

## CHAPTER IV<sup>1</sup>

### HATE SPEECH AND INCITEMENT TO VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX PERSONS IN THE AMERICAS

#### A. Introduction

1. The Inter-American Commission has received information that indicates that violence against lesbian, gay, bisexual, trans and intersex (LGBTI) persons in the region is fueled by the dissemination of “hate speech” targeted at this community in different contexts, including through public debate, manifestations against events organized by LGBTI persons, such as pride parades, the media and the internet. Although there is a need for further study this phenomenon, evidence shows that when crimes against LGBTI persons occur, they are frequently preceded by a context of heightened dehumanization and discrimination.

2. In a democratic society, states should protect freedom of expression while also guaranteeing equality and the safety of others.<sup>2</sup> In this complex task, States are called to, on the one hand, identify and adequately respond to these incidents, with a view to effectively guaranteeing the rights to personal integrity and security of LGBTI persons. On the other hand, all measures must be respectful of the right to freedom of expression, according to article 13 of the American Convention. Similar to Article 13.1 of the American Convention, Article IV of the American Declaration establishes that “[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.” Unlike the American Convention, this provision does not include the conditions to be met by any restriction to this right. However, the Commission has traditionally interpreted the scope of the obligations established under the American Declaration in the context of the international and inter-American human rights systems more broadly, in light of developments in the field of international human rights law since the instrument was first adopted, and with due regard to other rules of international law applicable to members states.<sup>3</sup>

3. In recent years, several countries in the Americas have proposed legal initiatives to promote equality, sanction discrimination and prohibit “hate speech.” However, the IACHR has received information that in many cases these legislations do not meet the principle of legality. Some of the definitions are vague, which could compromise the effective enjoyment of the right to freedom of expression on issues of public interest. Hence, the growing need to ensure that measures adopted to discourage intolerance and respond to hate speech against LGBTI persons, are part of a policy aimed at promoting the right to freedom of expression of everyone, without discrimination.

4. In order to elaborate on these points, this section of the report provides an overview of the Inter-American legal framework concerning hate speech and incitement to violence. This section also identifies and analyses various non-legal measures and good practices that can contribute to prevent and counter hate speech. The overall goal of this section is to establish the basis for an understanding of the scope of hate speech and allow for the development and implementation of effective responses. This report primarily addresses the obligations of States, but additionally examines the significant role that media can play in the implementation of varied strategies to prevent and combat hate speech.

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<sup>1</sup> Approved by the Inter-American Commission on Human Rights on November 12, 2015. This report was jointly prepared by the IACHR Office of the Rapporteur on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons and the IACHR Office of the Special Rapporteur for Freedom of Expression.

<sup>2</sup> [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#). October 5, 2012. Para. 2. See also, for example: United Nations Committee on the Elimination of Racial Discrimination. General recommendation No. 35, Combating racist hate speech. CERD/C/GC/35. September 26, 2013. Par. 45; United Nations. General Assembly. [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/67/357](#). September 7, 2012, para. 43; Article 19. [Responding to Hate Speech against LGBTI People](#). October 2013; Article 19. [The Camden Principles on Freedom of Expression and Equality](#). April 2009.

<sup>3</sup> IACHR, Report No. 80/11, Case 12.626, Merits, Jessica Lenahan (Gonzales) et al. United States, 21 July 2011, para. 118.

## B. Freedom of expression and equality

5. Pursuant to the American Convention, all human beings are entitled to equal enjoyment and exercise of all rights, without discrimination on the basis of race, color, sex, language, religion, political or other opinions, national or social origin, birth, or any other social condition. As has been recognized by the Inter-American Court, “the prohibition of discrimination due to sexual orientation should include, as protected rights, the conduct associated with the expression of homosexuality.”<sup>4</sup> The IACHR is of the opinion that this rationale also applies to the expression of one’s gender identity. The IACHR’s Office of the Special Rapporteur for Freedom of Expression has stated that Article 13 of the American Convention encompasses the right to express one’s own sexual orientation and gender identity and that this kind of expression enjoys a special level of protection under Inter-American instruments, because it conveys an integral element of personal identity and dignity.<sup>5</sup>

6. The rights to equality and freedom of expression are “mutually supportive”<sup>6</sup> and have an “affirmative relationship,” as they make a “complementary and essential contribution to the securing and safeguarding of human dignity.”<sup>7</sup> In this regard, the Inter-American Commission and the Inter-American Court have systematically reiterated the importance of the right to freedom of expression in guaranteeing the right to equality of members of groups that have suffered from historical discrimination.<sup>8</sup> This importance stems from the role of freedom of expression both in its own right and as an essential tool for the defense of all other rights, and makes freedom of expression a core element of democracy.<sup>9</sup>

7. The right to freedom of expression is key in the redress by vulnerable groups of “the balance of power among the components of society.”<sup>10</sup> Further, freedom of expression is useful in promoting intercultural understanding and tolerance, deconstructing stereotypes, facilitating the free exchange of ideas, and offering alternative views and counterpoints.<sup>11</sup> Inequality results in the exclusion of certain voices from the democratic process, undermining values of pluralism and diversity of information. The individual

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<sup>4</sup> I/A Court H. R., Case of Atala Riffo and Daughters v. Chiles. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 139.

<sup>5</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Paras. 54-57; I/A Court H. R., Case of López-Álvarez v. Honduras. Merits, Reparations and Costs. Judgment of February 1, 2006. Series C No. 141, para. 169.

<sup>6</sup> United Nations. General Assembly. [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/67/357](#). September 7, 2012, para. 3; United Nations Committee on the Elimination of Racial Discrimination. General recommendation No. 35, Combating racist hate speech. CERD/C/GC/35. September 26, 2013, para. 45.

<sup>7</sup> Article 19. [The Camden Principles on Freedom of Expression and Equality](#). April 2009.

<sup>8</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009, paras. 1-4; I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 50; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

<sup>9</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009, paras. 6-10; I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 70; I/A Court H. R., Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 85; I/A Court H. R., Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 112; I/A Court H. R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 82; I/A Court H. R., Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194, para. 105; I/A Court H. R., Case of Perozo et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195, para. 116.

<sup>10</sup> United Nations, Committee on the Elimination of Racial Discrimination. General Recommendation No. 35, Combating racist hate speech. CERD/C/GC/35. September 26, 2013, paras. 39 - 42.

