

OFFICE OF THE SPECIAL RAPPORTEUR ON FREEDOM OF EXPRESSION OF THE IACHR PRESENTS PRELIMINARY OBSERVATIONS FOLLOWING VISIT TO ECUADOR

Quito - The Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights (IACHR), Edison Lanza, today concluded an official visit to Ecuador, which took place from August 20-24. The purpose of this visit was to assess the situation of freedom of expression in the country. In addition, the visit is part of a series of special actions by the Office of the Special Rapporteur to promote the right to freedom of expression in Ecuador.

During the mission, the Special Rapporteur visited the cities of Quito and Guayaquil, where he participated in meetings and visited the newspaper *El Universo* in Guayaquil. Edison Lanza met with journalists, media outlets, representatives of civil society, victims of violations of freedom of expression committed during the previous administration, relatives of the team of journalists from the newspaper *El Comercio*. He also met with President Lenín Moreno, Foreign Minister José Valencia, and other representatives of the Executive Branch and the Judiciary, including the Chief Justice of the National Court of Justice, the Chief Judge of the Provincial Court of Justice of Guayas, the Prosecutor General of the Republic, the acting Ombudsperson, the Deputy Minister of Information and Communication Technologies, the Minister of the Interior, the Minister of Justice, Human Rights, and Religious Affairs, National Secretary of Communication Andrés Michelena and the National Under-Secretary of Communication, the President of the National Assembly, the General Manager of Public Media, the Director General of the International Center for Advanced Communication Studies for Latin America, the Telecommunications Regulation and Oversight Agency (ARCOTEL), the Council for Regulation and Development of Information and Communication (CORDICOM), the Superintendent of Information and Communication, and the Attorney General of the Republic.

In addition, as part of his official visit, the Rapporteur met with representatives of the embassies of Canada, the United States, the United Kingdom, Chile, Peru, Colombia, the European Union, Brazil, and Switzerland.

The Office of the Special Rapporteur is grateful for the cooperation of the Government of Ecuador in facilitating and organizing the visit and for the extraordinary participation and contribution of civil society, academia, journalists, and the media. It also acknowledges the support of the UNESCO Office in Quito and the University of San Francisco de Quito (USFQ) in Ecuador during the visit; and thanks the information offered by the OHCHR's Human Rights Adviser in Ecuador.

The Office of the Special Rapporteur presents below its preliminary observations on the visit, which will be more thoroughly developed in a country report to be published at the end of this year.

I. TRANSITION FROM AUTHORITARIANISM TO AN AUTONOMOUS AND DEMOCRATIC CIVIC SPACE

Between 2007 and 2017, the Office of the Special Rapporteur on Freedom of Expression documented how the government of Ecuador, headed by President Rafael Correa, designed and implemented a systematic policy to discredit, stigmatize, constrain, and punish—through the use of criminal and administrative law—journalists, the media, human rights defenders, and political opponents. Journalists who investigated and disseminated information that the government considered to be false or contrary to its interests, social leaders, human rights defenders, and

opponents who disseminated opinions and ideas contrary to the political movement it called the “citizen revolution” were particularly targeted for this coordinated action by the State apparatus. Thus, Ecuador’s civic space and public sphere were severely repressed, in a climate of control and interference by the executive branch in the justice and oversight institutions that were supposed to protect human rights. The Office of the Special Rapporteur received dozens of statements during its visit attesting to the pressure placed on prosecutors and judges when they had to adjudicate cases brought by the President of the Republic and other senior officials, while this week the Council of the Judiciary began a process to recover the truth about what happened inside the justice system over the past decade.

However, this strategy of attacking the press, activists, and opponents was not limited to the judicial sphere alone; the power of the State was also used to stigmatize and discredit them. An example of this was the abuse of the legal power to air national government broadcasts. Ceremonies or events led by the President of the Republic, known as “*sabatinas*”—which lasted for hours—were broadcast live through the public media and used to discredit or mock journalists, social leaders, and dissidents. It is important to note that trade unions, land rights organizations, and indigenous nations were also persecuted. The legal status of their associations was rescinded, and social protest was repressed through the use of force.

The Correa administration also issued Executive Decree No. 016 of 2013, later amended by Decree No. 739 of 2015, which established the regulations for the “Unified Information System on Social and Citizen Organizations,” resulting in the 2013 dissolution of the Pachamama Foundation and the 2016 dissolution of the National Teachers Union. Likewise, *Fundamedios* was subjected to two attempts at dissolution, and *Acción Ecológica* to one.

The Legislative Branch did not escape this coordinated action either, and once the Citizens’ Revolution movement achieved parliamentary majorities, there was a phase during which a number of laws were enacted with the aim of placing the press and social organizations under official government control. An example of this is the Organic Law on Communication (LOC), passed by the National Assembly in 2013; the decrees to restrict the right to freedom of association; the amendment of the Comprehensive Organic Criminal Code, which incorporated provisions affecting accountability and the dissemination of information of public interest; and other laws containing vague and ambiguous concepts to restrict the dissemination of information, such as “financial panic” or the dissemination of classified information related to various areas of State action.

The Office of the Special Rapporteur recognizes that there was a progressive and substantial turnaround in this situation with the arrival of the current President Lenín Moreno. The president acknowledged the systemic violation of fundamental rights and freedoms, and took on the task of dismantling this climate of repression in areas such as the press, the defense of environmental rights, the rights of indigenous peoples, and the political sphere. Thus, for example, in October 2017, through Executive Decree 1937, President Lenín Moreno repealed Executive Decrees 016 and 739. However, according to reports received from civil society organizations during the official visit, the Decree remained a cause for concern because, among other things, it maintained a wide margin of discretion by providing that “departure from the aims and objectives for which it was established,” and “reducing the number of members to less than the minimum established” in the Regulations are grounds for an organization’s dissolution.

