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PROTECTION OF THE RIGHT TO THE FREEDOM OF EXPRESSION IN THE INTER-AMERICAN SYSTEM



CEJIL is a non-governmental, non-profit organization with consultative status before the Organization of American States (OAS), the United Nations (UN) and observer status before the African Commission of Human Rights.



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Presentation

*“I am not at all in agreement with what you say, but
I will defend with my life your right to say it.”*

Voltaire

Freedom of expression is a fundamental guarantee that ensures personal autonomy, the rule of law and democratic institutions. In this sense, diverse international instruments recognize this right as fundamental ¹, and it is reiterated in jurisprudence emitted by international and regional tribunals as well as in doctrine. In the Inter-American System, the Inter-American Court of Human Rights has established that: “Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that

1 The American Convention on Human Rights (article 13), the American Declaration of the Rights and Duties of Man (article IV), the Universal Declaration of Human Rights, (article 19), The International Covenant on Civil and Political Rights (article 19), the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 10), Resolution 59 (1) of the United Nations General Assembly, and the Resolution 104 adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO).

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.”².

Despite the widespread recognition of this right at both the regional and international levels and the consensus among States regarding its importance at the individual and collective level, in practice grave violations of the freedom of expression and information exist on a daily basis. In fact, democracies in this hemisphere have not completely overcome authoritarian traditions and impunity, and violence has taken on new forms. Given this right’s crucial role in strengthening the autonomy of individuals and of democratic institutions, violations of the freedom of expression are serious reflections of these tendencies. Thus, harassment, threats and assassinations of social communicators; the judicial persecution of political opposition, defenders of human rights and journalists; the lack of informed participation, interception of communication and censure, among other acts, are expressions of this violence. In light of this reality, it is necessary to strengthen guarantees to insure that democratic institutions function correctly.

The control of institutions and government action is essential for the rule of law and is one of the keys to strengthening democracy in our continent. Said control many times is seen as a threat by those who make power as an end in itself and use their political influence in order to deviate democratic institutions to their advantage. This attitude translates many times into intimidating actions and/or injury of rights, and has produced a serious risk in our continent for social commentators, journalists and many other people who have raised their voice to criticize, denounce and reveal corruption, injustice and hypocrisy.

The Center for Justice and International Law (CEJIL) has developed a number of activities in its diverse areas of work (legal defense, training, dissemination of information and advocacy) in favor of the freedom of expression in the continent. Most importantly, it has assumed the legal defense of more than two-dozen cases related to this theme in countries as diverse as Guatemala, Chile, Panama, Argentina, Paraguay,

2 I/A Court H.R Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights) Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 70.

Colombia, Venezuela, among others.³ Likewise, CEJIL has created a thematic file on its webpage that offers theoretical aspects and practices on this issue.⁴

In this manner, CEJIL considers it fundamental to facilitate access of journalists and social commentators to the work of the Inter-American organs of human rights protection through this manual. It offers specialized coverage of this theme that will translate into greater protection of the freedom of expression for communicators in the region. In this sense, the central object of this text is to present the tools found in the Inter-American System of human rights protection; in particular, those that refer to the protection of the right to freedom of expression. The first chapter will present specific mechanisms of protection, including urgent measures of protection for serious cases in which human rights are threatened as well as individual petitions and hearings. The second chapter will deal with the standards that have been established by the Inter-American System for the protection of the freedom of expression, including instruments, jurisprudence and doctrine.

This manual has been enriched by the creative contributions of various members of our institution. Attorney Marisol Blanchard, who worked for two years with CEJIL as a fellow of the program “New Voices”, was the person responsible for the text of this publication in its first edition and author of the section on standards for the protection of the freedom of expression. The general section on the Inter-American System resulted from an update of the Guide for the litigation of cases and educative material authored by Viviana Krsticevic, Executive Director of CEJIL. In its distinct stages, the text benefited substantially from the contributions of María Clara Galvis, Roxanna Altholz, Ana Aliverti, Tatiana Rincón, Viviana Krsticevic and Gisela De León. The final revision of the manual in its second edition was the responsibility of Viviana Krsticevic, Ana Aliverti y Tatiana Rincón. We thank Lisa J. Laplante and Pablo J. Valverde Bohórquez for their help with the English version of this edition.

3 For more information see, CEJIL Report of Activities (accessible through our webpage: www.cejil.org). To gain perspective on our institutional work in the area of freedom of expression in the first 10 years of CEJIL, see Annual Report 2002 (also available on our webpage).

4 See, www.cejil.org.

Many organizations that financed the work of CEJIL contributed directly or indirectly to making this book possible. We especially would like to thank the European Commission for its financial support, which has made the publication of this second revised edition possible. As with the first edition, we also would like to highlight that the idea for this work arose out of the elaboration of the Guide for the Defense of Journalists in Situations of Risk, produced by CEJIL in the year 2001 with the help of the National Endowment for Democracy and the McCormick Tribune Foundation. The work of CEJIL in this thematic area is made possible, at the same time, by the support offered by the Open Society Institution, the Ford Foundation, Misereor, the European Commission, HIVOS and PRODECA.

Lastly, CEJIL would like to emphasize and recognize the support of so many human rights organizations, journalist associations, individual social communicators, associations that defend the freedom of the press, for the trust they have demonstrated upon being convened to share the litigation of cases in the Inter-American System of human rights and for permitting us to enrich our understanding and knowledge of the subject. They deserve all the credit for the advances gained in the area of international protection of the freedom of expression.

We hope this work will contribute to safeguarding and protecting human rights for the security of journalists and social commentators, and that it contributes to the preservation of the freedom of expression in the Americas.

Viviana Krsticevic
Executive Director
Center for Justice and International Law

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Prologue

It is with great satisfaction that I write this prologue for the book “The Protection of the Freedom of Expression in the Inter-America System”, edited by the Center for Justice and International Law (CEJIL).

Any analysis of the right to the freedom of expression should be evaluated considering the fundamental role that this right plays in a democratic society. Nevertheless, in a large part of the continent the freedom of expression and information is far from having been fully reached.

The task of promoting and protecting human rights, particularly that of freedom of expression, situates this work. The publication of this book represents a valuable contribution to the freedom of expression in the continent, since it constitutes an important initiative for increasing our knowledge of the right to the freedom of expression in democratic societies, and for helping journalists support, defend and maintain a free press in the Americas.

The potential of the Inter-American System to protect and promote these rights has been clearly exemplified by the *Verbitsky* case. This was the first case of the Inter-American System of the Protection of Human Rights that resulted not only in a solution of an individual petition but also the derogation of an Argentinean law incompatible with the Pact of San Jose, Costa Rica, and thus providing recommendations for similar procedures in another 14 countries in the region. Also, it permitted an illustration of the rich process of juridical elaboration, in which abstract regional instruments give life to doctrine and jurisprudence in member countries.

In this manner, the American Convention converts into a true Carta Magna of Human Rights and permits a framework of a vast area of actions for non- governmental organizations that work in the region: bringing the teaching of human rights and the great juridical instruments to the level of everyday life, country by country, is how human rights violations are verified. “The Protection of the Freedom of Expression and the Inter-American System” constitutes a tool to help make this possible.

Horacio Verbitsky



Introduction

The Situation of the Freedom of Expression in the Hemisphere

The long awaited return of democracy and peace after years of dictators and civil wars in our hemisphere has not guaranteed the full consolidation of democratic institutions nor of human rights in the Americas.

This is due in great part to the fact that countries in the region have not completely overcome the traditions of authoritarianism nor impunity and the great social inequality that exists in our hemisphere.⁵ In a large number of States, there persists systematic violation of human rights. In effect, political violence, torture, prolonged detention, the lack of an adequate defense of the poor, the marginalization of important sectors of the population to the enjoyment of economic, social and cultural rights, discrimination in the administration of justice, telephonic interceptions, harassment, threats and judicial persecution against opposition politicians, defenders of human rights and journalists form part of this reality in a great number of the countries in the Americas. There exists, on the other hand, high rates of poverty and social inequality which creates unequal access to information and to the freedom of

5 Meeting the Millennium Poverty Reduction Targets in Latin America and the Caribbean, a report prepared for the United Nations Development Program (UNDP), the (Brazilian) Instituto de Pesquisa Econômica Aplicada (IPEA), and the Economic Commission for Latin America and the Caribbean (ECLAC), Santiago, Chile, December 2002.

expression. This endemic situation has become a part of another serious threat: as much the medium of mass communication (journalists, television, and cinema) as the editorial industry have not escaped the economic globalization process, whose characteristics, among others, is the concentration of goods and services in a few large multinational conglomerates with subsidiaries throughout the whole hemisphere with the result of limiting the plurality of voices.⁶

Democratic controls, like periodic elections and an independent and effective judicial power, have not exactly fulfilled their purpose. Despite the existence of elections without electoral fraud in a large number of countries in the region, the political class has not been sufficiently renovated. A significant number of the countries in America have maintained signs of authoritarianism and corruption. In turn, the judicial powers have not been capable of fighting against impunity, and frequently have been influenced by the executive power and by legal and illegal powerful groups. It is due in fact to the insufficiency of democratic controls in various countries in the region – which results in successive political crisis – that the role of the press has acquired growing importance in the development of national and regional politics in the last decade.

In this period, the American continent has relied on the Inter-American System of human rights protection, which has made important contributions to the consolidation of democracy and the liberty of expression. In Peru, the sadly enough celebrated government of Fujimori illustrates the contribution of the Inter-American System in guaranteeing democracy and the freedom of expression. After a decade of confrontations and spurious alliances with sectors of the press, the regime of Alberto Fujimori finally fell, thanks to, among other factors, the media that made evident the intrigues and confabulations of this corruption. In this context, the Inter-American Commission of Human Rights⁷ and the Inter-American Court of Human Rights⁸ played an important role in

6 For example, in the editorial industry 80% of the books sold in the United States belong to the five largest editorial houses (see information in André Schiffrin, *La Edición sin Editores*, Editorial Destino, 2000) and in Latin America the greater part of the editorial industry is controlled by 5 or 6 of these consortiums that, at the same time, are also owners of the principle television and newspaper chains.

7 Hereinafter the Commission, the Inter-American Commission, or IACHR.

8 Hereinafter the Court, the Inter-American Court, or I/A Court H.R.

the protection of the communication professionals as well as the very right to the freedom of expression through the emission of reports, evaluation of complaints about human rights violations, the provision of protective measures for people in risk, hearings to deal with telephonic interventions⁹ or situations related to the freedom of expression in the country (for example, those promoted by the IPYS (Instituto Prensa y Sociedad) country visits and the condemnation of Peru for violations of human rights.

The actions of both organs in the hemisphere-through decisions in cases like that of Baruch Ivcher Bronstein in Peru, the Ultimate Temptation of Christ, and Palamara in Chile, Herrera Ulloa in Costa Rica, and of Ricardo Canese in Paraguay, as well as the granting of provisional measures dictated in favor of journalists and human rights defenders in Venezuela, demonstrates the importance that the Inter-American Protection System¹⁰ gives to the freedom of expression. Likewise, as expression of this recognition, in 1997 the Inter-American Commission established the office of the Special Rapporteur of Freedom of Expression. In this way, it gave impetus to the discussion around this theme that is so crucial in the Americas. Moreover, in 2001, the IACHR through the initiative of the Special Rapporteur of the Freedom of Expression issued the Declaration of Principles on the Freedom of Expression.¹¹ This latest contribution arose out of a necessity to systemize and clarify the legal framework that effectively regulates the protection of the freedom of expression in the Americas. In this sense, the Declaration of Principles incorporates basic standards widely recognized and established by diverse international instruments. Thus, with respect to the freedom of expression, this instrument constitutes an important interpretation of the American Declaration of the Rights and Duties of Man¹² and the American Convention of Human Rights¹³, and represents an important tool for explaining the States' obligations in relation to this theme.

9 See, for example, Inter-American Commission on Human Rights, Case 12.085 Ana Elena Townsend Diez-Canseco et Al. Peru. Report N° 1/01, January 19, 2001.

10 Hereinafter, System, or Inter-American System.

11 Hereinafter, the Declaration of Principles

12 Hereinafter, the Declaration, or the American Declaration.

13 Hereinafter, the Convention, or the American Convention.

As already mentioned, despite these advances, various States in the region maintain legislation and judicial practices and policies that restrict the freedom of expression. For example, in the majority of countries there exist penalties that criminalize criticism of public figures or functionaries. In this sense, the majority of States in the region have not achieved a reasonable balance between defending honor and privacy, with the obligation to guarantee lively, extensive and free flowing public debate, without resorting to its punishing power. Nor have they arrived at a consensus on the establishment of autonomous mechanisms of professional ethics. On the other hand, in various countries legal harassment has been used as an effective inhibition of public criticism. Moreover, some legislation in the region still permits prior censorship and the imprisonment of people who criticize the public administration.¹⁴

Another obstacle to the development of a plural and tolerant public debate has been the lack of editorial autonomy of many regional newspapers: impoverished journalists, with meager salaries and precarious work conditions, have seen their capacity to independently and integrally carry out their work become highly restricted. Additionally, in recent years, a considerable increase in the number of journalist deaths have been registered: consider for example that in 2003, in the American continent, at least 7 journalists lost their lives for having exercised their profession.¹⁵ Hundreds of activists, politicians and unionists, among others, have been threatened or killed for having exercised their right to the freedom of expression.¹⁶ Moreover, many journalists were

14 In this way, Panama and Cuba practice censorship through diverse modalities.

15 For more information, see www.cpj.org. Since its establishment in 1997, the office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission has reported, in a systematic manner, on the obstacles that guarantee the enjoyment of the freedom of expression. Updated information can be found in the Annual Report of the Special Rapporteur for Freedom of Expression, 2003. OEA/Ser.L/V/II.118, doc. 70 rev. 2, December 29, 2003, Chapter II.C.

16 For more information, see, Human Rights Defenders in a "Security First" Environment, Publication of the Annual Report for 2003 of the Observatory for the Protection of Human Rights Defenders (Joint program of FIDH and OMCT), (14th/04/2004). This report has revealed that at least 15 unionists and human rights defenders were killed in 2003 in our hemisphere.

objects of kidnapping, harassment, and intimidation.¹⁷ In other countries, state agents have resorted to unlawful telephonic interceptions in order to control the political opposition and people inconvenient to those in power.¹⁸

In many cases, the attempts of the judicial system to investigate illegal activities and sanction those responsible for these corrupt acts, human rights violations, harassment of journalists and defenders, or other crimes, are rarely successful. As a result, the press ends up being one of the few channels for criticizing or exposing the wrongs committed by the authorities. Moreover, citizens, journalists and organizations of civil society who realize investigations and complaints become targets of legal intimidation and physical attacks.

On the other hand, despite the importance of the press and the activity of communicators, there exist obstacles for accessing information about government acts and other information related to the public interest; this situation contributes to making precarious democratic systems less transparent since it impedes control by those who by definition are the depositories of power: the inhabitants of a State.¹⁹ Few nations in the hemisphere count on legislation that permits or helps individuals access or correct information that the State has about their person or about subjects in the public interest – although it is necessary to mention that there have been advances in this area through the incorporation of habeas data into the constitutions of countries in the region ²⁰ and with

18 See, for example, the Annual Report of the Special Rapporteur for Freedom of Expression of the Inter-American Commission, 2002. OEA/Ser.L/V/II.117, doc. 1, March 7, 2003, Chapter 2.C

19 For more information on countries in which they have regulated access to information, see, Annual Report of the Special Rapporteur for Freedom of Expression, 1999.OEA/Ser.L/V/II.106, doc. 3, April 13, 2000, Chapter III.C –particularly, paragraphs 42/166-; and Toby Mendel, Freedom of Information as an Internationally Protected Right (2000), available at www.article19.org/docimages/627.htm.

20 For information about countries that have regulated the procedure of habeas data, see Annual Report of the Special Rapporteur for Freedom of Expression, 2000. OEA/Ser.L/V/II.111, doc. 20, April 16, 2001, Chapter II. B.3. Also, see updated information with respect to the Annual Report of the Special Rapporteur for Freedom of Expression, 2003, *Idem* nota 15, Chapter IV.C.

17 *Supra* nota 15.

the recent promulgation in several countries (like Mexico, Jamaica and Peru) of laws that facilitate access to information.²¹

In this context, the Inter-American System has recognized once and again-through a normative framework, jurisprudence and doctrine- the relevance of the freedom of expression for the development of democratic regimes and to guarantee the full respect of individual autonomy. In this way, CEJIL and many other human rights organizations and social communicators have utilized the Inter-American System in order to denounce violations and request urgent measures for the protection of communicators that find themselves at risk. The use of these mechanisms has favored the development of this right and the strengthening of its application, as well as having contributed to saving lives. Below we will develop some central aspects of the right to the freedom of expression and information about the Inter-America System, and the instruments of this protection system, with the object of sharing our experience and hope of strengthening its development, and also delivering tools in order that all may access the full protection of their rights.

21 Annual Report of the Special Rapporteur for Freedom of Expression, 2003, *Idem* nota note 20. It is important to note that the United States has been one of the pioneers in dictating laws that order state agents to give citizens access to documents in the public interest. *Id.*

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Chapter I

THE INTER-AMERICAN HUMAN RIGHTS PROTECTION SYSTEM

Chapter I

The Inter-American Human Rights Protection System

A. Organs of the Inter-American System

The Inter-American System has developed within the framework of the Organization of American States (OAS)²² in the second half of the 20th century, replicating the movement initiated at the universal and European levels to create an international mechanism of human rights protection based on the work of two organisms: the Inter-American Commission and the Court.

The Inter-American Commission was established in 1959 in the Fifth Meeting of Consultation of Ministers of Foreign Affairs, held in Santiago Chile. In turn, the Inter-American Court was created in 1969 upon the adoption of the American Convention, as an organism of judicial supervision of the enforcement of human rights.²³ The Court began to function twenty years later after the treaty entered into force.

The Commission and the Court are each composed of six experts, who act in their personal capacity; these experts are nominated and elected by the States in accordance with that established by the Statute of the Commission and of the Court, as well as by the American Convention.²⁴ The members of the IACHR are elected by all of the countries that form part of the OAS, and the judges of the Court are elected exclusively by countries that have ratified the American Convention (those called "State parties" of the treaty).

One of the requirements established by these respective norms is that the members of the Commission and Court be people of high moral authority, recognized as well-versed in human rights; in addition, the

22 Hereinafter, the Organization, or the OASS.

23 The American Convention on Human Rights- also known as the "Pact of San Jose, Costa Rica"- was subscribed to in San José, Costa Rica on November 22, 1969. Hereinafter, the American Convention, the Convention or ACHR.

24 See, article 2 of the Statute of the Inter-American Commission on Human Rights (with respect to all of the OAS member States) and Article 34 and 52 of the American Convention (related to those who ratified the treaty exclusively).

judges of the Court must be lawyers who, according to that established by the Convention, must meet these conditions before performing the highest judicial functions.²⁵

The duration of the Commission Members' mandate is four years and they may be reelected one additional time; the judges of the Court exercise their mandate for periods of six years and also may be reelected one additional time.²⁶ Neither the Commission nor the Court convene their sessions in a permanent manner. Rather, both generally meet in the countries that serve as their central location: the Commission in Washington, D.C. in the United States, and the Court in San Jose, Costa Rica. Normally, these organisms have three or four periods of ordinary sessions, that last for approximately two or three weeks and, on occasion, they hold extraordinary sessions.²⁷

The Commission and Court act in accordance with the faculties granted by the distinct international instruments, in conformity with the particular evolution of the Inter-American System. In International Law, States are bound by the treaties they have ratified, international customary law and *jus cogens*.²⁸ This situation implies that in the Inter-American System there are States that have assumed diverse levels of international protection of its inhabitants' rights. Some countries have ratified almost

25 See, article 52 of the American Convention.

26 See, Articles 34, 36 and 37 of the American Convention, with respect to the Commission; and Articles 52, 53 and 54 of the American Convention, with respect to the Court.

27 By regulation, the IACHR is committed to meeting at least two times a year in ordinary sessions (article 14). These meetings take place in February/March and in September/October. The Court has established through regulation that it will have ordinary and extraordinary sessions but has not determined the minimum number (see article 11 of the Court's Rules of Procedures). The sessions of the Court generally occur in February, April-May, July and November.

28 For those people who do not have lawyers: in international law "custom" is a sustained practice that responds to the conviction that there exists an obligation. A rule of "*jus cogens*" is that which reflects a universal moral conviction that translates into a non-derogable right, for example, the prohibition against discrimination or against genocide. Many times, rules of *jus cogens* have a greater or lesser level of reception (expressed, for example, through the number of ratifications of respective treaties that are deposited.) For more development of this theme, see Ian Brownlie, *Principles of Public International Law*, Oxford University Press, New York, fourth edition, 1990 pp. 4 y 512.

all of the Inter-American treaties and others have done so only with respect to some; and in some exceptional cases some countries have not ratified any Inter-American human rights treaties.²⁹

The Commission and the Court develop their functions under a normative framework composed of the following collection of international instruments³⁰:

- Charter of the Organization of American States
- American Declaration of the Rights and Duties of Man³¹;
- The Inter-American Charter on Social Guarantees
- International Charter of Social Guarantees or the Declaration of the Rights of the Worker
- American Convention on Human Rights;
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"
- Protocol to the American Convention on Human Rights to Abolish the Death Penalty;
- Inter-American Convention to Prevent and Punish Torture;
- Inter-American Convention on Forced Disappearance of Persons
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém Do Pará
- Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities
- Inter-American Democratic Charter

29 Argentina, Costa Rica, Colombia and Perú are among those countries that have ratified the greatest number of human rights treaties; and the United States and Canada are among those who have not ratified any.

30 Even when, as we explained above, these instruments do not bind all countries equally, the Charter of the OAS and the ADRDM are both fundamental to the system that applies to all countries. The full text of these documents (with the exception of the OAS Charter) can be found in *The Inter-American System of Human Rights: Compilation of Instruments* (Costa Rica, CEJIL: 2004).

31 Hereinafter, the American Declaration or the "ADRDM"

- Declaration of Principles on Freedom of Expression
- Statute of the Inter-American Commission on Human Rights³²
- Rules of Procedure of the Inter-American Commission on Human Rights³³
- Statute of the Inter-American Court of Human Rights³⁴
- Rules of Procedure of the Inter-American Court of Human Rights³⁵

The Commission has developed its function as a guardian of human rights through its promotional activities and involvement in shaping human rights, as well as through individual cases, in virtue of its powers conceded by the Charter of the OAS³⁶, the American Declaration, its Statute and Rules of Procedures; and with respect to States that have ratified other treaties: the American Convention and the other Inter-American conventions of human rights.³⁷

In virtue of said attributes, the Commission may realize diverse protection activities, such as the publication of reports, visits to countries or issuing press releases. In the same manner, the Commission may process and resolve individual cases involving human rights violations and, in the case of a state's failure to comply with its recommendations, it may submit a case to the Court's jurisdiction. Additionally, exercising its mandate, the Commission may order the adoption of protective measures and solicit the Court to adopt provisional measures; also it may hold hearings about different aspects related to the processing of cases.

32 Hereinafter, the Commission's Statute.

33 Hereinafter, the Commission's Rules of Procedure.

34 Hereinafter, the Court's Statute.

35 Hereinafter, the Court's Rules of Procedure.

36 See, article 112 of the Charter of the OAS. The Commission is one of the principle organs of the OAS, incorporated into the basic structure of the OEA through its inclusion in its Charter; different from the Court, which was created by the American Convention as one of its organs of supervision of the obligations agreed to by the States.

37 Cfr. articles 18 through 20 of the Commission's Statute, 15, 23, 24, 25, 56 through 64 of the Commission's Procedures, 41 and the following of the American Convention.

In effect, the Commission has developed important work in relation to the protection of the rights of people in the hemisphere. It has performed a role each time more active as an organ of protection through its processing of individual cases and the perfection of its promotional strategies³⁸.

The Court, for its part, was created by the Convention with the aim of supervising, in a manner complementary to the Commission, the fulfillment of the obligations assumed by the States upon ratifying the Convention, principally through the system of individual cases. The Court has double competency: contentious and consultative.

In virtue of its contentious jurisdiction, the Inter-American Court decides cases and provisional measures that came under its jurisdiction through the Inter-American Commission or by the States. In the vast majority of cases, the Commission is the organism that decides whether to present cases to the Court. The States rarely take this initiative. In the process of adopting this decision, the Commission has created a formal stage where it gives the victim and petitioner the possibility of sharing their views.³⁹ Additionally, the Commission has established through regulation, the basic criteria for this determination principally centering its analysis on an evaluation of whether justice has been achieved in the case.⁴⁰

On the other hand, in exercising its consultative jurisdiction, the Court interprets the American Convention and other international treaties related to the protection of human rights in the countries of the Americas. The consultation may be requested by any member state of the OAS – not only those who are a part of the Convention- and by the organs enumerated in Chapter X of the OAS's Charter.⁴¹

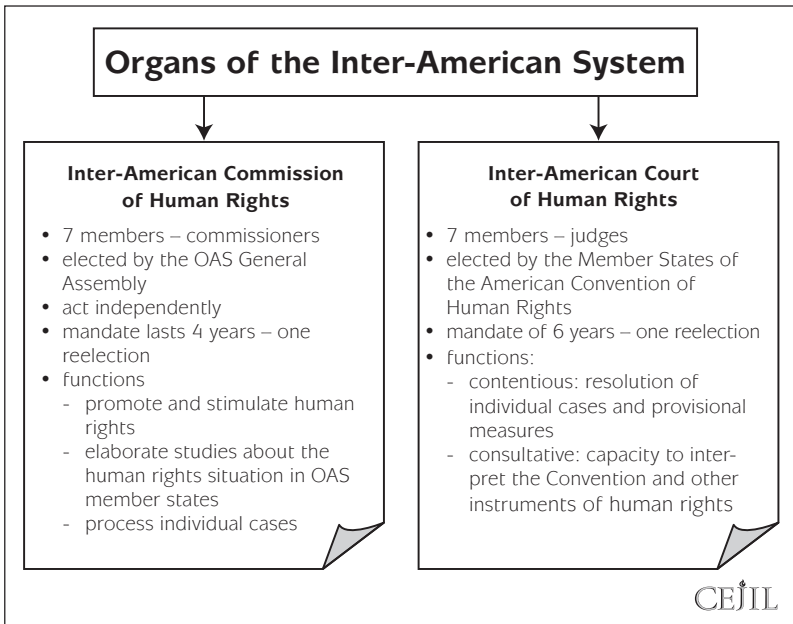
38 In this sense, it is important to signal that in the beginning of the 1990s the IACHR did not issue the important number of decisions that it presently adopts, and neither had it developed a system of Rapporteurships nor of thematic reports in a manner that favored the fullest guarantee of human rights as it does in the present.

39 See, article 43.3 of the Commission's Rules of Procedures.

40 See, article 44 of the Commission's Rules of Procedures.

41 See, article 64 of the American Convention.

By virtue of its consultative jurisdiction, the Court has established important standards about its own authority, on limits to state action, on discrimination, on its own appropriate consultative function and about some themes crucial for the effective protection of human rights, such as habeas corpus, judicial guarantees, the death penalty, the State's international responsibility, the rights of migrant workers, the rights of children, equality and non-discrimination, obligatory membership of journalists and the enforceability of the right of reply, among others. The Advisory Opinions related to these last two themes are specifically those that have established parameters in regard to the freedom of expression.⁴²



42 I/A Court H.R. Compulsory membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No.5, and I/A Court H.R., Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights). Advisory Opinion OC-7/86 of August 29, 1986. Series A No.7.

B. The State's International obligations in the Inter-American System

Countries of the Americas are committed to respecting human rights expressed in the Charter of the OAS and the American Declaration.⁴³ In turn, the States that ratified the American Convention and other Inter-American treaties specifically committed to respect human rights and liberties protected by those instruments.

The American Convention reaffirms this duty by establishing that its member States are obligated to respect and guarantee the full and free exercise of the rights in that instrument for all people that live in their territory without discrimination.⁴⁴ This duty implies that the States commit to omit certain actions that violate guaranteed rights (for example, to be free of torture), as well as to carry out determined actions, with the goal of allowing the effective enjoyment of those rights (for example, provide a system of administrative justice and guarantee public defense).⁴⁵

The States have an obligation to “organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”⁴⁶

This provision is especially important, taking into account that the acts and omissions of a state agent connected with any State organs – as much the executive power, judicial power, legislative power or any other power institutionally established by the State ⁴⁷ – can generate

43 I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No.10. para. 45.

44 See, article 1 of American Convention.

45 See, article 1.1 of American Convention.

46 See, I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, para. 166.

47 The Constitution of the Republic of Bolivia and of Venezuela contemplate, for example, in addition to the executive, legislative and judicial powers, other powers: the electoral and citizen power.

international responsibility, even when they act outside of the framework of their functions or without color of authority. For example, we can illustrate the responsibility of the State in the case of a prisoner sexually abused by a prison guard. Likewise, said responsibility can arise from acts or omissions of a person who acts with the complacency or tolerance of state authorities, such as a member of a paramilitary group that executes a suspected terrorist.

From the general obligations of respecting and guaranteeing rights arises the duty of the State to “prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”⁴⁸

The prevention of human rights violations includes the adaptation of internal legislation, the clarification of human rights violations, and training, among other measures. The text of Article 2 of the American Convention reaffirms the member States’ obligation to adapt its internal legislation to the parameters established by the Convention. Thus, the State commits to adopt those legislative dispositions, or of other character, that are necessary to make effective the rights and liberties protected by said treaty.

The Court has recognized the transformative value of the truth in clarifying crimes by helping those societies that tolerated them to prevent similar situations in the future.⁴⁹

Likewise, the Court has derived from the “guarantee” obligation the duty of the State to train its functionaries (and in general its agents) to respect human rights.⁵⁰ In its Caracazo case reparation judgment,

48 See, I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, para. 166 (partial citation). In this way, the Court has signaled: “[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.” *Id.*, para. 174.

49 See, I/A Court H. R., Case of 19 Merchants vs. Colombia. Judgment of July 5, 2004. Series C No. 109, para. 259.

50 See, I/A Court H.R., Case of Del Caracazo vs. Venezuela. Reparation (Art. 63(1) American Convention on Human Rights). Judgment of August 29, 2002. Series C, No. 95.

the Court ordered Venezuela to train its security force members about limits to the use of legitimate force.⁵¹

The obligation to investigate human rights violations and punish those responsible for them must be done diligently. In the words of the Court, “it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective.”⁵² In this manner, States have to guarantee that the judicial system – that is, the internal system responsible for imparting justice in each country—is organized in a manner that assures the fulfillment of this international obligation. As much the Inter-American human rights instruments as the Court’s jurisprudence put special emphasis on the guarantee of effective punishment of human rights violations. The Inter-American Convention to Prevent and Punish Torture requires that punishment be imposed in accordance with the gravity of the crime⁵³. The Convention of Belém do Pará also requires punishment of the responsible parties⁵⁴. For its part, the jurisprudence of the Inter-American Court requires the elimination of formal obstacles that might impede effective punishment of those who commit grave human rights violation (like resorting to amnesty or statute of limitations for crimes, and the establishment of legal defenses that try to impede the investigation and sanction of these crimes).⁵⁵

Reparation is another commitment assumed by States upon obligating themselves internationally. That is, the State assumes that if it violates rights that it obligated itself to protect, it must take the necessary

51 Here, the Court established in its reparation judgment in the Caracazo case: [the State of Venezuela must] take all necessary steps to educate and train all members of its armed forces and its security agencies regarding principles and provisions on protection of human rights and the limits to which the use of weapons by law enforcement officials is subject, even under a state of emergency”; See, I/A Court H.R., Case of Del Caracazo vs. Venezuela. Reparation (Art. 63(1) American Convention on Human Rights). Judgment of August 29, 2002. Series C No. 95. point 4.a operative paragraphs.

52 See, I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, para. 177.

53 See, Article 6, Inter-American Convention to Prevent and Punish Torture.

54 See, Article 7, Convention of Belém Do Pará.

55 See, I/A Court H. R., Case of 19 Merchants vs. Colombia. Judgment of July 5, 2004. Series C, No. 109, para. 262.

action to erase or eliminate the consequences of the unlawful act or omission.⁵⁶ They must remedy the violation by integrally restoring the victim to the situation he or she was in before the illegal act, and if that is not possible, provide economic compensation and adopt all reparation measures adequate for remedying the damage caused. Reparation for damages is also intended to prevent the repetition of acts like those being denounced.

The failure to fulfill these commitments constitutes a subsequent violation of the Convention: for example, if a country executes a journalist and later investigates and punishes the guilty but does not economically compensate the victim's family, the State is still failing in its duty.

C. Tools for the Protection of Human Rights in the Inter-American System

As we have mentioned above, the Inter-American Commission's principal function is to promote the observance and the defense of human rights.⁵⁷ To fulfill its mandate, the Commission:

1. receives, analyzes and investigates complaints (individual petitions) that allege violations of human rights.⁵⁸ Likewise, it presents cases to the Inter-American Court, later appearing before the Court to litigate them⁵⁹;
2. requests that the States adopt "precautionary measures" so as to avoid irreparable damage of human rights in serious and urgent

56 See, P.C.I.J., *Factory at Chorzow Case*, Merits, Judgment No. 13, 1928, Serie A, No. 17, p. 47.

57 The Inter-American Commission has an Executive Secretary based in Washington, D.C., who directs the the Commission and who depends principally on lawyers to carry out instructions and provide assistance to the Commission in the legal and administrative preparation of its assignments.

58 This is done in conformity with articles 44 through 51 of the American Convention, articles 19 and 20 of the Commission's Statute, and articles 22 through 50 of the Commission's Rules of Procedures. In accordance with articles 41.f, 51 and 61 of the American Convention; article 19.a-b of the Commission's Statute; articles 44 and 69 and following. of the Commission's Rules of Procedures; article 28 of the Court's Statute; articles 22, 32 and 44 and following. of the Court's Rules of Procedures.

59 For more information see *infra* Chapter 1(C): "Rappateurships".

cases. The Commission can also request that the Inter-American Court order the adoption of “provisional measures” in urgent cases that pose a danger to the person, even if the case has not yet been presented to the Court;

3. during its sessions, it holds hearings related to cases, precautionary measures, and determined themes or situations;
4. observes the general human rights situation in the member countries, and when it considers it appropriate, publishes special reports on the human rights situation in specific states;
5. creates consciousness in the public opinion about human rights in the Americas. To this effect, the Commission carries out and publishes studies on specific themes, such as measure that they must adopt to guarantee greater independence of the judiciary, the activities of irregular armed groups, the situation of human rights of children and women, and human rights of indigenous communities;
6. establishes rapporteur in order to study themes of interest and of relevance in the region, like the Special Rappateaur for the Freedom of Expression⁶⁰;
7. realizes visits to countries to carry out on-the-ground analyses with more depth on the general situation and/or to investigate a specific situation. When the visits have as their object to study the human rights situation in a country, they result in the preparation of a report on the theme observed and later are published and presented to the Permanent Council and to the General Assembly of the OAS;
8. issues press alerts about a determined situation or about a human rights violation;
9. organizes and holds conferences, seminars and meetings with representatives of governments, university institutions, non-governmental institutions and others in order to share information and foster knowledge in relation to questions related to the Inter-American System;

60 For detail about the activities that the Commission realizes each year, see the “Legal bases and activities of the IACHR” in each of its annual reports, available at www.cidh.org.

