

**REPORT OF THE OFFICE OF THE SPECIAL RAPPORTEUR FOR THE FREEDOM OF  
EXPRESSION 1998**

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## REPORT OF THE OFFICE OF THE SPECIAL RAPPOREUR FOR THE FREEDOM OF EXPRESSION

### INTRODUCTION

In 1858, J.S. Mill wrote: “It is to be hoped that the time in which it was necessary to defend freedom as expression as one of the guarantees against corrupt or authoritarian government has passed.”<sup>1</sup>

In recent years, unfortunately, some 150 journalists have been murdered and hundreds more threatened in our hemisphere. Indirect ways to limit freedom of expression are constantly being developed, either through legislation, court rulings or government-led initiatives. More than a century after Mill wrote his book, it is still necessary to defend freedom of expression as a guarantee, not only in times of dictatorship, but also under the rule of democratically elected governments.<sup>2</sup>

The last two decades will go down in history as a time of major political change. People around the globe turned their backs on oppressive, authoritarian regimes to usher in more open governments democratically chosen in transparent elections. Free and fair elections became the preferred road to return to democracy. Such elections are without a doubt a prerequisite for democracy, but in and of themselves are hardly sufficient. Authoritarian regimes do not automatically become democratic through one or more elections, not matter how free and fair they may be.

For the continued development of stable and participatory democracy, elections in themselves are not enough. Other elements inherent to democratic society must also be fostered, such as recognition and respect for human rights, effective and independent legislative and judicial branches of government, a party system that facilitates open lines of communication between citizens and leaders, an active civil society, and above all, wide-ranging freedom of expression and access to information to ensure that all citizens have the information they need to make decisions.

Freedom of expression certainly holds a prominent position among the different requirements for a participatory and stable democracy. If it does not exist, it becomes impossible to develop the other elements needed to deepen democracy. Thus, freedom of expression has often been said to be the fundamental freedom underlying the very existence of democratic society.

In this regard, the Inter-American Court of Human Rights has said, “Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural associations and, in general, those who wish to

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<sup>1</sup> J. S. Mill, “On Liberty” in “On liberty and other writings”, edited by Stefan Collini, Cambridge University Press, pages 5 a 115.

<sup>2</sup> It is difficult to precisely establish the number of journalist murdered during the past years. In many cases, it is not possible to determine the motive of the murders with absolute certainty. This number is used by different organizations involved in the defense of freedom of expression around the world.

influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.”<sup>3</sup>

For freedom of expression to be fully developed, it must be reinforced by the political will of those who govern, by appropriate legislation laying the legal foundation for its defense and by an independent and effective judiciary that guarantees that it can be exercised to the fullest extent.

Great strides have been made in fostering respect for freedom of expression throughout the hemisphere. Democracy has led to greater freedom of expression in comparison to previous decades when many countries in the Americas were under the rule of dictatorships or very authoritarian governments. Nevertheless, if democratic institutions are used to limit freedom of expression, democracy will not have been planted in the fertile ground necessary to extend its branches through the whole of society. Quite to the contrary, such ground may nurture authoritarian tendencies that continue to survive even after the birth of democracy.<sup>4</sup>

In many Latin American democracies today, the public institutions designed to act as checks on authorities and individuals are still weak. For example, in many cases the Judicial Power fails to be efficie to investigate situations brought to their attention and punish guilty parties, as appropriate. Corruption and drug trafficking have taken their toll on public institutions. In countries affected by such problems, the press has become the main check on authorities and individuals alike by bringing to light illegal or abusive acts previously unnoticed, ignored or perpetuated by official control bodies. In many instances the press has become the most effective instrument to uncover and/or stop the illegal or abusive acts of authorities or individuals. And in doing so, it often puts itself at risk.

This is the context in which the Office of the Special Reporter will evaluate freedom of expression in the hemisphere today. Such an examination would fall short if it were not to take into account the democratic framework now in place. Free elections, respect for human rights, independent branches of government and freedom of expression are all basic elements of democracy and no one of them can be evaluated apart from the others.

This is the first report prepared by the recently appointed Special Reporter on Freedom of Expression and, as such, it aims to prepare the way for a series of both general and subject-specific reports to come. Here the main objectives of the Office of the Special Reporter will be outlined and the initial views and concerns of the Reporter made known.

Chapter I will cover background, the goals contemplated by the Inter-American Commission on Human Rights (IACHR) when it decided to create the Office of the Special Reporter on Freedom of Expression, the reporter’s work plan for the first three years and an account of what has been

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<sup>3</sup> Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 48. Annex A

<sup>4</sup> The Rapporteur considers also that poverty and social exclusion, affecting vast sectors of society in the Americas have an impact on the freedom of expression of their citizens. Their voices and the progressive development of human rights as a whole are postponed.

done in these first five months. Chapter II will review the basic norms on freedom of expression enshrined in the American Convention on Human Rights (“the American Convention”) and the case law developed by the organs of the Inter-American system for the protection of human rights. Mention will also be made of cases now pending before the Inter-American Court of Human Rights. In Chapter III and IV the Special Rapporteur will outline his main concerns regarding freedom of expression today and address three specific problems: the murder of journalists, contempt laws and rules on the compulsory membership of journalists in professional associations (“compulsory licensing”). In Chapter V the Rapporteur will make some final considerations and recommendations for the attention of the Member States in general.

## CHAPTER I

### A. Background to the Creation of the Office of the Special Rapporteur on Freedom of Expression

The Office of the Special Rapporteur on Freedom of Expression is a permanent office that operates independently and has its own budget. It was created by the Inter-American Commission on Human Rights in accordance with its powers and competenc, and operates within the legal framework of the Commission.<sup>5</sup>

The Inter-American Commission on Human Rights is an organ of the Organization of American States (OAS) whose principal function is to promote the observance and protection of human rights and to serve as a consultative body to the OAS. The powers of the Commission are derived mainly from the American Convention on Human Rights and the Charter of the Organization of American States. The IACHR investigates and rules on complaints alleging human rights violations, makes on-site vists, prepares draft treaties and declarations in the field of human rights and reports on the human rights situation in countries of the region.

The Commission has touched upon the specific question of freedom of expression in its decisions on individual petitions concerning censorship and crimes against journalists that have gone unpunished. In special reports, such as that on contempt laws, the Commission has examined the question of threats to and restrictions on the media. The IACHR has also included freedom of expression among the topics examined during on-site visits and covered in general reports.<sup>6</sup> Lastly, the Commission has taken precautionary measures in urgent situations in order to avoid irreparable damage to persons.<sup>7</sup>

At its 97<sup>th</sup> Regular Session in October 1997, the Commission, pursuant to the faculties conferred upon it by the Convention and its own Regulations, unanimously decided to create the permanent Office of the Special Rapporteur on Freedom of Expression (hereinafter “the Office”), which enjoys both structural and functional independence. In doing so, the Commission acted in accordance with the faculties conferred upon it by the Convention and its own Regulations, giving due consideration to recommendations made by many sectors of society in the Member States that feel profound concern for ongoing restrictions on freedom of expression. The decision also grew out of observations made during on-site visits, during which the Commission was witness to the serious problems and threats to the full and effective enjoyment of a freedom that is of vital importance to the development and consolidation of the rule of law. At its 98<sup>th</sup> Special Session in March 1998, the Commission defined the characteristics and functions of the Office in general and decided to create

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<sup>5</sup> Articles 40 and 41 of the American Convention on Human Rights and Article 18 of the Statute of the Inter-American Commission of Human Rights.

<sup>6</sup> See, “Report on the Situation of the Human Rights in Mexico” OEA/Ser.L/V/II.100 Doc. 7 rev. 1, September 24, 1998; “Third Report on the human Rights Situation in Colombia” OEA/Ser.L/V/II.102 Doc.9 rev. 26 February 1999.

<sup>7</sup> Article 29 of the Regulations of the Commission states, “In urgent cases, when it becomes necessary to avoid irreparable damage to persons, the Commission may request that provisional measures be taken to avoid irreparable damage in cases where the denounced facts are true.

a voluntary economic assistance fund for it.<sup>8</sup> That same year the Commission announced that it would accept applications for the position of Special Rapporteur on Freedom of Expression in the Americas. After evaluating and interviewing the candidates, the Commission decided to appoint attorney Santiago Alejandro Canton of Argentina to the post. Mr. Canton assumed his position on 2 November 1998.

By creating the Office, the Commission aims to raise public awareness of the importance of freedom of expression throughout the hemisphere. This is being done in the conviction that this basic right plays a fundamental role in the development and consolidation of democracy and in the protection of all other human rights. The other purposes of the Office are: to make specific recommendations to Member States regarding freedom of expression so that they can better take measures to support it, to draft specific reports and studies, and to quickly respond to any petition or communication reporting violations of freedom of expression in an OAS Member State.

The initiative to create the permanent Office of the Special Rapporteur for Freedom of Expression was fully backed by OAS Member States at the Second Summit of the Americas, where the Heads of State and Government acknowledged the fundamental role freedom of expression plays in the area of human rights and in democracy, and expressed satisfaction with the creation of the new permanent Office. In the April 1998 Declaration of Santiago, the Heads of State and Government said:

We agree that a free press plays a fundamental role in (the area of human rights) and we reaffirm the importance of guaranteeing freedom of expression, information and opinion. We commend the recent appointment of a Special Rapporteur for Freedom of Expression, within the framework of the Organization of American States.<sup>9</sup>

At the same Summit, the Heads of State and Government made a commitment to support the Office of the Special Rapporteur for Freedom of Expression. In this regard, the Plan of Action adopted by the Summit called on governments to:

Strengthen the exercise of and respect for all human rights and the consolidation of democracy, including the fundamental right to freedom of expression and thought, through support for the activities of the Inter-American Commission of Human Rights in this field, in particular the recently created Special Rapporteur for Freedom of Expression.<sup>10</sup>

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<sup>8</sup> In general terms the Commission described the duties and mandate of the Office as including 1) The preparation of a report on the general situation of freedom of expression in the hemisphere. Said report will be presented to the Commission for consideration and inclusion in the IACHR Annual Report. 2) The preparation of specific reports by subject matter. 3) Collection of all information needed for the elaboration of said reports. 4) The organization of activities for the promotion of human rights as charged by the Commission, including but not limited to presenting papers at conferences and seminars, instructing civil servants, professionals and students on the work being done by the Commission in its area of expertise and preparing promotional material. 5) The expeditious presentation of information to the Commission on urgent situations that call for the adoption of precautionary measures or of provisional measures that the Commission can request from the Inter-American Court to avoid irreparable harm to human rights from occurring. 6) The provision of information regarding individual cases related to freedom of expression that comes before the Commission.

<sup>9</sup> Declaration of Santiago, Second Summit of the Americas, April 18-19, 1998, Santiago, Chile.

<sup>10</sup> Plan of Action, Second Summit of the Americas, April 18-19, 1998, Santiago, Chile.

## **B. Plan of Work for the Office of the Special Rapporteur for Freedom of Expression**

The Special Rapporteur has drawn up a plan of work outlining the main activities and priority areas for the Office's first three years.

The Special Rapporteur will concentrate on: 1) Drafting general and subject-specific reports; 2) creating a hemispheric network for the defense of freedom of expression; 3) making visits to OAS Member States to monitor the situation of freedom of expression; 4) promoting the right to freedom of expression in OAS Member States.

### **1. General and Subject-Specific Reports**

One of the main tasks of the Special Rapporteur will be to periodically prepare a general report on the state of freedom of expression in the hemisphere. The report will assess the situation facing freedom of expression, including the main threats to its full enjoyment and progress that have been identified. The report will mention general and specific violations of freedom of expression in the Member States.

To draft the report, the Office will use information collected by the Special Rapporteur during visits to Member States, provided by governments and governmental bodies, or supplied by any other interested organization or individual.

The Rapporteur will also draft reports on specific questions that he believes merit closer scrutiny.

### **2. Hemispheric Network for the Defense of Freedom of Expression**

The Special Rapporteur has the intention to establish a hemispheric network to help defend freedom of expression. This network would be composed of non-governmental organizations (NGOs), the media and journalists. The purpose is to provide for the rapid transmission of information regarding possible violations of freedom expression in any OAS Member State.

The Special Rapporteur believes that such a network will be crucial for the effective protection of freedom of expression throughout the Americas, since one of the main problems currently existing is the lack of timely information on violations.

It should be noted that the violations that do come to light on either the national or international level are usually those that affect well-known individuals or occur in major cities where access to national media is readily available. However, very often victims do not have the means to turn a national or international spotlight on their case, or the violation occurs in an outlying area of the country where access to the media is not readily available.

Publicity is clearly one of the main instruments for the defense of freedom of expression. Obscurity and silence are the closest allies of impunity and are thus accomplices in the silencing of those whose job it is to provide news. A network will allow information to be exchanged quickly and

easily among all of the network's participants. It will undoubtedly help limit the number of violations and contribute to resolving cases in which the right to freedom of expression has been violated.

The purpose of a network is to make both the domestic and international communities aware of problems facing freedom of expression in the hemisphere and of the importance of those problems. The network will quickly inform the Special Rapporteur, who in turn will inform the States, the international community and the media. The Special Rapporteur will also check the source and veracity of all information received from civil society organizations, and make sure that appropriate measures have been taken to verify the truth of the information.

### **3. Country Visits**

The Special Rapporteur will make visits to OAS Member States to ensure that the Office is well informed and up to date on the status of freedom of expression in the various countries. These visits will facilitate dialogue and the creation of the appropriate mechanisms and environment to freely exercise this right. During these visits the Special Rapporteur will meet with government representatives, NGOs and the media, as well as with individuals who take an interest in freedom of expression.

### **4. Promotion**

The promotion of freedom of expression, both in itself and as a part of all human rights, constitutes one of the most effective mechanisms to validate and defend that right in the continent. In the Rapporteur's opinion, promotion should include activities such as education, training and dissemination.

The Special Rapporteur proposes that a hemispheric conference be organized to promote freedom of expression in the Americas. The main purpose of such a conference would be to set a common agenda for the defense of freedom of expression among Member States, the media, organizations representing civil society and journalists in general.

In recent years, government representatives, independent journalists and NGOs have made their views on freedom of expression known. Different criteria used in examining the question have thus come to light. A hemispheric meeting would provide an opportunity to search for common ground and build a consensus on an agenda that would create true protection of freedom of expression throughout the region. The Rapporteur will seek financing in order to organize this conference.

