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INTER-AMERICAN STANDARDS

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I. INTRODUCTION

I. INTRODUCTION

1. The Inter-American Commission on Human Rights (hereinafter “IACHR”, “Commission” or “Inter-American Commission”) recalls that respect for and protection of human rights is a fundamental pillar of the rule of law and democracy. It also stresses the indivisibility and interdependence of all human rights, and that democracy, sustainable development, and human rights are undeniably interrelated. Thus, in order to build prosperous, peaceful, just societies, all human rights—civil, political, economic, social, cultural and environmental—must be ensured without discrimination, and priority given to measures to combat poverty and inequality and to protect the environment.¹ In this compendium the IACHR compiles and systematizes important standards in this regard.
2. In recent years, the IACHR has identified two major challenges to the effectiveness of rights and freedoms in democratic systems. On the one hand, is the need to bolster the democratic institutions of States, and on the other is the urgency to strengthen the capacities of the States to implement public policies with a human rights approach that generate concrete impacts in terms of the enjoyment and exercise of those rights for individuals, groups, and communities, with guarantees of equality and justice based on the inherent foundation of human dignity.²
3. In this regard, the IACHR has noted with concern that some parts of the region have seen reverses in the protection of human rights and the separation of powers, as well as a closing of spaces for democratic participation, lack of judicial independence and, on occasion, the absence of free and informed elections.³ This has been made worse by actions aimed at concentrating power in some branches of government; the adoption of measures that restrict the rights to freedom of expression and association; an increase in intimidation, physical assaults, and arbitrary detention of human rights defenders,⁴ and the use of stigmatizing and

¹ IACHR, Press Release No. 231/19. [IACHR Stresses its Commitment to Defending and Promoting Human Rights and Democracy](#). September 17, 2019.

² IACHR, [Public policies with a human rights approach](#), OEA/Ser.LV/II, Doc. 191, September 15, 2018. para. 6.

³ IACHR, Press Release No. 231/19. [IACHR Stresses its Commitment to Defending and Promoting Human Rights and Democracy](#). September 17, 2019.

⁴ IACHR, Press Release No. 231/19. [IACHR Stresses its Commitment to Defending and Promoting Human Rights and Democracy](#). September 17, 2019.

discriminatory rhetoric.⁵ In addition, high levels of impunity⁶ and the serious impact of corruption on the observance of human rights persist as phenomena that adversely affect the States of the hemisphere.⁷

4. All these factors have a direct, negative impact on the stability of democratic institutions and the rule of law, whose fragility is exacerbated not only by the disproportionate restrictions, limitations and suspensions of rights in the context of emergencies and the containment of the pandemic,⁸ but also by the economic crisis that was unleashed as a result and which continues to have an adverse effect in many countries, especially vulnerable populations traditionally subject to discrimination.⁹
5. According to the Inter-American Democratic Charter, representative democracy is essential for the social, political, and economic development of peoples; the basis for the rule of law and constitutional regimes; and indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence.¹⁰ Accordingly, elements of democracy include, *inter alia*, respect for human rights; access to and the exercise of power in accordance with the rule of law; the holding of periodic, free, and fair elections; the pluralistic system of political parties and organizations; the separation of powers and independence of the branches of government; transparency; responsible public administration on the part of governments; respect for social rights; and freedom of expression and of the press.¹¹
6. Throughout its existence, the IACHR has emphasized that ensuring rights and freedoms in a democratic society requires a legal and institutional order in which the

⁵ IACHR, Office of the Special Rapporteur for Freedom of Expression. Press Release R12621, *The Office of the Special Rapporteur for Freedom of Expression calls on those who hold or aspire to hold elected office in Peru to contribute with their speech to the protection of human rights*, May 17, 2021.

⁶ IACHR, 2022 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, April 1, 2023, para. 9.

⁷ IACHR, *Strategic Plan 2017–2021* oEA/Ser.LV/II.161. Doc. 27/17, March 20, 2017, p. 25.

⁸ IACHR, Press Release No. 13020, *IACHR Calls for Guarantees for Democracy and the Rule of Law during the COVID-19 Pandemic*, June 9, 2020.

⁹ IACHR, *Strategic Plan 2017–2021* oEA/Ser.LV/II.161. Doc. 27/17, March 20, 2017, p. 25.

¹⁰ Organization of American States (OAS), General Assembly, *Inter-American Democratic Charter*. Adopted at the first plenary session, held on September 11, 2001 (Inter-American Democratic Charter), Articles 1, 2, and 7.

¹¹ *Inter-American Democratic Charter*, Articles 3 and 4.

law prevails over the will of the rulers and of private individuals, and in which there are judicial controls on the constitutionality and legality of the exercise of public power.¹² It has also stressed the importance of full observance of human rights to achieve solid, inclusive democracies,¹³ which means that constitutions, laws, and public policies must be designed—and institutions created—in a manner consistent with international human rights standards.

A. Objective

7. The IACHR strives to ensure that the commitment of OAS member states to democracy and human rights produces tangible results.¹⁴ Therefore, in compliance with its mandate to provide advice and technical assistance to member states, it considers it essential to develop instruments and tools that are useful both for States and for users of the system, civil society organizations, academia, social movements, and the Commission itself. For that reason, this compendium of IACHR standards is intended as a tool for promotion, dissemination, and technical cooperation in connection with democratic institutions, the rule of law, and human rights.
8. In the framework of the IACHR Strategic Plan 2017-2021, Strategic Objective 3 aims to “promote democracy, human dignity, equality, justice, and fundamental freedoms based on an active contribution to the strengthening of State institutions and public policies with a human rights approach in accordance with inter-American norms and standards and to the development of the capacities of social and academic organizations and networks to act in defense of human rights.”¹⁵ Now, under the Strategic Plan 2023–2027, the IACHR aims to “guarantee the rule of law and the working of the mechanisms of social participation to maintain the link between democratic institutions and society. The objective is to protect, from a human rights perspective (i) the independence of the branches of government and the effective operation of a system of checks and balances; (ii) the existence and effectiveness of formal mechanisms and opportunities for channeling social grievances to the state

¹² IACHR, *Corruption and Human Rights*, OEA/Ser.LV/II, Doc. 236, December 6, 2019, para. 287.

¹³ IACHR, *Considerations Related to the Universal Ratification of the American Convention and other Inter-American Human Rights Treaties*, OEA/Ser.LV/II.152, Doc. 21, August 14, 2014, para. 8.

¹⁴ IACHR, *Public policies with a human rights approach*, OEA/Ser.LV/II, Doc. 191, September 15, 2018. para. 16.

¹⁵ IACHR, *Strategic Plan 2017–2021*, OEA/Ser.LV/II.161. Doc. 27/17, March 20, 2017, p. 45.

to safeguard rights; (iii) social participation in the design and implementation of public policies and accountability by the state authorities; (iv) transparent government open to scrutiny and social audit; and (v) permanent mechanisms of dialogue with civil society that respect its autonomy, free operation, and independence, among other aspects.”¹⁶

9. This compendium is part of the Commission’s efforts to enhance and strengthen public policies, regulations, practices, and initiatives in the countries of the region, in order to strengthen democratic institutions and the rule of law, as well as to better protect fundamental rights. In that respect, the purpose of the compendium is to facilitate access to the standards on the subject by providing an updated systematization of those standards. It is also expected that the dissemination of IACHR standards will encourage reflection on factors that weaken democratic institutions and the rule of law, as well as inspiring societal participation in upholding rights, the spaces for dialogue between States and civil society, and the regulatory and public policy adjustments needed to strengthen them.

B. Methodology

10. This compendium was based on a review, systematization, and analysis of the standards developed by the IACHR on democratic institutions, the rule of law, and human rights. It identifies and compiles in an orderly and strategic manner a representative selection of paradigmatic pronouncements that demonstrate the development of standards in this regard.
11. It should be noted that the jurisprudence cited does not necessarily include all IACHR pronouncements, but only those considered most illustrative for the purposes of the compendium. In their place, the original citations are maintained, and others are included that also refer to similar pronouncements, in order to expand the reference information.
12. To serve as an up-to-date, representative instrument, the compendium was prepared based on a review of reports published by the IACHR from 2000 to 2023. In particular, the following were examined: annual, country and thematic reports; resolutions, precautionary measures, and friendly settlements; and substantive

¹⁶ IACHR, *Strategic Plan 2023–2027*, OEA/Ser.L/V/II.185.Doc. 310, October 31, 2022, p. 44.

decisions on cases submitted to inter-American protection system, including reports published by the IACHR under Article 51 of the American Convention on Human Rights and reports on cases referred to the Inter-American Court of Human Rights in accordance with Article 61 of the American Convention and Article 45 of the Rules of Procedure of the IACHR. Although the standards emanating from the Commission in the exercise of its mandate are included, in some cases the pronouncements included in the compendium refer to the jurisprudence of the Inter-American Court and other bodies of the universal system for the protection of human rights.

13. The pronouncements in the Compendium are presented under a thematic classification system that accounts for the essential elements of the democratic institutional framework and the rule of law; it is organized by source and follows the wording of the original document. In general terms, except where necessary to maintain a common thread to facilitate reading, sources are presented in a particular order: first thematic, merits, country, and annual reports, followed by reports on friendly settlements, reports on precautionary measures, and resolutions.
14. As mentioned, it is important to emphasize that the Compendium is not an exhaustive historical review, but a systematization of the main standards on the most recurrent or important issues that does not pretend to cover all particular situations and exceptions. It is also important to note that references to reports on petitions and cases, as well as thematic or country reports, do not necessarily reflect the legal situation of the case cited as regards the responsibility of the State concerned, but are included for illustrative purposes.

C. Structure

15. This compendium is divided into four main chapters. Chapter I sets out the objectives, structure and methodology used to systematize the standards on democratic institutions, the rule of law, and human rights.
16. Chapter II introduces the concepts generally associated with democracy, human rights, and the rule of law. To that end, reference is made to the legal framework, general principles, essential elements of representative democracy, and principles of the rule of law, in order to provide a current overview of the core notions of the inter-American system and thus facilitate a proper grasp of the concepts.

17. Chapter III presents the pronouncements and decisions of the IACHR that illustrate the content and scope of the standards on democratic institutions. In that connection, it includes and drills down on related elements, such as separation of powers and independence of branches of government, citizen security, the right to participation, freedom of expression, and the civic space. It also presents pronouncements on the rule of law, including the principle of legality and freedom from ex post facto laws; access to justice and due process; the obligation of the States to adapt their law and to incorporate inter-American standards and conventionality control; and states of emergency.
18. Lastly, Chapter IV offers a series of general conclusions, highlighting the importance of this compendium for technical cooperation amid the current context and trends with regard to democracy and the rule of law in the region.



II. THE CONCEPTS OF DEMOCRACY, HUMAN RIGHTS, AND RULE OF LAW

II. THE CONCEPTS OF DEMOCRACY, HUMAN RIGHTS, AND RULE OF LAW

19. In this chapter, the IACHR presents a series of general standards and institutional considerations that are useful for defining the concepts of democracy, human rights, and the rule of law.
20. First, the section dealing with the legal framework and general principles presents references developed by the Inter-American Commission with respect to the instruments adopted within the framework of the OAS and the inter-American human rights system that constitute the source of law for the provisions on democracy and the rule of law. It also includes pronouncements that illustrate how, on the basis of that legal underpinning, a link between democracy and human rights is recognized, as is the indivisibility and interdependence of those rights.
21. Next, pronouncements are included that refer to the concept of democracy and the rule of law, including its principles and core elements, particularly in relation to the Inter-American Democratic Charter. It is worth noting that while the work of the IACHR in addressing these concepts has been extensive and broad, this chapter only presents a concise, illustrative selection of definitions, since their content and scope is addressed in the next chapter and, with regard to certain specific topics, other IACHR systematizations already exist or may be prepared in the future.
22. The final part of this section contains a short overview of the main challenges to democracy in the region that have been identified by the Commission in the last five years (2017–2022), to which the Compendium returns to at different points to provide a brief description of the contributions made by the IACHR to democratic systems in the region.

A. Legal framework and general principles

23. The founding instrument of the regional organization, the Charter of the Organization of American States (hereinafter “Charter” or “OAS Charter”), as adopted in 1948 and amended in 1967, includes in its preamble and main body several references to

democracy and the rights and duties of human person.¹⁷ The Preamble of the Charter establishes the relationship between essential rights and the exercise of democracy. Those rights are linked to regional solidarity within the framework of democratic institutions, a system of individual liberty and social justice based on respect for the essential rights of the human person.¹⁸ Chapter II of the Charter defines democracy as the only acceptable form of political organization of the member states to achieve the purposes of the Organization. In that regard, Article 3(d) provides: “The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.”¹⁹

24. Furthermore, in the Charter, the member states agree that “representative democracy is an indispensable condition for the stability, peace and development of the region,”²⁰ and that “the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of [the human person].”²¹

25. For its part, the American Declaration of the Rights and Duties of Man, adopted that same year, established a human rights legal framework limited only by the rights of others, the security of all, and the just demands of general welfare and democratic development²².

26. The Declaration was later supplemented by a treaty in the form of the American Convention on Human Rights, adopted in 1969. The Convention, reaffirming its intention to consolidate a system of personal liberty and social justice within a

¹⁷ *Charter of the Organization of American States* (OAS Charter), signed in Bogotá in 1948 and amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993.

¹⁸ *OAS Charter*, preamble.

¹⁹ *OAS Charter*, Article 3(d).

²⁰ *OAS Charter*, preamble.

²¹ *OAS Charter*, preamble.

²² *American Declaration of the Rights and Duties of Man* (American Declaration), adopted in 1948 at the Ninth International Conference of American States in Bogotá, Colombia, Article XXVIII.

framework of democratic institutions, enshrined a series of fundamental rights and established them as necessary conditions for a democratic society²³.

27. In addition, other regional treaties, declarations and instruments have reinforced the interconnection between democracy, human rights, and the rule of law. In that regard, the countries of the Americas reiterated their commitment to democratic systems by adopting the Inter-American Democratic Charter, which states: “The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it.”²⁴. The Inter-American Democratic Charter clarified the provisions set forth in the OAS Charter on the preservation and defense of democratic institutions.²⁵ To that end, among others, it established the essential elements of democracy ²⁶ and reaffirmed their link to human rights, integral development, and the fight against poverty.²⁷ The above, through provisions necessary to strengthen the institutional framework²⁸ and the democratic culture .²⁹ In short, the Democratic Charter “reflects the efforts to promote and strengthen democracy and the mechanisms implemented to prevent and respond to situations that affect the development of the democratic political institutional process.”³⁰

28. The IACHR recalls that the corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations), as well as the decisions of international human rights organs. This conception pertaining to international human rights law, and the interpretation of treaties, is particularly important for the protection and

²³ [American Convention on Human Rights \(Pact of San José\)](#), San José, Costa Rica, November 7 to 22, 1969, Articles 15, 16(2), 22(3) and 32(2).

²⁴ [Inter-American Democratic Charter](#), Article 1.

²⁵ [Inter-American Democratic Charter](#), Chapter IV.

²⁶ [Inter-American Democratic Charter](#), Article 3.

²⁷ [Inter-American Democratic Charter](#), Chapter III.

²⁸ [Inter-American Democratic Charter](#), Chapter IV.

²⁹ [Inter-American Democratic Charter](#), Chapter VI.

³⁰ IACHR, [Honduras: Human Rights and the Coup d'État](#), OEA/Ser.LV/II, Doc. 55, December 30, 2009, para. 18.

defense of human rights.³¹ In this regard, the authorities of a State have the obligation to apply domestic law in a manner that is consistent with the State's international human rights obligations;³² and it is up to the organs of the inter-American system to interpret inter-American instruments and, therefore, to determine whether the State's interpretation has been made in accordance with international instruments.³³ In this context, the following is a summary of IACHR pronouncements that refer to the aforementioned instruments as a source of law for democracy, the rule of law, and human rights.

Reports on Merits

Report No. 98/03. Case 11.204. Merits. Statehood Solidarity Committee. United States. December 29, 2003.

86. The central role of representative democracy in the inter-American system is evidenced in the provisions of the system's founding instruments, including Article 3(d) of the Charter of the OAS³⁴ which confirms that "solidarity of the American states and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy." Resolutions adopted by the Organization's political organs have likewise reflected the indispensability of democratic governance to the stability, peace and development of the region. In OAS General Assembly Resolution 837, for example, OAS member states reaffirmed the "inalienable right of all of the peoples of the Americas freely to determine their political, economic and social system without outside interference, through a genuine democratic process and within a framework of social justice in which all sectors of the population will enjoy the guarantees necessary to participate freely and effectively through the exercise of

³¹ IACHR, Report No. 377/20, Case 13.399, Merits, Arnaldo Javier Córdoba and D, Paraguay, December 15, 2020, para. 86.

³² IACHR, Report No. 377/20, Case 13.399, Merits, Arnaldo Javier Córdoba and D, Paraguay, December 15, 2020, para. 131.

³³ IACHR, Report 130/17, Case 13.044, Merits, Gustavo Francisco Petro Urrego, Colombia, October 25, 2017, para. 127.

³⁴ Charter of the Organization of American States, as amended by the Protocol of Cartagena of 1985, OAS, Treaty Series, Nos. 1-C and 61.

universal suffrage.”³⁵ Citing these and other similar instruments, the Commission recently reaffirmed that “there is a conception in the inter-American system of the fundamental importance of representative democracy as a legitimate mechanism for achieving the realization of and respect for human rights; and as a human right itself, whose observance and defense was entrusted to the Commission.”³⁶ According to the Commission, this conception implies protecting those civil and political rights in the framework of representative democracy, as well as the existence of institutional control over the acts of the branches of government, and the rule of law.³⁷

Annual Reports

Annual Report of the Inter-American Commission on Human Rights, 2022, Chapter IV. Cuba

14. In turn, the Inter-American Court of Human Rights (“the Inter-American Court”), in the case of *San Miguel Sosa et al. v. Venezuela* (2018), stated that the Inter-American Democratic Charter “is a rule of authentic interpretation of the treaties to which it refers, since it reflects the interpretation that the OAS Member States themselves, including the States Parties to the Convention, make of the provisions pertaining to democracy in both the OAS Charter and the Convention.”³⁸ In this regard, the Inter-American Court concluded that “the effective exercise of democracy in the American States is, therefore, an international legal obligation and they have sovereignly agreed that such exercise is no longer a matter solely for their domestic, internal or exclusive jurisdiction.”³⁹

³⁵ OAS General Assembly Resolution 837 (XVI-O/86).

³⁶ *Aylwin Azocar et al. v. Chile (Merits)*, Case 11.863, Report N° 137/99, Annual Report of the IACHR 1999, at 536.

³⁷ *Id.*, para. 56.

³⁸ I/A Court H. R., *Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations and Costs. Judgment of February 8, 2018. Series C No. 348*, par. 114.

³⁹ I/A Court H. R., *Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations and Costs. Judgment of February 8, 2018. Series C No. 348*, par. 114.

[Annual Report of the Inter-American Commission on Human Rights, 2006, Chapter IV. Venezuela](#)

149. A feature of democracy is its ability to be refined and, on that premise, erecting a hemispheric position on the issues of due process, emergency situations, equality before the law, and prohibition of discrimination, creates increasing avenues at the domestic level to foment the growth of democracy. With the vision of contributing to the construction of democratic societies based on full observance of human rights, the States created, among other instruments, the inter-American system for protection of human rights, consisting of a set of provisions and two specialized organs: the Inter-American Commission and the Inter-American Court of Human Rights. The States, the creators of the system, voluntarily undertook to fulfill their commitments and to act as guarantors of the system both individually and collectively.

29. In addition, the organs of the inter-American system have emphasized the intrinsic relationship that exists between democracy and observance of and respect for human rights. In this context, the Commission has noted that “the collapse of the rule of law in a State party has repercussions that go beyond democratic governance: indeed, the historical experience of Latin America has shown that institutional collapse undermines fundamental rights and creates fertile ground for subsequent violations of human rights.”⁴⁰
30. The following is a summary of IACHR pronouncements that refer to the importance of democracy and the rule of law in protecting human rights, taking into account their indivisibility and interdependence.

Country reports

[Honduras: Human Rights and coup d'état. OEA/Ser.L/V/II. Doc. 55. 30 December 2009](#)

207. The organs of the Inter-American system for the protection of human rights have repeatedly underscored the connection between democracy and human rights. In Advisory Opinion OC-8, the Inter-

⁴⁰ IACHR. [Report on the Situation of Human Rights in Venezuela](#). OEA/Ser.L/V/II.118. Doc. 4 rev. 1. 24 October 2003, para. 525.

American Court of Human Rights (hereinafter, “the Inter-American Court”) wrote that: “In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning.”⁴¹ For its part, the Inter-American Commission wrote that the democratic system and the rule of law are essentials for effective protection on human rights; conversely, human rights cannot be fully guaranteed without effective and unqualified recognition of political rights.⁴²

[Third report on the situation of Human Rights in Paraguay. OEA/Ser.L/VII.110.doc.52.9 March 2001](#)

6. The Commission would add that representative democracy cannot be separated from what is stated in the very preamble of the American Convention, which proclaims that “the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights.”

7. The objective is not only to advance towards full representative democracy, but to ensure that this system of political organization represents, for each individual, the possibility of attaining respect for and the full realization of all his or her human rights, civil and political as well as economic, social, and cultural. Moreover, this is the best means to guarantee the very preservation of democracy as a system, for to the extent that people are convinced, from their own personal experience, that democracy is in effect the best model for political organization, they will be the best guarantee against traditional dictatorships and other authoritarian forms of government.

⁴¹ I/A Court H.R., Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, paragraph 26.

⁴² IACHR, Annual Report 2008, Chapter IV, Cuba.

Thematic reports

Public policies with a human rights approach. OEA/Ser.L/V/II. Doc. 191. 15 September 2018

110. The Commission observes that the principles of indivisibility, universality, and interdependence of human rights depending on the understanding that the full exercise of rights can only be achieved if the state adopts comprehensive measures. This integral nature does not only entail dialogue, coordination, and working together with the various sectors of the state's apparatus which must contribute coordinated responses on the basis of the various dimensions involved in dealing with one problem, it also requires focusing on situations of multiple discrimination suffered by persons and social groups.⁴³

Annual reports

Annual Report of the Inter-American Commission on Human Rights, 2006, Chapter IV, Venezuela

206. The Commission considers that it is an inherent part of the democratic transformation and enhancement processes undertaken by the countries in the Hemisphere to safeguard observance of human rights, fundamentally through policies and practices designed to ensure for persons the full exercise of their civil and political rights, as well as their economic, social, and cultural rights. These processes benefit from the existence of government policies that promote a plurality of ideas and eliminate any measures that discriminate against individuals or groups of persons by preventing their equal and full participation in the political, economic, and social life of their country for reasons of "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition".⁴⁴

⁴³ IACHR. Strategic Plan 2017-2021, p. 39.

⁴⁴ American Convention on Human Rights, Article 1.1, San José, Costa Rica, November 22, 1969.

B. Essential elements of representative democracy

31. The IACHR has stated that representative democracy is the system of state organization explicitly adopted by the member states of the Organization of American States. Unlike the universal system, the Inter-American system has incorporated it as an express norm in its Charter, specifically in the aforementioned Article 3(d). Accordingly, since 1948 the member states have recognized the “right to vote and to participate in government” as a human right, enshrined as it is in Article XX of the American Declaration, which provides: “Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.” Likewise, in the framework of the American Convention under Article 23, the political rights inherent to representative democracy were enshrined, including the right to take part in the conduct of public affairs and to vote and be elected.⁴⁵
32. The Commission, citing the General Assembly of the Organization of American States, echoed the call to Member States to “reestablish and perfect the democratic system of government, in which the exercise of power derives from the legitimate and free expression of the will of the people, in accordance with the particular characteristics and circumstances of each country.”⁴⁶
33. The following is a summary of some IACHR pronouncements that shed light on the definition of representative democracy and its essential elements in the terms of the Inter-American Democratic Charter, as well as on the concepts of democratic institutionality and human rights institutionality that the IACHR established in its institutional strategy.
34. Regarding the concept of representative democracy:

⁴⁵ IACHR, [Report No. 137/99](#), Case 11.863, Merits, Andrés Aylwin Azócar et al. (Chile), December 27, 1999, paras. 31, 41, and 43.

⁴⁶ IACHR, [Report No. 137/99](#), Case 11.863, Merits, Andrés Aylwin Azócar et al. (Chile), December 27, 1999, para. 35.

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25. The IACHR recalls that democracy is understood as “[...] a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.⁴⁷ It is indispensable for the exercise of fundamental freedoms and human rights.⁴⁸ In order for it to consolidate, it is essential for institutions to be guided by the separation and balance of powers and the independence of the branches of government, as well as the effective exercise of political rights through free and fair elections and respect for and promotion of pluralism in society.⁴⁹

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13. In addition, the OAS member states, in adopting the Inter-American Democratic Charter in 2001, recognized that representative democracy is the system in which stability, peace, and development in the region can be achieved, and is fundamental to achieving the full exercise of fundamental rights. Article 3 of the Inter-American Democratic Charter establishes that:

Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people,

⁴⁷ UN, General Assembly, Documento Final de la Cumbre Mundial 2005, Final Document World Summit A/60/L.1, September 15, 2005, par. 135.

⁴⁸ Article 7 of the Inter-American Democratic Charter.

⁴⁹ Article 3 of the Inter-American Democratic Charter; and, UN Commission on Human Rights, Resolution 2000/47, Promoting and Consolidating Democracy, April 25, 2000.

the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.⁵⁰

Thematic reports

Freedom of expression in Cuba. OEA/SER.L/V/II IACHR/RELE/INF.21/18 December 31, 2018.

21. Given the close relationship between [...] rights and democracy, reference should be made to the Inter-American Democratic Charter and, in particular, to Article 4, which states the following: “Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy.” [...]

35. In relation to political rights, i.e., the pluralistic regime of political parties and organizations, the holding of periodic elections and access to and exercise of power subject to the rule of law:

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Nicaragua: Concentration of power and weakening of the rule of law. OEA/Ser.L/V/II. Doc. 288 25 October 2021

117. Political rights, recognized in Article XX of the American Declaration of the Rights and Duties of Man,⁵¹ are those that recognize and protect the right and duty of every citizen to participate in the political life of his or her country. These are by nature rights that serve to strengthen democracy and political pluralism.⁵² As the IACHR has emphasized, there exists a “direct relationship between the

⁵⁰ OAS, Inter-American Democratic Charter, Art. 3. Adopted at the twenty-eighth special session, September 11, 2001, Lima, Peru

⁵¹ Article XX of the American Declaration states that “every person having legal capacity has the right to take part in the government of his country, directly or through his representatives, and to participate in popular elections, which shall be by secret ballot, genuine, periodic and free”.

⁵² IACHR, Democracy and Human Rights in Venezuela. December 30, 2009, par. 18

exercise of political rights and the concept of democracy as a way of organizing the state ...”⁵³.

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15. [...] IACHR doctrine states that exercising the right to political participation entails “the right to organize parties and political associations, which through open discussion and ideological struggle, can improve the social level and economic circumstances of the masses and prevent a monopoly on power by any one group or individual.”⁵⁴ The Commission has also found that:

The governments have, in the face of political rights and the right to political participation, the obligation to permit and guarantee: the organization of all political parties and other associations, unless they are constituted to violate human rights; open debate of the principal themes of socioeconomic development; the celebration of general and free elections with all the necessary guarantees so that the results represent the popular will.⁵⁵

16. [...] for the IACHR, the concept of representative democracy is based on the principle that political sovereignty resides with the people and that, in the exercise of that sovereignty, they elect their representatives to exercise political power. These representatives are also elected by citizens to implement specific policy measures, which in turn implies that there has been broad debate on the nature of the policies to be applied – freedom of expression – among organized political groups – freedom of association – that have had the opportunity to express themselves and meet publicly – right of

⁵³ IACHR, *Democracy and Human Rights in Venezuela*. December 30, 2009, par. 21; and *Second Report on the Situation of Human Rights in Peru*. June 2, 2000, Chapter IV, par. 1.

⁵⁴ IACHR, *Annual Report, Chapter IV, Cuba*, “a. Political rights,” 2002, par. 12

⁵⁵ IACHR, *Annual Report, Chapter IV, Cuba*, “a. Political rights,” 2002, par. 12.

assembly.⁵⁶ The exercise of political rights is therefore inseparable from other fundamental human rights.

[Annual Report of the Inter-American Commission on Human Rights, 2021, Chapter IV. Nicaragua](#)

34. In line with these ideas, the Commission emphasizes that “the exercise of political rights is an essential element of the system of representative democracy.” It has therefore referred to the need to hold “authentic and free” elections, indicating that there is “a direct linkage between the electoral mechanism and the system of representative democracy.” In the Commission’s opinion, as part of the authenticity of elections referred to in Article 23(2) of the American Convention on Human Rights, in a positive sense, there must be some consistency between the will of the voters and the result of the election; however, “in the negative sense, the characteristic implies an absence of coercion which distorts the will of the citizens.”⁵⁷ Specifically, the Commission has developed the view that “the authenticity of the elections covers two different categories of phenomena”:⁵⁸ on the one hand, those referring to the general conditions in which the electoral process is carried out and, on the other hand, phenomena linked to the legal and institutional system that organizes elections and which implements activities linked to the electoral act, that is, everything related in an immediate and direct way to the casting of the vote.⁵⁹

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[Nicaragua: Concentration of power and weakening of the rule of law, OEA/Ser.L/V/II. Doc. 288. 25 October 2021](#)

176. [...] The IACHR notes that the Inter-American Juridical Committee (CJRES. 159. (LXXV-OT)) established that democracy “does not

⁵⁶ IACHR, Report on the Situation of Human Rights in Haiti, OAS/Ser.L/V/II.77. rev. 1 Doc. 18, May 8, 1990, Chapter 1. “Political rights,” par. 15.

⁵⁷ IACHR. Resolution No. 01/90 Cases 9768, 9780, and 9828 (Mexico), May 17, 1990, para. 47.

⁵⁸ IACHR. Resolution No. 01/90 Cases 9768, 9780, and 9828 (Mexico), May 17 29, 1990, para. 48.

⁵⁹ IACHR. Resolution No. 01/90 Cases 9768, 9780, and 9828 (Mexico), May 17, 1990, para. 48

consist only in electoral processes, but also in the legitimate exercise of power within the framework of the rule of law, which includes respect for the essential elements, components and attributes of democracy.”⁶⁰

36. Regarding the separation and independence of public authorities:

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29. By the foregoing considerations, Article 3 of the Inter-American Democratic Charter lists among the constituent elements of representative democracy the separation and independence of branches of government. On this, the Inter-American Court specified, in the context of Advisory Opinion No. 28 of 2021, that “The separation of State powers into different branches and organs is linked closely with the aim of preserving related freedoms, with the understanding that concentration of power leads to tyranny and oppression. At the same time, the separation of State powers allows for the efficient fulfillment of the various aims entrusted to the State.”⁶¹

30. In this sense, the Inter-American Court finds that “the separation and independence of powers presupposes the existence of a system of control and oversight to constantly regulate the balance of powers.”⁶² This system of “checks and balances” requires, therefore,

⁶⁰ IA Court HR. Advisory Opinion OC-28/21. Presidential Reelection without Term Limits in Presidential Systems in the Context of the Inter-American Human Rights System. June 7, 2021.

⁶¹ IA Court H. R. Presidential reelection without term limits in the context of the inter-American human rights system (Interpretation and scope of Articles 1, 23, 24, and 32 of the American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter). Advisory Opinion OC- 28/21 of June 7, 2021. Series A No. 28, par. 80.

⁶² IA Court H. R. Presidential reelection without term limits in the context of the inter-American human rights system (Interpretation and scope of Articles 1, 23, 24, and 32 of the American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter). Advisory Opinion OC- 28/21 of June 7, 2021. Series A No. 28, par. 82.

the existence of guarantees that allow the branches to act freely and autonomously, without interference or subordination of one to another.

37. Regarding transparency, probity, freedom of the press, and accountability and effectiveness in the exercise of public power:

Thematic reports

Towards the effective guarantee of the rights of children and adolescents: National Protection Systems. OEA/Ser.L/V/II.166. Doc. 206/17.30 November 2017

440. Transparency is a principle that should guide the relationship between the State and all persons under its jurisdiction in the conduct of public affairs. Access to information is a right that undergirds the proper working of democracy, as it is a condition for ensuring other rights, in particular the right to citizen participation in the conduct of public affairs.

442. The principle of active transparency and the right of access to information are crucial in a democratic society, as they facilitate participation, monitoring, and oversight of State activity. They also make it possible to overcome the barrier of the lack access to information as an obstacle to obtaining services for groups in a situation of greater vulnerability, and to keep the information from being used as a way of exercising power, discriminating, proselytizing, or engaging in corruption. In addition, information should be provided on the procedure for consultations and filing complaints. That information should be provided to the public routinely and proactively.

Silenced Zones: Highly Dangerous Areas for the Exercise of Freedom of Expression. OEA/Ser.L/V/II. CIDH/RELE/INF.16/17. March 15, 2017

16. The inter-case law has been consistent in reaffirming that, as a cornerstone of democratic society, freedom of expression is an essential condition for society to be sufficiently informed⁶³; that the

⁶³ I/A Court H.R., Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73. Para. 68.

maximum possible flow of information is a requirement of the common good and that the full enjoyment of freedom of information is what guarantees that maximum flow;⁶⁴ in addition the free circulation of ideas and news is inconceivable without a plurality of sources of information and respect for the media.⁶⁵

145. The media and investigative journalism have become fundamental in the struggle against corruption, abuse of authority, serious human rights violations, and inefficiency in the performance of the Government. In the Americas, journalism plays a fundamental role in ensuring transparency in government activities, probity responsible public administration, respect for social rights, and freedom of expression and of the press.⁶⁶

38. On another hand, it is highlighted particular considerations regarding Economic, Social, Cultural, and Environmental Rights, the promotion and observance of which are inherently linked to integral development, equitable economic growth, and to the consolidation of democracy in the states of the Hemisphere⁶⁷.

⁶⁴ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 77.

⁶⁵ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 78.

⁶⁶ *Inter-American Democratic Charter*: "Article 4. Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy".

⁶⁷ *Inter-American Democratic Charter*, Article 13.

Thematic reports

Situation of Human Rights in Venezuela - "Democratic Institutions, the Rule of Law and Human Rights in Venezuela". OEA/Ser.L/V/II. Doc. 209. 31 December 2017

414. [...] The IACHR reiterates that human rights constitute an indissoluble whole, which is why—even though ESCER are addressed separately based on their specificities—the effective exercise of democracy in any State necessarily presupposes the full exercise of rights and fundamental freedoms for the entire population.⁶⁸ In that regard, the IACHR recalls that “[f]reedom from fear and want necessarily entails the guarantee of civil and political rights. Through popular participation those who are affected by the neglect of their economic and social rights are able to participate in the decisions that concern the allocation of national resources and the establishment of social, educational, and health care programs.”⁶⁹

Third report on the situation of Human Rights in Paraguay. OEA/Ser.L/VII.110. doc. 52. 9 March 2001

4. The preamble to the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador,” expressly acknowledges “the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified.” Along the same lines, the Commission has cited the current President of the Inter-American

⁶⁸ The IACHR recognized several years ago the link between violation of the right to physical security, on one hand, and the denial of economic and social rights and suppression of political participation, on the other. The IACHR has also said that “[a]ny distinctions drawn between civil and political rights and economic, social and cultural rights are categorical formulations that detract from the promotion and guarantees of human rights.” [IACHR, Ten Years of Activities 1971-1981, p. 321. Cited in IACHR, 1993 Annual Report, Chapter V.]

⁶⁹ IACHR, 1993 Annual Report, Chapter V.

Court of Human Rights, Professor Antonio A. Cançado Trindade, who notes as follows:

The denial or violation of economic, social, and cultural rights, materialized, for example, in extreme poverty, affects human beings in all aspects of their lives (including civil and political rights), clearly revealing the interrelation or indivisibility of human rights. Extreme poverty constitutes, ultimately, the denial of all human rights. How can one speak of freedom of expression without the right to education? How can one conceive of the right to enter and leave the country (freedom of circulation) without the right to housing? How can one consider the right to free participation in public life, without the right to adequate food? How can one speak of the right to legal assistance without also taking into account the right to health? And the examples multiply. Clearly, we all experience the indivisibility of human rights in our everyday experience, and that is a reality that cannot be left aside. There is no place for compartmentalization, an integrated vision is needed of all human rights.⁷⁰

[Poverty and Human Rights. OEA/Ser.L/V/II.164. Doc. 147. 7 September 2017](#)

3. Taking into account that human rights are indivisible and interdependent, the Inter-American Commission [...] has emphasized that the violation of economic, social, and cultural rights generally also entails a violation of civil and political rights. Through its various mechanisms, the Commission has observed that the high degree of structural discrimination and social exclusion to which certain groups living in poverty are subjected renders their civic participation, access

⁷⁰ IACHR, Second Report on the Situation of Human Rights in Peru, 2000, Chapter VI, para. 4, citing Cançado Trindade, Antonio A., “*La Justiciabilidad de los derechos económicos, sociales y culturales en el plano internacional*,” published in *Revista Lecciones y Ensayos*, 1997-98, Universidad de Buenos Aires, School of Law and Social Sciences, Abeledo-Perrot, Buenos Aires, 1998, p. 80.

to justice, and their effective enjoyment of human rights illusory.⁷¹ From a human rights perspective, poverty and extreme poverty impair both categories of rights and overcoming them both, therefore, is associated with access to, and satisfaction of, human rights in its widest sense.

108. Article 2 of the Charter of the Organization of American States (OAS) provides that one of the purposes of the Organization is to promote the economic, social, and cultural development of its member states and to eradicate extreme poverty. Likewise, Article 3 of the OAS Charter identifies the elimination of extreme poverty as an essential part of the promotion and consolidation of representative democracy. For its part, Article 34 of the Charter provides that, in the pursuit of integral development, the member states agree to devote their utmost efforts to accomplishing a series of basic goals, including, for instance, proper nutrition and conditions that offer the opportunity for a healthful, productive, and dignified life: fair wages, eradication of illiteracy, housing, etc. Achieving these goals in conditions of equality and in light of human rights constitutes a point of departure for integral development.

109. The Inter-American Democratic Charter, approved in Lima in 2001, highlights the link between the eradication of poverty and the stability and consolidation of democracy. One of its sections focuses specifically on the link between "Democracy, Integral Development, and Combating Poverty" establishing that "democracy and social and economic development are interdependent and mutually reinforcing" (Article 11) and that "[p]overty, illiteracy, and low levels of human development are factors that adversely affect the consolidation of democracy" (Article 12).⁷²

⁷¹ IACHR, Third Report on the Situation of Human Rights in Paraguay, Op. Cit., para. 4

⁷² OAS, Charter of the Organization of American States Inter-American Democratic Charter. It is likewise important to point out that, in the Summits of the Americas framework, States have recognized the universality, indivisibility, interdependence, and interrelatedness of human rights as essential to the functioning of democratic societies. Fifth Summit of the Americas, Port of Spain, Trinidad and Tobago, Declaration of Commitment of Port of Spain, April 17-19, 2009, para. 82, Third Summit of the Americas, Quebec City, Canada, April 20-22, 2001, Plan of Action, p. 5.

93. Experience shows that extreme poverty can seriously impair the democratic institutional framework, as it affects the very essence of democracy and renders citizen participation, access to justice, and the effective enjoyment of human rights in general, illusory. Therefore, in addition to allocating a sufficient budget to implement public policies for the eradication of poverty and the progressive achievement of economic, social, and cultural rights in full, States must be accountable for the appropriate use of these resources.

221. [...] the Inter-American Court analyzes the content of the obligations established in Article 26 of the American Convention and recalls the interdependence between civil and political rights and economic, social, and cultural rights. It finds that they must be understood comprehensively as human rights, with no hierarchy between them and in all cases enforceable vis-a-vis the competent authorities.⁷³

39. Regarding democratic institutions and human rights institutions:

Thematic reports

Pandemic and Human Rights. OEA/Ser.L/V/II. Doc. 396. September 9, 2022

24. The IACHR has understood democratic institutions and human rights institutions as transversal axes through which progress and setbacks in the exercise of political rights and freedoms, the right of association and assembly, freedom of expression and dissemination of thought are verified, as well as the challenges faced by democratic systems. It also includes the monitoring of the instances where public policies are designed, executed and controlled, particularly those related to the promotion, protection and mainstreaming of human rights.

25. The purpose of these axes is also to verify the mechanisms of social participation in order to understand, from a human rights

⁷³ I/A Court H.R., *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 1, 2009, Series C No. 198, para. 101

perspective, the necessary relationship of the population with formal spaces to claim the effective protection of their rights from the State; the State strategies to encourage social participation in the elaboration, implementation and monitoring of public policies; and the provision of permanent instances of dialogue with civil society, respecting its autonomy, free functioning and independence, among other aspects.⁷⁴

Institutional Strategy

Strategic Plan 2017-2021. OEA/Ser.L/V/II.161. Doc. 27/17.20 March 2017

INSTITUTIONALITY IN HUMAN RIGHTS. In order to analyze how public institutions are responding to human rights issues, it will be important to understand how public policies, laws and institutions in general are set up, their characteristics, and how they are linked. Public and state institutions are understood as the spaces in which public policies are designed, executed and overseen; in all these spheres it is essential that the importance of the promotion and protection of human rights is underscored. Public policies incorporating a focus on human rights guide and coordinate state action to protect and promote these rights, focused on solving issues that are politically defined within a social and economic context. Institutional strengthening in human rights is key to achieve full respect for and implementation of inter-American human rights standards.

A complementary aspect to the perspective on institutions and public policies in human rights is the analysis of fiscal policies and the state budget available to finance human rights. It is necessary to consider whether there are resources allocated and whether they respond to structural issues of human rights in accordance with the goals and objectives that they should pursue, whether they are clearly focused on specific aspects to be addressed and whether their execution can be traceable and transparent in order to measure the impact of public policies on human rights. Fiscal policy can contribute to the redistribution of wealth in order to reduce inequalities; to corrections of

⁷⁴ IACHR, *Strategic Plan 2017-2021, OEA/Ser.L/V/II.161, Doc. 27/17, March 20, 2017. Page 39*

market deficiencies and the protection of public property; to the financing of rights according to what is required; and to the promotion of investment in respect for human rights; and to accountability between the State and the public. Those are issues that deserve to be observed given that they directly impact the implementation of human rights. It is important to highlight the importance of the institutional structure of human rights as a State agenda.

C. Rule of Law

40. The IACHR has established that, as a form of political organization for a constitutional State, democracy is based on the principle that political sovereignty is vested in the people who, in exercise of which, elect their representatives, who wield political power, while respecting the rights of those whose views are in the minority. These representatives receive a mandate which they exercise through effective control over public institutions and through the existence of checks and balances between all the branches of government. While the citizens elect their representatives, they also participate in the process of taking decisions. This also entails effective observance of human rights, which requires a juridical and institutional order in which the law takes precedence over the will of those who govern in order to preserve the expression of the popular will through the rule of law.⁷⁵
41. The following IACHR pronouncements illustrate the definition of the rule of law and its principles, which are necessary for democratic governance.

Country reports

Second report on the situation of human rights in Peru. OEA/Ser.L/V/II.106. Doc. 59 rev. 2 June 2000.

1. The validity of rights and freedoms in a democratic system requires a legal and institutional order in which the laws prevail over the will of the rulers, and in which there is judicial control of the constitutionality and legality of the acts of the public power, i.e., it presupposes respect for the rule of law.

⁷⁵ IACHR. *Report on the Situation of Human Rights in Venezuela*. OEA/Ser.L/V/II.118. Doc. 4 rev. 1. 24 October 2003, para. 528.

Report on the situation of human rights in Venezuela. OEA/Ser.L/V/II.118. Doc. 4 rev. 2. 29 December 2003.

526. The definition of the rule of law is based on three fundamental principles. First, the principle of the limitation of power, which is embodied in the constitutional distribution of power. Secondly, the principle of legality, which establishes that the organs of the State must be and act subject to the law. The Constitution is the supreme law, to which all the organs of the State must submit, certainly including the head of the Executive Branch, who cannot ignore its provisions. Finally, the third principle is the declaration of fundamental rights.

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26. The IACHR understands that democratic rule of law, as a form of political power organization, is governed by the separation of powers, among other fundamental principles. It presupposes that the different state functions correspond to separate and independent bodies whose powers are balanced so as to create the limits necessary on the exercise of power and prevent arbitrariness⁷⁶.

Thematic reports

Pandemic and Human Rights. OEA/Ser.L/V/II. Doc. 396. September 9, 2022.

28. The Commission emphasizes that the rule of law in a democratic system implies a division of the functions of the branches of government and, at the same time, a system of controls for the exercise of those functions. This system of institutional control must be guaranteed with particular emphasis in emergency contexts. In this way, it is possible to provide the democratic system with solid foundations and ensure that human rights, although they may be

⁷⁶ IACHR, Nicaragua: Concentration of Power and Undermining of the Rule of Law, OEA/Ser.LV/II. Doc. 288, October 25, 2021, par. 176

limited in accordance with the norms of international human rights law, are not undermined or frustrated in their exercise⁷⁷.

42. Regarding the principle of legality:

Thematic reports

Guarantees for the independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas. OEA/Ser.L/V/II. Doc. 44. 5 December 2013

206. The principle of freedom from ex post facto laws, or principle of legality, is recognized in Article 9 of the American Convention and is one of the pre-eminent principles governing the conduct of all organs of the State in their respective areas of competence, particularly in the exercise of punitive authority.⁷⁸ By virtue of the principle of legality, the definition of an act as unlawful and the determination of its legal effects must precede the conduct of the subject regarded as the offender.⁷⁹ The principle requires a clear definition of the punishable conduct and its distinctive elements, so as to distinguish that conduct from non-punishable behaviors.⁸⁰

43. Regarding the principle of the declaration of fundamental rights:

⁷⁷ IACHR, IACHR Calls to Ensure Democracy and the Rule of Law in the Context of the COVID-19 Pandemic, June 9, 2020

⁷⁸ 8 IA Court H.R. Case of Ricardo Canese v. Paraguay. Judgment of August 31, 2004. Series C No. 111. Para. 176. Citing: IA Court H.R., Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, para. 107.

⁷⁹ IA Court H.R. Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, para. 106. Citing. Eur. Court H.R., Ezelin judgement of 26 April 1991, Series A no. 202, para. 45; and Eur. Court H.R. Müller and Others, judgement of 24 May 1988, Serie A no. 133, para. 29.

⁸⁰ Cf. IA 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 and Cf. Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, paras. 105-107.

Annual reports

Annual Report of the Inter-American Commission on Human Rights, 2006. Chapter IV. Venezuela

208. In this context, the democratic system and the observance of the rule of law are crucial for effective protection of human rights. In accordance with international instruments on human rights. A state in which the rule of law prevails is one that functions soundly and that equitably and effectively fulfils its responsibilities in the areas of justice, security, education, and health. In the final analysis, the rule of law entails full respect and effective exercise of the human, political, economic, social, and cultural rights of the inhabitants of states, ensuring access to better and increased protection of the values of human dignity.

44. Regarding the principle of non-discrimination and equality before the law:

Thematic reports

The road to substantive democracy: women's political participation in the Americas. OEA/Ser.L/V/II. Doc. 79. April 2011

12. The IACHR has established the principle of nondiscrimination is a pillar of any democratic system, and a fundamental basis of the OAS system.⁸¹ Article 3(1) of the OAS Charter establishes as a basic principle that: "The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex." Article 1(1) of the American Convention stipulates that the States Parties to the Convention "undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or other social condition." Moreover, Article II of the American Declaration provides that: "All persons are equal before the

⁸¹ IACHR, Annual Report 1999, "Considerations regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-discrimination," Chap. III, A, 2.

law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.” In furtherance to the principle of nondiscrimination, Article 24 of the above-mentioned Convention recognizes: “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.” These principles have been established in the judicial decisions of the inter-American human rights system

Reports on Merits

Report No. 75/15. Case 12.923. Merits. Rocío San Miguel Sosa and others. Venezuela. October 28, 2015

144. In regard to the principle of equality and non-discrimination established in Articles 24 and 1.1 of the Convention, the Commission and the Inter-American Court have repeatedly held that it constitutes the central and fundamental axis of the Inter-American human rights system. Also, it has been established that it "entails erga omnes obligations of protection that bind all States and generate effect with regard to third parties, including individuals"⁸². The Court has indicated that in the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of jus cogens. On it rests the legal structure of national and international public order, and permeates the entire legal system⁸³.

Report No. 5/14. Case 12.841. Ángel Alberto Duque. Colombia. November 2, 2011.

61. [...] the right to equal protection of the law and non-discrimination imply that States have the obligation to (i) refrain from introducing into their legal system discriminatory regulations or regulations that have discriminatory effects on different groups of a population; (ii) eliminate discriminatory regulations; (iii) combat discriminatory practices; and (iv) establish norms and adopt the necessary measures to recognize and

⁸² I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 173 (5).

⁸³ Cfr. *Juridical Condition and Rights of the Undocumented Migrants*, para. 101, and *Case of Espinoza González v. Peru*. Preliminary Objection, para. 216.

ensure the effective equality of all persons before the law⁸⁴. Moreover, the Court has established that States must refrain from actions that in any way are aimed, directly or indirectly, at creating situations of de jure or de facto discrimination⁸⁵. States are obliged to adopt positive measures to reverse or change existing discriminatory situations in their societies, to the detriment of a certain group of people. This implies the special duty of protection that the State must exercise with respect to the actions and practices of third parties that, under its tolerance or acquiescence, create, maintain or favor discriminatory situations⁸⁶.

D. The main challenges to democracy

45. This section provides a brief overview of the recent state of democratic institutions in the Americas observed by the IACHR. In this regard, the IACHR has observed that in the past, difficulties with respect to governance of citizen security became readily apparent over recent decades when many countries in the Hemisphere began their return to a democratic system of government after years of civil war, authoritarian government, or military dictatorship. Without ignoring the region's longstanding institutional shortcomings, it was felt that the absence of the rule of law during those periods heightened the challenges.⁸⁷

46. In the last five years, in the exercise of its mandate to monitor the human rights situation in the region, the IACHR has recognized that there has been some

⁸⁴ IACHR, *Women's Work, Education and Resources: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights*, OEA/Ser.L/V/II.143, Doc. 59, 3 November 2011, para. 17, citing IACHR Court. *Case of the Yeán and Bosico Girls v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, para. 141; *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, para. 88; *Case of López Álvarez v. Honduras*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 1, 2006. Series C No. 141, para. 170; *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 44.

⁸⁵ Cf. I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 103; *Case of the Xákmok Kásek Indigenous Community. Vs. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010 Series C No. 214, para. 271.

⁸⁶ IACHR Court. *Case of Atala Riffo and Girls v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 80, citing, inter alia, *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18.

⁸⁷ IACHR, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, Doc. 57, December 31, 2009, para. 75.

encouraging progress and commitments that demonstrate the willingness of States to ensure the full enjoyment of human rights in the Hemisphere⁸⁸. However, there are also challenges that highlight the institutional fragility of the rule of law and the need to strengthen democracy in the hemisphere.⁸⁹

47. In particular, the IACHR has been concerned about efforts to discredit democratic institutions as a result of the dissatisfaction of some sectors with election results. It has been observed that, in some cases, these situations have been used to foment instability, to try to remove persons elected by the people and keep certain political groups in power.⁹⁰ Of no lesser importance are the various appeals made by the IACHR to some States to ensure peaceful elections and respect the highest expression of popular sovereignty, adhering strictly to representative democracy and human rights, in accordance with the Inter-American Democratic Charter.⁹¹

48. The rise in authoritarian practices is another trend that has been observed with concern in the region, including the shutting down of democratic spaces, the weakening of national human rights institutions, and the enactment of laws or initiatives that restrict the right of association and the freedom of expression, participation, and peaceful assembly.⁹²

49. Coupled with these practices has been a tendency to undermine the independence of the judiciary in some countries in the region. In this regard, actions by different branches of government have posed serious challenges to the system of checks and balances and put democratic institutions at risk.⁹³ Of particular concern are the

⁸⁸ IACHR, 2017 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, December 31, 2017, para. 10.

