INTER - AMERICAN COMMISSION ON HUMAN RIGHTS
COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMÉRICAINE DES DROITS DE L'HOMME

OFFICE OF THE SPECIAL REPPORTEUR FOR FREEDOM OF EXPRESSION
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Washington D.C., June 28, 2013

His Excellency
Dr. Ricardo Patiño
Minister of Foreign Affairs, Commerce and
Integration of the Republic of Ecuador
Ministry of Foreign Affairs
Carrión E1-76 y Av. 10 de Agosto
Quito, Ecuador

Dear Minister:

I have the honor to address Your Excellency, as Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR), regarding the recently approved Communications Act. Over the course of the past three years the Office of the Special Rapporteur has had the opportunity to inform your Illustrious State about its main concerns regarding the content of the different drafts of this bill.

On this occasion and in view of the importance that the Constitution of Ecuador affords to international human rights norms, doctrine, and jurisprudence, the Office of the Special Rapporteur takes this opportunity to, in a very respectful manner, reference some of the provisions of the Act that might be incompatible with international standards on the issue. The lack of reference to some of the provisions of the Act does not necessarily mean that they are consistent with the inter-American standards.

The Communications Act was passed by the National Assembly of Ecuador on June 14 and sanctioned by the President on June 22, 2013. The text of the Act contains some important principles regarding the exercise of the right to freedom of thought and expression. Nevertheless, in regulating those principles, the Act establishes onerous restrictions that render the aforementioned principles practically ineffective.

In the pages that follow I would explain to Your Excellency the grounds on which the Office of the Special Rapporteur supports this assertion.

1. Scope of application of the Act

The Act imposes a significant number of obligations on all communications media, without regard to their format or size. As such, the majority of the obligations it creates are applied equally to print media, radio and television, companies that provide subscription-based audio and video services, and those media whose content can be created or reproduced via the Internet (Art. 5). In addition, the Act does not distinguish between media that are widely circulated and those that are more restricted, or between specialized media, such as media that disseminate cultural and artistic information, or alternative media.

Under this Act, all persons who avail themselves of any of these media to express their ideas or opinions are providing a public service, "which must be provided with responsibility and quality, respecting the communication rights established in the Constitution and in international instruments, and contributing to the good living [*buen vivir*] of individuals" (Art. 71).

Given that the Act appears to reflect the opinion that it is incumbent upon the State to ensure the quality of the information or opinions that circulate via the aforementioned media, those who use such media are subject to dozens of obligations, including: the manner in which they must present the content; the prohibition against omitting or refraining from publishing information that the authorities consider to be in the public interest; the obligation to issue critical (or negative) value judgments when they present information about acts that adversely affect legally protected interests such as "the environment"; the obligation to circulate only "verified, corroborated, accurate, and contextualized" information; and the requirement that the opinions not offend the honor of individuals—or groups—and other constitutionally protected interests.

In a subsequent commentary, the Office of the Special Rapporteur will discuss the scope of the aforementioned legal obligations. However, this Office must emphasize that the right to express oneself by any means is a fundamental right protected by Article 13 of the American Convention on Human Rights. Consequently, any limit that States seek to impose must adhere strictly to the provisions of this rule of international law.

Also, as this Office has mentioned on several occasions, any legal regulation on this subject must take very careful account of the nature of each type of media so as not to impose unnecessary restrictions that disproportionately jeopardize the right to freedom of expression. Indeed, as this Office has already stated, the creation of a single set of obligations or an administrative sanctions regime that encompasses all communications media without making pertinent distinctions is problematic. In this respect, what might be legitimate in the limited sphere of broadcasting—given the use of a public good such as open radio and television frequencies—might not be legitimate when applied to subscriber-based television, mainstream press, specialized print media, or those media that are produced and disseminated via the Internet. Accordingly, any regulation must take careful account of the nature of each medium so as not to impose unnecessary restrictions that disproportionately jeopardize the right to freedom of expression. As it will be explained, the Act in question does not take these differences into account and imposes a similar set of duties, burdens and responsibilities on all types of media without demonstrating that this treatment is necessary in a democratic society in the terms established in international human rights treaties.