The Rapporteur will also raise the funds to carry out activities such as dissemination, training and education in the States of the Hemisphere. These activities will have the purpose of increasing awareness and knowledge amongst the diverse sectors of society--particularly those working daily as social communicators and the national institutions devoted to the area of freedom of expression--on the importance of the Inter-American system of human rights protection, the international norms on freedom of expression, the comparative case-law on the subject, and the importance of freedom of expression in the context and development of a democratic society. These dissemination and education activities will consist on panels, seminars and the preparation of handbooks and other kinds of publications.

## **C. Activities of the Special Rapporteur for Freedom of Expression**

### **1. Promotion and Dissemination of Information**

In his first few months on the job, the Special Rapporteur has attended numerous events to make the Office known and explain what it does.

In November 1998, he participated in the 54<sup>th</sup> General Assembly of the Inter-American Press Association (IAPA) in Punta del Este, Uruguay, where he spoke on the goals of the Office and the challenges it faces. He stressed the office's importance for the protection of human rights in general and of freedom of expression in particular.<sup>11</sup> The Rapporteur also expressed the desire to coordinate with IAPA so that experience and information could be readily shared. During the meeting, the Special Rapporteur also had the opportunity to speak personally to several IAPA representatives about freedom of expression in various countries of the region.

At the end of its meeting, the IAPA issued a resolution expressing its support for the activities being carried out by the Office of the Special Rapporteur for Freedom of Expression.<sup>12</sup>

During the same meeting, the Special Rapporteur also met with representatives of foundations that work in the field of freedom of expression, such as the Freedom Forum and the McCormick Foundation, and discussed methods of working together in the future. The Freedom Forum has already collaborated with the Office on a seminar convened to promote coordination of activities with civil society and has expressed an interest in broadening cooperation in the future.

In November 1998, upon the invitation of the Inter-American Institute of Human Rights, the Special Rapporteur attended the 4<sup>th</sup> Inter-American Seminar on Mass Media and Democratic Society in Cartagena (Colombia) to talk about the Office's functions and objectives regarding the defense of freedom of expression in the hemisphere.<sup>13</sup>

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<sup>11</sup> The IAPA is an organization bringing together representatives of the main print media of the hemisphere.

<sup>12</sup> The resolution states:

**WHEREAS**

the Inter-American Commission on Human Rights of the Organization of American States (OAS) has created the position of special Rapporteur for freedom of expression and appointed lawyer Santiago Canton to that office

the IAPA has always been interested in the creation of this position of Rapporteur for the maintenance and guarantee of freedom of expression and press freedom in the hemisphere and to remain vigilant lest there be abuse of journalists and newspapers

**THE IAPA GENERAL ASSEMBLY RESOLVES**

to congratulate itself on the creation of the position of special rapporteur for freedom of expression within the OAS' Inter-American Commission on Human Rights

to express to the OAS its support for the special rapporteur in his work to maintain freedom of expression and press freedom in the hemisphere

to place on record its wish to have an ongoing cooperative relationship with the position of the rapporteur and to call upon the holder of that office to come up with concrete ways in which that collaboration may be brought about."

<sup>13</sup> This seminar is held three times per year, in Colombia, Guatemala and Bolivia respectively. Its purpose is to train members of the media in matters of freedom of expression and democracy.

In December 1998, the Special Rapporteur was invited to participate in a working group on “Investigative Journalism and Corruption” sponsored by Organization Article XIX.<sup>14</sup> The meeting’s objective was to come up with a proposal for legislation that would facilitate journalistic investigation of corruption. The working group seeks support from all rapporteurs for freedom of expression (OAS, UN and OSCE) and invites their collaboration in proposing legislation to facilitate the work of journalists.

In February 1999, the Special Rapporteur was invited to speak about the Office before the Coordinating Committee of Organizations for Freedom of the Press.<sup>15</sup> At the end of the meeting, this group expressed its full support for the Office and said that it would seek ways to actively work with the Special Rapporteur.

The Rapporteur participated in the Commission’s 102 Sessions, during which, among other things, reported on the activities carried out and coordinated future activities with the members of the Commission.

The Special Rapporteur has also been active in disseminating information on the new Office through the media. He has participated in numerous domestic and hemispheric radio and television programs.

The Special Rapporteur has also met with the Permanent Representatives of the OAS member States to inform them of the activities being planned and to establish an open line of communication between the Office and them. In the coming months, the Special Rapporteur will continue to meet with the Permanent Representatives.

## **2. Country Visits**

Just one week after assuming his duties, the Special Rapporteur accompanied the IACHR on its on-site visit to Peru. He participated in numerous meetings with representatives of the Peruvian government, civil society, non-governmental organizations and the media.

At the end of the visit, the Special Rapporteur added his comments on freedom of expression in Peru to the press release issued by the IACHR.<sup>16</sup>

## **3. Hemispheric Network for the Defense of Freedom of Expression**

As has already been stated in this report, one of the Office’s priorities is to establish a hemispheric network for the defense of freedom of expression. It would be a way to channel

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<sup>14</sup> Article XIX is a London based NGO dedicated to studying freedom of expression in the world.

<sup>15</sup> This is one of the most important international groups working to defend freedom of expression. It is composed of the Committee to Protect Journalists (CPJ), the Commonwealth Press Union (CPU), the Inter-American Press Association (IAPA), the International Association of Broadcasting (IAB), the International Press Federation (IPF), the International Press Institute (IPI), the North American Broadcasters Association (NABA), the World Association of Newspapers (WAN) and the World Press Freedom Committee (WPFC).

<sup>16</sup> Annex E (1).

information on violations of freedom of expression wherever they occur in the region and would essentially be composed of organizations representing civil society and journalists.

To begin this work, the Special Rapporteur, Freedom Forum and the Institute of Press and Society (IPYS) of Peru jointly sponsored a meeting of civil society representatives from various Latin American countries. This represented a major step toward coordinating efforts between civil society organizations and the Office of the Special Rapporteur.

One of the examples of how the hemispheric net should operate is the case of the Peruvian radio broadcaster Johnny Pezo, in which the Rapporteur was involved. Mr. Pezo, was forced by the *Movimiento Revolucionario Tupac Amaru* (MRTA) to broadcast one of their statements. Mister Pezo, who was told he would be killed should he refuse to read the statement, decided to do it. However, he informed the audience that he was reading the statement against his will. Having read the statement he left the radio station and was questioned by the police. The next day he reported to the Police and was detained charged with inciting crime.

Immediately after learning about his detention, the IPYS group in Peru verified the veracity of the news. The group hired a lawyer to defend Johnny Pezo, and reported the incident to the international community via internet, including the Rapporteur. The Rapporteur immediately contacted the Peruvian Mission before the OAS in order that his concern for this case was transmitted to the authorities of that country. Finally, Mr. Pezo was released and cleared of accusation.

This example illustrates how a well-organized hemispheric information network can help to resolve problems of violations of freedom of expression wherever they may occur in the Americas.

## CHAPTER II

### Freedom of Expression within the Context of the Inter-American System for the Protection of Human Rights

At this time, it would be pertinent to briefly refer to the specific and general norms on freedom of expression found in the American Convention on Human Rights. The relevant jurisprudence developed by organs charged with protecting human rights within the Inter-American system will also be reviewed.

#### A. Legal Framework

Article 13 of The American Convention on Human Rights says that everyone has the right to freedom of thought and expression, which can be exercised in any medium, and shall not be subject to censorship but rather to subsequent imposition of liability. The Convention states:

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

Article 4 of The American Declaration of the Rights and Duties of Man provides, "Every Person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever."

Moreover, Article 14 of the Convention consecrates the right to reply or correction, pointing out that anyone injured by inaccurate or offensive information disseminated by the media has the right to reply or to make a correction, under such conditions as the law may establish.<sup>17</sup>

These norms which relate specifically to freedom of expression, must be taken in the context of other general norms established by the American Convention, such as the provisions of Articles 1 and 2.

Article 1(1) stipulates that States undertake to respect the rights and freedoms recognized in the Convention and to ensure to all persons subject to their jurisdiction the free and full exercise of them. Thus, the State acquires two obligations: (1) to respect, and (2) to guarantee the rights and freedoms enshrined in the Convention.

With regard to the respect of the rights and freedoms recognized in the Convention, the Inter-American Court of Human Rights has pointed out that:

Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention....The State is responsible for the acts of its agents undertaken in their official capacity and for their omission, even when those agents act outside the sphere of their authority or violate internal law.<sup>18</sup>

With regard to the second obligation, that of guaranteeing the free and full exercise of the rights recognized by the Convention, the Inter-American Court of Human Rights has said that it implies:

This obligation implies the duty of the States parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of judicially ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.<sup>19</sup>

Article 2 of the American Convention specially provides that “the States Parties undertake to adopt ...such legislative or other measures as may be necessary to give effect to those rights or freedoms,” if they do not already exist.<sup>20</sup>

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<sup>17</sup> Article 14 reads: “1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish. 2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred. 3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company shall have a person responsible who is not protected by immunities or special privileges.

<sup>18</sup> See, Inter-American Court of Human Rights, Case Velásquez Rodríguez, Judgement of July 29, 1988, Serie C N 4 par. 169 –170.

<sup>19</sup> Inter-American Court of human Rights, Velásquez Rodríguez Case, Judgement of July 29, 1988, Serie C N 4 para. 166.

<sup>20</sup> Article 2 of the American Convention reads: “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

In the same way, the Court has said that “the obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligations –it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights”.<sup>21</sup>

## **B. Summary of Jurisprudence Related to Freedom of Expression in the Inter-American System of Human Rights**

This report will next provide a brief summary of the main case law on freedom of expression laid down by the organs charged with protecting human rights in the Inter-American Human Rights System, namely the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.

Both organs have developed an important body of case law dealing directly with freedom of expression. The Court has done so mainly through advisory opinions, particularly in relation to the compulsory licensing of journalists. The Commission, has established its doctrine through individual cases and a special study of contempt laws in the hemisphere.

In the sections that follows, the Rapporteur reproduces the case law developed by organs of the interamerican system of human rights on the following issues: characteristic and dimensions of freedom of expression; the role of the media in freedom of expression; restrictions to freedom expression; freedom of expression, prior censorship and subsequent liability; freedom of expression and the protection of personal honor and dignity; and freedom of expression and democracy.<sup>22</sup>

### **1. Characteristics and Dimensions of Freedom of Expression**

Article 13 indicates that freedom of thought and expression “includes freedom to seek, receive, and impart information and ideas of all kinds...” This language established that those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. Hence, when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to “receive” information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.<sup>23</sup>

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<sup>21</sup> Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgement of July 29, 1988, Serie C N 4 para. 169 –170.

<sup>22</sup> See, Grossman, Claudio; Goldman, Robert K.; Martin, Claudia; Rodríguez Pinzon, Diego; Zwaak, Leo; *Repertorio de Jurisprudencia del Sistema Interamericano de Derechos Humanos* Tomos I y II; Center for Human Rights and International Humanitarian Law, Washington College of Law, American University.

<sup>23</sup> Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 30. Annex A.

In its individual dimension, freedom of expression goes further than the theoretical recognition of the right to speak or to write. It also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible. When the Convention proclaims that freedom of thought and expression includes the right to impart information and ideas through “any...medium,” it emphasizes the fact that the expression and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely. The importance of the legal rules applicable to the press and to the status of those who dedicate themselves professionally to it derives from this concept.<sup>24</sup>

In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.<sup>25</sup>

The two dimensions mentioned (supra 30) of the right to freedom of expression must be guaranteed simultaneously. One cannot legitimately rely on the right of a society to be honestly informed in order to put in place a regime of prior censorship for the alleged purpose of eliminating information deemed untrue in the eyes of the censor. It is equally true that the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view.<sup>26</sup>

## **2. The Role of Mass Media in Freedom of Expression**

If freedom of expression requires, in principle, that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media, it must be recognized also that such media should, in practice, be true instruments of that freedom and not vehicles for its restriction. It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, *inter alia*, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.<sup>27</sup>

## **3. Restrictions on Freedom of Expression**

The Convention itself recognizes that freedom of thought and expression allows the imposition of certain restrictions whose legitimacy must be measured by reference to the requirements of Article 13 (2). Just as the right to express and disseminate ideas is indivisible as a concept, so too must it be recognized that the only restrictions that may be placed on the mass media are those that apply to freedom of expression. It results therefrom that in determining the legitimacy of restrictions and,

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<sup>24</sup> Ibid. para. 31

<sup>25</sup> Ibid. para. 32

<sup>26</sup> Ibid. para. 33

<sup>27</sup> Ibid. para. 34

hence, in judging whether the Convention has been violated, it is necessary in each case to decide whether the terms of Article 13 (2) have been respected.<sup>28</sup>

These provisions indicate under what conditions a limitation to freedom of expression is compatible with the guarantee of this right as it is recognized by the Convention. Those limitations must meet certain requirements of form, which depend upon the manner in which they are expressed. They must also meet certain substantive conditions, which depend upon the legitimacy of the ends that such restrictions are designed to accomplish.<sup>29</sup>

Article 13 (2) of the Convention defines the means by which permissible limitations to freedom of expression may be established. It stipulates, in the first place, that prior censorship is always incompatible with the full enjoyment of the rights listed in Article 13, but for the exception provided for in subparagraph 4 dealing with public entertainment, even if the alleged purpose of such prior censorship is to prevent abuses of freedom of expression. In this area any preventive measure inevitably amounts to an infringement of the freedom guaranteed by the convention.<sup>30</sup>

Abuse of freedom of information thus cannot be controlled by preventive measures but only through the subsequent imposition of sanctions of those who are guilty of the abuses. But even here, in order for the imposition of such liability to be valid under the Convention, the following requirements must be met:

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

All of these requirements must be complied with in order to give effect to Article 13 (2).<sup>31</sup>

In fact it is possible, within the framework of the Convention, to understand the meaning of public order as a reference to the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles. In that sense, restrictions on the exercise of certain rights and freedoms can be justified on the ground that they assure public order. The Court interprets the argument to be that compulsory licensing can be seen, structurally, as the way to organize the exercise of professions in general. This contention would justify the submission of journalists to such a licensing regime on the theory that it is compelled by public order.<sup>32</sup>

It is important to note that the European Court of Human Rights, in interpreting Article 10 of the European Convention, concluded that 'necessary,' while not synonymous with 'indispensable,' implied 'the existence of a 'pressing social need'' and that for a restriction to be 'necessary' it is not enough to show that it is 'useful,' 'reasonable' or 'desirable.' (Eur. Court H.R., **The Sunday Times Case**, judgement of 26 April 1979, Series A no. 30, para. 59, pp. 35-36.) This conclusion, which is equally applicable to the American Convention, suggests that the 'necessity' and, hence, the legality of restrictions imposed under Article 13 (2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be

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<sup>28</sup> Ibid. para. 36