In its Annual Report for 2017, the Office of the Special Rapporteur explicitly acknowledged this change of position and stressed that the current president and a large part of his team, through public statements, public events, and dialogue, have recognized the role played by journalists, the

media, indigenous peoples, human rights defenders, and the political opposition in a democratic society.

The President and his administration have also taken the first steps to align the legal and institutional framework, as well as the State's communication policy, with international standards on freedom of expression. The Special Rapporteur welcomes the introduction of a bill to the National Assembly to amend the Organic Law on Communication, although he has said that it needs to be improved. In addition, it welcomes the pardon of Gerardo Portillo, who had been imprisoned for investigating contracts held by former President Correa; the pardons of seven activists prosecuted for protesting during the previous government; President Moreno's request to SUPERCOM to set aside penalties against seven media outlets; the return of its headquarters to the indigenous organization CONAIE; and the opening of a process for the liquidation of SUPERCOM, among other decisions. The Secretary of Communication also initiated a process to bring pluralism to the public media and stopped the use of national channels to interfere with the functioning of the media.

Despite all these advances, the transition process towards an inclusive democracy that guarantees an autonomous space free of threats for journalists, the media, social organizations, and the opposition must continue and be consolidated.

Nearly a decade of persecution and harassment has been a major drain on private and community media outlets and social organizations. Journalism as a profession and a fundamental institution of democracy has been weakened and discredited. Valuable members of the profession have been forced to leave journalism or the country for fear of retaliation and a lack of prospects, or they have suffered the chilling effect of the aforementioned policies. Fear and mistrust persist among human rights defenders.

Likewise, the recent kidnapping and murder of journalists Javier Ortiz, Paul Rivas, and Efraín Segarra, members of the daily paper *El Comercio*, by an organized crime group operating on the Ecuador-Colombia border—a heinous crime that the Office of the Special Rapporteur has condemned—was a tragic reminder of the State's weakness in terms of preventing and protecting against violence toward the press. The Office of the Special Rapporteur acknowledges that after this tragic outcome, Ecuador's President and Foreign Minister made the decision to accept special international monitoring by a Special Follow-up Team of the Inter-American Commission on Human Rights, as requested by the victims' families.

Several cases involving limitations to freedom of expression on the Internet were also reported, such as the suspension or blocking of Twitter accounts following posts with political or current affairs content or references to the previous government. This phenomenon is of concern to civil society organizations and calls attention to the Internet provider companies, given its repetition in Ecuador.

Additionally, academics and journalists who do not share the current administration's politics informed the Office of the Special Rapporteur that there could be a climate of revenge in Ecuadorian society, which could have a chilling effect on pluralism and criticism of the current government.

A. Stigmatization of critical journalists and dissidents

The years of former President Rafael Correa's administration were marked by a constant and systematic stigmatization of investigative journalists, critical columnists, and dissidents in general. Through his Saturday program ("*Enlace Ciudadano*"), the former head of state regularly criticized

and discredited journalists, media outlets, and civil society organizations that did not toe the government line.

In its Annual Reports, the Office of the Special Rapporteur has provided a detailed account of the death threats, personal assaults, and intimidation against various reporters, journalists, and Twitter users. Thus, the 2017 Annual Report detailed how Correa described the newspapers *Expreso* and *El Universo* and some columnists as the “corrupt press” and “ignorant,” accused them of acting in “bad faith,” and said he was “embarrassed for them.” In addition, among other similar acts, on January 21, 2016, had called the media into question for not giving sufficient coverage to the celebration of his government’s ten-year anniversary, and accused the newspapers *El Comercio* and *La Hora* of being “corrupt” and of engaging in “prior censorship” for not covering the ceremony as front page news. The Report also details how Correa repeatedly accused the organization *Fundamedios* of being part of a plan to destabilize his government and of trying to tarnish the country’s image.

On several occasions, former President Correa called on his Twitter followers to find out and expose the identity and personal details of people who insult and criticize him on social media.

According to monitoring by civil society organizations, the sharp decline in the government’s confrontation with the media has had a positive impact on the safety of journalists and media personnel in the performance of their work. During the official visit, journalists, media directors, indigenous leaders, and human rights defenders acknowledged that the new administration has shown “greater openness” and “tolerance” toward journalistic work, which has led to a decrease in attacks on freedom of expression. Civil society reports that the elimination of the *Enlace Ciudadano* program and changes in the editorial line of the state-owned media—which had been used to attack and wage campaigns to disparage those who thought differently—are positive signs from the current government.

Principle 9 of the IACHR’s Declaration of Principles on Freedom of Expression states that, “the murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression. It is the duty of the state to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation.”

The Rapporteur has also repeatedly stated that constant disparagement and stigmatization create a climate that prevents reasonable and pluralistic deliberation on all public issues and that it is the responsibility of States to contribute to a climate of greater tolerance and respect for the ideas of others, even when such ideas are offensive or disturbing.

B. Organic Law on Communication and its amendment process

The Office of the Special Rapporteur for Freedom of Expression expressed its serious concern about this law prior to its enactment, through communications sent to the State, press releases, and during the hearings convened by the IACHR to address the situation in Ecuador. In particular, this Office noted the departure from international standards in areas such as: the creation of vague and ambiguous concepts such as so-called “media lynching”; the inadequate regulation of the right of reply; the imposition of prerequisites for truthfulness; the imposition of information as “prior censorship”; the compulsory membership of journalists in a professional association; the prohibition against disseminating information of public interest related to judicial proceedings; the lack of independence of the enforcement body; and the disproportionate punitive sanctions regime it established.