⁸⁹ IACHR, 2017 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, December 31, 2017, para. 11.

⁹⁰ IACHR, *Strategic Plan 2023–2027*, OEA/Ser.LV/II.185, Doc. 310, October 31, 2022, p. 24.

⁹¹ Some of the appeals by the IACHR are as follows: IACHR, Press Release No. 180/23, *Ecuador: IACHR Condemns Political Violence and Warns of Attacks on Democracy*, August 11, 2023; IACHR, Press Release No. 163/23, *IACHR Urges State of Guatemala to Guarantee Right to Participate in General Elections and Avoid Undue Interference*, July 21, 2023; IACHR, Press Release No. 155/23, *Venezuela: IACHR Condemns Politically Motivated Persecution of Individuals in Run-Up to Elections*, July 14, 2023.

⁹² IACHR, *Strategic Plan 2023–2027*, OEA/Ser.LV/II.185, Doc. 310, October 31, 2022, p. 24.

⁹³ IACHR, 2022 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, April 1, 2023, para. 6

criminalization of justice operators, as well as threats to their lives, acts of harassment, unwarranted transfers or reassignment of duties, among other reprisals.⁹⁴

50. The IACHR has also observed the closure of democratic spaces and obstacles to the exercise of journalism, as well as violence against defenders, including stigmatizing rhetoric from all areas of the State, murders, harassment, intimidation, criminalization, and increasing attacks on press freedom.⁹⁵
51. Also of concern is the tendency to constrain peaceful protest, including by its criminalization, disproportionate use of force by police and military personnel, arbitrary arrests, use of physical violence, and use of firearms and weapons considered “less lethal.”⁹⁶ This trend worsened dramatically in the context of the COVID-19 pandemic, in which illegitimate restrictions and excessive use of force were adopted in the area of citizen security, which in some States in the region resulted in deaths, serious injuries, and arbitrary arrests of demonstrators and third parties not involved in the protest.⁹⁷ Similarly, the increased frequency or propensity to resort declarations of states of emergency in response to situations affecting citizen security is a matter of concern.⁹⁸
52. The IACHR has also been alarmed by the scourge of corruption, particularly that resulting from the exponential growth and empowerment of organized crime.⁹⁹ The Commission regards as an aggravated phenomenon that undermines the

⁹⁴ IACHR, *Strategic Plan 2023–2027*, OEA/Ser.L/V/II.185, Doc. 310, October 31, 2022, p. 24.

⁹⁵ IACHR, 2022 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, April 1, 2023, para. 8; IACHR, *Strategic Plan 2023–2027*, OEA/Ser.L/V/II.185, Doc. 310, October 31, 2022, p. 24; IACHR, 2021 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, May 26, 2022, para. 11; IACHR, 2020 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, March 30, 2021, para. 12; IACHR, 2019 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, February 24, 2020, para. 9; among others.

⁹⁶ IACHR, 2019 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, February 24, 2020, para. 7; IACHR, 2020 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, March 30, 2021, para. 10 and 11.

⁹⁷ IACHR, 2020 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, March 30, 2021, para. 9.

⁹⁸ IACHR, 2022 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, April 1, 2023, para. 10.

⁹⁹ IACHR, *Strategic Plan 2023–2027*, OEA/Ser.L/V/II.185, Doc. 310, October 31, 2022, p. 24.

construction of democratic and transparent societies and the effective enjoyment of human rights, especially economic, social, cultural, and environmental rights.¹⁰⁰ Therefore, the IACHR has considered as a challenge the persistence of high levels of impunity and corruption in cases of human rights violations, both structural and circumstantial, which have weakened social trust in state institutions.¹⁰¹


53. Lastly, institutional and democratic fragility has also been heightened by the economic crisis triggered by the pandemic, compounded by existing social and economic inequalities and inequities; as well as by high levels of discord and violence, which create a climate of insecurity and directly impact the enjoyment of human rights in the Americas. This has disproportionately serious effects on vulnerable populations traditionally subject to discrimination, such as women, LGBTI persons, Afro-descendants and indigenous people, children and adolescents, older persons, persons with disabilities, migrants and refugees, and people deprived of liberty, among others.

54. Thus, the IACHR has identified two major challenges to the effectiveness of rights and freedoms in democratic systems. On the one hand, is the need to bolster the democratic institutions of States, and on the other is the urgency to strengthen the capacities of the States to implement public policies with a human rights approach that generate concrete impacts in terms of the enjoyment and exercise of those rights for individuals, groups, and communities, with guarantees of equality and justice based on the inherent foundation of human dignity.¹⁰²

¹⁰⁰ IACHR, 2017 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, December 31, 2017, para. 12.

¹⁰¹ IACHR, 2022 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, April 1, 2023, para. 9; IACHR, 2021 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, May 26, 2022, para. 12; IACHR, 2020 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, March 30, 2021, para. 12; IACHR, 2019 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, February 24, 2020, para. 9; IACHR, 2017 Annual Report, Chapter IV, *Section A. Human Rights Developments in the Region*, December 31, 2017, para. 12.

¹⁰² IACHR, *Public policies with a human rights approach*, OEA/Ser.LVII, Doc. 191, September 15, 2018. para. 6.



**III. PRONOUNCEMENTS
AND DECISIONS OF THE
IACHR ON DEMOCRATIC
INSTITUTIONS AND THE
RULE OF LAW**

III. PRONOUNCEMENTS AND DECISIONS OF THE IACHR ON DEMOCRATIC INSTITUTIONS AND THE RULE OF LAW

A. Rule of Law

55. The democratic system and the rule of law are crucial for the effective protection of human rights. Likewise, the full observance of human rights has become an essential part of democracy itself, to the extent that it is inconceivable without them. The following IACHR pronouncements are illustrative of the Commission's decisions on the rule of law, particularly with regard to the the principle of legality and freedom from ex post facto laws; the right of access to justice and due process; the obligation of the States to adapt their law and to incorporate inter-American standards and conventionality control; and states of exception, siege, emergency, or defense.

1. Principle of legality and freedom from ex post facto laws

56. As defined in Chapter 2, the rule of law implies the existence of a legal and institutional order in which the law prevails over the will of the rulers through judicial controls on the constitutionality and legality of the exercise of public power.¹⁰³ Therefore, the principles of legality and freedom from ex post facto laws are suitable mechanisms of the rule of law to govern the actions of the authorities in general, in a clear manner for society. The following pronouncements of the Commission are useful for defining these principles and understanding their scope in a democratic state governed by the rule of law.

Thematic reports

Criminalization of the Work of Human Rights Defenders. OEA/Ser.L/V/II. Doc. 49/15. 31 December 2015

242. The principle of legality comprises two dimensions: formal and material. The formal legality involves the issuance of legal rules adopted by the legislature following the procedure required by the domestic law of each State, enacted for reasons of general interest and the purpose for which they are established. This implies that they

¹⁰³ IACHR, *Report on the Situation of Human Rights in Venezuela*, OEA/Ser.LV/II.118. Doc. 4 rev. 1, October 24, 2003, para. 150; IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.LV/II.106. Doc. 59 rev., June 2, 2000, Chapter II, para. 1, and IACHR, *Democracy and Human Rights in Venezuela*, OEA/Ser.LV/II, Doc. 54, December 30, 2009, para. 180 be observed.

are adopted for the common good.¹⁰⁴ By virtue of this, States must refrain from criminalizing activities that are specific to the promotion and protection of human rights.

243. On the other hand, the material dimension of the principle of legality implies that criminal offenses be formulated unambiguously in strict, precise, and unequivocal terms that clearly define the conduct penalized as punishable crimes, by precisely establishing the elements and factors that distinguish them from other behaviors that are not punishable offenses or are punishable under other criminal offenses.¹⁰⁵

244. Similarly, the Court has stated that "the codification of a crime shall be stated expressly, accurately, taxatively, and previously, even more so when criminal law is the most restrictive and severe means to establish liabilities for illicit behavior, taking into account that the legal framework shall provide juridical certainty to its citizens."¹⁰⁶ In turn, it has stressed that it corresponds to the judge "upon applying criminal law, to strictly abide by the provisions thereof and be extremely

¹⁰⁴ IA Court H.R., Advisory Opinion OC-6/86 of May 9, 1986, the term legislation in Article 30 of the American Convention on Human Rights, Párr.29. According to the Inter-American Court "one cannot interpret the word "laws," used in Article 30, as a synonym for just any legal norm, since that would be tantamount to admitting that fundamental rights can be restricted at the sole discretion of governmental authorities with no other formal limitation than that such restrictions be set out in provisions of a general nature. Such an interpretation would lead to disregarding the limits that democratic constitutional law has established from the time that the guarantee of basic human rights was proclaimed under domestic law. Nor would it be consistent with the Preamble to the American Convention, according to which "the essential rights of man are... based upon attributes of the human personality and... they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states.." para. 26.

¹⁰⁵ IACHR, Report on the Situation of Human Rights in Peru (2000), OAS/Ser.LV/II.106, Doc. 59 rev. 2 June 2, 2000, paras. 80, 168; IACHR, Report on Terrorism and Human Rights, OAS/Ser.LV/II.116, Doc. 5 rev. 1 corr., October 22, 2002, para. 225; IA Court H.R., Castillo Petruzzi et al v. Peru, judgment of May 30, 1999 (merits, reparations and costs), Series C No. 52, para. 121; Cantoral Benavides v Peru. Judgment of August 18, 2000. Series C No. 69, para. 157; Case of Ricardo Canese v. Paraguay. Judgment of August 31, 2004. Series C No. 111, para. 174; Case De la Cruz Flores v. Peru. Judgment of November 18, 2004. Series C No. 115, para. 79; Garcia Asto and Ramírez Rojas v. Peru. Judgment of November 25, 2005. Series C No. 137, para. 188; Usón Ramírez v Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 55.

¹⁰⁶ IA 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; and Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008. Series C No. 177, para. 63.

rigorous when likening the accused person's conduct to the criminal definition, so as not to punish someone for acts that are not punishable under the legal system."¹⁰⁷

245. Regarding the risks posed by the lack of precision in the definition of offenses, the Inter- American Court has noted that "Ambiguity in describing offenses creates doubts and the opportunity for abuse of power, which is particularly undesirable when determining the criminal liability of an individual and punishing the latter with penalties that severely affect fundamental attributes such as life or freedom."¹⁰⁸ The lack of specificity of criminal offenses causes inaccuracies that include broad modalities of participation, changing the characteristics of the crime in question.¹⁰⁹ In failing to comply with these requirements, the principle of legality established in Article 9 of the American Convention is violated.¹¹⁰ The Commission has indicated that compliance with the principle of legality in these terms, allows people to effectively determine their conduct in accordance with the law.¹¹¹ As stated by the IACHR, "the principle of legality has a specific role in the definition of crimes; on the one hand, it guarantees individual liberty and safety by preestablishing the behavior that is penalized clearly and unambiguously and, on the other hand, it protects legal certainty."¹¹²

253. To ensure that the decisions of justice operators are not discretionary, all their actions should be guided by the principle of

¹⁰⁷ I/A Court H.R., *De la Cruz Flores v. Peru*. Judgment of November 18, 2004. Series C No. 115, para. 82; *García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, para. 190.

¹⁰⁸ I/A Court H.R., *Castillo Petruzzi vs. Peru*. Judgment of May 30, 1999. Series C No. 52, para. 121; *Case of Ricardo Canese v Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 174.

¹⁰⁹ I/A Court H.R., *Case of Lori Berenson Mejía v. Peru*. Judgment of November 25, 2004. Series C No.119, paras. 117 and 118.

¹¹⁰ I/A Court H.R., *Castillo Petruzzi v. Peru*. Judgment of May 30, 1999. Series C No. 52, para. 121.

¹¹¹ IACHR, *Report on Terrorism and Human Rights*, OAS/Ser.LV/II.116, Doc. 5 rev. 1 corr., October 22, 2002, para. 225, and Executive Summary, para. 17.

¹¹² IACHR, *Application and Arguments before the Inter-American Court of Human Rights in the case of De la Cruz Flores v Peru*; Cited in: I/A Court H.R., *De la Cruz Flores v. Peru*. judgment of November 18, 2004 (merits, reparations and costs), Series C No. 115, para. 74.

legality. As the Inter-American Court has held: "under the rule of law, the principles of legality and non-retroactivity govern the actions of all the State's bodies in their respective fields, particularly when the exercise of its punitive power is at issue."¹¹³

Reports on Merits (submitted to the Court)

Report No. 9/20. Case 13.378. Merits. Beatriz. El Salvador. March 3, 2020

163. The principle of legality is one of the pillars of the rule of law. The Court has pointed out that "someone can only be punished for what he has done, but never for what the perpetrator is" and, therefore, the principle of legality and the derived non-retroactivity of unfavorable criminal law must be observed by all the organs of the State, in their respective competencies, particularly when it comes to the exercise of their punitive power.¹¹⁴

Reports on Merits

Report No. 460/21. Case 12.721. Ángel Pedro Falanga. Argentina. December 31, 2021

72. The Commission recalls that the principle of legality recognized in Article 9 of the Convention governs the actions of State bodies when they move to exercise their power to punish.¹¹⁵ The Court has indicated that, as a corollary to the principle of legality, pursuant to Article 9 of the Convention, the State is prohibited from exercising its punitive power by retroactively applying criminal laws that increase punishments, establish aggravating factors, or establish aggravated

¹¹³ IA Court H.R., Case of the Cruz Flores v. Peru. Merits, Reparations and Costs. Judgment of November 18, 2004. Series C No.115, para. 80.

¹¹⁴ IA Court H.R., Case of Pollo Rivera et al. Case of Pollo Rivera et al. v. Peru. Merits, Reparations and Costs. Judgment of October 21, 2016. Series C No. 319, para. 218; and Case of Mohamed v. Argentina. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 23, 2012, Series C No. 255, para. 130.

¹¹⁵ IACHR, Criminalization of the Work of Human Rights Defenders, OEA/Ser.LV/Doc.49/15, December 31, 2015, para. 253.

forms of a offense.¹¹⁶ Along these lines, the Court has also established that the same provision underpins the principle of the retroactivity of the most favorable criminal law, on finding that, “If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.”¹¹⁷

[Report No. 43/15. Case 12.632. Merits. Adriana Beatriz Gallo, Ana María Carega and Silvia Maluf de Christin. Argentina. July 28, 2015.](#)

191. On this point, the Commission recalls the Court’s repeated rulings that the freedom from ex post facto laws enshrined in Article 9 of the American Convention is one of the principles that govern the actions of all bodies of the State in their respective fields, particularly when the exercise of its punitive power is at issue.¹¹⁸ In terms of its scope, the Court has ruled that the freedom from ex post facto laws applied not only to criminal matters, but also to administrative sanctions.¹¹⁹

2. Access to justice and due process

57. The Commission has determined that in strengthening the rule of law it is fundamental to have a consolidated administration of justice that inspires confidence in the population, is accessible without discrimination, and can respond to human rights violations, whether committed by state agents or private individuals.¹²⁰ Therefore, rights and guarantees related to access to justice and due process are necessary elements of a democratic rule of law, which the Commission has

¹¹⁶ Inter-American Court. Case of Ricardo Canese v. Paraguay. Merits, Reparations, and Costs. Judgment dated August 31, 2004. Series C No. 111. Par. 175.

¹¹⁷ Inter-American Court. Case of Ricardo Canese v. Paraguay. Merits, Reparations, and Costs. Judgment dated August 31, 2004. Series C No. 111. Par. 178.

¹¹⁸ IA Court H. R., Case of Ricardo Canese v. Paraguay, Judgment of August 31, 2004, Series C No. 111, para. 176, citing: IA Court H. R., Case of Baena Ricardo et al. v. Panama, Preliminary Objections, Judgment of November 18, 1999, Series C No. 61, para. 107.

¹¹⁹ IA Court H. R., Case of Ricardo Canese v. Paraguay, Judgment of August 31, 2004, Series C No. 111, para. 177, citing: IA Court H. R., Case of Baena Ricardo et al. v. Panama, Preliminary Objections, Judgment of November 18, 1999, Series C No. 61, para. 106.

¹²⁰ IACHR, Access to Justice and Social Inclusion: The Path to Strengthening Democracy in Bolivia. OEA/Ser.LV/II, Doc. 34, 28 June 2007, para. 413.

catalogued as the first line of defense of human rights.¹²¹ Inter-American jurisprudence is extensive in this regard; however, it is not the intention of this compendium to provide an exhaustive reproduction of those standards, which could well be subject to another systematization exercise. On the contrary, the following is a selection of standards that demonstrate the close relationship between the rule of law and access to justice and due process, as well as general notions about their scope and content.

Thematic reports

Pandemic and Human Rights. OEA/Ser.L/V/II. Doc. 396. September 9, 2022.

199. Access to justice is an internationally recognized human right and a basic principle of the rule of law. It is fundamental to the realization of other rights, such as the right to liberty, health, education, work, civil and political liberties. International human rights law has developed standards on the right to judicial and other remedies that are suitable and effective to claim for the violation of fundamental rights¹²². In this sense, States have the obligation not to impede access to these remedies, and at the same time to organize the institutional apparatus in such a way that all individuals may have access to these remedies, for which purpose States must remove the normative, social or economic obstacles that prevent or limit the possibility of access to justice.

200. This right is specifically contemplated in Article XVIII of the American Declaration of the Rights and Duties of Man and in Articles 8 and 25 of the American Convention on Human Rights. These articles establish that all persons have the right of access to judicial remedies and the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal when they believe their rights have been violated.

¹²¹ IACHR, Situation of Human Rights in the Dominican Republic, OEA/Ser.LV/II, Doc. 45/15, December 31, 2015, para. 398.

¹²² IACHR, Access to Justice as a Guarantee of Economic, Social and Cultural Rights. Estudio de los estándares fijados por el 366 Sistema Interamericano De Derechos Humanos, OEA/Ser.LV/II129Doc. 4, 7 September 2007. Para. 41

13. [...] the Commission and the Court have held that the right to the truth is directly connected to the rights to judicial guarantees and judicial protection, [...]. Likewise, in some cases the right to the truth is connected to the right of access to information, protected under Article IV of the American Declaration and Article 13 of American Convention.

14. Under those articles, the right to the truth has two dimensions. The first dimension is the right of the victims and their family members to know the truth about the events that led to serious violations of human rights, and the right to know the identity of those who played a role in the violations. This means that the right to the truth creates an obligation upon States to clarify and investigate the facts, prosecute and punish those responsible for cases of serious human rights violations, and, depending on the circumstances of each case, to guarantee access to the information available in State facilities and files concerning serious human rights violations.

15. Secondly, a principle has been established to the effect that the holders of this right are not just the victims and their family members, but also society as a whole. The Commission has maintained that greater society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent recurrence of such acts in the future.

109. Similarly, the organs of the inter-American human rights system have emphasized the fact that these rights enable society to rebuild the past, recognize the mistakes made, make reparation to victims and form the vigorous public opinion that is instrumental in rebuilding democracy and restoring the rule of law.¹²³ The Commission has underscored the fact that “the duty to preserve memory”, as the corollary of the right to the truth, is vitally important in avoiding a

¹²³ IACHR, *Application before the Inter-American Court of Human Rights in Case 11.324, Narciso González Medina v. Dominican Republic*, May 2, 2010, para. 159.

recurrence of violations in the future¹²⁴ and is a guarantee essential to ensure that measures are taken to prevent a recurrence of past events.¹²⁵ Likewise, ensuring the right of access to information in cases of alleged grave violations of human rights is fundamental to dismantling the authoritarian structures that seek to survive the transition to democracy¹²⁶ and is a necessary precondition for

¹²⁴ Cf. IACHR, *Third Report on the Situation of Human Rights in Paraguay*, OEA/Ser.L/VII.110, doc. 52, March 9, 2001, para. 23, citing from IACHR, Report No. 1/99, Case 10480, Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, Fausto García Funes, Andrés Hernández Carpio, José Catalino Meléndez and Carlos Antonio Martínez, El Salvador, January 27, 1999, para. 147. See, also, IACHR, Report No. 13699, Case 10.488, Ignacio Ellacuría, S.J.; Segundo Montes, S.J.; Armando López, S.J.; Ignacio Martín Baró, S.J.; Joaquín López y López, S.J.; Juan Ramón Moreno, S.J.; Julia Elba Ramos and Celina Mariceth Ramos, El Salvador, December 22, 1999; Report No. 37/00, Case 11.481, Monsignor Oscar Arnulfo Romero y Galdámez (El Salvador), April 13, 2000. Similarly, the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* states the following: (i) the inalienable right to the truth: every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations; (ii) the duty to preserve memory: a people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfillment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments; (iii) the victims' right to know: irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate; and (iv) guarantees to give effect to the right to know: States must take appropriate action, including measures necessary to ensure the independent and effective operation of the judiciary, to give effect to the right to know. Appropriate measures to ensure this right may include non-judicial processes that complement the role of the judiciary. *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, February 8, 2005.

¹²⁵ IACHR, *Report of the Special Rapporteur for Freedom of Expression 2009*, OEA/Ser.L/VII.Doc.51, December 30, 2009, Chapter IV, para. 5.

¹²⁶ IACHR, Report of Special Rapporteur for Freedom of Expression, *Access to information on human rights violations. The right of the victims of human rights violations to access information in State archives on such violations*, para. 12, citing the Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic ("Birthler Commission"), reports on activities of the years 1999, 2001, 2009, describing the contribution of the office of the Federal Commissioner to the convictions of guards and other persons involved in murders committed in the former borders of the German Democratic Republic. This commission has also facilitated the seeking of redress on the part of victims of arbitrary detention, political persecution, labor discrimination, illegal confiscation of property, etc. Between 1991 and 2009 more than 2.6 million persons consulted the archives kept by the Federal Commissioner. Information available at: <http://www.oas.org/en/iachr/expression/docs/reports/access/Right%20to%20Access%20Araguaia%202010.pdf>.

promoting accountability and transparency in government, and for preventing corruption and authoritarianism.¹²⁷

Criminalization of the Work of Human Rights Defenders. OEA/Ser.L/V/II. Doc. 49/15. 31 December 2015

176. Also, in accordance with the first of the guarantees stipulated in Article 8 of the American Convention, everyone has the right to a hearing, with due guarantees and within a reasonable time by a competent, independent, and impartial tribunal established before the law, in the determination of any criminal charge against him, or for the determination of his rights and obligations of civil, labor, fiscal, or any other nature. With regard to the reasonableness of the duration, the jurisprudence of the Inter-American Court has indicated that it is necessary to take into account four elements to determine the fairness of such a period: a) the complexity of the matter; b) the procedural activity of the interested party; c) the conduct of judicial authorities; and d) the impairment to the legal situation of the person involved in the proceedings.¹²⁸

Merits reports (submitted to the Court)

Report No. 24/21. Case 13.047. Merits. Miguel Ángel Aguirre Magaña. El Salvador. March 23, 2011

34. Pursuant to articles 8 and 25 of the American Convention, States have an obligation to make effective judicial remedies available to the victims of human rights violations, and they must meet the requirements of the rules of legal due process.¹²⁹ This obligation, which is one of means and not ends, must be assumed by the State

¹²⁷ IACHR, Report of Special Rapporteur for Freedom of Expression. *Report of the Special Rapporteur for Freedom of Expression 2009*, OEA/Ser.L/V/II.Doc.51, December 30, 2009, Chapter IV, para. 5.

¹²⁸ IA Court H.R., Case *Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 112

¹²⁹ Inter-American Court. Case of *Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 14, 2014. Series C No. 287, para. 435

as its own juridical duty and not a simple formality condemned from the start to failure.¹³⁰ Likewise, the IACHR has held as follows:

The judicial investigation must be undertaken in good faith, diligently, exhaustively, and impartially, and must be aimed at exploring all possible lines of investigation to enable the identification of the perpetrators of the crime so they can be tried and punished¹³¹ .

35. As regards States' obligation to act with due diligence, this means facilitating access to suitable and effective judicial remedies to human rights violations. Likewise, for the purposes of guaranteeing the right to access to justice, States have "an obligation to ensure the right of the victims or their families to participate in all phases of the respective proceedings, so that they can make suggestions, receive information, provide evidence, make arguments and, in brief, assert their interests and rights."¹³² The Court has held as follows:

[T]he investigation must be aimed at pursuing, arresting, prosecuting, and punishing both the perpetrators and the masterminds of the facts. Impunity must be eradicated by establishing both general State responsibilities and the individual responsibilities (criminal and other) of its agents or of private parties, such that to comply with this obligation, the State must remove all de facto and de jure obstacles that maintain impunity¹³³ .

¹³⁰ Inter-American Court. Case of García Lucero et al. v. Chile. Preliminary Objection, Merits, and Reparations. Judgment of August 28, 2013. Series C No. 267, para. 161.

¹³¹ IACHR. Report 37/00. Case 11,481. Monseñor Oscar Arnulfo Romero and Galdámez, para. El Salvador. April 13, 2000, para. 80

¹³² IACHR. Thematic report The Right to Truth in the Americas. August 13, 2014, para. 80. Inter-American Court. Case of González Medina and relatives v. Dominican Republic. Preliminary Objections, Merits, Reparations, and Costs. Judgment of February 27, 2012. Series C No. 240, para. 251.

¹³³ Inter-American Court. Case of the Employees of the Fireworks Factory of Santo Antonio de Jesus v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 15, 2020. Series C No. 407, para. 220.

36. Additionally, States have an obligation to ensure investigations are conducted exhaustively and diligently. This means conducting all the inquiries necessary to ensure the victims can learn the truth of all the facts that took place and to ensure those involved in the crimes are punished.¹³⁴ The State must demonstrate that it has conducted an immediate, exhaustive, serious, and impartial investigation¹³⁵ aimed at exploring all potential lines of investigation to enable the identification of the perpetrators of the crime so they can be tried and punished.¹³⁶ Both the IACHR and the Courts have held that States can be held responsible for failure to “order, practice, or evaluate” evidence that could be fundamental for solving the facts.¹³⁷

[Report No. 9/20. Case 13.378. Merits. Beatriz. El Salvador. March 3, 2020](#)

171. Thus, those remedies that, due to the general conditions of the country or even the particular circumstances of a given case, are illusory¹³⁸ cannot be considered effective. This may occur, for example, when their uselessness has been demonstrated by practice, because the Judiciary lacks the necessary independence to decide impartially or because the means to enforce its decisions are lacking; because of any other situation that constitutes a denial of justice, such as when there is an unjustified delay in the decision; or for any other reason, the alleged injured party is not allowed access to the judicial remedy.¹³⁹

¹³⁴ Inter-American Court. Case of Coc Max et al. (Xamán Massacre) v. Guatemala. Merits, Reparations, and Costs. Judgment of August 22, 2018. Series C No. 356, para. 81.

¹³⁵ IACHR. Report 55/97. Merits. Juan Carlos Abella et al. Argentina. November 18, 1997, para. 412.

¹³⁶ IACHR. Report 25/09. Merits. Sebastião Camargo Filho. Brazil. March 19, 2009, para. 109

¹³⁷ Inter-American Court, Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala. Judgment of November 19, 1999. Series C No. 63, para. 230. Also see: IACHR. Access to Justice for women who are Victims of Violence in the Americas. January 20, 2007, para. 41.

¹³⁸ IA Court H.R., Case of López Lone et al. Case of López Lone et al. v. Honduras. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 247.

¹³⁹ IACHR Court. Judicial Guarantees in States of Emergency (arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24.

172. Likewise, within the framework of such recourse, the right of every person to [...] a reasoned decision must be enshrined.¹⁴⁰ In relation to the duty to state reasons, the Inter-American Court has specified that it implies the "externalization of the reasoned justification that allows a conclusion to be reached".¹⁴¹

173. The duty to give reasons for decisions is, therefore, a guarantee linked to the proper administration of justice that protects the right of citizens to be judged by the reasons that the law provides and gives credibility to legal decisions in the framework of a democratic society.¹⁴² The Court added that the requirement that a decision be reasoned is not equivalent to an analysis of the merits of the case, a study that is not essential to determine the effectiveness of the remedy.¹⁴³ However, the reasoning of a decision must make it possible to know what were the facts, motives and norms on which the authority based its decision, in order to rule out any indication of arbitrariness.¹⁴⁴

Reports on Merits

Report No. 43/15. Case 12.632. Merits. Adriana Beatriz Gallo, Ana María Carega and Silvia Maluf de Christin. Argentina. July 28, 2015.

144. The Inter-American Court has ruled that "although Article 8 of the American Convention is entitled 'Judicial Guarantees' [in the Spanish version – 'Right to a Fair Trial' in the English version], its application is not strictly limited to judicial remedies, but rather the procedural requirements that should be observed [...] so that a person may defend

¹⁴⁰ IACHR, Report No. 26/09, Case 12.440, Wallace de Almeida, Brazil, March 20, 2009, para. 119.

¹⁴¹ IA Court H.R., Case of Chaparro Álvarez and Lapo Iñiguez v. Ecuador. Case of Chaparro Álvarez and Lapo Iñiguez v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 107.

¹⁴² IA Court H.R., Case of Chocrón Chocrón v. Venezuela. Case of Chocrón Chocrón v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011, Series C No. 227, para. 118.

¹⁴³ IACHR Court. Case of Castañeda Gutman v. United States of Mexico. Preliminary Objections, Merits, Reparations and Costs, Judgment of August 6, 2008, Series C No. 184, para. 94.

¹⁴⁴ IACHR. Report No. 21/17. Case 11.738. Elba Clotilde Perrone and Juan Jose Preckel. Argentina. March 18, 2017, para. 85.

himself adequately in the face of any kind of act of the State that affects his rights.”¹⁴⁵

145. The Court has also said that although that article does not establish minimum guarantees in matters relating to the determination of rights and obligations of a civil, labor, fiscal, or any other nature, the full range of minimum guarantees stipulated in its second paragraph are also applicable in those areas and, therefore, in matters of that kind, the individual also has the overall right to the due process applicable in criminal matters.¹⁴⁶

[Report No. 458/21. Case 12.880. Merits. Edmundo Alex Lemun Saavedra et al. Chile. December 31, 2021](#)

110. Whenever the death or injury to an individual occurs in violent circumstances, the Commission and the Inter-American Court have held that Articles 8 (judicial guarantees) and 25 (judicial protection) of the American Convention oblige the State to conduct ex officio a serious, impartial and effective investigation without delay, as a fundamental and conditional element for the protection of the rights affected.¹⁴⁷ This obligation under Article 1 (1) of the American Convention, obliges the State to provide a prompt and simple remedy to ensure, inter alia, that those responsible for human rights violations are tried, and to obtain reparation for the harm suffered.¹⁴⁸ Article 2 of the Convention, for its part, requires the State to eliminate rules and practices incompatible with the guarantees provided for in the

¹⁴⁵ I/A Court H. R., Judicial Guarantees in States of Emergency (Arts. 27.2, 25, and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987, Series A No. 9, para. 27.

¹⁴⁶ 3 I/A Court H. R., Case of the Constitutional Court v. Peru, Judgment of January 31, 2001, Series C No. 71, para. 70.

¹⁴⁷ IACHR, Report No. 85/13, Case 12.251, Admissibility and Merits, Vereda la Esperanza, Colombia, November 4, 2013, para. 242; and I/A Court H.R., Case of Kawas Fernández v. Honduras. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 75.

¹⁴⁸ I/A Court H.R., Case of Loayza Tamayo v. Peru. Reparations and Costs. Judgment of November 27, 1998. Series C No. 42, para. 169; Case of Velásquez Rodríguez v. Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1. para. 91.

Convention, as well as to enact laws and to develop practices conducive to the effective and appropriate investigation.¹⁴⁹

113. The Committee recalls that special jurisdictions, such as the military criminal justice system, must be restrictive and exceptional in scope and must be aimed at protecting special legal interests linked to the entity itself.¹⁵⁰ For its part, the Inter-American Court has analyzed the structure and composition of special tribunals, such as military courts, in the light of the United Nations Basic Principles on the Independence of the Judiciary. Some relevant factors are: i) the fact that its members are officers in active service and are subordinated hierarchically to their superiors through the chain of command; (ii) the fact that their appointment is not dependent on professional competence and suitability to perform judicial functions; and (iii) the fact that they do not have sufficient guarantees of stability. This has led to the conclusion that such courts lack independence and impartiality to hear cases involving human rights violations.¹⁵¹

114. Taking into consideration the above criteria, the Commission and the Inter-American Court have referred to the incompatibility of the American Convention with the use of the military criminal jurisdiction to clarify potential human rights violations, and the difficulties in ensuring independence and impartiality whenever the armed forces themselves are "charged with judging their own peers for the execution of civilians".¹⁵² Thus, in the case of special jurisdictions, such as military courts, the Inter-American Court has pointed out that only active soldiers

¹⁴⁹ IA Court H.R., Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154., para. 118; and 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. 85.

¹⁵⁰ IACHR. Report 53/01. Case 11.565. Ana, Beatriz and Cecilia González Pérez. Mexico. April 4, 2001, para. 81

¹⁵¹ IA Court H.R., Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs. Judgment of November 22, 2005, Series C, No. 135, paras.155-156

¹⁵² 2 IACHR. Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. 2007. Para. 167; IA Court H.R., Case of Las Palmeras v. Colombia. Merits. Judgment of December 6, 2001. Series C No. 90, para. 53; IACHR, Report on the Situation of Human Rights in Peru (OEA/Ser.LV/II.106), June 2, 2000.

must be tried “for the commission of crimes or offences based on their own nature threaten the juridical rights of the military order itself.”¹⁵³

Friendly settlements

Report No. 83/20. Case 11,626 C. Friendly Settlement Report. Santo Enrique Cañola González, Ecuador. June 1, 2020

18. In this regard, the IACHR reminds the State, that is a standard established in the jurisprudence of the Inter-American human rights system, to consider “that the amnesty provisions, the statute of limitations provisions and the establishment of exclusionary liability that seek to prevent the investigation and punishment of those responsible for gross human rights violations such as torture, summary, extralegal or arbitrary executions and enforced disappearances, all of which are prohibited for violating non-derogable rights recognized by International Human Rights Law¹⁵⁴ . [...]

Annual Reports

Annual Report of the Inter-American Commission on Human Rights, 2009, Chapter IV. Cuba

238. Jurisprudence in the Inter-American System has consistently sustained that all the bodies that exercise functions of a materially jurisdictional nature have a duty to adopt fair decisions based on full respect for the guarantee of due process. The American Declaration stipulates that everyone has the right to a fair trial¹⁵⁵, the right of protection from arbitrary arrest¹⁵⁶ and the right to due process of law¹⁵⁷. These rights form part of what is known as the body of

¹⁵³ IA Court H.R., Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, para. 272.

¹⁵⁴ Inter-American Court of Human Rights, Case Barrios Altos v. Peru, Judgment of March 14, 2001, Merits. Par. 41.

¹⁵⁵ American Declaration, Article XVIII.

¹⁵⁶ American Declaration, Article XXV.

¹⁵⁷ American Declaration, Article XXVI.

guarantees of due legal process, the minimum guarantees applying to any whom being as far as any kind of judicial process is concerned.

Country reports

[Situation of Human Rights in the Dominican Republic. OEA/Ser.L/V/II. Doc. 45/15. 31 December 2015](#)

423. When interpreting the provisions of the American Convention, the organs of the IAHRs have made headway toward identifying certain minimum standards of due process of law that must govern administrative proceedings [...]. The following are some of those procedural guarantees: 1) prior notification of the existence of the proceeding; 2) a hearing for a determination of the rights at stake; 3) the right to be assisted by counsel; 4) the right to put on a defense and to have a reasonable period of time to prepare and formalize the arguments and produce the relevant evidence; 5) the right to have the proceedings and decisions in writing; 6) a reasonable period for the proceedings; 7) the right to effective judicial review of administrative decisions; 8) the right to a reasoned judgment; 9) the right to have the administrative proceedings made public, and others.¹⁵⁸

[Access to Justice and Social Inclusion: The Road towards strengthening Democracy in Bolivia. OEA/Ser.L/V/II. Doc. 34. 28 June 2007](#)

68. [...] This right presupposes that there is a judicial system that covers as much as possible of the national territory, in accordance with the population census. While the Commission recognizes that full judicial coverage is a complex task that requires a great budgetary effort, the State must take all measures within its power to achieve this. In light of the State's obligation to guarantee access to justice for all persons within its jurisdiction, it is unacceptable that there should be no judges in more than half of the municipalities.

¹⁵⁸ IACHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards adopted by the Inter-American System of Human Rights*, para.97; IACHR, *Access to justice for women victims of sexual violence in Mesoamerica*, OEA/Ser.L/V/II. Doc. 63, December 9, 2011. See also, United Nations, *Human Rights and Arbitrary Deprivation of Nationality*. AHRC/13/34, para. 43.

[Fifth Report on the Situation of Human Rights in Guatemala. OEA/Ser.L/V/II.111. Doc. 21 rev. 6 April 2001.](#)

15. As with other rights under the American Convention, the right to judicial protection and guarantees must be realized on a nondiscriminatory basis, pursuant to Article 1(1). Article 24 further specifies that “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

[Situation of Human Rights in the Dominican Republic. OEA/Ser.L/V/II. Doc. 45/15. 31 December 2015](#)

415. The organs of the Inter-American System have observed that under the principle of non-discrimination recognized in Article 1(1) of the American Convention, members of at-risk groups must be guaranteed access to justice, making it imperative “that States offer effective protection that considers the particularities, social and economic characteristics, as well as the situation of special vulnerability, customary law, values, customs, and traditions.”¹⁵⁹

[Justice and Social Inclusion: The challenges of Democracy in Guatemala. OEA/Ser.L/V/II.118. Doc. 5 rev. 1. 29 December 2003](#)

236. [...] Access to justice on the part of [...] Indigenous populations includes two different aspects. On the one hand access to State justice, and on the other, recognition and respect for Indigenous rights; both systems must be compatible with internationally recognized human rights. [...].

[Second Report on the Situation of Human Rights in Peru. OEA/Ser.L/V/II.106. Doc. 59 rev. 2 June 2000.](#)

235. The practice of failing to enforce judicial sentences, in addition to gravely undermining the rule of law, violates the right to effective judicial protection, set forth at Article 25 of the American Convention.

¹⁵⁹ IACHR. *Truth, Justice and Reparation – Report on the Situation of Human Rights in Colombia*, December 31, 2013, para. 203; IA Court H.R., *Case of Rosendo Cantú et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2010. Series C No. 216, para. 184; and *Case of Fernández Ortega et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2010. Series C No. 215, para. 200.

[Article 25 provides that the States Parties undertake to guarantee implementation, by the competent authorities, of all the decisions in which the judicial remedies pursued with respect to acts that violate fundamental rights of persons recognized in the Constitution, the law, or the Convention have been deemed legitimate]. A fundamental premise of the administration of justice is the binding nature of the decisions adopted in the judicial determination of citizens' rights and obligations, which must be carried out, recurring to the security forces if necessary, even though they entail the liability of the State organs.

[Situation of Human Rights in Venezuela - "Democratic Institutions, the Rule of Law and Human Rights in Venezuela". OEA/Ser.L/V/II. Doc. 209 31. December 2017](#)

251. The Commission reiterates its utmost rejection of any act of torture or cruel, inhuman and degrading treatment, especially when it appears to have become commonplace, as in this instance. It would remind the State, that the prohibition of torture and cruel, inhuman and degrading treatment is a *ius cogens* norm of international law.¹⁶⁰ That prohibition is enshrined in Articles XXV and XXVI of the American Declaration as well as in Article 5 of the Inter-American Convention to Prevent and Punish Torture.¹⁶¹ Furthermore, the Commission reiterates that this peremptory prohibition of any form of torture is the corollary of the State's duty to treat everyone deprived of their liberty humanely and with respect for their dignity.¹⁶² The Commission emphasizes that the investigation of cases of torture and cruel, inhuman and degrading treatment “must be conducted *ex officio* and be governed by the principles of independence, impartiality, competence, diligence, and

¹⁶⁰ IACHR, 2014 Annual Report, Chapter IV.B, Venezuela, para. 23; Report No. 84/13, Case 12.482, Merits, Valdemir Quispialaya Vilcapoma, Peru, para. 95; and Report on the Human Rights of Persons Deprived of Liberty in the Americas, OEA/Ser.LV/II. Doc. 64, December 31, 2011, para. 332.

¹⁶¹ That provision states: “The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture. Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.”

¹⁶² IACHR, 2014 Annual Report, Chapter IV.B, Venezuela, para. 23.

promptness,”¹⁶³ and that “in cases involving persons deprived of liberty, the State's duty to investigate has to meet a higher standard,”¹⁶⁴ since they are in its custody.

[Report on the Situation of Human Rights in Venezuela. OEA/Ser.L/V/II.118. Doc. 4 rev. 2. 29 December 2003.](#)

191. The rule of law is largely upheld by ensuring that the justice system has no tolerance for impunity. As the Inter-American Commission has said: “impunity is one of the serious problems in the administration of justice in the hemisphere.”¹⁶⁵ The Inter-American Court has defined impunity as “the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention.”¹⁶⁶

204. The Commission understands that impunity is upheld on both a *de jure* basis (through amnesty laws, for example) and a *de facto* basis, through the failure to investigate and punish the perpetrators of human rights violations. *De facto* impunity can also arise for structural reasons, such as excessive formalism on the part of judges or a shortage of resources for tackling the number of crimes reported, or it can be caused by factual situations, such as interference in investigations or proceedings driven by political imperatives. In all these cases, be they *de jure* or *de facto*, the State fails to comply with its obligations set by the Convention in Articles 8, 25, and 1(1), whereby it is required to prosecute and punish the perpetrators of human rights violations.

¹⁶³ IACHR, Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas, OEA/Ser.L/V/II.163, Doc. 105, July 3, 2017, para. 193; and Report on the Human Rights of Persons Deprived of Liberty in the Americas, OEA/Ser.L/V/II. Doc. 64, December 31, 2011, para. 345.

¹⁶⁴ IACHR, Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas, OEA/Ser.L/V/II.163, Doc. 105, July 3, 2017, para. 193; and Report on the Human Rights of Persons Deprived of Liberty in the Americas, OEA/Ser.L/V/II. Doc. 64, December 31, 2011, para. 347

¹⁶⁵ IACHR, *Second Report on the Situation of Human Rights in Peru*, Annual Report 1999, Chapter II, paragraph 255.

¹⁶⁶ Inter-Am.Ct.H.R., Paniagua Morales *et al.* Case, Judgment of March 8, 1998, paragraph 173. See also: Loayza Tamayo Case, Judgment of November 27, 1998, paragraph 170.

205. Impunity gives rise to international responsibility on the part of the State; this applies even to crimes committed by common criminals who are not state agents when the State does not meet its international obligation of pursuing a serious, impartial, and effective investigation into the incident with the aim of punishing the guilty. This omission also places the State under the obligation of indemnifying the victims or their next-of-kin for the violation of their human rights implied by the State's failure to provide a proper investigation of the incident, irrespective of whether or not the perpetrators were state agents.

[Third report on the situation of Human Rights in Paraguay. OEA/Ser./L/VII.110.doc. 52.9 March 2001](#)

3. The problem of high levels of impunity, as the Commission has held, transcends the fact that numerous individual crimes remain in impunity, and becomes a situation in which the very life and culture of the nation are impacted, affecting not only persons who have been the victims of human rights violations or other crimes, but also society in general.¹⁶⁷

9. Impunity thus entails a grave violation of a state's duties, and involves a sort of vicious circle that tends to recur and become perpetuated, increasing the occurrence of crimes, mostly violent crimes.¹⁶⁸ Impunity gives rise to a situation of injustice such that many people opt to take justice into their own hands, leading to incidents entailing new violations of fundamental human rights, such as assassinations and lynchings.

[Situation of Human Rights in Brazil. OEA/Ser.L/V/II. Doc. 9. 12 February 2021](#)

357. Here, the Commission reiterates the doctrine and jurisprudence of the organs of the inter-American system that "impunity fosters chronic recidivism of human rights violations, and total defenselessness of

¹⁶⁷ IACHR, Third Report on the Human Rights Situation in Colombia, 1999, Ch. V, para. 16.

¹⁶⁸ See, in this respect, the Commission's considerations in its Third Report on the Human Rights Situation in Colombia, *op. cit.*, Ch. V, para. 16.

victims and their relatives.”¹⁶⁹ Thus, failure to investigate human rights violations and to indict the perpetrators transcends the individual right of victims and their next of kin to justice and truth, because it becomes an incentive to repeat those violations.

360. Accordingly, the IACHR maintains that it is vital for States to combat impunity in respect of human rights violations as a core feature of their political agenda, which needs to be espoused by State bodies across the board, and to accompany that agenda with a budget appropriation that will enable justice system organs to have the human and technical resources and the organizational structure they need to be able to investigate, prosecute, and punish those responsible for human rights violations. In its report on Citizen Security and Human Rights, the IACHR stressed that “the shortages in this area have always been one of the causes of impunity and of the mistrust in the system of the administration of justice in the Hemisphere.”¹⁷⁰

3. Obligations of States as regards adaptation of their laws, incorporation of inter-American standards, and conventionality control

58. Article 2 of the American Convention establishes international obligations with respect to the domestic legal frameworks of States upon their ratification of the American Convention.¹⁷¹ That provision states: “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.”¹⁷²

¹⁶⁹ IA Court of H.R., Case of the “White Van” (Paniagua-Morales et al.) v. Guatemala, Judgment of March 8, 1998. Series C N° 37, par. 173.

¹⁷⁰ IACHR. Report on Citizen Security and Human Rights, OEA/Ser.LV/II. Doc. 57, approved on December 31, 2009, par. 112.

¹⁷¹ In accordance with the principles of international law, States may not invoke their domestic law to avoid meeting obligations assumed under international instruments.

¹⁷² *American Convention on Human Rights* (Pact of San José), San José, Costa Rica, November 7 to 22, 1969, Article 2.

59. Under the provisions of this article, States Parties are required to adapt their domestic legal system in order to do away with any norms that contravene the international obligations adopted, as well as to identify such legislative and institutional measures that may have to be adopted to ensure that the rights recognized in the American Convention are respected and guaranteed.¹⁷³ Therefore, the obligation of the States to adapt their domestic legislation to the standards of the inter-American system has long been the subject of recommendations by the IACHR, which has concluded that provisions of domestic law contrary to the American Convention have no legal effect.¹⁷⁴

60. For its part, the Inter-American Court has referred to this obligation by developing the concept of conventionality control, starting with the judgment in the case of *Almonacid Arellano v. Chile* in 2006, in which it established that “domestic judges and courts are bound to respect the rule of law and, therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws, which run counter to its purpose and that do not have any legal effects since their inception. In other words, the Judiciary must exercise a sort of ‘conventionality control’ between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.”¹⁷⁵

¹⁷³ This obligation applies to all State authorities, since the obligation to respect and ensure rights under Articles 1(1) and 2 of the Convention falls on the State, and therefore its fulfillment cannot be subject to the division of areas of authority established by domestic law. Likewise, authorities in hierarchically superior positions must also make the necessary adjustments with respect to the actions of other officials.

¹⁷⁴ In its first reports, the Commission referred to this matter on the basis of the incompatibility of amnesty laws with the conventional obligations assumed by States in cases of serious human rights violations. See IACHR, *Compendium on the Obligation of States to Adapt Their Domestic Legislation to the Inter-American Standards of Human Rights*, OEA/Ser.L/V/II. Doc. 11, January 25, 2021, para. 17.

¹⁷⁵ IA Court H.R., *Case of Almonacid-Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations and Costs*, Judgment of September 26, 2006, Series C No. 124. para. 124.

61. The IACHR recalls that the need to adapt domestic legislation to international obligations arises from the principles of public international law, as well as from the Vienna Convention on the Law of Treaties. Thus, States must comply in good faith with the treaties to which they are parties, taking into account their object and purpose, refraining from invoking provisions of domestic law as a basis for non-compliance with their international commitments.¹⁷⁶ In addition, the Inter-American Court has established: “Based on the provision of the Convention that is interpreted by the issue of an advisory opinion, all the organs of the OAS Member States, including those that are not party to the Convention but have undertaken to respect human rights under the Charter of the OAS (Article 3(I)) and the Interamerican Democratic Charter (Articles 3, 7, 8 and 9), have a source that, in accordance with its inherent nature, also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights and, in particular, constitutes a guideline when deciding matters relating to the respect and guarantee of human rights [...]”¹⁷⁷ For its part, the Commission has made an important effort to systematize its standards regarding this obligation.¹⁷⁸ Therefore, below are some excerpts that are considered relevant for a better understanding of this obligation under a democratic rule of law.

Annual Reports

Annual Report of the Inter-American Commission on Human Rights, 2013, Chapter IV.A Human rights development in the region

72. The efficacy of the IAHRs requires not only that victims of human rights violations have full access to the human rights defense and protection mechanisms afforded by the IACHR and the InterAmerican Court of Human Rights, but also that domestic authorities properly incorporate and enforce inter-American standards. The obligation to

¹⁷⁶ IACHR, *Compendium on the Obligation of States to Adapt Their Domestic Legislation to the Inter-American Standards of Human Rights*, OEA/Ser.LV/II. Doc. 11, January 25, 2021, para. 26.

¹⁷⁷ IA Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights) Advisory Opinion OC-24/17 of November 24, 2017, Series A No. 24.

¹⁷⁸ IACHR, *Compendium on the Obligation of States to Adapt Their Domestic Legislation to the Inter-American Standards of Human Rights*, OEA/Ser.LV/II. Doc. 11, January 25, 2021.

incorporate those standards follows, inter alia, from the preamble to the American Declaration,¹⁷⁹ Article 2 of the American Convention¹⁸⁰, Articles 26 and 27 of the Vienna Convention on the Law of Treaties¹⁸¹ and the fundamental principles of the OAS Charter

73. As expressed in the preamble to the American Convention, the IAHRs is based on the principle of complementarity¹⁸² whereby the member States are the principal parties responsible for preventing human rights violations and ensuring their effective enjoyment by all persons subject to their jurisdiction.

74. When they accede to the instruments that govern the Inter-American Human Rights System, member States pledge that their domestic organs and authorities shall ensure that the interAmerican standards take precedence in the event of conflict with domestic law. This maxim depicts what the Inter-American Court has called “conventionality control.” Although the expression was first used in the IAHRs in the judgment delivered in the Case of Almonacid Arellano et al. v. Chile,¹⁸³ the gist of this principle was already present in previous pronouncements by the Inter-American Court and the Inter-American

¹⁷⁹ The preamble of the American Declaration states that “[t]he affirmation of essential human rights by the American States together with the guarantees given by the internal regimes of the states establish the initial system of protection considered by the American States as being suited to the present social and juridical conditions ...”

¹⁸⁰ While Article 1(1) of the American Convention establishes the States’ obligation to ensure to all persons subject to their jurisdiction the free and full exercise of the rights and freedoms recognized therein, Article 2 provides that “[w]here 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 ...”

¹⁸¹ Article 26 of the Vienna Convention on the Law of Treaties enshrines the general principle of International Law – *pacta sunt servanda*, as it provides that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” On the other hand, Article 27 states that “[a] party [to the Vienna Convention] may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

¹⁸² In the preamble to the American Convention, international protection of the essential rights of the person is “in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states.”

¹⁸³ IA Court H.R. Case of Almonacid Arellano et al. v. Chile. Judgment of September 26, 2006. Series C No. 154, paragraph 124.

Commission, whereby they asserted that domestic provisions clashing with the American Convention have no legal effects. In early 1990s, the Inter-American Commission had already held, for instance, that amnesty laws enacted in Argentina¹⁸⁴, Uruguay¹⁸⁵, Guatemala¹⁸⁶ and El Salvador¹⁸⁷ were incompatible with the obligations to investigate and punish serious human rights violations.