<sup>29</sup> Ibid. para. 37

<sup>30</sup> Ibid para. 38

<sup>31</sup> Ibid para. 39

<sup>32</sup> Ibid para. 64

selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it. (**The Sunday Times Case, supra**, para. 62, p. 38. See also Eur. Court H, R., **Barthold** judgement of 25 March 1985, Series A no. 90, para. 59, p. 26).<sup>33</sup>

Article 13 (2) must also be interpreted by reference to the provisions of Article 13 (3), which is most explicit in prohibiting restrictions on freedom of expression by 'indirect methods and means... tending to impede the communication and circulation of ideas and opinions.' Neither the European Convention nor the Covenant contains a comparable clause. It is significant that Article 13 (3) was placed immediately after a provision – Article 13 (2) – which deals with permissible restrictions on the exercise of freedom of expression. This circumstance suggests a desire to ensure that the language of Article 13 (2) not be misinterpreted in a way that would limit, except to the extent strictly necessary, the full scope of the right to freedom of expression.<sup>34</sup>

Article 13 (3) does not only deal with indirect governmental restrictions, it also expressly prohibits 'privacy controls' producing the same result. This provision must be read together with the language of Article 1 of the Convention wherein the States Parties 'undertake to respect the rights and freedoms recognized (in the Convention)...and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms...' Hence, a violation of the Convention in this area can be the product not only of the fact that the State itself imposes restrictions of an indirect character which tend to impede 'the communication and circulation of ideas and opinions,' but the State also has an obligation to ensure that the violation does not result from the 'private controls' referred to in paragraph 3 of Article 13.<sup>35</sup>

Article 13 may be violated under two different circumstances, depending on whether the violation results in the denial of freedom of expression or whether it results from the imposition of restrictions that are not authorized or legitimate.<sup>36</sup>

In truth, not every breach of Article 1 of the Convention constitutes an extreme violation of the right to freedom of expression, which occurs when governmental power is used for the express purpose of impeding the free circulation of information, ideas, opinions or news. Examples of this type of violation are prior censorship, the seizing or barring of publications and, generally, any procedure that subjects the expression or dissemination of information to governmental control. Here the violation is extreme not only in that it violates the right of each individual to express himself, but also because it impairs the right of each person to be well informed, and thus affects one of the fundamental prerequisites of a democratic society. The Court believes that the compulsory licensing of journalists, as that issue is presented in the instant request, does not fall into this category.<sup>37</sup>

Suppression of freedom of expression as described in the preceding paragraph, even though it constitutes the most serious violation possible of Article 13, is not the only way in which that provision can be violated. In effect, any governmental action that involves a restriction of the right to

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<sup>33</sup> Ibid para. 46

<sup>34</sup> Ibid para. 47

<sup>35</sup> Ibid para. 48

<sup>36</sup> Ibid para. 53

<sup>37</sup> Ibid para. 54

seek, receive and impart information and ideas to a grater extent or by means other than those authorized by the Convention, would also be contrary to it. This is true whether or not such restrictions benefit the government.<sup>38</sup>

Furthermore, given the broad scope of the language of the Convention, freedom of expression can also be affected without the direct intervention of the State. This might be the case, for example, when due to the existence of monopolies or oligopolies in the ownership of communications media, there are established in practice 'means tending to impede the communication and circulation of ideas and opinions'.<sup>39</sup>

#### **4. Freedom of Expression, Prior Censorship and subsequent liability**

The Convention allows restrictions to be imposed on the right to freedom of expression in order to protect the community from certain offensive manifestations and prevent the abusive exercise of that right. Article 13 authorizes certain restrictions to the exercise of this right and sets out the permissible limits and the requirements necessary to put these restrictions into practice. The principle set forth in that article is clear in that prior censorship is incompatible with the full enjoyment of the rights protected therein. The exception is the one contained in paragraph 4, which allows censorship of "public entertainments" for the moral protection of children. The only restriction authorized by Article 13 is the subsequent imposition of liability. Moreover, any subsequent imposition of liability must have been previously established by law and may only be 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.<sup>40</sup>

The prohibition of prior censorship, with the exception present in paragraph 4 of Article 13, is absolute and is unique to the American Convention, as neither the European Convention nor the Covenant on Civil and Political Rights contains similar provisions. The fact that no other exception to this provision is provided is indicative of the importance that the authors of the Convention attached to the need to express and receive any kind of information, thoughts, opinions and ideas.<sup>41</sup>

Under Article 13, any restriction of the rights and guarantees contained therein must take the form of a subsequent imposition of liability. Abusive exercise of freedom of expression may not be subject to any other kind of limitation. As that article indicates, anyone who has exercised this freedom shall be answerable for the consequences for which he is responsible.

Based on this reasoning, the Commission considers that the decision to ban the entry, circulation, and distribution of the book "Impunidad diplomática" in Chile violates the right to impart "information and ideas of all kinds", a right that Chile is bound to respect as a State Party to the American Convention. In other words, the decision is an unlawful restriction of the right to freedom of expression, in the form of an act of prior censorship disallowed by Article 13 of the Convention.<sup>42</sup>

The Commission also ruled on the matter when it decided a case where the Government of Grenada was allegally responsible for the violation of the right to freedom of expression

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<sup>38</sup> *Ibid* para. 55

<sup>39</sup> *Ibid* para. 56

<sup>40</sup> Inter-American Commission on Human Rights, 1996 Annual Report, Report No. 11/96 (Case No. 11.230 – Francisco Martorell), Chile, para. 55.

<sup>41</sup> *Ibid.* para. 56.

<sup>42</sup> *Ibid.* paras. 58 and 59.

because of the confiscation of several books.<sup>43</sup> In its decision, the Commission pointed out that acts of confiscation and banning of books by the Government have the effect of imposing “prior censorship” on freedom of expression, and therefore such acts affect both dimensions of the right, that is, to receive and to issue information from “any person”, both to and from the community, with no distinction of borders, as guaranteed by Article 13 of the American Convention on Human Rights. The Government failed to prove that the content of the books fit any of the exceptions, namely the “respect for the rights or reputations of others” or “the protection of national security, public order, or public health or morals” as expressed by the aforementioned Article 13.

In light of the above, the Commission found that the Government of Grenada had violated the victims’ rights to freedom of thought and expression when it confiscated and banned their books. The Commission stated:

The two dimensions referred to by the Inter-American Court in (supra 30) of the right to freedom of expression must be guaranteed simultaneously. “One cannot legitimately rely on the right of a society to be honestly informed in order to put in place a regime of prior censorship for the alleged purpose of eliminating information deemed to be untrue in the eyes of the censor. It is equally true that the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view.” The petitioners’ right to transport the books to Grenada and the right to receive such books in Grenada are protected by Article 13 of the American Convention.

Article 2 of the American Convention provides that: “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.” Therefore, the Grenadian Government must ensure that its Legislation complies with the provisions of Article 13 of the American Convention.<sup>44</sup>

## **5. Freedom of Expression and the Right of all Persons to Honor and Dignity**

The Government of Chile has pointed out that the rights to honor and dignity often conflict with freedom of expression, that the State must endeavor to balance these rights with the guarantees inherent in freedom of expression, and that a right may be sacrificed for the sake of what is considered to be a higher right.<sup>45</sup>

Under the Convention the State of Chile has a positive obligation to protect persons within its jurisdiction from violations of the right to privacy and, whenever that right is breached, to provide

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<sup>43</sup> Inter-American Commission on Human Rights, 1995 Annual Report, Report No. 2/96 (Case No. 10.325 – Steve Clark), Grenada.

<sup>44</sup> IACHR Report No. 2/96, paras. 8 and 9.

<sup>45</sup> IACHR Report No. 11/96, para. 61.

remedies that are prompt, effective and adequate to redress any injury caused by a violation of that right.

In the instant case it is alleged that the content of the book "Impunidad diplomática" impugned the honor of some persons and that, under the pretext of describing the circumstances which led to the Argentine ambassador's departure from Chile, a number of unrelated attacks were made on private individuals. According to the Government, these attacks were described as so severe that only a complete ban of the book could be deemed an adequate and effective solution to protect the victims' right to privacy and their honor.<sup>46</sup>

The Commission considers that it is not for the Commission to examine the content of the book in question or the conduct of Mr. Martorell, because it does not have competence in the matter and because the right to honor is duly protected under Chilean law. Moreover, as the proceedings in the instant case show, those persons who believe that their honor and dignity have been impugned have, in the Chilean courts, adequate remedies to settle that question.

For that reason, the Commission cannot accept the Chilean Government's argument that the right to honor would be higher than the right to freedom of expression.

Likewise, the organs of the State cannot interpret the provisions of Article 11 in a manner that violates Article 13, which prohibits prior censorship...

The Commission cannot accept the Government's argument, because the means that the Chilean State used to protect honor in the instant case were unlawful. To accept Chile's position in the case of Mr. Martorell would be tantamount to giving the organs of the State the authority to limit, through prior censorship, the right to freedom of expression upheld in Article 13 of the American Convention.

When legislating the protection of honor and dignity referred to in Article 11 of the American Convention -and when applying the relevant provisions of domestic law on this subject- States Parties have an obligation to respect the right of freedom of expression. Prior censorship, regardless of its form, is contrary to the system that Article 13 of the Convention guarantees.

...any potential conflict in the application of articles 11 and 13 of the Convention can be resolved by resorting to the language of Article 13 itself.

## 6. Freedom of Expression and Democracy

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.<sup>47</sup>

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<sup>46</sup> Idem, paras. 67-70.

<sup>47</sup> Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 70.

## 7. Journalism and Freedom of Expression

Within this context, journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent rights of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain "colegio".<sup>48</sup>

### C. Cases Concerning Freedom of Expression Pending Decision within the Inter-American Human Rights System.

The Inter-American Commission of Human Rights is currently processing more than 20 cases that charge various OAS Member States with having violated the right to freedom of expression.

The IACHR has also brought two cases of possible violations of freedom of expression before the Inter-American Court of Human Rights. These are:

**Case No. 11.803 "Juan Pablo Olmedo and others" (Chile)** The Commission recently referred to the Court a case against Chile regarding the violation of the right to freedom of expression of Juan Pablo Olmedo and others. The case relates to judicial censorship, upheld by the Supreme Court of Chile, which banned the screening of the movie "The Last Temptation of Christ".<sup>49</sup>

**Case No. 11.762 Baruch Ivcher Bronstein (Peru)** The Commission recently referred a case to the Inter-American Court of Human Rights against Peru regarding, amongst other rights, the right to freedom of expression of Baruch Ivcher Bronstein. Mr. Ivcher, who was effectively deprived of his nationality by the Peruvian State, owns a television channel which was critical of the Peruvian Government. Through various legal mechanisms, Peru deprived him of his nationality in order to prevent him from owning the TV channel which by law are required to be owned by Peruvian nationals.

The Rapporteur is aware of the existence of matters related to freedom of expression that have not been developed in the case law, among others: freedom of expression and gender; freedom of expression and poverty; and precautionary and provisional measures relating to freedom of expression. The Rapporteur will continue reporting on the development of case law on freedom of expression and other related matters.

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<sup>48</sup> Ibid para. 71

<sup>49</sup> Inter-American Court of Human Rights, Press Release 3/3, 1999.

### CHAPTER III

#### Evaluation of the Freedom of Expression in the Hemisphere

This report is being presented just shortly after the position of the Special Rapporteur for Freedom of Expression was created. Thus, the Rapporteur will limit himself to a few initial concerns regarding freedom of expression in the hemisphere, based on preliminary observations and information received to the present time. Mention will also be made of countries that have given us cause for special concern regarding the state of freedom of expression. There are also certain areas in which threats to freedom of expression are especially noteworthy: the murder of journalists, contempt legislation and compulsory membership in a professional association.

In general terms it is possible to say that with democratic elections in 34 over 35 States of the hemisphere, the recognition and protection of freedom of expression has improved greatly in comparison to previous decades, when dictatorial or authoritarian regimes were in and of themselves a clear restriction to freedom of expression.

Nevertheless, in several countries freedom of expression is still endangered. Many States have not yet created a climate that fosters the full and effective recognition and development of this right. A variety of factors come into play depending on the circumstances in each country. Among others, we can mention the murder of journalists and the ongoing, daily threats that hang over the media in general and over journalists in particular, the determination of some governments to silence critics through the use of various forms of harassment, the continued existence and enforcement of laws contrary to the American Convention and other international instruments safeguarding freedom of expression, and the use of prior censorship and the existence of censorship bodies.

The murder of journalists is an extremely grave threat to the exercise of freedom of expression and the most direct way of attacking this fundamental right. In 1998 eighteen journalists were killed: Brazil (2), Canada (1), Colombia (9), Mexico (4) and Peru (2).<sup>50</sup> In some cases it has not been possible to establish with certainty whether the motive of the crime was the professional activity of the journalist in question. Nonetheless, in all of these cases, organizations working to safeguard freedom of expression believe that there is sufficient cause to suspect that the motive behind each killing may indeed have been work being carried out by the journalist.

Intimidation of journalists through verbal or written threats and actual attacks against them or their properties are frequently used in our region in an attempt to limit freedom of expression. The Special Rapporteur has already received a great number of communications reporting on acts of intimidation, especially against investigative journalists.

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<sup>50</sup> See, pages 50 to 57.

The murder of journalists and threats against them do not exactly create a climate favorable to the development of freedom of expression. Violence is being used to silence the “primary and principal manifestation” of the right of freedom of expression.

The Special Rapporteur has received information to the effect that most cases of murder and threats against journalists have gone unpunished and are not investigated by law enforcement agencies with the efficacy, determination and dedication that they deserve. It should be recalled that every State has the duty to effectively investigate the facts whenever journalists are murdered or threatened, and to punish those responsible.<sup>51</sup>

The Special Rapporteur has also come to recognize that many of the countries of the hemisphere continue to have in place legislation that is both anachronistic and incompatible with the American Convention and other international human rights instruments. Two cases can be mentioned to illustrate the situation – Panama and Chile. Panama has a legal framework that seriously limits freedom of expression (the specific legislation violating Article 13 of the Convention is mentioned further on in this document). President Perez Balladares has more than once said that he intends to change the law, but until now nothing has been done.

In Chile there are laws on the books with provisions that clearly limit freedom of expression. Articles 263 and 264 of the Penal Code, article 284 of the Military Code of Justice and Article 6 (b) of the State Security Law are prime examples. The last of these provides for the punishment of those who “defame, slander or libel” high level authorities such as the President, ministers, members of Parliament, members of superior courts, chiefs of staff of the armed forces, etc. In this regard, various Chilean officials have used this provision against people who have been critical of them.<sup>52</sup> For example, on April 13, 1999, the Appellate Court of Santiago in application of the act on security of the state banned “El Libro Negro de la Justicia Chilena” (The Black Book of Chilean Justice), written by the journalist Alejandra Matus on the basis of a request by Servando Jordán, member of the Supreme Court and former President of that body. Members of the civil police seized all copies from the offices of *Editorial Planeta*. They also seized copies from bookshops in the country.