Nevertheless, in 2013, neither the Executive Branch nor the National Assembly accepted the recommendations of the Office of the Special Rapporteur; the Organic Law on Communication was enacted and, as mentioned above, was accompanied by institutions and enormous resources dedicated to penalizing the media and journalists. In the meetings held during the official visit with public, private, and community media outlets, journalists, and civil society organizations, as well as with dozens of State officials, there was a consensus that the law was used as an instrument of persecution and restriction of the right to freedom of expression, which seriously affected the functioning of the media and journalism in Ecuador.

In addition, some provisions that did meet international standards, such as recognition of the community sector, the strengthening of public media, and the reduction of media concentration, were not fully observed; also, many of these provisions were not applied when it came to related media. Community and indigenous media highlighted this aspect of the law, but complained that over the past decade they had been compelled to align themselves with the government through their media outlets.

During the first three years of its operation, the Superintendency of Information and Communication (SUPERCOM) opened a total of 1,190 proceedings at the national level, according to figures provided by the State. In 705 of these cases, penalties were imposed; 148 cases were dismissed; and 314 were shelved. According to SUPERCOM's current controller, 21 proceedings are still pending. The fines imposed amount to approximately US\$3 million, although US\$879,000 has been collected to date. At one point, there were 350 staff members working at SUPERCOM, and media monitoring software was installed to alert them to any breaches of the law.

Several of these cases were emblematic and exemplify the discretion and arbitrariness seen in the sanctioning of critical, humorous, or informative speech. For example, in 2014 the newspaper *El Universo* paid a fine of US\$90,000 for the publication of a cartoon by the cartoonist Bonil; and in 2017 fines of nearly US\$4000 were assessed against seven independent media outlets (*Ecuavisa*, *Teleamazonas*, *Telecentro*, *El Universo*, *El Comercio*, *Diario La Hora* and *Diario Expreso*) based on Article 18 of the LOC, which describes as "prior censorship" the "failure to publish information of public relevance or general interest." This was done after the Argentine daily newspaper *El Universo* published information concerning assets held in tax havens by former opposition presidential candidate Guillermo Lasso. It was also common for the State to impose information by way of a right of reply to various written and television media for their allusions to public officials, in conjunction with the imposition of considerable fines.

During the early months of 2017, the Ecuadorian Government continued with the practice of ordering the publication or broadcasting of its official opinion on various matters in the private media, when the information disseminated by journalists did not coincide with the interpretations or assessments of State entities. Thus, during Rafael Correa's term in office, the government often ordered the mandatory broadcasting of official programming on television and radio stations to refute news and opinions, and to question journalists and organizations that had broadcast information critical of the government's performance. Refusal to publish the State's replies was punishable by fines.

The mandatory broadcasting and publication of content ordered by the Secretariat of Communication (SECOM) was extensive during the first half of 2017. Affected media outlets included *Ecuavisa*, *La Hora*, *Exa-Democracia*, and *Radio Visión*, *Teleamazonas*, radio stations in the Amazon region of Sucumbíos and Pastaza, *Gama Tv*, and *El Universo*.

The daily newspaper *El Universo* had to publish a correction on its front page imposed by the National Institute of Statistics and Censuses (INEC), after having disseminated news about unemployment in Ecuador that the agency considered to reflect an “incorrect reading” and a “biased interpretation” of the employment figures. The daily *La Hora* was also required to publish replies on the front pages of its January 22 and 29, 2017 editions to articles it had published on unemployment figures. On February 5, 2017, *La Hora* had to once again run a front page reply from the Superintendency of Information and Communication (SUPERCOM), which questioned the outlet for not having contacted them in time to cross-check a report on press freedom and the indexes published by the international organization Freedom House. The mandatory reply took up a four-column space in the middle of the front page.

The Office of the Special Rapporteur would like to point out that when the law was being enforced, the media and civil society organizations such as Fundamedios documented and condemned the fact that it had a chilling effect on journalism, and since then have been calling for the amendment of this and other legal provisions and for the elimination of the Secretariat of Communication.

The Office of the Special Rapporteur welcomes the initiative of the Presidency of the Republic of Ecuador to introduce before the National Assembly the draft Organic Law to Amend the Organic Law on Communication (hereinafter “LOC”). This Office notes that the bill’s Statement of Legislative Intent mentions the willingness to enact the necessary reforms to ensure that the regulatory framework on these freedoms and the functioning of the media is in line with international standards. Similarly, we note that the amendment addresses several concerns expressed by this Special Rapporteur regarding the LOC.

The Statement of Legislative Intent additionally recognizes that the LOC grants excessive powers in regulating the operation of the media. The Executive Branch also calls for the law in any field to be interpreted under the provisions of the Constitution of the Republic of Ecuador, international treaties, and the case law of the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”).

On 25 July, at the invitation of the National Assembly, the Office of the Special Rapporteur presented a document analyzing the draft amendment. While acknowledging the progress made in relation to the current LOC, the Rapporteur also made a number of recommendations to amend several articles that could affect freedom of expression.

Among others, the recommendations include:

- Revise restrictions on the circulation of different types of information derived from criminal proceedings or about personal data, since they do not meet the requirement of necessity in the context of a democratic society.
- Bear in mind that journalists and the media are not covered by a duty of confidentiality on the protection of judicial investigations when it comes to the publication of information of public interest.
- Strengthen the legal framework in order to effectively guarantee the right of journalists and the media to protect their sources and to ensure that any restrictions meet the strictest standards in accordance with relevant international norms.
- Revise the provision referring to the illegal interception of communications, as this restriction is not appropriate for a law on freedom of expression and audiovisual media services.