75. In judgments recently handed down by the Inter-American Court, it has defined the scope of the obligation to exercise *ex officio* conventionality control as follows:

When a State has ratified an international treaty such as the American Convention, the judges are also subject to it; this obliges them to ensure that the effect of the Convention is not reduced or annulled by the application of laws contrary to its provisions, object and purpose. In other words, the organs of the Judiciary should exercise not only a control of constitutionality, but also of “conventionality” *ex officio* between domestic norms and the American Convention; evidently in the context of their respective spheres of competence and the corresponding procedural regulations¹⁸⁸.

The Judiciary, at all levels, must exercise *ex officio* a form of “conventionality control” between domestic legal provisions and the American Convention, obviously within the framework of their respective competences and the corresponding procedural regulations. In this task, the Judiciary must take into account not

¹⁸⁴ IACHR, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 v. Argentina, Report No. 28/92 of October 2, 1992.

¹⁸⁵ IACHR, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375 v. Uruguay, Report No.29/92 of October 2, 1992.

¹⁸⁶ IACHR, Annual Report of 1996, Chapter V, Human Rights Development in the Region, section on Guatemala.

¹⁸⁷ IACHR, Massacre of Las Hojas v. El Salvador, Report No. 26/92, September 24, 1992.

¹⁸⁸ IA Court H.R. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Judgment of November 24, 2006. Series C No. 158, paragraph 128, citing the Case of Almonacid Arellano et al. v. Chile. Judgment of September 26, 2006. Series C No. 154, paragraph 124.

only the treaty itself, but also the interpretation thereof by the InterAmerican Court, which is the ultimate interpreter of the American Convention¹⁸⁹.

86. Although the information the IACHR received indicates that in a minority of the countries of the region specific guidelines have been issued by the Judicial Branch for incorporation of inter-American standards, both the States and civil society organizations described countless decisions, delivered for the most part by lesser courts, in which they performed ex officio a kind of conventionality control of the provisions of domestic laws. Despite the increase in the number of justice operators who regularly invoke inter-American standards in their rulings, it has occasionally happened that the disciplinary organs within the justice systems of some countries have instituted administrative proceedings against judges who fail to cite judicial precedents or cite legal provisions that are patently contrary to inter-American standards. For the IACHR, such examples demonstrate that the process of making conventionality control standard practice in the daily activities of magistrates requires not only their training and initiative, but also that specific guidelines be adopted to ensure the possibility of harmonizing a country's domestic legal system with its international human rights obligations.

Thematic reports

Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15. 31 December 2015

42. On the other hand, Article 2 of the American Convention establishes the general obligation to adapt domestic legislation to the provisions of the American Convention. This duty implies that each State party has to

¹⁸⁹ I/A Court H.R. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, paragraph 225, which cites the case of Rosendo Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2010. Series C No. 219, and the case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations and Costs. Judgment of September 1, 2010. Series C No. 217, paragraph 202.

bring its domestic laws in line with the provisions hereof to guarantee the rights recognized therein, which implies that the measures provided for in the domestic law must be effective (principle of *effet utile*).¹⁹⁰ This duty implies on the one hand, the suppression of rules and practices of any kind that entail the violation of the guarantees established in the Convention and, secondly, the adoption of laws and the development of practices leading to the effective observance of those guarantees.¹⁹¹ In sum, the obligations contained in Articles 1.1 and 2 of the Convention provide the basis for determining international responsibility of a State for violations of that instrument, and reflect not only negative obligations, but also clear positive obligations to ensure respect for human rights within its jurisdiction.

Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System. OEA/Ser.L/V/II. Doc. 46/15 31 December 2015

180. As the IACHR observed [...], the principal objectives of the Inter-American Human Rights System and the principle of efficacy demand that the rights and freedoms recognized in the American Convention are observed and are practiced. Therefore, when the exercise of any of the rights recognized in the American Convention are not yet guaranteed de jure and de facto within their jurisdiction, States parties have an obligation, under Article 2 of the Convention, to adopt the legislative or other measures necessary to give effect to those rights or freedoms.

Country reports

Situation of Human Rights in the Dominican Republic. OEA/Ser.L/V/II. Doc. 45/15 31 December 2015

¹⁹⁰ IA Court. "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. 87; and Case of Heliodoro Portugal v Panama. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 186, para. 179

¹⁹¹ IA Court. Castillo Petruzzi et al vs. Peru. Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52, para. 207, and Case Mendoza et al v Argentina. Preliminary Objections, Merits and Reparations. Judgment of May 14, 2013 Series C No. 260. para. 293.

219. The Commission must point out that the organs of the Inter-American System are not called upon to examine the domestic laws of each State as a function of its Constitution; instead, they must perform a “conventionality control”, i.e., an analysis of the alleged incompatibility of those domestic laws, practices and decisions with the States Party’s international obligations under the American Convention.¹⁹² In this regard, both the Commission and the Court have ruled on the incompatibility of State’s laws, court rulings and/or practices practice with the American Convention¹⁹³.

Situation of Human Rights in Mexico. OEA/Ser.L/V/II. Doc. 44/15. 31 December 2015

84. Secondly, to implement the conventionality control as established by the InterAmerican Court of Human Rights, it is indispensable to unify judicial criteria in terms of human rights. This becomes particularly relevant for federal countries such as Mexico, as the possibility of disparate application of the same concepts, principles, and standards is multiplied at the federal level, on the one hand, and the state level, on the other.

86. Notably, the conventionality control, in the terms established by the InterAmerican Court, is binding also for military, administrative, and

¹⁹² IA Court H.R., Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2010. Series C No. 219. Para. 49.

¹⁹³ IA Court H.R. Case of Baena Ricardo et al. v. Panama. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 2nd, 2001. Series C No. 72, par. 126; IA Court H.R. Case of “The Last Temptation of the Christ” (Olmedo Bustos et al.) v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 5th, 2001. Series C No. 73, par. 88; IA Court H.R. Case of La Cantuta v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 29th, 2006. Series C No. 162, para. 174. ; IA Court H.R. Case of Boyce et al. v. Barbados. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20th, 2007. Series C No. 169, para. 77 and 78.; IA Court H.R. Case of Xákmok Kásek indigenous community v. Paraguay. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 24th , 2010. Series C No. 214, par. 313.; IA Court H.R. Case of Fernández Ortega et al. v. Mexico. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 30th, 2010. Series C No. 215, para. 237.; IA Court H.R. Case of Rosendo Cantú et al. v. Mexico. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31st, 2010. Series C No. 216, para. 220.; IA Court H.R. Case of López Mendoza v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 1st , 2011. Series C No. 233 par. 228; IA Court H.R. Case of Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28th, 2012. Series C No. 257.

labor tribunals, and for all public authorities, and therefore the justice operators that work at these entities should also receive the same level of training.¹⁹⁴ [...]

513. The Inter-American Court and Commission have highlighted the importance of courts and other State entities related to the administration of justice apply criteria that are consistent among one another and in accordance with international human rights standards.¹⁹⁵ [...]

Friendly settlements

Report No. 71/07. Petition 758-01 and Others. Friendly Settlement. Hernán Atilio Aguirre Moreno and Others. Peru. July 27, 2007

17. The Commission understands that the subsidiary nature of the inter-American human rights system requires that, in view of the recognition of international responsibility and the multiple friendly settlement agreements approved by this Commission, the State should adopt at the domestic level a comprehensive solution to the situation of all the prosecutors and judges who have not been ratified. To this end, and in accordance with Article 41 of the American Convention, it requests the State to [...] submit to the Commission a proposal for a comprehensive solution to the situation [...].

4. States of emergency

62. Very early in its existence, the Inter-American Commission recognized the importance of maintaining the rule of law and constitutional law when invoking states of emergency. Thus, from the outset, it established a fundamental requirement: a state of emergency can only be invoked to preserve democracy. In that regard, it determined that the suspension of constitutional guarantees and martial law are only compatible with representative democracy if they do not restrict the validity of the

¹⁹⁴ I.A. Court H.R., *Gelman v. Uruguay. Merits and Reparations*. Judgment of February 24, 2011. Series C No. 221, para. 193.

¹⁹⁵ I/A Court H.R., *Cabrera García and Montiel Flores Vs. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 26, 2010. Series C No. 220, paras. 225, 233; I/A Court H.R., *Gelman Vs. Uruguay. Merits and Reparations*. Judgment of February 24, 2011. Series C No. 221, para. 239.

rule of law or constitutional law, nor alter the authorities of the branches of government or the functioning of checks and balances.¹⁹⁶

63. The following IACHR pronouncements illustrate the requirements that a state of emergency or exception must meet in order to remain within the bounds of democratic rule of law and avoid arbitrary practices.

Country reports

[Second Report on the Situation of Human Rights in Peru. OEA/Ser.L/V/II.106.Doc. 59 rev. 2 June 2000.](#)

69. As regards the requirements for declaring a state of emergency, the Inter-American Court has indicated that a legal analysis of Article 27 of the Convention:

The starting point for any legally sound analysis of Article 27 and the function it performs is the fact that it is a provision for exceptional situations only. It applies solely "in time of war, public danger, or other emergency that threatens the independence or security of a State Party." And even then, it permits the suspension of certain rights and freedoms only "to the extent and for the period of time strictly required by the exigencies of the situation." Such measures must also not violate the State Party's other international legal obligations, nor may they involve "discrimination on the ground of race, color, sex, language, religion or social origin."¹⁹⁷

70. The requirements for declaring a state of emergency are as follows:

Need: Pursuant to Article 27 of the Convention, in order to consider that there is a real emergency, there must be an extremely grave situation, such as war, public danger, or other emergency that threatens the independence or security of the State party. The Commission has established that measures

¹⁹⁶ IACHR, 2016 Annual Report 2016. Chapter IV, [Section B. Venezuela](#), March 15, 2017, para. 55.

¹⁹⁷ Inter-American Court of Human Rights, [Habeas Corpus in Emergency Situations...](#), op. cit., para. 19.

related to a state of emergency "can only find a justification in the face of real threats to public order or state security."¹⁹⁸

Time: This requirement refers to the duration of the suspension, which, as established in Article 27(1) of the Convention, should be only for the time strictly limited to the exigencies of the situation. The Commission has warned that it is even more serious to decree states of emergency for indefinite or prolonged periods, especially when they allow broad powers to be concentrated in the head of state, including the judicial branch abstaining with respect to the measures decreed by the Executive, which in certain cases may lead to the exact opposite of the rule of law.¹⁹⁹

Proportionality: Article 27(1) of the Convention provides that the suspension may only be effectuated to the extent strictly limited to the exigencies of the situation. This requirement refers to the prohibition on the unnecessary suspension of certain rights, imposing restrictions more severe than necessary, and unnecessarily extending the suspension to areas not affected by the emergency.

Non-discrimination: As established in Article 27(1) of the Convention, consistent with Articles 1 and 24, the suspension of rights must not entail any kind of discrimination against any individual or group.

Compatibility with other international obligations: The suspension of certain rights must be compatible with all other obligations established in other international instruments ratified by Peru.

Reporting: Pursuant to Article 27(3) of the Convention, the declaration of a state of emergency should be reported

¹⁹⁸ IACHR, Annual Report 1980-1981, p. 115.

¹⁹⁹ *Id.*

immediately to all other States parties to the Convention, through the Secretary General of the OAS.²⁰⁰

Even where the aforementioned requirements are met, there are certain rights and guarantees enshrined in the Convention that the States cannot suspend.

71. With respect to the rights that can be suspended during the imposition of a state of emergency, the Inter-American Court has indicated that:

It is clear that no right guaranteed in the Convention may be suspended unless very strict conditions --those laid down in Article 27(1)-- are met.... [R]ather than adopting a philosophy that favors the suspension of rights, the Convention establishes the contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency.²⁰¹

72. Most of the rights that the State cannot suspend, however grave the emergency, are mentioned in Article 27(2) of the Convention, and are those set forth at the following Articles of the American Convention: 3 (right to juridical personality); 4 (right to life); 5 (right to humane treatment); 6 (prohibition on slavery and servitude); 9 (principle of non-retroactivity of laws); 12 (freedom of conscience and religion); 17 (protection of the family); 18 (right to a name); 19 (rights of the child); 20 (right to nationality); and 23 (political rights) of the Convention. Under Article 27(1) of the Convention, the suspension of rights has to be compatible with all other obligations established in other international instruments ratified by the country. The Inter-American Court has

²⁰⁰ See, in this regard, e.g., Grossman, Claudio: "*Algunas consideraciones sobre el régimen de situaciones de excepción en bajo la Convención Americana sobre Derechos Humanos*," in IACHR, *Derechos Humanos en las Américas, Homenaje a la Memoria de Carlos A. Dunshee de Abranches*, Washington, 1984.

²⁰¹ Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations...*, op. cit., para. 21.

indicated that the suspension of guarantees cannot include suspension of the rule of law or of the principle of legality:

The suspension of guarantees also constitutes an emergency situation in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled. This does not mean, however, that the suspension of guarantees implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times. When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These restraints may not be considered to be non-existent, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the circumstances justifying the grant of such exceptional legal measures. The Court has already noted, in this connection, that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law (The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 32).²⁰²

73. Along these lines, "in serious emergency situations it is lawful to temporarily suspend certain rights and freedoms whose free exercise must, under normal circumstances, be respected and guaranteed by the State. However, since not all of these rights and freedoms may be suspended even temporarily, it is imperative that 'the judicial guarantees essential for (their) protection' remain in force."²⁰³ In addition, it is essential that the judiciary be independent, given that such independence is a fundamental pillar of the rule of law and of human rights protection. In this regard, the Court has indicated

²⁰² *Id.*, para. 24.

²⁰³ *Id.*, para. 27.

that *habeas corpus* and *amparo* remedies are judicial guarantees that protect rights that cannot be suspended, and that those procedures are "essential to ensure the protection of those rights."²⁰⁴ The purpose of the judiciary is to protect legality and the rule of law during a state of emergency.

75. In this regard, in addition to the rights mentioned in the previous paragraph, according to the provision in the final part of Article 27(2) of the Convention, neither can there be suspension of the judicial guarantees essential for protecting those rights that cannot be suspended, for, as the Inter-American Court has said:

it must also be understood that the declaration of a state of emergency --whatever its breadth or denomination in internal law-- cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency.²⁰⁵

76. The Inter-American Court of Human Rights has held that:

the judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees.²⁰⁶

²⁰⁴ *Id.*

²⁰⁵ OC-9, para. 25.

²⁰⁶ *Id.*, para. 38.

Situation of Human Rights in Venezuela - "Democratic Institutions, the Rule of Law and Human Rights in Venezuela". OEA/Ser.L/V/II. Doc. 209, 31 December 2017

384. The Commission emphasizes once again that the adoption of "states of exception" must be tailored to the needs of a situation being dealt with in a reasonable manner, without going beyond what is strictly necessary, so as to avoid extensions, disproportionate responses, or the misuse or abuse of power, because the arbitrary use of such states leads to the impairment of democracy and the curtailment of rights established in the American Declaration.²⁰⁷ The Commission points out again how important it is to maintain the rule of law and abide by constitutional provisions when states of emergency are invoked.²⁰⁸ The IACHR likewise points to the consequences of using broad and ambiguous concepts in regulatory instruments, including emergency decrees, because they can lead to limitations on human rights.²⁰⁹

Annual Reports

Annual Report of the Inter-American Commission on Human Rights, 2021, Chapter IV.A. Development of Human Rights in the Region (El Salvador)

366. The Commission recognizes the importance of reducing crime rates, particularly those related to homicides perpetrated in the country, a challenge that it has highlighted as a priority in terms of citizen security in recent years. On the other hand, it reinforces that measures for the prevention and deterrence of violence and crime must be implemented without compromising human rights, with their full validity being the standard in the rule of law. [...]

²⁰⁷ IACHR, Press Release No. 07/17, IACHR Expresses its Concern Regarding the Declaration of a "State of Exception and Economic Emergency, June 1, 2016.

²⁰⁸ IACHR, Resolution concerning the Protection of Human Rights following Suspension of Constitutional Guarantees or Declaration of a State of Siege [IACHR, Report on Activities during the Eighteenth Period of Sessions, July 1968, p. 47]. The IACHR has stated the same thing on previous occasions [IAVHR, Report No. 48/00, Case 11.166, Walter Humberto Vásquez, Peru, para. 30; and 2016 Annual Report, Chapter IV.B, Venezuela, para. 55].

²⁰⁹ IACHR, Press Release No. 71/17, IACHR Expresses its Concern Regarding the Declaration of a State of Exception and Economic Emergency, June 1, 2016.

Annual Report of the Inter-American Commission on Human Rights, 2021, Chapter IV.B Venezuela

38. On this score, the IACHR recalls that States do not have unlimited discretion to use declarations of states of emergency. Pursuant to Inter-American Standards, “it is the obligation of the State to determine the reasons and motives that lead the domestic authorities to declare a state of emergency and it is up to these authorities to exercise appropriate and effective control over this situation and to ensure that the suspension decreed is limited to the extent and for the period of time strictly required by the exigencies of the situation.”²¹⁰

Thematic reports

Protest and Human Rights Standards on the rights involved in social protest and the obligations to guide the response of the State. OEA/Ser.L/V/II. CIDH/RELE/INF.22/19. September 2019

321. In Advisory Opinion No. 8, the Inter-American Court addressed the requirements set out in Article 27 of the ACHR, and it established some general guidelines for the imposition of states of emergency: 1) the emergency must be invoked in order to preserve democracy; and 2) the need for declaring a state of emergency must be objectively justifiable.²¹¹

322. Similarly, this Commission has maintained that states of emergency should be reserved exclusively for truly exceptional cases—extremely serious situations—that endanger the life of the nation. In all other situations, routine administrative measures should be taken.²¹²

324. This Commission considers that public protests and demonstrations, as legitimate and protected forms of the exercise of various rights and a fundamental instrument of democratic coexistence—even when they

²¹⁰ IA Court of HR. Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment July 4, 2007. Series C No. 166, par. 47.

²¹¹ Cfr. IACHR, Report No. 4800, Case 11.166, Walter Humberto Vásquez Vejarano – Peru, April 13, 2000, para. 24.

²¹² Cfr. IACHR. Second Report on the Situation of Human Rights in Colombia 1993. Recommendation 2; See also: IACHR, Annual Report 2015, Chapter IV. B Venezuela, para. 66.

express social unrest—cannot be used as a justification for declaring states of emergency or for suspending rights in other ways. Many of the nuisances caused by these events are inherent to the exercise of the rights involved in protest, and any violent events that may occur in the context of demonstrations should be prevented, investigated, and punished as they normally would, without the need to resort to the suspension of rights.

326. The Commission has emphasized just how inadequate and dangerous it can be to decree a state of emergency to address tense social conflicts or to fight crime in view of the numerous human rights violations that consistently occur as a result, and considering that these are not sustainable or effective responses for taking on and resolving such challenges.²¹³

Pandemic and Human Rights. OEA/Ser.L/V/II. Doc. 396. September 9, 2022.

35. In this regard, the Commission understands that in the case of a pandemic, it may in fact be imperative in certain circumstances to restrict the full enjoyment of rights such as the right to assembly and freedom of movement in tangible, public and/or common spaces, which are not indispensable for the supply of essential supplies or for medical

²¹³ Cfr. IACHR, Annual Report 2015, chapter 4.A, Use of Force, para. 139. In its Follow-Up Report on Compliance by the Republic of Ecuador with the Recommendations Offered by the Inter-American Commission on Human Rights in its 1997 Report on the Situation of Human Rights in Ecuador, the IACHR stated that, while it was aware of the difficult economic situation facing the State of Ecuador and the social unrest that this had produced, the State had an obligation to take the necessary measures to guarantee citizen security through methods that respected human rights standards within the framework of a democratic society. The IACHR was of the opinion that alleviating the social unrest arising from the economic situation and fighting crime through the suspension of individual guarantees under the state of emergency did not meet the requirements of the American Convention for the declaration of an emergency; the State has—and is required to have—other mechanisms for channeling social unrest and fighting crime that do not involve suspending the population’s fundamental guarantees. Although, as has been mentioned in this Report, some forms of public demonstrations may create inconveniences or disturbances, or even situations of violence that must be prevented and investigated, in a democracy these cannot be considered exceptional situations that allow States to suspend guarantees. IACHR, Follow-Up Report on Compliance by the Republic of Ecuador with the Recommendations Offered by the Inter-American Commission on Human Rights in its 1997 Report on the Situation of Human Rights in Ecuador, paras. 44 et seq.

care itself and in order to generate adequate social distance²¹⁴. However, it is essential that States ensure that restrictions such as those indicated and any others imposed on a right in this context are necessary in a democratic society, meet the criteria of legality, legitimate purpose, suitability and, therefore, strictly proportional to meet the legitimate purpose of protecting life and health. Likewise, the IACHR recalls that any restriction adopted must particularly consider the effects it has on the most vulnerable groups and ensure that its impact is not particularly disproportionate through the adoption of positive measures. Likewise, any decision must consider in a particularly relevant manner the gender, intersectional, linguistic and intercultural perspective.²¹⁵

38. [...] Therefore, the declaration of a state of exceptional emergency to address the spread of the pandemic of the new coronavirus should not be used to suppress an indeterminate catalog of rights or ad infinitum, nor to justify actions contrary to international law by State agents, for example, the arbitrary use of force or the suppression of the right of access to justice for persons who are victims of human rights violations in the current context.

40. [...] In particular, States must ensure that in the event of the establishment of a state of emergency: "(i) there is justification that there is an exceptionality of the emergency situation in terms of its gravity, imminence and intensity constituting a real threat to the independence or security of the State; (ii) the suspension of certain rights and guarantees is only for the time strictly limited to the exigencies of the situation; iii) the measures adopted are proportional, in particular, that the suspension of rights or guarantees constitutes the only means of dealing with the situation, that it cannot be dealt with through the use of the ordinary powers of the State authorities, and that the measures adopted do not generate a greater affectation of the right that is suspended in comparison with the benefit obtained; and iv) the measures adopted are not by their very nature or by their effects

²¹⁴ IACHR, [IACHR calls on OAS States to ensure that emergency measures adopted to address the COVID-19 pandemic are consistent with their international obligations](#), April 17, 2020.

²¹⁵ IACHR, [Resolution No. 01/2020, Pandemic and Human Rights in the Americas](#), April 10, 2020

discriminatory and incompatible with the other obligations imposed by international law"²¹⁶.

41. In short, for the proclamation of a state of emergency to be carried out in accordance with the constitutional framework and other provisions governing such action, the rights whose full enjoyment will be limited must be clearly identified, as well as the temporal and geographic scope that justifies such an exception²¹⁷. "Any restriction or suspension adopted must be based on the best scientific evidence and consider, prior to its adoption and during its implementation, the particular effects it may have on the most vulnerable groups in order to ensure that its impact is not particularly disproportionate through the adoption of the necessary positive measures".²¹⁸

205. [...] Thus, the context of the 371 emergency cannot be a reason to suspend judicial procedures that guarantee the exercise of rights and freedoms, particularly those actions aimed at controlling the actions of the authorities in this context. Therefore, it is essential to ensure the existence of suitable and flexible means to file appeals that allow the control of the provisions issued in an emergency situation. In this regard, all public institutions must have sufficient capacity to control each of the temporary suspension or restriction measures adopted. Likewise, States must adopt measures aimed at protecting justice operators by guaranteeing the functioning of services.

B. DEMOCRATIC INSTITUTIONS

64. Article 3 of the Inter-American Democratic Charter indicates that, for democracy to be consolidated there has to be an institutional system rooted in the separation, independence, and balance of powers, along with the effective exercise of political

²¹⁶ IACHR, Resolution No. 01/2020, Pandemic and Human Rights in the Americas, April 10, 2020.

²¹⁷ IACHR, Annual Report of the Inter-American Commission on Human Rights 1980 - 1981, Washington, D. C., 1981, p. 115. 28 IACHR, Application to the Inter-American Court of Human Rights in the case of Wilmer Zambrano Vélez, José Miguel Caicedo and Segundo Olmedo Caicedo (Case 11.579) against the Republic of Ecuador, June 24, 2006, para. 64

²¹⁸ IACHR, Report on Terrorism and Human Rights. OEA/Ser.L/V/II.116. Doc. 5 rev. 1 corr. 22 October 2002. Parr. 351

rights through free and fair elections, and a commitment to respect and promote pluralism in society.²¹⁹ Likewise, the Commission has also noted that the Inter-American Juridical Committee established that democracy “does not consist only [of] electoral processes, but also [of] the legitimate exercise of power within the framework of the rule of law.”²²⁰

65. For its part, the Commission has linked the concept of democratic institutions to means of social participation; to formal spaces from which to call on the State to effectively safeguard their rights; to state strategies for encouraging social participation in the design, implementation, and monitoring of public policy; and to the establishment of permanent mechanisms for dialogue with civil society, respecting its autonomy, freedom of action, and independence, among other aspects.²²¹

66. Therefore, this chapter summarizes a series of pronouncements by the Commission that illustrate the minimum conditions to be met by the aforementioned elements of democracy, in particular the separation of powers and the independence of the branches of government; citizen security with a human rights-based perspective; the right to participation; freedom of expression; and the civic space.

1. Separation of powers and independence of the branches of government

67. The IACHR considers that democratic rule of law, as a form of organization of political power, is governed by, among other fundamental principles, the principle of separation of powers. This presupposes that the different state functions correspond to separate and independent bodies whose powers are balanced so as to create the limits necessary on the exercise of power and prevent arbitrariness.²²²

²¹⁹ IACHR, *Democratic Institutions, the Rule of Law and Human Rights in Venezuela*, OEA/Ser.LV/II, Doc. 209, December 31, 2017, para. 73.

²²⁰ IACHR, *Nicaragua: Concentration of Power and the Undermining of the Rule of Law*, OEA/Ser.LV/II, Doc. 288, October 25, 2021, para. 176.

²²¹ IACHR, *Strategic Plan 2017–2021*, OEA/Ser.LV/II.161 Doc. 27/17, March 20, 2017, p. 39.

²²² IACHR, *Nicaragua: Concentration of Power and the Undermining of the Rule of Law*, OEA/Ser.LV/II, Doc. 288, October 25, 2021, para. 176.

68. The Commission has also emphasized the fundamental role of the independence—and the actions—of all public authorities and oversight institutions, whose functioning must be constantly ensured. In that sense, in a democratic society, the rule of law and human rights constitute a whole, where each of the institutional components defines, completes, and acquires mutual meaning.²²³ Therefore, the IACHR has called for continued efforts to ensure that possible clashes between state powers do not have an impact on governance or the observance of human rights.²²⁴ For example, the IACHR has indicated that when a ruler stays in office for a prolonged or indefinite period of time, a concentration of power may result that renders the institutional equilibrium maintained by the system of checks and balances illusory.²²⁵ At the same time, corruption in the Judiciary has a direct impact on the democratic system because systems based on the separation of powers and checks and balances rely on inter-agency oversight, in which those organs mandated to monitor the constitutionality and legality of acts must abide by the rules and not be guided by private or corporate interests.²²⁶ Likewise, although in some cases legislatures may exercise jurisdictional functions, within the framework of separation powers and the system of checks and balances, their decisions must conform to the principle of legality.²²⁷

69. For the purposes of this compendium, a series of pronouncements by the Commission are presented on matters in each of the three branches of government (executive, legislative and judicial) that it regards as challenges to democracy in the region. Standards related to gender parity are included for all branches of government.

²²³ IACHR, Press Release No. 130/20, *IACHR Calls for Guarantees for Democracy and the Rule of Law during the COVID-19 Pandemic*, June 9, 2020.

²²⁴ IACHR, Press Release No. 269/22, *IACHR Condemns Decisions That Violate the Constitutional Order in Peru and Calls to Protect Governance*, December 8, 2022.

²²⁵ IACHR, Nicaragua: Concentration of Power and the Undermining of the Rule of Law, OEA/Ser.LV/II, Doc. 288, October 25, 2021, para. 57.

²²⁶ IACHR, Corruption and Human Rights in the Americas: Inter-American Standards, OEA/Ser.LV/II, Doc. 236, December 6, 2019, para. 289.

²²⁷ IACHR, Press Release No. 233/22, *Visit to Peru: IACHR Notes Risks for Democracy, Calls on Institutions to Exercise Their Mandates in Compliance with Legality and Due Process*, October 19, 2022.

A. Executive branch

70. Through its various mechanisms, the IACHR has observed situations where power has been concentrated in the executive branch, which has ultimately led to the adoption of measures and decrees that restrict essential rights in the democratic rule of law, such as freedom of expression and association. It has also identified that the concentration of power in the Executive has been used to deter other political actors from participating in elections or to reduce their likelihood of success.²²⁸ Subordination to the executive branch of the other branches and institutions weakens the structures of administration of justice and perpetuates the impunity.²²⁹ In its most severe form, it transforms the State into a police state, in which the government-installed regime suppresses all freedoms through control and surveillance of the citizenry and uses the security agencies to wield repression with the endorsement of the other government branches and no system of checks and balances to thwart arbitrariness.²³⁰

71. As has been recognized in inter-American jurisprudence, the IACHR recalls that “the greatest current danger facing the region’s democracies is not the abrupt breakdown of the constitutional order, but the gradual erosion of democratic safeguards that can lead to an authoritarian regime, even if it is popularly elected.” Therefore, for the purposes of this compendium, a series of pronouncements of the Commission are presented on practices that contribute to the concentration and retention of power in the executive branch, in particular indefinite reelection and diversion or abuse of power.

Annual Reports

Annual Report of the Inter-American Commission on Human Rights, 2021, Chapter IV.B Nicaragua

60. The IACHR recalls that indefinite reelection, or extensive periods of exercising the presidency by the same person in given contexts where

²²⁸ IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.LV/II.106. Doc. 59 rev., June 2, 2000, Final Considerations, para. 6.

²²⁹ IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.LV/II.106. Doc. 59 rev., June 2, 2000, Final Considerations, para. 8.

²³⁰ IACHR, *Nicaragua: Concentration of Power and the Undermining of the Rule of Law*, OEA/Ser.LV/II, Doc. 288, October 25, 2021, paras. 173 and 174.

there are no adequate safeguards or guarantees, can lead to certain risks for the system of representative democracy, which is a key pillar to the inter-American system. To the extent that those currently in office have the authority to appoint those at the helm of oversight bodies and in other branches of government, their prolonged or indefinite stay can lead to a concentration of power that renders illusory the institutional balance of power with the system of checks and balances and can end up undermining the foundations of democracy, which would involve alternating the exercise of and access to power as a guarantee of pluralism.²³¹

61. As for the Inter-American Court, it has established that authorizing the indefinite reelection of the president is contrary to the principles of representative democracy and, ultimately, contrary to the obligations set forth in the American Convention and the American Declaration of the Rights and Duties Man.²³² In that regard, the Court has pointed out that this prohibition on indefinite terms in office aims to prevent people who hold popularly elected office from keeping themselves in power. The Court also emphasizes that representative democracy is characterized by the fact that the people exercise power through their representatives as established by the Constitution, who are chosen through universal elections:

When a person can hold a public office perpetually, there is a risk that the people will cease to be duly represented by their elected leaders, and that the system of government will come to resemble an autocracy more than a democracy²³³.

²³¹ OAS. “The Situation in Nicaragua,” adopted by the General Assembly on November 12, 2021.

²³² IA Court H.R. Advisory Opinion OC-28/21. La figura de la reelección presidencial indefinida en sistemas presidenciales en el contexto del sistema interamericano de derechos humanos [Presidential Reelection without Term Limits in the Context of the InterAmerican Human Rights System], June 7, 2021, para. 72.

²³³ IA Court H.R. Advisory Opinion OC-28/21. La figura de la reelección presidencial indefinida en sistemas presidenciales en el contexto del sistema interamericano de derechos humanos. [Presidential Reelection without Term Limits in the Context of the InterAmerican Human Rights System], June 7, 2021, para. 73.

62. The Inter-American Court also established that enabling presidential reelection without term limits by allowing the incumbent president to stand for reelection has serious consequences in terms of access to power and the functioning of democracy in general. Therefore, the removal of the limits preventing presidential reelection without term limits must not be subject to being decided by the will of the majority or their representatives for their own benefit. The Court also established that, as a general rule, the risks posed to democracy in the region arising from presidential reelection without term limits have materialized. The Court therefore concluded that the enablement of presidential reelection without term limits keeps political forces other than the person holding the office of the presidency from gaining popular support and being elected, impairs the separation of powers, and undermines the functioning of democracy.²³⁴

Country reports

[Nicaragua: Concentration of Power and Weakened Rule of Law. OEA/Ser.L/V/II. Doc. 288. 25 October 2021](#)

61. Finally, both the Commission and the I/A Court of H.R. have pointed out that the right to be reelected is not recognized in the American Convention on Human Rights. Specifically, the Inter-American Court established that indefinite presidential re-election is not protected as an autonomous right.²³⁵ Likewise, it is not recognized in the Convention or the American Declaration, and in general, in the corpus iuris of international human rights law, in other international treaties, in regional customary law, or in the general principles of law.²³⁶

Merits reports (submitted to the Court)

²³⁴ IA Court H.R. Advisory Opinion OC-28/21. La figura de la reelección presidencial indefinida en sistemas presidenciales en el contexto del sistema interamericano de derechos humanos [Presidential Reelection without Term Limits in the Context of the InterAmerican Human Rights System], June 7, 2021, paras. 144-145.

²³⁵ IA Court HR. Advisory Opinion OC-28/21. Presidential Reelection without Term Limits in Presidential Systems in the Context of the Inter-American Human Rights System. June 7, 2021, par. 91-102.

²³⁶ IA Court HR. Advisory Opinion OC-28/21. Presidential Reelection without Term Limits in Presidential Systems in the Context of the Inter-American Human Rights System. June 7, 2021, par. 91-102.

Report No. 75/15. Case 12.923. Merits. Rocío San Miguel Sosa and Others (Venezuela). October 28, 2015

165. For its part, the Court has also referred to the importance of the concept of misuse of power in cases such as this:

(...) The Court considers necessary to note that the reason or purpose of a particular act of State authorities is relevant to the legal analysis of a case²³⁷, because a motivation or a different purpose of the rule that grants the powers State authority to act, can show whether the action may be considered arbitrary²³⁸ or a misuse of powers. In relation to this, the Court takes as its starting point that the actions of State authorities are covered by

²³⁷ IA Court H. R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, para 189. Quoting. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2013. Series C No. 266, para. 173, and Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2013. Series C No. 268, para. 210.

²³⁸ IA Court H. R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, para 189. Quoting. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. In this regard, the European Court of Human Rights has taken into account the real purpose or grounds that the State authorities had when exercising their functions, in order to determine whether or not there had been a violation of the European Convention on Human Rights. For example, in the Case of Gusinskiy v. Russia, the European Court considered that the restriction of the victim's detention, authorized by Article 5.1(c) of the European Convention was applied not only in order to make him appear before the competent judicial authority, considering that there were reasonable indications of the commission of an offense, but also in order to oblige him to sell his Company to the State. In the case of Cebotari v. Moldavia, it declared that Article 18 of the European Convention had been violated because the Government had not convinced the Court that there were reasonable indications that the applicant had committed an offense, and the Court concluded that the real purpose of the criminal proceeding and the applicant's detention was to put pressure on him and, thus, prevent his company "Oferta Plus" from suing before the Court. Finally, in the case of Lutsenko v. Ukraine, the European Court determined that the deprivation of liberty of the applicant, authorized by Article 5.1(c), had been applied not only in order to make him appear before the competent judicial authority, because there were reasonable indications that he had committed an offense, but also for other reasons related to the prosecutor's intention of accusing the applicant for publicly expressing his opposition to the charges against him. Cf. European Court of Human Rights, Case of Gusinskiy v. Russia, Judgment of 19 May 2004, paras. 71 to 78; Case of Cebotari v. Moldavia, Judgment of 13 February 2008, paras. 46 to 53, and Case of Lutsenko v. Ukraine, Judgment of 3 July 2012, paras. 100 to 110.

a presumption of lawful behavior²³⁹. And therefore unlawful conduct by state authorities must appear proven to rebut the presumption of good faith²⁴⁰.

Case 12.489. Application before the Inter-American Court of Human Rights. Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz (Venezuela). November 29, 2006

125. The Inter-American Commission has pointed out that the deviation of power constitutes a violation of the right to judicial guarantees and may imply the violation of other rights protected by the Convention.²⁴¹ [The Commission concluded that the invocation by the Executive Branch of an alleged emergency situation, which in reality did not exist, as a pretext to eliminate the independence of the Judicial and Legislative Branches, in order to subordinate them to the Executive Branch,

²³⁹ IA Court H. R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, Quoting. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, para. 173, and Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador, para. 210.

²⁴⁰ IA Court H. R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, paras. 189. Quoting. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, para. 173, and Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador, para. 210.

²⁴¹ In the Case of General Gallardo, the Inter-American Commission emphasized that "all administrative activity must be directed to the attainment of an end, always determined, expressly or tacitly (and, therefore, necessarily regulated), by the norm that attributes the power to act. If the authority or organ of the Administration departs from that end that conditions the exercise of its competence, the act or decision adopted in consideration of a different end ceases to be legitimate...". Alibery has also said that "the deviation of power is the fact of the administrative agent, who performing an act of his competence and respecting the forms imposed by law, uses his power in cases, for reasons and for purposes other than those in view of which this power has been conferred to him. The deviation of power is an abuse of mandate, an abuse of right. An administrative act may have been performed by the competent official with all appearances of regularity and yet this discretionary act performed, which the qualified official had the strict right to perform, may be affected by illegality if its author has used his powers for a purpose other than that in view of which they were conferred upon him, or, to retain the formula of the jurisprudence, for a purpose other than the general interest or the good of the service." (T)he Commission considers that although in principle General Gallardo was apprehended after the respective arrest warrant was issued by a competent Court, it is evident that said public power was used for purposes other than those established in the Mexican legal system, thus constituting a deviation of power, through successive and chained acts, tending to deprive General José Francisco Gallardo of his personal liberty, through acts with the appearance of legality. Therefore, this conduct of the Mexican military authorities determines a use of legal forms to achieve an end other than that established in the legal system, which is the undue deprivation of liberty through acts that have a legal formality. IACHR, Report No. 43/96, Case 11.430, Mexico, October 15, 1996.

constituted a usurpation or diversion of power.²⁴² However, the accusation of deviation of power or partial action must be based on duly proven objective factors that demonstrate the deviation in the intention of the person carrying out the activity under examination.

128. The Inter-American Commission emphasizes that the test for misuse of power is particularly complex, since it involves the use of formally valid procedures to conceal an illegal practice and, in the instant case, a serious attack on judicial independence.

[Report No. 112/12. Case 12.828. Marcel Granier et al. \(Venezuela\), November 9, 2012](#)

213. The Commission is reminded that bias or abuse of authority on the part of judges must be proved, especially when they are acting within the authority that the law has vested in them, as happened in the instant case.²⁴³ There must be concrete and direct evidence to establish whether legal procedures were used, not as legitimate means of administering justice but as tools to accomplish unstated purposes.²⁴⁴ A charge of abuse of authority or bias must be based on duly proven objective factors that demonstrate the abusive intent of the party whose conduct is in question, since in principle the personal impartiality of members of a tribunal is to be presumed until there is

²⁴² IACHR, Report No. 48/00, Case 11.166, Walter Humberto Vásquez Vejarano, Peru, April 13, 2000, para. 68-72.

²⁴³ IACHR, Application filed by the IACHR with the IA Court H.R.. Case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz ("First Court of Administrative Disputes") against the Bolivarian Republic of Venezuela, Case 12.489. November 29, 2006. Paragraph 124.

²⁴⁴ Cf. IACHR, Application filed by the IACHR with the IA Court H.R.. Case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz ("First Court of Administrative Disputes") against the Bolivarian Republic of Venezuela, Case 12.489. November 29, 2006. Paragraph 124. On the matter of abuse of power by court authorities, see also European Court of Human Rights, Case of Gusinskiy v. Russia, Judgment of May 19, 2004, paragraphs 71-78.

proof to the contrary.²⁴⁵ Here, the Court has set a very high standard of proof to establish abuse of authority on the part of a court.²⁴⁶

Report No. 170/17. Case 11.227. Merits. Members and militants of the Patriotic Union (Colombia). December 6, 2017.

1469. The use of criminal law in a state governed by the rule of law must pursue the legitimate purpose of combating and repressing those conducts considered as crimes. However, in cases of unfounded criminalization, what exists is the use of said legal tool with a covert purpose other than the legal one or the one granted by the justice system, for which the Commission considers that it must be understood as a case of "deviation of power".²⁴⁷ The IACHR has pointed out that in cases of misuse of power, the circumstantial or presumptive evidence is of special importance,²⁴⁸ because by its very nature, the motivations or purposes.

1470. The Commission has indicated that the initiation of unfounded criminal proceedings can violate various human rights, such as the rights to judicial guarantees and judicial protection, the right to personal liberty, and the right to honor and dignity.²⁴⁹ Regarding personal liberty, the Commission considers that when it is proven that a preventive detention measure emanates from a criminal proceeding initiated or

²⁴⁵ Cf. IACHR, Application filed by the IACHR with the I/A Court H.R.. Case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz ("First Court of Administrative Disputes") against the Bolivarian Republic of Venezuela, Case 12.489. November 29, 2006. Paragraphs.124-125.

²⁴⁶ Cf. 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, paragraph 114.

²⁴⁷ IACHR, Application to the Inter-American Court of Human Rights in the case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz ("Corte Primera de lo Contencioso Administrativo") (Case 12.489) v. Bolivarian Republic of Venezuela, November 29, 2006, para. 124.

²⁴⁸ IACHR. Report No. 75/15. Case 12.923. Merits report. Rocío San Miguel et al. Venezuela. October 28, 2015. Para. 151; IACHR, Application to the Inter-American Court of Human Rights in the case of Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz ("Corte Primera de lo Contencioso Administrativo") (Case 12,489) v. Bolivarian Republic of Venezuela, November 29, 2006, para. 129.

²⁴⁹ IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/ser.LV/II.Doc.66, December 31, 2011, para.81.

continued as a deviation of power, the detention automatically becomes arbitrary.²⁵⁰ The same assessment applies to the deprivation of liberty of a person serving a sentence in these circumstances.

Thematic reports

Report on Citizen Security and Human Rights. OEA/Ser.L/V/II. Doc. 57. 31 December 2009

96. [...] Where there is no clear set of laws, rules and regulations available to the public and constituting the basis of the training and instruction that police officers receive, police officers are more likely to rely upon their own judgment. Such a situation invites violations and abuses of power.²⁵¹

181. [...] Furthermore, the rules and regulations governing police conduct in the member states should include disciplinary systems and administrative sanctions for those cases in which the police officers who took these actions abused their authority, notwithstanding any criminal consequences that such conduct may have for those responsible.

The Road to substantive Democracy: Women's Political Participation in the Americas. OEA/Ser.L/V/II. Doc. 79. 18 abril 2011

72. Persistent difficulties have prevented a sustainable presence of women in the executive branch. As one IDB study has noted, “the positions gained by women in one administration can easily disappear with the next.”²⁵² An study of the Economic Commission for Latin America and the Caribbean (ECLAC) of the presence of women ministers covering

²⁵⁰ IACHR, Report No. 4396, Case 11.430, José Francisco Gallardo, Mexico, October 15, 1996, para. 70.

²⁵¹ Barcelona Llop, Javier *Policía y Constitución*, Tecnos S.A., Madrid, 1997. “In a democratic State, where it is assumed “that the legal system is based on the premise that rights and liberties are paramount, it is clear that law enforcement should, in the final analysis, see itself as protecting a normative system in which the essential point of reference are rights and freedoms (...) Police are not only bound to protect those rights and freedoms, but must also assume that everything they do is to be imbued with respect for those rights and freedoms. In other words, the system of rights and freedoms is the norm to which all police conduct must necessarily adhere.”

²⁵² Elba Luna, Vivian Roza and Gabriela Vega, *The Road to Power: Latin American Women Ministers 1950-2007*, Inter-American Development Bank, Program for the Support of Women's Leadership and Representation (PROLEAD), 2008, p. 19.

the last three government administrations, likewise concludes that although the presence of women is now part of the political culture “[their numbers] are not increasing arithmetically and are not yet consolidated.”²⁵³ Consequently, the Commission reminds the States of their obligation to promote balanced representation between men and women in their national governments. According to the CEDAW Committee: “States parties have a responsibility, where it is within their control, both to appoint women to senior decision-making roles and, as a matter of course, to consult and incorporate the advice of groups which are broadly representative of women’s views and interests.”²⁵⁴

74. [...] one of the primary concerns of women ministers, which reflects this lack of institutional framework in decision-making, “has been their lack of power and the necessary tools to achieve a transformation of the development model, as well as their inability to add women’s issues to the agenda.”²⁵⁵ Consequently, the Commission urges the States to adopt the necessary measures to ensure a more complete institutional framework for decision-making processes and the conduct of public affairs.

B. Judicial branch

72. The judicial branch has been established to ensure compliance with the laws and its role is fundamental for protecting human rights. In the inter-American system of human rights, the proper functioning of the judicial branch is regarded as an essential element for preventing abuse of power by another organ of the state, and therefore for the protection of human rights.²⁵⁶

73. To this end, both the Commission and the Inter-American Court have repeatedly held that the principle of judicial independence gives rise to a series of guarantees:

²⁵³ ECLAC, *Women’s Contribution to Equality in Latin America and the Caribbean*, Tenth Regional Conference on Women in Latin America and the Caribbean, Quito, August 6, 2007, p. 43.

²⁵⁴ See CEDAW Committee, *General Recommendation No. 23, Political and Public Life*, para. 26.

²⁵⁵ [See Eglé Iturbe de Blanco, “Women: Power and Development in Latin America”, *University of Saint Thomas Law Journal*, 2008] p. 691.

²⁵⁶ IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.LV/II.106. Doc. 59 rev., June 2, 2000, para. 2

appropriate appointment procedures, fixed terms in office, and guarantees against external pressure.²⁵⁷ The Commission has also stated that the courts must be autonomous from the other branches of government and free from influence, threats or interference, whatever the source, so that challenges to their work are not motivated by other interests.²⁵⁸

74. The Commission has extensively developed standards on these guarantees and has already carried out an important systematization exercise in that regard.²⁵⁹ However, for the purposes of this compendium, the series of pronouncements that provided below, though not exhaustive, demonstrate the relationship of the principle of judicial independence—and judicial guarantees—as a necessary minimum condition in a democratic rule of law. In particular, the standards compiled concern the selection and appointment of justice operators, independence in the exercise of their duties, issues related to their tenure (removal from office and disciplinary regime), and their security and protection.
75. The IACHR recalls that the concept of justice operators refers to state officials and employees who play a role in the justice systems and perform functions that are essential to respecting and ensuring the rights to protection and due process. From this perspective, the Commission has included judges—who play the paramount role in the determination of rights—and to prosecutors and public defenders who, in their respective roles, are part of the process through which the State guarantees access to justice.²⁶⁰
76. Regarding selection and appointment processes, the Commission considers that there is a direct relationship between guarantees of independence and impartiality in the administration of justice, as a precondition for meeting the standards of due process, and the creation and strengthening of transparent mechanisms for the appointment and promotion of judges on the basis of their qualifications, and not for

²⁵⁷ IACHR, [Report No. 43/15](#), Case 12.632, Merits, Adriana Beatriz Gallo, Ana María Cariaga and Silvia Maluf de Christin, Argentina, July 28, 2015, para. 121.

²⁵⁸ IACHR, [Situation of Human Rights in Honduras](#), OEA/Ser.LV/II, Doc. 42/15, December 31, 2015, para. 280.

²⁵⁹ See IACHR thematic report [Guarantees for the Independence of Justice Operators](#), OEA/Ser.LV/II, Doc. 44, December 5, 2013.

²⁶⁰ IACHR, [Guarantees for the Independence of Justice Operators](#), OEA/Ser.LV/II, Doc. 44, December 5, 2013, para. 15

other, improper motives.²⁶¹ This includes procedures that are open to societal scrutiny in order to reduce the degree of discretion and consequent possibility of interference from other powers.²⁶²

77. Likewise, the IACHR has pointed out that in order to guarantee that independence and impartiality it is necessary to ensure an adequate and transparent process of election and appointment. The circumstances of their appointment should enable them to perform their work independently and impartially in the cases they adjudicate, bring, or defend, as well as establishing disciplinary procedures that offer the appropriate guarantees.²⁶³
78. Considering that not just any appointment procedure will satisfy the conditions required by the American Convention,²⁶⁴ the following is a summary of a series of standards developed by the Commission that shed light on the minimum conditions that should govern the selection and appointment of justice operators in order to ensure judicial independence in the terms required for the democratic rule of law.

Thematic reports

Guarantees for the independence of justice operators. OEA/Ser.L/V/II. Doc. 44 5 December 2013

62. The goal of any selection and appointment process must be to appoint applicants based on their merit and professional qualifications, and also to ensure equality of opportunity.²⁶⁵ Accordingly, States must ensure that persons who have the qualifications are able to compete as equals, even in the case of persons temporarily occupying the

²⁶¹ IACHR, *Access to Justice and Social Inclusion: The Path to Strengthening Democracy in Bolivia*, OEA/Ser.LV/II, Doc. 34, 28 June 2007, para. 84.

²⁶² IACHR, *Guarantees for the Independence of Justice Operators*. OEA/Ser.LV/II, Doc. 44, December 5, 2013, para. 80.

²⁶³ IACHR, *Situation of Human Rights in Guatemala*, OEA/Ser.LV/II. Doc. 208/17, December 31, 2017, para. 77; and IACHR, *Democratic Institutions, the Rule of Law and Human Rights in Venezuela*, OEA/Ser.LV/II, Doc. 209, December 31, 2017, para. 89.

²⁶⁴ IACHR, *Situation of Human Rights in Guatemala: Diversity, Inequality and Exclusion*. OEA/Ser.LV/II, Doc. 43/15, December 31, 2015, para. 372.

²⁶⁵ I/A Court H.R. Case of *Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, paragraph 72.

positions; a person temporarily in a position, he or she cannot be treated with privileges and advantages or disadvantages.²⁶⁶

64. The Commission urges the States to review and eliminate provisions in their laws that could result in discrimination against candidates applying for a post within the institutions of justice, those that are clearly discriminatory and those whose wording is so vague or broad that they could lead to de facto discrimination. The IACHR is also calling upon the States to take steps to introduce objective criteria in the selection and appointment procedures, and thereby avoid discriminatory practices. It is particularly important that the personnel in charge of these functions be properly trained to be objective when assessing the qualifications or suitability of applicants.

75. The goal of any process to select and appoint justice operators must be to select candidates based on personal merit and professional qualifications,²⁶⁷ taking into account the singular and specific nature of the duties to be performed,²⁶⁸ in such a way as to ensure equal

²⁶⁶ IA Court H.R. Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, paragraph 73; and IACHR. Second Report on the situation of human rights defenders in the Americas. OEA/Ser.L/V/II. Doc.66, December 31, 2011, paragraph 361.

²⁶⁷ IACHR, Second Report on the Situation of Human Rights Defenders, December 31, 2011, para. 363. See also, IA Court H.R. Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 72; and United Nations. Human Rights Committee. General Comment No. 32, CCPR/C/GC/32, August 23, 2007, para. 19. The Basic Principles provide that persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Basic Principles on the Independence of the Judiciary, Principle 10. In this regard, the IACHR has observed that “[i]n addition to the importance of appropriate mechanisms for appointing judges, the right to an independent judiciary requires that the same principles also apply to the appointment of public prosecutors.” See IACHR, Democracy and Human Rights in Venezuela, OEA/ Ser. L/II. Doc. 52, December 30, 2009, para. 219. The Venice Commission has written that “[t]he qualities required of a prosecutor are similar to those of a judge, and require that suitable procedures for appointment and promotion are in place.” See, European Commission for Democracy through Law (Venice Commission). Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service. Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), Strasbourg, January 3, 2011, para. 18.

