

The Inter-American Legal Framework regarding the Right to Freedom of Expression

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



Organization of
American States

ISBN 978-0-8270-5457-8



Organization of
American States



OEA/Ser.L/V/II
CIDH/RELE/INF. 2/09
30 December 2009
Original: Spanish

INTER-AMERICAN LEGAL FRAMEWORK REGARDING THE RIGHT TO FREEDOM OF EXPRESSION

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

2010

Internet: <http://www.cidh.org/relatoria>

Email : cidhexpresion@oas.org

OAS Cataloging-in-Publication Data

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

Marco jurídico interamericano sobre el derecho a la libertad de expresión = the inter-American legal framework regarding the right to freedom of expression / Relatoría Especial para la Libertad de Expresión, Comisión Interamericana de Derechos Humanos.

p. ; cm. (OEA documentos oficiales ; OEA Ser.L/V/II CIDH/RELE/INF.)(OAS official records ; OEA Ser.L/V/II CIDH/RELE/INF.) ISBN 978-0-8270-5457-8

1. Freedom of information--Legal aspects--America. 2. Freedom of speech--America. 3. Freedom of information--America. 4. Civil rights--America. 5. Human rights--America. I. Title. II Series. III. Series. OAS official records ; OEA/Ser.L. V/ II CIDH/RELE/INF. KG576.L7 I58 2010 OEA Ser.L/V/II. CIDH/RELE/INF. 2/09

Book printed thanks to the financial support Swedish International Development Cooperation Agency – SIDA / ASDI
Texts elaborated with the financial support of the European Commission – Agreement IEDDH Cris No. 2009 / 167-432

Approved by the Inter-American Commission on Human Rights on December 30, 2009¹

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

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

MEMBERS

Felipe González

Paulo Sergio Pinheiro

Dinah Shelton

María Silvia Guillén

Rodrigo Escobar Gil

Luz Patricia Mejía Guerrero

José de Jesús Orozco Henríquez

Santiago A. Canton, Executive Secretary.

Elizabeth Abi-Mershed, Deputy Executive Secretary

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

INDEX

TABLE OF ACRONYMS AND REFERENCES	viii
PROLOGUE	ix
INTER-AMERICAN LEGAL FRAMEWORK REGARDING THE RIGHT TO FREEDOM OF EXPRESSION.....	1
A. Importance and function of the right to freedom of expression	1
1. Importance of freedom of expression within the Inter-American legal framework..	1
2. Functions of freedom of expression	2
B. Main characteristics of the right to freedom of expression	4
1. Entitlement to the right to freedom of expression	4
2. Dual dimension – individual and collective – of freedom of expression	5
3. Duties and responsibilities contained within freedom of expression.....	6
C. Types of speech protected by freedom of expression	7
1. Types of protected speech according to form	7
a. Forms of expression specifically protected by inter-American instruments	7
2. Types of speech protected according to content	10
a. Presumption of coverage <i>ab initio</i> for all types of speech, including offensive, shocking or disturbing speech	10
b. Specially protected speech	11
i. Political speech and speech involving matters of public interest	11
ii. Speech regarding public officials in the exercise of their duties and candidates for public office.....	13
iii. Speech that expresses essential elements of personal identity or dignity....	19
3. Speech not protected by freedom of expression.....	20
D. Limits on freedom of expression	21
1. Admissibility of limitations under the American Convention on Human Rights	22
2. Conditions that limitations must meet in order to be legitimate under the American Convention	23
a. General rule: compatibility of limitations with the democratic principle.....	23
b. Specific conditions derived from Article 13.2: the three-part test	24
i. The limitations must be set forth in laws that are drafted clearly and precisely	24
ii. The limitations must serve compelling objectives authorized by the American Convention.....	26
iii. The limitations must be necessary in a democratic society to serve the compelling objectives pursued, strictly proportionate to the objective pursued, and appropriate to serve such compelling objective	29
c. Types of limitations that are incompatible with Article 13.....	31
i. The limitations must not amount to prior censorship, for which reason they may be established only through the subsequent and proportional imposition of liability	31
ii. The limitations cannot be discriminatory nor have discriminatory effects....	32
iii. The limitations may not be imposed by indirect means such as those proscribed by Article 13.3 of the American Convention	33
iv. Exceptional nature of the limitations.....	33
3. Stricter standards of control for certain limitations due to the type of speech they address	34
4. Means of limitation of freedom of expression in order to protect the rights of others to honor and reputation	35
a. General rules.....	35

b.	Cases in which the Inter-American Court has examined the conflict between the right to freedom of expression and personal rights like public officials' right to honor and reputation	43
c.	Fundamental incompatibility of "desacato laws" and the American Convention	48
E.	The prohibition against censorship and indirect restrictions to freedom of expression	51
1.	The prohibition against direct prior censorship	51
2.	The prohibition against indirect restrictions to freedom of expression by the authorities	54
3.	The prohibition against indirect restrictions to freedom of expression by causes other than the abuse of State restrictions	57
F.	Journalists and the social communications media	59
1.	Importance of journalism and the media for democracy; characterization of journalism under the American Convention	59
2.	Responsibility inherent in the practice of journalism	61
3.	Rights of journalists and State duties to protect the safety and independence of journalists and media outlets	62
4.	Journalists who cover armed conflict or emergency situations	70
5.	Conditions inherent in the functioning of the media	71
G.	The exercise of freedom of expression by public officials	72
1.	General duties of the exercise of freedom of expression by public officials	73
2.	The duty of confidentiality which may apply to certain information controlled by the State	77
3.	The right and duty of public officials to denounce human rights violations	77
4.	The particular situation of members of the Armed Forces	77
H.	Freedom of expression in the electoral context	78
I.	Pluralism, diversity and freedom of expression	80
	NATIONAL INCORPORATION OF THE INTER-AMERICAN STANDARDS ON FREEDOM OF EXPRESSION DURING 2009	85
A.	Implementation of the legal standards of the inter-American system in national legal systems	85
B.	Incorporation of standards on freedom of expression through legislative reform	92
1.	The decriminalization of speech concerning matters of public interest in Uruguay	92
2.	Amendments to the Criminal Code and the Press Law of Argentina to decriminalize speech in the public interest	93
C.	Decisions of national courts that incorporate inter-American standards on freedom of expression	94
1.	Judgment of the Federal Supreme Court of Brazil on the requirement of a professional degree for the practice of journalism	95
a.	Brief summary of the case	95
b.	Legal Reasoning of the Court and incorporation of inter-American standards	96
2.	Judgment of the Federal Supreme Court of Brazil finding the press law incompatible with the Constitution	97
a.	Brief summary of the case	97
b.	Legal reasoning of the court and application of inter-American standards	97
3.	Judgment T-298/09 of the Constitutional Court of Colombia, on confidentiality of sources	98
a.	Brief summary of the case	99
b.	Legal reasoning of the court and application of inter-American standards	99
4.	Judgment of the Labor Court of First Instance in Valparaíso in Chile: social protest and freedom of expression	101

a.	Brief summary of the case	101
b.	Reasoning of the court and application of inter-American standards	102
5.	Decision of the Supreme Court of Mexico on the unconstitutionality of vague criminal laws that protect the honor and privacy of public officials	105
a.	Brief summary of the case	105
b.	Legal reasoning of the court and application of inter-American standards	106
6.	Decision of the First Chamber of the Supreme Court of the Nation of Mexico on the special protection of the right to freedom of expression concerning matters that may be in the public interest	110
a.	Brief summary of the case	110
b.	Legal reasoning and application of inter-American standards	111
7.	Judgment C-417/09 of the Constitutional Court of Colombia over the truth exception (<i>exceptio veritatis</i>)	114
a.	Brief summary of the case	114
b.	Legal reasoning of the Colombian Constitutional Court and the application of inter-American standards	114
D.	Conclusions	117

TABLE OF ACRONYMS AND REFERENCES

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

PROLOGUE

The IACHR's Office of the Special Rapporteur for Freedom of Expression is pleased to present this publication, which contains a systematic analysis of inter-American standards on freedom of expression, along with a review of some of the most significant legislation and court rulings from throughout the hemisphere that incorporated these standards at the domestic level in 2009. In doing this, we hope to show how regional principles can - when placed in the hands of legislators, judges, attorneys, and other actors in the legal system - become tools that are useful for strengthening the right to freedom of expression in the Americas.

The first chapter of this report lays out the principles, scope, and limits of the right to freedom of thought and expression according to the interpretation put forward by the authorized bodies of the inter-American system. This vision emphasizes the right's fundamental importance for the development of democratic systems. It also emphasizes the right's individual and social dimensions, guaranteeing as it does the right of individuals to freely express ideas, information, and opinions, and guaranteeing society's right to receive information and ideas of all kind.

The chapter also analyzes the types of speech that are especially protected, as well as those that are not protected by the American Convention on Human Rights. Effectively, expressions related to matters in the public interest or to individuals who hold or are seeking to hold public office are especially protected by the system because of their fundamental relationship with democratic institutions. This principle is expressed through certain standards that the Inter-American Court and Inter-American Commission have developed in recent years, such as the greater tolerance of criticism that must be shown by public officials or public figures who find themselves subject to increased scrutiny from society. On the other hand, the inter-American system excludes certain kinds of speech from its protection, in keeping with Article 13.5 of the American Convention and other human rights instruments. In effect, child pornography, direct and public incitements to genocide, and war propaganda and hate speech that constitute incitements to violence with the intent and ability to cause such violence are all expressions that are not protected by the Convention.

One of the most important subjects this book addresses is the conditions under which limits to the right to freedom of expression are admissible. In effect, the Inter-American case law has developed a three-part test that is used to determine if restrictions on the exercise this right are acceptable under the parameters of the American Convention. This standard requires that the restrictions be clearly and precisely provided for by law; that they be designed to achieve one of the vital objectives recognized in the Convention; and that they be necessary in a democratic society. When it comes to restrictions on especially protected speech, inter-American case law has interpreted these limitations restrictively and indicated their exceptional character, as the cases analyzed herein demonstrate.

Finally, this section concludes by reviewing the inter-American case law on various problems that are particularly relevant to current democratic societies. These problems include direct or indirect censorship; special guarantees of protection for journalists and media outlets; the principles of plurality and diversity that should govern the mass media; and freedom of expression as regards elections.

The second chapter of the book analyzes how inter-American standards have been incorporated domestically by various public bodies. The first section briefly discusses the different mechanisms through which inter-American standards can be incorporated domestically. The second section shows how the legislatures in different countries have

taken inter-American standards into account in promoting legal reforms intended to adapt domestic law to the inter-American legal system. For example, when Uruguay decided to decriminalize expression on matters in the public interest, its legislature did so by expressly citing the precedents of the inter-American system. Similarly, Argentina eliminated the crimes of libel and slander when related to matters in the public interest as a consequence of litigation before the inter-American system brought by journalists and civil society organizations in the *Kimel* case. In its judgment in that case, the Inter-American Court had ordered the Argentine state to modify its existing legal regime.

Another mechanism that allows inter-American standards to be incorporated domestically is local litigation. For example, Brazil's Superior Federal Court ruled that requiring those who wished to practice journalism to have a diploma was unconstitutional. The Court found that the requirement was disproportionate and violated the country's Constitution, as well as the international agreements to which Brazil is a party. The Court made a specific reference to Advisory Opinion OC-5/85, in which the Inter-American Court had ruled that requirements of this type are incompatible with Article 13 of the American Convention.

In Chile, the Valparaíso Labor Court applied inter-American standards on social protest and freedom of expression in protecting a group of workers whose right to protest was being illegally restricted. The case is particularly interesting as its use of international standards was vital for strengthening the protection of those workers' human rights.

In Mexico, meanwhile, the Supreme Court of Justice ruled that criminal laws of the State of Guanajuato that protected honor and privacy were not compatible with the Constitution because they were extremely vague. The Court followed inter-American standards, ruling that limitations on freedom of expression must meet certain formal, substantive requirements. The Court recognized the special protection that should be granted to certain kinds of speech related to matters in the public interest. In another of the cases presented, the Constitutional Court of Colombia heard a case that questioned the constitutionality of excluding *exceptio veritatis* in criminal trials for slander and libel. In ruling on the case, the Court made explicit reference to various reports from the IACHR and the Office of the Special Rapporteur which make repeated calls for the decriminalization and special protection of political speech on matters in the public interest.

These kinds of rulings show that fruitful dialogue between national and regional authorities produces a virtuous circle of mutual learning and allows for greater and better guarantees to be put in place for all the region's inhabitants. The purpose of this dialogue is to move toward more robust and effective protection of human rights. This publication, which systemizes the standards and gives practical examples of their domestic application, seeks to progress toward this important objective.

INTER-AMERICAN LEGAL FRAMEWORK REGARDING THE RIGHT TO FREEDOM OF EXPRESSION

1. This first chapter explains the content and scope of the right to freedom of expression within the legal framework of the Inter-American System of Human Rights. The purpose of this chapter is to systematize the jurisprudence and doctrines developed by the Inter-American Court of Human Rights (hereinafter Inter-American Court) and by the Inter-American Commission on Human Rights (hereinafter IACHR), as well as the reports and opinions of the Office of the Special Rapporteur for Freedom of Expression on the matter.

2. The following sections summarize the Inter-American doctrine and jurisprudence on the following topics: the importance and function of the right to freedom of expression; the principal characteristics of the right to freedom of expression; the types of speech protected, specially protected, and not protected by the right to freedom of expression; and the limitations on the right to freedom of expression. This chapter also discusses the standards that apply to the prohibition of censorship and indirect restrictions on freedom of expression, as well as to the right to access to information. Finally, specific sections are dedicated to various issues that have been discussed by the doctrine and jurisprudence, which are fundamental because of their importance to current democratic society: the protection of journalists and social communications media; the exercise of freedom of expression by public officials; freedom of expression in the area of electoral processes; and pluralism and diversity in the process of mass communication.

A. Importance and function of the right to freedom of expression

1. Importance of freedom of expression within the Inter-American legal framework

3. The legal framework of the Inter-American system for the protection of human rights is probably the international framework that provides the greatest scope and the broadest guarantees of protection to the right to freedom of thought and expression. In effect, Article 13 of the American Convention on Human Rights,¹ Article IV of the American Declaration of the Rights and Duties of Man,² and Article 4 of the Inter-American

¹ Inter-American Convention on Human Rights, Article 13: "Freedom of Thought and Expression 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. // 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (1) respect for the rights or reputations of others; or (2) 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."

² American Declaration of the Rights and Duties of Man, 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."

Democratic Charter³ offer a number of reinforced guarantees that do not appear to be equaled in the universal system or in any other regional system of protection.

4. From a comparative perspective, when the texts of Article 13 of the American Convention, Article IV of the American Declaration, and Article 4 of the Inter-American Democratic Charter are contrasted with the relevant provisions of other international human rights treaties—specifically with Article 19 of the International Covenant on Civil and Political Rights or with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms—it is clear that the Inter-American framework was designed by the American States to be more generous and to reduce to a minimum the restrictions to the free circulation of information, opinions and ideas.⁴ This has been interpreted by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights as a clear indication of the importance ascribed to free expression by the hemisphere's societies. Specifically referring to Article 13 of the American Convention on Human Rights, the Inter-American Commission has pointed out that its wording "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."⁵ The importance that Article 13 confers upon freedom of expression also means that the restrictions provided for in other international instruments are not applicable in the American context, nor should such instruments be used to interpret the American Convention restrictively. In such cases, the American Convention should prevail by virtue of the *pro homine* principle—widely accepted by all democratic States—according to which the norm most favorable to human beings should prevail.⁶

5. Inter-American case law has explained that the inter-American legal framework places this high value on freedom of expression because it is based on a broad concept of the autonomy and dignity of the individual, and because it takes into account the instrumental value of freedom of expression for the exercise of all other fundamental rights, as well as its essential role within democratic systems, as discussed below.

2. Functions of freedom of expression

6. The importance of freedom of expression stems mainly from its triple function within democratic systems.

7. First, it is one of the individual rights that most clearly reflects the virtue that marks – and characterizes – human beings: the unique and precious capacity to think about the world from our own perspective and communicate with one another in order to construct, through a deliberative process, not only the model of life that each one has a

³ Inter-American Democratic Charter, Article 4: "Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. // The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy."

⁴ 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. 50; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

⁵ IACHR. Report No. 11/96. Case 11.230. Merits. Francisco Martorell. Chile. May 3, 1996. para. 56.

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. 52.

right to adopt, but the model of society in which we want to live. All our creative potential in arts, in science, in technology, in politics—in short, all our individual and collective creative capacity—fundamentally depends on the respect and promotion of the right to freedom of expression, in all its dimensions. This is therefore an individual right without which the first and foremost of our liberties would be denied: our right to think by ourselves and share our thoughts with others.

8. Second, the Inter-American Commission and Court have underlined in their case law that the importance of freedom of expression within the catalogue of human rights also stems from its structural relationship to democracy.⁷ This relationship, which has been characterized by the bodies of the inter-American human rights system as “close,” “indissoluble,” “essential,” and “fundamental” –*inter alia*– explains in large part the interpretive developments on the issue of freedom of expression in the various pertinent decisions of the Commission and the Court.⁸ The link between freedom of expression and democracy is so important that, according to the Inter-American Commission, the very purpose of Article 13 of the American Convention is to strengthen the operation of deliberative and pluralistic democratic systems through the protection and promotion of the free circulation of information, ideas and expressions of all kinds.⁹ Likewise, Article 4 of the Inter-American Democratic Charter characterizes freedom of expression and freedom of the press as “essential components of the exercise of democracy.” Similarly, the freedom of expression rapporteurs of the UN, the OSCE and the OAS recalled in their first Joint Declaration of 1999 that “freedom of expression is a fundamental international human right and a basic component of civil society based on democratic principles.” Indeed, the full exercise of the right to express one’s own ideas and opinions, and to circulate all available information, as well as the possibility of deliberating in an open and uninhibited manner about the matters that concern us all, is an indispensable condition for the consolidation, functioning and preservation of democratic regimes. The formation of an informed public opinion that is aware of its rights, citizen control over the conduct of public affairs and the accountability of public officials, would not be possible if this right was not guaranteed. In this same sense, the case law has emphasized that the democratic function of freedom of expression deems it a necessary condition to prevent the consolidation of authoritarian

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. 70; I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 85; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 112; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 82; I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para.105; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 116.

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. para. 70; I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 85; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 116. I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 86.

⁹ IACHR. Arguments before the Inter-American Court of Human Rights in the *Case of Ivcher-Bronstein v. Peru*, cited in I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 143.d); IACHR. Pleadings before the Inter-American Court of Human Rights in the *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile*, cited in I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 61.b).

systems and to facilitate personal and collective self-determination,¹⁰ as well as to insure that “the mechanisms of citizen control and complaints” function.¹¹ In this regard, if the exercise of the right to freedom of expression tends not only towards the personal fulfillment of those who express themselves but also towards the consolidation of truly democratic societies, the State has the obligation to generate the conditions to ensure that the public debate not only satisfies the legitimate needs of all as consumers of a given information (entertainment, for example), but also as citizens. That is to say, the necessary conditions must be given for there to be a public, plural and open deliberation about the matters that concern us all as citizens of a given State.

9. Finally, Inter-American case law has explained that freedom of expression is a key instrument for the exercise of all other fundamental rights. Indeed, it is an essential mechanism for the exercise of the rights to participation, religious freedom, education, ethnic or cultural identity and, needless to say, equality, understood not only as the right to be free from discrimination, but as the right to enjoy certain basic social rights. Given the important instrumental role it fulfils, freedom of expression is located at the heart of the human rights protection system in the Americas. As stated by the Inter-American Commission, “lack of freedom of expression is a cause that ‘contributes to lack of respect for the other human rights.’”¹²

10. In short, the preservation of freedom of expression is a necessary condition for the free and peaceful functioning of democratic societies in the Americas. According to the Inter-American Commission, “[f]ull and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart. A society that is to be free both today and in the future must engage openly in rigorous public debate about itself.”¹³

B. Main characteristics of the right to freedom of expression

1. Entitlement to the right to freedom of expression

11. Pursuant to Article 13 of the American Convention, freedom of expression is a right of *every person*, under equal conditions and without discrimination of any kind.

¹⁰ 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; I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 85; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 116; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 86; I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 73; IACHR. Report No. 130/99. Case 11.740. Merits. Víctor Manuel Oropeza. Mexico. November 19, 1999. para. 46; I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 105; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 116.

¹¹ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para.105; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 116.

¹² IACHR. Report No. 38/97. Case 10.548. Merits. Hugo Bustíos Saavedra. Peru. October 16, 1997. para. 72.

¹³ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

12. According to the relevant jurisprudence, the entitlement to the right to freedom of expression cannot be restricted to a profession or a group of individuals, nor applied solely to freedom of the press.¹⁴ In this respect, for example, the ruling in *Tristán Donoso v. Panama* states that: “The American Convention guarantees this right to every individual, irrespective of any other consideration; so, such guarantee should not be limited to a given profession or group of individuals. Freedom of expression is an essential element of the freedom of the press, although they are not synonymous and the exercise of the first does not condition exercise of the second. The case in question involves a lawyer who claims protection under Article 13 of the Convention.”¹⁵

2. Dual dimension – individual and collective – of freedom of expression

13. As the case law of the inter-American system has explained on numerous occasions, freedom of expression is a right that has two dimensions: an individual dimension, consisting of the right of each person to express her own thoughts, ideas and information, and a collective or social dimension, consisting of society’s right to obtain and receive any information, to know the thoughts, ideas and information of others, and to be well-informed.¹⁶

14. Bearing in mind this dual dimension, it has been held that freedom of expression is a *means for the exchange* of information and ideas among individuals and for mass communication among human beings, which involves not only the right to communicate to others one’s own point of view and the information or opinions of one’s choosing, but also the right of all people to receive and have knowledge of such points of view, information, opinions, reports and news, freely and without any interference that blocks or distorts them.¹⁷ It has been specified in this respect that it is as important for the

¹⁴ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 114.

¹⁵ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 114.

¹⁶ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 53; I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 75; I/A Court H. R., *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141. para. 163; IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*, cited in I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 101.1).a); I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 146; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 77; I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 64; 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. 30; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V; IACHR. Report No. 130/99. Case 11.740. Merits. Víctor Manuel Oropeza. Mexico. November 19, 1999. para. 51; IACHR. Report No. 11/96. Case 11.230. Merits. Francisco Martorell. Chile. May 3, 1996. para. 53.

¹⁷ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 110; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 79; I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 66; 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. 32; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

average citizen to have knowledge of others' opinions, or of the information made available by others, as it is for him to have the right to impart his own.¹⁸

15. A specific act of expression involves both dimensions simultaneously. Likewise, a limitation to the right to freedom of expression affects both dimensions at the same time.¹⁹ Thus, for example, in the case of *Palamara Iribarne v. Chile*, the Inter-American Court held that when Chilean military criminal justice authorities prevented (by means of prohibitions and physical seizures) the petitioner from publishing a book that he had already written and that was in the process of being printed and distributed, both dimensions of freedom of expression were violated: Mr. Palamara's right to exercise his freedom by writing and publishing the book was adversely affected, and the right of the Chilean public to receive the information, ideas and opinions set forth in that writing was also infringed.

16. The two dimensions of freedom of expression are of equal importance; they are inter-dependent and must be guaranteed simultaneously, in full, in order for the right enshrined in the Inter-American instruments to be completely effective.²⁰

17. One of the main consequences of the duty to guarantee both dimensions simultaneously is that one of them cannot be affected by invoking the preservation of the other as a justification; thus, for example, "[o]ne 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. It is equally true that the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view."²¹

3. Duties and responsibilities contained within freedom of expression

18. The exercise of freedom of expression entails duties and responsibilities for those who express themselves. The basic duty derived from it is the duty not to violate the rights of others while exercising this fundamental freedom. The scope of the duties and

¹⁸ I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 66; 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. 32.

¹⁹ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 107; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 81; 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. 33; IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*, cited in I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 101.1).a); IACHR. Report No. 90/05. Case 12.142. Merits. Alejandra Marcela Matus Acuña et al. Chile. October 24, 2005. para. 39.

²⁰ I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 80; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 149; I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 67; IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*, cited in I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 101.1).a).

²¹ 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. 33.

responsibilities also depends on the specific situation in which the right is exercised, and the technical method used to voice and impart the expression.

C. Types of speech protected by freedom of expression

1. Types of protected speech according to form

a. Forms of expression specifically protected by inter-American instruments

19. Article 13 of the American Convention establishes the right of every person to freedom of expression, and specifies that this right encompasses 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.” In its interpretation of the scope of the right to freedom of expression, the Declaration of Principles on Freedom of Expression issued by the Inter-American Commission on Human Rights indicates that this fundamental and inalienable right refers to human expression “in all its forms and manifestations,” and that it covers the right of every person, under equal conditions, “to seek, receive and impart information and opinions freely,” “by any means of communication,” as well as the “right to communicate his/her views by any means and in any form.” The Declaration of Principles also states expressly that 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 to “update it, correct it and/or amend it” if necessary, as well as the right to “access to information held by the State.”

20. In their decisions, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have given a broad content to the right to freedom of expression enshrined in Article 13 of the American Convention, and have derived from its individual and collective dimensions a series of rights protected by that article in relation to different forms of human expression.²² According to these bodies, Article 13 of the American Convention reflects a broad concept of freedom of expression that is based on the autonomy and dignity of the individual,²³ and is meant to serve an important democratic function, as discussed below.²⁴

21. The main specific types of expression that have been addressed in the decisions of the Inter-American Commission and the Inter-American Court are the ones set forth below.

22. *The right to speak*, that is, to express one’s thoughts, ideas, information or opinions orally. This is a basic right which, according to the Commission and the Court, is one of the pillars of freedom of expression.²⁵

²² I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 75.

²³ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ivcher Bronstein v. Peru*, cited in I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 143.d).

²⁴ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

²⁵ I/A Court H. R., *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141. para. 164; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 109; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C

23. The right to speak necessarily entails people's right to use the language of their choice to express themselves.²⁶ Accordingly, the Inter-American Court in the case of *López Alvarez v. Honduras* examined the case of a member of an ethnic group who had been deprived of his liberty, and during the course of his incarceration had been adversely affected by the prohibition, imposed by the prison Director, against speaking in the language of his ethnic group. In the Court's opinion, this prohibition was a violation of Article 13 of the American Convention, in that "one of the mainstays of the freedom of expression is precisely the right to speak, and (...) this necessarily implies the right of people to use the language of their choice when expressing their thoughts. The expression and dissemination of thoughts and ideas are indivisible; therefore a restriction on the possibilities of spreading information directly represents, in the same measure, a limit to the right to express oneself freely."²⁷

24. *The right to write*, that is, to express one's thoughts, ideas, information, or opinions in written or printed form,²⁸ also in the language of one's choice. The Inter-American Commission and Court have protected various manifestations of the right to write, for example, in the case of those who write books,²⁹ news articles³⁰ and opinion pieces.³¹

25. *The right to disseminate* spoken or written expressions of thoughts, information, ideas, or opinions, through the means of dissemination of one's choosing, in order to communicate them to the greatest possible number of people. On this point the Inter-American Court has stressed the following: (a) freedom of expression is not limited to the abstract right to speak or write; rather, it encompasses inseparably the right to disseminate the thought, information, ideas, and opinions by any appropriate means chosen, in order to reach as many people as possible;³² (b) to guarantee this freedom effectively, the

No. 111. para. 78; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 147; I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 65; 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. 31.

²⁶ I/A Court H. R., *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141. para. 164.

²⁷ I/A Court H. R., *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141. para. 164.

²⁸ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 109; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 78; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 147; I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 65.

²⁹ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135; I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177.

³⁰ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107.

³¹ I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111.

³² I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 73; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 109; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 78; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of

State must not only protect the exercise of the right to speak or write ideas and information but also has the duty to refrain from restricting their dissemination through the prohibition or disproportionate regulation of the means chosen for others to receive them;³³ and (c) in establishing that freedom of expression encompasses the right to impart information and ideas “by any (...) medium,” the American Convention establishes that the expression and dissemination of thoughts and ideas are indivisible, and therefore any limitation on the means and possibilities for the dissemination of the expression is, directly and in the same measure, an infringement of freedom of expression³⁴ –which implies, among other things, that restrictions on the communications media are also restrictions to freedom of expression.³⁵ As such, in the case of *Palamara Iribarne v. Chile*, the Inter-American Court held that respect for freedom of expression requires States not only to allow individuals to express themselves verbally or in writing but also to refrain from preventing the dissemination of their expressions through means such as the publishing of a book. According to the Court, “in order to ensure the effective exercise of Mr. Palamara Iribarne’s right to freedom of thought and expression, it was not enough for the State to allow him to write his ideas and opinions. The protection of such right implied the duty of the State not to restrict their dissemination, enabling him to distribute his book by any appropriate means to make his ideas and opinions reach the maximum number of people and, in turn, allowing these people to receive this information.”³⁶

26. *The right to artistic and symbolic expression, to the dissemination of artistic expression, and to access to art, in all its forms.*³⁷

February 6, 2001. Series C No. 74. para. 147; I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 65; 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. 31.

³³ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 73; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 109; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 78; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 147; I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 65; 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. 31.

³⁴ I/A Court H. R., *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141. para. 164; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 72; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 109; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 78; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 147; I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 36.

³⁵ 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. 36.

³⁶ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 73.

³⁷ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile*, cited in I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 61.b).

27. *The right to seek, receive and have access to expressions, ideas, opinions and information of all kinds.* According to the Inter-American Commission and Court, the right to freedom of expression also enables individuals to seek, procure, obtain and receive all types of information, ideas, expressions, opinions and thoughts. The right of access to information, particularly information held by the State, is a specific and crucial manifestation of this freedom that has warranted special attention in the inter-American system.

28. *The right of access to information about oneself contained in public or private databases or registries,* with the corresponding right to update, correct or amend it.

29. *The right to possess information, whether written or in any other medium, to transport such information, and to distribute it.* The inter-American bodies have protected this manifestation of freedom of expression, for example, in cases involving the possession of printed media for distribution or personal use,³⁸ or the possession, transportation, sending and receipt of books.³⁹

2. Types of speech protected according to content

a. Presumption of coverage *ab initio* for all types of speech, including offensive, shocking or disturbing speech

30. In principle, all forms of speech are protected by the right to freedom of expression, independently of their content and degree of government and social acceptance. This general presumption of coverage of all expressive speech is explained by the State's primary duty of content-neutrality and, as a consequence, by the necessity to guarantee that, in principle, there are no persons, groups, ideas or means of expression excluded *a priori* from public debate.

31. Particularly important is the rule according to which freedom of expression must be guaranteed not only with regard to the dissemination of ideas and information that are received favorably or considered inoffensive or indifferent but also in cases of speech that is offensive, shocking, unsettling, unpleasant or disturbing to the State or to any segment of the population.⁴⁰ This is required by the pluralism, tolerance and spirit of openness without which a democratic society cannot exist.⁴¹ In this vein, the Commission

³⁸ IACHR. Report No. 3/98. Case 11.221. Merits. Tarcisio Medina Charry. Colombia. April 7, 1998. para. 77.

³⁹ IACHR. Report No. 2/96. Case 10.325. Merits. Steve Clark *et al.* Grenada. March 1, 1996.

⁴⁰ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 2, 2004. Series C No. 107. para. 113; I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs.* Judgment of February 5, 2001. Series C No. 73. para. 69; I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 194. para. 105; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 195. para. 116; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

⁴¹ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 2, 2004. Series C No. 107. para. 113; I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs.* Judgment of February 5, 2001. Series C No. 73. para. 69; I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 194. para. 105; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 195. para. 116; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

has pointed out the special importance of protecting freedom of expression “as regards minority views, including those that offend, shock or disturb the majority,”⁴² and it has emphasized that restrictions to freedom of expression “must not ‘perpetuate prejudice or promote intolerance.’”⁴³ Likewise, it is clear that the duty to not interfere with the right of access to information of all kinds extends to the circulation of information, ideas and forms of expression that may or may not have the personal approval of those who represent State authority at a given time.⁴⁴

b. Specially protected speech

32. While it is true that all forms of expression are protected in principle by the freedom enshrined in Article 13 of the Convention, there are certain types of speech that receive special protection because of their importance to the exercise of other human rights, or to the consolidation, proper functioning and preservation of democracy. In the case law of the inter-American system, the types of specially protected speech are the following three: (a) political speech and speech involving matters of public interest; (b) speech regarding public officials in the exercise of their duties and candidates for public office; and (c) speech that is an element of the identity or personal dignity of the person expressing herself.

i. Political speech and speech involving matters of public interest

33. The operation of democracy demands the greatest possible degree of public debate on the functioning of society and the State in all of their aspects, that is, on matters of public interest. In a democratic and pluralistic system, the acts and omissions of the State and of government officials must be subject to rigorous scrutiny, not only by the internal control authorities, but also by the press and by public opinion. The conduct of public affairs and issues of common interest must be controlled by society as a whole. The democratic control of government through public opinion encourages the transparency of State activities and the accountability of public officials for their actions, and is a mean of achieving the maximum degree of citizen participation. It follows that the adequate functioning of democracy requires the greatest possible circulation of reports, opinions and ideas on matters of public interest.⁴⁵

34. Along these lines, inter-American case law has defined freedom of expression as “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.’”⁴⁶ Such case law has emphasized that freedom of expression is one

⁴² IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

⁴³ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

⁴⁴ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile*, cited in I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 61.c).

⁴⁵ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 57 and 87; I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 84, 86 and 87; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 83; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 127.

⁴⁶ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V; IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in

of the most effective ways to denounce corruption and that, in the debate of matters concerning public interest, the right to freedom of expression protects both expressions that are inoffensive and well-received by public opinion and those that shock, irritate or unsettle public officials, candidates for public office or any sector of the population.⁴⁷

35. Consequently, the expression of statements, information and opinions regarding matters of public interest, the State and its institutions enjoy greater protection under the American Convention on Human Rights. This means that the State must refrain more rigorously from placing limitations on these forms of expression, and that State entities and officials, as well as those who aspire to hold government positions, must have a higher threshold of tolerance in the face of criticism because of the public nature of their duties.⁴⁸ In a democratic society, given the importance of monitoring the conduct of public affairs through opinion, there is a narrower margin for any restriction of political debate or discourse on matters of public interest.⁴⁹

36. For example, in the case of *Tristán Donoso v. Panama*, the Inter-American Court found that a report on the Attorney General's use of an illegal recording of an attorney's private conversation, in the context of intense questioning of the Attorney General's power to order wiretaps, was a matter currently in the public interest. In that respect, the Court stated, "the manner in which a high ranking public official – such as the *Procurador General de la Nación* [National Attorney General] – exercises his or her statutory powers – in this case, the wiretapping of telephone conversations – and the manner in which domestic rules and regulations are abided by in therefore doing, is a matter of public interest. It is against the background of the series of challenges publicly made against the former Attorney General by various State authorities, such as the Ombudsman and the President of the Supreme Court, regarding his actions in connection with telephone wiretapping, that the alleged victim stated in a press conference that such public official had tape-recorded a telephone conversation and had disclosed such recording to the *Junta Directiva del Colegio Nacional de Abogados* [National Bar Association Governing Board] [...]. The Court considers that Mr. Tristán Donoso made statements regarding events that had the greatest public interest in a context of intense public debate regarding the powers of the *Procurador General de la Nación* [National Attorney General] to wiretap and record telephone conversations, a debate in which court authorities, among others, were involved."⁵⁰

I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.c).

⁴⁷ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 88; I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 69; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 152; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 83.

⁴⁸ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 83; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 125; IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*, cited in I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 101.2).c).

⁴⁹ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 127; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 155; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

⁵⁰ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 121.

According to the Court, the importance of not stifling democratic debate on a matter in the public interest is a factor that should be considered by a judge when establishing possible subsequent responsibility for freedom of expression: "Likewise, as has already been held by the Court, the Judiciary must take into account the context in which the statements involving matters of public interest are made; the judge shall 'assess the respect of the rights and reputations of others in relation to the value in a democratic society of open debate regarding matters of public interest or concern.'"⁵¹

37. The prevailing importance of discussion on matters of public interest leads, in addition, to a heightened protection of the right of access to information on public affairs. Although this topic shall be explained in greater detail below, it is pertinent to recall that citizens are able to question, investigate and consider whether public duties are being performed properly only when they have access to information of public interest that is under the State's control.⁵²

38. The case law of the inter-American system has similarly stressed the importance of the role of the communications media in providing broad information about public interest issues affecting society.⁵³ It has asserted on this point that freedom of expression grants the heads of communications media, as well as the journalists who work for them, the right to investigate and publicize events of public interest.⁵⁴ It has also held that the prosecution of individuals, including journalists and other media professionals, for the mere act of investigating, writing and publishing public interest information violates freedom of expression because it has a chilling effect on the public debate of issues that are of interest to society⁵⁵ and results in self-censorship.⁵⁶

ii. Speech regarding public officials in the exercise of their duties and candidates for public office

39. The expression of statements, information, ideas and opinions on public officials in the exercise of their duties and on candidates for public office also enjoys a special degree of protection under the American Convention, for the same reasons that support the special protection of political speech and speech on matters of public interest.