- Revise the text of draft Article 15 of the bill, which would potentially allow the media to be held liable for the dissemination of information whose author is not properly identified.
- Guarantee that the right to freedom of expression is not subject to prior censorship but rather to subsequent liability, in accordance with Article 13.2 of the American Convention.
- Delegate the drafting of the content of the codes of ethics to a Press or Media Council for discussion, to include the participation of representatives of the media, academia, civil society organizations, and the public.
- Replace the minimum quota of 33% spectrum allocation to public media with a system of direct allocation to public media, provided that the needs, objectives, and mandates of public media justify the creation of new media.
- Meet the urgent need to reserve radio spectrum space for community media and ensure that the competitive bidding processes are differentiated from those established for the private sector.
- Consider that the National Assembly be more specific in its enactment of the legislation that will enable a process for reviewing the use of penalties under the LOC in recent years.

In this regard, the Office of the Special Rapporteur urges the Legislative Branch to take these recommendations into account in order to adapt all the provisions of the future LOC to international principles on freedom of expression. The Executive Branch should also take these recommendations and standards into account when validating the text adopted by the National Assembly.

II. RIGHT TO FREEDOM OF EXPRESSION AND THE USE OF CRIMINAL LAW

A. Use of criminal law against the media, journalists, human rights defenders, and political leaders

During the last decade, the government of Rafael Correa used criminal law to prosecute and impose example-setting penalties against journalists, columnists, social leaders, and opponents. The Regional Human Rights Advisory Foundation (INREDH) systematized thirteen cases that illustrate the strategy developed by public officials through investigations or opinions related to their actions.

The case of journalist Emilio Palacio and the directors of the newspaper *El Universo* is one of the most emblematic. Palacio was the subject of several criminal complaints, one of them brought by former President Rafael Correa himself, who accused Palacio and the directors of *El Universo*, Carlos, César, and Nicolás Pérez Barriga of criminal defamation [*injurias calumniosas*] and sought US\$80 million in damages. The complaint originated with an opinion column published in *El Universo*, in which Palacio stated that the president could be investigated for crimes against humanity based on the orders he gave during what he considered a police-led *coup d'état*. On February 16, 2012, in proceedings in which various irregularities were reported, the Criminal Division of the National Court of Justice upheld the conviction of three years in prison and the payment of \$40 million against the directors and former editorial writer of *El Universo* for having insulted Rafael Correa. Correa subsequently announced “the pardon of the accused.”

The cases of Fernando Villavicencio and Marco Tapia, obtained by the Office of the Special Rapporteur, are also paradigmatic.

Fernando Villavicencio, an Ecuadorian journalist, was subjected to continuous legal persecution after denouncing numerous cases of corruption. In April 2013, the Criminal Chamber of the National Court of Justice sentenced Villavicencio to a term of imprisonment and ordered him to pay a heavy fine and issue a public apology. On January 30, 2014, Mr. Villavicencio filed a petition with the Inter-American Commission on Human Rights against the State of Ecuador. In his petition, Villavicencio requested precautionary measures from the IACHR, which were granted on March 24, 2014. However, the Attorney General's Office opened new criminal proceedings against him for the alleged disclosure of confidential information contained in emails sent by the Attorney General to President Correa and the Advisor to the President of the Republic. In October 2016, he was ordered held in pretrial detention. This prompted the request for new precautionary measures before the Inter-American Commission on Human Rights. After Correa's departure from power, Villavicencio returned to the country, his pretrial detention was replaced by another measure that invaded his privacy (the use of an electronic ankle monitor). His case was ultimately closed.

In addition, on September 25, 2008, Freddy Aponte, a journalist with Radio Luz y Vida, was sentenced to six months in prison after being accused of criminal defamation [*injurias calumniosas*] against former Loja mayor Bolívar Castillo. The convictions are still affecting Aponte, who continues to be subject to judicial harassment by Castillo. Similarly, on November 11, 2015, Twitter user and deputy national director of the Unidad Popular movement, Sebastián Cevallos, was sentenced by a court in Cuenca to 15 days in prison for a fourth-class violation of Article 396 of the Comprehensive Organic Criminal Code, relating to honor and good name. Cevallos did not go to jail because his sentence was pardoned by the complainant.

Finally, during the official visit, the Office of the Special Rapporteur observed that, since the time Lenín Moreno took office, the Judicial Branch, the Public Ministry, and the Executive Branch had made positive decisions to protect the right to freedom of expression in the context of criminal proceedings against journalists, activists, and social leaders. Some administrative penalties imposed against the media or political representatives on the basis of information or opinions disseminated were also lifted. In this regard, the Office of the Special Rapporteur welcomes the decision of the Constitutional Court, which on August 1, 2018, repealed a package of constitutional charter amendments proposed by then-President Correa, and supported by his bloc in the Assembly. With this decision, communication ceased to be a public service in Ecuador.

B. Criminal provisions restricting freedom of expression

In this context of the use of the criminal law to penalize the disclosure of information of public interest, the Office of the Special Rapporteur recognizes as a significant step forward the decriminalization of "insult crimes" [*desacato*] that came about when the new Comprehensive Organic Criminal Code (COIP) was enacted in 2014. The Office of the Special Rapporteur further notes that, despite the elimination of the criminal offense of slander [*injuria*], the COIP retains the criminalization of calumny [*calumnia*], with a formulation that is incompatible with human rights. Similarly, Article 396 of the Code still contains an offense used to punish speech against the honor of individuals. After the adoption of these criminal offense definitions, several journalists and political opponents were convicted under them.

This Office reiterates the importance of criminal provisions being designed and drafted in such a way as to ensure their compatibility with international human rights law, including the principles and standards governing the imposition of restrictions on freedom of expression. In accordance with Article 13.2 of the American Convention, this type of restriction must be provided for by law, pursue legitimate objectives, and respect the principles of necessity and proportionality. When it

comes to limitations on freedom of expression imposed by criminal law, the Inter-American Court has held that the requirements of the principle of strict legality must be met. This is expressed in the need to “use precise and unambiguous language that narrowly defines the criminal offense,” which means “a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment.”

