

Original: Spanish

National Case Law on Freedom of Expression

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

This book corresponds to chapter V of the 2016 Annual Report of the Office of the Special Rapporteur for Freedom of Expression approved on March 15, 2017 by the Inter-American Commission on Human Rights.

Edison Lanza
Special Rapporteur for Freedom of Expression

INDEX

INTRODUCTION	7
CASE LAW ON THE IMPORTANCE, FUNCTION, AND SCOPE OF FREEDOM OF EXPRESSION IN DEMOCRATIC SYSTEMS	11
CASE LAW ON ENTITLEMENT TO FREEDOM OF EXPRESSION AND ITS DUAL DIMENSION	19
CASE LAW ON THE ADMISSIBILITY OF LIMITATIONS TO FREEDOM OF EXPRESSION: GENERAL FRAMEWORK	23
CASE LAW ON PROHIBITION OF PRIOR CENSORSHIP	29
CASE LAW ON THE CONDITIONS THAT LIMITATIONS ON FREEDOM OF EXPRESSION MUST MEET IN ORDER TO BE ADMISSIBLE (THREE-PART TEST STANDARD)	33
CASE LAW ON THE PRESUMPTION OF AB INITIO COVERAGE FOR ALL KINDS OF EXPRESSION, INCLUDING OFFENSIVE, SHOCKING OR DISTURBING SPEECH.....	43
CASE LAW ON SPECIALLY PROTECTED SPEECH	47
CASE LAW ON THE INCOMPATIBILITY OF DESACATO (DEFAMATION OF PUBLIC OFFICIALS) LAWS AND THE AMERICAN CONVENTION	53
JURISPRUDENCIA SOBRE LA PROTECCIÓN ESPECIAL DE LAS OPINIONES Y LA INEXISTENCIA DEL DELITO DE OPINIÓN	59
CASE LAW ON THE APPLICATION OF THE PRINCIPLE OF FAIR (OR NEUTRAL) REPORTING.....	63
CASE LAW ON THE APPLICATION OF STANDARDS OF ACTUAL MALICE AND PROPORTIONALITY WHEN ESTABLISHING SUBSEQUENT CIVIL LIABILITY.....	67
CASE LAW ON THE RIGHT TO PROTECT THE CONFIDENTIALITY OF SOURCES.....	71
THE PROHIBITION AGAINST PRIOR AND INDIRECT CENSORSHIP ESTABLISHING LIMITATIONS ON FREEDOM OF EXPRESSION BY INDIRECT MEANS, INCLUDING THE DISCRIMINATORY PLACEMENT OF GOVERNMENT ADVERTISING	77
CASE LAW ON THE STATE'S OBLIGATION TO GUARANTEE PLURALISM AND DIVERSITY	83
CASE LAW ON FREEDOM OF EXPRESSION AND THE INTERNET	89

INTRODUCTION

INTRODUCTION

1. Pursuant to its mandate, the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) monitors and documents in its annual reports the intervention of the region's justice system in matters of freedom of expression. In this report, the Office of the Special Rapporteur presents a compilation of different judgments handed down over the past four years by national high courts that represent progress at the domestic level or enrich the regional doctrine and jurisprudence, while incorporating the inter-American standards in support of their decisions.
2. As in other annual reports, this type of analysis aims to contribute to a positive dialogue between the bodies of the system and the national courts, with the conviction that sharing different experiences leads to a virtuous circle of mutual learning.
3. Indeed, the Inter-American Court and the Commission have repeatedly acknowledged that all of the national courts—regardless of their ranks and hierarchies—play an important role in the development and implementation of regional human rights standards. According to the Court's interpretation, the local justice systems not only operate as a guarantee of the rights of individuals in particular cases; through their decisions, they can also broaden and strengthen the content of the constitutional norms and national laws connected to these rights, and therefore broaden and strengthen the content of the international instruments themselves, such as the American Convention. The bodies of the system have similarly emphasized that national judges have a significant role in the process of implementing international human rights law in the domestic legal system.¹
4. This compilation was put together starting with the cases that have been highlighted and documented by the Office of the Special Rapporteur in its annual reports for the 2013 – 2016 period. The criterion used for the selection of the judicial decisions summarized in this chapter was that they represent progress at the domestic level, either because they ensure the protection of the freedom of expression of the persons directly involved in the specific case, and/or because they set forth legal guidelines that incorporate and develop the inter-American standards in the national sphere.
5. The report includes case law from ten countries (Argentina, Brazil, Canada, Colombia, Costa Rica, United States, Mexico, Panama, Dominican Republic, and Uruguay). Of particular note is the work of the high courts of Argentina, Colombia, Mexico, and

¹ IACHR. [Annual Report 2012. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Domestic Case Law on Freedom of Expression). OEA/Ser.L/V/II.147.Doc.1. March 5, 2013. Para. 3.

Uruguay, which are prolific in the incorporation and development of the inter-American doctrine and case law, and the work of different Brazilian courts, which have played a very important role during this period to promote the right to freedom of expression and exercise “conventionality control.”

6. The group of decisions examined reflects a solid body of case law from the region’s national high courts that—consistent with the Inter-American Court and Commission—underscores the importance of freedom of expression as a “cornerstone of the very existence of a democratic society,” reaffirms the individual and collective dimension of this right and the prohibition of prior censorship, and applies the *three-part test* in analyzing the admissibility of limitations to freedom of expression under the American Convention.
7. With respect to the catalog of issues that have traditionally been addressed by the courts of the region, this compilation identifies advances in the judicial protection of specially protected speech, particularly political speech about public servants. With regard to the themes that have emerged in the hemisphere in recent years in relation to freedom of expression, the chapter discusses the growing litigation of matters involving freedom of expression on the Internet, privacy, and surveillance, on which the case law is still nascent.
8. Summarized below is a selection of notable court decisions. They have been systematized in accordance with 24 items that reflect different standards and rules of the inter-American legal framework, and grouped according to 13 analytical aspects. The decisions are preceded by a synthesis of the inter-American standard that was used as a reference in each category.
9. Finally, as in other annual reports, this Office recognizes that an exhaustive study of the national court decisions handed down in relation to this right is beyond the scope of this report. Accordingly, the Office of the Special Rapporteur will refer only to those notable court decisions about which it has received information.

CHAPTER I

CASE LAW ON THE IMPORTANCE,
FUNCTION, AND SCOPE OF
FREEDOM OF EXPRESSION IN
DEMOCRATIC SYSTEMS

CASE LAW ON THE IMPORTANCE, FUNCTION, AND SCOPE OF FREEDOM OF EXPRESSION IN DEMOCRATIC SYSTEMS

10. The Inter-American legal framework grants a robust and broad scope to the right to freedom of expression. The doctrine and jurisprudence established by the Inter-American Commission and the Inter-American Court of Human Rights based on the American Convention, the American Declaration, and the Inter-American Democratic Charter, have helped to spur significant regulatory progress in the region in recent decades. They have also strengthened the intervention of the hemisphere's justice systems when it comes time to act in favor of protecting this right.
11. The fundamental role of freedom of expression that the bodies of the Inter-American Human Rights System have recognized has been addressed extensively by the high courts of the region which, in turn, have enriched and developed the emerging judicial discourse on the inter-American standards.
12. For instance, on June 20, 2013, in admitting unconstitutionality action 29/2011 filed by National Human Rights Commission [*Comisión Nacional de Derechos Humanos*] (CNDH) to challenge an article of the Criminal Code of Veracruz, the Supreme Court of Mexico held that freedom of expression and the right to information are “central to the constitutional and democratic rule of law” and are “fundamental pillars.”² The high court underscored the dual dimension of these rights, and held that “they enjoy a public, collective, or institutional aspect that makes them basic components in the proper workings of a representative democracy.” It emphasized that “freedom of expression is a preferential right, as it serves to guarantee the realization of other rights and freedoms.” The Court also referred to the interrelationship and interdependence of freedom of expression and other human rights. It held that “having full freedom to express, gather, disseminate, and publish information and ideas is indispensable, not only as an essential means of self-expression and self-creation but also as a premise for the ability to fully exercise other human rights — the right of association and peaceful assembly with any lawful aim, the right of

² Suprema Corte de Justicia de la Nación de México (SCJN). June 20, 2013. [Invalida SCJN Artículo 373 del Código Penal del Estado de Veracruz](http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=132774); Suprema Corte de Justicia de la Nación de México (SCNJ). Acción de Inconstitucionalidad 29/2011. Judgment of June 20, 2013. Available at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=132774>; See also, Suprema Corte de Justicia de la Nación de México (SCJN). [Contenido de la versión taquigráfica de la sesión pública ordinaria del pleno de la Suprema Corte de Justicia de la Nación](http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=132774). June 20, 2013.

petition, and the right to vote and be voted for—and as a functional element that determines a country’s democratic quality of life.”

13. In 2014, these conclusions were reaffirmed by the First Chamber of the Supreme Court of the Nation of [*Primera Sala de la Suprema Corte de Justicia de la Nación*] Mexico in the judgment handed down on February 7 of that year, in which it ruled direct *amparo* [petition for a constitutional remedy] 3123/2013 groundless. That petition sought to protect the honor and reputation of a public servant in view of the mass email distribution of criticism of his performance as the academic coordinator of a state university.³ On May 20, 2015, the Supreme Court again ruled similarly by declaring the unconstitutionality of an article of the Criminal Code of Chiapas that established the so-called offense known as *halconeo*, or acting as a “lookout,” and made it punishable by prison to obtain and disclose confidential or reserved information from the public security forces or armed forces for a number of purposes.⁴ The Court held that “the rights to freedom of expression and access to information not only protect freedoms necessary for the personal autonomy of individuals but also are meant to protect and guarantee a public forum for political deliberation.”
14. The Chamber of Criminal Cassation of the Supreme Court of Colombia [*Sala de Casación Penal de la Corte Suprema de Justicia de Colombia*] expressed similar considerations in its July 10, 2013 decision to acquit journalist Luis Agustín González, the director of the newspaper *Cundinamarca Democrática*, of the crime of defamation [*injuria*].⁵ In this case, upon considering the extraordinary petition for cassation filed by the journalist’s defense attorney, the Court exhaustively examined the function of freedom of expression in its political dimension. Citing the case law of the country’s Constitutional Court,⁶ the judgment underscored the importance of freedom of expression as a pre-condition for effective social participation, the improvement of public policies, and the guarantee of robust discussion on matters of general interest. It held that freedom of expression “promotes socio-political stability, by providing a safety valve for social dissent [...] protects the political minorities that are active at a given time, preventing them from being silenced by prevailing or majority forces [...] helps shape public opinion on political matters and the consolidation of a properly informed electorate.” The Chamber of Criminal Cassation of the Supreme Court of Colombia thus concluded that the “profound” constitutional and international protection of freedom of expression “is justified precisely because of those lofty goals of solidifying participatory democracy.”

³ Primera Sala de la Suprema Corte de Justicia de la Nación de México (SCJN). Amparo Directo en Revisión 3123/2013. Judgment of February 7, 2014. Available at:

<http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=156633&SinBotonRegresar=1>

⁴ Primera Sala de la Suprema Corte de Justicia de la Nación de México (SCJN). Amparo en revisión 492/2014. Judgment of May 20, 2015. Available at:

<http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=167949>

⁵ Corte Suprema de Justicia de Colombia. Sala de Casación Penal. Casación sistema acusatorio N° 38.909. Judgment of July 10, 2013. Available at:

<http://flip.org.co/resources/documents/c4ab6f8aa7b923cc81bf7d99e4da4e93.pdf>

⁶ The judgment quoted sentence T-391 of 2007 of the Corte Constitucional.

15. Along the same line of reasoning, in judgment T-904/13 of December 3, 2013, the First Chamber of the Constitutional Court of Colombia, citing the July 2, 2004 judgment of the Inter-American Court in the case of *Herrera Ulloa v. Costa Rica*, held that “Without effective freedom of expression, materialized in all of its terms, democracy vanishes, pluralism and tolerance start to break down, the mechanisms of citizen oversight and complaint start to become inoperable, and, in short, fertile ground is created for authoritarian systems to take root in society.”⁷ The Court so ruled in overturning an order of the lower courts which, invoking the need to protect the right to image and privacy of a minor child—the son of a high-ranking public servant—had ordered measures to de-link videos connected to the news story and delete a sentence from an opinion column.
16. On September 19, 2013, the Fourth Civil Chamber of Private Law of the Court of Justice of the state of São Paulo [4ª Câmara de Direito Privado do Tribunal de Justiça do Estado de São Paulo] in Brazil, dismissed an appeal filed by an association of religious entities seeking to have a video removed from the Internet, finding that freedom of expression “entails respect for political and ideological pluralism, elements that are inseparable from democracy.”⁸ In this case, the Court held that the freedom to express thought “is, without doubt, the greatest achievement of contemporary history.” Brazil’s highest Court, the Federal Supreme Court (STF), underscored in different decisions handed down during the period covered by this report the importance of freedom of expression as a condition of every democratic system and reaffirmed the standards set forth in its landmark decision of 2009, which held that the Press Law of 1967 was incompatible with the Federal Constitution. It did so, for instance, in its judgment of September 17, 2014, by setting aside an injunction issued *inaudita altera pars* by a court in the District of Fortaleza, State of Ceará, which barred the publication of an edition of the magazine *IstoÉ*.⁹ In this case, the Federal Supreme Court was of the opinion that the measure amounted to an act of prior censorship that was inadmissible under the constitutional standards. The Federal Supreme Court held that the freedoms of expression, information, and the press are “the underpinnings for the functioning of democratic regimes,” and therefore “there is a public interest” in guaranteeing their exercise. It also held that “For this reason, they are treated as preferential freedoms [*liberdades preferenciais*] in different parts of the world [...]”
17. The Argentinean Supreme Court’s October 28, 2014 judgment in the case of *Rodríguez María Belén v. Google Inc. re: Damages*, reaffirmed its prior position that among “[t]he freedoms enshrined in the Constitution, freedom of the press is one of the most important, to the point that without it being properly safeguarded democracy would be eroded or purely nominal.”¹⁰ In this case, the high court ruled that an Internet

⁷ Sala Primera de la Corte Constitucional de Colombia. [Judgment T-904/13](#) of December 3, 2013.

⁸ Tribunal de Justiça do Estado de São Paulo. 4ª Câmara de Direito Privado. Processo Nº 0192984-85.2012.8.26.0100. Judgment of September 19, 2013. Available at: <https://esaj.tjsp.jus.br/cposg/open.do>

⁹ Supremo Tribunal Federal do Brasil (STF). [Reclamação 18.638](#). Judgment of September 17, 2014.

¹⁰ Corte Suprema de Justicia de la Nación Argentina. [Rodríguez María Belén c/google Inc. s/ Daños y Perjuicios](#). Judgment of October 28, 2014.

intermediary that had been sued for damages was not liable. Citing the Inter-American Court, the Supreme Court held that “Freedom of expression is a cornerstone of the very existence of a democratic society.” It ruled identically in its October 29, 2013 judgment in the case of *Grupo Clarín SA et al. v. National Executive Branch, et al./ action for a declaratory judgment*, in which it adjudicated an action alleging the unconstitutionality of the Audiovisual Communication Services Law.¹¹ In this decision—as discussed later in this chapter—in addition to asserting the importance of freedom of expression for the construction of democratic societies, the Supreme Court conducted an exhaustive study on the media concentration and its impact on media quality.

18. Similarly, on March 21, 2014, the Constitutional Chamber of the Supreme Court of Costa Rica upheld the right of journalists to maintain the confidentiality of their sources, noting “the very close relationship between democratic pluralism and freedom of information. To curtail the latter is, essentially, a weakening of the democratic system.”¹² In support of her vote in this case, Judge Hernández López stated that “freedom of the press is special and preferential in nature, because it is a crucial right for the operation of democracy and the full exercise of freedom of expression.”
19. On April 11, 2014, the Supreme Court of Panama, sitting *en banc*, upheld the constitutionality of a law barring high-ranking public servants from filing criminal complaints for crimes against honor. It underscored the importance of freedom of expression for democracy, and reaffirmed that public servants are subject to a higher degree of scrutiny, which is fundamental for “the operation of democratic society.”¹³ The Court referred to the legal nature of the right to freedom of expression as a human right, and stressed that this right “is one of the primary achievements of the liberal constitutionalism enshrined in international treatie[s].”
20. Another aspect developed extensively by the high courts of the region concerns the scope of the right to freedom of expression.
21. Citing the inter-American doctrine and jurisprudence, the Supreme Court of Mexico held in the previously cited judgment of June 20, 2013 that, “As the Inter-American Court has had the opportunity to underscore on repeated occasions,¹⁴ it is not only a matter of the freedom to express one’s own thoughts but also of the right to seek,

¹¹ Corte Suprema de Justicia de la Nación Argentina. [Grupo Clarín AS y otros c/Poder Ejecutivo Nacional y otros/ acción meramente declarativa](#). Judgment of October 29, 2013.

¹² Sala Constitucional de la Corte Suprema de Justicia de Costa Rica. Fallos Relevantes Año 2014. Expediente No. 14-000848-0007-CO. Judgment 2014-004035 of March 21, 2014. Available at: <http://sitios.poder-judicial.go.cr/salaconstitucional/Centro%20de%20Jurisprudencia/Sentencias%20relevantes/Sentencias%20Relevantes.htm>; See also: Sala Constitucional Corte Suprema de Justicia de Costa Rica. [Expediente No. 13-007483-0007-CO](#). Recurso de Amparo. Judgment 00531 of January 17, 2014.