It has also come to the attention of the Special Rapporteur that intimidation of journalists and the media occurs through the preparation and presentation before legislative bodies of bills that would clearly threaten freedom of expression. In Peru, for example, a bill has been introduced that, if it becomes law, would require journalists to reveal their sources.

Last June in Argentina, the Executive introduced a bill before Congress that would provide incarceration for anyone who films or records confidential records of government employees without their consent and reproduces them in the media. The bill would sanction the press by punishing “(anyone who), to uncover secrets or invade the privacy of another person, records or reproduces sounds or images without his consent.” If this bill were to become law, it would forbid the use of hidden recorders and cameras, which have proven so useful in recent

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<sup>51</sup> See, pages 47 to 50.

<sup>52</sup> Those convicted under this law can be sentenced to imprisonment, demotion or exile. See Article 7 of Law 2.927.

years to uncover acts of corruption committed by government and private-sector employees. Currently, the bill has been approved by one (the Senate) of the two houses of Congress.

The Office of the Special Rapporteur is especially worried by attempts to use the courts to limit freedom of expression, especially that of journalists who are critical of the authorities. At times charges are made against journalist based on legislation that clearly violates of Article 13 of the American Convention on Human Rights. This is especially true of charges of contempt, as we shall see later on.

The courts are also used as a means of intimidation. Journalists are imprisoned or fined, made to appear before the court on a regular basis, and forced to spend money to defend themselves. This seriously affects the practice of their profession. When such means are brought to bear against journalists who are critical of the government, the courts become an instrument for the limitation of freedom of expression rather than a channel for resolving the conflicting interests of the authorities and the journalist. In Panama, for example, many lawsuits against journalists have been initiated by government employees.

Also worrisome are court decisions restricting freedom of expression. Certain decisions handed down by some courts in the region are clearly out of line with the provisions of the American Convention and international jurisprudence. In Chile, for example, the Supreme Court banned the screening of the film "The Last Temptation of Christ". In Argentina there has been an alarming increase in the number of Supreme Court decisions restricting freedom of expression (11 in the last year alone) and most of them involve senior governmental authorities in some regard.

The Special Rapporteur is also concerned by the continuing existence of censorship bodies in some countries, which restrict, and in effect put a straitjacket on freedom of expression. The Constitution of Chile, for example, stipulates that, "The law shall establish a system of censorship for the exhibition and publicity of cinematography productions". The Rapporteur has become aware that the Chilean Government has tried to modify its Political Constitution in respect to censure of the exhibition and publicity of cinematography productions. On April 14, 1997, the Executive presented to the National Congress a plan to reform the Constitution article 19, number 12, final subparagraph. This bill has the purpose of eliminating and substituting it by a system of film rating. This bill is still under study by Congress.

Another mechanism sometimes used to control freedom of expression is the use of public funds to favor some media and prejudice others. In Nicaragua, for example, the State Revenue Office (Dirección de Ingresos) and the Customs Office recently stopped placing announcements in the daily "La Prensa", while continuing to run them in other media. The application of different standards to "La Prensa" and the rest of the media indicates that there is an intention to harm the former.

Official announcements are often a significant source of income for the media. State bodies must establish clear, objective and fair criteria on how such official announcements will be distributed. Such announcements should never be used to damage some media and favor others.

Lastly, one of the most serious concerns the Office of the Special Rapporteur has is in regard to journalists being investigated by intelligence services and other state agencies. The Special Rapporteur has been given access to documents, allegedly belonging to the Peruvian intelligence services, that describe in great detail a plan to undertake in-depth investigation of journalists critical of the government, and especially of those critical of the Armed Forces and Intelligence Services. More information on this will be provided later in this report. In Argentina, four Air Force officers were condemned in December 1998 for spying on 10 journalists at a time when the press was critical of the safety levels of airports and airport privatization.

The Special Rapporteur notes that the Chapultepec Declaration is receiving growing recognition among all social sectors of our hemisphere and is becoming a major point of reference in the area of freedom of expression.<sup>53</sup>

In this first report, the Special Rapporteur would like to express special concern for the status of freedom of expression in Panama and Peru. Mention will also be made of the situation in Cuba.

Currently **Panama** has a set of anachronistic laws on freedom of expression. Rather than acting as an effective guarantee of rights, these laws have become a frequently used tool in the hands of government employees who wish to silence criticism, thereby restricting freedom of expression and endangering public debate.

This use of outdated laws by government employees has created a situation of non-stop harassment and has placed a virtual siege on journalists and the press in general. Since journalists often carry out their duties in sectors of society that may impinge on the functions of some government employees, journalists now find the threat of court action hanging over them constantly.

The main pillars of this outdated legal framework in Panama are Cabinet Decree 251 of 1969 on censorship; Chapters I and II of Title III of the Criminal Code (Articles 172-180) on “crimes against honor” (delitos contra el honor); and Laws 11, 67 and 68 of 1978 on the media and journalism, commonly referred to as the “gag laws”. To this triumvirate should be added provisions on contempt derived from the Political Constitution and Article 307 of the Criminal Code, and which those who work in the Judiciary, the Public Prosecutor’s Office and the Electoral Tribunal often use to silence their critics.

The Rapporteur has received numerous petitions regarding charges filed by Panama State officials against journalists, revealing the intent to silence criticism against the Government through judicial pressure. The ombudsman, Dr. Italo Isaac Antinory Bolanos, together with a number of independent journalists, expressed their concern to the Rapporteur for the judicial persecution by prosecutor Jose Antonio Sossa against journalists and other personalities. The ombudsman himself has been threatened with charges after making public

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<sup>53</sup> The Chapultepec Declaration, drafted by the Inter-American Press Association, contains 10 fundamental principles for the protection of freedom of expression in our hemisphere. Prominent persons are signing it in growing numbers. Numerous Heads of State and Government of the hemisphere have signed it. See Annex F.

his opposition to the use of phone tapping by prosecuting authorities. Some of the information received reveals that:

1. On 28 February 1998, three officers of the Technical Judicial Police raided *Diario La Prensa* in Panama City and tried to detain investigative reporter Herasto Reyes on charges of slander and libel of the President of the Republic. The journalists in the premises of *Diario La Prensa* at the time surrounded Mr. Reyes and prevented him from being arrested. This judicial action stemmed from an article for which Mr. Reyes had interviewed José Renán Esquivel, former director of the Social Security Savings Fund (Caja de Seguro Social). The journalist quoted Mr. Renán as saying that in 1982 His Excellency, then Finance Minister was involved in a financial scandal related to a CSC housing project.

2. In regard to the Office of the Public Prosecutor, when accusations proliferated about the inflow of illegal funds during the 1994 electoral campaign and the peddling of influence in the allocation of public assets, the two public prosecutors who manage the Office, José Antonio Sossa and Alma Montenegro de Fletcher, decided to bring charges against the journalists who made the accusations public, Gustavo Gorriti and Rolando Rodríguez in the first case and Marcelino Rodríguez, Michelle Lescure and Brittmarie Janson Pérez in the second.

3. In February 1998 José Luis Sosa, Director of the National Police, brought a libel and slander suit against Miguel Antonio Bernal, journalist, lawyer and a candidate to the Mayor's Office of the Capital District. On the television news program "TVN-Noticias", Mr. Bernal had said that the National Police was responsible for the death of four prisoners who were decapitated by other inmates of the Coiba Island prison colony.

4. In March of 1999, the Electoral Tribunal determined that *Editorial Panama America SA*, EPASA, violated Article 177 of the Electoral Code and was liable to pay ten thousand Balboas. Article 177 provides that "political surveys must be registered with the Electoral Tribunal before being published." The company in charge of the survey had presented the information by fax. The Tribunal decided to reject that presentation and demanded that it be submitted by hand. The Rapporteur considers that the requirement of prior registry of the surveys imposed by the Electoral Tribunal could be considered prior censorship.

In relation to this subject, the Special Rapporteur wishes to emphasize that the legal definition of and protection against libel and slander does not in itself constitute a violation of the right to freedom of expression. The violation occurs when such legal figures are joined to other norms to forge a weapon wielded constantly by people in the public employ to impede open and transparent discussion. The result is an environment of overriding threat to the free enjoyment of freedom of expression, especially when journalists, the "prime manifestation" of the right to freedom of expression, are being constantly harassed with lawsuits.

It is imperative that all Panamanian legislation regarding the press be reviewed and brought into line with the provisions of Article 13 of the Convention.

In **Peru**, limitations on the independence of the Judiciary have bred a climate of legal insecurity in regard to the practice of journalism. A wave of death threats and a systematic

campaign of persecution and personal attack against journalists critical of the government have exacerbated the situation.

During its visit to Peru, the Inter-American Commission of Human Rights announced in a press release that “the Commission received, however, various complaints from journalists – and especially from those engaging in investigative journalism – reporting that they often are subjected to threats and various kinds of harassment”.<sup>54</sup> The Special Rapporteur accompanied

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<sup>54</sup> IACHR Press Release 20/98 was issued at the end of the Commissions on-site visit to Peru to examine the rule of law in the country. In it, the Commission said:

**1. The Intervention of the Judiciary: Temporary Judges and Prosecutors**

20. The Commission was informed that almost seven years after the government intervened in the judiciary, more than 70 percent of the country’s judges and public prosecutors are “temporary,” and that the constitutional functions of the National Magistracy Council in appointing those officials have also suffered interventions by executive commissions from both the judiciary and the Department of Public Prosecutions. This poses a grave threat to the independence and autonomy of the judiciary vis-a-vis political power, and it has in numerous cases given rise to complaints of undue interference.
21. The Commission stresses the importance of re-establishing the constitutional normalcy of the judiciary; it therefore hopes that the reorganization of the judicial sector will not take longer than the period set by law, which is due to expire in December of this year, and that the powers of the National Prosecutor will be reinstated. The National Magistracy Council must be given back its constitutional powers to appoint and remove judges and prosecutors.
22. The Commission also received information and reports from judges and public prosecutors that have been harassed, transferred, removed, or even charged with crimes after deciding on issues affecting the interests of the political sector within the Government.
23. In connection with this, the IACHR was informed that the First Civil Circuit of the Superior Court of Lima, which specializes in summary and non contentious proceedings, had accepted an injunction brought by Mrs. de Baruch Ivcher, thus allowing her to defend her right to legally intervene in the trial dealing with calls for shareholders’ general meetings. The complaint states that another circuit of the same court, acting with complete irregularity, admitted an *amparo* relief injunction against this judicial ruling. The complaint states that *amparo* injunctions are not intended to upset the effects of a judicial decision reached during normal proceedings. It also states that if actions of this kind, which are prohibited by the *amparo* legislation, were to be authorized, the independence of the Peruvian judiciary and the legal security of individuals would be affected even more severely and that the judges against who *amparos* are brought could be removed and tried in criminal proceedings for their interpretations of the law. The complaint says that this underscores once again the precarious standing of the rule of law in Peru, the questions asked about the independence and autonomy of the judiciary, and the legal certainty enjoyed by its rulings, all of which are guaranteed by the Constitution.
24. The IACHR also received a complaint regarding another *amparo* injunction brought against the decision of the 29th Civil Court in Lima, which would also have entitled Mrs. Ivcher to defend her rights in the trial against Frecuencia Latina regarding calls for shareholders’ general meetings.
25. These complaints cause the Commission concern; they will be studied carefully because they involve the autonomy and independence of judges, both irreplaceable guarantees of human rights.

**2. The Dismantling of the Constitutional Court**

26. Under the Peruvian constitutional system, the Constitutional Court is the body that controls the constitutionality of laws. This important guarantee of the constitutional rule of law has been dismantled, after the dismissal of three of its magistrates left it without the quorum needed to perform that control function.
27. The Commission made a statement on this matter in a press release issued in June 1997 during the General Assembly of the OAS held in Lima. The Commission hopes that the normal functioning of the Constitutional Court will be re-established soon and that there will be a review of certain institutional elements in the law that governs its operations, which, *inter alia*, requires an exaggeratedly high majority of six votes out of seven magistrates for a law to be declared unconstitutional.

**3. Due Process**

(Continued...)

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28. The IACHR received numerous complaints regarding Peru's failure to observe the rules of due process enshrined in the American Convention on Human Rights.
29. These complaints involve the following: (A) The use and distortion of national security legislation to fight common crime. Peru levels charges of aggravated terrorism, under Legislative Decree No. 895, against persons who, under international treaties, are not terrorists but common criminals. This extension of terrorism to common criminality deforms and devalues terrorist actions and the need to penalize and punish them severely. The IACHR understands the gravity of the crimes committed by common criminals against personal property, individual freedom, human life, and other things of value. However, universal legal traditions demand the appropriate application of concepts that entail such important consequences as the imprescriptibility of crimes or the existence of universal jurisdiction. (B) The fact that detainees are kept incommunicado in violation of international law; the presence of questionable types of evidence (the police statement); lack of freedom during trial preparations; exaggeratedly short times allotted for trials; the absence of mechanisms for making challenges; and continuous isolation in cells (Legislative Decree No. 895). (C) The classification of qualified homicide or murder, rape of minors, kidnapping, aggravated robbery, and extortion as aggravated crimes (see Decrees No. 896 and 897). In cases of this kind, the Department of Public Prosecutions does not conduct the investigation; it only intervenes in it. In addition, the period allowed for police investigations is often extended to 15 days, in breach of the Constitution. The right of defense in these cases is undermined, in that magistrates cannot be challenged and the individuals who prepared police statements cannot be called as witnesses. (D) The unconstitutional erection of major barriers to judges' authority in cases of habeas corpus and *amparo* (Legislative Decree No. 900). Under this provision, Specialized Public Law Judges have jurisdiction in these matters, whereas before the decree these important proceedings could be heard by all criminal judges in Lima and Callao. (E) The granting of competence to military justice, which can now try a new type of proceeding — military habeas corpus — in circumstances in which military judges, under international law, should only deal with breaches of the law committed in performance of those functions (Legislative Decree No. 905). (F) The adoption of provisions that negatively affect young people and violate the rules of due process, such as including adolescents over the age of 16 into the adult criminal regime (Legislative Decree No. 895). In such cases, Family Judges have no competence and adolescents are referred to military justice, which can impose punishments of more than 25 years in prison. (G) Rules for reconsidering common crimes that contain, among other elements objected to, extremely subjective and unclear descriptions that therefore offer the possibility for discretionary decisions by the authorities and false accusations and charges (see Legislative Decrees Nos. 901 and 902). (H) The distortion of functions belonging to the National Police (see Legislative Decree No. 904). This decree created the National Intelligence Directorate for Social Protection and Tranquility, allowing the National Intelligence Service (SIN) to intervene politically in the police.
30. The IACHR gives the highest importance to these complaints submitted to it that affect basic tenets of the rule of law and of the inter-American human rights protection system. The IACHR repeats that civic security is an important and basic prerequisite for democracy and for the observance of human rights. However, the essence of the rule of law is affected by the inappropriate extension of penal classifications from the struggle against subversive elements to the realm of common crime. In such cases, individuals' basic rights and guarantees are affected, in that the assumption of innocence and the guarantees of due process are undermined. The underlying confusion in this new legislation between "national security" and "civic security" confuses the arenas to which the two belong. Mixing the two concepts into a single idea militarizes the criminal justice system and, at the same time, gives military and intelligence agencies powers which do not correspond to them, thus invading the arena of individual basic rights.
31. One of the gravest problems that affect societies as they emerge from periods of violence and terrorism is how to keep the institutions, practices, and cultural habits developed to combat subversion from becoming institutionalized and consequently from binding society to the patterns of the past. In its report on Peru, the IACHR will closely study these issues of vital importance to the democratic future of Peru and it will formulate the appropriate recommendations.

