

CHAPTER II

ASSESSMENT OF THE SITUATION OF FREEDOM OF EXPRESSION IN THE HEMISPHERE

This chapter deals with the situation of freedom of expression and information in the hemisphere, and it singles out the main problems and challenges. It begins with some basic principles of freedom of expression and information that the hemisphere's various domestic legal systems must recognize in order to guarantee effective exercise of this right. It also discusses two other issues of great importance: women and freedom of expression, and the Internet and freedom of expression. At the end of the chapter there is a mention of some states that warrant the attention of this office.

A. Introduction

Freedom of expression and information in the hemisphere has improved notably in comparison with past decades, when dictatorial or authoritarian regimes aggressively curtailed freedom of expression and information. However, in many States, freedom of expression and information is still in peril, because the climate necessary to cultivate and protect it has not been created. A wide variety of factors have contributed to this situation. Journalists are killed and/or abducted. The media and journalists in general are routinely exposed to threats, harassment and intimidation. All too often, crimes committed against journalists go unpunished. Some laws are inconsistent with the American Convention on Human Rights and other international instruments. The courts sometimes harass and intimidate journalists and rule in favor of prior censorship.

The murder of journalists is undoubtedly the most brutal method of abridging freedom of expression and information. In 1999, six journalists were killed because of their journalistic activities: five in Colombia and one in Argentina. This is less than the number given in the

1998 Report, which reported that 18 journalists had been killed in various States in the hemisphere by reason of their profession.¹⁷

The intimidation of journalists and/or their families, through verbal and/or written threats, and the physical assaults upon their persons and/or property is the method most often used to abridge freedom of expression and information. In 1999, the Special Rapporteur received numerous communications reporting cases where journalists had been intimidated, especially those engaged in investigative journalism.

Because freedom of expression is so crucial to any democratic system, States must step up their efforts to comply with their duty to investigate and prosecute crimes against freedom of expression and punish those responsible, and to prevent any unlawful interference with the enjoyment of this right. The Commission has established that the failure to conduct a serious investigation of crimes against journalists and to prosecute and punish the material and intellectual authors of those crimes is not only a violation of the guarantees of due process of law and other rights, but also a violation of the right to inform and be informed and to express oneself freely and publicly. In these cases the State incurs in international responsibility.¹⁸

Although murder, abduction, and intimidation are the principal means used to curtail freedom of expression and information, the existing legal restrictions are the main institutional obstacle to the full and effective recognition and enjoyment of this right, protection of the other basic rights, and the development of a pluralistic, democratic society. The first step toward building a defense of the right to freedom of expression and information is the enactment of the proper laws. Many laws in this hemisphere do not

¹⁷ IACHR, Annual Report 1998, Report of the Rapporteur for Freedom of Expression, 16 April 1999, p. 50.

¹⁸ IACHR, Report No. 50/99, Case No. 11,739 (Mexico). The Inter-American Court of Human Rights has held that: "The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention." (Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 176).

measure up to international standards and must be amended for the States to have a body of law that promotes and defends freedom of expression and information.

For example, many States in this hemisphere still have the so-called *desacato* laws on the books.¹⁹ In some States journalists continue to be harassed with the threat of being charged with the crime of slander and libel. In some States, a journalism degree is required to practice the profession, and under many legal systems access to public or personal information is restricted. Some States have embraced the concept of truthful information, which in 1999 was introduced into the Venezuelan Constitution. That is one of the most serious setbacks for freedom of expression and information in this hemisphere.

It is important to emphasize that under Article 2 of the American Convention, the States have a duty “to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as may be necessary to give effect to th[e] rights or freedoms” set forth in the American Convention. The Court has ruled that “every State has the legal duty to adopt the measures necessary to comply with its obligations under the treaty, whether those measures be legislative or of some other kind.”²⁰

This main purpose of this report is to bring to the States’ attention the main problems in the legislation, so that they may be resolved and the laws brought in line with international standards.

B. Legislation and freedom of expression

¹⁹ The report of the Rapporteur for Freedom of Expression identified 16 countries where such *desacato* legislation is in force: Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, Peru, Uruguay, and Venezuela. IACHR, Annual Report 1998, Report of the Office of the Rapporteur for Freedom of Expression, April 16, 1999, pp. 40-44.

²⁰ See Article 2 of the American Convention on Human Rights.

Any analysis of the laws that directly affect freedom of expression and information must be premised upon the fundamental role that freedom of expression and information plays within a democratic society. There can be no democratic society where the right to freedom of expression is not respected. Democracy relies heavily on broad freedom of expression, not simply because the right itself must be respected, but also because freedom of expression and information is vital in order to guarantee respect for the other basic rights.²¹

Both the Commission and the Court have repeatedly pointed up how crucial freedom of expression and information is to the growth of democracy. In one of its advisory opinions, the Court specifically held that freedom of expression and information “is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. (...) It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.”²² The Court has also held that inasmuch as freedom of expression, information and thought is the cornerstone of the democratic system and the very basis of public debate, the American Convention attaches “an extremely high value” on this right and reduces to a minimum any restrictions on it. As the Court has held, it is in the interest of “the democratic public order inherent in the American Convention” that every person’s right to freely express oneself be “scrupulously respected.”

Quoting the Inter-American Court, the Commission wrote that “this constant reference to democracy in Article(s) 29 and 32 indicates that when provisions of the

²¹ In this regard, the Argentine constitutional lawyer Gregorio Badeni has stated that:

It is true that freedom of the press, like the other constitutional freedoms, is not absolute in terms of the consequences that follow from the exercise of that freedom. However, when freedom of the press operates on the institutional or strategic phase, special rules must be applied to determine legal liability, rules different from those acceptable on the personal phase. Not in order to grant some privilege to someone who exercises that freedom, but in order to preserve the survival of a constitutional system of democratic government.

Badeni, G. *Libertad de Prensa* [Freedom of the Press], Editorial Abeledo Perrot, Buenos Aires 1997, p. 386 (unofficial translation).

²² Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, Series A No. 5, paragraph 70.

Convention are critical to the 'preservation and functioning of democratic institutions', the 'just demands of democracy must guide their interpretation.' Hence, "the interpretation of the Article 13(2) restrictions on freedom of expression must be 'judged by reference to the legitimate needs of democratic societies and institutions,' precisely because freedom of expression is essential to democratic forms of governance."²³

The importance that the Inter-American System attaches to freedom of expression and information is evident from the fact that the American Convention is more generous in its guarantee of freedom of expression than the European Convention and the International Covenant of Civil and Political Rights. Similarly, the European Court has held that freedom of expression and information should apply not just to favorable information and ideas but also to those that "offend, shock or disturb" and that these "are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society."

It is against this backdrop of sweeping protection and minimum restriction as a pillar of a democratic society that laws governing the right to freedom of expression must be evaluated. A series of doctrines are discussed below. Their inclusion in the member States' legal systems will represent a significant step forward in the protection of freedom of expression. The member States need to begin to examine, discuss and adopt new mechanisms that allow for broader protection of freedom of expression and information. A reference is also made to the concept of truthful information recently included in Venezuela's Constitution.

1. The Dual System of Protection: Public Persons and Private Persons

The right to freedom of expression and information is one of the main tools available to society for exercising democratic control over the individuals responsible for matters of

²³ *Ibid.*

public interest. Therefore, to abridge freedom of expression and information is to abridge or diminish the citizens' control over their public officials and to transform democracy into a system where authoritarianism can find fertile ground for imposing itself upon the will of society.²⁴

Representative democracy requires that public officials, or all those involved in public affairs, be responsible to the men and women they represent. In a democratic society, citizens delegate the administration of public affairs to their representatives. But the citizenry retains control and must have an open right to monitor, with as few restrictions as possible, their representatives' conduct in the public affairs.

Full and effective control of the management of public affairs is necessary to preserve a democratic society. Persons in charge of managing public affairs must be less guarded from criticism than the average private citizen not involved in public affairs.

The Commission wrote that:

The use of *desacato* laws to protect the honor of public functionaries acting in their official capacities unjustifiably grants a right to protection to public officials that is not available to other members of society. This distinction inverts the fundamental principle in a democratic system that holds the Government subject to controls, such as public scrutiny, in order to preclude or control abuse of its coercive powers. If we consider that public functionaries acting in their official capacity

²⁴ One justice of the United States Supreme Court wrote that:

This nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. "For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it."

The New York Times Co. v. Sullivan, 376 US 255, 84 S.Ct. 710 (1964).

are the Government for all intents and purposes, then it must be the individual and the public's right to criticize and scrutinize the officials' actions and attitudes in so far as they relate to public office.²⁵

The Commission then added the following:

Moreover, ... contrary to the rationale underlying *desacato* laws, in democratic societies political and public figures must be more, not less, open to public scrutiny and criticism. The open and wide-ranging public debate, which is at the core of democratic society, necessarily involves those persons who are involved in devising and implementing public policy. Since these persons are at the center of public debate, they knowingly expose themselves to public scrutiny and thus must display a greater degree of tolerance for criticism.²⁶

The European case law, like that of the United States, shares this principle of a distinction in the level of protection granted to public and private persons. In the *Lingens* case, the European Court held that "the limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance."²⁷

The first implication of this dual system of protection is the obligation incumbent on the member states to repeal their *desacato* laws to bring them into line with Article 13 of the American Convention.²⁸ The Commission has said that it understands that, "the State's use of its coercive powers to restrict speech lends itself to abuse as a means to silence unpopular ideas and opinions, thereby repressing the debate that is critical to the effective functioning of democratic institutions. Laws that criminalize speech which does not incite

²⁵ *Op. Cit.*, 3, p. 207.

²⁶ *Op. Cit.*, 3, pp. 207-208.

²⁷ *Lingens v. Austria*, European Court of Human Rights, Res. No. 09815/82, para. 42.

²⁸ The Rapporteur for Freedom of Expression has repeatedly underscored the need to repeal the *desacato* laws that exist in this hemisphere's legal systems.

lawless violence are incompatible with the freedom of expression and thought guaranteed in Article 13, and with the fundamental purpose of the American Convention of allowing and protecting the pluralistic, democratic way of life.”

In his first Annual Report, the Special Rapporteur called upon the member States to repeal the contempt [*desacato*] laws inasmuch as they are incompatible with the objective of a democratic society, which is to nurture public debate, and are contrary to Article 13 of the American Convention.