10. Makes recommendations to the OAS State members to adopt measures that contribute to the protection of human rights;
11. requests Advisory Opinions from the Inter-American Court for interpretations of aspects of the American Convention;
12. currently, the Commission processes more than 1000 individual cases. Any group or non-governmental organization may present a complaint before the Commission alleging a violation of a human right protected by the American Convention and/or the Universal Declaration.⁶¹

1. Individual Petitions

When faced with a human rights violation protected by the Inter-American framework (by the American Declaration or Convention or other Inter-American treaty), the person affected, their families or some other person or entity in his/her representation may present an individual complaint or petition before the Inter-American Commission.⁶²

By processing a petition through the system's organs, the State may be declared internationally responsible for violating the affected person's rights and, as a consequence, the State will be ordered to fulfill certain obligations in favor of the victim that are intended to repair the violation (such as an act of public reparation; services in health, education, housing; investigation and punishment of those responsible; compensation, etc.) and to prevent repetition of acts similar to those found in the complaint (such as through modifications of the legislation through derogation or the adoption of new norms; acts destined to honor the memory of the victim like the construction of monuments or the designation of schools in his/her name, etc.). When appropriate, the Inter-American organs establish the international responsibility of the State - not the criminal responsibility of the individuals involved in the perpetration of the denounced violations.

61 Id.

62 The complaint may be presented in any of the four official languages of the OAS (English, French, Portuguese or Spanish) by the presumed victim or by a third party. See also, "How to present a petition", en www.cidh.org.

Through the use of the Inter-American System, cases that have been won, among others, include, impeding the deportation of a journalist (by granting precautionary measures in favor of Mr. Gorriti), eliminating a penalty for contempt from the Argentine Criminal Code (within the framework of a friendly settlement in the case of *Verbitsky v. Argentina*), modifying the Constitution of Chile in order to actualize its commitment to the freedom of expression consecrated in the American Convention (sentence of the Inter-American Court in *The Last Temptation of Christ*), granting protective measures to journalists (for example, in the case of Colombia) and annulling criminal sentences in all its extremes –including advances with respect to third parties –, that violate the freedom of thought and expression of a journalist (sentence of the Inter-American Court in *Herrera Ulloa v. Costa Rica*).

1.a. Procedures before the Inter-American Commission

The Commission is the first organ encountered in the processing of an individual petition. Through an adversarial proceeding⁶³ between the State and the petitioners that has the goal of guaranteeing the protection of the basic rights protected by the Convention, the Commission establishes the existence, or not, of a State's international responsibility for the violation of one or various rights protected by the Convention or other international instruments. Once this stage has ended, depending on the circumstances of the case and the applicable juridical framework, the commission can submit the case to the Court's jurisdiction or publish a final report in which it determines the existence or not of the responsibility of the denounced State. If an imminently dangerous situation exists that poses a serious or irreparable harm to the rights of a person, is it possible to seek "precautionary measures" that require immediate protection from the Commission⁶⁴.

In accordance with article 44 of the Convention or through its own initiative permitted by article 24 of its Rules of Procedures⁶⁵, the Commission begins processing a case brought through a petition or complaint.

63 That is, with participation of the affected party and the State.

64 This theme will be developed in greater detail in this same chapter in the section below entitled "Precautionary Measures".

65 In general, the cases begin with the presentation of a complaint, since in the last years the Commission has not used its faculty to initiate a case *motu proprio* in accordance with its Rules of Procedures.

1.a.i. Conditions for Admissibility of a Petition

Before beginning to process an individual petition, the Commission must verify the following aspects or conditions of the petition's admissibility:

- **the nature of who takes part in** the procedures, as much those who bring the complaint (denouncer) as those against who the complaint is brought (denounced): the former may be an individual or group⁶⁶; the latter, the State.⁶⁷ The individual petitions may be presented by any person or group of people; it is not necessary that the victim(s) of the alleged violations present(s) the petition. It is not required that the denouncer be the representative of the victim or a person directly tied to him/her, nor must there be the express or tacit consent of the victim. The denounced must be a State that has ratified the Convention or a member state of the OAS.

Individual Petition

- Who may present an individual petition?
 - Any individual
 - Group of people
 - Legally recognized NGOs in the Americas
- Distinction between the victim and the petitioner
- The consent of the victim is not required

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- **Material object of the petition or communication:** the petition or the communication should refer to some right protected by the American Convention or Declaration or any other Inter-American treaty ratified by the denounced State, and to which no reservations have ever been made that would impede their application.⁶⁸

66 See, article 44 of the American Convention.

67 *Id.*.

68 See, Articles 47.b of the American Convention, and 23 and 27 of the Commission's Rules of Procedures. To locate the status of member State ratification of treaties see "Basic Documents" at www.cidh.org.

Concerning OAS State members which have not ratified the Convention, the petition must refer to a right recognized in the American Convention.⁶⁹

- place or jurisdiction where the acts that are the subject of the petition occurred: in accordance to article 1.1 of the Convention, the member States commit to respect the rights found and recognized by that treaty and to guarantee their free and full exercise by every person that is “subject to its jurisdiction” at the moment the violation occurs;

- **Exhaustion of internal remedies**

- * **General rule:** in order for a petition or a communication to be admissible it is indispensable that previous attempts have been made to exhaust judicial remedies made available within the State in question⁷⁰ and that are adequate for protecting the violated right. Article 46, paragraph 1(a) of the Convention, anticipates that in order for a petition or communication presented to the Commission to be considered admissible, in conformity with articles 44 or 45 of the same, it is necessary “that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law”.

The above mentioned implies that when faced by a human rights violation, one must first access the State’s internal remedies and only then if they do not result in reparations or an end to the violation then the person may access the Inter-American System; except when it relates to a grave or urgent situation, a case that may merit the presentation of precautionary measures as will be further developed below⁷¹. In effect, in international human rights law the majority of protections systems require that a person previously exhaust available domestic remedies to remedy

69 See, Article 49 of the Commission’s Rules of Procedure. The mandate related to the supervision of the fulfillment of the Convention is found in this article, and the jurisdiction to examine the presumed violations of the American Declaration is found in the OAS Charter and the Commission’s Statute.

70 See, Article 46.1. of the American Convention and 31 of the Commission’s Rules of Procedures.

71 It is important to mention that in order to request precautionary measures it is not necessary to exhaust internal remedies. See, *infra* Chapter 1(C) 2 and 3. for a specific analysis of the necessary conditions in order to request these measures.

the violation of his/her rights. The goal of this rule is to permit the State to resolve the alleged violations at the local level. For this same reason, this norm reflects the subsidiary and complementary character of the international system as a last resort, and its deference to systems of protection are guaranteed at the local level.

The exigency of needing to previously exhaust the internal venue refers to those ordinary judicial remedies⁷² that are capable of remedying the alleged violation. Thus, it is fundamental to identify which is the ideal judicial venue for protecting a right. In order to evaluate the fulfillment of this prerequisite before accessing the international venue, it is not necessary to exhaust the multiplicity of available remedies, rather it is necessary only to identify which is the most appropriate judicial remedy: adequate and effective for protecting the violated right.⁷³ For that reason, it is not necessary to exhaust remedies that do not have judicial character such as a request for presidential clemency or a complaint before the Ombudsman, or a legislative proposal.

It is necessary to bear in mind that the remedy must be both adequate and effective. In accordance with that established by the Court, "adequate" means "suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted."⁷⁴ On the other hand, according to the Court in order for a judicial recourse to be effective it must be capable of producing the result for which it has been created. In its words,

72 In general, it is necessary to conscientiously utilize ordinary recourses available at the local level, some extraordinary recourses due to their discretionary character or their limited reach cannot be exhausted. When in doubt, and for greater protection of victim's rights, it is important to exhaust each and every available remedy.

73 As we sustained in the last note, while from the strictly legal point of view it is not necessary to do so, the multiplicity of actors connected to distinct aspects of the same case at the local level can join in its resolution. From the point of view of legal arguments, it is necessary to have clarity and consistency related to the most adequate judicial recourses.

74 See, I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, para. 64.

“[p]rocedural requirements can make the remedy of habeas corpus ineffective: if it is powerless to compel the authorities; if it presents a danger to those who invoke it; or if it is not impartially applied.”⁷⁵

The identification of a judicial remedy that needs to be exhausted to access the international venue does not imply that the person making the complaint should necessarily have been a party to the internal judicial process. For example, in a significant number of violations denounced before the Commission – relevant to executions, tortures or disappearances – the State had a duty to investigate those acts independently from the procedural initiative of the victim or his/her relatives.⁷⁶

The Exhaustion of Internal Remedies

- **Judicial**
- **Ordinary**
- **Adequate**
- **Effective**

***Exceptions:** given that the objective of the system is the effective protection of rights, the Convention establishes some grounds of exception to the rule of exhaustion of domestic remedies. According to section 2 of article 46 of the Convention, domestic remedies in the internal jurisdiction need not be exhausted when:

- a) there is no existing internal legislation in the State that relates to legal due process for the protection of the right(s) alleged to have been violated; that is, when the juridical order does not create a recourse or action for remedying the determined violation;
- b) the person whose rights have been harmed has not been permitted access to remedies in the internal jurisdiction, or has been impeded in exhausting them; and
- c) there has been an unjustified delay in the decision from the mentioned recourse.

The exhaustion rule is established in the interest of the State, and for that reason can be renounced. Otherwise, if the State alleges the failure

75 Id, para. 66.

76 Id, para 177.

to exhaust domestic remedies, it must indicate the internal remedies that should be exhausted and that they are effective.⁷⁷ In practice, this is the formal obstacle that the majority of States oppose. This is due in part to the fact that in the majority of cases it is more feasible to allege an exception to the exhaustion of domestic remedies than exhaustion itself, due to the pattern of impunity and the structural failures of our systems of justice.

In the case of setting forth one of the exceptions to the exhaustion requirement, if a State has proven the availability of the internal resources, the claimant will have to demonstrate that the exceptions enumerated in article 46.2 apply and, for example, that they were impeded from obtaining the necessary legal assistance for the protection and guarantee of their rights recognized in the Convention.⁷⁸ The requirement of exhausting internal remedies can never come at the cost of the effective protection of rights that concern the organs of the system. The Court has said:

"[t]he lack of effective domestic remedies renders the victim defenseless and explains the need for international protection. Thus, whenever a petitioner alleges that such remedies do not exist or are illusory, the granting of such protection may be not only justified, but urgent."⁷⁹

Exceptions to the Rule of Exhaustion of Domestic Remedies in the Internal Jurisdiction: Article 46 of the ACHR

- Absence of legal due process in internal proceedings to protect the violated right
- Denial of justice or the impossibility of accessing internal remedies by the presumed victims
- Undue delay in the decision of the internal remedies

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77 See, I/A Court H.R., Case of Velásquez-Rodríguez vs. Honduras. Preliminary Objections. Judgment of June 26 [1988], Series C No. 1, para. 88.

78 See, I/A Court H.R., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 42.

79 See, I/A Court H.R., Case of Velásquez-Rodríguez vs. Honduras. Preliminary Objections. Judgment of June 26 [1988], Series C No. 1, para. 93.

- **Timely presentation of the petition:** in order for the petition or communication to be admitted it is necessary that it be submitted for the Commission's consideration within a timeframe of six months after there has been a definite judicial decision that closed that venue. This time limit begins from the date that the person whose rights were violated has been notified of the final decision that indicating that he/she has exhausted the internal remedies, adopted by a judicial authority with respect to the action of recourse used to remedy the alleged violation.⁸⁰ The greater part of petitions presented to the Inter-American System allege exceptions to the exhaustion rule, and thus most proceedings generally lack a final resolution that has closed the internal venue;
- **Absence of another international petition and duplication:** the petition or communication must not be pending in another international forum of the same nature (absence of *lis pendens*). Likewise, it can be declared inadmissible if it is verified that the case substantially reproduces a prior case already examined by the same Commission or by another international body (absence of duplication). The difference between these requirements is that the first refers to a pending matter, while the second, to a matter that has already been resolved⁸¹;
- **Denounced acts and facts about the petitioner:** the petition must contain information of the denounced facts, with the indication, if possible, of the name of the victim(s) of the violation, as well as of any authority that is informed of the situation. Equally, information for identifying the petitioner must be provided.⁸² The intervention of a lawyer is not required to

80 See, articles 46.b of the American Convention and 32.1 of the Commission's Rules of Procedures.

81 See, articles 46.c and 47.d of the American Convention, and 33 of the Commission's Rules of Procedures. For a better understanding of the scope of these concepts, see I/A Court H.R., Case of Baena-Ricardo et al. vs. Panama. Preliminary Objections. Judgment of November 18, 1999. Serie C No 61, para. 52.

82 This is the term used to refer to the person(s) or non governmental entity that brings the case to the Commission. It is important to distinguish between the petitioners and the victims since the latter is the one that has suffered the violation, while the petitioner is the one that presents the complaint about the violation.

present or process a complaint or petition. When it is a presentation done by non-governmental organizations, the written submission must include the name, the nationality, the profession, the domicile and the signature of the person(s) or of the legal representative of the entity that submitted the petition.

Requirements for Submitting a Petition or Complaint (article 28 of the Commission's Rules of Procedures)

- name, nationality and signature of the person(s) making the complaint or, in the case where the petitioner is a government entity, the name and signature of the legal representative(s);
- If the petitioner wants, his or her identity may be kept confidential before the State;
- Address where correspondences from the Commission can be received and a telephone and fax number as well as email address;
- A report of the denounced act or situation, with specific information about the place and date of the alleged violations;
- When possible, the name of the victim, as well as any public authority that knows of the denounced act or situation;
- Indication of which State the petitioner considers responsible, by act or omission, of the violation of some right consecrated by the American Convention and other applicable violations, even though there is not specific reference made to the exact article presumably violated.
- Fulfillment of the time period contemplated in article 32 of the Rules of Procedure;
- Actions taken to exhaust the remedies in the internal jurisdiction or the impossibility of doing so in conformity with article 31 of the Rules of Procedure;
- in conformity with article 33 of the Rules of Procedure, indication of whether the complaint has been submitted to another international forum.

The complaint or petition must be directed to:

Mr. or Ms. Executive Secretary⁸³
Inter-American Commission on Human Rights
1889 F Street, N.W.
Washington, D.C. 20006
Fax: 202 458 3992

A copy of any petition related to the violation of the freedom of expression should be sent to:

Mr. or Ms. Special Rapporteur of Freedom of Expression⁸⁴
Inter-American Commission on Human Rights
1889 F Street, N.W.
Washington, D.C. 20006
Fax: 202 458 6215

1.a.ii. Procedures for bringing a Complaint

The procedures for bringing a complaint to the Commission are found in articles 36 through 43 of its Rules of Procedures.⁸⁵ The procedures are adversarial in nature: during the initial phase of the proceedings, the Commission receives documentation, which it evaluates and, if determining that it fulfills all requirements, requests information from the government. Upon receiving information from the government, the Commission then transmits it to the party who made the complaint requesting his or her observations.

Once the Commission has received this last communication, it assigns it a number that begins with the letter “P” (referring to a petition) and

83 At the time of publication, this position is held by lawyer Santiago Cantón. See www.cidh.org.

84 At the time of publication, this position is held by lawyer Eduardo Bertoni. See www.cidh.org.

85 These articles clarify that established in articles 23 and 24 of the Statute and regulate the procedures outlined in articles 44 through 51 of the Convention for the treaty's member States. In its reform of 2000, the Commission established a unique procedure related to those complaints processed under the American Declaration or the American Convention.

sends a letter of receipt to the petitioner(s). Later, the “group of admission of petitions” (GRAP) of the Commission’s Secretary analyzes the petition to verify that it fulfills the requirements established by the Convention to decide if it may proceed. If they decide that the petition fulfills the previously enumerated prerequisites, they transmit the petition to the State which has two months to present its reply. In the contrary case, before notifying the State, the secretary may reject the petition or request more information from the petitioners.⁸⁶

Once deciding the parties’ position regarding elements relevant to admissibility (among others, the exhaustion of internal remedies, compliance with time limits for the presentation of petitions, duplication of proceedings), the Commission decides if the petition is admissible or not, after which it publishes a report (of admissibility or inadmissibility, whichever may be the case).

In some cases, the Commission has differed in the handling of admissibility, waiting until the merits of the case are discussed. The Commission’s Rules of Procedure gives it the express faculty to make this determination in exceptional circumstances.⁸⁷ While the rules of procedure do not establish the diverse situations that permit the application of this article, we should mention the following: a. if the case has been litigated for various years and questions of admissibility, facts and applicable rights have been fully discussed; b. if there is a strong connection between the elucidation of questions of admissibility and the merits, such as the absence of available remedies to protect the right in question; c. that the State has not opposed the preliminary

86 While the Commission has delegated the capacity to reject a petition to the Secretary in the Commission’s most recent Rules of Procedure, this practice has generated strong criticism by those who consider that, given their nature, denials of admissibility should be decided through a resolution issued by the Commission.

87 Article 37.3 of the Commission’s Rules of Procedures establishes, “In exceptional circumstances, and after having requested information from the parties in keeping with the provisions of Article 30 of these Rules of Procedure, the Commission may open a case but defer its treatment of admissibility until the debate and decision on the merits. The case shall be opened by means of a written communication to both parties”.

exceptions⁸⁸, among others. In practice, the Commission uses a letter to inform the parties of its decision to exercise this discretion.

If the Commission adopts a report of admissibility in the processing of a complaint, it will initiate procedures to decide the merits of the case. At this moment, the petition officially becomes a case and it is assigned a new number.

During this new procedural stage, the facts of the case are established and there is discussion of applicable law. The adversarial nature is maintained throughout the proceedings: each party receives notice and is requested to respond to the arguments presented by its adversary. For its part, the Commission can also carry out its own investigation, whether through visits⁸⁹ or requiring specific information from the parties, among other things. Likewise, it can hold hearings to analyze legal arguments and alleged facts.

In all cases, the Commission makes itself available to the parties for the purpose of seeking a friendly settlement between them.⁹⁰ This stage is a critical period in the Commission's procedures since it permits the State and the petitioner(s) to advance towards arranging duly owed reparation measures in order to mitigate the human rights violation.⁹¹ If this procedure succeeds and an effective settlement for resolving the violations is reached, the Commission issues a final report that succinctly informs of the facts that motivated the complaint and the settlement reached.⁹²

88 Many States present objections to the processing of a case that does not fit within the framework of preliminary exceptions. For more information see, I/A Court H.R., Case of Las Palmeras vs. Colombia. Preliminary Objections. Judgment of February 4, 2000. Series C No. 67, para. 34.

89 The Commission can send a functionary, commissioner, or other person to visit the country with the purpose of investigating some aspect of the case being processed in accordance with article 40 of its Rules of Procedures. This faculty was used widely by the Commission in the past but does not reflect current practice.

90 The friendly settlement is an agreement between the parties to avoid the Commission making a pronouncement on the merits of the subject matter. In this process, the parties negotiate the conditions, including the actions that the State must perform as well as the reparations owed to the victims or their family.

91 See, CEJIL Gaceta No. 4 at www.cejil.org.

92 See, article 49 of the American Convention.

Once the parties have exhausted their respective arguments, the Commission considers if they possess sufficient information, and the processing of the case comes to a completion. The Commission prepares a report in which it includes its conclusions and makes recommendations to the State in question. This document is known as “Report 50” (because it is issued in accordance with article 50 of the American Convention), and is confidential. In this report, the Commission provides the State with a period of time to comply with the recommendations made.⁹³

If the term granted expires without the State having complied with these recommendations, the Commission has two options: it may either elaborate a concluding report and publish it in its Annual Report⁹⁴ or, when there are feasible and appropriate legal conditions, it may submit the case to the Court⁹⁵.

If the Commission issues a concluding report, later it will realize an evaluation of the fulfillment and implementation of the recommendations it formulates. The Commission may request information from the State and the petitioners about the advances made and the obstacles or challenges that are still pending; likewise, it may report whether or not the State complied with the recommendations. With the aim of urging the fulfillment of the Commission’s recommendations, it is important to keep this organ informed of the status of compliance with its recommendations, as much through the presentation of reports or letters that provide updates on the advances or obstacles encountered, as through request for follow-up hearings to arrive at formulas for helping advance the implementation of its recommendations. Currently, the Commission includes a table in its annual report to publicize the degree of state compliance with respect to individual cases. In comparison with the Court, the Commission does not issue separate decisions or reports.

93 See, article 43.2 of the Rules of Procedures of the Commission.

94 This Annual Report is presented by the Inter-American Commission before the OAS General Assembly, and for that reason the publication of a case acts as political pressure against a State that has failed to comply with the Commission’s recommendations.

95 See, articles 50 and 51 of the American Convention.

While the follow-up of its recommendations is of vital importance for urging compliance, the efforts of the Commission and of the victims in this regard do not always reach hoped for results. As made evident in the evaluation made by the Commission in its annual report, a significant number of States have not complied perfectly with the Commission's decisions in individual cases.⁹⁶ For that reason, the majority of victims and their families consider that it is better to submit a case to the Court's jurisdiction if there are the legal conditions to do so.

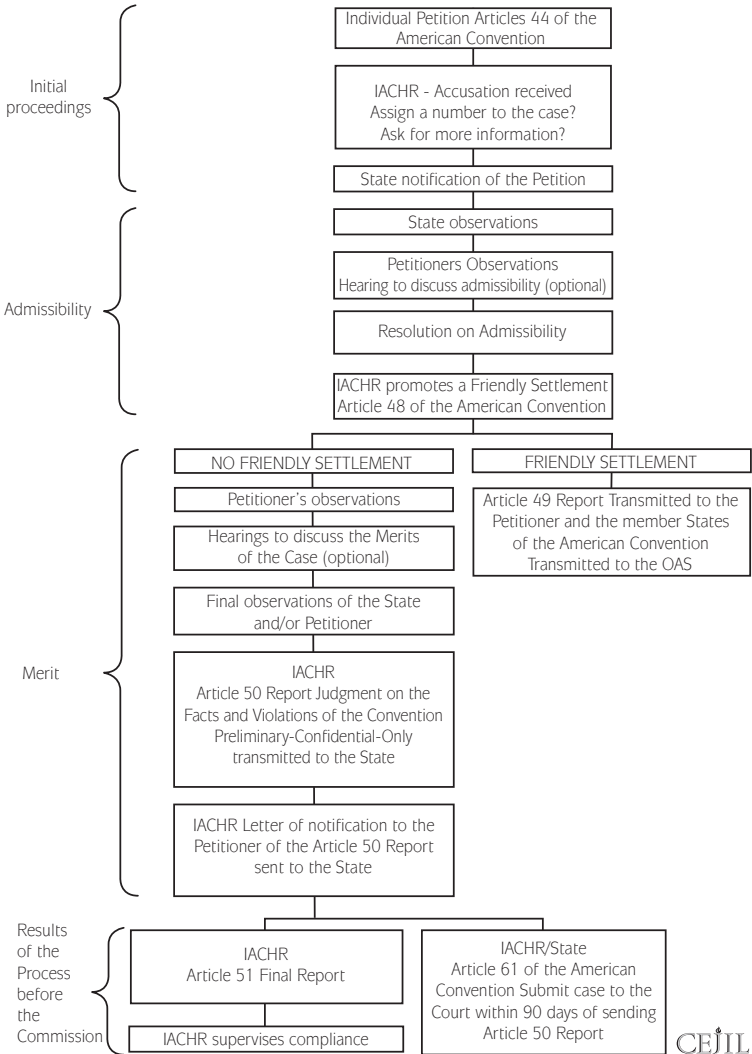
As was already mentioned above, in order for the Court to accept a case, it is necessary to first exhaust proceedings before the Commission. Upon completing these proceedings, and in abidance with time limits established by the Convention, the Commission or State may submit a case to the Court, as long as the denounced State has accepted the obligatory jurisdiction of said tribunal or accepted its jurisdiction in that particular case.⁹⁷ An additional limitation to the acceptance of the Court's jurisdiction may occur if the denounced facts occurred before the State ratified the Convention (for example, the allegation that the responsibility for the extrajudicial execution occurred in 1960) or if the acceptance of the Court's obligatory jurisdiction was made only with respect to acts that occurred after such consent.⁹⁸

96 IACHR, Annual Report of the Inter-American Commission on Human Rights, 2003. OEA/Ser.LV/II.118. Doc. 5 rev. 2, 29 December 2003, Chapter III. However, in some cases, it is possible that the State complies after a prolonged period of indifference or contempt. As a result of the follow-up work made entirely by victims, and their representatives (The Mexican Commission for the Promotion and Defense of Human Rights and CEJIL) and the Commission, compliance with the recommendations in the cases of General Gallardo v. México has eventually made. In this case, the Mexican State liberated Mr. Gallardo eight years after the Commission ordered such a measure. See, IACHR Press Releases No. 3/02, "IACHR welcomes freeing of General Gallardo in Mexico".

97 See, article 62 of the American Convention.

98 With respect to this question, it is important clarify that continuous violations or situations can generate responsibility even when their execution began before the denounced State ratified the treaty (here, it is important to check the reservations made by each State); likewise, some violations that occurred before the State ratified the treaty can generate new acts or omissions that violate rights protected by the Convention after the state joined the treaty; for example, when a person is executed before the ratification of the ACHR and the State applies an amnesty in violation of obligations, acquired through the American Convention, after its ratification.

Proceedings of the Inter-American System before the Commission: Individual Petitions



In order to arrive at such a decision, the Commission considers the likelihood of reaching justice in the particular case, based on, among other criteria, the opinion of the petitioners, the gravity of the violation, and the necessity to develop or clarify the system's jurisprudence, etc.⁹⁹

If the Commission decides to send the case to the Court it will have to do so within a period of three months, which begins when the date that the original report is mailed to the State. This same report is also annexed to the complaint brought to the Court.

The complaint before the Court presents the conclusions about the State's responsibility as well as the facts established in the Commission's previous proceedings. It also offers proof produced in that process, as well as any additional evidence that the Commission considers appropriate for strengthening the formal petition. Different from the final reports of the Commission, the complaints before the Court include much more detail about reparations not only in regard to pecuniary aspects but also other measures intended to prevent the repetition of the denounced acts.

1.b. Proceedings before the Inter-American Court

1.b.i. Contentious jurisdiction and stages of the proceedings

The procedural stage before the Court is fundamental because it allows the possibility of a definitive and binding decision of the case by the highest tribunal of the Americas. In the previous section, we dealt with the conditions that must be met in order to reach this phase from the affected person's or victim's perspective.

In 2001, the reforms of the Court's Rules of Procedure assured greater space for affected people or victims and their representatives in the defense of their rights at this stage. In article 23.1 of the Court's Rules of Procedure establishes: "[w]hen the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their pleadings, motions and evidence, autonomously, throughout the proceedings". This memorandum is called "the victim's complaint".

99 See, article 44 of the Commission's Rules of Procedures.

The victims' complaint ideally must be a text that supports conclusions of fact and law formulated by the Commission. This must include:

- a. final version of the facts and the proof sustained (in international law, this includes as much the context as the chain of denounced events, the response of the authorities and the applicable juridical framework, among others);
- b. an exhaustive treatment of the rights violated, and that may amplify or modify the analysis of the Commission if necessary (in this section it is important to maintain a fluid interchange with that sustained by the Commission in its written submission, in accordance with the jurisprudence of the Court and of the State during the process, if relevant); and
- c. a section on reparations that includes the proof necessary for documenting the requested measures in order to guarantee the restitution of the right, economic compensation, if relevant, and other measures of satisfaction and non-repetition that will guarantee not only integral reparations but also the non-repetition of the denounced acts.

The evaluation of the case before the Court replicates the examination realized by the Commission in three areas:

- a. admissibility, in which they discuss preliminary exceptions, and where the State may make objections to form that it considers necessary to eliminate from the complaint.¹⁰⁰
- b. the merits, in which they deal with the alleged violations of the American Convention or of any other human rights instrument over which the Court has jurisdiction *ratione materiae*; and
- c. reparations, in which they discuss the measures that the State must fulfill in order to compensate and/or avoid the reoccurrence of the violations that have been proven during the procedures.

On the other hand, although the Court distinguishes between its analysis of questions of admissibility, the merits and reparations, in general

100 In accordance with Article 37.1 of the Rules of Procedure, these alone will be presented by the State in its written response of the complaint.

it holds one hearing for the processing of all three themes and dictates only one sentence.¹⁰¹

It is important to add that in November 2003, new reforms to the Court's Rules of Procedure were introduced that were directed mainly towards shortening time limits, clarifying some procedural questions and granting greater participation to the victims and their representatives in provisional measures proceedings, as will be presented in greater detail below.

Once the IACHR has presented the complaint to the Court, notice is given to the State being complained against, the victim or his/her representative and the original petitioner.¹⁰² The victim or his/her representative are given a time limit of two months, that cannot be extended, to separately present its requests, arguments and evidence to the Court.

The State has a time limit, that cannot be extended, of four months to respond to the complaints and to interpose preliminary exceptions, if considered opportune.¹⁰³ If in its answer the State makes use of its faculty to interpose objections to the complaint's admissibility, the victims and the IACHR will have one month from the time of written notification to formulate its observations on the matter¹⁰⁴. On an exceptional basis, the Court will set a hearing to study the issue. If not, they will treat this question together with the other aspects of the case.

The hearing before the Court is public, during which the documental proof will be complemented by declarations made by the victims, witnesses and experts. Additionally, the Court hears allegations related to questions of admissibility, the merits and reparations presented by each of the parties to the proceedings: the Commission, the victim(s)

101 Before the current Court's Rules of Procedure went into force, three stages generally existed in which respective submissions were made with all allegations, hearings were held, and immediately afterwards a corresponding judgment was dictated. Since May 2001, the Court may now "decide on the preliminary objections and the merits of the case in a single judgment, under the principle of procedural economy". Cfr articles 37.6 of the Court's Rules of Procedure.

102 See article 35 of the Court's Rules of Procedure.

103 See articles 37 and 38 of the Court's Rules of Procedure.

104 See article 37.4 of the Court's Rules of Procedure.

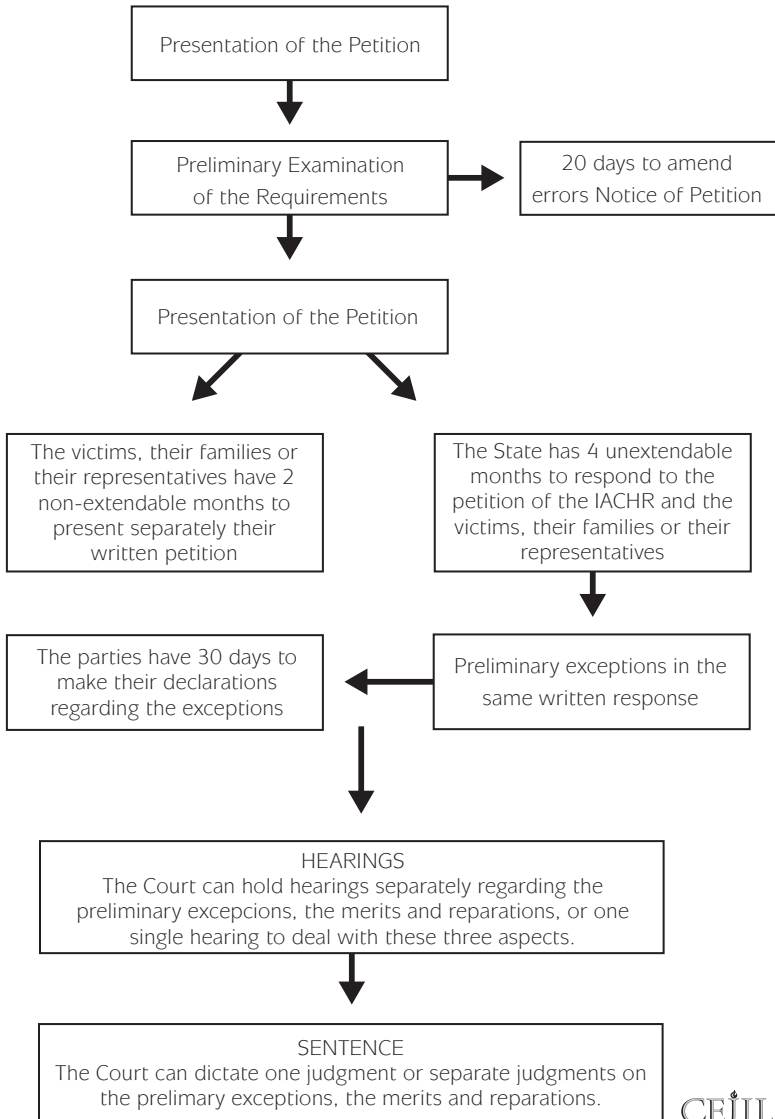
and the State. In a timeframe of between three and nine months, the Court issues a decision in the case establishing whether or not there exists state responsibility for the denounced violations and the extent of reparations owed.

Upon issuing its decision in the case, the Court supervises compliance with its order. In the case that the State incurs complete or partial non-compliance and after hearing the parties of the proceedings, the Court issues a resolution reporting the degree of compliance.

In accordance with article 65 of the American Convention, the treaty's member States share the assigned role of collectively being guarantors of compliance with the Court's decisions. For that reason, the Court must inform the General Assembly about cases in which a State has not complied with its judgments. Unfortunately, instead of supporting the Court in its important responsibility, states have responded with indifference to information provided by the Court.

States substantially comply with more Court judgments during a period that generally exceeds that established in the original decision. Notwithstanding, the guarantee of effective investigation of acts in violation of the treaty as well as of punishment of the perpetrators, are areas in which there are enormous difficulties with compliance.

Proceedings before the Court



1.b.ii. Consultative Jurisdiction

The consultative function refers to the Court's jurisdiction to interpret the Convention and other international human rights instruments. This jurisdiction is not limited to only States that are parties to the American Convention, but can be activated by any of the member States of the OAS and by any of the organs enumerated in Chapter X of the OAS Charter.¹⁰⁵

Likewise, this power is much wider than that possessed by the analogous tribunal in the European system as well as other international human rights organisms¹⁰⁶, since said faculty is not limited to the interpretation of the American Convention but rather "extends to other treaties concerning the protection of human rights in the American States. In principle, no part or aspect of these instruments is excluded from the scope of its advisory jurisdiction."¹⁰⁷

The consultative jurisdiction was used with greater assiduity during the first years of the tribunal's existence. In fact, the Court had made pronouncements in only three contentious cases, but had dictated eleven Advisory opinions from the time it initiated activities until 1990.¹⁰⁸ This permitted this organ to establish guidelines regarding its own authority, limits to State action, discrimination, its own consultative function and some crucial themes about effective protection of human rights, such as habeas corpus, judicial guarantees, the death penalty, and responsibility of the State, etc.¹⁰⁹

With respect to the theme of this manual, the consultative function of the Court is an additional mechanism that can be used to accomplish greater protection of the freedom of expression in the hemisphere, whether through the expansion of the Inter-American protection norms or through the revision of internal law to be made compatible with

105 See, article 64 of the American Convention.

106 I/A Court H.R., "Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No.1, paras. 15 and 16.

107 *Id.*, para 14.

108 *Id.*

109 See, Viviana Krsticevic, Guide for the litigation of cases. Cejil, p. 192.

international human rights instrument, among others. As we maintained in the beginning of this chapter, the Court has issued two opinions related directly to the freedom of expression: one related to compulsory membership in an association prescribed by law for the practice of journalism and another on the right of reply or correction. Additionally, other opinions of this tribunal have an indirect impact on the enjoyment of the freedom of expression: such as, among others, the establishment of the principle of equality and non discrimination, or the development of a theory on permissible limitations of treaty protected rights.¹¹⁰

2. Precautionary Measures

Precautionary measures consist of proceedings of urgent action, found in Article 25 of the Commission's Rules of Procedure, that are used to safeguard the fundamental rights of those persons who find themselves in a grave and urgent situation that demands quick action in order to avoid irreparable damage to a right. In general, it is used with respect to a person who suffers threats to life and physical integrity at the hands of State agents or groups whose acts are tolerated by the State. It can also be used to avoid censorship and other violations of rights protected by the Inter-American instruments.

The precautionary measures offer the Commission the possibility of providing an appropriate preventive action without it needing to know the concrete case.

Article 25 of the Rules of Procedure of the Inter-American Commission prescribes:

1. In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.

110 I/A Court H.R., Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4. para. 55 and following; and the The Word "Laws" in Article 30 of the American Convention on Human Rights .Advisory Opinion OC-6/86 of May 9, 1986. Series A No.6

2. If the Commission is not in session, the President, or, in his or her absence, one of the Vice-Presidents, shall consult with the other members, through the Executive Secretariat, on the application of the provision in the previous paragraph. If it is not possible to consult within a reasonable period of time under the circumstances, the President or, where appropriate, one of the Vice-President shall take the decision on behalf of the Commission and shall so inform its members.