40. As previously mentioned, the democratic oversight of government through public opinion promotes the transparency of the State's activities and the responsibility of public officials for their performance; it also encourages broader citizen participation. As

⁵¹ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 123.

⁵² I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 86.

⁵³ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 57.

⁵⁴ I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 157.

⁵⁵ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case Kimel v. Argentina*, cited in I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 37.

⁵⁶ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Palamara-Iribarne v. Chile*, cited in I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 64.e).

such, in the democratic context, speech regarding public officials or individuals who perform public duties, as well as speech regarding candidates for public office, must enjoy a particularly strong margin of openness. In this sense, in a democratic society, public officials and those who aspire to be public officials have a distinct threshold of protection that exposes them to a greater degree of scrutiny and public criticism. This is justified by the public interest nature of the activities they engage in, as they have exposed themselves voluntarily to heightened scrutiny, and because they have an enormous capacity to call information into question through their power to appeal to the public.⁵⁷ Effectively, due to a profile that implies greater influence on society and easier access to the media, public officials have greater opportunity to give explanations or respond to questions and criticism.⁵⁸

41. Given that speech and information concerning public officials, private citizens who involve themselves voluntarily in public affairs, candidates for public office, enjoy a greater degree of protection,⁵⁹ the State must refrain to a higher degree from imposing limitations on these forms of expression. Such individuals, because of the public nature of the duties they perform, are subject to a different type of protection to their reputation or their honor as compared to other people, and, correspondingly, must have a higher threshold of tolerance to criticism.⁶⁰ In this sense, given that the right to freedom of expression enables the individual and the community to participate in active, robust and challenging debate on all aspects relative to the functioning of society, this right covers debate that may be critical of or even offensive to public officials, candidates for public office or individuals

⁵⁷ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. paras. 86-88; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 83; I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 69; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. paras. 152 and 155; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 83; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. paras. 125-129; I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 87; I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193, par. 115.

⁵⁸ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 122.

⁵⁹ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 86; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 82.

⁶⁰ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. paras. 86-88; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. paras. 83-84; I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 69; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. paras. 152 and 155; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 83; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 128; IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Herrera-Ulloa v. Costa Rica*, cited in I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. paras. 125-29; I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 87.

involved in shaping public policy.⁶¹ As stated by the Inter-American Commission, “[t]he 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.”⁶² This does not mean that public officials cannot be judicially protected when their honor is subjected to unjustified attack, but such protection must be consistent with the principles of democratic pluralism,⁶³ and it must be afforded through mechanisms that do not have a potential for creating inhibition or self-censorship.

42. The case law of the inter-American system has also held that freedom of expression includes the right to denounce human rights violations committed by public officials; that the obstruction or silencing of this type of complaint is a violation of freedom of expression in both its individual and collective dimensions;⁶⁴ and that in a democratic society the press has the right to inform freely and to criticize the government, and the people have the right to be informed of different views as to what happens in the community. The denunciation of human rights violations committed by agents of the State is especially protected.⁶⁵

43. Different decisions of the Inter-American Commission and Court illustrate the type of speech covered under this increased level of protection. One example of this rule is given by the case of *Palamara Iribarne v. Chile*. Mr. Palamara had been criminally convicted for the offence of *desacato*, because of critical declarations he had made against the officers of a military criminal court who were in charge of a prosecution against him.

44. The Inter-American Court, referring to Mr. Palamara’s statements to the media in which he criticized the actions of the military criminal court in his case, stated that it was “logical and appropriate that statements concerning public officials and other individuals who perform public services are afforded, as set forth in Article 13(2) of the Convention, greater protection, thus allowing some latitude for broad debate, which is essential for the functioning of a truly democratic system.”⁶⁶ The Court found that this standard was applicable to Palamara’s critical statements regarding the actions of the military criminal court in the proceedings against him. According to the Inter-American Court, “[d]emocratic checks and balances, exercised by society through public opinion, encourage transparency in State activities and promote accountability of public officials for their administration. This is why there should be more tolerance and openness to criticism in the face of statements and opinions advanced by individuals in the exercise of said democratic mechanism. This is applicable to officers and members of the Navy, including

⁶¹ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.c).

⁶² IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

⁶³ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 128.

⁶⁴ IACHR. Report No. 20/99. Case 11.317. Merits. Rodolfo Robles Espinoza and Sons. Peru. February 23, 1999.

⁶⁵ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ivcher-Bronstein v. Peru*, cited in I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. paras. 143.g)-h).

⁶⁶ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 83; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 82.

those who preside over courts. Moreover, said democratic mechanism of checks and balances promotes greater participation among people in matters of social interest.”⁶⁷

45. Along these same lines, in the case of *Herrera Ulloa v. Costa Rica*,⁶⁸ the Inter-American Court ruled that the accurate reprinting in a local newspaper of certain statements published in the European press, which seriously affected the reputation of a high Costa Rican government official stationed in Belgium, was entitled to special protection. The publications were about the alleged commission of serious criminal offenses by the (then) diplomatic representative of Costa Rica before the International Atomic Energy Agency, in relation to the alleged payment of illegal commissions. The Court emphasized that, in relation to the admissible limitations to freedom of expression, a distinction must always be made between expressions referring to public officials and those that refer to private citizens. It explained that, “it is logical and appropriate that statements concerning public officials and other individuals who exercise functions of a public nature should be accorded, in the terms of Article 13(2) of the Convention, a certain latitude in the broad debate on matters of public interest that is essential for the functioning of a truly democratic system. The foregoing considerations do not, by any means, signify that the honor of public officials or public figures should not be legally protected, but that it should be protected in accordance with the principles of democratic pluralism.”⁶⁹ It also held that, “[a] different threshold of protection should be applied, which is not based on the nature of the subject, but on the characteristic of public interest inherent in the activities or acts of a specific individual. Those individuals who have an influence on matters of public interest have voluntarily exposed themselves to more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate.”⁷⁰

46. A third case from the Inter-American Court that addresses speech that receives special protection under the American Convention is the case of *Canese v. Paraguay*.⁷¹ In this case, the Court examined the situation of Ricardo Canese, a candidate in the 1992 Paraguayan presidential election, who was convicted of defamation as a result of statements he made while he was a candidate and during the course of the campaign. He had said that his opponent in the race was the “straw man” of the family of the former dictator Stroessner and had concealed his financial interests in a consortium that was involved in the construction and development of the Itaipú Hydroelectric Complex. A criminal complaint was filed by certain partners of the consortium, and as a result of those statements Mr. Canese was convicted of the offense of defamation and sentenced to a term of incarceration and the payment of a fine, and while the case was pending he was permanently barred from leaving the country; this bar was lifted only under exceptional circumstances, and in an inconsistent manner. The Inter-American Court, after reiterating

⁶⁷ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 83; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 82.

⁶⁸ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107.

⁶⁹ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 128.

⁷⁰ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 129.

⁷¹ I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111.

the important democratic function of the full exercise of freedom of expression and its heightened importance in the electoral arena, concluded that in this case there had been a violation of the freedom of expression protected by Article 13. To arrive at this conclusion, the Court took into particular consideration that Mr. Canese's statements had been made in the context of a presidential election campaign with regard to matters of public interest, "circumstances in which opinions and criticisms are issued in a more open, intense and dynamic way, according to the principles of democratic pluralism," reason for which in this case "the judge should have weighed respect for the rights or reputations of others against the value for a democratic society of an open debate on topics of public interest or concern."⁷²

47. As it had done in its prior decisions, the Court concluded that the criminal proceedings and the judgment against Mr. Canese constituted an unnecessary and excessive punishment that limited the open debate of issues of public interest and restricted the victim's freedom of expression during the rest of the election campaign. In the Court's judgment, "the freedom of thought and expression of the alleged victim was restricted disproportionately, without taking into consideration that his statements referred to matters of public interest;"⁷³ the case therefore entailed a restriction or limitation to freedom of expression that was excessive in a democratic society, contrary to Article 13 of the Convention.

48. A fourth case from the Inter-American Court that illustrates this same rule is the case of *Kimel v. Argentina*.⁷⁴ In this case the Inter-American Court examined the situation of an Argentinean writer and journalist, Eduardo Kimel, who had written and published a book in which he harshly criticized the actions of a federal judge. The judge, who was by then retired, had previously been assigned the task of investigating the massacre of certain members of a religious order during the military dictatorship. In the book, Mr. Kimel asserted that the judge had acted in an acquiescent manner with the dictatorship because, having been aware of evidence that the crime was committed on the orders of high military commanders, he halted the investigation.⁷⁵ As a consequence of the book's publication, the retired judge filed a criminal action for libel against Mr. Kimel, who was sentenced to one year in prison (suspended) and ordered to pay monetary compensation. The Inter-American Court ruled that this case involved a violation of Article 13 of the Convention in that the State used its punitive authority unnecessarily and disproportionately. It arrived at this conclusion by taking into account, among other factors,

⁷² I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 105.

⁷³ I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 106.

⁷⁴ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177.

⁷⁵ The relevant fragment of Mr. Kimel's book, which is cited in the Inter-American Court's judgment, is as follows: "[Judge Rivarola] adopted all applicable steps and procedures. He collected the police reports containing the preliminary information, requested and had forensic and ballistics reports made, and summoned to appear a number of people who might be able to provide information for the elucidation of the case. Notwithstanding, an examination of the judicial record poses an initial question: Did the authorities actually intend to find out clues which might lead to the murderers? Under the military dictatorship judges were normally acquiescent, if not accomplices to the dictatorial regime. In the case of the Palatine clergymen, the [J]udge (...) complied with most of the formal requirements regarding the investigation, though it is evident that a number of decisive elements that could have shed light on the murder were not taken into consideration. The evidence that the order to carry out the murder had come from within the core of the military structure in power checked the development of the investigation, bringing it to a standstill." I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 42.

(i) that Mr. Kimel's criticism was with respect to issues of notorious public interest; and (ii) that the book in question concerned the actions of a judge in the exercise of his official duties. In this respect, the Court stressed that, as a public official, the judge was exposed to a greater degree of criticism by public opinion; that "democratic checks promote the transparency of the actions of the State and foster the accountability of public officials," reason for which they must demonstrate "greater tolerance to the statements and opinions expressed by individuals in the exercise of such democratic power," given that "[t]hese are the requirements of the pluralism inherent in a democratic society, which requires the greatest possible flow of information and opinions on issues of public interest;" and that in debate on matters of public interest, the American Convention protects both expressions that are inoffensive and well-received by public opinion and those that "shock, irritate or disturb public officials or any sector of society," because "in a democratic society, the press must inform extensively on issues of public interest which affect social rights, and public officials must account for the performance of their duties."⁷⁶

49. A fifth case is that of *Tristán Donoso v. Panama*, in which the Court protected the rights of Mr. Tristán Donoso. Donoso, an attorney, was convicted of the crime of slander after he called a press conference to accuse the Attorney General of recording and illegally using his private communication. Later, the Attorney General was acquitted of the charge in court. In its ruling, the Inter-American Court held that, "any expression regarding the suitability of an individual for holding public office or regarding the acts performed by public officials in the course of their duties enjoys greater protection, thus fostering democratic debate."⁷⁷ Likewise, the Court indicated that, "in a democratic society, public officials are more exposed to scrutiny and criticism by the general public. This different protection threshold is justified by the fact that public officials have voluntarily exposed themselves to stricter scrutiny. Their activities go beyond their private life and expand to enter the arena of public debate."⁷⁸

50. The Court found in this case that the punishment imposed was disproportionate. First, the Court took into account that the statements for which Tristán Donoso was convicted were in reference to "a person that held one of the highest public offices in his country, the *Procurador General de la Nación* [National Attorney General]."⁷⁹ In addition, the Court found that the issue was one of interest to the public, given the context and the broad debate within which the statements had been made. Finally, the Court held that given the knowledge the attorney had at the moment of making his statements, "it was not possible to sustain that his expression was groundless and, consequently, that the criminal remedy was a necessary action."⁸⁰ All of this is in spite of the fact that Tristán Donoso essentially accused the Attorney General of a crime for which he was later acquitted.

⁷⁶ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. paras. 87-88.

⁷⁷ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 115

⁷⁸ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 115

⁷⁹ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 122

⁸⁰ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 126

51. Up until December 2009, the last case decided by the Inter-American Court on this subject was *Usón Ramírez v. Venezuela*. Mr. Usón, a retired member of the military, was sentenced for the crime of “insult against the Armed Forces,” for issuing several opinions that were critical of the performance of said institution in the so-called case of “Fuerte Mara.” In that case, a group of soldiers suffered severe burnings while being detained in a punishment cell. Mr. Usón was sentenced for saying, on a television program, that if the information that was circulating regarding the kind and degree of the burnings was accurate, the soldiers must have been deliberately attacked with a flamethrower. According to Mr. Usón, the kind of burnings that were described by the father of one of the soldiers could only be the product of this kind of weapon, and the use of such weapon had to be premeditated, because of the different actions that had to be taken in order to get the flamethrower into the detention facility and load and activate it, issues on which Mr. Usón had expertise due to his status as a former member of the Armed Forces. As a consequence of these opinions, Mr. Usón Ramírez was tried and sentenced to five years and six months in jail for the crime of “insult against the National Armed Forces,” following a criminal provision set forth in Article 505 of the Organic Code Military Justice whereby “whoever insults, offends, or disparages the National Armed Forces or any of its units shall be subject to three to eight years in prison.”

52. In this case, the Inter-American Court judged that the criminal law applied to convict Mr. Usón did not abide by the principle of legality, because it did not clearly establish the scope of the conduct protected by the right to freedom of expression nor the scope of the penalty for “insult against the armed forces.” Furthermore, the Court considered that the application of criminal law in this case was not suitable, necessary or proportionate. The Court considered that Mr. Usón’s assertions were worthy of special protection because they made reference to State entities about which there was an important public debate going on: “[T]he remarks made by Mr. Usón Ramírez were related to matters that clearly were of public interest. Despite the existence of public interest in the events in Fuerte Mara, a facility belonging to the National Armed Forces, Mr. Usón Ramírez was tried and sentenced without taking into account the requirements of the American Convention regarding the larger tolerance required regarding any affirmations and considerations expressed by citizens exercising their democratic control.”⁸¹ The Court found that the State violated, among other things, the principle of legality and the right to freedom of thought and expression recognized in Articles 9, 13.1 and 13.2 of the American Convention, in relation to Articles 1.1 and 2 of that Convention, to the prejudice of Mr. Francisco Usón Ramírez. As a consequence, the Court ordered the State to leave without effect, within a year, the criminal military procedure and to change, within a reasonable period of time, Article 505 of the Organic Code of Military Justice.

iii. Speech that expresses essential elements of personal identity or dignity

53. A third type of expression that enjoys special protection under the American Convention involves forms of speech that express constituent elements of one’s personal identity or dignity.

54. The case law of the inter-American system has addressed this point expressly in reference to the use of language by ethnic or minority groups. It has held that the use of one’s own language is one of the most important elements of the identity of an

⁸¹ I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. para. 83.

ethnic group, because it safeguards the expression, dissemination and transmission of its culture. It has further held that it is one of the elements that distinguishes the members of indigenous groups from the general population, and shapes their cultural identity. As such, it has concluded that the prohibition on use one's own language, insofar as it is an expression of belonging to a cultural minority, is especially serious and violates the personal dignity of its members, and is also discriminatory.⁸²

55. This was the decision adopted by the Inter-American Court in the case of *López Álvarez v. Honduras*, which examined the prohibition imposed by the warden of a prison, banning the Garífuna inmates from speaking in their own language. The Court held that this constituted a restriction that was not only unnecessary and unjustified but also was particularly serious, "since the mother tongue represents an element of identity of Mr. Alfredo López Álvarez as a Garífuna. In this way, the prohibition affected his personal dignity as a member of that community. (...) States must take into consideration the characteristics that differentiate the members of the Indian populations from that of the population in general and that make up their cultural identity. Language [is] one of the most important elements of identity of any people, precisely because it guarantees the expression, diffusion, and transmission of their culture."⁸³

56. Other forms of speech that, in accordance with the previous reasoning, should enjoy a special level of protection are religious speech and speech that expresses one's own sexual orientation and gender identity, because they express an integral element of personal identity and dignity. In effect, Article 12.1 of the Convention, by protecting freedom of conscience and religion, provides expressly that this right entails "freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private;" and Article 12.3 establishes that "freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedom of others." Therefore, because of its close relation with the dignity, liberty, and equality of all human beings, speech that expresses one's own sexual orientation and gender identity is part of this category of specially protected speech. In this respect, it is worth recalling that Resolution 2435 (XXXVIII-O/08)⁸⁴ of the General Assembly of the Organization of American States marked a milestone on the matter at the international level.

3. Speech not protected by freedom of expression

57. Without prejudice to the presumption of coverage *ab initio* of all forms of human expression by freedom of expression, there are certain types of speech that are excluded from this freedom's scope of coverage by virtue of express prohibitions set forth in international human rights law. There are three principle types of speech that do not enjoy protection under Article 13 of the Convention, according to the international treaties in force.

58. *Propaganda for war and advocacy of hatred that constitute incitements to lawless violence.* Article 13.5 of the Convention expressly states that "[a]ny propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to

⁸² I/A Court H. R., *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141. para. 169.

⁸³ I/A Court H. R., *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141. para. 169.

⁸⁴ AG/RES. 2435 (XXXVIII-O/08)

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.” The IACHR has said, following the settled international doctrine and jurisprudence on the subject, that the imposition of sanctions for the abuse of freedom of expression under the charge of incitement to violence (understood as the incitement to commit crimes, the breaking of public order or national security) must be backed up by actual, truthful, objective and strong proof that the person was not simply issuing an opinion (even if that opinion was hard, unfair or disturbing), but that the person had the clear intention of committing a crime and the actual, real and effective possibility of achieving this objective.⁸⁵ Acting otherwise would mean admitting the possibility of punishing opinions, and all the States would be authorized to suppress any kind of thought or expression critical of the authorities that, like anarchism and opinions radically opposed to the established order, question the existence of current institutions. In a democracy, the legitimacy and strength of institutions are strengthened by the force of the public debate over their operation, not by its suppression. Furthermore, the inter-American case law has clearly established that, in order to impose any kind of penalty in the name of the defense of public order (understood as security, public health or morals), it is necessary to show that the concept of “order” that is being defended is not an authoritarian, but a democratic order understood as the existence of the structural conditions that enable all people to exercise their rights in freedom, with neither discrimination nor fear of punishment as a consequence thereof. In effect, for the Inter-American Court, generally speaking, public order cannot be invoked to suppress a right guaranteed in the American Convention, to denaturalize it or to deprive it of its real content. If this concept is invoked as a source of limitations to human rights, it must be interpreted in a way strictly attached to the fair demands of a democratic society that keeps in mind the equilibrium among the interests at stake and the need to preserve the object and goals of the American Convention.⁸⁶

59. *Direct and public incitement to genocide*, proscribed under international treaty law by Article III(c) of the Convention on the Prevention and Punishment of the Crime of Genocide, as well as under customary international law.

60. *Child pornography*, prohibited in absolute terms by the Convention on the Rights of the Child (Article 34-c), by the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, and by ILO Convention No. 182 on the Worst Forms of Child Labor (Article 3-b). This prohibition, read in conjunction with Article 19 of the American Convention on Human Rights, under which “[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state,” means necessarily that child pornography, as a form of speech that is violently harmful to the prevailing rights of children and their best interests, must be excluded from the protection provided by freedom of expression.

D. Limits on freedom of expression

⁸⁵ On this issue, see the following cases of the European Court of Human Rights: *Karatas v. Turkey* [GC], no. 23168/94. ECHR 1999-IV; *Gerger v. Turkey* [GC], no. 24919/94, 8 July 1999; *Okçuoglu v. Turkey* [GC], no. 24246/94, 8 July 1999; *Arslan v. Turkey* [GC], no. 23462/94, 8 July 1999, *Erdogdu v. Turkey*, no. 25723/94, § 69, ECHR 2000 – VI. Also see 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. 77.

⁸⁶ 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. 67.

1. Admissibility of limitations under the American Convention on Human Rights

61. Freedom of expression is not an absolute right.⁸⁷ Article 13 of the American Convention provides expressly—in paragraphs 2, 4 and 5—that it can be subject to certain limitations, and establishes the general framework of the conditions required for such limitations to be legitimate.⁸⁸ The general rule is set forth in paragraph 2, according to which “[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, 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.” Paragraph 4 provides that “[n]otwithstanding 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;” and paragraph 5 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.”

62. In the interpretation of this article, the case law of the inter-American system has developed a three-part test to control the legitimacy of limitations, according to which they must meet a set of specific conditions in order to be admissible under the American Convention. These conditions are explained in detail below. The Inter-American Commission and Court have also considered that (a) certain forms of limitations of freedom of expression are inadmissible, and (b) certain types of limitations, due to the type of speech they affect or the means that they use, must be put to a more strict and rigorous test in order to be valid under the Convention. This issue will also be addressed below.

63. The standards for the admissibility of restrictions are applied to all of the constitutive elements of freedom of expression in its diverse manifestations. Thus, for example, limitations imposed upon the expression of a person’s own thoughts and ideas, access to information, the dissemination and circulation of information and upon the communications media must all meet these conditions.⁸⁹

⁸⁷ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 54; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 79; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 120; I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 110; I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 106; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 117; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

⁸⁸ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 120; 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. 35; IACHR. Report No. 11/96. Case 11.230. Merits. Francisco Martorell. Chile. May 3, 1996. para. 55; IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.a)

⁸⁹ 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. 36.

64. In addition, the rules setting the conditions that restrictions to freedom of expression must meet in order to be legitimate are applied to the laws that establish them as such, as well as to the administrative, judicial, police or other decisions that bring them into being—that is, to every manifestation of State authority that affects the full exercise of freedom of expression.⁹⁰ The types of State acts constituting limitations to freedom of expression addressed in the case law of the inter-American system include: the decisions of prosecutors and judges of the military criminal justice system in cases they are prosecuting,⁹¹ orders given by members of the Armed Forces to their subordinates,⁹² orders given by the Directors of prison centers regarding the conduct of inmates,⁹³ the decisions of criminal courts,⁹⁴ administrative acts of the executive branch,⁹⁵ and even legal and constitutional provisions,⁹⁶ among others.

65. The Inter-American Court has also held that the compatibility of limitations with the American Convention must be evaluated considering the facts of the case in their totality and the circumstances and context in which they arose, and not by examining only the act in question.⁹⁷ In this respect, in the case of *Tristán Donoso* the Court held that both the context in which the expression in question was made, as well as the importance of democratic debate on subjects of public interest, are elements that a judge should consider when establishing subsequent responsibility: “the Judiciary must take into account the context in which the statements involving matters of public interest are made; the judge shall ‘assess the respect of the rights and reputations of others in relation to the value in a democratic society of open debate regarding matters of public interest or concern.’”⁹⁸

2. Conditions that limitations must meet in order to be legitimate under the American Convention

a. General rule: compatibility of limitations with the democratic principle

66. In general terms, the case law of the inter-American system has maintained that “restrictions on freedom of expression must incorporate the just demands of a democratic

⁹⁰ I/A Court H. R., *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141. para. 165.

⁹¹ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135.

⁹² I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135.

⁹³ I/A Court H. R., *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141.

⁹⁴ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107; I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177; I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193.

⁹⁵ I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74.

⁹⁶ I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73.

⁹⁷ I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 154.

⁹⁸ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 123

society,”⁹⁹ that “[t]he norms under which these restrictions are interpreted must be compatible with the preservation and development of democratic societies as articulated in Articles 29 and 32 of the American Convention,”¹⁰⁰ and that “interpretation of the Article 13(2) restrictions on freedom of expression must be ‘judged by reference to the legitimate needs of democratic societies and institutions’ precisely because freedom of expression is essential to democratic forms of governance.”¹⁰¹ In the following paragraphs, the specific conditions that arise from this general rule are explained.

b. Specific conditions derived from Article 13.2: the three-part test

67. As it has been interpreted in the case law of the inter-American system, Article 13.2 of the Convention requires that the following three conditions be met in order for a limitation to freedom of expression to be admissible: (1) the limitation must have been defined in a precise and clear manner by a law, in the formal and material sense; (2) the limitation must serve compelling objectives authorized by the Convention; and (3) the limitation must be necessary in a democratic society to serve the compelling objectives pursued, strictly proportionate to the objective pursued, and appropriate to serve said compelling objective.

68. It is incumbent upon the authority imposing the limitations to prove that these conditions have been met. Furthermore, all of the stated conditions must be met simultaneously in order for the limitations to be legitimate pursuant to the American Convention. The content of each condition is explained in greater detail below.

i. The limitations must be set forth in laws that are drafted clearly and precisely

69. Every limitation to freedom of expression must be established in advance, expressly, restrictively and clearly¹⁰² in a law – in the formal and material sense.¹⁰³ This means that the text of the law must establish unambiguously the grounds for subsequent liability for the exercise of freedom of expression. The laws that set limits to freedom of expression must be drafted in the clearest and most specific terms possible, as the legal framework must provide legal certainty to the public.

⁹⁹ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

¹⁰⁰ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

¹⁰¹ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

¹⁰² 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. paras. 39-40; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135, par. 46; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 120; I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 117; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V; IACHR. Report No. 11/96. Case 11.230. Merits. Francisco Martorell. Chile. May 3, 1996. para. 55; IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.a).

¹⁰³ In this respect, the applicable definition is the one provided by the Inter-American Court in Advisory Opinion 6/86, by which the expression “laws” does not refer to any legal provision, but to general normative acts adopted by the constitutionally established and democratically elected legislative body, in accordance with the procedures established in the Constitution, and for the pursuit of the common good.

70. In this sense, vague or ambiguous legal provisions that grant, through this channel, very broad discretionary powers to the authorities, are incompatible with the American Convention, because they can support potential arbitrary acts that are tantamount to prior censorship or that establish disproportionate liabilities for the expression of protected speech.

71. Vague, ambiguous, broad or open-ended laws, by their mere existence, discourage the dissemination of information and opinions out of fear of punishment, and can lead to broad judicial interpretations that unduly restrict freedom of expression. As such, the State must specify the conduct that may be subject to subsequent liability in order to prevent adverse impacts upon the free expression of protest and disagreement with the actions of the authorities.

72. When limits on freedom of expression are established by criminal laws, the Court has established that they must satisfy the principle of strict legality: "should the restrictions or limitations be of a criminal nature, it is also necessary to strictly meet the requirements of the criminal definition in order to adhere to the *nullum crimen nulla poena sine lege praevia* principle."¹⁰⁴ The latter is expressed in the need "to use strict and unequivocal terms, clearly restricting any punishable behaviors,"¹⁰⁵ which requires "a clear definition of the incriminated behavior, setting its elements and defining the behaviors that are not punishable or the illicit behaviors that can be punishable with non-criminal measures."¹⁰⁶ The Court has also pointed out that in the case of military criminal regulations, these "must clearly set forth without any ambiguities, *inter alia*, which criminal offenses fall within the specific military scope, and the illegal nature of criminal offenses by means of a description of the injury to or endangerment of military legal interests which have been seriously attacked, which may justify the exercise of punitive military power, as well as establish the appropriate sanction."¹⁰⁷ In sum, in the judgment of the Court, a crime must be formulated "previously, in an express, accurate, and restrictive manner,"¹⁰⁸ because "criminal law is the most restrictive and severe mean to establish liabilities for illicit behavior, taking into account that the legal framework shall provide juridical certainty to citizens."¹⁰⁹

73. For example, in the case of *Usón Ramírez v. Venezuela*, the Court considered that the terms used to draft the law establishing the crime of insult against the Armed forces, for which Mr. Usón had been convicted, did not abide by the minimum standards demanded by the principle of strict legality. As a consequence, the Court considered that

¹⁰⁴ I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. para. 55.

¹⁰⁵ I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. para. 55.

¹⁰⁶ I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. para. 55.

¹⁰⁷ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 126.

¹⁰⁸ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 54; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 63.

¹⁰⁹ I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. para. 55.

that law violated Articles 9 and 13.2 of the American Convention. In that sense, the judgment explained: “The Court observes that the description of punishable violation in Article 505 of the Military Justice Organic Code¹¹⁰ does not establish the elements that may offend, slander or disparage, nor does not specify whether it is important that the active subject attributes facts that damage the honor or whether it suffices simply to give an offensive or disparaging opinion, without attributing any illicit acts, for example, for the imputation of the crime. That is, this Article responds to a description that is vague and ambiguous and it does not specify clearly the typical forum for the criminal behavior, which could lead to broad interpretations allowing the determined behaviors to be penalized unduly by using the criminal provision.¹¹¹ The ambiguity of this criminal provision raises doubts and opens up possibilities for the discretionary exercise of authority, something particularly undesirable when it comes to establishing the criminal liabilities of individuals and penalizing them in a manner that seriously affects fundamental goods such as freedom. Moreover, the mentioned article of the law merely establishes the penalty that should be imposed, without consideration of the intent to cause discredit, damage to reputation or prestige, or harm to the passive subject. By not stating the required intention, the law allows for the subjectivity of the person offended to determine the existence of a crime even when the person involved did not had the intention to slander, offend or discredit the passive subject. This statement is particularly forceful when, according to the statements made by the expert proposed by the State¹¹² in the public hearing of this case, ‘there is no legal definition of military honor’ in Venezuela.’”¹¹³ According to the Court, a provision like the one established in the criminal Military Code to describe the crime of “insult to the armed forces” does not respond to the “legality requirements of Article 9 of the Convention and the provisions of Article 13.2 of the Convention regarding the imposition of further liabilities.”¹¹⁴

ii. The limitations must serve compelling objectives authorized by the American Convention

74. The restrictions imposed must pursue one of the limited compelling objectives set forth in the American Convention, to wit: the protection of the rights of others, the protection of national security, public order, or public health or morals. These are the only objectives authorized by the Convention, which is explained by the fact that the limitations must be necessary to achieve imperative public interests that, because of their importance in specific cases, clearly prevail over the social need for the full enjoyment of freedom of expression protected by Article 13.

75. States are not free to interpret in any way the content of these objectives for purposes of justifying a limitation to freedom of expression in specific cases. The case law of the inter-American system has paid considerable attention to the interpretation of some of

¹¹⁰ This articles establishes that “whoever insults, offends, or disparages the National Armed Forces or any of its units shall be subject to three to eight years in prison”.

¹¹¹ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 92.

¹¹² Expert deposition of Angel Alberto Bellorin in front of the I/A Court H.R., in the public hearing held on April 1, 2009.

¹¹³ I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. para. 56.

¹¹⁴ I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. para. 57.

these objectives, specifically to the notion of “protection of the rights of others” and to the notion of “public order,” as indicated below.

- *The “protection of the rights of others” as an objective that justifies limiting freedom of expression*

76. The Inter-American Commission and Court have held that the exercise of human rights must be carried out with respect for other rights, and that in the process of harmonizing competing rights, the State plays a critical role by establishing the subsequent liability necessary to achieve such harmonization.¹¹⁵ Particular emphasis has been placed throughout the case law of the inter-American system on the guidelines that must govern this exercise of balancing and harmonization whenever the exercise of freedom of expression conflicts with the right of others to their honor, reputation and good name. In view of the importance of the rules established with regard to such conflicts, this issue will be addressed separately in this chapter.

77. In addition, the case law of the inter-American system has been clear in specifying that in cases where limitations to freedom of expression are imposed for the protection of the rights of others, it is necessary for those rights to be clearly harmed or threatened, and that it is the burden of the authority imposing the limitation to demonstrate this requirement; if there is no clear harm to another’s right, the subsequent imposition of liability is unnecessary.

78. The Inter-American Court has also specified that the protection of freedom of expression or freedom of information cannot be invoked as an objective that in turn justifies the restriction of freedom of expression or information, because that is an antinomy: “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.”¹¹⁶ Likewise, the Court has indicated that it is also impossible to justify the imposition of a system for the control of freedom of expression in the name of a supposed guarantee of the accuracy and truthfulness of the information society receives, as it could be the source of gross abuses, and in the end violates society’s right to information,¹¹⁷ which includes the right to be informed of different interpretations and views of the world and to choose the one considered most suitable.

79. In any case—as discussed below—when there is an actual abuse of freedom of expression that causes harm to the rights of others, the means least restrictive to freedom of expression must be used to repair that harm. The first means to be used is the right of correction or reply enshrined in Article 14 of the American Convention. If that is insufficient, and if it is shown that serious harm was caused intentionally or with obvious disregard for the truth, it is possible to resort to the imposition of civil liability in accordance with the strict conditions derived from Article 13.2 of the Convention. Finally, with respect to the use of criminal law mechanisms, it should be noted that both the Inter-American

¹¹⁵ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177.

¹¹⁶ 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. 77.

¹¹⁷ 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. 77.

Commission and the Inter-American Court of Human Rights have considered, in all of the specific cases submitted for their consideration and decision, that the protection of the honor or reputation of public officials, politicians or individuals involved in the formulation of public policy through the instruments of criminal law—that is, through criminal prosecution or conviction for criminal defamation offenses, or through *desacato* legislation [laws against insulting, threatening or injuring a public official]—was disproportionate and unnecessary in a democratic society. This topic will be examined in greater detail later in this chapter.

- *The notion of “public order” for purposes of the imposition of limitations to freedom of expression.*

80. According to the Inter-American Court, in general terms, “public order” cannot be invoked to suppress a right guaranteed by the Convention, to change its nature or to deprive it of its real content. If this concept is invoked as a basis for limitations to human rights, it must be interpreted in strict adherence to the just demands of a democratic society, which take into account the balancing of different interests at stake and the necessity of preserving the object and purpose of the American Convention.¹¹⁸

81. In this sense, for purposes of limitations to freedom of expression, the Court defines “public order” as “the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles.”¹¹⁹ Under this definition, it is clear to the Court that the defense of public order requires the broadest possible circulation of information, opinions, news and ideas—that is, the maximum degree of exercise of freedom of expression. According to the Court: “that same concept of public order in 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. Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is inconceivable 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.”¹²⁰ The Inter-American Commission has likewise explained that a functional democracy is the highest guarantee of public order, and that the right to freedom of expression is the cornerstone of the existence of a democratic society.¹²¹

82. Moreover, any impairment of public order that is invoked as a justification to limit freedom of expression must be based on real and objectively verifiable causes that present the certain and credible threat of a potentially serious disturbance of the basic conditions for the functioning of democratic institutions. Consequently, it is not sufficient to invoke mere conjecture regarding possible disturbances of public order, nor hypothetical circumstances derived from the interpretations of the authorities in the face of events that do not clearly present a reasonable threat of serious disturbances (“anarchic violence”). A

¹¹⁸ 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. 64.

¹¹⁹ 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. 64.

¹²⁰ 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.

¹²¹ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

broader or more indeterminate interpretation would inadmissibly open the door to arbitrariness and would fundamentally restrict the freedom of expression that is an integral part of the public order protected by the American Convention.

iii. The limitations must be necessary in a democratic society to serve the compelling objectives pursued, strictly proportionate to the objective pursued, and appropriate to serve such compelling objective

83. States that impose limitations upon freedom of expression are obligated to demonstrate that they are necessary in a democratic society to serve the compelling objectives pursued.¹²²

84. Indeed, Article 13.2 uses the term “*necessary*,” the link between the necessity of the limitations and democracy is derived, in the opinion of the Inter-American Court, from a harmonic and comprehensive interpretation of the American Convention in light of its object and purpose, and bearing in mind Articles 29 and 32 as well as the preamble. “It follows from the repeated reference to ‘democratic institutions’, ‘representative democracy’ and ‘democratic society’ that the question whether a restriction on freedom of expression imposed by a state is ‘necessary to ensure’ one of the objectives listed in subparagraphs (a) or (b) must be judged by reference to the legitimate needs of democratic societies and institutions. (...) The just demands of democracy must consequently guide the interpretation of the American Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions.”¹²³

85. Now, the adjective “*necessary*” is not synonymous with “*useful*,” “*reasonable*” or “*convenient*.”¹²⁴ In order for a limitation be legitimate, it must be established that there is clear and compelling need for its imposition; that is, it must be established that the legitimate and compelling objective cannot reasonably be accomplished by any other means less restrictive to human rights.

86. The requirement of “*necessity*” also means that the full exercise and scope of the right to freedom of expression must not be limited beyond what is strictly indispensable in guaranteeing the full exercise and scope of the right to freedom of expression.¹²⁵ This requirement suggests that the restrictive measure taken should be the

¹²² I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. paras. 120-23; 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. 46.

¹²³ 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. 44.