<sup>11</sup> United Nations, Committee on the Elimination of Racial Discrimination. General Recommendation No. 35, Combating racist hate speech. CERD/C/GC/35. September 26, 2013, paras. 39 - 42.

members of the social groups that have been traditionally marginalized and discriminated against, or that are in a situation of helplessness, are for various reasons systematically excluded from public debate. These groups do not have institutional or private channels for the serious, robust and constant exercise of their right to express publicly their ideas and opinions, or to be informed of the issues that affect them. This process of exclusion has simultaneously deprived the rest of society of knowledge of the interests, needs, and proposals of those who have not had the opportunity to access democratic debate on an equal footing. The effect of this phenomenon of exclusion is similar to the effect of censorship: silence.<sup>12</sup> When members of vulnerable or marginalized groups are excluded from public debate, “their issues, experiences and concerns are rendered invisible, and they become more vulnerable to bigotry, prejudice and marginalization.”<sup>13</sup>

8. According to report examining the media in five countries in the Caribbean region, media outlets tend to completely ignore LGBTI persons and their specific issues in their coverage. When reported, matters related to LGBTI persons are frequently covered in a “sensationalized and demeaning” way. Further, according to the information received, in some of the countries included in that report, “the generalized ridicule of LGBTI persons,” in combination with threats and violence against LGBTI activists and supporters, leads to a limited pool of individuals willing to be publicly associated with promoting non-discrimination and an end to violence. According to this study, this results in the general public having a distorted view of LGBTI individuals and reinforces an erroneous belief that not many people are willing to publicly defend their rights. Moreover, the report concludes that this situation in turn “has a direct impact on the safety and security of LGBTI people. The fact that prejudice is entrenched against a marginalized group combined with the perception that no one will protect or uphold their rights contributes directly to an environment that encourages discrimination and violence.”<sup>14</sup>

9. In light of the above, the IACHR reiterates that the promotion and protection of the right to freedom of expression should coincide with efforts to combat intolerance, discrimination, hate speech, and incitement to violence. Particularly, with the promotion of proactive public policies to ensure social inclusion in the media, as a means to guarantee that LGBTI persons and communities can exercise their right to freedom of expression, without discrimination. All these efforts should be in strict conformity with international human rights law in general, and freedom of expression standards in particular.

### **C. Definition of Hate Speech**

10. While the inter-American system has developed certain specific standards, there is no universally accepted definition of “hate speech” under international law. According to a recent UNESCO report that surveyed different definitions of hate speech in international law, the concept of hate speech usually refers to “expressions that advocate incitement to harm (particularly, discrimination, hostility or violence) based upon the target’s being identified with a certain social or demographic group. It may include, but is not limited to, speech that advocates, threatens, or encourages violent acts. For some, however, the concept extends also to expressions that foster a climate of prejudice and intolerance on the assumption that this may fuel targeted discrimination, hostility and violent attacks.”<sup>15</sup>

11. In its report UNESCO states that notwithstanding the aforementioned, the concept of hate speech, in any of its formulations under national and international law, does not consist of broad and abstract ideas, such as political views and ideologies, faiths, or personal beliefs. Nor is it correct to automatically label as hate speech any insult or derogatory or inflammatory expression regarding an individual. When the concept is defined vaguely, the prohibition of hate speech can be easily manipulated to encompass

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<sup>12</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009, para. 36.

<sup>13</sup> Article 19. [The Camden Principles on Freedom of Expression and Equality](#). April 2009, at “introductory statement.”

<sup>14</sup> International Gay and Lesbian Human Rights Commission (IGLHRC) and United and Strong, in collaboration with Groundation Grenada, Guyana Rainbow Foundation, J-FLAG, and United Belize Advocacy Movement, *Homophobia and Transphobia in Caribbean Media: A Baseline Study in Belize, Grenada, Guyana, Jamaica, and Saint Lucia*, 2015, p. 1.

<sup>15</sup> UNESCO. [Countering Online Hate Speech](#). 2015, pp. 10 -11.

expressions that are deemed offensive to others, particularly those in power, leading to misapplication of the law in attempts to curb dissenting and critical speech. Further, hate speech needs to be differentiated from “hate crimes” based on conducts, such as threats and sexual harassment, which are outside of the protection of the right to freedom of expression.

12. A lack of clear definition of hate speech is also evident in terms of national legislation. In this regard, the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has expressed concern about the “continuing existence and the use of flawed domestic laws that purport to combat hate speech but are in fact used to suppress critical or opposing voices.”<sup>16</sup> These laws are characterized by vague and overbroad legal provisions prohibiting incitement to hatred, and are abused in order to censor discussions that are in the public interest.

13. As explained below, under the principles established under the inter-American human rights system, States are only *mandated to prohibit* hate speech in certain circumstances, this is, when the speech constitutes “incitements to lawless violence or to any other similar action against any person or groups of persons on any grounds including those of race, color, religion, language, or national origin.” (Article 13(5) of the American Convention).

14. In other cases, even though the inter-American legal framework *allows* States to limit by legal measures the right to freedom of expression, under strict compliance with the requirements of legality, necessity and proportionality (Article 13(2) of the American Convention), the IACHR considers it necessary to highlight that censorship of the debate of controversial issues will not address structural inequalities and prejudice that affect LGBTI persons in the Americas. On the contrary, as a principle, states must encourage more and richer debates as a means of exposing and addressing negative stereotypes.

#### **D. Freedom of Expression and the prohibition of hate speech: Inter-American Law and Standards**

15. In principle, all forms of speech are protected by the right to freedom of expression, independently of the content and the degree of government and social acceptance of the speech in question. The State has a primary duty of content-neutrality and, as a consequence, it must guarantee that there are no persons, groups, ideas or means of expression that are excluded *a priori* from public debate.<sup>17</sup> Particularly important is the rule according to which freedom of expression must be guaranteed not only with regard to the dissemination of ideas and information that are received favorably or considered inoffensive or indifferent but also in cases of speech that is shocking, unsettling, unpleasant or disturbing to the State or to any segment of the population. This is necessary to protect and foster the pluralism, tolerance and spirit of openness without which a democratic society cannot exist.<sup>18</sup>

16. Notwithstanding this strong protection of free speech, the right to freedom of expression is not an absolute right and can be subject to limitations. Such limitations are specifically established in Articles 13(2) and 13(5) of the American Convention. First, in Article 13(2), the American Convention establishes that freedom of expression may be limited to the extent necessary to ensure certain public interests or the rights

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<sup>16</sup> United Nations. General Assembly. [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/67/357](#). September 7, 2012, para. 42.

<sup>17</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter VI (Freedom of Expression and Broadcasting). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 36.

<sup>18</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 31; I/A Court H. R., Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. para. 113; I/A Court H.R., Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73, para. 69; I/A Court H. R., Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194, para. 105; I/A Court H. R., Case of Perozo et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195, para. 116; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

of other persons. Article 13(2) prohibits prior censorship, but allows for the subsequent imposition of liability. The establishment of such limitations must be exceptional in nature, and in order to be permissible must be subject to three basic conditions, also set forth in Article 13(2): (a) the limitation must be clearly and precisely defined in a substantive and procedural law; (b) it must pursue objectives authorized by the American Convention; and (c) it must be necessary in a democratic society for the attainment of the aims pursued, suitable for accomplishing the intended objective, and strictly proportional to the aims pursued.