3. The Commission may request information from the interested parties on any matter related to the adoption and observance of the precautionary measures.

4. The granting of such measures and their adoption by the State shall not constitute a prejudgment on the merits of a case.

In accordance with this article, the Inter-American Commission will be able to, at its own initiative or through the petition of a party, ask that precautionary measures be adopted in **urgent and grave cases** in order to avoid **irreparable damage of the rights in question**.

The effectiveness of this recourse, however, depends on the timely presentation of a request that contains all required information. From the text of article 25 it can be deduced that the requirements for requesting the precautionary measures are:

- that there exists an urgent situation;
- that there exists a grave situation;
- that the situation will result in irreparable damage to fundamental rights of a person; and
- that the acts are likely to occur.

Thus, it must relate to a situation in which the **threats and harassment** are immediate and imminent, that are directed **against fundamental** rights and in accordance with all **available information** can be viewed as likely to occur.

Taking into consideration these requirements, it is important to present a request that includes a **clear and detailed description** of those acts that illustrate the urgency, gravity and danger of the situation in

which the journalist or social communicator finds him or herself. If the journalist has received threats, it is important to provide details, to the extent possible, about:

- the content
- The author;
- the form;
- the frequency;
- the hour and date of each threat; and
- the rights that have been violated and/or are exposed to irreparable damage due to the gravity and urgency of the situation.

Communication professionals, in various countries in the continent, are often targets of threats and harassment. This urgent situation may implicate a threat of irreparable damage to the following rights consecrated in the American Convention:

- the right to life (article 4°);
- the right to personal integrity (article 5°);
- the right to the freedom of thought and expression (article 13);
- the right to judicial protection (article 25);
- the right to circulation and residency (article 22).

As we have already indicated, precautionary measures are characterized by the urgency of their adoption to avoid irreparable harm to the rights of a person. For this reason, requirements that can increase the risk to people and their rights are not insisted upon. Thus, exhaustion of internal remedies is not requested; contrary to this flexibility, the proceedings are not destined to establish with finality the alleged violations, and the Commission's Rules of Procedure signal that the granting of these measures does not create a prejudice to the merits of the subject matter.¹¹¹

In some situations, it may be necessary to present a request for precautionary measures with anticipation of or together with the presentation of a complaint to the Commission. Beyond the demands of the international arena, however, it is useful to access remedies at the local

111 Cfr. article 25.4 of the Commission's Rules of Procedure.

level with the same goal as that at the international level to guarantee the protection of a person's rights. Moreover, even though it is not necessary to exhaust internal remedies in order to request precautionary measures, it is important to mention in the petition any procedure that has been realized by State authorities with the object of establishing the credibility of the claim and the seriousness of the situation. The petitioner should inform the Commission about the State's response to the urgent situation in which he or she finds herself; that is, they should, to the extent possible, indicate if the State has taken concrete measures to avoid the commission of violations against the rights of the victim, if it has initiated a serious investigation into the denounced acts, and if it has demonstrated the will to sanction those responsible.

It is necessary to consider that the content of article 25(3) of the Rules of Procedure contains text that did not exist in article 29 of the old Rules of Procedure that regulated the precautionary measures. The new norm establishes: "[t]he Commission may request information from the interested parties on any matter related to the adoption and observance of the precautionary measures." In light of this provision as well as of practice, the procedure for requesting the adoption of precautionary measures is carried out in the following manner:

1. the Commission receives a request for precautionary measures, evaluates the situation and orders the measures that it considers appropriate for a determined time (generally six months), ordering the State to report within a brief period (varies from a day to a month) on its compliance in providing the adopted measures;
2. the State informs the Commission about the fulfillment of these measures;
3. the petitioner presents his or her observations;
4. in the case of failure to provide these measures, if the State accepts the Court's obligatory jurisdiction, the IACHR has the faculty to bring the request to the Court in order to request provisional measures.¹¹²

112 Up until the time of publication, the IACHR has not developed a practice of raising the issue with the Court when faced with contempt towards its measures despite reiterated requests from the petitioners.

It is important to emphasize that, regarding a request to adopt precautionary measures or provisional measures, it is of vital importance that petitioners or non-governmental organizations follow-up as much with the orders dictated by the Commission as those adopted by the Court, with special attention to the measures that the States effectively adopt.

On the other hand, considering that the American Convention attributes a protective function of the rights protected by the Convention to the Commission and considering that the Commission has the faculty to request the adoption of all measures that are intended to prevent irreparable damage, it is important that the petitioner(s) inform the Commission of all specific measures that they consider conducive to the effective protection of their rights.

In accordance with this, in general it is possible to classify measures that can be requested into three categories:

- those which seek to protect the victim through the implementation of security measures;
- those which seek to protect the victim through the elimination of the cause of the threat;
- those which seek to redirect the judicial or administrative action.

For that reason, it is relevant to note that while the security of the victim can be accomplished through the adoption of physical measures of protection (like escorts, armed cars, cellular phones, the guarding of a residence or place of work), the protection of the rights of people is not accomplished only through the implementation of these measures; rather, in addition it is crucial to investigate and punish those responsible for those acts of intimidation and aggression against the victim.

The following is an example of what could be a petition requesting precautionary measures the Commission. In the petition one must keep the following guidelines in mind:

- it is required that the State adopt, without delay, as many security measures as necessary to protect the life, physical integrity and/or freedom of expression of a person;
- it is required that the State, upon implementing the precautionary measures, has previously consulted with the people the measures are meant to protect;

- it is required that the State initiate serious and exhaustive investigations with the objective of clarifying the facts and sanctioning those responsible.

Request Precautionary Measures from the Commission Requirements

The Commission will be able to request precautionary measures when:

- It is an urgent case
- It is a serious case
- It is necessary to avoid irreparable harm
- The denounced acts are likely to occur

It is not necessary to exhaust internal remedies within the state's jurisdiction

3. Provisional measures

Closely related to the adoption of precautionary measures in the Rules of Procedure, Article 63, section 2 of the Convention considers the possibility of extremely grave and urgent cases in which precautionary measures will not be effective nor sufficient, and the Commission requests that the Inter-American Court adopt provisional measures. This request requires additional conditions: the respective State's acceptance of the Court's jurisdiction.

Article 63, section 2 of the American Convention declares:

"[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission".

Similarly, article 74.1 of the Commission's Rules of Procedures establishes:

"[t]he Commission may request that the Court adopt provisional measures in cases of extreme gravity and urgency, and when it becomes necessary to avoid irreparable damage to persons in a matter that has not yet been submitted to the Court for consideration."

The reform of the Court's Rules of Procedure that entered into force on Jan 1, 2004, offers victims, their family or representatives the possibility of directly soliciting provisional measures from the Court when these are related to cases that are already found in the Court's docket. Previous to this reform, the request to adopt provisional measures had to be made in all cases by the Commission.

When the provisional measures have no relation to a case already being studied by the Court, a person who finds him or herself in a grave or urgent situation cannot directly request that the Court adopt provisional measures. As deduced in the text of article 63.2 of the Convention and article 74.1 of the Commission's Rules of Procedure, the Commission is the entity that must make such a request to the Court.

In both cases, petitions should explain why the precautionary measures have been insufficient. It is equally important to concretely signal the specific measures the Court should adopt and request that it assure the petitioner(s) the necessary information about the measure's procedures, as much at the international level as at the national level.

Otherwise, the parties may request provisional measures once the case has been submitted to the Court's jurisdiction. Moreover, the Court can *motu proprio* request that a State adopt provisional measures in those cases it is studying or which are in the execution of the judgment phase.

Finally, it is important to signal that the request and receipt of precautionary measures do not impede the petitioner(s) or victim(s) from presenting a complaint to the Inter-American Commission at any moment.

Provisional Measures Requirements

The Court,

Through official request or through a request made by the victims, their family or representatives, related to subject matter already in the Court's docket—or requested by the Commission in cases that have not yet been accepted by the Court,

Will be able to order provisional measures:

- in cases of extreme gravity or urgency
- when it is necessary to avoid irreparable damage to the person's rights

CEJIL

4. Hearings

Hearings are one of the tools used by the Commission for the promotion and defense of human rights. They may be linked to a contentious proceeding in individual petitions (cases) such as precautionary measures, or through the study of questions of fact or law that are relevant to the promotion of the rights of people from the continent.¹¹³

In the context of processing individual cases, the hearings are opportunities to have direct contact with the commissioners and provide them with additional information considered useful for demonstrating the State's responsibility for the denounced acts, in order to provide specific information and to allege the extent of the alleged violations. In the hearings one may present witnesses or experts; they may also present videos and other audiovisual aids that permit a better understanding of the denounced acts. On the other hand, as part of this opportunity it is also convenient to make concrete requests from the Commission, such as the adoption of reports on admissibility or on the merits, the possibility of sending the case to the Court or the tribunal's adoption of provisional measures, the realization of an on-site country visit to learn about the case, the measure being administered or to take a testimony.

Likewise, the Commission may convene a hearing to receive information about the general human rights situation in a determined State, or

¹¹³ See, article 60 of the Rules of Procedure of the Commission.

about a situation or problem related to one or various countries in the region – such as about injurious and calumnious legislation in the States of Central American or the Southern Cone, or the situation of Freedom of Expression in the determined State-. The information supplied to the Commission in this type of hearing must not refer to the case or measure being processed by it.¹¹⁴

Within the context of these hearings, it is also possible to make requests of the Commission¹¹⁵, to visit the country in question, for example, to gain first hand knowledge about the general situation, to study a problem, or to issue general recommendations related to some theme.

It is important to consider that requests for hearings must be made, at minimum, forty days before the beginning of the corresponding period of the Commission's sessions. Likewise, it is important to consider that one may request a copy of the hearing minutes, which must include information about the date and hour that the hearing was held, the names of the participants, the decisions adopted and any existing commitments assumed by the parties.¹¹⁶

5. General Information

In accordance with Article 41 of the Convention, every year the Commission must prepare a report addressed to the OAS's General Assembly. This is known as the "Annual Report of the Inter-American Commission on Human Rights".¹¹⁷ In it, the Commission reports on the activities it realized during the year, including decisions adopted during the processing of cases and of provisional and precautionary measures. One of its volumes summarizes the activities of the Special Rapporteur for the Freedom of Expression, including doctrine in the matter, an analysis of the situation of the freedom of expression in the hemisphere, special reports, among other items.¹¹⁸

114 See, article 64 of the Commission's Rules of Procedure.

115 See, article 62.2 of the Commission's Rules of Procedure.

116 See, article 68 of the Commission's Rules of Procedure.

117 Available at www.cidh.org.

118 For example, see volume III of the 2003 Annual Report of the IACHR. The complete text of this volume can be found in the IACHR's webpage (www.cidh.org).

6. Reports on human rights in the State

With the goal of better fulfilling the functions entrusted to it by the Charter of the OAS, the American Convention, and its Statute and Rules of Procedure, the Commission can realize studies and reports that they consider appropriate regarding the general human rights situation in some of the OAS's member States.

In its country reports, the Commission includes recommendations for the States in order to contribute to improving the human rights situation in their territories. Normally, reports on the human rights situation in a determined State are later produced as a result of an on-site visit to the said State, although it does not necessarily have to be that way. In effect, the Commission can also issue a report on a state's situation related to human rights with a base of information received from the parties, either through writing or the hearings convened for that purpose. In its reports on the human rights situation in the countries of the region, the Commission may develop a chapter dedicated to the analysis of the freedom of expression. For example, it did so in the report on the human rights situation in Venezuela, published on December 29, 2003, in which it dedicated Chapter VI to the freedom of expression and thought, and in the report on the human rights situation in Guatemala, which was also published in December 2003.¹¹⁹ "Justice and Social Inclusion: Challenges of democracy in Guatemala"-, which dedicated Chapter VII to the freedom of expression in that country. Similarly, the Commission follows up on the human rights situation in some countries through its annual report.

This tool has been very useful in promoting human rights in diverse countries across the hemisphere. It is important to remember that a person or group of people may request that the Commission prepare a report on the general human rights situation in a determined State either through hearings or in writing.

119 See, www.cidh.org. The complete text of this report can be found on the the IACHR webpage. Available only in Spanish.

7. Thematic Reports

The Commission may study a particular right in one or in many States. The following exemplify thematic reports: the report on requests for asylum in Canada¹²⁰ in 2000; or the reports on the human rights of indigenous people in the Americas¹²¹, also in 2000; and on terrorism and human rights¹²², in October 2002.

Otherwise, a person, group or State may request, in hearings or in writing, that the Commission elaborate a special study on some right consecrated by the Convention that represents a particular issue in one or various States. For example, the report on the compatibility between laws of desacato and the American Convention of Human Rights¹²³ issued by the IACHR in 1995 resulted from a joint request made by the Argentine government, Horacio Verbitsky and his representatives in the context of a friendly settlement.¹²⁴

8. Visits

To fulfill its function of promoting the observance and the defense of human rights, and in order to have direct contact with the rights situation in a determined country, the Commission may advance visits to a country or region. These visits are called On-site observations.¹²⁵

The visits are advanced through a State's prior invitation. If the visit arises out of the Commission's initiative, it requires the consent of the State

120 IACHR. Report on the situation of human rights of asylum seekers within the Canadian refugee determination system. OEA/Ser.L/V/II.106 Doc. 40 rev. February 28, 2000.

121 IACHR, Report on the Human Rights Situation of Indigenous People in the Americas 2000. OEA/Ser.L/V/II.108. Doc. 62, 20 October 2000.

122 See IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002.

123 IACHR. Report on the Compatibility of Contempt laws with the American Convention on Human Rights. OEA/Ser.L/V/88 Doc. 9 rev. 1, 17 February 1995.

124 Americas Watch (currently called Human Rights Watch) and CEJIL. For more information see, IACHR. Report n° 22/94. Case 11.012. Argentina. Friendly Settlement. September 20, 1994. Likewise, see CEJIL Gazette No. 4, at: www.cejil.org.

125 See, Chapter IV of the Commission's Rules of Procedure.

to take place. During the visits, the Commission normally interviews not only state authorities but also people, groups and organizations belonging to civil society. In order for this to be possible, the State must guarantee complete freedom to the commissioners to move around the whole national territory, have access to prisons and other places of detention, as well as documents and information that they need.

After an on-site visit, the Commission produces a report in which it makes recommendations to the State oriented towards overcoming the obstacles and circumstances that affect the full enforcement of human rights in its territory.

The rapporteurs also carry out visits to States in the region with promotional aims. In this sense, the successive special rapporteurs for the freedom of expression have carried out multiple activities of diverse kinds in countries in the region. They have participated in conferences on the theme, promoted academic events or situational evaluations of the freedom of expression or some aspect of it, realized meetings with authorities, non-governmental organizations, owner(s) of the media, journalists, legislators, and functionaries connected with the administration of justice, among others.¹²⁶ This type of visit does not require the prior permission of the State in question.

9. Press Releases

Press Releases are another mechanism used by the Commission as a tool for fulfilling its work of overseeing human rights in the American continent. In this manner, the Commission provides information on the activities that it is carrying out or to call attention to some special event, or to express their concern about some particular aspect of a human rights situation in any of the States that are OAS members. The Special Rapporteur for Freedom of Expression¹²⁷ also has the faculty to issue press releases, and has used this power frequently to call attention to

126 See, Annual Reports of the Special Rapporteur for Freedom of Expression in the years 1998, 1999, 2000, 2001 and 2003, as well as the relevant sections of the special Country Reports of different countries (for example, Guatemala, Venezuela, Haití, Panamá, Paraguay and, Perú).

127 Hereinafter the Special Rapporteur for Freedom of Expression, or Special Rapporteur.

threats and harassment against journalists, and assassinations of communicators, etc. For that reason, it is useful to submit information related to the freedom of expression to the Special Rapporteur in order to allow the Special Rapporteur to make a timely pronouncement when necessary or desirable.

10. The Rapporteurships

a. Introduction

As part of its function of promoting and defending human rights in the region, the Inter-American Commission has established diverse thematic rapporteurships on specific subjects. In effect, article 41 of the American Convention and article 15.1 of the Commission's Statute allows this organ to create rapporteurships in order "to better fulfill its functions."¹²⁸ This disposition also establishes that a member of the Commission or whatever other person selected by it may be named as a rapporteur. The authority to establish its mandate also rests with the same Commission.

The thematic Rapporteurs carry out the work assigned by the Commission, generally resulting in special reports that are submitted for the consideration of the IACHR for its approval and later publication. In combination, the Rapporteur and Secretary's specialists who assist him/her with these functions may carry out other activities related to groups of people covered by its mandate. Thus, the Rapporteur might undertake the elaboration of special reports as well as realize on-site visits for monitoring the human rights situation or themes which fall within the Rapporteur's responsibility. He or she might promote a right or a specific theme through the organization of distinct events: a proposal to the Inter-American Commission so that it may in turn request the Inter-American Court to issue a Advisory Opinion on a specific theme; and the elaboration of projects of declarations and conventions in the framework of the Inter-America System to be presented before the OAS's General Assembly.¹²⁹

128 See article 15.1 of the Commission's Rules of Procedure.

129 See as example, H. Bicudo e I. Álvarez, "Notas respecto a la Relatoría de Derechos del Niño de la Comisión Interamericana de Derechos Humanos", in *Revista IIDH*, No. 29, p. 163.

b. The Special Rapporteur for the Freedom of Expression

Based on these experiences and in virtue of its deep concern for the serious threats and problems that exist for the full and effective development of the freedom of expression in the Americas, the Inter-American Commission unanimously decided in 1997 that its members establish a Special Rapporteur for the Freedom of Expression. Likewise, this decision was greatly motivated by the recommendations made by wide sectors of society of the different States in the hemisphere that expressed profound concern regarding the existence of constant restrictions on the freedom of expression and information.

Upon creating the Special Rapporteur, the Commission sought the best way to stimulate consciousness regarding the full respect of the freedom of expression in the hemisphere, in consideration of the fundamental role that it plays in the consolidation and development of democratic systems, and in the denouncement and protection of other human rights. Thus, the Special Rapporteur formulates specific recommendations for State members on matters related to the freedom of expression with the aim that they adopt progressive measures in its favor; it elaborates reports and specialized studies on the matter, and acts promptly with respect to those petitions and other communications which indicate that this right is being violated by some OAS member State.¹³⁰

Created within the sphere of the Inter-American Commission's attributes and competencies, and operating within this juridical framework, the office of the Special Rapporteur is of permanent character, with independent functions and its own budget.

According to a developed work plan, the principle activities of the Special Rapporteur in the coming years will be directed towards:

- 1) the elaboration of general reports and specialized thematic reports;
- 2) the creation of network in the hemisphere for the protection of the freedom of expression;

130 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression 2001. April 16, 2002. Chapter I.A." Mandate and Competence of the Office of the Special Rapporteur for Freedom of Expression".

- 3) the realization of visits to OAS member States in order to monitor the situation of the freedom of expression in their territories;
- 4) the promotion of the right to the freedom of expression in the OAS member States.

In general, the Special Rapporteur assists the Inter-American Commission in the area of the freedom of expression with information on the status of the freedom of expression in Latin American countries, the preparation of a special chapter on the matter in the Annual Report of the Commission and help in litigation of cases and precautionary measures occurring both before the Commission and the Court. Additionally, it receives denunciations of violations of the freedom of expression and maintains a network for the protection of journalists that mobilizes existing mechanisms to offer the necessary protection to victims who have had their right to the freedom of expression violated. For this reason, it is important to maintain the Special Rapporteur for individualized causes of action presented to the commission, and thus a copy of all communication that allege a violation of the freedom of expression in any form should be mailed to the Special Rapporteur.

... todas las personas. La libe...
... La libertad de expresion, en todas s...
... expresion, en todas... manifestaciones,
... formas y manifestacion es un de... fu... ame...
... nes de un... e... d... alien... inherente...
... nd... alien... inherente a tod... so... s...
... able, inherente a toda... persona... a libertad de expresion
... las personas. La libertad de expresion, sus formas y
... d... expresion... formas... y manifestaciones...
... as... formas y manifestaciones... der... fun...
... aciones... inherente a... inal... nabl... nte a...
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... ab... inherente a todas las personas. La libertad de expresion
... as... formas. La libertad de expresion, en todas sus formas y
... de... formas... en todas sus formas y manifestaciones...
... formas... manifestaciones... un... inherente...
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... libertad de expresion, en todas sus formas

Chapter II

FREEDOM OF THOUGHT AND EXPRESSION

Chapter II

Freedom of thought and expression ¹³¹

The Inter-American human rights protection instruments recognize freedom of thought and expression in unequivocal and generous terms.¹³² Likewise, jurisprudence has solidified the content of these instruments. This development has been the product of the constant work of the Commission, the Court, non-governmental organizations and journalists and social communicators who are litigating and have litigated in the Inter-American System. With their persistence, they have achieved notable developments. This chapter gathers the current jurisprudence of the Inter-American System's organs, offering points considered to be important.

The protection of the freedom of expression in the Inter-American System consists of three sources: the normative, comprised of the OAS Charter, the American Declaration and Convention, and the Declaration of Principles on Freedom of Expression of the Special Rapporteur; jurisprudence, formed by the Commission and the Inter-American Court decisions; and doctrine, consisting of the Inter-American Commission and the Special Rapporteur's press releases and reports, the Declaration of Chapultepec, and works by distinguished authors and organizations in the area of the freedom of expression, among others.

These three sources form the basis for the protection of the freedom of thought and expression in Latin America that will be developed in this chapter, divided into themes. The first section will develop the

131 This chapter was written by Marisol Blanchard, and is a compilation of the jurisprudence and doctrine related to the freedom of expression in the Inter-American System. Similarly, it presents some pending challenges. This chapter also arose out of the efforts and tireless work of human rights organizations.

132 The Inter-American Commission has sustained in its Declaration of Principles on Freedom of Expression: "[f]reedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals. Additionally, it is an indispensable requirement for the very existence of a democratic society." (Principle 1). Important literature exists, including from Latin America, on the fundamental concepts of the right to the freedom of expression. See, among others, Bianchi y Gullco, *El derecho a la libre expresión*, Editora Platense, Buenos Aires, 1997; John Stuart Mill, *On Liberty*, Everyman Edition, 1972; y Eric Barendt, *Freedom of Speech*, Clarendon, Londres, 1992.

normative framework; and the second, the development of jurisprudence and doctrine related to the protection of the right to the freedom of expression.

A. Normative Framework of the protection of the Freedom of Expression in the Inter-American System

1. The OAS Charter

The OAS is an international organization created by the States of the Americas through the approval of the OAS Charter in 1948, in Bogota. This Charter was later modified by the Protocol of Buenos Aires, in 1967, and later by the Protocol of Cartagena of the Indias, in 1985.¹³³

The Charter establishes the fundamental and essential purposes of the Organization¹³⁴, including, among others that are relative to the freedom of expression, the following:

“Article 33. Development is a primary responsibility of each country and should constitute an integral and continuous process for the establishment of a more just economic and social order that will make possible and contribute to the fulfillment of the individual.”

Moreover, according to Article 45(f) of the OAS Charter, the member States agree to promote,

“The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system.”

133 The OAS is the oldest regional organization in the world, dating back to the first International Conference of the American States held in Washington, D.C. in October 1889 until April 1890. In this meeting, the creation of an International Union of Republics of the Americas was approved.

134 For more information about the Charter of the OAS and its history see “Basic Documents Pertaining to Human Rights in the Inter-American System”, updated May 2001. OEA/Ser.L/V/I.4 rev.7, May 22, 2001, “Introduction”.

2. The American Declaration

The American Declaration was prepared by the Inter-American Legal Committee and presented in the Ninth International American Conference in 1948, where it was adopted. The initial intention was that it would be adopted in the form of a Convention, which did not occur. Nevertheless, it established essential rights of man as well as the obligation of the countries of the Americas to respect them. The Declaration consists of thirty-eight articles that define the protected rights and their corresponding State duties. It establishes, without distinction, the denominated “civil and political rights” as well as those known as “economic, social and cultural rights.”

The article that specifically refers to the freedom of expression establishes:

“Article IV. Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”

3. The American Convention

The American Convention was adopted in San Jose, Costa Rica in 1969. It entered into force on July 18, 1978, strengthening the system by offering a conventional framework of human rights obligations, as well as recourse of a judicial character to victims of human rights violations in the continent. This treaty marked the culmination of the process of developing human rights in the Americas, since it changed the juridical nature of the instruments upon which rests the institutional structure of the Inter-America System. The American Convention contains a catalogue of rights and duties that must be respected by the States: the first chapter deals with general State duties; the second recognizes civil and political rights; the third chapter has only articles dedicated to economic, social and cultural rights. Different from the Declaration, the Convention clearly distinguishes between both types of rights, giving preeminence to the protection of civil and political rights.

The articles relevant to the freedom of expression are the following:

Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information

and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

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

Article 14. Right of Reply

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

B. Development

1. Dimensions of the Freedom of Thought and Expression

The freedom of expression has two dimensions: individual and collective. This double dimension is established in the American Convention, which recognize the freedom of expression as including the ability to “search, receive and disseminate information and ideas of all kinds”. Thus, this idea was emphasized in the Inter-American Court’s sentence on the merits in the case of “The Last Temptation of Christ v. Chile”, as well as in its Advisory Opinion related to the Compulsory Membership in a journalist association:

“[w]ith regard to the content of the right to freedom of thought and expression, those who are protected by the Convention not only have the right and the freedom to express their own thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds. Consequently, freedom of expression has an individual and a social dimension.”¹³⁵

On the other hand, the Court emphasized the importance of both aspects establishing:

“[t]he Court considers that both dimensions are of equal importance and should be guaranteed simultaneously in order to give total effect to the right to freedom of thought and expression in the terms of Article 13 of the Convention.”¹³⁶

135 For more information about the Charter of the OAS and its history see Basic Documents Pertaining to Human Rights the Inter-American System, OEA/Ser. L/V/I.4 rev. 8 (May 22, 2001).

136 I/A Court H.R., Case of “The Last Temptation of Christ” vs. Chile (Olmedo-Bustos et al.). Judgment of February 5, 2001. Series C No. 73, para. 64.

It added,

"[w]ith regard to the first dimension of the right embodied in the said article [13], the individual one, freedom of expression is not exhausted in the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate method to disseminate thought and allow it to reach the greatest number of persons. In this respect, the expression and dissemination of thought and information are indivisible, so that a restriction of the possibilities of dissemination represents directly, and to the same extent, a limit to the right to free expression."¹³⁷

With respect to the individual dimension, Advisory Opinion No. 5 has sustained that it also,

"includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely. The importance of the legal rules applicable to the press and to the status of those who dedicate themselves professionally to it derives from this concept."¹³⁸

Otherwise, in relation to the content of the second dimension, the Court has established:

"[r]egarding the second dimension of the right embodied in Article 13 of the Convention, the social element, it is necessary to indicate that freedom of expression is a way of exchanging ideas and information between persons; it includes the right to try and communicate one's point of view to

137 I/A Court H.R., Case of "The Last Temptation of Christ" vs. Chile (Olmedo-Bustos et al.), Judgment of February 5, 2001. Series C No. 73, para. 65.

138 I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), para. 31.

others, but it also implies everyone's right to know opinions, reports and news. For the ordinary citizen, the knowledge of other people's opinions and information is as important as the right to impart their own."¹³⁹

Related to this last point, the Court referred to the social dimension of the freedom of expression, clarifying

"a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole. [...] It is also in the interest of the democratic public order inherent in the American Convention that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected."¹⁴⁰

It further added,

"[W]hen an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others."¹⁴¹

139 I/A Court H.R., Case of "The Last Temptation of Christ" vs. Chile (Olmedo-Bustos et al.). Judgment of February 5, 2001. Series C No. 73, para. 31.

140 I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). para. 69.

141 I/A Court H.R., OC-5/85 Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights) para. 30.

For that reason, the Declaration of Principles on the Freedom of Expression expresses this distinction in its first principle:

“1. Freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals. Additionally, it is an indispensable requirement for the very existence of a democratic society.”

This double dimension of the freedom of expression, both individual and collective, in relation to democracy, reflects the importance of fully respecting the exercise of this right, and requires an analysis of each one of its provisions as well as an interpretation of any restrictions permitted by the American Convention.

2. Permitted Restrictions

The freedom of thought and expression is not an absolute right. That is, there are certain limitations. Nevertheless, the American Convention not only broadly protects this freedom, but also has contemplated and carefully limited restrictions permitted by it.

Thus, Article 13 of the Convention establishes that “abuses” to the exercise of this right can be subject only to subsequent imposition of liability. In this way, the honorable Court has signaled that “[a]buse of freedom of information thus cannot be controlled by preventive measures but only through the subsequent imposition of sanctions on those who are guilty of the abuses.”¹⁴²

The Convention establishes that the liability must be previously established by law and must be necessary to assure the goals specifically enumerated in Article 13.¹⁴³ Clarifying these conditions, the Court in its Advisory Opinion No. 5 maintains that in order to validly establish liability,

142 I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights) para. 39.

143 I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), para. 39. The article 13.2 of the American Convention [...] “a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals”.

"[t]he following requirements must be met:

- a) the existence of previously established grounds for liability;
- b) the express and precise definition of these grounds by law;
- c) the legitimacy of the ends sought to be achieved;
- d) a showing that these grounds of liability are "necessary to ensure" the aforementioned ends.

All of these requirements must be complied with in order to give effect to Article 13(2)."¹⁴⁴

Additionally, permissible restrictions to the freedom of expression, such as those established by Article 13 of the American Convention, should be interpreted in accordance with the general criteria established in articles 29 and 32.2 of the Convention, which express the principle *pro individual* or *pro homine*: the rule of strict interpretation of any limitation to rights; and the necessity of applying conventional norms when considering society's and democratic institutions' legitimate necessities.¹⁴⁵

In this way, the Commission has established:

"[w]ith respect to the requirement of 'necessity', the Inter-American Court of Human Rights has interpreted this to

144 I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), para. 39. The Inter-American Commission in the *Report on Terrorism and Human Rights*, as already mentioned, has indicated "[t]he requirement that a subsequent penalty be 'expressly established by law', also included in Article 10 of the European Convention on Human Rights, has been interpreted by the European Court of Human Rights to mean that the basis for subsequent liability must be 'formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[...]' This does not mean that the subsequent penalty must specifically be provided for in legislation passed by the legislature; it may be contained in common law, administrative regulations or similar sources. It must, however, be reasonably precise and accessible to the public." (cfr. para. 275).

145 I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), paras. 41 and 42.

mean that a subsequent penalty is more than just “useful,” “reasonable” or “desirable.” Rather, the government must show that such a penalty is the least restrictive of possible means to achieve the government’s compelling interest. The penalty “must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees.” Moreover, the provision “must be so framed so as not to limit the right protected by Article 13 more than is necessary. ...[T]he restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.” (citation omitted) This is an extremely high standard and any provisions imposing subsequent liability for the exercise of freedom of expression must be carefully examined using this proportionality test in order to prevent undue limitations of this fundamental right.”¹⁴⁶

In this way, the Court has highlighted,

“...that the freedom of expression is not an absolute right. It may be subject to restrictions, as subsections 4 and 5 of Article 13 of the Convention indicate. Similarly, the American Convention foresees in Article 13.2 the possibility of establishing restrictions to the freedom of expression, which manifest themselves in the application of liability for the abuse of this right. These restrictions must in no way limit, more than is strictly necessary, the full reach of the freedom of expression and must not become a direct or indirect mechanism of prior censure. In order to determine liability imposed by the law, three requirements must be satisfied, namely: 1) they must be expressly determined by the law; 2) they must be intended to protect either the reputation of others or to protect the security of the nation, public order, or public health and morals; and 3) they must be necessary in a democratic society... In this way, the restriction must be proportionate

146 See IACHR. Report on Terrorism and Human Rights OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 October 2002. para. 278.

to the interest that justifies it and must be narrowly tailored to achieve this goal, without interfering more than is strictly necessary with the effective exercise of the freedom of expression."¹⁴⁷

Likewise, the American Convention prohibits the imposition of restrictions on the freedom of expression through "indirect methods or means"¹⁴⁸, and gives some examples of these types of restrictions.¹⁴⁹ The illegitimate means of indirect restriction of the freedom of expression can include other circumstances of fact or of law, such as has been recognized by the honorable court in the case of *Ivcher Bronstein v. Perú*.¹⁵⁰

3. Prohibition against discrimination

The effective exercise of the freedom of expression requires guaranteeing its exercise without discrimination. This permits all people, without discrimination of any kind, to express their ideas and necessities through informed participation in the decisions they make regarding situations that affect them; that is, to grant a real voice to those who, for whatever motive, are constantly marginalized from all dialogues.

147 I/A Court H. R., *Case of Herrera-Ulloa vs. Costa Rica*. Judgment of July 2, 2004. Serie C No 107, paras. 120 and 123. [translation]

148 Article 13.3 of the American Convention establishes "[t]he right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions."

149 In this sense, upon interpreting the conventional norms, the Inter-American Commission included in its Declaration of Principles on the Freedom of Expression that "Prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression." (see, principle 5).

150 I/A Court H.R., *Case of Ivcher-Bronstein vs. Peru*. Judgment of February 6, 2001. Series C No. 74, para. 154. This case was litigated by a team of lawyers contracted by Mr. Ivcher Bronstein and CEJIL.

In this sense, it is indispensable that the States permit that the voices that are not in harmony with the majority, even those that offend the sensibility of many, have the possibility of expressing themselves freely through diverse means: artistic, written print, etc. The European Court has held with respect to this idea:

“Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”¹⁵¹

For its part, the Inter-American Commission has sustained,

“the right to freedom of expression is precisely the right of the individual and the entire community to engage in active, challenging and robust debate about all issues pertaining to the “normal and harmonious functioning of society.” 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 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.”¹⁵²

Likewise, the exercise of the freedom of expression without discrimination requires guaranteeing the ability of diverse sectors of the population to exercise this right.

151 ECHR, *Case of Handyside v. The United Kingdom*, Judgment of 7 December 1976, pára. 49.

152 Report on the Compatibility of “Desacato” laws with the American Convention on Human Rights, Annual Report of the Inter-American Commission on Human Rights 1994. OEA/Ser.L/V.88, Doc. 9 rev. 1, 17 February 1995.

Our hemisphere presents a serious panorama of discrimination; there exists sectors that are discriminated against and deprived of access to expression and information for reasons of racial origin, socioeconomic situation and gender, among others. In fact, poverty and social marginalization in which large sectors of the population live in the Americas are the most common motives for discrimination in the region. This seriously affects the exercise of their human rights.¹⁵³ These factors also affect the exercise of the freedom of expression by the hemisphere's inhabitants every time their voices are deferred or pushed outside of any debate.¹⁵⁴

All people have the right to be consulted about decisions that affect their lives and to freely give their opinion. This requires mechanisms "that promote access to public debate of a diversity of voices in society, including a wide range of ideological and political opinions."¹⁵⁵

The American Convention directly recognizes this guarantee in its article 13, establishing, "[e]veryone has the right to freedom of thought and

153 Regarding this, it is important note the speech of Dr. Juan Méndez, former President of the Inter-American Commission on Human Rights, at the inauguration of the 114th regular session of the Inter-American Commission on Human Rights: "[a] very large and representative segment of our hemisphere faces extreme poverty, which constitutes a generalized violation of every human right. The poor, whose numbers increase with every passing day, cannot lead decent lives in freedom from fear. They barely survive in an existence where their most basic human rights, if they are present at all, stand on extremely shaky ground."

154 This panorama has been evidenced by the former Special Rapporteur of the Freedom of Expression of the Inter-American Commission, Santiago Cantón, during his presentation to the United Nations. See Report for the United Nations Human Rights Commission, Period 56 of sessions of March 20-April 28, 2000. (translation by author).