¹²⁴ 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. 46; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 122; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

¹²⁵ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 83; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 85; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. paras. 121-122; I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*

least serious measure available “to safeguard essential legally protected interests from the more serious attacks which may impair or endanger them.” Otherwise, the restriction would imply abuse of power by the State.¹²⁶ In other words, among the various options available for reaching the same objective, the State should choose the one that least restricts the right protected by Article 13 of the Convention.

87. In addition, any limitation to the right to freedom of expression must be an appropriate instrument for meeting the aim pursued through its imposition; that is, it must be a measure that is effectively conducive to attaining the legitimate and compelling objectives in question. In other words, the limitations must be suitable to contribute to the achievement of the aims compatible with the American Convention, or be capable of aiding in the accomplishment of such aims.¹²⁷

88. Limitations to freedom of expression must not only be appropriate to meet their stated objectives and necessary. In addition, they must be strictly proportionate to the legitimate aims that justify them, and must be closely tailored to the accomplishment of that aim, interfering to the least possible extent with the legitimate exercise of the freedom.¹²⁸ To determine the strict proportionality of the restrictive measure, it must be determined whether the sacrifice of freedom of expression it entails is exaggerated or excessive in relation to the advantages obtained through such measure.¹²⁹

89. According to the Inter-American Court, in order to establish the proportionality of a restriction when freedom of expression is limited for purposes of preserving other rights, three factors must be examined: (i) the degree to which the competing right is affected (serious, intermediate, moderate); (ii) the importance of satisfying the competing right; and (iii) whether the satisfaction of the competing right justifies the restriction to freedom of expression. There are no *a priori* answers or formulas of general application in this field. The results of the analysis will vary in each case; in some cases freedom of expression will prevail, and in others the competing right will prevail.¹³⁰ If the subsequent imposition of liability in a specific case is disproportionate, or does not conform to the interests of justice, there is a violation of Article 13.2 of the American Convention.

(Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 46.

¹²⁶ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 119.

¹²⁷ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177.

¹²⁸ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 83; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 85; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 123; 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. 46; IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*, cited in I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 101.1).b).

¹²⁹ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 83

¹³⁰ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 84.

c. Types of limitations that are incompatible with Article 13

90. In addition, and by virtue of Article 13, it has been established that certain types of limitations are contrary to the American Convention. Limitations imposed upon freedom of expression may not be tantamount to censorship, so they can only impose liability subsequent to the abusive exercise of this right; they may not be discriminatory or produce discriminatory effects; they may not be imposed through indirect mechanisms such as those proscribed by Article 13.3 of the Convention; and they must be exceptional.

i. The limitations must not amount to prior censorship, for which reason they may be established only through the subsequent and proportional imposition of liability

91. Limitations to freedom of expression may not constitute direct or indirect mechanisms of prior censorship.¹³¹ In this respect it must be noted that, save for the exception established in Article 13.4 of the Convention, prior measures of limitation to freedom of expression inevitably entail the undermining of this freedom. In other words, this right cannot be subject to prior or preventive control measures, but whoever abuses its exercise may be subject to subsequent liability.¹³² The content of the prohibition against censorship and the direct and indirect forms of censorship proscribed by the American Convention will be explored in more detail later.

92. Article 13.2 foresees expressly the possibility of requiring subsequent liability for the abusive exercise of freedom of expression, and it is only through this mechanism that admissible restrictions to freedom of expression may be established.¹³³ That is, the limitations must always be established through laws that prescribe subsequent liability for legally defined conduct, and not through prior controls on the exercise of freedom of expression. This is the precise meaning that the case law of the inter-American system has given expressly to the terms “restrictions” or “limitations” within the framework of the American Convention. According to the Inter-American Commission, “[u]nder Article 13, any restriction of the rights and guarantees contained therein must take the form of a subsequent imposition of liability. Abusive exercise of freedom of expression may not be subject to any other kind of limitation. As that article indicates, anyone who has exercised this freedom shall be answerable for the consequences for which he is responsible.”¹³⁴ The manner in which these types of limitations have been approached by the case law is explained in more detail further ahead.

¹³¹ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 54; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 79; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 120.

¹³² 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. 39; IACHR. Report No. 11/96. Case 11.230. Merits. Francisco Martorell. Chile. May 3, 1996. para. 7.

¹³³ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 54; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 79; IACHR. Report No. 11/96. Case 11.230. Merits. Francisco Martorell. Chile. May 3, 1996. para. 58; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

¹³⁴ IACHR. Report No. 11/96. Case 11.230. Merits. Francisco Martorell. Chile. May 3, 1996. para. 58.

ii. The limitations cannot be discriminatory nor have discriminatory effects

93. Limitations imposed on freedom of expression “must not ‘perpetuate prejudice or promote intolerance.’”¹³⁵ Therefore, such limitations cannot be discriminatory nor have discriminatory effects, as that would additionally violate Article 24 of the American Convention.¹³⁶ It must be recalled in this respect that according to Article 13 of the American Convention, freedom of expression is a right of “everyone,” and that by virtue of Principle 2 of the IACHR Declaration of Principles on Freedom of Expression, “[a]ll 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.”

94. The Inter-American Court has indicated that differential treatment of individuals because they are affiliated with a media outlet with a critical or independent editorial position could fall into the prohibited category of differential treatment for “political opinions,” enshrined in Article 1(1) of the American Convention.¹³⁷ Likewise, the Court has indicated that the use of that category (“political opinions”) would not necessarily depend on an individual actually having directly expressed critical or dissident positions, or even that an individual share the editorial positions of the media outlet where he or she works. It is enough that the entity or official effecting the differential treatment identify the subject of the treatment with the critical media outlet and discriminate against the subject for that reason. In this sense, the Court has recognized the possibility that “a person be discriminated against based on a perception that others have of their relationship with a group or social sector, regardless of the whether the perception corresponds to reality or the victim’s self-identification.”¹³⁸

95. Another illustrative example of the limitations to freedom of expression that are contrary to Article 13 of the Convention due to their discriminatory nature is provided in the aforementioned judgment of the Inter-American Court in the case of *López Alvarez v. Honduras*.¹³⁹ In this case, as previously discussed, it was ruled that the prohibition imposed by a prison Director banning inmates who were members of an ethnic group from speaking their own language was openly discriminatory against Mr. López Alvarez as a member of such ethnic group. As such, it constituted a violation of the freedom of expression protected in the American Convention on Human Rights.

¹³⁵ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

¹³⁶ I/A Court H. R., *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141. para. 170.

¹³⁷ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 349; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 380

¹³⁸ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 349; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 380

¹³⁹ I/A Court H. R., *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141.

iii. The limitations may not be imposed by indirect means such as those proscribed by Article 13.3 of the American Convention

96. Restrictions to freedom of expression may not be established through mechanisms that amount to indirect restrictions to the exercise of this right, which are prohibited by Article 13.3 of the American Convention. That article states that, “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.” In that same sense, the IACHR’s Declaration of Principles on Freedom of Expression holds in Principle 5 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.” Also, Principle 13 of the same Declaration holds that, “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.”

97. The Inter-American Court has held that Article 13.3 is not exhaustive since it does not preclude from consideration “any other means” or indirect methods, such as those derived from new technology.¹⁴⁰ Likewise, the Court has indicated that the State can be responsible for indirect restrictions on the right to freedom of expression when it is remiss in its duty to guarantee that right in the face of a real or immediate and predictable risk, or when it fails in its duty to provide protection.¹⁴¹ These restrictions can take place even when the public officials who cause or tolerate them do not derive benefit from them, as long as the “method or means effectively restrict, even if indirectly, the communication of ideas and opinions.”¹⁴²

iv. Exceptional nature of the limitations

¹⁴⁰ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 340; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 367

¹⁴¹ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. paras. 107-110, 340; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. paras. 118-21, 367

¹⁴² I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 368; see also I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 340.

98. The limitations imposed must be the exception to the general rule of respect for the full exercise of freedom of expression.¹⁴³ In this respect, the Inter-American Commission and the Court have examined whether specific limitations fall within a State pattern or tendency to unduly limit or restrict the exercise of this right, in which case they would be inadmissible for lack of an exceptional nature. The logical rationale underlying this condition is that the limitations regulated in Article 13.2 are restricted as a guarantee of freedom of expression, so that certain persons, groups, ideas or means of expression are not excluded *a priori* from public debate.¹⁴⁴

3. Stricter standards of control for certain limitations due to the type of speech they address

99. As discussed previously, there are certain forms of speech that are accorded a heightened degree of protection under Article 13 of the American Convention, namely: (a) political speech and speech regarding matters of public interest; (b) speech regarding public officials in the exercise of their duties or candidates for public office; and (c) speech that expresses an essential element of the personal identity or dignity of the individual. This heightened degree of protection entails a series of stricter standards for verifying the validity of limitations by the authorities on these types of expression. In terms of inter-American jurisprudence, there is a very limited margin for imposing restrictions on these forms of expression.

100. First, the Inter-American Court and Commission on Human Rights have held consistently that the test for the necessity of limitations must be applied more strictly whenever dealing with expressions concerning the State, matters of public interest, public officials in the performance of their duties, candidates for public office, private citizens involved voluntarily in public affairs, or political speech and debate.¹⁴⁵

101. Second, in these cases the analysis of the proportionality of the measure must bear in mind 1) the greater degree of protection accorded to speech concerning the suitability of public officials and their performance, or of those who aspire to hold public office; 2) speech concerning political debate or debate on matters of public interest – due to the need for a broader degree of openness for the wide-ranging debate required in a democratic system and the citizen oversight inherent in it- and 3) the correspondingly heightened threshold of tolerance for criticism that State institutions and officials must demonstrate when confronted by the statements and opinions of persons exercising such oversight. In such cases, the demands of the protection of these individuals' right to their honor and reputation must be balanced against the interests of an open debate on public

¹⁴³ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.a); I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 110.

¹⁴⁴ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*, cited in I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 61.e).

¹⁴⁵ See I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135; I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

affairs.¹⁴⁶ On the point, for example, the Inter-American Court in the case of *Tristán Donoso v. Panama*, recalled that “any expression regarding the suitability of an individual for holding public office or regarding the acts performed by public officials in the course of their duties enjoy greater protection, thus fostering democratic debate.”¹⁴⁷

4. Means of limitation of freedom of expression in order to protect the rights of others to honor and reputation

a. General rules

102. The case law of the inter-American system has considered in general terms that fundamental rights must be exercised with respect for other rights, and that in the process of harmonization the State plays an essential role through the establishments of the limits and liabilities necessary for the purpose of such harmonization.¹⁴⁸

103. Honor, dignity and reputation are also human rights enshrined in Article 11 of the American Convention, which limits State or individual interference with them.¹⁴⁹ According to Article 13.2 of the American Convention, the protection of the honor and reputation of others can be a reason to establish restrictions to freedom of expression; that is, it can be a reason for establishing subsequent liability for the abusive exercise of such freedom.¹⁵⁰ Nevertheless, it is clear—as previously mentioned—that the exercise of the right to honor, dignity and reputation must be reconciled with the right to freedom of expression, as it is not a right with a higher level or hierarchy.¹⁵¹ The honor of individuals must be protected without prejudice to the exercise of freedom of expression or the right to receive information. When a State demonstrates a tendency or pattern of privileging the right to honor over freedom of expression, restricting the latter when it is in tension with the former, it violates the principle of harmonization that arises from the general obligation to respect and ensure all the rights recognized in the American Convention.¹⁵²

104. It has been specified in this regard that the simultaneous exercise of the rights to honor and to freedom of expression must be guaranteed through a balancing

¹⁴⁶ See I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107.

¹⁴⁷ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 115.

¹⁴⁸ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 75.

¹⁴⁹ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 55; I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 111.

¹⁵⁰ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 71; I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 118.

¹⁵¹ IACHR. Report No. 11/96. Case 11.230. Merits. Francisco Martorell. Chile. May 3, 1996. para. 70.

¹⁵² IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile*, cited in I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 61.i)

exercise in each specific case, which ponders the weight of each right in the circumstances of the individual case.¹⁵³

105. In cases involving a conflict between public officials' right to honor and the right to freedom of expression, freedom of expression should prevail in principle (or *prima facie*), given that in the debate on matters in the public interest, this right has greater weight. The IACHR and the Inter-American Court refer precisely to this when they indicate that expression in the public interest constitutes speech that is the object of special protection under the American Convention. For the Court, the special protection of expression that refers to public officials or matters in the public interest has been justified citing, among other things, the importance of maintaining a legal framework that fosters public debate and the fact that officials voluntarily subject themselves to a greater level of scrutiny by society and have greater opportunity to give explanations of or response to facts in which they are involved. In this respect, the Court has said: "[I]t is established in international law that the threshold for protecting the honor of public officials should allow for the broadest control by citizens regarding the way they discharge their duties (...). This different honor protection standard is justified by the fact that public officials voluntarily expose themselves to control by society, which results in a greater risk of having their honor affected and also the possibility – given their status – of having greater social influence and easy access to the media to provide explanations or to account for any events in which they take part."¹⁵⁴ This has been expressly recognized by the Court by establishing that, in applying the proportionality test, it must be taken into account that expressions regarding the practices of State institutions enjoy greater protection, in the interest of furthering democratic debate within society.¹⁵⁵ This is so because it is assumed that in a democratic society the institutions or bodies of the State, as such, are exposed to the criticism and scrutiny of the public, and its activities are part of the broader public debate.¹⁵⁶ This threshold is not based on the quality of the subject involved, but rather on the public interest in its activities.¹⁵⁷ Assessments and opinions of citizens in the exercise of such democratic control, therefore, should be entitled to greater tolerance.¹⁵⁸ These are the demands of the

¹⁵³ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 51; I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 93.

¹⁵⁴ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 122.

¹⁵⁵ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 128; I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 86; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 103.

¹⁵⁶ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 129; *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 86; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 103.

¹⁵⁷ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 129; *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 86; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 92.

¹⁵⁸ I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 87; *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 86; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 83.

kind of pluralism that is appropriate for a democratic society,¹⁵⁹ which requires the broadest flow of information and opinions regarding issues of public interest.¹⁶⁰

106. In addition, the Court has considered that to grant “automatic protection” to the reputation of the institutions of the State and its members is incompatible with Article 13 of the Convention. In the case *Usón*, the Court held that “establishing disproportionate sanctions for giving opinions on an alleged illicit fact of public interest that involved military institutions and their members, thus providing a larger and automatic protection to their honor or reputation, without considering the larger protection due to the exercise of freedom of expression in a democratic society, is incompatible with Article 13 of the American Convention.”¹⁶¹

107. In cases of imposition of subsequent liabilities aimed at protecting the rights of others to honor or reputation, the requirements established in Article 13.2 of the Convention for limiting the right to freedom of expression must be strictly complied with. In the words of the Commission, “any potential conflict in the application of Articles 11 and 13 of the Convention can be resolved by resorting to the language of Article 13 itself,”¹⁶² that is, through the subsequent imposition of liability that meets the specified requirements. As stated above, the requirements that must be met by any restriction of freedom of expression have been clearly established in the case law, and may be summarized as follows. First, the existence of a clear harm or threat of harm to the rights of others must have been proven: it is necessary for the rights whose protection is being sought to be clearly harmed or threatened, and the burden of proof is on the party requesting the limitation. Unless there is clear and arbitrary harm to the right of another, the subsequent imposition of liability is unnecessary.¹⁶³ In this sense, it is incumbent upon the State to demonstrate that it is truly necessary to restrict freedom of expression in order to protect a right that has effectively been harmed or is being threatened.¹⁶⁴ Second, there must be clear and precise legal provisions establishing such subsequent liabilities, drafted in unequivocal terms that delimit unlawful conduct clearly, set forth the elements of such conduct with specificity and enable it to be differentiated from lawful conduct. Otherwise, doubts will arise, the door will be opened to arbitrariness on the part of the authorities, the principle of legality will not be respected,¹⁶⁵ and the risk arises that these laws could be used to adversely affect freedom of expression. Laws that limit freedom of expression must be written with such clarity that any sort of interpretation is unnecessary. Even specific judicial interpretations are not

¹⁵⁹ I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 152; *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 87; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 83.

¹⁶⁰ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 113.

¹⁶¹ I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. para. 86.

¹⁶² IACHR. Report No. 11/96. Case 11.230. Merits. Francisco Martorell. Chile. May 3, 1996. para. 75.

¹⁶³ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.f).

¹⁶⁴ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.e).

¹⁶⁵ IACHR, *Case of Castillo Petruzzi*, cited in I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 63.

sufficient to compensate for overly-broad formulations, as judicial interpretations change, or are not followed strictly, and are not general in nature.¹⁶⁶ Third, the absolute necessity of the imposition of liabilities must have been proven, bearing in mind that the test for the necessity of restrictions to freedom of expression, when they are imposed through laws that establish liabilities for those who express their opinions, is more demanding. In those cases, taking into account the requirement of reconciling the protection of freedom of expression and the protection of other rights in a rational and balanced manner, without adversely affecting the right to freedom of expression as a bulwark of a democratic system, the absolute necessity of resorting, in a truly exceptional manner, to the imposition of legal liability against those who express themselves must be demonstrated.

108. In particular, the strict necessity test to be applied requires that, in order to repair the harm which has been inflicted, the State must choose the least costly means for freedom of expression. Therefore, recourse must be made in the first instance to the right of correction or reply, which is set forth expressly in Article 14 of the American Convention.¹⁶⁷ Only when this is insufficient to repair the harm that has been inflicted may recourse be made to the imposition of legal liabilities more costly for those who have abused their right to freedom of expression, and –while doing so- have produced an actual and serious damage to the rights of others or to juridical assets specially protected by the American Convention.

109. In the events in which the right of correction or reply is insufficient to re-establish the right to reputation or honor of those who have been affected by a given exercise of freedom of expression, and recourse may therefore be had to other mechanisms of legal liability,¹⁶⁸ such recourse to the imposition of legal liability must strictly comply with certain specific requirements in addition to the ones mentioned above, namely: (a) *Application of the standard of actual malice*. In resorting to the imposition of liability for alleged abuses of freedom of expression, the standard of assessment of “actual malice” must be applied; that is, it must be demonstrated that the person expressing the opinion did so with the intent to cause harm and the knowledge that she was disseminating false information, or that she did so with a reckless disregard for the truth of the facts. With regard to communications professionals and journalists, Principle 10 of the IACHR Declaration of Principles on Freedom of Expression provides that “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.” As an example, in the case of *Tristán Donoso v. Panama*, the Inter-American Court heard the case of an attorney convicted of slander after making a statement in a press conference accusing the Attorney General of having illegally intercepted his communications. The Attorney General was later acquitted of this charge in court. According to the Inter-American Court, due to the context in which the interceptions were revealed, the attorney had good reason to consider that the

¹⁶⁶ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. paras. 72.s)-u).

¹⁶⁷ Article 14 provides: “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.”

¹⁶⁸ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile*, cited in I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 61.d)

statements he made corresponded to true facts and that he was distributing true information. In the words of the Court: “[when] Mr. Tristán Donoso called the press conference, there were various and important information and assessment elements allowing him to consider that his statement was not groundless regarding the responsibility of the former Attorney General for the recording of the conversation.”¹⁶⁹ In this same sense, the judge in the lower court in the slander trial against Mr. Tristán Donoso found that there was no crime because “in order for there to be a crime, the person who makes the accusation must know it is false, which was not the case.”¹⁷⁰ The Inter-American Court stated that among the elements which must be weighed for the exceptional application of the punishment is “the malice with which [the damaging party] acted.”¹⁷¹ The Court has also established that when an assertion that may jeopardize the reputation of a person is conditioned upon the confirmation of a fact, the existence of the willful purpose of insulting, offending or disparaging must be ruled out. For example, in the *Usón* decision, the Court considered that the assertions for which Mr. Usón was convicted had been formulated in a conditional manner and that therefore a willful intention to injure could not be inferred from them. “Mr. Usón Ramírez was not stating that a premeditated crime had been committed, but that in his opinion such a crime would seem to have been committed if the hypothesis about the use of the flamethrower was true. An opinion conditioned in such a way cannot be subjected to truthful requirements. Furthermore, the above shows that Mr. Usón Ramírez lacked any specific intention to insult, offend or disparage, since if he had had the will to do so, he would not have conditioned his opinion in such a way.”¹⁷² (b) *Burden of proof*. In cases where legal liability is imposed against a person who has abused his right to freedom of expression, the party alleging harm is the one that must bear the burden of proof in demonstrating that the pertinent statements were false, and that they effectively caused the harm that is being invoked.¹⁷³ Moreover, the Inter-American Court in the case of *Herrera Ulloa v. Costa Rica* held that requiring the person who expressed himself to legally prove the veracity of the facts asserted in his statements, and failing to accept the *exceptio veritatis* on his behalf, “is an excessive limitation on freedom of expression that does not comport with Article 13.2 of the Convention.” In any case, and as just explained, even if the *exceptio veritatis* should be a defense against any type of liability, it cannot be the only such defense; as long as the expressions under consideration are reasonable, liability cannot be imposed for expressions on matters of current public interest. (c) Finally, it is important to bear in mind in this respect that only facts, and not opinions, are susceptible to judgments

¹⁶⁹ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 125

¹⁷⁰ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 102

¹⁷¹ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 125

¹⁷² I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. para. 86.

¹⁷³ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 132; IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*, cited in I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 101.2).I); IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. paras. 72.o)-p); I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 120.

of truthfulness or untruthfulness.¹⁷⁴ Consequently, nobody may be punished for expressing opinions about other persons when such opinions do not imply false accusations of verifiable facts.

110. The type of subsequent legal liabilities to which recourse may be had whenever the right of correction or reply has been insufficient to repair the harm caused to the rights of others are in principle the mechanisms of civil liability. Such civil liabilities, as the UN, OAS and OSCE Special Rapporteurs on Freedom of Expression stated in their Joint Declaration of 2000, “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.” On this subject, the jurisprudence of the Inter-American Court has held that not only criminal sanctions but also civil ones can have a chilling or intimidating effect on the exercise of freedom of expression. For example, in the case of *Tristán Donoso*, the Court held that the civil sanction imposed on Mr. Tristán Donoso was, because of the large sum that the Attorney General requested as reparation for the facts that he considered constituted slander, just as intimidating and inhibiting for the exercise of freedom of expression as a criminal sanction: “[T]he facts the Tribunal is examining show that the fear of a civil penalty, considering the claim by the former Attorney General for a very steep civil reparation, may be, in any case, equally or more intimidating and inhibiting for the exercise of freedom of expression than a criminal punishment, since it has the potential to compromise the personal and family life of an individual who accuses a public official, with the evident and very negative result of self-censorship both of the affected party and of other potential critics of the actions taken by a public official.”¹⁷⁵

111. Finally, it is important to point out that the Inter-American Commission and Court of Human Rights have both held, in all of the specific cases they have examined and decided on the issue, that the protection of the honor and reputation of public officials or candidates for public office through the prosecution or criminal conviction for defamation offenses of persons expressing themselves was disproportionate and unnecessary in a democratic society.

112. The Court’s decisions are based on: (i) the higher levels of protection granted to speech concerning the State, matters of public interest and public officials in the exercise of their duties and candidates who aspire to hold public office; (ii) the high demands placed on limitations to this type of speech; and (iii) the strict requirements of validity that resorting to legal sanctions must meet in order to limit freedom of expression. On this point, the case law has explained that public officials as well as candidates for public office enjoy, like everyone, the right to honor protected by the Convention. However, public officials in a democratic society have a different threshold of protection, which exposes them in greater measure to public criticism. This is justified by the public interest nature of the activities in which they engage; because they have exposed themselves voluntarily to stricter scrutiny; because their activities go beyond the private sphere into the realm of public debate; and because they have appropriate means of defense.¹⁷⁶ This does not mean that public officials

¹⁷⁴ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 93; I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 124.

¹⁷⁵ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 129

¹⁷⁶ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. paras. 86-87; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*.

cannot be legally protected with respect to their honor, but such protection must be consistent with democratic pluralism and must weigh the interest of such protection against the interests of open public debate on public affairs.¹⁷⁷ It has been emphasized that the imposition of criminal liability, such as under the criminal defamation laws, to protect the honor and reputation of public officials or candidates for public office causes fear and inhibition and has a chilling effect on the practice of critical expression and on journalism in general, preventing debate on matters of interest to society. It has also been underscored that there are other, less restrictive means by which persons involved in matters of public interest can defend their reputation from unfounded attacks. Such means are, in the first instance, the increase of democratic debate, to which public officials have broad access, and, should that prove to be insufficient for repairing a harmed inflicted willfully, recourse could be made to civil remedies, applying the standard of actual malice.¹⁷⁸ In addition, in the *Kimel* case, the Court stated that the legal definition of the criminal offense concerning the protection of honor in Argentina violated the principle of strict legality because of its extreme vagueness. Consequently, it ordered the amendment of that law.

113. The Inter-American Court has found it unnecessary to confirm the truth of a statement to dismiss the possibility of criminal or civil penalty. As previously mentioned, it is enough that there exist sufficient reason for making the statement, as long as the statement is of public interest. As a consequence, even if the stated facts (for example, the commission of a crime) cannot be proven in a trial, the individual who made the statements in question will be protected as long as he or she had no prior knowledge of the falsity of the statement or did not act with grave negligence (total disregard for the truth). In the aforementioned case of *Tristán Donoso*, upon studying the proportionality of the criminal and civil penalties imposed on an attorney who, at a press conference, had accused the Attorney General of illegally intercepting his telephone calls – a charge which subsequently could not be proven in court – the Court indicated that it would not analyze whether the statements given at the press conference by the victim constituted slander under Panamanian law,¹⁷⁹ “but whether in the instant case, upon imposing a criminal punishment on Mr. Tristán Donoso and the consequences thereof, such as additional pecuniary compensation, the amount of which is pending determination, the State has violated or restricted the right enshrined in Article 13 of the Convention.”¹⁸⁰ In the trial before the Court, disproportionality originated in the fact that the statements referred to a matter of public interest and there was enough reason to make them, even though a judge later considered them not proven.

Judgment of November 22, 2005. Series C No. 135. paras. 83-84; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. paras. 128-29; I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 115; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

¹⁷⁷ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 128.

¹⁷⁸ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72; IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*, cited in I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 101.4).c).

¹⁷⁹ *Cfr.* I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 106.

¹⁸⁰ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 94.

114. The Inter-American Commission has considered that the use of criminal law mechanisms to punish speech concerning matters of public interest, public officials, candidates for public office or politicians *in and of itself* violates Article 13 of the American Convention: there is no compelling social interest that justifies it; it is unnecessary and disproportionate; and it can also constitute an indirect means of censorship given its intimidating and inhibiting effect on debate concerning matters of public interest.¹⁸¹ The Inter-American Commission has also stressed that resorting to criminal law instruments in order to punish specially protected speech is not only a direct limitation to freedom of expression but also can be considered an indirect method of restricting the expression of opinions because of its intimidating, silencing and inhibiting effects on the free flow of ideas, opinions and information of all kinds. The mere possibility of being criminally prosecuted for making critical statements on matters of public interest may lead to self-censorship given its threatening nature. In the words of the Inter-American Commission, “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. [...] [T]he State’s use of its coercive powers to restrict speech lends itself to abuse as a means to silence unpopular ideas and opinions, thereby repressing the debate that is critical to the effective functioning of democratic institutions. Laws that criminalize speech which does not incite lawless violence are incompatible with freedom of expression and thought guaranteed in Article 13, and with the fundamental purpose of the American Convention of allowing and protecting the pluralistic, democratic way of life.”¹⁸²

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

116. In turn, the Inter-American Court, in its judgment in the case of *Kimel v. Argentina*, held as follows: “The Court does not deem any criminal sanction regarding the right to inform or give one’s opinion to be contrary to the provisions of the Convention; however, this possibility should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception.”¹⁸³ These same considerations were reaffirmed in the case of *Tristán Donoso v. Panama*. Interpreting this statement in consonance with the Inter-American Court’s jurisprudence, is it reasonable to conclude that, in principle, resort to criminal proceedings is prohibited with regard to

¹⁸¹ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*, cited in I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 101.2); IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.h).

¹⁸² IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

¹⁸³ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 78.

specially protected speech that could offend the honor or reputation of public officials, candidates for public office, or persons directly related to issues of public interest. In other cases, when dealing with an accusation made in good faith, limiting debate through the use of the criminal law has such grave effects on democratic accountability that this option does not comply with the requirements of extreme and absolute necessity. For this reason, in the case of *Kimel v. Argentina*, the Inter-American Court found that the State had violated the American Convention by convicting a journalist who accused a judge of being complicit in the commission of the worst human rights violations.

b. Cases in which the Inter-American Court has examined the conflict between the right to freedom of expression and personal rights like public officials' right to honor and reputation

117. Article 11 of the Convention prohibits all “unlawful attacks on [the] honor or reputation” of individuals and “imposes on States the duty to provide legal protection from such attacks.” According to the Court, “the right to have honor respected relates to self-esteem and self-worth, whereas reputation refers to the opinion other persons have about someone.”¹⁸⁴

118. As previously established, the protection of the individual’s right to honor and to reputation, covered under Article 11 of the Convention, can conflict with freedom of expression. These cases should evaluate, in keeping with the aforementioned considerations, which of the two rights should take priority at a given moment. In all the cases in which the Court has studied the tension between the honor and reputation of individuals who hold – or are seeking to hold – public office, and the right to freedom of expression, it has found that the latter right takes precedence. In every case, the Court has applied the principle of precedence of freedom of expression in matters of current public interest. The following aside briefly presents the cases in which the Inter-American Court of Human Rights has ruled on the issue.

119. The first of these cases, *Herrera Ulloa v. Costa Rica*, discussed above, dealt with the situation of Costa Rican journalist Mauricio Herrera Ulloa, who was convicted of violating the honor of a Costa Rican government official stationed abroad, for having accurately reprinted information from European newspapers regarding the alleged unlawful conduct of that official. The journalist was convicted on four counts of criminal defamation, and was ordered to pay a fine and to publish the holding of the court’s judgment in the newspaper. Furthermore, the judgment found the civil action for damages resulting from said crimes to be admissible, and ordered Mr. Herrera and the newspaper *La Nación* to pay damages and court costs. Finally, the newspaper *La Nación* was ordered to change the content of its online edition by removing the link from the diplomat’s surname to the articles at the heart of the controversy and providing a new link from those articles to the holding of the court’s judgment.

120. The Inter-American Court of Human Rights held that the penalties constituted a violation of the freedom of expression protected by the American Convention on Human Rights. In its judgment, the Court highlighted the dual dimension—individual and collective—of freedom of expression, the crucial democratic function of this right, and the central role of the communications media. After recalling the requirements set forth in the

¹⁸⁴ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 57

Convention for restrictions to freedom of expression to be legitimate, it concluded that Mr. Herrera had been subjected to the excessive and unnecessary use of the punitive power of the State, which failed to respect said Convention requirements. It took into particular account that: (a) Mr. Herrera was a journalist who was conveying facts and opinions of public interest; (b) the exercise of his right resulted in statements critical of a public official in the exercise of his duties, and the official was exposed to a greater degree of criticism than private citizens; and (c) Mr. Herrera had limited himself to faithfully reprinting information published in the foreign press on the conduct of a Costa Rican diplomatic official. The Court emphasized that his criminal conviction had had a chilling effect on the practice of journalism and on debate concerning matters of public interest in Costa Rica, stating that “[t]he effect of the standard of proof required in the judgment is to restrict freedom of expression in a manner incompatible with Article 13 of the American Convention, as it has a deterrent, chilling and inhibiting effect on all those who practice journalism. This, in turn, obstructs public debate on issues of interest to society.”¹⁸⁵ Consequently, it found Costa Rica in violation of the Convention and ordered that it make reparations for the violation of Article 13 of the Convention, in the form of setting aside the conviction and paying compensation for non-pecuniary damages to journalist Herrera Ulloa.

121. In the second of these cases, the *Canese* case, also discussed previously, the Court examined the situation of Ricardo Canese, a presidential candidate in the 1992 elections in Paraguay. Mr. Canese was convicted of criminal defamation as a consequence of statements he made while he was a candidate, and during the course of the campaign, concerning the conduct of his opponent in relation to the Itaipú Hydroelectric Complex. He was sentenced to a term of incarceration and the payment of a fine. Also, during the course of the case he was permanently prohibited from leaving the country.

122. The Inter-American Commission argued before the Court that the imposition of criminal liability and criminal penalties for political speech within the context of an election is contrary to Article 13 of the Convention, because there is no imperative social interest that justifies the criminal penalty; because the restriction is disproportionate; and because it is an indirect restriction, given that criminal penalties have an intimidating effect on all debate involving public figures and matters in the public interest. Consequently, it affirmed that statements made in electoral contests must not be criminalized, and that recourse should be made instead to civil penalties, based on the standard of actual malice: “[I]n other words, it is necessary to prove that, by disseminating the information, the author intended to cause harm or knew full well that he was disseminating false information.”¹⁸⁶

123. The Inter-American Court, after highlighting the considerable democratic function of the full exercise of freedom of expression and its heightened importance in the electoral arena, concluded that in this case the freedom of expression protected by Article 13 was violated. Indeed, the Court took into account that: (a) criminal law is the most restrictive and severe means for establishing liability for unlawful conduct; and (b) Mr. Canese’s statements had been made in the context of a presidential election campaign with regard to matters of public interest, which places them in a category warranting greater protection under Article 13 of the Convention. It therefore concluded that the case and the criminal sentence issued against Mr. Canese constituted an unnecessary and excessive

¹⁸⁵ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 133.

¹⁸⁶ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.h).

punishment that limited the open debate of issues in the public interest and restricted the victim's freedom of expression during the rest of the electoral campaign. Furthermore, it emphasized that the criminal case and the conviction, together with the accompanying restrictions on leaving the country, were indirect means of restricting freedom of expression.

124. The case of *Kimel v. Argentina* was also examined in the preceding sections. In that case, upon finding that Article 13 of the American Convention had been violated by means of the conviction of Mr. Eduardo Kimel for having published a book critical of the way in which a judge had conducted the investigation of a massacre committed during the years of the dictatorship, the Inter-American Court maintained that the punitive power of the State had been used unnecessarily and disproportionately. To arrive at this conclusion, the Court considered not only the greater degree of protection afforded to Mr. Kimel's statements in his book because they referred to the conduct of a public official but it also considered other reasons, namely: (a) that the Argentinean criminal defamation laws were extremely vague and ambiguous, thus contradicting the requirement of specific legality; (b) the fact that the prosecution and punishment of the investigative journalist had reflected a notorious abuse of the punitive power of the State, "taking into consideration the crimes charged to Mr. Kimel, the impact they had on his legally protected interests, and the nature of the sentence imposed on the journalist—deprivation of freedom;" and (c) the obvious disproportionality and excess in affecting Mr. Kimel's freedom of expression in relation to the alleged harm to the right to honor of the individual who had served as a public official. Such disproportion was inferred by the Court from the joint evaluation of several factors, including that the exercise of freedom of expression was done through opinions that did not entail the accusation of crimes or the indication of facts or issues relating to the judge's personal life; that the opinions amounted to a critical value judgment on the conduct of the judicial power during the dictatorship; that the opinion was imparted bearing in mind the facts verified by the journalist; and that opinions, unlike facts, cannot be subjected to judgments of truthfulness or untruthfulness. As a consequence of the international responsibility of the State of Argentina for having violated the American Convention, the Court ordered that it: (1) compensate Mr. Kimel for pecuniary and non-pecuniary damages and reimburse his legal costs and expenses; (2) set aside the criminal conviction against him and all of the consequences derived from it; (3) remove Mr. Kimel's name from public records registering his criminal history; (4) duly publish the decision of the Inter-American Court as a measure of satisfaction; (5) hold a public act to recognize its responsibility; and (6) bring its domestic law in line with the American Convention on Human Rights insofar as it concerns criminal defamation offenses, "so that the lack of accuracy acknowledged by the State (...) be amended in order to comply with the requirements of legal certainty so that, consequently, they do not affect the exercise of the right to freedom of thought and expression."¹⁸⁷

125. In the case of *Tristán Donoso*, the Inter-American Court studied the situation of attorney Santander Tristán Donoso, convicted of the crime of slander for statements made about the Attorney General in a press conference. In the statements, Tristán Donoso had accused the Attorney General of recording a private telephone conversation between him and one of his clients, which he alleged the Attorney General later distributed to others. After the Attorney General pressed charges for libel and slander, Mr. Tristán Donoso was convicted and sentenced to 18 months in prison, along with a fine of 750 balboas; a restriction on practicing public service for the same time period; and reparations for material

¹⁸⁷ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 128.

and moral damages whose amount would be determined in a liquidation proceeding before a lower court.