²⁶⁸ IACHR, Second Report on the Situation of Human Rights Defenders, December 31, 2011, para. 363. See also, IA Court H.R., Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 72. See also the Guidelines on the Role of Prosecutors, guideline 1.

opportunity,²⁶⁹ and with no unreasonable advantages or privileges.²⁷⁰ Where merit is concerned, the persons selected shall be individuals of integrity and ability with appropriate instruction or qualifications in law.²⁷¹ As for professional qualifications, the Commission has emphasized that every selection and appointment must be done according to objective and transparent criteria based on proper professional qualifications.²⁷²

79. [...] Thus, States must publish in advance the vacancy announcements and procedures for applying, the qualifications required, the criteria and the deadlines, so that any person who believes he or she meets the requirements can apply for a post as a prosecutor, a judge or a public defender.²⁷³

80. In addition to publishing the requirements and procedures, another transparency-related factor is that the selection procedures be open to public scrutiny, which will significantly reduce the degree of discretion exercised by the authorities in charge of the selection and appointment process and the possibility of interference from other quarters. In this way, the candidates' merits and professional qualifications can be

²⁶⁹ IA Court H.R. Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 72.

²⁷⁰ IA Court H.R. Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 73.

²⁷¹ Cf. Principle 10 of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Conference on the Prevention of Crime and the Treatment of Offenders, held in Milan August 26 to September 6, 1985, 1985, and confirmed by the General Assembly in resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>. This principle also states that a requirement that applicants to positions in the judiciary be nationals of the country concerned shall not be deemed to be discriminatory.

²⁷² Article 9 of the Universal Charter of the Judge, unanimously approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on November 17, 1999. Available at: <http://www.hjpc.ba/dc/pdf/THE%20UNIVERSAL%20CHARTER%20OF%20THE%20JUDGE.pdf>.

²⁷³ United Nations. Human Rights Committee. General Comment No. 32, CCPR/C/GC/32, August 23, 2007, para. 19. See also, United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 30; and the Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Mexico, A/HRC/17/30/Add.3, April 18, 2011, para. 23.

more readily identified. These practices are essential when appointing the highest-ranking justice operators, when procedure and selection is in the hands of the executive or legislative branch.

81. To strengthen the independence of the justice operators [...], public hearings or interviews should be held, with adequate advance preparations, where the public, nongovernmental organizations and other interested parties will have an opportunity to see what the selection criteria are, to challenge candidates and express either their concern or support.²⁷⁴

88. While the margin of discretion in a system requiring a justice operator to run for re-election is problematic, it is also true that a justice operator looking to be reelected or ratified runs the risk that he or she will behave in a manner to curry favor with the authority in charge of this decision or at least to be perceived as doing so by those facing or standing trial.²⁷⁵ The Commission also believes that in order to strengthen independence, the term for which a justice operator is appointed should not coincide with the changes of government²⁷⁶ or the terms of the legislature.²⁷⁷

²⁷⁴ Cf. United Nations. Economic and Social Council. Commission on Human Rights. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy. Addendum. Preliminary report on the mission to Ecuador. E/CN.4/2005/60/Add.4, March 29, 2005, para. 5; United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 31. See also, United Nations. General Assembly. Human Rights Council. Report of Special Rapporteur Gabriela Knaul, Addendum, Communications to and from governments, A/HRC/14/26/Add.1, 18 June 2010, Guatemala, para. 379, where the Special Rapporteur wrote that the roll-call vote by the deputies and the public interviews with the candidates for seats on the bench, are mechanisms that should be adopted to strengthen transparency in Congress' selection process.

²⁷⁵ European Commission for Democracy through Law (Venice Commission). Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service. Adopted by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 37.

²⁷⁶ See, Presidential Steering Committee for the Executive's Policy on Human Rights in Guatemala, Questionnaire requested by the Inter-American Commission on Human Rights for preparation of the "Report on the situation of Justice Operators in the Americas," February 2013, p. 5.

²⁷⁷ Cf. European Commission for Democracy through Law (Venice Commission). European Commission for Democracy through Law (Venice Commission). Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service. Adopted by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 37.

108. Like the United Nations Special Rapporteur, the Commission is recommending that justice operators at all levels should be selected and appointed by an independent body. As the United Nations Human Rights Committee observed, the Commission believes that the States would be best served by establishing a body independent of the government and the administration²⁷⁸ whose functions would include appointments, promotions and disciplinary action at all levels, as well as reviewing remunerations to ensure that they are commensurate with the justice operators' responsibilities and functions.²⁷⁹ [...]

114. The Commission observes that the selection of the chairperson by other branches or organs of government can mean interference in the courts, affecting the ability of judges to perform their functions independently when a representative elected by other branches of government has the authority to make decisions that will affect the organization and internal workings of the courts. Such risks, which themselves can threaten the independence of the judiciary, are compounded when the selection of the chairperson is a discretionary decision adopted in the absence of objective criteria preestablished by an organ other than the court itself. The Commission therefore considers that the system for selecting the chairpersons of the courts must be in the hands of the justice operators themselves, as this will enhance their ability to function independently.

122. The Commission is of the view that, like the initial selection and appointment process, promotions should be done by pre-determined procedures that are public, fair and impartial and that contain safeguards against any technique that might favor the interests of specific groups and to the exclusion of any type of discrimination.²⁸⁰ Promotions must be

²⁷⁸ See in this regard, Council of Europe. Recommendation No. R (94) 12 of the Committee of Ministers to the Member States on the Independence, Efficiency and Role of Judges, October 13, 1994, principle I.2.c.

²⁷⁹ Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. CCPR/CQ/84/TKJ, June 18, 2005, para. 17.

²⁸⁰ Council of Europe, Committee of Ministers, Recommendation Rec (2000) 19 of the Committee of Ministers to the Members States on the Role of Public Prosecution in the Criminal Justice System, adopted by the Committee of Ministers on October 6, 2000 at the 724th Meeting of the Ministers' Deputies), para. 5.a.

merit-based and take into account such factors as qualifications, integrity, ability and efficiency.²⁸¹ Therefore, a promotion system must be based on objective and known criteria such as professional qualifications, ability, integrity,²⁸² competence and experience.²⁸³ It should preferably be administered by an independent authority [...].

124. States where the judicial career service does not include the highest-ranking members of the judiciary, public defender service or prosecution service, might consider extending the judicial career service so that it covers every level of the hierarchy, and thereby ensure that promotion to the highest levels is based on objective and technical criteria.²⁸⁴ The foregoing notwithstanding, another possibility is to induce the organs charged with the selection and promotion process –even if political- to take into consideration the criteria established for the career service, so as to make the selection criteria more transparent, strengthen the independence of the judiciary and further justice operators' professional development.

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Situation of Human Rights in Venezuela - "Democratic Institutions, the Rule of Law and Human Rights in Venezuela". OEA/Ser.L/V/II. Doc. 209. 31 December 2017

82. [...] To that end, it is also important [...] that entities responsible for making the appointment substantiate their decision.²⁸⁵ [...]

²⁸¹ 8 Cf. United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 72.

²⁸² Cf. Guidelines on the Role of Prosecutors, Guideline 7.

²⁸³ Council of Europe, Committee of Ministers, Recommendation Rec (2000) 19 of the Committee of Ministers to the Members States on the Role of Public Prosecution in the Criminal Justice System, adopted by the Committee of Ministers on October 6, 2000 at the 724th Meeting of the Ministers' Deputies), para. 5.b

²⁸⁴ United Nations. Human Rights Council. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Colombia, A/HRC/14/26/Add.2, April 16, 2010, para. 88. a. xii).

²⁸⁵ According to the Due Process of Law Foundation (DPLF) guarantees for the appointment of high court justices should include establishing "transparent procedures" that make it possible to discern candidates' merits and ensure equal access opportunities for all candidates. [DPLF, El proceso de selección de la Corte Suprema de El Salvador: Recomendaciones para una reforma necesaria].

Thematic reports

Pandemic and Human Rights. OEA/Ser.L/V/II. Doc. 396 September 9, 2022

102. [...] the processes carried out during the emergency situation must comply with the principles of publicity and transparency, and the candidates must be selected on the basis of their independence, knowledge and experience²⁸⁶. In this way, it must be ensured that all institutions of the justice system can perform their functions in conditions of transparency and under the principle of accountability.

The Road to substantive Democracy: Women's Political Participation in the Americas. OEA/Ser.L/V/II. Doc. 79. 18 abril 2011

78. The Commission observes with concern that most countries in the region lack legislation and public policies to guarantee gender equality in the nomination, selection, and distribution of positions in their domestic courts and tribunals. The Commission further notes that in countries that have implemented special temporary measures in this area, such as quota laws governing the appointment to high-level decision-making positions, compliance with such measures is incomplete. [...]

79. The Commission notes that women face formidable difficulties in terms of qualifying as candidates and being elected as judges to the high courts of the region's countries. In particular, the IACHR observes that traditional gender roles impact the equal participation of women in the judiciary. The bulk of women judges are in the civil, family, and administrative courts, with only a very few women judges on the bench in the criminal and labor law courts.²⁸⁷ Despite the incursion of women into the practice of law and law schools of some countries of the region, barriers persist in others owing to discriminatory stereotypes of

²⁸⁶ IACHR, Joint Declaration on Access to Justice in the Context of the COVID-19 Pandemic, January 27, 2021.

²⁸⁷ See Feminist Regional Network on Human Rights and Gender Justice, Regional Report on Women's Human Rights and Gender Justice, 2008; Equipo Latinoamericano de Justicia y Género (ELA), Informe sobre Género and Derechos Humanos. Vigencia and respeto de los derechos de women en Argentina (2005-2008) ["Report on Gender and Human Rights. Observance and Respect for the Human Rights of Women in Argentina (2005-2008)"], Buenos Aires, Argentina, 2009.

women that impair them from participating in these professions or pursuing judicial careers.²⁸⁸

80. [...] Accordingly, the Commission urges the States to adopt necessary measures, such as campaigns to promote and raise awareness on the human rights of women, with a view to debunking cultural and gender stereotypes that make it difficult for women to enter and remain in public positions within the justice system. The Commission also recommends that the States offer incentives to encourage women's access to education and higher learning, especially law schools.

81. [...] For these reasons, and in keeping with its past statements,²⁸⁹ the Commission believes mechanisms should be established to guarantee that women are appointed to the constitutional courts and tribunals of the countries, with a view to overcoming the gender prejudices still rooted in judicial structures, improving women's access to justice, and guaranteeing respect for human rights in the region.

79. In addition, the concept of judicial independence is related to the separation of powers that characterizes democratic systems of government.²⁹⁰ This principle has been recognized as "international custom and general principle of law" and is enshrined in numerous international treaties. The independence of any body, that performs jurisdictional functions is a condition *sine qua non* for the observance of the standards of due process as a human right and the lack of such independence affects exercise of the right of access to justice and creates mistrust and even fear of the courts, which discourages those who would otherwise turn to the courts for

²⁸⁸ Response of the Colombian State to the IACHR questionnaire regarding advances and challenges in the area of women's political participation, May 11, 2009; Response of the Salvadoran State to the IACHR questionnaire regarding advances and challenges in the area of women's political participation, April 20, 2009; Response of the Honduran State to the IACHR questionnaire regarding advances and challenges in the area of women's political participation, May 27, 2009; Response of the United States to the IACHR questionnaire regarding advances and challenges in the area of women's political participation, November 17, 2009.

²⁸⁹ See IACHR, Report on Access to Justice for Women Victims of Violence in the Americas, OEA/Ser. L.V.II. Doc.68, January 20, 2007, para. 257.

²⁹⁰ IACHR, [Report No. 43/15](#), Case 12.632, Merits, Adriana Beatriz Gallo, Ana María Cariaga and Silvia Maluf de Christin, Argentina, July 28, 2015, para. 232.

justice.²⁹¹ In that connection, the IACHR has stressed the importance of an efficient, independent, autonomous justice administration to strengthen democracy and the rule of law, since it puts limits on abuses of power and guarantees the rule of law and protection of human rights for all.²⁹²

80. This obligation of independence and impartiality implies that States must guarantee that the bodies required to be involved in the judicial process—whether during the preliminary investigation or in the trial itself—approach the matter with as much objectivity as possible, have no personal prejudice, and provide sufficient guarantees so that there is no reason to doubt their impartiality.²⁹³ It also requires the Judiciary to be independent from other state powers, so that it can exercise its functions properly.²⁹⁴
81. The following compilation of pronouncements, without being exhaustive, seeks to illustrate the minimum conditions necessary to ensure judicial independence in a democratic state governed by the rule of law.

Reports on Merits

Report No. 43/15. Case 12.632. Merits. Adriana Beatriz Gallo, Ana María Careaga and Silvia Maluf de Christin. Argentina. July 28, 2015.

119. This principle is set out in Article 8.1 of the American Convention and represents one of the basic pillars of a democratic system. On this point, the Inter-American Court has stated that one of the principal purposes of the separation of public powers is to guarantee the

²⁹¹ IACHR, *Guarantees for the Independence of Justice Operators*, OEA/Ser.LV/II, Doc. 44, December 5, 2013, para. 30; and IACHR, *Situation of Human Rights in Honduras*, OEA/Ser.LV/II, Doc. 42/15, December 31, 2015, para. 279.

²⁹² IACHR, *Justice and Social Inclusion: The Challenges of Democracy in Guatemala*, OEA/Ser.LV/II.118. Doc. 5 rev.2, December 20, 2003, para. 15; IACHR, *Nicaragua: Concentration of Power and the Undermining of the Rule of Law*, OEA/Ser.LV/II, Doc. 288, October 25, 2021, para. 95; and IACHR, *Situation of Human Rights in Mexico*, OEA/Ser.LV/II, Doc. 44/15, December 31, 2015, para. 95.

²⁹³ IACHR, *Report No. 24/21*, Case 13.047, Merits, Miguel Ángel Aguirre Magaña (El Salvador), March 23, 2021, para. 37.

²⁹⁴ IACHR, 2022 Annual Report, Chapter IV, *Section B. Cuba*, April 1, 2023, para. 31.

independence of judges.²⁹⁵ Although the principle of judicial independence is regulated by the American Convention as a right enjoyed by persons facing prosecution or appearing before the courts to resolve their disputes, the duty of respecting and ensuring that right has implications that are directly related to the procedures whereby judges are appointed and removed – issues regarding which consolidated international standards exist, as will be indicated below.

120. In this regard, the Inter-American Court has ruled that:

Judges, unlike other public officials, have reinforced guarantees due to the necessary independence of the Judicial Power, which the Court has understood as “essential for the exercise of the judicial function.”[...] Said autonomous exercise shall be guaranteed by the State both in its institutional aspect, that is, with regard to the Judicial Power as a system, as well as in connection with its individual aspect, that is, with regard to the specific judge as an individual. The objective of the protection lies in avoiding that the justice system in general and its members specifically be submitted to possible improper restrictions in the exercise of their duties by bodies foreign to the Judicial Power or even by those judges that exercise duties of revision or appeal.[...] Additionally, the State has the duty to guarantee an appearance of independence of the Magistracy that inspires legitimacy and enough confidence not only to the parties, but to all citizens in a democratic society.²⁹⁶

²⁹⁵ IA Court H.R., *Case of the Constitutional Tribunal v. Peru*, Merits, Reparations and Costs, Judgment of January 31, 2001, Series C No. 71, para. 73; and *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. 55. IACHR, Report No. 2894 Case 10,026, Panama, September 30, 1994.

²⁹⁶ IA Court H.R., *Case of Reverón Trujillo v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment of June 30, 2009, Series C No. 197, para. 67. Citing *Case of Herrera Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment of July 2, 2004, Series C No. 107, para. 171.

147. Regarding the guarantees of independence and impartiality, the Court has established that although they are related, it is also true that they each have a legal content of their own.²⁹⁷ As the Court has said;

One of the principal purposes of the separation of public powers is to guarantee the independence of judges. [...] Said autonomous exercise shall be guaranteed by the State both in its institutional aspect, that is, with regard to the Judicial Power as a system, as well as in connection with its individual aspect, that is, with regard to the specific judge as an individual. The objective of the protection lies in avoiding that the justice system in general and its members specifically be submitted to possible improper restrictions in the exercise of their duties by bodies foreign to the Judicial Power or even by those judges that exercise duties of revision or appeal. [...]

On the other hand, impartiality demands that the judge acting in a specific dispute approach the facts of the case subjectively free of all prejudice and also offer sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality. [...] The European Court of Human Rights has explained that personal or subjective impartiality is to be presumed unless there is evidence to the contrary. [...] Thus, the objective test entails determining whether the judge in question provided convincing elements to eliminate legitimate or grounded fears regarding his or her impartiality. [...] That is so since the judge must appear as to act without being subject to any influence, inducement, pressure, threat, or

²⁹⁷ *IA 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. 55, citing: "For example, the Committee Against Torture has stated: 'The Committee is concerned at the judiciary's de facto dependence on the executive, which poses a major obstacle to the immediate institution of an impartial inquiry when there are substantial grounds for believing that an act of torture has been committed in any territory under its jurisdiction.' United Nations, Committee against Torture, Conclusions and Recommendations: Burundi, CAT/C/BDI/CO/1, para. 12."*

interference, be it direct or indirect, and only and exclusively in accordance with – and on the basis of – the law.²⁹⁸

233. [...] In this, the Inter-American Court has embraced the precedents set by its European counterpart, which has ruled that subjective impartiality is assumed to exist absent evidence to the contrary and that objective impartiality is established through elements of conviction that serve to exclude all legitimate misgivings or well-grounded suspicion of partiality regarding his or her person, since judges must appear as “acting without being subject to any influence, inducement, pressure, threat or interference, direct or indirect.”²⁹⁹

234. These precepts, enshrined in numerous international treaties and statements of principles,³⁰⁰ are essential to the correct functioning of a democratic system, since the independence of the judiciary is a *sine qua non* for the defense of human rights, of the Constitution, and of

²⁹⁸ IA Court H. R., Case of the Constitutional Court v. Peru, Judgment of January 31, 2001, Series C No. 71, para. 73; IA 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, paras. 55 and 56. Citing: Eur. Court H. R., Pullar v. the United Kingdom, Judgment of June 10, 1996, Reports of Judgments and Decisions 1996-III, § 30, and Fey v. Austria, judgment of February 24, 1993, Series A No. 255-A p. 8, § 28. Citing: Eur. Court H. R., Dakaras v. Lithuania, No. 42095/98 (Sect. 3) (bil.), ECHR 2000-X – (10.10.00), § 30. Citing: Eur. Court H. R., Piersack v. Belgium, Judgment of October 1, 1982, Series A No. 53, and De Cubber v. Belgium, Judgment of October 26, 1984, Series A No. 86. No. 2 of the Basic Principles on the Independence of the Judiciary.

²⁹⁹ IA 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. 56. See: European Court of Human Rights, Case of Pullar v. the United Kingdom, Judgment of June 10, 1996, Reports of Judgments and Decisions 1996-III, § 30; European Court of Human Rights, Case of Fey v. Austria, Judgment of February 24, 1993, Series A No. 255-A p. 8, § 28; European Court of Human Rights, Case of Dakaras v. Lithuania, No. 42095/98 (Sect. 3) (bil.), ECHR 2000-X – (10.10.00), § 30; See: Piersack v. Belgium, Judgment of October 1, 1982, Series A No. 53, and De Cubber v. Belgium, Judgment of October 26, 1984, Series A No. 86.

³⁰⁰ See, in this regard: United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, August 26 to September 6, 1985, and confirmed by the General Assembly in resolutions 40/32 of November 29, 1985, and 40/146 of December 13, 1985; Bangalore Principles of Judicial Conduct; International Covenant on Civil and Political Rights (Art. 14); the Statute of the Ibero-American Judge, adopted by the Sixth IberoAmerican Summit of Supreme Court Presidents, held in Santa Cruz de Tenerife, Canaries, Spain, on May 23 to 25, 2001; American Convention on Human Rights (Articles 8, 59, and 71); European Convention on Human Rights (Article 6); and others.

democracy itself through judicial channels.³⁰¹ In light of those principles, certain restrictions on the freedom of expression of judges are deemed legitimate provided they are limited, specific, and directed toward upholding them.

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[Report on the Situation of Human Rights in Venezuela. OEA/Ser.L/V/II.118.Doc.4 rev.2.29 December 2003.](#)

155. In order to define the meaning and scope of the twin concepts of independence and impartiality, the United Nations (UN) has drawn up a series of “basic principles” on the independence of the judiciary. Of these, the Commission believes the following to be of particular importance:

1. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law (...)
2. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. (...)
3. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
4. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the conclusion of their term of office, where such exists.³⁰²

³⁰¹ See: Barak, Aharon, *The Judge in a Democracy*, p. 76 (2006).

³⁰² UN, *Basic Principles on the Independence of the Judiciary*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan on August 26 to September 6, 1985, Doc. A/CONF.121/22/Rev.1 p. 59 (1985). Although this UN document is not binding, the IACHR sees it as an authorized interpretation for determining the scope of binding provisions contained in other treaties, such as – with specific reference to the case at hand – the terms of Article 8 of the American Convention.

Haiti: Failed Justice or the Rule of Law? Challenges Ahead for Haiti and the International Community. OEA/Ser/L/V/II.123. Doc. 6 rev. 1. 26 October 2005.

139. Judicial independence and impartiality are two of the elements necessary to guarantee the right to a hearing by a competent, independent and impartial tribunal and which are crucial to the proper administration of justice and protection of human rights.³⁰³ These prerequisites in turn require that the “judge or tribunal not harbor any actual bias in a particular case, and that the judge or tribunal not reasonably be perceived as being tainted with any bias.”³⁰⁴ The Commission has also held that the requirement of independence necessitates that courts be autonomous from the other branches of government, free from influence, threats or interference from any source and for any reason, and benefit from other characteristics necessary for ensuring the correct and independent performance of judicial functions, including tenure and appropriate professional training.³⁰⁵ The Basic Principles on the Independence of the Judiciary similarly reinforce the need to maintain an independent judiciary by requiring that judges decide matters impartially, “on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”³⁰⁶

³⁰³ See IACHR Report on Terrorism and Human Rights (2002), *supra*, paras. 228-229.

³⁰⁴ Case 11.139, Report N° 57/96, William Andrews (United States), Annual Report of the IACHR 1997, paras. 159-161. See similarly *Eur. Court H.R., Findlay v. UK*, 25 February 1997, Reports 1997-I, at 281, para. 73.

³⁰⁵ See, e.g., IACHR, Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, doc. 17, 1985, Ch. VIII, para. 139; IACHR, Report on the Situation of Human Rights in Haiti (1995), OEA/Ser.L/V/II.88, February 9, 1995, Ch. V, paras. 276-280; IACHR, Report on the Situation of Human Rights in Ecuador (1997), 24 April 1997, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, Ch. III; IACHR, Report on the Situation of Human Rights in Mexico (1998), September 24, 1998, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, Ch. V, paras. 393-398.

³⁰⁶ Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985), paras 2, 4,,5, 6.

508. One of the key issues in the administration of justice is the independence and autonomy of judges and other officials of the judiciary, which is key to combating impunity. On the one hand, it is necessary that judges and ministers have institutional independence, that is, that they do not suffer interference from other spheres of power and institutions of the State³⁰⁷. They must be independent in budgetary terms first and foremost, and also not hold positions of any kind in the executive or legislative branches of government³⁰⁸. Autonomy must be absolute to ensure that the judiciary does not respond to political interests of any kind³⁰⁹. It is also of utmost importance to have mechanisms that prevent judicial officials from running the risk of being intimidated, corrupted or co-opted by criminals, particularly members of organized crime³¹⁰. As long as political powers and criminal interests can infiltrate the judiciary, [...] it will be impossible for the justice system to function fully to ensure justice for crime victims and their families³¹¹.

³⁰⁷ IACHR, Guarantees for the Independence of Justice Operators. Toward Strengthening Access to Justice and the Rule of Law in the Americas, OEA/Ser.L/V/II, Doc. 44, December 5, 2013, para. 29.

³⁰⁸ IACHR, Guarantees for the Independence of Justice Operators. Toward Strengthening Access to Justice and the Rule of Law in the Americas, OEA/Ser.L/V/II, Doc. 44, December 5, 2013, paras. 33-34. In Guerrero, for example, a minister and president of the Guerrero Judiciary Council also served [in the governor's office]. Open Society Justice Initiative, Failed Justice in the State of Guerrero, 2015, p. 49. Available at: <https://www.opensocietyfoundations.org/reports/broken-justicemexicos-guerrero-state/en>.

³⁰⁹ IACHR, Guarantees for the Independence of Justice Operators. Toward Strengthening Access to Justice and the Rule of Law in the Americas, OEA/Ser.L/V/II, Doc. 44, December 5, 2013, para. 34.

³¹⁰ In the state of Guerrero, for example, a minister and president of the Guerrero Judiciary Council reportedly also served as the state's Secretary General of Government. Open Society Justice Initiative, Failed Justice in the State of Guerrero, 2015, p. 33. Available at: <https://www.opensociety-foundations.org/reports/broken-justice-mexicos-guerrero-state/en>

³¹¹ IACHR, Guarantees for the Independence of Justice Operators. Toward Strengthening Access to Justice and the Rule of Law in the Americas, OEA/Ser.L/V/II, Doc. 44, December 5, 2013.

Situation of Human Rights in Guatemala. OEA/Ser.L/V/II. Doc. 208/17. 31 December 2017

206. The Commission finds that to strengthen the institutional independence of the judicial branch and of the prosecution service and public defender service, they must be statutorily provided with stable and sufficient resources to enable them to perform their functions of protecting and ensuring the right of access to justice. Moreover, their budgets must be periodically reviewed with a view toward progressive increase. There must be a procedure in place to enable the entity concerned to participate in any change or modification of its budget and it must have assurances that it can execute and manage its own budget or that such authority will be vested in the respective organ of government.³¹²

Situation of Human Rights in Honduras. OEA/Ser.L/V/II. Doc. 42/15. 31 December 2015

307. The IACHR calls to mind that given the essential role the Public Prosecutor's Office plays in moving criminal investigations forward, the independence, impartiality, and suitability of its officials must be guaranteed to ensure that their work is effective and to help eliminate the factors of impunity in cases involving human rights violations.³¹³ International law has underscored how important it is that investigations and, on a broader level, any activities associated with the prosecution of crime, be independent and impartial so that crime victims are assured access to justice. The Inter-American Court has emphasized that investigations into human rights violations must be immediate and thorough, but they must be independent and impartial as well. The United Nations Special Rapporteur has stressed how important it is that prosecutors are able to conduct their own

³¹² IACHR, *Garantías para la independencia de las y los operadores de justicia. Hacia el fortalecimiento del acceso a la justicia y el estado de derecho en las Américas*, [“Guarantees for the Independence of Justice Operators: Toward strengthening access to justice and the rule of law in the Americas”], OEA/Ser.L/V/II. Doc. 44 December 5, 2013, para. 55.

³¹³ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Available at: <http://cidh.org/pdf%20files/BOLIVIA.07.ENG.pdf>.

functions independently, autonomously, and impartially.³¹⁴ The IACHR emphasizes that the lack of institutional autonomy can erode the credibility of the prosecutorial authority and undermine public confidence in the justice system.³¹⁵

Justice and Social Inclusion: The Challenges of Democracy in Guatemala. OEA/Ser.L/V/II.118. Doc. 5 rev. 1 December 29, 2003.

40. In addition, the Commission takes the view that corruption is a serious form of improper influence on the judiciary, and that it affects as well the offices of prosecutors and security forces. The complaints received about corruption in the Judicial Agency are deeply distressing to the Commission, inasmuch as the existence of corruption in the judicial branch of government not only undermines the administration of justice but detracts, insofar as the actions of judges may be the result of corruption, from the right of every individual to have access to an independent and impartial judge.

Third report on the situation of Human Rights in Paraguay. OEA/Ser.L/V/II.110.doc. 52. 9 March 2001

47. Another point where corruption and human rights concerns come together, also in the context of impunity, is that the corruption of the judge in a particular trial undermines his or her independence when deciding the case, and may consequently constitute a violation by the state of the rights and guarantees enshrined in the American Convention, among them the guarantee that all persons will be judged

³¹⁴ IACHR. Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas. OEA/Ser.L/V/II. Doc. 44, December 5, 2014, para. 36. Available at: <http://www.oas.org/es/cidh/defensores/docs/pdf/Justice-Operators-2013.pdf>.

³¹⁵ IACHR. Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas. OEA/Ser.L/V/II. Doc. 44, December 5, 2014, para. 44. Available at: <http://www.oas.org/es/cidh/defensores/docs/pdf/Justice-Operators-2013.pdf>.

by an independent and impartial judge, enshrined in Article 8(1) of the American Convention.³¹⁶

Thematic reports

Guarantees for the Independence of Justice Operators. OEA/Ser.L/V/II. Doc. 44. 5 December 2013

118. For the Inter-American Commission, the absence of a clear regulation, with properly defined procedures and objective criteria for assigning cases and for removing justice operators from cases already underway, works to the advantage of parties or other persons who may be interested in influencing or interfering with the assignment of a particular case or getting a case withdrawn; this includes persons within the judiciary itself, public prosecution services or public defender services. These kinds of discretionary practices can be used as vehicles of corruption, creating objective threats to the independence of justice operators in the performance of their functions and thereby allowing crimes to go unpunished.

119. The IACHR therefore concurs with the observation made by the UN Special Rapporteur to the effect that States must establish a mechanism to allocate court cases in an objective manner. One possibility could be drawing of lots or a system for automatic distribution according to alphabetic order, or by assigning cases on the basis of pre-determined court management plans that should feature objective assignment criteria, such as specialization in a particular area.³¹⁷ The Inter-American Commission is urging the States to ensure

³¹⁶ See, e.g., that the Commission has held as follows: “if Mr. Marzioni presented information establishing that the trial was not impartial because the judges were corrupt, or were biased for racial, religious, or political reasons against him, the Commission would be competent to examine the case under Articles 8, 21 and 25 of the Convention.” IACHR, Report No. 3996, Santiago Marzioni, Case 11,673 (Argentina), 1996 Annual Report, para. 62.

³¹⁷ United Nations. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*. AHRC/2019, June 7, 2012, para. 80; and Council of Europe, Committee of Ministers, *Recommendation Rec (2000) 19 of the Committee of Ministers to the Members States on the Role of Public Prosecution in the Criminal Justice System*, adopted by the Committee of Ministers on October 6, 2000 at the 724th Meeting of the Ministers’ Deputies), para. 9.

that the respective law be as detailed as possible to prevent manipulation in the allocation of cases.³¹⁸

125. Transferring justice operators from their seats on the bench or from the chambers in which they work can be for a legitimate reason and necessary for the reorganization and efficient management of the judicial branch, the prosecution services or public defender services. However, when such transfers are entirely discretionary, the act of separating a justice operator from the case he or she is hearing or from his or her workplace can be in retaliation for his or her decisions. The threat of transfer can become a disincentive to independent performance of one's functions.

127. Given situations like those described above, the Commission must emphasize how important it is that transfers of justice operators be done according to public, objective criteria, following a clear, pre-established procedure in which the interests and needs of the justice operator are taken into account.³¹⁹ Justice operators facing transfer should be given an opportunity to express their views, their aspirations and their family situation,³²⁰ and to describe their particular area of legal expertise and the strengths acquired during the course of their

³¹⁸ Cf. United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, AHRC/11/41*, March 24, 2009, para. 47. See also, Council of Europe, Committee of Ministers. *Recommendation No. R (94) 12 on the independence, efficiency and role of judges*. Adopted by the Committee of Ministers on October 13, 1994, at the 518th meeting of the Ministers' Deputies, principle 1.2.e).

³¹⁹ Concerning the material conditions, Article 34 of the Statute of the Ibero-American Judge provides that "Judges must have the human resources, material means and technical support to perform their functions properly. The opinion of judges must be taken into consideration when decisions on the matter are adopted; accordingly, their views must be heard. In particular, judges must have access to the laws, case law and all other resources needed for a prompt and reasoned resolution of litigation and cases." Statute of the Ibero-American Judge, adopted by the VI Ibero-American Summit of Chief Justices of Supreme Courts, held in Santa Cruz de Tenerife, Canary Islands, May 23 through 25, 2001, Article 34.

³²⁰ United Nations. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, AHRC/20/19*, June 7, 2012, para. 69. See also, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Colombia, AHRC/14/26/Add.2*, April 16, 2010, para. 88, Recommendations, d), where she writes that: "The wishes of the judges and prosecutors should be considered in decisions pertaining to judicial transfers in the country." [translation ours]

careers.³²¹ Decisions to transfer and rotate justice operators should not be arbitrary; instead, they should adhere to objective criteria. Like the United Nations Special Rapporteur, the Commission believes that justice operators should be given an opportunity to challenge decisions to transfer them or remove them from cases, which should include the right to turn to the courts.³²²

128. Adequate remuneration, human and technical resources, ongoing training and security are conditions that are essential to enabling justice operators to perform their functions independently and in order for the cases assigned to them to be prosecuted in court. Proper working conditions also help combat external or internal pressures like corruption.³²³ [...]

82. The Commission has noted the Inter-American Court's position that judges must enjoy tenure, which means a right to be secure in their posts and have "reinforced guarantees" of tenure to ensure the necessary independence of the judicial branch and justice in the cases over which they preside.³²⁴ In other words, the duration of an appointment as a justice operator is a corollary of their independence and implies having an established and sufficiently long term to enable them to perform their functions with autonomy, without pressure, and without fear of being subject to confirmation or ratification.³²⁵

³²¹ Cf. United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. Mission to Turkey. A/HRC/20/19/Add.3, May 4, 2012, para. 42.

³²² United Nations. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. Mission to Turkey. A/HRC/20/19/Add.3, May 4, 2012, para. 42.

³²³ As the United Nations Special Rapporteur has pointed out, there are a variety of ways to counter judicial corruption, such as disclosure of personal assets by judicial officials and other persons with significant responsibility in the criminal justice system; control mechanisms at the institutional level to ensure the transparency of operations; the establishment of internal oversight bodies and confidential complaint mechanisms; regular and systematic publication of activity reports, and others. United Nations General Assembly, *Interim report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, A/65/274*, August 10, 2010 paras. 44, 45.

³²⁴ IACHR, *Guarantees for the Independence of Justice Operators*, OEA/Ser.LV/II, Doc. 44, December 5, 2013, para. 184.

³²⁵ IACHR, *Guarantees for the Independence of Justice Operators*, OEA/Ser.LV/II, Doc. 44, December 5, 2013, para. 83.

83. Therefore, the Commission considers that under the applicable international law on the matter, judges may only be removed in two different types of circumstances: (i) circumstances that are commensurate with the guarantee of irremovability and are dictated by the term of office, period of appointment, or mandatory retirement age; and (ii) circumstances related to the judge's fitness for office, i.e., through the disciplinary system.³²⁶ The following pronouncements of the IACHR illustrate the scope of the State's obligations in this latter dimension.

Reports on Merits

Report No. 43/15. Case 12.632. Merits. Adriana Beatriz Gallo, Ana María Careaga and Silvia Maluf de Christin. Argentina. July 28, 2015.

123. Regarding fixed terms in office, the Court noted Nos. 11, 12, 13, 18, and 19 of the Basic Principles on the Independence of the Judiciary and referred to the rulings of the Human Rights Committee in the following terms:

The Basic Principles state that “the term of office of judges shall be adequately secured by law” and that “judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”

On the other hand, the Universal Principles also state that “promotion of judges, wherever such a system exists, should be based on objective factors, in particular on ability, integrity and experience.”

Finally, the Basic Principles state that the judges “shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties” and that “all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.” Similarly, the Human Rights Committee has pointed out that the judges may only be removed for grave disciplinary

³²⁶ IACHR, *Guarantees for the Independence of Justice Operators*, OEA/Ser.LV/II, Doc. 44, December 5, 2013, para. 186.

offenses or incapacity and according to fair procedures that guarantee objectivity and impartiality according to the constitution or law. Additionally, the Committee has expressed that “the dismissal of judges by the Executive Power before the expiration of the term of office for which they were appointed, without giving them a specific reason and without having an effective judicial protection to appeal the dismissal, is not compatible with judicial independence.”³²⁷

126. In addition, the Commission has maintained that one of the objectives of judicial tenure is to ensure that judicial functions are performed with the freedom necessary to ensure that rulings are given in strict accordance with the law. For that guarantee to be possible, judges must enjoy (i) the power to interpret and apply the sources of law and (ii) the power to freely assess facts and evidence.³²⁸ Consequently investigations and disciplinary sanctions imposed on judges may in no case be based on the legal opinions developed in any of their resolutions.³²⁹ [...]

127. In line with those principles, the Court has said that the authority in charge of the process for the dismissal of a judge must act independently and impartially in the proceedings established for that purpose and allow the exercise of the right of defense.³³⁰ As the Court has stated, the free removal of judges fosters an objective doubt in the

³²⁷ *IA Court H.R., Case of Reverón Trujillo v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment of June 30, 1999, Series C No. 197, para. 77. Citing: Principles 11, 12, 13, 18 and 19 of the Basic Principles on the Independence of the Judiciary; and United Nations, Human Rights Committee, General Comment No. 32, Article 14, para. 20.*

³²⁸ *IACHR, Application to the Inter-American Court of Human Rights, Case of Ana María Ruggeri Cova, Perkins Rocha Contreras, and Juan Carlos Apitz (First Court of Administrative Disputes) v. Venezuela, Case 12.489, November 29, 2006, para. 89.*

³²⁹ *IACHR, Application to the Inter-American Court of Human Rights, Case of Ana María Ruggeri Cova, Perkins Rocha Contreras, and Juan Carlos Apitz (First Court of Administrative Disputes) v. Venezuela, Case 12.489, November 29, 2006, para. 89.*

³³⁰ *IA Court H.R., Case of Reverón Trujillo v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment of June 30, 1999, Series C No. 197, para. 78. Citing Case of Constitutional Tribunal v. Peru, Merits, Reparations and Costs, Judgment of January 31, 2001. Series C No. 71, para. 74.*

observer regarding the effective possibility they may have to decide specific controversies without fearing retaliation.³³¹

128. From the above, it is clear that the various international human rights agencies and courts agree that heightened stability in the tenure of judges, and the resultant ban on their free removal, is an essential part of the principle of judicial independence. As the Inter-American Court has said, if a State fails to abide by those guarantees, it would be failing in its obligation of upholding judicial independence.³³² Similarly, the Inter-American Commission has stated that the guarantee of stability in the positions of judges must be reinforced – a requirement that arises from the need to establish mechanisms to ensure their independence from the other branches of government.³³³ The Commission highlights the Inter-American Court’s comments on prohibiting the free removal of judges:

To the contrary the States could remove the judges and therefore intervene in the Judicial Power without greater costs or control. Additionally, this could generate a fear in the other judges, who observe that their colleagues are dismissed (...). Said fear could also affect judicial independence, since it would promote that the judges follow instructions or abstain from contesting both the nominating and punishing entity.³³⁴

137. The Commission reiterates that, to be valid, the procedure for removing a judge has to be disciplinary in nature, in that it is intended to separate the person from the post held on account of serious

³³¹ IA Court H.R., *Case of Reverón Trujillo v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment of June 30, 1999, Series C No. 197, para. 78. See also Principles 2, 3, and 4 of the Basic Principles on the Independence of the Judiciary.

³³² IA Court H. R., *Case of Reverón Trujillo v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of June 30, 2009, Series C No. 197, para. 79. See also: Nos. 2, 3, and 4 of the Basic Principles on the Independence of the Judiciary.

³³³ IACHR, Application to the Inter-American Court of Human Rights, Case 12.556, *Chocrón Chocrón v. Venezuela*, para. 72.

³³⁴ IA Court H. R., *Case of Reverón Trujillo v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of June 30, 2009, Series C No. 197, para. 81.

disciplinary failings or incompetence. Given the strengthened stability of judicial functions and the punitive nature of this procedure, it follows that not only must the grounds for such a removal be determined by law in detail in advance thereof, but also that the guarantees of due process must be ensured. It also follows that regardless of the name given to the procedure or of the agency that carries it out, the removal of a judge cannot arise from political control, based on criteria of trust and timeliness, because that would gravely undermine the principle of judicial independence.

148. Regarding the possibility of review, the Commission has stated that decisions adopted both in disciplinary proceedings and when suspending or separating judges from their positions must be subject to independent review. In addition, in both disciplinary and criminal proceedings leading to the removal of judges, States must provide a suitable and effective remedy allowing those judges to obtain reinstatement when their responsibility is not proven or when their removal was arbitrary. The guarantee of tenure must operate so as to allow the reinstatement of a judge who was arbitrarily deprived of his position, since otherwise States could remove judges and intervene in this way in the judicial branch without any great cost or control, which could create fear among other judges who see their colleagues removed and not reinstated even when the removal was arbitrary³³⁵.

192. The Commission has already established that if a judge is to be removed from office, that removal must be carried out in strict compliance with the procedures set forth in the Constitution, as a safeguard for the democratic system of government and the rule of law. The principle is based on the very special nature of the function of

³³⁵ IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.LV/II. Doc. 66, December 31, 2011, para. 380, citing: *IA Court H. R., Case of Reverón Trujillo v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of June 30, 2009, Series C No. 197, para. 81.

the courts and to guarantee the independence of the judiciary vis-à-vis the other branches of government and political-electoral changes.³³⁶

193. In addition, the Commission has stated that with respect to the disciplinary control to which judges are subject when they fail to efficiently and adequately fulfill their jurisdictional duties, one of the requirements to be met for imposing a disciplinary sanction is that the sanctioned conduct be defined previously and in detail in the law and that the seriousness of the violation and the type of disciplinary measure to be imposed in the respective case be specified and that, in all cases the penalty must be in proportion to the seriousness of the offense.³³⁷

[Report No. 109/18, Case 12.870 Merits, Yenina Esther Martinez Esquivia, Colombia, October 5, 2018.](#)

55. [...] the Commission reiterates that the states must ensure that all persons who exercise a judicial function have reinforced guarantees of stability in the understanding that except for committing serious disciplinary breaches, stability in the position should be respected for the term or until satisfaction of the condition established in the designation, without any distinction between career service judges and those who perform the judicial function temporarily or provisionally. Such temporary or provisional nature should be determined by a term or a specific condition for the exercise of the judicial function, so as to ensure that these judges will not be removed from their positions due to the rulings they adopt or by virtue of arbitrary decisions by administrative or judicial entities. The appointment of temporary judicial officers with no defined term or condition in their appointment should be considered incompatible with the international obligations of a state as regards judicial independence and cannot be argued as an excuse

³³⁶ IACHR, Report No. 3097, Case 10.087, Merits, Gustavo Carranza (Argentina), September 30, 1997, paras. 41, 58. IACHR, Report 4800, Case 11.166, Merits, Walter Humberto Vásquez Bejarano (Peru), April 13, 2000, para. 76.

³³⁷ IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.LV/II. Doc. 66, December 31, 2011, para. 372, citing: United Nations General Assembly, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, paras. 57 and 58.

for not granting due process guarantees in a decision on removal.³³⁸ The IACHR has indicated that the independence of the judicial system is undermined when provisional judges can be dismissed without any statement regarding the cause.³³⁹

Country reports

[Report on the Situation of Human Rights in Venezuela. OEA/Ser.L/V/II.118.Doc.4 rev.2.29 December 2003.](#)

159. “Provisional” judges are those who do not enjoy security of tenure in their positions and can be freely removed or suspended; this implies that their actions are subject to conditions, and that they cannot feel legally protected from undue interference or pressure from other parts of judiciary or from external sources.

160. The Commission has previously ruled on this matter,³⁴⁰ stating that having a high percentage of provisional judges has a serious detrimental impact on citizens’ right to proper justice and on the judges’ right to stability in their positions as a guarantee of judicial independence and autonomy.

[Situation of Human Rights in Venezuela - "Democratic Institutions, the Rule of Law and Human Rights in Venezuela". OEA/Ser.L/V/II. Doc. 209. 31 December 2017](#)

94. For several years now, the Commission has noticed a series of dismissals of judges almost immediately after they have handed down

³³⁸ IACHR, Application before the Inter-American Court of Human Rights in the case of Mercedes Chocrón Chocrón, Case 12,556, para. 78.

³³⁹ IACHR, Second Report on the Situation of Human Rights in Peru, Chapter II, Administration of Justice and Rule of Law, OEA/Ser.L/V/II.106 Doc. 59 rev., June 2, 2000, para. 15.

³⁴⁰ IACHR, *Report on the Situation of Human Rights in Peru*, 2000.

rulings with political connotations, which is suggestive of reprisals.³⁴¹ In that regard, the IACHR reiterates that such acts send "[...] a strong signal – to society and to other judges – that the judiciary does not enjoy the freedom to adopt rulings that go against government interests and, if they do so, that they face the risk of being removed from office."³⁴² Accordingly, the IACHR reiterates that, based on the United Nations Basic Principles on the Independence of the Judiciary, judges shall decide matters before them "[...] without improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."³⁴³ Likewise, the Commission considers it essential that the State not only refrain from any act that directly or indirectly impairs the independence of judges in

³⁴¹ In its Democracy and Human Rights report, the IACHR indicated that this had been the case of: (i) Judge Mercedes Chocrón Chocrón, one week after she had conducted a judicial inspection of the home of Gen. Carlos Alfonso Martínez, a dissident member of the armed forces, to determine whether the State was complying with the precautionary measures extended by the IACHR; (ii) judges Miguel Luna, Petra Jiménez, and María Trastoy, after releasing a number of citizens arrested for allegedly participating in the anti-government demonstrations of February 27, 2004; (iii) Justice Franklin Arrieche, after he acquitted four members of the Armed Forces accused of insurrection in the events of April 11 to 13, 2002; (iv) Judge Juan Carlos Márquez Barroso, after he overturned a resolution of the National Telecommunications Commission imposing a large fine on Globovisión; (v) Judge Mónica Fernández, because she had exercised judicial oversight of the warrant to search the home of Ramón Rodríguez Chacín, a former Minister of the Interior and Justice; (vi) Alicia Torres, after she claimed she had been harassed to order an injunction against the President of Globovisión and his son; and (vii) Judge Elías Álvarez, after granting bail to the former Chairman of the Industrial Bank of Venezuela [IACHR, *Democracy and Human Rights in Venezuela*, OEA/SER.L/V/II, Doc. 54, December 30, 2009, para. 286-296]. The IACHR takes note of the acts of hostility against judges Ali Paredes and Nelson Moncada. [El Universal, *Tribunal liberta al destituido juez Alí Fabricio Paredes*, June 2, 2015; and La Patilla, *Fiscalía procesará al juez Alí Paredes, de los casos Makled y Afuni, por “favorecimiento de procesados”*, February 10, 2015]. [Youtube video, *Public hearings before OAS regarding Venezuela*, OAS, October 16 2017]. [Livestream, *Public hearings before OAS regarding Venezuela*, OAS, November 16, 2017]. Nelson Moncada, on the other hand, was allegedly murdered on May 31, 2017, reportedly for reasons relating to his participation in the Leopoldo López case [Youtube video, *Public hearings before OAS regarding Venezuela*, OAS, October 16, 2017]. Prosecutors had also been victims of harassments. Along those lines, ex-prosecutor Nieves described the case of prosecutors Manuel Medina and Javier Gutiérrez, from February 14, 2017. These prosecutors had requested the release of Alejandro Cedeño, manager of Petrocedeño, and his driver, José Pérez. The judge who heard the case ordered their unconditional release. Later, SEBIN officials surrounded the judicial offices. According to the ex-prosecutor Nieves, a negotiation had to be conducted to ensure the prosecutors were not arrested. [Livestream, *Public hearings before the OAS regarding Venezuela*, OAS, November 16, 2017; El Pitazo, *Sebin intenta intervenir en decisiones judiciales sobre Pedro León en Barcelona*, February 14, 2017, and Caraota Digital, *Juez “recoló” en una decisión tras visita del Sebin al Palacio de Justicia de Barcelona*, February 14, 2017].

³⁴² IACHR, *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II Doc. 54, December 30, 2009, para. 301.

³⁴³ Principle 2 of the *Basic Principles on the Independence of the Judiciary*.

their deliberations, rulings, and other functions, but also that it investigate such acts with due diligence, punish those responsible for them, and make reparations to those affected.

87. Accordingly, both the Commission and the IA Court of Human Rights have underscored that the temporary nature of the judges' tenure does not mean that they can be dismissed at will.³⁴⁴ On the contrary, they should be guaranteed a degree of irremovability in the form of the right to hold their position until a condition terminating it has been met (*condición resolutoria*), such as the completion of a pre-established term or the holding of a competitive process resulting in the appointment of a permanent replacement for the post.³⁴⁵ Unless those conditions are met, dismissal should be admissible only in connection with disciplinary proceedings or a properly substantiated administrative action with all due guarantees.

88. The Commission reiterates that indefinitely temporary tenure and the nonexistence of stability guarantees entail a risk that judges may take decisions to please the authority responsible for their appointment or removal, a state of affairs that seriously impairs their independence.³⁴⁶ [...]

³⁴⁴ IA Court HR. *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. 43; and *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011, Series C No. 227, para. 117; and IACHR, *Guarantees for the independence of justice operators. Toward Strengthening Access to Justice and the Rule of Law in the Americas*, OEA/SER.L/V/II, Doc. 44. December 5, 2013, para. 94.

³⁴⁵ IA Court HR. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 116; and *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011, Series C No. 227, 105.

³⁴⁶ IA Court HR. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 78; and IACHR, *Guarantees for the independence of justice operators. Toward Strengthening Access to Justice and the Rule of Law in the Americas*, OEA/SER.L/V/II, Doc. 44, December 5, 2013, para. 90.

Thematic reports

Guarantees for the Independence of Justice Operators. OEA/Ser.L/V/II. Doc. 44, December 5, 2013

93. In the case of justice operators, provisional appointments must be the exception and not the rule.³⁴⁷ [...] Although the Commission understands that, in exceptional circumstances, it may be necessary to appoint judges on a temporary basis, such judges must not only be selected by means of an appropriate procedure, they must also enjoy a certain guarantee of tenure in their positions.³⁴⁸

96. The more security and stability that provisional justice operators have the better protected they are from internal and external pressures. If justice operators are uncertain about the duration of their appointments, they will be vulnerable to pressure from various quarters, mainly from those who have the power to decide their fate.³⁴⁹ The Commission is therefore urging the States to ensure that their laws clearly and carefully regulate the provisional status system with an express guarantee of the stability that justice operators must have in their posts while serving the pre-established term or until the condition subsequent is met. Therefore, during those periods, provisional justice operators should only be removed on disciplinary grounds, following a procedure in which the guarantees of due process are observed.

97. The Commission has observed that the laws in some countries provide for a probationary period to determine whether a person will, in the end, be admitted into the judicial career service.³⁵⁰ Not unlike what

³⁴⁷ IA Court H.R., *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C No. 227, para. 107.

³⁴⁸ IACHR. *Democracy and Human Rights in Venezuela*. OEA/Ser.L/V/II. Doc. 54. December 30, 2009, para. 256.

³⁴⁹ IA Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 117.

³⁵⁰ For example, Colombia, Law 270 of 1996, Article 193; and Honduras, Judicial Career Service Law, Article 23.

happens in the case of provisional status, justice operators required to undergo a probationary period may sometimes be subjected to pressures to take certain decisions or courses of action that serve the interests of the authority upon whom his or her permanent appointment depends, thereby putting his or her independence at risk. The Commission is of the view that once the requirements under the merit-based competition have been met and the examinations passed, justice operators should be permanently appointed to the post for which they were selected, without any probationary period and without being subjected to any other discretionary evaluation that might affect their independence. However, the IACHR concurs with the UN Rapporteur's observation to the effect that if a probationary period is required, it should be short and non-extendable, and a permanent appointment or fixed tenure should be granted thereafter.³⁵¹

202. Given these considerations, the IACHR is concerned that political control of justice operators' activities based on discretionary and politically motivated criteria is, by its very nature, inimical to the guarantees of independence and impartiality that, under international law, must be observed in disciplinary proceedings. Here, the Commission must point out that the disciplinary control exercised by legislative bodies in "impeachment" proceedings poses a threat to the guarantees of independence and impartiality. States that vest their legislatures with that authority must ascertain, on a case-by-case basis, whether that political body affords the necessary guarantees to exercise the kind of legal oversight that does not compromise the principle of judicial independence.³⁵²

³⁵¹ Cf. United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, A/HRC/11/41, March 24, 2009, para. 56.