The Office of the Special Rapporteur considers that the provisions contained in Articles 182 and 396 of the COIP do not meet these requirements and are extremely onerous with respect to freedom of expression.

Article 182 defines as “calumny” [*calumnia*] the conduct of any person who “by any means, falsely accuses another of a crime,” and provides for “a custodial sentence ranging from six months to two years.” Although it provides that “statements made before authorities, judges, and courts do not constitute calumny if the accusations have been made as a defense in the case,” and if the person responsible “proves the veracity of the accusations,” it establishes that “in no case shall evidence be admitted regarding the accusation of an offense that has been the subject of a judgment of acquittal, or dismissal, or closure of proceedings.” This rule does not meet the requirement of necessity, i.e. the assumption that least restricts the protected right. By excluding evidence of the veracity of claims in cases where a final decision has already been rendered by the criminal justice system, the rule establishes a radical and excessive limitation on the right to freedom of expression in the protection of the right to honor. It is tantamount to an absolute prohibition on referring to certain facts and persons in cases where there is a final judgment of dismissal, which is incompatible with the principles of a democratic system, especially in the case of public officials or those who aspire to be public officials.

Article 396, in turn, punishes “with a term of imprisonment of fifteen to thirty days” anyone who “by any means, utters speech that discredits or dishonors another.” This provision is extremely vague and ambiguous, and therefore has an undeniable discouraging and inhibiting effect on speech.

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

In a similar vein, the Human Rights Committee stated in its General Comment No. 34 that “States parties should consider the decriminalization of defamation, and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.”

The Office of the Special Rapporteur recommends that the Ecuadorian State decriminalize these offenses and convert offenses against honor and reputation into civil actions, in accordance with international standards and best practices. This will be especially relevant to protect critical speech about public officials, public figures or, in general, matters of public interest. It also recommends that the State strengthen legal guarantees to ensure that journalists are not subjected to judicial or

other forms of legal harassment in retaliation for their work, establishing differentiated standards for assessing subsequent civil liability, including the standard of actual malice and the strict proportionality and reasonableness of subsequent civil penalties.

Finally, the Office of the Special Rapporteur notes that laws on other matters also contain provisions punishing speech that may be lawful. Some of them are included in the finance law, others in the Telecommunications Act, the Citizen Participation Act, and the Democracy Code. These will be examined in relation to the inter-American standards in the final report on this visit.

III. SAFETY OF JOURNALISTS AND IMPUNITY

In the regional context, Ecuador was not among the countries where journalists faced the highest risk of experiencing attacks on their lives and safety in the practice of their profession. However, the stigmatizing and demeaning speech against the press by former President Correa and his administration, as well as the absence of protection policies and the impunity with which numerous attacks have been carried out, exposed journalists and the media to a greater risk of attack.

This Office of the Special Rapporteur recalls that, under certain circumstances, even when official speech does not expressly authorize, instigate, order, instruct, or promote acts of violence against certain citizens, its repetition and content may increase the “relative vulnerability” of these groups and thus the risk they face.

In April 2018, the kidnapping and subsequent murder of *El Comercio* journalists Javier Ortega Reyes, Paúl Rivas Bravo, and Efraín Segarra on the northern border of Ecuador and Colombia, was the most serious attack on the lives of journalists by organized crime. The group that claimed responsibility for the murder had entered into negotiations with the Ecuadorian government for a prisoner exchange, but ultimately cut off communication. The bodies were found in Colombia weeks later.

The Inter-American Commission on Human Rights issued precautionary measures to protect the journalists’ safety during the kidnapping and called on the States involved to exhaust all measures at their disposal to secure their release. Ecuador and Colombia have now agreed to the establishment of a special IACHR follow-up team.

The murders also caused major shock in the journalistic profession and garnered the support of most of society, leading many to demonstrate in the streets to express their outrage. The path to rebuilding a free and independent press in Ecuador also requires the State to rebuild the trust lost during so many years of alienation and attack.

Faced with this situation, the Government must take significant measures to strengthen the functioning and safety of the press, even in high-risk areas such as the Colombian border, and put in place effective protection mechanisms with the involvement of civil society, journalists, the media, and experts in the field.

The Office of the Special Rapporteur takes note of and welcomes the announcement made during the official visit by the Secretary of Communication, Andrés Michelena, of the forthcoming establishment of an Inter-institutional Committee for the Protection of Journalistic Work, which will coordinate the efforts of various institutions and civil society to provide protection in situations of risk and to establish a violence prevention policy.

The Office of the Special Rapporteur recommends that the Government ensure that all staff members of every department involved in this Committee be trained on how to meet their

obligations to protect journalists, and that they fully understand the importance of the role of journalists in a democratic society. The Government must also provide sufficient resources for this program to ensure effective coordination between all the authorities and also to enable it to operate sustainably in the different regions of the country.

It is also essential to strengthen coordination with the Office of the Attorney General of Ecuador in order for it to fulfill its responsibility to identify and investigate the risks faced by journalists who are the targets of attacks and threats. The investigation of attacks on the press should be seen as a crucial aspect of any protection program.

It is also vitally important for risk assessment methodologies to include a differentiated approach that takes account of the specific risks faced by certain groups of journalists, including women journalists and community and indigenous journalists.

IV. ACCESS TO PUBLIC INFORMATION

This Office was informed that challenges remain in the country in relation to overcoming the culture of secrecy and having greater access to information, statistics, figures and data held by the State. Several journalists and media outlets indicated that mechanisms for access to information remain ineffective for the practice of journalism in Ecuador.