2. Enforcement authority

For the enforcement of sanctions and the supervision of the obligations set forth in the Act, this norm establishes three bodies.[1] The lack of clarity regarding the competence of these different bodies could generate a significant level of uncertainty about the extent of their attributions. In particular, the law creates an administrative entity called the "Superintendency of Information and Communication" (Art. 55), defined as the "technical monitoring, auditing, intervention, and control body with sanctioning powers," over all the media previously mentioned. The head of this administrative agency will be appointed by a collegial administrative body[2] from a short list sent by the President of the Republic. This administrative official's powers will include the authority to supervise the media and impose penalties upon any medium that commits any of the infractions established in the Act or fails to comply with any of the multiple obligations that it creates (Art. 55 *et seq.*).

[1] Article 47 creates the Council of Regulation and Development of Information and Communications; Article 54 creates a "Consultative Council"; and Article 55 creates the Superintendency of Information and Communication.

[2] The Superintendency is elected by the Council of Citizen Participation and Social Control, based on a set of three candidates sent by the President of the Republic. Article 55 of the Act.

In their 2001 Joint Declaration, the UN, OSCE, and OAS Special Rapporteurs on Freedom of Expression underscored that "broadcast regulators and governing bodies should be so constituted as to protect them against political and commercial interference."[3] Given the importance of their duties, it is essential that the bodies responsible for implementing policies and overseeing compliance with broadcasting regulations be independent of political influence as well as of the interests of economic groups.

The Superintendency would not be limited to the implementation of the broadcasting regime. As such, it would have jurisdiction over all communications media regardless of their format or purview, which is problematic for the aforementioned reasons and are further explored below.

As the Special Rapporteur has explained in prior letters sent to your Illustrious State, the establishment of administrative bodies with the authority to establish controls, limits, and sanctions that can substantially affect the exercise of fundamental rights such as the right to freedom of expression for all communications media, without regard to their format or purview, is problematic from the perspective of Articles 13, 8, and 25 of the American Convention.

In this sense, it is important to note that according to Article 8.1 of the American Convention "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation […] or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

Similarly, Article 25 of the American Convention provides that "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties." The Act does not include any remedy with these characteristics, and journalists and media of all types, formats, and purviews would be subject to infringements of their right to freedom of expression by the administrative authorities for the entire length of a judicial proceeding, given that the decisions of the bodies created by the Act take effect immediately.

3. Remarks on the infractions and sanctions regime

As previously mentioned, the Act creates a system of obligations for the media that could give rise to various types of sanctions. First, it is important to note that each one of the limits (or obligations) imposed upon the media as part of a punitive system must meet the requirements of Article 13.2 of the Convention, that is: the restrictions must be defined clearly and precisely in a law, both procedurally and substantively; they must be aimed at meeting the compelling objectives authorized by the American Convention; they must be limits that are necessary in a democratic society to safeguard of one of the legally protected interests mentioned in that provision; and they must be strictly proportional to that protection.

[3] The UN 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. *Joint Declaration about Countering Terror, Broadcasting and the Internet*. Approved on November 20, 2001. Available at: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=48&lID=1. In the same way, Recommendation Rec(2000)23 from the Committee of Ministers of the Council Europe indicates that, the "rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces of economic interests." Council of Europe. Committee of Ministers. Appendix to Recommendation Rec(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector. Provision 3. December 20, 2000. Available at: https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2000)23&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

The Office of the Special Rapporteur would like to state that some of the obligations imposed by the Act on the media can be ambiguous or extremely broad. This is especially important given that, for the reasons explained below, the lack of precision or clarity in the system of obligations, or the existence of disproportionate obligations (excessively costly or truly unnecessary), could amount to an unjustified impediment to the operation or even the very existence of communications media that cannot sustain the obligations imposed, or create a chilling effect that is incompatible with a democratic society. Indeed, it is essential that the legal framework provide legal certainty to citizens, and define, in the clearest and most precise terms possible, the conditions of exercise and the limitations to which the exercise of the right to freedom of expression is subject.[4]

In addition, it is important to recall that the State must be neutral with respect to the content put out by the media, with the exception of the restrictions expressly authorized in Article 13 of the American Convention, in conjunction with international human rights law standards and in the terms established by that provision.