17. Further, Article 13(5) of the American Convention states that “[a]ny propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.” The IACHR and its Special Rapporteurship on Freedom of Expression are of the view that, according to general principles of treaty interpretation, “advocacy of hatred” that is directed against individuals on the basis of their sexual orientation, gender identity, or bodily diversity, and that constitutes incitement to lawless violence or “to any other similar action,” falls within the scope of this provision and is therefore a violation of Article 13 of the American Convention.<sup>19</sup>

18. There is a distinction between Articles 13(2) and 13(5) of the American Convention in terms of the level of obligation imposed on the State. In interpreting Article 13(5) of the American Convention, the IACHR has indicated that States *are required* to adopt legislation to punish advocacy of hatred that constitutes “incitement to lawless violence or to any other similar action.”<sup>20</sup> Whereas Article 13(2) of the American Convention considers other intolerant expressions or comments that do not strictly amount to “incitement to violence.” Under Article 13(2), such speech *could be* subject to the imposition of subsequent liability to ensure the rights to dignity and non-discrimination of a particular group in society, including LGBTI persons. The International Covenant on Civil and Political Rights (ICCPR) provides a similar approach.<sup>21</sup> The United Nations “Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (“UN Rabat Plan of Action”), adds a third type of speech that while not punishable, raises a concern in terms of tolerance and civility. As such the UN Rabat Plan of Action establishes that it is important for States to make a clear distinction between: (i) expressions that constitute a criminal offence, (ii) expressions that are not criminally punishable but may justify a civil suit or administrative sanctions, and (iii) expressions that are not legally punishable “but still rais[e] a concern in terms of tolerance, civility and respect for the rights of others.”<sup>22</sup>

19. In interpreting similar standards in the universal human rights system, the UN Special Rapporteur on minority issues, Rita Izsák, has expressed that “in order to develop consistent and effective legislation and measures to prohibit and penalize incitement to hatred, hate speech should not be confused with other types of inflammatory, hateful or offensive speech. As experts have stated, the intended or actual effects of speech can be a useful indicator to distinguish incitement to hatred from other categories of hate

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<sup>19</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009, paras. 58-59. IACHR, Annual Report 2014: Chapter V: Follow-up to the 2012 Jamaica Report, para. 238.

<sup>20</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009, para. 58.

<sup>21</sup> In the universal human rights system, “expression labelled as ‘hate speech’ can be restricted under articles 18 and 19 of the International Covenant on Civil and Political Rights (ICCPR) on different grounds, including respect for the rights of others, public order, or even sometimes national security. States are also obliged to ‘prohibit’ expression that amounts to ‘incitement’ to discrimination, hostility or violence” under article 20.2 of the ICCPR. [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#). October 5, 2012, para 14.

<sup>22</sup> United Nations Committee on the Elimination of Racial Discrimination. General recommendation No. 35, Combating racist hate speech. CERD/C/GC/35. September 26, 2013, paras. 20, 25; United Nations. General Assembly. [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/67/357](#). September 7, 2012, para. 32; [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#). October 5, 2012, para. 11.

speech.”<sup>23</sup> Indeed, several United Nations human rights bodies<sup>24</sup> have highlighted that the application of criminal sanctions on hate speech should be seen as a last resort measure to be applied only in “strictly justifiable situations,” in accordance with the requirements set out in Article 20.2 of the ICCPR.<sup>25</sup>

20. To combat hate speech, experts have suggested that “civil sanctions and remedies should also be considered, including pecuniary and non-pecuniary damages, along with the right of correction and the right of reply. Administrative sanctions and other remedies should also be considered, including those identified and put in force by various professional and regulatory bodies.”<sup>26</sup> The IACHR is of the opinion that expressions that openly denigrate, stigmatize, or discriminate against a person or a group of persons on the grounds of perceived or actual sexual orientation or gender identity, but that do not reach the threshold of *advocacy of hatred that incites lawless violence* according to Article 13(5) of the American Convention (“hate speech”), *may be* subject to the imposition of subsequent sanctions of a civil or administrative nature, or to remedies such as the right of correction and reply. Notwithstanding this, the IACHR highlights that such sanctions cannot be aimed at inhibiting or restricting the dissemination of information and ideas concerning issues of public interest. Further, as with any other restriction on freedom of expression, the imposition of subsequent sanctions must satisfy the requirements set forth in Article 13(2) of the American Convention and be applied by an independent state entity.

21. Negative or derogatory portrayal and other expressions that stigmatize LGBTI persons are certainly offensive and hurtful and they increase the marginalization, stigmatization, and general insecurity of LGBTI persons. However, the IACHR is of the opinion that the legal prohibition of this type of speech will not do away with the stigma, prejudice, and hatred against LGBTI persons that is deeply rooted in the societies of the Americas. In many contexts, given the structural social inequalities, discriminatory views and prejudice in public discourse cannot be eradicated through legal sanctions. As will be explained below, more should be done to promote a comprehensive approach that goes beyond legal measures and includes preventive and educational mechanisms and measures implemented by States, media, and society in general.

22. The Commission and its Special Rapporteurship on Freedom of Expression deem of particular importance that States take action to guarantee the exercise of the right to freedom of expression of LGBTI persons and to empower those affected and made invisible by hate speech. As observed by the Special Rapporteurship on Freedom of Expression of the IACHR, “speech that offends because of the intrinsic falseness of its racist and discriminatory content must be refuted, not silenced: those who promote these points of view need to be persuaded of their error in public debate. Given the unfairness of these opinions, there is no better response than the justice of arguments, and that requires more and better debate, not less.”<sup>27</sup> However, in order to enable a vigorous debate it is necessary to guarantee that members of groups

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<sup>23</sup> UN, Human Rights Council, Report by the Special Rapporteur on Minority Issues, Rita Izsák, A/HRC/28/64, 5 January 2015, para. 54.

<sup>24</sup> In 2011 and 2012, the United Nations Office of the High Commissioner for Human Rights (OHCHR) held four regional expert workshops focused on the relationship between freedom of expression and hate speech. The goal was to “conduct a comprehensive assessment of the implementation of legislation, jurisprudence and policies regarding advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence at the national and regional levels, while encouraging full respect for freedom of expression as protected by international human rights law.” The workshops resulted in the “Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”, a document containing a series of recommendations to States, United Nations bodies and other stakeholders on implementing the prohibition of incitement to discrimination, hostility or violence contained in Article 20 of the International Covenant on Civil and Political Rights. The Rabat Plan of Action was subsequently supported and adapted by other international bodies in the fulfillment of their mandates.

<sup>25</sup> [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#). October 5, 2012, paras. 20 - 22; United Nations Committee on the Elimination of Racial Discrimination. General recommendation No. 35, Combating racist hate speech. CERD/C/GC/35. September 26, 2013, para. 12.

<sup>26</sup> [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#). October 5, 2012, paras. 14 - 19.