At the same time, women's rights organizations reported that in cases of sex crimes, femicide, abortion, hate crimes, and others, there is a lack of access to statistics that are properly disaggregated by age, sex, gender expression and identity, and sexual orientation. Likewise, it was reported that the information provided in response to such requests for information is inconsistent, and that the State in some cases responds incompletely to requests, or alleges that the information does not exist.

It was additionally reported that, despite Ecuadorian law establishing the confidentiality of information as an exception to the principle of openness and maximum disclosure, there is a measure of discretion on the part of the institutions. Moreover, many of these institutions do not have the legal authority to declare that the information they handle, produce, or hold is confidential. Under the MLoaip - Entidades system, agencies that would report the classified information index listing are reportedly diverse in nature, and given their scope of competence, most would not necessarily handle information concerning national security.

With regard to the right of access to public information, the Office of the Special Rapporteur notes that the Secretary General of the Presidency announced the forthcoming adoption of a resolution issuing general guidelines for dealing with requests for access to public information in regulated entities. The Office of the Special Rapporteur also views positively the 2018 implementation of an active transparency monitoring mechanism through which the Office of the Ombudsman reviews and assesses, on a random basis, the entities required to comply with the standards set forth in Article 7 of the Organic Law on Transparency and Access to Public Information (LOTAIP).

Finally, the Office of the Special Rapporteur takes note of and welcomes the proposal for a data protection law. However, the Office is concerned that, according to reports, there has been no active involvement of civil society in its drafting process.

The Office of the Special Rapporteur recalls that the right of access to information, as a constituent element of freedom of expression, is subject to a limited number of exceptions according to inter-American standards. Such limitations must strictly adhere to the requirements of Article 13(2) of

the American Convention, that is: exceptional conditions, legal establishment, legitimate objectives, necessity, and proportionality.

In this exact regard, Principle 4 of the Statement of Principles provides that, “Access to information [...] allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.”

V. PLURALISM AND DIVERSITY

In its 2016 Annual Report, the Office of the Special Rapporteur discussed the competitive bidding process for the award of 1,472 radio and television frequencies by the Telecommunications Regulation and Oversight Agency (ARCOTEL) and the Council for Regulation and Development of Information and Communication (CORDICOM), of which 846 were for frequency modulation (FM) radio stations, 148 for amplitude modulation (AM) stations, and 478 for UHF (ultra high frequency) channels.

In the joint letter sent on October 14, 2016, the Special Rapporteur for Freedom of Expression of the IACHR and the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression voiced their concern about the alleged lack of inclusion and transparency in the bidding process for the allocation of radio and television frequencies. In addition, in its 2016 Annual Report, the Office of the Special Rapporteur reported allegations of corruption by a former CORDICOM official.

Finally, in June 2018, the Office of the Comptroller General of the State issued a binding opinion instructing the bodies in charge of the bidding process to suspend it. At the time of the suspension, the frequency allocation processes had been completed for 268 frequencies, while another 800 frequencies were still pending examination and decision by CORDICOM and ARCOTEL.

Without prejudice to the fact that different communication stakeholders agree that there were irregularities in some of the bids examined and in different aspects of the bidding process, the suspension has given rise to concern and legal uncertainty in the private media as well as in the community sector. Some of these actors, who participated in the competition in good faith, met their obligations and in some cases have already obtained licenses to operate; others have incurred the necessary expenses and understand that the State is responsible for the suspension of the bidding process. In turn, the discussion of amendments to the LOC may also lead to changes in the overall picture of spectrum allocation, such as the elimination of a 33% quota for public media.

The Office of the Special Rapporteur recommends that the State establish an advisory council or forum for all the stakeholders involved (public, private, commercial, and community media), in order to engage in a dialogue on the general framework for spectrum allocation, a case-by-case review of the rights already granted to beneficiaries in good faith, and the establishment of new allocation processes. The Office of the Special Rapporteur offers its follow-up and technical advice to the State in handling this process.

The Office of the Special Rapporteur reiterates that the allocation of radio and television licenses should be guided by democratic criteria and pre-established, public, and transparent procedures that serve as a check on the possible arbitrariness of the State and guarantee equal opportunities for all persons and sectors concerned. In this regard, Principle 12 of the Declaration of Principles has underscored that, “The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.”

The Office also reiterates the need to maintain the spectrum reserve for the community and indigenous peoples' sector, with the incorporation into the law of a strict definition of community media—that is, media at the service of a given community—as well as fair conditions of access to licenses that differentiate between private and non-commercial media.

VI. INTERNET AND FREEDOM OF EXPRESSION

During the last decade, the Internet in Ecuador was a space in which the government of former President Correa also fought a battle against journalists and critics. Some of the strategies were systematic, such as hiring a company to request that the main platforms take down politically critical accounts and content based on the DMCA [Digital Millennium Copyright Act] of the United States; the denial of service, and attempts to reveal the identity of anonymous users. The former president also created a network to expose and register social media users critical of his government, and the state reportedly procured malware from the Hacking Team company during this period.

The attack and blocking of accounts was reported to have decreased during 2017. However, during the official visit to Ecuador, civil society organizations, journalists, and media outlets reported several cases of limitations on freedom of expression on the Internet, including the suspension or blocking of Twitter accounts, as well as the denial of services (DDoS) to opinion or investigative journalism portals, following political publications and in the context of existing polarization. Among the most recently reported cases were those of Fernando Villavicencio and Crudo Ecuador, whose Twitter accounts were suspended on several occasions.