155 See Deepa Narayan, *Voices of the Poor, Can Anyone Hear us?*, Oxford University Press/World Bank, 2000. (translation by author) The United Nations Development Program (UNDP) has also pronounced on this theme. Cfr. the United Nations Development Program (UNDP), Human Development Report 2000, available at: <http://www.undp.org/hdr2000/english/HDR2000.html>: This document signals, "Growth alone is not enough. Growth alone is not enough. It can be ruthless, leaving losers to abject poverty. Jobless, creating little employment. Voiceless, failing to ensure participation of people. Futureless, destroying the environment for future generations. And rootless, destroying cultural traditions and history." See, p. 81.

expression..." Adequate protection of the freedom of expression requires, on one hand, assuring all people access without discrimination to the media, and on the other hand, the guarantee that all people will have access to information. The Inter-American Court has even indicated that the media must fulfill certain requisites to guarantee this right:

"[i]f freedom of expression requires, in principle, that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media, it must be recognized also that such media should, in practice, be true instruments of that freedom and not vehicles for its restriction. It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, **inter alia**, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists."¹⁵⁶

It adds:

"[t]he foregoing analysis of Article 13 shows the extremely high value that the Convention places on freedom of expression. A comparison of Article 13 with the relevant provisions of the European Convention (Article 10) and the Covenant (Article 19) indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas."¹⁵⁷

156 I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), para. 34.

157 I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), para. 50.

Regarding this, the Special Rapporteur, in his 2000 Annual Report, has signaled:

“[t]he lack of equal participation makes it impossible for democratic, pluralistic societies to prosper, thereby exacerbating intolerance and discrimination. Including all sectors of society in communication, decision-making and development processes is essential to ensure that their needs, opinions and interests are taken into account in policy-making and decision-making”¹⁵⁸ [and adds] “... It is precisely through active, peaceful participation in the democratic institutions of the State that the exercise of freedom of expression and information by all sectors of society is manifest and enables historically marginalized sectors to improve their conditions.”¹⁵⁹

In turn, the Declaration of Principles on the Freedom of Expression establishes:

“2. Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights.

All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.”

It is necessary, therefore, to insure equal opportunities for accessing free expression, information and the media.

Further development by the System of this point is still needed. Its inclusion in the Declaration of Principles on the Freedom of Expression

158 IACHR, Annual Reports, 2000, Volume III Report of the Special Rapporteur for Freedom of Expression 2000, p 18. in the Annual Report of the Special Rapporteur for Freedom of Expression, 2002. See, Chapter IV.A, para. 6.

159 IACHR, Annual Reports, 2000, Volume III, Report of the Special Rapporteur for Freedom of Expression 2000, p 19. in the Annual Report of the Special Rapporteur for Freedom of Expression, 2002. See, Chapter IV.A, para. 6.

signifies an advance, especially given the importance of people having the widest possible access to the media and to all information, without discrimination.¹⁶⁰ Nevertheless, the hemisphere's constant crisis ignited among other reasons by the lack of institutional channels for expressing social necessity, requires special attention- as much by the Commission as the Court and the users of the system—to the subject of wide and plural exercise of the freedom of expression without discrimination. Community radios are one fundamental channel for permitting the propagation of ideas and information in a plural way.

4. Access to Information Held by the State

In connection with the above, access to public information by the hemisphere's inhabitants is indispensable in a democratic society. Although the conceptualization of access to information as a right is still recent¹⁶¹, its importance as a right in itself and as a guarantee to the exercise of other rights, has been widely recognized.¹⁶² In turn, as much the Inter-American Court as the Commission, especially the Special Rapporteur, has developed this theme.¹⁶³

These organs have followed an extensive doctrine of interpretation of the freedom of expression, including the collective aspects of the right to access information. At the same time, the debate has been centered on public information. In its collective aspect, the right to the freedom of expression operates as an indispensable mechanism for democratic control and social development. In this sense, the right to access information in the State's power permits its inhabitants to effectively participate in democracy. Without information being available in a rapid

160 See, *infra* Chapter II (17)

161 In this regard, it is debated whether it is an individual or collective right being referred to. For further discussion, see Víctor Abramovich y Christian Courtis, "El acceso a la información como derecho" in Centro de Estudios Legales y Sociales (CELS), Annual Report on the situation of Human Rights of Argentina 2000, Buenos Aires, 2001.

162 See Toby Mendel, Freedom of Information as an Internationally protected Human Right. Available at: www.article19.org/docimages/627.htm.

163 In particular, the Special Rapporteur has dedicated a chapter on this theme in each of its reports. See, for example, Chapter IV of the Annual Report of the Special Rapporteur for Freedom of Expression, 2003.

manner, our systems of democratic control do not function. The American Convention recognizes this right in article 13, establishing:

“[t]his right includes freedom to seek, receive, and impart information and ideas of all kinds...”

Interpreting this provision, the Inter-American Court has established a relation between the freedom of expression and information. It has held:

“[the freedom of expression] is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. 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.”¹⁶⁴

As has indicated, “this wide concept of the freedom of expression opens channels of interpretation of the freedom of information that likens it to the right to access information.”¹⁶⁵

With specific reference to the right to access information, the Court established:

“[t]hose 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. Hence, when an individual’s freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to “receive” information and ideas.

164 I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), para. 70.

165 *Abramovich and Courtis*, “El acceso a la información como derecho”, supra 161 [translation by author]

The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.”¹⁶⁶

In turn, the Inter-American Commission has also recognized its relevance. It has referred to the freedom of expression in terms of access to information:

“[t]he right to freedom of expression includes both the right to disseminate and the right to seek and receive ideas and information. Based on this principle, access to information held by the State is a fundamental right of individuals and States have the obligation to guarantee it.”¹⁶⁷

With relation to State obligations, the Special Rapporteur has clarified:

“[e]ffective citizen control over public activities requires not only that the state refrain from censorship, but also that positive steps be taken to provide citizens with information. It is clear that if such information is not provided to all persons entitled to it, the exercise of freedom of expression cannot function as an effective mechanism for citizen participation or democratic oversight of government.”¹⁶⁸

Additionally, the Special Rapporteur has indicated that “[a]ccess to information held by the State is a pillar of democracy.”¹⁶⁹ In relation to the

166 I/A Court H.R Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights) para. 30.

167 IACHR. Report on Terrorism and Human Rights. para. 281.

168 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2001. Chapter III, para 16.

169 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2000, Chapter III, para 17.

particular objective of this right, it has established, "individuals have a right to request documentation and information held in public archives or processed by the State, in other words, information considered to be from a public source or official government documentation."¹⁷⁰

On the other hand, two additional aspects to the access to information have been emphasized by the Commission. The first is 'principle of maximum disclosure'. In other words, the presumption should be that information will be disclosed by the government."¹⁷¹ The second is based on 'a presumption that all meetings of governing bodies are open to the public.' This presumption is applicable to any meeting in which decision-making powers are exercised, including administrative proceedings, court hearings, and legislative proceedings."¹⁷²

Inasmuch as free access to information in the State's power contributes to increasing transparency of government acts and the consequent decrease of corruption in the State administration, it has been established that the limitations to access should be exceptional. As much the Special Rapporteur¹⁷³ as the Commission has specifically spoke on this point. The latter has signaled that,

"Limited restrictions on disclosure, based on the same criteria that allow sanctions to be applied under Article 13, may be included in the law. The burden of proof is on the State to show that limitations on access to information are compatible with the inter-American standards on freedom of expression."¹⁷⁴

The legitimacy of denying access to information should be evaluated in each particular case. The Special Rapporteur has established that "information considered classified should be reviewed by an independent

170 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2000. Chapter III, para 17.

171 IACHR. Report on Terrorism and Human Rights, para. 284.

172 IACHR. Report on Terrorism and Human Rights, para. 287.

173 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2000. Chapter III.C.

174 IACHR. Report on Terrorism and Human Rights, Cit. para. 285. See this chapter for restrictions permitted by international human rights law.

legal entity capable of weighing the interest of protecting civil rights and freedoms against national security concerns.”¹⁷⁵

Citing the Johannesburg Principles on National Security, Freedom of Expression and Access to Information¹⁷⁶, the Commission has established that

“[a]ny restriction on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law. In particular, governments may not prevent journalists or representatives of intergovernmental or non-governmental organizations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law are being, or have been, committed. Access to information also dictates that journalists have access to conflict areas, disaster sites and other such locations unless to give them such access would pose a ‘clear risk to the safety of others.’”¹⁷⁷

The Commission’s Report on Terrorism and Human Rights develops the limits to restrictions to information based on national security.¹⁷⁸

For its part, the Declaration of Principles on the Freedom of Expression establishes:

“4. Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established

175 For more information, See, IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2000. Chapter III, para 25.

176 Regarding these principles, the Comisión, like other internacional authorities, considers them as “authoritative guidance for interpreting and applying the right to freedom of expression in light of considerations of national security.” IACHR. Report on Terrorism and Human Rights, para. 288.

177 IACHR. Report on Terrorism and Human Rights, para. 288.

178 IACHR. Report on Terrorism and Human Rights, paras. 327/331.

by law in case of a real and imminent danger that threatens national security in democratic societies.”

Despite wide doctrinal recognition and of the advances in national legislation¹⁷⁹, limitations to accessing information under the State’s power continues to be an impediment to serious and informed journalism that can effectively fulfill its role as a democratic control of the government. In addition, despite the fact that denying information based on a broad interpretation of the concept of national security is a constant practice in the majority of countries in our continent, there is no specific jurisprudence regarding this problem. CEJIL and other human rights organizations have alleged violations of this right in cases of forced disappearances and grave human rights violations (based normatively on the right to the truth) and, especially, in cases involving amnesties, which has oriented the development of jurisprudence with respect to this right until present.¹⁸⁰

5. Habeas Data

The right to the access of information not only refers to State action. Rather, the freedom of expression also protects the right of every person to know information about him/herself, through the exercise of rapid, simple and effective action. In this sense, the Special Rapporteur has established that

179 In this sense, for example, the Annual Report of the Special Rapporteur for Freedom of Expression, 2001 provides information about countries that constitutionally recognize the right to access information. In this respect, it mentions Argentina, Brasil, the Dominican Republic, Guatemala, Honduras, Colombia, Mexico, Peru and Venezuela. Nevertheless, this situation does not mean in practice that this right can be exercised freely, inasmuch as in many of these countries there are not laws regulating its exercise, among other reasons.

180 See, for example, IACHR, Report N° 25/98, Chile, Alfonso René Chanfeau Orayce y otros Cases 11.505; 11.532; 11541; 11.546; 11.549; 11.569; 11.572; 11.573; 11.595; 11.657 y 11.705, April 7, 1998. In this report the Commission considers for the first time the right to truth in the protection framework provided by article 13; likewise, it was the first opportunity in which the Commission recognized that this right belonged as much to members of society in general as to families of the victims of human rights violations. Annual Report of the Special Rapporteur for Freedom of Expression, 2002, Chapter III. A.3, g, para. 42.

“[o]ne means of guaranteeing the right to protection against information that is abusive, inaccurate, or prejudicial to individuals is through access to public and private databases for the purpose, as necessary, of updating, correcting, removing, or reserving information about the individual concerned. This action, known as *habeas data*, was introduced as a modality of the “*amparo*” process for the protection of personal privacy. The procedure is used to guarantee access for any individual to information contained in public or private databases or records referring to him or his property, and when necessary, the ability to update, correct, remove, or reserve such information for the purpose of protecting certain fundamental rights.”¹⁸¹

We can affirm that said protection is found in the American Convention, when it establishes in article 13 that 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 still not deliberated on this dimension of the freedom of expression. Nevertheless, as much the Commission as the Special Rapporteur has expressly recognized it in its reports and in its Declaration of Principles on the Freedom of Expression. Interpreting the Declaration of Principles of the Freedom of Expression, the Special Rapporteur wrote:

“[t]he *habeas data* writ is based on three premises: 1) the right of every person to undisturbed privacy, 2) the right of every person to have access to information about him or herself contained in public or private databases and to modify, remove or correct such information due to its sensitive, false, biased, or discriminatory information about him nature, and 3) the right of individuals to resort to the action of *habeas data* as an enforcement mechanism.”¹⁸²

181 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2001., Chapter III, para. 26.

182 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2001, Chapter III, para. 28

With respect to the requirements established by the Special Rapporteur for the effective exercise of this action, it has been determined that it is necessary that “administrative barriers to access to information should be removed” and that “user-friendly, simple and low-cost procedures for requesting information should be implemented”. He has likewise indicated that, “it is not necessary to explain the reasons for requesting the information in order to use this procedure. The fact that personal data exists in public or private records is, in and of itself, sufficient grounds for exercising this right.”¹⁸³

On the other hand, he warns about the importance of this action in the context of contemporary societies and how it:

“[a]cquires even greater significance with the emergence of new technologies. Widespread use of computers and the Internet has meant that the State and private sector can gain rapid access to a considerable amount of information about people. It is therefore necessary to ensure that there are specific channels for rapid access to information that can be used to modify any incorrect or outdated information contained in electronic databases. Moreover, the habeas data writ gives rise to certain obligations on the part of entities involved in processing data: they must: use the information for the express and specific purpose established; guarantee that data is protected from accidental or unauthorized access or manipulation; and allow the petitioner access to information when State or private sector entities might have obtained it in an irregular or illegal manner.”¹⁸⁴

Otherwise, he has recognized that the action of habeas data

“[...]is an important mechanism for monitoring the activities of State security or intelligence agencies. Through access to personal data it is possible to verify the legality of the methods employed by State agencies to collect personal information. Access to such information, moreover, enables

183 See, IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2000., Chapter III, para. 38.

184 See, IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2000., Chapter III, para. 29.

the petitioner to ascertain the identity of those involved in illegal data collection, making it possible to punish those responsible."¹⁸⁵

The protection provided by the action of habeas corpus has been recognized and has been expressed in the Declaration of Principles on the Freedom of Expression:

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

The Special Rapporteur concluded the chapter on the right to access information and habeas data¹⁸⁶ establishing,

"...the right of access to information and the action of habeas data, within the framework presented in this section, represent legal tools which can be used to achieve transparency in government, protect personal privacy against the arbitrary or illegitimate use of personal data, and ensure accountability to and participation by society."¹⁸⁷

Same as that signaled in the case of the right to access public information, despite the advanced doctrine of the Inter-American Commission and of the Special Rapporteur, there is still not resolution by the Tribunal of the Americas with respect to these themes.

6. The right to the truth

The right to the truth, partially protected by the right to information, constitutes one of the most recently developed in the area of investigation of human rights violations. CEJIL, together with numerous human rights defenders, has widely litigated in favor of recognizing this

185 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2000. Chapter II, para. 14

186 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2001. Chapter III, paras 1/40

187 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2001. Chapter III, para 39.

right with the goal of insuring that victims of human rights violations, their families and society have the right to know information held by the State. For example, CEJIL, together with other organizations, presented an *amicus curiae* on the right to the truth in the case of the Argentinean courts in 1995¹⁸⁸, faced with the impossibility of obtaining detailed information on the whereabouts of people disappeared during the military dictatorship in this country between 1976 and 1983. As a fundamental of this right, the following arguments were alleged:

1. the State's general duty to guarantee human rights derives from a double obligation: first, in response to a violation the State must offer a rapid and effective remedy to make it cease, and in addition, identify and facilitate the measures that provide reparations for moral and material damages caused by the violation;
2. the State must identify all possible sources of information about these acts, and later, as a first step, provide the victim's next of kin with the information contained in official files, for example, lists of victims or agents of the State that have participated in these acts and allow full clarification;
3. The investigation of the truth and its full public dissemination is part of "effective remedies" that the State should assure in the case of serious and systematic violations;
4. the right to the truth—the full clarification of the facts surrounding the case—do not only belong to the families but also the society in general.¹⁸⁹

Likewise, it has been said that one aspect of this right is "the right of families of disappeared persons to know their whereabouts, independent of the possibility of criminal prosecution."¹⁹⁰ This right extends also to human rights victims or their families and society in general.

188 Cfr., Mignone, Emilio F., s/ presentación en causa Nro. 761, "Hechos denunciados como ocurridos en el ámbito de la Escuela Superior de Mecánica de la Armada (E.S.M.A.)".

189 *Amicus curiae* brief submitted jointly by Human Rights Watch and CEJIL June 1995. Available at: <http://www.nuncamas.org/document/internac/achrwcej.htm>

190 Abramovich y Curtis, "El acceso a la información como derecho".supra 161.[translation of text by author].

In the Inter-American System, the concept of the right to the truth has evolved. At first, the Commission recognized that the right of families to know the whereabouts of their loved ones derived from the obligation of the State to offer victims and their families a simple and rapid recourse, in accordance with article 25 of the Inter-American Convention.¹⁹¹ The Commission recognized for the first time the right to the truth as a right in the case related to amnesties in Chile that was litigated by CEJIL and other petitioners including, as its basis, among others, article 13 of the Convention.¹⁹²

Likewise, the protection of the right to the truth has been extended from the cases of disappeared detainees to other cases of serious human rights violations. For example, in 1999, the Commission explicitly found a violation of article 13 in a case against El Salvador for extrajudicial executions of six Jesuit priests.¹⁹³

The Inter-American Court has had the opportunity to pronounce on this right.¹⁹⁴ At the request of the representatives of the victims, the Inter-American Commission alleged in the Barrios Altos Case before the Inter-American Court that,

191 See Case 10.580, Report N° 10/95, Ecuador, Manuel Bolaños, September 12, 1995. Annual Report of the Special Rapporteur for Freedom of Expression, 2002. Chapter III.A.3.g, para 41.

192 IACHR. Report N° 36/96, Case 10.843, October 15, 1996, para. 59 and following; and Report N° 25/98, párrafo 92.

193 This deals with Report n° 1/99, Case 10.480, Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, Fausto García Funes, Andrés Hernández Carpio, José Catalino Meléndez and Carlos Antonio Martínez, El Salvador, January 27, 1999. In this case, it is signaled that the State has a duty to offer families of the victims and society in general information about circumstances surrounding serious human rights violations and about the identity of their perpetrators. Likewise, it affirmed that this right emanates from articles 1.1, 8.1 and 13. Annual Report of the Special Rapporteur for Freedom of Expression, 2002. Chapter III.A.3.g, para 44.

194 The first case to allege a violation of this right at the request of the families of the victims was in Castillo Paez v. Perú (litigated by CEJIL together with FEDEPAZ). After this case, the theme was presented to the Court in a series of cases: Barrios Altos v. Perú (presented by the Nacional Coordinator of Human Rights of Peru, APRODEH, COMISDEH, FEDEPAZ y CEJIL); the Bámaca Velásquez case (brought to the System by widow Jennifer Harbury and represented by CEJIL), the Mack case (litigated by the Foundation of Myrna Mack, Hogan and Harson, the Lawyers Committee for Human Rights y CEJIL), among others.

“[t]he right to truth is founded in Articles 8 and 25 of the Convention, insofar as they are both “instrumental” in the judicial establishment of the facts and circumstances that surrounded the violation of a fundamental right. It also indicated that this right has its roots in Article 13(1) of the Convention, because that article recognizes the right to seek and receive information. With regard to that article, the Commission added that the State has the positive obligation to guarantee essential information to preserve the rights of the victims, to ensure transparency in public administration and the protection of human rights.”¹⁹⁵

In this regard, the Court resolved that while the victims were impeded from accessing the truth, in this case in particular this right was found included in the investigation and judgment, established by articles 8 and 25. In the Court’s words,

“[i]n this case, it is evident that the surviving victims, their next of kin and the next of kin of the victims who died were prevented from knowing the truth about the events that occurred in Barrios Altos. Despite this, in the circumstances of the instant case, the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention. Therefore, this matter has been resolved, since it has been indicated that Peru violated Articles 8 and 25 of the Convention, with regard to judicial guarantees and judicial protection.”¹⁹⁶

195 See the Commission’s arguments in I/A Court H.R., *Barrios Altos*. Case Judgment of March 14, 2001. Series C No. 75, para. 45. Similarly, I/A Court H.R., *Bámaca Velásquez*. Case Judgment of November 25 2000. Series C No. 70, para. 197. Both are cited in the IACHR, *Annual Report of the Special Rapporteur for Freedom of Expression*, 2002. Chapter III.A.3.g paras 41/46.

196 I/A Court H.R., *Barrios Altos* Case. para. 47/49.

In a similar manner, in the *Bámaca Velásquez* case, the Court indicated:

"[i]n its final arguments, the Commission alleged that, as a result of the disappearance of *Bámaca Velásquez*, the State violated the right to the truth of the next of kin of the victim and of society as a whole. In this respect, the Commission declared that the right to the truth has a collective nature, which includes the right of society to "have access to essential information for the development of democratic systems", and a particular nature, as the right of the victims' next of kin to know what happened to their loved ones, which permits a form of reparation. The Inter-American Court has established the obligation of the State to investigate the facts while there is uncertainty about the fate of the person who has disappeared, and the need to provide a simple and prompt recourse in the case, with due guarantees. Following this interpretation, the Commission stated that this is a right of society and that it is emerging as a principle of international law under the dynamic interpretation of human rights treaties and, specifically, Articles 1(1), 8, 25 and 13 of the American Convention."¹⁹⁷

Finally, the Court resolved that,

"[n]evertheless, in the circumstances of the instant case, the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention."¹⁹⁸

Upon analyzing the alleged violation of articles 8, 25 and 1.1, the Inter-American Court concluded,

"that [the function of juridical organs] is not exhausted by enabling due process that guarantees defense in the trial,

197 I/A Court H.R., *Bámaca-Velásquez*. Case. para. 197.

198 I/A Court H.R., *Bámaca-Velásquez*. Case. para. 201.

but that they must also ensure within a reasonable time the right of the victim or the victim's next of kin to know the truth of what happened and for those possibly responsible to be punished. The right to effective judicial protection therefore requires that the judges direct the proceeding in such a way as to avoid undue delays and obstructions that lead to impunity, thus frustrating due judicial protection of human rights. In light of the above, the Court deems that the judges, who are in charge of directing the proceeding, have the duty to direct and channel the judicial proceeding with the aim of not sacrificing justice and due legal process in favor of formalism and impunity. Thus, if the authorities permit and tolerate such use of judicial remedies, they turn them into a means for those who commit the illegal act to delay and obstruct the judicial proceeding. This leads to a violation of the international obligation of the State to prevent and protect human rights and it abridges the right of the victim and the next of kin of the victim to know the truth of what happened, for all those responsible to be identified and punished, and to obtain the attendant reparations."¹⁹⁹

7. Prior Censorship

The American Convention prohibits, in absolute terms, prior censorship. The only challenge to this rule is censorship of public spectacles with the exclusive objective of regulating the access of them "for the moral protection of children and adolescents." This rule, as has been recognized by the Commission²⁰⁰, is unique to the American Convention. In this sense, paragraph 2 of article 13 of the American Convention establishes:

"[t]he exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability [...]"

199 I/A Court H.R., Myrna Mack-Chang. Case. Judgment of November 25, 2003. Series C No. 101, paras. 209/211.

200 See IACHR. Report n° 11/96. "Francisco Martorell", Case 11.230. May 3, 1996, para. 56. The case of Francisco Martorell was litigated by the victim and represented by CEJIL and Americas Watch (currently, Human Rights Watch).

For its part, paragraph 4 establishes:

“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.”

Interpreting these provisions, the Inter-American Court has established:

“that abuses of freedom of expression can not be subject to preventive measures, but may be grounds for the subsequent imposition of liability of the person implicated. In this case, the subsequent imposition of liability must be carried out through the subsequent application of civil sanctions rather than prior censorship of the unpublished expression.”²⁰¹

In this sense, it has clearly defined itself against censorship. It has held that “the seizing or barring of publications and, generally, any procedure that subjects the expression or dissemination of information to governmental control”, produces

“[a]n extreme violation of the right to freedom of expression, which occurs when governmental power is used for the express purpose of impeding the free circulation of information, ideas, opinions or news. Here the violation is extreme not only in that it violates the right of each individual to express himself, but also because it impairs the right of each person to be well informed, and thus affects one of the fundamental prerequisites of a democratic society.”²⁰²

The Court, in this way, only recognized one exception to censorship, establishing clearly in the Last Temptation of Christ case,

“[i]t is important to mention that Article 13(4) of the Convention establishes an exception to prior censorship, since it allows it in the case of public entertainment, but only in order to regulate access for the moral protection of children and

201 IACHR, Annual Report of the Special Rapporteur for Freedom of Expression, 2000, para. 24.

202 I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights) para. 54.

adolescents. In all other cases, any preventive measure implies the impairment of freedom of thought and expression."²⁰³

Also, the Inter-American Commission has decided in a forceful manner against previous censorship. It unequivocally pronounced:

"[t]he Convention allows restrictions to be imposed on the right to freedom of expression in order to protect the community from certain offensive manifestations and prevent the abusive exercise of that right. Article 13 authorizes certain restrictions to the exercise of this right and sets out the permissible limits and the requirements necessary to put these restrictions into practice. The principle set forth in that article is clear in that prior censorship is incompatible with the full enjoyment of the rights protected therein. The exception is the one contained in paragraph 4, which allows censorship of "public entertainments" for the moral protection of children. The only restriction authorized by Article 13 is the subsequent imposition of liability.. [t]he prohibition of prior censorship, with the exception present in paragraph 4 of Article 13, is absolute and is unique to the American Convention, as neither the European Convention nor the Covenant on Civil and Political Rights contains similar provisions. The fact that no other exception to this provision is provided is indicative of the importance that the authors of the Convention attached to the need to express and receive any kind of information, thoughts, opinions and ideas."²⁰⁴

The Special Rapporteur has established that censorship assumes the control and veto of information before it is disseminated, impeding the individual, whose expression has been censured, as well as the totality of society, from exercising its right to the freedom of expression and information.²⁰⁵

203 I/A Court H.R., "The Last Temptation of Christ" (Olmedo-Bustos et al.). Case. para. 70.

204 Nota 206: IACHR. Report n° 11/96. "Francisco Martorell", paras. 55/56. See, also, I/A Court H.R., "The Last Temptation of Christ" (Olmedo-Bustos et al.). Case. Both cases were litigated by CEJIL.

205 See for example, in Annual Report of the Special Rapporteur for Freedom of Expression, 2002. Chapter III.A.3.c, paras 19 and following.

With respect to censorship, the Declaration of Principles on the Freedom of Expression signals:

“5. Prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression.”

8. Ethics and the Freedom of Expression

The discussion on journalistic ethics has a long history, but, as has been observed, documented efforts to establish principles are found only from the end of the 19th century onward. At which point, journalistic information acquired the form of what we today denominate as social mass communication.²⁰⁶ There is still no consensus with respect to the manner of promoting journalistic ethics and the quality of information without becoming a form of State control. In this sense, as will be developed in the following paragraphs, the Inter-American System has explicitly pronounced against the imposition of qualifiers of information, such as “truthfulness”, as well as against compulsory membership to a journalist association.

In his 2001 Annual Report, the Special Rapporteur indicates some mechanisms that tend to promote ethical behavior of the media, and gives examples of state and non-state participation. With respect to state participation, the report establishes that,

“[t]he government can punish truly serious violations by the media through proportional sanctions that do not place excessive restrictions on freedom of expression. It can also

206 In 1896, the Austrian session of the Association of Polish Journalists created a Court of Honor that included the exhortation to abide by a *una moral periodística*. The first professional code of ethics emerged in Switzerland in 1900. For a detailed analysis of the theme, see Hernán Uribe, *La Invisible Mordaza: El Mercado contra la prensa*, Editorial Cuarto Propio, Santiago, Chile, 1999.

undertake positive measures in some cases that can improve media responsibility."²⁰⁷

In relation to state mechanisms, it gives examples such as ethical codes, training and press councils.²⁰⁸

Along these lines, the report concludes indicating:

"Some of the greatest obstacles to creating more ethical media are the lack of knowledge on the part of the public about the ways they can effect change in the media, lack of education in the media on ethical issues, lack of awareness in the media about what possibilities exist for encouraging more ethical behavior and the cost of implementing the various media accountability mechanisms.[47] While the government's role in this process must be limited for the reasons stated earlier, the government can encourage the voluntary use of various mechanisms to promote media accountability, especially through education. The government must refrain from placing restrictions on the media that are designed to promote ethical behavior. Given the freedom to choose how and what to report and the education necessary to make ethical decisions, the media will become more responsible."²⁰⁹

9. Prohibition of Obligatory Membership Laws

Obligatory membership to journalist associations has been a very controversial theme, including in the Inter-American System. Many think that obligatory membership can be a useful mechanism for regulating journalistic ethics and in improving working conditions. Nevertheless, the discussion has been presented because the freedom of expression is considered basic for the democratic system and essential as an individual right and, for that reason, restrictions to exercising freedom of expression must be minimal.

207 IACHR, Annual Report of the Special Rapporteur for Freedom of Expression, 2002. Chapter IV.B., para. 8.

208 IACHR, Annual Report of the Special Rapporteur for Freedom of Expression, 2002. Chapter IV.

209 See Annual Report of the Special Rapporteur for Freedom of Expression, 2001, Chapter IV, parr.31.

Although the theme has been resolved in an explicit form by the Court in the sense that it has declared the incompatibility between laws of obligatory membership to journalists and the American Convention, the debate between communication professionals continues.

As was indicated by the Special Rapporteur's 2002 Annual Report, discussion between the organs of the System had their origin in 1984 in the case brought against Costa Rica. In this case, the petitioner-editor of the newspaper "The Tico Times" was convicted of the illegal exercise of the profession, since he did not have a license from the association of journalists, and was sentenced to three months of prison. The Commission considered that article 13 of the American Convention had not been violated in this case, understanding that entities like journalists associations protect the right to the search and supply of information without controlling its dissemination and that it helps to regulate more than restrict the activities of journalists. The Commission considered, moreover, that the association of journalists protects the freedom of expression, lending members of the profession services like ethical regulations and promotion of professional and social development of its members.²¹⁰

Because of this declaration, the State of Costa Rica solicited an advisory opinion from the Court on obligatory affiliation to a professional association as a requisite for exercising journalism. This request led to the Advisory Opinion 5 of the Court that specifically declares the incompatibility of obligatory membership to journalist associations with article 13 of the American Convention. In this sense the tribunal affirmed:

"[t]he Court is of the opinion [...] [b]y unanimity, "[t]hat the compulsory licensing of journalists is incompatible with Article 13 of the American Convention on Human Rights if it denies any person access to the full use of the news media as a means of expressing opinions or imparting information, is incompatible with article 13 of the American Convention on Human Rights."²¹¹

210 Cfr. IACHR, Report N° 17/84. , "Stephen Schmidt", Case 9178, October 3, 1984. Annual Report of the Special Rapporteur for Freedom of Expression, 2002. Chapter III.A.3.e, para. 30.

211 I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights) First point of Conclusion.

The arguments outlined above are the following:

“[t]he argument that [obligatory] 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, violates the right to information that this same society has.”²¹²

And added:

“[j]ournalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional ‘colegio’.”²¹³

As a result of the Court’s decision, the Commission modified its position and today it clearly declares against obligatory membership to professional journalist associations. In effect, the report on the compatibility

212 I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights) para. 77.

213 I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights) para. 71.

between desacato laws and the American Convention on Human Rights has indicated that

"[...] every person is entitled to fully exercise freedom of expression without the necessity of degrees or membership in associations to legitimize this right. As stated earlier, the Inter-American Court has asserted that the exercise of freedom of expression requires that no one be arbitrarily limited or impeded in expressing his or her own thoughts, since such expression is not only the right of individuals, but also includes the collective right to receive any information whatsoever and to have access to the thoughts expressed by others. When the Convention proclaims that freedom of thought and expression includes the right to impart information and ideas through any medium, it underscores the indivisibility of expression and dissemination of thought. This means that restrictions imposed on dissemination represent, directly and in equal measure, a limitation on the right to express oneself freely."²¹⁴

Finally, it is important to mention that these standards have been expressed in the Declaration of Principles on the Freedom of Expression. Principle 6^o declares:

"[e]very person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression. Journalistic activities must be guided by ethical conduct, which should in no case be imposed by the State."

10. Prohibition of prior restraint on information

Within the discussion on journalistic ethics, one of the means that has been discussed and implemented in some countries has been the

214 IACHR, Report on the Compatibility of desacato Laws with the American Convention on Human Rights, OEA/Ser L/V/II.88, Doc. 9 Rev (1995) Cited in, IACHR, Annual Report of the Special Rapporteur for Freedom of Expression, 2000. Cit, Chapter IV.

establishment of information qualifiers, such as, for example, that the information must be “truthful, timely and impartial”.²¹⁵ This regulation can lead to profound problems in the exercise of the freedom of expression inasmuch as it can constitute an efficient mechanism of prior censorship by the State; especially for censoring those opinions that “disturb” the authorities. The Court and the Commission have made declarations with respect to these conditions, establishing their incompatibility with article 13 of the Convention. Nevertheless, until now, there has not been a decision which specifically resolved the theme. With respect to these types of conditionalities, the Inter-American Court has indicated:

“[t]he two dimensions mentioned [individual and collective] 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.”²¹⁶

For its part, the Special Rapporteur has indicated that,

“[p]roper interpretation of international standards, particularly Article 13 of the Convention, leads us to conclude that the right to information encompasses all information, including that which we might term “erroneous,” “untimely,” or “incomplete.” Therefore, any prior conditionality to qualify information would limit the amount of information protected by the right to freedom of expression. For example, the right to truthful information would not protect information that, by contrast to truth, we would label erroneous. Therefore,

215 Article 52 of the Constitution of the Republica Bolivariana de Venezuela “[c]ommunications are free and plural, and involve the duties and responsibilities indicated by law. Everyone has the right to timely, truthful and impartial information, without censorship, in accordance with the principles of this Constitution...”

216 I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights) para. 33.

this right would not protect any information that could be considered erroneous, untimely, or incomplete.”²¹⁷

On the other hand, we must warn that demanding the truth, the opportunity or the impartiality of information is based on the premise that there exists a unique and unquestionable truth. In this regard, it is important to distinguish between those themes that respond to concrete acts that may be factually corroborated, and those that correspond to value judgments. In this last case it is impossible to talk about the veracity of information. The veracity requirement can carry an almost automatic censorship of all information that is impossible to prove, and this would negate, for example, practically all political debate that is mainly based on ideas and opinions of a clearly subjective character.²¹⁸

The incompatibility of the criteria that restrict the right to freedom of expression has been affirmed in principle 7 of the Declaration of Principles on the Freedom of Expression. In this sense, it establishes:

“7. [p]rior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments.”

11. The right to refuse disclosure of sources

The main foundation underlying the right to withhold information about sources is the important public service that a journalist fulfills when he or she gathers and imparts information to people. In this manner, the journalist satisfies the individual’s right to receive information that, otherwise--that is, without keeping sources secret--could not be known.

In this sense, the Special Rapporteur has established that

“every social communicator has the right to refuse to disclose sources of information and research findings to

217 IACHR, Annual Report of the Special Rapporteur for Freedom of Expression, 2000. para. 31.

218 IACHR, Annual Report of the Special Rapporteur for Freedom of Expression, 2000. para. 32.

private entities, third parties, or government or legal authorities. Professional confidentiality is considered the social communicator's right not to reveal information or documentation that has been received in confidence or in the course of research."²¹⁹

For its part, the Inter-American Commission has declared that

"[f]reedom of expression is understood as encompassing the right of journalists to maintain the confidentiality of their sources. It is the social communicator's right not to reveal information or documentation that has been received in confidence or in the course of research. Professional confidentiality allows journalists to assure sources that they will remain anonymous, reducing fears they may have of reprisals for disclosing information. As a result, journalists are able to provide the important public service of collecting and disseminating information that would not be made known without protecting the confidentiality of the sources. The European Court of Human Rights has recognized the importance of the protection of journalistic sources as one of the basic conditions for press freedom."²²⁰

Similar to the Commission, the approval of the Declaration of Principles on the Freedom of Expression indicated that the protection of sources is part of the general guarantee of the freedom of the press.²²¹ On this point, it has been uncompromising, "[i]t should be emphasized that this right does not constitute a duty, as the social communicator does not have the obligation to protect the confidentiality of information sources, except for reasons of professional conduct and ethics."²²²

219 IACHR, Annual Report of the Special Rapporteur for Freedom of Expression, 2000, para. 36.

220 IACHR, Report on Terrorism and Human Rights, para. 279.

221 IACHR, Report on Terrorism and Human Rights, para. 280.

222 IACHR, Report on Terrorism and Human Rights, para. 280. In this report, the Commission cited the Annual Report of the Special Rapporteur for Freedom of Expression, 2000.