#### **4. The Extension of Military Justice**

32. The Commission received exhaustive information on the extension of military justice into civilian trials, and on its preservation as the sole system for trying members of the armed forces, even for common crimes. This situation has been upheld on many occasions by the Supreme Court of Justice, which has ruled in favor of military justice in disputes of jurisdiction. In this press release, the IACHR also refers to a series of legislative decrees that confuse the concepts of national security and civic security and which are either intended to or have the effect of unduly submitting civilians to military justice.
33. In this regard, the Commission repeats its doctrine that military justice must be applied only to active service personnel and solely for service crimes. Thus, crimes against human rights must be investigated and punished in accordance with the law by ordinary criminal courts. The distortion of jurisdictions must not be allowed because, beneath false conceptions of the efficiency of military justice, it undermines judicial guarantees and has grave institutional repercussions that challenge civil courts and the currency of the rule of law.

(Continued...)

the Commission on the on-site visit, and also issued a press release at the close of the visits. In it, he said that, "The death threats that many journalists have received for the practice of their professions are our main concern. Given that approximately 150 journalists have been killed in our hemisphere in recent years, any threat on the life of a journalist must be fully investigated. Moreover, the government has the responsibility of finding means to ensure that the profession can be practiced without consequences that endanger the physical well-being of those who practice it."<sup>55</sup>

The Special Rapporteur also received information on indirect means of bringing pressure to bear with the objective of limiting freedom of expression, including court cases, attacks on one's professional reputation and workplace persecution.

The Rapporteur had access to documentation allegedly belonging to the Peruvian Intelligence Service. These documents suggest that there could be an intention to restrain freedom of expression by harassing journalists. According to these documents, a group of journalists should be investigated with the purpose of obtaining evidence that by revealing intelligence activities through their profession, they are involved in illegal activities against the government or the army. The documents also note that these journalists carry out investigations on sensitive intelligence areas for the government and the army, such as torture, murder between members of the Armed Forces, special tasks by the SIN and SIE (intelligence services), and phone tapping. The journalists mentioned in the documents are: " Cesar Hildebrant and his investigating team; Cecilia Valenzuela and her investigating team; Lilian Zapata; Lucho Iberico; Josefina Townsend; Nicolas Lucar; Monica Chang; Beto Ortiz, special investigation team (Mr. Ivcher); Jose Arrieta (Pepe); Alejo (Gordo); Milagros (Chala); Naomi (Gorda); Karen (Flaca); Ivan; Carmen (Camucha); Javier; Jaime; personnel of the newspaper "La Republica" (opposition) and others."

Some of the journalists listed in the documents have received death threats more than once, and one of them, José Arrieta Matos, found himself obliged to flee the country. The documents in question would indicate that certain sectors of the Peruvian government have the intention of silencing journalists who have expressed opinions critical of authorities.

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#### **5. Impunity for Human Rights Crimes**

34. The undue extension of military justice, the intervention suffered by the judiciary, and the amnesty laws promulgated in 1995 give rise to a serious situation in which the perpetrators of human rights violations enjoy impunity, a circumstance which could well affect the social fabric as a whole. In light of its broad, hemisphere-wide experience, the IACHR is deeply concerned by this, and so its final report will analyze this important question in detail.
35. On this occasion the Commission repeats its doctrine that when human rights crimes occur, the state is under the obligation of investigating and punishing the perpetrators. This international obligation of the state is unrenounceable, and so situations of impunity arising from *de facto* or *de jure* amnesties contravene the American Convention on Human Rights and, in addition, undermine the responsibility of the state. The Commission presses for the amnesty laws to be declared null and void and for an independent investigation to be conducted to establish the truth about the events that occurred during the years of violence. In addition, the state has the power to and obligation of punishing such violations in order to protect the population and social tranquility.

<sup>55</sup> See, Annex 5 (a).

The Special Rapporteur also learned of a great many individual cases regarding freedom of expression in Peru, including the following:

Angel Paez Salcedo, chief of the investigative department of the daily La República and correspondent of the Argentine daily Clarín. Claims that in early 1998, he began to receive threats on his life. According to organizations for the protection of the press, he was being threatened for his investigation of corruption in the army and clandestine operations of the Army Intelligence Service.

César Hildebrandt, anchor of the news program “En Persona”. He received several death threats. On 5 November 1998, he received a threat on his life and was labeled a “traitor to the fatherland” by an Armed Forces commanding officer. The threats he received warned him that he was being watched closely because of his report on the National Intelligence Service.<sup>56</sup>

José Arrieta Matos, Director of the Investigative Department of Channel 2/Frecuencia Latina. Faced with the relentless pursuit of the security forces, he sought refuge in the United States. Peruvian authorities accused Mr. Arrieta Matos of having committed an offense against the public administration. He left the country in January of 1998, and on 16 July of that year the U.S. Department of Justice granted him refuge.

Cecilia Valenzuela, director of the television program “Acá y ahora” broadcast by Andina de Televisión., indicates that she received a telephone call and anonymous letters threatening her with death in May 1998. According to organizations for the protection of the press, the cause was her investigation of cases of government corruption and human rights abuses by military personnel.<sup>57</sup>

The newspaper “El Comercio” also received numerous phone threats in April of last year. Press protection organizations attribute this to the publication of an interview with a former police captain in which secrets from government investigations were revealed.

Johny Eduardo Pezo Tello was jailed in November of 1998 on a charge of terrorism. The cause was that he had read on his radio program a letter from MRTA (Revolutionary Movement Tupac Amaru). Mr. Pezo Tello had received a call threatening him and his family with serious consequences if he didn't read the document over the air during his show. He tried to leave the station and report the incident to the police, but two individuals keeping watch outside warned him to do what he had been told or else. He went back to the studio, and only after apologizing to the audience and stating that he did not agree with the ideas of the MRTA, did he read the document. International condemnation of his subsequent arrest was immediate. The Special Rapporteur facilitated all relevant information to Peruvian authorities seeking a suitable solution. Finally the announcer was released.

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<sup>56</sup> He is on an Intelligence Service list of journalists to be investigated.

<sup>57</sup> Idem.

Regarding Mr. Baruch Ivcher's case, currently pending before the Inter-American Court on Human Rights, the Commission has found that the Peruvian State deprived Mr. Ivcher of his title of nationality in order to remove him from control of Channel 2 "Frecuencia Latina" and thus violated his freedom of expression at a moment in which such Station reported on serious human rights violations and acts of corruption.

**Cuba** must be discussed separately from the other countries of the hemisphere. The absence of democracy in Cuba clearly impinges on the right to freedom of expression. Until a move toward democracy is made, significantly broadening the basic rights of all Cubans, it will be impossible to develop freedom of expression as consecrated by the American Declaration and the American Convention.

The Cuban Constitution contains a clause prohibiting any of the media, including the written press, from being privately appropriated "in order to make sure that it will be used exclusively for the working people and in the interest of society." The government censures all foreign material attempting to enter the island, in addition to arbitrarily denying entry to foreign journalists. The Inter-American Press Association reported that over 80 foreign journalists had been denied visas to enter the country prior to the Pope's visit to Cuba, for the reason that they had previously been critical of the country's authorities. Thus the government uses the arbitrary granting of visas as another way of influencing and controlling the news coverage within the country.

Chapter VII of the Cuban Constitution on fundamental guarantees, duties, and rights drastically curtails the formal political rights that are essential in any democratic regime and are enshrined in Article XX of the American Declaration of the Rights and Duties of Man. Article 53 recognizes freedom of expression and press, but only "in accordance with the purposes of a socialist society." Freedom of expression is also limited in Article 39(ch), which states that artistic freedom exists "provided that its content is not contrary to the Revolution." The Constitution also contains the legal foundations for censorship, since it is the state that determines whether oral or written expression or art is contrary to the Revolution. The Constitution also contains the legal basis for the state to direct all activities in the area of art, culture, or the press, all of which is in contradiction with Article IV of the American Declaration.

Domestic legislation on freedom of expression contains a large number of criminal laws that repress freedom of expression it by imposing punishment in the form of prison terms. The punishment for publishing "anti-government propaganda" is imprisonment for one year. Last year, the National People's Assembly approved the Law of National Dignity which, for the first time, punishes the act of transmitting information. Article 8 of that Law establishes that "the weight of the law will fall on all persons who, either directly or indirectly, collaborate with the information media of the enemy ... with prison terms ranging from three to ten years...".

Finally, in 1999 the "Law for Protection of National Independence and the Economy" was approved in Cuba. The objective of this law is clearly to place even further restrictions on the scant freedom of expression existing in Cuba. The supply, search, or obtaining of information and the introduction into the country of subversive material, or the reproduction or dissemination of such material, are considered crimes, as are the direct collaboration, or collaboration through third parties, with radio or television stations, newspapers, magazines, or other mass media, for

the purposes indicated in the Law.”<sup>58</sup> The law provides for sanctions in the form of prison terms of up to 20 years for the perpetrators of such acts and for their accomplices.

To the body of law limiting freedom of expression is added the constant practice of persecution and intimidation of all persons who express opinions different from those adopted by the authorities. Recently, in March 1999, four persons were convicted on charges of sedition, for having published a manifesto entitled “The Fatherland is for Everyone” [*La Patria es de Todos*], which criticized the views of the Fifth Congress of the Cuban Communist Party (CCP). The four persons, Marta Beatriz Roque Cabello, Félix Bonne Carcasés, René Gómez Manzano, and Vladimiro Roca Antúnez, were members of the “Internal Dissidence Working Group.” Vladimiro Roca Antúnez, a former pilot in the Cuban Air Force, was given a five-year prison term. Félix Bonne Carcasé, 59 years of age, and René Gómez Manzano, a 55 year old attorney, were sentenced to four years in jail. The economist Marta Beatriz Roque Cabello, 53 years of age, was sentenced to three and a half years in jail. These four persons had been in pretrial custody since July 16, 1997.

The Rapporteur will continue monitoring the evolution of freedom of expression in the hemisphere, noting the improvements achieved as well as any deterioration and concerns.

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<sup>58</sup> Law for Protection of the National Independence of Cuba, Articles 1, 5(1), and 6(1), February 17, 1999.

## CHAPTER IV

### Laws on Contempt, Compulsory Membership in a Professional Association, and Murder of Journalists

In this chapter, the Rapporteur will refer to the following three specific problems: legislation on contempt [*desacato*]; the requirement that journalists be affiliated with a professional association; and, the murder of journalists.

The Rapporteur has selected these three issues because murder of journalists is the most direct and brutal threat to or violation of freedom of expression. As for the legislation on contempt and compulsory membership in a professional association, the Rapporteur decided to take up these subjects to follow up on recommendations made by the Commission in its report on contempt laws [*leyes de desacato*] and on the Court's advisory opinion on compulsory membership in a professional association [*colegiación obligatoria*].

#### A. Contempt Laws [*Leyes de Desacato*]

The Commission took special care in analyzing the incompatibility of laws punishing offensive expressions directed at public officials, or the so-called "contempt laws," with the right to freedom of thought and expression.<sup>59</sup> The Commission concluded that these laws restrict freedom of expression as it is prescribed in the Convention.<sup>60</sup> On this point, it had the following to say:

In conclusion, the Commission finds that the use of such powers to limit the expression of ideas lends itself to abuse, as a method for silencing unpopular ideas and opinions, and thus it restricts the public debate which is fundamental to the effective functioning of democratic institutions. Laws that penalize the expression of ideas which does not incite lawless violence are incompatible with freedom of expression and thought, as established in Article 13, and with the basic purpose of the American Convention to protect and guarantee a pluralistic and democratic way of life.<sup>61</sup>

The Commission went on to state as follows in that study:

Application of contempt laws to protect the honor of public officials acting in an official capacity unjustifiably grants them the right to a protection that is not offered to other members of society. This distinction is in direct conflict with the fundamental principle of a democratic system, according to which the government is the object of controls, including the scrutiny of its citizens, so as to prevent or control any abuse of its coercive power. If public officials acting in an official capacity

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<sup>59</sup> IACHR, Report on Compatibility between Contempt Laws and the American Convention on Human Rights, OAS/Ser L/VIII.88, Doc.9 rev (1995), pages 210 to 223.

<sup>60</sup> At the same time, it is important to note that the Commission received a complaint from journalist Horacio Verbitsky against the Argentine government, which referred to restrictions on freedom of expression in the form of contempt laws. In this case, a friendly settlement was reached. In the report on the friendly settlement, it was pointed out that: "In accordance with Article 49 of the American Convention, the Commission analyzed the content of the friendly settlement in question to ascertain its conformity with the Convention. The Commission is of the opinion that annulment of the crime of contempt in the context of the case in point would bring Argentine law in conformity with the American Convention, since it would eliminate a legal basis for government restriction of freedom of expression, as established in the American Convention." See annex 3.

<sup>61</sup> Op. Cit. at 60.

are regarded for all effects and purposes as the government, it is then precisely the right of individuals and the citizenry to criticize and scrutinize the action and attitudes of those officials in matters related to their public office.

In addition to direct restriction, contempt laws indirectly restrict freedom of expression because they carry with them the threat of imprisonment or fines for persons who insult or offend a public official. In this regard, the European Court argued that although the subsequent penalties of a fine and revocation of a published article do not prevent the petitioner from expressing himself, "they are nonetheless equivalent to censorship, which might deter that person from formulating criticism of that sort in the future." The fear of punishment and sanctions necessarily discourages citizens from expressing their opinions on issues of public concern, and especially when legislation fails to distinguish between value judgments and facts. Political criticism often involves value judgments.