For the reasons noted, the provisions of the law should be drafted in a way that avoids vagueness or ambiguity.

For example, the Act creates an infraction called "media lynching," which bars "the dissemination of information that, directly or through third parties, is produced in a coordinated manner and published repeatedly through one or more communications media with the purpose of discrediting or harming the reputation of a person or entity" (Art. 26 and 10.4.j). In this respect, any sustained report of corruption that could lead to the loss of public credibility of the public servant involved could be considered "media lynching" by the competent administrative body, and constitute grounds for the respective sanctions. "Media lynching" does not require that the publisher acts knowing (actual knowledge or presumed knowledge) that the information is untrue or false.

The Act also creates the obligation of all media, regardless of their form and content, to draft a code of ethics, the basic content of which is established in the text of the law itself (Arts. 9 and 10). Thus, for example, the codes of ethics of all media must include, among other things, the obligation to "avoid disseminating acts that are irresponsible toward the environment in a positive manner or without value judgments" (Art. 10.4.h). In this way, the media would be required to determine when an act is "irresponsible" toward the environment, and could not limit themselves to presenting the relevant information; rather, they would be required by law to issue a negative value judgment with regard to the matter.

Similarly, the Act contains the obligation of all media to "cover and disseminate events of interest to the public," and specifies that "the deliberate and repeated omission to disseminate issues of public interest is an act of prior censorship" (Art. 18), that will be subject to the respective sanctions. The fine will be assessed by the Superintendency of Information and Communication.

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[4] Similar statements are found in the jurisprudence of the European Court, in virtue of which, the expression 'prescribed by law,' contained in Articles 9 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms "not only require[s] that an interference with the rights enshrined in these Articles should have some basis in domestic law, but also refer to the quality of the law in question. That law should be accessible to the persons concerned and formulated with sufficient precision to enable them – 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." *Glas Nadezhda Eood and Elenkov v. Bulgaria*, No. 14134/02, § 45, E.C.H.R (11/10/2007). Disponible en: http://echr.ketse.com/doc/14134.02-en-20071011/view/

Accordingly, in any case where the administrative authority finds that a medium has failed to publish information that is—in the authority's opinion—of public interest, the medium will be in noncompliance with its legal obligation and the penalties established in the law will be applicable, "without prejudice to the possible criminal prosecution of the party responsible for the acts of censorship and/or proceedings against that party for damages as a result of the harm produced" (Art. 18).

Similarly, as mentioned earlier, the law reiterates the requirement that disseminated information must be "verified, corroborated, accurate, and contextualized," assigning specific obligations in each one of these areas to all communications media (Arts. 22 and 10.3.a). The administrative entity is the one that determines whether the information meets the abovementioned requirements (Art. 56).

The aforementioned are just a few examples of how the Act establishes the framework of action, obligations, and prohibitions for individuals who exercise their freedom of expression through any communications medium, and how they could be problematic in light of the previously mentioned standards.

4. Remarks on the obligation of the media to have a "media watchdog" elected by the State and whose duties would be defined by the State

The Act establishes the requirement that all communications media must have an "ombudsman of the audiences and readers" (Art. 73). Each medium's watchdog will be elected in a competitive public process by a State administrative body called the Council of Citizen Participation and Social Control.

It is of enormous concern to this Office that the State might require the media to put on their payrolls and in their newsrooms a person chosen through a procedure designed and implemented by the State, whose powers and responsibilities would be set by the State itself and to whom the media might have to provide spaces for the publication of errors and corrections (Art. 73). While the concept of a readers' ombudsman is greatly relevant and notably contributes to compliance with the ethical principles of journalism, it is also up to each medium to adopt its code of ethics and the mechanisms by which to enforce it. Even more worrisome is the fact that the Act could place a person chosen through procedures designed and implemented by the State in the media and gives him the power to monitor and intervene in the content of those media. The Office of the Special Rapporteur does not find a single reason under the international law on freedom of expression to justify a decision of this nature.

5. Remarks on the imposition of prior conditions

The Act includes other requirements in addition to the ones required under Article 13 of the American Convention in terms of offering protection to the circulation of information.

In fact, the Act establishes the requirement that the information that circulates in the media must be "verified, corroborated, accurate, and contextualized," and it assigns specific obligations to the media in each one of these areas (Art. 22).