126. The representatives of the victim argued before the Inter-American Court that, first, “the exercise of freedom of expression is not exclusively reserved for journalists.”¹⁸⁸ Likewise, they indicated that the violation of the right to freedom of expression occurred because, among other causes, Panamanian legislation did not recognize standards of actual malice nor the compensatory (non-punitive) nature of sanctions, and did not set forth measures to guarantee the proportionality of the sanctions. For its part, the State argued that at no time had Mr. Tristán Donoso’s right to freedom of expression been restricted and that the public accusation Mr. Tristán Donoso had made against the Attorney General could be understood neither as “‘criticism’ nor as ‘public discourse’ on the actions of a public official.” In the State’s estimation, “giving slander the connotation of news ‘of great public interest’ is the same as legitimizing all illegitimate acts done in the name of the exercise of freedom of expression, as long as they catch the attention of the public.”¹⁸⁹

127. In its judgment, the Inter-American Court emphasized that although the Convention does protect the right to freedom of expression, it is not an absolute right since the Convention provides for the possibility of imposing subsequent liability for its abuse. Likewise, the Court held that the Convention protects the right to honor and recognizes the dignity of all people. From there, it derived limitations on the actions of the State and individuals, as well as the possibility of requesting protective legal measures.¹⁹⁰

128. Finally, the Court indicated that in a democratic society, expression on the suitability of officials enjoys greater protection, since those officials decided to expose themselves voluntarily to greater scrutiny; since the activities they take part in are of public interest; and since they have greater opportunity to reply publicly to statements that affect them. On applying the test to verify the legitimacy of a subsequent sanction on Mr. Tristán Donoso, the Court found that although it met the standard of legality (the crime of slander was defined by law, both formally and materially) and the standard of suitability (recourse to criminal law was a measure that could effectively contribute to protecting the right to the honor or reputation of the individual affected), the subsequent sanction was unnecessary because, given that the individual in question had a high public profile, there were other means of protecting the personal rights affected. The cost of freedom of expression was disproportionate. Effectively, in the case at hand, the Court held that the matter was one of public interest, and it was therefore important to guarantee the broadest level of debate. It held that the attorney had enough reason to believe at that moment that it was, effectively, the Attorney General who had intercepted his communication. Finally, the Court found that the official had the ability to respond to the statements in question. In light of the aforementioned, the application of criminal law or of disproportionate civil sanctions was not only not necessary for the protection of the Attorney General’s honor and reputation, but implied a very high cost in terms of its effects on democratic discourse.

129. In this case, the Court reiterated its jurisprudence on the limits of the use of the punitive power of the State: “In a democratic society punitive power is exercised only to

¹⁸⁸ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 91.

¹⁸⁹ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 92.

¹⁹⁰ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. paras. 110-11.

the extent that is strictly necessary in order to safeguard essential legally protected interests from the more serious attacks which may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State.”¹⁹¹ The Court reaffirmed the importance of weighing “the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception.”¹⁹²

130. In the case of *Usón Ramírez v. Venezuela*, Mr. Usón, a retired member of the military, was sentenced for the crime of “insult against the Armed Forces” for issuing several opinions criticizing the performance of said institution in the so-called case of “Fuerte Mara.” In that case, a group of soldiers suffered severe burnings while being detained in a punishment cell. Mr. Usón was sentenced for saying in a TV interview that, if the information that was circulating regarding the kind and degree of the burns was accurate, the soldiers must have been deliberately attacked with a flamethrower. According to Mr. Usón, the kind of burns that were described by the father of one of the soldiers could only be the product of this kind of weapon, and the use of such weapon had to be premeditated, given the different actions that had to be taken in order to get the flamethrower into the detention facility, load it and activate it. Mr. Usón had been invited to the TV show because he had been a member of the Armed Forces until 1992, when he retired for disagreements with the government and some high military officials. As a consequence of these opinions, Mr. Usón Ramírez was tried and sentenced to five years and six months in jail for the crime of “insult against the National Armed Forces,” following a criminal provision set forth in Article 505 of the Organic Code Military Justice whereby “whoever insults, offends, or disparages the National Armed Forces or any of its units shall be subject to three to eight years in prison.”

131. In this case, the Court strictly applied the three-prong test, and found that several of its requirements have not been met. Specifically, the Court found that the measure that was restricting freedom of expression—that is, the imposition of a sentence for the crime of insult against the armed forces—was not properly formulated, thus it violated the principle of strict legality. According to the Court, the criminal regulation was “vague and ambiguous,” such that it failed to respond to “the legality requirements of Article 9 of the Convention and the provisions of Article 13.2 of the Convention regarding the imposition of further liabilities.”¹⁹³ Furthermore, the Court found that the imposed penalty was neither suitable nor necessary, as it was “excessively vague and ambiguous.” The judgment recalled that “the Tribunal has considered on previous occasions that the exercise of the punitive power of the State has been abusive and unnecessary to protect the right to honor when the criminal provision in question does not establish clearly what behaviors involve a serious damage to such right. That was what happened in the case of Mr. Usón Ramírez.”¹⁹⁴

¹⁹¹ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 119.

¹⁹² I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 120.

¹⁹³ I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. para. 57.

¹⁹⁴ I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. para. 75.

132. Finally, regarding proportionality, the Court found that the consequences of the application of the measure had been truly serious, and that freedom of expression was disproportionately affected. "As regards the affectation of the freedom of expression, the Court considers the consequences of being subjected to trial in a military court (...); the criminal trial itself; the preventive deprivation of freedom imposed on him; the sanction depriving him of liberty for five years and six months to which he was sentenced; his inclusion in the criminal record; the loss of revenues during the time he was in prison; the affectation of the exercise of the rights that are restricted due to the sanction imposed; being far from his family and loved ones; the latent risk of losing his personal liberty, and the stigmatizing effect of the criminal sanction imposed on Mr. Usón Ramírez show that the further liabilities established in this case were truly serious."¹⁹⁵ Moreover, the Court considered that the fact that the assertions made by Mr. Usón were specially protected (specially protected speech), because they were made with the intention of questioning the performance of an institution of the State that was under public scrutiny at the time, had not been taken into account. "The remarks made by Mr. Usón Ramírez were related to matters that were clearly of public interest. Despite the existence of public interest in the events in Fuerte Mara, a facility that belonged to the Armed Forces of the State, Mr. Usón Ramírez was tried and sentenced without taking into account the requirements of the American Convention regarding the greater tolerance required regarding any affirmations and considerations expressed by citizens exercising their democratic control."¹⁹⁶

133. Based on these arguments, the Court concluded that "imposing any further liabilities on Mr. Usón Ramírez for the crime of offense against the Armed Forces violated his right to freedom of expression, since the requirements of legality, need and proportionality were not respected when restricting said right. Consequently, the State violated the right to freedom of expression set forth in Articles 9, 13.1 and 13.2 of the American Convention, in relation to the general obligation to respect and guarantee these rights and freedoms established in Article 1.1 of said Convention, and the duty to reform national law established in Article 2, to the prejudice of Mr. Usón Ramírez."¹⁹⁷

c. Fundamental incompatibility of "desacato laws" and the American Convention

134. The Inter-American Commission and the Court have declared that so-called *desacato* laws contradict the freedom of expression protected by Article 13 of the American Convention.¹⁹⁸

135. The so-called *desacato* laws, according to the definition provided by the Inter-American Commission—and regardless of their specific denomination within domestic legal systems—"are a class of legislation that criminalizes expression which offends, insults or threatens a public functionary in the performance of his or her official duties."¹⁹⁹ In the

¹⁹⁵ I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. para. 81.

¹⁹⁶ I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. para. 84.

¹⁹⁷ I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. para. 88.

¹⁹⁸ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 88; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

¹⁹⁹ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

countries in which these laws exist, they are justified by several reasons, most notably the protection of the proper functioning of government, or public order: “Desacato laws are said to play a dual role. First, by protecting public functionaries from offensive and/or critical speech, these functionaries are left unhindered to perform their duties and thus, the Government itself is allowed to run smoothly. Second, *desacato* laws protect the public order because criticism of public functionaries may have a destabilizing effect on national government since, the argument goes, it reflects not only on the individual criticized but on the office he or she holds and the administration he or she serves.”²⁰⁰

136. In the Commission’s view, these justifications do not find support in the American Convention on Human Rights. In its opinion, the *desacato* laws “conflict with the belief that freedom of expression and opinion is the ‘touchstone of all freedoms to which the United Nations is consecrated’ and ‘one of the soundest guarantees of modern democracy;’”²⁰¹ as such, the *desacato* laws are an illegitimate restriction to freedom of expression, because (a) they do not serve a legitimate purpose under the Convention, and (b) they are not necessary in a democratic society. According to the Commission, “[t]he use of *desacato* laws to protect the honor of public functionaries acting in their official capacities unjustifiably grants a right to protection to public officials that is not available to other members of society. This distinction inverts the fundamental principle in a democratic system which holds the Government subject to controls, such as public scrutiny, in order to preclude or control abuse of its coercive powers. If one considers 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 the public office.”²⁰²

137. In the Commission’s opinion, given that the right to freedom of expression enables individuals and society to participate in active and vigorous debates on all matters of interest to society, and that this type of debate necessarily generates certain speech that is critical of or offensive to public officials or those persons involved in the shaping 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. Such limitations on speech may affect not only those directly silenced, but society as a whole.”²⁰³ Principle 11 of the IACHR Declaration of Principles on Freedom of expression clearly affirms that, “[p]ublic officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as *desacato* laws, restrict freedom of expression and the right to information.”

²⁰⁰ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V. In this same opinion, the Commission explained that the design and content of *desacato* laws varies among the States that have them in force: “The application of *desacato* laws varies among OAS member states. In certain countries, *desacato* laws penalize only insulting speech which is said in the presence of the public functionary or by direct communication, such as a letter or telephone call [see Article 456, Penal Code of El Salvador]. Other *desacato* laws penalize any speech which insults, offends or threatens a public functionary, whether made directly to the person in question or through an indirect medium, such as the press [See Article 173, Penal Code of Uruguay]. In general, however, the protection of *desacato* laws only extends to public functionaries performing in their official capacity. In addition, OAS member states differ as to defenses allowed in charges of *desacato*. In some countries, *desacato* laws require that defendants prove the veracity of their impugned statements as a defense. [See Article 413, Penal Code of Guatemala]. In others, the law does not allow the defense of truth to be introduced with regard to insulting or offensive language against public functionaries. [See Article 307, Penal Code of Costa Rica]. Penalties for *desacato* range from fines to prison sentences.”

²⁰¹ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

²⁰² IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

²⁰³ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

138. In addition to being a direct restriction to freedom of expression, the *desacato* laws also restrict it indirectly, “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. (...) [T]he burden *desacato* laws place on persons wishing to participate in debate over the proper functioning of the public administration is not lessened by the possibility of proving truth as a defense. Even those laws which allow truth as a defense inevitably inhibit the free flow of ideas and opinions by shifting the burden of proof onto the speaker. This is particularly the case in the political arena where political criticism is often based on value judgments, rather than purely fact-based statements. Proving the veracity of these statements may be impossible, since value judgments are not susceptible to proof.”²⁰⁴ Likewise, the threat of criminal liability for dishonoring the reputation of a public official, even if it is done through an opinion or a value judgment, can be used as a method to suppress criticism and silence political adversaries; by protecting public officials from defamatory statements, such threats of liability establish a structure that in the end protects the government itself from criticism.²⁰⁵

139. From another perspective, *desacato* laws are based on an erroneous notion of the preservation of public order, which is incompatible with democratic systems and contrary to the definition of such “public order” as may legitimately justify a limitation to freedom of expression: “the rationale behind *desacato* laws reverses the principle that a properly functioning democracy is indeed the greatest guarantee of public order. These laws purport to preserve public order precisely by restricting a fundamental human right which is recognized internationally as a cornerstone upon which democratic society rests. *Desacato* laws, when applied, have a direct impact on the open and rigorous debate about public policy that Article 13 guarantees and which is essential to the existence of a democratic society. In this respect, invoking the concept of “public order” to justify *desacato* laws directly inverts the logic underlying the guarantee of freedom of expression and thought guaranteed in the Convention.”²⁰⁶

140. In more specific terms, *desacato* laws are unnecessary because abusive attacks on the reputation and honor of public officials may be counteracted through other less restrictive means: “The special protection *desacato* laws afford public functionaries from insulting or offensive language is incongruent with the objective of a democratic society to foster public debate. This is particularly so in light of a Government's dominant role in society, and particularly where other means are available to reply to unjustified attacks through the government's access to the media or individual civil actions of libel and slander. Any criticism that is not related to the officials' position may be subject, as is the case for all private individuals, to ordinary libel, slander and defamation actions. In this sense, the Government's prosecution of a person who criticizes a public official acting in his or her official capacity does not comply with the requirements of Article 13.2 because the protection of honor in this context is conceivable without restricting criticism of the public administration. As such, these laws are also an unjustified means to limit certain speech that is already restricted by laws that all persons, regardless of their status, may invoke.”²⁰⁷ Moreover, *desacato* laws are contrary to the notion that in a democratic society public officials must be exposed to a greater extent to public scrutiny and demonstrate a higher tolerance for criticism.

²⁰⁴ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

²⁰⁵ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

²⁰⁶ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

²⁰⁷ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

141. In sum, in the opinion of the Inter-American Commission, the enforcement of criminal *desacato* laws against those who criticize public officials is *per se* contrary to the Convention, given that it is an imposition of subsequent liability for the exercise of freedom of expression that is unnecessary in a democratic society, and is disproportionate because of its serious effects on the person expressing the opinion and on the free flow of information in society. *Desacato* laws are a means of silencing unpopular ideas and opinions, and discourage criticism by generating fear of legal action, criminal punishment and monetary sanctions. *Desacato* laws are disproportionate in terms of the penalties they establish for criticizing State institutions and their members; they suppress the debate that is essential to the functioning of a democratic system, and unnecessarily restrict freedom of expression.

142. The Inter-American Court has also examined, in specific cases, the disproportionate nature of *desacato* laws and of the prosecution under those laws of individuals who exercise their freedom of expression. For example, in the aforementioned case of *Palamara Iribarne v. Chile*,²⁰⁸ the Court examined the situation of a civilian employee of the Chilean Armed Forces who had been criminally prosecuted for having attempted to publish a book without the authorization of his military superiors, had been subjected to various actions amounting to prior censorship, and while the case was pending had made statements to the media that were critical of the actions of the military criminal justice system in his case. Based on the foregoing, he was subsequently prosecuted for the offense of *desacato*. According to the Inter-American Court, “by pressing a charge of contempt, criminal prosecution was used in a manner that is disproportionate and unnecessary in a democratic society, which led to the deprivation of Mr. Palamara-Iribarne’s right to freedom of thought and expression with regard to the negative opinion he had of matters that had a direct bearing on him and were closely related to the manner in which military justice authorities carried out their public duties during the proceedings instituted against him. The Court believes that the contempt laws applied to Palamara-Iribarne established sanctions that were disproportionate to the criticism leveled at government institutions and their members, thus suppressing debate, which is essential for the functioning of a truly democratic system, and unnecessarily restricting the right to freedom of thought and expression.”²⁰⁹

143. In the *Tristán Donoso* case, the Inter-American Court highlighted the positive fact that after convicting Mr. Tristán Donoso for slander based on the statements he made about a senior official, the country’s laws changed to prohibit sanctions for *desacato* and other limitations on freedom of expression.²¹⁰

E. The prohibition against censorship and indirect restrictions to freedom of expression

1. The prohibition against direct prior censorship

²⁰⁸ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135.

²⁰⁹ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 88.

²¹⁰ I/A Court H. R., *Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. para. 133

144. Article 13.2 of the American Convention on Human Rights provides expressly that “[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, 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.” The only exception to this prohibition against prior censorship is found in Article 13.4 of the Convention, pursuant to which, “[n]otwithstanding 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.”

145. Interpreting these Convention standards, the Declaration of Principles on Freedom of Expression of the Inter-American Commission provides in Principle 5 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;” and Principle 7 establishes that “[p]rior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments.”

146. Prior censorship is the prototype of extreme and radical violation of freedom of expression, as it entails the suppression of such freedom. It takes place when means are established through public authority to impede *in advance* the free circulation of information, ideas, opinions or news, by any means that subjects the expression or dissemination of information to State control—for example, through the prohibition or seizure of publications, or any other procedure with the same aim.²¹¹ According to the Inter-American Commission, prior censorship “implies restricting or preventing expression before it has been circulated, preventing not only the individual whose expression has been censored, but also all of society, from exercising their right to the information. In other words, prior censorship produces ‘a radical suspension of freedom of expression through preventing the free circulation of information, ideas, opinions, or news.’ As has been stated previously, ‘this constitutes a radical suspension not only of the right of each person to express himself, but also of the right of every person to be well informed, and therefore affects one of the basic conditions of a democratic society.’”²¹² Cases of prior censorship result in the radical violation of each person’s right of expression, as well as the right of all people to be well-informed and to receive and know the expressions of others; as such, one of the basic conditions of a democratic society is adversely affected.²¹³

²¹¹ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 68.

²¹² IACHR. Report No. 90/05. Case 12.142. Merits. Alejandra Marcela Matus Acuña *et al.* Chile. October 24, 2005. para. 35.

²¹³ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 68; 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. 54; IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*, cited in I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 101.5).

147. According to the Inter-American Court, “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.”²¹⁴ This feature distinguishes this treaty from other international human rights conventions, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms or the International Covenant on Civil and Political Rights. In the opinion of the Inter-American Commission on Human Rights, “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.”²¹⁵

148. The following, among others, are examples of prior censorship according to the case law of the inter-American system: the seizure of books, printed materials and electronic copies of documents; the judicial prohibition against publishing or circulating a book;²¹⁶ the prohibition of a public official from making critical comments with regard to a specific case or institution;²¹⁷ an order to include or remove specific links, or the imposition of specific content in Internet publications; the prohibition against showing a film;²¹⁸ or the existence of a constitutional provision that establishes prior censorship in film production.²¹⁹

149. In one of its first judgments dealing with freedom of expression, the Inter-American Court addressed the issue of prior censorship, in this case, of movies. Indeed, in the case of *Olmedo Bustos and others v. Chile*²²⁰ the Court examined a prohibition imposed by the Chilean judicial authorities on the exhibition of the film “The Last Temptation of Christ” at the request of a group of citizens who had filed a claim seeking that remedy, invoking the protection of the image of Jesus Christ, of the Catholic Church, and of their own rights. The Inter-American Court, highlighting some of the salient features of freedom of expression—namely, its double dimension as an individual and collective right, and its critical democratic function—and recalling that this right covers both information that is favorable, indifferent or harmless as well as that which is shocking, disturbing or offensive for the State or for society, concluded that the Chilean authorities had engaged in an act of prior censorship that was incompatible with Article 13 of the American Convention on Human Rights. It held in this regard that the violation of the Convention had been produced not only by the judicial decisions which had been called into question, but by the existence of an article in the Chilean constitution which established a system of prior censorship for

²¹⁴ I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 70.

²¹⁵ IACHR. Report No. 11/96. Case 11.230. Merits. Francisco Martorell. Chile. May 3, 1996. para. 56.

²¹⁶ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135; IACHR. Report No. 2/96. Case 10.325. Merits. Steve Clark *et al.* Grenada. March 1, 1996; IACHR. Report No. 11/96. Case 11.230. Merits. Francisco Martorell. Chile. May 3, 1996; IACHR. Report No. 90/05. Case 12.142. Merits. Alejandra Marcela Matus Acuña *et al.* Chile. October 24, 2005.

²¹⁷ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135.

²¹⁸ I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73.

²¹⁹ I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73.

²²⁰ I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73.

cinematographic production, thus conditioning the acts of all three branches of public power; it therefore ordered Chile to adapt its internal legal system to the Convention's provisions.

150. Another illustrative case in which the Inter-American Court issued a ruling on acts of censorship was *Palamara Iribarne v. Chile*.²²¹ As previously mentioned, Mr. Palamara Iribarne, a retired military officer who was working as a civilian employee of the Navy, wrote a book entitled *Ethics and Intelligence Services*, which dealt in general terms with some aspects of military intelligence and the need for it to be governed by ethical parameters. Nevertheless, when the book was in the process of being printed and prepared for commercial distribution, it was subject to several restrictive measures, to wit: (i) Mr. Palamara's military superiors forbade him from publishing the book; (ii) said military superiors verbally ordered Mr. Palamara to withdraw all of the records of the publication from the publishing house; (iii) by order of a Prosecutor, all of the writings, documents and publications relating to the book were seized from the publishing house, and the copies that had already been printed were seized from the publishing house and from Mr. Palamara's house, as were the leftover pages and the publication's electrostatic plates; (iv) the court also ordered Mr. Palamara to erase the digital version of the book from his personal computer, and ordered the elimination of the electronic version of the text from a diskette and the publishing house's computer; (v) legal proceedings were conducted to recover the copies of the book that were already in various people's possession; and (vi) Mr. Palamara was legally prohibited from making critical remarks concerning the criminal cases pending against him, or the image of the Chilean Navy.

151. In the opinion of the Inter-American Court, all of these acts controlling the exercise of Mr. Palamara's right to disseminate information and ideas—when the book had already been printed and was in the process of being publicized and sold—prevented the book from being disseminated effectively through distribution in the marketplace, and prevented the public from having access to its content. To the Court, such measures of control “constituted acts of prior censorship that are incompatible with the parameters set by the Convention inasmuch as there was no element that, pursuant to said treaty, would call for the restriction of the right to freely publish his work, which is protected by Article 13 of the Convention.”²²² Consequently, the Court ordered reparations including the payment of compensation for damages to Mr. Palamara; it further ordered that he be permitted to publish the book, that the seized materials be returned to him, that the electronic version of the text be reconstructed, and that the judgments issued in the criminal cases be set aside.

2. The prohibition against indirect restrictions to freedom of expression by the authorities

152. There are different ways of unlawfully affecting freedom of expression, ranging from the extreme of radical suppression through acts of prior censorship, to other forms that are less evident (more subtle) but equally contrary to the American Convention.²²³ Aside from extreme violations consisting of the suppression of freedom of

²²¹ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135.

²²² I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 78.

²²³ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 68; 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. 54.

expression through direct actions such as censorship, “any governmental action that involves a restriction of the right to seek, receive and impart information and ideas to a greater extent or by means other than those authorized by the Convention” is also a violation of the American Convention.²²⁴

153. It is in this sense that Article 13.3 of the American Convention provides that “[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.”

154. The Inter-American Court has held that Article 13.3 is not exhaustive since it does not prevent the consideration of “any other measures” or indirect methods, such as those derived from new technologies.²²⁵ Likewise, the Tribunal has indicated that State responsibility for indirect restrictions can also come from acts between private individuals since that responsibility includes not only indirect government restrictions, but “also private (...) controls” that have the same result.²²⁶ In these cases, however, as will be seen further on, State responsibility is only valid if the obligation to guarantee the right—derived from the legal framework—is demonstrated to have been infringed.²²⁷ Finally, these restrictions constitute infringement even when the public officials who generate or tolerate them do not derive any advantage from them, as long as “the method or means effectively restrict, even if indirectly, the communication of ideas and opinions.”²²⁸

155. Interpreting this provision of the Convention, the Declaration of Principles on Freedom of Expression of the Inter-American Commission provides in Principle 5 that “[p]rior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression;” and Principle 13 establishes that “[t]he 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

²²⁴ 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. 55.

²²⁵ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 340; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 367

²²⁶ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. paras. 107-10 and 340; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. paras. 118-21, 367.

²²⁷ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. paras. 107-110. I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. paras. 118-21, 367.

²²⁸ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 340; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 368

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.”

156. Inter-American jurisprudence has in different rulings condemned State adoption of measures that indirectly restrict freedom of expression. For example, it has condemned the obligatory membership in a professional organization as a necessary requirement to practice journalism,²²⁹ as well as the arbitrary use of State regulatory power when it is used to take action designed to intimidate the board of a media outlet or revoke the citizenship of the director of a media outlet as a consequence of the editorial perspective of the programs it broadcasts.²³⁰ Another means of indirect restriction involves statements by public officials that, in context, can constitute “forms of direct or indirect interference or harmful pressure on the rights of those who seek to contribute to public deliberation through the expression and diffusion of their thoughts.”²³¹ Likewise, in spite of the fact that the case in question was not proved, the Court has held that the disproportionate or discriminatory requirement of “accreditations or authorizations for the written media to participate in official events” would constitute an indirect restriction.²³²

157. On this subject, the Inter-American Commission has also explained that a single State act may constitute simultaneously a limitation to freedom of expression contrary to the requirements of Article 13.2 of the Convention and an indirect or subtle means of restricting freedom of expression. For example, the imposition of criminal penalties for certain expressions contrary to the interests of the Government constitutes a direct limitation to this right in contravention of Article 13 by virtue of being unnecessary and disproportionate; however, it is also an indirect limitation of this right because it may silence or discourage future expressions, thus inhibiting the circulation of information and causing the same result as direct censorship.²³³ Along this same line of reasoning, the Commission has stated that the prosecution of individuals, including journalists and communications professionals, for the mere act of investigating, writing about and publishing information that is of interest to the public violates freedom of expression by discouraging public debate on matters of concern to society, since the mere threat of being prosecuted criminally for

²²⁹ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 76.

²³⁰ I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. paras. 158-163.

²³¹ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 139; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 151

²³² I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 346; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 375

²³³ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*, cited in I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. paras. 102.3.a) and 102.3.e); IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.i).

critical statements concerning matters of public interest may result in self-censorship, given its intimidating effect.²³⁴

158. The Special Rapporteurs of the UN, the OAS and the OSCE have also addressed the issue of indirect restrictions to freedom of expression by the authorities. For example, in their Joint Declaration of 2002 they affirmed that “[g]overnments and public bodies should never abuse their custody over public finances to try to influence the content of media reporting; the placement of public advertising should be based on market considerations.”

159. To date, the issue of regulation of the communications media and the requirements that must be met in order to prevent the violation of freedom of expression has not been ruled on expressly by the bodies of the inter-American system. However, the UN, OAS and OSCE Special Rapporteurs on Freedom of Expression addressed this issue directly in their Joint Declaration of 2003. After preliminarily “[c]ondemning attempts by some governments to limit freedom of expression and to control the media and/or journalists through regulatory mechanisms which lack independence or otherwise pose a threat to freedom of expression,” and “[n]oting the importance of protecting broadcasters, both public and private, from interference of a political or commercial nature,” they made statements on the political and economic independence of regulatory bodies, differences among various media subject to regulation, systems for registering communications media, and restrictions on content. With respect to (i) the political and economic independence of regulatory entities, the Special Rapporteurs declared that “[a]ll public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.” As for (ii) the differences among various communications media, they asserted that “[r]egulatory systems should take into account the fundamental differences between the print and broadcast sectors, as well as the Internet,” that “[b]roadcasters should not be required to register in addition to obtaining a broadcasting license,” that “[t]he allocation of broadcast frequencies should be based on democratic criteria and should ensure equitable opportunity of access,” and that “[a]ny regulation of the Internet should take into account the very special features of this communications medium.” With regard to (iii) systems for the registration of the communications media, the Rapporteurs declared that “[i]mposing special registration requirements on the print media is unnecessary and may be abused and should be avoided,” and that “[r]egistration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.” Finally, in terms of (iv) restrictions on content, they stated that “[c]ontent restrictions are problematical,” that “[m]edia-specific laws should not duplicate content restrictions already provided for in law as this is unnecessary and may lead to abuse,” and that “[c]ontent rules for the print media that provide for quasi-criminal penalties, such as fines or suspension, are particularly problematical.”

3. The prohibition against indirect restrictions to freedom of expression by causes other than the abuse of State restrictions

²³⁴ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Palamara-Iribarne v. Chile*, cited I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 64.e); IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*, cited in I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 101.2).

160. Freedom of expression can also be adversely affected without the direct intervention of the State; for example, when as a consequence of the existence of monopolies or oligopolies in the ownership of the communications media, “means tending to impede the communication and circulation of ideas and opinions” are established in practice.²³⁵ The Inter-American Court has understood that Article 13.3 prohibits not only government restrictions but also private controls that produce the same result. In this sense, the Court has held that Article 13.3 imposes on the States an obligation of guarantee as pertains to relations among individuals that could cause an indirect restriction of freedom of expression: “Article 13.3 of the Convention imposes on the State obligations to guarantee, even in the realm of the relationships between individuals, since it not only covers indirect governmental restrictions, but also ‘individual...controls’ that produce the same result.”²³⁶ Read in conjunction with Article 1.1 of the American Convention, this means—in the Court’s opinion—that the American Convention is violated not only when the State imposes indirect restrictions on the circulation of ideas or opinions through its agents but also when it has failed to ensure that the establishment of private controls does not result in the violation of freedom of expression.²³⁷

161. Along these lines, the Declaration of Principles on Freedom of Expression issued by the Inter-American Commission on Human Rights sets forth, in Principle 12, that “[m]onopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people’s right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.”

162. The UN, OAS and OSCE Special Rapporteurs on Freedom of Expression have addressed in their various Joint Statements the issue of indirect restrictions to freedom of expression derived from economic and commercial factors. Thus, in the Joint Declaration of 2001, they stated that “[e]ffective measures should be adopted to prevent undue concentration of media ownership,” and that “[m]edia owners and media professionals should be encouraged to conclude agreements to guarantee editorial independence; commercial considerations should not unduly influence media content.” Likewise, in the Joint Declaration of 2002 they declared themselves “[c]ognizant of the threat posed by increasing concentration of ownership of the media and the means of communication, in particular to diversity and editorial independence;” and they affirmed that “[m]edia owners have a responsibility to respect the right to freedom of expression and, in particular, editorial independence.”

163. The UN, OAS and OSCE Special Rapporteurs have also spoken to the specific issue of the promotion of diversity in the media and in the allocation of frequencies. In their various Joint Declarations, they have highlighted the importance of this issue for the

²³⁵ 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. 56.

²³⁶ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 339; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 367.

²³⁷ 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. 48.

full exercise of freedom of expression. For example, in the Joint Declaration of 2001 they adopted a section on “Broadcasting,” in which it was affirmed (i) that “[p]romoting diversity should be a primary goal of broadcast regulation; diversity implies gender equity within broadcasting, as well as equal opportunity for all sections of society to access the airwaves;” (ii) that “[b]roadcast regulators and governing bodies should be so constituted as to protect them against political and commercial interference;” and (iii) that “[e]ffective measures should be adopted to prevent undue concentration of media ownership.”

164. As will be studied in detail, indirect restrictions coming from private individuals do not originate solely in economic factors that in practice restrict the free flow of ideas. Another of these kinds of restrictions studied by the Court has been the restriction on freedom of expression through acts of violence carried out by private individuals. In this regard, in two cases in which the violence against journalists linked to certain media outlets were committed mainly by private groups in reaction to the editorial stance of the outlet or the content of its reporting, the Inter-American Court observed that, “the State’s international responsibility can be the result of violating acts committed by third parties, which in principle would not be attributable to it.²³⁸ This occurs if the State fails to comply, by action or omission of its agents in a position of guarantors of human rights, the obligations *erga omnes* included in Articles 1(1) and 2 of the [American] Convention.”²³⁹ The Court added that, “a State is not responsible for any violation of human rights committed by individuals. The *erga omnes* nature of the conventional obligations to guarantee does not imply an unlimited responsibility of the States with regard to any act of individuals. The specific circumstances of the case and the concretion of those obligations to guarantee must be analyzed, considering the predictability of a real and immediate risk.”²⁴⁰

F. Journalists and the social communications media

1. Importance of journalism and the media for democracy; characterization of journalism under the American Convention

165. Journalism, in the context of a democratic society, is one of the most important manifestations of freedom of expression and information. The work of journalists and the activities of the press are fundamental elements for the functioning of democracies, as journalists and the communications media keep society informed of events and their varied interpretations—a necessary condition for public debate to be robust, informed and

²³⁸ Cf. I/A Court H. R., *Case of the “Mapiripán Massacre” v. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C No. 134. para. 11.a) and I/A Court H. R., *Case of Valle Jaramillo et al. Vs. Colombia. Merits, Reparations and Costs*. Judgment of November 27, 2008. Series C No. 192. para. 77.

²³⁹ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 109; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 120.

²⁴⁰ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 110; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 121.

vigorous.²⁴¹ It is also clear that an independent and critical press is a fundamental element for the effectiveness of other freedoms in a democratic system.²⁴²

166. Indeed, the case law of the inter-American system has been consistent in reaffirming that, as a cornerstone of democratic society, freedom of expression is an essential condition for society to be sufficiently informed;²⁴³ that the greatest amount possible of information is required for the general welfare and that the full exercise of freedom of information is precisely what guarantees this maximum circulation;²⁴⁴ and that the free circulation of ideas and news is inconceivable without a plurality of sources of information and respect for the communications media.²⁴⁵

167. The importance of the press and the status of journalists are explained in part by the indivisibility of the expression and dissemination of thoughts and information, and by the fact that a restriction to the possibilities for dissemination is, directly and to the same extent, a limit to freedom of expression in both its individual and collective aspects.²⁴⁶ It follows that, in the opinion of the Inter-American Court, government restrictions to the circulation of information must be minimized, considering the importance of freedom of expression in a democratic society and the responsibility that such importance places upon journalists and communications professionals.²⁴⁷

168. Its direct nexus to freedom of expression distinguishes journalism from other professions. In the opinion of the Inter-American Court, the practice of journalism means that a person is involved in activities defined by or consisting of the freedom of expression that the American Convention protects specifically. Such activities are guaranteed specifically through a right that coincides in its definition with journalistic activity. Thus, the professional practice of journalism cannot be differentiated from the exercise of freedom of expression, for example, by the criterion of remuneration. They are “obviously interwoven” activities, and the professional journalist is simply a person who exercises his freedom of expression continuously, steadily and for pay.²⁴⁸ Because of its close overlap with freedom of expression, journalism cannot be thought simply as the provision of a professional service to the public through the application of knowledge acquired at a university or by those

²⁴¹ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. paras. 117-118.

²⁴² IACHR. Report No. 5/99. Case 11.739. Merits. Héctor Félix Miranda. Mexico. April 13, 1999. para. 42; IACHR. Report No. 130/99. Case 11.740. Merits. Víctor Manuel Oropeza. Mexico. November 19, 1999. para. 46.

²⁴³ I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. para. 68.

²⁴⁴ 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. 77.

²⁴⁵ 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. 78.

²⁴⁶ 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. 31-32.

²⁴⁷ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 57.

²⁴⁸ 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. 74.

persons who are registered with a particular professional association (as can occur with other professions); journalism is linked to the freedom of expression inherent in every human being. According to the Court, journalists are engaged professionally in the exercise of the freedom of expression defined expressly in the Convention, through social communications.

169. Therefore, in the case law of the inter-American system, the reasons of public order that justify the compulsory membership in associations that exists for other professions cannot be invoked validly in the case of journalism, because it leads to the permanent limitation, to the detriment of those who are not association members, of the right to make full use of the faculties that Article 13 recognizes with respect to every person; “[h]ence, it would violate the basic principles of a democratic public order on which the Convention itself is based.”²⁴⁹ Thus, Principle 6 of the Statement of Principles on Freedom of Expression issued by the Inter-American Commission states that “[c]ompulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression.”

170. Similarly, the UN, OAS and OSCE Special Rapporteurs on Freedom of Expression recalled in their Joint Declaration of 2003 that “the right to freedom of expression guarantees everyone the freedom to seek, receive and impart information through any medium and that, as a result, attempts to limit access to the practice of journalism are illegitimate,” and they declared (i) that “[i]ndividual journalists should not be required to be licensed or to register;” (ii) that “[t]here should be no legal restrictions on who may practice journalism;” (iii) that “[a]ccreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events, and that such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non discriminatory criteria published in advance;” and (iv) that “[a]ccreditation should never be subject to withdrawal based only on the content of an individual journalist’s work.”

171. As for the communications media, the case law of the inter-American system has stressed that they play an essential role as vehicles or instruments for the exercise of freedom of expression and information—in their individual and collective aspects—in a democratic society.²⁵⁰ Freedom of expression is particularly important in its application to the press; it is the job of the media to transmit information and ideas on matters of public interest, and the public has the right to receive them.²⁵¹ As such, the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe [OSCE] Representative on Freedom of the Media and the OAS Special Rapporteur for Freedom of Expression affirmed in their Joint Declaration of 1999 that “[a]n independent and pluralistic media is essential to a free and open society and accountable government.”

2. Responsibility inherent in the practice of journalism

²⁴⁹ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 76.

²⁵⁰ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 117; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 149.

²⁵¹ I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 153.

172. In view of its social and political importance, the practice of journalism entails implicit duties and is subject to responsibilities. It is important to bear in mind with reference to journalists that the requirements of Article 13.2 of the Convention must be met—particularly those requirements concerning legality, legitimate ends, and the necessity of limitations—and that the very nature of this professional practice is linked directly to the exercise of a right defined and protected by the American Convention.²⁵² In any case, given the importance of the role played by the media in a democratic society, the IACHR's Declaration of Principles on Freedom of Expression establishes in Principle 6 that "[j]ournalistic activities must be guided by ethical conduct, which should in no case be imposed by the State."