³⁵² IACHR, *Final observations in Case 12,597 Camba Campos et al. (Associate Justices on the Constitutional Court) v. Ecuador*, para. 20. Given how important it is to reduce the influence that political organs of government have in determining the membership of the Councils of the Judiciary and the need to ensure the necessary level of judicial independence. United Nations, Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, A/HRC/11/41*, March 24, 2009, para. 60

205. The Commission is of the view that the use of impeachment in the case of justice operators should be gradually eliminated in the region, as impeachment poses a significant threat to judicial independence. Historically speaking, impeachment has been used as a tool in some States, whereby the legislature or parliament exercises control, especially of the highest courts, at times when the courts are deciding cases of enormous national import, such as the human rights violations committed by heads of state or the constitutionality of acts taken by the executive or legislative branch. The parties in power, or ruling parties, should not be in a position to affect justice operators' independence.

211. Laws that establish administrative disciplinary measures such as dismissal must be subjected to the strictest test of legality. Such laws not only provide for extremely serious penalties and curtail the exercise of rights, but also create an exception to the principle of judicial stability and can compromise the principles of judicial independence and autonomy.

223. The Commission is therefore urging the States to ensure that their laws regulate disciplinary proceedings in such a way as to ensure that justice operators have the opportunity and means to prepare an adequate defense, in keeping with the principles of international law.

226. A critical aspect to consider in the decisions ordering disciplinary measures against justice operators is that "the ground for disciplinary investigations and sanctions imposed" on justice operators "should never be the legal judgment developed in a decision"³⁵³ Therefore, the Commission must repeat that in those States where inexcusable judicial error are, by statute, grounds for disciplinary action, the disciplinary authority has an obligation to explain, in a proper statement of grounds, the seriousness of the conduct and the

³⁵³ IACHR. *Second Report on the situation of human rights defenders in the Americas*. OEA/Ser.LV/II. Doc. 66, December 31, de 2011, para. 376. See also, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted as part of the Report on Activities of the African Commission at the Second Summit and Assembly of Heads of State and Government of the African Union, held in Maputo, July 4 to 12, 2003, Principle A, number 4, subpara. n (2).

proportionality of the disciplinary measure.³⁵⁴ This kind of review requires an autonomous statement of grounds or reasons to show that in fact a disciplinary offense has been committed as a result of an inexcusable judicial error that disqualifies the justice operator for the performance of his or her functions.³⁵⁵ A proper statement of grounds or reasons ensures that the reviewing body will not penalize judges for well reasoned and well founded legal decisions, even if different from the decisions supported by the reviewing body³⁵⁶ or that prosecutors and public defenders will not be penalized for a legal position that might be different from that of their superiors.

234. The Commission believes that in cases where separation from service may be an implied sanction wrapped in the guise of the law, the reason for the separation must be examined to determine whether it constituted a misuse of power calculated to punish a justice operator for some action or decision he or she took. Hence, the justice operator must have the right to a review. A proper, well reasoned statement of the grounds for separation is required to dispel any doubts as to whether there was any misuse of power.

238. The Commission therefore considers that in their disciplinary systems, States must provide a possibility to have a decision reviewed by a higher body, which will examine the facts of the case and the law, in order to assure a suitable and effective judicial recourse against possible violations of rights that happened during the disciplinary process.

189. The Commission's view is that like judges, prosecutors and public defenders should be given a certain degree of tenure or fixed tenure in their positions because of the fundamental role they play in the justice

³⁵⁴ IA 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. 86.

³⁵⁵ IA 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. 86.

³⁵⁶ IA 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. 90.

system. The Commission has already had occasion to observe that the stability of prosecutors in their positions is indispensable to guarantee their independence from political changes or changes in government.³⁵⁷ That stability, ensured by a proper appointment system and a disciplinary system that ensures all the applicable guarantees, will prevent a prosecutor from being arbitrarily separated from service for having taken an unpopular decision.³⁵⁸ Similarly, the stability of public defenders in the cases they are defending is a corollary of the State's obligation to ensure the right to adequate defense in a case in all its stages.³⁵⁹

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72. [...] Likewise, taking into account that the free removal of justice operators puts access to justice at risk, as well as the punitive nature of disciplinary processes, the acts aimed at penalizing them for reasons attributable to their conduct must observe the principle of legality and due process of law.³⁶⁰

99. For its part, the Inter-American Court has established that prosecutors perform the functions of justice operators and, as such, they need to enjoy job stability as an elementary condition of their independence for the due fulfillment of their procedural functions. Therefore, they are protected by the following guarantees: i) to an adequate appointment process; ii) to tenure in the position, and iii)

³⁵⁷ IACHR, *Democracy and Human Rights in Venezuela*, OEA/Ser.L./VII. Doc. 54, December 30, 2009, para. 229.

³⁵⁸ Cf. European Commission for Democracy through Law (Venice Commission). *Report on European Standards as regards the independence of the judicial system: Part II - The Prosecution Service*. Adopted by the Venice Commission at its 85th plenary session (Venice, December 17-18, 2010), Strasbourg, January 3, 2011, para. 18.

³⁵⁹ IA Court H.R. *Case of Barreto Leiva v. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009, para. 29.

³⁶⁰ IACHR, *Guarantees for the Independence of Justice Operators: Towards strengthening access to justice and the rule of law in the Americas*, OEA/Ser.L./VII. Doc. 44, December 05, 2013, para. 216.

guarantees against external pressures. Otherwise, the lack of these guarantees would jeopardize the independence and objectivity that are required of their function to ensure that the investigations conducted, and the claims filed before the jurisdictional bodies are addressed exclusively at achieving justice in a particular case, in keeping with Article 8 of the Convention.³⁶¹

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51. In this regard, the Inter-American Commission recalls that, pursuant to Inter-American standards, “removing a provisional prosecutor from his or her position must be based on grounds provided for by law, which are either (i) because the operative requirement to which the appointment or designation was subjected, such as the expiration of a term of office as predetermined by holding and completing a public competitive selection process, based on which the replacement of the provisional prosecutor is appointed or designated with permanent status, or (ii) for serious disciplinary offenses or proven incompetence, for which a proceeding would have to be instituted, which complies with all the due process guarantees and ensures the objectivity and impartiality of the decision.”³⁶²

56. The Inter-American Commission recalls that the American Convention “does not allow any administrative organ to apply a punishment that involves a restriction (for example, imposing a sentence of disqualification or dismissal) on a person for their social misconduct (in the performance of their public duty or outside thereof) for the exercise of political rights to elect or be elected; it can only be

³⁶¹ IAHR Court. *Bámaca Velásquez, Maritza Urrutia, Plan de Sánchez Massacre, Chitay Nech et al., Río Negro Massacres, and Gudiel Álvarez et al. ("Diario Militar") v. Guatemala. Provisional measures and Monitoring compliance with judgment. Resolution of the Inter-American Court of Human Rights dated November 22, 2022, para. 39.*

³⁶² IA Court of HR. *Case of Martínez Esquivia v. Colombia. Interpretation of Judgement on Preliminary Objections, Merits and Reparations. Judgment of June 21, 2021. Series C No. 428, par. 99.*

for an adjudicatory act (judicial ruling) of a competent judge in the respective criminal proceeding.”³⁶³ [...]

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61. With regard to the specific function of prosecutors, the Inter-American Court has noted that they perform duties corresponding to agents of justice and, in that capacity, they must enjoy guarantees of job security, among others, as a fundamental condition for their independence in the correct performance of their procedural functions.³⁶⁴ Therefore, they must also be protected by the guarantees of an adequate appointment process, a fixed term in the position, and protection against external pressures. Otherwise, this would jeopardize the independence and objectivity that are required of their function to ensure that the investigations conducted and the claims made before the jurisdictional bodies are addressed exclusively at achieving justice in the particular case, in keeping with Article 8 of the Convention. The absence of the guarantee of irremovability of prosecutors—since it makes them vulnerable to reprisals for the decisions they take—results in a violation of their independence that Article 8(1) of the Convention guarantees.³⁶⁵ The independence recognized to prosecutors ensures that they will not be subject to political pressures or improper obstruction of their actions, nor will they suffer retaliation for the decisions they objectively make, which precisely requires a guarantee of stability and a fixed term in the position.³⁶⁶

³⁶³ IA Court of HR., *Case of Petro Urrego v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of July 8, 2020, Series C No. 406, par. 96.

³⁶⁴ IA Court H.R., *Case of Martínez Esquivia v. Colombia*, Preliminary Objections, Merits, and Reparations, Judgment of October 6, 2020, Series C No.412, par. 94.

³⁶⁵ IA Court H.R., *Case of Martínez Esquivia v. Colombia*, Preliminary Objections, Merits, and Reparations, Judgment of October 6, 2020, Series C No.412, par. 94; *Case of Casa Nina v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2020, Serie C No. 419, par. 72.

³⁶⁶ IA Court H.R., *Case of Valenzuela Ávila and Case of Ruiz Fuentes et al. v. Guatemala*, Provisional Measures and Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of September 23, 2021, par. 44; *Case of Casa Nina v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2020, Serie C No. 419, par. 80.

62. Likewise, the Inter-American Court has indicated that the guarantee of tenure and irremovability of prosecutors consequently implies (i) that separation from the position must be exclusively for permitted causes, either through a procedure that complies with judicial guarantees or because the mandate has expired; (ii) that prosecutors may be removed only for grave disciplinary offenses or incapacity; and (iii) that all proceedings against prosecutors must be resolved by means of fair procedures that guarantee objectivity and impartiality according to the Constitution or the law, given that removal of prosecutors without cause promotes an objective doubt regarding the possibility that they are able to perform their duties without fear of reprisal.³⁶⁷

63. Finally, the IACHR recalls that if prosecution services are subordinate to other institutions, their independence may be compromised, both in terms of the effectiveness and thrust of their investigations and any implications to due process. In this sense, the IACHR recalls that the duties of prosecutors—such as the investigation of crimes, oversight to ensure the lawfulness of investigations, and enforcement of court rulings—are essential to eliminating impunity in cases involving human rights violations.³⁶⁸ [...]

84. Lastly, the Commission has pointed out that States breach their obligations to protect and ensure the right to judicial protection when the justice administration system fails to serve as an effective and efficient tool to meet the needs of victims of violence and crime.³⁶⁹ In this regard, threats, attacks and murders of judges, witnesses and other justice operators limit their ability to act, not least because of the absence of the peace of mind and security required to administer justice.

³⁶⁷ IA Court H.R., *Case of Valenzuela Ávila and Case of Ruiz Fuentes et al. v. Guatemala*, Provisional Measures and Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of September 23, 2021, par. 45. *Case of Casa Nina v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2020, Serie C No. 419, par. 80.

³⁶⁸ IACHR, *Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas*, OEA/Ser.L/V/II. Doc.44, December 5, 2013, par. 37.

³⁶⁹ IACHR, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II. Doc. 57, December 31, 2009, para. 165.

Consequently, a lack of adequate protection for the persons concerned discourages them from seeking justice through legal channels and jeopardizes the independence and impartiality of judges, as well as the proper functioning of the courts and the rule of law.³⁷⁰

85. Therefore, both the Commission and the Inter-American Court have pointed out that it is incumbent upon the State to protect justice operators by ensuring that they have recourse to an adequate security and protection system that takes into account the circumstances of the cases under their jurisdiction and their places of work so that they may perform their duties with due diligence³⁷¹ or, failing that, investigating those who violate their rights and effectively punishing them.³⁷² The following pronouncements of the IACHR are related to this obligation of the State.

Thematic reports

Guarantees for the Independence of Justice Operators. OEA/Ser.L/V/II. Doc. 44. 5 December 2013

146. The State has an obligation to protect the life and personal safety of justice operators, an obligation created by the fact that, under the American Convention and the American Declaration, every person within the jurisdiction of the States of the hemisphere has the right to life and the right to the integrity of one's person. But it is also a prerequisite to guaranteeing due process and judicial protection with respect to investigations into human rights violations. In its case law, the Inter-American Court has held that to prevent human rights violations, "it [is] important that the State provide its judicial officers, prosecutors, investigators and other justice officials with recourse to an adequate security and protection system that takes into account the

³⁷⁰ IACHR, *Justice and Social Inclusion: The Challenges of Democracy in Guatemala*, OEA/Ser.LV/II.118 Doc. 5 rev. 1, December 29, 2003, para. 47. In a similar vein, see IACHR, *Guarantees for the Independence of Justice Operators*, OEA/Ser.LV/II, Doc. 44, December 5, 2013, par. 147; IACHR, *Situation of Human Rights in Honduras*, OEA/Ser.LV/II, Doc. 42/15, December 31, 2015, para. 75; IACHR, *Situation of Human Rights in Mexico*, OEA/Ser.LV/II, Doc. 44/15, December 31, 2015, para. 373.

³⁷¹ IACHR, *Situation of Human Rights in Guatemala*, OEA/Ser.LV/II, Doc. 208/17, December 31, 2017, para. 204.

³⁷² IACHR, 2021 Annual Report, Chapter IV, *Section B. Guatemala*, May 26, 2022, para. 82.

circumstances of the cases under their jurisdiction and their places of work so that they may perform their duties with due diligence.”³⁷³

165. [...] the IACHR is urging the States to pursue an effective prevention and protection policy with respect to justice operators, which would include swift, thorough and diligent investigations of the threats, harassment, attacks and murders of justice operators and incidents when their privacy is violated by illegally tapping or interception of their phone calls. The Commission believes that one of the essential steps is for the States to compile statistics and create a record of incidents in which justice operators are attacked and/or intimidated, in order to be able to identify patterns and the sources of the threats, and from there offer suitable and effective protective measures.

166. In its *Second Report on the Situation of Human Rights Defenders in the Americas*, the Commission discussed the guidelines that the national mechanisms of protection have to observe. The protection programs should be part of a national human rights plan undertaken as a priority policy in all institutional decision-making bodies, both at the central and local levels. The Commission commends those States that have established protection programs secured by law and premised on the principle that the measures that are best suited and most effective in protecting the beneficiaries must be negotiated in concert with them, and take into consideration their individual circumstances.³⁷⁴

167. An assault against a justice operator because of his or her functions is a particularly serious matter, not just because it is assault upon a justice operator’s person but also because it has the effect of intimidating and instilling fear, which can spread to other justice operators. The risk is that cases involving human rights violations could go unpunished and the citizenry’s confidence in the institutions

³⁷³ IA Court H.R. *Case of the La Rochela Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, para. 297.

³⁷⁴ IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, December 31, de 2011, paras. 481 *et seq.*

of the State charged with administering and delivering justice could be undermined.³⁷⁵

Country reports

Situation of Human Rights in Honduras. OEA/Ser.L/V/III. Doc. 42/15. 31 December 2015

73. The Commission recalls the obligation of the State to investigate ex motu proprio crimes of this nature. The Commission emphasizes the need for special protocols for conducting investigations concerning cases of attacks against justice operators and to effectively punish those responsible. The Commission urges the State [...] to immediately adopt as a matter of urgency all necessary measures to ensure the right to life, integrity and security of all judges, magistrates, and all justice operators [...].

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49. [...] In compliance with this obligation, the Commission reiterates what the Inter-American Court has stated regarding the fact that it is not appropriate that justice operators must file criminal complaints with regard to the intimidating acts or threats they face so that the State provides protection for their rights to life and integrity, especially in the face of fears related to the exercise of their work in the investigation of serious violations committed during the armed conflict.³⁷⁶

³⁷⁵ Cf., *mutatis mutandi*, VA Court H.R. *Case of the La Rochela Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, paras. 79 to 81.

³⁷⁶IAHR Court, *Bámaca Velásquez, Maritza Urrutia, Masacre Plan de Sánchez, Chitay Nech et al., Río Negro Massacres, and Gudiel Álvarez et al. ("Diario Militar") v. Guatemala. Provisional Measures and Monitoring of Compliance with Judgment. Resolution of the IAHR Court of November 22, 2022, para. 24.*

Precautionary measures

Resolution No. 55/21. MC 576-21 - José Domingo Pérez Gómez and his family nucleus, Peru. July 25, 2021

44. As the Commission has previously indicated, this category of digital harassment, known as “doxing”, consists of the disclosure of confidential personal information for intimidation or extortion purposes³⁷⁷. For the Commission, the doxing has the potential to expose people to digital attacks and, in addition, to violations in the physical sphere, including attempts against life and personal integrity, promoted by the disclosure of personal information in the digital sphere³⁷⁸. In the specific matter, the available information indicates that the smear campaigns went from messages on social networks to materialize in concrete acts of harassment and intimidation against the proposed beneficiary. Consequently, the Commission understands that the proposed beneficiary, although he performs work as a representative of the Public Ministry, which places him in public opinion, his current situation would not only be evidence of “[...] [his] exposure to [her] [...]”, in the terms in which it was alleged by the State (vid. supra para. 18). What is valued, on the contrary, allows us to affirm that there is a continuity of the events that the proposed beneficiary has been facing, at least since 2017, and also an intensification of these. Likewise, as the available information reflects, for the Commission there is the possibility that a threat may persist over time, and an “unstable equilibrium” may occur until certain events trigger the perpetrator’s actions³⁷⁹, even more so in the current context.

³⁷⁷ IACHR, Press Release No. The IACHR expresses concern over reports of acts of harassment and stigmatizing messages that encourage discrimination in the electoral context in Peru, June 22, 2021

³⁷⁸ Ibid.

³⁷⁹ See: IA Court H.R. Yarce et al. V. Colombia. Preliminary objection, merits, reparations and costs. Judgment of November 30, 2016. Series C No. 325, para. 188

Resolutions

[Resolution 1/2018. Corruption and human rights. Adopted by the IACHR on March 2, 2018.](#)

By virtue of the foregoing and in application of Article 41.b of the American Convention on Human Rights, and Article 18 of its Statute, the Inter-American Commission on Human Rights resolves the following:

1. Independence, impartiality, autonomy and capacity of judicial systems

[...]

i. Protect justice operators when their lives and personal integrity are at risk, adopting an effective and comprehensive prevention strategy, in order to avoid pressure, attacks and harassment against them. This requires granting appropriate funds and support to institutions and protection programs for justice operators.

C. Legislative branch

86. The IACHR has emphasized that achieving participatory, stable democratic development requires, *inter alia*, an independent and effective legislative branch. It has also recognized that, through legal measures, legislative branches can facilitate the incorporation of inter-American standards into domestic legislation,³⁸⁰ and therefore it has emphasized the importance of the participatory development of such norms.³⁸¹ Therefore, it has called attention to practices that tend to nullify de facto the popular vote through which members of congress have been elected,³⁸² as well

³⁸⁰ IACHR, [The Inter-American Legal Framework regarding the Right to Freedom of Expression](#), OEA/Ser.L/V/II, IACHR/RELE/INF.209, December 30, 2009, p. 87, para. 3.

³⁸¹ IACHR, [Public policies with a human rights approach](#), OEA/Ser.L/V/II, Doc. 191, September 15, 2018, para. 62.

³⁸² IACHR, Press Release No. 041/17, [IACHR Condemns Supreme Court Rulings and the Alteration of the Constitutional and Democratic Order in Venezuela](#), March 31, 2017.

as pointing out the need to strengthen representation of the most vulnerable groups in the legislative branch.³⁸³

87. In this regard, the Commission has noted the increase in women’s political representation in legislatures in recent decades as an advance in the Americas.³⁸⁴ This process has been accelerated by the implementation of special temporary measures in several countries in the region, such as quota laws. However, progress in women’s leadership in congresses across the countries of the region is uneven, with the result that significant disparities in women’s representation persist among the region’s Congresses.³⁸⁵
88. Therefore, the following sample of standards of the Inter-American Commission propose specific actions that States should implement to promote gender parity and greater political participation by women in the legislative branch.

Thematic reports

The Road to substantive Democracy: Women’s Political Participation in the Americas. OEA/Ser.L/V/II. Doc. 79. 18 April 2011

61. [...] the Commission recommends, to any State that has yet to do so, to implement special temporary measures designed to increase women’s participation in parliament, such as gender quota laws. According to the literature,³⁸⁶ gender quota laws have been

³⁸³ IACHR, *Right to Self-determination of Indigenous and Tribal Peoples*, OEA/Ser.LV/II, Doc. 413, December 28, 2021, para. 172; and IACHR, *The Road to Substantive Democracy: Women’s Political Participation in the Americas*, OEA/Ser.LV/II, Doc. 79, April 18, 2011.

³⁸⁴ The IACHR noted in its report *The Road to Substantive Democracy: Women’s Political Participation in the Americas* that “[a]ccording to statistics of the Inter-Parliamentary Union, women currently account for 22.7 percent of members of the legislatures of the Americas. In fact, the region of the Americas is second only to the Nordic countries in terms of the percentage of women represented within this branch of government.”

³⁸⁵ IACHR, *The Road to Substantive Democracy: Women’s Political Participation in the Americas*, OEA/Ser.LV/II, Doc. 79, April 18, 2011, para. 54 and 61.

³⁸⁶ Line Bareiro and Isabel Torres (eds.), *Equality for an Inclusive Democracy*, Inter-American Development Institute, 2009, Costa Rica, 2009; Ana Isabel García Quesada, “Conditions determining the level of representation of women: The experience of quota systems in Latin America,” United Nations, EGMEPWD/2005/EP.2, December 12, 2005; Jacqueline Peschard, “The Quota System in Latin America: General Overview”; Marcela Ríos Tobar (ed.), *Women and Politics*, IDEA, Flacso, Catalonia, 2008.

instrumental in increasing women's political representation and in the formation of a "critical mass" of women in the region's statehouses.

62. However, gender quotas designed to increase the numeric representation of women should be carried out together with other measures so as to foster the substantive political participation of women, promote their inclusion within the power structures of the political party apparatus in parliament, and encourage the representation of women's interests. The Commission has discovered that even where women have achieved a significant level of representation in parliament, they do not tend to wield the same influence and power as their male counterparts, and may be excluded from party "power blocs." [...]

63. For this reason, the Commission views as essential that the States adopt the necessary measures to establish, facilitate, and strengthen opportunities for women to exercise political leadership in parliament on equal terms with men. Although the formation of women's caucuses and the establishment of parliamentary gender equity committees have played a key role in promoting gender equality in parliamentary tasks and draft legislation, the Commission nevertheless notes that the functioning and structure of these discussion forums lack the necessary strength and legislative support to fulfill their missions. As well, civil society reports have often complained that such committees are not part of the formal parliamentary structure, are temporary in nature, and lack the necessary visibility and political heft that would allow women representatives to have a real impact on parliamentary debate and decision-making.³⁸⁷

³⁸⁷ See Equipo Latinoamericano de Justicia y Género (ELA), *Informe sobre Género and Derechos Humanos. Vigencia and respeto de los derechos de women en Argentina (2005-2008)* ["Report on Gender and Human Rights. Observance and Respect for the Human Rights of Women in Argentina (2005-2008)"], Buenos Aires, Argentina, 2009; Institute for Democracy and Electoral Assistance (IDEA), *30 Years of Democracy: Riding the Wave? Women's Political Participation in Latin America (2008)*; Inter-Parliamentary Union, *Equality in Politics: A Survey of Women and Men in Parliaments, Reports and Documents No. 54, 2008*; Feminist Regional Network on Human Rights and Gender Justice, *Regional Report on Women's Human Rights and Gender Justice, 2008*.

65. The Commission likewise notes with concern that the traditional gender roles assigned to women, i.e., as primarily responsible for raising children and tending to the home, are among the main obstacles preventing them from performing their parliamentary duties on equal terms with men. An international survey of parliamentarians conducted by the Inter-Parliamentary Union, found that “more than half the women respondents and more than 40 percent of male lawmakers have difficulty balancing their family and political obligations.”³⁸⁸ Consequently, the IACHR urges the States to adopt the measures needed to overcome inequities in the division of labor between the sexes that are detrimental to the participation of women legislators. In this vein, the Commission urges the States to promote “gender-sensitive parliaments,” by adopting parliamentary practices that take the needs of women into account, such as scheduling legislative and working sessions outside of family hours, and establishing child day care centers/nurseries within or near parliamentary facilities..

66. The Commission has established that women’s political participation and representation in parliament on equal terms with their male counterparts strengthens democracy and promotes more equitable societies. Different sources have noted that a greater presence of women in the legislature helps to establish the interests of women within the parliamentary agenda and also encourages the development of draft legislation and enactment of laws to promote gender equality.³⁸⁹ Women in parliament have played a critical role in promoting legislation to punish violence against women, to secure

³⁸⁸ See Inter-Parliamentary Union, *Equality in Politics: A Survey of Women and Men in Parliaments, Reports and Documents No. 54*, 2008, p. 3.

³⁸⁹ See Inter-Parliamentary Union, *Equality in Politics: A Survey of Women and Men in Parliaments, Reports and Documents No. 54*, 2008; ECLAC, *Women’s Contribution to Equality in Latin America and the Caribbean, Tenth Regional Conference on Women in Latin America and the Caribbean, Quito, August 6, 2007*; Institute for Democracy and Electoral Assistance (IDEA), *30 Years of Democracy: Riding the Wave? Women’s Political Participation in Latin America (2008)*; UNIFEM, *Progress of the World’s Women 2008/2009, Who Answers to Women? Gender and Accountability*, available at: <http://www.unifem.org/progress2008>; Mayra Buvinic and Vivian Roza, “Women, Politics and Democratic Prospects in Latin America,” Inter-American Development Bank, Washington, D.C.; María José Lubertino Beltrán, “The Experience and Impact of Quota Laws in Latin America,” in *Igualdad para una democracia incluyente*, Inter-American Institute of Human Rights (IIHR), Costa Rica, 2009.

women's sexual and reproductive health rights, and to enact gender quota laws and electoral reforms that promote women's access to positions of power.

67. In view of the foregoing, the Commission urges the States to implement the necessary structural reforms within their parliaments to promote the participation of women therein. Some of the global strategies adopted to achieve greater levels of equality both within and beyond the parliaments include: promoting the establishment of gender equity committees and organizations and networks of women parliamentarians (caucuses); adapting parliamentary practices and facilities to address the needs of female parliamentarians; conducting research and training activities to raise awareness within parliament of the needs of both men and women lawmakers; and allocating more funding to parliaments for support and outreach services.³⁹⁰

Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas. OAS/Ser.L/V/II.170 Doc. 184 7 December 2018

111. The Inter-American Commission on Human Rights considers that the recognition of the identity of LGBTI persons is a fundamental condition for the exercise of the right to political participation and is central to the consistency of democracies. However, this right must be ensured in such a way that it constitutes the effective right of persons to elect and/or be elected to public and legislative functions. Consequently, the IACHR considers that the effective participation of LGBTI persons is fundamental to ensure the effectiveness of legislation, policies and programs aimed at improving the conditions for the full enjoyment and exercise of their human rights, and the realization of their life projects.

³⁹⁰ See Inter-Parliamentary Union, *Equality in Politics: A Survey of Women and Men in Parliaments*, Reports and Documents No. 54, 2008 and UNIFEM, *Progress of the World's Women 2008/2009, Who Answers to Women? Gender and Accountability*, available at: <http://www.unifem.org/progress2008>.

2. Citizen security and human rights

89. The IACHR considers that the concept of citizen security is the one that best lends itself to addressing the problems of crime and violence from a human rights perspective. In lieu of concepts such as “public security”, “internal security” or “public order,” it represents an uncontroversial move towards an approach that focuses on building a stronger democratic citizenry, while making clear that the central objective of the policies established is the human person, and not the security of the State or a given political system. In this regard, the Commission considers it pertinent to recall that the expression *citizen security* emerged, for the most part, as a concept in Latin America, as governments made the transition to democracy, as a way to distinguish the concept of security under a democracy from the notion of security under the earlier authoritarian regimes. In the latter case, the concept of security was associated with concepts like “national security”, “internal security” or “public security”, all of which refer specifically to the security of the State. Under democratic regimes, the concept of security against the threat of crime or violence is associated with “citizen security” and is used to refer to the paramount security of individuals and social groups. By contrast to other concepts used in the region, namely “urban security” or “safe city,” citizen security refers to the security of all persons and groups, both urban and rural. Nevertheless, it is worth highlighting that the concept of “public security” is still widely used in the United States and Canada to also refer to the security of the individuals and groups who make up society. By contrast, as noted above, in Latin America the very same expression, “public security,” refers to a different concept altogether, alluding to the security built by the State or, on occasion, the security of the State.³⁹¹

90. Under the aforementioned concept of citizen security, the following summary of Commission standards illustrate the obligations of States in this area, particularly with regard to democratic governance of citizen security; professionalization and modernization of security forces; the intervention of the armed forces in citizen security tasks; and use of force in demonstrations and social protests.

³⁹¹ IACHR, [Report on Citizen Security and Human Rights](#), OEA/Ser.LV/II, Doc. 57, December 31, 2009, par. 21.

A. Democratic governance of citizen security

91. The IACHR has reiterated that States have the ineluctable duty to adopt, in keeping with their international human rights obligations, all necessary measures to protect the life and personal integrity of all those under their jurisdiction and, therefore, to implement comprehensive public security policies that respect human rights to ensure the continuation of the democratic system.³⁹²
92. To this end, the Commission has defined democratic governance of citizen security as the lawful authorities' institutional capacity to design, implement and evaluate policies to prevent and control violence and crime. However, historically within the region, these responsibilities have been delegated—often informally—to the state security forces. The result was that decisions about the security of persons and their property were informed mainly by the interests of those forces; these decisions were completely separate and apart from the rest of public policy and not subject to any form of citizen oversight. In many cases, the result was the abuse and misuse of power on the part of state security forces. This institutional weakness and the lack of civilian oversight constitute a clear-cut failure to fulfill the obligations that the member states have undertaken vis-à-vis their duties with respect to the human rights at stake in public policy on citizen security.³⁹³
93. The following summary of standards developed by the Commission shed light on the conditions that a citizen security policy must meet in a democratic State under the rule of law.

Thematic reports

[Report on Citizen Security and Human Rights. Thematic Reports. OEA/Ser.L/V/II. Doc. 57.31 December 2009](#)

76. To enable democratic institutions to function normally and the citizenry to exercise control over the political system, legitimately elected government authorities must undertake full responsibility for

³⁹² IACHR, 2016 Annual Report, Chapter VI, [Section B. Venezuela](#), March 15, 2017, para. 43; and IACHR, [Democratic Institutions, the Rule of Law and Human Rights in Venezuela](#), OEA/Ser.L/V/II, Doc. 209, December 31, 2017, para. 351.

³⁹³ IACHR, [Report on Citizen Security and Human Rights](#), OEA/Ser.L/V/II. Doc. 57, December 31, 2009, para. 74.

designing and putting in place a public policy on citizen security. Within the apparatus of government, the ministries or secretariats that have responsibilities in the area of citizen security must have technical and policy personnel trained in the various professions associated with citizen security, to craft and make decisions in the established areas within this public policy. The legislatures must have professional advisory services to enable them to exercise effective political oversight of the measures implemented to prevent and control violence and crime. Member States must also put into place systems to allow civil society to participate and thereby make democratic oversight possible, to foster transparency and hold accountable officials of the institutions in charge of public policy on citizen security.

[Impact of Organized Crime on Women, Girls and Adolescents in the countries of Northern Central America. OEA/Ser.L/V/II. Doc. 9/23, February 17, 2023.](#)

176. The IACHR has affirmed that security policies heavily focused on punitive repression through the criminal justice system, in seeking to show short-term results, do not address the underlying causes of violence and do not focus sufficiently on prevention.³⁹⁴ Such policies have proven to be inappropriate and ineffective and, on the contrary, have been linked to the increase and persistence of cycles of violence and criminality,³⁹⁵ as well as to the saturation of prison systems.³⁹⁶ In this sense, it has emphasized that security policies should be oriented

³⁹⁴ IACHR. Situation of Human Rights in El Salvador, OEA/Ser.L/V/II. Doc. 278. October 14, 2021; IACHR. Violence, Children and Organized Crime. OEA/Ser.L/V/II. Doc. 40/15. 11 November 2015, para. 414. In this regard, it agrees with the conclusions reached by the United Nations Special Rapporteur on Extra-legal, Summary or Arbitrary Executions who, at the conclusion of her mission to El Salvador, highlighted: "it is unlikely that (...) the mass incarceration of alleged gang members, the normalization of emergency decrees, the imposition of extraordinary security measures and the application of anti-terrorism laws to gang activities are measures that can eradicate the root causes of violence and the existence of gangs, or satisfy the obvious need for accountability." See: UN: OHCHR Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on her mission to El Salvador. A/HRC/38/44/Add.2. 7 December 2018, para. 100.

³⁹⁵ IACHR. Violence and discrimination against women, girls and adolescents. OEA/Ser.L/V/II. Doc. 233. 14 November 2019, para. 197; 538 IACHR. Violence, children and organized crime. OEA/Ser.L/V/II. Doc. 40/15. 11 November 2015, para. 7.

³⁹⁶ IACHR. Situation of persons deprived of liberty in Honduras, OEA/Ser.L/V/II.147 Doc. 6. 18 March 2013, paras. 158 - 160.

towards the prevention and reduction of violence, together with the traditional functions of crime control and repression,³⁹⁷ and from a rights-based approach.³⁹⁸

Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas. OAS/Ser.L/V/II.rev.2. Doc. 36. 12 November 2015

128. The IACHR has held that the lawful activity of security forces, directed toward the protection of the population, is fundamental for achieving the common good in democratic society. Human rights require that States prevent and respond to the arbitrary exercise of authority and constitute an essential safeguard of the security of the public. Respect for, and correct interpretation and application of, the guarantees established in the American Convention and American Declaration must serve as a guide to member states to ensure that the activities of their security forces respect human rights.³⁹⁹

Country reports

Situation of Human Rights in Honduras. OEA/Ser.L/V/II. Doc. 42/15. 31 December 2015

241. As the Commission stated in its report on Citizen Security, a public policy on citizen security, comprising an effective tool for Member States to properly fulfill their obligations to respect and guarantee human rights of all people living in its territory, must have an institutional framework and professional operating structure appropriate for those purposes⁴⁰⁰. [...]

³⁹⁷ IACHR. Violence, children and organized crime. OEA/Ser.LV/II. Doc. 40/15. 11 November 2015, para. 484.

³⁹⁸ IACHR. Report on Citizen Security and Human Rights. OEA/Ser.LV/II. Doc. 57. December 31, 2009, para. 55.

³⁹⁹ IACHR, Report on Citizen Security and Human Rights, OEA/Ser.LV/II., Doc. 57, December 31, 2009 (hereinafter IACHR, Report on Citizen Security and Human Rights, 2009, para. 24.

⁴⁰⁰ IACHR, *Report on Citizen Security and Human Rights*. OEA/Ser.LV/II. Doc. 57, December 31, 2009, para. 109.

Situation of Human Rights in Mexico. OEA/Ser.L/V/II. Doc. 44/15. 31 December 2015

96. As pointed out on previous occasions, the Commission reiterates that the obligations undertaken by the State demand public policies on security and the fight against crime that prioritize the functioning of an efficient institutional structure. This structure must guarantee the population effective exercise of their human rights with regard to prevention and control of violence and crime, including organized crime.⁴⁰¹

Situation of Human Rights in Brazil. OEA/Ser.L/V/II. Doc. 9. 12 February 2021

289. At the same time, the IACHR issues a reminder that the best way to combat violence, lack of security, and crime is through comprehensive and holistic public policies mindful of the various structural causes, tackling risk factors, and bolstering any protection factors available.

290. It further reaffirms that fighting this type of violence requires well-coordinated cooperation among a variety of sectors and institutions, including security agents and forces and judicial institutions. Likewise, as a measure to prevent these gangs spreading and growing stronger, it is essential to grasp the link between organized crime and inequalities and to develop a response that includes guaranteeing access to high quality health care and education, social services, employment, culture, sport, and entertainment/leisure. These policies must be capable of meeting short, medium- and long-term needs with respect to security and the observance of human rights⁴⁰².

300. As the Commission sees it, those approaches are shaped by two separate trends. One is authoritarianism, which translates into ongoing institutionalized violence and increasing militarization of security

⁴⁰¹ IACHR, *Report on Citizen Security and Human Rights*. OEA/Ser.LV/II, doc. 57, December 31, 2009, para. 7 (Executive Summary).

⁴⁰² IACHR, *Violence, Children, and Organized Crime*, OEA/Ser.LV/II. Doc. 40/15, November 11, 2015.

operations, repression of social protest, and the adoption of public policies, in such areas as drugs, that exacerbate punitive responses and incarceration. Those measures have disproportionate impacts on persons traditionally exposed to extreme vulnerability, in addition to jeopardizing the lives and physical integrity of the State agents charged with providing public security services. The second trend is the outsourcing of services to private entities, for instance through the privatization of prison establishments, the contracting of therapeutic communities, or the glorification of self-defense, which might be called a kind of shrinking its public character.

347. Likewise, the IACHR reiterates that States have an obligation to guarantee security and safeguard public order and therefore have the power to use force to guarantee those goals. Nevertheless, that authority is limited by the duty to respect human rights, the enjoyment of which entails not just the obligation of the State not to violate those rights, but also the requirement to protect and preserve human rights. Therefore, actions by the State undertaken to comply with its security obligations must ensure that any risk to fundamental rights is minimized and must guarantee strict compliance with international principles and standards. [...].

[The Human Rights Situation in El Salvador. OEA/Ser.L/V/II Doc.278/21, October 14, 2021](#)

44. The IACHR has pointed out that to be truly effective, any public policy on citizen security must be supported by a strong political consensus and enjoy the support of broad sectors of the population, which is also central to strengthening democratic governance. In addition, such policies should strictly adhere to human rights and to democratic principles and the rule of law. In this regard, pursuant to Article 23 of the American Convention, the IACHR recalls that States have a legal obligation to organize the most all-inclusive systems for society's participation in dealing with the prevention of violence and crime, as a way to strengthen democracy and the rule of law.⁴⁰³ As

⁴⁰³ IACHR Citizen security and human rights, OAS/Ser.LV/II. Doc. 57, December 31, 2009, para. 53 and 207.

indicated by the IACHR, the participation of the inhabitants in the management of public affairs and the design, implementation, monitoring, and evaluation of public policies, especially at the local level, is part of their civil and political rights, as well as a valuable strategic approach for reducing levels of insecurity and violence.⁴⁰⁴

B. Professionalization and modernization of security forces

94. The Commission considers that all measures necessary for crime prevention, control, and reduction should be adopted in accordance with international human rights standards. In particular, it has called for attention to be paid to specific obligations with respect to individuals, groups and communities at greatest risk and traditionally subject to exclusion and discrimination. To this end, the IACHR has urged States to have trained personnel and infrastructure specialized to provide quality services that meet the needs of those sectors of the population that are most vulnerable to violence and crime, such as women, children, and the elderly.⁴⁰⁵ Consequently, the Commission has reiterated the importance of taking measures to strengthen the police through its purge and reconstruction, if deemed necessary, in order to regain citizen confidence.⁴⁰⁶
95. In this regard, the following summary of pronouncements by the Commission related to the processes of professionalization and modernization by States of their security forces under a human rights approach.

Thematic reports

Report on Citizen Security and Human Rights. Thematic Reports. OEA/Ser.L/V/II. Doc. 57.31 December 2009

77. Time and again the Commission has stressed the vital role that the police play in enabling the democratic system of government to function properly. It has said that “[t]he police force is a fundamental

⁴⁰⁴ IACHR, Violence, children and organized crime, OAS/Ser.L/V/II. Doc. 40/15, November 11, 2015, para. 515; IACHR, Citizen security and human rights, OAS/Ser.L/V/II. Doc. 57, December 31, 2015

⁴⁰⁵ IACHR, Situation of Human Rights in Venezuela - "Democratic Institutions, the Rule of Law and Human Rights in Venezuela". OEA/Ser.L/V/II. Doc. 209 31. December 2017, para. 348.

⁴⁰⁶ IACHR. Situation of Human Rights in El Salvador, OEA/Ser.L/V/II. Doc. 278. October 14, 2021; para. 51.

institution to uphold the rule of law and to guarantee the security of the population. Given its nationwide coverage and the variety of its functions, it is one of the State institutions that most often have relations with the public.”⁴⁰⁷ It also observed that “an honest police force that is professional in its approach, well trained and efficient is essential for gaining the confidence of citizens.”⁴⁰⁸

80. These efforts to modernize and professionalize police forces within the region are up against longstanding institutional problems. In general, apart from an occasional formal change, police forces have not modernized their philosophical frame of reference. In a number of countries of the Hemisphere, the police philosophy is still tied to the concept of public order, with the security of the State as the first priority, over the needs of the individuals or groups that make up society. In traditional police literature in the region, human rights are at most mentioned only in passing and they are never tied in with what are understood to be the values or principles of police work. For a police force to aspire to be respectful of human rights, it should not only be trained in human rights theory but it should also organize itself, select its personnel, train constantly and perform its professional functions to ensure the observance of the human rights of the public it serves.

83. Police forces must have personnel and infrastructure specialized to provide quality services that meet the needs of those sectors of the population that are most vulnerable to violence and crime, such as women, children and adolescents, the indigenous population, Afro-descendants and migrants. The Commission has indicated that

[w]hile the doctrine of the Inter-American human rights system, like that of other human rights regimes, does not prohibit all distinctions in treatment in the enjoyment of protected rights and freedoms, it requires at base that any permissible distinctions be

⁴⁰⁷ IACHR, Report on the Situation of Human Rights in Venezuela, OEA/Ser.LV/II.118, doc. 4 rev. 2, 29 December 2003, Chapter III: “State Security: The Armed Forces and the Police,” paragraph 294.

⁴⁰⁸ IACHR, Report on the Situation of Human Rights in Mexico, OEA/Ser.LV/II.100, Doc. 7 rev. 1, September 24, 1998, Chapter V, paragraph 392.

based upon objective and reasonable justification, that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought (...) The principle of equality may also sometimes require member states to take affirmative action as a temporary measure in order to diminish or eliminate conditions which cause or help to perpetuate discrimination, including vulnerabilities, disadvantages or threats encountered by particular groups such as minorities and women.⁴⁰⁹

Impact of Organized Crime on Women, Girls and Adolescents in the countries of Northern Central America. OEA/Ser.L/V/II. Doc. 9/23, February 17, 2023.

179. The IACHR warns that no citizen security objective can be achieved without taking into account the differentiated impacts that violence and crime have on women, girls, and adolescents due to their gender status.⁴¹⁰ In particular, the assumptions of women's subordination to men, as well as the normalization of violence against women and discriminatory gender stereotypes must be taken into account when addressing the causes, consequences and responses in the area of public security.⁴¹¹

180. As the UNDP has pointed out, a gender approach to citizen security means that security and protection policies require a differentiated analysis of threats, access to resources or the difference

⁴⁰⁹ IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paragraph 338.

⁴¹⁰ Spotlight Initiative Regional Programme for Latin America, UNDP. Violence against women and girls in contexts of 544 organized crime. Central America, Colombia, Mexico and Dominican Republic. 2021, p. 17; FIIAPP. The gender perspective in the fight against organized crime. April 19, 2021; Pérez Villalobos, MCP and Romero Aviles, N. Equality and gender: Basic concepts for its application in the field of security and defense. In: El papel de la mujer y el género en los conflictos. Cuadernos de Estrategia, No.157. Spanish Institute for Strategic Studies. July 2012; ParlAmericas. VIII Plenary Assembly of the Inter-Parliamentary Forum of the Americas. September 8-10, 2011.

⁴¹¹ ParlAmericas. VIII Plenary Assembly of the Inter-Parliamentary Forum of the Americas. September 8-10, 2011.

in power and autonomy between men and women, as well as other segments of the population. This "entails focusing on the perspective of prevention and attention to violence, with the objective of generating social conditions that allow for sustainable anticipation of violence or criminal acts at the local, national and international levels".⁴¹²

181. In this regard, the Commission highlights the importance of integrating the gender perspective in the design and implementation of citizen security policies with a human rights approach, in order to address the differentiated protection needs of women, girls and adolescents in organized crime contexts. In particular, because they represent a highly vulnerable population to suffer various forms of violence and gender discrimination in these contexts;⁴¹³ given the increase in their presence with various roles within criminal structures;⁴¹⁴ and considering the context of militarization of citizen security tasks.

[Report on Citizen Security and Human Rights. Thematic Reports. OEA/Ser.L/V/II. Doc. 57.31 December 2009](#)

92. The most widely recognized literature in the region mentions the following among the rights of members of the police force: (1) fair pay that affords the police officer and his or her family a decent living, taking into account the dangers, responsibilities and stress that the police officer experiences every day in his or her work; (2) safety and hygiene on the job; (3) respect for working hours and the required

⁴¹² Spotlight Initiative Regional Programme for Latin America, UNDP, La violencia contra las mujeres y niñas en contextos de crimen organizado. Central America, Colombia, Mexico and the Dominican Republic. Since the adoption of the "Women, Peace and Security" agenda through United Nations Security Council Resolution 1325 and subsequent resolutions, a new paradigm has been set that leads to the integration of a gender approach both in classic peacekeeping operations and in the implementation of regional domestic security policies in the face of new challenges related to transnational crime. See: UN: Security Council. Resolution 1325. 2000; UN: Security Council. The seven "Women, Peace and Security" Resolutions. Adopted by the United Nations Security Council are: RES. 1325 (2000), RES. 1820 (2008), RES. 1888 (2009), RES 1889 (2009), RES 1960 (2010), RES 2106 (2013), RES 2122 (2013).

⁴¹³ See Chapter 4, Forms of violence against women and girls related to the presence and actions of criminal groups, of this report.

⁴¹⁴ See Chapter 3, Section C, Interactions of women, girls and adolescents with gangs, of this report.

psychological and physical support, with time off for relaxation and vacation that is proportionate to the toll that the constant stress of the job exacts; (4) following the orders of superiors when those orders are lawful; if not, the right to challenge the orders without having to face criminal or disciplinary sanctions for refusal to follow an unlawful order or one that violates human rights; (5) constant training that enables the police officer to perform his or her functions, and a police career service that will be an academic-professional underpinning of the cultural transformation. The men and women who serve on the police force must receive ongoing instruction and practical training in human rights, and thorough training and instruction in the area of tactical danger assessment, so that they are able to determine, in every situation, whether the use of force, including lethal force, is proportionate, necessary and lawful.⁴¹⁵

[Pandemic and Human Rights. OEA/Ser.L/V/II. Doc. 396. September 9, 2022.](#)

320. In addition, in States with a greater presence of Afro-descendants, the rates of police violence against this population are higher in comparison with people of other ethnic-racial origin⁴¹⁶. For this reason, the Commission urges States to take effective measures to prevent institutional violence and excessive use of force based on ethno-racial origin and racial profiling patterns.

Country Reports

[Situation of Human Rights in Venezuela - "Democratic Institutions, Rule of Law, and Human Rights in Venezuela". OEA/Ser.L/V/II. Doc. 209. December 31 2017](#)

339. In this regard, the Commission reiterates the need to establish supplementary protection for this group of persons when it comes to

⁴¹⁵ Domínguez Vial, Andrés *Policía y Derechos Humanos*, Policía de Investigaciones de Chile/IDH, Santiago, 1996.

⁴¹⁶ See, inter alia, IACHR, *Afro-descendants, police violence, and human rights in the United States*, OEA/Ser.L/V/II. Doc. 156 26 560 November 2018

citizen security.⁴¹⁷ This obligation derives from Article VII of the American Declaration which establishes that all children have the right to special protection, care and aid. Concretely, it is vital that States strive to correct the structural and institutional conditions, as well as social norms and cultural patterns that serve to legitimize and reproduce forms of violence against children and adolescents, and to guarantee effective enforcement of the laws in force in this regard.⁴¹⁸ Furthermore, as far as police action is concerned, an appropriate legal framework is needed that follows international standards and provides for specially trained units to operate in situations involving children and adolescents, as both victims and perpetrators of violent or criminal acts.⁴¹⁹

[Situation of Human Rights in Haiti. OEA/Ser.L/V/II. Doc. 358. August 30, 2022.](#)

104. Based on the foregoing, the Inter-American Commission considers that building a professional security corps that is trained and equipped with sufficient resources and focused on protection and guarantee of human rights is key to the sustainability of citizen security policies. In this sense, the IACHR reiterates the importance that the police institution provide its officers a fair salary and safe working conditions, with adequate education and training and the necessary equipment for the performance of their duties, and instruction that is founded on the highest principles and standards.⁴²⁰ In line with the Inter-American Court, the IACHR emphasizes that any effort to strengthen security institutions is insufficient if States do not train their members in "the principles and standards for the protection of human

⁴¹⁷ IACHR, [Report on Violence, Children and Organized Crime](#), OEA/Ser.LV/II., Doc. 40/15, November 11, 2015, para. 276 and 288: [Report on Citizen Security and Human Rights](#), OEA/Ser.LV/II, Doc. 57, December 30, 2009, para. 87.

⁴¹⁸ IACHR, [Report on Violence, Children and Organized Crime](#), OEA/Ser.LV/II., Doc. 40/15, November 11, 2015, para. 293.

⁴¹⁹ IACHR, [Report on Citizen Security and Human Rights](#), OEA/Ser.LV/II, Doc. 57, December 30, 2009, para. 89.

⁴²⁰ IACHR, [Report on Citizen Security and Human Rights](#), OEA/Ser.LV/II. Doc. 57, December 31, 2009, para. 92.

rights and the limits to which the use of weapons by law enforcement officials must be subject in all circumstances”.⁴²¹

[Situation of Human Rights in Brazil. OEA/Ser.L/V/II. Doc. 9. 12 February 2021](#)

309. Likewise, the IACHR again points out that public policies need to consider the conditions under which government officials, such as policemen and other agents responsible for public security, go about their work, in such a way as to avoid their working under stress or in risky conditions, the idea being to establish a clear link between improved working conditions and improvements in security for citizens. Accordingly, it is necessary that the State adopt ongoing and structural measures to ensure professional training for these agents in accordance with human rights parameters, along with a public policy that takes the security and rights of those professionals into account. Public citizen security policies must focus on establishing and consolidating public institutions and policies that effectively and efficiently meet the security demands of a democratic society, while strictly observing international human rights standards.

[Situation of Human Rights in Chile. OAS/Ser.L/V/II. Doc. 1/22. January 24, 2022.](#)

182. Likewise, the IACHR has reiterated that states must incorporate specific training protocols and contents for agents aimed at the safe use of each particular weapon. The protocols should strengthen the prevention of inappropriate or abusive uses that may result in injury or death of individuals and should consider situations prohibiting the use of these weapons in contexts or against individuals that may pose risks to physical integrity. Additionally, there should be an obligation to

⁴²¹ IACHR, [Police Violence against Afro-descendants in the United States](#), OEA/Ser.LV/II. Doc. 156 26 November 2018; IACHR, 137 Annual Report 2015, Chapter IV Use of Force, para. 21 (citing IACHR Court. Case of [Montero Aranguren et al. \(Retén de Catia v. Venezuela\)](#)). Preliminary Objections, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, para. 77. IACHR, [Police Violence against Afro-descendants in the United States](#), OEA/Ser.LV/II. Doc. 156 26 November 2018; IACHR, Annual Report 2015, Chapter IV Use of Force, para. 21 (citing IACHR Court. Case of [Montero Aranguren et al. \(Retén de Catia v. Venezuela\)](#)). Preliminary Objections, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, para. 77.

establish explicit definitions regarding who should authorize their use, and guidelines for attributing responsibility for the incorrect use of each type of weapon or implemented device should be developed.