¹³ Órgano Judicial de la República de Panamá. Registro Judicial. Advertencia de Inconstitucionalidad. Expediente No. 478-08. Judgment of April 11, 2014. Pages 749-766. Available at: <http://www.organojudicial.gob.pa/wp-content/uploads/2014/05/rj2014-04.pdf>

¹⁴ The judgment cited Advisory Opinion OC-5/85 of November 13, 1985 and the case of *Olmedo Bustos et al. v. Chile* (“The Last Temptation of Christ”) settled in judgment of February 5, 2001.

receive, and disseminate” ideas and information of all kinds.¹⁵ The Court reaffirmed the inter-American standards and maintained that both dimensions “must be guaranteed simultaneously in order to ensure the proper effectiveness of the right to freedom of thought and expression.” It added that, “The expression and dissemination of thought and information are indivisible, such that a restriction on opportunities for dissemination directly represents a limit on the right to express oneself freely. This has repercussions of various kinds, on many levels, but especially within the sphere of what we call the media.”

22. On April 5, 2016, the Supreme Court of Uruguay adjudicated the first of a set of actions challenging the constitutionality of the Audiovisual Communication Services Law, ruling in accordance with the case law of the Inter-American Court that article 13 of the Convention must be interpreted under a two-part standard: the democratic aspect and the dual dimension.¹⁶ Accordingly, it held that “Through the ‘democratic standard,’ the Inter-American Court proposes that freedom of expression is a value that, if lost, jeopardizes the operation of the essential principles for the existence of a democratic society. The protection of the right to express one’s ideas freely thus becomes fundamental for the full enjoyment of all other human rights. In fact, without freedom of expression full democracy does not exist, and without democracy, the sad history of the hemisphere has demonstrated that everything from the right to life to the right to private property is seriously endangered.”

¹⁵ S uprema Corte de Justicia de la Nación de México (SCJN). June 20, 2013. [Invalida SCJN Artículo 373 del Código Penal del Estado de Veracruz](http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=132774); Suprema Corte de Justicia de la Nación de México (SCNJ). Acción de Inconstitucionalidad 29/2011. Judgment of June 20, 2013. Available at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=132774>

¹⁶ Suprema Corte de Justicia de Uruguay. IUE 1-18/2015. [Directv de Uruguay Limitada c/ Poder Legislativo](#). Acción de inconstitucionalidad. Judgment No. 79 of April 5, 2016.

CHAPTER II

CASE LAW ON ENTITLEMENT TO
FREEDOM OF EXPRESSION AND ITS
DUAL DIMENSION

CASE LAW ON ENTITLEMENT TO FREEDOM OF EXPRESSION AND ITS DUAL DIMENSION

23. The inter-American doctrine and jurisprudence emphasizes universal entitlement to freedom of expression and its interrelationship with and interdependence on other human rights. Under article 13 of the American Convention, freedom of expression is a right to which *everyone* is entitled, under conditions of equality and without discrimination of any kind.¹⁷
24. The Inter-American Court has underscored that entitlement to the right to freedom of expression cannot be restricted to a certain profession or group of people, nor to the sphere of freedom of the press. In this regard, for instance, in its judgment in the case of *Tristán Donoso v. Panama*, the Court stated 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 exercise of the first does not condition exercise of the second.”¹⁸
25. Similarly, on December 3, 2013, in its previously cited Judgment T-904/13, the First Review Chamber of the Constitutional Court of Colombia [*Sala Primera de Revisión de la Corte Constitucional de Colombia*] held that “What we call freedom of expression is a general category that consists of bundle of different rights and freedoms, most notably including (...) freedom of opinion (also called “freedom of expression in the strict sense”), which includes the freedom to express and disseminate one’s own thought, opinions, and ideas, without being limited by borders and by any means of expression; and freedom of information, which protects the freedom to seek, transmit, and receive accurate and impartial information about events, ideas, and opinions of all kinds.”¹⁹ The Court explained that, “Both freedom of opinion and freedom of information can be exercised by any person by any means of expression, but when they are exercised through the mass media, the content of freedom of the press is incorporated. This includes, in addition to the freedom to disseminate information and opinions through the media, the right to establish and operate such media.”

¹⁷ IACHR. [Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 11.

¹⁸ I/A Court H.R. *Case of Tristán Donoso v. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. Para. 114.

¹⁹ Sala Primera de la Corte Constitucional de Colombia. [Judgment T-904/13](#) of December 3, 2013.

26. Another characteristic of freedom of expression that the Court and the Inter-American Commission have emphasized is their dual dimension. On numerous occasions, the inter-American case law has stated that freedom of expression has an individual dimension, consisting of the right of each person to express his or her own thoughts, ideas, and information; and a collective or social dimension, consisting of society's right to seek and receive any information, to learn about the thoughts, ideas, and information held by others, and to be well-informed.²⁰ The doctrine and jurisprudence of the system has indicated that both dimensions are interdependent and equally important, and therefore one cannot be diminished by invoking the preservation of the other.
27. Consistent with the above, when the Supreme Court of Argentina handed down the aforementioned October 23, 2013 judgment in the case of *Grupo Clarín SA et al. v. National Executive Branch, et al./ action for a declaratory judgment*, it held that, in its individual aspect "understood in this way—as a faculty of self-determination, self-realization—the exercise of freedom of expression allows for almost minimal state regulatory activity, which would only be justified in those cases in which that freedom adversely affects the rights of third parties (article 19 of the National Constitution)."²¹ Therefore, "in its collective dimension—an aspect that is especially promoted by the challenged law—freedom of expression is a necessary instrument to guarantee freedom of information and the formation of public opinion." As such, "from this point of view, freedom of expression is a cornerstone of the very existence of a democratic society." The Supreme Court of Uruguay ruled similarly on April 5, 2016, in adjudicating the previously cited unconstitutionality action.²²

²⁰ I/A Court H.R. *Case of Kimel v. Argentina. Merits, Reparations, and Costs*. Judgment of May 2, 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 in the case of *Herrera Ulloa v. Costa Rica*. Transcribed 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 Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of July 2, 2004, Series C No. 107. Para. 108; 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 (Articles 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](#). Chapter V: Report on the Compatibility of "Desacato" Laws with the American Convention On Human Rights. Title III. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995. Available at: <https://www.cidh.oas.org/annualrep/94eng/chap.5.htm>; IACHR. Report No. 130/99. Case of No. 11.740. *Víctor Manuel Oropeza*. Mexico. November 19, 1999. Para. 51; IACHR. Report No. 11/96, Case No. 11.230. *Francisco Martorell*. Chile. May 3, 1996. Para. 53.

²¹ Corte Suprema de Justicia de la Nación Argentina. [Grupo Clarín AS y otros c/Poder Ejecutivo Nacional y otros/ acción meramente declarativa](#). Judgment of October 29, 2013.

²² Suprema Corte de Justicia de Uruguay. IUE 1-18/2015. [Directv de Uruguay Limitada c/ Poder Legislativo](#). Acción de inconstitucionalidad. Judgment No. 79 of April 5, 2016.

CHAPTER III

CASE LAW ON THE ADMISSIBILITY
OF LIMITATIONS TO FREEDOM OF
EXPRESSION: GENERAL
FRAMEWORK

CASE LAW ON THE ADMISSIBILITY OF LIMITATIONS TO FREEDOM OF EXPRESSION: GENERAL FRAMEWORK

28. According to the standards developed by the inter-American doctrine and jurisprudence,²³ this Office of the Special Rapporteur has stressed that freedom of expression is not an absolute right. Article 13 of the American Convention provides expressly—in clauses 2, 4, and 5—that freedom of expression can be subject to certain limitations, and establishes the general framework of the conditions that such limitations must meet in order to be legitimate. Accordingly, it has stated that the general rule was established in clause 2, according to which “The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals.”²⁴
29. Article 13(4) of the American Convention provides that 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, without prejudice to the provisions of clause 2. Finally clause 5 establishes that 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.

²³ I/A Court H.R. Case of *Eduardo Kimel VS. Argentina. Merits, Reparations, and Costs*. Judgment of May 2, 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 v. 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. v. Venezuela. Preliminary Exceptions, 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. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of January 28, 2009. Series C No. 195. Para. 117; IACHR. [Annual Report 1994](#). Chapter V: Report on the Compatibility of “Desacato” Laws with the American Convention On Human Rights Title IV. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995, among others.

²⁴ IACHR. [Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 61.

30. The Office of the Special Rapporteur has explained that the rules pertaining to the admissibility of restrictions apply to all of the elements of freedom of expression and in their diverse manifestations.
31. In applying “conventionality control,” different courts of the region have developed standards of constitutional scrutiny in their case law that apply when imposing limitations to freedom of expression.
32. For instance, in the aforementioned *González v. Serrano* judgment of July 10, 2013, the Chamber of Criminal Cassation of the Supreme Court of Colombia [*Sala de Casación Penal de la Corte Suprema de Justicia de Colombia*] developed a detailed analysis of the conditions under which the right to freedom of expression may be limited under the standards of the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the Constitution of Colombia.²⁵ Based on the case law of the Constitutional Court, the Chamber held that limitations to the right to freedom of expression may be constitutionally admissible, in the following terms: “(1) they are provided by law, specifically and exhaustively, (2) they pursue certain compelling aims, (3) they are necessary for the accomplishment of such aims, (4) they are subsequent and not prior to the expression, (5) they do not constitute censorship in any of its forms, which includes the requirement to maintain neutrality with respect to the content of the expression that is limited, and (6) they do not interfere excessively with the exercise of this fundamental right; that is, they are proportionate.” The Colombian Constitutional Court [*Corte Constitucional*] issued a similar ruling on December 3, 2013, in the previously cited Judgment T-904/13. It held that “The constitutional case law has held that any limitation on freedom of expression, especially when it pertains to specially protected speech, is presumed to be suspect, and therefore must be subject to a strict constitutional analysis.”²⁶
33. Similarly, the Supreme Court of Mexico [*Suprema Corte de Justicia de la Nación de México*] addressed the issue in a June 20, 2013 judgment upholding a constitutional challenge to article 373 of the Criminal Code of Veracruz.²⁷ The challenged criminal provision established penalties ranging from one to four years in prison and a fine equivalent to five hundred to one thousand days’ wages for any person who “falsely claims the existence of explosive devices or others; attacks with firearms; or chemical, biological, or toxic substances that can harm human health, thus disturbing public orde[r].” In its decision, the Court cited Advisory Opinion 5/85 of the Inter-American Court,²⁸ stating that, “according to the Inter-American Court of Human Rights, in

²⁵ Corte Suprema de Justicia de Colombia. Sala de Casación Penal. Casación sistema acusatorio N° 38.909. Judgment of July 10, 2013. Available at:

<http://flip.org.co/resources/documents/c4ab6f8aa7b923cc81bf7d99e4da4e93.pdf>; The judgment cites sentence T-391/2007 of Corte Constitucional de Colombia.

²⁶ Sala Primera de la Corte Constitucional de Colombia. Judgment T-904/13 of December 3, 2013.

²⁷ Suprema Corte de Justicia de la Nación de México (SCJN). June 20, 2013. *Invalida SCJN Artículo 373 del Código Penal del Estado de Veracruz*; Suprema Corte de Justicia de la Nación de México (SCJN). Acción de Inconstitucionalidad 29/2011. Judgment of June 20, 2013. Available at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=132774>

²⁸ The judgment cited paragraphs 37 and 39 of Advisory Opinion OC-5/85 of the I/A Court H.R., *Compulsory Membership in an Association prescribed by Law for the Practice of Journalism*, of November 13, 1985.

order for subsequent liability to be established as a limit to freedom of expression, it must meet several requirements: a) it must correspond to previously established grounds of liability; b) there must be an express and exhaustive definition of those grounds in the law; c) the aims pursued when imposing it must be legitimate, and d) those grounds of liability must be necessary in a democratic society to ensure the aforementioned aims. Any interference that fails to meet any of these requirements constitutes a violation of freedom of expression.”

34. In examining the scope of article 13.2 of the American Convention, the Argentine Supreme Court [*Corte Suprema de Justicia de la Nación*] held that “any restriction, penalty, or limitation to freedom of expression must be interpreted restrictively[y].”²⁹ Along these lines, it further held that “[a]ny prior censorship exercised over freedom of expression is subject to a strong presumption of unconstitutionality,” the imposition of subsequent liability being the principle eventually applicable in the event of the abuse of its exercise. “This is because (...) the case law of the Court has been consistent with the governing principle whereby press law occupies a privileged position in our legal system. And this could not be otherwise, given that contemporary society breathes through informatio[n],” it stated. The Court ruled similarly in its October 28, 2014 decision in the case of *Rodríguez v. Google Inc. & Yahoo Argentina*, in which it found that the Internet companies were not liable for damages.
35. On December 17, 2014, the Federal Supreme Court of Brazil [*Supremo Tribunal Federal*] (STF), in suspending a measure that had ordered *Rede União de Rádio e Televisão LTDA* to pay compensation for non-pecuniary damages, upheld the prohibition against prior censorship and held that, in order to be admissible, limitations to freedom of expression must be properly provided for in valid laws; must pursue constitutionally legitimate aims, and must be “necessary to the preservation of a democratic and plural society.”³⁰
36. In its April 5, 2016 decision adjudicating an unconstitutionality action challenging various articles of the Audiovisual Communication Services Law, the Uruguayan Supreme Court [*Suprema Corte de Justicia*] maintained the importance of adopting “the democratic standard” and the “dual dimension” of the right to freedom of expression, in assessing the constitutionality of the challenged provisions, which the petitioners alleged would inadmissibly restrict the right to freedom of expression.³¹ The Court rejected including issues related to “the convenience, justice, or timeliness of the provision” as a criterion of analysis. In explaining the reasoning behind its position on the standard of scrutiny that should be adopted, Judge Jorge Chediack stated that, “Although some rights can be limited by the legislature, the Court must examine in each case whether the provision effectively protects the general interest,”

²⁹ Corte Suprema de Justicia de la Nación Argentina. [Rodríguez María Belén c/google Inc. s/ Daños y Perjuicios](#). Judgment of October 28, 2014.

³⁰ Supremo Tribunal Federal do Brasil (STF). [Reclamação 16.329 MC/CE](#). Judgment of December 17, 2014, published on February 2, 2015.

³¹ Suprema Corte de Justicia de Uruguay. IUE 1-18/2015. [Directv de Uruguay Limitada c/ Poder Legislativo](#). Acción de inconstitucionalidad. Judgment No. 79 of April 5, 2016.

a determination that requires the application of “the rules of reasonableness.” He specified that, “In case of doubt, and if it is not clear what the protected general interest is, the situation must be resolved in favor of freedom of expression.” For his part, Judge Ricardo C. Pérez Manrique, citing the position taken by the Inter-American Court in the case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, noted that, “Freedom of expression can also be affected without the direct intervention of State action,” for instance, through the existence of monopolies and oligopolies in media ownership.

37. Another relevant decision was issued by the Constitutional Court of the Dominican Republic [*Tribunal Constitucional de República Dominicana*] on April 4, 2016. The Court, partially upholding a direct action of unconstitutionality that challenged a number of articles of the Law on the Expression and Dissemination of Thought and of the Criminal Code, held that limitations on freedom of expression must: a) be provided for by law, b) pursue a legitimate aim, and c) be suitable, necessary, and proportionate.³²

³² Tribunal Constitucional de República Dominicana. [Acción directa de inconstitucionalidad](#). Judgment TC/0075/16 of April 4, 2016.

CHAPTER IV
CASE LAW ON PROHIBITION OF
PRIOR CENSORSHIP

CASE LAW ON PROHIBITION OF PRIOR CENSORSHIP

38. The Inter-American Commission and this Office of the Special Rapporteur have underscored that, under article 13 of the American Convention, the limitations imposed on freedom of expression cannot amount to censorship and must be established through subsequent liability for the exercise of the right in question. These restrictions cannot be discriminatory or produce discriminatory effects, nor can they be established by indirect means.³³ Below are some examples of the way in which different courts in the region have incorporated these principles to protect freedom of expression.
39. In the previously cited judgment of June 20, 2013, the Supreme Court of Mexico [*Suprema Corte de Justicia de la Nación de México*] reaffirmed “the prohibition against prior censorship set forth in article 7 of the Constitution of the United Mexican States, article 13 of the American Convention on Human Rights, and article 19 of the International Covenant on Civil and Political Rights.”³⁴ The Court held that this prohibition “is consistent” with the “preferential position” of freedom of expression and the right to information, and has “as a principal consequence the general presumption that all expressive or informative speech is covered by the constitution, and is justified by the primary obligation of the State to remain neutral toward the content of the opinion and information disseminated, as well as by the need to guarantee that, in principle, no persons, groups, ideas, or means of expression are excluded *a priori* from public discourse.” The judgment held that “The Pact of San José is one of the clearest instruments on this issue, because it expressly opposes the mechanism of prior censorship with the rule that the exercise of free speech and freedom of the press can only be subject to subsequent liability.”
40. The issue was also addressed by the Federal Supreme Court [*Supremo Tribunal Federal*] (STF) in Brazil in a judgment handed down on September 17, 2014. In that decision, the Court set aside an injunction issued by the District Court of Fortaleza, in the State of Ceará, ordering the magazine *IstoÉ* to cease distributing, marketing, and publishing—in print and electronic formats—any news related to the Governor of Ceará and related to an investigation of cases of money laundering and tax evasion.³⁵ The injunction had also assessed a daily fine in the event of noncompliance. In its

³³ IACHR. [Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 90.