Another consequence of the dual system of protection is the need for the member states’ legislation to incorporate the doctrine of “actual malice,” which is explained below. Here again, many of the countries of the hemisphere have slander and libel laws that need to be amended.

a. Actual Malice²⁹

The dual system of protection means, in practice, the imposition of civil damages alone in cases where false statements made with “actual malice” are present.³⁰ In *The New York Times Co. v. Sullivan*, the United States Supreme Court ruled that: “The constitutional guarantees require ... a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice” –that is, with the knowledge that it was false or with reckless disregard of whether it was false or not.”³¹

²⁹ The Office of the Special Rapporteur decided to use the expression actual malice to refer to this doctrine based on the fact that it is commonly known in those terms in the Americas.

³⁰ *The New York Times v. Sullivan*, 376 US 255, 84 S. Ct. 710 (1964). Although the doctrine of actual malice has been introduced in both civil and criminal proceedings in different countries around the hemisphere, it should be noted that when the victim of slander is a private citizen, the normal standard of negligence is applied to determine the liability of the person responsible for false information.

³¹ The majority’s main argument for the principle of “actual malice” was the importance of freedom of expression and information to the functioning of a democratic society.

This doctrine was enshrined in *Vago v. Ediciones La Urraca S.A.*,³² a case dealing with damages, in which Argentina's Supreme Court of Justice ruled that, "those that deem themselves affected by false or inaccurate information must prove that the person who produced said information acted with malice."³³

The Commission's report on contempt [*desacato*] laws does not make specific mention of the principle of "actual malice." However, its acceptance of the principle can be inferred from the fact that the Commission recognizes that public officials are subject to closer scrutiny and discards "*exceptio veritatis*" (defense of truth) as an adequate defense for duly guaranteeing freedom of expression.

The Commission's reference to the fact that public officials and public figures are subject to closer scrutiny was explained in the previous section. As for the principle of *exceptio veritatis* (defense of truth), which is to say the possibility of proving the veracity of statements made, the Commission concluded that this was not sufficient:

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369. "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *Bridges v. California*, 314 U.S. 252, 270, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." *N.A.A.C.P. v. Button*, 371 U.S. 415, 429 [376 U.S. 254, 270].

Elsewhere the Court affirmed the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." It also wrote that "Neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct [and] the combination of the two elements is no less inadequate."

Interestingly, one of the concurring opinions went even further and stated that: "[t]he First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses."

³² See Badeni, G., *Libertad de Prensa*, Editorial Abeledo Perrot, Buenos Aires, 1997, pp. 414-417.

³³ Pellet, A., *La Libertad de Expresión*, Editorial Abeledo Perrot, Buenos Aires, 1993, p. 189.

Even those laws which allow truth as a defense inevitably inhibit the free flow of ideas and opinions by shifting the burden of proof onto the speaker.³⁴

Finally, when the information that prompted a lawsuit is a value judgment rather than a statement of fact, there can be no liability. One of the requirements for liability is that the falsehood of the information can be proved or that the respondent published a statement that he or she knew was false or very likely false. If the information is a value judgment, it cannot be shown to be either true or false, since it is an entirely subjective assessment not susceptible of proof.³⁵ In this regard, the Commission has said:

This is particularly the case in the political arena where political criticism is often based on value judgments, rather than purely fact-based statements. Proving the veracity of these states may be impossible, since value judgments are not susceptible of proof. Thus, a rule compelling the critic of public officials to guarantee the factual assertions has disquieting implications for criticism of governmental conduct. It raises the possibility that a good-faith critic of government will be penalized for his or her criticism.³⁶

b. Decriminalizing Libel and Slander Laws

If Article 13 and the report on *desacato* laws are interpreted within the democratic context referred to at the beginning, it then becomes necessary to amend those laws whose primary purpose is to protect the honor of persons (commonly known as slander, libel and defamation laws). In the report on *desacato* laws, indirect reference is made to this type of legislation:

The sort of political debate encouraged by the right to free expression will inevitably generate some speech that is critical of, and even offensive to those who hold public office or are intimately

³⁴ *Op. Cit.*, 3, p. 208.

³⁵ The reference here is specifically to crimes of libel.

³⁶ *Op. Cit.*, 3, p. 208-209.

involved in the formation of public policy. A law that targets speech that is considered critical of the public administration by virtue of the individual who is the object of the expression, strikes at the very essence and content of freedom of expression.³⁷

While the Commission's report concerns to the *desacato* laws in particular, it is also true that slander and libel laws are often used not so much to protect a person's honor as to attack –or, better said, silence- speech that is considered critical of government, as the Commission has noted.

As for criminal law, the Office of the Rapporteur recommends to derogate slander and libel laws, when the circumstances described above are present. Again, decriminalization of these offenses is consistent with the Commission's interpretation of Article 13 in the Report on *Desacato* Laws. Criminalization of speech targeted at public officials is disproportionate when compared to the important role that free speech and information play within a democratic system. The Commission wrote that:

(...) However, particularly in the political arena, the threshold of State intervention with respect to freedom of expression is necessarily higher because of the critical role political dialogue plays in a democratic society. The Convention requires that this threshold be raised even higher when the State brings to bear the coercive power of its criminal justice system to curtail expression. Considering the consequences of criminal sanctions and the inevitable chilling effect they have on freedom of expression, criminalization of speech can only apply in those exceptional circumstances when there is an obvious and direct threat of lawless violence.³⁸

The Commission added the following:

³⁷ In this sense, much of the report on *desacato* laws is applicable to laws of this type. In some respects *desacato* laws, understood as laws that punish speech that is offensive, insulting or threatening to a public official in the performance of his official functions, are similar to slander and libel laws when the person whose honor is alleged to have been "offended" is a public official, public figure, or private person who has voluntarily become involved in public issues. *Op. Cit.*, 3, p. 208.

³⁸ *Op. Cit.*, 3, p. 211.

The Commission considers that the State's obligation to protect the rights of others is served by providing statutory protection against intentional infringement of honor and reputation through civil actions and by implementing laws that guarantee the right of reply. In this sense, the State guarantees protection of all individuals' privacy without abusing its coercive powers to repress individual freedom to form opinions and express them.³⁹

Therefore, the interpretation of Article 13 of the Convention and the Report on *Desacato* Laws according to the democratic system that the Convention guarantees, the Special Rapporteur concludes that to ensure that freedom of expression is properly defended, the States should discuss the convenience of incorporating the distinction between public and private persons in their laws protecting honor. The acceptance of this doctrine requires repealing the *desacato* laws, to incorporate the principle of "actual malice," and decriminalizing slander and libel when they are used to protect discourse that is critical of government.

2. Faithful reporting

According to this principle, when information is faithfully reported, no liability or responsibility is incurred, even if the information is incorrect or can damage someone's honor,. This principle can be traced back to a 1796 case in the United Kingdom, *Curry v. Walter*. In that case, Judge Eyre ruled that although the subject matter contained in the newspaper could be truly prejudicial to the person of the magistrates, because it was an account of something that transpired in a public court of law, its publication was not illegal.⁴⁰

The Spanish Constitutional Court has also relied on this doctrine. The Director of the newspaper *Egin* was convicted of advocacy of criminal conduct for having published communiqués from the ETA terrorist organization. The Spanish Constitutional Court held that "the courts should have relied on the interpretation most favorable to the basic right and

³⁹ *Op. Cit.*, 3, p. 211.

⁴⁰ Bianchi, E. *et al.*, *El Derecho a la Libre Expresión*, Editorial Planeta, 1997, p. 97.

to its effects on the related norms of criminal law. Such an interpretation would have dictated the journalist's right to impart, and his readers' right to receive, complete and truthful information. It is an objective, institutional guarantee. For the journalist to assert that right, his conduct must be devoid of any criminal intent; instead, he must confine himself to simply reporting the information, even though the content of that information be criminal in nature." In a ruling on a case involving *La Voz de Asturias*, the Constitutional Court held that "(...) as this is a case of imparting information, where the medium has confined itself to faithfully reporting statements entirely alien to it, the medium cannot be regarded as the 'author of the news'. It cannot be held responsible for the authorship of news not attributable to it."⁴¹

In Argentina this is known as the Campillay principle, because of the decision in a suit that the actor Campillay brought against the newspapers *La Razón*, *Crónica* and *Diario Popular*. The three newspapers had carried stories that incorrectly reported that the actor was involved in the incident. The Argentine Supreme Court recognized that the publications had merely transcribed an official but incorrect Police press release that implicated Campillay in a number of crimes. The decision cleared the newspapers of all any wrongdoing.

This principle is also based on the importance of freedom of expression and information for a democratic society. Democracy requires a public, free-flowing and wide-ranging debate. Publishing information supplied by third parties must not be restricted by threatening the publisher with holding him or her responsible for reporting statements made by others. The contrary, will abridge every person's right to be informed.

⁴¹ *Idem.*

3. Freedom of information

The Office of the Rapporteur is conducting a study on *habeas data* and on the freedom to access official information.⁴² The goal is to analyze the legislation and practices within the hemisphere and their compatibility with the American Convention on Human Rights. In November 1999, the Special Rapporteur informed the member States of this initiative and requested information to determine what their laws, jurisprudence and practices were in this regard.

Under Article 13 of the American Convention on Human Rights, the right to freedom of thought and expression includes “freedom to seek, receive, and impart information and ideas of all kinds.” The Inter-American Court has held that “it can be said that a society that is not well informed is not a society that is truly free.”⁴³ It has also stated that “For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinion.”⁴⁴

As to the scope of freedom of expression and information, the Court wrote the following:

... those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds... (Freedom of expression) requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual.

⁴² The right to access information held by the government (public information) and *habeas data* both follow from the right to freedom of information. While the two are similar in that they have a similar objective, the information to which they grant access serves a clearly different function. The information in the first case is public in nature, and the right to that information is informed by the need to make the democratic system work better and scrutinize government. *Habeas data*, however, provides one the opportunity to request information housed in both government data banks and private data banks.

⁴³ Inter-American Court of Human Rights, “Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, para. 70.

⁴⁴ *Ibid.*, para. 32.

Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.⁴⁵

The right to access to official information is one of the cornerstones of representative democracy. In a representative system of government, the representatives should respond to the people who entrusted them with their representation and the authority to make decisions on public matters. It is to the individual who delegated the administration of public affairs to his or her representatives that belongs the right to information. Information that the State uses and produces with taxpayer money.

Procedures that ensure access to information held by the government is one way to monitor state governance and one of the most effective means of combating corruption. The absence of effective control can “imply activity utterly inimical to a democratic State and opens the door to unacceptable transgressions and abuse.”⁴⁶ Guaranteeing access to official information helps to increase transparency in government affairs and thus serves to reduce government corruption.

It is important to note that while access to government information is a basic right of individuals, the exercise of that right is not absolute.⁴⁷ Article 13.2 of the American Convention provides for certain restrictions. The general principle that official information is public in nature is subject to limitations when there is some interest at stake that requires that the information be kept confidential. These restrictions are few, however, and must be expressly stipulated by law. They generally apply to information related with national security and public order.

⁴⁵ *Ibid.*, para. 30.

⁴⁶ Pierini, A. *et al.*, *Habeas Data*, Editorial Universidad, Buenos Aires 1999, p. 21.

⁴⁷ Medina, C, *Sistema Jurídico y Derechos Humanos*, Escuela de Derecho, Universidad Diego Portales, 1996. Cited in Rodríguez, D. *et al.*, *La dimensión internacional de los Derechos Humanos*, Inter-American Development Bank – American University, Washington, D.C., 1999, p. 305.

One important aspect of the right to information is the petition of *habeas data*, whereby any person may have access to information about himself or his property contained in public or private databases or records and, when necessary, may update or correct it. This petition is becoming increasingly important with the introduction of new communication technologies like the Internet. With the growth of these technologies, both the State and the private sector will have rapid access to a vast amount of information about the individuals. At the same time, the accelerated pace at which the information available on the Internet is growing makes the existence of channels by which to access that information all the more imperative should it be necessary to correct inaccurate or out-of-date information in electronic data banks.

In addition to the recognition of the right of access to information and *habeas data*, there must be a rapid and effective procedure so that this right can be fully exercised. In many States an administrative bottleneck makes it difficult to obtain information, new mechanisms should be incorporated that will make simple and inexpensive for applicants to request information.⁴⁸

A study comparing the laws in this hemisphere reveals that initiatives aimed at full recognition of the right to access to information held by the government and the petition of *habeas data* have been developed. In **Argentina**, for example, Article 43 of the Constitution recognizes *habeas data* and reads as follows:

Every person shall have the right to file a petition (of *habeas data*) to see any information that public or private data banks have on file with regard to him and how that information is being used to supply material for reports. If the information is false or discriminatory, he shall have the right to demand that it be removed, be kept confidential or updated, without violating the confidentiality of news sources.

⁴⁸ Some of the procedures that would ensure compliance with the duty to provide information would be: to penalize public officials who refuse to supply information without cause; to impose fines on the State for failing to comply with its obligation; and to make provision for rapid judicial review through a petition of *amparo*.

Argentine jurisprudence has affirmed that the petition of *habeas data* recognized in Article 43 of the Constitution has a twofold purpose:

On the one hand, anyone can see the data that public or private databases or records have on file with regard to him and the use to which that data is being put. On the other hand, if there is some misinformation or discrimination, this Article gives the individual the right to demand that the information be removed, corrected, kept confidential or updated, without breaching the confidentiality of news sources.⁴⁹

Article 28 of **Venezuela's** new Constitution provides that:

Every person shall have the right to access the information and data that official or private records have on file with regard to his person and/or property, with the exceptions that the law stipulates. He or she shall also have the right to know how that information is being used and to what purpose, and to petition the competent court to have the information updated, corrected or destroyed, if there are errors or his or her rights are unlawfully affected.

Article 200, subparagraph 3 of **Peru's** Constitution expressly recognizes the petition of *habeas corpus* as a constitutional guarantee:

A petition of *habeas data* filed against an act or omission on the part of any authority, official or person, that violates or threatens the rights to which Article 2, paragraphs 5 and 6, refers.

In November 1998, the Autonomous Government of the City of Buenos Aires, **Argentina**, passed Law No. 104, recognizing every person's right to request information in the city government's possession. Article 1 reads as follows:

In accordance with the principle that all government affairs shall be public, any person shall be entitled to request complete, truthful, adequate and timely information from any organ of the

⁴⁹ Cámara Nacional en lo Civil, Sala B, February 14, 1997, "Varksberg, Hermann", LL, t. 1997-C p. 946, *Ibid* 38, p. 204.

central administration, the decentralized administration, independent regulatory agencies, State-owned businesses and companies, corporations in which the State is the majority shareholder, dual economy ventures, and all those other businesses in which the City Government is a shareholder or has some role in corporate decision-making, from any office of the legislative and judicial branches of the city government, insofar as their government business is concerned, and the other organs established under Book II of the Constitution of the City of Buenos Aires.

Provisions relating to access to information held by the government are found elsewhere in **Peru's** Constitution, under Article 2, number 5:

To request, without indicating the reason, the information that one requires and to receive it from any public entity, within the legal time period, at the cost that the request involves. The exceptions are information affecting personal privacy and those expressly precluded by law or for reasons of national security (...)

Canada's Access to Information Act provides that records held by federal government institutions are to be available to the public. Sections 14 to 16 stipulate the exceptions to the general principle of open access to information held by the federal government. Those exceptions basically concern information on international affairs and defense, law enforcement and investigations, and information whose disclosure would be injurious to the conduct of government of federal-provincial affairs.

Section 7 of **Canada's** Privacy Act protects personal information held by the government. This law restricts unauthorized disclosure of that personal information. Under the law, personal information can only be used for the purpose for which it was compiled.

In the **United States**, access to information in the federal government's possession is also guaranteed. Originally passed in 1966, the Freedom of Information Act recognizes the right to obtain public information, by guaranteeing that citizens shall have the right to access to information about them held by the federal government. The government is permitted to charge for the costs of searching, retrieving and copying the information.

The law upholds the principle that all records of federal agencies must be accessible to the public unless one of the specific exceptions obtains. Section 552(b) lists nine cases in which government agencies are authorized to deny access to information contained in their databases. Those reasons include the following: 1) information that is confidential for reasons of national defense or international policy; 2) information exclusively related to internal personnel rules and practices of government offices; 3) information specifically exempted from disclosure by statute; 4) trade secrets and commercial or financial information obtained from a person and privileged and confidential; 5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; 6) personnel, medical and similar files the disclosure of which would constitute an unwarranted invasion of privacy; 7) information for law enforcement purposes; 8) information obtained for purposes of regulation and supervision of financial institutions, and 9) geological and geophysical information related to oil wells.

If the information is denied, the applicant may file an appeal with the agency. Should the agency again refuse to supply the information without giving just cause, the applicant can appeal to the federal courts, which can order that the information be released and even impose sanctions.

Finally, the special Rapporteur would like to endorse the principles the “Public’s Right to know: Principles on Freedom of Information Legislation”, developed by the non-governmental organization Article XIX. These principles establish the fundamental basis and criteria to secure an effective access to information.⁵⁰

⁵⁰ See Annex N° 6

4. The concept of a right to truthful information⁵¹

The so-called right to truthful information has been a subject of intense debate across the hemisphere in response to concern and alarm brought on by the press being used as a sensationalist medium or to disseminate news that is not always correct or truthful.

Because freedom of expression and information is so vital to the normal functioning of a democratic society, international laws have accorded it broad protection, with a few clearly stated limitations. This ensures clarity regarding the limitations that are allowed and prevents interpretations that could jeopardize the exercise of this very basic right.

Article 13 of the American Convention on Human Rights, Article 19 of the Universal Declaration of Human Rights, and Article 19 of the International Covenant of Civil and Political Rights clearly reflect the interest in according this right broad protection. As can be seen by reading these articles, no preconditions are placed on freedom of expression and information. All these instruments simply refer to freedom of expression, information and/or opinion.

Under Article 13 of the American Convention, the responsibilities stemming from the exercise of the right to freedom of expression are *ex post fact*. Prior censorship is expressly prohibited.⁵²

⁵¹ The concept of truthful information is used here because it has received so much attention of late. However, within this concept we include others, such as the concepts of timely, objective, ample, thorough information, and so on.

⁵² Article 13 of the American Convention states the following: "Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence."

In this regard, in *The New York Times v. Sullivan* case, the United States Supreme Court held the following:

The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in *Smith v. California*, 361 U.S. 147, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale. We said: "For if the bookseller is criminally liable without knowledge of the contents, ... he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction

Any adjective used to qualify the information would limit the volume of information protected by this right. For example, the right to truthful information would not protect information that, by contrast to truth, we would label erroneous. Hence, any information that might be considered erroneous –a matter that will be discussed at greater length later in this report– would not be protected by that right. However, a correct interpretation of the international norms, especially Article 13 of the Convention, compels us to conclude that the right to information covers all information, including information that we might deem “erroneous”.⁵³

First, it is impossible to determine, with absolute certainty, the veracity of most information produce by the individuals. By requiring truthful information, this principle is premised on the notion that there is some single, indisputable truth. One must be careful here to draw a distinction between facts that can be demonstrated, and value judgments. In the latter case, the information cannot be said to be either true or false, and cannot be demonstrated with factual proof. The veracity test might mean almost automatic censorship of any information that cannot be proven, which would virtually do away with any political debate that relies primarily on purely subjective ideas and opinions.

Even in those cases where the information concerns concrete facts that could in all likelihood be factually proven, it is impossible to require the veracity of the information, since any single fact could undoubtedly lend itself to a number of markedly different interpretations. In this regard, John Stuart Mill said that “Even in natural philosophy, there is

upon the distribution of constitutionally protected as well as obscene literature... And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted... [H]is timidity in the face of absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally [376 U.S. 254, 279] suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.” A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions –and to do so on pain of libel judgments virtually unlimited in amount- leads to a comparable “self-censorship.”

⁵³ The analysis we make of the concept of “erroneous” information and its incompatibility with international norms would no doubt apply to all other adjectives used to qualify information, such as out-of-date, incomplete, and so on.

always some other explanation possible of the same facts (...).⁵⁴ It must be proven because the other theory cannot be the true one, and as long as this is not shown and as long as we do not know how it was proved, we cannot understand the bases of our opinion. But when we turn to issues that are infinitely more complicated, morals, religion, politics, social relations, and issues of life in general, three quarters of the argument on any opinion discussed is to disprove the arguments that favor any different opinion.