173. Considering this, it is reasonable to maintain that the debate over the media is necessary and healthy for democracy. In this debate, however, public officials should remember that, as the Court has indicated, questioning the conduct of journalists or media outlets "would not justify the non-compliance with state obligations to respect and guarantee human rights" of all individuals, without discrimination.²⁵³ This subject will be explored in greater detail in the following section.

3. Rights of journalists and State duties to protect the safety and independence of journalists and media outlets

174. Throughout their case law, the Inter-American Commission and the Inter-American Court have recognized a series of rights to which journalists and the communications media are entitled, and which give rise to corresponding obligations for the authorities.

175. First, it has been recognized that freedom of expression grants the directorship of the media, as well as the journalists who work for those media, the right to investigate and disseminate events of public interest,²⁵⁴ and that in a democratic society, the press has the right to inform freely on the activities of the State and to criticize the government, since the public has a corresponding right to be informed of what goes on in the community.²⁵⁵ It has also been recognized that journalists have the right to impart information on matters of legitimate public interest that are available in the foreign press.²⁵⁶ As such, it has been established that the restriction of the right of journalists and the communications media to circulate news, ideas and opinions also affects the public's right to receive information, limiting its freedom to exercise political options and to engage fully in

²⁵² 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. 80.

²⁵³ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 62; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 74

²⁵⁴ I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 157.

²⁵⁵ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ivcher-Bronstein v. Peru*, cited in I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 143.g).

²⁵⁶ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*, cited in I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 101.5).

a democratic society.²⁵⁷ In addition, it has been held that the punishment of a journalist for aiding in the dissemination of statements made by another or available in the foreign press is a serious threat to the contribution of the press to the discussion of matters of public interest.²⁵⁸

176. The UN, OAS and OSCE Special Rapporteurs addressed this issue in their Joint Declaration of 2003, in which they stated that they were “[a]ware of the important watchdog role of the media and of the importance to democracy and society as a whole of vibrant, active investigative journalism,” and affirmed consequently (i) that “[m]edia workers who investigate corruption or wrongdoing should not be targeted for legal or other harassment in retaliation for their work,” and (ii) that “[m]edia owners should be encouraged to provide appropriate support to journalists engaged in investigative journalism.”

177. The case law of the inter-American system has also been emphatic on the point that those who practice journalism have the right to the conditions of freedom and independence required to perform fully their critical function of keeping society informed, and consequently, to be able to be responsible.²⁵⁹ Ensuring the protection of the freedom and independence of journalists is one of the conditions that must be met in order for the communications media to be, in practice, true instruments of freedom of expression and not vehicles for its restriction.²⁶⁰ According to the Inter-American Court, “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. It is a matter, then, of an argument based on a legitimate interest of journalists and the public at large, especially because of the possible and known manipulations of information relating to events by some governmental and private communications media.”²⁶¹ It follows that the freedom and independence of journalists is an asset that must be protected and guaranteed.²⁶² The communications media themselves are also entitled to the right to independence and to be free from pressure of any kind. In this regard, Principle 13 of the IACHR Declaration of Principles on Freedom of Expression affirms that “[t]he 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.”

²⁵⁷ I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 163.

²⁵⁸ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 134, citing *Eur. Court H.R., Case of Thoma v Luxemburg*, Judgement of March 29, 2001, para. 62.

²⁵⁹ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 119; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 150.

²⁶⁰ 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. 34.

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). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 78.

²⁶² 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.

178. Journalists also have an especially important right to be protected by the State in circumstances that may threaten their safety, their physical integrity or their lives. The Inter-American Commission has explained that the lack of protection for journalists, whenever there is a real and imminent risk of which the State is aware, could implicate the State in a violation of its international responsibilities pertaining to Article 13 of the American Convention. Effectively, and as previously mentioned, the authorities have the duty of guaranteeing the protection of communicators so they can exercise fully their right to freedom of expression, and obviously to protect their fundamental right to life, personal safety and physical integrity and that of their families, which is equally guaranteed by the American Convention. The Inter-American Court has also indicated that States can be responsible for the actions of third parties when, by action or omission by its agents, they fail to comply with their obligation to guarantee the aforementioned rights. Specifically, the Court has indicated that the State could be responsible for attacks perpetrated by private individuals against the media and journalists when a non-compliance with the duty to guarantee is demonstrated, with attention paid to the fact that “specific circumstances of the case and the concretion of those obligations to guarantee must be analyzed, considering the predictability of a real and immediate risk.”²⁶³ Likewise, and as will be further explored going forward, the Court has indicated that public officials should refrain from making statements that, in a context of social division, increase the risk that journalists and media outlets will suffer attacks by third parties. In this respect, the Court has indicated that: “Within the framework of its obligations to guarantee the rights acknowledged in the American Convention, the State must abstain from acting in such a way that favors, promotes, fosters, or deepens that vulnerability and it must adopt, when appropriate, necessary and reasonable measures to prevent or protect the rights of whoever is in that situation, as well as investigate facts that affect them.”²⁶⁴

179. The situation of attacks against journalists and media workers is so serious that in their Joint Declaration de 2000, the UN, OSCE and OAS Special Rapporteurs included a segment entitled “Censorship by killing,” in which they affirmed that “[a]ttacks 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.” They also addressed this topic in the Joint Declaration of 2006, in which they again recalled that “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,” and they stated that acts involving the “[i]ntimidation of journalists, particularly murder and physical attacks, limit the freedom of expression not only of journalists but of all citizens, because they produce a chilling effect on the free flow of information, due to the fear they create of reporting on abuses of power, illegal activities and other wrongs against society. States have an obligation to take effective measures to prevent such illegal attempts to limit the right to freedom of expression.”

²⁶³ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 110; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 121.

²⁶⁴ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 107; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 118.

180. As previously mentioned, the Inter-American Court has indicated that the effective exercise of the right to freedom of expression implies the existence of favorable social conditions and practices that do not inhibit freedom of expression or cause self-censorship for fear of violent or illegitimate retaliation. In this sense, acts of public and/or private violence against the media and journalists because of their editorial position place the victims in a condition of special vulnerability, a condition that cannot go unnoticed by the State. In these cases, the authorities should take every measure to protect those who are vulnerable and should in any case avoid worsening the situation. With respect to the cases of *Ríos et al. v. Venezuela* and *Perozo et al. v. Venezuela*, the Court held that, “The effective exercise of freedom of expression implies the existence of conditions and social practices that favor it. It is possible that this freedom be illegally restricted by regulatory or administrative acts of the State or due to *de facto* conditions that place those who exercise it or try to exercise it in a direct or indirect situation of risk or greater vulnerability due to acts or omissions of state agents or individuals. Within the framework of its obligations to guarantee the rights acknowledged in the Convention, the State must abstain from acting in such a way that favors, promotes, fosters, or deepens that vulnerability.” Likewise, the Court found that the State must “adopt, when appropriate, the measures necessary and reasonable to prevent or protect the rights of whoever is in that situation, as well as investigate facts that affect them.”²⁶⁵

181. The Court has also found that statements made by senior officials against media outlets and journalists because of their editorial perspectives can increase the risk of practicing journalism: “even though it is true that there is an intrinsic risk to journalistic activity, the people who work for a specific social communication firm can see the situations of risk they would normally face exacerbated if that firm is the object of an official discourse that may provoke or suggest actions or be interpreted by public officials or sectors of the society as instructions, instigations, or any form of authorization or support for the commission of acts that may put at risk or violate the life, personal safety, or other rights of people who exercise journalistic tasks or whoever exercises their freedom of expression.”²⁶⁶ Likewise, the Court has indicated that such statements by public officials can implicate State responsibility since “statements of high state officials can be considered not only as an admission of the behavior of the State itself, but also generate obligations for the latter.”²⁶⁷

182. In the cases *Ríos et al. v. Venezuela* and *Perozo et al. v. Venezuela*, as pertains to the protection of journalists, directors, and other media representatives who have been the object of official statements, both the Court and the IACHR held that one measure that would have contributed to the protection of the victims—and that was not used—was a public and emphatic rejection of the attacks that had been carried out against them: “In the

²⁶⁵ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 107; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 118.

²⁶⁶ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 143; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 155.

²⁶⁷ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 120; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 131.

context of the facts of the present case, it is possible to consider that the appropriate behavior of high public authorities with regard to acts of aggression against journalists due to their role as communicators in a democratic society, would have been the public manifestation of disapproval of those acts.”²⁶⁸ As previously mentioned, even though to Court understood the exercise of journalism to imply an intrinsic risk, that risk could be exacerbated when made the subject of official speeches.²⁶⁹

183. In the aforementioned cases, the Court found that official comments had increased the vulnerability of the victims, which resulted in an “omission of the state authorities in their duty to prevent the facts, since [the comments] could have been interpreted by individuals and groups of individuals in such a way that they result in acts of violence against the alleged victims, as well as hindrances to their journalistic task.”²⁷⁰ It was also explicit in finding that with the “situation of actual vulnerability in which the alleged victims found themselves when carrying out their journalistic task” well known, the content of some official statements was “not compatible with the state’s obligation to guarantee the rights of those people to personal integrity and the freedom to seek, receive, and impart information, since they could have resulted intimidating for those linked with that communication firm and constituted offenses to the duty to prevent violating situations or situations of risk for the rights of people.”²⁷¹ The Court also held that ordering protective measures was not enough for the Court to consider that the authorities had complied with their duty since it “does not prove the State has effectively protected the beneficiaries of the order in relation to the facts analyzed.”²⁷²

184. In the aforementioned cases, it was never demonstrated that State agents directly affected the physical integrity of the victims. However, the hindering of their work and affecting of physical integrity by private individuals was proven. In the *Ríos* case, the Court found that, “in five of the facts proven it has been verified that people or groups of undetermined individuals caused damage to the physical integrity of and hindered the exercise of the journalistic tasks of” several of the victims and that, “[a]dditionally, in 10 of the facts proven it has been verified that people or group of undetermined individuals hindered the exercise of the journalistic activities”²⁷³ of several more victims. In the case of

²⁶⁸ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 142; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 154.

²⁶⁹ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 143; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 155.

²⁷⁰ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 148; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 160.

²⁷¹ I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 161; see also I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 149.

²⁷² I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 143; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 155.

²⁷³ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 265. I/A Court H. R., *Case of Perozo et al. Vs.*

Perozo et al., the Court verified that, “in five of the proven facts, it has been demonstrated that unknown private individuals or groups caused physical harm and hindered the journalism work of” several journalists and that in “15 of the proven facts, it has been demonstrated that private, unknown individuals or groups hindered journalism work.”²⁷⁴

185. The Court also held in both cases that, although moral damage had not occurred, it had been demonstrated that the victims had suffered “intimidation and hindrances” as well as attacks, threats, and harassments, in the exercise of their journalistic activities,” causing them to be “affected in their professional and personal lives in different ways,” by, for example, causing the “fear they had of performing their journalistic tasks” and necessitating the use of “bulletproof vests and gas masks.” Some were “afraid to go to certain areas or of covering certain events.”²⁷⁵ In the case of Ríos, some victims moved “to a different municipality or state,” while others preferred “to retire, temporarily or definitively, from their tasks,” and still others “stopped exercising journalistic activities on the street.”²⁷⁶

186. After also analyzing the state of the internal investigations launched into these matters by the State, the Court concluded that the “mentioned pronouncements by high public officials” had put those who work in the media outlets involved “and not only its owners, directors, or those who determine their editorial line (...) in a position of greater relative vulnerability regarding the State and specific sectors of society.” Specifically, the reiteration of the content of those pronouncements and speeches during that period “could have contributed to emphasizing an environment of hostility, intolerance, or rejection on the part of sectors of the population toward the alleged victims.”²⁷⁷ The Court also found that the attacks were linked to the victims’ journalism work, given that the situations or events in which the violence occurred “could have had a public interest or the nature or relevance of a news story that could have eventually been broadcast” for which reason “the alleged victims saw their possibilities to seek and receive information limited, restricted, or annulled, since journalistic teams were attacked, intimidated, or threatened by actions carried out by individuals.”²⁷⁸ That being the case, the Court concluded that the facts “were forms of obstruction, hindrance, and intimidation to the exercise of the journalistic tasks of the alleged victims, expressed through attacks or situations that put their personal integrity at risk, which in the context of the mentioned pronouncements made by high public officials and of the omission of state authorities in their duty to offer due diligence in the

Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195. para. 279.

²⁷⁴ I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 195. para. 279.

²⁷⁵ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 194. para. 272; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 195. para. 286.

²⁷⁶ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 194. para. 272.

²⁷⁷ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 194. para. 332; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 195. para. 360

²⁷⁸ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 194. para. 333; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 195. para. 361

investigations, constituted failures to comply with the state's obligation to prevent and investigate the facts."²⁷⁹

187. In this sense, the Commission has repeatedly found that in cases of attacks against journalists or media workers the State incurs in international responsibility when it fails to investigate and administer justice, because freedom of expression must be protected in practice by effective judicial guarantees that enable the investigation, punishment and reparation of abuses and crimes against journalists.

188. Principle 9 of the IACHR Declaration of Principles on Freedom of Expression establishes in this sense that "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." According to the Commission, in cases of crimes against journalists "the lack of an exhaustive investigation, that would lead to the punishment of all those responsible for the murder of the journalist, also constitutes a violation of the right to freedom of expression, due to the chilling effect of such impunity on every citizen."²⁸⁰ "[T]he resignation by a State of its duty to fully investigate the killing of a journalist is especially serious because of its impact on society."²⁸¹

189. The Inter-American Court has held that investigating the possible infringement of a right like the right to life or humane treatment can be a way to "shelter, protect, or guarantee this right [to freedom of expression]" and that the urgency of the obligation to investigate depends on the "gravity of the crimes committed and the nature of

²⁷⁹ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 334; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 362. In the case of *Ríos et al. v. Venezuela*, several criminal processes had been launched, but none of them resulted in a conviction of those responsible. The Court found that the processes were characterized by a lack of investigation of some of the facts (paras. 292-304), frequent changes of the prosecutor in charge (paras. 308-311), slowness of the Public Prosecutor in making decisions (paras. 312-318), and a lack of diligence in the medical examination (paras. 319-322). The Court concluded that "in the majority of the investigations started there is an unjustified procedural inactivity" and it found that "in some investigations not all the tasks necessary to verify the existence of the facts were carried out" (para. 331), and as a consequence "the totality of the investigations did not constitute an effective means to guarantee the rights of the alleged victims to humane treatment and to seek, receive, and impart information" (para. 331). In the case of *Perozo et al. v. Venezuela*, also mentioned previously, numerous criminal investigations and proceedings had been initiated before the Ombudsman's Office. The Court found that these proceedings showed a lack of investigation into some of the facts (paras. 331-321), frequent changes of the prosecuting attorney (paras. 326-330), slowness of the Public Prosecutor in making decisions, (paras. 331-337), lack of due diligence in some of the investigations (paras. 338-341), failure to issue timely orders when the need for new action arose (paras. 342-343), unjustified delays in resolving requests for dismissal (para. 344) and inactivity in the proceedings before the Ombudsman's Office (paras. 350-357). The Court concluded that the investigations into the attacks on the journalists and the television channel had not been carried out with due diligence: "[T]he Court notes that only 19 out of the 48 facts reported were investigated; that in most of the investigations opened, there is an unwarranted procedural delay and that in some of the investigations, the necessary steps to proceed with the confirmation of the materiality of the facts have not been taken. Moreover, in those 19 investigations, as a result of which no responsible person has yet been identified, there have been unwarranted delays in the rendering of certain decisions by the authorities charge of the criminal prosecution, as well as by those that play a judicial role. Therefore, this Tribunal finds that in those cases, the investigations did not constitute an effective means to ensure the right to humane treatment and the right to seek, receive and impart information of the alleged victims" (para 359).

²⁸⁰ IACHR. Report No. 130/99. Case 11.740. Merits. Víctor Manuel Oropeza. Mexico. November 19, 1999. para. 47.

²⁸¹ IACHR. Report No. 5/99. Case 11.739. Merits. Héctor Félix Miranda. Mexico. April 13, 1999. para. 52; IACHR. Report No. 130/99. Case 11.740. Merits. Víctor Manuel Oropeza. Mexico. November 19, 1999. para. 58.

the rights infringed,” being able to even reach in some cases the standard of *jus cogens*.²⁸² The Court has also indicated that the obligation to investigate is derived from the standards of domestic law, which establishes that the obligation to investigate “corresponds to the States Parties to establish, pursuant to the procedures and through the bodies established in its Constitution and its laws, which illegal behaviors will be investigated ex officio, and to regulate the regimen of criminal actions within the domestic procedure, as well as the rules that allow the victims or affected parties to file a complaint or exercise a criminal action and, if this is the case, participate in the investigation and the process.”²⁸³ In any case, criminal law is not always the right measure to protect against violations of the right to freedom of expression. Its suitability depends on the nature of the infringements in each individual case: “the appropriateness of criminal proceedings as the adequate and effective resource to guarantee it will depend on the act or omission that violated said right.”²⁸⁴ In cases in which the violation of the right to freedom of expression is related to the violation of other rights “such as personal freedom, personal integrity, or life,” criminal law “may be an adequate resource to protect that situation.”²⁸⁵

190. Similarly, it has been recognized that attacks against journalists—because their purpose is to silence them—are also violations of society’s right to access information freely.²⁸⁶ It follows that the international responsibility of the State also arises in these cases as a result of the intimidating and inhibiting effect of such lack of protection against aggressions. The murder of a journalist and the State’s failure to investigate and criminally punish the perpetrators has an impact not only on other journalists but also on the rest of society: “this sort of crime has a chilling effect on other journalists, but also on every citizen, as it generates a fear of reporting abuses, harassment and all kinds of illegal actions. The Commission considers that such an effect can only be avoided by swift action by the respective State to punish all those that may be responsible, as is its duty under international law and domestic law.”²⁸⁷ Therefore, the [...] State must send a strong message to society that there shall be no tolerance for those who engage in human rights violations of this nature. ... [T]he homicide of the journalist constitutes an aggression against all citizens inclined to denounce arbitrary acts and abuses to society, aggravated by the impunity of one or more of the intellectual perpetrators.”²⁸⁸

191. Likewise, in their Joint Declaration of 1999, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and

²⁸² I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 283; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 298

²⁸³ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 284; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 299

²⁸⁴ I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 300

²⁸⁵ I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 300

²⁸⁶ IACHR, Report No. 50/99. Case No. 11.739. *Héctor Félix Miranda*. México. April 13, 1999. para. 42. IACHR, Report No. 130/99. Case No. 11.740. *Victor Manuel Oropeza*. México. November 19, 1999. para. 46.

²⁸⁷ IACHR, Report No. 130/99. Case No. 11.740. *Victor Manuel Oropeza*. México. November 19, 1999. para. 58.

²⁸⁸ IACHR, Report No. 130/99. Case No. 11.740. *Victor Manuel Oropeza*. México. November 19, 1999. para. 61.

the OAS Special Rapporteur for Freedom of Expression affirmed that “[s]tates must ensure an effective, serious and impartial judicial process, based on the rule of law, in order to combat impunity of perpetrators of attacks against freedom of expression.” They also asserted in their Joint Declaration of 2000 that “[s]tates are under an obligation to take adequate measures to end the climate of impunity and such measures should include devoting sufficient resources and attention to preventing attacks on journalists and others exercising their right to freedom of expression, investigating such attacks when they do occur, bringing those responsible to justice and compensating victims.” They addressed this issue again in their Joint Declaration of 2006, declaring that “[s]tates should, in particular, vigorously condemn such attempts when they do occur, investigate them promptly and effectively in order to duly sanction those responsible, and provide compensation to the victims where appropriate. They should also inform the public on a regular basis about these proceedings.”

192. Finally, it has been recognized that journalists and media workers are entitled to the right to the confidentiality of sources. Principle 8 of the IACHR Declaration of Principles on Freedom of expression provides that “[e]very social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.”

4. Journalists who cover armed conflict or emergency situations

193. The status of journalists who report on armed conflict or emergency situations has warranted special attention. The Inter-American Commission has recognized that it is part of the field of journalistic activity covered by the right to freedom of expression to visit communities affected by armed conflict or disturbances to public order, document their living conditions, and take down statements and reports of human rights violations committed by the authorities. It has held that any attack or retaliation by the authorities as a consequence of the performance of these activities is a violation of the right to freedom of thought and expression.²⁸⁹

194. Along these lines, the Commission has specified that journalists covering armed conflicts, in spite of the fact that they expose themselves to the risks, cannot thereby lose their civilian status. They continue to be protected by the applicable guarantees under International Humanitarian Law and International Human Rights Law, particularly the guarantees derived from the principle of distinction.²⁹⁰

195. Similarly, it has been recognized that attacks against journalists covering armed conflicts violate both the individual and collective aspects of freedom of expression. In terms of the individual, the curtailment of the exercise of the right to seek, cover and impart information results in the harassment and intimidation of other journalists, and this affects the information transmitted. As for the collective aspect, society is deprived of the right to know about the information obtained by the journalists.²⁹¹ For this reason the Commission has recognized that, given the importance of the work of journalists in informing society by covering situations of armed conflict, the press that operates under

²⁸⁹ IACHR. Report No. 29/96. Case 11.303. Merits. Carlos Ranferí Gómez. Guatemala. October 16, 1996. para. 92.

²⁹⁰ IACHR. Report No. 38/97. Case 10.548. Merits. Hugo Bustíos Saavedra. Peru. October 16, 1997. para. 61.

²⁹¹ IACHR. Report No. 38/97. Case 10.548. Merits. Hugo Bustíos Saavedra. Peru. October 16, 1997. paras. 76-77.

such conditions must be entitled to special protections and benefits from the State, even if the conflict involves unlawful armed groups: “[M]aking the work of the press possible in periods of armed conflict, even with irregular armed combatants, requires the greatest protection. It is journalists who are risking their lives to bring the public an independent and professional view of what is really happening in areas of conflict.”²⁹² Consequently, when there is an armed conflict, and when it is known that certain individuals are journalists, the State must grant them the greatest possible protection and the highest degree of guarantees in order for them to perform their function of seeking and transmitting information on the subject.²⁹³

196. For its part, the Inter-American Court has held that in situations of serious domestic tension or disruption of public order, it is not enough for authorities to order measures of protection since this “does not prove the State has effectively protected the beneficiaries of the order in relation to the facts analyzed.” An effective, coherent, and consistent implication of the order is also required. The Court has also indicated that the State’s comment that the journalists “had acted beyond what state authorities could reasonably prevent and do,” or that they “disobeyed instructions,” should be proven by the State.²⁹⁴

5. Conditions inherent in the functioning of the media

197. Freedom of expression demands certain conditions with respect to the functioning of the communications media, so that “such media should, in practice, be true instruments of that freedom and not vehicles for its restriction,”²⁹⁵ as it is the media that serve to put the exercise of this right into practice. “This means that the conditions of its use must conform to the requirements of this freedom.”²⁹⁶ These conditions include, among others: (a) the plurality of the media;²⁹⁷ (b) the application of anti-monopoly legislation in this field, so as to prevent media concentration, in whatever form²⁹⁸ -Principle 12 of the IACHR Declaration of Principles on Freedom of Expression establishes in this respect that “[m]onopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people’s right to information;”- and (c) the

²⁹² IACHR. Report No. 38/97. Case 10.548. Merits. Hugo Bustíos Saavedra. Peru. October 16, 1997. para 73.

²⁹³ IACHR. Report No. 38/97. Case 10.548. Merits. Hugo Bustíos Saavedra. Peru. October 16, 1997. para 75.

²⁹⁴ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 154; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 167.

²⁹⁵ 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. 34.

²⁹⁶ 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. 34.

²⁹⁷ 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. 34.

²⁹⁸ 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. 34.

guaranteed protection of the freedom and independence of the journalists who work for the media.²⁹⁹ It has also been recognized that 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.”³⁰⁰

198. Pluralism and diversity in the communications media are of particular importance in the full and universal exercise of the right to freedom of expression. These rules point to the State’s obligation to guarantee the maximum pluralism and diversity in the shaping, function and content of public debate. According to the Inter-American Court, the maximum possibility of information is a requirement of general welfare, and it is the full exercise of freedom of information that ensures such maximum circulation.³⁰¹ Therefore, the State must foster informative pluralism to the greatest degree possible in order to achieve the balanced participation of diverse information in public debate, as well as to protect the human rights of those who confront the power of the media. According to the Court, “[g]iven the importance of freedom of thought and expression in a democratic society and the great responsibility it entails for professionals in the field of social communications, the State must not only minimize restrictions on the dissemination of information, but also extend equity rules, to the greatest possible extent, to the participation in the public debate of different types of information, fostering informative pluralism. Consequently, equity must regulate the flow of information. In these terms is to be explained the protection of the human rights of those who face the power of the media and the attempt to ensure the structural conditions which allow the equitable expression of ideas.”³⁰²

G. The exercise of freedom of expression by public officials

199. Public officials, like all people, are entitled to the right to freedom of expression in its diverse manifestations. Nevertheless, the exercise of this fundamental freedom acquires certain connotations and specific characteristics that have been recognized under the case law of the inter-American system, particularly in the areas of (a) the special duties they acquire by virtue of their status as state officials; (b) the duty of confidentiality that may apply to certain types of information held by the State; (c) the right and duty of public officials to denounce human rights violations; and (d) the particular situation of members of the Armed Forces.

200. As far as the impact that statements of public officials have on the rights of others, the Inter-American Court has indicated that under certain circumstances, even when official comments do not expressly authorize, instigate, order, instruct, or promote acts of

²⁹⁹ 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. 34.

³⁰⁰ 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. 34.

³⁰¹ 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. 77.

³⁰² I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 3, 2008. Series C No. 177. para. 57; I/A Court H. R., Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193. para. 113; I/A Court H. R., Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194. para. 106; I/A Court H. R., Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195. para. 117.*

violence against individual citizens, their repetition and content can increase the “relative vulnerability” of these groups and the risk they face.³⁰³

1. General duties of the exercise of freedom of expression by public officials

201. *Duty to make statements in certain cases, in the performance of their legal and constitutional duties, regarding matters of public interest.* As noted by the Inter-American Court, the important democratic function of freedom of expression demands that, in specific cases, public officials make statements on matters of public interest in the performance of their legal duties. In other words, under certain circumstances, the exercise of their freedom of expression is not just a right but a duty.³⁰⁴ In the words of the Court, “[t]he Court has repeatedly insisted on the importance of freedom of expression in any democratic society, particularly in connection with public-interest matters. ... Accordingly, making a statement on public-interest matters is not only legitimate but, at times, it is also a duty of the state authorities.”³⁰⁵

202. *Special duty to reasonably verify the facts on which their statements are based.* When public officials exercise their freedom of expression, whether in compliance with a legal duty or as a simple exercise of their fundamental right to express themselves, “in making such statements the authorities are subject to certain restrictions such as having to verify in a reasonable manner, although not necessarily exhaustively, the truth of the facts on which their opinions are based, and this verification should be performed subject to a higher standard than that used by private parties, given the high level of credibility the authorities enjoy and with a view to keeping citizens from receiving a distorted version of the facts.”³⁰⁶

203. *Duty to ensure that their statements do not amount to human rights violations.* Given the State’s obligations to guarantee, respect and promote human rights, it is the duty of public officials to ensure that when they exercise their freedom of expression they are not causing fundamental rights to be ignored. To quote the Inter-American Court, “they should bear in mind that, as public officials, they are in a position of guarantors of the fundamental rights of the individual and, therefore, their statements cannot be such that they disregard said rights.”³⁰⁷ As a result, public officials cannot, for example, violate the presumption of innocence by accusing media outlets or journalists of crimes that have not been investigated and judicially determined.

³⁰³ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 145; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 157

³⁰⁴ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 139; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 151

³⁰⁵ I/A Court H. R., *Case of Apitz-Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 5, 2008 Series C No. 182. para. 131.

³⁰⁶ I/A Court H. R., *Case of Apitz-Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 5, 2008 Series C No. 182. para. 131. Also see: I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 139; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 151

³⁰⁷ I/A Court H. R., *Case of Apitz-Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 5, 2008 Series C No. 182. para. 131.

204. *Duty to ensure that their statements do not constitute arbitrary interference—direct or indirect—with the rights of those who contribute to the public discourse through the expression and distribution of their thoughts.* Public officials also have a duty to ensure that their statements are not damaging to the rights of those who contribute to the public discourse through the expression and distribution of their thoughts. This includes journalists as well as media outlets. In this respect, the Inter-American Court has indicated that officials should look to the context in which they express themselves in order to ensure that their expression does not constitute “forms of direct or indirect interference or harmful pressure on the rights of those who seek to contribute with public deliberation through the expression and diffusion of their thoughts.” This duty is even more important in situations of “greater social conflict, alterations of public order or social or political polarization, precisely because of the set of risks they may imply for certain people or groups at a given time.”³⁰⁸

205. *Duty to ensure that their statements do not interfere with the independence and autonomy of judicial authorities.* Finally, public officials are bound by the duty to guarantee that, upon exercising their freedom of expression, they are not interfering with the appropriate functioning of other authorities to the detriment of the rights of individuals, particularly the autonomy and independence of the courts. In the Inter-American Court’s view, “public officials, particularly the top Government authorities, need to be especially careful so that their public statements do not amount to a form of interference with or pressure impairing judicial independence and do not induce or invite other authorities to engage in activities that may abridge the independence or affect the judge’s freedom of action,” given that this would affect the corresponding rights to such independence to which the citizens are entitled.³⁰⁹

206. Two judgments handed down by the Inter-American Court in 2009 are illustrative of the impact of the speech of public officials given the vulnerability of journalists and individuals associated with the media. Both cases had very similar facts and the Court’s rulings had almost the same terms. In both cases, the Court recognized that the context in which officials made their speeches and comments was one of “very high political and social polarization and conflict.”³¹⁰ Likewise, the Court held that in two incidents, private individuals had attacked television channels’ facilities and journalists, in most cases while they were working.³¹¹ It also held that several public officials had made statements linking both channels to criminal acts.³¹²

³⁰⁸ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 139; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 151

³⁰⁹ I/A Court H. R., *Case of Apitz-Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 5, 2008 Series C No. 182. para. 131.

³¹⁰ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 121; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 132

³¹¹ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. paras.129-33; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. paras. 141-45.

³¹² I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 127; I/A Court H. R., *Case of Perozo et al. Vs.*

207. The Court held that these statements could be considered official since “the mentioned public officials made use, in exercise of their investiture, of the means provided to them by the State to issue their statements and speeches,” and that it was enough to analyze the case in “the context in which the facts occurred, that the content of those pronouncements was repeated on several occasions during that period.” However, the Court found that these facts had not been authorized as “State policy.”³¹³

208. In both cases, the Court found that even though the official speeches had not authorized, instigated, ordered, instructed, or promoted the violence against the victims, it had put them in a situation of greater vulnerability before the state and some sectors of society.³¹⁴ The Court also held that the impact of these speeches fell on those who worked for the affected media outlets, given that, independent of what they personally thought about the government, the official comments had created a general perception about those media outlets and the journalists who worked for them: “The self-identification of the alleged victims with the editorial line (...) is not a *condition sine qua non* to consider that a group of people, made up by people linked to that social communication firm, faced, in greater or smaller degree, according to the position they occupied, a same situation of vulnerability. In fact, it is not relevant or necessary for all the employees of [a media outlet] to have a political opinion or position in agreement with the editorial line of the communication firm. The mere perception as the ‘opposition,’ ‘coup mongerer,’ ‘terrorist,’ ‘uninformed,’ or ‘destabilizing’ identity, resulting mainly from the content of the mentioned speeches, is enough to consider that group of people, for the mere fact of being identified as employees of that television station and not because of other personal conditions, as submitted to the risk of suffering, to the hands of individuals, consequences that are unfavorable for their rights.”³¹⁵

209. The Court found that it had not been demonstrated that the individuals who assaulted the victims and their offices had official support or were following the instructions of some State body or official.³¹⁶ However, it did find that, given the polarization of the country and the perception of the media held by the government and some sectors of civil society, the statements of public officials created,³¹⁷ brought about,³¹⁸ or in any case

Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195. para. 139.

³¹³ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 194. para.138; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 195. para. 150.

³¹⁴ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 194. para. 138; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 195. para. 157

³¹⁵ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 194. para. 146; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 195. para. 158

³¹⁶ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 194. para. 147; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 195. para. 159

³¹⁷ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 194. para. 148

“contributed to emphasizing or exacerbating situations of hostility, intolerance, or animosity by sectors of the population towards the people linked to that communication firm.”³¹⁹ The “content” of the speeches, the “high investiture” of those who made them, and their “repetition” formed in both cases “the omission of the state authorities of their duty to prevent the facts, since it could have been interpreted by individuals and groups of individuals in such a way that they resulted in acts of violence against the alleged victims, as well as hindrances to their journalistic task.”

210. Finally, given the situation of real vulnerability of the victims—of which the State had knowledge—some of the content of these official speeches was incompatible with the State’s obligation to guarantee the rights of the victims. In the words of the Court: “[I]n the situation of actual vulnerability in which the alleged victims found themselves when carrying out their journalistic task, known by state authorities, some content of the mentioned pronouncements is incompatible with the state’s obligation to guarantee the rights of those people to personal integrity and the freedom to seek, receive, and impart information, since they could have intimidated those linked with that communication firm and constituted offenses to the duty to prevent violating situations or situations of risk for the rights of people.”³²⁰

211. Given the aforementioned, the Court ordered “as a guarantee of non-repetition that the State adopt the measures necessary to avoid illegal restrictions and direct or indirect hindrances on the exercise of the freedom to seek, receive, and impart information of the alleged victims.”³²¹

212. In other cases in which the Office of the Special Rapporteur and the Commission have held that official speeches increase the vulnerability of journalists and media outlets, thereby increasing the risk of suffering effects on their fundamental rights, citing inter-American doctrine and jurisprudence they have indicated that public officials, especially those occupying senior positions with the State, have a duty to respect the circulation of information and opinion, including that which runs contrary to the State’s interests and position. In this sense, it should actively promote the pluralism and tolerance that are the characteristics of a democratic society. This obligation is derived from the obligation to protect the human rights of all individuals, in particular the rights of those who, like journalists or human rights defenders who have been the object of threats or enjoy measures of domestic and international protection, find themselves in situations of extraordinary risk. In these cases, the State must not only diligently exercise its duty to guarantee, but must also avoid increasing the risk to which these individuals are exposed.³²²

³¹⁸ I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 160

³¹⁹ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 148; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 160

³²⁰ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 149; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 161

³²¹ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 406.

³²² In this respect, see, for example, press release N° R05/09, in which the Offices of the Special Rapporteur for Freedom of Expression of the UN and the OAS express concern over statements from senior

2. The duty of confidentiality which may apply to certain information controlled by the State

213. The Inter-American Court has accepted that, under certain circumstances and given the conditions that permit keeping certain State-held information from public knowledge, the employees or officials of an institution have a duty to maintain the confidentiality of certain information to which they have access in the performance of their duties, provided that the content of such information is covered by said duty. In any case, in order for given information to fall within this protection, it is necessary to comply with the requirements examined in the following chapter of this document, in relation to the right of access to information. The Court has also accepted in general terms that, in certain cases, failure to comply with the duty of confidentiality can give rise to administrative, civil or disciplinary liabilities for such officials.³²³

214. Nevertheless, the Court has also specified that such duty of confidentiality does not cover information concerning the institution or its functions, when such information has already been made public.³²⁴

215. In their Joint Declaration of 2002, the UN, OAS and OSCE Special Rapporteurs affirmed that “[j]udges’ right to freedom of expression, and to comment on matters of public concern, should be subject only to such narrow and limited restrictions as are necessary to protect their independence and impartiality.”

3. The right and duty of public officials to denounce human rights violations

216. Freedom of expression covers the right of public officials, including members of the Armed Forces and the Police, to report human rights violations of which they become aware—which also constitutes fulfillment of a legal and constitutional duty by which they are bound. The exercise of this manifestation of freedom of expression, which is vital to the preservation of the rule of law in the hemisphere’s democracies, cannot be obstructed by the authorities or be grounds for subsequent acts of retaliation against the public officials who make such reports. According to the Inter-American Commission, “the exercise of the right of freedom of thought and expression within a democratic society includes the right to not be prosecuted or harassed for one’s opinions or for one’s allegations about or criticisms of public officials. (...) This protection is broader, however, when the statements made by a person deal with alleged violations of human rights. In such a case, not only is a person’s individual right to transmit or disseminate information being violated, but the right of the entire community to receive information is also being undermined.”³²⁵

4. The particular situation of members of the Armed Forces

Colombian government officials against a journalist. *Geneva – Washington, February 9, 2009*. At: <http://www.cidh.oas.org/Relatoria/showarticle.asp?artID=738&IID=1>

³²³ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 77.