³⁴ Suprema Corte de Justicia de la Nación de México (SCJN). June 20, 2013. [Invalida SCJN Artículo 373 del Código Penal del Estado de Veracruz](#); Suprema Corte de Justicia de la Nación de México (SCNJ). Acción de Inconstitucionalidad 29/2011. Judgment of June 20, 2013. Available at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=132774>

³⁵ Supremo Tribunal Federal do Brasil (STF). [Reclamação 18.638](#). Judgment of September 17, 2014.

decision, the Federal Supreme Court reaffirmed “the full freedom of the press as a legal category prohibiting any type of prior censorship.” In this regard, it held that the lower court’s order imposed prior censorship on a journalistic publication under circumstances in which such measures were inadmissible. The Court stated that, “On the contrary, all of the standards [...] indicate that the appropriate solution is to allow for the disclosure of the news, after which the interested party may avail itself of subsequent redress mechanisms.” The Federal Supreme Court added that, in this specific case, the censored news was of “clear public interest,” given that it referred to the investigation into alleged criminal acts related to the diversion of public funds.

41. This reasoning was reiterated by the Federal Supreme Court (STF) on October 3 of the same year, in its ruling on claim [*Reclamação*] 18.746.³⁶ In this case, the Court set aside an injunction issued by the 12th civil court of the District of João Pessoa [*Juízo da 12ª Vara Cível da Comarca de João Pessoa*], state of Paraíba, barring *Rede Globo* from publishing reports on alleged irregularities committed by a judge in the State of Paraíba in adoption proceedings, which were the subject of parliamentary investigations.

³⁶ Supremo Tribunal Federal do Brasil (STF). [Reclamação 18.746](#). Judgment of October 3, 2014.

CAPÍTULO V

CASE LAW ON THE CONDITIONS
THAT LIMITATIONS ON FREEDOM
OF EXPRESSION MUST MEET IN
ORDER TO BE ADMISSIBLE (THREE-
PART TEST STANDARD)

CASE LAW ON THE CONDITIONS THAT LIMITATIONS ON FREEDOM OF EXPRESSION MUST MEET IN ORDER TO BE ADMISSIBLE (THREE-PART TEST STANDARD)

42. In interpreting article 13.2 of the American Convention, the inter-American case law has developed a *three-part test* to control the legitimacy of restrictions to freedom of expression. According to that test, in order for a limitation on the right to freedom of expression to be admissible, it must: be clearly and precisely provided for in advance by law, both substantively and procedurally; be designed to achieve one of the compelling objectives recognized in the American Convention; and be necessary in a democratic society to accomplish the compelling aims, strictly proportionate to the aim pursued, and suitable for accomplishing the compelling aim pursued.
43. The Inter-American Commission has specified that these conditions are included in the general rule that the limitations must be compatible with the democratic principle, which entails—at least—the following requirements: “restrictions on freedom of expression must incorporate the just demands of a democratic society;” that “the rules under which these restrictions are interpreted must be compatible with the preservation and development of democratic societies in keeping with articles 29 and 32 of the [American] Convention;” and that “the interpretation of restrictions on freedom of expression (article 13(2)) must ‘be judged making reference to the legitimate needs of societies and democratic institutions,’ given that freedom of expression is essential for every form of democratic government.”³⁷
44. The reasoning and legal grounds expressed by different courts of the region upon specifically considering the different elements of the *three-part test* is systematically organized below.
- **The Requirement that Limitations Must Be Established by Law, in a Clear and Precise Manner**
45. In its 2013 decision on unconstitutionality action 29/2011,³⁸ the Supreme Court of Mexico [*Suprema Corte de Justicia de la Nación de México*] held that article 373 of the

³⁷ IACHR. [Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 67.

³⁸ Suprema Corte de Justicia de la Nación de México (SCJN). June 20, 2013. [Invalida SCJN Artículo 373 del Código Penal del Estado de Veracruz](#); Suprema Corte de Justicia de la Nación de México (SCJN). Acción de Inconstitucionalidad 29/2011. Judgment of June 20, 2013. Available at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=132774>

Criminal Code of Veracruz³⁹ amounted to an inadmissible restriction to freedom of expression, in that—among other elements—its ambiguity violated the principle that the law must be exhaustive. The article allowed for the criminal prosecution of anyone who, “(a) *by any means, falsely claims the existence of explosive devices **or others** [...]*” (emphasis in the original). Referring to Advisory Opinion 5/85 of the Inter-American Court, the decision held that “In matters concerning limitations to freedom of expression imposed by criminal provisions, the Inter-American Court has held that the requirements of the principle of strict legality must additionally be met. The purpose of this requirement has a dual function: first, it reduces the jurisdiction of the State with regard to the way in which it can restrict freedom of expression; in addition, it tells the citizen exactly what is prohibited.” This principle “amounts to an authentic constitutional duty of the legislature, whereby it is obligated to formulate the factual assumptions of the criminal provisions in precise terms,” emphasized the Court. In this specific case, it established that the governing language describing the challenged concept “is ‘falsely claim,’ and therefore the conduct that constitutes the crime is the expression, whether verbal, written, or symbolic.” It then determined that:

the expression included in the challenged provision, related to the governing language of the statutory description of the offense, and which is imprecise, is ‘**or others**.’ The challenged provision contains this phrase as a disjunctive with respect to the false claim of the existence of explosives: “*anyone who, by any means, falsely claims the existence of explosive devices **or others** [...]*.” This issue allows for at least two possible interpretations: 1) that the phrase “or other” refers to another type of device analogous to explosives; or 2) that it refers to a different type of devices, that is, not explosives. This dual possibility is another example of potential vagueness, since it is not clear to which of the two aspects the legislature is referring, which could be interpreted in either of the aforementioned ways. The issue is relevant because it concerns the statutory definition of a criminal offense that in no way allows for or makes possible the imposition of penalties based on analogy or compelling logic (article 14 of the Constitution). This problem can lead to cases of over-inclusion.

46. Accordingly, the Mexican Supreme Court concluded that the “arguments expressed by the Chairman of the National Human Rights Commission are especially well-founded with regard to their two concepts of invalidity,” in which he had indicated, respectively, “that the challenged provision violates the human rights of freedom of expression and the right to information, and fails to comply with the guarantees of legality, legal certainty and precise application of the criminal law.” The Court also adopted other important conclusions by applying the three-part test, as mentioned in the sections below.

- **Requirement that Limitations Must Be Designed to Achieve the Legitimate Aims Recognized in the American Convention**

³⁹

“Article 373. Whoever, by any means, falsely claims the existence of explosive or other devices; of firearm assaults; or of chemical, biological or toxic substances that may cause health damage; causing disturbance of the public order, shall be imprisoned from one to four years and fined from five hundred to one thousand days of their salary, considering the alarm or disturbance of the order actually produced.”

47. As stated earlier, the limitations imposed must pursue one of the compelling aims set forth exhaustively in the American Convention, to wit: the protection of the rights of others, the protection of national security, public order, or public health and morals. This Office of the Special Rapporteur and the bodies of the Inter-American System have emphasized that “these are the only objectives authorized by the American Convention.”⁴⁰
48. In relation to this point, the June 20, 2013 judgment of the Supreme Court of Mexico cited in the previous section is of particular interest.⁴¹ In this judgment, which cites the inter-American doctrine and jurisprudence multiple times, the high court held that “the protection of public order is an objective authorized” by the “legal system to limit the freedom of expression of citizens. Nevertheless, citing OC – 5/85 of the Inter-American Court, it held that, in general terms, “‘public order’ may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content.” Citing the Office of the Special Rapporteur, the Court stated that, “any limitation on freedom of expression in the name of one of the aims provided for 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.”
- **Requirement that the Limitation be Necessary in a Democratic Society, Suitable for Accomplishing the Compelling Aim Pursued, and Strictly Proportionate to that aim**
49. The inter-American case law has noted that the States that impose limitations on freedom of expression are required to demonstrate that those limitations are necessary in a democratic society for the accomplishment of the compelling objectives they pursue.⁴² 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.⁴³

⁴⁰ IACHR. [Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 74.

⁴¹ Suprema Corte de Justicia de la Nación de México (SCJN). June 20, 2013. [Invalida SCJN Artículo 373 del Código Penal del Estado de Veracruz](#); Suprema Corte de Justicia de la Nación de México (SCJN). Acción de Inconstitucionalidad 29/2011. Judgment of June 20, 2013. Available at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=132774>

⁴² 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. 120-123; H.R. I/A Court H.R. *Compulsory Membership in an Association prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 46.

⁴³ IACHR. [Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 84.

50. The Supreme Court of Mexico [*Suprema Corte de Justicia de la Nación de México*] further developed these concepts in the previously cited judgment of June 20, 2013.⁴⁴ It held that, “It is not enough for the legislature to demonstrate that the aim pursued is legitimate; rather, it must ensure that the measure employed is carefully designed to accomplish that compelling aim.” Along these lines, the Court specified that “necessary” is not the same as “useful” or “opportune.” Accordingly, “In order for the restriction to be legitimate, the certain and compelling need to impose the limitation must be clearly established. In other words, it must be demonstrated that the objective in question cannot reasonably be accomplished by another measure less restrictive of freedom of expression. This means that it must not be limited beyond what is strictly necessary in order to guarantee the full exercise and scope of this human right,” held the Court. In its decision, the Supreme Court found that “A restriction to freedom of expression must be proportionate to the legitimate aim that justifies it, and strictly tailored to the accomplishment of that objective without interfering in the legitimate exercise of said freedom.”
51. In applying these standards to this specific case, the Court concluded that “the omission from the challenged provision of malice as an integral part of the statutorily defined conduct creates a very relevant **chilling effect**, whereby well-intentioned individuals may feel inhibited or frightened to express necessary alerts with respect to the ‘real’ existence of those elements (emphasis in the original).” “In this regard, article 373 caused greater harm than the harm it intended to prevent,” the Court summarized. Therefore, the Court, sitting *en banc*, found that the article was not “carefully designed to interfere as little as possible with freedom of expression and the right to information,” and did not “adequately meet the requirement of necessity demanded for all subsequent liability for the illegitimate exercise of speech.” It concluded that “The fear of serious harm does not by itself justify the chilling effect created by the threat of criminal prosecution or the seriousness of the penalty. The silence imposed by the State ends up blocking the flow of information more than necessary in a democratic society, and therefore violates articles 6 and 7 of the Federal Constitution.”
52. The First Division of the Supreme Court of Mexico [*Primera Sala de la Suprema Corte de Justicia de la Nación de México*], ruled similarly in its May 20, 2015 judgment on the unconstitutionality of article 398 Bis⁴⁵ of the Criminal Code of Chiapas that prohibited

⁴⁴ Suprema Corte de Justicia de la Nación de México (SCJN). June 20, 2013. [Invalida SCJN Artículo 373 del Código Penal del Estado de Veracruz](http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=132774); Suprema Corte de Justicia de la Nación de México (SCJN). Acción de Inconstitucionalidad 29/2011. Judgment of June 20, 2013. Available at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=132774>. The sentence cites the following: 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. Parr. 120-233; *Compulsory Membership in an Association prescribed by Law for the Practice of Journalism* (Articles 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 44.

⁴⁵ Article 398 Bis of the Criminal Code of Chiapas: “Any person who obtains and provides confidential or classified information from the public security or armed forces for the purpose of preventing the individual or individuals active of the crime from being detained or for the purpose of enabling them to engage in criminal activity to the detriment of a third party, shall be penalized with two to fifteen years of imprisonment and a fine of two hundred to four hundred days of minimum wage.

When the behavior is carried out using persons who are minors or persons without the capacity to understand the unlawful nature of the act, the penalty shall be increased by one-half of that indicated in the first paragraph.

“halconeó” [acting as a lookout].⁴⁶ The provision imposed a term of imprisonment between two and fifteen years for persons “who obtain and disclose confidential or reserved information from the public security or armed forces for purposes of preventing the perpetrator or perpetrators of the crime from being arrested or for them to be able to conduct criminal activity against a third party.” In this case, the Court ruled on an *amparo* petition filed by the non-governmental organization *Artículo 19*, which called into question the vagueness of the terms of the provision, on the assertion that practically any search for information on matters of public safety was thus absolutely restricted. In its rationale for finding the provision unconstitutional, the First Division [*Primera Sala*] de la Suprema Corte de Justicia de la Nación de México held that although the provision pursued a legitimate aim—protecting public safety—“the restriction was not oriented toward satisfying the public interests meant to be protected (necessity) and the restriction imposed is not the one that restricts the right of access to information to the least extent possible (suitableness). All of which, in turn (...) is related, in the instant case, to the violation of the principle that criminal provisions must be exhaustive in nature.”

53. The judgment of the First Division, delivered by Judge Alfredo Gutiérrez Ortiz Mena, held that “the challenged provision restricts the enjoyment of the essential core of the right of access to information (...) by criminalizing the public discussion of a part of the government’s activity that ideally should be front and center for society to evaluate—that is, public safety (core speech), and is not limited to restricting incidental or peripheral aspects of that speech.” The judgment contained important references to the doctrine and jurisprudence of the Inter-American Commission and the Inter-American Court of Human Rights with respect to the right to information. Among other things, it mentioned the standards on the right to information set forth in the *Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil* and the *Case of Claude Reyes et al. v. Chile*.
54. In Colombia, the Constitutional Court [*Corte Constitucional*] applied the *three-part test* to determine which constitutional remedy would be least restrictive of freedom of expression, for purposes of adopting measures designed to protect the rights to honor and reputation of a citizen who sought the removal of content from the Internet concerning alleged criminal acts of which she was never found guilty. She sought to

Likewise, the sentence will be increased up to one half when the behavior is carried out by civil servants who belong or have belonged to a public security institution, the armed forces or who are persons having belonged or belonging to legal entities that provide private security services.

When the behavior is carried out using official equipment or vehicles, or vehicles of a public or commercial transport service, or that by their characteristics are similar to those in appearance, the penalty will be increased up to one half of the one indicated in the first paragraph.

Likewise, confidential or classified information is understood as that which is related to the activities coming from operations, investigations, prosecution of crimes or their perpetrators, the same information that, in terms of the Political Constitution of the United Mexican States and the Law that Guarantees the Transparency and the Right to Public Information for the State of Chiapas, has such a nature.”

⁴⁶ Primera Sala de la Suprema Corte de Justicia de la Nación (SCJN). Amparo en revisión 492/2014. Judgment of May 20, 2015. Available at:

<http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=167949>

have measures ordered to prevent search engines from providing links to the news story published by *El Tiempo* in its web version. In Judgment T-277 of May 12, 2015, the Court upheld the lower court's decision regarding the need to grant the protection requested by the citizen, but ordered measures it considered less restrictive in application of the three-part test.⁴⁷ In its examination of the lower court's decision, the Court held that "This decision ordered the *El Tiempo* Publishing House to delete from the web page all of the negative information about Mrs. Gloria's arrest and the criminal investigation against her for the offense of human trafficking. Although it is a measure that seeks to protect the rights of the petitioner, we should not lose sight of the fact that it also imposes a restriction on the media outlet's right to freedom of expression, as it suppresses the published information." Therefore, "this being a matter that has the potential to jeopardize the freedom of expression of a media outlet, the Court finds that three-part test developed in the case law of the Inter-American Court of Human Rights should be used in the examination of this case, to the extent that it is designed specifically to assess whether a limitation on the restriction of the right to freedom of expression is in turn an unlawful violation of that right." Weighing the "need" of the measure adopted by the lower court judge, the Constitutional Court found that it was necessary "to verify whether there are other constitutionally admissible means that are equally suitable for the proposed objective and less harmful to the right to freedom of expression of the *El Tiempo* Publishing House."

55. The three-part test was also applied by the Supreme Court of Argentina in 2013⁴⁸ and the Supreme Court of Uruguay in 2016, in examining the legitimacy of measures designed to guarantee the diversity and plurality of the media and combat monopolies and oligopolies. In those cases, which are examined at greater length below, the courts found that the regulation provided by the audiovisual communication services laws of both countries pursued a legitimate aim consistent with the democratic standard.
56. The Supreme Court [*Suprema Corte de Justicia*] of Uruguay found that, by restricting the enjoyment of fundamental rights, the legislature is limited by "the precaution that the restrictive law (...) is enacted for 'reasons of general interest' and by the principle of proportionality that 'appears as a logical consequence.'"⁴⁹ Along these lines, it held that "proportionality in the strict sense leads to an examination of the reasonableness of the legally provided measure considered in its totality, by weighing the limitation or restriction of the right, on one hand, and the aim it seeks to accomplish, on the other. If the curtailment of the potential enjoyment or exercise of the right is excessive in relation to the proposed objective, the measure is disproportionate and therefore unlawful. It follows that the assessment of proportionality in the strict sense focuses on the means/ends relationship, which must be balanced or proportionate (Cf. Casal Hernández [...])." The Court noted that, additionally, and according to the parameters established by the Inter-American Court of Human

⁴⁷ Corte Constitucional de Colombia. Sala Primera de Revisión. [Judgment T-277/15](#) of May 12, 2015.