<sup>27</sup> IACHR. [Annual Report 2010. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II. Doc. 5. March 4, 2011, para. 50.

affected by hate speech can fully exercise their freedom of expression, which includes fostering greater diversity and pluralism in access to the media.<sup>28</sup>

23. In light of the foregoing, the Commission has stated that the imposition of sanctions under the charge of advocacy of hatred that constitutes “incitements to lawless violence or to any other similar action” – as defined and prohibited by Article 13(5) of the American Convention – requires a high threshold. Such sanctions must be backed by truthful, objective, and strong proof that the person was not simply issuing an opinion (even if that opinion was unfair or disturbing), but that the person had: (a) the clear *intention* of promoting lawless violence or any other similar action against LGBTI persons; and (b) the *capacity* to achieve this objective and create an *actual* risk of harm to LGBTI persons.<sup>29</sup>

24. Complementary requirements or “threshold tests” have been proposed by different international bodies and civil society organizations in order to clearly differentiate between speech that constitutes “incitement to lawless violence or to any other similar action,” allowing for the separation of speech warranting the imposition of criminal sanctions from speech that is intolerant or offensive but not criminal.<sup>30</sup> For instance, the UN Rabat Plan of Action sets forth the following criteria that should be taken into account by legislators, prosecutors and judges when assessing expressions which are criminally prohibited: (i) the social and political context prevalent at the time the speech was made and disseminated;<sup>31</sup> (ii) the position or status of the speaker in the society, including the individual’s or organization’s standing in the context of the audience to whom the speech is directed; (iii) the intent of the speaker;<sup>32</sup> (iv) the content or form of the speech, which may include “the degree to which the speech was provocative and direct, as well as a focus on the form, style, nature of the arguments deployed in the speech at issue or in the balance struck between arguments deployed;” (v) the extent of the speech, including elements such as the reach of the speech, its public nature, magnitude and the size of its audience;<sup>33</sup> and (vi) the likelihood, including imminence, that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.<sup>34</sup>

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<sup>28</sup> IACHR. [Annual Report 2010. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II. Doc. 5. March 4, 2011, para. 50; IACHR. [Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter VI (Freedom of Expression and Broadcasting), OEA/Ser.L/V/II. Doc.51. December 30, 2009, paras. 24-37. IACHR. [Annual Report 2008. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV (A Hemispheric Agenda for the Defense of Freedom of Expression), para. 100.

<sup>29</sup> IACHR. [Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009, para. 59.

<sup>30</sup> See, for example: United Nations Committee on the Elimination of Racial Discrimination. General recommendation No. 35, Combating racist hate speech. CERD/C/GC/35. September 26, 2013, paras. 15 - 16; United Nations. General Assembly. [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/67/357](#). September 7, 2012, para. 45; Article 19. [Responding to Hate Speech against LGBTI People](#). October 2013, p. 27.

<sup>31</sup> “Context is of great importance when assessing whether particular statements are likely to incite to discrimination, hostility or violence against the target group and it may have a bearing directly on both intent and/or causation.” Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Adopted on October 5, 2012. Par. 22. Available at: [http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf).

<sup>32</sup> “Negligence and recklessness are not sufficient for an article 20 situation which requires ‘advocacy’ and ‘incitement’ rather than mere distribution or circulation. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech as well as the audience.” [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#). October 5, 2012, para. 22.

<sup>33</sup> “Further elements are whether the speech is public, what the means of dissemination are, considering whether the speech was disseminated through one single leaflet or through broadcasting in the mainstream media or internet, what was the frequency, the amount and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work of art) was circulated in a restricted environment or widely accessible to the general public.” [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#). October 5, 2012. Para. 22.

<sup>34</sup> “Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for that speech to amount to a crime. Nevertheless some degree of risk of resulting harm must be identified.” [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#). October 5, 2012, para. 22.

25. It is important to recognize that any limit on freedom of expression, especially limits that could bring serious sanctions such as prison sentences, must meet three basic guarantees: they must be applied by a body that is independent of the Executive Branch and that has structural guarantees of independence and autonomy; they must respect the principles of due process; and they must be accompanied by sanctions that are proportional. In any case, as has been repeatedly held by the IACHR and the Inter-American Court, any restriction imposed on the right to freedom of expression should be established in advance, expressly, restrictively, unambiguously and clearly in law – in the formal and material sense.<sup>35</sup> The restriction must also serve compelling objectives as set out in the American Convention, be necessary to serve the compelling objectives pursued in a democratic society, be strictly proportionate to the objective pursued, and be appropriate to serve said compelling objective.<sup>36</sup>

26. When limits on freedom of expression are established by criminal law, the Court has established that they must further satisfy the principle of strict legality. The Court has held that should the restrictions or limitations be of a criminal nature, it is also necessary to strictly meet the requirements of the criminal definition in order to adhere to the principle of legality. The Court has indicated that this principle is understood as the requirement to use strict and unequivocal terms, clearly restricting any punishable behavior, which in turn requires “a clear definition of the incriminated behavior, setting its elements and defining the behaviors that are not punishable or the illicit behaviors that can be punishable with non-criminal measures.”<sup>37</sup>

27. With regard to implementation of Article 20.2 of the ICCPR, the “Rabat Plan of Action” recommends that definitions of hate speech, especially of a criminal nature, incorporate robust definitions of key terms used, for example: hatred, incitement, and advocacy.<sup>38</sup> Similarly, the Camden Principles on Freedom of Expression and Equality, developed by a civil society organization on the basis of discussions involving a group of high-level UN and other officials, as well as civil society actors and academic experts, recommend that “[n]ational legal systems should make it clear, either explicitly or through authoritative interpretation, that: i. The terms ‘hatred’ and ‘hostility’ refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; ii. The term ‘advocacy’ is to be understood as requiring an intention to promote hatred publicly towards the target group; iii. The term ‘incitement’ refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.”<sup>39</sup>

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<sup>35</sup> IACHR. [Annual Report 2010. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II. Doc. 5. March 4, 2011, para. 51; Inter-American Court, 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, November 13, 1985. Series A No. 5, paras. 39-40; Inter-American Court, Case of Palamara Iribarne v. Chile. Judgment dated November 22, 2005. Series C No. 135, para. 79; Inter-American Court, Case of Herrera Ulloa v. Costa Rica. Judgment dated July 2, 2004. Series C No. 107, para. 120; Inter-American Court, Case of Tristán Donoso v. Panama. Preliminary Objections, Merits, Reparations and Costs. Judgment dated January 27, 2009. Series C No. 193. para. 117; IACHR. Annual Report 1994. Chapter V: Report on the Compatibility of “Desacato” laws with the American Convention on Human Rights. Title IV. OAS/Ser. L/V/II.88. doc. 9 rev. February 17, 1995, IACHR. Report No. 11/96. Case No. 11.230. Francisco Martorell. Chile. May 3, 1996, para. 55; IACHR. Arguments before the Inter-American Court in the case of Ricardo Canese v. Paraguay. Transcripts available at: InterAmerican Court, Case of Ricardo Canese v. Paraguay. Judgment dated August 31, 2004. Series C No. 111. para. 72. a). Further, in this respect, the definition of the Inter-American Court in its Advisory Opinion OC-6/86 is applicable. It states that the term “laws” does not mean any legal provision, but rather general legal provisions established by the legislative body that is constitutionally provided for and democratically elected, according to the procedures established in the Constitution, hewing to the common good.