Regarding this, the Declaration of Principles on the Freedom of Expression dedicates one of its principles to the theme in question, establishing:

“[e]very social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.”²²³

12. Assassination, kidnapping, intimidation, or threats to social communicators

One of the most serious problems facing the Americas is the constant threats, aggression and homicides of social communicators. In effect, the exercise of journalism has converted into one of the most dangerous professions in the hemisphere. Assassination, threats and harassment of social communicators constitute a direct violation of the rights to life and physical integrity. In this sense, the American Convention establishes:

Article 4. Right to Life

1. “[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”

Article 5. Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”

223 See Principle 8°.

But in these cases, because social commentators are the main implementers of the freedom of expression²²⁴, any attack or aggression towards their lives or personal integrity for reasons of exercising their profession constitutes a violent attack against the freedom of expression in general. These attacks produce a paralyzing effect on society by sending a very clear message to those who carry-out informative activities, which becomes a proven method of effective censorship and management of information.²²⁵

The State can be responsible for these acts directly or indirectly: it is directly responsible when one of its agents threatens kidnaps, intimidates or assassinates a social commentator; it is indirectly responsible when it does not seriously investigate the acts or when it does not effectively protect people in risk. Thus, its international responsibility is triggered when also dealing with actions of private individuals.

The Inter-American Commission has explicitly sustained,

“[a]ttacks on journalists are specifically intended to silence them, and so they also constitute violations of the right of a

224 The Honorable Inter-American Court has indicated that it is primarily through the media that society exercises its right to the freedom of expression and that “[i]t is also necessary that journalists and, in general, all those who dedicate themselves professionally to the mass media are able to work with sufficient protection for the freedom and independence that the occupation requires....[t]he practice of professional journalism cannot be differentiated from freedom of expression. On the contrary, both are obviously intertwined, for the professional journalist is not, nor can he be, anything but someone who has decided to exercise freedom of expression in a continuous, regular and paid manner”. I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights) paras. 78 and 74.

225 It is important to emphasize the importance of denouncing these attacks and harassment before a competent authority, since the Commission requires it as one of the conditions for holding the State responsible for an omission in the violation of the right to life and personal integrity; that is, in those cases in which the assassination is not imputable to the State or its agents. In one particular case, the Commission considered it impossible to impute responsibility to the State, “[t]he authorities knew about the threats Mr. Félix Miranda had received, since they had not been apprised thereof by the competent bodies in order for the State to take the steps necessary for safeguarding the security and the life of the aforementioned journalist.” IACHR. Report N° 50/99. Case 11.739. Héctor Felix Miranda. Mexico, April 13, 1999, para. 15.

society to have free access to information. An independent and critical press is fundamental to ensuring respect for other liberties that are part of a democratic system of government and a state in which the rule of law prevails."²²⁶

For his part, the Special Rapporteur has signaled:

"[t]he murder, abduction, intimidation and threatening of journalists, as well as the destruction of press materials, are carried out with two concrete aims. The first is to eliminate journalists investigating attacks, abuses, irregularities or illegal acts of any kind committed by public officials, organizations or private individuals in general. This is done to make sure that the investigations are not completed or never receive the public debate they deserve, or simply as a form of reprisal for the investigation itself. Secondly, such acts are used as an instrument of intimidation that sends an unmistakable message to all members of civil society engaged in investigating attacks, abuses, irregularities, or illicit acts of any kind. This practice seeks to silence the press in its watchdog role, or make it an accomplice to individuals or institutions engaged in abusive or illegal actions. Ultimately, the goal is to keep society from being informed about such occurrences, at any cost."²²⁷

In this sense, the State has a special responsibility to protect journalists and the media.²²⁸ In accordance with the American Convention and other international instruments, the States must abstain from directly assassinating or harassing journalists and the media, and "[s]tates have the obligation to effectively investigate the events surrounding the murder of and other violent acts against journalists and to punish the perpetrators."²²⁹

226 Report on the Situation of Human Rights in Mexico. OEA/Ser.L/V/II.100, Doc. 7 rev. 1, September 24, para. 649. Likewise, see, Report N° 50/99 .

227 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2000. para. 39.

228 IACHR. Report on Terrorism and Human Rights. Cit. para. 297.

229 IACHR. Report on Terrorism and Human Rights. Cit. para. 298.

With respect to the State's duty to investigate human rights violations in general, the Inter-American Court has said,

"[a]n investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government."²³⁰

For its part, the Inter-American Commission has specifically held in relation to the case of communication professionals,

"a State's failure to carry out an effective and thorough investigation of the murder of a journalist and to apply criminal sanctions against the material and intellectual authors is particularly serious in terms of the impact this has on society. This type of crime has an intimidating effect not just on journalists, but on all citizens, because it inspires fear of reporting attacks, abuses and illegal activities of any kind. This effect can only be avoided by concerted government action to punish those responsible for murdering journalists. In this way, States can send a strong, direct message to society that there will be no tolerance for those who engage in such a grave violation of the right to freedom of expression."²³¹

Additionally, the Declaration of the Principles on the Freedom of Expression has echoed the doctrine established repeatedly by the Inter-American Court and Commission, and has codified and enshrined its criteria respecting this point. Thus, principle 9 establishes:

"9. The murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression. It is the duty of the state to prevent and investigate such occurrences,

230 Cfr. I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, para. 177.

231 IACHR Report N° 50/99, para. 52. See also, Annual Report of the Special Rapporteur for Freedom of Expression, 2000, paras 40/41.

to punish their perpetrators and to ensure that victims receive due compensation.”

The Report of the Inter-American Commission on terrorism adds an analysis on the protection of journalists and press installations during armed conflicts to these standards of protection.²³² It specifically establishes,

“[u]nder the rules and principles of international humanitarian law, applicable in both international and non-international armed conflicts, journalists are considered to be civilians and are entitled to the rights that this status implies, including those analyzed in other sections of this report. Journalists retain this civilian status so long as they “take no action adversely affecting their status as civilians.” Those journalists who serve as war correspondents accredited to a particular armed force in an international armed conflict are entitled to prisoner of war status if they fall under the power of the enemy. Any other journalist who is captured by an enemy power may only be detained if criminal proceedings are to be instituted against him or her or if imperative reasons of security justify internment. The status of journalists with respect to internal armed conflict is not explicitly defined, however, journalists should be considered civilians in this type of conflict as well, so long as they do not engage in acts of hostility or participate directly in hostilities. It should be emphasized that the dissemination of information or the expression of opinions in favor or in disfavor of a party involved in the conflict cannot be considered as hostile acts and cannot render the person expressing such views or opinions a legitimate military objective.”²³³

With respect to press installations it establishes:

“[w]hile media installations are not specifically mentioned as civilian objects, they should generally be considered as

232 For more information, see IACHR, Report on Terrorism and Human Rights. paras. 300/303.

233 IACHR. Report on Terrorism and Human Rights. para. 301.

such, since their nature and location is generally not military-related, and since they are generally not used for military purposes or to make an effective contribution to the military action. However, if media installations are used as part of a command and control or other military function, they may become legitimate military targets subject to direct attacks.”²³⁴

13. Defamation

Defamation is a matter that is currently being debated in the proceedings of individual cases before the Inter-American Court. In the context of litigation, CEJIL has argued that the criminalization of crimes against honor is unjustifiable in the Inter-American System. In effect, CEJIL sustains that the codification of defamation, submitting it to a criminal proceedings with a criminal sanction, contravenes the right to the freedom of expression.

The violation of the freedom of expression through these criminal offenses is based on the fact that these infringe on the three limits established by the Convention for the imposition of restrictions to the right at issue. In the first place, as much the codification as the punishment of defamation are not necessary in a democratic society; secondly, they are disproportionate; and finally, they constitute an indirect means of restriction to the freedom of expression and information.²³⁵ In effect, subjecting a person to criminal proceedings—and eventually sanction—constitutes a particularly serious means of restricting rights, not only because of the risk of losing one’s freedom, but also for the stigmatizing effect that the criminal proceedings and sanction carry, as well as other additional consequences.²³⁶ In turn, in general, the mere existence of criminal proceedings against a person for this type of crime generates an inhibiting effect on society as a whole that limits open and democratic debate.

234 IACHR Report on Terrorism and Human Rights. para. 303 in fine.

235 See, in particular, section 2 of this chapter that refers more extensively to the permitted restrictions.

236 Thus, for example, the official registry of a person accused or convicted for the commission of a crime can prevent him or her from obtaining probation, or jobs, or render immigration or other kinds of procedures difficult.

Both comparative law and the American Convention itself provide less restrictive means of protecting the honor of people. In this sense, the Inter-American Commission has sustained, “[t]he State fulfills its obligation to protect the rights of others by establishing statutory protection against intentional attacks on honor and reputation through civil procedures, and by enacting legislation to ensure the right to rectification or reply.”²³⁷ Thus, article 14, of the American Convention, enshrines the right of all people effected by inexact or offending information publicly disseminated to request the right to reply. On the other hand, diverse internal legislations contemplate civil actions.²³⁸

Nevertheless, because in this type of proceedings there are rights at play such as that of property, it is necessary to establish criteria that make this last route compatible with the Convention.²³⁹

237 IACHR, Report on the Compatibility of desacato Laws with the American Convention on Human Rights, para. 210.

238 In this regard, the President of the Court in his vote in the case of *Herrera Ulloa v. Costa Rica*, recognized, “Through the civil venue its possible to obtain the results sought after in the criminal venue, without the risks and disadvantages that the latter presents. In effect, the In fact, the condemnatory civil sentence constitutes, by itself, a declaration of illegality no less emphatic and efficient than the criminal one: it signals, under a different legal title the same thing expected from the criminal venue, that is, that the defendant incurred an illicit behavior that harmed the plaintiff, who benefits from law and reason. In this way, the civil judgment offers a reparation by offering satisfaction for the honor of the person who brought the civil action....Evidently, the civil solution does not create the same problems that the criminal solution raises in face of national and international rules of human rights, nor does it have the intimidating character that is inherent in a criminal threat and which, as the court has seen, inhibits the exercise of freedom of expression.” Cfr., Reasoned Concurring Opinion of Judge Sergio García Ramírez in the Judgment of Inter-American Court of Human Rights in *Herrera Ulloa*. Case. paras. 18 y 19, in fine.

239 Within a general analysis in which the Special Rapporteur made an evaluation of the state of the freedom of expression in the hemisphere, he stated: “[t]he Rapporteur has maintained, on repeated occasions, that provided there is an independent judiciary and the civil courts are used, legal action is a valid tool for defending against abuses committed by journalists or the media. The Rapporteur notes, however, that lawsuits filed by public officials are often used as a form of intimidation to silence the work of reporters and the press.” IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2001. Chapter II para. 7.

In the first place, a clear and precise **distinction must be established between public people and questions of public interest and private people with private interests.** With respect to the difference between public and private people, the Declaration of Principles on the Freedom of Expression, in its tenth principle establishes:

“10. Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person’s reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.

In turn, the next principle declares:

“Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as “desacato laws,” restrict freedom of expression and the right to information.”

The Commission has decided on this point, establishing clear criteria, that:

“[i]n 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.”²⁴⁰

240 IACHR. Report on the Compatibility of “Desacato” laws with the American Convention on Human rights.

For its part, the European Court has said: “[t]he limits of acceptable criticism are accordingly wider with regard to a politician acting in his public capacity than in relation to a private individual. 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 display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.”²⁴¹

On the other hand, manifestations related to questions of public interest must enjoy a wider margin of protection and its restrictions must be subjected to stricter scrutiny, so as to make possible an open debate among citizens about these themes. In this sense, the media not only has the right, but also the obligation to keep citizens informed about these themes.²⁴² This was the interpretation of the European Court, advising “[the] freedom [of Expression] requires extra guarantees when the discussion relates to a matter of public interest.”²⁴³ In particular, “[t]he most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.”²⁴⁴

In a recent judgment, the Inter-American Court addressed this extreme situation, establishing,

“Democratic control by society through public opinion promotes transparency in governmental activities and encourages

241 ECHR, *Case of Oberschlick v. Austria*, Judgment of 23 May 1991, para. 59. [Translation by author].

242 See ECHR, *Stambuk v. Germany*, Judgment of 17 October 2002, para. 42 and citations.

243 ECHR, *Castells v. España*, Judgment of 23 April 1992, para. 40. In this case, the European Court considered that the sentence imposed on the petitioner constituted a violation of the right to the freedom of expression inasmuch as the statements that gave rise to the proceeding was produced in the context of political criticism about the government and in the public interest. In this way, the Court established that the restrictions to the freedom of expression can not be used as an instrument by those who exercise political power to limit criticism of public authorities.

244 ECHR, *Bladet Tromsø and Stensaas v. Norway*, Judgment of 20 May 1999, para. 64.

officials to act responsibly when conducting public business. This is why only a very reduced margin to any restriction of political discussion or discussion of matters of public interest must exist... In this context it is logical and appropriate that expressions concerning public officials or other persons exercising functions of a public nature must enjoy, pursuant to article 13.2 of the Convention, leeway in order for an ample debate to take place on matters of public interest. This wide margin of openness is essential to the functioning of a truly democratic system. However, this is not to say that the honor of public officials, or that of public figures, should not be legally protected. It must be protected, but in a manner that conforms to the principles of democratic pluralism... It is in this way that the emphasis of this different threshold of protection is not determined by the quality of the subject, but on the character of public interest, which is determined by the activities and roles played by a given person. Those persons who influence matters of public concern have voluntarily exposed themselves to more demanding public scrutiny, and, in consequence, find themselves exposed to a greater risk of being criticized, since their activities have left the private sphere and have entered into the sphere of public debate."²⁴⁵

Secondly, **one must differentiate assertions of fact from value judgments**. The latter, to the extent that they are not susceptible to being considered as true or false, should not be justiciable and, for that reason, must not attach liability to those who make them. In this regard, the Special Rapporteur affirmed:

There should be no liability when the information giving rise to a lawsuit is a value judgment rather than a factual assertion. If the information is a value judgment, it is impossible to prove its truth or falsity, since it represents a totally subjective opinion that cannot be proved.²⁴⁶

245 Cfr. I/A Court H.R., Herrera Ulloa Case, paras. 127-129. (translation by author)

246 IACHR, Annual Reports, 2000, Volume III Report of the Special Rapporteur for Freedom of Expression 2000, para 47.

Special reference in this sense has been made to expression in political environments. Thus, in the report of the Commission on contempt laws it advises “This is particularly the case in the political arena where political criticism is often based on value judgments, rather than purely fact-based statements”.²⁴⁷

Third, **the test of real malice must be established by legislation**.²⁴⁸ In accordance with this test, in determining civil liability of the defendant, the subjective component of liability must be considered: that is, the direct knowledge that the information disseminated was in fact false (intent) or the suspicion that it could not be true and the negligent act of the accused with respect to this knowledge or suspicion (actual malice). Thus, objective responsibility is not sufficient proof in the determination of civil liability.

As established in the tenth principle of the Declaration of Principles of Freedom of Expression,

“it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.”

The Special Rapporteur has commented on this principle and in this sense has understood that

[t]his principle also establishes the standard of “actual malice” as a legal doctrine used to protect the honor of public officials or public figures. In practice, this standard means that only civil sanctions are applied in cases where false information has been produced with “actual malice,” in other words, produced with the express intention to cause harm, with full knowledge that the information was false or with

247 IACHR, Report on the Compatibility of desacato Laws with the American Convention on Human Rights.

248 This term (“actual malice”) was fashioned by the Supreme Court of the United States in the case “New York Times v. Sullivan”, 376 US 254.

manifest negligence in the determination of the truth or falsity of the information.”²⁴⁹

For its part, the European Court has adopted this test in various decisions, and has criticized the so-called “exceptio veritatis”. In the case *Thorgeirson v. Iceland*, for example, the court held against the conviction for defamation of a journalist who denounced the police for arbitrary and violent acts, saying it was contrary to the right of freedom of expression since his account was based on another person’s version of the facts. With respect to this, it indicated: “[i]n so far as the applicant was required to establish the truth of his statements, he was, in the Court’s opinion, faced with an unreasonable, if not impossible task.”²⁵⁰ In another case, this tribunal considered that it was a violation of the right to free expression to hold the media liable for imparting objectively inexact information if it had shown that it had acted in “good faith” when it based its information on the statements of a trustworthy public official.²⁵¹

A derivation of the test or doctrine of real malice is the doctrine of faithful reporting which exonerates liability: “according to the doctrine of faithful reporting, the faithful reproduction of information does not give rise to responsibility, even in cases in which the information is not correct and could cause harm to the honor of a person.”²⁵² In this sense, the Special Rapporteur warned:

“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.”²⁵³

249 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2000. para. 46.

250 ECHR, *Thorgeirson v. Island*, Judgment of 28 May 1992, para. 65.

251 See, ECHR, *Bladet Tromso and Stensaas v. Norway*, Judgment of 20 May 1999, paras. 65, 68 y 72.

252 Annual Report of the Special Rapporteur for Freedom of Expression, 2000. para 49.

253 *Libertad de expresión en las Américas. Los cinco primeros informes de la Relatoría para la Libertad de Expresión, IIDH y Relatoría para la Libertad de Expresión de la Comisión Interamericana de Derechos Humanos*, San José de Costa Rica, 2003, p. 105.

Finally, in order for a restriction to the right to the freedom of legitimate thought and expression to fulfill the proportionality and necessity requirements demanded by the Convention and clarified by the general norms of interpretation²⁵⁴, it must fulfill the following prongs: **it must be proportional** to the damage caused; its aim must be **reparation for the claimant for the damage caused**—and not a sanction of the defendant²⁵⁵; and **it must only order compensation for damages and harm when the insufficiency of other non-pecuniary remedies has been demonstrated**.

14. Desacato Laws

“Desacato laws” are those laws which grant the honor of public officials special protection. For example, those that stipulate additional or higher penalties, or more expedited mechanisms for criminal or civil proceedings, against someone who expressed opinions or reproduced information that is deemed harmful to someone’s honor.

Even though the Inter-American Court has not directly declared the incompatibility of desacato laws with article 13 of the American Convention, the Commission issued a report specifically on the issue as an epilogue to a friendly settlement in the case *Verbitsky v. Argentina*, litigated by CEJIL and Human Rights Watch/Americas. In this report, the Commission explicitly declared that these laws are incompatible with the American Convention; since, they violate the right to the freedom of thought and expression.²⁵⁶

This report indicated:

“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 are not available to other members of society. This distinction inverts

254 See, section 2 of this same chapter on “Permittable Restrictions”.

255 In this regard, the principle 13.b. of the Principles on Freedom of Expression

256 See, section 2 of this same chapter on “Permittable Restrictions” on and Protection of Reputation. The Definition of Defamation affirms: “The overriding goal of providing a remedy for defamatory statements should be to redress the harm done to the reputation of the plaintiff, not to punish those responsible for the dissemination of the statement” (Article 19, July, 2000).

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 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. (...)

Desacato laws restrict freedom of expression because they carry with them the threat of imprisonment and/or fines for those who insult or offend a public official. (...) The fear of criminal sanctions necessarily discourages people from voicing their opinions on issues of public concern particularly when the legislation fails to distinguish between facts and value judgments. Political criticism often involves value judgments."²⁵⁷

For its part, the Special Rapporteur has established that

"[s]uch [laws desacato laws] completely invert the parameters of a democratic society in which public officials must be subject to greater scrutiny by society. To safeguard democratic principles, these laws must be repealed in countries where they still exist. Because of the way in which they are structured and used, these laws constitute bastions of authoritarianism left over from past eras and must be done away with."²⁵⁸

257 Briefly summarizing the background for this report, on May 5, 1992, a complaint was presented to the Commission by Mr. Horacio Verbitsky, professional journalist, who had been convicted for the crime of desacato for defaming Mr. Augusto César Belluscio, minister of the Supreme Court of Justice of Argentina. In effect, the Argentine authorities considered the publication of an article in which the journalist referred to Belluscio as "disgusting" constituted a crime of desacato. In September of 1992, the government and the petitioners agreed to certain guidelines in order to initiate procedures for a friendly settlement that culminated in the derogation of the crime of desacato from the Argentine legislation and the publishing of a report by the Inter-American Commission in which it declared the incompatibility of the crime of desacato with the American Convention. See IACHR. Report N° 22/94, Case 11.012, September 20, 1994.

258 IACHR. Report on the Compatibility of "Desacato" laws with the American Convention on Human rights.

The Declaration of Principles on the Freedom of Expression also refers to desacato laws in its Principle 11:

“Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as “desacato laws,” restrict freedom of expression and the right to information.”

15. Prohibition of monopolies and oligopolies

An important restriction to the freedom of expression in the Americas is monopolistic ownership of the media.²⁵⁹ While it is true that as much the Court as the Commission have declared the incompatibility of monopolies and oligopolies of the media with the American Convention, they still have not developed concrete parameters for the effective protection of the plurality of the media and full freedom of expression. One problem is the difficulty of proof, since many times monopolies are undercover. Nevertheless, they have provided an important doctrinal discussion around the role of the State in the promotion of a plurality of voices in a democratic society. It would be very useful if this idea were to be developed through the resolution of cases.

While the organs of the system still have not had the opportunity to specifically pronounce with respect to this theme, as much the Court and the Commission established certain promising standards: in effect, both organs have clearly established that the existence of monopolies and oligopolies of the media represent a serious obstacle to the right of all people to search for, receive and disseminate information and ideas.

In this sense, the Inter-American Court has signaled:

“It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof,

259 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2000. para. 52.

in whatever form, and guarantees for the protection of the freedom and independence of journalists.”²⁶⁰

For its part, the Inter-American Commission has said:

“the free circulation of ideas and news is possible only through a plurality of sources of information and respect for the communications media. But, viewed in this light, it is not enough to guarantee the right to establish and manage organs of mass media; it is also necessary that journalists and, in general, all those who dedicate themselves professionally to the mass media are able to work with sufficient protection for the freedom and independence that the occupation requires.”²⁶¹

Also on this point, the Special Rapporteur has established:

“It is the mass media that makes the exercise of freedom of expression a reality and therefore the media must adapt itself to the requirements of this right (...)”

“In this context, it is imperative to guarantee the right of every person to equal opportunity to receive, seek and impart information through any communications medium, without discrimination for any reason. Monopolies or oligopolies in the mass communications media represent a serious obstacle to the right of all people to express themselves and to receive information.

(...)

“In modern society, mass communications media, such as television, radio and the press, have an undeniable power in the cultural, political, religious etc. formation of society’s inhabitants. If these media are controlled by a small number of

260 In this regard, Uribe argued that “the world tendency toward the concentration of property is apparent also in the communications arena, and today it is possible to speak, *verbi gratia* for example of the big seven of this field. Time Warner, Walt Disney, Sony, Viacom, Seagram, Bertelsman y News Corporation”. Cfr., Uribe, *La invisible Mordaza*. *supra* 206.

261 I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights) para. 34.

individuals, or by a single one, this in fact creates a society in which a small number of persons exercise control over information and, directly or indirectly, over the opinions received by the rest of society.”²⁶²

Additionally, the Declaration of Principles on the Freedom of Expression establishes:

“12. Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people’s right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.”

16. Independence of the Media

Despite the fact that the prohibitions of restrictions to the right to the freedom of expression by indirect ways or mechanisms is expressly established in the American Convention, and that the jurisprudence of the Court and Commission has been clear with respect to this prohibition, there still have not been many cases presented that claim this type of violation.

The provision of article 13(3) of the American Convention is clear on this point:

[t]he right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

262 IACHR, the Application before the Inter-American Court of Human Rights in the Ivcher Bronstein case, p. 27.

For its part, the Inter-American Court also has interpreted and applied this norm, indicating:

“[t]he Article 13(3) does not only deal with indirect governmental restrictions, it also expressly prohibits ‘private controls’ producing the same result. This provision must be read together with the language of Article 1 of the Convention wherein the States Parties ‘undertake to respect the rights and freedoms recognized (in the Convention)... and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms....’ Hence, a violation of the Convention in this area can be the product not only of the fact that the State itself imposes restrictions of an indirect character which tend to impede ‘the communication and circulation of ideas and opinions,’ but the State also has an obligation to ensure that the violation does not result from the ‘private controls’ referred to in paragraph 3 of Article 13.”²⁶³

In relation to the independence of journalists and the media, the Court has signaled:

“[the] freedom of expression is not exhausted in the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate method to disseminate thought and allow it to reach the greatest number of persons. (...) [the] importance of this right is further underlined if we examine the role that the media plays in a democratic society, when it is a true instrument of freedom of expression and not a way of restricting it; consequently, it is vital that it can gather the most diverse information and opinions.... (...) Furthermore, it is essential that the journalists who work in the media should enjoy the necessary protection and independence to exercise their functions comprehensively, because it is they who keep

263 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2000. paras. 53/55.

society informed, and this is an indispensable requirement to enable society to enjoy full freedom."²⁶⁴

Also the Special Rapporteur has pronounced with respect to this issue, stating the following:

"[t]he State must refrain from using its power and public funds in order to punish, reward, or favor social communicators or the mass media based on their approach to coverage. The State's primary role is to facilitate the most wide-ranging, pluralistic and free debate of ideas. Any interference that restricts the free flow of ideas must be expressly prohibited by law."²⁶⁵

Likewise, he sustained:

"[t]he use of the State's power to impose restrictive criteria can be a covert means of censoring information that is considered critical of authorities.... [t]he imposition of direct or indirect pressure aimed at silencing the informative work of social communicators impedes the full functioning of democracy, inasmuch as the consolidation of democracy in the hemisphere is intimately related to the free exchange of ideas, information and opinions among individuals."²⁶⁶

Finally, we can cite the Declaration on Principles of the Freedom of Expression, which also reflects the importance of the existence of an independent media and the State's role as guarantor. Its principle 13 declares:

264 I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights) Cit., para. I/A Court H.R., *Ivcher-Bronstein*. Case.

265 *Id.* paras. 147/149/150. In the case of *Ivcher Bronstein*, the Court indicated that "the resolution that annulled Mr. Ivcher's nationality constituted an indirect means of restricting his freedom of expression, as well as that of the journalists who worked and conducted investigations for *Contrapunto* of Peruvian television's Channel 2". Cited in IACHR. *Report on Terrorism and Human Rights*. para. 296.

266 IACHR. *Annual Report of the Special Rapporteur for Freedom of Expression*, 2000. para. 56.

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

17. Community Radios

Radio broadcasting is the exercise of the freedom of the press through a technical means other than paper.²⁶⁷ The theme of community radios is another aspect related to the freedom of expression that has not been dealt with directly by the Inter-American Court even though it presents a singular issue. In effect, the Inter-American Commission as well as the Special Rapporteur have discussed the obligation to respect democratic criteria that assures equal opportunities to access frequencies.

Traditional mediums of mass communication do not always present the most accessible route for communicating the needs and accomplishments of all sectors of society. In this sense, alternative and community media have been working hard to win the inclusion of strategies and goals that attend to their needs in national agendas. In this manner, they are strengthening information and dialogue necessary in a democratic society.

In October 2002, the World Association of Community Radio Broadcasters (AMARC), the Latin American Association of Radio Education (la Asociación Latinoamericana de Educación Radiofónica) (ALER), lawyer Damián Loreti and CEJIL made presentations during a hearing of the Inter-American Commission about the situation of community radios

267 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2000. paras. 56/58.

in the Americas. Through this experience, they were able to alert the Commission about the existence of legislation in the continent that excluded and discriminated against social organizations or non-profit entities, curtailing their ability to own radio and television frequencies. In various countries, the right to information is indirectly restricted by discriminating against this type of station, imposing limitations on their outreach, making technical thresholds inaccessible and imposing economic types of restrictions.²⁶⁸

In this sense, the Inter-American Commission has signaled in its Report on Paraguay:

“[d]uring its visit, the Special Rapporteur received and has continued receiving information regarding the problematic situation affecting community radio stations in Paraguay. According to the information received, the vast majority of the radio stations that operate in Paraguay have obtained their licenses based solely on economic criteria. On several occasions the Rapporteur has said that the assignment of radio and television frequencies should consider democratic criteria that guarantee equal opportunity in access to them for all sectors of society. Auctions that consider solely economic criteria are incompatible with democratic government and with the right to freedom of expression and information guaranteed in the American Convention on Human Rights.”

(...)

“[t]he Rapporteur has also learned of a new UNESCO initiative to seek solutions that permit an understanding between the community and commercial radio stations. This UNESCO initiative is supported by the Office of the Rapporteur and includes the participation of the International Association of

268 See the report presented to the Inter-American Commission by the World Association of Community Broadcasters (AMARC) and the Latin American Association of Radio Education (Asociación Latinoamericana de Educación Radiofónica (ALER), represented by Gustavo Gómez and Néstor Busso, respectively, and with the assistance of lawyer Damián Loreti and CEJIL at the October 21, 2002 hearing.

Radio Broadcasting and the World Association of Community Radio Broadcasters.”²⁶⁹

Likewise, in a press alert in which the Rapporteur made a preliminary evaluation about the situation of the freedom of expression in Guatemala, and later visiting the country, he indicated:

“[i]n relation to this subject, the Office of the Rapporteur wishes to say that the existence of monopolistic practices in the mass media, whether in television, radio, or the written press, is not compatible with the free exercise of the right to freedom of expression in a democratic society. It is the duty of the states to ensure equal opportunity of access to radio and television frequency concessions. In connection with the point, the Inter-American Court has held that, ‘It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.’”²⁷⁰

With respect to this point, the Declaration on the Principles of the Freedom of Expression in its principle 12 specifically presents the need to establish anti-monopoly regulations in order to stimulate a plurality of voices:

“12. Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people’s right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account

269 This panorama is reflected in the press alert of The World Association of Community Broadcasters (AMARC), October 21, 2002.

270 IACHR. Third Report on the Situation of Human Rights in Paraguay OEA/Ser./L/VII.110 doc. 52, 9 March 2001, Chapter IV, paras. 53/54.

democratic criteria that provide equal opportunity of access for all individuals.”

For its part, principle 13 refers to a generic form of state action that implicates indirect control that can result in the silencing of alternative channels of expression. It is also relevant to the situation of community media sources:

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

An open debate exists with respect to the measures that States must take to assure the participation of all people in the exercise of their right to the freedom of expression, especially related to the necessity of respecting democratic criteria – not merely economic- to assure equal opportunities in the distribution of radio and television frequencies. Likewise, the establishment of legislation that assures non-discrimination and permits access to information, along with other complementary norms that regulate its exercise and contemplate international standards in the matter, is considered, indispensable. The Inter-American System has yet to form part of this debate, as well as to establish a clear parameter in order to assure the participation of community radios.²⁷¹

271 IACHR. Preliminary Evaluation of Freedom of Expression in Guatemala. Press Release of the The Special Rapporteur for Freedom of Expression. Press Release 24/00, para. 20.

18. Internet and the Freedom of Expression

The Special Rapporteur refers to this theme in his 1999 Annual Report. In this document, he writes:

“[t]he 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 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. 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.”²⁷²

Likewise, in his 2001 Annual Report, the Special Rapporteur established:

“The Rapporteur urges states to implement mechanisms that will allow all citizens access to the Internet and also to refrain from regulating its content in any way that would violate the provisions of these two international instruments.”²⁷³

272 See The World Association of Community Broadcasters (AMARC), *Carpeta de Información y Sensibilización: Panorama legislativo de la Comunicación y los Medios Alternativos en América Latina*, 2002

273 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 1999., Chapter II. D.

19. Women and the Freedom of Expression

In his 1999 Annual Report, the Special Rapporteur specifically refers to the relation between the condition of women and its repercussion on the right to the freedom of expression and information.

Regarding this point, he indicates:

“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.”²⁷⁴

Continuing, he specifies three particular factors of inequality in the situation of women that has a direct influence on their right to the freedom of expression and information, particularly with regard to their right to access to information:

“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

(...)

“Violence or fear of violence also curtails women’s freedom of expression and information. Intimidated by the violence, women frequently opt not to report incidents of violence to the authorities, remain in seclusion and do not participate in society

(...)

274 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2001. Chapter II. B, para. 11 in fine.

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.

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 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."²⁷⁵

20. Other forms of expression

The American Convention protects the right of all people to the freedom of thought and expression, clearly establishing that it includes the "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". That is, that the protection contemplated by the Convention includes not only written and oral expression, but also any other type of expression for any type of "proceeding".

In this way, the Inter-American Commission indicated in its petition before the Inter-American Court in the case of the Last Temptation of Christ that

"[t]his conventional norm [article 13] enshrines the right to receive information in artistic form or any other medium, and expressly establishes that the exercise of this right cannot be subject to previous censorship. Article 13 reflects the full concept of the freedom of expression and autonomy of people. The objective of this norm is to protect and promote access to information, ideas and artistic expressions of all

275 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 1999. Chapter II. C.

kinds and in this way strengthen the functioning of a plural democracy.

(...)

“Respect for these freedoms is not limited to allowing the circulation of only ideas and artistic works acceptable to the opinion of State organs. The duty to not interfere in the enjoyment of the right to access information of all types extends to the circulation of information and to the exhibition of artistic works without needing to count on a benefactor from a state authority at any given moment.”²⁷⁶

The Court accepted the allegations of the Commission that article 13 of the Convention applies to more than just written expressions when ruling against the Chilean State for having censored the movie “The Last Temptation of Christ”.

For its part, the Special Rapporteur has pronounced in the same manner:

“It also should be emphasized that the declaration refers to freedom of expression ‘in all its forms and manifestations.’ The right to freedom of expression is not limited to the media or to individuals who exercise this right through the media. The right to freedom of expression includes artistic, cultural, social, religious and political expressions, as well as any other type of expression.”²⁷⁷

In turn, the Declaration of the Principles of the Freedom of Expression establishes:

“[i]t also should be emphasized that the declaration [of Principles on Freedom of Expression] refers to freedom of expression ‘in all its forms and manifestations’. The right to freedom of expression is not limited to the media or to individuals who exercise this right through the media. The right to freedom of expression includes artistic, cultural, social,

276 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 1999. Chapter II. C.

277 CIDH, the application before the Inter-American Court v. Chile in the case of “The Last Temptation of Christ” (Olmedo Bustos y otros). (translation by author)

religious and political expressions, as well as any other type of expression.”

21. Right to Reply

Despite the fact that the American Convention expressly recognizes the right to reply, there is not much jurisprudence on this matter. Principally, the theme has been dealt with in an Advisory Opinion by the Inter-American Court and reports of the Commission and the Special Rapporteur with relation to the elimination of desacato and the decriminalization of defamation.

Article 14 of the American Convention contains this right in a broad manner. In this regard, it expresses:

- “1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.”

In interpreting this provision, the Inter-American Court has specifically made declarations in relation to three questions that were formulated in Costa Rica’s request for an advisory opinion. From the Court’s decision, we can distinguish three thematic axes in relation to this right.

The right to reply is a right established by the Convention and is an obligation of the States:

“[t]he argument that the phrase ‘under such conditions as the law may establish, ‘used in Article 14(1), merely empowers the States Parties to adopt a law creating the right of reply or correction without requiring them to guarantee it if their internal legal system does not provide for it, is not consistent with the ‘ordinary meaning’ of the terms used nor with the ‘context ’ of the Convention. It is worth noting, in this

connection, that the right of reply or correction for inaccurate or offensive statements disseminated to the public in general is closely related to Article 13(2) on freedom of thought and expression, which subjects that freedom to the “respect of the rights and reputations of others”;to Article 11(1) and 11(3),and to Article 32(2).....”²⁷⁸

With regard to conditions under which this right should be exercised, it should be regulated by law, and respect specific conditions, among them: the law should establish this right for all people; the law should respect the relation between this article and the right to the freedom of expression; and it should assure the enjoyment of guarantees necessary for the exercise of right and liberties, including rights to judicial protection and legal remedies.