⁴⁸ Corte Suprema de Justicia de la Nación Argentina. [Grupo Clarín AS y otros c/Poder Ejecutivo Nacional y otros/ acción meramente declarativa](#). Judgment of October 29, 2013.

⁴⁹ Suprema Corte de Justicia de Uruguay. IUE 1-18/2015. [Directv de Uruguay Limitada c/ Poder Legislativo](#). Acción de inconstitucionalidad. Judgment No. 79 of April 5, 2016.

Rights in Advisory Opinion 5/85, it is appropriate to examine in each case whether a restriction on freedom of expression is necessary to secure one of the objectives mentioned in article 13.2 of the American Convention, reaffirming that such objectives “must be tied to the legitimate needs of societies and democratic institutions.”

CHAPTER VI
CASE LAW ON THE PRESUMPTION
OF AB INITIO COVERAGE FOR ALL
KINDS OF EXPRESSION, INCLUDING
OFFENSIVE, SHOCKING OR
DISTURBING SPEECH

CASE LAW ON THE PRESUMPTION OF AB INITIO COVERAGE FOR ALL KINDS OF EXPRESSION, INCLUDING OFFENSIVE, SHOCKING OR DISTURBING SPEECH

57. The Inter-American Commission and the Court have emphasized that freedom of expression must be guaranteed not only in terms of the dissemination of ideas and information received favorably or considered inoffensive or indifferent but also with regard to those that offend, shock, upset, are disagreeable, or disturb the State or any sector of the population.⁵⁰ The bodies of the Inter-American System have underscored the importance of this rule to ensure the pluralism, tolerance, and spirit of openness that are indispensable in a democratic society. This Office of the Special Rapporteur has emphasized that this general assumption that all expression is covered is explained by the primary obligation of the State to remain neutral toward the content of the opinion and information disseminated, as well as by the need to guarantee that, in principle, no persons, groups, ideas, or means of expression are excluded *a priori* from public discourse.⁵¹
58. The application of this standard by courts in the region has contributed to the judicial protection of the right to freedom of expression in cases where there have been attempts to restrict the right because of the content of the speech.
59. For instance, in Brazil, on September 19, 2013, the Fourth Civil Chamber of Private Law of the Court of Justice of the state of São Paulo [*Tribunal de Justiça do Estado de São Paulo. 4ª Câmara de Direito Privado*], in its decision in the *União Nacional de Entidades Islâmicas do Brasil v. Google Brasil Internet Ltda.* case, held that the content of a video critical on the religion of Islam was protected [*encontra-se socorrido*] by the right to the free expression of artistic thought and the free circulation of ideas.⁵² The

⁵⁰ 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. v. 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. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of January 28, 2009. Series C No. 195. Para. 116; IACHR. [Annual Report 1994](#). Chapter V: Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights. Title III. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995.

⁵¹ IACHR. [Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 30.

judgment held that religious criticism is an expression of thought, as citizens are entitled to set forth, debate, and practice their beliefs. In making these arguments, the Chamber upheld the judgment of the trial court and dismissed the claim for damages and the removal from YouTube of all of the videos from the film entitled “The innocence of muslims” [*Inocência dos Muçulmanos*].

60. In consonance with the previously explained, the issue was also taken up by the First Division of the Mexican Supreme Court [*Primera Sala de la Suprema Corte de Justicia de la Nación de México*] in a judgment handed down on February 7, 2014.⁵³ The decision rejected an *amparo* review petition in which a public servant sought civil damages for harm to his honor based on the dissemination of opinions critical of his work as the academic coordinator of a State university. The First Division held that “The main consequence of the preferential position of freedom of expression and the right to information is the general presumption that all expressive or informative speech is covered by the constitution” (highlighted in the original). Citing the Office of the Special Rapporteur, the Court held that that presumption “is justified by the primary obligation of State neutrality toward the content of the opinions and information disseminated, as well as by the need to ensure that, in principle, no persons, groups, ideas, or means of expression are excluded *a priori* from public discourse.” The judgment underscored that “protected speech includes not only ideas that are received favorably or viewed as inoffensive or indifferent but also speech that may offend, shock, disturb, bother, upset, or disgust, as that is precisely where freedom of expression is most valuable. These are the demands of a plural, tolerant, and open society, without which a true democracy does not exist.”

⁵² Tribunal de Justiça do Estado de São Paulo. 4ª Câmara de Direito Privado. Processo Nº 0192984-85.2012.8.26.0100. Judgment of September 19, 2013. Available at: <https://esaj.tjsp.jus.br/cposg/open.do>

⁵³ Primera Sala de la Suprema Corte de Justicia de la Nación de México (SCJN). Amparo Directo en Revisión 3123/2013. Judgment of February 7, 2014. Available at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=156633&SinBotonRegresar=1>

CHAPTER VII
CASE LAW ON SPECIALLY
PROTECTED SPEECH

CASE LAW ON SPECIALLY PROTECTED SPEECH

61. Albeit all forms of expression are, in principle, protected by the freedom enshrined in article 13 of the American Convention, there are certain types of speech that receive special protection, given its importance to the exercise of all other human rights or to the consolidation, operation, and preservation of democracy. This Office of the Special Rapporteur has determined from the inter-American case law that such specially protected modes of speech are: (a) political speech and speech about matters of public interest; b) speech about public servants and candidates for public office; and (c) speech that comprises an element of the personal identity or dignity of the speaker.
62. This issue was addressed by the Constitutional Court of the Dominican Republic [*Tribunal Constitucional de República Dominicana*] in its April 4, 2016 judgment finding seven articles of the Law on the Expression and Dissemination of Thought unconstitutional.⁵⁴ The Court was called upon to adjudicate a direct unconstitutionality action challenging eleven provisions of the law, and five articles of the Criminal Code. The plaintiffs, the directors of three newspapers—Rafael Molina Morillo, the director of *El Día*, Miguel Antonio Franjul, the director of *Listín Diario*, and Osvaldo Santana, the director of *El Caribe*—and the *Fundación Prensa y Derecho* [Press and Law Foundation], alleged that the challenged articles made “speech crimes” and “liability for the acts of another” criminal offenses punishable by imprisonment, which was inadmissible under the inter-American standards and the constitutional protection of the right to freedom of expression in the country. The decision, found that the criminalization of speech about public servants in the performance of their duties or persons holding government positions, is inadmissible and “affects the essential core of freedom of expression and opinion.” The Court ruled as follows:

In view of the legal precedent, the Court concludes that the provisions of articles 30, 31, 34, and 37 of Law No. 6132,⁵⁵ by establishing criminal penalties for any

⁵⁴ Tribunal Constitucional de República Dominicana. [Expediente No. TC-01-2013-0009](#). Acción directa de inconstitucionalidad. Judgment TC/0075/16 of April 4, 2016.

⁵⁵ Article 30.- Article 30.- Defamation committed by one of the means set forth in articles 23 and 29 to the detriment of the Courts and Tribunals, the Armed Forces, the National Police, Legislative Chambers, Town Halls and other State institutions, will be punished with a one month to one year prison sentence and with a fine of RD \$ 50.00 to RD \$ 500.00, or with only one of these two penalties. Article 31.- The same punishment established in article 30 applies to defamation committed by the means announced in articles 23 and 29 to the detriment of: a) One or more members of the Cabinet; b) One or more members of the Legislative Chambers; c) One or more public officials; d) One or more depositaries or agents of public authority; e) One or more citizens in charge of any service or official, temporary or permanent mandate; f) A witness because of his deposition. This article only applies to defamation committed by reason of the office or quality of the persons who are considered aggrieved. Article 34.- Defamation (Injuria) committed by the same means to the detriment of the

defamatory act against any public servant in the performance of his or her duties or persons holding government positions, constitute a legal limitation that affects the essential core of freedom of expression and opinion through the press when it concerns public servants subject by their nature to citizen oversight through public opinion, and therefore are unconstitutional.⁵⁶

63. Similarly, on April 21, 2014 the Constitutional Court [*Corte Constitucional*] of Panama handed down a decision upholding the constitutionality of article 196 (previously 192)⁵⁷ of the Criminal Code [*Código Penal*]. This provision partially decriminalized crimes against honor in those cases where the alleged victims are high-ranking public servants, elected officials, or governors.⁵⁸ The Court recalled its doctrine and ruled that public servants are subject to a higher degree of scrutiny, which is fundamental for “the operation of democratic society”. In setting forth the reasoning for the decision adopted by the majority of the Court, the Judge who delivered the opinion, José Eduardo Ayu Prado Canals, stated that although the national constitution and the international instruments protect all people’s right to their honor,

from the perspective of the supranational laws on human rights, when an individual assumes a public position, he or she becomes a person of public relevance; therefore, he or she inevitably and deliberately is exposed to the watchful oversight of his or her

bodies or persons designated by articles 30 and 31 of this law shall be punished with a six days to three months prison penalty and a fine of RD\$ 6.00 to RD\$ 60.00 or with just one of these two penalties. Article 37.- The truth of the defamatory act, but only when it relates to the functions performed by the allegedly aggrieved body or person, may be established by all means of evidence in the case of accusations against the constituted Powers, Armed Forces, National Police, public institutions and against the persons listed in article 31. The truth of defamatory and libelous accusations may also be established against the directors or administrators of any industrial, commercial or financial enterprise that publicly applies for savings or credits. Likewise, the truth of allegedly defamatory acts can always be proved except: a) When the accusation concerns the private life of one or more persons; b) When the accusation refers to an event that constitutes an amnestied or prescribed violation, or that has resulted in a sentence erased by rehabilitation or review, provided that the person to whom the accusation is made is not charged or convicted with new crimes or offenses. In the cases provided for in the preceding section, the evidence to the contrary is reserved. If the defamatory event is proven, the complaint against the defendant will be rejected. In any other circumstance and in which it concerns any other person not qualified by this law, when the event of which the person is accused is being object of judicial proceedings initiated at the request of the public prosecutor or was subject of a complaint by the defendant himself, it shall be discontinued during the investigation and hearing of the case, prosecution and ruling of the crime of defamation. (Consejo del Estado de República Dominicana. Ley No. 6132 de Expresión y difusión del Pensamiento. December 19, 1962. Available at: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/83343/91947/F1965099340/DOM83343.pdf>)

⁵⁶ Tribunal Constitucional de República Dominicana. [Expediente No. TC-01-2013-0009](#). Acción directa de inconstitucionalidad. Judgment TC/0075/16 of April 4, 2016.

⁵⁷ Subsequently it was registered in the new Criminal Code with article 196. The article that originated the challenge stated: “In crimes against honor, public retraction consented by the offended excludes criminal responsibility. When in the behaviors described in the preceding article, those allegedly offended are one of the public servants dealt with in Article 304 of the Political Constitution, elected officials or governors, the criminal sanction will not be imposed, which does not exclude civil responsibility from the event”. The plaintiff argued that the normative reference “the criminal sanction will not be imposed” violated articles 17, 19, 20 and 163 number 1 of the National Constitution. (Asamblea Nacional de la República de Panamá. April 26, 2010. Article 196. Available at: <http://www.asamblea.gob.pa/legispan-2/>).

⁵⁸ Órgano Judicial de la República de Panamá. Registro Judicial. Advertencia de Inconstitucionalidad. Expediente No. 478-08. Judgment of April 11, 2014. Pages 749-766. Available at: <http://www.organismojudicial.gob.pa/wp-content/uploads/2014/05/rj2014-04.pdf>

acts and gestures, both by journalists and by the multitude of citizens. As such, he or she must exhibit greater tolerance,” he affirmed. “In other words, when a public servant becomes a person of public relevance, he or she must withstand the fact that his or her honor will be affected or influenced to a greater degree. This is necessary for political pluralism and the establishment of a critical, open, and tolerant spirit, without which democratic society and the oversight and control of the authorities who act on behalf of the people would be rendered devoid of content.

64. In Colombia, the Chamber of Criminal Cassation of the Supreme Court addressed the special protection of speech about public servants and the public interest.⁵⁹ In its judgment of July 10, 2013, acquitting a journalist of the defamation charge filed against him after a lengthy court case brought by a high-ranking public servant, the Court referred to the “principle of public relevance” as the applicable standard. Citing the precedent established by the Constitutional Court in Judgment SU- 1723 of 2000, it held that this principle “justifies the preferential position *prima facie* of freedom of expression vis-à-vis other fundamental rights whose purpose is to safeguard the private sphere of the individual. It refers to the need for information to be developed within the framework of the general interest in the matter at hand, in which regard two essential aspects come into play: (i) the status of the person; and (ii) the content of the information.”
65. On February 7, 2014, the First Division of the Supreme Court of Mexico⁶⁰ dismissed as groundless a direct *amparo* petition seeking the protection of the honor and reputation of a public servant following the mass email distribution of information and opinions critical of his performance as the academic coordinator of a State university.⁶¹ In rendering its decision,⁶² the Court analyzed what standard it should use to assess the lawfulness of the speech in question, based on the status of the subjects involved in the specific case and the public relevance of the information disseminated. In this analysis, the Court expressly incorporated the inter-American doctrine and jurisprudence as summarized below.

⁵⁹ Corte Suprema de Justicia de Colombia. Sala de Casación Penal. Casación sistema acusatorio N° 38.909. Judgment of July 10, 2013. Available at:

<http://flip.org.co/resources/documents/c4ab6f8aa7b923cc81bf7d99e4da4e93.pdf>

⁶⁰ Primera Sala de la Suprema Corte de Justicia de la Nación de México (SCJN). Amparo Directo en Revisión 3123/2013. Judgment of February 7, 2014. Available at:

<http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=156633&SinBotonRegresar=1>

⁶¹ The case went to court based on the lawsuit initiated by the public official demanding payment of compensation for moral damages derived from the distribution of various communications through the Internet, which she stated, contained expressions that undermined her reputation and institutional prestige in her workplace. After the rejection of her claim in previous judicial instances, the official appealed before the Supreme Court of Justice. The appellant relied on the following arguments: (a) the information disclosed has no public relevance nor encourages national debate; b) the co-defendants are not journalists nor communication professionals, so that the standard of effective malice [estándar de malicia efectiva] is not applicable; and c) assuming that her academic duties were of public relevance, her nature as a public official does not automatically require her to tolerate the dissemination of false events or insults. Primera Sala de la Suprema Corte de Justicia de la Nación de México (SCJN). Amparo Directo en Revisión 3123/2013. Judgment of February 7, 2014. Available at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=156633&SinBotonRegresar=1>

66. The First Division of the Court maintained that there was a “dual system of protection” in which “the limits of criticism are broader if it concerns individuals who, because they are involved in public activities or because of the role they play in a democratic society, are exposed to a more rigorous oversight of their activities and statements than those private citizens who have no public influence.” Commenting on the position of the Inter-American Court in the *Case of Herrera Ulloa*, the Court held that “the emphasis of this different threshold of protection does not lie in the status of the individual, but rather in the public interest nature of his or her activities or actions.” Accordingly, the Court’s unanimous decision noted that, “in order for the requirement of subsequent liability for speech that infringes upon the honor of public servants or other individuals involved in the performance of public duties to constitute a necessary, suitable, and proportionate legal response, stricter conditions must be met than those that apply in the case of infringements upon a private citizens’ right to honor.” Finally, the high court summarized its position in the following terms:

this First Division finds that, in a democratic society, there is a slim margin to any restriction of political speech or speech concerning matters of public interest, such as speech calling into question the entities and public servants that make up the State. This does not mean that public servants cannot avail themselves of the judicial protection of their honor when it is subject to unjustified attacks, but it must be done in a manner consistent with the principles of democratic pluralism and through mechanisms that do not have the potential to create inhibition or self-censorship.

67. On September 17, 2014, the Federal Supreme Court of Brazil [*Supremo Tribunal Federal*] (STF) ruled in claim [*Reclamação*] 18.638 that “Persons who hold positions in government enjoy a less intense level of protection of their right to privacy. The oversight of government power and the prevention of censorship broadens the lawful degree of interference in the personal sphere of conduct of State agents.”⁶³ The Court ruled similarly in the previously cited case involving the appeal filed by the magazine *IstoÉ* to suspend an injunction that imposed prior censorship.

⁶³ Supremo Tribunal Federal do Brasil (STF). [Reclamação 18.638](#). Judgment of September 17, 2014.