Principle 7 of the IACHR Declaration of Principles on Freedom of Expression states that "Prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments."

In addition, with respect to insults to public servants, Principle 10 of the IACHR Declaration of Principles on Freedom of Expression states that "it must be proven that in the dissemination of the news the journalist had the 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." Imposing additional requirements to protect information about complaints regarding

matters of public interest may lead to the disproportionate curtailment of robust, uninhibited, and genuinely plural debate regarding all public matters.

6. Remarks on the requirement that certain positions be held exclusively by "professional journalists"

The Act establishes that only "professional" journalists and media workers may perform the ongoing journalistic activities of the communications media, at any level or position. Exceptions are made for those who have specialized or opinion programs and columns and those who perform journalistic activities in the "languages of the indigenous peoples and nations" (Art. 42).

This provision appears to be inconsistent with the case law of the Inter-American Court of Human Rights, which held in one of its first decisions interpreting Article 13 of the American Convention that the imposition of special requirements for the practice of journalism, such as mandatory membership in a professional association, constitutes an illegitimate restriction on the freedom of expression.[5]

From this perspective, the Act is very similar to the regulation of "compulsory membership in a professional association" as a requirement to practice journalism, which the State of Costa Rica submitted to the advisory jurisdiction of the Court in 1985. In that case, the State of Costa Rica asked the Court whether "there is a conflict or contradiction between the compulsory membership in a professional association as a necessary requirement to practice journalism, in general, and reporting, in particular […] and international norms.[6]" The Court found that this type of regulation is incompatible with Article 13 of the American Convention, since "[t]he compulsory licensing of journalists does not comply with the requirements of Article 13(2) of the Convention because the establishment of a law that protects the freedom and independence of anyone who practices journalism is perfectly conceivable without the necessity of restricting that practice only to a limited group of the community."[7] Therefore, the Court unanimously held that "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."[8]

Applying this doctrine expressly, the highest courts of Brazil and Colombia have declared that it is unconstitutional to legally require a person to have a diploma to work in the news media.[9]

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[5] *Cf*. 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. 79.

[6] 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. 11.

[7] 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. 79.

[8] 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. Resolution One.

[9] See*, e.g. Judgment C-087/98 of March 18, 1998 of the Constitutional Court of Colombia. Available at: http://www.corteconstitucional.gov.co/relatoria/1998/c-087-98.htm and Judgment of June 17, 2009 of the Supreme*

It follows from the above-cited precedents that the establishment of professional requirements to exercise journalistic activities in the media, in any position or level, unduly restricts the right of all persons to freedom of expression, as it limits the scope of the exercise of that right to a specific group of citizens who practice journalism "professionally."

The Office of the Special Rapporteur recalls that Principle 6 of the Declaration of Principles on Freedom of Expression states that "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. Self-censorship

The Act expressly prohibits self-censorship. Nevertheless, it creates very strong incentives for journalists, editors, and media owners to adopt disproportionate self-restrictions as a measure of protection against the uncertain potential of being subject to the penalties established in the Act. Thus, for example, although the Act indicates that editorial directors must respect the independence of their journalists, it makes the media outlet liable for the dissemination of information of all types of content that is decontextualized, inaccurate or insufficiently verified, or when it could violate the human rights, reputation, honor, and good name of individuals and the public safety of the State. The same contradiction arises with respect to the liability of the media for comments published by users. In effect, one section establishes the need to respect the freedom of opinion and expression of all persons and another establishes the administrative, civil and criminal liability of media outlets for the publication of the offensive comments of third parties that violate the rights enshrined in the Constitution and the law, when in the authorities' view the media have failed to adopt sufficient mechanisms to filter them (Art. 20).

In this respect, it is important to point out that self-censorship is a highly worrisome phenomenon that must be eradicated with a legal framework that protects the exercise of freedom of expression for all, and ensures that individuals will not be subject to uncertain or disproportionate sanctions or any type of violence or retaliation. Accordingly, States committed to the fight against self-censorship must protect journalists and ensure that their legal frameworks do not create disproportionate obligations that can cause this chilling effect.