<sup>36</sup> IACHR. [Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009, para. 62 *et seq.*

<sup>37</sup> I/A Court H.R., Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 55; IACHR. [Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009, para. 73.

<sup>38</sup> [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#). October 5, 2012, p. 14.

<sup>39</sup> Article 19. [The Camden Principles on Freedom of Expression and Equality](#). April 2009.



28. The IACHR and its Special Rapporteurship on Freedom of Expression believe that independent “watchdog” bodies can serve an important role in identifying and reporting hateful content and promoting the application of the highest ethical standards. While doing so, however, they must adhere to international human rights standards. Examples of non-punitive administrative remedies employed by independent “watchdog” bodies can be found in measures recently adopted by the Ombudsperson of the Audience of Broadcasting Services in Argentina [*Defensoría del Público de Servicios de Comunicación Audiovisual*] to promote the right to equality and non-discrimination on broadcasting services programming.<sup>40</sup> For instance, in December 2014 the Ombudsperson of the Audience recommended that a certain radio station adopt a code of ethics or style manual incorporating guidelines on the principle of non-discrimination that reflect national legal requirements in this regard. The Ombudsperson also mandated that its own legal department “process, prepare and distribute a guide on responsible press coverage of sexual diversity in the audiovisual media services.”<sup>41</sup>

29. Finally, the IACHR recognizes that other international and regional human rights instruments and treaties prohibit ‘promotion or incitement of hatred’ with different implications for conceptualizing and defining the varied forms of hate speech. The IACHR notes the adoption in June 2013 of the Inter-American Convention against All Forms of Discrimination and Intolerance, which as of the date of release of the instant report is yet not in force<sup>42</sup>. Once this convention enters into force, the Inter-American Commission and Court are called to, in accordance to international law principles, interpret the relationship between this convention and the American Convention.

### **E. Hate Speech and Public Officials**

30. The Inter-American Court has established that even when official speech might not have authorized, instructed, or directly incited violence, it may often put potential victims of violence in a situation of greater vulnerability before the State and some sectors of society.<sup>43</sup> The Commission and the Court have reiterated that given the State’s obligations to guarantee, respect, and promote human rights, it is the duty of

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<sup>40</sup> According to Article 3(m) of the Act 26.522 of Audiovisual Communication Services, broadcasting media should “promote the protection and safeguarding of equality between men and women, and a plural, equal and non-stereotypical coverage, avoiding discrimination by gender or sexual orientation.” Congreso de la Nación Argentina. [Act 26.522. Servicios de Comunicación Audiovisual](#). October 10, 2009.

<sup>41</sup> Ombudsperson of the Audience (Defensoría del Público). [Resolución N° 141/2014](#). December 29, 2014.

<sup>42</sup> For example, Article 4 of the Inter-American Convention against All Forms of Discrimination and Intolerance establishes that “[t]he states undertake to prevent, eliminate, prohibit, and punish, in accordance with their constitutional norms and the provisions of this Convention, all acts and manifestations of discrimination and intolerance, including: i. Public or private support provided to discriminatory activities or that promote intolerance, including the financing thereof; ii. Publication, circulation or dissemination, by any form and/or means of communication, including the Internet, of any materials that: a. advocate, promote, or incite hatred, discrimination, and intolerance; b. condone, justify, or defend acts that constitute or have constituted genocide or crimes against humanity as defined in international law, or promote or incite the commission of such acts; [...] Preparing and introducing teaching materials, methods, or tools that portray stereotypes or preconceptions, based on any of the criteria set forth in Article 1.1 of this Convention.” OAS General Assembly, [Inter-American Convention against all Forms of Discrimination and Intolerance](#), adopted on June 5, 2013 at the 43<sup>rd</sup> Regular Session. Further, The International Convention on the Elimination of All Forms of Racial Discrimination obligates States to condemn “all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination” (art. 4). Further, three situations constitute offences punishable by law: (a) all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) organizations, organized and all other propaganda activities which promote and incite discrimination—which must be declared illegal and prohibited—, and participation in such organizations or activities; (c) promotion or incitement of racial discrimination by public authorities or public institutions, national or local. International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by the UN General Assembly on 21 December 1965 (entered into force 4 January 1969).

<sup>43</sup> I/A Court H. R., Case of Ríos et al. vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194, para. 138; I/A Court H. R., Case of Perozo et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195, para. 157; IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009, para. 208.

public officials to ensure that when they exercise their freedom of expression they are not causing fundamental rights to be ignored.<sup>44</sup>

31. In this regard, the Inter-American Commission has expressed its concern over public officials in different States of the region promoting harmful stereotypes of, and expressing discriminatory views regarding, LGBTI persons.<sup>45</sup> For example, the IACHR received information regarding the use of expressions of stigmatization and intolerance by the President of the Human Rights Commission of the House of Representatives in Brazil in 2013. According to the information received, he has publicly indicated that LGBT people “want to impose a gay dictatorship in the country, in order to expel God out of Brazil” and that “the putrefaction of gay feelings leads to hate, crime and rejection.”<sup>46</sup> Similarly, in 2013 the President of the Human Rights Commission of Congress, in Costa Rica, made a series of intolerant and discriminatory remarks regarding the congressional debate of a bill to protect LGBTI people from discrimination. He reportedly said to the press “[b]ut who is bothering them? Who is bothering them? We cannot tell who they are. If they are not “fruity” and they do not declare themselves as such, in reality one does not know who they are.”<sup>47</sup>

32. In similar terms, a Councilman in La Candelaria, Bogotá, Colombia, indicated in 2013 that LGBT people “are involved with the judges and they are perverse or perverted .... [they] sleep with 5, 20 or 30 people. They sleep with children. They sleep with girls ... because the ones who are buying children are judges of the Republic, senators and magistrates. And we have a big problem. People run for office and they do not say whether or not they are LGBTI. Gay and bisexual men are being elected, but if the voters knew what kind of people [they are], they would not vote for them. But here, people are being lied to.”<sup>48</sup> Colombian civil society organizations have claimed that the Inspector General has also publicly expressed negative and demeaning views of LGBTI people. For example, the Inspector General considers same-sex relationships or couples to be “aberrations,” and equates them to bestiality.<sup>49</sup> Along these lines, on August 13, 2013, a Member of the House of Representatives for the Partido Socialista Unido de Venezuela (PSUV), used homophobic slurs while in a parliamentary session, when he referred to a state governor as “*maricón*” [Spanish equivalent to “faggot”] and a “homosexual.”<sup>50</sup>

33. Further, the Commission calls on authorities to not only refrain from disseminating hateful messages against LGBTI people but also to “contribute decisively to the building of a climate of tolerance and respect in which all people, including lesbian, gay, trans, bisexual and intersex persons and those who defend

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<sup>44</sup> I/A Court H. R., Case of Apitz-Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008 Series C No. 182. para. 131. See also (related): IACHR. [Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 204; I/A Court H. R., Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194. para. 139; I/A Court H. R., Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195. para. 151; IACHR, [Annual Report 2013. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA /Ser.L/V/II.149 Doc. 50. December 31, 2013, para. 44.