[Situation of Human Rights in Cuba. OEA/Ser.L/V/II. Doc. 2. 3 February 2020](#)

302. In that regard, the Commission stresses the importance of collecting disaggregated data on a variety of situations of racial discrimination, including those related to the use of racial profiling in communities and occurrences of arbitrary detention. The IACHR underscores that the State has a duty to promote the observance of clearly defined codes of conduct and ethical standards, in accordance with international standards, by all public officials, particularly law enforcement officials and justice operators, including security personnel, prosecutors, and judges. The State should also ensure that racial profiling and other explicit or implicit discriminatory practices on the basis of ethno-racial origin and other reasons are explicitly prohibited and punished.

[Situation of Human Rights in Brazil. OEA/Ser.L/V/II. Doc. 9. 12 February 2021](#)

274. [...] the Commission has again asserted that the effect of privatizing security functions is loss of control over acts undertaken with the use of force and insensitivity to the notion of human rights, which the State has a duty to defend, protect, and guarantee. Security becomes a mere commodity that can be bought on the market and usually only by those sectors of society that can afford it⁴²². That being so, the IACHR urges the [...] State to reconsider certain measures and proposals it is tending to espouse and to bear in mind Inter-American rules and parameters regarding human rights.

⁴²² IACHR, Report on Citizen Security and Human Rights, OEA/Ser.LV/II. Doc. 57, December 31, 2009

Situation of Human Rights in Honduras. OEA/Ser.L/V/II. Doc. 146. 27 August 2019

70. [...] The Commission reiterates the importance of greater supervision of private security companies and recalls that the State has the obligation to establish transparent and strict selection processes for the purpose of granting licenses to private security companies, as well as the supervision of these companies and their members.⁴²³

Haiti: Failed Justice or the Rule of Law? Challenges Ahead for Haiti and the International Community. OEA/Ser.L/V/II.123. Doc. 6 rev. 1. 26 October 2005.

118. In light of the potential for human rights and other abuses such as those discussed above, the international community has acknowledged the importance of developing and enforcing proper standards of conduct for law enforcement authorities. In this respect, the United Nations has promulgated a Code of Conduct for Law Enforcement Officials, which prescribes the principal obligations of police and other law enforcement officials in executing their mandates and the need for appropriate authorities or organs with the power to review or remedy violations of such obligations.⁴²⁴

C. The intervention of the armed forces in the work of citizen security

96. It has been observed that within the region, it is sometimes suggested—or it just happens—that military troops take over internal security based on the argument that violence or criminal acts are on the rise. The Commission considers that arguments of this type “confuse the concepts of public security and national security, when there is no doubt that the level of ordinary crime, however high this may be, does

⁴²³ IACHR, *Report on Citizen Security and Human Rights*, December 31, 2009, para. 73. See also: UN General Assembly, Latin American and Caribbean Regional Consultation on the effects of the activities of private military and security companies on the enjoyment of human rights: regulation and monitoring, A/HRC/7/7/Add.5, March 5, 2008. IACHR, *Annual Report 2015*, Chapter IV.A, Use of Force, State Obligations towards Non-State Actors.

⁴²⁴ UN Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979).

not constitute a military threat to the sovereignty of the State.”⁴²⁵. This is because the role of the police is to enforce the law and work with citizens to prevent and investigate threats to public safety, while the role of the military is to fight the enemy. In this context, the role of the military police would seem to reinforce the overlap between duties that are not compatible.⁴²⁶ In that regard, the Hemisphere’s history is testament to the fact that the intervention of the armed forces in internal security matters brings the risk of human rights violations.⁴²⁷

97. Therefore, the Commission has pointed out that it is essential to draw a clear and precise distinction between internal security as a function for the police, and national defense as the function of the armed forces, since they are two substantively different institutions, insofar as the purposes for which they were created and their training and preparation are concerned.⁴²⁸ This section contains a compilation of IACHR standards in relation to this obligation.

Country reports

[Report on the Situation of Human Rights in Jamaica. OEA/Ser.L/V/II.144. Doc. 12. 10 August 2012.](#)

40. [...] A cornerstone of citizen security is that military forces not be used for civilian crime-fighting. In its report on citizen security, the IACHR stated:

One of the Commission’s central concerns with respect to the actions that the member states have taken as part of their policy on citizen security is the following: the involvement of the armed forces in professional tasks that, given their nature, fall strictly with

⁴²⁵ IACHR, Report on Citizen Security and Human Rights, OEA/Ser.L/V/II, Doc. 57, December 31, 2009, para. 103.

⁴²⁶ IACHR, [Situation of Human Rights in Honduras](#), OEA/Ser.L/V/II, Doc. 42/15, December 31, 2015, para. 242.

⁴²⁷ IACHR, [Report on the Situation of Human Rights in Venezuela](#), OEA/Ser.L/V/II.118. Doc. 4 rev. 1, October 24, 2003, para. 272. In that same connection: IACHR, [Situation of Human Rights in Chile](#), OEA/Ser.L/V/II, Doc. 1/22, January 24, 2022, para. 228; and IACHR, [Report on Citizen Security and Human Rights](#), OEA/Ser.L/V/II, Doc. 57, December 31, 2009, par. 101.

⁴²⁸ IACHR, [Report on the Situation of Human Rights in Venezuela](#), OEA/Ser.L/V/II.118. Doc. 4 rev. 1. October 24, 2003, par. 272; and IACHR, [Report on the Situation of Human Rights in Jamaica](#), OEA/Ser.L/V/II.144. Doc. 12, August 10, 2012, para. 39

the purview of the police force. The Commission has repeatedly observed that the armed forces are not properly trained to deal with citizen security; hence the need for an efficient civilian police force, respectful of human rights and able to combat citizen insecurity, crime and violence on the domestic front. [...]

[Situation of human rights in Chile. OEA/Ser.L/V/II. Doc. 1/22. January 24, 2022.](#)

230. In any case, the participation of the armed forces in citizen security tasks must be extraordinary, so that any intervention is justified and exceptional, temporary and restricted to what is strictly necessary in the circumstances of the case; subordinated and complementary to civilian police forces, as well as regulated by legal mechanisms and protocols on the use of force.⁴²⁹

[Report on the Situation of Human Rights in Venezuela. OEA/Ser.L/V/II.118. Doc. 4 rev. 1. 24 October 2003.](#)

287. The IACHR emphatically underscores that, pursuant to Article 4 of the Inter-American Democratic Charter, the constitutional subordination of all state institutions to the civilian authority is essential to democracy.

288. For that reason, the Commission points out that the armed forces cannot engage in political decision making. The Commission considers it essential for the Venezuelan state urgently to implement the measures necessary to ensure that the armed forces do not engage in political decision making and to prevent the participation of these institutions in the political affairs of the country. In that connection, it is necessary to punish any involvement in political decision making by the armed forces, in order to avoid further acts of insubordination of sectors of the armed forces against the democratically elected civilian authority. Finally, to restore the credibility of the armed forces and protect the rights of citizens, it is essential to ensure that the armed forces and the security services refrain from involvement in political

⁴²⁹ IACHR, Press Release No. 317/19 - IACHR condemns the excessive use of force in the context of the 302 social protests in Chile, expresses grave concern over the high number of complaints, and rejects all forms of violence, December 6, 2019.

decision making, are subordinate to civilian authority, and act with impartiality. In that regard it is also essential to avoid their use for tasks connected with preservation of public order.

289. Furthermore, it is essential to take resolute steps to enforce military and criminal codes that punish such conduct, in order to avert acts of insubordination by sectors of the armed forces against the democratically elected civilian authority. As mentioned, the reality in the region shows is that the involvement of the armed forces in political decision-making tends to precede departures from the constitution, which almost always lead to serious violations of human rights. It is the responsibility of all sectors, but particularly that of the Government, to ensure that the armed forces play exclusively the roles of defending the national sovereignty for which they have been established and trained.

[Situation of Human Rights in Honduras. OEA/Ser.L/V/II. Doc. 42/15. 31 December 2015](#)

259. The IACHR considers the State's legitimate interest in providing safe spaces for training children and adolescents. However, the role of the Armed Forces, which is the defense of the country against security threats coming from abroad, is incompatible with the coordination, supervision and implementation of programs of civic education for children. Furthermore, it is pertinent to note that the initiative is inserted in a context of militarization of various state functions, which correspond to other state entities. Therefore, trusting the Armed Forces with this initiative reflects the inadequacies of the state mechanisms responsible for training children, and exemplifies the great pending challenges to build and consolidate a system of comprehensive protection for the children and adolescents.

[Situation of Human Rights in Venezuela - "Democratic Institutions, the Rule of Law and Human Rights in Venezuela". OEA/Ser.L/V/II. Doc. 209. 31 December 2017](#)

360. The IACHR emphatically reiterates that the "imminent deployment of military forces and armed civilian militias ordered by the Executive Branch represents a serious threat to the standards regarding citizen

security and the protection of human rights."⁴³⁰ Once again, the IACHR points out that military training is not appropriate for controlling domestic security, so that fighting violence domestically must be the exclusive task of a properly trained police force that acts in strict compliance with human rights. Likewise, citizens must not be incorporated into any kind of domestic security strategy. Nor should the role of society vis-à-vis national security be distorted.⁴³¹ The Commission further notes that it is not sufficient for the authorities to condemn violent acts committed by the "colectivos." Those authorities have an obligation to adopt all necessary measures to prevent them, as well as to investigate, try, and punish those responsible, when such acts do occur.⁴³²

Thematic reports

Report on Citizen Security and Human Rights. Thematic Reports. OEA/Ser.L/V/II. Doc. 57.31 December 2009

102. [...] The distinction between the functions of the armed forces, which are limited to defending national sovereignty, and the functions of the police, which has exclusive responsibility in the matter of citizen security, is an essential premise that cannot be overlooked when devising and implementing public policy on citizen security. The Court has held that "(...) the States must restrict to the maximum extent the use of armed forces to control domestic disturbances, since they are trained to fight against enemies and not to protect and control civilians, a task that is typical of police forces."⁴³³

105. [...] The Inter-American Commission concurs with the following: "The State must be ready and willing to deal with conflicts

⁴³⁰ IACHR, Press Release No. 048/17, *IACHR Urges Venezuela to Guarantee the Right to Protest and to Demilitarize Streets*, April 19, 2017.

⁴³¹ IACHR, *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II Doc. 54, December 30, 2009, para. 699.

⁴³² IACHR, Press Release No. 093/17, *IACHR Condemns Serious Acts of Violence at National Assembly in Venezuela*, July 10, 2017.

⁴³³ IA Court H.R., *Montero Aranguren et al. (Detention Center of Catia) v. Venezuela* Case. Judgment of July 5, 2006. Series C No. 150, paragraph 78.

through peaceful means, as this is an axiom of citizen security which holds that differences arise between citizens who are to be protected, not between enemies one has to fight.”⁴³⁴

Impact of Organized Crime on Women, Girls and Adolescents in the countries of Northern Central America. OEA/Ser.L/V/II. Doc. 9/23. February 17, 2023.

177. [...] In this regard, the Commission has called on the States to progressively and definitively withdraw military forces from citizen security and to strengthen police forces in the exercise of their functions.

D. Use of force in the context of protests

98. The Commission has addressed the issue of social protest based on the relationship between effective protection and guarantee of the right of assembly in the Hemisphere and the need to reconcile exercise of that right with the State’s obligations to prevent violence and to maintain the conditions that make coexistence in a democratic society possible.⁴³⁵

99. In this regard, the IACHR has recognized that the exercise of this right can sometimes be disruptive to the normal routine of daily life, especially in large urban centers; it may even cause problems or affect the exercise of other rights that the State has an obligation to protect and ensure, such as freedom of movement. However, it also holds that such disruptions are part of the mechanics of a pluralistic

⁴³⁴ Ramírez Ocampo, Augusto, Seguridad ciudadana y derechos humanos, Andean Commission of Jurists, Lima, 1999. On the same issue, High Commissioner Louise Arbour issued the following statement at the end of her mission to Mexico on 8 February 2008: “during my visit, I have seen and heard that the situation of human rights at the national level raises persistent concerns in a number of areas. Foremost amongst the issues brought to my attention has been the question of the use of the military to engage in law enforcement activities. I emphasize that it is the primary obligation of the State to protect and defend life and physical security. In a situation of serious challenges to the State’s authority from heavily armed organized criminals and severe deficiencies in law enforcement agencies, including widespread corruption, I acknowledge the dilemma faced by the authorities in discharging their responsibility to protect. However, recourse to the military remains problematic, as it is fundamentally unsuited – in training, philosophy, equipment and outlook - to perform civilian law enforcement functions. The focus must be on devoting urgently the necessary resources for reinforcing civilian agencies that work with integrity and professionalism. In the meantime, civilian courts should have jurisdiction over the acts of military personnel performing law enforcement functions, and effective remedies must be available for human rights violations perpetrated by military personnel.” Available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/A2804F56E452D130C12573EC0057685B?opendocument>.

⁴³⁵ IACHR, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II. Doc. 57, December 31, 2009, para. 197.

society in which diverse and sometimes conflicting interests coexist and find the forums and channels in which to express themselves.⁴³⁶

100. However, considering that the right of assembly must be exercised in a peaceful and unarmed manner, and that the state authorities have the obligation to prevent and, as appropriate, control any form of violent conduct that violates the human rights of any person;⁴³⁷ a series of standards regulating the use of force by the police in the context of social protests are summarized below.

Thematic reports

Report on Citizen Security and Human Rights. Thematic Reports. OEA/Ser.L/V/II. Doc. 57. 31 December 2009

201. The Commission has indicated that states should establish administrative controls to ensure only exceptional use of force in public demonstrations, in cases where it is necessary, through measures for planning, prevention, and for the investigation of cases in which an abuse of force may have occurred. The Commission has recommended the following: a) implementation of mechanisms to prohibit, in an effective manner, the use of lethal force as a recourse in public demonstrations; b) implementation of an ammunition registration and control system; c) implementation of a communications records system to monitor operational orders, those responsible for them, and those carrying them out; d) promotion of visible means of personal identification for police agents participating in public law enforcement operations; e) promotion of opportunities for communication and dialogue prior to demonstrations and of the activities of liaison officers to coordinate with demonstrators concerning demonstration and protest activities and law enforcement operations, in order to avoid conflict situations; f) the identification of political officials responsible for law enforcement operations during marches, particularly in the case of scheduled marches or prolonged social conflicts or circumstances in which potential risks to the rights of the demonstrators or others are

⁴³⁶ IACHR, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II. Doc. 57, December 31, 2009, para. 198.

⁴³⁷ IACHR, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II. Doc. 57, December 31, 2009, para. 198.

anticipated, so that such officials are tasked with supervising the field operation and ensuring strict compliance with norms governing the use of force and police conduct; g) the establishment of an administrative sanctions regime for the law enforcement personnel involving independent investigators and the participation of victims of abuses or acts of violence; h) the adoption of measures to ensure that police or judicial officials (judges or prosecutors) directly involved in operations are not responsible for investigating irregularities or abuses committed during the course of those operations.⁴³⁸

[Protest and Human Rights. Standards on the rights involved in social protest and the obligations to guide the response of the State. OEA/Ser.L/V/II. CIDH/RELE/INF.22/19. September 2019](#)

102. In its 2015 Annual Report, this Commission recalled, based on a number of reports⁴³⁹ and on the case law of the inter-American system,⁴⁴⁰ the irreversibility of the consequences that may result from the use of force. As such, the use of force is viewed as “a last resort that, qualitatively and quantitatively limited, is intended to prevent a more serious occurrence than that caused by the State’s reaction. Within that framework, characterized by exceptionality, both the Commission and the I/A Court HR have agreed that for the use of force to be justified one must satisfy the principles of legality, absolute necessity, and proportionality.”⁴⁴¹

103. [...] the InterAmerican Court, in referring to the principle of legality, has stated that the use of force “must be aimed at achieving a

⁴³⁸ IACHR, Report on the Situation of Human Rights Defenders in the Americas, paragraph 68.

⁴³⁹ IACHR, Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II.124. Doc. 5 rev. 1, adopted on March 7, 2006, para. 64; IACHR: Report No. 90/14, Admissibility and Merits, Luis Jorge Valencia Hinojosa, Ecuador, November 4, 2014, para. 181; Report on Terrorism and Human Rights, October 22, 2002, para. 87; Report on Citizen Security and Human Rights, December 31, 2009, para. 114.

⁴⁴⁰ I/A Court H.R., Case of Cruz Sánchez et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of April 17, 2015. Series C No. 292, para. 265; Case of J. v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 27, 2013. Series C No. 275, para. 330; Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C No. 251, para. 85.

⁴⁴¹ IACHR, Annual Report 2015, Chapter IV A, para. 7. 153 IACHR, Annual Report 2015, Chapter IV A, para. 8

legitimate objective, and there must be a regulatory framework which takes account of the form of action in such a situation.”⁴⁴²

104. The principle of absolute necessity refers to the possibility of resorting to “the defensive and offensive security measures used should be those strictly necessary to carry out the lawful orders of a competent authority in the event of acts of violence or crime that imperil the right to life or the right to personal security.”⁴⁴³ At the same time, according to the circumstances of the case, it is necessary to “verify whether other less harmful means exist to safeguard the life and integrity of the person or situation that it is sought to protect, according to the circumstances of the case.”⁴⁴⁴ Specifically, it has also established that this requirement cannot be invoked when people do not pose a direct danger, “even when the failure to use force results in the loss of the opportunity to capture them.”⁴⁴⁵

106. Finally, the Commission has understood the principle of proportionality as “moderation in the actions of law enforcement officials in an effort to minimize the harm and injuries that may result from their intervention, guaranteeing immediate assistance to the persons negatively impacted, and endeavoring to inform next-of-kin or loved ones of the situation as soon as possible.”⁴⁴⁶ Agents who may legitimately make use of force should “apply a standard of differentiated use of force, determining the level of cooperation,

⁴⁴² IA Court H.R., Case of Cruz Sánchez et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of April 17, 2015. Series C No. 292 (only in Spanish), para. 265.

⁴⁴³ IACHR, Report on Citizen Security and Human Rights, December 31, 2009, para. 116.

⁴⁴⁴ IA Court H.R., Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, paras. 67-68; Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C No. 251, para. 85.

⁴⁴⁵ IA Court H.R., Case of Landaeta Mejías Brothers et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 27, 2014. Series C No. 281, para. 134; Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C No. 251, para. 85; ECtHR, *Kakoulli v. Turkey*, No. 38595/97. Judgment of 22 November 2005, para. 108.

⁴⁴⁶ IACHR, Annual Report 2015, Chapter IV A, para. 12; IACHR, Report on Citizen Security and Human Rights, December 31, 2009, para. 119.

resistance, or aggressiveness of the person involved and, on this basis, use tactics of negotiation, control or use of force, as appropriate.”⁴⁴⁷ Circumstances such as “the level of intensity and danger of the threat; the attitude of the individual; the conditions of the surrounding area, and the means available to the agent to deal with the specific situation”⁴⁴⁸ are determinants when it comes to evaluating the proportionality of the interventions by the authorities, as their display of force must at all times aim “to reduce to a minimum the harm or injuries caused to anyone.”⁴⁴⁹

107. The general principles on the use of force, applied to the context of protests and demonstrations, “require that the security operations be carefully and meticulously planned by persons with experience and training specifically for this type of situation and under clear protocols for action.”⁴⁵⁰

109. It is important to note that the State has an obligation to protect participants in a demonstration against physical violence by third parties and non-state actors, including persons who may hold opposing views.⁴⁵¹ The use of force in demonstrations may prove necessary and proportional in cases where there are threats that pose a certain risk to the life or physical integrity of persons present, whether or not they are participating in the protest.

110. The principles of moderation, proportionality, and progressivity must be observed both in situations where the objective is to restrain and/or detain a person who is resisting the police authority’s lawful action, and

⁴⁴⁷ IACHR, Annual Report 2015, Chapter IV A, para. 12; IACHR, Report on Citizen Security and Human Rights, December 31, 2009, para. 119.

⁴⁴⁸ IACHR, Annual Report 2015, Chapter IV A, para. 12; Basic Principles on the Use of Force, Principle No. 9

⁴⁴⁹ IA Court H.R., Case of Landaeta Mejías Brothers et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 27, 2014. Series C No. 281, para. 136.

⁴⁵⁰ IACHR, Annual Report 2015, Chapter IV A, para. 79.

⁴⁵¹ IACHR, Report on the Situation of Human Rights Defenders in the Americas, March 7, 2006, OEA/Ser.LV/II.124 Doc. 5 rev. 1, para. 50.

in police operations involving demonstrations or mass gatherings that may result in violence or affect the rights of third parties.⁴⁵²

111. The design of intervention plans should take into account the fact that the State institutions involved have often had conflicting relationships with demonstrators. The design of these operations must also respect aspects related to the socio-cultural values of those participating in the protest and/or their membership in groups that must be specially protected.

113. States need to make progress in regulating their actions, especially the use of force and police action in the specific contexts of protest. These regulations should seek to include both the prevention and prohibition of violations committed through the abuse of firearms or less lethal weapons and devices, unlawful arrests, beatings, or any form of abuse of force that may be involved in a demonstration. They should also cover the use of force to protect rights associated with social protest through actions that facilitate the right to demonstrate, and prevent and deter harm to the safety or other rights of demonstrators or third parties at the hands of State or non-state actors.

114. As this Commission has underscored, the use of firearms is an extreme measure. They should not be used except where police institutions are unable to use non-lethal means to restrain or detain persons who threaten the life or safety of police officers or third parties.⁴⁵³ This general principle governing the use of lethal force by the police has a particular application in the area of public protests or demonstrations.⁴⁵⁴

⁴⁵² IACHR, Report on Citizen Security and Human Rights, OEA/Ser.L/V/II.Doc. 57, December 31, 2009, para. 133.

⁴⁵³ IACHR, Report on Citizen Security and Human Rights, 2009, para. 118; UN, OHCHR, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 1 April 2014, A/HRC/26/36, para. 58.

⁴⁵⁴ IACHR, Annual Report 2015, Chapter IV A, para. 81; UN Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, "Use of force during demonstrations," A/HRC/17/28, 23 May 2011 para. 75. For additional development of these principles, see: Amnesty International, Use of Force – Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, pp 148 i).

116. This Commission also considers that potentially lethal force cannot be used merely to maintain or restore public order or to protect legal interests less valuable than life, such as property. Only the protection of life and physical integrity from imminent threats can be a legitimate aim for the use of such force.⁴⁵⁵ As discussed by the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions:

*The 'protect life' principle demands that lethal force may not be used intentionally merely to protect law and order or to serve other similar interests (for example, it may not be used only to disperse protests, to arrest a suspected criminal, or to safeguard other interests such as property). The primary aim must be to save life. In practice, this means that only the protection of life can meet the proportionality requirement where lethal force is used intentionally, and the protection of life can be the only legitimate objective for the use of such force. A fleeing thief who poses no immediate danger may not be killed, even if it means that the thief will escape.*⁴⁵⁶

117. The use of firearms in the context of social protests is almost never justified by this criterion of proportionality. As the IACHR has rightly considered, this means that The states should implement mechanisms for effectively prohibiting recourse to the use of lethal

⁴⁵⁵ Human Rights Council, The promotion and protection of human rights in the context of peaceful protests, A/HRC/25/L.20, of 24 March 2014, art. 10; Human Rights Council, The promotion and protection of human rights in the context of peaceful protests, A/HRC/RES/25/38 of 11 April 2014, art. 10; United Nations Code of Conduct for Law Enforcement Officials and Interpretive Commentary (art. 3): "The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender." In addition, the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials state that: "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life" (Principle 9).

⁴⁵⁶ OHCHR, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 1 April 2014, A/HRC/26/36, paras. 72-73.

force in public demonstrations.⁴⁵⁷ Prohibiting officers who might come into contact with demonstrators from carrying firearms and lead ammunition has proven to be the best measure to prevent lethal violence and deaths in the context of social protests.⁴⁵⁸ Accordingly, firearms and ammunition should be excluded from operations to control social protests.⁴⁵⁹

118. Although operations may allow for the availability of firearms and lead ammunition somewhere outside the demonstration's radius of action in exceptional cases where there is a situation of real, serious, and imminent risk to the life or physical integrity of persons that warrants their use,⁴⁶⁰ there should be explicit rules concerning who has the power to authorize their use in such extreme cases and the ways in which such authorization is to be documented.⁴⁶¹

119. In some cases, it has been found that police officers carry weapons and/or ammunition of their own, without authorization or registration. The Commission considers that the States should clearly prohibit police officers from carrying weapons and/or ammunition other than those provided under the rules and regulations of the institution to

⁴⁵⁷ IACHR, Annual Report 2015, Chapter IV A, para. 81, Report on Citizen Security and Human Rights, OEA/Ser.LV/II. Doc. 57, December 31, 2009, para. 201.

⁴⁵⁸ IACHR, Annual Report 2015, Chapter IV A, para. 82; Report on the Situation of Human Rights Defenders in the Americas, 2006, para. 68 a); UN Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, "Use of force during demonstrations," A/HRC/17/28, 23 May 2011 para. 75). Amnesty International has also noted that firearms should not be used as tactical tools in the containment of public assemblies (Amnesty International, Use of Force – Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, p. 148 i).

⁴⁵⁹ IACHR, Annual Report 2015, Chapter IV A, para. 82

⁴⁶⁰ IACHR, Annual Report 2015, Chapter IV A, para. 82; The United Nations Human Rights Council has called upon "...States, as a matter of priority, to ensure that their domestic legislation and procedures are consistent with their international obligations and commitments in relation to the use of force and are effectively implemented by officials exercising law enforcement duties, in particular applicable principles of law enforcement, such as the principles of necessity and proportionality, bearing in mind that lethal force may only be used to protect against an imminent threat to life and that it may not be used merely to disperse a gathering." Human Rights Council, Resolution A/HRC/25/L.20, 24 March 2014, para. 10.

⁴⁶¹ IACHR, Annual Report 2015, Chapter IV A, para. 82.

which they belong, regardless of such privately owned weapons being duly registered for general use⁴⁶².

[Pandemic and Human Rights. OEA/Ser.L/V/II. Doc. 396. September 9, 2022.](#)

226. On the other hand, the IACHR has received information on the excessive use of force in the detention of persons on public streets in areas surrounding urban centers or marginalized neighborhoods. In the situations reported, security agents resort to the use of firearms as a first resort in the performance of their public security functions. The indiscriminate use of lethal force has resulted in deaths in unclear contexts of alleged crossfire with security agents and of people, including adolescents, who were walking peacefully in the area. The Commission emphasizes that the use of lethal force is not authorized in order to detain a person who does not represent a real or imminent threat or danger to the agents or third parties. In the case of the use of force, States should adopt concomitant and subsequent measures after the use of force to ensure the review of the performance of their public agents and the determination of disciplinary and criminal responsibilities, if any. All police actions should be recorded and there should be precise inventories of the weapons assigned to each officer. It is necessary to establish a clear chain of command with specific powers regarding the authorization of the use of force and an adequate police communication system that safeguards the totality of operational orders issued.⁴⁶³

⁴⁶² IACHR, Annual Report 2015, Chapter IV A, para. 83.

⁴⁶³ IACHR, The IACHR calls on the States of the region to implement democratic and participatory citizen security policies focused on the protection of the individual, September 25, 2020.

Country Reports

Human Rights Situation in Peru in the context of social protests. OEA/Ser.L/V/II. Doc. 57/23. April 23, 2023.

235. The IACHR recognizes that there may be very exceptional cases⁴⁶⁴ in which, due to the length of time, intensity and scale of the disruption, the authorities take a lawful and legitimate decision to disperse a protest. Such an order must consider that the appropriate "degree of tolerance" cannot be defined in the abstract and therefore it is up to the State to examine the particular circumstances of each case with respect to the extent of the disturbance.⁴⁶⁵ In this regard, the Commission reiterates that such an order must be based on the serious risk to the life or physical integrity of persons; and when no other less harmful measures are possible to protect those rights.⁴⁶⁶

236. In these exceptional and delimitable cases in terms of circumstances of time, manner and place, as well as in other situations where the possibility of ordering the dispersal of the protest is assessed, "the conditions for ordering the dispersal of an assembly should be set out in national law and only a duly authorized official can order the dispersal of a peaceful assembly".⁴⁶⁷ Moreover, only "only government authorities or high-ranking officials with sufficient and accurate information about the situation developing on the ground should be empowered to order a dispersal".⁴⁶⁸ Therefore, the

⁴⁶⁴ United Nations Human Rights Committee, CCPR/C/GC/37, General Comment n. 37 (2020, on the right to peaceful assembly (art. 21), September 17, 2020, para. 53.

⁴⁶⁵ ECHR, *Primov et al. case*, 2014, para. 145.

⁴⁶⁶ IACHR. *Protest and human rights*. OEA/Ser.L/V/II. IACHR/RELE/INF. 22/19. September 2019, para. 153.

⁴⁶⁷ United Nations Human Rights Committee, CCPR/C/GC/37, General Comment n. 37 (2020, on the right to peaceful assembly (art. 21), September 17, 2020, para. 53.

⁴⁶⁸ Human Rights Council, *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper handling of demonstrations*, A/HRC/31/66, 4 February 2016, para. 63.

dispersal order should not be based on an exclusively political or expediency criterion .⁴⁶⁹

237. Finally, when the authorities legally and legitimately take the decision to disperse demonstrators, this decision must be communicated to them in their language and in a clear manner. This should be done in order to allow the demonstrators to fully understand and comply with the decision, giving them sufficient time to disperse without the need to resort to the use of force.⁴⁷⁰

244. When planning operations and intervention plans, the State must take into consideration that on many occasions the security agents in charge may have had conflictive relations with the demonstrators.⁴⁷¹ Therefore, the decision to use, or not, all types of force requires consideration of the risks involved, which may contribute to an escalation of tension levels.⁴⁷² Attention to these specificities is important to protect the right to life and physical integrity of all those involved,⁴⁷³ including members of the security forces.

245. In situations of prolonged protests or circumstances where potential risks to the rights of demonstrators or third parties can be foreseen, the need to identify the chain of command, including the civilian political authorities, in charge of security operations and their respective indications is reinforced. These persons are responsible for controlling the operation, in accordance with Inter-American human rights standards. Additionally, the traceability protocols of the persons

⁴⁶⁹ IACHR. Protest and human rights. OEA/Ser.LV/II. IACHR/RELE/INF. 22/19. September 2019, paras. 314-315.

⁴⁷⁰ IACHR. Protest and human rights. OEA/Ser.LV/II. IACHR/RELE/INF. 22/19. September 2019, para. 155.

⁴⁷¹ IACHR. Protest and human rights. OEA/Ser.LV/II. IACHR/RELE/INF. 22/19. September 2019, para. 115. para. 111.

⁴⁷² IACHR. Protest and human rights. OEA/Ser.LV/II. IACHR/RELE/INF. 22/19. September 2019, para. 115. para. 108.

⁴⁷³ IACHR. Protest and human rights. OEA/Ser.LV/II. IACHR/RELE/INF. 22/19. September 2019, para. 115. para. 108.

involved are essential for the eventual establishment of an adequate line of responsibility for the State's actions.⁴⁷⁴

246. At the same time, considering the need to identify the perpetrators of acts of violence, dispersal can only be resorted to in very exceptional cases. This requires an express order based on a serious risk to the life or physical integrity of the persons.⁴⁷⁵ It also requires elements to substantiate that the protest as a whole is "no longer peaceful or if there are clear indications of an imminent threat of serious violence that cannot be reasonably addressed by more proportionate measures, such as targeted arrests".⁴⁷⁶ The mere risk of violent incidents is not an excuse to break up assemblies that are in principle peaceful.⁴⁷⁷

248. Therefore, an effort must be made to identify and individualize if there are violent groups that, apart from the right to protest, may denaturalize it or use this context for other purposes away from it, and thus avoid scenarios of confrontation and extreme violence. State deployment should focus on protecting the life and physical integrity of all persons, whether or not they participate in the context of protests.

[Situation of Human Rights in Chile. OEA/Ser.L/V/II. Doc. 1/22. January 24, 2022.](#)

169. With respect to the indiscriminate use of less lethal weapons in the context of social protests, such as tear gas or repetitive firing devices, which are sometimes used to fire rubber, rubber-coated, plastic, or rubber projectiles, the IACHR has particularly pointed out that tear gas should not be used in enclosed spaces or in front of people who do not have a means of deconcentration or evacuation.

⁴⁷⁴ IACHR. Protest and human rights. OEA/Ser.L/V/II. IACHR/RELE/INF. 22/19. September 2019, para. 314.

⁴⁷⁵ IACHR. Protest and human rights. OEA/Ser.L/V/II. IACHR/RELE/INF. 22/19. September 2019, para. 314. para. 153.

⁴⁷⁶ United Nations Human Rights Committee, CCPR/C/GC/37, General Comment n. 37 (2020, on the right to peaceful assembly (art. 21), September 17, 2020, para. 85.

⁴⁷⁷ United Nations Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/29/25, para. 41.

The IACHR has particularly pointed out that tear gas should not be used in enclosed spaces or in front of people who do not have a means of deconcentration or evacuation. In this regard, the IACHR has stated that the use of this type of weapon should be discouraged due to the impossibility of controlling the direction of its impact, which increases the possibility of causing serious injuries that may even compromise a sense or an organ.⁴⁷⁸

Annual Reports

Annual Report of the Inter-American Commission on Human Rights, 2016, Chapter IV.B Venezuela

164. The protection of the exercise of the rights to assembly and freedom of expression entails not only a State obligation to not interfere with their exercise but also a duty to adopt, during and prior to certain circumstances, positive measures to ensure them.⁴⁷⁹ These measures include the duty to protect the rights of demonstrators during a protest from acts committed by private or nonstate actors.⁴⁸⁰ They also encompass the obligation to investigate and punish anyone who commits acts of violence against the life or personal integrity of demonstrators.

Reports on Merits

Report No. 458/21. Case 12.880. Merits. Edmundo Alex Lemun Saavedra and others. Chile. December 31, 2021

87. When it is alleged that a death has occurred as a result of the use of force, the Inter-American Court has established clear rules on the burden of proof. In the words of the Court:

⁴⁷⁸ RELE-IACHR, Protest and Human Rights. Standards on the rights involved in social protest 199 and the obligations that should guide state response, OEA/Ser.LV/II. IACHR/RELE/INF.22/19. September 2019, paras.122 and 125.

⁴⁷⁹ IACHR, Report on Citizen Security and Human Rights, 2009, para. 192; IACHR, Report on the Situation of Human Rights Defenders in the Americas, 2011, para. 133.

⁴⁸⁰ Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia, OEA/Ser.L/VII.Doc. 34, June 28, 2007, para. 43. IACHR, Report on the Situation of Human Rights Defenders in the Americas, 2006, para. 63.

(...) whenever the use of force [by state agents] results in the death or injuries to one or more individuals, the State has the obligation to give a satisfactory and convincing explanation of the events and to rebut allegations over its liability, through appropriate evidentiary elements.⁴⁸¹

89. In this regard, in order for an explanation of the lethal use of force to be considered satisfactory, it must be the result of an investigation consistent with the guarantees of independence, impartiality and due diligence and, in addition, must comply with elements conforming to Inter-American jurisprudence justifying such use of force, namely:

i. Legitimate purpose: the use of force must be addressed at achieving a legitimate purpose (...)

ii. Absolute necessity: it is necessary to verify whether other less harmful means exist to safeguard the life and integrity of the person or situation that it is sought to protect, according to the circumstances of the case (...)

iii. Proportionality: The level of force used must be in accordance with the level of resistance offered, which implies establishing a balance between the situation that the agent is facing and his response, considering the potential harm that could be caused.⁴⁸²

⁴⁸¹ 6 I/A Court H.R., Case of Zambrano Vélez et al. v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166. Para. 108; Case of Cruz Sánchez et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of April 17, 2015. Series C No. 292, para. 291; and Case of Landaeta Mejías Brothers et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 27, 2014. Series C No. 281. Para. 132.

⁴⁸² 9 I/A Court H.R., Case of Landaeta Mejías Brothers et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 27, 2014. Series C No. 281, para. 134.

Resolutions

Resolution 2/2021. Protection of Haitian Persons in Human Mobility: Inter-American Solidarity Adopted by the IACHR on October 24, 2021.

36. In the event that abusive use of force is detected, States should investigate with due diligence, punish those responsible, and make reparation to the victims, with differentiated and intersectional approaches, in keeping with the relevant inter-American standards.

C. RIGHT TO PARTICIPATE

101. Participation is a political right recognized in Article XX of the American Declaration of the Rights and Duties of Man and Article 23 of the American Convention on Human Rights. In this regard, the IACHR has pointed out that there are various participation models and schemes that have various levels of formalization and institutionalization.⁴⁸³ In other words, beyond the electoral sphere, the active participation of people in public decision-making—including on public policies—is an enforceable right and a state obligation.⁴⁸⁴ Likewise, the Inter-American Court has also interpreted participation in a broad sense and considers that it may include diverse activities that the population carries out individually or on an organized basis in order to intervene in the appointment of those who will govern a State or who will be in charge of managing public affairs, as well as to influence the development of State policies through direct participation mechanisms.⁴⁸⁵

102. In particular, the American Convention establishes in Article 23 that citizens have the right to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and to have access, under general conditions of equality, to the public service of their country.⁴⁸⁶ In this regard, the Commission has pointed out that political rights help favor the strengthening of democracy and

⁴⁸³ IACHR, *Public policies with a human rights approach*, OEA/Ser.LV/II.Doc. 191, September 15, 2018. para. 58.

⁴⁸⁴ IACHR, *Public policies with a human rights approach*, OEA/Ser.LV/II.Doc. 191, September 15, 2018. para. 56.

⁴⁸⁵ IACHR, *Public policies with a human rights approach*, OEA/Ser.LV/II.Doc. 191, September 15, 2018. para. 55.

⁴⁸⁶ IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.LV/II.106. Doc. 59 rev., June 2, 2000, para. 9.

political pluralism. They also presuppose the observance of other fundamental human rights that, together, make the democratic game possible.⁴⁸⁷ In other words, the exercise of political rights implies, in turn, the ability of citizens to exercise other fundamental rights such as freedom of expression, freedom of association, and freedom of assembly.⁴⁸⁸ For example, the election of representatives by the citizenry requires there to have been a broad debate on the nature of the policies to be implemented (freedom of expression) among organized political groups (freedom of association) that have had the opportunity to express themselves and meet publicly (freedom of assembly).⁴⁸⁹

103. The Commission also considers that the participation of populations or groups traditionally subject to discrimination is particularly important and should not be confused with the will of majorities. On the contrary, from a human rights perspective, it requires that emphasis be placed on meeting their needs in line with the international obligations acquired by the State concerned.⁴⁹⁰ Therefore, this section not only includes IACHR pronouncements related to the right to political participation in the terms established in Article 23 of the American Convention (participation in public affairs, the right to vote and be elected, and the right to have access to public service), but also an illustrative selection regarding the right to prior consultation and free and informed consent, as an exercise of political rights of indigenous peoples.

1. Political rights and participation in public life and public service under conditions of equality

104. The right to have access to public office, under general conditions of equality, protects access to a direct form of participation in the design, implementation, development and execution of the State's political policies through public office. In

⁴⁸⁷ IACHR, Annual Report 2008, Ch. IV, [Section B. Venezuela](#), February 25, 2009, para. 336.

⁴⁸⁸ IACHR, [Fifth Report on the Situation of Human Rights in Guatemala](#), OEA/Ser.LV/II.111. Doc. 21 rev., April 6, 2001, Chapter X, para. 4.

⁴⁸⁹ IACHR, Annual Report 2008, Ch. IV, [Section B. Venezuela](#), February 25, 2009, para. 336.

⁴⁹⁰ IACHR, [Corruption and Human Rights in the Americas: Inter-American Standards](#), OEA/Ser.LV/II, Doc. 236, December 6, 2019, p. 191.

this regard, it is understood that these general conditions of equality refer to access to public office by popular election and by appointment or designation.⁴⁹¹

105. The Commission has pointed out that ensuring the representation and full participation of all social sectors in public life is one of the fundamental objectives of any democratic system.⁴⁹² The Commission has observed that exclusion, gender-based violence, and discrimination against women have a direct impact on their political participation. Likewise, the IACHR has called on States to adopt measures to prevent and combat gender-based political violence.⁴⁹³ However, despite progress, the minority representation of women in the governments of all countries in the Americas demonstrates the need for States to do more.⁴⁹⁴ In the same sense, the pattern of exclusion to which indigenous populations have been submitted is reflected not only in their minimal participation in positions of leadership in government, but also in the little respect shown for those populations' traditional forms of participation.⁴⁹⁵

106. In light of this reality, the following pronouncements of the Commission illustrate the need to implement affirmative-action measures to strengthen and achieve participation in public life and public service under conditions of equality for groups that are still vulnerable, excluded, and underrepresented.

⁴⁹¹ IACHR, *The Road to Substantive Democracy: Women's Political Participation in the Americas*, OEA/Ser.LV/II, Doc. 79, April 18, 2011, para. 25.

⁴⁹² IACHR, 1999 Annual Report, Chapter VI, *Section A. Considerations regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-Discrimination*, April 13, 2000.

⁴⁹³ IACHR, Press Release No. 191/21, *International Day for Afro-Latina, Afro-Caribbean, and Diaspora Women: IACHR Calls on States to Combat Political Violence against Women of African Descent*, July 25, 2021.

⁴⁹⁴ IACHR, *Justice and Social Inclusion: The Challenges of Democracy in Guatemala*, OEA/Ser.LV/II.118. Doc. 5 rev. 2, December 29, 2003, para. 284.

⁴⁹⁵ IACHR, *Justice and Social Inclusion: The Challenges of Democracy in Guatemala*, OEA/Ser.LV/II.118. Doc. 5 rev. 2, December 29, 2003, para. 254.

Thematic reports

Violence and Discrimination against Women and Girls: Best Practices and Challenges in Latin America and the Caribbean. OEA/Ser.L/V/III. Doc. 233. 14 November 2019

118. A growing number of women are participating in building and strengthening representative, transparent and accountable governments in the region. [...] one of the pending challenges for States is to address the impact that discriminatory gender-based stereotyping has on these women's professional practice, as well as on the protection of their rights. By defying male chauvinist stereotypes, that are disapproving of their participation in public life, they become victims of gender-based violence and discrimination and gender differentiated forms of violence⁴⁹⁶, while continuing to be more vulnerable and facing more obstacles in accessing justice than their fellow male human rights defenders.⁴⁹⁷

120. [...] there is still a considerable gap between the formal recognition of women's political rights and the degree of political participation⁴⁹⁸. In particular, the IACHR has warned that the exercise of women's political rights is notoriously affected by the prevalence of discriminatory gender stereotypes that frame them in the domestic sphere, ignore their

⁴⁹⁶ IACHR. Press Release No.192/17. IACHR Calls on States to Recognize and Protect the Work of Women Human Rights Defenders. November 29, 2017. IACHR. Second Report on the Situation of Human Rights Defenders in the Americas. OEA/Ser.L/V/II., Doc. 66, 2011, para. 283; IACHR. Towards Effective Integral Protection Policies for Human Rights Defenders OEA/Ser.L/V/II. Doc. 207/17, 2017, para. 43; IACHR. Criminalización de la labor de las defensoras y los defensores de derechos humanos. Criminalization of the Work of Human Rights Defenders. OEA/Ser.L/V/II. Doc. 49/15. 2015, p. 37.

⁴⁹⁷ RFOE. Report on Women Journalists and Freedom of Expression. OEA/Ser.L/V/II. CIDH/RELE/INF.20/18. 2018, para. 3.

⁴⁹⁸ CIDH. The Road To Substantive Democracy: Women'S Political Participation In The Americas. OEA/Ser.L/V/II. Doc. 79. 18 de abril de 2019.

fundamental role in the public space⁴⁹⁹ and result in acts of violence against them. According to the information obtained by the Commission, women with political commitments face numerous forms of violence that restrict and inhibit their effective participation in spaces of power, including acts such as the burning of women's election campaign materials; harassment and pressures for them to resign the positions; stereotyped and discriminatory trials against women in the media and social networks; violent messages and threats against them and their families; threats death and/or of sexual violence and even murders⁵⁰⁰.

122. [...] the creation and use of gender stereotypes, premised on the inferiority of women, is one of the causes and consequences of violence against women in political life. Thus, “a considerable minority of the population in the Americas continues to think that women do not have the same capacity as men to manage public affairs.”⁵⁰¹ In this same vein, when you examine the differences between violence against men and women in the political sphere, civil society organizations have identified that “the latter [violence against women] has a double aim: to punish women for attempting to occupy men’s

⁴⁹⁹ Entendiendo como “espacio o vida pública y política” el concepto desarrollado por la Recomendación número 23 del Comité CEDAW, según la cual, la vida política y pública es un concepto amplio que se refiere al ejercicio del poder político, en particular, al ejercicio de los poderes legislativo, judicial, ejecutivo y administrativo. El término abarca todos los aspectos de la administración pública y la formulación y ejecución de la política en los niveles internacional, nacional, regional y local; y abarca también muchos aspectos de la sociedad civil y de las actividades de organizaciones, como son los partidos políticos, los sindicatos, las asociaciones profesionales o industriales, las organizaciones femeninas, las organizaciones comunitarias y otras organizaciones que se ocupan de la vida pública y política. Ver: MESECVI. Ley Modelo Interamericana para prevenir, sancionar y erradicar la violencia contra las Mujeres en la vida política. OEA/Ser.LII.6.17. 2017, p.11; CIDH. Comunicado de prensa No.061/19. En el Día Internacional de la Mujer, la CIDH llama a los Estados a fomentar y fortalecer la participación y representación política de las mujeres en las Américas. 8 de marzo de 2019.

⁵⁰⁰ MESECVI. Ley Modelo Interamericana para prevenir, sancionar y erradicar la violencia contra las Mujeres en la vida política. OEA/Ser.LII.6.17. 2017, p.13; ONU Mujeres. Violencia Política por razón de género. 2010.

⁵⁰¹ MESECVI. Ley Modelo Interamericana para prevenir, sancionar y erradicar la violencia contra las Mujeres en la vida política. Inter-American Model Law on the prevention, punishment and eradication of violence against women in political life. OEA/Ser.LII.6.17. 2017, p. 15.

place and restrict their participation and, therefore, their ability to make decisions that affect society in general.⁵⁰²

114. [...] Given that the gender-based perspective is an approach that raises awareness of the position of inequality and structural subordination of women and girls to men based on their gender, and that it is a key tool to combat discrimination and violence against them,⁵⁰³ preventing the introduction thereof into the legal framework and operational programs poses an obstacle to ending discriminatory gender-based stereotypes, that contribute to perpetuating violence against women.

The Road to substantive Democracy: Women's Political Participation in the Americas. OEA/Ser.L/V/II. Doc. 79. 18 April 2011

108. The economic disadvantages facing women, including unremunerated work in the home, unemployment, and salary discrimination, as well as inequalities in the access to, use, and control of resources, have the effect of slowing down women's progress toward full political participation.⁵⁰⁴ Hence, "[t]here is also a direct link between women's work in the private sphere and their participation in politics, as women are confronted with the difficulty of covering indirect costs such as family obligations that are inherent in conducting a long campaign and maintaining political support."⁵⁰⁵ Moreover, the States have indicated that women's situation of poverty is one of the main

⁵⁰² Amnesty International. *Latinoamérica: leyes contra la violencia política hacia la mujer, el próximo paso a la paridad*. [Latin America: Laws countering political violence against women, the next step to parity]. 2018.

⁵⁰³ IACHR. Press Release No.208/17: IACHR Regrets Ban on Gender Education in Paraguay. December 15, 2017; IACHR. Press Release No.243/18: IACHR Completes Working Visit to Peru. November 16, 2018.

⁵⁰⁴ Claudia Ranaboldo, Yolanda Solana (coord.), Latin American Center for Rural Development (RIMISP), *Gender Inequality in Women's Political Participation in Latin America and the Caribbean*, UN-INSTRAW/AECID, 2008, p. 12.

⁵⁰⁵ ECLAC, *Women's Political Participation and Gender Parity in Decision-Making at All Levels in the Caribbean*, Gender Dialogue, December 2007, p. 3.

obstacles hindering the exercise of their political rights.⁵⁰⁶ Therefore, one of the challenges facing the countries of the Americas is ensuring that women have equal opportunities in access to and management of economic resources and financing, both public and private, to fund their election campaigns.

110. The use of harassment and violence has been denounced as factors that undermine and limit women's political participation and representation.⁵⁰⁷ The Commission has learned that in some countries, men who aspire to the political offices won by women have used tactics such as pressure and harassment with the clear intention of forcing them to resign their seats. Although these events have been denounced publicly, the affected women have not received any response from electoral authorities.⁵⁰⁸ The Commission condemns such practices, as they constitute forms of discrimination against women.

111. The IACHR has also recognized the link between discrimination and violence against women, noting that the States' obligation to act with due diligence goes beyond simply prosecuting and convicting; it also includes the obligation "to prevent these degrading practices."⁵⁰⁹ The Commission has also repeatedly established that the various forms of violence against women nullify and impair the exercise of all the human rights of women. Hence, the IACHR reiterates this obligation of the States to act with due diligence in order to prevent, punish, and eradicate violence against women, as it undermines their rights to political participation and representation. The Commission

⁵⁰⁶ See response of the Honduran State to the IACHR questionnaire regarding advances and challenges in the area of women's political participation, May 27, 2009; Response of the Ecuadorian State to the IACHR questionnaire regarding advances and challenges in the area of women's political participation, May 28, 2009.

⁵⁰⁷ Claudia Ranaboldo, Yolanda Solana (coord.), Latin American Center for Rural Development (RIMISP), *Gender Inequality in Women's Political Participation in Latin America and the Caribbean*, UN-INSTRAW/AECID, 2008, p. 12.

⁵⁰⁸ IACHR, *Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia*; OEA/Ser.L/V/II.Doc. 34, June 28, 2007, para. 315; Response of the Mexican State to the IACHR questionnaire regarding advances and challenges in the area of women's political participation, May 20, 2009.

⁵⁰⁹ IACHR, *Report on the Merits*, No. 54/01, Maria Da Penha Fernandes (Brazil), April 16, 2001, para. 56; *Report on Access to Justice*.

also urges the States to compile statistics and information on how different forms of violence affect women's political participation, as a strategy to assess and prevent future recurrences of such violence.

23. The Commission has determined that those provisions of human rights instruments that guarantee political rights are to be interpreted and applied in such a way as to give significant effect to the exercise of representative democracy in the Hemisphere.⁵¹⁰ Moreover, with respect to its review function concerning the right to participate in government, the Commission maintains that its purpose is to ensure that all differential treatment in the grant of this right is justified on the basis of objective and reasonable criteria.⁵¹¹ Accordingly, as is the case of other fundamental rights, restrictions or limitations on the right to participate in government must be justified by the need for them in the framework of a democratic society, demarcated by the justification of the means, their motives, reasonability, and proportionality.⁵¹² The Court also takes into account that any attempt to regulate political rights by the States must comply with legal requirements, have a legitimate purpose, and be reasonable, necessary, and proportional; in other words, any regulation of a right must be reasonable and in keeping with the principles of representative democracy.⁵¹³

43. Furthermore, the IACHR has established that special temporary measures are fully compliant with the principle of nondiscrimination and human rights standards, and may be necessary to achieve women's substantive equality with respect to men.⁵¹⁴ Moreover, the

⁵¹⁰ IACHR, Merits Report No. 9803, *Statehood Solidarity Committee (United States)*, 29 December 2003, para. 87.

⁵¹¹ *Ibid.*, para. 90

⁵¹² IACHR, Report on the Merits No. 137/99, Case No. 11.863, *Andrés Aylwin Azocar et al (Chile)*, December 27, 1999, para. 102.

⁵¹³ I/A Court H. R., *Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations, and Costs. Judgment of 23 June 2005. Series C No. 127*, para. 207; *Case of Castañeda Guzmán. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008*, para. 145.