“The fact that the right of reply or correction (Art. 14) follows immediately after the right to freedom of thought and expression (Art. 13) confirms this interpretation. The inescapable relationship between these articles can be deduced from the nature of the rights recognized therein since, in regulating the application of the right of reply or correction, the States Parties must respect the right of freedom of expression guaranteed by Article 13. They may not, however, interpret the right of freedom of expression so broadly as to negate the right of reply proclaimed by Article 14(1).”²⁷⁹

(...)

“If for any reason, therefore, the right of reply or correction could not be exercised by “anyone” who is subject to the jurisdiction of a State Party, a violation of the Convention would result which could be denounced to the organs of protection provided by the Convention.”²⁸⁰

(...)

278 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2000. Chapter II.

279 I/A Court H.R., Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights) Cit., para. 23.

280 I/A Court H.R., Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights) Cit., para. 25.

“In any case, in regulating those conditions the States Parties have an obligation to ensure the enjoyment of the guarantees necessary for the exercise of the rights and freedoms, including the rights to a fair trial and to judicial protection (Arts. 8 and 25 of the Convention).”²⁸¹

And, finally, it established that the restrictions to its exercise should be established by law.

“If Article 14(1) is read together with Articles 1 and 2 of the Convention, any State Party that does not already ensure the free and full exercise of the right of reply or correction is under an obligation to bring about that result, be it by legislation or whatever other measures may be necessary under its domestic legal system. This justifies the conclusion that the concept “law,” as used in Article 14(1), includes all those measures designed to regulate the exercise of the right of reply or correction. If, however, those measures restrict the right of reply or correction or any other right recognized by the Convention, they would have to be adopted in the form of a law, complying with all of the conditions contained in Article 30 of the Convention.”²⁸²

For its part, the Inter-American Commission has said,

“[t]he State fulfills its obligation to protect the rights of others by establishing statutory protection against intentional attacks on honor and reputation through civil procedures, and by enacting legislation to ensure the right to rectification or reply...”²⁸³

281 I/A Court H.R., *Enforceability of the Right to Reply or Correction* (Arts. 14(1), 1(1) and 2 American Convention on Human Rights) Cit., para. 28.

282 I/A Court H.R., *Enforceability of the Right to Reply or Correction* (Arts. 14(1), 1(1) and 2 American Convention on Human Rights) Cit., para. 34.

283 I/A Court H.R., *Enforceability of the Right to Reply or Correction* (Arts. 14(1), 1(1) and 2 American Convention on Human Rights) Cit., para. 33 in fine.

22. Criminalization of Social Protest

Recently a debate was initiated with respect to the relation between repression and criminalization of social protest and the freedom of expression in view of the importance assigned by the American Convention to the freedom of expression, as much in the area of individual autonomy, in the form of expressing ones own opinion as in the collective, inasmuch as giving foundation to a democratic society.

Neither the Court nor the Commission has made declarations regarding this relation. Nevertheless, it is important to highlight some existing points of doctrine. During a hearing before the Inter-American Commission, CEJIL, the Committee on the Administration of Justice (CAJ) and the Center of Legal and Social Studies (el Centro de Estudios Legales y Sociales) (CELS) made presentations during a case being reviewed by the IACHR regarding the denouncement of repression and criminalization of protest. In this presentation, they argued:

the acts described [repression and criminalization of social protest] violate the freedom of expression, as well as the right to assemble, protest and petition without discrimination. Similar to that which has occurred in the internal context of the States, international organizations of human rights protection have considered the right to freedom of expression to be particularly relevant.

(...)

"The Court has signaled that in the interest of democratic public order, as is conceived by the American Convention, the right of every human to freely express themselves must be scrupulously respected.

(...)

"The exchange and expression of ideas, assumes the exercise of complementary rights, such as the right of citizens to organize and protest, which are indispensable precisely because they produce the free flow of opinions which is a basic requisite for a well functioning democratic state.

(...)

“For its part, the freedom to organize is a fundamental right, and for that reason can not be conceived in abstraction or isolation from the other fundamental rights. It acts as the foundation and/or an instrument for the development of other rights. With this understanding, the right to the freedom to assemble will be interpreted as a means of reaching all that which is not expressly prohibited by the law in force in a determined context. The acts described directly affect the freedom of expression protected by the Convention. State acts of repression, on one side, and the criminalization of protest, on the other, are fundamentally directed towards silencing expression of discontent and popular demands to improve life conditions.

Additionally, the direct repression of these protests represents an open violation of the right to physical integrity and in some cases the life of the victims...”

The Special Rapporteur has declared on the importance of forms other than voting as means of channeling petitions and denouncements made by citizens before the authorities. In this way, he warns of the close relation between the right to the freedom of expression and the right to assembly in the construction of a more inclusive and democratic society. Thus,

“The Rapporteur’s office understands that restrictions on the right of assembly must be intended exclusively to prevent serious and imminent dangers. A future, generic danger would be insufficient, since the right of assembly cannot be taken as synonymous with public disorder and, hence, subjected to restrictions per se. Another question is whether the imposition of criminal sanctions is the least harmful way of restricting the freedom of expression and right of assembly exercised through a demonstration in the streets or other public space. It should be recalled that in such cases, criminalization could have an intimidating effect on this form of participatory expression among those sectors of society that lack access to other channels of complaint or petition, such as the traditional press or the right of petition within the state body from which the object of the claim arose. Curtailing free speech by imprisoning those who make use of

this means of expression would have a dissuading effect on those sectors of society that express their points of view or criticisms of the authorities as a way of influencing the processes whereby state decisions and policies that directly affect them are made.”²⁸⁴

23. Freedom of Expression and Terrorism

In its 116th session in October 2002, the Inter-American Commission approved a report on Terrorism and Human Rights. In accordance with that established in this report, its presentation was made

“[i]n the hope that it will assist member states of the Organization of American States and other interested actors in the Inter-America System in ensuring that anti-terrorism initiatives comply fully with fundamental human rights and freedoms and thereby achieve one of the crucial components for a successful campaign against terrorist violence.”²⁸⁵

In this report, the Inter-American Commission clearly established that the Inter-American instruments of human rights protection apply fully in the context of terrorism, unless there exists a legally declared state of emergency, and that the limited right must be derogable.

Likewise, it indicates that despite the freedom of expression being derogable in a state of emergency, States that consider the suspension of some aspect of this right “should always bear in mind the importance of freedom of expression for the functioning of democracy and guaranteeing other fundamental rights”.²⁸⁶ In the paragraphs that follow, we will analyze only some of the themes that deal with the chapter on the freedom of expression. While some points have already been discussed in the previous sections, it is important to review the standards established by the Commission specifically in the case called “fight against terrorism”.

284 IACHR. Report on the Compatibility of “Desacato” laws with the American Convention on Human rights. Cit.

285 Special Rapporteur of the Freedom of Speech Annual Report 2002, Chapter IV, para 34-35.

286 IACHR. Report on Terrorism and Human Rights.” Preface .

Prior censorship: “[w]hile there are no exceptions in this Article [the 13] for national security or public order reasons, there could arise in the context of an emergency situation, validly declared under Article 27, some situations in which national security or public order arguably would permit limited censorship. There is no jurisprudence in the Inter-America System that specifically speaks to this issue, however, cases from the United States and from the European human rights system demonstrate the high level of scrutiny that any prior censorship must be given.”²⁸⁷

Subsequent Liabilities: similar to other aspects of the freedom of expression already analyzed, the same restrictive criteria apply that must be respected in normal situations.²⁸⁸ These requirements can present a series of difficulties in the context of the so-called anti-terrorist struggle, for example in relation to the requisite according to which all sanctions must be established by law –that are founded, among other things, on the necessity of guaranteeing a certain grade of notice for those who make specific expressions, with regard to those that can lead to subsequent liability. Regarding this point, it is important to observe that laws on order and security that are promulgated in order to prosecute the crime of terrorism are usually very wide and/or vague.

In this respect, the Commission warns that each provision needs to be analyzed in light of article 13.2, remembering that an overbroad and vague provision can possibly run contrary to the requirement of notice and, for that reason, violate the American Convention.²⁸⁹

Regarding proportionality of sanctions, the Commission emphasizes that “.....the right to freedom of expression, although it may be subject to reasonable subsequent penalties in accordance with the terms of the Convention, is broader when the ‘statements made by a person deal with alleged violations of human rights.’”²⁹⁰

With relation to the limitations to expressions that might be considered as favoring violence or violent groups, article 13.5 of the Convention

287 IACHR. Report on Terrorism and Human Rights. “ para. 310.

288 IACHR. Report on Terrorism and Human Rights. para. 312.

289 See section B.2 of this chapter.

290 IACHR. Report on Terrorism and Human Rights. para. 316.

establishes that “[a]ny propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.” In this sense, the Commission clearly establishes that,

“laws that broadly criminalize the public defense (apology) of terrorism or of persons who might have committed terrorist acts, without considering the element of incitement to lawless violence or to any other similar action, are incompatible with the right to freedom of expression.”²⁹¹

Confidentiality of sources: The Commission establishes that “the disclosure must be “necessary” within the terms of Article 13(2) of the Convention.”²⁹²

Access to information: The legitimate necessity of the State to maintain certain information secret, in order to protect national security and public order, and the legitimate necessity of society to access information usually are in conflict.

In this regard, the Commission resorts to the Johannesburg Principles on National Security, Freedom of Expression and Access to Information as a tool that can orient the search for equilibrium between these two values. Principle 1 (2), specifically declares:

“[a]ny restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.”

At the same time, the Johannesburg Principles define the interests that can be legitimately invoked at the moment of restricting rights, with the goal of protecting national security. In this sense, certain criteria are clearly established:

291 IACHR. Report on Terrorism and Human Rights. para. 318, cited in Report No 20/99, “Rodolfo Robles Espinoza and sons” (Peru), Case 11.317.

292 IACHR. Report on Terrorism and Human Rights. para. 323.

The Johannesburg Principles define legitimate national security interests, stating:

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose or demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

Considering these principles, the Commission establishes in its report that when laws regulating access to information contain restrictions based on justifications of security and public order, these reasons will have to apply to only information that clearly affects national security. They should also require, moreover, that the information is disclosed, unless the damage to one of these legitimate interests is substantial. Regarding the action of accessing personal data ("habeas data"), the necessary restrictions should be proportional to the damage that they avoid by maintaining the information a secret.²⁹³

Finally, and in conclusion, it is important to mention that just as the Commission reiterated in its report, all the foregoing standards must be observed without discrimination for reasons of "race, color, sex, language, religion, political or other opinions, national and social origin, economic status, birth or any other social condition" in conformity with that established by the Declaration of Principles on the Freedom of Expression.²⁹⁴

293 IACHR. Report on Terrorism and Human Rights. para. 326.

294 IACHR. Report on Terrorism and Human Rights. paras. 327 & 332.

24. Duty to adapt domestic laws

Articles 1.1 y 2 of the American Convention are usually violated when the freedom of expression is violated. In this sense, we must recognize that one of the region's serious problems is the lack of adequate legislation for the full protection and respect for the freedom of expression. National legislation, in many cases, has not adopted the principles for the protection of human rights to which they are bound since signing and ratifying the relevant international treaties.²⁹⁵ Additionally, the practice of authorities often violates these rights.

It is thus worthwhile to present article 2° of the American Convention:

“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 Parties undertake 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.”

In interpreting this provision, the honorable Court has sustained that

“[a] State may violate an international treaty and, specifically, the Convention, in many ways. It may do so in the latter case, for example, by failing to establish the norms required by Article 2. Likewise, it may adopt provisions which do not conform to its obligations under the Convention”.²⁹⁶

For its part, the Commission, citing the Court, has signaled that article 2 of the American Convention codifies a fundamental rule of international law that “a State Party to a treaty has a legal duty to take whatever legislative or other steps as may be necessary to enable it to comply with its treaty obligations.”²⁹⁷

295 IACHR. Report on Terrorism and Human Rights. paras. 333.

296 In accordance with that established in article 27 of the Vienna Convention on the Law of Treaties, “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

297 I/A Court H.R., Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights) Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 26.

And moreover the Commission adds that the States have the obligation to take all measures to adjust their internal legislation at the time of the ratification of the American Convention:

“through the ratification of the American Convention on August 21, 1990, the illustrious State [of Chile] should have taken the necessary measures to dictate the appropriate constitutional and statutory provisions in order to revoke the prior censorship system of cinema graphic productions and its publicity, adjusting its internal legislation to the norms of the American Convention.”²⁹⁸

The measures that the State is obliged to take must be, moreover, effective. In the words of the Inter-American Court:

“In international law, customary law establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed. This law is universally accepted, and is supported by jurisprudence. The American Convention establishes the general obligation of each State Party to adapt its domestic law to the provisions of this Convention, in order to guarantee the rights that it embodies. This general obligation of the State Party implies that the measures of domestic law must be effective (the principle of *effet utile*). This means that the State must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system, as Article 2 of the Convention requires. Such measures are only effective when the State adjusts its actions to the Convention’s rules on protection.”²⁹⁹

Likewise, article 2° of the American Convention establishes the obligations of States to adopt “such legislative or other measures as may be

298 IACHR, Application to the Inter-American Court of Human Rights in the Case of “The Last Temptation of Christ” vs. Chile (Olmedo Bustos et al.) cited in I/A Court H.R., Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights) paras. 28/30.

299 See, IACHR, Application to the Inter-American Court of Human Rights in the Case of “The Last Temptation of Christ” vs. Chile, p. 23.

necessary to give effect to those rights or freedoms” established by the Convention. In this regard, the Court has said that

“... the general obligations of the State, established in Article 2 of the Convention, include the adoption of measures to suppress laws and practices of any kind that imply a violation of the guarantees established in the Convention, and also the adoption of laws and the implementation of practices leading to the effective observance of the said guarantees.”³⁰⁰

For its part, the Inter-American Commission, in its complaint before the honorable Court in the case “The Last Temptation of Christ”, with respect to this point indicated:

“[a]rticle 2 of the Convention also signals that the states commit to “adopting measures of other character”, apart from legislation, in order to make the rights and liberties recognized by the Convention effective. Regarding this point, the Convention imposes on the organs of the Member States a positive obligation in the sense that these must, in the exercise of its different powers, make rights and liberties recognized in the American Convention effective...”

While the State has the faculty to apply and interpret treaties through its Judicial Power, every time the tribunals commit errors, refuse to make the treaty effective or are incapable of doing so, given the necessity of adapting internal legislation, they trigger the State’s international responsibilities for having violated the treaty.”³⁰¹

The Special Rapporteur, in turn, warns of the lack of adequate legislation in the countries of the Americas, sustaining the following:

“[a]s stated in previous reports, the Rapporteur still believes that member states need to display greater political willingness to work toward amending their laws and ensuring that their societies fully enjoy freedom of expression and

300 I/A Court H.R., “The Last Temptation of Christ” (Olmedo-Bustos et al.). Case, para. 87.

301 I/A Court H.R., “The Last Temptation of Christ” (Olmedo-Bustos et al.). Case., para. 85.

information. Democracy requires broad freedom of expression, and that cannot be pursued if mechanisms that prevent its generalized enjoyment remain in force in our countries.”³⁰²

Still remaining is the need to analyze article 1.1 of the Convention, which establishes:

“Obligation to Respect Rights The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

This article imposes two clearly established obligations on States: to “respect” the rights and liberties consecrated in the Convention and to “guarantee” their full and free exercise.

With respect to the obligation to respect rights, the Court has indicated:

“Whenever a State organ, official or public entity violates one of those rights enshrined in the Convention, this constitutes a failure of the duty to respect.[the] State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.”³⁰³

With relation to the obligation to guarantee, the Court has expressed that this

“...implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through

302 IACHR, Application to the Inter-American Court of Human Rights in the Case of “The Last Temptation of Christ” vs. Chile, p. 25.

303 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2001. Chapter II. A, para 10.

which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."³⁰⁴

For its part, the Commission has signaled:

[i]n this way, the states assume the responsibility of respecting and guaranteeing all the rights and liberties recognized in the Convention to all people subject to its jurisdiction, and to change or adjust its legislation in order to make the enjoyment and exercise of those rights and liberties effective, and this responsibility can be triggered through the action or omission of any public agent official."³⁰⁵

304 I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988.. paras. 169/170.

305 I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. para. 166.



Annexes

1. Declaration of the Principles on the Freedom of Expression
2. Joint Collection of Declarations of the three Rapporteurs on the Freedom of Expression
 - Freedom of the Press. The shield of democracy in periods of conflict.
 - International mechanisms for the promotion of the freedom of expression
 - International Mechanisms for promoting the freedom of expression. Joint Declaration on racism and the media
3. Principles of Johannesburg on National Security, the Freedom of Expression and Access to Information
4. Declaration of Chapultepec
5. The Right to Public Information. Relevant Principles of Legislation on Freedom of Information. Article 19, London
6. Principles of Lima
7. *Amicus Curiae* presented by CEJIL in the case of Herrera Ulloa v. Costa Rica

Annexe 1: Declaration of Principles on Freedom of Expression

Preamble

REAFFIRMING the need to ensure respect for and full enjoyment of individual freedoms and fundamental rights of human beings under the rule of law;

AWARE that consolidation and development of democracy depends upon the existence of freedom of expression;

PERSUADED that the right to freedom of expression is essential for the development of knowledge and understanding among peoples, that will lead to a true tolerance and cooperation among the nations of the hemisphere; CONVINCED that any obstacle to the free discussion of ideas and opinions limits freedom of expression and the effective development of a democratic process;

CONVINCED that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of governmental activities and the strengthening of democratic institutions;

RECALLING that freedom of expression is a fundamental right recognized in the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights, the Universal Declaration of Human Rights, Resolution 59 (1) of the United Nations General Assembly, Resolution 104 adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Covenant on Civil and Political Rights, as well as in other international documents and national constitutions;

RECOGNIZING that the member states of the Organization of American States are subject to the legal framework established by the principles of Article 13 of the American Convention on Human Rights;

REAFFIRMING Article 13 of the American Convention on Human Rights, which establishes that the right to freedom of expression comprises the freedom to seek, receive and impart information and ideas, regardless of borders and by any means of communication;

CONSIDERING the importance of freedom of expression for the development and protection of human rights, the important role assigned to it by the Inter-American Commission on Human Rights and the full support given to the establishment of the Office of the Special Rapporteur for Freedom of Expression as a fundamental instrument for the protection of this right in the hemisphere at the Summit of the Americas in Santiago, Chile;

RECOGNIZING that freedom of the press is essential for the full and effective exercise of freedom of expression and an indispensable instrument for the functioning of representative democracy, through which individuals exercise their right to receive, impart and seek information;

REAFFIRMING that the principles of the Declaration of Chapultepec constitute a basic document that contemplates the protection and defense of freedom of expression, freedom and independence of the press and the right to information;

CONSIDERING that the right to freedom of expression is not a concession by the States but a fundamental right;

RECOGNIZING the need to protect freedom of expression effectively in the Americas, the Inter-American Commission on Human Rights, in support of the Special Rapporteur for Freedom of Expression, adopts the following Declaration of Principles:

Principles

1. Freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals. Additionally, it is an indispensable requirement for the very existence of a democratic society.
2. Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights. All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

3. Every person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
4. Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.
5. Prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression.
6. Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression. Journalistic activities must be guided by ethical conduct, which should in no case be imposed by the State.
7. Prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments.
8. Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.
9. The murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression. It is the duty of the state to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation.
10. Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's

reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.

11. Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as "desacato laws," restrict freedom of expression and the right to information.
12. Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.
13. The exercise of power and the use of public funds by the state, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans; the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law. The means of communication have the right to carry out their role in an independent manner. Direct or indirect pressures exerted upon journalists or other social communicators to stifle the dissemination of information are incompatible with freedom of expression.

Annexe 2: Joint Declarations by the Three Defenders of the Freedom of Expression

A. Joint United Nations-OSCE-OAS Press Release

3 May 2000

Free journalism - the shield of democracy in periods of conflict

On the occasion of World Press Freedom Day, 3 May 2000, Abid Hus-sain, United Nations Special Rapporteur on freedom of opinion and expression, Freimut Duve, OSCE Representative on freedom of the media and Santiago Canton, OAS Special Rapporteur on freedom of expression joined in a statement about the harassment and killing of journalists in conflict situations:

- We note with deep concern that, in 1999, 87 journalists and media personnel were reportedly killed while carrying out their assignments, many in the context of conflict or post-conflict situations.
- We emphasize the importance of access to information and, in particular, the right of journalists to seek, receive and impart information. Journalists are the shields of democracy - all the more during periods of conflict and tension. Free access to war zones is essential in order to enable journalists to fulfil their mission of informing the public.
- We urge Governments to respect and protect fully the right to freedom of expression, and the right of access to information in particular, by guaranteeing the security and safety of journalists in conflict and post-conflict areas. Guarantees should also be provided to prevent journalists from being subject to influence and pressure, so that the information they provide remains fair, impartial and non-partisan.
- We recall that, in accordance with international standards, during periods of conflict and tension, only the narrowest limitations may be imposed on the right to freedom of expression and information, and the law must have prescribed these. Consequently, all national laws that restrict this right in an abusive manner should be repealed.

- We reaffirm that in post-conflict situations the re-establishment of a free, independent and pluralist press constitutes an essential step towards rebuilding and strengthening democratic institutions.
- We reiterate that Governments and other power groups should refrain from using the media as a propaganda machine to call for violence and to disseminate racial hatred.
- We express concern about the lack of common principles regarding the access of journalists to areas of conflict or tension and request the international community to take adequate steps to ensure minimum standards applicable to all.

B. Joint Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Opinion and Expression

- Having met with representatives of NGOs, UNESCO, journalists' associations and human rights experts in London on 29 and 30 November 2000, under the auspices of ARTICLE 19, Global Campaign for Free Expression, assisted by Canadian Journalists for Free Expression;
- Recalling and reaffirming their Joint Declaration, made in London on 26 November 1999;
- Noting the importance of regional mechanisms in promoting the right to freedom of expression and the need to promote such mechanisms in every region of the world;
- Welcoming the recommendation of the African Commission on Human and Peoples' Rights Seminar on Freedom of Expression and the African Charter that a special rapporteur or other mechanism on freedom of expression be established for Africa;
- Encouraging moves in ASEAN and in the Asia and Pacific region to develop regional mechanisms for the promotion and protection of human rights;

- Supporting the Inter-American Declaration of Principles on Freedom of Expression of the Inter-American Commission on Human Rights;
- Endorsing the ARTICLE 19 document, “Defining defamation: principles on freedom of expression and protection of reputation”;
- Stating our intention to adopt a joint statement on racism and the media as part of the preparatory process for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance;

Adopt the following Declaration:

- Two threats to freedom of expression and the free flow of information and ideas have now reached crisis proportions in many parts of the world:
- Attacks on journalists and others exercising their right to freedom of expression (censorship by killing); and
- The abuse of restrictive defamation and libel laws.

Censorship by killing

- Attacks such as the murder, kidnapping, harassment of and/or threats to journalists and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, pose a very significant threat to independent and investigative journalism, to freedom of expression and to the free flow of information to the public.
- States are under an obligation to take adequate measures to end the climate of impunity and such measures should include devoting sufficient resources and attention to preventing attacks on journalists and others exercising their right to freedom of expression, investigating such attacks when they do occur, bringing those responsible to justice and compensating victims.

Defamation

- All States should review their defamation laws in order to ensure that they do not restrict the right to freedom of expression and to bring them into line with their international obligations.

- At a minimum, defamation laws should comply with the following standards:
- The repeal of criminal defamation laws in favour of civil laws should be considered, in accordance with relevant international standards;
- The State, objects such as flags or symbols, government bodies, and public authorities of all kinds should be prevented from bringing defamation actions;
- Defamation laws should reflect the importance of open debate about matters of public concern, and the principle that public figures are required to accept a greater degree of criticism than private citizens; in particular, laws which provide special protection for public figures, such as *desacato* laws, should be repealed;
- The plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern;
- No one should be liable under defamation law for the expression of an opinion;
- It should be a defence, in relation to a statement on a matter of public concern, to show that publication was reasonable in all the circumstances; and
- Civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritize the use of a range of non-pecuniary remedies.
- At the same time, the three special mechanisms recognize that new communications technologies are of enormous value in promoting the right to freedom of expression and the free flow of information and ideas, and express their intention to include this as a topic for discussion at their next joint meeting.

Abid Hussain

United Nations Special Rapporteur on freedom of opinion and expression

Freimut Duve
OSCE Representative on freedom of the media

Santiago Canton
OAS Special Rapporteur on freedom of expression

C. Joint Statement by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression on Racism and the Media

In support of the objectives and with the desire to make a contribution to the preparations for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, we:

Reaffirm that the promotion of equality, and freedom from racism, discrimination, xenophobia and intolerance are essential to the realization of human rights and freedoms;

Stress the fundamental importance of the right to freedom of expression, including of the media, for the personal development, dignity and fulfilment of every individual, for the promotion and protection of equality and democracy, for the enjoyment of other human rights and freedoms, and for the progress and welfare of society;

Note with concern the prevalence of racism and discrimination, as well as the existence in many countries and regions of the world of a climate of intolerance, and the threat these pose to equality and full enjoyment of human rights and freedoms;

Recognize the positive contribution the exercise of the right to freedom of expression, particularly by the media, and full respect for the right to freedom of information can make to the fight against racism, discrimination, xenophobia and intolerance; Recognize as harmful all forms of expression which incite or otherwise promote racial hatred, discrimination, violence and intolerance and note that crimes against humanity are often accompanied or preceded by these forms of expression;

Are cognizant of the need to ensure a balance between efforts to combat racism, discrimination, xenophobia and intolerance, and protection of the right to freedom of expression;

Reiterate the need to respect the editorial independence and autonomy of the media;

Desire to make a contribution to the preparations for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance;

Adopt the following joint statement:

Promoting an optimal role for the media in the fight against racism, discrimination, xenophobia and intolerance requires a comprehensive approach which includes an appropriate civil, criminal and administrative law framework, and which promotes tolerance, including through education, self-regulation and other positive measures.

These efforts must be made with the realization that respect for freedom of expression and information ensures that all citizens have access to information which helps them form their opinions and challenges their views, and which they need to make decisions.

Civil, criminal and administrative law measures

Any civil, criminal or administrative law measures that constitute an interference with freedom of expression must be provided by law, serve a legitimate aim as set out in international law and be necessary to achieve that aim. This implies that any such measures are clearly and narrowly defined, are applied by a body which is independent of political, commercial or other unwarranted influences and in a manner which is neither arbitrary nor discriminatory, and are subject to adequate safeguards against abuse, including the right of access to an independent court or tribunal. If these safeguards are not in effect, there is a very real possibility of such measures being abused, particularly where respect for human rights and democracy is weak, and hate speech laws have in the past been used against those they should be protecting.

In accordance with international and regional law, hate speech laws should, at a minimum, conform to the following:

- no one should be penalized for statements which are true;

- no one should be penalized for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- no one should be subject to prior censorship; and
- any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

These standards should also apply to new communications technologies such as the Internet, which are of enormous value in promoting the right to freedom of expression and the free flow of information and ideas, particularly across frontiers and at the global level. Any restrictions on these new communications technologies should not:

- limit or restrict the free flow of information and ideas protected by the right to freedom of expression,
- or enable the authorities to interfere with the work of, or intimidate, human rights defenders.

Defamation laws have in some cases been used to limit the right to freely identify and openly combat racism, discrimination, xenophobia and intolerance. To prevent this from happening, defamation laws should be brought into line with international standards on freedom of expression, in particular as outlined in our joint declaration of 30 November 2000.

Freedom of information

The free flow of information and ideas is one of the most powerful ways of combating racism, discrimination, xenophobia and intolerance. There should be free access to information which exposes or otherwise helps to combat these problems, whether that information is held by public or private bodies, unless denial of access can be justified as being necessary to protect an overriding public interest. In addition, States should ensure that the public has adequate access to reliable information relating to racism, discrimination, xenophobia and intolerance including, where necessary, through the collection and dissemination of such information by public authorities.

Promoting tolerance

Media organizations, media enterprises and media workers -particularly public service broadcasters -have a moral and social obligation to make a positive contribution to the fight against racism, discrimination, xenophobia and intolerance. There are many ways in which these bodies and individuals can make such a contribution, including by:

- designing and delivering media training programmes which promote a better understanding of issues relating to racism and discrimination, and which foster a sense of the moral and social obligations of the media to promote tolerance and knowledge of the practical means by which this may be done;
- ensuring that effective ethical and self-regulatory codes of conduct prohibit the use of racist terms and prejudicial or derogatory stereotypes, and unnecessary references to race, religion and related attributes;
- taking measures to ensure that their workforce is diverse and reasonably representative of society as a whole;
- taking care to report factually and in a sensitive manner on acts of racism or discrimination, while at the same time ensuring that they are brought to the attention of the public;
- ensuring that reporting in relation to specific communities promotes a better understanding of difference and at the same time reflects the perspectives of those communities and gives members of those communities a chance to be heard; and
- promoting a culture of tolerance and a better understanding of the evils of racism and discrimination.

Annexe 3: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information

November 1996

Introduction

These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg.

The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognized by the community of nations.

These Principles acknowledge the enduring applicability of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights and the Paris Minimum Standards of Human Rights Norms In a State of Emergency.

Preamble

The participants involved in drafting the present Principles:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;

Convinced that it is essential, if people are not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law;

Reaffirming their belief that freedom of expression and freedom of information are vital to a democratic society and are essential for its progress and welfare and for the enjoyment of other human rights and fundamental freedoms;

Taking into account relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the UN Convention on the Rights of the Child, the UN Basic Principles on the Independence of the Judiciary, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights;

Keenly aware that some of the most serious violations of human rights and fundamental freedoms are justified by governments as necessary to protect national security;

Bearing in mind that it is imperative, if people are to be able to monitor the conduct of their government and to participate fully in a democratic society, that they have access to government-held information;

Desiring to promote a clear recognition of the limited scope of restrictions on freedom of expression and freedom of information that may be imposed in the interest of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedoms;

Recognizing the necessity for legal protection of these freedoms by the enactment of laws drawn narrowly and with precision, and which ensure the essential requirements of the rule of law; and

Reiterating the need for judicial protection of these freedoms by independent courts;

Agree upon the following Principles, and recommend that appropriate bodies at the national, regional and international levels undertake steps to promote their widespread dissemination, acceptance and implementation:

I. General Principles

Principle 1: Freedom of Opinion, Expression and Information

- (a) Everyone has the right to hold opinions without interference.
- (b) Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in

print, in the form of art, or through any other media of his or her choice.

- (c) The exercise of the rights provided for in paragraph (b) may be subject to restrictions on specific grounds, as established in international law, including for the protection of national security.
- (d) No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.

Principle 1.1: Prescribed by Law

- (a) Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.
- (b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.

Principle 1.2: Protection of a Legitimate National Security Interest

Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.

Principle 1.3: Necessary in a Democratic Society

To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

- (a) the expression or information at issue poses a serious threat to a legitimate national security interest;
- (b) the restriction imposed is the least restrictive means possible for protecting that interest; and
- (c) the restriction is compatible with democratic principles.

Principle 2: Legitimate National Security Interest

- (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
- (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

Principle 3: States of Emergency

In time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law.

Principle 4: Prohibition of Discrimination

In no case may a restriction on freedom of expression or information, including on the ground of national security, involve discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, nationality, property, birth or other status.

II. Restrictions on Freedom of Expression**Principle 5: Protection of Opinion**

No one may be subjected to any sort of restraint, disadvantage or sanction because of his or her opinions or beliefs.

Principle 6: Expression That May Threaten National Security

Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Principle 7: Protected Expression

- (a) Subject to Principles 15 and 16, the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security or subjected to any restrictions or penalties. Expression which shall not constitute a threat to national security includes, but is not limited to, expression that:
 - (i) advocates non-violent change of government policy or the government itself;
 - (ii) constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agencies or public officials;
 - (iii) constitutes objection, or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes;
 - (iv) is directed at communicating information about alleged violations of international human rights standards or international humanitarian law.
- (b) No one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agency or public official unless the criticism or insult was intended and likely to incite imminent violence.

Principle 8: Mere Publicity of Activities That May Threaten National Security

Expression may not be prevented or punished merely because it transmits information issued by or about an organization that a government has declared threatens national security or a related interest.

Principle 9: Use of a Minority or Other Language

Expression, whether written or oral, can never be prohibited on the ground that it is in a particular language, especially the language of a national minority.

Principle 10: Unlawful Interference With Expression by Third Parties

Governments are obliged to take reasonable measures to prevent private groups or individuals from interfering unlawfully with the peaceful exercise of freedom of expression, even where the expression is critical of the government or its policies. In particular, governments are obliged to condemn unlawful actions aimed at silencing freedom of expression, and to investigate and bring to justice those responsible.

III. Restrictions on Freedom of Information**Principle 11: General Rule on Access to Information**

Everyone has the right to obtain information from public authorities, including information relating to national security. No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.

Principle 12: Narrow Designation of Security Exemption

A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.

Principle 13: Public Interest in Disclosure

In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

Principle 14: Right to Independent Review of Denial of Information

The state is obliged to adopt appropriate measures to give effect to the right to obtain information. These measures shall require the authorities, if they deny a request for information, to specify their reasons for doing so in writing and as soon as reasonably possible; and shall provide for a right of review of the merits and the validity of the denial by an independent authority, including some form of judicial review of the legality of the denial. The reviewing authority must have the right to examine the information withheld.

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 16: Information Obtained Through Public Service

No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

Principle 18: Protection of Journalists' Sources

Protection of national security may not be used as a reason to compel a journalist to reveal a confidential source.

Principle 19: Access to Restricted Areas

Any restriction on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law. In particular, governments may not prevent journalists or representatives of intergovernmental or non-governmental organizations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law are being, or have been, committed. Governments may not exclude journalists or representatives of such organizations from areas that are experiencing violence or armed conflict except where their presence would pose a clear risk to the safety of others.

IV. Rule of Law and Other Matters

Principle 20: General Rule of Law Protections

Any person accused of a security-related crime involving expression or information is entitled to all of the rule of law protections that are part of international law. These include, but are not limited to, the following rights:

- (a) the right to be presumed innocent;
- (b) the right not to be arbitrarily detained;
- (c) the right to be informed promptly in a language the person can understand of the charges and the supporting evidence against him or her;
- (d) the right to prompt access to counsel of choice;
- (e) the right to a trial within a reasonable time;
- (f) the right to have adequate time to prepare his or her defence;
- (g) the right to a fair and public trial by an independent and impartial court or tribunal;
- (h) the right to examine prosecution witnesses;
- (i) the right not to have evidence introduced at trial unless it has been disclosed to the accused and he or she has had an opportunity to rebut it; and

- (j) the right to appeal to an independent court or tribunal with power to review the decision on law and facts and set it aside.

Principle 21: Remedies

All remedies, including special ones, such as habeas corpus or amparo, shall be available to persons charged with security-related crimes, including during public emergencies which threaten the life of the country, as defined in Principle 3.

Principle 22: Right to Trial by an Independent Tribunal

- (a) At the option of the accused, a criminal prosecution of a security-related crime should be tried by a jury where that institution exists or else by judges who are genuinely independent. The trial of persons accused of security-related crimes by judges without security of tenure constitutes a prima facie violation of the right to be tried by an independent tribunal.
- (b) In no case may a civilian be tried for a security-related crime by a military court or tribunal.
- (c) In no case may a civilian or member of the military be tried by an ad hoc or specially constituted national court or tribunal.