CHAPTER VIII
CASE LAW ON THE
INCOMPATIBILITY OF DESACATO
(DEFAMATION OF PUBLIC
OFFICIALS) LAWS AND THE
AMERICAN CONVENTION

CASE LAW ON THE INCOMPATIBILITY OF DESACATO (DEFAMATION OF PUBLIC OFFICIALS) LAWS AND THE AMERICAN CONVENTION

68. Principle 11 of the Declaration of Principles on Freedom of Expression establishes that “Public officials are subject to greater scrutiny by society,” and therefore, “Laws that penalize offensive expressions directed at public officials, generally known as ‘*desacato* laws,’ restrict freedom of expression and the right to information.” In other words, do not constitute a legitimate restriction on freedom of expression under article 13 of the American Convention.
69. The Inter-American Commission on Human Rights has posited that the “*desacato* laws” are an illegitimate restriction on freedom of expression, because they do not pursue a legitimate aim under the American Convention and are not necessary in a democratic society. According to the IACHR, “the use of ‘*desacato* laws’ to protect the honor of public functionaries acting in their official capacities unjustifiably grants a right to protection to public officials that is not available to other members of society. This distinction inverts the fundamental principle in a democratic system that holds the Government subject to controls, such as public scrutiny, in order to preclude or control abuse of its coercive powers. If we consider that public functionaries acting in their official capacity 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.”⁶⁴
70. As this Office of the Special Rapporteur has explained, in the opinion of the IACHR, “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

⁶⁴ IACHR. [Annual Report 1994](http://cidh.oas.org/annualrep/94span/cap.V.htm). Chapter V: Report on the Compatibility of “Desacato” Laws with the American Convention On Human Rights. Title IV Section B). OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995. Available at: <http://cidh.oas.org/annualrep/94span/cap.V.htm>

essential to the functioning of a democratic system, and unnecessarily restrict freedom of expression.”⁶⁵

71. Below are examples in which the inter-American standards have been decisive in protecting the right to freedom of expression in Brazil, even within the framework of legal systems that still have so-called crimes of *desacato* against public servants on the books.
72. In a decision of December 15, 2016, the Judges of the Fifth Chamber of the Superior Court of Justice of Brazil [*Quinta Turma do Supremo Tribunal de Justiça do Brasil* (STJ)], unanimously, followed the vote of Judge Rapporteur Ribeiro Dantas, in an appeal filed by the Public Defender's Office of São Paulo before the STJ, against a decision of the Court of Justice [*Tribunal de Justiça*] of São Paulo that sentenced a man to five years and five months of imprisonment for stealing a bottle of drink valued at BRL\$ 9 (approximately US\$ 3), for the crime of *desacato* to the detriment of the military police who would have detained him, and for resisting detention.⁶⁶ The Judges annulled the sentence, stating that the criminal provision of *desacato* was not compatible with article 13 of the American Convention on Human Rights. In this important decision, the TSJ exercised control of the conventionality of the criminal provision, taking into account the decisions and reports adopted by the IACHR in this matter. In this regard, the Court held that the adherence to the Pact of San José implies the obligation to incorporate in the national legislation the criteria of interpretation of the international organizations and their methods of interpretation, including the *pro person* standard. In this regard, it noted that the IACHR "has already expressed that *desacato* laws lend themselves to abuse as a means to silence ideas and opinions considered uncomfortable by the establishment and therefore provide a greater level of protection for State agents than particulars, in contravention of democratic and egalitarian principles". The Court concluded that "the criminalization of contempt is opposed to universal humanist values because it reveals the preponderance of the state - personified in its agents - over the individual. The existence of these norms in the [Brazilian] legal system is anachronistic and represents unequal treatment of employees and individuals unacceptable in the rule of law."⁶⁷
73. On July 4, 2016, the Special Criminal Court of the Second Criminal Division of the District of Belford Roxo in Brazil, [*Juizado Especial Criminal Adjunto a Segunda Vara Criminal da Comarca de Belford Roxo*], applied the inter-American standards and, following a strict exercise in "conventionality control," ruled inadmissible a *desacato* complaint filed by the Office of the Attorney General.⁶⁸ The Judge Alfredo José

⁶⁵ IACHR. [Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 141.

⁶⁶ Superior Tribunal de Justiça do Brasil (STJ). [Recurso Especial No. 1.640.084 - SP \(2016/0032106-0\)](#). Judgment of December 15, 2016.

⁶⁷ Superior Tribunal de Justiça do Brasil (STJ). [Recurso Especial No. 1.640.084 - SP \(2016/0032106-0\)](#). Judgment of December 15, 2016.

⁶⁸ Tribunal de Justiça do Estado do Rio de Janeiro Comarca de Belford Roxo. Juizado Especial Criminal Adjunto a 2da Vara Criminal da Comarca de Belford Roxo. Processo No. 0013156 -07.2015.8.19.0008. Judgment of July 4, 2016. Available at: <http://emporiadodireito.com.br/juiz-do-tjrj-faz-controle-de-convencionalidade-do-crime-de-desacato/>

Marinho Neto was of the opinion that the complaint should be dismissed based on the protection of the right to freedom of expression that emerges from articles: 1, II, III, V and its sole paragraph; 5, IV, V, and IX; and article 220, all of the Federal Constitution; article 13 of the American Convention; article 27th of the Vienna Convention on the Law of Treaties; article 395.III of the Code of Criminal Procedure of Brazil [*Código de Procedimento Penal*] (CPP), and Principles 1 and 11 of the Declaration of Principles on Freedom of Expression adopted by the IACHR. The judgment held that the complaint should be shelved immediately, “due to the unconstitutionality and non-conventionality of the criminal offense of *desacato* contained in article 331 of the Criminal Code [*Código Penal*].”⁶⁹ It further underscored that, “Citizens have the right to criticize and examine the actions and attitudes of public servants in the performance of their duties,” this being a core element of democracy. The judge noted that, insofar as Brazil acceded to the American Convention “it is subject to the action” of the IACHR and to the jurisdiction of the Inter-American Court of Human Rights. It further held that, according to article 27^t of the Vienna Convention —of which Brazil is also a signatory—a State party cannot invoke the provisions of its domestic law to justify the breach of a treaty. It held that, in short, the country would have to “formally expunge” article 331 of the Criminal Code from its legal system; otherwise, it would incur international responsibility.

74. The judgment incorporated the doctrine of the IACHR that *desacato* laws are incompatible with the American Convention and observed that maintaining this offense in the Brazilian legal system “inhibits individuals from expressing their opinions and thoughts to government authorities,” having a chilling effect on freedom of expression, because of the self-censorship in which citizens are liable to engage. The court maintained that “the interpretation and enforcement of the law” by the State judge should entail not only an analysis of its constitutionality but also a “conventionality control” analysis, as it was “imperative” in the Court’s view, “to acknowledge the non-conventionality and unconstitutionality of the criminal type in question, “to do otherwise violates the fundamental and inalienable right of persons to freedom of expression, which constitutes the axiological and ontological foundation of democracy itself.”
75. Similar reasoning was expressed on March 17, 2015 by Judge Alexandre Morais da Rosa, of the Fourth Criminal Division of the District of the Capital of Santa Catarina [4^a *Vara Criminal da Comarca da Capital de Santa Catarina*], in ruling inadmissible a complaint filed by the Office of the Attorney General against a citizen for the offense of criminal defamation [*desacato*] for statements allegedly made to police officials during an operation.⁷⁰ In this case,⁷¹ the court also performed a “conventionality

⁶⁹ Art. 331 - Desacatar funcionário público no exercício da função ou em razão dela: Pena - detenção, de seis meses a dois anos, ou multa (Presidência da República de Brasil. [Código Penal](#). December 7, 1940. Article 331).

⁷⁰ Poder Judiciário de Santa Catarina. 4^a Vara Criminal da Comarca da Capital de Santa Catarina. [Processo No. 0067370-64.2012.8.24.0023](#). Judgment of March 17, 2015.

⁷¹ In this case, according to the account of the facts contained in the sentence, the citizen was denounced for “*desacato*”, after allegedly saying to police agents who intervened in a street brawl in which he had reportedly taken part: “I do not like the Police and they are all a bunch of animals, arrogant and good for nothing”, refusing to contribute any clarification about the brawl “much less” to a female police agent.

control.” The court held that the conviction of an individual under Brazilian law for the offense of *desacato* violates article 13 of the American Convention on Human Rights, as interpreted by the Inter-American Commission on Human Rights. The judgment cited the decisions of the Inter-American Commission on Human Rights on the incompatibility of the *desacato* laws with the Convention, whereby it has determined that these types of provisions do not pass the *three-part test*, given that they fail to meet the criterion of necessity and do not pursue a legitimate objective in a democratic society.

CAPÍTULO IX
CASE LAW ON THE SPECIAL
PROTECTION OF OPINIONS AND
THE NONEXISTENCE OF CRIMES OF
OPINION

CASE LAW ON THE SPECIAL PROTECTION OF OPINIONS AND THE NONEXISTENCE OF CRIMES OF OPINION

76. The right to disseminate ideas and opinions by any means and in the terms provided in article 13 of the American Convention is protected under the robust protection of the right to free expression in the Inter-American System. Principle 2 of the Declaration of Principles on Freedom of Expression emphasizes this protection. Reaffirming the inter-American doctrine and jurisprudence, the Office of the Special Rapporteur for Freedom of Expression has underscored that only facts, and not opinions, are subject to determinations of accuracy or falsity; therefore, no one can be convicted for an opinion about a person when it does not entail the false attribution of verifiable facts.⁷²
77. Consistent with this reasoning, the Court of Appeals of Washington, Division 1, held in the 2013 case of *U.S. Mission Corp. v. Kiro TV, Inc.* that a statement of opinion is not actionable as defamatory.⁷³ The court issued this ruling after examining one of the allegedly false statements included in a news report that made reference to the United States Mission Corporation, submitted as evidence in a suit for defamation against the *Kiro TV* television station. On this point, the Court found that it was a statement of opinion, and held that a statement of opinion cannot be defamatory. The judgment upheld the lower court's dismissal of the defamation suit filed by the Seattle transitional housing service against the local television station.
78. On August 29, 2016, the Sixth Specialized Criminal Division of the Superior Court of Lima for Cases with Defendants Not in Custody [*Sexta Sala Especializada en lo Penal para Procesos con Reos Libres, de la Corte Superior de Justicia de Lima*], overturned the conviction of journalist Rafael Enrique León Rodríguez, a columnist for the magazine *Caretas*, who was found guilty of the offense of aggravated defamation against a

⁷² IACHR. [Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 109; I/A Court H.R. Case of *Kimel v. Argentina. Merits, Reparations, and Costs*. Judgment of May 2, 2008. Series C No. 177. Para. 93; I/A Court H.R. Case of *Tristán Donoso v. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. Para.124

⁷³ Court of Appeals of the State of Washington, Division 1. *United States Mission Corporation v. Kiro TV, Inc.* No. 66868-4-I. Judgment of January 14, 2013. Available at: <http://www.leagle.com/decision/In%20WACO%2020130114B77>

fellow journalist.⁷⁴ The Court held that there was no “criminal content” in the journalist’s conduct because the publication that gave rise to the complaint was an opinion column that concerned matters of public interest. The Court based its reasoning on Peruvian case law and on the judgments of the Inter-American Court of Human Rights.⁷⁵

79. The Chamber of Criminal Cassation of the Supreme Court [*Corte Suprema de Justicia*] of Colombia examined the special protection of political opinion. In its previously cited judgment of July 10, 2013, acquitting journalist Luis Agustín González of the defamation [*injuria*] charge brought against him as the result of a lawsuit filed by former Governor Leonor Serrano,⁷⁶ the Court held that: although “disrespectful,” the “statements concerning the character of the former governor—who was referred to as despotic, arrogant, haughty, demeaning, erratic, flamboyant, and mentally unstable—do not contain objective elements to support the assertion that her honor was undermined or her image tarnished in front of other people. Rather, they pertain to the columnist’s perception of her.” The decision indicated that although the terms used by the journalist could “cause discomfort or humiliation to the complainant because of their highly disrespectful content,” criminal law cannot be “the appropriate forum for resolving these differences or for the aggrieved party to see her legitimate claims of redress satisfied” according to the “principle of strict legality and condition of *ultima ratio* established for criminal law.”
80. On December 17, 2014, the Federal Supreme Court [*Supremo Tribunal Federal*] of Brazil (STF) affirmed that freedom of expression includes the right to criticize and opine.⁷⁷ In its decision, the Court held that, “The essential and irreducible core of the fundamental right to freedom of expression encompasses the right to inform, to be informed, to have and share opinions, and to criticize.” It thus underscored the importance of critical speech in the strengthening of democracy, and affirmed that “reducing the social role of the press to sanitized informative one that is supposedly neutral and impartial” does nothing to contribute to the dynamic of a democratic society. It held that the imposition of objectivity and the prohibition of pejorative opinions and unfavorable criticism “annihilate” the protection of freedom of the press, reducing it to the freedom to inform, which—in spite of being one of its dimensions—is by no means the only one. Freedom of the press and the imposition of objectivity “are mutually exclusive concepts,” emphasized the Court. It further stressed that the threshold for the protection of freedom of expression is even higher in cases of public interest.

⁷⁴ Corte Superior de Justicia de Lima. Expediente N° 14156-2014. Judgment of August 29, 2016. Available at: <http://legis.pe/wp-content/uploads/2016/09/Lee-aqu%C3%AD-la-sentencia-de-segunda-instancia-que-absuelve-a-Rafo-Le%C3%B3n-Legis.pe.pdf>

⁷⁵ Corte Superior de Justicia de Lima. Expediente N° 14156-2014. Judgment of August 29, 2016. Available at: <http://legis.pe/wp-content/uploads/2016/09/Lee-aqu%C3%AD-la-sentencia-de-segunda-instancia-que-absuelve-a-Rafo-Le%C3%B3n-Legis.pe.pdf>

⁷⁶ Corte Suprema de Justicia de Colombia. Sala de Casación Penal. Casación sistema acusatorio N° 38.909. Judgment of July 10, 2013. Available at: <http://flijp.org.co/resources/documents/c4ab6f8aa7b923cc81bf7d99e4da4e93.pdf>. The Corte Constitucional de Colombia, with a judgment on April 30, 2014 of the Sala Tercera de Revisión, denied an action for protection brought by the former governor against the decision of the Sala de Casación Penal of the Supreme Court of Justice which is being commented. (Corte Constitucional de Colombia. [Judgment T-265/14](#) of April 30, 2014).

⁷⁷ Supremo Tribunal Federal do Brasil (STF). [Reclamação 16.329 MC/CE](#). Judgment of December 17, 2014, published on February 2, 2015.

CHAPTER X

CASE LAW ON THE APPLICATION
OF THE PRINCIPLE OF FAIR (OR
NEUTRAL) REPORTING

CASE LAW ON THE APPLICATION OF THE PRINCIPLE OF FAIR (OR NEUTRAL) REPORTING

81. The decision of the Inter-American Court in the case of *Herrera Ulloa v. Costa Rica* introduced into the Inter-American System the principle of “neutral reporting” or “fair reporting.” According to this principle, persons who disseminate a news item that is limited to copying statements or information from third parties, will not be subjected to tests of veracity, as long as the source is cited.⁷⁸
82. Consistent with this standard, in a judgment delivered by its Chief Judge, the Supreme Court of the Dominican Republic held that “[w]hen a person, in his public or private life, offers a statement, and another person merely publishes it, making use of the right of access to information and its dissemination, that person is not the author of the information; only the person who made the statement is its author. Therefore, in the event that such information attacks the honor or reputation of a third party, the person who has limited him or herself to disseminating the information by the means set forth in Law No. 6132 is not personally liable for the harm that may be caused to the third party.”⁷⁹ The Judge subsequently declared the unconstitutionality of article 46⁸⁰ of that law (Law on the Expression and Dissemination of Thought), which established so-called vicarious liability of the media directors or editors.

⁷⁸ IACHR. [Annual Report 2012. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Domestic Case Law on Freedom of Expression). OEA/Ser.L/V/II.147 Doc.1. March 5, 2013. Para. 113.

⁷⁹ Suprema Corte de Justicia de República Dominicana. Judgment on Excepciones e Incidentes No 18-2013 of April 17, 2013. Available at: <http://www.yumpu.com/es/document/view/12872337/datos-adjuntos-sentencia-2010-3051>

⁸⁰ Article 46: "The persons in the order indicated below shall be liable, as the principal perpetrators of the penalties constituting the repression of crimes and offenses committed by means of the press:

- 1.- The directors of publications or publishers, whatever their professions or denominations, and in the cases provided for in the second paragraph of article 4, the substitutes of the directors.
- 2.- In the absence of directors, substitutes or publishers, the authors; 3.- In the absence of authors, the printers;
- 4.- In the absence of printers, the vendors, distributors, film exhibitors, announcers, posters setters.

In the cases provided for in the second paragraph of Article 4, subsidiary liability shall fall on persons referred to in paragraphs 2, 3 and 4 of this article as if there were no director of the publication.

When the violation of this law is made through a paid advertisement, notice or publication, appearing in a publication or transmitted by radio or television, the author shall be considered the individual or authorized representatives of the entity or corporation that orders it, who will incur in the liability set forth in section 2 of this article.

Any advertisement that is not strictly commercial must be published or disseminated under the responsibility of a particular person". (Consejo del Estado de República Dominicana. Ley No. 6132 de Expresión y difusión del Pensamiento. December 19, 1962. Article 46. Available at:

<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/83343/91947/F1965099340/DOM83343.pdf>).