Moreover, the Office of the Special Rapporteur appreciates the fact that no action has been taken on the draft laws presented to the National Assembly in recent years with the aim of exercising government control over social networks. However, the Office is concerned that the Draft Law Regulating Acts of Hate and Discrimination on Social Networks and the Internet, introduced by former President Correa the day before his departure from office, has not been definitively shelved to date.

Finally, civil society organizations reported an increase in attacks on vulnerable groups based on xenophobia, homophobia, and misogyny on social networks. These organizations consider that in some cases violence is being incited for discriminatory reasons.

VII. SOCIAL PROTEST AND THE CRIMINALIZATION OF DEMONSTRATIONS, HUMAN RIGHTS DEFENDERS

In the last 10 years, there were several reported cases of human rights defenders being criminalized in the context of protests in Ecuador because of the content of their criticism of the government and the forms of protest they used. According to the Office of the Ombudsperson of Ecuador, between 2007 and 2017, 841 people were criminalized in 98 documented protests. Ninety per cent of these cases were brought by the Ecuadorian State.

During the official visit to Ecuador, the Office of the Special Rapporteur was informed that there has been a marked decrease in the number of cases of criminalization of social protest since the new government took office; however, the organizations stated that there had been excessive use of force by the security forces against demonstrators in specific cases. In this regard, they mentioned that there was police repression against Alianza País activists sympathetic to former President

Correa, and assaults against demonstrators during a sit-in outside the Judicial Unit of Cuenca where a hearing was being held to seek protection against extractive activity in indigenous territory.

With regard to indigenous peoples, the Office was informed of the murder of Héctor Aguavil Calazacón, of the Tsáchila indigenous community. He was killed in the city of Santo Domingo de los Colorados at his natural medicine clinic on February 16, 2018. President Lenín Moreno condemned the act and attributed it to hired assassins. It was also reported that on the 28th of the same month, Jorge Washington Acosta, coordinator of the Trade Union Association of Agricultural, Banana, and Peasant Workers, was threatened over denunciations he made as a union leader.

Until the entry into force of the current Comprehensive Organic Criminal Code (COIP) in 2014, several criminal offenses whose statutory definitions were drafted in a manner inconsistent with the principle of strict legality were reportedly being used to criminalize social protest. These included the crimes of illegally obstructing roadways, sabotage, advocating crime, terrorism, promotion of unauthorized parades or public demonstrations, conspiracy against the security of the State, and offenses against public officials, among other crimes.

The Special Rapporteur is concerned that, while the current COIP eliminates certain offenses that contributed to greater criminalization, new punitive provisions have been incorporated to include crimes such as conspiracy, attack or resistance, incitement to public discord, and the blocking of public services, which have allowed for the continued repression of social protest in Ecuador.

During the visit, the Office of the Special Rapporteur also gathered information on the request for a new amnesty proposal for advocates criminally prosecuted for mobilizing, protesting, or resisting during the government of former President Rafael Correa. The advocates acknowledged that President Lenín Moreno had granted seven pardons, but noted that the National Assembly seemed unable to make progress in granting amnesties to all those affected.

According to the Confederation of Indigenous Nationalities of Ecuador (CONAIE), there are 177 individuals who have been targeted for criminal prosecution in the context of mobilization, protest, or resistance in Ecuador. This information was reported by CONAIE through a request made in June 2018 to the Office of the Ombudsperson and the Office of the Public Defender to continue with the amnesty process in the legislature.

The Office of the Special Rapporteur notes that, in response to this request by CONAIE, a technical committee was set up to process applications for amnesty. It also notes that, in order to expedite the granting of such applications, “Regulations for the admission and processing of applications for amnesties submitted to the National Assembly in cases of the criminalization of human rights defenders” have been drawn up and are currently under review by the National Assembly.

The Office of the Special Rapporteur has repeatedly stated that social protest is a fundamental tool for the defense of human rights, and an essential means of expressing political and social criticism of the activities of government authorities. Similarly, the Inter-American Commission has pointed out that the criminalization of social mobilization and protest, either through the direct repression of demonstrators, or through the arbitrary detention and criminal prosecution of demonstrators, is incompatible with a democratic society in which people have the right to express their opinions peacefully.

In this regard, security operations must be carefully planned under clear protocols of action that guarantee the appropriate, gradual, and proportional use of less-lethal weapons and encourage dialogue. Police action in these contexts should be aimed at facilitating the exercise of the rights to

freedom of expression and assembly, as well as protecting the lives and safety of demonstrators and others present rather than containing or confronting demonstrators. The fact that some groups or individuals use violence at a demonstration does not, per se, make the entire protest violent, nor does it authorize security forces to break up the protest through the use of force or carry out mass arrests.

The State also has a duty to ensure that journalists and media professionals who are covering public demonstrations are not arrested, threatened, assaulted, or otherwise deprived of their rights because they are practicing their profession. Attacks on journalists and the destruction or seizure of reporters' equipment violate freedom of expression, in both its individual and collective dimensions.

VIII. CONCLUSIONS AND RECOMMENDATIONS

a. Reparations

There has been a broad range of violations of freedom of expression in the last decade, affecting individual victims and society as a whole, as the apparatus of the State has been set up to create a climate of repression of fundamental freedoms. Because of this, the State must establish individual reparation measures aimed at providing restitution, compensation, and rehabilitation to victims, as well as general measures of satisfaction and guarantees of non-repetition.