Assuming, for the sake of argument, that one could determine the truth of everything, debate and the exchange of ideas are the best way to go after that truth. Requiring from the outset that only truth be told obviates any possibility of the debate needed to arrive at that truth. Paradoxically, this principle –which holds that only truth must be reported- also precludes or impairs the exchange of ideas and opinions that are part of the quest for the truth.⁵⁵

The possibility of penalties for reporting information that an open debate might prove incorrect, will lead to self-censorship to avoid possible penalties. The entire citizenry will suffer, because they will not be able to have the truth produce by the exchange of ideas. Absolute certainty will frequently be impossible; but just the possibility of making information public, sparks the debate that leads to the truth and the benefits to all mankind.

⁵⁴ Mill, John Stuart, *On Liberty and Other Writings*, Chapter 2, Of the Liberty of Thought and Discussion, Cambridge University Press, Cambridge, 1997, p. 38.

⁵⁵ In his *On Liberty and Other Writings*, John Stuart Mill wrote at length on the importance of unfettered and unqualified freedom of opinion and expression. Mill mentions three main reasons why divergent arguments and opinions are essential for freedom of expression and opinion. First, if an opinion is true, there is no better way to consolidate and propagate it than to juxtapose it to error. If the opinion is wrong, the contrast with the truth will clearly point up the error, to the good of all society. Finally, the most common case is when conflicting doctrines share the truth between them and a nonconforming opinion is needed to supply the remaining truth.

Because Mill's observations are so important, clearly stated and current, the Rapporteur cites some of the passages that are particularly relevant for purposes of pointing up the problem with the concept of truthful information:

But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

If we were never to act on our opinions, because those opinions may be wrong, we should leave all our interests uncared for, and all our duties unperformed.

There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument: but the facts and arguments, to produce any effect on the mind, must be brought before it. Very few facts are able to tell their own story, without comments to bring out their meaning.

The Inter-American Court of Human Rights raised this point in Advisory Opinion OC-5/85 on compulsory membership in an association prescribed by law for the practice of journalism:

The two dimensions mentioned of the right to freedom of expression must be guaranteed simultaneously. One cannot legitimately rely on the right of a society to be honestly informed in order to put in place a regime of prior censorship for the alleged purpose of eliminating information deemed to be untrue in the eyes of the censor.⁵⁶

Thus, the effect that this principle has is precisely opposite to the one that its proponents argue as the basis for its application. In other words, the search for truth in information would be severely hampered by inhibiting the free flow of information for fear of possible penalties. The right to freedom of information also protects all the information that we have labeled “erroneous”. In any case, under international law and the most modern jurisprudence, only information that is shown to be erroneous and produced with “actual malice” could be penalized. Even in that case, the sanction should be *ex post facto*, as information can never be subject to prior censorship.

C. Women and freedom of expression

The Office of the Rapporteur for Freedom of Expression would like to stress the relationship that exists between the situation of women and its impact on the right to freedom of expression and information. The Commission has noted that the member States must endeavor to eliminate any type of measure that discriminates against women leaving them less than full and equal partners in their country’s political, economic, public and social

⁵⁶ See Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 33.

life. The American Convention on Human Rights recognizes the right to equality and nondiscrimination as pillars of strong and healthy democratic systems in the hemisphere.⁵⁷

Although the situation of women has undergone significant change, as they have acquired rights and protections under domestic laws and international human rights treaties,⁵⁸ *de facto* and *de jure* discrimination against women has not stopped.⁵⁹ In its Report on the Status of Women in the Americas,⁶⁰ the Inter-American Commission on Human Rights urged the member States to amend or abolish all laws that have the purpose or effect of discriminating against women, to work toward eliminating the practices and structural barriers standing in the way of women's full assimilation into national life, and to allocate adequate resources to achieve those ends.⁶¹

Full exercise of the right to freedom of expression and information is essential to ensuring that women's human rights are protected and respected. Full and unrestricted exercise of this right will allow women to play a greater and more active role in denouncing abuses and in finding solutions that mean greater respect for all their basic rights. Silence is the best ally for perpetuating the abuses and inequalities that have been the lot of the women across this hemisphere.

⁵⁷ See IACHR, Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/II92 rev.3, May 3, 1996. Article 3(k) of the Charter of the Organization of American States upholds as one of its principles "the fundamental rights of the individual, without distinction as to race, nationality, creed or sex."

⁵⁸ That document gives a general idea of the system and includes texts of instruments, norms and statutes related to human rights. See also the Convention on the Elimination of All Forms of Violence against Women, December 18, 1979, 19 I.L.M. 33 (1980).

⁵⁹ The civil codes of some countries still have laws on the books that deny a woman's right to administer conjugal assets, that limit her parental authority over her children, and that authorize a spouse to prohibit his wife from obtaining employment outside the home. (See the María Eugenia Morales de Sierra Case with the Inter-American Commission on Human Rights, March 1998).

⁶⁰ On March 6, 1998, the Inter-American Commission on Human Rights named one of its members, Dean Claudio Grossman, to serve as Special Rapporteur for women's rights. The Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas, adopted March 6, 1998.

There are a number of reasons why women suffer inequality in the hemisphere. This report will mention those that have a direct bearing on exercise of the right to freedom of expression and information. They are women's inequality in educational opportunities, violence against women and the need for women to become more politically involved.⁶²

The lack of equal access to education is a direct violation of women's right to seek and receive information. In the more impoverished sectors of society, a woman's role has been largely confined to the home, thus diminishing the opportunity she has to receive an education that would increase her chances of participating in public life and seeking employment in a variety of areas.⁶³

Statistics from the Social Development Division of the Inter-American Development Bank's Sustainable Development Department reveal major discrepancies between male and female literacy rates across the world: "In 1990, only 74 women knew how to read and write for each 100 men with those skills. . . . Throughout the world, 77 million girls aged between 6 and 11 do not attend primary school, a level much higher than the corresponding figure of 52 million for boys."

Violence or fear of violence also curtails women's freedom of expression and information.⁶⁴ Intimidated by the violence, women frequently opt not to report incidents of

⁶¹ See Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas", OEA/Ser.L/V/II.100 of October 17, 1998, p. 16.

⁶² Other practices also affect women's freedom of expression. This report concentrates on these three because they are deemed to be the ones with the greatest impact on free expression. Nevertheless, the discrimination against women in the labor area also affects freedom of expression and information. Discriminatory policies on the part of businesses and corporations are tolerated in some countries, and these policies have the effect of limiting women's chances for an equal role in public life and give them less of a voice in opinions and decisions.

⁶³ Statistics developed by the Division of Social Development of the Inter-American Development Bank's Sustainable Development Department reveal significant discrepancies between men and women with regard to literacy levels worldwide: "Global literacy statistics show that in 1990, there were only 74 women for every 100 literate men. Schooling statistics show a similar trend worldwide, 77 million girls of primary school age (6-11 years old) are out of school, compared with 52 million boys." See, Mayra Buvinic, *Women in poverty: a global problem*. Washington, D.C., July 1998-No. WID-101.

⁶⁴ In December 1993, the United Nations General Assembly approved the Declaration on the Elimination of Violence against Women. Article 1 defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."

violence to the authorities, remain in seclusion and do not participate in society.⁶⁵ Estimates are that in this hemisphere, anywhere between 30 and 70 percent of adult women with partners are subjected to psychological or physical abuse.⁶⁶ At the same time, in some States of the hemisphere adequate measures have not been taken to protect women from violence and prevent it. In some instances, cases of domestic violence reported to the police have been treated as minor offenses, and attempts have been made to dissuade the women from reporting future abuses on the grounds that these are private matters. In some cases, the police have refused to act on the complaints or to offer precautionary measures to protect the victim.⁶⁷ Such actions and attitudes relegate women to a subordinate and degrading role, silencing their ability to express themselves and leaving them helpless to take action, thus perpetuating the circle of violence, abuse and discrimination.⁶⁸

It is by active political participation in the democratic institutions of the State that freedom of expression and information plays a basic role in bringing about the needed changes within institutions and society in general, the changes that will improve the lot of women in the hemisphere. This is why it is crucial that greater political participation for women be assured.

As long as women do not play an equal role in political life, democratic, pluralistic societies will never prosper and intolerance and discrimination will only worsen. Women's inclusion in communication, decision-making and development processes is crucial if their needs, opinions and interests are to be factored into policies and decisions. Women's access to greater political participation in places where decisions are made will further

⁶⁵ The Pan American Health Organization emphasized that according to studies done in a number of Latin American countries, estimates are that only between 15 and 20 percent of the incidents of intrafamily violence against adult women are reported. CEFEMINA, 1994. *Mujeres Hacia del 2000: Deteniendo la Violencia*, San José, Costa Rica: Programa "Mujer No Estás Sola" CEFEMINA: in *La ruta crítica que siguen las mujeres afectada por la violencia intrafamiliar*, Pan American Health Organization, Research Protocol, p. 5 (Washington, 1998).

⁶⁶ Inter-American Development Bank. Sustainable Development Department. Publication: *Violence in Latin America and the Caribbean: A Framework*, March 1999.

⁶⁷ Human Rights Watch Report 1999: Violence Against Women. At www.hrw.org (Women's Human Rights p. 2).

⁶⁸ At the regional level, in Article 5 of the Convention of Belém do Pará" or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, adopted by the General Assembly of the Organization of American States on July 9, 1994, the States recognize that violence against women prevents and nullifies the exercise of their fundamental rights.

respect for other basic rights, thereby ensuring the advocacy and defense of policies, laws and practices that protect the rights and guarantees that affect them.⁶⁹

As the Commission pointed out in its Report on the Status of Women in the Americas, there is a sense in the region that for true democracy, women must have a greater role in decision making, and that access to a country's political life does not end with nondiscriminatory exercise of the right of suffrage.⁷⁰ The member States are urged to encourage women's participation in political life and decision-making in the public and private arenas. Unless and until all members of society participate fully, freedom of expression and information will be in jeopardy.