The Commission further observes that the burden that contempt laws place on persons wishing to participate in the public debate over the proper functioning of the public administration is not lessened by the possibility of proving the truth as a defense. Even the laws that allow truth as a defense inevitably inhibit the free flow of ideas and opinions by shifting the burden of proof onto the person expressing his opinions. This is particularly the case in the political arena, where political criticism is often based on value judgments, rather than purely fact-based statements. Proving the veracity of these statements may be impossible, since value judgments do not allow for proof. Therefore, a rule that requires a critic of public officials to guarantee the factual content of his statements has disturbing implications for criticism of government conduct. Rules of this sort raise the possibility that persons who criticize the government in good faith may be penalized for that criticism. Moreover, the threat of criminal liability for dishonoring the reputation of a public official, even as an expression of a value judgment or an opinion, can be used as a method for suppressing criticism and political adversaries. By shielding officials from defamatory expression, contempt laws establish a structure that, in the final analysis, shields the government itself from criticism.

The Commission is of the opinion that an important distinction should be drawn between misconduct that disrupts or prevents public officials from performing their official functions and discourse that criticizes individual performance. Although it can be argued that contempt laws that require that the offensive discourse be pronounced in person are designed to prevent civil unrest and disturbances, in any event they punish freedom of expression to the extent that it is related to the honor of a public official.

Finally, and most importantly, the Commission notes that the rationale behind contempt laws reverses the principle that a properly functioning democracy is indeed the greatest guarantee of public order. These laws claim to preserve public order precisely by restricting a fundamental human right which is also internationally recognized as a cornerstone upon which democratic society rests. Contempt laws, when applied, have a direct impact on the open and rigorous debate about public policy which Article 13 guarantees and which is essential to the existence of a democratic society. In this respect, reference to the concept of 'public order' to justify contempt laws directly inverts the logic underlying the guarantee of freedom of expression and thought established in the Convention.

The special protection contempt laws afford public functionaries from insulting or offensive language is not congruent with the objective of a democratic society to foster public debate. This is particularly so in light of a government's dominant role in society, and especially where other means are available to reply to unjustified attacks, through government access to the media or civil action against individuals for libel or slander. Any criticism that is not related to the officials' position may, as is the case for all private individuals, be subject to ordinary libel, slander, and defamation actions. In this sense, the government's prosecution of a person who criticizes a public official acting in an official capacity does not comply with the requirements of Article 13(2), because the protection of honor in this context is conceivable without restricting criticism of the government administration. As such, these laws are also an unjustified means of limiting speech that is already restricted by laws that all persons may invoke, regardless of their status.

Moreover, the Commission notes that, contrary to the rationale underlying contempt laws, in democratic societies, political and public figures must be more, not less, open to public scrutiny and criticism. The open and wide-ranging public debate, which is at the core of a democratic society, necessarily includes those persons who are involved in devising and implementing public policy. Since these persons are at the center of public debate, they knowingly expose themselves to public scrutiny and thus must display a greater degree of tolerance to criticism.

Articles 13(2) and (3) recognize that the zone of legitimate state intervention begins at the point where the expression of an opinion or idea directly interferes with the rights of others or constitutes a direct and obvious threat to life in society. However, particularly in the political arena, the threshold of state intervention with respect to freedom of expression is necessarily higher because of the critical role political dialogue plays in a democratic society. The Convention requires that this threshold be raised even higher when the state brings to bear the coercive power of its criminal justice system to curtail freedom of expression. Considering the consequences of criminal sanctions and the inevitable chilling effect they have on freedom of expression, criminalization of speech can only apply in those exceptional circumstances when there is an obvious and direct threat of lawless violence. Article 13(5) stipulates 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.'

The Commission considers that the state's obligation to protect the rights of others is served by providing statutory protection against intentional infringement on honor and reputation through civil actions and by implementing laws that guarantee the right of reply or correction. In this sense, the state guarantees protection of the privacy of all individuals without abusing its coercive powers to repress individual freedom to form opinions and express them.

The Rapporteur sets out below which States and which laws have contempt provisions and are therefore not compatible with the terms of the American Convention and should be revoked. This list does not cover all existing legislation on the subject. Many States have other laws that criminalize contempt and that should also be revoked. Some Penal Codes provide as follow:

## **BOLIVIA**

Article 162: Persons who by any means slander, insult, or libel a public official in the performance of his functions or by reason of them shall be punished by imprisonment ranging from one month to two years.

If the previous acts were directed against the President or the Vice President of the Republic, State Ministers, or members of the Supreme Court or of Congress, the punishment will be enhanced by half.

## **BRAZIL**

Article 331: Showing contempt for a public official in the performance of his functions or by reason of them is punished by imprisonment of 6 months to two years, or a fine.

**CHILE**<sup>62</sup>

Article 263: Any person who by deed or by speech gravely offends the President of the Republic or any of the legislative bodies or committees of those bodies, either in the public acts representing them or in the performance of their individual functions, or the high courts of justice, shall be punished by an average to maximum sentence to medium-term imprisonment [*reclusión menor*] and a fine ranging from eleven to twenty minimum wages.

Article 264: Persons who commit the following acts are considered to be acting in contempt of authority:

1. Persons who seriously breach the order of sessions of the legislative bodies and persons who insult or threaten a deputy or senator during any such sessions;
2. Persons who seriously breach the order of hearings in the courts of justice and persons who insult or threaten a member of those courts during any such hearings;
3. Persons who insult or threaten: First: A senator or deputy for the opinions expressed in Congress. Second: Members of the court for rulings they may have issued. Third: State ministers or another authority in the performance of their official duties. Fourth: A superior officer in the performance of their functions.

**COSTA RICA**

Article 307. Any person who offends the honor or decorum of a public official or threatens him by reason of his functions, addressing him personally or publicly or by written, cable, or telephone communication, or by line of authority, shall be punished by imprisonment of one month to two years.

A sentence of six months to three years shall apply if the injured party is the President of the Nation, a member of the supreme powers, or a judge, magistrate of the Supreme Election Board, or the Comptroller or Assistant Comptroller-General of the Republic.

**CUBA**

Article 144. Any person who threatens, slanders, libels, defames, insults, or in any way offends or affronts, by speech or in writing, the dignity or decorum of an authority or public official, or their agents or aides, in the performance of their functions or on the occasion or by reason of them, shall be punished by deprivation of freedom for a term ranging from three months to one year or a fine of one hundred to three hundred *cuotas* or both.

**ECUADOR**

Article 231. Any person who uses threats, insults, intimidation, or violence to offend any of the public officials listed in Article 225 while these officials are performing their official functions, or by reason of those functions, shall be punished by imprisonment ranging from fifteen days to three months and a fine of fifty to three hundred sucres. Persons who commit the violations listed in the previous clause against another official who is not performing official duties shall be punished by imprisonment ranging from eight days to one month.

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<sup>62</sup> In Chile, Article 6(b) of the State's Internal Security Law is also often used as a contempt [*desacato*] law.

## EI SALVADOR

Article 339. Persons who offend the honor or decorum of a public official in the performance of his official duties or by reason of those duties, in action or by speech while in his presence, or in a written communication addressed to him, shall be sanctioned by imprisonment ranging from six months to three years.

If the injured party is the President or Vice President of the Republic, a Deputy to the Legislative Assembly, a Minister or the Assistant State Secretary, a magistrate of the Supreme Court of Justice or Court of Appeals, a lower court judge, or a justice of the peace, the sanction may be enhanced by one-third of the maximum sentence.

## GUATEMALA

Article 411. Any persons who offend the dignity or decorum, or threaten, insult, or slander any of the presidents of state organs shall be punished with a prison term of one to three years.

Article 412. Any persons who threaten, insult, or slander or in any other way offend the dignity or decorum of a public official or authority in the performance of his functions or on the occasion of them shall be punished with a prison term of six months to two years.<sup>63</sup>

## HAITI

183. When one or several administrative or judicial magistrates or communal chiefs should, in the performance of their functions or on the occasion of said performance, be offended orally or in writing in a way that is injurious to their honor or sensitivity, the offender shall be punished by imprisonment of three months to one year.

184. Any offense committed by means of gestures or threats to magistrates or communal chiefs in the performance of their functions or on the occasion of said performance shall be punished by imprisonment of one month to one year.

185. Any offense committed by gestures, words, or threats against any ministerial official or member of the law enforcement forces, while performing their functions or on the occasion of said performance, shall be punished by a fine ranging from 16 gourdes to 40 gourdes.

Articles 390 and 393 of the Criminal Code

390-10. Any persons who have proffered insults other than those covered by Article 313-323 shall be punished with a fine ranging from 2 – 4 *piastres*.

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<sup>63</sup> Articles 411 and 412 of the Criminal Code should be considered together with Article 35 of the Political Constitution and Article 35 of the *Ley Constitucional de Emisión del Pensamiento* [Constitutional Law on Expression]. Article 35 of the Constitution states as follows: "Publications that contain reports, criticism, or accusations against public employees or officials for acts performed while exercising their duties shall not constitute crimes or offenses...."

Public employees and officials may demand that a court of honor, formed as determined by law, declares that the publication affecting them is based on inaccurate facts or that the charges against them are unfounded. A court decision vindicating the injured party must be published in the same information medium where the accusation or offending statement appeared.

Article 35 of the Constitutional Law on Expression states: "Criticism of public employees or officials for purely official acts performed as part of their official position shall not constitute the crime of slander or libel, even if they have left those public offices at the time that the accusations are made."

393. The persons covered by Article 390 shall in all cases be sentenced to imprisonment for three days.

## **HONDURAS**

Article 345. Any persons who threaten, slander, libel, insult, or any other way offend the dignity of a public authority on the occasion of the performance of those functions, either in deed, in speech, or in writing, shall be punished by imprisonment of two to four years. If the injured party is the President of the Republic or any of the high officials referred to in Article 325 above, the prison term shall be three to six years.

## **MEXICO**

Article 189. Any persons who commit a crime against public servants or agents of the government while such persons are legitimately fulfilling their functions or by reason of said functions, shall be sentenced to one to six years in prison, in addition to any sentence applicable in the case of the crime committed.<sup>64</sup>

## **NICARAGUA**

Article 347. The following persons shall be in contempt of authority:

1. Persons who provoke to a duel, slander, defame, or insult, in action or in speech, or threaten public officials in the performance of their duties or on the occasion of said duties, in their presence or by notification or in writing addressed to them;
2. Persons who cause a serious breach of order in the courts and tribunals and in any other place where public officials or authorities are performing their functions;
3. Persons who, while armed and without being authorized by law, either openly or clandestinely enter Congress while it is in session, or any of the legislative chambers, or any court or tribunal;
4. Persons who prevent a public official or representative from gaining access to his chamber or office;
5. Persons who openly disobey authority.

## **PANAMA**

Article 307. Persons who publicly offend or insult the President of the Republic or the person replacing him in his functions shall be punished by imprisonment of six months to one year and a 50- to 100-days' fine.

Article 308. Persons who publicly denigrate a government body shall be punished with a prison term of six months to one year, and a 50- to 100-days' fine.

## **PERU**

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At the same time, the 1917 press law establishes in its Article 3: "[...] causes injury to the authorities of the country for the purposes of causing hatred or scorn or ridicule of them, or for the same purposes attacks professional public bodies, the Army or the National Guard, or the members of those groups, by reason of their functions;"

Article 374. Persons who threaten, insult, or in any other way offend the dignity or decorum of a public official by reason of the performance of his duties or at the time of performing them shall be punished with imprisonment of no more than three years.

If the injured party is the President of one of the government branches, the sentence shall be no less than two or more than four years.

## **DOMINICAN REPUBLIC**

Article 368. Public defamation or libel against the Head of State shall be punished by a sentence ranging from three months to one year in prison, and a fine of ten to one hundred pesos and accessory or additional punishment during a period of time equal to the sentence, and complete disqualification and suspension of the civil and political rights set forth in Article 42.

Article 369. Acts of defamation or libel against deputies or representatives to Congress, State Secretaries, magistrates of the Supreme Court or trial courts, or heads or sovereigns of friendly countries shall be punished by imprisonment of one to six months and a fine of fifty pesos.

## **URUGUAY**

Article 173. Contempt is committed by discrediting the authority of officials in one of the following ways:

1. By actual, written or verbal offenses, committed in the presence of the official or in the place where he performs his functions, or outside the place and the presence of that official, but, in the latter two cases, by reason of or on the occasion of those functions.
2. By open disobedience of the orders or instructions of said officials.

Actual offenses are considered as entering with arms the place where the officials perform their functions, physical violence, offensive gestures and shouts, even if they are not directed against said officials.

The crime is punished by a prison term of three to eighteen months.

## **VENEZUELA**

Article 223. Any person who in any way, by speech or by act, offends the honor, reputation, or decorum of a member of Congress, or of any public official, shall be punished as follows, provided the act took place in the presence of said official or on the occasion of his functions:

1. If the offense was directed against a law enforcement officer, the offender is sentenced to a prison term of one to three months;
2. If the offense was directed against a member of Congress or any public official, the offender is sentenced to a prison term of one month to one year, depending on the rank of the persons in question.

Article 226. Any person who in any way, by speech or by act, offends the honor, reputation, decorum, or dignity of any judicial, political, or administrative body shall be punished with imprisonment of three months to two years, if the crime was committed while said body was in session, or while a judicial hearing was being held.

If the offender used violence or threats, the prison term shall be six months to three years.

Action shall be brought only at the request of the offended party. If the crime was committed against bodies not in session, legal action shall be brought only at the petition of the presiding members.

Said petition shall be addressed to the representative of the Office of the Public Prosecutor, to initiate the appropriate proceedings.

Article 227. In the cases stipulated in the preceding articles, the offending party may not present any proof as to the truth or the notoriety of the acts or errors with which the party is charged.

Article 228. The provisions established in the proceeding articles shall not apply if the public official has given cause for the act by arbitrarily exceeding the confines of his powers.

Article 229. In all other cases not covered by a special provision of the law, persons who commit any crime against a member of Congress or any public official by reason of his functions shall be liable for the punishment established for the crime committed, plus an enhancement of one-sixth to one-third.

The Rapporteur wishes to note that a pluralistic and tolerant democracy in one in which a fluid movement of ideas, opinions, and open public debate are permitted. It is within this context so crucial to democracy that civil servant designing and applying public policy including the administration of justice are exposed to public opinion and scrutiny. The contempt laws seek to avoid debate as well as the scrutiny or criticism of state officials. Thus, contempt laws, instead of protecting freedom of expression or civil servants limit freedom of expression and weaken the democratic system.