<sup>45</sup> IACHR, Press Release No. 37/13. [The IACHR Calls Member States to Ensure Respect of the Rights of LGTBI Persons by Public Officials](#). May 17, 2013.

<sup>46</sup> FELGTB. [La FELGTB denuncia la homofobia del presidente de la Comisión de Derechos Humanos de Brasil](#). April 15, 2013; Tribuna da Bahia. [Marco Feliciano põe o projeto sobre a “cura gay” para ser votado na Câmara](#). May 2, 2013.

<sup>47</sup> The original quote in Spanish: “*si a ellos no se les ve el plumero y no se declaran así, en realidad uno no sabe quiénes son.*” Dos Manzanas. [Costa Rica: el presidente de la Comisión de Derechos Humanos avergüenza a sus compatriotas con sus declaraciones homófobas](#). March 4, 2013; El PeriodicoCR. [Comentarios homofóbicos de diputado Orozco causan indignación en las redes sociales](#). February 22, 2013.

<sup>48</sup> El Espectador. [Edil de Bogotá, en lós por posible discriminación](#). May 2, 2013.

<sup>49</sup> Colombia Diversa, “*Todos los Derechos, Pocos los Deberes,*” *Situación de Derechos Humanos de Lesbianas, Gay, Bisexuales y Transgeneristas en Colombia 2008-2009*, p. 11; citing Ordoñez, Maldonado Alejandro, *Ideología de Género: Utopía Trágica o Subversión Cultural*. 2006, pp. 108 and 153. This information has also been submitted by civil society organizations to the IACHR. IACHR, Public Hearing Situation of Human Rights Defenders of Reproductive Rights in Colombia,” 147th Period of Sessions, 14 March 2013, video available at [www.iachr.org](#).

<sup>50</sup> Noticias24, [Pedro Carreño a Capriles: “Acepta el reto, mari...”](#) (video), August 13, 2013.

their rights, can express their thoughts and opinions without fear of being attacked, punished, or stigmatized for doing so.”<sup>51</sup>

34. Likewise, the UN Special Rapporteur has warned that when high-level officials engage in hate speech, “they undermine not only the right to non-discrimination of affected groups, but also the faith of such groups in State institutions and, thus, the quality and level of their participation in democracy.” Consequently, States should “take appropriate disciplinary measures with regard to hate speech or incitement to hatred by public officials.”<sup>52</sup>

35. In this regard, the UN Special Rapporteur on Freedom of Expression has noted that public officials have a “special responsibility” to clearly and formally denounce hate speech.<sup>53</sup> Similarly, the UN Rabat Plan of Action affirms the crucial role of political and religious leaders in “speaking out firmly and promptly against intolerance, discriminatory stereotyping and instances of hate speech.”<sup>54</sup> For its part, the UN Committee against Racial Discrimination has found that the formal rejection of hate speech by high-level public officials and the condemnation of hateful ideas expressed can work as a preventive measure to combat incitement to violence and discrimination.<sup>55</sup>

## **F. Non-legal measures to counter hate speech**

36. The IACHR and its Special Rapporteurship on Freedom of Expression reaffirm that in order to effectively combat hate speech, a comprehensive and sustained approach that goes beyond legal measures and includes preventive and educational mechanisms should be adopted.<sup>56</sup> As previously stated by the Special Rapporteur of the IACHR, these types of measures strike at the cultural root of systematic discrimination. As such, they can be valuable instruments in identifying and refuting hate speech and encouraging the development of a society based on the principles of diversity, pluralism and tolerance.<sup>57</sup>

37. In this context, preventive mechanisms could include: education to promote understanding and combat negative stereotypes and discrimination against LGBTI persons, including programs aimed at schoolchildren and informational campaigns; training for law enforcement agents and those involved in the administration of justice on the prohibition of hate speech and incitement to violence; and data collection and analysis in relation to freedom of expression and hate speech.

38. Education and awareness-raising measures should include the promotion of digital and media literacy. The IACHR has stated that in order to ensure access to the internet, educational measures intended to promote the training of all users in the autonomous, independent, and responsible use of the internet and digital technologies is needed. This is because “full access to information and communications

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<sup>51</sup> IACHR. Press Release No. 37/13. [The IACHR Calls Member States to Ensure Respect of the Rights of LGTBI Persons by Public Officials](#). May 17, 2013.

<sup>52</sup> United Nations. General Assembly. [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/67/357](#). September 7, 2012, para. 67.

<sup>53</sup> United Nations. General Assembly. [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/67/357](#). September 7, 2012, para. 64.

<sup>54</sup> [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#). October 5, 2012, para. 24.

<sup>55</sup> United Nations Committee on the Elimination of Racial Discrimination. General recommendation No. 35, Combating racist hate speech. CERD/C/GC/35. September 26, 2013, paras. 37 and 38.

<sup>56</sup> [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#). October 5, 2012, para. 11; United Nations. General Assembly. [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/67/357](#). September 7, 2012, para. 33.

<sup>57</sup> IACHR. [Annual Report 2010. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II. Doc. 5. March 4, 2011, para. 48.

technologies, particularly the Internet, is closely related to the capacity to make effective use of these tools.”<sup>58</sup> The IACHR views as positive that in Argentina, the National Institute against Discrimination, Xenophobia and Racism [INADI] established the “Platform for an Internet Free of Discrimination.” The initiative aims to promote digital literacy among children, teenagers, and parents in order to guarantee that the Internet remains a space free from discriminatory violence that affects the rights of groups, communities, and individuals.<sup>59</sup> The Platform provides information to enable users to identify and report discriminatory language on the web. Civil society also plays a role in addressing hate speech against LGBTI persons, through education and awareness-raising efforts. In Canada, for example, the non-profit organization *Media Smarts* is dedicated to the promotion of media and digital literacy. It launched an initiative on diversity, non-discrimination, and hate online that provides practical tools for a diverse audience of internet users, including parents, teachers, and children, for identifying and facing hate speech.<sup>60</sup>