D. The Internet and freedom of expression

The Rapporteur for Freedom of Expression believes that the Internet is an instrument with the capacity to fortify the democratic system, assist the economic development of the region's countries, and strengthen full enjoyment of freedom of expression. The technology of the Internet is without precedent in the history of communications and it allows rapid access of and transmission to a universal network of multiple and varied information.

The Internet is a medium with great possibilities because it allows individuals to participate openly in discussions and exchanges of information on issues of interest to them. The global scope of the Internet allows people to communicate and obtain information immediately, regardless of geographical borders and distinctions based on race, sex, religion, or social origin.

⁶⁹ A statistical study into worldwide female participation in parliaments conducted by the Inter-Parliamentary Union revealed that women occupy only 15.3% of the available seats in the upper and lower chambers of the congresses of the Americas. See <http://www.ipu.org/wmn-e/world.htm>.

⁷⁰ IACHR, Report on the Status of Women in the Americas, published October 13, 1998.

Maximizing the population's active participation through the use of the Internet furthers the political, social, cultural, and economic development of nations by strengthening democratic societies. In turn, the Internet has the potential to be an ally in the promotion and dissemination of human rights and democratic ideas and a major tool in the actions of human rights organizations, because of its speed and breadth which allow it to immediately transmit and receive information on situations affecting fundamental rights in different regions.

The community of American states has explicitly recognized the protecting of the right of freedom of expression in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.⁷¹ These instruments allow a broad interpretation of the scope of freedom of expression. Internet content is covered by Article 13 of the American Convention on Human Rights. The Rapporteur urges the member states to refrain from implementing any sort of regulation that would violate the terms of the Convention.

E. Freedom of expression and information in some member states

Restrictions and threats to freedom of expression and information are present in virtually every State of this Hemisphere. Absolute respect for freedom of expression and information is as impossible as absolute respect for other fundamental rights. Nevertheless, States in which the restrictions on freedom of expression and information are part a systematic campaign by authorities to silence criticism of the government, must be distinguished from those in which the restrictions and threats to freedom of expression and information are not symptomatic of systematic persecution by government authorities. In the latter cases, the democratic institutions themselves can find ways to put a stop to such attacks and threats.

⁷¹ Article IV of the American Declaration of the Rights and Duties of Man states that: "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever." Similarly, Article 13.1 of the American Convention states that: "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."

Both situations are of concern to the Rapporteur. A State is responsible for the abuses or acts committed. Of the two, however, systematic persecution on the part of government authorities is by far the more disturbing because it threatens other fundamental rights and the preservation of the democratic system of government.

In line with this, the Rapporteur distinguishes three main categories of restrictions on and threats to freedom of expression: 1) States without freedom of expression; 2) States where freedom of expression is severely limited owing to systematic persecution by government authorities to silence their critics; and 3) Other cases.

The Office of the Rapporteur is most concerned with the first two categories, because of the serious implications such situations have for the existence of a democratic society. The cases outlined below are not an exhaustive list of the complaints that this Office received in 1999.

First of all, mention must be made of some cases of progress made by states in defending and protecting freedom of expression.

Progress

Panama

The Annual Report for 1998 stated that there were a number of anachronistic laws in Panama that constituted a legal obstacle to the full exercise of the right to freedom of expression. Public officials frequently used those laws to silence their critics and to harass journalists and the press in general.

The great majority of these laws are still in force in Panama and public officials continue to use them against journalists.⁷² Some of the laws restricting freedom of expression and information are: Article 33 of Panama's Constitution, Articles 202 and 386 of the Judicial Code, Article 827 of the Administrative Code on Correctional Penalties, Articles 307 and 308 of the Penal Code. All these are, in one way or another, a contempt law. Article 903 of the Administrative Code, Cabinet Decree No. 251 of 1969 and Article 177 of the Electoral Code allow censorship. Certain articles of 1978 Law 67 regulate journalistic activities by requiring that those practicing journalism fulfill certain requirements set by the Ministry of Government and Justice.

The new Administration of President Mireya Moscoso has expressed its willingness and has signaled its intention to make it possible to repeal these laws. Two *ad hoc* committees have been appointed, composed of lawyers and journalists, to study the laws that curtail freedom of expression and information and prepare bills for their repeal or amendment.

In December 1999, the *ad hoc* committees introduced their first two proposals, which lead to repeal of the laws (the Rapporteur is awaiting the texts for the proper citation).

The commitment, effort and drive that the Administration of President Mireya Moscoso has put behind the goal of repealing or amending the laws that restrict freedom of expression and information are laudable. The Office of the Special Rapporteur is very gratified that two laws have already been repealed. However, the repeal of these two laws is a first step but does not completely dismantle the body of laws that curtail freedom of expression. Any amendment or legal initiative related to freedom of expression and information must conform to the parameters set in Article 13 of the American Convention on Human Rights.

⁷² The newspaper *Panamá América* reported on February 25, 1999, that the contempt laws had been used to institute

Argentina

The Argentine Senate is now examining a bill to amend the libel and slander law.⁷³ The Office of the Rapporteur is urging continued action on this bill, which can serve as an example to the other nations of the hemisphere and become one of the most important advances for freedom of expression and information in the years ahead.

1. Restrictions and threats to freedom of expression

a. States without freedom of expression

Cuba

Freedom of expression does not exist in Cuba. Unless and until changes are introduced to democratize the country and the other basic rights are recognized, freedom of expression and information will not grow in Cuba.⁷⁴

Many laws in Cuba restrict freedom of expression and information. The Cuban Constitution provides that no means of communication can be the target of private appropriation, thus “ensuring that all media will be used exclusively to serve the proletariat and the interests of society.” The government censors all foreign material entering the island and arbitrarily refuses entry to foreign journalists.⁷⁵

more than 86 legal proceedings against journalists in recent years.

⁷³ See the full text of the bill in Appendix N° 4.

⁷⁴ See IACHR, 1998 Annual Report, Report of the Rapporteur for Freedom of Expression, April 16, 1999, pp. 34-35.

⁷⁵ In January 1998, Cuba denied visas to Argentine journalists Matilde Sánchez from the newspaper *Clarín*, Mario Perez Colman from the newspaper *La Nación* and Rodolfo Pousá of *Américas TV*, who were trying to cover Pope John Paul II's visit to Cuba.

Chapter VII of the Cuban Constitution, on “Basic Rights, Duties and Guarantees” recognizes freedom of expression, information and the press, but only “in accord with the ends of a socialist society.” Freedom of artistic expression and information is also limited, as the Constitution stipulates “that artistic freedom exists only insofar as its content is not counter-revolutionary.” The Constitution also establishes the legal grounds for censorship, which is that only the State has the authority to determine whether oral or written expression is counter-revolutionary.

The Cuban Constitution also states that “none of the freedoms accorded to citizens may be exercised to challenge the Constitution and laws, or the existence and purposes of a socialist State, or the decision of the Cuban people to build socialism and communism. Violation of this principle is a punishable offense.”⁷⁶

In February 1999, Law No. 88 was enacted, called the Law on Protection of the National Independence and Economy. This law makes it a crime to impart, search for or obtain subversive information or to bring subversive materials into the country, reproduce them or circulate them. It also criminalizes collaboration –either direct or through third parties- with radio or television transmitters, newspapers, magazines or other mass communication media for the purpose of disseminating subversive materials.⁷⁷ This law establishes penalties of up to 20 years imprisonment for the authors of these acts and their accomplices. Cuban authorities are using this law to threaten journalists if they persist in activities with which the State is uncomfortable.⁷⁸

Cuban authorities frequently use laws on the books criminalizing certain behaviors, such as enemy propaganda,⁷⁹ contempt, state of danger, operation of clandestine printing

⁷⁶ Article 62 of the Constitution of Cuba.

⁷⁷ Law No. 88 on Protection of Cuba’s National Independence and Economy, articles 1, 5(1) and 6(1), February 17, 1999.

⁷⁸ See press communiqué No. 4/99 from the Office of the Rapporteur for Freedom of Expression, dated February 18, 1999.

⁷⁹ Article 8 of 1997 Law No. 80 on Reaffirmation of the National Dignity and Sovereignty provides that “the full force of this law will be used against anyone who either directly or indirectly collaborates with the enemy’s information media.”

presses, circulation of unauthorized news, insult to fallen heroes and acts committed against the security of the State, to silence critics and dissidents and to restrict to the maximum freedom of expression and information.

In 1999, the Cuban government tried a number of dissidents and detained more than thirty independent journalists and activists. On March 15, 1999, a court convicted four leaders of the *Grupo de Trabajo de Disidencia Interna* (GTDI) [Internal Dissidence Working Group] for “acts against the security of the State” and sentenced them to prison. In 1997, this group had published the document *La Patria es de Todos*, where it analyzed the Cuban economy, suggested amendments to the Constitution, debated human rights issues and criticized the fact that Cuba recognized only one political party.⁸⁰

The following persons are also serving prison sentences: Bernardo Arévalo Padrón, sentenced to six years in 1997 for the crime of speech offensive to President Fidel Castro and Vice President Carlos Lage; Manuel Antonio González Castellanos, arrested in October 1998 and sentenced to two years and six months in prison, and Leonardo Varona González, arrested in October 1998 and sentenced to sixteen months in prison, both for speech offensive to President Fidel Castro; and Jesús Joel Díaz Hernández, Director of the *Cooperativa Avileña de Periodistas Independientes*, arrested on January 18, 1999, and sentenced to four years’ imprisonment for the crime of “posing a danger to society.”

In September 1999, the Rapporteur received information to the effect that the Cuban government had refused journalist Raúl Rivera, founder and director of the Cuba Press independent news agency, permission to travel to the United States. He was on his way to receive the prestigious *María Moors Cabot* award that New York City’s Columbia University bestows each year. That same month, journalist Angel Pablo Polanco from the independent news agency *Cooperativa de Periodistas Independientes* was arrested at his home by State

⁸⁰ The four people are Martha Beatriz Roque Cabello, economist, sentenced to three years six months in prison; Vladimiro Roca, economist, sentenced to five years; Félix Antonio Bonne Carcassés, engineering professor, sentenced to four years; and René Gómez Manzano, attorney, sentenced to four years.

police and his telephone line was cut. The journalist, known for his coverage of the activities of human rights organizations, was accused of participated in illegal activities.