Principle 23: Prior Censorship

Expression shall not be subject to prior censorship in the interest of protecting national security, except in time of public emergency which threatens the life of the country under the conditions stated in Principle 3.

Principle 24: Disproportionate Punishments

A person, media outlet, political or other organization may not be subject to such sanctions, restraints or penalties for a security-related crime involving freedom of expression or information that are disproportionate to the seriousness of the actual crime.

Principle 25: Relation of These Principles to Other Standards

Nothing in these Principles may be interpreted as restricting or limiting any human rights or freedoms recognized in international, regional or national law or standards.

Annexe 4: Chapultepec Declaration

Adopted by the Hemisphere Conference on Free Speech. Mexico City
March 11, 1994

Preamble

On the threshold of a new millennium, the Americas envision a future rooted in democracy. A political opening has taken hold. Citizens have a heightened awareness of their rights. More than at any time in our history regular elections, governments, parliaments, political parties, labor unions, associations and social groups of every kind reflect the hopes of our people.

In this environment of democratization, several developments engender optimism but also suggest prudence. Institutional crises, inequalities, backwardness, unresolvable frustrations, the search for easy solutions, failure to grasp the nature of democracy and special interest groups constantly threaten the advancements made. They also represent potential hurdles to further progress.

That is why we who share this hemisphere, from Alaska to Tierra del Fuego, must consolidate the prevailing public freedoms and human rights.

Democratic rule must be embodied in modern institutions that represent and respect the citizenry; it must also guide daily life. Democracy and freedom, inseparably paired, will flourish with strength and stability only if they take root in the men and women of our continent.

Without democracy and freedom, the results are predictable: Individual and social life is stunted, group interaction is curtailed, material progress is distorted, the possibility of change is halted, justice is demeaned and human advancement becomes mere fiction.

Freedom must not be restricted in the quest for any other goal. It stands alone, yet has multiple expressions; it belongs to citizens, not to government.

Because we share this conviction, because we have faith in the creative force of our people and because we are convinced that our principles and goals must be freedom and democracy, we openly support their most forthright and robust manifestation: Freedom of expression and

of the press, whatever the medium of communication. The exercise of democracy can neither exist nor be reproduced without these.

We, the signatories of this declaration, represent different backgrounds and dreams. We take pride in the plurality and diversity of our cultures, considering ourselves fortunate that they merge into the one element that nurtures their growth and creativity: Freedom of expression, the driving force and basis of mankind's fundamental rights.

A free society can thrive only through free expression and the exchange of ideas, the search for and the dissemination of information, the ability to investigate and question, to propound and react, to agree and disagree, to converse and confront, to publish and broadcast. Only by exercising these principles will it be possible to guarantee individuals and groups their right to receive impartial and timely information. Only through open discussion and unfettered information will it be possible to find answers to the great collective problems, to reach consensus, to have development benefit all sectors, to practice social justice and to advance the quest for equality. We therefore vehemently reject assertions which would define freedom and progress, freedom and order, freedom and stability, freedom and justice, freedom and the ability to govern as mutually exclusive values.

Without freedom there can be no true order, stability and justice. And without freedom of expression there can be no freedom. Freedom of expression and the seeking, dissemination and collection of information can be exercised only if freedom of the press exists.

We know that not every statement and item of information can find its way into the media. We know that the existence of press freedom does not automatically guarantee unrestricted freedom of expression. But we also know that a free press favors an environment that nurtures freedom of expression and thereby benefits all other public freedoms.

Without an independent media, assured of the guarantees to operate freely, to make decisions and to act on them fully, freedom of expression cannot be exercised. A free press is synonymous with free expression.

Wherever the media can function unhindered and determine their own direction and manner of serving the public, there is a blossoming of the ability to seek information, to disseminate it without restraints, to

question it without fear and to promote the free exchange of ideas and opinions. But wherever freedom of the press is curtailed, for whatever reasons, the other freedoms vanish.

After a period when attempts were made to legitimize government control over news outlets, it is gratifying to be able to work together to defend freedom. Many men and women worldwide join us in this task. But opposition remains widespread. Our continents are no exception. There are still counties whose despotic governments abjure every freedom, particularly those freedoms related to expression. Criminals, terrorists and drug traffickers still threaten, attack and murder journalists.

But that is not the only way to harm a free press and free expression. The temptation to control and regulate has led to decisions that limit the independent action of the media, of journalists and of citizens who wish to seek and disseminate information and opinions.

Politicians who avow their faith in democracy are often intolerant of public criticism. Various social sectors assign to the press nonexistent flaws. Judges with limited vision order journalists to reveal sources that should remain in confidence. Overzealous officials deny citizens access to public information. Even the constitutions of some democratic countries contain elements of press restriction.

While defending a free press and rejecting outside interference, we also champion a press that is responsible and involved, a press aware of the obligations that the practice of freedom entails.

Principles

A free press enables societies to resolve their conflicts, promote their well-being and protect their liberty. No law or act of government may limit freedom of expression or of the press, whatever the medium.

Because we are fully conscious of this reality and accept it with the deepest conviction, and because of our firm commitment to freedom, we sign this declaration, whose principles follow.

1. No people or society can be free without freedom of expression and of the press. The exercise of this freedom is not something authorities grant, it is an inalienable right of the people.

2. Every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.
3. The authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector. No journalist may be forced to reveal his or her sources of information.
4. Freedom of expression and of the press are severely limited by murder, terrorism, kidnapping, intimidation, the unjust imprisonment of journalists, the destruction of facilities, violence of any kind and impunity for perpetrators. Such acts must be investigated promptly and punished harshly.
5. Prior censorship, restrictions on the circulation of the media or dissemination of their reports, forced publication of information, the imposition of obstacles to the free flow of news, and restrictions on the activities and movements of journalists directly contradict freedom of the press.
6. The media and journalists should neither be discriminated against nor favored because of what they write or say.
7. Tariff and exchange policies, licenses for the importation of paper or news-gathering equipment, the assigning of radio and television frequencies and the granting or withdrawal of government advertising may not be used to reward or punish the media or individual journalists.
8. The membership of journalists in guilds, their affiliation to professional and trade associations and the affiliation of the media with business groups must be strictly voluntary.
9. The credibility of the press is linked to its commitment to truth, to the pursuit of accuracy, fairness and objectivity and to the clear distinction between news and advertising. The attainment of these goals and the respect for ethical and professional values may not be imposed. These are the exclusive responsibility of journalists and the media. In a free society, it is public opinion that rewards or punishes.
10. No news medium nor journalist may be punished for publishing the truth or criticizing or denouncing the government.

The struggle for freedom of expression and of the press is not a one-day task; it is an ongoing commitment. It is fundamental to the survival of democracy and civilization in our hemisphere. Not only is this freedom a bulwark and an antidote against every abuse of authority, it is society's lifeblood. Defending it day upon day is honoring our history and controlling our destiny. To these principles we are committed.

Annexe 5: The Public's Right to Know. Principles on Freedom of Information Legislation. Article 19. London

June 1999

Preface

By Andrew Puddephatt Executive Director of ARTICLE 19

Information is the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society. But information is not just a necessity for people – it is an essential part of good government. Bad government needs secrecy to survive. It allows inefficiency, wastefulness and corruption to thrive. As Amartya Sen, the Nobel Prize-winning economist has observed, there has not been a substantial famine in a country with a democratic form of government and a relatively free press. Information allows people to scrutinize the actions of a government and is the basis for proper, informed debate of those actions.

Most governments, however, prefer to conduct their business in secret. In Swahili, one of the words for government means “fierce secret”. Even democratic governments would rather conduct the bulk of their business away from the eyes of the public. And governments can always find reasons for maintaining secrecy – in the interests of national security, public order and the wider public interest are just some. Too often governments treat official information as their property, rather than something which they hold and maintain on behalf of the people.

That is why ARTICLE 19 has produced this set of international principles – to set a standard against which anyone can measure whether domestic laws genuinely permit access to official information. They set out clearly and precisely the ways in which governments can achieve maximum openness, in line with the best international standards and practice.

Principles are important as standards but on their own they are not enough. They need to be used – by campaigners, by lawyers, by elected representatives and by public officials. They need applying in the

particular circumstances that face each society, by people who understand their importance and are committed to transparency in government. We publish these principles as a contribution to improving governance and accountability

and strengthening democracy across the world.

Background

These Principles set out standards for national and international regimes which give effect to the right to freedom of information. They are designed primarily for national legislation on freedom of information or access to official information but are equally applicable to information held by inter-governmental bodies such as the United Nations (UN) and the European Union.

The Principles are based on international and regional law and standards, evolving state practice (as reflected, inter alia, in national laws and judgments of national courts) and the general principles of law recognized by the community of nations. They are the product of a long process of study, analysis and consultation overseen by ARTICLE 19, drawing on extensive experience and work with partner organizations in many countries around the world. The Principles have been formally endorsed by both the UN Special Rapporteur on Freedom of Opinion and Expression (2000 Annual Report, E/CN.4/2000/63, para. 43) and the Organization of American States Special Rapporteur on Freedom of Expression (1999

Annual Report, OEA/Ser.L/V.II.106, Chapter II(B)(3)).

Principle 1. Maximum Disclosure

Freedom of information legislation should be guided by the principle of maximum disclosure

The principle of maximum disclosure establishes a presumption that all information should be subject to disclosure and that this presumption may be overcome only in very limited circumstances (see Principle 4). This principle encapsulates the basic rationale underlying the very concept of freedom of information and ideally it should be provided for in

the Constitution to make it clear that access to official information is a basic right. The overriding goal of legislation should be to implement maximum disclosure in practice.

Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information. Everyone present in the territory of the country should benefit from this right. The exercise of this right should not require individuals to demonstrate a specific interest in the information. Where a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings. In other words, the public authority must show that the information which it wishes to withhold comes within the scope of the limited regime of exceptions, as detailed below.

Definitions

Both 'information' and 'public bodies' should be defined broadly.

'Information' includes all records held by a public body, regardless of the form in which the information is stored (document, tape, electronic recording and so on), its source (whether it was produced by the public body or some other body) and the date of production. The legislation should also apply to records which have been classified, subjecting them to the same test as all other records.

For purposes of disclosure of information, the definition of 'public body' should focus on the type of service provided rather than on formal designations. To this end, it should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalized industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organizations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads or operating rail lines). Private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health. Inter-governmental organizations should also be subject to freedom of information regimes based on the principles set down in this document.

Destruction of records

To protect the integrity and availability of records, the law should provide that obstruction of access to, or the willful destruction of records is a criminal offence. The law should also establish minimum standards regarding the maintenance and preservation of records by public bodies. Such bodies should be required to allocate sufficient resources and attention to ensuring that public record-keeping is adequate. In addition, to prevent any attempt to doctor or otherwise alter records, the obligation to disclose should apply to records themselves and not just the information they contain.

Principle 2. Obligation to Publish

Public bodies should be under an obligation to publish key information

Freedom of information implies not only that public bodies accede to requests for information but also that they publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity. Which information should be published will depend on the public body concerned. The law should establish both a general obligation to publish and key categories of information that must be published.

Public bodies should, as a minimum, be under an obligation to publish the following categories of information:

- operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;
- information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and

- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.

Principle 3. Promotion of Open Government

Public bodies must actively promote open government

Informing the public of their rights and promoting a culture of openness within government are essential if the goals of freedom of information legislation are to be realized. Indeed, experience in various countries shows that a recalcitrant civil service can undermine even the most progressive legislation. Promotional activities are, therefore, an essential component of a freedom of information regime. This is an area where the particular activities will vary from country to country, depending on factors such as the way the civil service is organized, key constraints to the free disclosure of information, literacy levels and the degree of awareness of the general public. The law should require that adequate resources and attention are devoted to the question of promoting the goals of the legislation.

As a minimum, the law should make provision for public education and the dissemination of information regarding the right to access information, the scope of information which is available and the manner in which such rights may be exercised. In countries where newspaper distribution or literacy levels are low, the broadcast media are a particularly important vehicle for such dissemination and education. Creative alternatives, such as town meetings or mobile film units, should be explored. Ideally, such activities should be undertaken both by individual public bodies and a specially designated and adequately funded official body – either the one which reviews requests for information, or another body established specifically for this purpose.

Tackling the culture of official secrecy through training.

The law should provide for a number of mechanisms to address the problem of a culture of secrecy within government. These should include a requirement that public bodies provide freedom of information training for their employees. Such training should address the importance and scope of freedom of information, procedural mechanisms for accessing information, how to maintain and access records efficiently,

the scope of whistleblower protection, and what sort of information a body is required to publish.

The official body responsible for public education should also play a role in promoting openness within government. Initiatives might include incentives for public bodies that perform well, campaigns to address secrecy problems and communications campaigns encouraging bodies that are improving and criticizing those which remain excessively secret. Another possibility is the production of an annual report to Parliament and/or Parliamentary bodies on remaining problems and achievements, which might also include measures taken to improve public access to information, any remaining constraints to the free flow information which have been identified and measures to be taken in the year ahead. Public bodies should be encouraged to adopt internal codes on access and openness.

Principle 4. Limited Scope of Exceptions

Exceptions should be clearly and narrowly drawn and subject to strict harm and public interest tests

All individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of the limited regime of exceptions. A refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test.

The three part test

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.

No public bodies should be completely excluded from the ambit of the law, even if the majority of their functions fall within the zone of exceptions. This applies to all branches of government (that is, the executive, legislative and judicial branches) as well as to all functions of government (including, for example, functions of security and defense

bodies). Non-disclosure of information must be justified on a case-by-case basis.

Restrictions whose aim is to protect governments from embarrassment or the exposure of wrongdoing can never be justified.

Legitimate aims justifying exceptions.

A complete list of the legitimate aims which may justify an exception should be detailed in the law. This list should include only interests which constitute legitimate grounds for refusing to disclose documents and should be limited to matters such as law enforcement, privacy, national security, commercial and other confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes.

Exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest. They should be based on specific content, rather than the type of document. To meet this standard exception should, where relevant, be time-limited. For example, the justification for classifying information on the basis of national security may well disappear after a specific national security threat subsides.

Refusals must meet a substantial harm test

It is not sufficient that information simply fall within the scope of a legitimate aim listed in the law. The public body must also show that the disclosure of the information would cause substantial harm to that legitimate aim. In some cases, disclosure may benefit as well as harm the aim. For example, the exposure of corruption in the military at first sight appear to weaken national defense but actually, over time, help to eliminate the corruption and strengthen the armed forces. For non-disclosure to be legitimate in such cases, the net effect of disclosure must be to cause substantial harm to the aim.

Overriding public interest

Even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm. For example, certain information may be private in nature but at the same time

expose high-level corruption within government. In such cases, the harm to the legitimate aim must be weighed against the public interest in having the information made public. Where the latter is greater, the law should provide for disclosure of the information.

Principle 5. Processes to Facilitate Access

Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available

A process for deciding upon requests for information should be specified at three different levels: within the public body; appeals to an independent administrative body; and appeals to the courts. Where necessary, provision should be made to ensure full access to information for certain groups, for example those who cannot read or write, those who do not speak the language of the record, or those who suffer from disabilities such as blindness.

All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Generally, bodies should designate an individual who is responsible for processing such requests and for ensuring compliance with the law.

Public bodies should also be required to assist applicants whose requests relate to published information, or are unclear, excessively broad or otherwise in need of reformulation. On the other hand, public bodies should be able to refuse frivolous or vexatious requests. Public bodies should not have to provide individuals with information that is contained in a publication, but in such cases the body should direct the applicant to the published source.

The law should provide for strict time limits for the processing of requests and require that any refusals be accompanied by substantive written reasons.

Appeals

Wherever practical, provision should be made for an internal appeal to a designated higher authority who can review the original decision.

In all cases, the law should provide for an individual right of appeal to an independent administrative body from a refusal by a public body to disclose

information. This may be either an existing body, such as an Ombudsman or Human Rights Commission, or one specially established for this purpose. In either case, the body must meet certain standards and have certain powers. Its independence should be guaranteed, both formally and through the process by which the head or board is/are appointed.

Appointments should be made by representative bodies, such as an all-party parliamentary committee, and the process should be open and allow for public input, for example regarding nominations. Individuals appointed to such a body should be required to meet strict standards of professionalism, independence and competence, and be subject to strict conflict of interest rules.

The procedure by which the administrative body processes appeals over requests for information which have been refused should be designed to operate rapidly and cost as little as is reasonably possible. This ensures that all members of the public can access this procedure and that excessive delays do not undermine the whole purpose of requesting information in the first place.

The administrative body should be granted full powers to investigate any appeal, including the ability to compel witnesses and, importantly, to require the public body to provide it with any information or record for its consideration, in camera where necessary and justified.

Upon the conclusion of an investigation, the administrative body should have the power to dismiss the appeal, to require the public body to disclose the information, to adjust any charges levied by the public body, to fine public bodies for obstructive behaviour where warranted and/or to impose costs on public bodies in relation to the appeal.

The administrative body should also have the power to refer to the courts cases which disclose evidence of criminal obstruction of access to or willful destruction of records.

Both the applicant and the public body should be able to appeal to the courts against decisions of the administrative body. Such appeals should include full power to review the case on its merits and not be limited to the question of whether the administrative body has acted reasonably. This will ensure that dif. cult questions are dealt with properly and that a consistent approach to freedom of expression issues will be promoted.

Principle 6. Costs

Individuals should not be deterred from making requests for information by excessive costs

The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants, given that the whole rationale behind freedom of information laws is to promote open access to information. It is well established that the long-term benefits of openness far exceed the costs. In any case, experience in a number of countries suggests that access costs are not an effective means of offsetting the costs of a freedom of information regime.

Differing systems have been employed around the world to ensure that costs do not act as a deterrent to requests for information. In some jurisdictions, a two-tier system has been used, involving flat fees for each request, along with graduated fees depending on the actual cost of retrieving and providing the information. The latter should be waived or significantly reduced for requests for personal information or for requests in the public interest (which should be presumed where the purpose of the request is connected with publication). In some jurisdictions, higher fees are levied on commercial requests as a means of subsidizing public interest requests.

Principle 7. Open Meetings

Meetings of public bodies should be open to the public

Freedom of information includes the public's right to know what the government is doing on its behalf and to participate in decision-making processes. Freedom of information legislation should therefore establish a presumption that all meetings of governing bodies are open to the public.

“Governing” in this context refers primarily to the exercise of decision-making powers, so bodies which merely proffer advice would not be covered. Political committees – meetings of members of the same political party – are not considered to be governing bodies.

On the other hand, meetings of elected bodies and their committees, planning and zoning boards, boards of public and educational authorities and public industrial development agencies would be included.

A "meeting" in this context refers primarily to a formal meeting, namely the official convening of a public body for the purpose of conducting public business. Factors that indicate that a meeting is formal are the requirement for a quorum and the applicability of formal procedural rules.

Notice of meetings is necessary if the public is to have a real opportunity to participate and the law should require that adequate notice of meetings is given sufficiently in advance to allow for attendance.

Meetings may be closed, but only in accordance with established procedures and where adequate reasons for closure exist. Any decision to close a meeting should itself be open to the public. The grounds for closure are broader than the list of exceptions to the rule of disclosure but are not unlimited. Reasons for closure might, in appropriate circumstances, include public health and safety, law enforcement or investigation, employee or personnel matters, privacy, commercial matters and national security.

Principle 8. Disclosure Takes Precedence

Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed

The law on freedom of information should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. Where this is not possible, other legislation dealing with publicly-held information should be subject to the principles underlying the freedom of information legislation.

The regime of exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it. In particular, secrecy laws should not make it illegal for officials to divulge information which they are required to disclose under the freedom of information law.

Over the longer term, a commitment should be made to bring all laws relating to information into line with the principles underpinning the freedom of information law.

In addition, officials should be protected from sanctions where they have, reasonably and in good faith, disclosed information pursuant to a

freedom of information request, even if it subsequently transpires that the information is not subject to disclosure. Otherwise, the culture of secrecy which envelopes many governing bodies will be maintained as officials may be excessively cautious about requests for information, to avoid any personal risk.

Principle 9. Protection for Whistleblowers

Individuals who release information on wrongdoing – whistleblowers – must be protected

Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing.

“Wrongdoing” in this context includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body. It also includes a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not. Whistleblowers should benefit from protection as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement.

In some countries, protection for whistleblowers is conditional upon a requirement to release the information to certain individuals or oversight bodies. While this is generally appropriate, protection should also be available, where the public interest demands, in the context of disclosure to other individuals or even to the media.

The “public interest” in this context would include situations where the benefits of disclosure outweigh the harm, or where an alternative means of releasing the information is necessary to protect a key interest. This would apply, for example, in situations where whistleblowers need protection from retaliation, where the problem is unlikely to be resolved through formal mechanisms, where there is an exceptionally serious reason for releasing the information, such as an imminent threat to public health or safety, or where there is a risk that evidence of wrongdoing will otherwise be concealed or destroyed.

Annexe 6: Lima Principles

Preamble

AFFIRMING that the individual rights to freedom of expression and access to information are fundamental to the existence of all democratic societies and essential for the progress, welfare and enjoyment of all other human rights

RECOGNIZING that these are inherent rights, neither granted nor conferred by the State, that the State cannot disregard them, and that their protection is essential

RECALLING that the International and Regional Instruments which guarantee and protect these fundamental rights impose on States the obligation not only to observe but to promote universal and effective respect for human rights

RECOGNISING the important efforts being made by the special rapporteurs on freedom of expression at the united nations and the organisation of american states to promote and protect freedom of expression and the right to information

STATING that is essential that people have access to information held by the State in order to ensure the accountability of government and to allow people full participation in a democratic society and to guarantee their enjoyment of other human rights

CONSIDERING that transparency of information reduces the possibility of abuse of power. Freedom of information in the context of democratic transition can contribute to guaranteeing truth, justice and reconciliation. Lack of information adds to the difficulty of transition and reduces its credibility

REITERATING that issues of national security never justify violations of human rights. any restrictions on freedom of expression and access to information can only be allowed under the exceptional limitations set out in these principles

WE PRESENT the following principles and urge all authorities officials and persons at the local, national, regional and international levels to commit themselves to adopt the necessary measures to promote the dissemination, acceptance and enforcement of these principles:

1. Access to Information as an Individual Right

Every person has the right to be free to search for, receive, have access to and disseminate information without being subject to interference by public authorities prior censorship or to indirect restrictions due to the abuse of official control. There is no obligation on the individual to justify any request for information in order to exercise this right. Access to information is both an individual right and necessary for a democratic society. The right covers both those who actively seek information as well as those who expect to receive information through the media as well as official channels.

2. Access to Information

Every person has the right to ensure accountability in the work of the public administration, the powers of the State in general and of public service companies.. In order to carry out this task effectively, people require access to information held by the authorities. Authorities must be legally required to make the information available to people in a timely and complete manner. It is the government's responsibility to create and maintain public records in a serious and professional manner so that the right to information can be effectively exercised. records should not be arbitrarily destroyed this, in turn, requires a public policy which preserves and develops a corporate memory within the institutions of government.

3. Transparency and Development

Access to information is essential for scrutiny and for adequate debate on government action, conditions essential not only for transparency on government actions and administration , but to avoid corruption and other abuse of power. This right permits people to participate in public affairs, in decision making and, more generally, allows for the identification of public servants responsibilities; the objective evaluation of facts and the forming of opinion in order to increase participation in the political, economic, social and cultural life of the country.

4. The Authorities' Obligations

Information belongs to the citizens. Information is not the property of the State and governments are obliged to grant access to information;

government holds information; government holds information only in its role as representative of its citizens.

The State and public service companies are committed to respect and guarantee access to information to all individuals and to adopt the necessary legislative or other means to promote the respect for this right and to ensure its effective recognition and enforcement. It is the State's obligation to act with due diligence in promoting access to information; identifying those who should provide information; preventing actions which deny its disclosure; sanctioning those who contravene it, and in promoting a culture of openness.

5. Journalism and Access to Information

Governments are obliged to guarantee and respect the exercise of journalism and freedom of the media. In furtherance of the individual's right to information, journalists must be guaranteed conditions and facilities to access information and have the right to disseminate it in the exercise of their profession. Officials who interfere shall be subject to sanctions.

6. Protection of Journalist's sources

No journalist should be compelled by a judicial or other public authority to reveal his or her sources of information including the content of notes or personal or professional files.

7. Legislation on Access to Information

Laws, rules or regulations developing the right to access to information must specify that every person is entitled to this right and to guarantee the maximum transparency; that the information be presented in the format requested by the applicant or in its original format; that the costs of the search, subsequent processes and transmission of the information will be assumed by the applicant by paying a fee which should not exceed the cost of the service; that the deadline for information to be disclosed should be reasonable and timely.

8. Exceptions to the Right of Access to Information

The exceptions to access to information may be legitimately regulated only by the constitution and by law in accordance with the principles

of a democratic society and only where these regulations are needed to protect a legitimate national security interest or the individual's legitimate right to privacy. It will not be possible to maintain secret information under the protection of unpublished regulations. Any person or official who denies access to information will have to justify its denial by means of a written reply and to demonstrate that it is included within the restricted categories of exceptions. If requested by an individual party, an impartial and competent authority should review such a denial and may order the release of information.

The withholding of information under the aegis of a broad and imprecise definition of national security is unacceptable. Any restrictions on the grounds of national security will be only be valid when orientated to protect the territorial integrity of the country and in the exceptional circumstances of extreme violence that threatens the imminent collapse of the democratic order. Any restrictions based on grounds of national security are not legitimate if their purpose is to protect the government's interests rather than those of society as a whole.

Privacy laws may not inhibit or restrict investigation and dissemination of any information in the public interest.

The law, having defined specified categories of classified information shall establish reasonable deadlines and procedures for declassification as soon as the national security interest allows. In no case may information be indefinitely classified.

9. Protection of Whistleblowers

No public servant or other person may not be subjected to any sanction for the disclosure of information even if classified or restricted as above if the public interest in knowing the information outweighs the consequences of disclosure. In these cases the individual may benefit from special protection.

10. Legal Protection of the Right of access to information

The autonomy and independence of the judiciary is fundamental to guaranteeing the right of access to public information. In cases where there is a denial by the authorities or officials to disclose information or restrictions to its exercise, prompt and brief judicial action is indispensable to protect this right and to generate public confidence and

transparent in the exercise of power. Added to these judicial mechanisms of protection is the right to petition other institutions such as the Ombudsman's office and other supranational bodies established to protect this and other rights.

Any existing regulations which contravene these principles should be abolished.

16 November 2000

ABID HUSSAIN

UN Special Rapporteur on Freedom of Opinion and Expression

SANTIAGO CANTON

OAS Special Rapporteur on Freedom of Opinion and Expression

ROBERT COX

First Vice-President of the Sociedad Interamericana de Prensa

RAFAEL MOLINA

President of the Comisión de Libertad de Prensa e Información de la Sociedad Interamericana de Prensa

ENRIQUE ZILERI

President of Consejo de la Prensa Peruana

SAMUEL ABAD

Defensoría del Pueblo, Perú

FRANCES D'SOUZA

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MALCOLM SMART

Human Rights Watch, US

SANDRA COLIVER

International Foundation for Electoral Systems, US

HANS LANDOLT

Instituto de Defensa Legal, Perú

HUGO GUERRA

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MABE ARCE

British Embassy in Perú

MARTINE ANSTETT

UN Freedom of the Press Directorate

LUIS PEIRANO

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Annexe 7: Amicus Curiae presented by CEJIL in the case of Herrera Ulloa v. Costa Rica^{1, 2}

Costa Rica, April 19, 2004

Dr.
Sergio García Ramírez
President
Inter-American Court of Human Rights
San José, Costa Rica

Ref: The La Nación Newspaper Case
Costa Rica
Presentation of the Amicus Curiae

Distinguished Dr. García Ramírez:

The Center for Justice and International Law (CEJIL) has the pleasure of presenting this *Amicus Curiae* ("friend of the court") brief regarding the referred to case, in which we present our legal and factual arguments regarding the violation of the right to freedom of expression committed by the State of Costa Rica against journalist Mauricio Herrera Ulloa and Fernán Vargas Rohmoser; the latter, in his position as legal representative of "*La Nación*".

I. Background

A. Facts

On May 19, 20 and 21 and December 13, 1995, the journalists Mauricio Herrera Ulloa wrote a series of articles, published in the newspaper "*La Nación*" (The Nation), which referred to the diplomat Félix Przedborski Chawa, representative ad honorem of Costa Rica before the International Organization of Atomic Energy, located in Austria. In these articles the journalist partially reproduced various Belgian press reports, in which illicit acts were attributed to Mr. Przedborski.

1 Also known as "*La Nación*" Newspaper Case.

2 Legal expert Hernán Gullco and lawyers of CEJIL, Viviana Krsticevic, Soraya Long and Gisela de León helped to prepare this *Amicus Curiae*.

As a result, the mentioned diplomat filed a criminal and civil action before the Costa Rican Courts against Mauricio Herrera Ulloa for defamation.

On May 29, 1998, the Criminal Court of the First Judicial Circuit of San Jose issued a judgment absolving Mr. Mauricio Herrera Ulloa of all responsibility for the criminal and civil damages actions filed by Mr. Przedborski against him for alleged crimes of defamation.

Mr. Przedborski appealed the judgment to the Third Chamber of the Supreme Court of Justice and won the annulment of this sentence on May 7, 1999, resulting in the case being returned to the Criminal Court of the First Judicial Circuit of San Jose, which dictated a judgment on November 12, 1999.

The Supreme Court of Justice affirmed the judgment on January 24, 2001, declaring that Mauricio Herrera Ulloa was liable for four counts of defamation, sentencing him to 120 prison days' worth of fines (300.000 *colones*) and jointly and severally the newspaper *La Nación*, represented legally by Fernán Vargas Rohrmoser, a fine of 70,000 *colones* for moral damages caused by the publication in 1995, plus 1,000 *colones* for legal fees, and three million eight hundred and ten thousand *colones* for personal costs. Similarly, the judgment ordered the removal of the links between the last name Przedborski and the challenged articles from the digital version of the *La Nacion* newspaper; and to establish a link between these and the judgment's conclusion. It also ordered journalist Mauricio Herrera Ulloa to publish the judgment himself.

Moreover, the court ordered Mr. Fernán Vargas Rohrmoser, legal representative of the newspaper *La Nación*, to comply with the decision under penalty of incurring the crime of contempt of court and imposition, as a consequence, of a prison term. Likewise, later, they ordered the inscription of Mauricio Herrera Ulloa in the Criminal Records Office.

I. The Violation of the Freedom of Expression of the Petitioners (Article 13 of the American Convention) by the State of Costa Rica.

A. Introduction

The American Convention recognizes the freedom of thought and expression in unequivocal and generous terms.³ Through the protection of this freedom, the Convention intends to protect the autonomy of people by recognizing and protecting their right to produce, express and receive information; and at the same time tries to assure the functioning of a democracy that guarantees the free exchange of ideas in the public arena.⁴

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

4 The Inter-American Commission has sustained in the Declaration of Principles on Freedom of Expression: “Freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals. Additionally, it is an indispensable requirement for the very existence of a democratic society.” (First Principle). There is important literature, including from Latin American, on the foundation of this freedom. See for example, among others, Bianchi y Gullco, “*El derecho a la libre expresión*”, Editora Platense, SRL, Argentina, 1997; John Stuart Mill, “On Liberty”, Everyman Edition, 1972; Eric Barendt, “Freedom of Speech”, Clarendon, London, 1992.

In this same sense, the Honorable Court has recognized that the freedom of expression is essential for the survival of a democratic form of governance. Specifically, it has established:

“Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard....[...] It is also in the interest of the democratic public order inherent in the American Convention that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected.”⁵

As can be observed in the paragraph above, the jurisprudence, as well as doctrine, of this Honorable Court has recognized the existence of the so-called double dimension of this freedom, consisting of the individual right to express information and ideas and the collective right of society to receive such information.⁶

Moreover, the Court has said that the individual dimension of this right:

“includes, inseparably, the right to use any appropriate method to disseminate thought and allow it to reach the greatest number of persons. In this respect, the expression and dissemination of thought and information are indivisible, so that a restriction of the possibilities of dissemination represents directly, and to the same extent, a limit to the right to free expression.”⁷

5 I/A Court H.R Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights) Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 69.

6 Regarding the double dimension, the Court has said “...[i]t requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.” See I/A Court H.R Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Cit. note 3, para. 30.

7 See I/A Court H.R Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Cit. note 3, paras. 30–31.

Similarly, the Court has emphasized the importance of the collective dimension of the right to the freedom of expression, signaling that:

“For the ordinary citizen, the knowledge of other people’s opinions and information is as important as the right to impart their own.”⁸

Nevertheless, the freedom of expression and thought is not an absolute right, that is, it has specific limitations. Regarding these, while the American Convention has widely protected freedom of expression, it has also zealously guarded restrictions to it.

In this regard, article 13 of the American Convention prohibits prior censorship, permitting it only in order to regulate access to “public performances” in order to protect the morality of children and adolescents.⁹

The Convention in its article 13 establishes that “abuses” to the exercise of this right can, nevertheless, be subject to subsequent liabilities. In this regard, the Honorable Court has signaled that:

“Abuse of freedom of information thus cannot be controlled by preventive measures but only through the subsequent imposition of sanctions on those who are guilty of the abuses.”¹⁰

The Convention establishes that the mentioned responsibilities must be previously established by law and must be necessary for securing the ends expressly enumerated in

8 See I/A Court H.R., “The Last Temptation of Christ” (Olmedo-Bustos et al.). Case. Judgment of February 5, 2001. Series C No. 73, para. 66.

9 The prohibition of previous censorship, with the exception established in paragraph 4 of article 13 of the American Convention, is absolute. The Court has held that: “It is important to mention that Article 13(4) of the Convention establishes an exception to prior censorship, since it allows it in the case of public entertainment, but only in order to regulate access for the moral protection of children and adolescents. In all other cases, any preventive measure implies the impairment of freedom of thought and expression”. I/A Court H.R., “The Last Temptation of Christ” (Olmedo-Bustos et al.). Case. Judgment of February 5, 2001. Series C No. 73, Cit. note 6, para. 70.

10 I/A Court H.R. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Cit. note 3, para. 39.

Article 13 of the Convention.¹¹ In its Advisory Opinion 5/85, the Court establishes that the necessary requirements for determining the legitimacy of subsequent liabilities include:

“a) the existence of previously established grounds for liability; b) the express and precise definition of these grounds by law; c) the legitimacy of the ends sought to be achieved; d) a showing that these grounds of liability are “necessary to ensure” the aforementioned ends.”¹²

Likewise, this honorable Court has indicated, with reference to European jurisprudence, in order that a specific liability be considered necessary, it requires “...the existence of a ‘pressing social need’” and that for a restriction to be “necessary” it is not enough to show that it is “useful,” “reasonable” or “desirable.”¹³

In this same line of reasoning, the Inter-American Court indicated,

This conclusion, which is equally applicable to the American Convention, suggests that the “necessity” and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be

11 I/A Court H.R Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Cit. note 3, para. 39. Article 13.2 of the American Convention determines that the legitimate ends for justifying limitations to the freedom of expression are: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals.

12 I/A Court H.R Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Cit. note 3, para. 39.

13 I/A Court H.R Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Cit. note 3, para. 46.

so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it [...]”¹⁴

Additionally, article 13 of the American Convention must be interpreted taking into account the general criteria established in articles 29 and 32.2 of the Convention that enshrine the principle *pro homine*, the rule of strict interpretation of limitations to a right, and the necessity to apply conventional norms taking into consideration the society’s democratic institutions’ legitimate necessities.¹⁵

The American Convention also prohibits the imposition of restrictions on the freedom of expression “by indirect methods or means”¹⁶, and gives some examples of types of restrictions. The illegitimate means of indirectly restricting the freedom of expression can include other circumstances of fact or law such as recognized by the Honorable Court in the Baruch Ivcher Bronstein case.¹⁷

The *La Nación* case implicates serious violations of the freedom of expression, as a result of the existence of unwarranted restrictions against it, such as those demonstrated by the facts stated in the first part of this document.