Some of the measures of reparation should include:

- the acknowledgement, through public statements by the most senior government officials, of the legitimacy and value of the work of journalists and the repudiation at all times of crimes committed against them;
- the enactment by the National Assembly of a transition provision in the amendment of the Organic Law on Communication to establish a process for reviewing the application of penalties by the Superintendency of Information and Communication (SUPERCOM);
- the enactment of an amnesty law for media professionals, human rights defenders, and political leaders, with open proceedings resulting from persecution by the authorities;
- the implementation of memory and truth processes aimed at ensuring that victims of criminal prosecution for the exercise of the right to freedom of opinion and expression are aware of the truth of what happened, including the role of the various judicial bodies involved in their respective cases; and
- give priority to the petitions and cases submitted by different victims to the Inter-American Commission on Human Rights and participate without delay in the friendly settlement mechanisms requested by the victims of this period.

b. Use of criminal law

The Office of the Special Rapporteur recommends that the Ecuadorian State decriminalize these acts and convert offenses against honor and reputation into civil actions, in accordance with international standards and best practices.

c. Organic Law on Communication

The Office of the Special Rapporteur has incorporated into this report the recommendations presented on July 25 in its technical analysis of the amendment of the Organic Law on Communication during the Rapporteur's previous visit in July.

In particular, it suggests that the National Assembly and the Executive Branch:

- Revise the restrictions on the circulation of different types of information derived from criminal proceedings or about personal data, since they do not meet the requirement of necessity in the context of a democratic society.

- Bear in mind that journalists and the media are not covered by a duty of confidentiality on the protection of judicial investigations when it comes to the publication of information of public interest.
- Strengthen the legal framework in order to effectively guarantee the right of journalists and the media to protect their sources and to ensure that any restrictions meet the strictest standards in accordance with relevant international norms.
- Revise the provision referring to the illegal interception of communications, as this restriction is not appropriate for a law on freedom of expression and audiovisual media services.
- Revise the text of draft Article 15 of the bill, which would potentially allow the media to be held liable for the dissemination of information whose author is not properly identified.
- Keep in mind that freedom of expression may not be subject to prior censorship or preconditions such as truthfulness but rather to subsequent liability.
- Change the rule that establishes compulsory qualification requirements for the practice of journalism.
- Delegate the drafting of the content of the codes of ethics to a Press or Media Council for discussion, to include the participation of representatives of the media, academia, civil society organizations, and the public.
- Replace the minimum quota of 33% spectrum allocation to public media with a system of direct allocation to public media, provided that the needs, objectives, and mandates of public media justify the creation of new media.
- Ensure that radio spectrum space is reserved for community media and ensure that the competitive bidding processes are differentiated from those established for the private sector.
- Ensure that the broadcasting enforcement and oversight authority is not subject to interference from the government or the private broadcasting sector.

d. Diversity and pluralism

- Replace the minimum quota of 33% spectrum allocation to public media with a system of direct allocation to public media, provided that the needs, objectives, and mandates of public media justify the creation of new media.
- Develop public media protocols and measures to guarantee pluralism in coverage, especially in electoral contexts, as well as to guarantee the independence of journalists and analysts from government influence.
- Ensure that radio spectrum space is reserved for community media and ensure that the competitive bidding processes are differentiated from those established for the private sector. Create sector support funds under transparent allocation mechanisms and objectives that respect the independence and autonomy of indigenous communities and peoples.
- Establish an advisory council or forum for all the stakeholders involved (public, private, commercial, and community media), in order to engage in a dialogue on the general framework for spectrum allocation, a case-by-case review of the rights already granted to beneficiaries in good

faith, and the establishment of new allocation processes. The Office of the Special Rapporteur offers its follow-up and technical advice to the State in handling this process.

- The allocation and/or renewal of radio and television licenses should be guided by democratic criteria and pre-established, public, and transparent procedures that serve as a check on the possible arbitrariness of the State and guarantee equal opportunities for all persons and sectors concerned.

e. Safety of journalists

- Thoroughly, effectively, and impartially investigate crimes against journalists. In addition, in cases of murders of journalists, it is necessary to judicially determine the motives and the possible relationship of the crime to journalistic activity and freedom of expression. The authorities should not rule out the practice of journalism as a motive for murder and/or assault before the investigation is completed.

- Establish a program to protect journalists and media workers and ensure that its content is in line with international standards. It should be developed in effective and broad consultation with civil society organizations, journalists, and media workers.

f. Access to public information

- Promote a culture of transparency, accountability, and facilitation of public access to information, and train public servants accordingly.

- The Ombudsperson's Office, as the guarantor of the Organic Law on Transparency and Access to Public Information, must exercise its power to enforce the law against the agencies and use the remedies of access to information or *amparo* [petition for a constitutional remedy] to bring judicial enforcement proceedings in those cases in which the agencies refuse or omit to provide information without adequate justification under the regime of exceptions.

g. Internet

- Order an investigation into the purchase and use of malware to monitor journalists, activists, and human rights defenders.

- Include experts on digital attacks in the program for the protection of journalists.

- Call on private sector platforms to publicly disclose the decisions they make regarding the blocking of content in Ecuador and the deletion of accounts reported for the alleged abuse of terms and conditions or copyright infringements, in the case of users persecuted for political or journalistic reasons.

h. Social protest

- Ensure that in social protests conducted in the exercise of the right to peaceful assembly and demonstration, demonstrators' rights to life, humane treatment, and individual liberty are protected;

- Develop policies, strategies, and special training focusing on negotiation techniques and peaceful conflict resolution, as well as law enforcement maneuvers for responding to potential riots and disturbances with minimal risk to the lives and safety of civilians and police officers.

- Adequately and effectively prevent, investigate, and punish the arbitrary use of force by law enforcement officers, showing greater rigor when it has been directed against vulnerable groups, given the historical discrimination against them on the basis of their ethnicity, race, sex, sexual orientation, way of thinking, and expression, among other grounds.

i. Criminalization of protesters and human rights defenders

- Take measures to prevent the judicial harassment of demonstrators and human rights defenders, such as protocols and training for court officials, in order to keep them from facing trials that are unfair or unfounded because of the judicial investigations.