CHAPTER XI
CASE LAW ON THE APPLICATION
OF STANDARDS OF ACTUAL
MALICE AND PROPORTIONALITY
WHEN ESTABLISHING
SUBSEQUENT CIVIL LIABILITY

CASE LAW ON THE APPLICATION OF STANDARDS OF ACTUAL MALICE AND PROPORTIONALITY WHEN ESTABLISHING SUBSEQUENT CIVIL LIABILITY

83. According to the Joint Declaration of 2000 issued by the Special Rapporteurs on Freedom of Expression of the UN, the OAS and the OSCE, civil penalties potentially assessed for the abuse of freedom of expression “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.⁸¹” Along these lines, in the case of *Tristán Donoso v. Panama*, the Inter-American Court found that, because of the significant amount requested by the Office of the Attorney General as reparation for the acts it considered to be defamatory, the civil penalty assessed against Tristán Donoso was just as intimidating and inhibiting of the exercise of freedom of expression as a criminal sentence.⁸²
84. The point was addressed by the First Chamber of the Constitutional Court [*Sala Primera de la Corte Constitucional*] of Colombia in the previously cited Judgment T-904/133 of December 2013.⁸³ In reaffirming the existence of specially protected speech, the First Chamber stated that, “the special importance of and potential threat to speech that aims to criticize public servants has led to the consideration that, in principle, any attempt—prior or subsequent—to restrict these types of speech constitutes censorship; and the enactment and enforcement of laws that penalize the criticism of public servants—known as ‘*desacato* laws’—as well as the assessment of substantial civil damages for the exercise of these types of speech, violate of freedom of expression.”
85. The judgment referred to the Report on the Compatibility of *Desacato* Laws with the American Convention on Human Rights.⁸⁴ It also cited the November 29, 2011 judgment of the Inter-American Court in the case of *Fontevecchia y D’Amico v.*

⁸¹ Joint declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. 2010. Available at: <http://www.oas.org/es/cidh/expresion/showarticle.asp?artID=142&IID=2>

⁸² I/A Court H.R. Case of *Tristán Donoso v. Panama*. *Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193.

⁸³ Sala Primera de la Corte Constitucional de Colombia. [Judgment T-904/13](#) of December 3, 2013.

⁸⁴ IACHR. [Annual Report 1994](#). Chapter V: Report on the Compatibility of “Desacato” Laws with the American Convention On Human Rights. Title IV Section B). OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995.

Argentina. Echoing the position of the Inter-American Court, the Colombian Constitutional Court recalled that, “the fear of a disproportionate civil penalty clearly may be as or more intimidating and inhibiting of freedom of expression than a criminal penalty, in that it has the potential to affect the personal and family life of the person who reports—or in this case publishes—information about a public servant, with the clear and damaging result of self-censorship, both for the person affected and other potential critics of the actions of a public servant.”

86. Also, the Mexican Supreme Court established, in a decision issued on February 7, 2014, that the applicable standard to adjudicate the case was “actual malice,” derived from the appellant’s status/activity as a public servant. It held that “the imposition of civil penalties derived from the expression of opinions, ideas, or assessments about a public servant is appropriate only in those cases in which there is false information and the intent to harm, regardless of the status of the person responsible for that expression—that is, regardless of whether that person is a journalist or media professional. This is because the point of distinction is the public activity of the recipient of the expression, who is subject to greater public scrutiny.” The Court held that the information disclosed, which gave rise to the claim for damages from the public servant, was a matter of public interest. It stated that, “The fact that the speech is designed to call into question the performance of the government in itself entails a public interest.”⁸⁵

⁸⁵ Primera Sala de la Suprema Corte de Justicia de la Nación de México (SCJN). Amparo Directo en Revisión 3123/2013. Judgment of February 7, 2014. Available at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=156633&SinBotonRegresar=1>

CHAPTER XII

CASE LAW ON THE RIGHT TO
PROTECT THE CONFIDENTIALITY
OF SOURCES

CASE LAW ON THE RIGHT TO PROTECT THE CONFIDENTIALITY OF SOURCES

87. The inter-American standards have acknowledged that journalists and media workers are entitled to the right to keep their sources confidential. Principle 8 of the Declaration of Principles on Freedom of Expression establishes that “Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.” The Office of the Special Rapporteur for Freedom of expression has interpreted that this principle “provides for the right of every social communicator to refuse to disclose sources of information and research findings to private entities, third parties, or government or legal authorities.”⁸⁶ This prerogative rests on the premise of ensuring, through the work of journalists and media workers, that society as a whole is able to learn of information that it would not otherwise have any way of knowing. Thus, the Office of the Special Rapporteur has maintained that, “confidentiality is an essential element of the work of the journalist and of the role society has conferred upon journalists to report on matters of public interest.”⁸⁷
88. The importance of this prerogative to guarantee the most extensive flow of information has also been expressed by different courts in the region.
89. Thus, for instance, in Judgment 2014-004035 of March 21, 2014, the Constitutional Chamber of the Supreme Court [Sala Constitucional de la Corte Suprema de Justicia] of Costa Rica upheld the right of journalists to maintain the confidentiality of their sources.⁸⁸ The case came before Court as an *amparo* petition filed by journalists from the newspaper *Diario Extra* after one of the paper’s journalists, Manuel Rodríguez Estrada, was subjected to telephone surveillance. The surveillance order was given by the Office of the Assistant Attorney General on Organized Crime [*Fiscalía Adjunta contra Crimen Organizado*], and was executed and requested by the Judicial Investigations Agency [*Organismo de Investigación Judicial*], a body within the Judiciary, as part of an investigation to determine the responsibility of a public servant for leaking confidential information related to two kidnappings for ransom.

⁸⁶ IACHR. Office of the Special Rapporteur for Freedom of Expression. [Background and Interpretation of the Declaration of Principles](#). 2002. Para. 36.

⁸⁷ IACHR. Office of the Special Rapporteur for Freedom of Expression. [Background and Interpretation of the Declaration of Principles](#). 2002. Para. 37.

⁸⁸ Sala Constitucional de la Corte Suprema de Justicia de Costa Rica. Fallos Relevantes Año 2014. Expediente No. 14-000848-0007-CO. Judgment 2014-004035 of March 21, 2014. Available at: <http://sitios.poder-judicial.go.cr/salaconstitucional/Centro%20de%20Jurisprudencia/Sentencias%20relevantes/Sentencias%20Relevantes.htm>; See also, Sala Constitucional Corte Suprema de Justicia de Costa Rica. [Expediente No. 13-007483-0007-CO](#). Recurso de Amparo. Judgment 00531 of January 17, 2014.

The telephone surveillance reportedly sought to determine who had provided the journalist with information about those events.⁸⁹

90. The Court concluded that, in this specific case, the journalist's right to privacy had been violated, and it sought to determine whether that circumstance had additionally entailed a violation of his right to freedom of expression and the right to keep sources confidential. Citing article 13.1 of the American Convention, article 19.2 of the International Covenant on Civil and Political Rights, and Principle 8 of the Declaration of Principles on Freedom of Expression, the Constitutional Court held that, "the confidentiality of sources of information" is "a fundamental right of journalists," and is "instrumental" to the "full enjoyment of the right to disseminate and receive information." In those terms, the high court reaffirmed and cited judgment 2008-007548 of April 30, 2008:

The confidentiality of sources is, then, an indispensable or essential condition for the exercise of the right to information. This confidentiality is also an institutional guarantee, in that it guarantees the right to information, which, in turn, has the objective of creating free public opinion and fostering democratic pluralism. The entitlement of journalists—that is, those who habitually or regularly engage in reporting—to this fundamental right is not an unjustified privilege; rather, as stated earlier, it is a condition *sine qua non* to guarantee freedom of information, and therefore, the development of free public opinion and democratic pluralism.

91. Referring to the scope of this right, the Constitutional Court held that "its protection and effectiveness apply *erga omnes*," including to the company that employs the journalists and to the authorities. It added that, "The reporter's privilege (...) allows him or her to refuse to reveal his or her sources of information, maintaining their confidentiality." Finally, the Court held that the confidentiality of sources cannot be equated to traditional professional privilege and affirmed that "the confidentiality of sources of information does not protect the journalist or the informant but rather the social conglomerate that is entitled to the right to receive information, such that it serves to guarantee a free, responsible, and independent press," reasserted the Court.
92. Particularly relevant is the separate opinion of Judge Jinesta Lobo, in which he stated that the telephone surveillance of journalists or persons who habitually and regularly inform the public or public opinion, "is totally, absolutely, and radically unconstitutional, as they reveal sources of information (...). It cannot even be ordered by a judge." He further found the telephone surveillance "of individuals who serve as sources of information for journalists or persons who habitually or regularly inform the public" to be inadmissible "under any circumstance." He stated that journalists' fundamental right not to disclose their sources "cannot yield, even to a court. It is a right that constitutes a secondary pillar of freedom of information, of the press, of the expression of thought and, consequently, of a robust and healthy democratic system

⁸⁹

The ruling ordered that all telephone tracking linked to the journalist be annulled and reportedly warned the Prosecutor's Office and the Judicial Investigation Agency of refraining from engaging in such conduct again. Although the appeal was filed because of alleged telephone tracking of several journalists in the newspaper, the Court only ruled on journalist Rodríguez Estrada, whose tracking was proven.

that seeks transparency.” Otherwise, “the right in question is deprived of its essential content,” he concluded.

93. On February 19, 2013, a judge from the United States District Court Southern District of New York quashed a subpoena seeking access to material filmed for the documentary *The Central Park Five*, including footage that had not been included in the final version of the movie.⁹⁰ The request for the subpoena was filed in a civil case brought against the city of New York, its police department, the Office of the District Attorney of New York, and employees of those offices, by five individuals who had been wrongly accused of attacking and raping a woman in Central Park in 1989.
94. The Court determined that the producer, *Florentine Films*, had demonstrated its independence in making the documentary and could claim the reporter's privilege recognized in the common law.⁹¹ It further concluded that the attorneys for the city of New York had failed to demonstrate the relevance and significance of the material requested at trial, and that the information was not reasonably obtainable from other sources. The Court held that the policy on the reporter's privilege reflects an essential public interest in maintaining a vigorous and independent press capable of participating in robust debate and without restrictions on controversial matters, “an interest which has always been a principal concern of the First Amendment.” It asserted that this privilege exists in order to guarantee the vital public function of the press to seek and disclose accurate information, and to protect the newsgathering process, as had been established in the case of *Chevron Corp. v. Berlinger* 629 F. 3d 297, 308 (2d Cir. 2011).
95. Also in the United States, a few months later, on December 10, 2013, the New York State Court of Appeals reversed an order of the Appellate Division of the New York Supreme Court and rejected the notion that a journalist from the FoxNews.com network should be required to testify and reveal her confidential sources in a trial held in Colorado against a defendant accused of a movie theater shooting in that state.⁹² The case began when the journalist published an article in July 2012 indicating that the suspect in that case had detailed to his psychiatrist how he would commit the attack. The journalist had cited two law enforcement officers as anonymous sources.
96. The New York State Court of Appeals held that protection of the anonymity of confidential sources is a core—if not *the* central—concern underlying the privilege granted to reporters under the New York Shield Law. The Court noted that the reporter's privilege seeks to prevent news sources from remaining silent for fear of

⁹⁰ United States District Court. Southern District of New York. In Re McCray, Richardson, Santana, Wise, and Salaam Litigation. Opinion and Order. 03 Civ. 9685 (DAB) (RLE). February 19, 2013. Available at: <http://www.nylj.com/nylawyer/adgifs/decisions/022013jogger.pdf>

⁹¹ The motion to quash a subpoena invoked the New York Shield Law, § 79-h (c) of the New York Civil Rights Law, and the decision by the Second Circuit Court of Appeals in the case of *Gonzales v. National Broadcasting Company Inc.*, 194 F. 3d 29 (2d Cir.1999).

⁹² New York Official Reports. Court of Appeals. [Matter of Holmes v Winter. 2013 NY Slip Op 08194 \[22 NY3d 300\]](#). December 10, 2013.

reprisals, thus inhibiting the future investigative efforts of reporters. The majority⁹³ of the Court concluded that—although the New York court had found that the order from Colorado did not specify that the purpose of the subpoena was to compel the journalist to reveal her sources—the only purpose of requiring her to appear in Colorado would be to force her to reveal the identities of the individuals who provided her with the information she reported in the news story, which was obtained in exchange for a promise of confidentiality. The Court of Appeals explained that this would almost certainly allow the District Court to identify the officers who revealed the information, and that they could potentially be sanctioned for violation of a nondisclosure order and perhaps even prosecuted for perjury. Nevertheless, the Court found that although this could be a valid objective, this predictable chain of events is precisely the harm sought to be avoided under the Shield Law, to the extent that it could have a chilling effect in the future. The defense appealed the Court’s decision to the United States Supreme Court, attempting a final review. On May 27, 2014, the U.S. Supreme Court upheld the decision.⁹⁴

97. Similarly, on January 8, 2015, Chief Judge Ricardo Lewandowski of the Federal Supreme Court [*Supremo Tribunal Federal*] of Brazil (STF), issued a ruling to suspend a judgment of the Fourth Federal Court of São José de Rio Preto [*4ª Vara Federal de São José do Rio Preto*], in the state of São Paulo, which had authorized lifting the confidentiality of the telephone communications of journalist Allan de Abreu Aio and his employer, the *Diário da Região* newspaper.⁹⁵ The journalist and the newspaper were accused by the Office of the Attorney General of disclosing confidential information about a Federal Police operation called “Tamburutaca.” As part of the investigations, the Office of the Attorney General requested that their communications be turned over.
98. In stating the reasons for its adoption of the provisional measure, the Court specified that “one of the most important constitutional guarantees, freedom of the press and, consequently, democracy itself” was at stake. The Court held that for this reason, and to ensure the usefulness of a judicial decision to address the urgency of the case, it was necessary to suspend the challenged decision until the merits of the case could be reexamined.

⁹³ Judge Robert Smith expressed his dissent. He agreed with the other members of the Court of Appeals that New York’s Shield Law establishes the robust protection of the right of reporters to protect sources. However, he held that it was not applicable to the case, since the communications that the journalist claimed to be privileged took place wholly in Colorado and not in New York.

⁹⁴ Supreme Court of the United States. Orders of the Court. CERTIORARI DENIED. 13-1096 HOLMES, JAMES V. WINTER, JANA. May 27, 2014. Available at: https://www.supremecourt.gov/orders/courtorders/052714zor_5fci.pdf; See also, Supreme Court of the United States. Orders of the Court. CERTIORARI DENIED. 13-1096 HOLMES, JAMES V. WINTER, JANA. May 27, 2014. Available at: <https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-1096.htm>

⁹⁵ Supremo Tribunal Federal do Brasil (STF). [Reclamação 19.464 MC/SP](#). Judgment of January 8, 2015, published on February 4, 2015.

CHAPTER XIII

THE PROHIBITION AGAINST PRIOR
AND INDIRECT CENSORSHIP
ESTABLISHING LIMITATIONS ON
FREEDOM OF EXPRESSION BY
INDIRECT MEANS, INCLUDING THE
DISCRIMINATORY PLACEMENT OF
GOVERNMENT ADVERTISING

THE PROHIBITION AGAINST PRIOR AND INDIRECT CENSORSHIP ESTABLISHING LIMITATIONS ON FREEDOM OF EXPRESSION BY INDIRECT MEANS, INCLUDING THE DISCRIMINATORY PLACEMENT OF GOVERNMENT ADVERTISING

99. Article 13.3 of the American Convention provides, without limitation, 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.”
100. The IACHR has explained that a single State act can simultaneously constitute a limitation of freedom of expression contrary to the requirements of article 13.2 of the American Convention, and an indirect or subtle restriction on freedom of expression. For instance, the imposition of criminal penalties for specific speech contrary to the interests of the government, which is a direct limitation on this freedom, violates article 13 by virtue of being unnecessary and disproportionate; it also constitutes an indirect limitation of this right because of its chilling effect on future speech, which curtails the circulation of information—that is, it has the same result as direct censorship.⁹⁶
101. In a decision handed down on June 30, 2016 in claim (*Reclamação*) 23.899, the Brazilian Federal Supreme Court [*Supremo Tribunal Federal*] (STF) suspended the effects of a judgment in the plaintiff’s favor and the processing of another set of class action lawsuits filed throughout the State of Paraná by judges seeking damages from the newspaper *Gazeta do Povo* following the publication of a report, an opinion column about the remuneration of judges and members of the Office of the Attorney General in Paraná.⁹⁷ *Gazeta do Povo* maintained that the class action lawsuit against the newspaper amounted to an abuse of the right of action and sought to prevent the publication of new journalistic material that cast the judges in an unfavorable light.

⁹⁶ IACHR. [Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 157.

⁹⁷ Supremo Tribunal Federal do Brasil (STF). Agravo Regimental. [Reclamação \(RCL\) 23899](#). Judgment of June 30, 2016.