³²⁴ I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 77.

³²⁵ IACHR. Report No. 20/99. Case 11.317. Merits. Rodolfo Robles Espinoza and Sons. Peru. February 23, 1999. para. 148.

217. Members of the Armed Forces are also entitled to freedom of expression and are legitimately able to exercise this right, and the limits imposed upon them must be respectful of the conditions established in the American Convention. For example, in the case of *Palamara Iribarne v. Chile*, the Inter-American Commission and Court considered it to be a legitimate exercise of freedom of expression when a retired Chilean Navy officer who was working as a Navy contractor wrote and tried to publish a book entitled *Ethics and Intelligence Services*, which dealt with matters related generally to military intelligence and the need for it to adhere to certain ethical parameters. The Inter-American Court decided that the prevention of this book's publication (through various measures including the physical seizure of copies of the book and the printers' material, the erasure of its electronic versions, and the prosecution of Mr. Palamara for having tried to publish the book and for having made public statements about the way in which the military criminal justice system had handled his case) amounted to a violation of the freedom of expression protected by Article 13 of the Convention.

218. In light of the particular structure of the Armed Forces and its inherent vertical discipline, the case law has accepted in general terms that "reasonable limits can be placed on the freedom of expression of members of the Armed Services on active duty in a democratic society."³²⁶ Nevertheless, these limitations can be neither excessive nor unnecessary, and they must in every case meet the requirements set forth in article 13.2 of the Convention. Thus, for example, the Inter-American Commission has held with regard to members of the military that the improper use of criminally defined offenses such as the crime of "insulting the armed forces," which may be legitimate under certain circumstances, results in the silencing of complaints of human rights violations, which itself violates freedom of expression in its individual and collective aspects within a democratic society: "[t]he Commission believes that undermining the Armed Forces or insulting a superior are appropriate terms when applied to the crimes for which they were created, in order to maintain a level of discipline suitable to the vertical command structure needed in a military environment, but that they are totally inappropriate when used to cover up allegations of crimes within the Armed Forces."³²⁷ (...) Moreover, the ambiguity and unclear limits of criminal definitions of this kind can undermine the juridical security of human rights (...). Among the members of the Armed Forces, the threat of such consequences fuels a permanent fear of facing an investigation or prosecution for revealing criminal acts committed by superiors.³²⁸ (...) This situation is incompatible with the principles of a democratic society, where the information available about the activities of public officials should be as transparent as possible and accessible to all social groups. Allowing criminal definitions that can be used to curtail freedom of information and the free dissemination of ideas and opinions, particularly in cases involving human rights violations and, consequently, punishable acts, is unquestionably a serious violation of freedom of thought and expression and, above all, of society's right to receive information and to control the exercise of public power."³²⁹

H. Freedom of expression in the electoral context

³²⁶ IACHR. Report No. 20/99. Case 11.317. Merits. Rodolfo Robles Espinoza and Sons. Peru. February 23, 1999. para. 148.

³²⁷ IACHR. Report No. 20/99. Case 11.317. Merits. Rodolfo Robles Espinoza and Sons. Peru. February 23, 1999. para. 151.

³²⁸ IACHR. Report No. 20/99. Case 11.317. Merits. Rodolfo Robles Espinoza and Sons. Peru. February 23, 1999. para. 152.

³²⁹ IACHR. Report No. 20/99. Case 11.317. Merits. Rodolfo Robles Espinoza and Sons. Peru. February 23, 1999. para. 153.

219. The exercise of freedom of expression in both of its aspects, individual and collective, is especially important during political campaigns and elections. It is a fundamental element of the process of electing the officials who will govern a State because, as the Inter-American Court has explained: (i) it is an essential tool for shaping voter opinion and strengthening the political contest among the various participants and it provides instruments for the analysis of each candidate's platform, thus enabling a greater degree of transparency and oversight of future authorities and their performance; and (ii) it fosters the shaping of the collective will manifested through voting.³³⁰ In electoral contexts, freedom of expression is tied directly to political rights and their exercise, and both types of rights are mutually strengthened.³³¹ It is thus necessary to healthy democratic debate for there to be the greatest possible circulation of ideas, opinions and information regarding the candidates, their parties and their platforms during the period preceding elections, mainly through the communications media, the candidates and other individuals who wish to express themselves. It is necessary for everyone to be able to question and investigate the ability and suitability of candidates, and disagree with and challenge their platforms, ideas and opinions, so that voters can develop their voting criteria.³³² As the Inter-American Commission has emphasized, free speech and political debate are essential for the consolidation of democratic life in societies, and therefore represent a compelling social interest.³³³ In this same context, the Court has highlighted that freedom of expression is also of special importance to political parties and their active members in carrying out their duties to represent voters and their interests.³³⁴

220. The Inter-American Court has also underscored the importance of the role of the communications media during elections. In general terms, it has insisted that the freedom of political controversy is an essential concept in democratic societies; it has categorized freedom of the press as one of the best means for the public to know about and judge the attitudes and ideas of political leaders; and it has held that in the context of an election, newspapers play an essential role as vehicles for the exercise of the social aspect of freedom of expression, as they gather and transmit the candidates' platforms to the voters, which helps voters to have sufficient information and different criteria to make a decision.

221. The special protection granted under the American Convention to speech concerning public officials and candidates to public office acquires a marked connotation during the course of electoral campaigns. As such, the Court has indicated that the limits to the criticism of politicians are broader than those concerning private individuals, since politicians have exposed themselves to the rigorous scrutiny of their words and actions by public opinion and journalists, and therefore must demonstrate a higher degree of tolerance. It has further held that the protection of politicians' right to their reputation, even when they

³³⁰ I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. paras. 88-90.

³³¹ I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 90.

³³² I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 90.

³³³ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.b)

³³⁴ I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. paras. 88-90.

are not acting as private citizens, is a legitimate aim, but that it must be considered in relation to the interest of open debate on public affairs.³³⁵ Consequently, in the context of elections and political parties, limitations on freedom of expression must be subjected to particularly strict scrutiny.³³⁶ For the IACHR, the conditions under which a State can limit expression in the framework of political debate are much stricter and more limited. There is a socially imperative interest that surrounds political debate in democratic societies, which converts it into the principle mechanism through which society holds accountable those in charge of matters of public interest.³³⁷

222. The decision of the Inter-American Court in the case of *Canese v. Paraguay* is instructive in this regard. In this case, which was previously discussed, the Court found that the criminal prosecution of a presidential candidate for the harsh statements he made about his opponent during the campaign was unnecessary and excessive. This was because it concerned speech that was subject to a higher level of protection, given the public's interest in knowing about the conduct of public officials or those who aspire to public office, and the essential role of freedom of expression in the consolidation of democracy.

223. The four Special Rapporteurs for Freedom of Expression made statements to the same effect in their joint declaration of 2009. On May 15th, 2009, the four rapporteurs—the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information—issued a Joint Statement on Media and Elections. In that declaration, the rapporteurs underlined the importance of a robust and open debate, as well as access to information, to elections, and the key role of the media in framing electoral issues and informing the citizenry. But they also stated that only a diverse and independent media, including independent public service broadcasting, could fulfill this role. Among other things, the Declaration calls for: (i) measures to create an environment in which a pluralistic media sector can flourish; (ii) the repeal of laws that unduly restrict freedom of expression and protection against liability for disseminating statements made directly by political parties or candidates; (iii) effective systems to prevent threats and attacks against the media; (iv) rules against discrimination in the allocation of political advertisements; (v) any regulatory powers to be exercised only by independent bodies; and (vi) clear obligations on public broadcasters, including to sufficiently inform the electorate on all relevant elements to participate in the electoral process, to respect strictly rules on impartiality and balance, and to grant all parties and candidates equitable access.³³⁸

I. Pluralism, diversity and freedom of expression

224. States have the obligation to guarantee, protect, and promote the right to freedom of information, pursuant to conditions of equality and non-discrimination, and the right of society to access all types of information and ideas. Within the framework of this

³³⁵ I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. paras. 88-90.

³³⁶ I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 103.

³³⁷ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.B)

³³⁸ Joint Declaration on Framework for Media and Elections. May 15, 2009. Available at: <http://www.cidh.org/Relatoria/showarticle.asp?artID=745&IID=1>.

obligation, States must prevent public or private monopoly of ownership and control over media outlets, and must promote different groups' access to radio and television frequencies and licenses, whichever the groups' technological means might be.

225. The participation of plural and diverse ideas in the public discourse is not only a legal imperative derived from the principle of non-discrimination and the obligation of inclusion, but also, according to the Court, a guarantee of protection of the rights of those facing the power of the media. In this respect, the Court has said that, "[g]iven the importance of freedom of expression in a democratic society and the responsibility it implies for social communication media firms and for those who professionally exercise these tasks, the State must minimize the restrictions to information and balance, as much as possible, the participation of the different movements present in the public debate, promoting informative pluralism. The protection of the human rights of whoever faces the power of the media, who must exercise the social task they undertake with responsibility, and the effort to ensure structural conditions that allow an equal expression of ideas, can be explained in these terms."³³⁹

226. Respect for principles of pluralism and diversity includes, on one hand, the obligation to establish structural conditions allowing for competition under equal conditions that involve more and more diverse groups in the communicative process; and, on the other hand, that the freedom to distribute information that could be "unpleasant for the State or a sector of the population" is ensured, in accordance with the "tolerance and spirit of openness" that are characteristic of pluralism.³⁴⁰

227. Accordingly, Principle 12 of the Declaration of Principles states that "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."

228. The Inter-American Court has indicated that the monopoly of media outlets is prohibited, whether by ownership or administration, whichever form it may take. In this regard, the Court stated in Advisory Opinion OC-5/85, 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."³⁴¹

229. The Inter-American Court also indicated that, "It is equally true that the right to impart information and ideas cannot be invoked to justify the establishment of private or

³³⁹ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 106.

³⁴⁰ I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 105; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 116

³⁴¹ 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. 34.

public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view.”³⁴²

230. Furthermore, in the same Advisory Opinion, the Court added that, “given the broad scope of the language of the Convention, freedom of expression can also be affected without the direct intervention of the State. This might be the case, for example, when due to the existence of monopolies or oligopolies in the ownership of communications media, there are established in practice ‘means tending to impede the communication and circulation of ideas and opinions.’”³⁴³

231. Based on the aforementioned jurisprudence from the Inter-American Court and on reports from the Office of the Special Rapporteur, the IACHR has reiterated the following: “[i]n the 2000 Annual report, the [Special] Rapporteur observed that one of the fundamental requirements for the right to freedom of expression is the need for a broad plurality of information. In today’s society, mass media such as television, radio and the press have an undeniable influence over people’s views on culture, politics, religion, etc. If these media outlets are controlled by a limited number of individuals, or by just one, a society is created in which a limited number of persons, or just one, control information and—directly or indirectly—the opinions that all other people receive. This lack of plurality of information is a serious obstacle to the functioning of democracy. Democracy needs debate, discussion, and ideas that confront one another. When this debate does not exist or it is weakened because the sources of information are limited, the basic pillar of democracy is attacked.”³⁴⁴

232. The cited Inter-American jurisprudence makes clear the need for requiring States to comply with the obligation to prevent monopolies or oligopolies, *de jure* or *de facto*, in the ownership and control of media outlets.³⁴⁵

233. In regards to community radio, the Office of the Special Rapporteur, in the Chapter on “freedom of expression and poverty” of its 2002 Annual Report, pointed out that:

The growing need for expression felt by majorities and minorities that lack media access, and their claims on the right to communication, to the free expression of ideas, and to the dissemination of information makes it necessary to seek access to goods and services that will ensure basic conditions of dignity, security, subsistence, and development.³⁴⁶

³⁴² 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. 33.

³⁴³ 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. 56.

³⁴⁴ IACHR, *Justicia e Inclusión Social: los Desafíos de la Democracia en Guatemala*. OEA/Ser.L/V/II.118. Doc. 5 rev. 1. 29 December 2003. Chapter VII. para. 419. Available at: <http://cidh.org/countryrep/Guatemala2003sp/capitulo7.htm>

³⁴⁵ See also IACHR, *Annual Report of the Office of the Special Rapporteur for Freedom of Expression* 2004. OEA/Ser.L/V/II.222. Doc. 5 rev. 23 February 2005. Chapters IV. Available at: <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=459&IID=1>

³⁴⁶ IACHR, *Annual Report of the Office of the Special Rapporteur for Freedom of Expression* 2002. OEA/Ser.L/V/II.117. Doc. 1 rev. 1. 7 March 2003. Chapter V. para. 41. Available at: <http://www.cidh.org/RELATORIA/showarticle.asp?artID=138&IID=1>

234. Likewise, the IAHR's Report on Justice and Social Inclusion indicated that:

The Commission and its Office of the Special Rapporteur understand that community radios are positive because they foment the culture and history of the communities, as long as they do so within the legal framework. The Commission recalls that the awarding or renewal of radio licenses should be subject to a clear, fair, and objective procedure that takes into consideration the importance of the media for all sectors of (...) society to participate in the democratic process in an informed manner. Community radios, in particular, are of great importance for the promotion of national culture, the development and the education of the different communities (...). Therefore, the auctions that contemplate only economic criteria or that award concessions without offering equal opportunity for all sectors, are incompatible with democracy and with the right to freedom of expression and information guaranteed in the American Convention on Human Rights and in the Declaration of Principles on Freedom of Expression.³⁴⁷

235. In the 2007 Annual Report, the Office of the Special Rapporteur stated that the norm on community broadcasting must recognize the special characteristics of this medium, and must contain, at a minimum, the following elements: (a) the existence of simple procedures for obtaining licenses; (b) no demand of severe technological requirements that would prevent them, in practice, from even being able to file a request for space with the state; and (c) the possibility of using advertising to finance their operations. All of these elements are included in the *Joint Declaration on Diversity in Broadcasting*, signed on December 2007 by the rapporteurs on freedom of expression of the OAS, United Nations, Africa, and Europe. The Office of the Special Rapporteur also added that: "[a]long the same lines, there is a need for legislation that appropriately defines the concept of community radio and that includes its social purpose, its nature as comprised of non-profit entities, and its operational and financial independence."³⁴⁸

236. Likewise, in this same report, the Office of the Special Rapporteur recommended that States "[l]egislate in the area of community broadcasting to assign part of the spectrum to community radio stations, and to ensure that democratic criteria be taken into account in assigning these frequencies that guarantee equal opportunity for all individuals in accessing them(.)"³⁴⁹

237. These obligations are founded upon the general principles pursuant to which States must guarantee the recognition and enjoyment of human rights in conditions of equality and non-discrimination. According to the Inter-American Court, applying the principle of equality and non-discrimination affirms that the State has at least two types of obligations, which the jurisprudence describes as follows:

In compliance with this obligation [of non discrimination], States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination. This translates, for example, into the

³⁴⁷ IACHR, Justicia e Inclusión Social: los Desafíos de la Democracia en Guatemala. OEA/Ser.L/V/II.118. Doc. 5 rev. 1. 29 December 2003. Chapter VII. para. 414. Available at: <http://cidh.org/countryrep/Guatemala2003sp/capitulo7.htm>

³⁴⁸ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2007. OEA/Ser.L/V/II.131. Doc. 34 rev. 1. 8 March 2008. Chapter III. para. 5. Available at: http://www.cidh.oas.org/annualrep/2007eng/Annual_Report_2007.VOL.II%20ENG.pdf

³⁴⁹ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2007. OEA/Ser.L/V/II.131. Doc. 34 rev. 1. 8 March 2008. Chapter III. para. 6. Available at: http://www.cidh.oas.org/annualrep/2007eng/Annual_Report_2007.VOL.II%20ENG.pdf

prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons.

In addition, States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.³⁵⁰

238. In sum, States must abstain from engaging in actions or favoring practices that may in any way be aimed, directly or indirectly, at creating situations in which certain groups or persons are discriminated against or arbitrarily excluded, *de iure* or *de facto*, from enjoying or exercising the right to freedom of expression. Likewise, States must adopt affirmative measures (legislative, administrative, or of any other nature), in a condition of equality and non-discrimination, to reverse or change existing discriminatory situations that may compromise certain groups' effective enjoyment and exercise of the right to freedom of expression. Naturally, such obligations must be carried out with full respect for the right of all persons to exercise freedom of expression, pursuant to the terms that have already been clearly defined by inter-American jurisprudence.

³⁵⁰ I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18. paras. 103-104.

NATIONAL INCORPORATION OF THE INTER-AMERICAN STANDARDS ON FREEDOM OF EXPRESSION DURING 2009

1. This second chapter discusses some of the most important advances made in 2009 with respect to the domestic incorporation of inter-American standards on freedom of thought and expression. The Office of the Special Rapporteur considers it very positive that the legislative branches, national courts and other national authorities of several countries have incorporated into their decisions the standards set by the inter-American system for the protection of human rights on matters of freedom of expression. This domestic implementation process is one of the fundamental aims of the inter-American system in its capacity as subsidiary guarantor of the human rights of all those who inhabit the region. As such, strengthening the capacity of national systems for the protection of human rights has always been a concern of the IACHR and its Office of the Special Rapporteur. Likewise, familiarity with the judicial and legislative decisions of the region's States has enabled the regional bodies for the protection of human rights to promote and enrich their own doctrines and case law.

2. This chapter aims to contribute to this productive dialogue among the regional human rights bodies and the national bodies and authorities, with the conviction that sharing different experiences leads to a virtuous circle of mutual learning.

3. The legislative decisions reviewed in this chapter are extremely valuable in at least two regards. First, with the issuance of these provisions, the Member States take an important step to protect, guarantee and promote the free exercise of the right to freedom of expression in their respective territories, and advance the process of bringing national provisions into line with inter-American standards, thus meeting the obligation set forth in article 2 of the American Convention. In addition, the ratification of these standards by the legislative bodies is an example for other Member States to follow, in terms of the way in which legislative branches can facilitate, through regulatory measures, the incorporation of the inter-American standards into their national legal systems. The Office of the Special Rapporteur commends these legislative decisions and others that could not be included in this chapter, as part of the dissemination work set forth in its mandate of promoting freedom of expression in the Americas.

4. In order to present these examples of good practices, this chapter has been divided into four main sections. In the first part, the Office of the Special Rapporteur will provide a brief introduction to the issue of the legal integration of international human rights law and national law. The second part provides examples of legislative incorporation, specifically modifications of freedom of expression laws in Argentina and Uruguay. Third, this chapter will review seven specific cases of which the Office of the Special Rapporteur is aware, all decided in 2009, in which the inter-American doctrine and case law referring to Article 13 of the American Convention were taken expressly as criteria for the decisions. Although the cases cited in this section are not the only ones, and other examples may be found in the aforementioned jurisdictions as well as in other countries, they are illustrative cases worth mentioning. Finally, some conclusions are presented.

A. Implementation of the legal standards of the inter-American system in national legal systems

5. Article 2 of the American Convention establishes States' obligation to give domestic legal effect to the Convention's mandates. Meanwhile, article 33 of the American Convention establishes that the IACHR and the Inter-American Court have jurisdiction to

hear matters related to the compliance of States parties with their inter-American legal obligations. The IACHR and the Inter-American Court, as guardians of the American Convention, are therefore authorized to interpret the treaty, and the jurisprudence and doctrine found in their judgments defines the scope and content of the provisions that—in accordance with the aforementioned article 2—must be incorporated into the domestic law of States parties to the American Convention.

6. It is fundamental to mention that the States of the region have maintained on repeated occasions that the protection bodies of the inter-American system are fundamental in contributing to the States' efforts to develop and strengthen national systems for the promotion and protection of human rights.¹ Likewise, the Member States have confirmed on multiple occasions the importance of complying with the decisions of the Inter-American Court of Human Rights and following the recommendations of the IACHR.² In this same regard, the IACHR as well as the Inter-American Court have stated that the improvement of the inter-American system of human rights requires, as an essential step for its strengthening, that the Member States comply fully and effectively with the judgments of the Inter-American Court and the recommendations of the IACHR,³ and that they bring their national legal systems into line with inter-American human rights standards. With regard to freedom of expression, through resolutions 2287 (XXXVII-O/07), 2434 (XXXVIII-O/08) and 2523 (XXXIX-O/09), the OAS General Assembly has invited the Member States to consider the recommendations of the Office of the Special Rapporteur, particularly the recommendations made with respect to defamation, in terms of “repealing or amending laws that classify *desacato* and defamation as criminal offenses.” Likewise, the General Assembly has reaffirmed to the IACHR that it follow up on the issues contained in the annual reports.

7. In accordance with the foregoing considerations, the incorporation of inter-American legal standards into domestic law constitutes both a legal obligation of States and a political commitment reiterated by the organs of the OAS. However, the obligation to give domestic legal effect to international human rights law also derives from a very important transformation in the constitutional regimes of countries in the hemisphere. In effect, developments in constitutional law in member States reveal the incorporation of open constitutional clauses that refer, in different ways, to human rights treaties, particularly the American Convention. In light of the relevance of this matter for the issue addressed in this chapter, it is worthwhile to briefly describe the different ways in which the region's constitutions incorporate inter-American human rights law into domestic law.

8. An initial incorporation mechanism arises when the constitution itself refers expressly to specific human rights treaties, including the American Convention. This mechanism thus makes it possible for the provisions of those instruments to complement the national legal system and to require that they be used to interpret the fundamental rights provisions contained in the constitutional or legal texts. For example, Article 75(22) of the 1994 Constitution of Argentina incorporated, with “constitutional ranking,” several international human rights treaties that are considered complementary to the rights and

¹ AG/RES. 2407 (XXXVIII-O/08) Strengthening of Human Rights Systems Pursuant to the Mandates Arising from the Summits of the Americas (June 3, 2008).

² AG/RES. 2407 (XXXVIII-O/08) Strengthening of Human Rights Systems Pursuant to the Mandates Arising from the Summits of the Americas (June 3, 2008).

³ OAS Permanent Council. Joint Appeal by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights to the Representatives of the States at the Organization of American States. OEA/Ser.G CP/CAJP-1930/02, 23 April 2002.

guarantees recognized therein.⁴ Similarly, Article 93 of the Colombian constitution makes reference to the Rome Statute of 1998, which created the International Criminal Court. That article authorizes the Colombian State to accept the jurisdiction of that court.⁵

9. A second incorporation option is to refer generally to the human rights treaties ratified by the respective State. Some of the judgments discussed in this chapter demonstrate this incorporation mechanism, particularly the cases of Brazil, Colombia and Chile. For example, the Constitution of Bolivia establishes that the international treaties and covenants that enshrine human rights and prohibit its limitation in states of emergency prevail in domestic law.⁶ Article 256 in turn states that the human rights treaties “that declare rights more favorable than those set forth in the constitution shall be enforced preferentially over [the constitution],” and that the rights recognized in the constitution itself must be interpreted “in accordance with international human rights treaties when they provide more favorable standards.”⁷ The same is true of the constitutions of Brazil and Chile, which establish that the rights of their citizens are guaranteed by the constitution but also by the international treaties to which the States are parties.⁸ Article 23 of the

⁴ Constitution of the Argentine Republic. Article 75. It is incumbent upon the Congress: (...) 22. To ratify or reject treaties entered into with other nations and with international organizations and concordats with the Holy See. Treaties and concordats have a higher rank than laws. The American Declaration on the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Optional Protocol; the Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child; while in force, have the rank of constitutional law, do not repeal any article of the first part of the Constitution, and must be understood as complementary to the rights and guarantees recognized therein. They may be denounced, if appropriate, only by the national Executive Branch, upon the approval of two-thirds of the total members of each Chamber. Other human rights treaties and conventions, once ratified by Congress, shall require the vote of two-thirds of the total members of each Chamber in order to enjoy constitutional ranking.

⁵ Constitution of Colombia. Article 93. The Colombian State may recognize the jurisdiction of the International Criminal Court in the terms provided in the Rome Statute, adopted on July 17, 1998 by the United Nations Conference of Plenipotentiaries, and consequently, may ratify this treaty in accordance with the procedure set forth in this Constitution. The admissibility of different treatment on substantive matters by the Rome Statute with respect to the guarantees contained in the Constitution shall have effects exclusively within the sphere of the subject matter regulated therein.

⁶ Constitution of Bolivia. Article 13. IV. The international treaties and conventions ratified by the Plurinational Legislative Assembly that recognize human rights and prohibit their limitation during States of Emergency shall prevail in the national legal system. The rights and duties enshrined in this Constitution shall be interpreted in accordance with the international human rights treaties ratified by Bolivia.

⁷ Constitution of Bolivia. Article 256. I. The international human rights treaties and instruments that have been signed, ratified or acceded to by the State, which declare rights more favorable than those contained in the Constitution, shall be applied with priority over the Constitution. // II. The rights recognized in the Constitution shall be interpreted according to the international human rights treaties when those treaties provide more favorable standards.

⁸ Constitution of Brazil. Article 5 § 2. The rights and guarantees established expressly in this Constitution do not exclude others derived from the system and the principles adopted from it, or by the international treaties to which the Federal Republic of Brazil is a party.

Constitution of Chile. Article 5. Sovereignty lies essentially with the Nation. It is exercised by the people through plebiscites and periodic elections and, also, by the authorities that this Constitution establishes. No sector of society or individual person may assume its exercise. // The exercise of sovereignty recognizes as a limitation the respect for the essential rights that emanate from human nature. It is the duty of the bodies of the State to respect

Constitution of the Bolivarian Republic of Venezuela establishes the constitutional rank of “the human rights treaties, pacts and conventions [that] prevail in the national legal system, to the extent that they contain provisions on their enjoyment and exercise that are more favorable than those established by this Constitution and the laws of the Republic.”⁹ The same article provides that those treaties can be enforced immediately and directly by the courts and other government bodies. The Constitution of Colombia also makes reference to the international treaties signed by that country in Articles 93 and 214. The first of those articles provides that the “international treaties and conventions ratified by Congress, which recognize human rights and prohibit their limitation in states of emergency, shall prevail in the national legal system.” It further establishes that the rights enshrined in the Constitution “shall be interpreted in accordance with the international human rights treaties ratified by Colombia.” Finally, Article 214 provides that neither human rights nor fundamental freedoms may be suspended during states of emergency, and stipulates that “the rules of international humanitarian law” must be respected.¹⁰

10. Ecuador also incorporated these principles into its recently approved constitution. Thus, Article 11 of the new constitutional text provides that the rights and guarantees “established in the Constitution and in international human rights instruments shall be directly and immediately enforceable by and before any judicial or administrative public servant, *sua sponte* or at the request of one of the parties.”¹¹ The Constitution also sets forth the obligation of the State to guarantee human rights and the obligation of the legislature to bring the regulatory framework into line with the rights recognized by the Constitution and by the human rights treaties to which Ecuador is a party.¹² For its part, Peru set forth in Final and Temporary Provision Four that “the provisions on the rights and freedoms recognized in the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on

and promote such rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and in force.

⁹ Constitution of the Bolivarian Republic of Venezuela. Article 23. The treaties, covenants and conventions on human rights, signed and ratified by Venezuela, have constitutional ranking and prevail in the national legal system, to the extent that they contain provisions on the enjoyment and exercise of such rights that are more favorable than those established by this Constitution and under the laws of the Republic, and shall be immediately and directly enforceable by the courts and other Government bodies.

¹⁰ Constitution of Colombia. Article 93. The international treaties and agreements ratified by Congress, which recognize human rights and prohibit their limitation during states of emergency, shall prevail in the national legal system. The rights and duties enshrined in this Constitution shall be interpreted in accordance with the international human rights treaties ratified by Colombia.

Article 214. The states of emergency referred to in the previous articles shall be subject to the following provisions: (...) 2. Neither human rights nor fundamental freedoms may be suspended. In all cases the rules of international humanitarian law shall be respected.

¹¹ Constitution of the Republic of Ecuador. Article 11. The exercise of rights shall be governed by the following principles: (...) 3. The rights and guarantees established in the Constitution and in international human rights instruments shall be directly and immediately enforceable by and before any judicial or administrative public servant, *sua sponte*, or at the request of one of the parties.

¹² Constitution of the Republic of Ecuador. Article 84. The National Legislature and all regulatory bodies shall have the obligation to adapt, substantively and procedurally, the laws and other legal provisions to the rights provided for in the Constitution and the international treaties, and those necessary to guarantee the dignity of the individual or of communities, peoples and nationalities. In no case shall the amendment of the Constitution, the laws, other legal provisions or acts of government violate the rights recognized in this Constitution.

those rights and freedoms ratified by Peru.”¹³ It should likewise be noted that a great number of constitutions of the Americas incorporate international treaties in the so-called constitutional supremacy clauses, which establish the order of priority of the different sources of domestic law in those countries.¹⁴

11. Finally, a third option for the incorporation of international law arises when the text of the constitution neither refers directly to any treaty nor makes general references to international law, but incorporates a general opening clause, which may be one of two kinds: a substantive clause whereby the recognition of the rights established in the constitution does not exclude other rights pertaining to the individual; and a more procedural clause, by virtue of which the constitutions require that States comply in good faith with the agreements recognized in their international treaties.

12. An example of the “substantive” clauses is provided in Article 33 of the Argentine Constitution, which states that, “the declarations, rights and guarantees enumerated in the Constitution shall not be understood to deny other rights and guarantees that are not enumerated, but which stem from the principle of the sovereignty of the people and the republican form of government.”¹⁵ In the same vein, the Ninth Amendment to the Constitution of the United States provides that, “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁶ Ecuador, for its part, provides in Article 11 of its constitution that the recognition of rights established in the constitution and in the international human rights instruments “shall not exclude other rights derived from the dignity of individuals, communities, peoples and nationalities, which are necessary for their full development,”¹⁷ and Colombia and Venezuela have provisions that use nearly identical language to establish this principle.¹⁸

13. It is also notable that certain countries incorporate constitutional formulas that refer to general concepts contained in international human rights treaties. Thus, for example, Article 226 of the Constitution of Brazil provides that it is the duty of the State to ensure the “dignity” of children and adolescents. Similarly, the Bolivian Constitution establishes that the State is based “on the values of unity, equality, inclusion, dignity, liberty, solidarity, reciprocity, respect, complementarity, harmony, transparency, equilibrium,

¹³ Constitution of Peru, Fourth Final and Temporary Provision.

¹⁴ This is done, for example, by Bolivia (Article 410), Costa Rica (Article 7), Ecuador (Articles 424 & 425), Mexico (Article 133) and Paraguay (Article 137).

¹⁵ Constitution of the Argentine Republic. Article 33.

¹⁶ Constitution of the United States of America. Amendment IX.

¹⁷ Constitution of the Republic of Ecuador. Article 11.7.

¹⁸ Constitution of Colombia. Article 94. The enunciation of the rights and guarantees contained in the Constitution and in the international agreements in force shall not be understood to deny others that, being inherent to every individual, are not set forth expressly in them.

Constitution of the Bolivarian Republic of Venezuela. Article 22. The enunciation of the rights and guarantees contained in this Constitution and in the international human rights treaties shall not be understood to deny others that, being inherent to every individual, are not set forth expressly in them. The absence of laws regulating these rights does not diminish the exercise of them.

equal opportunity, social and gender equity in participation, common welfare, responsibility, social justice, distribution and redistribution of social goods and products."¹⁹ The Constitution of Ecuador holds that the National Legislature must adapt the domestic legal framework not only to the rights contained in the Constitution and in international treaties but also with respect to the rights "necessary to guarantee the dignity of the individual, or of communities, peoples and nationalities."²⁰ Through these types of clauses that use general concepts, judges can incorporate rights contained in international instruments.

14. In the same way, there are examples of "procedural" clauses in those provisions that impose upon different authorities the obligation to comply with the international agreements of States. Such is the case of the Constitution of Ecuador in relation to the President (Article 147) and the National Equality Councils (Article 156), to cite just two examples. Moreover, the constitution itself establishes a legal remedy for noncompliance aimed precisely at guaranteeing compliance with the judgments and reports of international bodies.²¹

15. Even in the abovementioned cases of substantive and procedural clauses that contain general references, the case law has demonstrated in practice that it is possible, based on the general standards of interpretation of international and constitutional law, to make use of the inter-American legal standards. To this end, national judges have turned to notions such as the "special and privileged treatment" of international human rights instruments.

16. Thanks to these transformations, the case law from important courts in the region has incorporated international human rights law into domestic law through the direct enforceability of international treaties or the interpretation of constitutional rights in view of the doctrine and case law of the inter-American bodies responsible for the authentic interpretations of those treaties.

17. In light of the concerns that exist with regard to these forms of complementarity between international human rights law and domestic law, it is sufficient to say in this chapter that it is derived from the voluntary option of each one of the States that has agreed to comply, in good faith, with the provisions of international human rights law. As is well known, such provisions can only be complied with if they are enforced in the domestic legal system, with the objective of protecting, guaranteeing and promoting the human rights of the inhabitants of the respective State. Indeed, the international human rights treaties recognize legal prerogatives that may be enforced by the inhabitants of States' own countries, that is to say, by individual rights-holders besides other States. This specific nature of human rights treaties, which distinguishes them from other public law

¹⁹ Constitution of Bolivia, Article 8.II.

²⁰ Constitution of the Republic of Ecuador. Article 84.

²¹ Constitution of the Republic of Ecuador. Article 93. The purpose of the noncompliance action shall be to guarantee the application of the provisions of the legal system, as well as compliance with the judgments or reports of international human rights bodies, when the provision or decision sought to be enforced contains a clear, express and enforceable obligation to act or not to act. The action shall be filed before the Constitutional Court.

treaties, has been recognized by the different international courts and bodies, including the bodies of the inter-American system.²²

18. Based on the obligations to individuals arising directly from human rights treaties, local authorities are undertaking to overcome the classic theories that used to impose serious barriers to the domestic implementation of treaties, in order to concentrate on determining the best way to meet international human rights obligations in the interest of better protecting the individual in his own country. Indeed, the case law of several States that are signatories to international human rights treaties—including those theoretically attached to the dualist theory—has approached a monist-like interpretation when dealing with human rights treaties. This has enabled judicial authorities to take the international standards into consideration as tools that support their legal reasoning or conclusions of law. This “*de facto* monism” assumes the consideration of international treaties as tools for interpretation, which enables the courts to use them directly in matters regarding the protection of human rights.

19. Finally, as already suggested, another argument in favor of the domestic incorporation of international standards stems from the obligation that international law imposes upon the States, embodied in the concept of *pacta sunt servanda*. By virtue of this principle, a State may not invoke provisions of its national law to justify noncompliance with international obligations. Complementarily, the principle of *pacta sunt servanda* gives rise to a positive obligation for States to adapt their domestic legal systems to the international obligations assumed.

20. Nevertheless, it is important to mention here that although both international human rights law and constitutional law are incumbent upon all branches of government, national judges are, in general, the ones who have led this process to incorporate the provisions of international human rights law into domestic law. On this point it is worth recalling that, ultimately, the ability of States to correct human rights violations in the domestic legal system depends upon national judges, given that they are the ones called upon to investigate and try the cases in which such violations are at issue. If they do so in accordance with the requirements of international standards, the judges will be able to prevent the intervention of the international systems for the protection of human rights. This is another reason why the judicial incorporation of these standards is fundamental not only for obtaining effective substantive justice but also as a safeguard for the international responsibility of States.

²² On this point, in Advisory Opinion OC-2/82 of September 24, 1982, entitled *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, the Inter-American Court stated that, “modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.” I/A Court H.R., *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*. Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2. para. 29. This idea has been reiterated in the case law of the Court in several cases, including the judgment on competence in the *Case of Ivcher Bronstein v. Perú*, in which the Court held: “The American Convention and the other human rights treaties are inspired by a set of higher common values (centered around the protection of the human person), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties. The latter govern mutual interests between and among the States Parties and are applied by them, with all the juridical consequences that follow there from for the international and domestic legal systems.” I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Competence. Judgment of September 24, 1999. Series C No. 54. para. 42. See also I/A Court H.R., *Case of the Constitutional Court v. Peru. Competence*. Judgment of September 24, 1999. Series C No. 55. para. 41.

21. In the same way, the judicial practices that are presented in this chapter indicate that if high-ranking judges, especially those in the constitutional courts, assert consistently and rigorously in their decisions that the judicial incorporation of international human rights standards is imperative, and if they make their case law binding upon other judges, they will be able to generate a multiplier effect on the decisions of other judges.

22. Finally, it is important to consider that the decisions of the different bodies of the inter-American system for the protection of human rights can be valuable to the national authorities in three ways: (i) they serve as criteria for the interpretation of the standards enshrined in the international treaties, given that those bodies are their authorized interpreters; (ii) they are particularly important as guidelines for identifying acts or omissions inconsistent with the rights recognized in the Convention; and (iii) they are guidelines for the States to take measures that seek to guarantee the observance of human rights and prevent future violations.