39. A preventive policy should include the collection and analysis of data and information on hate speech. In most countries in the region, such data is not collected and analyzed. The goals of data collection and analysis could include the assessment of: the various forms of hate speech; the perpetrators involved; the circumstances under which hate speech emerges; and the audiences reached or targeted. Other areas of assessment should include the impact of existing hate speech laws and the extent to which they comply with international norms, as well as the effects of counter-speech/counter-narrative techniques.<sup>61</sup>

40. Another important measure is the promotion of proactive public policies for social inclusion in the media to ensure that LGBTI individuals and communities can realize their right to freedom of expression without discrimination.<sup>62</sup> The United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has stressed the need to “address and redress the indirect censorship, powerlessness and/or alienation felt by many groups and individuals,” especially those that have been frequent targets of severe harassment and intimidation by both state and non-state actors, since “explicitly or implicitly, through such actions an illusion is created that only those with the requisite authority can speak on particular issues,” resulting in a culture of fear that hampers public debate and violates the right to freedom of expression.<sup>63</sup> Therefore, States should “proactively facilitate counter-speech of individuals belonging to groups that are systematically targeted by hate speech.”<sup>64</sup>

41. One example of good practice is the strengthening of the obligations of public broadcasters to serve the informational and expressive needs of the LGBTI community and promote awareness of LGBTI issues. Another example is the reservation of parts of the radio spectrum for community media outlets operated by LGBTI groups, together with the establishment of special procedures to assist those sectors in obtaining radio licenses. Efforts should also be made to provide support, whether of a financial or regulatory nature, for media outlets or media content that serve the informational and voice needs of LGBTI groups.

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<sup>58</sup> IACHR. [Annual Report 2013. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013, para. 48.

<sup>59</sup> National Institute against Discrimination, Xenophobia and Racism [INADI], [Plataforma por una Internet Libre de Discriminación](#).

<sup>60</sup> For more information visit: [Media Smarts.com](#).

<sup>61</sup> [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#). October 5, 2012, paras. 23 to 29; UN, Committee on the Elimination of Racial Discrimination. General recommendation No. 35, Combating racist hate speech. CERD/C/GC/35. September 26, 2013, paras. 34-36; United Nations. General Assembly. [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/67/357](#). September 7, 2012, paras. 58-69.

<sup>62</sup> The UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. [Joint Declaration on Universality and the Right to Freedom of Expression](#). May 6, 2014.

<sup>63</sup> United Nations. General Assembly. [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/67/357](#). September 7, 2012, para. 62.

<sup>64</sup> United Nations. General Assembly. [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/67/357](#). September 7, 2012, para. 62.

These are examples of measures that are aimed toward generating equal opportunities and real equality in the exercise of the right to freedom of expression.<sup>65</sup>

42. It is important to emphasize the role of media as channels of information, ideas, and opinions. This role is fundamental to the development of narratives that value diversity and condemn arbitrary discrimination.<sup>66</sup> In this regard, the IACHR has expressed its concern over the use of discriminatory language and harmful stereotyping by media outlets, which disregard the humanity or dignity of LGBTI persons.<sup>67</sup> The Special Rapporteur for Freedom of Expression has expressed concern over the promotion by media outlets of openly discriminatory content that could incite violence against LGBTI persons, especially when those messages come from shapers of public opinion.<sup>68</sup>

43. The IACHR welcomes a recent joint study by several civil society organizations monitoring media in five countries in the region (Belize, Grenada, Guyana, Jamaica and St. Lucia). According to this study, many media outlets reinforce negative stereotypes that can lead to violence against LGBTI persons, and overall, they create an “unbalanced, inaccurate and largely unflattering picture” of LGBTI persons. The study also found that stories depicting LGBTI persons engaged in positive activities, or important stories regarding policy issues or concerns about discrimination and exclusion, were largely ignored by the media.<sup>69</sup> Further, the study indicated that because much of the coverage consisted of depictions of LGBTI persons purportedly engaged in criminal activity, or negative depictions of LGBTI persons more generally, the coverage contributed to a heightened risk of violence against these persons.<sup>70</sup>

44. Coincidentally, the IACHR has expressed concern over the “systematic publication by some media articles with messages that could foment hatred and violence against members of the LGBTI community” in 2013 and 2014 in Jamaica.<sup>71</sup> For example, the IACHR noted<sup>72</sup> that on March 23, 2014, the *Jamaica Observer* newspaper reportedly published a cartoon indicating “the invasion of Jamaica by homosexuals” [*homos over run Jamaica*], which was alleged to be comparable to the increase in crime and government corruption.<sup>73</sup> On July 1, 2014, an article was published under the headline “Local churches vow to prevent homosexuality from dominating society,” which contained phrases such as “The local church

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<sup>65</sup> IACHR. [Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression](#). Chapter VI (Freedom of Expression and Broadcasting), OEA/Ser.L/V/II. Doc.51. December 30, 2009, paras 37 and 96 *et seq.* IACHR. [Annual Report 2012. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II.147. Doc. 1. March 5, 2013, para. 155.

<sup>66</sup> IACHR. [Annual Report 2010. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II. Doc. 5. March 4, 2011, para. 46.

<sup>67</sup> IACHR, [An Overview of Violence against LGBTI Persons in the Americas: a Registry Documenting Acts of Violence between January 1, 2013 and March 31, 2014](#). Annex to Press Release No. 153. December 17, 2014.

<sup>68</sup> IACHR, Annual Report 2014: Follow-up to the 2012 Jamaica Report, para. 183. IACHR. [Annual Report 2012. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II.147. Doc. 1. March 5, 2013, para. 351; IACHR. [Annual Report 2013. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II.149 Doc. 50. December 31, 2013, paras. 560-563; IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009, paras. 58-59. Similarly, see: United Nations. General Assembly. [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/67/357](#). September 7, 2012, para. 43.

<sup>69</sup> International Gay and Lesbian Human Rights Commission (IGLHRC) and United and Strong, in collaboration with Groundation Grenada, Guyana Rainbow Foundation, J-FLAG, and United Belize Advocacy Movement, *Homophobia and Transphobia in Caribbean Media: A Baseline Study in Belize, Grenada, Guyana, Jamaica, and Saint Lucia*, 2015, p. 1.

<sup>70</sup> International Gay and Lesbian Human Rights Commission (IGLHRC) and United and Strong, in collaboration with Groundation Grenada, Guyana Rainbow Foundation, J-FLAG, and United Belize Advocacy Movement, *Homophobia and Transphobia in Caribbean Media: A Baseline Study in Belize, Grenada, Guyana, Jamaica, and Saint Lucia*, 2015, p. 2.

<sup>71</sup> IACHR, Annual Report 2014: Follow-up to the 2012 Jamaica Report, para. 236.

<sup>72</sup> IACHR, Annual Report 2014: Annual Report by the Special Rapporteur of Freedom of Expression, para. 657.