⁵¹⁴ IACHR Annual Report 1999, Chapter VI "Considerations Regarding the Compatibility of Affirmative Action Measures Desig

IACHR has noted that a distinction which is based on reasonable and objective criteria is in keeping with the human rights instruments of the inter-American system, provided that it: "(1) pursues a legitimate aim; and (2) employs means which are proportional to the end sought."⁵¹⁵ Accordingly, the adoption of special measures of affirmative action to promote the genuine equality of women in political participation must be carried out in accordance with these standards.⁵¹⁶

47. Taking into account the principles of equality and non-discrimination that prevail in the inter-American system, the Commission notes that the involvement of women in all spheres of political life is a necessary condition to guarantee a truly egalitarian society and to consolidate participatory and representative democracy in the Americas. The inclusion of women in politics fosters more democratic societies and accountability, as the voices and demands of women, who constitute approximately half of the population in the Americas and of the electoral roll, are heard⁵¹⁷.

6. [...]The IACHR also notes that women's participation in positions of power and political decision-making can have a multiplier effect, which is capable of achieving equal rights in all pertinent areas of gender equality, and not only in the political arena.

48. In this sense, the political rights of women in a participatory and representative democracy have two components: the full insertion of women in public service, and the need for the public agenda to reflect women's priorities. Both of these goals require the involvement of men as well as women as an essential condition for achieving these objectives.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid.

⁵¹⁷ Line Bareiro and Isabel Torres, "Participación política igualitaria de las mujeres: deber ser de la democracia", in *Igualdad para una democracia incluyente*, Inter-American Institute of Human Rights, Costa Rica, 2009 and Jacqueline Peschard, *Estudio de Caso, el Sistema de Cuotas en América Latina*.

82. In view of the obligations of the States within the inter-American system to guarantee the right of women to participate in all spheres of public life, the Commission considers it necessary to include mechanisms and measures designed to promote the inclusion of women in the judicial system, such as the adoption and effective implementation of special temporary measures, e.g., implementing gender quotas in appointments to public service and penalties for noncompliance; the implementation of systems that accord preference to women in the selection and appointment to judicial positions; special measures to promote and disseminate information on positions and applications for judicial job vacancies; and promote women's access to judicial training and education programs organized and instructed by judicial organs and academic institutions.

128. Likewise, the State should take the necessary steps to eliminate formal and structural obstacles standing in the way of women exercising their rights to vote and to be elected on the basis of equality with men. Based on the right of women to vote and to be elected in genuine periodic elections established in Article 23(1)(b) of the American Convention on Human Rights, the IACHR urges the States to implement positive measures to guarantee the right of women to participate in elections. Such measures include: improving women's access to polling places; streamlining procedures for the issuance of identity documents; organizing informational campaigns to encourage women to vote; improving electoral statistical data, facilitating the breakdown of this data by gender, ethnic group, and race; and promoting the civil and political rights of women in marginalized and poor areas.

109. In view of the foregoing, the IACHR urges the States adopt legislative and public policy measures to promote women's political participation and overcome the barriers described above, such as encouraging political parties and external sources to make funds available for women's political campaigns under conditions of equality; improve women's opportunities to access economic resources, e.g., providing financial assistance to female candidates; and organize

training interventions to prepare women for the responsibilities of higher office.⁵¹⁸ According to UNIFEM, the codes of conduct of political parties and the communications media, in addition to controls on the funding of campaigns, have proven to be effective measures in providing greater clarity to the rules of the political game with respect to women candidates.⁵¹⁹

98. The Commission likewise urges the States to disseminate information regarding the human rights of indigenous and Afro-descendant women, especially their political rights, through training programs and instructional activities. As one study notes, “Afro-descendant women, are perhaps the most under-represented group in the democracies of the region. Through their organizations, these women have pointed to the need for more training and political instruction as a means of identifying more and better solutions to the infinite number of challenges they face.”⁵²⁰ Moreover, indigenous women have identified the need for training in a variety of areas, including an understanding of how the entities they wish to participate in operate, instruction on managing administrative projects, and on municipal laws.⁵²¹

⁵¹⁸ ECLAC, *Women’s Political Participation and Gender Parity in Decision-Making at All Levels in the Caribbean*, Gender Dialogue, December 2007, p. 3; United Nations, Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 23, Political and public life, (1997), para. 15.

⁵¹⁹ UNIFEM, *Who Answers to Women? Gender and Accountability*, Progress of the World’s Women 2008/2009, available at: , p. 21

⁵²⁰ Epsy Campbell Barr, “Leadership and Political Participation for Afro-Descendant Women”, essay prepared for the conference *Women in the Americas: Paths to Political Power*, Inter-American Development Bank, Inter-American Dialogue, League of Women Voters of the United States and the Organization of American States, March 2007, p. 3.

⁵²¹ Claudia Ranaboldo, Gilles Chiche, and Antonieta Castro, *Participation of Indigenous Women in Governance Processes and Local Governments. Case Studies: Bolivia, Colombia, Ecuador, Guatemala and Peru*, UN- INSTRAW, Spanish Agency for International Development Cooperation, 2006, p. 52, available at: <http://www.un-instraw.org/es/biblioteca/gender-governance-and-political-participation/indigenous-womens-participation-in-governance-processes-and-local-governments-bolivia-colombia-e/view.html>, consulted August 4, 2009.

Indigenous Women and Their Human Rights in the Americas. OEA/Ser.L/V/II. Doc. 44/17. 17 April 2017

44. Indigenous women must be given the opportunity to participate in all the processes that affect their rights. The IACHR considers it a priority for women who define themselves as members of indigenous peoples to participate and express their views in relevant processes, which have repercussions on their rights, including the drafting of this report. Like the peoples they belong to, indigenous women are entitled to participate in the formulation, implementation and evaluation of any and all policies and programs that may affect them. This principle has been recognized in Article XXIII (sections 1 and 2) and XXXII of the American Declaration on the Rights of Indigenous Peoples; Articles 5 and 23 of the United Nations Declaration on the Rights of Indigenous Peoples; and Article 7 of ILO Convention 169, among other instruments. The IACHR finds that the right to participation is of a substantive and instrumental nature for the exercise of all the rights of women, including indigenous women.⁵²² Indeed, the acknowledgement of the empowerment of indigenous women to advocate for their rights, which was highlighted [...] as a guiding principle for State action, is realized in practice through their integration and active participation in the processes that affect their rights.

Right to Self-Determination of Indigenous and Tribal Peoples. OEA/Ser.L/V/II. Doc. 413. 28 December 2021

79. [...] The IACHR notes the need for the right of self-determination to be seen as the "basis for dialogue, a catalyst for effective participation in the process of state building and as a basis for the construction of a new relationship between indigenous peoples and the State in terms of

⁵²² IACHR, *The Road toward a Substantive Democracy: Political Participation of Women in the Americas*, OEA/Ser.L/V/II, April 18, 2011, paragraphs 92, 97-98

mutual respect, which fosters peace, development, coexistence and common values"⁵²³ [...].

35. [...] In this regard, the IACHR considers that the ability of indigenous and tribal peoples to maintain their cultures, traditional knowledge, ancestral lands and territories, their own systems of government and territorial governance, and other elements essential to their self-determination is of particular importance in providing responses to various global problems.

158. The lack of constitutional or legal legislation that does not directly address the right to autonomy and self-government of indigenous and tribal peoples cannot be used as an impediment to the exercise of this right. It is consubstantial to their very existence as a people, to their right to live in accordance with their cultural system, their social systems, their belief systems, their economic systems, as well as their legal systems. The role of legislation should be to facilitate and not to hinder or delay the exercise of self-government.⁵²⁴

169. For indigenous and tribal peoples, the right to political participation constitutes an extremely important right because they are groups that have historically suffered the consequences of social and structural inequalities. This requires the adoption of affirmative actions that effectively and practically ensure the participation of peoples in popularly elected institutions, through, for example, the reservation of seats or special electoral districts for the peoples. One alternative is the creation of indigenous electoral constituencies.

172. Thus, in the Commission's understanding, the State must ensure a legal apparatus that promotes the representation of indigenous and tribal peoples and their political participation in the various government entities at different levels. It must establish mechanisms that guarantee

⁵²³ Adelfo Regino Montes and Gustavo Torres Cisneros, "The United Nations Declaration on the Rights of Indigenous Peoples: Basis for the New Relationship between Indigenous Peoples, States and Societies," in Claire Charters and Rodolfo Stavenhagen (ed.), *The Challenge of the Declaration: History and Future of the UN Declaration on Indigenous Peoples*, Copenhagen: IWGIA (2009), p. 165.

⁵²⁴ Meeting of International Experts, held on March 30, 2021

indigenous and tribal political participation in political decision-making spaces, both at the executive and legislative levels, executive and legislative levels. The authorities elected at the different levels where there is an important presence of indigenous peoples do not belong to them or are not authorities elected by them, much less do they respond to a political party structure of indigenous cosmovision.

214. The recognition and protection of indigenous and tribal peoples as culturally distinct peoples also requires that their participation in public life be guaranteed through inclusive political and institutional structures and the protection of their cultural, social, economic and political institutions in decision-making.⁵²⁵ Furthermore, it is recognized that the objective of establishing horizontal and balanced relations between indigenous peoples and the rest of the population of the States is aimed at overcoming the colonial situation, which is in line with the purposes pursued by the recognition of their right to self-determination.⁵²⁶

Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources OEA/Ser.L/V/II. Doc. 56/09. December 30, 2009

373. Recognizing the juridical personality of the people as a whole allows for the development of initiatives taken by peoples' chosen representatives to defend communal territory, rather than individual recourse to State authorities.⁵²⁷ For the Court, juridical personality of

⁵²⁵ IACHR. Situation of the human rights of the indigenous and tribal peoples of Panamazonia. OAS/Ser.L/V/II. Doc. 176, 2019, para. 44.

⁵²⁶ Kuppe, René. "Autonomy of indigenous peoples - the perspective from the Declaration on the Rights of Indigenous Peoples". GONZÁLES, Miguel et al. La autonomía a debate. Autogobierno indígena y Estado plurinacional en América Latina. Quito: FLACSO, Sede Ecuador; GTZ; IWGIA; CIESAS; UNICH, 2010, p. 125-128.

⁵²⁷ "Any individual member of the Saramaka people may seek judicial protection against violations of his or her individual property rights, and (...) a judgment in his or her favor may also have a favorable effect on the community as a whole. In a juridical sense, such individual members do not represent the community as a whole. The decisions pertaining to the use of such individual property are up to the individual and not to the Saramaka people in accordance with their traditions. Consequently, a recognition of the right to juridical personality of the Saramaka people as a whole would help prevent such situations, as the true representatives of the juridical personality would be chosen in accordance with their own traditions, and the decisions affecting the Saramaka territory will be the responsibility of those representatives, not of the individual members." *VA Court H.R., Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 169*

the group would also avoid debates about identifying the true representative of the people for purposes of actions before national authorities and international bodies.⁵²⁸ Therefore, the Court held that “the right to have their juridical personality recognized by the State is one of the special measures owed to indigenous and tribal groups in order to ensure that they are able to use and enjoy their territory in accordance with their own traditions. This is a natural consequence of the recognition of the right of members of indigenous and tribal groups to enjoy certain rights in a communal manner.”⁵²⁹

[The Situation of People of African Descent in the Americas. OEA/Ser.L/V/II. Doc. 62. 5 December 2011](#)

260. These recommendations seek cooperation with the States in the region, in the processes that lead to the adoption of measures and practices that allow effective compliance with their obligation of protection and guarantee the human rights of Afro- descendant people in the Americas

[...]

9. Moreover, the States must adopt positive measures aimed at ensuring the political participation of Afro-descendant people in various public institutions, since this participation will contribute considerably to the modification of racist patterns, and shed light on their concrete needs.

[Towards the Effective Fulfillment of Children’s Rights: National Protection Systems. OEA/Ser.L/V/II.166. Doc. 206/17. 30 November 2017](#)

308. The IACHR recalls that children and adolescents should be regarded as full holders of rights whose exercise must be ensured and progressively realized, including through spaces for their participation, consistent with their developing abilities and taking into account their age and maturity. Therefore, the State should adopt

⁵²⁸ IA Court H.R., Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 170.

⁵²⁹ IA Court H.R., Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 172.

effective, appropriate measures to ensure the rights of children and adolescents to express their views on all issues that affect them, by providing them with access to the means and mechanisms for doing so in line with their development. They should also see to it that due weight is given to their views in, for example, policies and decisions relating to their education, health, sexuality, safety, culture, family life, and judicial and administrative proceedings, among others. That principle extends to all spheres in which children and adolescents play a role, including the family, education, the community, politics, administrative settings, and judicial proceedings, as well as in the context of services provided for them.⁵³⁰

310. The IACHR underscores that it should not be about just any kind of role for them, but involve meaningful and protagonist participation. That includes the possibility to express themselves freely and to be heard by those who take decisions that will affect their rights, their development, and the course of their lives. It entails, on one hand, that the State ensure that children and adolescents receive all the information and advice they need freely to form an opinion and take an autonomous, informed decision in their best interests. On the other hand, it requires that laws, at a minimum: ensure and promote the existence of appropriate spaces and processes suitable for children and adolescents to exercise their right to participate and to be heard; envisage sustained, set procedures and mechanisms to that end; make assistance available for children and adolescents in those processes; establish mechanisms to guarantee that those opinions are being heard and due weight given to them in decisionmaking; and contemplate the obligation to set down on record a reasoned explanation of the way in which the opinions of children and adolescents are weighed in the final decision, as well as to notify them of the outcomes. Merely symbolic, inconsequential exercises that do not offer a real possibility of influencing discussions and the final decision should be avoided.

⁵³⁰ See, in this connection, Committee on the Rights of the Child, General Comment No. 12, The right of the child to be heard, especially para. 19.

311. Likewise, the Committee on the Rights of the Child has said that participation processes should be meaningful, genuine, respectful, and sustained. The concept of participation emphasizes that including children should not only be a momentary act, but the starting point for an intense exchange between children and adults on the development of policies, programs and measures in all relevant contexts of children's lives. Accordingly, it encourages that participation occur in the context of permanent structures. The Committee also underlines the importance of States establishing a direct relationship with children, not simply a link through nongovernmental organizations (NGOs) and civil society organizations.⁵³¹

312. Specifically, the State should ensure that children and adolescents are consulted and participate actively and directly in the preparation, application, oversight, and evaluation of all pertinent laws, policies, programs, and services that affect their lives, whether in schools or in community, local, national, and other contexts. As was mentioned, the views expressed by children and adolescents may add perspectives and experience that are highly useful in analyzing the situation of children in a country or municipality and in decision-making, policymaking and preparation of laws and/or measures, as well as their evaluation.⁵³² The importance has also been highlighted of hearing the views of certain groups of children and adolescents on specific matters, such as, for example, the opinion of adolescents who have experience with the juvenile criminal justice system with regard to proposed amendments to applicable laws in that sphere; of children and adolescents who were adopted on laws and policies relating to adoption; of child and adolescent migrants on immigration laws, policies, and practices; or of children and adolescents who have been placed in alternative care on reforms of standards and practices with respect to children without parental care.

⁵³¹ In that vein, see Committee on the Rights of the Child, General Comment No. 5, "General measures of implementation of the Convention on the Rights of the Child," para. 12, and Committee on the Rights of the Child, General Comment No. 12, The right of the child to be heard, paras. 3 and 13.

⁵³² Coincidentally, see General Comment No. 12, paras. 12 and 27.

144. The IACHR emphatically notes that, flowing from international obligations in the area of the rights of the child and, especially, the right of children and adolescents to participate and be heard, the States must create formal structures or institutional spaces for the broad and representative participation of children and adolescents at the different levels. The law itself establishing the national system must provide for their creation, in light of the importance and consequence of the participation of children and adolescents and with a view toward ensuring the conditions of permanence and continuity of these spaces.

146. The mechanisms of participation must be meaningful and geared toward different age groups, in order to make them truly accessible, providing information and materials to facilitate active and meaningful participation in the process.⁵³³ The participation must also be broad, pluralistic, diverse and inclusive, ensuring that children and adolescents of different backgrounds, ages and social groups, inter alia, are represented.

[Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas. OAS/Ser.L/V/II.170 Doc. 184 7 December 2018](#)

112. One of the most positive ways in which the IACHR considers that States can promote the democratic participation of LGBTI persons in State actions is through their effective participation in decision-making spaces and bodies on the respective public policies, in order to ensure that their own vision of inclusion and the enforcement of their rights is taken into account. Likewise, it is important to create specific governmental bodies to deal with the rights of this population and work on the respective public policies, particularly if these allow for the participation of civil society organizations. The IACHR has been informed of several initiatives in this regard adopted by some States in the region. In this regard, it is essential to note that many of these bodies have been created precisely as a result of the work of civil

⁵³³ Committee on the Rights of the Child, General Comment No. 5 “General measures of implementation of the Convention on the Rights of the Child, para. 29.

society organizations committed to the struggle of LGBTI persons for access to and recognition of their human rights.

121. [...] international human rights law recognizes the right, on the one hand, to vote and, on the other, to be elected, inter alia, without unjustified or arbitrary discrimination. In this regard, the IACHR notes that the lack of recognition of the right to identity, specifically of trans persons, as evidenced by the difficulty or impossibility of obtaining identification documents consistent with their gender identity, may result in such persons being unable to vote or being faced with difficulties in voting in popular elections. Hence the importance, as stated above, for States to ensure that trans persons have access to identity documents that include name and sex changes, as well as that they conform to their gender image and expression.

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Follow-up to the Report Access to Justice and Social Inclusion: The Road to Strengthening Democracy in Bolivia. OEA/Ser.L/V/II. Doc. 34, 28 June 2007

211. Finally, with respect to this issue, it has come to the attention of the IACHR that a high number of women, in particular indigenous women in rural areas, older women, and women with disabilities, do not have identity documents and cannot, therefore, exercise their political rights, gain access to public institutions, and obtain the services and social benefits to which they are entitled.⁵³⁴

212. Based on the foregoing, the IACHR calls on the States to [...] make the necessary efforts to move forward with the process of registration of women, in particular indigenous women in rural areas, older women, and women with disabilities, in order to provide them with the necessary documents to enable them to exercise their rights in full.

⁵³⁴ United Nations, Committee on the Elimination of Discrimination against Women, Concluding comments of the Committee on the Elimination of Discrimination against Women, Bolivia; CEDAW /C/BOL/CO/4; Fortieth Session, 14 January 1 February 2008, par. 18 .Available at <http://www2.ohchr.org/english/bodies/cedaw/cedaws40.htm>.

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64. The Inter-American Commission underscores how important it is for any process of dialogue to effectively involve civil society, including organizations working for the rights of women, children and adolescents, human rights defenders, indigenous peoples, persons with disability, Afro-descendants, persons deprived of liberty, lesbians, gays, bisexual, trans and intersex persons, among others. Likewise, it stresses the importance of any process of dialogue to be aimed at reaching commitments that are compatible with the State's international obligations.

2. The right to take part in the conduct of public affairs, to vote, and to stand for election in periodic elections

107. Representative democracy is the system of organization explicitly adopted by the member states of the Organization of American States, one of the central elements of which is the popular election of those who exercise political power.⁵³⁵

108. In this regard, the IACHR has echoed the Inter-American Court in the sense that the right to vote is an essential element of democracy and one of the ways in which citizens exercise their right to participate in government. This right implies the right to freely and equally elect their representatives, as well as to run as candidates on equal terms and that they can hold elected public office if they are able to get the number of votes needed.⁵³⁶

109. The following compilation of IACHR pronouncements reflect the scope and content of political rights in terms of participating through exercise of the right to vote and be elected in periodic elections for the conduct of public affairs. In this sense, the

⁵³⁵ IACHR, 2008 Annual Report, Chapter IV. Venezuela, para. 337.

⁵³⁶ IACHR, *The Road to Substantive Democracy: Women's Political Participation in the Americas*, OEA/Ser.LV/II. Doc. 79, April 18, 2011, para. 25, citing I/A Court H.R., Case of Yatama v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs, Judgment of June 23, 2005, Series C No. 127, paras. 198 and 199; IACHR, 2017 Annual Report, Chapter IV, *Section B. Cuba*, December 31, 2017, para. 25; and IACHR, *The Situation of Human Rights in Cuba*, OEA/Ser.LV/II. Doc. 2, February 3, 2020, para. 148.

selected standards address the minimum conditions required for suffrage and electoral processes, as well as respect for pluralism and opposition voices.

Country reports

Second Report on the Situation of Human Rights in Peru. OEA/Ser.L/V/II.106. Doc. 59 rev. 2 June 2000.

1. Inter-American legal doctrine, as it has evolved, has placed great emphasis on the existence of a direct relationship between the exercise of political rights and the concept of democracy as a way of organizing the state, which, in turn, presupposes the observance of other fundamental human rights. In effect, the concept of representative democracy is based on the principle that popular sovereignty vests in the people, and that it is in the exercise of that popular sovereignty that they elect their representatives to hold power. These representatives, moreover, are elected by the citizens to adopt certain measures that require political decisions, which implies, in turn, that there has been a wide-ranging debate on the nature of the rights to be expressed during that debate among organized political groups who have been able to exercise their right to public assembly. The effective observance of the rights to express oneself during this debate, to associate and to assemble, requires a legal and institutional order in which the laws come before the will of the rulers, and in which there are checks and balances among the various institutions for the purpose of preserving the pure expression of the popular will, i.e., it requires the effective observance of the rule of law.⁵³⁷

Situation of Human Rights in Venezuela - " Democratic Institutions, the Rule of Law and Human Rights in Venezuela ". OEA/Ser.L/V/II. Doc. 209.31 December 2017

150. The right to vote implies, on the one hand, that citizens can decide directly and freely elect, on an equal footing, those who will represent them in decisions taken with regard to public affairs. For its part, the right to be elected presupposes that people can stand on an equal footing as candidates for elective office and can hold and

⁵³⁷ IACHR, Annual Report 1990-1991, p. 521.

perform elective public positions if they manage to win enough votes to do so.⁵³⁸ [...]

[Fifth Report on the Situation of Human Rights in Guatemala. OEA/Ser.L/V/II.111.Doc.21 rev.6 April 2001.](#)

34. [...] the Commission calls special attention to the urgent need to enhance access to voter registration, voter information and polling stations, especially in the rural areas of the country and for the sectors of the population that remain underrepresented as voters. Access to these means of political participation is a fundamental component of the quest to consolidate a participatory democratic system of government.

[Nicaragua: Concentration of Power and the Undermining of the Rule of Law. OEA/Ser.L/V/II. Doc. 288. 25 October 2021](#)

67. It is important to note that the OAS General Assembly has deemed essential to adopt measures to promote free and fair elections in Nicaragua. Notable among them are: (a) modernization and restructuring of the Supreme Electoral Council to ensure it operates in a fully independent, transparent, and accountable fashion; (b) a pluralistic political process leading to the effective exercise of civil and political rights, including the rights of peaceful assembly and freedom of expression, and open registration of new political parties; (c) independent technical review and updating of voting registries and independent audit of voter rolls; (d) independent, credible, and accredited international electoral observation; and (e) transparent and effective voter registration, ID card distribution, and voting center management (...) [...].

133. Regarding this matter, the IACHR and OHCHR rejected the misuse of criminal charges against opposition individuals to restrict their right to participate in public affairs and the right to freedom of

⁵³⁸ IACHR, *Democracy and Human Rights in Venezuela*, OEA/Ser.LV/II Doc. 54, December 30, 2009, para. 92; and IA Court H.R., *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, para. 148.

association, by formalizing serious crimes against them, such as "money laundering" or "conspiracy to undermine national integrity"⁵³⁹.

136. Given the extreme seriousness of the blatant use of the criminal justice system for political and electoral purposes, the Commission strongly condemns arbitrary detentions [...]. At the same time, it urges the release of [...] arbitrarily detained individuals [...], upon whom it has the obligation to guarantee integrity and security. The IACHR calls on the State to immediately cease arbitrary and illegal detentions of those considered opposition individuals to the government and to restore guarantees for the full enjoyment of civil and political rights.

142. For its part, the Inter-American Court has emphasized that opposition voices are essential in a democratic society; without them it is not possible to reach agreements that satisfy the different visions that prevail in society. Hence, in a democratic society States must guarantee the effective participation of opposition individuals, groups and political parties by means of appropriate laws, regulations and practices that enable them to have real and effective access to the different deliberative mechanisms on equal terms, but also by the adoption of the required measures to guarantee its full exercise, taking into consideration the situation of vulnerability of the members of some social groups or sectors.⁵⁴⁰

143. [...] the IACHR notes that political rights are fundamentally important human rights within the inter-American system and are closely related to other rights declared in the American Convention, such as freedom of expression, of assembly, and of association, which together make possible the democratic process. The Commission has also referred to the necessity of guaranteeing citizens and organized political groups the right to public assembly, permitting and fomenting a broad debate about the nature of the political decisions adopted by the

⁵³⁹ 238/21 - The IACHR and OHCHR condemn the criminalization, violations of due process, and serious conditions of detention of individuals considered as opposition figures in Nicaragua. Washington D.C./ Panama City, September 10, 2021.

⁵⁴⁰ A Court HR. Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of ray 26, 2010. Series C No. 213, par. 173.

representatives elected by the citizens.⁵⁴¹ It also considers that to safeguard democracy, in addition to effective political participation, freedom of expression and of social protest are fundamental. In this sense, the Commission urges the State to cease repression and, in particular, to restore the legal status of political parties.

[The Situation of human rights in Cuba. OEA/Ser.L/V/II. Doc. 2. 3 February 2020](#)

141. In this regard, the Commission considers that the constitutional provision of a single party not only prevents a higher level of political discussion which is a fundamental condition for a democracy, but also, limits the rights of those who do not have the political conviction of the Communist Party because it does not allow people to participate as provided for in Article XX of the American Declaration of the Rights and Duties of Man, which states: "every person, legally qualified, has the right to take part in the government of his country, directly or through his representatives, and to participate in popular elections, which shall be by secret ballot, genuine, periodic and free."

[Honduras: Human Rights and Coup d'Etat. OEA/Ser.L/V/II. Doc. 55. 30 December 2009](#)

400. The IACHR has indicated that the right to vote and to participate in government "is broader than the right to associate for purely political reasons" as it also "includes the right to organize parties and political associations that, through the free exchange of ideas, prevent a monopoly on power by any single group or individual."⁵⁴² It has also established that the absence of an atmosphere of respect, in which ideas contrary to the form of government can be expressed freely, violate the right to participate in government, since "free exercise of the right to participate in government also requires respect for other human rights, especially liberty and personal

⁵⁴¹ IACHR, *Democracy and Human Rights in Venezuela*. December 30, 2009, par. 21; and *Second Report on the Situation of Human Rights in Peru*. June 2, 2000, Chapter IV, par. 1.

⁵⁴² IACHR, Report No. 67/07 (Merits), Case 12,476 *Oscar Elías Biscet et al. (Cuba)*, October 21, 2006, paragraph 245.

security. Full exercise of freedom of expression and the rights of association and assembly are essential to having a direct role in shaping the decisions that affect the community.”⁵⁴³

[Situation of Human Rights in Venezuela - " Democratic Institutions, the Rule of Law and Human Rights in Venezuela ". OEA/Ser.L/V/II. Doc. 209. 31 December 2017](#)

181. [...] The IACHR reiterates that the inter-American system has established that the exercise of political rights must be regulated by law and, that being the case, only a judicial body may, through criminal proceedings, curtail those rights, while observing the judicial guarantees proper to proceedings of a punitive nature.⁵⁴⁴ Likewise, as the Commission has established, disqualification from the exercise of public office, when imposed through administrative channels in contravention of the standards of due process, constitutes an unlawful restriction of the political right to stand for public office.⁵⁴⁵

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[Annual Report of the Inter-American Commission on Human Rights, 2022, Chapter IV.B Nicaragua](#)

30. The IACHR again underscores how urgent it is to find solutions with the participation of civil society in order to restore the guarantees and democratic freedoms that are common to the democratic rule of law through full respect for the principle of separation of powers, as well as ensuring the necessary conditions for holding fair, free and transparent elections.

⁵⁴³ IACHR, Report No. 67/07 (Merits), Case 12,476 *Oscar Elías Biscet et al.*, *op. cit.*, paragraph 256.

⁵⁴⁴ IACHR, 2015 Annual Report, Chapter IV.B, Venezuela, para. 94; Application before the I/A Court H.R., Leopoldo López Mendoza (Case 12.668) against the Bolivarian Republic of Venezuela, para. 65; and I/A Court H.R., Case of López Mendoza v. Venezuela. Merits, Reparations, and Costs. Judgment of September 1, 2011. Series C No. 233, para. 107.

⁵⁴⁵ I/A Court HR. Case of López Mendoza v. Venezuela. Merits, Reparations, and Costs. Judgment of September 01, 2011. Series C No. 233, para. 147-149; and IACHR, Democracy and Human Rights in Venezuela, OEA/SER.L/V/II, Doc. 54, December 30, 2009, para. 71.

38. Based on the foregoing, the Commission regrets the failure to put in place the minimum conditions necessary to hold free, fair, and competitive elections, the proven lack of an independent electoral system and the continuing violations of the human rights of individuals identified as opponents to the government. The IACHR recalls that the exercise of political rights constitutes an end in itself and, at the same time, a means for democratic societies to ensure their other rights.

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25. [...] The IACHR emphasizes that the mere holding of electoral events does not certify the existence of democratic guarantees or competitive elections. In addition to removing obstacles to the exercise of political rights in conditions of equality and without discrimination, such as administrative disqualifications, it is necessary to reach agreement with all sectors on the eventual advancement of elections. Otherwise, there is a risk that the advance will be perceived as a strategy to favor a particular political sector over others who may not be prepared to participate in the electoral contest.

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28. [...] In this regard, the Inter-American Court, in the 2008 case of *Castañeda Gutman v. Mexico*, stated that, although the inter-American system does not impose a specific electoral system or means of exercising the right to vote and to be elected, there are general guidelines as to essential political rights that must be upheld.⁵⁴⁶ Consequently, as emphasized by the Court in *Yatama v. Nicaragua* of 2005, “the full scope of political rights cannot be limited in such a way that their regulation or the decisions adopted in application of this regulation prevent people from participating effectively in the

⁵⁴⁶ IA Court H. R. *Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184, par. 166.*

governance of the State or cause this" participation to become illusory, depriving such rights of their essential content."⁵⁴⁷ [...].

[Annual Report of the Inter-American Commission on Human Rights, 2016, Chapter IV.B Cuba](#)

42. [...] Thus, the discretion that States have to design their electoral systems finds its limits in the principles of legality, necessity, and proportionality, otherwise one would run the risk of rendering the essential core of the right illusory.⁵⁴⁸

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57. [...] the Inter-American Commission reaffirms that the State must ensure the full exercise of the political rights of all persons, regardless of their stance on the government's policies, and cease and desist all actions that prevent persons from exercising their right to freely elect their representatives and to conduct oversight of their performance.⁵⁴⁹

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34. In line with these ideas, the Commission emphasizes that "the exercise of political rights is an essential element of the system of representative democracy." It has therefore referred to the need to hold "authentic and free" elections, indicating that there is "a direct linkage between the electoral mechanism and the system of representative democracy." In the Commission's opinion, as part of the authenticity of elections referred to in Article 23(2) of the American Convention on Human Rights, in a positive sense, there must be some consistency between the will of the voters and the result of the election; however, "in the negative sense, the characteristic implies an absence of

⁵⁴⁷ IA Court H. R. Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, par. 204.

⁵⁴⁸ IA Court HR. Case of Yatama v. Nicaragua. Judgment of June 23, 2005. Series C No. 127, par. 206.

⁵⁴⁹ IACHR, Situation of Human Rights in Venezuela – Democratic Institutions. Rule of Law and Human Rights in Venezuela. 2018, recommendation 16.

coercion which distorts the will of the citizens.”⁵⁵⁰ Specifically, the Commission has developed the view that “the authenticity of the elections covers two different categories of phenomena”:⁵⁵¹ on the one hand, those referring to the general conditions in which the electoral process is carried out and, on the other hand, phenomena linked to the legal and institutional system that organizes elections and which implements activities linked to the electoral act, that is, everything related in an immediate and direct way to the casting of the vote.⁵⁵²

35. In short, the Commission understands that, for elections to meet the requirements of Article 23 of the Convention, it is essential that the States adopt measures to ensure adequate general conditions for the electoral contest, as well as during the organization of the election and its implementation. This encompasses both the adoption of certain positive measures such as the state refraining from favoring any candidate or political group. The Commission also recognizes that, by complying with the obligations that guarantee the authenticity of elections, not only are the obligations deriving from political rights being fulfilled from an active perspective, but also from a passive perspective, because when equity is ensured in an electoral contest, it contributes to the observance of the right to participate on an equal footing.⁵⁵³

90. The harassment, censorship, smear tactics and persecution and the detentions and arbitrary legal proceedings filed against the media, journalists, and civil society organizations defending human rights and freedom of the press are incompatible with the protection of the right to freedom of expression and create a widespread climate of fear and self-censorship. In the framework of an electoral process, they are also especially serious and incompatible with democracy and international human rights obligations.

⁵⁵⁰ IACHR. Resolution No. 01/90 Cases 9768, 9780, and 9828 (Mexico), May 17, 1990, para. 47

⁵⁵¹ IACHR. Resolution No. 01/90 Cases 9768, 9780, and 9828 (Mexico), May 17 29, 1990, para. 48.

⁵⁵² IACHR. Resolution No. 01/90 Cases 9768, 9780, and 9828 (Mexico), May 17, 1990, para. 48.

⁵⁵³ IACHR. Report No. 30320. Case 13.727. Merits. Fabio Gadea Mantilla. Nicaragua. October 29, 2020, para. 59

127. In practice, [...] the exercise of these rights, in particular the right to freedom of expression, acquires special importance in the context of general elections where a plural debate and critical discussions about the capability and suitability of the candidates are indispensable for shaping the collective will.⁵⁵⁴ In any case, the IACHR recalls that any direct or indirect restriction on the exercise of the right to freedom of association, in addition to being provided for in law, must pursue a legitimate end and must also be necessary and proportional in the framework of a democratic society.⁵⁵⁵

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119. Based on this, the Commission reiterates its call for the State to fulfill its duty to facilitate mechanisms of political participation and decision-making such as the recall referendum and cease such actions preventing the exercise of the rights of persons to elect their representatives and hold them accountable.⁵⁵⁶

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220. Political rights are human rights of fundamental importance and are intimately associated with an array of other rights that make the democratic possible. The existence of free elections; independent, effective branches of public power and full respect for freedom of expression, among others, are basic characteristics of democracy that cannot be evaluated in isolation. From that perspective, full assurance of human rights is not possible without effective and unrestricted recognition of the right of individuals to form and participate in political

⁵⁵⁴ IA Court H.R. Case of Ricardo Canese v. Paraguay. Merits, reparations, and costs. Judgment of August 31, 2004, Series C No. 111, paras. 87 and 88.

⁵⁵⁵ IACHR. Press release No. 265/18. CIDH condena la cancelación de la personalidad jurídica de organizaciones de derechos humanos en Nicaragua [IACHR Condemns Cancellation of the Legal Personality of Human Rights Organizations in Nicaragua], December 13, 2018.

⁵⁵⁶ IACHR, Press Release No. 154/16 IACHR and Office of the Special Rapporteur for Freedom of Expression Condemn Measures to Shut Down Spaces for Political Participation in Venezuela and Raise Alarm at their Impact on Democracy, Oct. 25, 2016.

groups. The right to vote is one of the *sine qua non* elements for the existence of democracy and one of the ways by which citizens freely express their will and exercise the right to participate in government. [...]

[Annual Report of the Inter-American Commission on Human Rights, 2009, Chapter IV.B Haiti](#)

385. The IACHR recalls that it is essential that the State create optimum conditions and mechanisms to ensure that political rights, as enshrined in Article 23 of the American Convention, can be exercised effectively, respecting the principle of equality and non-discrimination.⁵⁵⁷ Although the Inter-American Commission recognizes the efforts made by the State and the international community to conduct these elections in a democratic and transparent manner, the participation rate reflects a serious disinterest in several regions. Also, some of the measures taken, such as the prohibition of transportation, seriously prevented an important portion of the population from exercising their right to vote. All these factors have a direct impact on the population's confidence in their representatives, required in the establishment of the rule of law.

[Annual Report of the Inter-American Commission on Human Rights, 2006, Chapter IV.B Venezuela](#)

210. The Commission wishes to underscore that political rights, which are understood as those that recognize and uphold the right and duty of all citizens to participate in the political life of their country, are essentially rights that foster the strengthening of democracy and political pluralism. With respect to this right, the Inter-American Court of Human Rights has ruled that "it is indispensable for the State to create optimal conditions and mechanisms for the effective exercise of political rights, observing the principle of equality and nondiscrimination."⁵⁵⁸

Thematic reports

⁵⁵⁷ See, *inter alia*, IA Court H.R., Case of Yatama, para. 194; IA Court H.R. Case of Castaneda Gutman v. Mexico, Judgment of August 6, 2008, Ser.C No.184.

⁵⁵⁸ IA Court H.R., Case of Yatama. Judgment of June 23, 2005. Series C No. 127, para. 192.

375. Representative democracy materializes in the holding of elections. All peoples have the authority to deliberate to make a collective decision. To reach a certain result election campaigns need to be regulated by law. In this phase of the exercise of democracy the various candidates can expound upon and disseminate their ideas to inform the citizens, who make the decision by voting. The fraudulent financing of partisan politics has a negative impact on the enjoyment and exercise of this political right, for it alters the conditions of equality among the candidates and at the same time has a negative impact on the communication and with that the information the voters receive when they are to decide by casting a vote.

388. Ensuring citizen participation in the oversight of elections is fundamental for greater transparency and the legitimacy of representative democracy. Such participation can help limit opportunities for fraudulent and corrupt maneuvers. Accordingly, the possibilities of oversight are fundamental for preventing corruption in the political sphere. The IACHR recognizes a clear trend⁵⁵⁹ on the part of the states of the hemisphere to regulating the activities of nongovernmental organizations in light of the important role they play in a democracy.⁵⁶⁰ Similarly, political parties are also subject to an array of transparency provisions on the financing of their activities including election campaigns, and of their activities with other political organizations.

394. The IACHR reiterates its concern over the impairments of the exercise of political rights that may derive from the manipulation of the electoral apparatus as the result of acts of corruption.

⁵⁵⁹ See, for example: OAS. First Workshop: Model Law on Access to Public Information 2.0. Sixth Module: Political Parties, Trade Unions, and other Mandated Persons. Working Paper. 2018.

⁵⁶⁰ Extra-state organs that play a role in democratic life may include trade unions, juridical persons of private law that receive public funds or engage in political lobbying, new forms of state management (such as PPPs), professional associations, and notaries. See: OAS. Second Workshop: The Gender Perspective in the Model Law of Access to Public Information 2.0. Working Papers: Compilation of recommendations made during the workshop in Santiago, Chile (April 16 and 17, 2018).

Accordingly, it is fundamental for the states to renew their commitment to pursue comprehensive initiatives to fight corruption, with special emphasis on the institutional sphere of the electoral apparatus, and that ensure adequate protection for the relevant actors of this key mechanism of representative democracy, particularly the political parties and their candidacies.

Reports on Merits

Report No. 67/06. Case 12.476. Merits. Oscar Elías Biscet et al. Cuba. October 21, 2006.

245. The Commission considers that the right to vote and to participate in government includes the right to organize parties and political associations that, through the free exchange of ideas, prevent a monopoly on power by any single group or individual. Accordingly, the right to participate in government is broader than the right to associate for purely political reasons.

246. The Commission has already written that “governments have, in the face of political rights and the right to political participation, the obligation to permit and guarantee: the organization of all political parties and other associations, unless they are constituted to violate human rights; open debate of the principal themes of socioeconomic development; the celebration of general and free elections with all the necessary guarantees so that the results represent the popular will.”⁵⁶¹

248. In the present case, the Commission has confirmed that criminal sentences have been given to individuals who have associated with each other for the purpose of opposing the government or establishing forms of political organization other than the single constitutionally recognized political party.⁵⁶² In that respect, the Commission considers that the banning of political activities outside the single recognized political party is a violation of the right to participate in government.

⁵⁶¹ IACHR, Annual Report 2002, *supra* note 133, paragraph 12.

⁵⁶² Constitution of Cuba, *supra* note 12, Article 5.

254. Nor it is legitimate to restrict the right of every citizen to associate for the purpose of changing the political structure or political system of a country, provided that this association takes place with respect for the institutional framework. [...]

256. Moreover, in the Commission's opinion, free exercise of the right to participate in government also requires respect for other human rights, especially liberty and personal security. Full exercise of freedom of expression and the rights of association and assembly are essential to having a direct role in shaping the decisions that affect the community [...]

Precautionary measures

Resolution 15/17 Precautionary Measure No. 248-17 Henrique Capriles Radonski with respect to Venezuela June 2, 2017.

60. In this regard, the Commission notes that the rights to life and personal integrity are essential prerequisites for the enjoyment of other rights. Hence, in relation to the exercise of political rights, it is essential that the State respects and guarantees the rights to life and personal integrity so that harassment or attacks do not generate a climate of intimidation that discourages political participation, which in turn would seriously affect the functioning of democracy. Indeed, the Commission recalls that in accordance with the jurisprudence of the inter-American system,⁵⁶³ States must guarantee that there is a real opportunity to exercise political rights. [...]

3. The right to prior consultation and free, prior and informed consent in the exercise of political rights

110. The Commission considers that culturally different peoples require wide political and institutional structures that allow them to participate in public life and protect their cultural, social, economic and political institutions in the decision-making process. This

⁵⁶³ IACHR, Application before the Inter-American Court of Human Rights in the case of Leopoldo López Mendoza (Case 12.668) v. Bolivarian Republic of Venezuela, December 14, 2009, para. 110. Case of Luna López v. Honduras. Merits, Reparations and Costs. Judgment of October 10, 2013. Series C No. 269, para. 143.

requires, among other aspects, the promotion of an intercultural citizenship based on dialogue, the generation of culturally appropriate services, and differentiated attention for indigenous and Afro-descendent tribal peoples. In this sense, the right to consultation and, when applicable, to previous, free and informed consent, constitutes an institution that allows the exercise of their singularity as ethno-racial groups and the guarantee of their rights, essential in multicultural, pluralist, and democratic States.⁵⁶⁴

111. The obligation to consult is not only a treaty-based, but also a generally recognized principle of international law.⁵⁶⁵ In addition, if the consultation is carried out in a free, prior and informed manner, in good faith, and through the representative entities of indigenous peoples, it effectively contributes to intercultural dialogue.⁵⁶⁶ Therefore, States should adopt the necessary measures to guarantee the right to prior consultation and modify those that impede its full and free exercise, in order to ensure the participation of indigenous and Afro-descendent tribal communities.⁵⁶⁷ The following compilation of pronouncements illustrate the content and scope of this obligation.

Thematic reports

Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. OEA/Ser.L/V/II. Doc. 56/09. December 30, 2009

273. States are under the obligation to consult with indigenous peoples and guarantee their participation in decisions regarding any measure that affects their territory,⁵⁶⁸ taking into consideration the special relationship between indigenous and tribal peoples and land and

⁵⁶⁴ IACHR, *Indigenous peoples, Afro-descendent communities, and natural resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OEA/Ser.L/V/II, Doc. 47/15, December 31, 2015, para. 150.

⁵⁶⁵ IACHR, *Report No. 49/23*, Petition 1633-11, Admissibility, Members of the indigenous community of San Mateo Texcalyacac (Mexico), March 12, 2023, para. 15.

⁵⁶⁶ IACHR, *Situation of Human Rights in Honduras*, OEA/Ser.L/V/II, Doc. 146, August 27, 2019, para. 213.

⁵⁶⁷ IACHR, *Situation of Human Rights in Brazil*, OEA/Ser.L/V/II, Doc. 9, February 12, 2021, para. 72.

⁵⁶⁸ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1058.

natural resources.⁵⁶⁹ This is a concrete manifestation of the general rule according to which the State must guarantee that “indigenous peoples be consulted on any matters that might affect them,”⁵⁷⁰ taking into account that “the purpose of such consultations should be to obtain their free and informed consent,”⁵⁷¹ as provided in ILO Convention No. 169⁵⁷² and in the UN Declaration on the Rights of Indigenous Peoples.⁵⁷³ Consultation and consent are not limited to matters affecting indigenous property rights, but are also applicable to other state administrative or legislative activity that has an impact on the rights or interests of indigenous peoples.⁵⁷⁴

⁵⁶⁹ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.LV/II. Doc. 54, 30 December 2009, par. 1071.

⁵⁷⁰ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/LV/II.135, Doc. 40, August 7, 2009, par. 157.

⁵⁷¹ IACHR, *Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser/LV/II.135, Doc. 40, August 7, 2009, par. 157.

⁵⁷² ILO Convention No. 169 binds states to consult with indigenous peoples, in good faith and with the objective of reaching an agreement or obtaining their consent, on matters that affect them in different contexts; see Arts. 6.1, 6.2, 15.2, 22.3, 27.3 and 28 of the Convention. In the words of a tripartite committee of the ILO Governing Body, “the spirit of consultation and participation constitutes the cornerstone of Convention No. 169 on which all its provisions are based” [Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), par. 31. Cited in: UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, par. 39].

⁵⁷³ See, inter alia, Articles 10, 11, 15, 17, 19, 28, 29, 30, 32, 36 and 38 of the UN Declaration.

⁵⁷⁴ The UN Special Rapporteur has phrased the general obligation of consultation in the following terms: “In accordance with the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169, States have a duty to consult with indigenous peoples through special, differentiated procedures in matters affecting them, with the objective of obtaining their free, prior and informed consent. Premised on an understanding of indigenous peoples’ relative marginalization and disadvantaged conditions in regard to normal democratic processes, this duty derives from the overarching right of indigenous peoples to self-determination and from principles of popular sovereignty and government by consent; and it is a corollary of related human rights principles. // The duty to consult applies whenever a legislative or administrative decision may affect indigenous peoples in ways not felt by the State’s general population, and in such cases the duty applies in regard to those indigenous groups that are particularly affected and in regard to their particular interests. The duty to consult does not only apply when substantive rights that are already recognized under domestic law, such as legal entitlements to land, are implicated in the proposed measure.” UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, pars. 62-63.

274. The right to consultation, and the corresponding state duty, are linked to several human rights,⁶⁴⁷ and in particular they connect to the right of participation established in Article 23 of the American Convention, as interpreted by the Inter-American Court in the case of *YATAMA v. Nicaragua*.⁵⁷⁵ Article 23 recognizes the right of every citizen “to take part in the conduct of public affairs, directly or through freely chosen representatives.” In the context of indigenous peoples, the right to political participation includes the right to “participate (...) in decision-making on matters and policies that affect or could affect their rights (...) from within their own institutions and according to their values, practices, customs and forms of organization”.⁵⁷⁶

276. Indigenous peoples’ right to be consulted about decisions that may affect them is directly related to the right to cultural identity, insofar as culture may be affected by such decisions.⁵⁷⁷ The State must respect, protect and promote indigenous and tribal peoples’ traditions and customs, because they are an intrinsic component of the cultural identity of the persons who form part of said peoples.⁵⁷⁸ [...]

278. There are multiple decisions that relate to ancestral territories and thus require that the State consult with the affected indigenous or tribal peoples; given the multiplicity of matters that can directly affect ancestral territories, there will be an equal diversity of practical application modalities.

280. In other cases, the IACHR has clarified that measures concerning access to and effective enjoyment of ancestral territory are subject to

⁵⁷⁵ I/A Court H.R., *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127.

⁵⁷⁶ I/A Court H.R., *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, par. 225.

⁵⁷⁷ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.LV/II. Doc. 54, 30 December 2009, par. 1050.

⁵⁷⁸ IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.LV/II. Doc. 54, 30 December 2009, par. 1050.

prior, effective and informed consultation,⁵⁷⁹ as is the establishment of the frontiers of indigenous territory through the processes of effective delimitation and demarcation.⁵⁸⁰ The adoption in domestic law of legislative, administrative, and any other measures necessary to delimit, demarcate and title or otherwise clarify and protect the territory in which indigenous people have a communal property right must also be done by fully informed consultations, in accordance with their customary land use practices, and without detriment to other indigenous communities.⁵⁸¹ The Inter-American Court has demanded prior consultation and the achievement of a consensus with indigenous or tribal peoples in cases of “selection and delivery of alternative lands, payment of fair compensation, or both,” which “are not subject to purely discretionary criteria of the State, but rather, pursuant to a comprehensive interpretation of ILO Convention No. 169 and of the American Convention, there must be a consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law.”⁵⁸²

283. The duty of consultation, consent and participation has special force, regulated in detail by international law, in the realization of development or investment plans or projects or the implementation of extractive concessions in indigenous or tribal territories, whenever such plans, projects or concessions can affect the natural resources found therein. Indigenous peoples’ participation through their own institutions and distinctive forms of organization is required before the approval of investment or development plans or projects over natural

⁵⁷⁹ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.LV/II, Doc. 34, June 28, 2007, par. 240.

⁵⁸⁰ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 132.

⁵⁸¹ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 197 – Recommendation 1.

⁵⁸² *IA Court H.R., Case of the Yakyé Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, par. 151. IA Court H.R., Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, par. 135.*

resources. The importance of this topic, and its central role in the current indigenous panorama of the Americas, is detailed the following section of the present study.

285. Consultation is not as a single act, but a process of dialogue and negotiation that implies both parties' good faith and the objective of achieving a mutual agreement. [...] Even in instances in which indigenous peoples' consent is not a necessary requirement, States have the duty to give due regard to the results of the consultation or provide objective and reasonable motives for not having taken them into consideration.

286. The right to participation in the decision-making processes that may affect ancestral territories belongs to the individual members of such peoples, and to the peoples as a whole. The IACHR has emphasized that "the collective interest of indigenous peoples in their ancestral lands is not to be asserted to the exclusion of the participation of individual members in the process. To the contrary, the Commission has found that any determination of the extent to which indigenous peoples may maintain interests in the lands to which they have traditionally held title and have occupied and used must be based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole."⁵⁸³ Procedures to obtain the prior and informed consent of the community as a whole require "at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives."⁵⁸⁴ The requirement of full participation by indigenous and tribal peoples in the determination, by administrative authorities, of their territorial property rights or interests, is disregarded whenever there are members of such peoples who have not been afforded the opportunity of playing a full

⁵⁸³ IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 165.

⁵⁸⁴ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 142.

and effective role in the selection, authorization or mandate of those who act on behalf of the people before the authorities;⁵⁸⁵ whenever the corresponding claims are promoted by a given band, clan or segment of the corresponding people, without an apparent mandate by the other bands, clans or segments thereof;⁵⁸⁶ or whenever appropriate consultations among the members of the entire people are not carried out at the moment of adopting substantial decisions on said rights or interests, in particular when those decisions entail the extinguishment of rights over ancestral territories.⁵⁸⁷

287. Regardless of the above, the representation of these peoples during the consultation processes must be the one established by the affected peoples themselves in accordance with their tradition, having taken into account the will of the whole people as channeled through the corresponding customary mechanisms. [...]

288. In consulting with regard to the right to communal property, States must not cause detriment to other indigenous communities.⁵⁸⁸ [...] In this context, the Inter-American Court has taken into account the legitimate claims that neighboring indigenous communities may have over the same geographical areas and has stipulated that in the demarcation processes, the precise limits of indigenous territories, “may only be determined after due consultation with said neighboring communities,”⁵⁸⁹ with their participation and informed consent.⁵⁹⁰

289. Indigenous and tribal peoples have the right to “be involved in the processes of design, implementation, and evaluation of development

⁵⁸⁵ IACHR, Report No. 7502, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 140

⁵⁸⁶ IACHR, Report No. 7502, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 140.

⁵⁸⁷ IACHR, Report No. 7502, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, par. 140.