23. The cases discussed in this section prove that many of the obstacles to domestic incorporation of international law identified by legal practitioners can be overcome through legislative reforms or the judicial interpretation of the constitutional texts of the countries of the region.

B. Incorporation of standards on freedom of expression through legislative reform

24. During 2009, at least two legislative reforms of note were undertaken. First, as explained below, the State of Uruguay eliminated the penalties for the dissemination of opinions or information concerning public officials or matters of public interest, except when the person allegedly harmed is able to demonstrate actual malice.²³ In addition, Argentina, as a result of the judgment in the *Case of Kimel v. Argentina*,²⁴ proceeded to decriminalize the criticism of matters of public interest. The Office of the Special Rapporteur views these legislative advances positively and finds that they contribute decisively to protecting freedom of expression and promoting stronger public debate under democratic conditions. For purposes of disseminating these measures, their fundamental characteristics are outlined below.

1. The decriminalization of speech concerning matters of public interest in Uruguay²⁵

25. The Executive Branch introduced a bill before Congress with the aim of amending the criminal provisions that regulated subsequent liability for the broadcasting of any expression, opinion and/or dissemination of interest to the public. The Executive Branch intended to promote regulations on the activity and responsibility of the press in accordance with the "standards established under international human rights law." In particular, according to the bill's preliminary recitals, it sought the "incorporation of the prior history of

²³ Office of the Special Rapporteur-IACHR. June 22, 2009. Press Release No. R38/09. Available at: <http://www.cidh.org/relatoria/showarticle.asp?artID=750&IID=2>

²⁴ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177.

²⁵ Bill introduced before the National Assembly of Uruguay. Available at: http://www.presidencia.gub.uy/web/proyectos/2008/09/CM556_26%2006%202008_00001.PDF

the inter-American system for the protection of human rights, from the IACHR as well as the Inter-American Court."²⁶

26. The Office of the Special Rapporteur is pleased by these important reforms to the Criminal Code and the Press Law, which were ultimately passed by the legislature on June 10, 2009. Several aspects of the law deserve to be highlighted, as they are an example of the way in which States can incorporate the inter-American standards directly through legislative means.

27. First, while it did not totally depenalize, by enacting these reforms the State of Uruguay eliminated the penalties for the dissemination of opinions or information concerning public officials or matters of public interest, except when the person allegedly harmed is able to demonstrate actual malice. Thus, Article 4 of the law that was enacted establishes that any person who seeks to overcome the exemption from liability in defamation and libel cases must prove "the actual malice of the perpetrator in insulting individuals or violating their privacy." Second, in spite of the fact that the reform does not repeal all forms of *desacato*, it substantially reduces the scope of application of this offense and states expressly that no person shall be punished for disagreeing with or questioning authority. Third, the new legislation eliminates penalties for offending or insulting national symbols or attacking the honor of foreign authorities.

28. With regard to the application of inter-American legal standards, perhaps the most relevant point is that the new legislation states that the international treaties on the issue are governing principles for the interpretation, implementation and integration of the civil, procedural and criminal provisions on freedom of expression. Further, it recognizes expressly the relevance of inter-American legal standards, as well as their authorized interpretations. Article 3 of the law itself establishes that:

"The provisions set forth in the Universal Declaration of Human Rights, the American Convention on Human Rights and the International Covenant on Civil and Political Rights are governing principles for the interpretation, implementation and integration of the civil, procedural and criminal provisions on expression, opinion and dissemination, relative to communications and information. Likewise, the criteria contained in the judgments and advisory opinions of the Inter-American Court of Human Rights, and in the resolutions and reports of the Inter-American Commission on Human Rights, shall be taken into special consideration, provided that they do not lessen the standards of protection established under national law, or recognized by national case law."

29. Thus, the National Legislature incorporated the international standards into the national legal system and made clear that the interpretation and application of the provisions in force must be guided by the highest standards on freedom of expression.

2. Amendments to the Criminal Code and the Press Law of Argentina to decriminalize speech in the public interest²⁷

30. On November 18, 2009, the Argentine Senate passed an amendment of the Criminal Code to decriminalize defamation offenses (*injuria* and *calumnia*). The initiative was introduced by the Executive Branch, which took it in part from a proposal submitted by a

²⁶ Bill introduced before the National Assembly of Uruguay, p. 4. Available at: http://www.presidencia.gub.uy/web/proyectos/2008/09/CM556_26%2006%202008_00001.PDF

²⁷ Criminal Code. Law 26.551. Available at: <http://www.infoleg.gob.ar/infolegInternet/anexos/160000-164999/160774/norma.htm>

civil society organization, and had previously been passed in the House of Representatives on October 28, 2009.

31. This bill moved through the legislative process in compliance with the orders of the Inter-American Court in its May 2, 2008 judgment in the *Case of Kimel v. Argentina*.²⁸ In that decision, the Court ordered the Argentine State to amend its criminal laws on defamation offenses. In rendering this decision, the Inter-American Court took into consideration that “Criminal Law is the most restrictive and harshest means to establish liability for an illegal conduct,”²⁹ and that “the broad definition of the crime of defamation might be contrary to the principle of minimum and *ultima ratio* intervention of criminal law.”³⁰ The Inter-American Court’s judgment also held that, “an opinion cannot be subjected to sanctions, even more so where it is a value judgment on the actions of a public official in the performance of his duties.”³¹

32. This reform eliminates penalties for the dissemination of opinions or information concerning public officials or matters of public interest. Indeed, the legislative reform contains four important points. First, the law eliminates the penalty of imprisonment for the commission of criminal defamation offenses, replacing it with a monetary fine. Second, the law establishes that in no case shall expressions that refer to matters of public interest, or expressions that are not affirmative, constitute criminal defamation. Likewise, the provision establishes that speech harmful to another person’s honor shall not constitute criminal defamation when it bears relation to a matter of public interest. Third, the law provides that any person who publishes or reproduces, by any means, defamation inferred by another, may not be considered the perpetrator of such defamation, unless the content was attributed in a manner substantially faithful to the pertinent source. Finally, the law establishes that a person accused of defamation shall be exempt from punishment if he makes a public retraction prior to answering the criminal complaint or in the act of doing so, and that such retraction is not an admission of guilt on the defendant’s part. With this measure, retraction is an effective mechanism of making reparations without resorting to criminal penalties.

C. Decisions of national courts that incorporate inter-American standards on freedom of expression

33. In this section the Office of the Special Rapporteur will discuss seven cases decided by courts in Brazil, Colombia, Chile and Mexico during 2009. The Office of the Special Rapporteur highlights these cases for their proper use of the inter-American standards on freedom of expression, and would like to invite more local courts to be aware of this practice and to inform the Office of the Special Rapporteur of their decisions so that those cases may be similarly highlighted in future reports.

²⁸ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177.

²⁹ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. p. 76

³⁰ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. p. 76

³¹ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. p. 93

1. Judgment of the Federal Supreme Court of Brazil on the requirement of a professional degree for the practice of journalism³²

34. On June 17, 2009, hearing and deciding an extraordinary appeal, the Federal Supreme Court of Brazil ruled that the requirement of a diploma in journalism and professional registration with the Ministry of Labor, as a condition for the practice of the profession of journalism, is unconstitutional. In rendering its judgment the Court examined whether the mandatory degree requirement was an unjustified barrier to the exercise of freedom of expression. In its analysis, it incorporated expressly Article 13 of the American Convention and the relevant doctrine of the supervisory bodies for the enforcement of that treaty.

a. Brief summary of the case

35. The Federal Public Ministry, with the support of the Union of Radio and Television Companies of the State of Sao Paulo, filed a public civil action against an order of the Federal Regional Court of the Third Region. That order was based on Executive Order No. 972 of 1969, which required a person to have a diploma or university course in journalism registered with the Ministry of Education in order to engage in journalistic work. The Public Ministry argued that the law was contrary to the Brazilian Constitution, since it placed an unlawful restriction on the exercise of freedom of expression.

36. The 16th Federal Civil Court of Sao Paulo admitted the case and found it properly filed in part. That decision was appealed by the representative of the federal executive branch. The proceedings were then forwarded to and heard by the Federal Regional Court of the Third Region. That court overturned the judgment of the court of first instance, as it found that the professional qualification requirements were not unreasonable. The Regional Court held that the practice of journalism has a relevant social function and carries with it significant professional responsibility, and therefore State regulation of the practice of that profession is justified in order to protect it from irresponsible practice and prevent potential violations of fundamental rights. According to the Court, these restrictions are justified by the Constitution itself, which authorizes the legislature to regulate specific professions.

37. The Regional Court's judgment was subject to an extraordinary appeal filed by the Federal Public Ministry and the Union of Radio and Television Companies of the State of Sao Paulo. The representative of the Union also intervened in that proceeding to defend the Regional Court's interpretation.

38. The Federal Supreme Court declared that Article 4(V) of Executive Order 972 of 1969, which established the requirement of a diploma from a university course in journalism in order to practice the profession, was inconsistent with the Constitution because it was an unlawful restriction on the right to freedom of expression enshrined in the Federal Constitution.

³² Plenary Court, Supreme Federal Court of Brazil. Recurso Extraordinário 511.961. Sao Paulo. Rapporteur: Minister Gilmar Mendes. June 17, 2009. Available at: <http://www.stf.jus.br/portal/inteiroTeor/obterInteiroTeor.asp?id=605643&idDocumento=&codigoClasse=437&numero=511961&siglaRecurso=&classe=RE>.

b. Legal Reasoning of the Court and incorporation of inter-American standards

39. Through the abovementioned judgment, the Brazilian State set aside a restriction to the free exercise of the dissemination of opinions and information that had been established during the time of the military dictatorship and which was in flagrant contradiction to the case law of the Inter-American Court and IACHR doctrine. Along these lines, the Office of the Special Rapporteur views this case law very positively and notes the reasoning used by the Supreme Court to arrive at this conclusion.

40. The first issue that the Supreme Court addressed was the scope of Article 5.XIII of the Federal Constitution, which authorizes the legislature to establish requirements and regulations for the exercise of specific professions. On this point, the Supreme Court stressed that this reservation of legal authority is not absolute and, therefore, must be in keeping with proper standards of reasonableness and proportionality.

41. Accordingly, the Supreme Court then questioned whether the requirement of a professional degree to engage in journalistic activity could be considered a reasonable and proportionate regulation in a democratic society. To answer this question, the Supreme Court used inter-American doctrine and case law expressly.

42. First, the Court sought to establish whether journalistic activity was related to or different from other professions that required a university degree in order to practice, such as medicine or law. The Supreme Court thus considered that journalism is a profession that is distinct from those others due to the fact that it is closely related to the exercise of freedom of expression. In this respect, journalism is “the very expression and dissemination of thought and information, in continuous, professional and remunerated form.”³³ Therefore, journalism and freedom of expression are two activities that overlap due to their very nature and cannot be considered and treated separately.

43. Based on this interrelatedness, the Supreme Court held that, “the requirement of a university diploma for the practice of journalism or the professional development of the freedoms of expression and information is not authorized by the Constitution, as it is a restriction, an impediment, a true, flat-out suppression of the effective exercise of freedom of expression, which is prohibited expressly by Article 220(1) of the Constitution.”³⁴

44. The Supreme Court found that the offending law did not pass the proportionality test, as it was a prior restriction on the exercise of the right to freedom of expression. According to the Supreme Court, any control of this type that interferes with access to journalistic activity is a prior control that constitutes real prior censorship of freedom of expression.

45. The Office of the Special Rapporteur likewise notes the Federal Supreme Court’s use of the inter-American standards in support of its decision. To this end, the Court based its decision on Advisory Opinion OC-5/85, in which the Inter-American Court had already established that the requirement of a university diploma for the professional practice of journalism contradicts Article 13 of the American Convention. Accordingly, the Federal

³³ Federal Supreme Court, RE 511.961 18/SP. p. 758.

³⁴ Federal Supreme Court, RE 511.961 18/SP. p. 761.

Court departed from the opinion of the Regional Court and the representative from the Executive Branch, who had opposed the use of the inter-American standards based on the notion that, if they were found to be binding, they should have been integrated into the national system with the rank of law, in which case the constitutional provision authorizing the legislature to regulate certain professions would take precedence. Although the Supreme Court did not discuss the legal ranking of those standards in depth, it found in practice that the inter-American bodies' interpretation of the right to freedom of expression contained in Article 13 of the American Convention was a useful guide in the interpretation of the corresponding provision of the Brazilian Constitution on freedom of expression (Article 220).

46. Likewise, the decision cited extensively to the considerations raised by the Office of the Special Rapporteur in Chapter III of its 2008 Annual Report, in the section entitled "Importance of journalism and the media for democracy; characterization of journalism under the American Convention."³⁵

2. Judgment of the Federal Supreme Court of Brazil finding the press law incompatible with the Constitution³⁶

47. The Federal Supreme Court of Brazil declared the country's press law, which had been enacted during the military regime, incompatible with the Federal Constitution. To this end, it gave an in-depth explanation of the scope and importance of freedom of expression in a democratic system, using—among other sources—the international standards on the issue.

a. Brief summary of the case

48. The Democratic Workers' Party (PDT) filed a constitutional action called *Arguição de Descumprimento de Preceito Fundamental* (ADPF), alleging that the Brazilian press law was inconsistent with the principles and provisions of the Federal Constitution. The law had been established in 1967 during the military dictatorship that ruled the country at that time. The plaintiffs asserted that several provisions of the law resulted in practices of censorship and punished journalists for the commission of criminal defamation offenses with jail sentences more severe than those established in the Criminal Code. They argued that such provisions were inconsistent with the right to freedom of expression established by the Federal the Constitution of 1988, and therefore it was proper to declare unconstitutional the entire law challenged in the lawsuit.

49. Upon examining the charges alleged in the suit and finding that it was properly filed, the Supreme Court declared the law incompatible with the Federal Constitution.

b. Legal reasoning of the court and application of inter-American standards

³⁵ Federal Supreme Court, RE 511.961 18/SP. p. 781; IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. paras. 177-183. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

³⁶ Plenary Court, Supreme Federal Court of Brazil. ADPF 130 / DF - Distrito Federal. Arguição de Descumprimento de Preceito Fundamental. Rapporteur: Minister Carlos Britto. April 30, 2009. Available at: <http://www.stf.jus.br/portal/inteiroTeor/obterInteiroTeor.asp?id=605411&idDocumento=&codigoClasse=776&numero=130&siglaRecurso=&classe=ADPF>.

50. The Office of the Special Rapporteur has expressed its satisfaction with this decision, as the press law had imposed severe penalties for criminal defamation offenses, and had permitted prior censorship and other measures that restricted the exercise of freedom of expression.³⁷ The Supreme Court indicated that this legislation was contrary to the right to freedom of expression. The Office of the Special Rapporteur highlights this decision and the case law on the protection of freedom of the press and the relationship between the exercise of this freedom and democracy.

51. The Supreme Court held that freedom of the press is a manifestation of the freedoms of thought, information and expression. Accordingly, full freedom of the press is the intangible heritage that demonstrates the political and cultural evolution of a people. According to the Court, given this intrinsic relationship between freedom of the press and democracy, the press must enjoy a freedom of action that is even greater than the freedom of thought and expression of individuals by themselves. The free press must likewise be plural; therefore, no monopolies or oligopolies must be allowed in this sector.

52. Likewise, the Supreme Court stressed that the press is a natural forum for the shaping of public opinion and an alternative to the official version of events. In this regard, critical thought is an integral part of complete and reliable information. Thus, the exercise of freedom of the press ensures the journalist's right to criticize any person, especially government agents and authorities. According to the Supreme Court, "journalistic criticism, due to its inherent relationship to public interest, cannot *a priori* be subject to legislative or judicial censorship."

53. According to the Supreme Court, the legal imposition of excessive monetary damages against communications media can, in and of itself, have a powerful chilling effect on freedom of the press. These kinds of damages violate the principle of proportionality of the restriction, and therefore violate freedom of expression.

54. In addition, the Supreme Court held that the State cannot, through any of its bodies, determine in advance what journalists may or may not say. Consequently, the Court decided that the press law should be declared unconstitutional in its entirety.

55. Based on these considerations, the Supreme Court ruled that there was an insurmountable substantive incompatibility between Press Law Law 5.250/67 and the Federal Constitution. The Court held that, in the future, potential abuses committed by journalists or communications media shall be subject to ordinary law.

3. Judgment T-298/09 of the Constitutional Court of Colombia, on confidentiality of sources³⁸

56. On April 23, 2009, in *tutela* [writ for the protection of constitutional rights] judgment T-298 of 2009, the Constitutional Court of Colombia protected the right to confidential sources, citing expressly the inter-American standards on freedom of expression.

³⁷ Office of the Special Rapporteur-IACHR. June 22, 2009. Press Release No. R38/09. Available at <http://www.cidh.org/Relatoria/showarticle.asp?artID=750&IID=1>.

³⁸ Third Chamber of Revision, Constitutional Court of Colombia. Judgment T-298/09. Bogotá, Colombia. April 23, 2009. Available at: <http://www.corteconstitucional.gov.co/relatoria/2009/T-298-09.htm>.

a. Brief summary of the case

57. In February of 2007, a Colombian newspaper published an article entitled, "Neiva Hospital Employees Turn on the Fan." According to the article, some doctors at the region's public hospital had given the reporter a letter condemning serious acts of corruption on the part of its director. The doctors indicated that one of those illegal acts "may have been" the financing of a senator's campaign. Given that the doctors had requested anonymity, the article neither identified nor mentioned by name those who had allegedly signed the letter. Nevertheless, the article mentioned that "the complaints have already been submitted to the Office of the Prosecutor General of the Nation, the Office of the Anticorruption Czar and the Attorney General's Office."

58. The senator in question alleged, among other things, that by virtue of the publication, the public had been left with the erroneous perception that he was involved in the acts of corruption that took place at the El Huila Hospital, and that this adversely affected his fundamental rights to honor and reputation. For this reason, he asked the newspaper for the letter signed by the doctors who made the allegations.

59. After hearing the case, and following an exhaustive examination of the right of correction and the confidentiality of journalistic sources, the Constitutional Court denied the plaintiff's right to see the confidential letter that had given rise to the proceedings or to oblige the newspaper to provide the names of those who had made the allegations.

b. Legal reasoning of the court and application of inter-American standards

60. In deciding the case, the Constitutional Court began by distinguishing the type of speech involved in the situation that was complained of. Thus, the Court framed the case according to the standard of the democratic interest of information relating to public affairs. From there, the Constitutional Court reiterated its doctrine on the "greatest breadth and resistance" of the right to freedom of expression in these cases.

61. At the same time, the Constitutional Court recognized that the reinforced protection of this right does not mean that it has no limits. In the words of the Constitutional Court: "Even though political speech and the criticism of public officials is subject to fewer limitations than perhaps the exercise of this right in other areas of lesser public relevance, it is certain that even in those cases freedom of expression has limits."³⁹ To the extent that in this case the right is accorded reinforced but not unlimited protection, it is necessary to determine what types of limitations to its exercise may be permissible. Here, the Constitutional Court made use of the inter-American standards to establish the framework of permissible restrictions. On this issue, the Colombian Court states:

The general framework of admissible limitations to freedom of expression is provided in Article 19 of the International Covenant on Civil and Political Rights, and Article 13 of the American Convention on Human Rights, which guide the interpretation of Article 20 of the Constitution and other related provisions. A careful reading of these provisions reveals that the limitations to freedom of expression (in a strict sense), information and press, must meet the following basic requirements in order to be constitutional: (1) they must be set forth in laws that are drafted clearly and precisely;

³⁹ Third Chamber of Revision, Constitutional Court of Colombia. Judgment T-298/09. Legal Grounds 4.4. Bogotá, Colombia. April 23, 2009. Available at: <http://www.corteconstitucional.gov.co/relatoria/2009/T-298-09.htm>

(2) they must pursue certain compelling objectives; (3) they must be necessary to accomplish such objectives; (4) they must be subsequent to and not prior to the expression; (5) they must not constitute censorship in any of its forms, which includes the requirement of maintaining neutrality with respect to the content of the expression that is limited; and (6) they must not affect the exercise of this fundamental right excessively.⁴⁰

62. On the issue of confidential sources, the Constitutional Court found that “the inviolability of professional privilege (confidentiality of sources) allows a journalist to maintain confidentiality with regard to the existence of specific information, its content, its origin or source, or the manner in which he obtained such information. The confidentiality of sources is a right that is fundamental and necessary to protect the true independence of the journalist, so he may practice the profession and satisfy the right to information without indirect limitations or threats that hinder the dissemination of information relevant to the public.”⁴¹

63. The Constitutional Court has considered the interpretation of the bodies of the inter-American system of human rights to be an authentic interpretation of the treaties of that system. Such interpretation is doctrine that is relevant in determining the scope of fundamental constitutional rights. Consequently, to find the scope of the right to freedom of expression and the guarantee of confidentiality of sources, the Court quoted verbatim Principle 8 of the Declaration of Principles,⁴² and the corresponding doctrine formulated by the Office of the Special Rapporteur, according to which “*confidentiality is an essential element in the undertaking of journalistic work and in the role conferred upon journalism by society to report on matters of public interest.*”

64. On the importance of the confidentiality of sources, and in light of the fact that the journalist who wrote the article in question had already had to flee and take refuge elsewhere because of the threats that the publication had provoked, the Constitutional Court stated: “Above all, in those cases involving large-scale criminal or mafia organizations, which have no scruples when they intimidate a source to prevent the revelation of information that may affect their interests, the confidentiality of the source becomes a privileged guarantee so that brave and independent journalism can do its work. (...) In those cases, greater diligence is required of journalists in the corroboration and assessment of information, but they cannot be required to reveal the source...”⁴³

65. In view of the foregoing arguments, the Constitutional Court found that the journalist and the newspaper had the full constitutional right to maintain the confidentiality of the source of the information published. In the Court’s opinion, although it was true that the senator affected by the information could have defended his rights much better had he

⁴⁰ Third Chamber of Revision, Constitutional Court of Colombia. Judgment T-298/09. Legal Grounds 4.8. Bogotá, Colombia. April 23, 2009. Available at: <http://www.corteconstitucional.gov.co/relatoria/2009/T-298-09.htm>

⁴¹ Third Chamber of Revision, Constitutional Court of Colombia. Judgment T-298/09. Legal Grounds 5.4. Bogotá, Colombia. April 23, 2009. Available at: <http://www.corteconstitucional.gov.co/relatoria/2009/T-298-09.htm>

⁴² Principle 8 indicates that: “*Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.*”

⁴³ Third Chamber of Revision, Constitutional Court of Colombia. Judgment T-298/09. Legal Grounds 5.8. Bogotá, Colombia. April 23, 2009. Available at: <http://www.corteconstitucional.gov.co/relatoria/2009/T-298-09.htm>

known the identity of the authors of the letter quoted in the newspaper, it was also true that such information was subject to the right to protect sources and, consequently, could be kept confidential by the newspaper.

4. Judgment of the Labor Court of First Instance in Valparaíso in Chile: social protest and freedom of expression⁴⁴

66. On August 31, 2009, the Labor Court of First Instance in Valparaíso, in deciding a petition for the protection of constitutional rights in a labor-related case (*tutela laboral*), applied the inter-American standards on social protest and freedom of expression in order to protect a group of workers whose right to protest was being limited unlawfully.

a. Brief summary of the case

67. The president of the labor union of the company El Mercurio Valparaíso S.A.P. filed a petition for the protection of constitutional rights against his employer, a communications medium in the city of Valparaíso. His main objectives were: to obtain an order for the employer to turn over some photographs taken of the workers during a labor union march; the implementation of specific reparations measures; and the imposition of the fines established in the Labor Code against the employer for having violated the rights of the workers affiliated with the union.

68. The events giving rise to the case occurred in the context of the negotiation of a collective bargaining agreement between the unionized workers and the communications medium. This negotiation began in the month of April, 2009, and continued until May, 2009. In this context, on April 16, 2009, the union leaders, with the authorization of its members, participated “for the first time in its 182-year history” in a march convened by the Central Workers Union (CUT).

69. According to the statement of facts set forth in the judgment, the director of the newspaper *La Estrella de Valparaíso*, which was part of the group of companies sued, met with the workers and warned that photographs and videos would be taken of the workers who participated in the march, for purposes of later firing them. The march was held on the scheduled date and several employees of the defendant company participated in it. A company director was caught by another communications medium taking pictures of the march from a balcony at the newspaper’s facility. In addition, the head of the newspaper’s human resources department and the head of the administrative unit appeared that day in the company’s lobby to watch and monitor which employees participated actively in the march.

70. The workers alleged that those acts violated their fundamental rights to freedom of expression, assembly and equality. The workers argued that the taking of photographs with the threat of termination, in addition to the workplace monitoring, violated their right to assembly and to expression, insofar as marches and protests are forms of expression that a State must respect and guarantee and that the newspaper must tolerate.

⁴⁴ Labor Court of First Instance of Valparaiso. RIT T-19-2009. RUC 09-4-0011952-7. Valparaiso, Chile. August 31, 2009. Available at: http://laboral.poderjudicial.cl:9081/SITLAPORWEB/ConsultaDetalleAtPublicoAccion.do?TIP_Consulta=1&TIP_Cuaderno=0&CRR_IdCuaderno=0&ROL_Causa=19&TIP_Causa=T&ERA_Causa=2009&CRR_IdCausa=27973&COD_Tribunal=1338&

71. The company had two defense arguments. First, it maintained that the march was a subject of journalistic interest, and therefore it was justifiable that a written communications medium would seek to cover it by taking pictures. In addition, the representatives of the company asserted that the taking of photographs did not in itself violate any right, as subsequent to these events none of the workers who had participated in the march was fired. They argued that this demonstrated that the newspaper's coverage had been guided strictly by a journalistic interest and did not aim to retaliate against the workers involved in the march.

72. Upon examining the facts and the allegations of the parties, the Court of First Instance ruled that the defendant company had violated the workers' freedom of expression. The Court therefore ordered the company to pay the court costs. The Court further ordered the company—in the case that the alleged photographs had been taken—to refrain from using those images or any other type of records that could harm the union or its members. It denied the claims alleging violations of the right to assembly and equality, as well as the request for the imposition of fines.

b. Reasoning of the court and application of inter-American standards

73. The Office of the Special Rapporteur notes the dual use of the inter-American standards in this judgment. First, the court used the inter-American standards to determine the legal framework applicable to the specific case. In addition, the rules of interpretation used in the regional case law and doctrine were also used by the court to resolve the issue at the heart of the case.

74. From the beginning of the case, the judge integrated the inter-American standards into the relevant legal framework to reach a decision. Thus, the applicable legal standards were set based on both the constitutional provisions (Art. 19.12 of the Constitution of the Republic) and the inter-American provisions (Art. 13 of the American Convention; Art. IV of the American Declaration; Art. 4 of the Inter-American Democratic Charter).⁴⁵ To this end, the court used the tools of harmonization and legal integration that are part of the Chilean Constitution itself (Art. 5.2). Based on this constitutional provision, the court found that it was possible to integrate into the constitutional legal framework "other guarantees that are enshrined and recognized in international treaties ratified by Chile and that have been incorporated thereby into domestic law."⁴⁶ This inclusion broadened considerably the legal framework applicable to the specific case.

75. Second, the very content of these national and international standards benefited from the interpretation of the right to freedom of expression in inter-American case law. The legal argument that justifies the application of the right to freedom of

⁴⁵ Labor Court Letras from Valparaíso. RIT T-19-2009. RUC 09-4-0011952-7. Conclusion of Law 15. Valparaíso, Chile. August 31, 2009. Available at :

http://laboral.poderjudicial.cl:9081/SITLAPORWEB/ConsultaDetalleAtPublicoAccion.do?TIP_Consulta=1&TIP_Cuaderno=0&CRR_IdCuaderno=0&ROL_Causa=19&TIP_Causa=T&ERA_Causa=2009&CRR_IdCausa=27973&COD_Tribunal=1338&.

⁴⁶ Labor Court Letras from Valparaíso. RIT T-19-2009. RUC 09-4-0011952-7. Conclusion of Law 15. Valparaíso, Chile. August 31, 2009. Available at :

http://laboral.poderjudicial.cl:9081/SITLAPORWEB/ConsultaDetalleAtPublicoAccion.do?TIP_Consulta=1&TIP_Cuaderno=0&CRR_IdCuaderno=0&ROL_Causa=19&TIP_Causa=T&ERA_Causa=2009&CRR_IdCausa=27973&COD_Tribunal=1338&.

expression to the analysis of the case is based on inter-American doctrine, as systematized in the reports of the Office of the Special Rapporteur. Based on this doctrine, the judge recognized the triple role this right plays in the inter-American system: as an individual right of every person, as a channel for democratic expression, and as a key tool for the exercise of other rights.⁴⁷

76. Based on this last attribute and bearing in mind the doctrine produced by the Office of the Special Rapporteur, the national court linked the violation of the right to protest (right to assembly) with freedom of expression. This enabled it to conclude that "social protest is one more collective form of expression." By virtue of this principle, it concluded that "the involvement of workers in mass social acts falls within the sphere of protection of the fundamental guarantee under examination [the right to freedom of expression]."⁴⁸ As such, the potential employer retaliations against the workers who participated in the public demonstration and the acts of intimidation (filming and taking photographs) are facts that must be examined from the perspective of the right to assembly as well as the right to freedom of expression.

77. But the incorporation of this standard had fundamental substantive and procedural consequences in the decision of the case. According to Chilean labor law (Art. 485 of the Labor Code), the right to assembly is excluded from the sphere of protection of the petition for constitutional relief in a labor matter (*tutela laboral*), which was the action the workers had filed. However, freedom of expression can in fact be subject to judicial relief through this procedure. Thus, the Court decided the case based on standards on freedom of expression developed by the inter-American bodies, and it refrained from examining the facts from the perspective of the right to assembly protected by the Chilean Constitution. A different decision would have made it impossible for the court to reach the merits of the case for want of subject matter jurisdiction.

78. Once the legal framework was identified and the jurisdiction of the court was established, the judgment proceeded to compare the right to freedom of expression with the facts of the case in order to determine whether there had been any conduct that was prohibited by the pertinent provisions. The judgment turned then on examining whether the employer's acts were justified in the exercise of its rights (including freedom of expression), or whether, to the contrary, the acts alleged exceeded the scope of this sphere of protection and therefore violated the fundamental freedoms and rights of the union and its members.

79. To solve this legal problem, the judge again made proper use of international standards. In addressing the problem, in its judgment the court conducted a balancing test based on the rules set by the case law of the inter-American system. Based on this case law, the court set out to determine whether the employer's acts were consistent with the

⁴⁷ Labor Court Letras from Valparaíso. RIT T-19-2009. RUC 09-4-0011952-7. Conclusion of Law 15. Valparaíso, Chile. August 31, 2009. Available at :

http://laboral.poderjudicial.cl:9081/SITLAPORWEB/ConsultaDetalleAtPublicoAccion.do?TIP_Consulta=1&TIP_Cuaderno=0&CRR_IdCuaderno=0&ROL_Causa=19&TIP_Causa=T&ERA_Causa=2009&CRR_IdCausa=27973&COD_Tribunal=1338&.

⁴⁸ The Labour Court Letras based its conclusion on the doctrine of the Office of the Special Rapporteur concerning the relationship freedom of expression and the freedom of assembly, protest and social mobilization. On this point, see: IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2005. OEA/Ser.L/V/II.124. Doc. 7. 27 February 2006. Chapter IV. paras. 98-108. Available at: <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=662&IID=1>

principle of proportionality, understood under the three assumptions specified by the IACHR and the Inter-American Court: the criteria of suitability, necessity and proportionality, *stricto sensu*.⁴⁹ In the application of this test to the specific case, the Court concluded that “the previously described monitoring that took place does not pass the test of necessity. It was not essential, and although it is true it is suitable, this lack of necessity renders unjustifiable the restriction to the fundamental right to freedom of expression that such measure entailed for the workers who were members of the complainant labor union.”⁵⁰ This decision demonstrates how the inter-American standards are not only useful when establishing the content and scope of abstract rights but also provide tools of interpretation that enable the national courts to apply those standards to specific cases where competing rights are at stake.

80. The Office of the Special Rapporteur notes the use that this court decision makes of the instruments provided by the inter-American system on legal standards and rules for the resolution of situations in which the exercise of rights is limited or violated. The decision also demonstrates how a dialogue can be established between national substantive laws and the standards of the inter-American system, and between the rules for case resolution and constitutional interpretation used by the national courts and the standards of the inter-American system for the protection of human rights. In this respect, the Office of the Special Rapporteur appreciates that during this year the Valparaíso Court has made use of the compilation of standards contained in the Office’s 2008 Annual Report. Indeed, the report of the Office of the Special Rapporteur specifically served the Judge in the case for three purposes. First, it was useful in establishing the scope and meaning of the right to freedom of expression in general.⁵¹ Second, it was useful in defining the specific content of the relationship between freedom of expression and social mobilization.⁵² Finally, the report was useful in establishing the legal framework on which the final decision was based.⁵³

⁴⁹ Labor Court Letras from Valparaíso. RIT T-19-2009. RUC 09-4-0011952-7. Conclusion of Law 17. Valparaíso, Chile. August 31, 2009. Available at :

http://laboral.poderjudicial.cl:9081/SITLAPORWEB/ConsultaDetalleAtPublicoAccion.do?TIP_Consulta=1&TIP_Cuaderno=0&CRR_IdCuaderno=0&ROL_Causa=19&TIP_Causa=T&ERA_Causa=2009&CRR_IdCausa=27973&COD_Tribunal=1338&.

⁵⁰ Labor Court Letras from Valparaíso. RIT T-19-2009. RUC 09-4-0011952-7. Conclusion of Law 15. Valparaíso, Chile. August 31, 2009. Available at :

http://laboral.poderjudicial.cl:9081/SITLAPORWEB/ConsultaDetalleAtPublicoAccion.do?TIP_Consulta=1&TIP_Cuaderno=0&CRR_IdCuaderno=0&ROL_Causa=19&TIP_Causa=T&ERA_Causa=2009&CRR_IdCausa=27973&COD_Tribunal=1338&.

⁵¹ On this point, the judgment states, “The 2008 Annual Report of the Office of the Special Rapporteur for Freedom of Expression of the Organization of American States (OAS) has referred to the meaning and scope of the right to freedom of expression in the legal framework of the Inter-American Human Rights system....”

⁵² In this regard, the court’s decision states, “[The Office of the Special Rapporteur] has stated in its report that social protest is one of the most effective forms of collective expression. In view of all of the foregoing, this Court concludes that the fundamental guarantee under examination includes within its scope of protection the participation of workers in mass social acts.”

⁵³ Thus, in summarizing the provisions on which it bases its decision, the Court first cites the provisions of the Constitution, several ILO provisions, “Article 13 of the American Convention [...] Article IV of the American Declaration, Article 4 of the Inter-American Democratic Charter, the 2008 Annual Report of the Office of the Special Rapporteur for Freedom of Expression of the Organization of American States (OAS), [and] Articles 1, 2, 5, 432 *et seq.* and 485 *et seq.* of the Labor Code.”

5. Decision of the Supreme Court of Mexico on the unconstitutionality of vague criminal laws that protect the honor and privacy of public officials⁵⁴

81. In its *amparo* [appeal for relief under the Constitution in a case of violation of civil rights] judgment of June 17, 2009, the Supreme Court implemented the inter-American standards on freedom of expression expressly in declaring the admissibility of the *amparo* action of a director of a communications medium. The director had been criminally convicted of the offense of "attack on privacy," for having published an article about a government official. The Supreme Court, with the express application of the inter-American standards on the issue, found that the State of Guanajuato's criminal provisions to protect honor and privacy were incompatible with the Constitution.

a. Brief summary of the case

82. On December 23, 2004, an interview was published in a regional communications medium in the State of Guanajuato. In that interview, a former municipal public servant made statements concerning activities that he had had to perform, and orders he had received during the time he worked as a driver for the Municipal President of Acámbaro. As a result of that publication, the public official filed a criminal complaint alleging that "everything that had been published was untrue, that those statements caused him dishonor, discredit and harm—by indicating, *inter alia*, that he had made improper use of public funds—and that they discredited him and made a fool of him as a public official."⁵⁵

83. The Public Prosecutor named the director of the communications medium as the alleged perpetrator of the crime of attacks on privacy. On January 25, 2007, the Trial Judge for Civil and Criminal Matters of the Acámbaro Judicial District convicted the defendant for the offense of attacks on privacy, and imposed a prison sentence of three years, one month and fifteen days. The judge also denied the defendant the privileges of probation and commutation of the sentence, but granted him a substitute sentence of community service. The judgment was appealed. The appellate court amended the judgment with respect to the reparation of the harm but affirmed the rest of the holding.