8. Remarks on the right of correction or reply

The Act stipulates that "All persons have the right to have the media correct information it has disseminated about them, their relatives, or matters under their responsibility when there are defects in the verification, corroboration, and accuracy of information of public relevance" (Art. 23). However, it does not require that the information published be false. In addition, the Act establishes that information that concerns public matters and matters of general interest or that violates "a person's right to honor or other constitutionally established rights" is "of public relevance" (Art. 7).

According to the Act, the media have the obligation to publish the appropriate corrections within 72 hours of the filing of a complaint, free of charge, with the same characteristics and size, and in the same space, section, or time slot.

In addition, according to the Act, "any person or group that has been directly referred to in the media in a way that harms its rights to dignity, honor, or reputation" has the right of reply. Such

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Federal Tribunal of Brazil. Recurso Extraordinario. 511.961. São Paulo. Available at: http://www.stf.jus.br/portal/inteiroTeor/obterInteiroTeor.asp?id=605643&idDocumento=&codigoClasse=437&numero=511961&siglaRecurso=&classe=RE

person or group "has the right to have the medium disseminate its reply free of charge, in the same space, page, and section of a print medium, or on the same radio or television program, within a period not to exceed 72 hours from the time the request is made" (Art. 24). In this respect, it is enough for a person to feel offended by any reference or editorial note for the medium to be required to publish, in the same space, his or her opinion with respect to the matter.

The enforcing authority in charge of determining whether there has been a violation that requires the publication of a reply or correction is the Superintendency of Information and Communication, which is headed by an administrative official selected from a short list sent by the President of the Republic without prior judicial oversight.

For the reasons explained below, the Office of the Special Rapporteur believes that the right of correction or reply, as it is regulated in the Act, would exceed the regulation of the same right provided for in Article 14 of the American Convention.[10] This is problematic in that the right to correction or reply is simultaneously an important mechanism for the protection of certain right and a form of restriction to the exercise of the right to freedom of expression. Indeed, the right of correction or reply enshrined in Article 14 of the Convention is one of the measures least restrictive to freedom of expression in comparison to civil or criminal penalties.[11] Nevertheless, this mechanism makes it possible to require a medium to disseminate information it does not wish to publish, and in the absence of appropriate and careful regulation, it could lead to abuses that end up disproportionately and unnecessarily jeopardizing freedom of expression. In this regard, it bears mentioning that freedom of expression not only protects the media's right to freely disseminate information and opinions but also the right not to have outside content imposed upon them.

As such, the right to freedom of thought and expression must be made compatible with the right of correction or reply, so that the latter may be exercised under fair conditions, when absolutely necessary to protect the fundamental rights of third parties.[12] It must therefore be based on a very careful legal development.

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[10] Article 14 of the American Convention indicates: "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."

[11] IACHR. Annual Report 2009. OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Volume II: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). Para. 80. Available at: http://www.oas.org/en/iachr/expression/docs/reports/annual/Informe%20Anual%202009%202%20ENG.pdf

[12] 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. Para. 25. This Advisory Opinion establishes that "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,

From this perspective, the regulation of this right as provided in the Act is problematic.

In this respect, the Office of the Special Rapporteur is of the opinion that the Act should respect the strict limits of Article 14 of the Convention, in order to avoid ambiguities that could disproportionately harm freedom of expression.

The possibility of correcting information only because the administrative authority finds that it is decontextualized or imprecise, or that it was "insufficiently verified" is problematic, since what Article 14 of the Convention requires is that the information be false or inaccurate. The terms used by the Act and the broad powers of the administrative authority to interpret them are of concern to the Office of the Special Rapporteur, as they could ultimately authorize strict government control over media content.

Likewise, the Office of the Special Rapporteur considers it very important to recall that the purpose of Article 14 of the Convention, although it refers to the right of "correction or reply," is to offer a mechanism to respond to false and offensive information—not to opinions, criticism, or value judgments. If it were possible to respond to all of the *opinions* or *criticism* put forward in a communications medium, beyond false and offensive *information,* it would detract from the editorial opinion of columnists; the media would be required to grant every request for a response or a reply that they received, based on the opinions and criticism they convey. In this respect, it bears repeating that opinions are broadly protected by the American Convention, including those that are offensive, disturbing, or shocking. As the Inter-American Court held in the *Kimel* case, opinions cannot be subject to penalties.[13]

Finally, the Office of the Special Rapporteur considers it of great importance to note that in any case, the decision to require a communications medium to publish outside content in defense of the rights of third persons can only come from a court, following a proceeding that meets all of the guarantees set forth in Articles 8 and 25 of the American Convention.