According to information received, on November 10, 1999, during a human rights demonstration staged on the occasion of the Ibero-American Summit in Havana, journalist Angel Pablo Polanco from the *Cooperativa de Periodistas Independientes* was arrested again, along with journalist Omar Rodríguez from the *Agencia Nueva Prensa*. That same day, journalists Aurora García del Busto from the *Cooperativa de Periodistas Independientes*, Ohalis Victores from *Cuba Voz* and José Antonio Fornaris from *Cuba Verdad* were placed under house arrest.

In December 1999, journalists Juan González Febles, Adela Soto Alvarez, María del Carmen Carro and Santiago Martínez Trujillo were detained in an apparent maneuver by Cuban authorities to prevent them from reporting on an anti-government protest demonstration. Six other journalists were placed under house arrest: Meri Miranda, Osvaldo de Céspedes, María de los Angeles Gómez, Amarylis Cortina, Ricardo González and Alida Viso.

The cases mentioned here clearly illustrate that freedom of expression and information does not exist in Cuba. The Special Rapporteur urges the Cuban authorities to change their posture with regard to an independent press and dissident voices and to recognize the Cuban people's right to freedom of expression and information.

b. States where freedom of expression is severely limited

Peru

The Special Rapporteur holds that Peru is lacking the guarantees needed for full exercise of the right of freedom of expression.⁸¹ Between the *in loco* visit in November 1998 and the publication of this report, there was no progress indicating a positive trend vis-à-vis freedom of expression.

⁸¹ On November 8, 1999, the United States Senate adopted Resolution No. 209, expressing its concern regarding interference in press freedoms and in the independence of the judiciary and stating that:

Whereas the Department of State's Country Report on Human Rights Practices for 1998, dated February 26, 1999, concludes, with respect to Peru, that 'government intelligence agents allegedly orchestrated a campaign of spurious attacks by the tabloid press against a handful of publishers and investigative journalists in the strongly pro-opposition daily La Republica and the other print outlets and electronic media';

and, Whereas on July 13, 1997, Peruvian immigration authorities revoked the Peruvian citizenship of Baruch Ivcher, the Israeli-born owner of the Channel 2 television station; and,

Whereas Baruch Ivcher subsequently lost control of Channel 2 under an interpretation of a law that provides that a foreigner may not own a media organization, causing the Department of State's Report on Human Rights Practices for 1998 to report that 'threats and harassment continued against Baruch Ivcher and some of his former journalists and administrative staff . . . In September Ivcher and several of his staff involved in his other nonmedia businesses were charged with customs fraud. The Courts sentenced Ivcher in absentia to 12 years imprisonment and his secretary to 3 years in prison. Other persons from his former television station, who resigned in protest in 1997 when the station was taken away, also have had various charges leveled against them and complain of telephone threats and surveillance by persons in unmarked cars': Now, therefore, be it Resolved,

SECTION 1. SENSE OF THE SENATE ON ANTIDEMOCRATIC MEASURES BY THE GOVERNMENT OF PERU.

It is the sense of the Senate that--

(1) the erosion of the independence of judicial and electoral branches of the Government of Peru and the blatant intimidation of journalists in Peru are matters of serious concern to the United States;

(2) efforts by any person or political movement in Peru to undermine that country's constitutional order for personal or political gain are inconsistent with the standard of representative democracy in the Western Hemisphere;

(3) the Government of the United States supports the effort of the Inter-American Commission on Human Rights to report on the pattern of threats to democracy, freedom of the press, and judicial independence by the Government of Peru; and

(4) systematic abuse of the rule of law and threats to democracy in Peru could undermine the confidence of foreign investors in, as well as the creditworthiness of, Peru.

On November 24, 1999, the Argentine Chamber of Deputies unanimously adopted the following statement:

To express its consternation and profound concern at the attitude taken by the Peruvian State in stripping Mr. Baruch Ivcher Bronstein of his nationality in order to eliminate his control over Channel 2, *Frecuencia Latina*, and thus curtail his freedom of expression, when that channel was known to report serious human rights violations and cases of corruption.

The basis for this Resolution states that freedom of expression is:

A fundamental right for the maintaining the democratic system, since it is the citizens who must, through their votes, periodically judge their rulers. As representatives of the Argentine people and members of a state that claims to be committed to world peace and democracy, we cannot divert our gaze from such a serious act of violence that does not only harm the journalist in question but also deprives the people of Peru as a whole, our brothers, of elements for forming critical opinions of their representatives.

In a number of its reports, the Commission has stated that the judiciary in Peru has little independence and autonomy. As a consequence, there is no effective judicial control of the constitutionality and legality of the government's acts. This leads to illegalities and abuses of authority.⁸²

Given this situation, the independent press is playing a vital role in Peru by reporting the authorities' irregularities, bringing to light acts that elude the scrutiny of democratic control mechanisms and whose authors find their allies and accomplices among the ranks of the authorities.

As a consequence of these reports, the media and independent journalists and opposition politicians have been the targets of a systematic plan of harassment by intelligence services and police. The attacks have range from threats and smear campaigns to serious human rights violations. Compounding the harassment plan is the judiciary's passive attitude, as it refrains from conducting serious and effective investigations into the abuses and crimes committed against journalists. The judiciary has also allowed itself to be used as a means to harass and intimidate investigative journalists.

One of the most frequently attacked media outlets in Peru is *La República*, a newspaper with a reputation as one of the government's sternest critics. Its publisher, Gustavo Mohme Llona, has received death threats on several occasions, and both he and the newspaper he heads are and have been the target of a campaign clearly intended to offend and tarnish the newspaper and its team of journalists.

Other journalists of the newspaper have also been threatened. The journalist Angel Páez Salcedo, head of the investigative unit of the newspaper and correspondent for *Clarín* of Argentina, received a death threat in December 1998. As a journalist, he reported on corruption involving Peru's government officials and military leaders.

⁸² In its 1998 Annual Report, the Commission wrote that the limited independence of the Peruvian Judiciary had created a climate of juridical insecurity for the exercise of journalism, compounding a wave of death threats and a campaign to persecute and smear journalists critical of the government.

In addition, Mohme, Páez, and other journalists of the newspaper have been the target of a smear campaign by various tabloid press media such as *República*, which was published in May 1999, but survived only one issue, because the *Instituto Nacional de Defensa de la Competencia y la Propiedad Intelectual* (National Institute to Defend Competition and Intellectual Property) passed a resolution banning its circulation. *República* was replaced by *Repudio*, which had the same content and objective of discrediting these journalists. Subsequently, in September 1999, a new anonymous publication called *República del Gran Sur* came out in Puno. Like *República*, it also aimed to discredit *La República* and its publisher. The injured parties filed a complaint requesting a thorough investigation.

Attacks on *La República* continued in October 1999 when the newspaper received 150 offensive faxes that jammed its telephone lines. It also received numerous threatening and insulting calls targeting the publisher and the editor-in-chief of the newspaper, Blanca Rosales.

The campaign against these newspapers was also carried on, in late 1998, via Internet. The web page was updated from Peru by the so-called *Asociación Pro Defensa de la Verdad* (APRODEV) (Association for the Defense of the Truth) with material similar in content and tenor to the editorials of certain of the above-mentioned anonymous lampoon media.

Another example of serious violations to the right to freedom of expression is the case of Mr. Baruch Ivcher Bronstein. Mr. Ivcher was born in Israel and acquired Peruvian citizenship in 1984. Under Peruvian law, Peruvian citizens may own shares in companies holding concessions for television channels in Peru. Within this legal framework, Mr. Ivcher owned 53.95% of the equity of *Compañía Latinoamericana de Radiodifusión*, the company that operates Channel 2, *Frecuencia Latina*.

In April 1997, Television Channel 2 broadcast news on torture committed by members of the Peruvian Army Intelligence Service. In July 1997, the Peruvian government passed a resolution annulling Mr. Ivcher's citizenship. Subsequently, in August, 1997, a judge suspended the ownership rights of Baruch Ivcher as president of the television company, prohibited the transfer of shares, and revoked the appointment of Ivcher as president of the firm.

In 1998, the Inter-American Commission on Human Rights issued a report on the case, and found that the Peruvian Government had violated the rights under the American Convention on nationality, due process, freedom of expression, property, and effective judicial protection to the detriment of Mr. Ivcher. Consequently, the Commission filed the case before the Inter-American Court, requesting that it order the Peruvian Government to restore to Mr. Ivcher Peruvian nationality and all the rights and prerogatives of which he had been arbitrarily deprived.

The Office of the Rapporteur also received information that police or army agents would go to the media to request information on the political affiliation of the owners, journalists, and activities of the various media, and also to ask them for copies of programs they broadcast. For instance, in August 1999, in Huancavelica, the Military Commander with Political Authority in the region (Jefatura Político Militar) ordered the media in the area to submit the news content of their radio programs. The memorandum addressed to media managers instructed them "... to make arrangements to send to the Office of the Military Commander with Political Authority, on a daily basis, and beginning from today, information transmitted by his/her radio station. On orders from our superiors, all information broadcast in this emergency zone must be monitored." A few days later, the Command Headquarters of National Security Sub-Zone for Center No. 8 issued a press release in which it reported that Captain Adolfo Delgado Ruíz had been dismissed and punished, and that charges had been brought against before the Army's Second Judicial Zone.

Similarly, the Rapporteur received information to the effect that the news program *Radio Tigre* in Iquitos had been arbitrarily shut down. The report stated that the executives of the radio station were under pressure from the Army who told them to order their employees to stop reporting the irregularities committed by high-ranking members of the Army.

The Rapporteur received information to the effect that in March of 1999, a number of journalists from *Radio Marañon* were threatened in a variety of ways. For example, two men in hoods shot journalist José Luis Linares Altamirano in his home in Jaén. Reporter Homero

Marín Salazar was the victim of an assault in his own home. The director of the radio said that he believed these attacks were part of an intimidation campaign possibly being waged by local groups that were uncomfortable with the programming.

In September 1999, Juan Sánchez Oliva, director of the radio news program *Quasar en la noticia* in the city of Huaraz, complained that he and his family were the victims of constant threats and aggression. Similarly, Angel Durán, a colleague of Sánchez Oliva, received phone threats that month and in November was shot in the right thigh while on his way to interview the mayor of Alija. The Special Rapporteur had an opportunity to speak by phone with the journalist in the hospital and offered him his support. Journalist Juan Sausa Seclén, a correspondent for *La República* and journalist for *Radio Marañon*, also received death threats.