Likewise, the Rapporteur points out that many States of the Continent still have rules on contempt of public authority that continue to be invoked by the authorities to silence their critics and thus restrain freedom of expression. This situations debilitates the democratic system.

## **B. Laws of Compulsory Membership in a Professional Association**

On November 13, 1985, the Inter-American Court of Human Rights issued advisory opinion OC-5 in which it stated that the compulsory membership of journalists in a professional association represented a restriction of freedom of expression. The Court reached the following conclusions on the subject:

From the foregoing considerations, it follows that a law requiring journalists to belong to a professional association, and that prevents journalists who are not members of the association from practicing journalism and limits access to the profession to graduates with a specific university degree is not compatible with the Convention. Such a law would contain restrictions to freedom of expression which are not authorized by Article 13.2 of the Convention and would therefore be in violation of both the right of every person to obtain and impart information and ideas through any medium of their choice, and the right of the community in general to receive information without restraint.

Further, in its analysis it had the following to say:

The Court observes that as a rule the organization of professions in professional associations is not per se contrary to the Convention, but it is a method for regulating and controlling legal authority

and public morals through the action of associates. Therefore, if the concept of public order is considered in the sense that it was referred to earlier, namely as the conditions that ensure the harmonious and normal functioning of institutions on the basis of a coherent system of values and principles, then it is possible to conclude that the organization of professions is implied in that order.

The Court, however, considers that the same concept of public order demands that, in a democratic society, the widest possible circulation of news, ideas, and opinions be guaranteed, as well as the greatest access to information by society as a whole. Freedom of expression is part of the underlying primary public order of democracy, which is inconceivable without open public debate and without dissident opinions being fully entitled to be heard. In this sense, the Court adheres to the ideas put forward by the European Commission of Human Rights which stated as follows, on the basis of the preamble of the European Convention: that in approving the Convention, it was not the intention of the High Contracting Parties to grant reciprocal rights and obligations with a view to satisfying their national interests, but rather ... to establish a common public order of free European democracies for the purpose of safeguarding their common heritage of political traditions, ideals, freedoms and rights. ("Austria vs. Italy," Application No. 788/60, European Yearbook of Human Rights, Vol. 4, 1961, page 138).

It is also important to democratic public policy, as it is conceived in the American Convention, to ensure scrupulous respect for the right of every human being to express himself freely and the right of society as a whole to receive information.

It has been argued that compulsory membership of journalists in a professional association is an attempt to protect a remunerated trade and that it is not contrary to the exercise of freedom of expression, provided that no compensation is involved and that, in this respect, it refers to something different from what is contemplated in Article 13 of the Convention. This argument is based on a contrast between professional journalism and the exercise of freedom of expression, which the Court cannot agree to. According to this line of reasoning, freedom of expression is one thing, and the professional practice of journalism is another. This is not accurate, however, and it can lead to serious dangers if it is taken to its ultimate consequences. The practice of professional journalism cannot be differentiated from freedom of expression. On the contrary the two are obviously intertwined, since a professional journalist neither is nor could be anything other than a person who has decided to exercise his freedom of expression on a continuous, steady, and remunerative basis. Moreover, to regard the two as different activities could lead one to the conclusion that the guarantees contained in Article 13 of the Convention do not apply to professional journalists.

Furthermore, the argument commented on in the previous paragraph does not take into account the fact that freedom of expression includes giving and receiving information, it has a dual, individual and collective, dimension. Because of this circumstance, the issue of whether this right is or is not exercised as a remunerated profession cannot be regarded as one of the restrictions referred to in Article 13.2 of the Convention, because, without disregarding the fact that a trade union is entitled to seek the best working conditions, this does not have to be done by depriving society of other possible sources of information.

The Court therefore concludes that the public policy arguments, which are valid in support of obligatory membership in a professional association for other professions, cannot be invoked in the case of journalism, since they would entail a permanent restriction of the right to make full use of the powers recognized for all human beings in Article 13 of the Convention, to the detriment of journalists who are not members of a professional association, and this would constitute a violation of the primary principles of democratic public policy on which the Convention is founded.

The arguments to the effect that professional membership is the way to guarantee that society has objective and true information provided through a system of professional responsibility and ethics were based on the common good. But in reality, as has been demonstrated, the common good requires a maximum amount of information, and it is the full exercise of freedom of expression that

favors that circumstance. Thus it is contradictory in principle to call for a restriction on freedom of expression as a means of guaranteeing it, because this would be ignoring the primary, basic nature of this right as inherent in every human being taken as an individual, even though it is also an attribute of society as a whole. A system for controlling the right to express oneself freely on the pretext that this would supposedly guarantee the correctness and truth of the information that society receives is a potential source of major abuses and, in the final analysis, is in violation of that same society's right to information.

It has also been argued that the compulsory professional association of journalists is a method for strengthening unions and thus a guarantee of the freedom and the independence of these professionals and a requirement for the common good. The Court is well aware that the free circulation of ideas and information can take place only in a situation where there are many sources of information and respect for the information media. It is not enough, however, that the right to establish or run public opinion agencies is guaranteed, but it is also necessary for journalists and, in general, all the persons professionally involved in the mass media, to be able to work with sufficient protection of the freedom and independence that this trade requires. So this is an argument based on a legitimate interest of journalists and the community in general, especially in situations where the truth of events can and is known to be manipulated as a result of decisions made by certain government or private news organizations.

Consequently, the Court is of the opinion that the freedom and independence of journalists is a common good that needs to be protected and guaranteed. Nevertheless, according to the terms of the Convention, the authorized restrictions of freedom of expression must be those "necessary to ensure" that certain legitimate purposes are met. In other words, it is not enough that the restriction is useful (see 46 above) to meet the purpose of question, that is, the purpose that can be achieved by means of the restriction, but rather that it must be necessary, or in other words that it cannot be reasonably achieved by any other means less restrictive of a right protected by the Convention. In this regard, the compulsory membership of journalists in a professional association is not consistent with the requirements of Article 13.2 of the Convention, because it is perfectly conceivable to establish a law that protects the freedom and independence of all persons who practice journalism, without any need to allow only a restricted group in the community to practice journalism.

The Rapporteur lists below those States that still have laws on their books that establish obligatory membership in a professional association for journalists and that prevent persons not affiliated with those associations from practicing journalism.

## **BOLIVIA**

Various legislative provisions in Bolivia establish the requirement of professional association or licensing to practice journalism, including the following:

### **Law 494 of 1979:**

Article 1. The profession of journalism is recognized and established for those citizens who have obtained the relevant academic degree from a Bolivian University and those citizens who fulfill the requirements established by this law because of their skills and experience acquired from the extended practice of journalism.

Article 6. The National Register of Journalists is established under the Ministry of Education and Culture, and the degrees conferred by the Bolivian University or by the Executive Branch of government shall be entered in it. When this requirement is fulfilled, the Bolivian Federation of Press Workers shall issue the single journalist identification card.

### **Organic Statute of Bolivian Journalism**

Article 27. None of the mass media, including dailies, newspapers, weekly publications, magazines with a permanent circulation, radio stations, television channels, or correspondents of national or international news agencies, may employ for specifically journalistic work any persons who do not have a professional degree and are not registered with the National Register of Journalists.

Article 31. Journalism is considered illegal when it is practiced by persons who do not have a national degree in journalism.

## **BRAZIL**

### **Decree No. 83284**

Article 4. In order to practice journalism, persons must be previously registered with the regional office of the Ministry of Labor. To register, persons must present the following documents:

- I. Proof of Brazilian nationality;
- II. Proof of never having been accused or convicted of practicing an illegal act pursuant to criminal law.
- III. A diploma from an advanced course in journalism or the media, accreditation in journalism, provided by a recognized school pursuant to the law, for the functions listed in items I to VII of Article 11;

## **HONDURAS**

### **Organic Law of the Association of Journalists**

Article 3. The following are members of the Honduran Association of Journalists:

- a) Graduates in journalism from a university in the country;
- b) Graduates in journalism from a foreign university whose degree has been recognized by the National Autonomous University of Honduras;
- c) Graduates in related professions who meet the requirements established by the Association, and can so demonstrate.

Article 8. Only members of the Honduran Association of Journalists may practice the profession of journalism in the country. For the offices of director, assistant director, chief editor, and information chief, persons must also be Honduran by birth. To provide the intellectual, political, and administrative direction of printed, radio, or television news, persons are required only to be Honduran by birth. Press officers and persons who are working in public relations or in information offices in public and private institutions must be members of the Association. The office of press attaché in Honduran diplomatic missions abroad shall be held by journalists who are members of the Association.

Article 45A. Persons who practice professional journalism and are not members of the Honduran Association of Journalists shall be punished with a fine of five hundred lempiras. In the case of a second offense, the fine shall be imposed on the party responsible for this violation.

Article 59. Permanently employed and part-time columnists and commentators, either salaried or not, may perform their functions freely, and are not required to be members of the Association. Their scope of action, however, will be limited to those jobs, and they may not work as a specialized or nonspecialized reporter.

Article 61. Only persons who are registered as members of the Association and are duly identified in their work shall be regarded as journalists vis-à-vis the national authorities.

## **PANAMA**

### **Law No. 67, "Regulating Practice of the Profession of Journalism in the Republic of Panama"**

Article 2. The following persons shall be recognized as eligible to practice journalism:

- a) Persons with the appropriate academic degree (Master's degree in communications or the equivalent) conferred by a university in the country or by foreign universities and revalidated by the University of Panama; or
- b) Persons who can prove that they have been practicing journalism continuously for no less than five years prior to the valid date of this law; or
- c) Persons who, at the time this law takes effect, have been practicing journalism for at least three continuous years and have continued to work in a professional capacity up to a period of five years.

Article 4. To demonstrate that the foregoing requirements are fulfilled and obtain the qualifying certificate issued by the Technical Journalism Board, the following requirements must be met:

- a) Presentation of the duly registered national university diploma with the specialty in journalism; or
- b) Presentation of the revalidated degree in journalism issued by a foreign university; or
- c) Written proof from the director or directors of the information media or the employers for whom the candidate has worked for five years while engaged in the professional practice of journalism, or written proof from legally established journalism organizations that the applicant has been a member of the union for five years.

Article 6. The following positions may be held only by journalists:

National or regional director of the information media and national or regional directors of information offices and heads of the information section in public relations offices of public or private agencies, head of a newspaper, editorialists, columnists, reporters, editors or writers, press photographers, title editors, diagrammers, correspondents, revisers or editors of the written information media; directors, assistant directors, chief editors, graphic reporters of radio, television, or film information programs.

Article 17. Persons who practice journalism without being legally authorized to do so shall be punished with a fine of one hundred to five hundred balboas. The fine imposed on a violator will be doubled in the event of a second offense.

A natural or legal entity that contracts the professional journalism services of a person who is not legally authorized as a journalist shall incur the same penalty.

## **Venezuela <sup>65</sup>**

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<sup>65</sup> The Venezuelan Supreme Court of Justice is expected to hand down a ruling on an appeal to nullify, on grounds of unconstitutionality, certain provisions contained in the Law on the Practice of Journalism. The Court's ruling could annul the (Continued...)

Article 2. To practice the profession of journalist, a person must have a university degree in journalism, a university degree in the information media, or an equivalent degree issued in the country by a University, or a legally revalidated degree, and must be affiliated with the National Association of Journalists [*Colegio nacional de Periodistas (CNP)*] and with the Journalists Welfare Institute [*Instituto de Previsión Social del Periodista (IPSP)*]. Only citizens who meet the requirements established in this provision shall be authorized to use the title of professional journalist.

Article 39. Persons who practice the profession of journalism illegally shall be punished with imprisonment of three to six months. The criminal courts have jurisdiction to hear and decide such cases, and the legal procedure shall be ex officio, by complaint, or at the request of a party.

The Rapporteur observes that the legislation of some States still require belonging to a particular association or having a specific university degree in order to work as a journalist, neither of which is compatible with the American Convention.

Regarding the latter point, the Rapporteur will continue observing the situation of freedom of expression. The Inter-American Court has established those requirements such as compulsory membership or university degrees constitute a limitation to freedom of expression.

### **1. Recent case laws on laws regarding of compulsory membership in professional association in the hemisphere**

The Rapporteur would like to take this opportunity to highlight decisions handed down by the constitutional review agencies in Costa Rica and Colombia, where the obligation of professional association of journalists was found to be contrary to freedom of expression as it is established in the American Convention. The Constitutional Division of the Supreme Court of Costa Rica ruled that Article 22 of the Organic Law of the Association of Journalists, which required journalists to become members in order to practice the profession, was unconstitutional. The grounds for this decision was Inter-American Court of Human Rights advisory opinion OC-5.<sup>66</sup> Colombia, for its part, challenged a law regulating the practice of journalism,<sup>67</sup> in which the requirements to practice journalism on a permanent basis are established. The Constitutional Court of Colombia, in a judgment handed down on March 18, 1998, declared that the law under challenge was unconstitutional.<sup>68</sup> In this way, the highest constitutional courts of both Costa Rica and Colombia accepted the interpretation of the Inter-American Court on Human Rights on the American Convention on Human Rights in relation to

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(...Continued)

professional association requirement, which is what the Colombian Constitutional Court did in a recent decision. According to the latest information received by the Rapporteur, the Court decided not to approve the ruling presented by Magistrate Humberto la Roche, who, according to the press, proposed that the legal provisions under challenge be repealed. Instead, the Court reassigned the case to a magistrate of the majority.

<sup>66</sup> See Judgment No. 2312-95 of 5/9/95.

<sup>67</sup> See Law 51 of December 18, 1985, "Regulating the practice of journalism and establishing other regulations.

<sup>68</sup> See Judgment No. C-087/98 issued by the Constitutional Court of Colombia on 3/18/98.

the limits of domestic laws regulating freedom of expression, thereby giving it obligatory and binding force in internal law.<sup>69</sup>

### C. Murder of Journalists

The murder of journalists is used as the most brutal method for curtailing freedom of expression in the hemisphere. This practice has had two specific objectives. On one hand, it has been used to eliminate those journalists who conduct investigations into violations, abuses, irregularities, or illegal acts of all kinds carried out either by public officials, organizations, or private parties in general, so that their investigations cannot be concluded or revealed to the public or simply in retaliation for those investigations. On the other hand, assassination of journalists also has been used as a tool for intimidation, by which a clear message is sent to any persons in civil society who are involved in the investigation of violations, abuses, irregularities, or illicit acts of any kind. In this way, the perpetrators seek to silence the press as a non institutional control mechanism or to make it an accomplice of those persons or institutions that engage or are involved in illegal or abusive acts. In the latter case, the objective is to prevent society from being informed of the events in question, at all costs.