9. Remarks on the duty to observe good journalistic practice

The Act requires that all media, regardless of their format or content, draft a code of ethics, the basic content of which is established in the text of the Act itself (Art. 10). It contains dozens of obligations that must be included in that code of ethics as "minimum standards," and the legally established administrative authorities will supervise their implementation.

In order to comply fully with the important role they must play in a democratic society, journalists and the media must adhere to strict parameters of ethical conduct. However, in order to prevent the undue influence of the States in the content of the information the media decide to publish, the implementation of those ethical standards and the monitoring of their compliance cannot be in the hands of State agencies. In this respect, Principle 6 of the Declaration of Principles on Freedom of Expression states that, "Journalistic activities must be guided by ethical conduct, which should in no case be imposed by the State." The principle of self-regulation is not limited solely to the establishment of those ethical standards; rather, it necessarily extends to the mechanisms for their implementation and oversight. The States cannot assume the role of guardian of journalistic ethics without thereby creating a content control mechanism that is incompatible with the American Convention.

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however, interpret the right of freedom of expression so broadly as to negate the right of reply proclaimed by Article 14(1)."

[13] *Cf.* I/A Court H.R., *Case of Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 2, 2008. Series C No. 177. Para. 93.

10. Remarks on the clauses that establish penalties for the publication of information considered by the State to be confidential and that grant the administrative bodies in charge of supervision of the media the authority to request personal information from individuals connected to the media

For the Office of the Special Rapporteur, it is of particular concern that the Act extends the duty of confidentiality with regard to public information that the State has classified not only to private parties but also to the communications media. Furthermore, this Office is concerned by the overly broad and vague terms that describe the powers of the administrative authority which applies the aforementioned Act to access private information belonging to actors related to the communications media.

Specifically, the Act contains four provisions that obligate any person, and particularly the communications media, to maintain confidential information that is deemed subject to "reserved circulation." Although the fourth provision legitimately refers to the protection of children and adolescents, the other three establish the following:

> "The following information may not circulate freely, particularly in the communications media:
> 1. That which is expressly protected by means of a reserve clause previously established by law;
> 2. Information regarding personal data and that which comes from personal communications, the dissemination of which has not been properly authorized by the data subject, by law or by a judge with jurisdiction over the matter;
> 3. Information produced by the Office of the Public Prosecutor in the course of a preliminary investigation; […]" (Art. 30).

In this regard, the Office of the Special Rapporteur considers it necessary to reiterate that, as it has expressed in its joint declarations on Wikileaks (2010) and on surveillance programs and their impact on freedom of expression (2013), "[p]ublic authorities and their staff bear sole responsibility for protecting the confidentiality of legitimately classified information under their control. Under no circumstances, journalists, media workers and civil society representatives, who receive and disseminate classified information because they believe it is in the public interest, should not be subject to liability." In these circumstances, self-regulatory mechanisms and codes of conduct that are freely adopted by the communications media are particularly useful.

Similarly, the Office of the Special Rapporteur calls attention to the fact that the organs of the inter-American system have recognized that in order to guarantee the efficient administration of justice, the confidentiality of judicial proceedings leading up to a criminal prosecution is permissible. Nevertheless, in conformity with the principle of maximum disclosure, prohibiting access or disclosure of this type of information to third parties must be clearly and precisely defined by law and be necessary to avoid the materialization of a clear, probable and specific risk of substantial harm to the prevention, investigation, and punishment of crimes.[14] In any case, it should be noted that, in conformity with international standards in this area, there is an imperative public interest in obtaining information related to the investigation of serious human rights violations or crimes against humanity.[15] As such, there should not only be a presumption that the classification of this type of information is prohibited, but also that the State has the obligation to disclose it broadly. Several countries in the region have adopted norms along these lines.[16]