84. The director of the communications medium filed an action for direct *amparo* against the criminal conviction. The court of first instance denied the *amparo*, and the plaintiff filed a motion for review before the Three-Judge Court, which affirmed the lower court's decision. The Three-Judge Court based its decision on the following considerations: i) freedom of expression has limits, and the legislature may specify them in the regular performance of its regulatory duties; ii) the offense in question considers an attack on privacy to be all statements or expressions made in print, or in any other manner circulated publicly, which expose a person to hatred, scorn or ridicule, and can cause harm to his reputation and interests; iii) the attacks covered by the Press Law of the State of Guanajuato are a valid limitation to constitutional guarantees insofar as they refer to privacy but not to the conduct of public officials in the performance of their official duties; and iv)

⁵⁴ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo en Revisión 2044/2008. June 17, 2009. Rapporteur: Ministro José Ramón Cossío Díaz. Secretary: Francisca María Pou Giménez and Roberto Lara Chagoyán. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/08020440.010.doc>.

⁵⁵ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo en Revisión 2044/2008. Statement of Facts, Point One. June 17, 2009. Rapporteur: Ministro José Ramón Cossío Díaz. Secretary: Francisca María Pou Giménez and Roberto Lara Chagoyán. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/08020440.010.doc>

the protection of the reputation of individuals is a justified limitation to the work of the communications media.

85. The Three-Judge Court ordered that the case be forwarded to the Supreme Court of the Nation, because it alleged the unconstitutionality of the state criminal law pursuant to which the criminal penalty was imposed. The Supreme Court overturned the *amparo* judgment, declared the unconstitutionality of several articles of the Press Law of the State of Guanajuato, and thereby overturned the criminal sentence imposed against the director of the communications medium.

b. Legal reasoning of the court and application of inter-American standards

86. In this monumental decision, the Mexican Supreme Court overruled the court decisions in both the criminal case and the *amparo* suit, holding that they violated the right to freedom of expression recognized by the Mexican Constitution and the American Convention. Essentially, the Court found four reasons to arrive at its conclusion: 1) the legal reasoning of the lower courts reflected an erroneous understanding of the role the law plays in the development and consolidation of fundamental rights; 2) the legal reasoning reflected an erroneous understanding of what is entailed in resolving a conflict between fundamental rights in a specific case; 3) the courts operated with an improper understanding of public officials' right to honor and to privacy; and 4) there was an incorrect interpretation of the Constitution that led to a prison sentence based on Articles 1, 3, 4, 5, 6, 7 and 8 of the Press Law of the State of Guanajuato, which must be declared unconstitutional.⁵⁶

87. The Office of the Special Rapporteur would like to emphasize that the legal reasoning of the Supreme Court was based, in large part, on the standards that the inter-American system has developed on the subject. As was established expressly in the text of the judgment, the Supreme Court availed itself in its decision of the judgments and advisory opinions of the Inter-American Court, as well as the decisions and recommendations of the Inter-American Commission and the reports and opinions of the Office of the Special Rapporteur. In this respect, there are four highly relevant issues involved in the incorporation of the inter-American standards into national law.

⁵⁶ Articles 1, 2, and 3 of the Press Law of the State of Guanajuato referred to attacks on privacy, attacks on morals and attacks on public peace or order in terms such as the following: "ARTICLE 1.- The following shall constitute attacks on privacy: I.- Any malicious statement or expression made verbally or through signs in the presence of one or more people, or by written or printed means, drawings, lithographs, photographs or any other means that, exhibited or circulated in public, or transmitted by mail, telegraph, telephone, radiotelegraphy or message, or by any other means, exposes a person to hatred, scorn or ridicule, or could cause harm to his reputation or interests."; ARTICLE 2.- "The following shall constitute attacks on morals: I.- Any verbal or written expression, or expression by any other means enumerated in section I of the preceding article, which publicly defends or excuses, counsels, or propagates vices, crimes or misdemeanors, or promotes them or their perpetrators;" ARTICLE 3.- "The following shall constitute attacks on order or public peace: I.- Any malicious statement or exhibition made publicly through speeches, cries, songs, threats, [that are] handwritten or printed, drawings, lithography, photography, cinematography, recording, or in any other form, that has the purpose of discrediting, ridiculing or destroying the institutions of the State or by which the State, the Municipalities, or the officials of such Entities are defamed."

Article 7 established that an expression was made publicly when it was made or carried out in the streets, squares, avenues, theaters or other public meeting places, or in private places, but in such a way that it could be observed, seen or heard by the public.

Finally, Article 8 referred to incitement to anarchy. This conduct occurred when a person "counsels or incites robbery, murder, the destruction of property through the use of explosives, or if these offenses or their perpetrators are promoted, as a means of achieving the destruction or the reform of the existing social order."

88. First, the Supreme Court affirmed the content and scope of the right to freedom of expression protected by the inter-American system in the broad sense. At the same time, the Court recognized that the exercise of that right entails duties and responsibilities for the person expressing himself. In the words of the Supreme Court, “the freedoms of expression, press and information enshrined in the Constitution and in the treaties have limits.”⁵⁷ These limits are specified strictly by the international treaties and by the Constitution of Mexico. In this regard, the Supreme Court establishes that the above “does not mean that any legal regulation presented as a manifestation of those limits is automatically legitimate.”⁵⁸

89. The Supreme Court thus turned to the inter-American standard to evaluate the admissibility of limitations to the right to freedom of expression. Consequently, it understood that any limitation must meet several substantive and procedural requirements. The mere existence of a law that expressly sets limits is not sufficient for the restrictions it establishes to be considered valid. On this point, the Supreme Court looks to the inter-American case law that has considered in general terms that fundamental rights must be exercised with respect for other rights, and that the State plays a key role in the process of harmonization, through the establishment of the limits and responsibilities necessary for that harmonization.⁵⁹

90. Second, the Supreme Court acknowledged the existence of a differentiated standard of protection for different types of speech, especially in terms of the reinforced protection of specially protected speech, as has been developed in the case law of the inter-American system. Particularly important in the case at hand is the Court’s analysis of the protection of political speech, and speech concerning matters of public interest, in relation to the protection of the privacy of the public official involved in the events. The Supreme Court began by weighing the role of the subjects involved in the events, noting the significance to the case that “the holder of the right to privacy who wishes to have his rights preserved through the use of the criminal law is, or has been, a public official.”⁶⁰

91. This precision enabled the Supreme Court to apply a specific standard to the facts of the case: the greater protection accorded to expressions, information and opinions relevant to matters of public interest. It is notable that the IACHR has asserted that the use of criminal mechanisms to penalize expressions concerning matters of public interest or public officials, candidates for public office or politicians violates *per se* Article 13 of the American Convention, as there is no compelling social interest that justifies it, it is unnecessary and disproportionate, and furthermore it may constitute a means of indirect censorship given its intimidating and chilling effect on speech concerning matters of public

⁵⁷ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo en Revisión 2044/2008. Conclusion of Law 5, p. 16. June 17, 2009. Rapporteur: Ministro José Ramón Cossío Díaz. Secretary: Francisca María Pou Giménez and Roberto Lara Chagoyán. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/08020440.010.doc>.

⁵⁸ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo en Revisión 2044/2008. Conclusion of Law 5, p. 16-17. June 17, 2009. Rapporteur: Ministro José Ramón Cossío Díaz. Secretary: Francisca María Pou Giménez and Roberto Lara Chagoyán. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/08020440.010.doc>.

⁵⁹ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 75.

⁶⁰ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo en Revisión 2044/2008. Conclusion of Law 5, p. 19. June 17, 2009. Rapporteur: Ministro José Ramón Cossío Díaz. Secretary: Francisca María Pou Giménez and Roberto Lara Chagoyán. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/08020440.010.doc>

interest.⁶¹ As an educational exercise, it is worth quoting the manner in which the Supreme Court internalized those standards:

One of the most agreed-upon specific rules in the sphere of comparative law and international human rights law—precipitated by repeated exercises in the balancing of rights, including those meant to examine the legislature’s balancing tests in general provisions—is the rule according to which individuals who perform or have performed public duties (in the previously defined broad terms), as well as candidates for public office, have a right to privacy and honor that is generally less protected than that of ordinary citizens when confronted by the acts of the mass media in the exercise of the rights of expression and information.⁶²

92. Following this doctrine, the Supreme Court stated that in cases where the right to the honor of public officials conflicts with freedom of expression, the balancing test must start with the *prima facie* priority of freedom of expression, which acquires a greater weighted value because it deals with a kind of speech that is accorded special protection under the American Convention. In the opinion of the Supreme Court, the freedom to impart and receive information protects vigorously the expression and dissemination of information on political issues and, more broadly, on matters of public interest. Political speech is more directly related than other types of speech—for example, commercial advertising speech—to the social aspect and the institutional functions of the freedoms of expression and information. Therefore, the protection of its free circulation is especially relevant so that these freedoms can properly perform their strategic functions in the shaping of public opinion, within the structure inherent to representative democracy.

93. Third, the Supreme Court referred to the type of limitations compatible with Article 13 of the American Convention. The central issue on this point was to determine whether the criminal penalties established by the state law could be considered valid measures for the subsequent imposition of liability for the abusive exercise of the right to freedom of expression. This reasoning proceeded on the basis that inter-American law requires that, to repair the harm caused by such abusive exercise, the States must choose the means least costly to freedom of expression. On this point, the Court reproached the Three-Judge Court for failing to apply this standard and for not having analyzed the relevance of the application of criminal law to the case. The Court held expressly that "there is no trace of any analysis designed to determine the conditions under which the need for limits could be so strong and intense as to justify the use of the criminal law (the most intense and dangerous instrument in the limitation of rights, which must be a tool of last resort in a constitutional democracy)."⁶³

⁶¹ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*, cited in I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 101.2); IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.h).

⁶² First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo en Revisión 2044/2008. Conclusion of Law 5, p. 33. June 17, 2009. Rapporteur: Ministro José Ramón Cossío Díaz. Secretary: Francisca María Pou Giménez and Roberto Lara Chagoyán. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/08020440.010.doc>

⁶³ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo en Revisión 2044/2008. Conclusion of Law 5, p. 18. June 17, 2009. Rapporteur: Ministro José Ramón Cossío Díaz. Secretary: Francisca María Pou Giménez and Roberto Lara Chagoyán. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/08020440.010.doc>

94. The Supreme Court thus established—in a manner similar to how the inter-American case law has—that the subsequent imposition of liability for imparting specially protected speech that allegedly violates the honor of public officials or other individuals related to the performance of public duties cannot be a necessary, suitable and proportionate judicial response unless the following conditions, *inter alia*, are met: a) legal support and clear language; b) specific intent to cause harm or clear negligence (*actual malice*); c) actual, verified harm; and d) varying degrees of liability and the minimization of indirect restrictions.

95. Upon applying this test to the specific case, the Supreme Court found that several provisions of the Guanajuato Press Law were contrary to the right to freedom of expression protected by the Mexican Constitution and by the American Convention. To start, the Supreme Court found that Article 1 of the Press Law of Guanajuato should address especially serious and clearly verified attacks on reputation. However, in referring simply to statements or expressions that expose a person to hatred, scorn or ridicule, or that can harm his reputation or interests, Article 1 criminalized even cases in which the harm to a person’s good reputation was merely a possibility. Furthermore, the Supreme Court found a lack of specificity and excessive breadth of other expressions in other articles. In view of these considerations, the Court concluded that the law did not meet the conditions of the principle of precision encompassed by the general principle of criminal legality. It found that it also failed to meet the requirement, functionally equivalent in this case, that all restrictions to freedom of expression be established in advance in a law that is drafted clearly and precisely. Thus, according to the Supreme Court, “The Press Law of the State of Guanajuato is a statute, but it is vague, ambiguous, overly broad and open: it does not meet the basic conditions that would enable it to be classified as a constitutionally (and conventionally) admissible restriction to the rights protected under Articles 6 and 7 of the Constitution.”⁶⁴

96. Finally, the judgment of the Supreme Court makes reference to the exercise of freedom of expression through the communications media and its relationship to democracy. On this issue, the Supreme Court pointed out, for example, that the mass communications media play an essential role in the collective function of freedom of expression. Thus, based on Advisory Opinion OC-5/85 of the Inter-American Court, the Mexican court stressed that “the communications media are among the basic shapers of public opinion in current democracies, and it is essential that conditions be assured for them to accommodate the most diverse information and opinions.”⁶⁵

97. The Supreme Court distinguishes in its analysis between the forming of opinions and the circulation of information. It recalls that only the second type of speech can be required, as stated in the Constitution, to be “true and impartial” information. Nevertheless, the Supreme Court calls for a correct interpretation of the scope of those terms, which is quite relevant in the context of constitutional litigation.

98. Once again, the Supreme Court undertakes an integrated interpretation between the requirements of truthfulness and impartiality set forth in the Mexican

⁶⁴ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo en Revisión 2044/2008. Conclusion of Law 5, p. 50. June 17, 2009. Rapporteur: Ministro José Ramón Cossío Díaz. Secretary: Francisca María Pou Giménez and Roberto Lara Chagoyán. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/08020440.010.doc>

⁶⁵ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo en Revisión 2044/2008. Conclusion of Law 5, p. 30. June 17, 2009. Rapporteur: Ministro José Ramón Cossío Díaz. Secretary: Francisca María Pou Giménez and Roberto Lara Chagoyán. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/08020440.010.doc>

Constitution and the standards set by the inter-American bodies. Thus, the Court stated that "truthful" information does not imply that it must be "true," that is, clearly and incontrovertibly certain. In the Supreme Court's opinion, "to require this would distort the exercise of rights." Under this understanding, the mention of truthfulness entails simply a requirement that the reports, interviews and journalistic articles meant to influence public opinion be supported by a reasonable practice of research and fact-checking aimed to determine whether what is to be disseminated is sufficiently based in reality. The informer must be able to demonstrate in some way that a certain standard of diligence has been respected in the verification of the facts he is reporting, and if he does not arrive at indubitable conclusions, the information must be presented in such a way as to give that message to the reader. He must suggest with sufficient clarity that there are other points of view and other possible conclusions regarding the facts or events recounted. As for the requirement of impartiality, the court recognized that this requirement does not demand absolute impartiality; rather, it is a barrier against the intentional dissemination of inaccuracies and against the unprofessional treatment of information whose dissemination always has an impact on the lives of the individuals involved. What the Supreme Court essentially does is adopt the standard of actual malice to define potential subsequent liabilities.

99. In sum, the Office of the Special Rapporteur appreciates the Supreme Court's use of the doctrine and case law compiled by the Office in its 2008 Annual Report. Indeed, as mentioned, in establishing its doctrine on the requirements for the subsequent imposition of liability for specially protected speech that allegedly violates the honor of public officials, the Supreme Court mentions expressly that it found support in the standards set forth in "paragraphs 64 and 63 of Chapter III of the 2008 Annual Report of the Office of the Special Rapporteur for Freedom of Expression of the Organization of American States, published in May of this year."⁶⁶

6. Decision of the First Chamber of the Supreme Court of the Nation of Mexico on the special protection of the right to freedom of expression concerning matters that may be in the public interest⁶⁷

100. On October 7, 2009, the Supreme Court of the Nation in Mexico, in deciding a direct *amparo* case, implemented the inter-American standards on the special protection of the right to freedom of expression with respect to matters that may be of public interest.

a. Brief summary of the case

101. A Mexican citizen, the wife of a former President of the Republic, filed an ordinary civil action against a journalist and the communications media (a magazine) that employed her. The plaintiff alleged that the journalist and the magazine had violated her rights to privacy and honor, in an article the magazine published about the reasons for which the plaintiff had requested the annulment of her first marriage. As a result of this alleged harm, the plaintiff requested the payment of money damages for the pain and suffering

⁶⁶ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo en Revisión 2044/2008. Conclusion of Law 5, note 31. June 17, 2009. Rapporteur: Ministro José Ramón Cossío Díaz. Secretary: Francisca María Pou Giménez and Roberto Lara Chagoyán. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/08020440.010.doc>

⁶⁷ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo 6/2009. October 7, 2009. Rapporteur: Ministro Sergio A. Valls Hernández. Secretaries: Laura García Velasco and José Álvaro Vargas Ornelas. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/09000060.001.doc>.

caused by the journalist and the magazine; she further requested that the court order the publication in the defendant magazine of the judgment of the civil court under the same terms in which the article had been published.

102. The lawsuit was heard in the Twelfth Civil Court of the Federal District, which ruled for the plaintiff. First, the Court ordered the journalist and the magazine to pay damages jointly. Second, the court ordered the journalist and the magazine, again jointly, to publish a summary of the judgment in the magazine.

103. The defendants filed an appeal that was heard by the First Civil Division of the Superior Court of Justice of the Federal District. That court overturned in part the judgment of the court of first instance. On one hand, the court found that the magazine had no liability for the violation of rights, based on the following arguments: i) the information published in the magazine was simply a reprint of a report previously published in a book (accurate report); ii) there was no criticism or opinion given by the editor in the presentation of the information; iii) it had not been proven that the information was false or inaccurate; and iv) the information was of public interest in that it concerned a public figure, as the plaintiff was the wife of the President of the Republic and, therefore, it was common knowledge that the plaintiff was the "country's first lady."

104. On the other hand, the Court affirmed the sentence against the journalist, but decided to reduce the amount of the money damages. According to the court, the journalist had already published the same information in a book, to which the plaintiff had not consented. As such, the publication of the same information in the defendant magazine was a new act on the part of the journalist, from which it is inferred that the journalist acted with malice and with the clear intention of harming the plaintiff's reputation and privacy. Consequently, the court ordered the journalist to publish an excerpt from the judgment in the newspaper *El Sol de México* at her own expense.

105. The plaintiff was dissatisfied with this decision and filed for protection and relief in the federal courts. The First Chamber of the Supreme Court of the Nation, in its judgment of October 7, 2009, found all of the violations alleged by the plaintiff to be unfounded.

b. Legal reasoning and application of inter-American standards

106. In the opinion of the Office of the Special Rapporteur, the value of this decision is two-fold. First, it affirms the case law on the application of the inter-American standards on the special protection of the right to freedom of expression with regard to matters that may be of public interest, as set forth in the judgment discussed in the above paragraphs. Furthermore, in this decision the Supreme Court established important criteria for deciding cases involving alleged conflicts between the exercise of freedom of expression and the privacy of public or well-known figures.

107. First of all, the Supreme Court reiterated, based on the standards set by the Inter-American Court in the *Herrera Ulloa v. Costa Rica* case, that "one of the means by which the circulation of information and public debate are most powerfully limited is the imposition of civil or criminal liability against journalists, for their own acts or the acts of others."⁶⁸ Bearing this situation in mind, the Mexican case-law, adopting the inter-American

⁶⁸ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo 6/2009. Conclusion of Law 5. p. 47. October 7, 2009. Rapporteur: Ministro Sergio A. Valls Hernández. Secretaries: Laura García Velasco

standards, reiterated the need to apply specific rules for the resolution of conflicts among expression, information and honor in cases involving public officials. Those rules state that "the collective or systematic function of freedom of expression and the right to information, and its specific underlined features, must be considered carefully when such freedoms conflict with the so-called personal rights, including the right to privacy and the right to honor."⁶⁹

108. The Supreme Court states that this case was not about a public official or a candidate for public office; rather it was about a "high-profile" person. In this respect, in the Supreme Court's view, the fundamental legal issue is to discern how freedom of expression and the right to information operate when dealing with individuals who, due to certain circumstances (which may be of a personal or family, social, cultural, artistic, athletic, or other nature) are known publicly or have public notoriety and can be considered "public figures", and who, as a result of such notoriety, affect or influence the community. The Supreme Court noted that there was a true and recognized interest in the information or opinions published about such persons, which may be derived from the issue or matter being addressed, or from the fact that the person is "newsworthy" because of the type of person he or she is.

109. To decide the issue, making use of the inter-American standards and of comparative law, the Supreme Court established a detailed repertoire of rules.

110. First, the Supreme Court stated that public or well-known figures are those persons who, "due to social, family, artistic, or athletic circumstances, or because they themselves have disseminated facts and events of their private lives, or due to any other analogous circumstance, have a high profile or notoriety in a community and, therefore, submit voluntarily to the risk that their activities or private lives may be the object of greater dissemination."⁷⁰ Accordingly, these people "must withstand a greater level of interference in their privacy, unlike private individuals or regular citizens, because society has a legitimate interest in receiving information about this public figure and, therefore, the media have a legitimate interest in disseminating it in the interest of free public debate."⁷¹ These people subject themselves to the risk that their activities, as well as their personal information, will be disseminated; therefore, they subject themselves to the opinions and criticism of third parties, including those that may be annoying, awkward or hurtful. Notwithstanding, the Supreme Court is emphatic in stating that such persons are constitutionally protected in their privacy or private lives. As such, just like any private citizen, they can assert their right to privacy when facing opinions, criticisms or information harmful to that right, and its

and José Álvaro Vargas Ornelas. Available at:
<http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/09000060.001.doc>.

⁶⁹ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo 6/2009. Conclusion of Law 5. p. 49. October 7, 2009. Rapporteur: Ministro Sergio A. Valls Hernández. Secretaries: Laura García Velasco and José Álvaro Vargas Ornelas. Available at:
<http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/09000060.001.doc>.

⁷⁰ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo 6/2009. Conclusion of Law 5. p. 78. October 7, 2009. Rapporteur: Ministro Sergio A. Valls Hernández. Secretaries: Laura García Velasco and José Álvaro Vargas Ornelas. Available at:
<http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/09000060.001.doc>.

⁷¹ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo 6/2009. Conclusion of Law 5. p. 78. October 7, 2009. Rapporteur: Ministro Sergio A. Valls Hernández. Secretaries: Laura García Velasco and José Álvaro Vargas Ornelas. Available at:
<http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/09000060.001.doc>.

resolution will warrant a balancing test to determine which right deserves greater protection in each case.

111. Second, the Supreme Court lays down rules for conducting this balancing test. In the Supreme Court's opinion, in this exercise, the public interest ascribed to the facts or information published is the legitimating circumstance for the invasions of privacy. Thus, the right to privacy must yield to freedom of expression when the facts disseminated can have public relevance, "whether due to [the person's] public conduct or to those private aspects which are of interest to the community, since the exercise of such rights is the foundation of free and open public opinion in a democratic society."⁷²

112. In this regard, the Court specifies the meaning of the notion of *public interest*. According to the Court, this concept does not correspond to *the public's interest*. Therefore, there is no place for curiosity or morbid interest. What must be considered is the public relevance of the information to community life; that is to say, it must deal with matters of general interest. Accordingly, a person cannot be required to withstand passively the journalistic dissemination of information relevant to his personal life, when it is trivial and irrelevant to public interest or debate.

113. Finally, the Supreme Court established that the resolution of the conflict between freedom of expression or the right to information and the right to privacy or one's private life must be decided on a case-by-case basis, in order to verify which of those rights deserves greater protection. It must even be considered that, "when dealing with public figures, a distinction must be made according to the person's degree of notoriety, given his position in society, as well as the manner in which he has modulated public knowledge about his private life."⁷³

114. In applying these rules of jurisprudence to the case at hand, the Supreme Court found that in this specific case the right to privacy must give way to freedom of expression. First of all, the Supreme Court found that the person the information pertained to was a public figure, not only because of her relationship to the President of the Republic but because for several years she herself had been a candidate and a public official with a high national and international profile. As such, the Court concluded that she enjoyed less protection from interference with her personal rights. Second, the Supreme Court found that the summary included in the publication should not have been examined in isolation but rather in the context of the article published. The Supreme Court found in its analysis that, viewed in the context in which it was presented, society had a legitimate interest in knowing such information. Finally, the Supreme Court took into consideration that the information contained in the article was a "neutral report" that satisfied the requirements of truthfulness and public relevance, as it was limited to disseminating an article written by a third party.

⁷² First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo 6/2009. Conclusion of Law 5. p. 79. October 7, 2009. Rapporteur: Ministro Sergio A. Valls Hernández. Secretaries: Laura García Velasco and José Álvaro Vargas Ornelas. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/09000060.001.doc>

⁷³ First Chamber of the Supreme Court of the Nation of Mexico. Amparo Directo 6/2009. Conclusion of Law 5. p. 81. October 7, 2009. Rapporteur: Ministro Sergio A. Valls Hernández. Secretaries: Laura García Velasco and José Álvaro Vargas Ornelas. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/09000060.001.doc>

7. Judgment C-417/09 of the Constitutional Court of Colombia over the truth exception (*exceptio veritatis*)⁷⁴

115. On June 26, 2009, the Constitutional Court of Colombia, sitting *en banc*, handed down judgment C-417 of 2009, which declared unconstitutional a provision of the criminal code related to slander (*calumnia*). According to that provision, in cases of defamation where the victim of the defamatory statements had been acquitted, the person responsible for the accusations could not be acquitted.

a. Brief summary of the case

116. In a public action of unconstitutionality, a group of citizens filed suit against the provision of the criminal code (Article 224.1 of Law 599 of 2000) that excluded the *exceptio veritatis* in criminal cases for criminal defamation offenses.⁷⁵ The plaintiffs alleged that the impossibility of submitting evidence of the truthfulness of the accusations of any punishable conduct that had resulted in an acquittal, closure of the investigation or termination of proceedings or their equivalent, violated the principle of equality by establishing the discriminatory and unjustified treatment of the subject who finds himself in such circumstances. In addition, they alleged that this restriction was inconsistent with the Constitution because it violated the essential purpose of guaranteeing the validity of a just legal system, because it ignored the rights of defense and due process of the defendant in a defamation case, and also because it violated freedom of expression and information.

117. Upon examining the case, the Constitutional Court held that the provision under review was incompatible with the Constitution of Colombia. In particular, the Constitutional Court found that the criminal provision was neither necessary nor strictly proportionate, since in the interest of protecting the fundamental rights to honor and reputation, and the constitutional principles of legal certainty and *res judicata*, the provision eliminated freedom of expression in its various forms in the cases covered therein. In the Constitutional Court's opinion, the protection of the rights and principles the provision intended to safeguard neither required nor justified the harm it caused to the right to freedom of expression.

b. Legal reasoning of the Colombian Constitutional Court and the application of inter-American standards

118. The Office of the Special Rapporteur highly appreciates the fact that the Colombian Constitutional Court incorporated international human rights law expressly into its reasoning when determining the legal framework applicable to the case. Moreover, the Office of the Special Rapporteur underscores the importance in this specific case of the decisions of other courts and tribunals of the region that had been praised in the public statements of this Office of the Special Rapporteur,⁷⁶ as well as the doctrine established in

⁷⁴ Constitutional Court of Colombia. Judgment C-417-09. Bogotá, Colombia. June 26, 2009. Available at: <http://www.corteconstitucional.gov.co/relatoria/2009/C-417-09.htm>.

⁷⁵ The provision stated: "*Grounds for acquittal*. Any person who proves the veracity of the accusations shall not be liable for the conduct described in the previous articles.// However, in no case shall evidence be admitted://1. Regarding the accusation of any punishable act that has resulted in an acquittal, closure of the investigation or termination of the proceedings or their equivalent, except where the statute of limitations on the action has expired [...]".

⁷⁶ Office of the Special Rapporteur-IACHR. June 22, 2009. Press release No. R38/09. Available at: <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=750&IID=1>.

its annual reports. The judgment of the Constitutional Court is, in this sense, a notable example of how local courts can play a very important role in the implementation of the inter-American standards and, in particular, of the hemispheric agenda proposed by the Office of the Special Rapporteur in its 2008 report, which was cited extensively by the Constitutional Court.

119. On the issue of comparative law, the Constitutional Court assessed the attitudes of other States in the world (and in the region, in particular) regarding the trend of decriminalizing offenses that place subsequent restrictions on the right to freedom of expression and information. Thus, the Colombian Constitutional Court found in the work of the Office of the Special Rapporteur, particularly in the press releases, up-to-date information that enabled it to study the situations of other countries.⁷⁷ The judgment cites decisions and laws examined in this chapter, including the Uruguayan legislature's amendment of the Press Law and the decision of the Federal Supreme Court of Brazil repealing the 1967 Press Law.

120. In conducting this comparative study, the Constitutional Court found that "within this trend, the proposal set forth by the **regional human rights system** is particularly persuasive" (emphasis in the original). Delving deeper into this issue, the Colombian Constitutional Court looked to the 2008 Annual Report of the Office of the Special Rapporteur, which "establishes among the components of the 'hemispheric agenda' for the defense of that freedom, the need to 'eliminate the provisions that criminalize expression and to promote proportionality in the subsequent imposition of liability.'" ⁷⁸

121. The Constitutional Court took into particular consideration the fact that this report states that the ideal citizen under the democracies of the Americas and the inter-American system for the protection of human rights is that of "a thinking subject who *has the courage to use his own intelligence* and who is willing to discuss with others the reasons for his decisions."⁷⁹ In this respect, the Colombian Court valued the position of the report that advocates "taking seriously the idea of a democratic and politically active citizenry," which entails the "design of institutions that enable, rather than inhibit or make difficult, the deliberation of all matters and phenomena of public relevance."⁸⁰

122. In order for this to be implemented in these democracies, the Colombian Court stated that "the very institutions of punitive law, especially of criminal law, are particularly relevant, as they serve as coercive means to impose a single viewpoint and discourage vigorous debate, and are otherwise incompatible with the principles that guide

⁷⁷ Constitutional Court of Colombia. Judgment C-417-09. Legal Grounds and Conclusions of Law. 2.b.2.d. Bogotá, Colombia. June 26, 2009. Available at: <http://www.corteconstitucional.gov.co/relatoria/2009/C-417-09.htm>.

⁷⁸ Constitutional Court of Colombia. Judgment C-417-09. Legal Grounds and Conclusions of Law. 2.b.2.d. Bogotá, Colombia. June 26, 2009. Available at: <http://www.corteconstitucional.gov.co/relatoria/2009/C-417-09.htm>. Legal Grounds and Conclusions of Law. 2.b.2.d.

⁷⁹ Constitutional Court of Colombia. Judgment C-417-09. Legal Grounds and Conclusions of Law. 2.b.2.d. Bogotá, Colombia. June 26, 2009. Available at: <http://www.corteconstitucional.gov.co/relatoria/2009/C-417-09.htm>.

⁸⁰ Constitutional Court of Colombia. Judgment C-417-09. Legal Grounds and Conclusions of Law. 2.b.2.d. Bogotá, Colombia. June 26, 2009. Available at: <http://www.corteconstitucional.gov.co/relatoria/2009/C-417-09.htm>.

democratic systems, especially freedom of expression in the terms provided under Article 13 of the American Convention on Human Rights.”⁸¹

123. The Constitutional Court’s judgment further underscores the special priority that the Office of the Special Rapporteur has accorded to this issue within the hemispheric agenda of freedom of expression. The Colombian Court specifically cites as an issue of concern: “(i) The existence of *desacato* and other criminal defamation laws, particularly when they are enforced to criminally prosecute those who have made critical assessments of matters of public interest or public figures; [and] (ii) the use of the criminal law to protect the ‘honor’ or ‘reputation’ of ideas or institutions (...).”⁸²

124. On this subject, the Court then pointed out that “in all of their reports on this issue, the IACHR and the Office of the Special Rapporteur have stressed the need to *decriminalize* the exercise of this freedom and to establish criteria of proportionality in establishing the subsequent imposition of liability that may arise from its abusive exercise, in accordance with Principles 10 and 11 of the Declaration of Principles.”⁸³

125. In defining the legal scope of these standards, the Colombian Court demonstrates a remarkable knowledge of the political documents of the inter-American system and refers to the obligations established by the States in the resolutions of the highest political body of the OAS, the General Assembly. In this respect, it is worth quoting the language of the Constitutional Court of Colombia:

Finally, it is of interest to note that in Resolution 2434 (XXXVIII-0/08), passed by the OAS General Assembly, “Right to freedom of thought and expression and the importance of the media,” based on the broadly recognized importance of this set of freedoms in the consolidation of democratic societies, one of the decisions adopted is: To invite member states to consider the recommendations concerning defamation made by the Office of the Special Rapporteur for Freedom of Expression of the IACHR, namely by repealing or amending laws that criminalize *desacato*, defamation, slander, and libel, and, in this regard, to regulate these conducts exclusively in the area of civil law.⁸⁴

126. Based on this valuable examination of the inter-American precedents, the trends and hemispheric objectives regarding freedom of expression, the Colombian Constitutional Court declared unconstitutional the provision barring grounds for acquittal of the offense of defamation (*calumnia*) when the person who was the object of the allegedly defamatory statements has been acquitted by a criminal judge. On this point it is important to explain that the only provision at issue in the lawsuit was the one that established the

⁸¹ Constitutional Court of Colombia. Judgment C-417-09. Legal Grounds and Conclusions of Law. 2.b.2.d. Bogotá, Colombia. June 26, 2009. Available at: <http://www.corteconstitucional.gov.co/relatoria/2009/C-417-09.htm>.

⁸² Constitutional Court of Colombia. Judgment C-417-09. Legal Grounds and Conclusions of Law. 2.b.2.d. Bogotá, Colombia. June 26, 2009. Available at: <http://www.corteconstitucional.gov.co/relatoria/2009/C-417-09.htm>.

⁸³ Constitutional Court of Colombia. Judgment C-417-09. Legal Grounds and Conclusions of Law. 2.b.2.d. Bogotá, Colombia. June 26, 2009. Available at: <http://www.corteconstitucional.gov.co/relatoria/2009/C-417-09.htm>.

⁸⁴ Constitutional Court of Colombia. Judgment C-417-09. Legal Grounds and Conclusions of Law. 2.b.2.d. Bogotá, Colombia. June 26, 2009. Available at: <http://www.corteconstitucional.gov.co/relatoria/2009/C-417-09.htm>.

defense of grounds for the acquittal of criminal defamation offenses, and not the provision that contained the legal definition of the offense itself. Therefore, the Court's decision is limited to the examination of that defense.

D. Conclusions

127. The Office of the Special Rapporteur takes a very positive view of the jurisprudence derived from the cases referred to in this chapter. These cases demonstrate the sufficiency with which the judges who issue the decisions implement the international standards. This, in turn, not only results in a better application of the law in the specific case but also promotes the application of these standards to similar cases, whether by these same judicial authorities or by other courts.

128. The judicial practice exemplified in the cases examined denotes the intersection of international law and constitutional law on the issue of human rights protection. This intersection has enabled the development of mechanisms for the interpretation and application of the legal standards that seek to meet this fundamental objective of contemporary law in an integrated manner.

129. This judicial practice is increasingly common in the hemisphere, and is a positive development in the task of strengthening national as well as international mechanisms for the protection of human rights. The Office of the Special Rapporteur disseminates these practices so that other courts and tribunals, as well as the verification bodies of the regional system for the protection of human rights, can be aware of them and study them. The Office also notes with satisfaction that an increasing number of judges from different States are finding in the inter-American standards practical tools for deciding specific cases.

130. Indeed, the judicial incorporation of the standards on freedom of expression developed by the bodies of the inter-American system are an important step forward in the administration of prompt and effective justice for the victims of violations. With this application, the States not only accomplish their work as guarantors of rights but they also prevent victims from turning repeatedly to international forums to ensure their rights. Thus, the incorporation of standards plays a fundamental role in enforcing the principle of subsidiarity that characterizes the regional system for the protection of human rights.

131. The cases reviewed further demonstrate that the absence in the text of a constitution of an express reference to the American Convention is not an absolute impediment to the protection of the right to freedom of expression through tools of constitutional interpretation. However, the task of incorporation would be more clear and direct for judicial authorities if States would eliminate the technical and legal barriers to the incorporation of international human rights law standards. One notable example of this process is the incorporation of the doctrine and case law of the Inter-American Court and the IACHR in the new Uruguayan law that was cited previously.

132. The reports of the Office of the Special Rapporteur can be a useful tool for judges in their task of incorporating international standards into the domestic system. This is particularly true given that, in addition to explaining the interpretation of the contents of the right to freedom of expression, the reports contain compilations of the standards that the IACHR and the Inter-American Court have developed. In this way, judicial authorities have material at their disposal that seeks to provide the necessary tools for deciding cases; it facilitates the determination of the applicable legal framework and the content and scope of the rights and obligations pertaining to the issue.

133. The Office of the Special Rapporteur acknowledges the work of the courts that issued the decisions studied herein, and encourages them to continue with their work of defending human rights. Likewise, the Office of the Special Rapporteur invites other courts to consider these practices an example worthy of being reinforced throughout the hemisphere.

134. In the future, the Office of the Special Rapporteur will follow decisions of this type and invite the national courts that decide cases with similar or new incorporation techniques to bring their decisions to the Office's attention. Likewise, the Office of the Special Rapporteur undertakes to study and disseminate the best practices on this subject and hopes to increase the free-flowing dialogue with judicial authorities in order to move forward in this important mutual learning process.