Around 150 journalists have been murdered in our hemisphere in recent years. In this respect, the Rapporteur has been able to ascertain that in many of these assassinations, there has not been a firm determination on the part of the authorities to conduct an effective investigation into these events and punish the intellectual authors or the actual perpetrators of the crime, thereby engendering an impunity for this type of crimes on numerous occasions. On this point, the Rapporteur would like to point out that pursuant to the American Convention on Human Rights and other instruments of international law, states have a duty to investigate effectively the events surrounding the murder of journalists and to punish all the authors of the crime.<sup>70</sup>

The duty of States to investigate is an “obligation pertaining to a means or conduct,” which cannot be considered as unfulfilled only because the investigation may have failed to produce a satisfactory result, but “it must be undertaken seriously and not as a simple formality doomed in advance to be futile.” The investigation “must be meaningful and must be taken on by the state as its own legal duty, and not as a simple measure adopted for private interests, based on the legal initiative of victims or their family members or on inputs that have no evidentiary value, without any attempt on the part of the authorities to pursue an effective search for the truth.”<sup>71</sup>

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<sup>69</sup> See Ayala, Carlos, “*Del Amparo Constitucional al Amparo Interamericano como Institutos para la Protección de los Derechos Humanos*”, Instituto Interamericano de derechos Humanos, editorial jurídica venezolana, Caracas/ San Jose, 1998, pages 86 to 90.

<sup>70</sup> The Inter-American Court has said, “The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violations goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with immunity to the detriment of the rights recognized by the Convention.” See, Inter-American Court of human Rights, case Velásquez Rodríguez, Judgement July 29, 1988, par. 176.

<sup>71</sup> See the Inter-American Court on Human Rights, Case of Velásquez Rodríguez, Judgment of July 29, 1988, para. 177.

It is appropriate to quote a text from the principles of the Declaration of Chapultepec that speaks to the same point:

Assassination, terrorism, kidnapping, abuse of power, intimidation, unfair imprisonment of journalists, the physical destruction of the information media, violence of any kind and the impunity of the aggressors severely limit freedom of expression and freedom of the press. These acts must be promptly investigated and severely punished.<sup>72</sup>

Likewise, the United Nations Education, Science, and Culture Organization (UNESCO) has expressed its concern at the growing number of journalists murdered in recent years as a result of the practice of their profession and at the impunity of these crimes. UNESCO made the following recommendations, among others, to the member states:

- a. That governments adopt the principle that they will not prescribe crimes against persons when they are perpetrated to prevent the exercise of freedom of information and expression or when they are committed for the purpose of obstructing justice.
- b. That governments will improve their legislation to facilitate the prosecution and conviction of the intellectual authors of murders of persons who were exercising their right to freedom of expression.<sup>73</sup>

The same concern was shared by the United Nations Special Rapporteur for promotion and protection of the right to freedom of thought and expression, who had the following to say:

Governments must ... make every effort to investigate acts or threats of violence, intimidation, or harassment against the personnel or offices of the information media and to prosecute the responsible parties.

In this regard, the Rapporteur express as has said the Inter- American Commission on Human Rights that the failure of a government to conduct an effective and complete investigation into the murder of a journalist and to punish the intellectual authors and the actual perpetrators of the crime is particularly serious because of the impact this has on society. This type of crime not only has an intimidating effect on other journalists, but it also has that effect on any citizen, since it generates fear of reporting violations, abuses, and illicit acts of any kind. This effect can be prevented only by decisive action on the part of states to punish the perpetrators of assassinations of journalists. In this way states can send a strong and direct message to society to the effect that there will be no leniency for persons who commit such serious violations of a person's right to freedom of expression.<sup>74</sup>

In conclusion, the Rapporteur stated, namely that failure to conduct an effective and complete investigation into the assassination of a journalist and to punish both the intellectual and the material authors of the crime entails a violation of the right to inform and to express

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<sup>72</sup> Principle No. 5, Declaration of Chapultepec, adopted by the Hemispheric Conference on Freedom of Expression, held in Mexico City, March 11, 1994.

<sup>73</sup> UNESCO, Resolution 120 of November 12, 1997.

<sup>74</sup> See the Inter-American Commission on Human Rights, Report No 50/99 case 11.739 (Mexico) OEA/Ser/L/V/II. Doc.57, April 13, 1999.

oneself publicly and freely. At the same time, the murder of journalists is an offense against all citizens who may have occasion to report arbitrariness and abuse to society, aggravated by the impunity of all or some of its authors. Thus, failure to conduct a serious and complete investigation into the murder of a journalist leads to international responsibility on the part of states for violating the right to freedom of expression of the murdered journalist and the right of citizens in general to receive information freely and to know the truth.

The Rapporteur would like to conclude this analysis by making specific reference to the relationship between the murderer of a journalist, the impunity of all or some of the authors of the crime, and social mobilization as a form of protest at the death of such persons and as a way of making people aware of the importance of freedom of expression and public debate in a democratic society.

On many occasions, civil society has realized that a journalist was murdered so that it would not be informed of a specific fact or event, and it has peacefully mobilized in protest against this brutal violation of the right to life and freedom of expression. A clear example of this was the assassination of Argentine journalist José Luis Cabezas in 1997. On that occasion, large sectors of Argentine society were mobilized and demanded that the authorities investigate the incident and prosecute the actual perpetrators and the masterminds of the crime. Although in this case the actual perpetrators of the murder were arrested, the persons who planned the crime were not. Human rights organizations and a number of journalists in Argentina repeatedly expressed their concerns over the irregularities and inefficiency of the investigations during the judicial phase.

The case of Journalist José Luis Cabezas shows that mobilization of society is fundamental to create a awareness on the part of society of the importance of freedom of expression to strengthen democracy, and the need for an objective, effective, complete, and independent investigation, so that these crimes do not go unpunished. The peaceful mobilization of society is also the best guarantee that such crimes will not be repeated. In this way, the silence that was sought by murdering a journalist disappears and is turned against the authors of the crime by the repudiation of society.

### **1. Cases concerning the murder of journalists in this hemisphere during 1998**

The Rapporteur has received information on cases regarding the killing of journalists during 1998.

The various groups devoted to the protection of freedom of expression have produced different data on the killing of journalists. Given the information received, the Rapporteur has decided to account for those cases where there is reasonable indicia that the reason for the killing was linked to the exercise of the journalistic activity. This list does not constitute a determination of State responsibility and has the sole purpose of highlighting that this is one of the most dangerous professions in the world.

## **BRAZIL**

NAME	DATE AND PLACE	DESCRIPTION
Manoel Leal de Oliveira	January 14, Itabuna, State of Bahia	Mr. Leal de Oliveira was a journalist and the publisher of <i>A Regiao</i> , a weekly publication on southern Bahia State. In this weekly magazine, he published reports of corruption involving local authorities.
José Carlos Mesquita	March 10 Ouro Preto, Rondonio State	Mr. Mesquita was a news announcer on " <i>Espaco Aberto</i> ." On the program he frequently criticized the local authorities

## CANADA

NAME	DATE AND PLACE	DESCRIPTION
Tara Singh Hayer	November 18 Vancouver	Mr. Singh Hayer was the publisher and editor of the "Indo-Canadian Times." He received numerous death threats. He had strong differences with fundamentalist sectors that wanted to take control of the 70,000 Sikhs in British Columbia. The Canadian police attributed the murder to two different Sikh groups: Federation of Sikhs Youth, and Babbar Khalsa. Mr. Sinng Hayer colleagues are certain that his murder was an attempt to intimidate more moderate sectors weeks before the election of Sikh leadership. The freedom of expression groups have not expressed any concerns about the judicial investigation in this case.

## COLOMBIA:

NAME	DATE AND PLACE	DESCRIPCIÓN
Oscar García Calderón	February 22 Bogota	Mr. García Calderon wrote on bullfighting for the newspaper "El Espectador." His colleagues say that the reason for the murder was his investigation for publication of a book on the connection between bullfights and drug trafficking.
Nelson Carvajal	April 16 Pitalito	Mr. Carvajal was a reporter for <i>Radio Sur</i> . According to his colleagues, this crime was related to his investigation into corruption in the former local governments.

Bernabé Cortéz Valderrama	May 19 Cali	Mr. Cortez Valderrama was a reporter for <i>Noticias CVN</i> on the telepacific network, the authorities suspect that Mr Cortéz Valderrama was murdered by drug traffickers because of a program broadcast on June 11, 1997, in which a military operation to destroy a cocaine laboratory was shown. The police caught the person who actually committed the murder.
Amparo Leonor Jiménez	August 11 Iledupar	The journalist Amparo Jimenez was working on the <i>Mandato por la Paz</i> [Mandate for Peace] program, helping former guerrillas to become part of society. In 1996, he was investigating the intimidation tactics of paramilitary groups on the property of a former public official, Carlos Arturo Marulanda. The authorities have arrested the persons who actually committed the homicide.
Didier Aristizábal Galeano	March 2 Cali	Mr Aristizabal Galeano was a radio reporter working for <i>Radio Todelar</i> . His colleagues say that his murder was directly related to his profession.
Jose Abel Salazar Serna	March 14 Manizales	Mr Salazar Serna was the leader of a radio program, <i>Juventud en Acción</i> [Youth in Action], in which he was an advocate for peace and coexistence. The police arrested Gustavo Adolfo Montes Castaño who was accused of killing Salazar Serna during a fight.
Nestor Villar Jimenez.	September 11 Villavicencio	He was a journalist and a member of Congress, his colleagues' say that he was murdered because of his sharp criticism of drug traffickers.
José Arturo Guapacha	October 15 Tulua	Mr. Guapacha was the publisher of <i>Panorama</i> . His colleagues say that the motive of the assassination was his articles criticizing drug trafficking and his attempt to organize a trade union of journalists.

Saúl Oswaldo Alcaraz	October 14 Medellin	Mr Alcaraz was the announcer of the radio station " <i>Mi Rio</i> and an environmental activist. Before that, he worked as a journalist for a news agency in Teleantioquia. According to local journalists, he was murdered by men who were disguised as police officers.
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## MEXICO:

NAME	DATE AND PLACE	DESCRIPTION
Claudio Cortez Garcia	October 23 Mexico City	Mr Cortez García was Design Director of two magazines: <i>Crisis</i> and <i>Le Monde Diplomatic</i> . The journalist disappeared on October 20 and was found murdered in his car days later.
Luis Mario García Rodríguez	February 12 Mexico City	He was a reporter for the Radio Program <i>La Tarde</i> in Mexico City. García made various investigative reports on the Office of the Attorney General and the Federal Judicial Police. In his reports, he implicated officials from the Federal Judicial Police with the Arellano Felix brothers, who supposedly run the Tijuana cartel.
Philip True	December 15 San Antonio Jalisco	Mr True was a United States correspondent for <i>San Antonio Express News</i> . Associations of journalists are displeased with the course of the judicial investigation in Mr True's death.
Pedro Valle Hernandez	October 29 Zihuatanejo	Mr Valle Hernandez was a correspondent for the official radio and television station in Guerrero. Prior to his murder, the reporter was working on a program regarding local mafia involved in child prostitution.

**PERU:  
Murders**

NAME	DATE AND PLACE	DESCRIPTION
Isabel Chumpitaz Panta and José Amaya Jacinto	April 6 La Unión	This couple hosted a program on <i>Radio Satélite</i> . They were murdered by a group of eleven men. The persons who committed the crime were caught and sentenced to life in prison. The authorities maintain that the motive was robbery, but Ms Chumpitaz Panta and Mr. Amaya Jacinto colleagues believe that it was a political crime, since the journalists had spoken out in favor of the peasants and against the policy of the regional government.

## CHAPTER V

### Final Considerations and Recommendations

Consolidation of democracy in the hemisphere is closely related to freedom of expression. When freedom of expression is limited, the development of democracy is interrupted, since the free debate of ideas and opinion among citizens is impeded. There is no doubt that freedom of expression has advanced in recent decades, hand in hand with the growth of democratic openness. However, this development has not prevented authoritarian tendencies from persisting in various countries, which continue to seek ways to limit the right to freedom of expression of the citizens of the Americas.

The mechanisms used to limit freedom of expression are many and varied. The range of options runs from murder of journalists to more sophisticated means such as the constant harassment of journalists through lawsuits, restrictive legislation, or steps taken by those in power, who place unnecessary obstacles in the way of freedom of expression. All violations of freedom of expression are serious, and the Rapporteur, in cooperation with governments and organizations in civil society that defend freedom of expression, is interested in finding ways to better defend this right in all the countries of the hemisphere.

Of all the ways in which freedom of expression is violated, murders and physical attacks are the cases that are of the greatest concern to the Rapporteur. The Americas is the most dangerous region of the world in which to practice the profession of journalism. In the past decade, there have been approximately 150 cases of murdered journalists, and many cases of physical attacks and threats. The governments of the region are responsible for making sure that these crimes against journalists do not be unpunished. The best way for states to strengthen freedom of expression is by guaranteeing an effective, wide-ranging, objective, and independent investigation into all cases of murders, attacks, and threats.

The Rapporteur recommends that the Member States carry out an effective, serious and impartial judicial investigation, according to the rules of due process, in cases regarding attacks or killings of journalists in order to clarify the facts and sanction the material and intellectual perpetrators.

Aside from the gravity of murders and acts of physical aggression against journalists, the Rapporteur is especially concerned over the use of other arrangements to control freedom of expression, which may be less direct than murder and physical aggression, but which are capable of causing greater damage to the strengthening of democracy. Examples include attempts to restrict freedom of expression by passing laws that are incompatible with Article 13 of the Inter-American Convention, such as provisions on contempt and compulsory membership in a professional association, or cases in which the government, through its intelligence services, seeks information for the purpose of harassing or denigrating journalists. Democratic institutions must be the primary guarantee of the defense of freedom of expression. When they are used as an instrument to limit that freedom, then it remains defenseless in the face of abuse on the part of authorities.

The Rapporteur recommends that the Member States adjust their domestic legislation on freedom of expression to the standards established by the American Convention on Human Rights, particularly in the area of compulsory membership of associations and contempt.

Lastly, the Rapporteur wishes to acknowledge the assistance of the States that have collaborated with him as well as that provided by the Inter-American Commission on Human Rights and its Executive Secretariat.

The Rapporteur also wishes to acknowledge the work of independent journalists who every day carry out one of the most important tasks in a democratic society, that is, assisting citizens in the exercise of their rights and fulfillment of their obligations by providing them with the necessary information.