<sup>73</sup> Maurice Tomlinson. March 23, 2014. More Anti-gay material from the Jamaica Observer. E-mail message sent to the IACHR. Available at: Archives of the Office of the Special Rapporteur for Freedom of Expression.

community is vowing never to sit idly by and allow homosexual lifestyles to infiltrate the Jamaican society.”<sup>74</sup> On July 13, 2014, it published the article “Police hunt gay murder suspect,” which contained statements like “The men who often dress in drag and pose as prostitutes, live subnormal lives and according to the police, pose a serious threat to the New Kingston environment,” and “Police say that they have strong evidence that more than 90 per cent of the robberies were perpetrated by persons purported to be members of the gay community.”<sup>75</sup> On July 16, 2014, the same newspaper published an editorial entitled “Homosexuality: the long, painful search for workable rules of engagement,” apparently justifying that “[a]ll Jamaicans, including entertainers, have the right to hold views against homosexuality without discrimination,” but also calling for tolerance and non-violence.<sup>76</sup>

45. In its 2014 Report to follow-up to the 2012 Report on the human rights situation in Jamaica,<sup>77</sup> the IACHR indicated that in the framework of the hearing “Monitoring the Report of the Commission on the Situation of Human Rights in Jamaica” held on October, 28, 2014, the IACHR and its Special Rapporteur received information on the constant stigmatizing by media regarding LGBTI persons. According to civil society organizations, State authorities have omitted promoting positive views to reduce the discrimination and stigma against LGBTI persons. The State reported that the government is aware of the debate in Jamaica on the rights of LGBTI persons and has made efforts to guarantee the right to equality for these people. Regarding public discussions on the subject, the State indicated that takes the position that these are issues covered by the right to freedom of expression in the context of private and independent media and acts in the debate only in the scope of institutions subject to the government’s control.<sup>78</sup> The Office of the Special Rapporteur has warned that these types of discriminatory statements can potentially cause violence, depending on the context in which they are disseminated.<sup>79</sup>

46. The Commission recalls that principle 6 of the Declaration of Principles on Freedom of Expression, adopted in 2000, establishes, *inter alia*, that journalistic activities must be guided by ethical conduct, although such ethical conduct should in no case be imposed by the State. The IACHR notes that the adoption of voluntary professional codes of conduct for the media and journalists can play a fundamental role in combating discrimination and in promoting equality principles. The voluntary conduct can include being alert to the danger of media outlets furthering discrimination or negative stereotypes, and reporting in a factually accurate and sensitive manner.<sup>80</sup> Similarly, the UN Special Rapporteur has underscored the importance of ensuring accountability for what is reported in the media, and has stressed that “media outlets and journalists should adopt voluntary ethical codes and standards that do not allow hate speech and promote high standards of professional journalism”.<sup>81</sup> Further, that media outlets and journalists should

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<sup>74</sup> Jamaica Observer. [Local churches vow to prevent homosexuality from dominating society](#). July 1, 2014.

<sup>75</sup> Jamaica Observer. [Police hunt gay murder suspect](#). July 13, 2014.

<sup>76</sup> Jamaica Observer. [Homosexuality: the long, painful search for workable rules of engagement](#). July 16, 2014.

<sup>77</sup> IACHR, Annual Report 2014: Follow-up to the 2012 Jamaica Report, para. 237.

<sup>78</sup> IACHR, Hearing on “Monitoring the Report of the Commission on the Situation of Human Rights in Jamaica,” 153<sup>rd</sup> Regular Session, October 28, 2014.

<sup>79</sup> In the context of Jamaica, there have been numerous attacks and assaults against persons because of their sexual orientation or gender identity. One example is the case of the murder of Dwayne Jones on July 22, 2013. IFEX/Human Rights Watch. August 1, 2013. [Cross-dressing teenager murdered in Jamaica](#); Huffington Post/AP. August 11, 2013. [Dwayne Jones, Jamaican Transgender Teen, Murdered By Mob: Report](#). IACHR, Annual Report 2014: Follow-up to the 2012 Jamaica Report, para. 237.

<sup>80</sup> IACHR, [An Overview of Violence against LGBTI Persons in the Americas: a Registry Documenting Acts of Violence between January 1, 2013 and March 31, 2014](#). Annex to Press Release No. 153. December 17, 2014. See also: Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Adopted on October 5, 2012. Recommendations to other stakeholders. Available at: [http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf)

<sup>81</sup> United Nations. General Assembly. [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/67/357](#). September 7, 2012, para. 74.

establish “independent and self-regulatory bodies to elevate standards of journalism and to ensure the accountability of all media professionals.”<sup>82</sup>

47. Indeed, media should play a positive role in countering discrimination, stereotypes, prejudices, and biases, including by highlighting their dangers, by adhering to the highest professional and ethical standards, by addressing issues of concern to groups that have suffer from historical discrimination (including LGBTI persons), and by giving members of these groups an opportunity to speak and to be heard.<sup>83</sup> This is consistent with the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, which recommend that “mass media avoid the use of stereotypes in relation to sexual orientation and gender identity, and promote tolerance and the acceptance of diversity of human sexual orientation and gender identity, and raise awareness around these issues.”<sup>84</sup>

48. In sum, in order to develop consistent and effective legislation and measures to prohibit and penalize incitement to hatred, hate speech should not be confused with other types of inflammatory, stigmatizing, or offensive speech. Further, States should adopt legislation prohibiting any advocacy of hatred that constitutes incitement to violence or other similar action. The imposition of sanctions under the charge of advocacy of hatred – as defined in and prohibited by Article 13(5) of the American Convention – requires a high threshold. This is because, as a matter of fundamental principle, prohibition of speech must remain an exception. Restrictions on speech must be backed by actual, truthful, objective, and strong proof that the person was not simply issuing an opinion (even if that opinion was unfair or disturbing), but that the person had the clear *intention* of promoting lawless violence or any other similar action against LGBTI persons, along with the *capacity* of achieving this objective and creating an *actual* risk of harm being committed against persons who are part of these groups. These elements should be made clear by national legal systems, either explicitly in the law or through authoritative interpretation by the judiciary. In other words, criminal sanctions should be seen as last resort measures, only to be applied in strictly justifiable situations, according to article 13(5) of the American Convention. Civil and administrative sanctions and remedies should also be considered, along with the right of correction and the right of reply.

49. Further, when high-level officials engage in hate speech, they undermine not only the right to non-discrimination of affected groups, but also the faith of such groups in State institutions and, thus, the quality and level of their participation in democracy. Consequently, States should adopt appropriate disciplinary measures with regard to hate speech or incitement to hatred by public officials. The media also plays an important role in countering discrimination, stereotypes, prejudices, and biases, including by highlighting their dangers, by adhering to the highest professional and ethical standards, and by adopting voluntary professional codes of conduct.

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<sup>82</sup> United Nations. General Assembly. [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/67/357](#). September 7, 2012, para. 74.

<sup>83</sup> The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. [Joint Declaration on Universality and the Right to Freedom of Expression](#). May 6, 2014.

<sup>84</sup> [Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity](#). March, 2007.