In November 1999, the Commission received a request asking that precautionary measures be ordered for the journalist Guillermo Gonzales Arica, that had been harassed by State agents and agencies because of his journalistic activities. On November 21, the Commission asked the Government of Peru to grant precautionary measures to journalist Guillermo Gonzales Arica.

c. Other cases

As mentioned earlier, attacks on and threats to freedom of expression and information are present in all the member States. The cases presented here are hardly representative of all the problems in the hemisphere. Only the most disturbing of the cases reported to the Rapporteur are mentioned here.

In Colombia there are cases of journalists being murdered, kidnapped, assaulted and threatened. In Chile, a restrictive law is on the books that some authorities use, as happened with the censorship of a book in 1999. In the Dominican Republic, there are laws

that require an identification card for journalist activities. In Venezuela, the concept of truthful information was introduced in the Constitution. These governments have repeatedly emphasized their commitment to making every effort possible to recognize and protect the right to freedom of expression. There are bills before the Chilean legislature, introduced by the executive branch and by members of the legislature, to amend some of the laws now on the books that effectively abridge freedom of expression.

Colombia

As the armed conflict escalated in Colombia in 1999, so did there the violence and intimidation against journalists and the media.

The violence targeted against journalists and the media left five journalists dead, killed while practicing their profession. Others have been kidnapped and/or threatened by members of armed dissident groups. According to reports received, fifteen journalists working for major media outlets were forced to flee the country in fear for their lives. But this figure is compounded by the number of journalists who leave the country or move, but file no complaint with the Office of the Rapporteur.

While at home in March 1999, Plinio Mendoza, a columnist for the newspaper *El Espectador*, received a package containing a bomb, which was quickly deactivated. The armed dissident group called *Ejército de Liberación Nacional* (ELN) claimed responsibility for the attempt and described Mendoza as a propaganda machine for State and paramilitary violence.

In March and August 1999, journalist Jaime Orlando Aristizabal was arrested, threatened with death and stripped of his journalism material by the *Audodefensas Unidas de Colombia* (AUC), because of his journalistic work for the RCN chain. In 1994, the journalist was the target of similar acts of violence and was forced to resign from his job at

the *Notipacífico* television news. Aristizabal had reported these acts of violence to State security agencies, but got no response.

On April 11, 1999, Hernando Rangel Moreno, director of the newspaper *Sur 30 Días* and a radio broadcaster, was killed. Jaime Garzón, a popular journalist and humorist, was killed on August 13. Guzmán Quintero Torres, editor-in-chief of the regional paper *El Pilón* and a news correspondent for *Tele Caribe*, was killed on September 16. Rodolfo Luis Torres, correspondent for *Radio Fuentes* in Sincelejo, was killed on October 21 and Pablo Emilio Medina Motta, a television cameraman, on December 4.⁸³

In August 1999, flyers began to circulate in Bogota, Cali, and Medellín. In those flyers, the *Ejército Rebelde Colombiano* named three journalists and 21 intellectuals as enemies of the peace process in Colombia. The journalists mentioned were Alfredo Molano and Arturo Alape, columnists with *El Espectador*, and Patricia Lara, former owner of the weekly publication *Cambio* and a columnist for the Bogota newspaper *El Tiempo*. In early 1999, Molano had to leave the country after his wife was threatened by a leader of one of Colombia's armed dissident groups.

In September 1999, the National Television Commission censored the program *Hechos y personajes*, done by journalist Ramón Jimeno, on the grounds that the journalist's profiles constituted a defense of criminal conduct.

On October 26, 1999, Henry Romero, reporter/photographer for the Reuters news agency, was abducted by the armed dissident group that calls itself *Ejército de Liberación Nacional* (ELN), as he was covering the release of a group of people from the Church of María de Cali who had been abducted since May 31, 1999. He was abducted immediately and held in order to explain why he published photographs showing the face of various ELN

⁸³ See press communiqués in appendices.

members. He was finally released the city of Suárez, on November 3, after nine days in captivity.

On October 29, 1999, seven journalists and a cameraman were abducted by an armed dissident group in the department of Bolívar. They were Wilson Lozano from *Radio Caracol*, Idamis Acero and Reynaldo Patiño of RCN Television, Blanca Isabel Herrera and John Jairo León of *CM Noticias*, Ademir Luna from *Vanguardia Liberal*, and Franklin Chaguala from *Noticiero de las siete*. One of the kidnappers spoke with the media to report the kidnapping and said that the journalists would not be released until they reported the real truth about the atrocities that paramilitary forces had committed against peasants in that region. The group was finally released on November 2.

On November 12, 1999, seven journalists and their driver were abducted by armed dissident groups in the department of Cesar. They were David Sierra and Isabel Ballesteros from *RCN Televisión*, José Urbano Céspedes and Aldemar Cárdenas of *Caraco Televisión*, Pablo Camargo Alí from the newspaper *El Pílon*, Libar Gregorio Maestra from *CM news* and Edgar de la Hoz from the Bucaramanga newspaper *Vanguardia Liberal*.⁸⁴ After being held by their abductors for five days, the journalists were released.

On November 14, 1999, a bomb containing six kilograms of dynamite exploded at a bus stop, close to the offices of the Cali newspaper *El Tiempo*. Three employees of the newspapers were wounded in the explosion, which did considerable property damage as well. The identity of the parties responsible for the attack is not known.

In June 1999, an armed dissident group abducted Jorge Rivera Serna, a journalist with Cartagena's newspaper *Universal*, and held him for one week. He was beaten and pressured to denounce other armed groups in his reporting. Later, Mr. Rivera Serna

⁸⁴ See press communiqué from the Rapporteur for Freedom of Expression No. 16/99, dated November 12, 1999.

decided to leave Colombia, saying that he was retiring from the profession because there were no guarantees of professional growth.

Similarly, journalist Juan Carlos Aguilar, television cameraman Javier Jaramillo, investigative journalist and columnist for the newspaper *El Tiempo* Alejandro Reyes Reyes and the deputy director of *Noticiero de las Siete* and columnist for *El Tiempo* Hernando Corral, left Colombia in 1999 after receiving numerous threats to their lives and/or their families.

The Office of the Rapporteur received information indicating that the Office of the Attorney General of the Nation would create a special unit to investigate the murders of journalists. The Special Rapporteur urges the Colombian authorities to move forward with this important initiative, which can help see to it that the murders of journalists are investigated.

Venezuela

The Special Rapporteur is concerned about Article 58 of the new Venezuelan Constitution. It provides that “Everyone has the right to timely, truthful, impartial and uncensored information.” As explained earlier in this report, information is not susceptible of preconditions or qualifiers. Requiring that information be truthful, timely, and so on is a kind of prior censorship expressly prohibited in the American Convention on Human Rights.

Chile

In June 1999, the Special Rapporteur visited Chile in response to an invitation to participate in several seminars on freedom of expression and information, in connection with

the censorship of the book titled *El Libro Negro de la Justicia Chilena* by Chilean journalist Alejandra Matus.

During his stay in Chile, the Special Rapporteur met with various officials, journalists, representatives of civil society and professors and found that some laws on freedom of expression were anachronistic. The Constitution still allows for film censorship and although prior censorship is prohibited in the Constitution, lesser laws allow it and are applied by the Chilean courts. The law also still criminalizes expression disrespectful of authority. These and other laws are incompatible with Article 13 of the American Convention and inconsistent with one of the objectives of a democratic and pluralistic society, which is to encourage public debate.

During his visit to Chile, the Special Rapporteur got a commitment from a number of Chilean authorities that they would introduce bills to amend or repeal the existing legislation on freedom of expression and information that is restrictive and incompatible with the American Convention and other international human rights instruments.

The laws that need to be repealed or made compatible with the American Convention owing to their frequent use are:⁸⁵

1. Article 6(b) of Law 12.927 on Internal State Security

This law establishes penalties for violations of public order and stipulates that these offenses occur whenever the president of the Republic, ministers of state, senators, deputies, members of the courts, the comptroller general, commanders-in-chief of the armed forces or the director general of

⁸⁵ Article 2 of the American Convention on Human Rights provides that "where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions," the States have an obligation to "adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms." The Court has held that the State has a legal obligation to adopt the measures necessary to comply with its obligations under the treaty, whether those measures be legislative or of some other kind.

the *Carabineros* is insulted, irrespective of whether the defamation, libel or slander is related to the offended party's performance of his official duties.⁸⁶

2. Articles 16 and 30 of the State Security Law

Article 16 of the State Security Law is very akin to Article 6(b). It reads as follows: "If the press, radio or television are used to commit any crime against State security," in other words, if it is perceived as violating or harming the public order, the court hearing the case may suspend publication of up to ten editions of the newspaper or magazine and up to ten days of broadcasting of the radio or television station. In serious cases, the court can order immediate confiscation of any edition in which an abuse of freedom of expression punishable under this law is apparent.

This article gives very broad discretionary authority to the examining judge. He need only assert "some apparent abuse of freedom of expression" to order confiscation of publications or temporary shutdown of other media of expression. Judges are thus able to ban circulation of books before deciding whether the law itself has been violated. The law is, therefore, authorizing or allowing judges to engage in prior censorship of a publication. The Rapporteur was informed of some concrete cases in which this law was used.⁸⁷

Article 30 states that in any proceeding instituted pursuant to the State Security Law, "the examining judge shall first order that the printed materials, books, pamphlets, records, films, tapes, and any other object that may have been used to commit the crime be immediately compiled and turned over to the court."

⁸⁶ The Rapporteur has been told that this article has been used on various occasions and by a number of public officials as a means to silence critics or to remove them from the political debate. The Special Rapporteur received reports of multiple legal actions brought against journalists or politicians under Article 6(b) of the State Security Law. The following cases of legal proceedings instituted against journalists are mentioned merely by way of example: Juan Andrés Lagos, director of *El Siglo*; Francisco Herreros, director of *Pluma y Pincel*; Juan Pablo Cárdenas, director of the journal *Análisis*; Osvaldo Muray, of *Fortín Mapocho*; Guillermo Torres, director of *El Siglo*; Alberto Luengo and Mónica González, of *La Nación*; Manuel Cabieses, director of *Punto Final*; Roberto Pulido and Paula Couddu, of the magazine *Cosas*; and Fernando Paulsen and José Ale, from the newspaper *La Tercera*, and others. Among the political leaders charged under this article of the State Security Law are the following: Mario Palestro, Socialist Party deputy; Jorge Schaulsohn and Nelson Avila, deputies from the *Partido por la Democracia*; Gladys Marín, Secretary General of the Communist Party, and José Antonio Viera Gallo, Socialist Party deputy. Mention should also be made of the suit recently brought against Alejandra Matus.