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[14] *Cf.* OAS General Assembly. Model Inter-American Law on Access to Public Information. AG/RES. 2607 (XL-O/10). Approved June 8, 2010. Article 40. Available at: http://www.oas.org/en/sla/dil/docs/AG-RES_2607-2010_eng.pdf

[15] *Cf.* OAS General Assembly. Model Inter-American Law on Access to Public Information. AG/RES. 2607 (XL-O/10). Approved June 8, 2010. Article 44. Available at: http://www.oas.org/en/sla/dil/docs/AG-RES_2607-2010_eng.pdf

[16] *Cf.* Decree No. 4/2010 of the President of the Argentine Nation, which establishes *inter alia,* that "the secrecy and confidentiality of information that could encourage full knowledge of the facts relating to human rights violations is to be lifted"; United Mexican States, Federal Law on Transparency and Access to Governmental Public Information, art. 14, establishing that "confidentiality may not be invoked when gross violations of basic rights or crimes against humanity are being investigated"; Republic of Peru, Law No. 27806, Law on Transparency and Access to Public Information, art. 15-C,

Finally, Principle 10 of the Declaration of Principles on Freedom of Expression of the Inter-American Commission on Human Rights provides 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 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."

On a related matter, the Office of the Special Rapporteur is concerned that while the Act establishes the aforementioned restrictions, it also confers on the Superintendency of Information and Communication the power to "require citizens, institutions and actors related to the communication to provide information about themselves that is necessary to comply with its functions" (Art. 56). The Act does not require judicial intervention or control of any type in relation to this clause. According to the text, those who do not comply with the obligation to send information "about themselves" when requested by the Superintendency will be subject to the sanctions applicable to the failure to comply with an order of this authority (Art. 55).

On other occasions, this Office has recognized the close relationship between the protection of the right to privacy and the full exercise of freedom of thought and expression.[17] This link becomes clearer when journalists or media workers are involved, as their work may be inhibited by arbitrary or abusive interference in their private life, including their correspondence. In this sense, Principle 8 of the Declaration of Principles recognizes that "Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential". As a result, the State has the duty to establish clearly in the law the provisions according to which it is permissible to order interference in the private life of individuals, particularly journalists, in order to protect them from arbitrary or abusive requests. Similarly, the law should establish limits regarding the nature and scope of this type of measures, the entities who are competent to authorize and execute them, as well as the legal mechanisms available to challenge them. At all times, the law should offer sufficient guarantees of due process and prior judicial control.

Final remarks

In the preceding paragraphs, the Office of the Special Rapporteur for Freedom of Expression has raised certain points concerning the Act passed by the Legislative Assembly and signed by the President of the Republic which, in the opinion of this Office, should be revised in light of the international standards on freedom of expression.

Likewise, the Office of the Special Rapporteur should reflect States' efforts to identify stronger guarantees to protect pluralism and diversity in the communicative process. Nevertheless, this

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which establishes that "information related to violations of human rights or of the Geneva Conventions of 1949 committed by any person in any circumstances shall not be considered classified"; Republic of Uruguay, Law No. 18.381, Right of Access to Public Information, art. 12, which establishes that "the entities subject to this law may not invoke any of the reservations listed in the preceding articles when the information sought deals with human rights violations or is of relevance in investigating, preventing, or avoiding such violations."

[17] *Cf*. The United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights of the OAS. *Joint Declaration on surveillance programs and their impact on freedom of expression*. June 21, 2013. Available at: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=926&lID=1

should be done with respect for the guarantees established in international law to fully ensure the fundamental right to freedom of expression.

In that sense, the Office of the Special Rapporteur would like to express to the authorities of the State the willingness of this Office to collaborate and provide technical assistance to Your Illustrious State in initiatives related to the right to freedom of thought and expression.

The inter-American standards that have been mentioned in this communication are the guide used by the Office of the Special Rapporteur for its activities, and they are contained in Chapters III and VI of the 2009 Annual Report issued by this Office, approved by the IACHR and incorporated into de Annual Report of the Commission. This report can be found on the web site of the Office of the Special Rapporteur: www.cidh.org/relatoria.

I would like to avail myself of this opportunity to express to Your Excellency the assurances of my highest and most distinguished regard.

Catalina Botero
Special Rapporteur for Freedom of Expression
Inter-American Commission on Human Rights
Organization of American States