In this section, through the presentation of three fundamental arguments, we will analyze the violations of the freedom of expression committed in detriment to Mauricio Herrera Ulloa and Fernán Vargas Rohmoser in his position as legal representative of *La Nación*. In the first place, we will argue that the criminalization, as well as the submission to

14 I/A Court H.R. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Cit. note 3, para. 46.

15 I/A Court H.R. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Cit. note 3, paras. 41 and 42.

16 The Article 13 of the American Convention: “The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.”

17 I/A Court H.R., Ivcher-Bronstein. Case. Judgment of February 6, 2001. Series C No. 74.

a criminal proceeding for defamation¹⁸ and the eventual application of a criminal sanction, unduly restrict the freedom of expression. Second, we will analyze conditions for the legitimate application of civil sanctions when there are excesses in the freedom of expression. Finally, we will explain how the concrete case, specifically the judicial proceeding that resulted in civil and criminal punishment of the petitioners transformed into an instrument that restricted the freedom of expression.

B. Criminal proceedings as an undue restriction of the freedom of expression

Mauricio Herrera was declared liable for four counts of defamation and was consequently penalized. In our opinion, the punishment of crimes against honor is not sustainable in the Inter-American System. In effect, the criminalization of defamation as well as the subsequent subjection to criminal proceedings and criminal sanctions runs counter to the right to freedom of expression.¹⁹

The subjection of the individual to a criminal proceeding infringes upon three of the limits established by the Convention regarding the imposition of restrictions. In the first place, the criminalization and punishment of defamation is not necessary in a democratic society; secondly, they are disproportionate measures; thirdly, they constitute an indirect means of restricting the freedom of expression and information. We will develop these arguments in detail in the following sections.

1. Criminalization and punishment of defamation is not necessary in a democratic society

The Court has emphasized that before establishing limitations to the freedom of expression special attention must be given to the necessity of preserving democratic institutions.²⁰

18 For the remainder of the document the terms slander, insult and defamation will be used interchangeably. (Traducer's note: in Spanish there exists an additional category called "insult" that would be included in the term slander, but for the purpose of this translation all terms will be included in the general term)

19 The position we present goes beyond that held by the distinguished Commission in that it maintains that it is exclusively the imposition of criminal sanction that violates article 13 of the Convention.

20 I/A Court H.R Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Cit. note 3, paras. 41 and 42.

Similarly, the Inter-American Commission in its Declaration of Principles on the Freedom of Expression, has signaled that the freedom of expression “is an indispensable requirement for the very existence of a democratic society.”

The exercise of the freedom of expression, and especially the issuance of opinions and information with respect to the acts of government agents, is fundamental in all democratic societies since they convert public opinion into a form of holding the government accountable for its acts.

The former requires that criminal sanctions be subject to a strong presumption of illegitimacy when applied to situations where information was imparted in the public interest about public personalities—as occurred in the case before us.

The possibility of being criminally sanctioned for having made assertions or value judgments necessarily causes people to be afraid of sharing information about the activities of public officials and public personalities, seriously harming the effective functioning of democratic systems.²¹

The European Court expressed similar considerations in the “Lingens” case, in which the court declared criminal sanctions found in the Austrian Criminal Code, similar to those in the current case, to be contrary to the freedom of expression. The Court said the following:

“The limits of acceptable criticism are accordingly 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. No doubt Article 10 para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not

21 This produces what the doctrine and jurisprudence of the United States calls the “chilling effect” See, among other examples, the judgment of the Supreme Court of the United States in the case of “New York Times v. Sullivan”, 376 US 254, 1964.

acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.²²

Precisely, based on the reviewed opinion, the Inter-American Commission indicated,

Desacato laws restrict freedom of expression because they carry with them the threat of imprisonment and/or fines for those who insult or offend a public official. (...) The fear of criminal sanctions necessarily discourages people from voicing their opinions on issues of public concern particularly when the legislation fails to distinguish between facts and value judgments. Political criticism often involves value judgments.²³

For that reason, the cited paragraph does not just question the legitimacy of criminal offenses specific to “*desacato*” but also applies to any other criminal law destined to suppress opinions that can affect the honor of public officials or public personalities.

In this regard, the criminalization and punishment of defamation constitutes, without doubt, a restriction that threatens against the preservation of democratic institutions, since the fear it instills impedes participation in public debate that must occur with regard to the acts of public officials, who are representatives of society.

2. The violation of the necessity and proportionality requirements

In the introduction of this section, we indicated that the factors for determining the legitimacy of requiring subsequent liability for the exercise of the freedom of expression are: that the basis for liability are expressly defined by law, that the ends pursued in creating them are legitimate and that its establishment be necessary for assuring the aforementioned ends.

22 ECHR, *Ligens v Austria* case, Judgment of 8 July 1986, series A, t.103. “legend?”

23 Report on the Compatibility of “*Desacato*” laws with the American Convention on Human Rights, Annual Report of the Inter-American Commission on Human Rights 1994. OEA/Ser.L/V.88, Doc. 9 rev. 1, 17 February 1995, p. IV B.

The criminalization of defamation, as resorted to by Costa Rica as a mechanism for restricting the freedom of expression, fulfills the first two requirements. In effect, it can be found duly established by law and with the goal of protecting the honor of people.²⁴

Nevertheless, it is possible to detect serious problems when analyzing compliance with the third mentioned requirement. According to the standard elaborated by the Inter-American Court on this question, in order for a restriction to be considered necessary, it should satisfy “a compelling governmental interest” as occurred in this case, the protection of the honor and rights of the person. However, the criminalization of defamation is “not to limit the right protected by Article 13 more than is necessary”, as the aforementioned restrictions are not those that “restrict the protected right on a minor scale”.

As has already been mentioned, restriction to the freedom of expression looks to protect the right of honor and personal dignity of the original claimant, recognized in article 11 of the American Convention. In the present case, this right could have been sufficiently protected by the right to reply contained in Article 14 of the American Convention, a mechanism that is less restrictive on the freedom of expression. This last norm establishes:

Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

As was signaled in the complaint presented by the Commission on behalf of the petitioners in this case, the newspaper *La Nación* offered the original claimant the opportunity to publish his response to the articles that he considered affected his honor and reputation, which was done in an article, published May 25, 1995.

Later, he was given a new opportunity to present his point of view regarding the accusations against him through an interview to discuss the matter. Nevertheless, he refused the invitation. The fact that the

24 Article 13.2.a expressly establishes “respect for the rights or reputations of others” as a legitimate end.

original claimant did not accept this offer and, instead, decided to bring a criminal action against the author of this report clearly indicates that his motive was not to adequately repair his right to honor, that according to him had been violated, since this could have been achieved if the original claimant had accepted to give his version of the facts.

The right of honor of the original claimant also could have been protected through the filing of a civil action²⁵, a means that would have been less restrictive to the freedom of expression of the petitioners than the criminal proceedings. This type of action permits that if an abuse of the exercise of the right to expression that violated the honor of a person is found, that person be fully and promptly compensated. As recognized by the Honorable Court, this type of action was exercised in the case being analyzed simultaneously with the criminal action.

In this way, the illustrious Commission indicated in its historical report on desacato that:

"[t]he State fulfills its obligation to protect the rights of others by establishing statutory protection against intentional attacks on honor and reputation through civil procedures, and by enacting legislation to ensure the right to rectification or reply."²⁶

Similarly, the jurist Eugenio Raúl Zaffaroni has maintained: "we believe that without doubt, honor must be the object of judicial protection, but this protection is not accomplished by criminal penalties of questionable legality. Reason seems to be, as much for the protection of the victim as for the freedom of expression, on the side of those who propose its decriminalization and replacement with a practical and simple way to make civil liability more effective."²⁷

25 IACHR. Report on the Compatibility of "Desacato" laws with the American Convention on Human Rights.

26 IACHR, *Report on the Compatibility of desacato Laws with the American Convention on Human Rights*. Cit. para. 210. IACHR. Report on the Compatibility of "Desacato" laws with the American Convention on Human Rights.

27 Eugenio R. Zaffaroni, *Las limitaciones a la libertad de prensa utilizando el poder punitivo formal en América Latina, in Justicia Penal y Libertad de Prensa*, Tome I: Ilanud, Costa Rica, 1993. p. 18. [translation by author]

The existence of less restrictive means to protect a person's reputation makes criminality of defamation an unnecessary means of achieving the legitimate objective being sought after. For that reason, it constitutes a disproportionate means for the attainment of said objective.

3. Criminal proceedings as an indirect restriction of the freedom of expression.

The criminalization of defamation violates the freedom of expression by limiting it from its full potential as permitted by article 13 of the Convention, and creates an indirect means of restriction of the freedom of expression. Thousands of journalists accused of defamation in the Americas and in the world, realize the weight generated by merely being subjected to criminal proceedings initiated to defend the right of honor. As sustained by the journalist Horacio Verbitsky: "to the extent that the brutality of dictatorships is no longer acceptable, new ways of more subtle control of the press arise around the world"²⁸

Criminal persecution of the opposition, whether politicians, journalists or any other social communicator, stands out among the most used method of silencing denouncements of corruption, the circulation of ideas and opinions and political information. This is precisely what occurred in the case before us. In this regard, the Report of the Special Rapporteur for the Freedom of Expression of the IACHR wrote in 2000:

"According to the information received on an ongoing basis by the Office of the Special Rapporteur, it is evident that the most common methods of curtailing freedom of expression are physical and psychological threats, harassment, intimidation and the use of domestic legislation to file suit against the press and other social communicators"²⁹

Subjecting a person to a criminal proceeding exposes the accused person to public disapproval—even more in the present case inasmuch

28 Horacio Verbitsky, *Restricción de las noticias mediante leyes de insulto*, en *Nuevos Términos de Código Censura*, SIP, EEUU, 2001, p. 104. [translation of text by author]

29 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, 2000. OEA/Ser./L/V/II.111, doc. 20, April 16, 2001, para.6.

as criminal justice in Latin America has become newsworthy in part because of the crisis of legitimacy that causes widespread impunity--- that seriously affects his/her reputation. The stigmatizing effects of the criminal machinery throughout the proceedings extend to the imposition of restrictions of the freedom of movement (such as prohibition of meeting in determined places, or traveling outside of the country); to the imposition of bail, or including summons or transfer by means of public force. In this way, criminal proceedings themselves, without more, have a penalizing character. Similarly, in addition to the mortification that results upon finding oneself immersed in a proceeding of this kind, one must add the consternation provoked by facing the threat of an eventual conviction that can seal definitively diverse aspects of a person's life, such as the future political, social or economic work of the accused.

Even the very theory of criminal law considers this process as being *ultima ratio* in nature. Thus, criminal law must be the last means of protection to be considered in order to protect a plural society's values. Criminal law must intervene to resolve individual conflicts only when other means of resolution fail. The mission of criminal sanction is to protect juridical goods in a subsidiary form. For that reason, it is not legitimate to anticipate and apply punitive sanctions in order to prevent or resolve conflicts that can be avoided and resolved through other means.

The Inter-American Commission has affirmed that laws that carry the threat of imprisonment or fine for those who insult or offend a public official necessarily discourage citizens to express their opinions about problems of public interest and for that reason indirectly restrict the freedom of expression.³⁰ Laws of defamation are, in many occasions, laws that instead of protecting the honor of people are used to attack and silence discourse that is considered to be critical of the public administration.³¹ In its report on Laws of *Desacato*, the Inter-American Commission signaled:

30 IACHR. Report on the Compatibility of "Desacato" laws with the American Convention on Human Rights.

31 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression, *supra* 29 , para. 42.

“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.”³²

The possibility of freely affirming our ideas without fear of criminal punishment is a fundamental value irrespective of whether our expressions will be wrong or generate hostilities. Any attempt to penalize the freedom of expression reduces the possibility of guaranteeing a democratic life. The fact that the free expression of ideas can come off as offensive or fallacious is not a sufficient reason to penalize it. On the contrary, in a democratic society, the limitation of this right through indirect censorship that the provision for criminal sanction carries, seriously damages republican institutions and also can cause the revitalization of anti-democratic postures. The inhibiting character of criminal proceedings on participation in debates in the public interest transforms into an indirect means of restricting the freedom of expression.

Interpreting the Convention, taking into mind the fair demands of a democracy, requires sustaining the necessity of decriminalize defamation because it is not a necessary mechanism in a democratic society, it is disproportionate and constitutes an indirect means of restricting the freedom of expression and thought.

In the case that now concerns us, the journalist Mauricio Herrera Ulloa did no more than transcribe that which was reported by the foreign press with relation to acts of corruption that supposedly involved Mr. Przedborski, who held a public position.

Moreover, according to that recognized by the same Criminal Court of the First Circuit of San Jose in its judgment on the case, it was done

“even disregarding the most offensive terms that these newspapers quote, using a balance of what was mentioned to offer the reader positions and evidence in favor of Mr. Przedborski, including positions favorable to two ex-presidents of the Republic.”

32 IACHR. Report on the Compatibility of “Desacato” laws with the American Convention on Human Rights.

Moreover, as has already been indicated, Mr. Przedborski was given the opportunity to present his explanations regarding the matter

The information contained in the foreign press was of great interest to Costa Rican public opinion since it accused a public official, nationalized as a Costa Rican, of serious acts of narco-trafficking, financial fraud and fraudulent bankruptcy, among other charges.

This is the type of public debate that the Convention intends to promote. Nevertheless, regardless of whether there had been some excess or imprecision in the journalistic statements, if the language had been offensive, if the opinion forwarded had not been shared by the majority of the community, it still deserves the highest protection.

Because of the legal and factual reasons presented, we consider that the mere submission of Mauricio Herrera Ulloa to criminal proceedings in order to arbitrate the possible effect of the right to honor of Mr. Przedborski, was contrary to the freedom of expression protected in the American Convention.

Based on the previously explained and as an evident conclusion, we contend that the criminal penalties once applied also constituted a mechanism of illegitimate restriction to the freedom of expression.

C. Conditions for the legitimate application of civil sanctions for the abuse of the freedom of expression

Given that the criminalization of defamation constitutes a violation of the right to the freedom of expression, it is important to ask under which conditions will the application of civil sanctions be permitted in circumstances of the abusive exercise of this right.

In specific circumstances, civil sanctions can produce the same effects as criminal sanctions. For example, the fear of receiving constant economic sanctions—which can bankrupt the media and individuals—undoubtedly can restrict the free interchange of expression. For that reason, it is highly complex to find a balanced mean to protect in simultaneous form, as much the honor of people as the right to the freedom of expression.

One way to determine whether or not civil actions that advance the protection of honor and reputation are legitimate is to distinguish between public and private persons.³³

Given their responsibilities for government activities, officials and other State agents, as well as other individuals involved in matters in the public interest, should be submitted to a greater level of scrutiny. This has been the position of the Inter-American Commission that, following the precedents of the European Court³⁴ has distinguished between public and private people:

“[i]n 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.”³⁵

Based on this first distinction, the Commission indicated that:

“Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person’s reputation should only be guaranteed through civil sanctions in those cases in which the person

33 Another aspect to be considered is the proportionality of the applied sanction. In order for the civil proceedings to respect the principles of the Convention, the sanctions that are eventually applied must be proportionate to the harm caused.

34 ECHR, *Castells v. Spain*, Judgment of 23 April 1992, paras. 43, 46. In the case *Castells v. Spain* the judgment imposed against Castells was considered in violation of article 10 of the European Convention, since it had been produced within the framework of political criticism toward the government and about a subject in the general interest. The Court established that the restrictions to the freedom of expression can not serve as an instrument by those who exercise political power to limit legitimate criticism of public authorities.

35 IACHR. Report on the Compatibility of “Desacato” laws with the American Convention on Human Rights.

offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.”³⁶

In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.

In other words, in order to conform the ability to initiate civil actions for the abusive exercise of the freedom of expression to the provisions of the Convention, it is necessary to distinguish between public and private people.³⁷

Considering if real malice or negligence of the person who made the declarations has been proved is a second aspect to be considered when evaluating the legitimacy of imposing civil sanctions for the abusive exercise of the freedom of expression.³⁸ Additionally, as indicated by the

36 IACHR. Declaration of Principles on Freedom of Expression (Principle 10).

37 In this sense, the tenth principle of the of the Declaration of Principles on Freedom of Expression indicate: “ Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person’s reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.”

38 While this is the position largely accepted by doctrine, another sector holds that the a declaration directed at a public figure or the public interest should never be sanctioned. See, Eduardo Andrés Bertoni, *Libertad de expresión en el Estado de Derecho. Doctrina y jurisprudencia nacional, extranjera e internacional*, Editores del Puerto, Buenos Aires, 2000. Cf. In particular, the chapter “New York Times vs. Sullivan” and the malice of the doctrine. The minority vote in the case “New York Times vs. Sullivan”, cited in the same book, concluded that it is not legitimate that the States limit the freedom of expression and of the press with respect to subjects that refer to public officials.

Commission: "There should be no liability when the information giving rise to a lawsuit is a value judgment rather than a factual assertion"³⁹

The Inter-American Commission has arrived at this conclusion in cases that involved public officials:

"in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news."⁴⁰

In the case before us, as has already been mentioned, the journalistic references made by Mauricio Herrera deal with a public official and moreover were not intended to cause harm to Mr. Przedborski. This point was accepted by the same court of the first instance, which based its decision on, among other reasons, the fact that journalist Mauricio Herrera Ulloa only relied on other printed press reports, eliminated the most offensive terms that they cited and presented the publication in a balanced form, in order to offer the reader positions and proof in favor of Mr. Przedborski. Moreover, he gave the concerned individual, the opportunity to make his defense regarding the accusations.

Finally, it is necessary to refer to the proportionality of the sanction imposed for the attributed offense. The threat of civil sanction that do not respect the principle of proportionality can have the same inhibiting effect as the possibility of being submitted to a criminal proceeding, since sanctions of this kind can cause bankruptcy.

In the case before us, the civil sanction imposed was sixty million *colones*, a very high amount that does not have any relation to the damage blamed on Mauricio Herrera and the newspaper *La Nación*.

For these reasons, we find that the civil proceedings against the petitioners do not comply with the minimum conditions for protecting the

39 IACHR. Annual Report of the Special Rapporteur for Freedom of Expression., para. 47.

40 IACHR. Declaration of Principles on Freedom of Expression (Principle 10).

freedom of expression, established by the Inter-American System of Human Rights, and for that reason violate article 13 of the American Convention.

D. Judicial proceedings against defendants as a restrictive instrument to the Freedom of Expression

Based on the facts developed above, it is possible to deduce that in this specific case, the criminal proceedings had a twice as inhibiting effect.

On one hand, Mauricio Herrera Ulloa was subjected to the disproportionate weight of criminal proceedings, which resulted in a sentence jointly with *La Nación*, and both were subject to civil proceedings also not reflective of the minimum conditions for the adequate protection of the right to the freedom of expression. Additionally, the proceedings against them were full of irregularities, which accented even more the violations that restricted the freedom of expression.

As has already been argued, the judicial proceedings against the petitioners converted into excellent instruments for restricting the exercise of the freedom of expression.

Unfortunately, in Latin American, the use of the judicial system as an instrument to curtail the freedom of expression is not a new tool. In this sense, the Commission in its report on the situation of human rights in Paraguay, recognizes:

“one of the main concerns of his Office is the use of the judicial system as a means of intimidation in several countries of the hemisphere, by imposing imprisonment or fines on journalists, forcing them to turn to the courts time and again and to incur the costs, for their defense, that have a significant detrimental impact on their activities. When this mechanism is used against journalists critical of the authorities, the judicial system is being used as an instrument to limit the freedom of expression, not as a mechanism for sorting out the conflicting interests of the authorities and journalists.”⁴¹

41 IACHR. Third Report on the Situation of Human Rights in Paraguay (2001). OEA/Ser.L/V/II.110 Doc.52, 9 March 2001.

In continuation, we refer to the different irregularities in the judicial process that contributed even more to the restriction of the petitioner's freedom of expression.

1. Criminal and Civil Judgments for having reproduced reports of a third party

In the challenged articles of the accused, "the journalist [Mauricio Herrera Ulloa] partially reproduced various reports of Belgium's written press", of relevant public interest about a public personality, that previously had been published by the European press. That is, the accused had been sentenced for fulfilling the typical duty of the press, which is to "...impart-in accordance with his obligations and responsibilities—information and ideas on any theme in the public interest."⁴² The application of jurisprudence from the European Court to this case offers us strong additional arguments for concluding that the judgments against the petitioners are contrary to article 13 of the American Convention. It cannot be forgotten, in this sense, that it is useful to use the decisions adopted in analogous subject matters presented by the European Court, those that have been considered by the Honorable Court as a useful guide for determining the reach of Article 13 of the American Convention.⁴³

Thus, in the case "Thorgeirson v. Iceland", the European Court resolved that the judgment for defamation against a journalist, who imputed acts of brutality to the police of Reykjavik, capital of Iceland, was contrary to the right to free expression. Arguing its decision, the Court indicated:

"[...]In short, the applicant was essentially reporting what was being said by others about police brutality. He was convicted by the Reykjavik Criminal Court of an offence under Article 108 of the Penal Code partly because of failure to justify what it considered to be his own allegations, namely that unspecified members of the Reykjavik police had committed a number of acts of serious assault resulting in disablement of their

42 ECHR., Case of Stambuk v. Germany, Judgment of 17 October 2002, para. 42 and its citations. [translation of text by author]

43 See I/A Court H.R. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Cit. note 3, para. 46, and I/A Court H.R., Ivcher-Bronstein. Case. Cit. note 17, para. 152..

victims, as well as forgery and other criminal offences[...]. In so far as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible task."⁴⁴

In a later case, the European Court reaffirmed this doctrine, finding a violation of the right to the freedom of expression when imposing liability on the media for imparting information that was objectively inaccurate if it had been proven that the journalist acted in "good faith" in disseminating the information based on the statements of a public official who deserved his trust.⁴⁵

This position also has been adopted in the legislation and internal judicial decisions of various countries in the American region.

For example, the Anglo-American jurisprudence widely accepts the doctrine of "fair report", which instructs that the press is not legally liable if it limits itself to just transcribing information disseminated by an official organism even when said information can affect the honor of a third party.⁴⁶ This doctrine has been extended to those cases in which the information has not come from an official source but rather a private entity.⁴⁷

Since 1986, the Supreme Court of the Republic of Argentina as well as lower courts in the country have repeatedly applied the doctrine of

44 ECHR., Case of *Thorgeir Thorgeirson v. Iceland*" Judgment of 28 May 1992, para. 65.

45 ECHR, Case of *Bladet Tromsø and Stensaas v. Norway*, Judgment of 20 May 1999, paras. 65, 68 y 72.

46 See, the review of jurisprudence done by Katryn Dix Sowle en "Defamation and the First Amendment: The case for a constitutional privilege of fair report", *New York University Law Review*, volume 54, no. 3, June 1979, p. 471.

47 For example, in the case, "*Edwards v. National Audubon Society, Inc.*" (decided by the Court of Appeal of the Second and Third Circuit of the United States, 556 F.2d 113), the court resolved that protected by the freedom of expression—by the First Amendment of the Constitution—a newspaper that had accurately reproduced the accusations formulated by a non-governmental entity against prominent scientists was protected by the freedom of expression. See note, Cit. 44, p. 527.

“fair report”⁴⁸, which may exempt an author from liability if he or she attributed the content of the information that affects the reputation of other people to a relevant source.⁴⁹

The application of this jurisprudence to the case before us clearly indicates that the judgment against the petitioners violates article 13 of the American Convention since they only faithfully transcribed the news about the complainant in the underlying case that originally had been published by European newspapers, eliminating the most offensive terms that these newspapers cited. Its important to add that, in their actions, the petitioners displayed conduct that was very fair and balanced, since they offered the original claimant—as has been indicated before—the possibility of exercising his right to reply in the same media source that had published the information from the European press.

48 Supreme Court of Argentine, “Campillay c. La Razón” case, judgment of May 15, 1986, published in Fallos: 308:789.

49 In this sense, the Supreme Court of Argentina has recently indicated in a vote that while not subscribed to by all the judges, reflects the doctrine of the Court in this sense, “It is the doctrine of this Court that when a journalistic organ disseminates information that can affect the reputation of someone, in order to be exempted from liability, it must be done “attributing the content directly to a relevant source, using a conditional verb tense or protecting the identity of those implicated in the illicit act (Judgments 308:789, consid. 7). This doctrine was reaffirmed in the ‘Granada’ files (Judgments 316:2394), clarifying—regarding that of interest here—that the attribution of a source must be sincere. In turn, the steps that must be taken to assure the report is “sincere” were clarified in the case ‘Triacca’ (Judgment 316:2416), and later in the precedent ‘Espinosa’ (Judgment 317:1448) and ‘Menem’ (Judgment 321:2848). In these last judgments, the Court indicated that to extend the liability of the informant, it is necessary to attribute the report to an identifiable source and that it deals with a substantially accurate or identical transcription of what was said by the source, in order to make the origin of the information transparent and allow the readers to relate them not to the media that published them, but to the specific cause that they generated. Those affected by the information, in such conditions, will benefit in that their eventual complaints—if they believed they had the right—can be directed against those from whom the reports really emanated and not against those who were only sources of their dissemination. (Judgment: 316:2394, cons. 6º, y 2416, consid. 9º)” judgment issued in case “S.,N.A. c. El día S.A.”, of Feb. 5, 2002, published in Judgments: 325:50 and in the “Revista de Responsabilidad Civil y Seguros”, March- April 2002, p. 81.

2. The criminal or civil judgment without the complainant proving the falsity of what the accused affirmed.

It is clear that telling the truth about subject matters of public interest, even when it can affect the honor or reputation of third parties, constitutes a fundamental value that must be protected by the Inter-American System of Human Rights. As expressed above, this value is linked to the known principle that the freedom of expression is a central element of a democratic system of governance. For that reason, finding that article 13 of the American Convention prohibits criminal or civil judgments against a person for statements in the public interest, would amount to an indispensable guarantee for the exercise of the freedom of expression.

In this way, it is once again useful to apply the European Court of Human Rights' jurisprudence on this question.

The European Court has resolved, with respect to the public dissemination about old legal proceedings of a politician, that these could "...be relevant factors in the moment of determining his competence to exercise political functions..."⁵⁰

This pronouncement is analogous to the case before us. The notes published by the journalist Mauricio Herrera Ulloa referred to the supposed participation of Mr. Przedborski in serious acts such as narcotrafficking, fiscal fraud, and fraudulent bankruptcy, among others.

As an *ad honorium* representative of an international organism in Costa Rica, Mr. Przedborski, qualifies as a public official and is thus subject to public scrutiny. Accusations as serious as those mentioned, without doubt, present questions regarding his competence to exercise that position, especially as a representative of the Costa Rican state before an international organism.

In another case, the European Court ratified this solution, holding that the dissemination of truthful information in themes in the public interest

50 ECHR., Case of Schwabe v. Austria, Judgment of 28 August. 1992, para. 32.
[translation of text by the author]

were protected by the free expression clause even though it was evident that it had seriously affected the reputation of the medical profession that had been mentioned in the cited information.⁵¹

In light of these principles, it is obvious that the judgments imposed in the case run contrary to article 13 of the American Convention.

In effect, as was indicated in point 46 of the complaint,

“in relation to the proof of truthfulness, the judgment of the Supreme Court of Costa Rica upheld the conviction, accepting the argument of the lawyer of plaintiff Przedborski, according to which article 152 ‘aims to prevent that certain offenses to honor remain in impunity, for the sole reason that the person who uttered them alleges that he was not the original author of the offense.’ The Third Court also accepted the doctrine according to which the proof of truthfulness “is only about the truth of the insulting allegation that is on the defendant’s mind’...

Thus, it becomes clear that the Court considers irrelevant whether or not the factual assertions made by the informant, in a subject relevant to the public interest like those in the case, are true when determining his/her liability.

This contradicts the fundamental principle mentioned that to state the truth in matters of public interest never justifies a judgment (whether civil or criminal) since this could frustrate the fundamental role of the freedom of expression in contributing to the debate of basic questions that form part of a functioning democratic system.

In conclusion, the norms applied in the case (or, at least their interpretation by the Costa Rican Supreme Court) violate article 13 of the American Convention.

51 ECHR., Case of Bergens Tidende and others v. Norway, Judgment of 2 May 2000, para. 59 and 60.

3. The civil or criminal judgment without establishing intent or serious negligence of the reporter with regard to the existence of false information

Despite having already referred to the minimum requirements necessary to assure that a civil proceeding conforms to article 13 of the American Convention, we here provide additional arguments.

It is evident that, when disseminating factual statements about matters of public interest, there always exists the risk that some of them will not be true. It is also clear that imposing liability (whether criminal or civil) for the mere act of making such false remarks, without considering the subjective attitude of the agent, would have disastrous consequences for the protection of free expression.⁵²

Additionally, the principle just reviewed, that is with regard to matters of the public interest a person cannot be subject to a civil or criminal judgment for the mere act of having shared inexact information without determining a subjective attitude of indifference towards the search for truth, can also be based on the principle of presumption of innocent found in article 8.2 in the American Convention.

In this sense, in its Report n° 5/96, the Inter-American Commission of Human Rights indicated that art. 8.2. of the Convention provides:

“...another elementary concept of criminal processal law, the objective of which is to preserve the principle of innocence, is the burden of proof. In criminal proceedings, the *onus probandi* does not lie with the accused; on the contrary, it is the State that has to demonstrate the accused’s guilt. Modern doctrine accordingly maintains that “the accused does not need to prove his innocence, which has already been constructed by the presumption protecting him, but rather the accuser has to fully construct his position, leading to certainty that a punishable act was committed...”⁵³

52 This would produce the “chilling effect” as referred to by the jurisprudence of the United States, as was mentioned above.

53 IACHR. Report N° 5/96, Case 10.970, March 1, 1996.

This burden of proof not only must correspond to the accuser with respect to the verification of the objective element of the offense being considered but also it's the subjective side, which refers to the intention of the accused.⁵⁴

In this sense, domestic courts in various countries in the region have pronounced on this issue. The precedent of the United States *New York Times v. Sullivan* held that it was not possible to pass civil judgment on a newspaper for reproducing information that was not completely true, if the plaintiff did not prove that the liable party had acted with knowledge about this falsehood or with total lack of concern about it.⁵⁵

In turn, the Supreme Court of the Republic of Argentina has expressly accepted this doctrine in its jurisprudence. In the *Ramos*⁵⁶ case, this Court ratified the doctrine that had already been expressed in the *Costa*⁵⁷ precedent, according to which, in order to obtain patrimonial reparation for a publication concerning the exercise of their duties, public officials had to prove that the information was made knowing its falsehood or with total lack of concern as to its falsity; conversely, "precipitate negligence" or "simple fault" in divulging defamatory news is enough to generate the corresponding liability of the media.

54 This has been clearly explained by Professor Julio Maier: "[...] also the relative elements of the will of the imputed, it is indispensable to ascertain and reconstruct his knowledge or representation when applying criminal law. For example, when criminal law refers to a subjective element, and its knowledge NO ESTOY SEGURO DE LO QUE QUIEREN DECIR, PUEDES CHEQUAR TRADUCCION? depends on the affirmation of the participation imputed to the accused (the fraud of the prevarication; CP 269) the lack of certainty of this knowledge favors the accused who should be absolved.[...]" in "Derecho Procesal Penal", Tomo I, Ediciones del Puerto, Buenos Aires, segunda edición, p. 501. [translation of text by author]

55 *New York Times v. Sullivan*, note Cit. 23. Later, this doctrine was extended to "public personalities" that were not state officials. For example, see "*Curtis Publishing Co. V. Butts; Associated Press v. Walter*", 388

U.S.130 -1967- and "*Gertz v. Robert Welch, Inc.*", 418 U.S. 323 -1974.

56 Corte Suprema de la República Argentina, Caso "Ramos", sentencia de 27 de diciembre de 1996, fallos: 319:3428

57 Corte Suprema de la República Argentina, Caso "Costa", sentencia de 1987, fallos:310:508.

The Argentinean Court transferred this doctrine later to the area of criminal law.⁵⁸

It is easy to see the reason why this jurisprudential doctrine has been so widely extended: the possibility of a person being judged for supplying information in the public interest because it contains inexactness regarding an official or public figure, without considering if that person diligently acted or not in the search for truth, creates the clear risk of self-censor, which ultimately is a detriment to the freedom of expression.

This doctrine constitutes, in reality, the indispensable guarantee necessary for the freedom of expression in all human rights systems: it seems obvious that you can only issue a judgment against an author of information deemed to be inexact, that affects the honor of the official or personality, if the author acted with knowledge of the falsehood or complete lack of concern. An attitude of diligence in the search for truth should never lead to liability, whether criminal or civil.

In the case before us, there is no fraud with relation to the petitioners, a fact recognized by the Criminal Court of the First Judicial Circuit of San José. Moreover, the Court indicated that the journalist Mauricio Herrera “did not write [the publications] in the spirit of slander or for the pure desire to offend, but rather only [fulfilling] the duty of informing on questions made abroad about a public Costa Rican official [...]”

58 The case “Pandolfi”, this Court left without effect a decision made by the Superior Tribunal of the Argentinan Province of Río Negro that had sentenced a journalist and politician for the crime of defamation. The regional court had based its resolution on the circumstances that “the blamed had not been able to check the truth of the statements.” The Argentine Supreme Court, founded its decision on the doctrine of “real malice”, considering that this reasoning was incompatible with the constitutional right to free expression since “there are elements that—in a well intentioned journalistic interpretation-- would have been able to justify the publication of the report because of its public import...” Supreme Court of the Republic of Argentina, “Pandolfi” case, Judgment of July 1, 1997, judgments: 320:1272, vote of judges Fayt and Boggiano, considering 12°. (translation by author) And, similar to what occurred in the jurisprudence of the United States, this doctrine, conceived originally only for state officials—was extended later by the Argentinan Court to “public figures”(See, among others, the “Díaz, Daniel” case, Judgement: 321:3170 ó J.A. 1999-II-2180 and the “Menem, Amado” case, judgment of Aug. 5, 2003, considering 5° through 7° and its citations, published in the “Diario de Jurisprudencia Argentina”, of November 5, 2003).

Proof that there was no intent in the actions of the petitioners, is the fact that the publications made in the newspaper *La Nación* eliminated “the most offensive terms that [the Belgian] newspapers had cited” and offered “the reader positions and proof in favor of Mr. Przerdboski, including favorable positions regarding the two ex-presidents of the Republic.” Similarly, they requested an interview with Mr. Przerdboski in order to present his version of the facts together with the journalistic reports accusing him of illicit acts. He declined to concede them this interview.

Based on these arguments, the judgments made against the petitioners are contrary to article 13 of the American Convention.

II. Preyer for Relief

Due to the reasons developed in the previous sections, we request that the Honorable Court, when dictating its decision, adopt the following conclusions:

- A. The State of Costa Rica violated the right to the freedom of expression contained in article 13 of the American Convention, with regard to having
 1. Submitted the journalist Mauricio Herrera Ulloa to criminal proceedings, which themselves violate article 13 of the American Convention.
 2. Issued a judgment against the journalist Mauricio Herrera Ulloa for the charge of defamation and ordered his inscription in the Costa Rican Criminal Records Office, which is itself in violation of article 13 of the American Convention.
 3. Issued a judgment against journalist Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser, in his position as legal representative of the newspaper *La Nación*, ordering the payment of economic reparations, the removal of the digital edition of *La Nación* with any links with the last name Przerdboski and articles of the petitioner; the creation of a link between the latter and the judgment’s conclusion, and the publication of the judgment, on the basis of a civil action for compensatory damages, also violates article 13 of the American Convention.

4. Issued a judgment against both petitioners through a judicial proceeding which, as already indicated, presented serious irregularities that exacerbated the violation of the right to the freedom of expression.
- B. that based on that already indicated, the State of Costa Rica must reform its legislation to conform with the standards of the American Convention relating to freedom of expression, decriminalize crimes of defamation and establishing adequate limits to the application of civil sanctions.