102. In this decision, STF's Judge Rosa Weber found that the Curitiba court's issuance of an order for the payment of non-pecuniary damages based on the journalistic publication provided "legal plausibility for the theory put forward" by the newspaper, "at least" insofar as the precedent of the Federal Supreme Court (ADPF 130) — in which the STF found that an entire set of mechanisms provided for in the Press Law was unconstitutional—was being ignored. In addition, the Judge took account of the fact that, as of the date of the decision, some 40 actions had been filed throughout the state of Paraná. Third, she considered the evidence submitted by the claimants before the Court to demonstrate the existence of a coordinated operation for the filing of class action lawsuits throughout the state, and to caution of the risk that this could entail for the claimants' exercise of their right to a defense if they were compelled to travel around the state to appear at hearings.
103. Based on the analysis of a prior case that dealt with a claim for alleged non-pecuniary damages stemming from a news publication, the Judge underscored that the "essential and irreducible core" of the fundamental right to freedom of thought encompasses the right to inform, to be informed, to have and share opinions, and to criticize. Citing prior case law, the Judge held that the imposition of restrictions to freedom of the press that, in addition to being excessive, are shown to be substantively incompatible with the democratic rule of law, defies the authority of the decision-making parameter issued by the Supreme Court.
104. Along these same lines, the First Division of the Supreme Court [*Primera Sala de la Suprema Corte de Justicia*] of Mexico found article 398 *Bis* of the Criminal Code [*Código Penal*] of Chiapas unconstitutional in the previously cited judgment of May 20, 2015. In so doing, it accepted the appellant's argument that the legal provision in question had a chilling effect, and therefore was contrary to the conventional and constitutional protection of freedom of expression and information.⁹⁸ The decision, adopted by a three-judge majority, stated that: "[t]he existence of a provision that penalizes *ab initio* the search for information that, in addition, is considered *prima facie*, without having been declared classified or reserved in advance, and without passing a 'harm test,' can have a chilling effect on that journalist, given that, aside from the fact that his or her liability is unproven, the simple fact of being exposed to criminal prosecution could clearly discourage the journalist from conducting his or her professional work, in view of the very real threat of being subjected to one or more court cases. Accordingly, this First Division finds that harm can arise from the simple fact of subjecting a journalist to a criminal case as a consequence of the legitimate exercise of that right, and that furthermore it can constitute a disproportionate use of the criminal law [...]."
105. On the occasion of the decision of February 7, 2014, the First Division of the Supreme Court of Mexico indicated that "[i]n interpreting and applying the relevant constitutional and legal provisions, we must not forget that the full guarantee of the freedoms enshrined in articles 6 and 7 of the Constitution requires preventing not

⁹⁸ Primera Sala de la Suprema Corte de Justicia de la Nación de México (SCJN). Amparo en revisión 492/2014. Judgment of May 20, 2015. Available at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=167949>

only unjustified direct restrictions but also indirect ones. The proscription of indirect restrictions has many possible derivations, but they undoubtedly include the obligation to pay special attention to the rules for assigning liability among the many subjects involved in the chain of dissemination of news and opinion. In other words, it is a matter of taking care not to create dynamics for the assignment of liability among citizens, journalists, publishers, and owners of media outlets that lead some to find interest in the silencing or restriction of the speech of the others.”⁹⁹

106. According to Principle 13 of the Declaration of Principles on Freedom of Expression, “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.” The Office of the Special Rapporteur has indicated that, “In the case of the allocation of government advertising, a case of indirect censorship occurs when such allocation is done with discriminatory aims according to the editorial position of the media outlet included in or excluded from such allocation, and with the purpose of imposing conditions on its editorial position or line of reporting.”¹⁰⁰
107. Following the important 2007 judgment in the *Editorial Río Negro*¹⁰¹ case, and in keeping with the Inter-American standards, on February 11, 2014 the Supreme Court of Argentina [*Corte Suprema de Justicia de la Nación de Argentina*] held that in allocating government advertising, the State must meet two constitutional criteria: “1) it cannot manipulate advertising, placing it and withdrawing it from certain media outlets based on discriminatory criteria; 2) it cannot use advertising as an indirect means of affecting freedom of expression.”¹⁰² In considering the case of *Arte Radiotelevisivo (ARTEAR SA) v. Estado Nacional*, the Argentine Supreme Court ruled admissible an extraordinary appeal filed by the respondent and affirmed the judgment of the IV Division of the Federal Court for the Judicial Review of Administrative Action [*Sala IV de la Cámara Nacional de Apelaciones en lo Contencioso*

⁹⁹ Primera Sala de la Suprema Corte de Justicia de la Nación (SCJN) México. Amparo Directo en Revisión 3123/2013. Judgment of February 7, 2014. Available at:

<http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=156633&SinBotonRegresar=1>

¹⁰⁰ IACHR. Office of the Special Rapporteur for Freedom of Expression. [Principles on the Regulation of Government Advertising and Freedom of Expression](#). OEA/Ser.L/V/II. CIDH/RELE/INF. 6/12. March 7, 2011. Para. 11.

¹⁰¹ Corte Suprema de Justicia de la Nación Argentina. [Caso Editora Río Negro S.A. c/ Neuquén, Provincia del y otro](#). Judgment of September 5, 2007.

¹⁰² Corte Suprema de Justicia de la Nación Argentina. [Caso Arte Radiotelevisivo Argentino S.A. c/ Estado Nacional](#). Recurso Extraordinario. Judgment of February 11, 2014.

Administrativo Federal]. The Court had overturned the trial court's judgment and admitted the *amparo* action filed by the media outlet.¹⁰³ In its decision, the appeals court had ordered the State to prepare and present to the court within 30 days "a plan for the allocation of government advertising" that "includes analog stations like the plaintiff" and "faithfully adheres to the guidelines of proportionality and fairness established in the precedent."

108. The Supreme Court underscored its status as the "supreme interpreter of the National Constitution and the laws enacted thereunder" and called into question the State's failure to respect "the doctrine" of the precedent judgments such as *Editorial Río Negro* versus the government of that province and *Editorial Perfil S.A.* against the National State. It noted that, "The State conduct aimed at not applying these criteria is a clear violation of constitutional principles," and that failure to comply with a court judgment constitutes disregard for the separation of powers, which is unacceptable under the rule of law." The Supreme Court held that "Consequently, all conduct that deviates from these essential values of the democratic system, whether in the process of applying the law or enforcing judgments, violates the State's function as guarantor of freedom of expression."

¹⁰³ The case started with an *amparo* action promoted by Arte Radiotevisivo Argentino S.A. (Artear - Canal 13), against the National State (in particular against the Chief of Cabinet, then led by Minister Juan Manuel Abal Medina and the Secretary of Public Communication, Alfredo Scoccimarro) in order to "cease the arbitrary and discriminatory allocation of official advertising regarding" that company. The *amparo* action was reportedly dismissed in the first instance. In June, the *Sala IV* of the *Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal* revoked the first decision. The State then filed an extraordinary appeal before the Supreme Court, which gave merit to the ruling mentioned here. The Supreme Court's decision was dissented by two Judges (Enrique Santiago Petracchi and Carmen M. Argibay) who upheld the inadmissibility of the extraordinary appeal.

CHAPTER XIV

CASE LAW ON THE STATE'S
OBLIGATION TO GUARANTEE
PLURALISM AND DIVERSITY

CASE LAW ON THE STATE'S OBLIGATION TO GUARANTEE PLURALISM AND DIVERSITY

109. The Office of the Special Rapporteur has stated that “The State’s authority to regulate broadcasting is based on, inter alia, the ‘duty 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.’ In this way, the broadcasting regulation that the State can and should create would form a framework under which the broadest, freest, and most independent exercise of freedom of expression for the widest variety of groups and individuals is possible. The framework should function in such a way that it guarantees diversity and plurality while simultaneously ensuring that the State’s authority will not be used for censorship.”¹⁰⁴ In this regard, emphasis has been placed on affirming that the regulation of broadcast media should take account of the international obligations assumed by the State under article 13 of the Convention and, in particular, the prohibition established in article 13.3 against the restriction of the right to freedom of expression by indirect means, such as the abuse of the power to regulate and administer radio frequencies.
110. This issue was taken up by the Supreme Court of Argentina [*Corte Suprema de Justicia de la Nación Argentina*] in its October 29, 2013 judgment on the constitutionality of a number of articles of the Audiovisual Communication Services Law (Law 26.522).¹⁰⁵ The Court ruled on the unconstitutionality action filed by *Grupo Clarín*, underscoring the importance of freedom of expression as the “cornerstone for the very existence of a democratic society” and held “that, unlike what occurs with freedom of expression in its individual dimension where—as stated earlier—the regulatory activity of the State is minimal, the collective aspect demands active protection on the part of the State, which is why its intervention here is intensified.”¹⁰⁶
111. In its decision, the Court held that “In order to meet this objective it is necessary to guarantee equal access to the mass media for all groups and persons,” so that “no

¹⁰⁴ IACHR. [Annual Report 2014. Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Freedom of Expression Standards for the Transition to Open, Diverse, Plural, and Inclusive Free-To-Air Digital Television). OEA/Ser.L/V.II Doc. 13. March 9, 2015.

¹⁰⁵ Argentina. Ley de Servicios de Comunicación Audiovisual. Ley No. 26.522. October 10, 2009. Available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/155000-159999/158649/norma.htm>

¹⁰⁶ Corte Suprema de Justicia de la Nación Argentina. [Grupo Clarín AS y otros c/Poder Ejecutivo Nacional y otros/ acción meramente declarativa](#). Judgment of October 29, 2013. The decision was adopted by a majority. The voting scheme can be consulted in the following systematization carried out by the Centro de Información Judicial of the court: <http://www.cij.gov.ar/nota-12394-La-Corte-Suprema-declar--la-constitucionalidad-de-la-Ley-de-Medios.html>

individuals or groups are excluded *a priori* from access to those media.” According to the Court, this requires “certain conditions with respect to the media so that, in practice, they are true instruments of that freedom rather than vehicles for its restriction. The media allow for the exercise of freedom of expression to materialize, so the conditions for their operation should be brought into line with the requirement of that freedom,” it affirmed, citing the position established by the Inter-American Court in OC 5/85.

112. Examining the possible ways in which the State can ensure free and robust speech, the Court asserted that, “one way (...) would be to leave the operation of the media up to the market, and step in through the laws that defend competition”; whereas “another way (...) is by enacting rules that *a priori* equitably organize and allocate citizens’ access to the mass media.” The Supreme Court emphasized that this second method is in line with the standards promoted by the Inter-American System. It established that the regulatory policy “can rely on licenses of any type, whether or not they use the radio spectrum. This is because the basis for the regulation lies not in the limited nature of the spectrum as a public good, but rather, fundamentally, in guaranteeing the plurality and diversity of voices that the democratic system demands [...].”
113. As *orbite dictum* the Court established: a) that the purpose of the law to guarantee diversity and pluralism in the mass media “would lose all meaning without the existence of transparent public policies on government advertising”; b) the same would occur, “if the public media, instead of giving voice to and satisfying the information needs of all sectors of society, were to become forums at the service of government interests”; c) that the accomplishment of the law’s objectives is tied to the existence of an independent enforcement body that adheres to the standards established in the Constitution and the international treaties incorporated therein, in order for it to be “protected against undue interference from both the government and other pressure groups.”
114. For its part, in an unconstitutionality action challenging several articles of the Audiovisual Communication Services Law (LSCA), Law 19.307,¹⁰⁷ the Supreme Court [*Suprema Corte de Justicia*] of Uruguay, upheld the lawfulness of the regulatory policies designed to guarantee media pluralism and diversity. In its initial decision of April 5, 2016, ruling on a group of actions filed by different media companies, the Court agreed with its Argentine counterpart—which it cited—insofar as the collective dimension of freedom of expression requires “the active protection of the State.”¹⁰⁸ It held that “That protection is, undoubtedly, what Law 19.307 seeks, as is evident from its articles and from the reliable history of its enactment.”¹⁰⁹ It held that the provision

¹⁰⁷ Uruguay. Ley de Servicios de Comunicación Audiovisual. Ley No. 19307. December 29, 2014. Available at: <http://www.impo.com.uy/bases/leyes/19307-2014>

¹⁰⁸ Suprema Corte de Justicia de Uruguay. IUE 1-18/2015. [Directv de Uruguay Limitada c/ Poder Legislativo](#). Acción de inconstitucionalidad. Judgment No. 79 of April 5, 2016.

¹⁰⁹ In this ruling, the Court ruled on the unconstitutionality action brought by Directv Uruguay. This is the first decision in a set of 28 lawsuits that were filed before the highest judicial body seeking the Court’s ruling on the constitutionality of several articles. The suit of unconstitutionality in this case challenged Articles 32, 33, 39 inc. 3, 40, 55, 56, 60, 66, 68, 97, 98, 115 a 117, 139, 142 and 176-186 of law Nº 19.307. The ruling declared unconstitutional and inapplicable to the plaintiff articles 39 Para. 3, 55, 60 letter C. Para. 1, 2 and 3, and 98 Para. 2 of law 19.307.

in question “is a legislative tool whereby the legislature, in the exercise of its lawmaking authority, has sought to promote freedom of expression and communication in its collective dimension.”

115. The Court established that, “essentially,” the case presented a “conflict between the right to freedom of expression in its collective dimension and other fundamental rights: the right to freedom of expression in its individual dimension, the right to freedom of enterprise, and the right to property.” It held that the “basic source of regulation” of freedom of expression in Uruguay is article 29 of the Constitution and article 13 of the American Convention. It stated that, “Freedom of expression, in its diverse manifestations and in the terms regulated by article 13 of the Convention (...), is a fundamental human right, incorporated” into the national legal system through article 72 of the Constitution.
116. The Supreme Court established the parameters of scrutiny accordingly. Citing Advisory Opinion [*Opinión Consultiva*] 5/85 of the Inter-American Court, it stated that, “The interpretation of article 13 of the Convention must rest on two basic pillars: the first, called the “democratic standard”; and the second, called the “dual dimension standard.” It held that both pillars should have a bearing on the resolution of this specific case, and ruled out the notion that the constitutionality action should be at issue in the consideration of the merits, appropriateness, justice, or timeliness of the challenged articles.
117. The judgment found that the State’s establishment of limits on media concentration is a legitimate aim. Referring to article 51 on monopolies and oligopolies,¹¹⁰ the Court held that this provision “seeks to respect the general interest of every society in ensuring the true right of individuals to information, which necessarily involves plurality and diversity in the ownership and control of audiovisual communication services.”¹¹¹

By October 2016, the Court had ruled in 10 of the 28 lawsuits filed. Based on these pronouncements, the president of the Supreme Court of Justice said that the structure of the law “in terms of user rights, the structure in terms of creating an independent body with multisectoral integration... has passed the test of constitutionality, as well as the vast majority of the law”. (Cfr: Comunicación Democrática. October 17, 2016. [Presidente de Suprema Corte de Uruguay afirma que sentencias sobre Ley de Medios sientan jurisprudencia: “una buena ley que supera el test de constitucionalidad”](#)).

¹¹⁰ Article 51 (Monopolies and oligopolies).- Monopolies or oligopolies in the ownership and control of audiovisual media services conspire against democracy by restricting the pluralism and diversity that ensures the full exercise of the right to information of people. It is the State’s duty to implement adequate measures to prevent or limit the existence and formation of monopolies and oligopolies in audiovisual communication services, as well as to establish mechanisms for their control. (Uruguay. Ley de Servicios de Comunicación Audiovisual. Ley No. 19.307. December 29, 2014. Available at: Uruguay. Ley de Servicios de Comunicación Audiovisual. Ley No. 19307. December 29, 2014. Available at: <http://www.impo.com.uy/bases/leyes/19307-2014>)

¹¹¹ However, the Court declared by majority the unconstitutionality of one of the anti-concentration rules provided for in the law. The regulation considered unconstitutional is Article 55, on limitations on the number of subscribers of television services for subscribers, based on the following reasons: a) because “regardless of pursuing the important purpose of avoiding monopolistic or oligopolistic behavior, it ends up violating the right of ownership of the plaintiff” (position held by judges Jorge Larrioux and Jorge Chediak); (b) because it “harms legal security, affecting the acquired rights of the company” (Judge Elena Martínez’s argument, shared also by the other two judges mentioned, with whom the majority was formed); c) Because it “distorts the free play of the market”. In this judgment, the Court ruled on the constitutionality of Article 56 inasmuch as it provides for the prohibition of cross-ownership between television and telecommunications services. The first paragraph of

118. The Supreme Court determined that the imposition of minimum percentages of national production for the audiovisual media is constitutional, given that these types of provisions “do not impose content, such as the expression or dissemination of specific material; rather, they establish rules on the origin of the production that, given their vagueness, in principle, would have no effect on freedom of expression.” Nevertheless, the majority of the Court was of the opinion that “the obligation to put out certain types of content”—citing some of the law’s provisions on programming—such as the obligation to show “new releases of fictional television” or “new film releases” are unconstitutional, because “they do not adhere to the content of the right of freedom of expression (which includes freedom of communication).” On this point, a majority of the Court opined that the provision “entails a measure that indirectly violates freedom of expression.”¹¹²
119. The uruguayan Court upheld the constitutionality of a number of provisions of article 32 of the law which establish a programming schedule designed to protect the rights of children and adolescents, and a number of guidelines regarding the programming to be aired during those hours. The judgment held that that regulation was compatible with article 29 of the Constitution and article 13 of the American Convention, to the extent that it “pays special attention to the moral protection of children” and therefore, the challenged provision “finds its support in a reason of general interest.”

the regulation states: “Natural or legal persons who provide audiovisual communication services regulated by this law may not, in turn, provide telephony or data transmission telecommunications services.” However, months later, with the same integration, the Court held in another ruling that such a provision is unconstitutional”.

¹¹² The sentence referred in this point to the second paragraph of letter C of Art. 60 of the law 19.307.