The Rapporteur is of the view that a law of this nature would have the same legal consequences as those described in the case of Article 16 of the State Security Law, i.e., authorizing judges to engage in prior censorship of publications.

Other laws that need to be repealed or made to conform to the American Convention on Human Rights are Articles 263 and 264 of the Penal Code and Article 284 of the Code of Military Justice, which also recognize and establish penalties for the crime of *desacato* (expression offensive to authority).

Some public officials are indeed using this anachronistic legislation. A case in point: an episode occurred in Chile in 1999 that was a regrettable setback for freedom of expression and information in that country, and so disproportionate that it became international news.

On April 13, 1999, the book titled *El Libro Negro de Justicia Chilena*, written by journalist Alejandra Matus and published by *Editorial Planeta*, was banned in Chile. Police confiscated the book in question from Chilean bookstores and the warehouses of Editorial Planeta. Its circulation was banned in Chile by order of Judge Ismael Huerta, in response to a court action brought by a sitting justice of the Chilean Supreme Court and its former chief justice, Servando Jordán. The latter invoked article 6(b) of the State Security Law and other laws to request that the book be confiscated and its circulation banned throughout Chile.

In addition to the court-ordered confiscation and ban of the book, journalist Alejandra Matus and Editorial Planeta were charged with defamation under the State Security Law. When Matus learned of her imminent arrest, she left for Buenos Aires and then the United States. The latter granted her political asylum in June 1999. Charges were also brought

⁸⁷ See Inter-American Commission on Human Rights, Report 11/96, Case No. 11,230 of May 3, 1996, Francisco Martorell v. Chile, in the Commission's 1996 Annual Report.

against Bartolo Ortíz, manager of Editorial Planeta, and Carlos Orellana, editor of Planeta. The Police arrested them on June 16 and held them for two days. Both were then released.

As of this writing, *El Libro Negro de la Justicia Chilena* is still banned and its author is under indictment.

In April 1999, a group of Chilean congressmen introduced a bill to amend the State Security Law. The most important changes were to eliminate *desacato* from Article 6(b) and to amend Article 16, which the judges use to ban publications. The executive branch later proposed some additional amendments. These legislative initiatives are still in Congress.

Finally, the Chilean Constitution still contains a clause allowing film censorship. It stipulates that “the law shall establish a censorship system for the screening and advertising of films.” This clause is contrary to Article 13 of the American Convention, which states that the right to freedom of expression and information cannot be subject to prior censorship but shall be subject to subsequent imposition of liability. The only exception is for the purpose of regulating children’s access to public entertainments.⁸⁸

The Special Rapporteur urges the Chilean authorities to act swiftly on those initiatives aimed at repealing contempt laws that penalize expression offensive to public officials [*desacato*], laws that allow film censorship, and any other law on freedom of expression and information that is contrary to the American Convention.

Dominican Republic

Rule 824 on the operation of the National Entertainment and Radio Commission authorizes the Commission to suspend entertainment containing portions the Commission has not approved; while Article 71 requires organizers to submit librettos to the Commission

⁸⁸ Article 19(2) of the Chilean Constitution provides, *inter alia*, that “the law shall establish a censorship system for the screening and advertising of film productions.

for review. These provisions could result in prior censorship, which is a violation of Article 13 of the American Convention.

According to reports received, some individuals have been barred from speaking on radio and television. By analogy to Advisory Opinion OC-5/85, issued by the Inter-American Court of Human Rights, one could argue that this rule is contrary to Article 13 of the Convention, since it denies those who do not have the identification card issued by the Commission their right to exercise their freedom to speak on radio or television.

The Court has held that:

76. The Court concludes, therefore, that reasons of public order that may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalism because they would have the effect of permanently depriving those who are not members of the right to make full use of the rights that Article 13 of the Convention grants to each individual. Hence, it would violate the basic principles of a democratic public order on which the Convention itself is based.

77. The argument that licensing is a way to guarantee society objective and truthful information by means of codes of professional responsibility and ethics, is based on considerations of general welfare. But, in truth, as has been shown, general welfare requires the greatest possible amount of information, and it is the full exercise of the right of expression that benefits this general welfare. In principle, it would be a contradiction to invoke a restriction to freedom of expression as a means of guaranteeing it. Such an approach would ignore the primary and fundamental character of that right, which belongs to each and every individual as well as the public at large. A system that controls the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violate the right to information that this same society has.

...

80. The Court also recognizes the need for the establishment of a code that would assure the professional responsibility and ethics of journalists and impose penalties for infringement of such a

code. The Court also believes that it may be entirely proper for a State to delegate, by law, authority to impose sanctions for infringement of the code of professional responsibility and ethics. But, when dealing with journalists, the restrictions contained in Article 13(2) and the character of the profession, to which reference has been made (*supra* 72-75), must be taken into account.

81. It follows from what has been said that a law licensing journalists, which does not allow those who are not members of the “colegio” to practice journalism and limits access to the “colegio” to university graduates who have specialized in certain fields, is not compatible with the Convention. Such a law would contain restrictions to freedom of expression that are not authorized by Article 13(2) of the Convention and would consequently be in violation not only of the right of each individual to seek and impart information and ideas through any means of his choice, but also the right of the public at large to receive information without any interference.⁸⁹

F. Assassination of journalists

The Office of the Rapporteur has received information on the journalists killed in 1999. Given the various stories received and after investigating the veracity of the information, it has decided to refer to those cases in which there are reasons to suppose that the motive behind the murders was related to the victims’ practice of journalism.

Argentina

May – Ricardo Gangeme (56). This journalist was killed on May 13, in the city of Trelew, province of Chubut. He was director of the weekly *El Informador Chubutense* and was killed as he was parking his car in front of his home. Gangeme had previously reported irregularities and corruption in the provincial government and by some local businessmen. Five days before he was killed, the journalist had filed a complaint of death threats, allegedly from Argentine businessman Héctor Fernández. On June 23, 1999, the judge hearing the

⁸⁹ See Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/95 of November 13, 1985, Series A No. 5.

case ordered that the businessman be indicted and, as the record shows, some days before Gangeme's death, the businessman had told him: "You're going to die for the things you're writing." In November 1999, preventive detention was ordered for six people charged in Gangeme's death and according to the sentencing arguments, the journalist was most likely killed for his investigative journalism.

Colombia

April – Hernando Rangel (44). This journalist was killed on April 11, 1999, in Plato, Magdalena. Rangel was director of the local publication *Sur 30 Días* and was attacked at the home of a friend. An unknown assailant shot him four times in the head. The journalist was also working independently and had a reputation for reporting corruption in government. The investigations conducted by the Prosecutor's Office found that the suspected intellectual author of the crime was Fidas Zeider Ospino, a mayor of that municipality who had been suspended. He was arrested on December 7, 1999.

August – Jaime Garzón (36). This journalist was killed on August 13, 1999, in Bogota. He was both a journalist and humorist with *Radionet* and *Caracol Televisión* and was assaulted by two men on a motorcycle, as he was listening to the radio. At the outset, a man who spoke on behalf of the *Autodefensas Unidas de Colombia* (AUC) claimed responsibility for the murder; later, however, this group denied the information in a fax sent to the *Radionet* station. The journalist was known for his role in the peace negotiations to obtain the release of persons abducted by guerrilla movements. He had also lobbied to get the authorities to begin talks with the *Ejército de Liberación Nacional* (ELN).

September – Guzmán Quintero Torres (34). This journalist was killed on September 16, 1999, in Valledupar, capital of the department of Cesar. He was editor-in-chief of the newspaper *El Pilón*. An armed man approached him and shot him several times in the head

and in the chest. He then fled the scene on a motorcycle. Two *El Pílon* journalists who were with Quintero Torres that night were witnesses to the event. Quintero was respected in journalistic circles. He was founder and vice president of the Valledupar Journalists' Club and a correspondent for *Televista*, a news program carried by *Telecaribe*, a regional television chain. He was also coordinator of the program to train communicators for community participation, conducted by the Universidad Nacional Abierta y a Distancia.

The motive for the killing has not yet been determined. According to his colleagues, Quintero had not received threats in the days leading up to the killing, although some years back he had received threats for publishing a note in the newspaper *El Herald* about the Autodefensas Unidas de Colombia (AUC), a paramilitary group fighting other guerrilla groups. After these threats, the journalist stopped reporting on political matters and devoted himself exclusively to the finance area. However, Quintero Torres had been investigating the murder of journalist Amparo Leonor Jiménez, which was on August 11, 1998.

October – Rodolfo Luis Torres (38). Torres was killed on October 21, 1999, in the city of San Onofre in the department of Sucre. The body of the journalist, a correspondent for *Radio Fuentes* of Sincelejo, was found along a highway with three bullet holes to the head. According to witnesses, very early that morning four men had forcibly dragged him from his home.

Torres was also working as a mayor's press secretary. He had once been a correspondent for *Radio Caracol* and the newspaper *Meridiano* in Sincelejo. Torres' colleagues were certain that the journalist was killed in retaliation for his published articles. One year later, a series of anonymous pamphlets distributed in the city accused him of belonging to an armed dissident group called the *Ejército de Liberación Nacional* (ELN).

December – Pablo Emilio Medina Motta (21). This journalist was killed on December 4, 1999, between the cities of Gigante and Garzón, in the department of Huila. According to

the first police report, Pablo Emilio Medina, a television cameraman for TV Garzón, was believed to have been killed by an armed dissident group called the *Fuerzas Revolucionarias de Colombia* (FARC) while covering the group's offensive on the city of Gigante. Members of FARC allegedly fired on Pablo Emilio Medina as he, riding in a police motorcycle at the time, was filming the attack. Local journalists said that the FARC members fired because they mistook him for the police.