CHAPTER XV

CASE LAW ON FREEDOM OF
EXPRESSION AND THE INTERNET

CASE LAW ON FREEDOM OF EXPRESSION AND THE INTERNET

- **The Need to Adopt a Systemic Perspective on the Digital Environment for Determining the Limits to Freedom of Expression on the Internet and Applying the Proportionality Test**

120. Based on the Inter-American doctrine on freedom of expression, the Office of the Special Rapporteur has underscored that, although freedom of expression enjoys the same protection whether it is exercised on the Internet or through other media, the conditions for the lawfulness of limitations on the right to freedom of expression on the Internet require addressing the special characteristics inherent to the web. For instance, when establishing the potential proportionality of a particular restriction, it is essential to assess the impact (or cost) of that restriction, not only from the point of view of the private citizens directly affected by the measure but also from the perspective of its impact on the operation of the Internet. A particular restrictive measure may seem mild if it is studied solely from the perspective of the person affected. However, the same measure can have a truly devastating impact on the overall operation of the Internet and, consequently, on the right to freedom of expression of all of its users as a whole. In this regard, the Office of the Special Rapporteur has stressed that it is crucial to evaluate each measure in a specialized fashion, from what could be called a systemic digital perspective.¹¹³
121. Some courts in the region have referred expressly to the need to adopt this criterion when resolving judicial claims related to freedom of expression on the Internet. In other cases, although the standard has not been cited expressly, it is understood that it has been incorporated into the reasoning of the courts when they evaluate the application of measures to harmonize the right to freedom of expression on the Internet with other rights, as discussed further below.
122. An illustrative example of this is in the opinion (*voto- vista*) delivered by Judge Nancy Andrighi of the Superior Court of Justice [*Superior Tribunal de Justiça*] (STJ) of Brazil, in the decision published on June 4, 2014.¹¹⁴ In that decision, the majority of the Second Section of the high court ruled to set aside a coercive measure ordered against an Internet search provider. The Judge maintained that guardianship of the virtual environment demands “increased care.” Consequently, “any type of restriction must

¹¹³ IACHR. [Annual Report 2013. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter IV (Freedom of Expression and the Internet). OEA /Ser.L/V/II.149 Doc. 50. December 31, 2013. Para. 53.

¹¹⁴ Superior Tribunal de Justiça do Brasil (STJ). [Reclamação 5.072](#). Judgment of December 11, 2013, published on June 4, 2014.

be carefully considered” so that it does not affect “the perfect functioning” of the Web. She added that “in the case of Internet search service providers, the imposition of implicit or subjective obligations would entail, potentially, the restriction of the search results, which would be to the detriment of all user[s]”. The judge highlighted the importance of search services in a world in which the daily lives of millions of people depend on information that is on the Internet and would be difficult to find without the search tools offered by search sites.

- **Application of the Principle of Universal Access and Emerging Obligations of the States**

123. The Declaration of Principles on Freedom of Expression states that, “All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.” This principle applied to freedom of expression on the Internet—this Office of the Special Rapporteur has stated—must be interpreted to have the following consequences: steps should be taken to progressively promote universal access not only to infrastructure but also to the technology needed for its use and to the greatest amount possible of information available on the Internet; to eliminate arbitrary barriers to access to infrastructure, technology, and information online; and to take positive differentiation measures to allow for the effective enjoyment of this right for individuals or communities who face exclusion or discrimination.¹¹⁵

124. A similar perspective is reflected in Judgment 531 of January 17, 2014, handed down by the Constitutional Chamber of the Supreme Court [*Sala Constitucional de la Corte Suprema*] of Costa Rica, in which the Court admitted an *amparo* petition filed by a resident of the town of Santa Ana de Nicoya who complained that she lacked access to cellular telephone and Internet service.¹¹⁶ In this case, the Constitutional Court ordered the State to take a number of measures designed to guarantee the principle of universal access according to the provisions of the Telecommunications Act.¹¹⁷ Stating the reasons for the decision, Judge Rapporteur Fernando Castillo Viquez, who delivered the opinion, invoked the principle in the following terms:

First, it should be noted that the Superintendence of Telecommunications, through the National Telecommunications Fund—and not this Court—is responsible for

¹¹⁵ IACHR. [Annual Report 2013. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149 Doc. 50. December 31, 2013. Para. 15.

¹¹⁶ Sala Constitucional Corte Suprema de Justicia de Costa Rica. [Expediente No. 13-007483-0007-CO](#). Recurso de Amparo. Judgment 00531 of January 17, 2014.

¹¹⁷ The ruling ordered *Instituto Costarricense de Electricidad* to “carry out actions that are within the scope of its powers, so that within a period of six months from the notification of the judgment, it shall submit a project” under the *Fondo Nacional de Telecomunicaciones* (Fonatel), in order to assess the possibility of installing the necessary infrastructure to provide Internet and cellular services in the community of Santa Ana de Nicoya. Likewise, it ordered “the *Consejo de la Superintendencia de Telecomunicaciones* (SUTEL), to carry out the actions that are within the scope of its competencies so that these applications are valued, so that if deemed feasible, they are included within the projects financed by FONATEL”.

promoting access to high-quality telecommunications services in a timely, efficient, affordable, and competitive manner to residents in the areas of the country where the cost of investing in the installation and maintenance of the infrastructure makes it so that the provision of these services is not financially profitable, ensuring the application of the principles of universality and solidarity in telecommunications services”.

125. The Constitutional Chamber of the Supreme Court of Costa Rica thus reaffirmed its jurisprudential position recognizing the right of access to the Internet as a fundamental right, and held that “the omission”¹¹⁸ of the State to take measures tending to guarantee Internet access in the area, regardless of financial feasibility or profitability, “violates the affected parties’ constitutional right to telecommunications.”
- **Content Blocking and Filtering: Its Restrictive Nature with Regard to Freedom of Expression and Exceptional Admissibility Under Strict Conditions in Relation to Unprotected Speech or Specific Content that is Openly Illegal**
126. According to the aforementioned Joint Declaration on Freedom of Expression and the Internet and the Inter-American legal framework, the Office of the Special Rapporteur has noted that “forcing the blocking or suspension of entire websites, platforms, channels, IP addresses, domain name extensions, ports, network protocols, or any other kind of application, as well as measures intended to eliminate links, information and websites from the servers on which they are stored, all constitute restrictions that are prohibited and exceptionally admissible only strictly pursuant to the terms of article 13 of the American Convention.”¹¹⁹
 127. This issue was addressed by the Supreme Court Argentina [*Corte Suprema de Justicia de la Nación Argentina*] in the adjudication of the extraordinary appeals filed by the plaintiff and the respondent in the previously cited case of *Rodríguez v. Google, Inc.*¹²⁰ The judgment of October 28, 2014 introduced the analysis in relation to the admissibility of content blocking and filtering and its compatibility with the standards on freedom of expression in its consideration of one of the plaintiff’s allegations of lower court error, which challenged the decision of the court of appeals to set aside the Trial Court’s judgment. The Trial Court had ordered the permanent deletion of the links between the plaintiff’s name, image, and photographs and sites containing sexual, erotic, and/or pornographic content on Google.
 128. In its conclusions of law, the judgment stated that, “This is a matter of determining whether, in cases in which freedom of expression is at stake, preventive protection is warranted for purposes of preventing the repeated dissemination of information

¹¹⁸ At this point in line with the support of the *Sala Constitucional* of the Supreme Court of Justice in judgment No. 2011017704 of December 23, 2011, the agency in charge of telecommunications should have sought to guarantee access to the Internet through the funds available by the legal framework to that effect.

¹¹⁹ IACHR. [Annual Report 2013. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149 Doc. 50. December 31, 2013. Para. 84.

¹²⁰ Corte Suprema de Justicia de la Nación Argentina. [Rodríguez María Belén c/google Inc. s/ Daños y Perjuicios](#). Judgment of October 28, 2014.

harmful to an individual's personal rights." Invoking the pertinent application of article 13. 2 of the American Convention to decide this point, the high court reaffirmed that the exercise of the right to freedom of expression cannot be subject to prior censorship, but rather only to subsequent liability. Accordingly, the Supreme Court ruled that it was not possible to force the search engines to establish filters or blocks on links in advance, as that would be tantamount to a form of prior censorship that is unconstitutional and proscribed by article 13 of the American Convention on Human Rights, a principle that can yield only to "absolutely exceptional circumstances." Accordingly, the plaintiff's allegation of lower court error was dismissed on that point, as "he had not even argued that the case justified deviating from the principles that arise from the case law" of the Supreme Court on the issue.¹²¹

129. In Brazil, in an August 5, 2014 judgment delivered by Judge Ricardo Villas Bôas Cueva regarding claim [*Reclamação*]18.685,¹²² the Second Section [*Segunda Seção*] of the Superior Court of Justice [*Superior Tribunal de Justiça*] (STJ) held that Internet search service providers cannot be forced to delete specific results from their systems with respect to a specific word, image, or text, even when it shows the exact address of the page sought to be deleted. It also found that search services, "by their nature," do not include the prior screening of content. The case came before the STJ on a request for the protection of constitutional rights [*Reclamação com pedido de liminar*] filed by Google Brazil, against the decision of the Fourth Rotation of the Court of Appeals of the Special Courts for the State of Espírito Santo [*Quarta Turma do Colégio Recursal dos Juizados Especiais do Estado do Espírito Santo*]. Google had been ordered to block the URL address—which linked the plaintiff's name to a news article—from search results when the plaintiff's name was used as a search criterion. The measure was requested by a judge, who, after having been acquitted in an administrative disciplinary case, filed the action seeking to have the news article associated with his name excluded from search results. The STJ held that the judgment against Google was "inconsistent" with its established case law.

- **The Responsibility of Internet Intermediaries**

130. Intermediaries have been defined as those actors—generally from the private sector—that "give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties."¹²³ This Office of the Special Rapporteur has noted that the circulation of information and ideas on the Internet would not be possible without these entities,

¹²¹ The President of the Supreme Court, Ricardo Luis Lorenzetti and Judge Juan Carlos Maqueda, expressed their partial dissent on this point. In support of their position, the magistrates stated that what was intended was the judicial protection of a very personal right that is compatible with freedom of expression. They contended that the claim is admissible "provided that, for an adequate balance of interests at stake, the links associated with its person and the damage that the linkage causes are precisely identified. Thus delimited, protection constitutes a type of further reparation and avoids any generalization that may affect the free circulation of ideas, messages or images and with it, the constitutional guarantee of freedom of expression."

¹²² Superior Tribunal de Justiça do Brasil (STJ). [Reclamação No. 18.685](#). Judgment of August 5, 2014.

¹²³ Definition given by the Organization for Economic Cooperation and Development (OECD). Organization for Economic Cooperation and Development (OECD). April 2010. [The Economic and Social Role of Internet Intermediaries](#). Page 9, cited in: IACHR. [Annual Report 2013. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149 Doc. 50. December 31, 2013. Quote 129.

which play an essential role in the exercise of the right to search for and receive information online, fostering the social dimension of freedom of expression in the terms of the Inter-American Court.¹²⁴ It is precisely this important role of intermediaries in the architecture of the Internet that explains the attention that the Inter-American and universal doctrine, as well as different Courts of the region, have paid to defining the scope of their responsibility in relation to alleged tensions or conflicts among rights arising from online activities.

131. The national chapters of the most recent annual reports prepared by this Office of the Special Rapporteur discuss the incremental presence of this issue on the freedom of expression agenda, which is constantly subject to new challenges arising from the impact of the Internet.
132. The Superior Court of Justice of Brazil [*Superior Tribunal de Justiça*] (STJ) handed down a decision on June 4, 2014,¹²⁵ in which the majority granted a motion filed by Google to set aside the imposition of a fine (*astreintes*) against the company. It had been assessed to compel compliance with an injunction ordering Google to exclude from Google Search results the hyperlink for a page of an online magazine that linked a judge—the claimant who requested the measure—to investigations into alleged acts of pedophilia, as well as to suspend in its search results the association between the judge’s name and reports of his alleged involvement in criminal acts. The STJ found that the injunction was impossible to enforce due to technical infeasibility, and it ruled to set aside the imposition of the fine.
133. The majority opinion analyzed the scope of responsibility of the Internet search providers, holding that they: “(i) are not responsible for the content of the results of searches performed by their users; (ii) cannot be required to exercise prior control over the content of the results of searches performed by each user; (iii) cannot be required to eliminate from their systems the results obtained from the search for a specific term or phrase, or of the results that point to [*apontem para*] a specific photo or text whether or not they specify the hyperlink of the page that contains it”.
134. The Court’s legal reasoning stated that search services cannot be held liable for the content of search results, even when those results may be illegal. In those cases, explained Judge Nancy Andighi, it is incumbent upon the victim to take measures to suppress them, “with which they will be automatically excluded from the search results on the search sites.” the high court thus held that “It is not possible, under the pretext of hindering the propagation of unlawful or offensive content on the Web, to repress the collective right to information.”
135. For its part, the Supreme Court of Argentina [*Corte Suprema de Justicia de la Nación de Argentina*], in the previously cited case of Rodríguez v. Google, Inc., concluded that “It is not appropriate to judge the potential responsibility of ‘search engines’

¹²⁴ IACHR. [Annual Report 2013. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149 Doc. 50. December 31, 2013. Para. 92.

¹²⁵ Superior Tribunal de Justiça do Brasil (STJ). [Reclamação 5.072](#). Judgment of December 11, 2013, published on June 4, 2014.

according to the rules of strict liability;” rather, they must be judged “in the light of subjective liability.”¹²⁶ The judgment stated that according to comparative law search engines “do not have a general obligation to ‘monitor’ (supervise, surveil) the content that is uploaded to the Internet and provided by those responsible for each web page.” Thus, the Court explained, “in principle, they are not responsible for content they have not created. If an unlawful activity—that, hypothetically, should be condemned—is conducted at the edge of a path, it is not reason to punish the party responsible for the route that allows access to the place, on the argument that the path made it easier to get there”.

136. Nevertheless, the high court specified that there are situations in which the search engine “can become responsible for the content of another.” This can occur “when it has *effectively become aware* of the unlawfulness” of content, “if that knowledge is not followed by diligent action.” In cases in which harmful content requires a “clarification that must be debated or addressed in a court or administrative forum for its effective decision, it should be understood that the ‘search engine’ cannot be required to take the place of the competent authority, much less of the judges. Therefore, in those cases, it is appropriate to require that notice be given to the competent judicial or administrative authority. The simple communication of the private party that considers itself harmed, let alone that of any interested party, is insufficient,” held the high court. The Court was of the opinion that the same reasoning applied to search engines should be taken into account with respect to thumbnails, given that their function is merely to provide a link to the original image uploaded to an Internet page. The Court explained that “the original image and the original text—uploaded to the web page—are the exclusive responsibility of their owner, the sole creator of the content.” As such, the judgment concluded that it is not appropriate to apply different rules to the image search engine and the text search engine.
137. The Constitutional Court of Colombia also ruled against the possibility of holding intermediaries liable for the content they make available. In Judgment T-277 of May 12, 2015, the First Review Chamber [*Sala Primera de Revisión*] held that “Assessing liability against Internet intermediaries for the content transmitted would significantly limit the dissemination of ideas through this medium, as it would give it the power to regulate the flow of information online. As for those who create the information, the Office of the Special Rapporteur for Freedom of Expression has indicated that subsequent liability may only be imposed against the authors of internet content—that is, those directly responsible for the offensive expression.”¹²⁷

¹²⁶ Corte Suprema de Justicia de la Nación Argentina. [Rodríguez María Belén c/google Inc. s/ Daños y Perjuicios](#). Judgment of October 28, 2014. This case had its origin in the lawsuit for damages brought by María Belén Rodríguez against Google Inc. and Yahoo of Argentina SRL, in which the commercial and unauthorized use of the plaintiff’s image was claimed. She argued that very personal rights had been violated by having linked her to certain erotic and / or pornographic websites. In the first instance, the defendants were convicted. Instead, *Sala A* of the *Cámara Nacional de Apelaciones en lo Civil* partially overturned the ruling: it rejected the lawsuit against Yahoo and admitted it against Google, but it reduced the compensation to one half and annulled the first ruling since it decided for “the definitive elimination of the links of the name, image and photographs of the plaintiff with sites and activities of sexual, erotic and / or pornographic content.”

¹²⁷ Corte Constitucional de Colombia. Sala Primera de Revisión. [Judgment T-277/15](#) of May 12, 2015.

- **Online Privacy, Surveillance, and Freedom of Expression**

138. The Office of the Special Rapporteur for Freedom of expression has maintained that respect for freedom of expression online assumes the privacy of communications. It has also stated that the protection of the right to privacy involves at least two specific policies linked to the exercise of the right to freedom of expression: the protection of anonymous speech and the protection of personal data.¹²⁸
139. On June 13, 2014, the Supreme Court of Canada handed down a judgment in the case of *R. v. Spencer*,¹²⁹ holding that law enforcement agencies must have a warrant to request information from Internet service providers about their subscribers, given that they have the ability to reveal online activity.
140. The Court emphasized that “Particularly important in the context of Internet usage is the understanding of privacy as anonymity.” It further stated that, “The identity of a person linked to their use of the Internet must be recognized as giving rise to a privacy interest beyond that inherent in the person’s name, address and telephone number.” This is because subscriber information, by tending to link particular kinds of information to identifiable individuals, may implicate privacy interests relating to an individual’s identity “as the source, possessor or user of that information.” In this same regard, it noted that the IP address, once identified with a particular individual, is capable of revealing the individual’s online activity.

¹²⁸ IACHR. [Annual Report 2013. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter IV (Freedom of Expression and the Internet). OEA /Ser.L/V/II.149 Doc. 50. December 31, 2013. Para. 130 and 133.

¹²⁹ Supreme Court of Canada. *R. v. Spencer*. June 13, 2014. Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14233/index.do>