⁵⁸⁸ IACHR, Report No. 4004, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 193, and par. 197 – Recommendation 1.

⁵⁸⁹ IA Court H.R., *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124*, par. 133.

⁵⁹⁰ IA Court H.R., *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124*, par. 210.

projects carried out on their lands and ancestral territories”,⁵⁹¹ and the State must “ensure that indigenous peoples be consulted on any matters that might affect them,”⁵⁹² taking into account that “the purpose of such consultations should be to obtain their free and informed consent.”⁵⁹³ When States grant natural resource exploration or exploitation concessions to utilize property and resources encompassed within ancestral territories, they must adopt adequate measures to develop effective consultations, prior to granting the concession, with communities that may potentially be affected by the decision.⁵⁹⁴ [...]

290. Consequently there is a State duty to consult and, in specific cases, obtain indigenous peoples’ consent in respect to plans or projects for investment, development or exploitation of natural resources in ancestral territories: States must “promote, consistent with their relevant international obligations, participation by indigenous peoples and communities affected by projects for the exploration and exploitation of natural resources by means of prior and informed consultation aimed at garnering their voluntary consent to the design, implementation, and evaluation of such projects, as well as to the determination of benefits and indemnization for damages according to their own development priorities.”⁵⁹⁵ Through such prior consultation processes, indigenous and tribal peoples’ participation must be guaranteed “in all decisions on natural resource projects on their lands

⁵⁹¹ IACHR, Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA/Ser.L/V/II.135, Doc. 40, August 7, 2009, par. 157.

⁵⁹² IACHR, Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA/Ser.L/V/II.135, Doc. 40, August 7, 2009, par. 157.

⁵⁹³ IACHR, Follow-up Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA/Ser.L/V/II.135, Doc. 40, August 7, 2009, par. 157.

⁵⁹⁴ IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 143

⁵⁹⁵ IACHR, Democracy and Human Rights in Venezuela. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1141, Recommendation 5. See also: IACHR, Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, par. 297, Recommendation 5.

and territories, from design, through tendering and award, to execution and evaluation.”⁵⁹⁶

291. Carrying out consultation procedures is a responsibility of the State, and not of other parties, such as the company seeking the concession or investment contract. In many of the countries that form part of the Inter-American system, the State responsibility to conduct prior consultation has been transferred to private companies, generating a de facto privatization of the State’s responsibility. The resulting negotiation processes with local communities then often fail to take into consideration a human rights framework, because corporate actors are, as a matter of definition, profit-seeking entities that are therefore not impartial. Consultation with indigenous peoples is a duty of States, which must be complied with by the competent public authorities.⁵⁹⁷

292. The minimum contents of the duty to consult, as elaborated by Inter-American jurisprudence and international instruments and practice, define consultation not as a single act, but as a process of

⁵⁹⁶ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.LV/II, Doc. 34, June 28, 2007, par. 248.

⁵⁹⁷ The UN Special Rapporteur has explained in this sense that “[f]requently, issues of consultation arise when Governments grant concessions to private companies to extract natural resources, build dams, or pursue other development projects within or in close proximity to indigenous lands. In this connection, the State itself has the responsibility to carry out or ensure adequate consultation, even when a private company, as a practical matter, is the one promoting or carrying out the activities that may affect indigenous peoples’ rights and lands. In accordance with well grounded principles of international law, the duty of the State to protect the human rights of indigenous peoples, including its duty to consult with the indigenous peoples concerned before carrying out activities that affect them, is not one that can be avoided through delegation to a private company or other entity. Further, as is the case in other contexts, consultations on extractive or other development activities affecting indigenous peoples should take place at the earliest opportunity and in all phases of decision-making, such that consultations should occur before concessions to private companies are granted. // The Special Rapporteur has observed several instances in which the State hands over consultation obligations to the private company involved in a project. In addition to not absolving the State of ultimate responsibility, such delegation of a State’s human rights obligations to a private company may not be desirable, and can even be problematic, given that the interests of the private company, generally speaking, are principally lucrative and thus cannot be incomplete alignment with the public interest or the best interests of the indigenous peoples concerned.” The Rapporteur thereby concluded that “[e]ven when private companies, as a practical matter, are the ones promoting or carrying out activities, such as natural resource extraction, that affect indigenous peoples, States maintain the responsibility to carry out or ensure adequate consultations.” UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, pars. 54-55, 72.

dialogue and negotiation that involves both parties' good faith and the aim of reaching mutual agreement.

293. Prior consultation procedures “must involve the groups that may be affected, either because they own land or territory or because such ownership is in the process of determination and settlement.”⁵⁹⁸ In other words, indigenous and tribal peoples who lack formal titles of property over their territories must also be consulted in relation to the granting of extractive concessions or the implementation of development or investment plans or projects in their territories.⁵⁹⁹ [...]

298. Compliance with the State duty to consult must be regulated in the domestic legal system through legislative or administrative measures (Articles 1.1 and 2 of the American Convention), in such a way as to fully guarantee the principle of legality and legal certainty to all interested actors. However, the absence of regulation does not exempt the State from said duty. States must approve legislation “that develops the individual rights of indigenous peoples, that guarantees the mechanisms of participation of indigenous persons in the adoption of political, economic, and social decisions that affect their rights, and

⁵⁹⁸ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.LV/II, Doc. 34, June 28, 2007, par. 246.

⁵⁹⁹ The UN Special Rapporteur has explained in this sense that “[t]he duty to consult is not limited to circumstances in which a proposed measure will or may affect an already recognized right or legal entitlement. The Special Rapporteur notes with concern that some States have effectively or purposefully taken the position that direct consultation with indigenous peoples regarding natural resource extraction activity or other projects with significant environmental impacts, such as dams, is required only when the lands within which the activities at issue take place have been recognized under domestic law as indigenous lands. Such a position is misplaced since, commensurate with the right to self-determination and democratic principles, and because of the typically vulnerable conditions of indigenous peoples, the duty to consult with them arises whenever their particular interests are at stake, even when those interests do not correspond to a recognized right to land or other legal entitlement. In this regard, a tripartite committee of the ILO Governing Body has expressly affirmed: ‘The consultations referred to in article 15, paragraph 2, are required in respect of resources owned by the State pertaining to the lands that the peoples concerned occupy or otherwise use, whether or not they hold ownership title to those lands.’ [Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC), para. 48] One can easily imagine innumerable ways in which indigenous peoples and their interests may be affected by development projects or legislative initiatives in the absence of a corresponding legal entitlement.” UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. AHRC/12/34, July 15, 2009, par. 44.

that they be accorded greater political participation in the adoption of decisions at the national level;⁶⁰⁰ for these purposes, States must prescribe clear rules and requirements for the process of the consultations, which include for example “information that must be shared with the communities concerned or the extent of community support necessary to permit a license to be issued.”⁶⁰¹ In most instances, the right to be consulted is violated because of the absence or limitations of the legislative and administrative mechanisms that regulate the duty to consult. ILO control organs have elaborated on the duty to consult in relation to the provisions of Convention No. 169, which stipulates States’ duty to develop, “with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity”,⁶⁰² inter alia through “the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned”.⁶⁰³

299. The absence of clear legal guidelines for the consultation procedure implies, in practice, a serious obstacle for compliance with the State duty to consult. In the absence of a legal framework on this obligation, some OAS Member States have resorted to the application of general environmental law, which frequently incorporates requirements of information and public hearings to allow for local participation in relation to investment and development projects, generally during the phase of elaboration of social and environmental impact studies. Nonetheless, in light of the Inter-American human rights standards, these types of mechanisms are usually insufficient to accommodate the requirements of consultation with indigenous peoples, visualized as a special mechanism to guarantee their rights

⁶⁰⁰ IACHR, Second Report on the Situation of Human Rights in Peru. Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter X, par. 39 – Recommendation 1.

⁶⁰¹ IACHR, Report No. 4004, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 143.

⁶⁰² ILO Convention No. 169, Article 2.1.

⁶⁰³ ILO Convention No. 169, Article 33.2.

and interests in accordance with the criteria established by the organs of the system applying international standards.⁶⁰⁴

300. States also have the general obligation to consult indigenous peoples on the legislative measures which can affect them directly, particularly with regard to the legal regulation of the consultation procedures.⁶⁰⁵ Compliance with the duty to consult indigenous and tribal peoples about the definition of the legislative and institutional framework of prior consultation, is one of the special measures required to promote indigenous peoples' participation in the adoption of the decisions that affect them directly.

301. It is important to note that, although Inter-American jurisprudence and international practice have elaborated the minimum contents of the State duty to consult, there does not exist a single formula applicable in all countries to comply with this duty.⁶⁰⁶ Article 34 of ILO Convention No. 169 explicitly incorporates the

⁶⁰⁴ As the Constitutional Court of Colombia has indicated, “the participation [of the indigenous peoples] is not reduced merely to an intervention in the administrative procedure aimed at ensuring the right of defense for those who have been affected by the authorization of the environmental license ... but has a larger meaning given the lofty interests it seeks to protect, such as those that go to the definition of the destiny and security of the subsistence of said communities.” Judgment on Tutela action T-652, of November 10, 1998. In the case of Peru, the Constitutional Court has indicated that Supreme Decree 012-2008-EMM, which regulates citizen participation in relation to hydrocarbon- related activities, does not meet the requirements of Convention 169 for consultation with indigenous peoples. Constitutional Court, Case No. 03343-2007-PA-TC, para. 32 See Response of CAAAP, DAR and CARE-Perú, p. 13 (“the citizen participation procedure is not, for the [indigenous peoples], in the nature of a consultation.”)

⁶⁰⁵ Cfr. ILO Convention No. 169, Art. 6.1(a); United Nations Declaration, Art. 19. According to the UN Special Rapporteur, “[n]otwithstanding the necessarily variable character of consultation procedures in various contexts, States should define into law consultation procedures for particular categories of activities, such as natural resource extraction activities in, or affecting, indigenous territories. Such mechanisms that are included into laws or regulations, as well as ad hoc mechanisms of consultation, should themselves be developed in consultation with indigenous peoples.” UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, July 15, 2009, par. 67.

⁶⁰⁶ The UN Special Rapporteur has explained in this sense that “[t]here is not one specific formula for carrying out consultations with indigenous peoples that applies to all countries and in all circumstances”, and that “[t]he specific characteristics of the consultation procedure that is required by the duty to consult will necessarily vary depending upon the nature of the proposed measure and the scope of its impact on indigenous peoples”. UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, July 15, 2009, pars. 37, 45.

principle of flexibility in the application of its provisions: “The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.”

302. Consultation, in order to be prior, must be carried out during the exploratory or planning phase of the corresponding project, plan or measure, well before commencement of its execution activities. Consultation procedures must be developed “preceding the design and execution of natural resource projects on the ancestral lands and territories of indigenous peoples.”⁶⁰⁷

304. As for projects and concessions for natural resource exploitation or extraction in indigenous territories, consultation must be carried out from the very moment of evaluation of the grant of a concession: States must secure, beforehand, the effective participation of the affected indigenous or tribal people, through their traditional decision-making methods, both in relation to the process of evaluating the granting of concessions in their territory, and in the adoption of the corresponding decisions.⁶⁰⁸ This is also the meaning of Article 15 of ILO Convention No. 169, which requires States to conduct consultations with indigenous peoples “before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands”.⁶⁰⁹ The prior nature of consultation in these instances is also confirmed by the United Nations Declaration, which clarifies that consultation must be conducted “prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”⁶¹⁰

⁶⁰⁷ IACHR, *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*. Doc. OEA/Ser.LV/II, Doc. 34, June 28, 2007, par. 249

⁶⁰⁸ IA Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 147.

⁶⁰⁹ ILO Convention No. 169, Article 15.2.

⁶¹⁰ United Nations Declaration, Article 32.2.

308. Processes for granting extractive concessions or implementing investment or development plans or projects, require the full provision of precise information on the nature and consequences of the project to the communities prior to and during the consultation.⁶¹¹ According to the Inter-American Court's jurisprudence, consultation must be informed, in the sense that indigenous peoples must be made "aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily."⁶¹² For the Inter-American Court, "this duty requires the State to both accept and disseminate information"⁶¹³, and "entails constant communication between the parties".⁶¹⁴ The informed nature of consultations is connected to the obligation to carry out social and environmental impact assessments prior to the execution of development or investment plans or extractive concessions which may affect these peoples.⁶¹⁵

309. The right to participate in decision-making processes related to investment or development plans or projects or extractive concessions, and the right of access to information, are two basic elements to

⁶¹¹ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004, par. 142.

⁶¹² IA Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 133.

⁶¹³ IA Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 133.

⁶¹⁴ IA Court H.R., *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 133.

⁶¹⁵ According to the UN Special Rapporteur, "[i]n cases involving natural resource exploitation or development projects affecting indigenous lands, in order for the indigenous peoples concerned to make free and informed decisions about the project under consideration, it is necessary that they are provided with full and objective information about all aspects of the project that will affect them, including the impact of the project on their lives and environment. In this connection, it is essential for the State to carry out environmental and social impact studies so that the full expected consequences of the project can be known. These studies must be presented to the indigenous groups concerned at the early stages of the consultation, allowing them time to understand the results of the impact studies and to present their observations and receive information addressing any concerns." UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, July 15, 2009, par. 53.

“support and enhance the ability of individuals to safeguard and vindicate”⁶¹⁶ the rights to life and personal integrity in situations of serious environmental risk, and thus contribute to “the quest to guard against environmental conditions which threaten human health”.⁶¹⁷ As explained by the IACHR, “access to information is a prerequisite for public participation in decision-making and for individuals to be able to monitor and respond to public and private sector action. Individuals have a right to seek, receive and impart information and ideas of all kinds pursuant to Article 13 of the American Convention.”⁶¹⁸ Therefore, the IACHR has advised States: “as the right to participate in decision-making and the right to effective judicial recourse each require adequate access to information, the Commission recommends that the State take measures to improve systems to disseminate information about the issues which affect them, and to enhance the transparency of and opportunities for public input into processes affecting the inhabitants of development sectors.”⁶¹⁹

311. In analogy to the safeguards applicable in other judicial or administrative procedures in which indigenous peoples or individuals take part, informed consultation requires States to adopt measures to ensure that members of indigenous peoples or communities “can understand and be understood (...), where necessary through the provision of interpretation or by other effective means”.⁶²⁰

312. Likewise, States may be required to provide these peoples with other means, which can include technical and independent

⁶¹⁶ IACHR, Report on the Situation of Human Rights in Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁶¹⁷ IACHR, Report on the Situation of Human Rights in Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁶¹⁸ IACHR, Report on the Situation of Human Rights in Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁶¹⁹ IACHR, Report on the Situation of Human Rights in Ecuador. Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.

⁶²⁰ ILO Convention No. 169, Article 12.

assistance, in order for indigenous peoples to be able to adopt fully informed decisions.⁶²¹

313. Informed consultation also requires States to ensure that the procedures "establish the benefits that the affected indigenous peoples are to receive, and compensation for any environmental damages, in a manner consistent with their own development priorities."⁶²²

314. The complexity and magnitude of investment or development plans or projects or concessions for natural resource extraction may require holding prior information meetings. These meetings, however, are not to be confused with the type of negotiation and dialogue required by a genuine consultation process.

315. The process of consultation with indigenous peoples must be carried out in good faith, and in all cases with the aim of achieving an agreement, or receiving indigenous peoples' informed consent to the development or

⁶²¹ ILO Convention No. 169, Article 12. Technical support to indigenous peoples in the context of consultation procedures may also be interpreted as one of the requirements for the provision of means for indigenous peoples to be able to fully exercise their right to autonomy. ILO Convention 169, Art. 6.1.(c) As pointed out by the UN Special Rapporteur, "indigenous peoples are typically disadvantaged in terms of political influence, financial resources, access to information, and relevant education in comparison to the State institutions or private parties, such as companies, that are their counterparts in the consultations. (...) States must dully address the imbalance of power by ensuring arrangements by which indigenous peoples have the financial, technical and other assistance they need, and they must do so without using such assistance to leverage or influence indigenous positions in the consultations." UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, pars. 50-51.

⁶²² IACHR, Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA/Ser.LV/II, Doc. 34, June 28, 2007, par. 248.

investment plans or extractive concessions that can affect their property right over lands, territories and natural resources.⁶²³ [...]

317. The international and regional regulation's emphasis on good faith in compliance with the State duty to consult indigenous peoples seeks to establish a safeguard against merely formal consultation procedures, an unfortunately frequent practice which has been consistently denounced by indigenous peoples. Consultation procedures are not tantamount to compliance with a series of pro forma requirements.⁶²⁴ The IACHR has explained that consultation procedures, as a means to guarantee indigenous and tribal peoples' right to participate in matters that may affect them, "must be designed to secure the free and informed consent of these peoples, and must not be limited to notification or quantification of damages."⁶²⁵

⁶²³ The UN Special Rapporteur has clarified in this regard that "[i]n all cases in which indigenous peoples' particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations. (...) this requirement does not provide indigenous peoples with a 'veto power', but rather establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned. (...) These principles [of consultation and consent] are designed to build dialogue in which both States and indigenous peoples are to work in good faith towards consensus and try in earnest to arrive at a mutually satisfactory agreement. (...) the duty of States to consult with indigenous peoples and related principles have emerged to reverse historical patterns of imposed decisions and conditions of life that have threatened the survival of indigenous peoples. At the same time, principles of consultation and consent do not bestow on indigenous peoples a right to unilaterally impose their will on States when the latter act legitimately and faithfully in the public interest. Rather, the principles of consultation and consent are aimed at avoiding the imposition of the will of one party over the other, and at instead striving for mutual understanding and consensual decision-making." UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, pars. 48-49.

⁶²⁴ As explained by the UN Special Rapporteur, the language of the UN Declaration on the Rights of Indigenous Peoples in this regard "suggests a heightened emphasis on the need for consultations that are in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process." UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, par. 46.

⁶²⁵ IACHR, Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA/Ser.LV/II, Doc. 34, June 28, 2007, par. 248.

318. Consultation in good faith requires the absence of any type of coercion by the State or by agents acting with its authorization or acquiescence. In too many cases, the consultation of indigenous peoples is carried out in climates of harassment and even violence perpetrated by private security guards hired by the companies that are responsible for the projects, and sometimes by public security forces.

319. Good faith is also incompatible with practices such as attempts to disintegrate the social cohesion of the affected communities, whether it is through the corruption of communal leaders or the establishment of parallel leaderships, or through negotiations with individual members of the community that are contrary to international standards.

320. In this sense, consultation in good faith requires the establishment of a climate of mutual confidence between the parties, based on the principle of reciprocal respect. As pointed out by an ILO Committee, “[r]ecalling that the establishment of effective consultation and participation procedures contributes to preventing and resolving disputes through dialogue ... the Committee emphasizes the need to: endeavour to achieve consensus on the procedures to be followed; facilitate access to such procedures through broad information; and create a climate of confidence with indigenous peoples which favours productive dialogue.”⁶²⁶ This means, inter alia, that “[i]n order to achieve a climate of confidence and mutual respect for the consultations, the consultation procedure itself should be the product of consensus. The [UN] Special Rapporteur has observed that, in many instances, consultation procedures are not effective and do not enjoy the confidence of indigenous peoples, because the affected indigenous peoples were not adequately included in the discussions leading to the design and implementation of the consultation procedures.”⁶²⁷

⁶²⁶ Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC), GB.294/17/1; GB.299/6/1 (2005), para. 53.

⁶²⁷ UN – Human Rights Council - Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. AHRC/12/34, 15 July 2009, par. 51.

321. As a process that involves two parties, consultation in good faith also has a series of implications for indigenous peoples themselves. As parties to good faith negotiation and dialogue processes in the framework of the State duty to consult, indigenous peoples have the primary responsibility of actively taking part in such processes. Nonetheless, indigenous peoples' responsibilities towards consultation may not be interpreted in such a way as to limit their human rights or the exercise of peaceful forms of social protest.

324. Insofar as development or investment plans or projects or extractive concessions substantially affect the right to indigenous property and other connected rights, the duty to consult requires, from all involved parties, flexibility to accommodate the different rights and interests at stake. The States' duty is to adjust or even cancel the plan or project based on the results of consultation with indigenous peoples, or failing such accommodation, to provide objective and reasonable motives for not doing so.

325. Failure to pay due regard to the consultation's results within the final design of the investment or development plans or projects or extractive concessions is contrary to the principle of good faith that governs the duty to consult, which must allow indigenous peoples the capacity to modify the initial plan. From another perspective, decisions related to the approval of such plans, that fail to express the reasons that justify failing to accommodate the results of the consultation procedure, could be considered contrary to the due process guarantees set by the standards of the Inter-American human rights system.

326. The fact that indigenous peoples' consent is not required as an outcome of every consultation process does not imply that the State duty to consult is limited to compliance with formal procedures. From a substantive standpoint, States have the duty to take into account the concerns, demands and proposals expressed by the affected peoples or communities, and to give due regard to such concerns, demands and proposals in the final design of the consulted plan or project.

327. Whenever accommodation is not possible for motives that are objective, reasonable and proportional to a legitimate interest in a democratic society, the administrative decision that approves the investment or development plan must argue, in a reasoned manner, which are those motives. That decision, and the reasons that justify failure to incorporate the results of the consultation to the final plan, must be formally communicated to the respective indigenous people.⁶²⁸

328. [...] the decisions taken must be subject to review by higher administrative and judicial authorities, through adequate and effective procedures, which evaluate the validity and pertinence of said reasons, as well as the balance between the rights and interests at stake.

334. The development of international standards on indigenous peoples' rights, including those set by the Inter-American system, makes it possible to identify a series of circumstances where obtaining indigenous peoples' consent is mandatory.

1. The first of these situations, identified by the UN Special Rapporteur, is that of development or investment plans or projects that imply a displacement of indigenous peoples or communities from their traditional lands, that is, their permanent relocation. The requirement of consent in these cases is established in Article 10 of the UN Declaration: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and

⁶²⁸ As the Inter-American Court of Human Rights has indicated, "the decisions adopted by national bodies that could affect human rights must be duly justified, because, if not, they would be arbitrary decisions. In such sense, the reasons given for a judgment must show that the arguments by the parties have been duly weighed.... Moreover, a reasoned decision demonstrates to the parties that they have been heard." 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. 78. In addition, the Court has emphasized that the reasoned explanation of judicial or administrative decisions is the guarantee that "grants credibility to legal decisions in the framework of a democratic society," "affords ... the possibility of challenging the Order and obtaining a new examination of the issues by higher Courts," and, accordingly, is "constitutes one of the 'due guarantees' enshrined in Article 8(1) of the Convention in order to safeguard the right to the due process of the law." I/A Court H.R., Case of *Tristán Donoso v. Panama*, Judgment of January 27, 2009, Series C, No. 193, pars. 152-153.

after agreement on just and fair compensation and, where possible, with the option of return”.⁶²⁹

2. Indigenous peoples’ consent is also required, according to the Inter-American Court in the Saramaka judgment, in cases where the execution of development or investment plans or of concessions for the exploitation of natural resources would deprive indigenous peoples of the capacity to use and enjoy their lands and other natural resources necessary for their subsistence.

3. Another case in which, as pointed out by the Special Rapporteur, indigenous peoples’ consent is required, is that of storage or disposal of hazardous materials in indigenous lands or territories, as established in Article 29 of the UN Declaration.⁶³⁰

[Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities. OEA/Ser.L/V/II. Doc. 47/15. 31 December 2015](#)

108. The information provided by the State in the consultation process must be clear and accessible. This supposes that the information which will be provided must be comprehensible, which means, among other things, that its divulgation must be realized in clear language and that, in such cases where it is necessary, it be communicated with the help of a translator or in a language or dialect which allows community members to understand them completely. The information provided must also be sufficient, appropriate and complete to allow for a consent which is not manipulated in favor of the project or activity. The condition of prior notification implies that information must be presented with sufficient time prior to the authorization or prior to the initiation of the negotiations, taking into consideration de consultation

⁶²⁹ See, in the same sense, Article 16 of ILO Convention No. 169.

⁶³⁰ United Nations Declaration, art. 29.2 (“States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent”).

process and the delays required to adopt representative decisions within each indigenous community.⁶³¹

[Economic, Social, Cultural and Environmental Rights of Persons of African Descent, Inter-American Standards for the Prevention, Combat and Eradication of Structural Racial Discrimination. OEA/Ser.L/V/II. Doc. 109. 16 March 2021](#)

226. The IACHR and its REDESCA urge the States to guarantee the full exercise of the right to free, prior and informed consultation and consent of African Descent communities in keeping with the principle of self-determination. They further urge the States to conduct environmental impact studies on collective Afro-descendant territories to assess potential damages or impacts that could be caused by investment projects or business activities in the tourism, mining, energy, agriculture, urban development, construction and other sectors. It is the responsibility of States to ensure effective participation of these communities in the assessment studies prior to granting environmental permits for execution of these projects or activities.

[Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region. OAS/Ser.L/V/II. Doc. 176 29 September 2019](#)

48. The gender perspective combined with an intercultural approach helps to recognize the particular position of indigenous women and adopt culturally appropriate measures to ensure their enjoyment of their fundamental rights and freedoms, as well as enabling them to have a life free from discrimination and violence. In the opinion of the IACHR, such approaches, [...] should also be applied to consultation processes, in which States should see to it that women's participation in internal decision-making processes is guaranteed, using measures that respect their customary law.⁶³²

⁶³¹ IACHR, Special Rapporteur on the right to freedom of expression, The right to access to information in the Inter-American System, OEA/Ser.L/V/II. CIDH/RELE/INF. 1/09. December 30, 2009. para. 72.

⁶³² IACHR, Indigenous Women and their Human Rights in the Americas, OEA/Ser.L/V/II. Doc.44/17, 2017, para. 231; IACHR, Indigenous Peoples, Afro-descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, OEA/Ser.L/V/II.Doc. 47/15, 2016, para. 211; OAS, American Declaration on the Rights of Indigenous Peoples, 2016.

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Situation of human rights in Brazil. OEA/Ser.L/V/II. Doc. 9. 12 February 2021

49. Accordingly, the State needs to conduct bone fide, culturally appropriate, prior, free, and informed consent consultations regarding all physical alterations to, or close to, the traditional territory, in addition to [...] activities that may affect the communities, be they activities that generate waste, sound pollution, or significant movement of people in the area, or that impose constraints on the population's right to freedom of movement. Similarly, consultation must be held regarding initiatives or bills that envisage [...] communities' participation in the benefits of the project⁶³³.

52. Prior consultation is required not only in matters relating to the territory or that have an environmental impact, but also regarding regulations to do with freedom of movement in traditional territories, changes in governmental administrative structures, and environmental licensing⁶³⁴. [...].

73. At the same time, the Commission commends the initiatives undertaken by indigenous peoples and communities to draw up autonomous consultation and consent protocol⁶³⁵. Such instruments constitute legitimate exercise of the right of indigenous peoples to participate in consultation processes in accordance with their own

⁶³³ Chamber of Deputies, Projeto cria fundo para beneficiar comunidades afetadas pela base de Alcântara, April 19, 2019.

⁶³⁴ Racismo Ambiental, Expansão da Base de Alcântara pode desabrigar 2700 famílias quilombolas, March 19, 2019.

⁶³⁵ The Commission was apprised of several consultation protocols, including: Wajãpi Consent; the Juruna (Yudjá) Consultation Protocol of the Paquiçamba de Volta Grande do Rio Xingu Indigenous Land; the Consultation Protocol for two Indigenous Peoples in Xingu Territory; the Protocol for Consulting the Waimiri Atoar people; the Consultation Protocol of the Kayapó-Menkrãgnoti people in association with the Kabu Institute; and the draft Consultation Protocol of the Indigenous Peoples of Oiapoque. Rede de Cooperação Amazônica, "Consulta previa, libre e informada", April 22, 2019.

cultural guidelines⁶³⁶. So far, such protocols have yet to be institutionalized by the State in such a way as to ensure that they are duly complied with and are incorporated into State practice in all situations requiring consultation

[Situation of human rights in Honduras. OEA/Ser.L/V/II. Doc. 146. 27 August 2019](#)

203. [...] Furthermore, the IACHR wishes to emphasize that, following the consultation process and, where appropriate, the obtaining of consent, States must continue to ensure that such authorized activities, plans or projects do not lead to the denial of the physical and cultural integrity of indigenous and Afro-descendant peoples. [...]

216. [...] the IACHR recalls that prior consultation is not a tool to mitigate social conflict, but rather a procedure to give effect to the right to self-determination, in relation to activities carried out in their ancestral lands and territories, or that have an impact on the natural resources found there.

220. Specifically, the IACHR urges the [...] state to implement public policies that address the needs of these groups. Any initiatives, programs, and policies relating to indigenous and Afro-descendant peoples must be tailored to their needs and concerns and must be duly consulted with them. [...]

[Situation of Human Rights in Guatemala. OEA/Ser.L/V/II. Doc. 208/17.31 December 2017](#)

108. In that regard, the Commission highlights, that the State's obligation of free and informed prior consultation of indigenous and tribal peoples also relates to the adoption of legislative measures.⁶³⁷ The Inter-American Court has stated: "In the case of consultation prior to the adoption of a legislative measure, the indigenous peoples must

⁶³⁶ IA Court of H.R. Case of the Kichwa de Sarayaku Indigenous People v. Ecuador. Merits and Reparations. Judgment of June 27, 2012. Series C, No. 245, par. 177.

⁶³⁷ IA Court H.R., Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment of June 27, 2012, Series C No. 245, para. 181.

be consulted in advance during all stages of the process of producing the legislation, and these consultations must not be restricted to proposals.”⁶³⁸ By the same token, the IACHR considers that identifying the measure that is to be the subject of consultation is fundamental in the process of consultation and consent. Thus it should be endowed with the greatest possible guarantees, reducing discretion in the decision and applying, in non-restrictive terms, the concept of impairment or negative impact. This is regardless of the type of megaproject, extraction project, investment project or any other that affects ancestral peoples.⁶³⁹

Admissibility Reports

Report No. 49/23. Petition 1633-11. Admissibility report. Members of the indigenous community of San Mateo Texcalyácac, Mexico. 12 March 2023

27. The IACHR has highlighted the need for the affected indigenous peoples to participate in the social and environmental impact study processes, since "the knowledge of the members of the indigenous peoples is necessarily required to identify such impacts, as well as for the identification of possible alternatives and mitigation measures".⁶⁴⁰

Resolutions

Resolution 3/2021. Climate Emergency: Scope and Inter-American Human Rights Obligations. Adopted by the IACHR on December 31, 2021.

24. States must respect and guarantee without any discrimination meaningful participation through the guarantee of the right to prior consultation seeking free, prior and informed consent in the design of action plans, public policies, norms and / or projects directly and

⁶³⁸ Ibid

⁶³⁹ IACHR, Situation of Human Rights in Guatemala: Diversity, Inequality and Exclusion, OEA/Ser.LV/II.Doc. 43/15, December 30, 2015, para. 495

⁶⁴⁰ IACHR. Rights of indigenous and tribal peoples over their ancestral lands and natural resources: norms and jurisprudence of the inter-American human rights system. OEA/Ser.LV/II. Doc. 56/09, paras. 266-267.

indirectly related to the fight against climate change. Such participation should take into account an intercultural approach and adequately incorporate traditional and local knowledge on mitigation and adaptation and respect the duty of accommodation in the final decision.

[Resolution 1/2020. Pandemic and Human Rights in the Americas. Adopted by the IACHR on April 10, 2020.](#)

57. Refrain from introducing legislation and/or moving forward to carry out production and/or extractive projects in the territories of indigenous peoples during the period the pandemic may last, given the impossibility of conducting prior informed and free consent processes (due to the recommendation of the World Health Organization (WHO) that social distancing measures be adopted) provided for in ILO Convention 169 and other pertinent international and national instruments.

D. RIGHT TO FREEDOM OF EXPRESSION

112. The IACHR, different civil society organizations, international agencies, and most States consider that the right of free expression is essential for the development and strengthening of democracy and for the full enjoyment of human rights, as well as a fundamental guarantee for ensuring the rule of law and democratic institutions.⁶⁴¹

113. The right to freedom of expression, as enshrined in Article 13 of the American Convention, seeks to strengthen the functioning of pluralistic, deliberative democratic systems by protecting and promoting the free flow of information, ideas, and expressions of all kinds. In this regard, the Court has stated that “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.”⁶⁴² Democratic control through public opinion fosters transparency in state activities and promotes the accountability of state officials in relation to their public activities.⁶⁴³

⁶⁴¹ IACHR, Report on the situation of human rights in Venezuela, OEA/Ser.LV/II.118Doc 4 rev. 1, October 24, 2003, para. 365.

⁶⁴² Cfr. 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.

⁶⁴³ IACHR, Report No. 27/15, Case 12.795, Merits, Alfredo Lagos del Campo, Peru, July 21, 2015, para. 75.

114. For its part, the Commission has pointed out that the right to freedom of expression and information is one of the main mechanisms that society has for exercising democratic control over those in charge of matters of public interest. Therefore, when the latter is restricted, citizen control over public officials is prevented or constrained and democracy is transformed into a system where authoritarianism finds fertile ground to impose itself on the will of society.⁶⁴⁴

115. Accordingly, this chapter compiles standards that refer to various elements that, according to the inter-American system, constitute protected rights under freedom of expression, including, in particular, access to public information and information of public interest; the right to peaceful protest; the right to assembly in public spaces; the Internet; and limits and prohibitions on hate speech and incitement to violence.

1. Access to public information and information of public interest

116. The Commission has pointed out that the right of access to information is a fundamental right of individuals, since it is one of the most effective instruments for citizen control over the actions of the authorities and for the strengthening of democracies in the hemisphere⁶⁴⁵. This right is contained in the provisions of Article 13(1) of the American Convention on Human Rights, which establishes the freedom to seek information. In the same sense, the Declaration of Principles on Freedom of Expression expressly establishes it: Access to information held by the State is a fundamental right of individuals. Therefore, States are obliged to guarantee the exercise of this right, which only admits exceptional limitations that must be previously established by law in the case of a real and imminent danger that threatens national security in democratic societies⁶⁴⁶.

117. The following is a summary of standards that refer to the scope and content of the right of access to public information and the limitations allowed by the Convention and inter-American standards.

⁶⁴⁴ IACHR, Third Report on the Situation of Human Rights in Paraguay, OEA/Ser.L/VII.110 doc. 52, March 9, 2001, para. 39.

⁶⁴⁵ IACHR, Third Report on the Situation of Human Rights in Paraguay. OEA/Ser.L/VII.110 doc. 52. 9 March 2001, para. 27.

⁶⁴⁶ IACHR, Third Report on the Situation of Human Rights in Paraguay. OEA/Ser.L/VII.110 doc. 52. 9 March 2001, para. 28.

Country Reports

Third report on the situation of Human Rights in Paraguay. OEA/Ser./L/VII.110 doc. 52.9 March 2001

5. The freedom of expression includes the right of every person to seek, receive, and disseminate information and ideas of all sorts. Accordingly, this right has a dual dimension, both individual and social. In this regard, the Court has said of this dual dimension:

It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it.... implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.⁶⁴⁷

41. The need for complete and effective control over the management of public affairs, as a guarantee of the existence of a democratic society, requires that the individuals in charge of managing public affairs have a different protection than that enjoyed by any private individual not involved in matters of public interest.

45. In this respect, the American Commission has established that:

The sort of political debate encouraged by the right to free expression will inevitably generate some speech that is critical of, and even offensive to those who hold public office or are intimately involved in the formation of public policy. A law that targets speech that is considered critical of the public administration by virtue of the individual who is the object of the expression, strikes at the very essence and content of freedom of expression.⁶⁴⁸

46. And the Commission adds:

⁶⁴⁷ *Id.*, para. 30.

⁶⁴⁸ *Id.*, pp. 218-219.

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.⁶⁴⁹

47. The criterion to be used, under the Declaration of Principles on Freedom of Expression, is that protection of one's reputation should be guaranteed through civil sanctions alone, in those cases in which the offended person is a public official or public or private figure who has voluntarily become involved in matters of public interest. In addition, in these cases, it should be proven that in disseminating news, the journalist or reporter had the intent to inflict harm or had full awareness that false news was being disseminated or conducted himself or herself with manifest negligence in respect of the truth or falsity of the same. This position is known as the doctrine of "actual malice."⁶⁵⁰

48. In addition, opinions that are not factual assertions in respect of public figures must not be punished. In this respect, the Commission has established that this is especially the case of the political arena, where the criticism is often through value judgments or not through statements based exclusively on facts. In this regard, it may be impossible to demonstrate the veracity of the statements, since no evidence can be offered as to value judgments. The laws that criminalize such expression raise the possibility of one who criticizes the government in good faith being sanctioned for his or her criticism.

[Second Report on the Situation of Human Rights in Peru. OEA/Ser.L/V/II.106. Doc. 59 rev. 2 June 2000](#)

3. [...] Freedom of expression is [...] also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural

⁶⁴⁹ *Id.*, p. 222.

⁶⁵⁰ Principle 10 of the Declaration of Principles of Freedom of Expression establishes: "Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news."

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.⁶⁵¹

[Report on the Situation of Human Rights in Venezuela. OEA/Ser.L/V/II.118. Doc. 4 rev. 1. 24 October 2003.](#)

367. Protecting the right to freely express ideas is fundamental in ensuring full currency for the other rights: without freedom of expression and information, full democracy cannot exist; and when democracy is absent, the history of the hemisphere has shown that rights ranging from the right to life to that of property are seriously endangered. Clearly, there is a direct relationship between the exercise of free expression and opinion and democratic existence.

Thematic reports

[A Hemispheric Agenda for the Defense of Freedom of Expression. OEA/Ser.L/V/II. CIDH/RELE/INF.4/09. 25 February 2009](#)

30. There are multiple reasons for the importance of the right to access to information, among which the case law of the inter-American system has underscored: (a) its nature as a critical tool for democratic participation, oversight of the functioning of the State and public administration, and the oversight of corruption by public opinion—without which citizen scrutiny of government activity and the prevention of government abuse through informed public debate would be impossible;⁶⁵² (b) its value as a means of individual and collective self-determination, especially democratic self-determination, given that it enables individuals and societies to make informed decisions on the

⁶⁵¹ 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, November 13, 1985, para. 70.

⁶⁵² *Ibid.* See also, *Arguments before the Inter-American Court of Human Rights in the Case of Claude Reyes et al. v. Chile*. Reprinted in the Judgment of September 19, 2006. Series C No. 151. 1999 and 2004 Joint Declarations of the UN, OAS and OSCE Special Rapporteurs for Freedom of Expression.

direction of their lives; and (c) its nature as an instrument for the exercise of other human rights, especially by those who are in subordinate or vulnerable positions, as it is only through the specific knowledge of the content of human rights and their forms and means of exercise that they can be enjoyed fully and effectively.

39. Finally, the Inter-American case law has emphasized the peculiar features this rights acquires when exercised within an electoral context.⁶⁵³ In this sense, the InterAmerican Court has established that the right to freedom of thought and expression is of fundamental importance during the process of electing the authorities who will govern a State, because (i) it is an essential tool for shaping voter opinion and strengthening the political contest among the various participants and it provides instruments for the analysis of each candidate's platform, thus enabling a greater degree of transparency and oversight of future authorities and their performance; and (ii) it fosters the shaping of the collective will manifested through voting.⁶⁵⁴ It is thus necessary to healthy democratic debate for there to be the greatest possible circulation of ideas, opinions and information regarding the candidates, their parties and their platforms during the period preceding elections, mainly through the communications media, the candidates and other individuals who wish to express themselves.. [...]

[The Inter-American Legal Framework regarding the Right to Access to Information. OEA/Ser.L/V/III. CIDH/RELE/INF. 1/09. December 30, 2009](#)

14. As the Office of the Special Rapporteur has broadly recognized within the rappourteurships of freedom of expression, in cases of discrepancies or conflicting statutes, the law of access to information must prevail over all other legislation.⁶⁵⁵ This has been recognized as an indispensable prerequisite for the proper functioning of

⁶⁵³ See Case of Canese, supra note 9 at para. 90.

⁶⁵⁴ See Case of Canese, supra note 9 paras. 88-90.

⁶⁵⁵ UN, OAS, and OSCE Special Rapporteurs on Freedom of Expression, Joint Declaration 2004.

democracy.⁶⁵⁶ This requirement helps encourage the States to comply effectively with the obligation to establish a law on access to public information and interpret the law favorably toward that right.⁶⁵⁷

[Report on Terrorism and Human Rights. OEA/Ser.L/V/II.116. Doc. 5 rev. 1 corr. 22 October 2002.](#)

267. Respect for and protection of freedom of expression plays a fundamental role in strengthening democracy and guaranteeing human rights by offering citizens an indispensable tool for informed participation. Weak public institutions, official corruption and other problems often prevent human rights violations from being brought to light and punished. In countries affected by such problems, the exercise of freedom of expression has become the main means by which illegal or abusive acts previously unnoticed, ignored or perpetrated by authorities are exposed. [...]

[Report on Freedom of Expression in the Americas: the first five reports of the Office of the Rapporteur for Freedom of Expression.](#)

[...] effective respect for freedom of expression is a fundamental tool for incorporating those who, for reasons of poverty, are marginalized both from information and from any dialogue. Within this framework of reference, it is the duty of the State to guarantee equal opportunities for all persons to receive, seek and impart information by any means of communication without discrimination, eliminating all types of measures that discriminate against an individual or group of persons in their equal and full participation in the political, economic and social life

⁶⁵⁶ Resolution AG/RES. 1932 (XXXIII-O/03) June 10, 2003 on “Access to Public Information: Strengthening Democracy”; Resolution AG/RES. 2057 (XXXIV-O/04) June 8, 2004 on “Access to Public Information: Strengthening Democracy”; Resolution AG/RES. 2121 (XXXV-O/05) June 7, 2005 on “Access to Public Information: Strengthening Democracy”; and AG/RES. 2252 (XXXVI-O/06) June 6, 2006 on “Access to Public Information: Strengthening Democracy.”

⁶⁵⁷ Cf. IACHR. Arguments before the Inter-American Court of Human Rights in the case *Claude-Reyes et al. v. Chile*, cited in *IA 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. 58.d).*

of their country.⁶⁵⁸ This right guarantees an informed voice for all people, an indispensable condition for the subsistence of democracy.

The Special Rapporteur considers that it is precisely through the active and peaceful participation of society as a whole in the democratic institutions of the State that the exercise of freedom of expression is fully manifested, allowing for the improvement of the condition of marginalized sectors.

This principle in turn establishes the parameter to which the State must conform for the denial of information in its possession. Because of the need to promote greater transparency of government acts as a basis for strengthening the democratic institutions of the countries of the hemisphere, limitations on state-held archives should be exceptional. They should be clearly established in law and applicable only in the case of a real and imminent danger that threatens national security in democratic societies. It is therefore considered that each act restricting access to information must be resolved on a case-by-case basis. The Inter-American Court of Human Rights has interpreted that restrictions on freedom of expression and information must be "judged by reference to the legitimate needs of democratic societies and institutions" since freedom of expression and information is essential to any form of democratic government.⁶⁵⁹ Therefore, within this context, the State must ensure that when there is a national emergency, the denial of information held by the State will be imposed only for the period strictly required by the exigencies of the circumstances and modified once the emergency situation is over.⁶⁶⁰ The Special Rapporteur recommends that a review of information considered classified be ensured by an independent judicial body capable of

⁶⁵⁸ See IACHR, Basic Documents on Human Rights in the Inter-American System, Advisory Opinion OC-5/85 para. 70, OEA/ser.LV/II92/rev. 3, May 3, 1996.

⁶⁵⁹ IA Court H.R., Compulsory Membership in an Association of Journalists, *supra* note 2, para. 70.

⁶⁶⁰ See Chapter IV, Article 27 of the American Convention on Human Rights, which contemplates the obligations of States under emergency situations.

balancing the interest of protecting the rights and freedoms of citizens with national security.

Likewise, this principle establishes that the imposition of economic or political pressures by sectors of economic and/or State power with the aim of influencing or limiting the expression of individuals and the media is inadmissible. The Inter-American Commission has expressed in this regard that the use of powers to limit the expression of ideas lends itself to abuse, since silencing unpopular or critical ideas and opinions restricts the debate that is fundamental for the effective functioning of democratic institutions. Limiting the free flow of ideas that do not incite anarchic violence is incompatible with freedom of expression and with the basic principles that underpin the pluralistic and democratic forms of today's societies.⁶⁶¹

The Commission also indicated, citing the Inter-American Court, that the "constant reference to democracy in Articles 29 and 32 indicates that since the provisions of the Convention are vital to the preservation and functioning of democratic institutions, the 'just requirements of democracy must guide their interpretation'. Thus, the interpretation of restrictions on freedom of expression and information (Article 13(2)) must be "judged by reference to the legitimate needs of democratic societies and institutions,' since freedom of expression and information is essential to any democratic form of government".⁶⁶²

The first derivation of this dual system of protection is the need to review the desacato laws to bring them in line with Article 13 of the American Convention.⁶⁶³ In this regard, the Commission noted that "in

⁶⁶¹ IACHR, "Report on the Compatibility between Contempt Laws and the American Convention on Human Rights," OAS Doc. 9, 88th Session, February 17, 1995.

⁶⁶² See IA Court H.R., Compulsory Membership in an Association of Journalists, Advisory Opinion OC-5/85 Series A, No. 5, November 13, 1985, [hereinafter IA Court H.R., Compulsory Membership in an Association of Journalists], para. 42.

⁶⁶³ In this regard, the Office of the Special Rapporteur for Freedom of Expression has repeatedly expressed the need to repeal desacato laws in the legal systems of the hemisphere.

conclusion, the Commission understands that the use of such powers to limit the freedom of expression of ideas lends itself to abuse, as a measure to silence unpopular ideas and opinions, thereby restricting a debate that is fundamental to the effective functioning of democratic institutions. Laws that criminalize the expression of ideas that do not incite lawless violence are incompatible with the freedom of expression and thought enshrined in Article 13 and with the fundamental purpose of the American Convention to protect and guarantee the pluralistic and democratic way of life."

The Special Rapporteur considers that it is precisely through active political participation in the democratic institutions of the State that the exercise of freedom of expression and information plays a fundamental role in bringing about the necessary changes, both at the institutional and societal levels, to improve the status of women in the hemisphere.

The central role played by freedom of expression in strengthening democracy is unquestionable. The right to express ideas and disseminate information of which one is aware is essential for the inhabitants of a country to participate in public activities.

The consolidation and development of democracy, as stated in the preamble of the Declaration of Principles on Freedom of Expression adopted by the Commission in 2000, depends on freedom of expression.

The right to freedom of expression and information is one of society's main mechanisms for exercising democratic control over those in charge of matters of public interest. Therefore, when freedom of expression and information is restricted, it prevents or limits citizen control over public officials and transforms democracy into a system where authoritarianism finds fertile ground to impose itself on the will of society.⁶⁶⁴

⁶⁶⁴ A U.S. Supreme Court Justice stated that "This Nation can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that it is possible for a country to live in freedom when people can be made to suffer physically or economically for criticizing their Government, its acts, or its officials. For a representative democracy ceases to exist the moment that public officials are absolved, by whatever means, from responsibility to their constituents, and this happens whenever those constituents can be prevented from uttering, writing or publishing their opinions on any public measure or on the conduct of those who advise or execute it." *The New York Times v. Sullivan*. 376 US 255, 84 S.Ct. 710 (1964).

Respect for and protection of freedom of expression is a fundamental factor in strengthening democracy and guaranteeing human rights by providing citizens with an indispensable tool for informed participation. Fragile state institutions, official corruption and other problems often prevent human rights violations from being exposed and punished. In countries affected by these problems, the exercise of freedom of expression has become one of the principal means by which illegal or abusive acts that previously went unnoticed or ignored by the authorities, or were perpetrated by them, are now denounced. As stated by the Inter-American Court of Human Rights:

[...] Freedom of expression is therefore not only a right of individuals but of society itself.⁶⁶⁵

[The Inter-American Legal Framework regarding the Right to Freedom of Expression. OEA/Ser.L/V/II. CIDH/RELE/INF.2/09. 30 December 2009](#)

40. As previously mentioned, the democratic oversight of government through public opinion promotes the transparency of the State's activities and the responsibility of public officials for their performance; it also encourages broader citizen participation. As such, in the democratic context, speech regarding public officials or individuals who perform public duties, as well as speech regarding candidates for public office, must enjoy a particularly strong margin of openness. In this sense, in a democratic society, public officials and those who aspire to be public officials have a distinct threshold of protection that exposes them to a greater degree of scrutiny and public criticism. This is justified by the public interest nature of the activities they engage in, as they have exposed themselves voluntarily to heightened scrutiny, and because they have an enormous capacity to call information into

⁶⁶⁵ IA Court H.R., *Compulsory Membership in an Association of Journalists*, supra note 2, para. 70.

question through their power to appeal to the public.⁶⁶⁶ Effectively, due to a profile that implies greater influence on society and easier access to the media, public officials have greater opportunity to give explanations or respond to questions and criticism.⁶⁶⁷

80. According to the Inter-American Court, in general terms, “public order” cannot be invoked to suppress a right guaranteed by the Convention, to change its nature or to deprive it of its real content. If this concept is invoked as a basis for limitations to human rights, it must be interpreted in strict adherence to the just demands of a democratic society, which take into account the balancing of different interests at stake and the necessity of preserving the object and purpose of the American Convention.⁶⁶⁸

81. In this sense, for purposes of limitations to freedom of expression, the Court defines “public order” as “the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles.”⁶⁶⁹ Under this definition, it is clear to the Court that the defense of public order requires the broadest possible circulation of information, opinions, news and ideas—that is, the

⁶⁶⁶ *IA Court H. R., Case Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 3, 2008. Series C No. 177. paras. 86-88; IA Court H. R., Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135. para. 83; IA 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; IA Court H.R., Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74. paras. 152 and 155; IA Court H. R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111. para. 83; IA Court H. R., Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. paras. 125-129; IA Court H. R., Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151. para. 87; IA Court H. R., Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, par. 115.*

⁶⁶⁷ *IA Court H. R., Case of Tristán Donoso Vs. Panama. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193. para. 122.*

⁶⁶⁸ *IA Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 64.*

⁶⁶⁹ *IA Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 64.*

maximum degree of exercise of freedom of expression. According to the Court: “that same concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole. Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is inconceivable without free debate and the possibility that dissenting voices be fully heard. (...) It is also in the interest of the democratic public order inherent in the American Convention that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected.”⁶⁷⁰ The Inter-American Commission has likewise explained that a functional democracy is the highest guarantee of public order, and that the right to freedom of expression is the cornerstone of the existence of a democratic society.⁶⁷¹

82. Moreover, any impairment of public order that is invoked as a justification to limit freedom of expression must be based on real and objectively verifiable causes that present the certain and credible threat of a potentially serious disturbance of the basic conditions for the functioning of democratic institutions. Consequently, it is not sufficient to invoke mere conjecture regarding possible disturbances of public order, nor hypothetical circumstances derived from the interpretations of the authorities in the face of events that do not clearly present a reasonable threat of serious disturbances (“anarchic violence”). A broader or more indeterminate interpretation would inadmissibly open the door to arbitrariness and would fundamentally restrict the freedom of expression that is an integral part of the public order protected by the American Convention.

⁶⁷⁰ IA Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 69.

⁶⁷¹ IACHR, *Annual Report 1994*. OEA/Ser.LV/88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

83. States that impose limitations upon freedom of expression are obligated to demonstrate that they are necessary in a democratic society to serve the compelling objectives pursued.⁶⁷²

84. Indeed, Article 13.2 uses the term “necessary;” the link between the necessity of the limitations and democracy is derived, in the opinion of the Inter-American Court, from a harmonic and comprehensive interpretation of the American Convention in light of its object and purpose, and bearing in mind Articles 29 and 32 as well as the preamble. “It follows from the repeated reference to ‘democratic institutions’, ‘representative democracy’ and ‘democratic society’ that the question whether a restriction on freedom of expression imposed by a state is ‘necessary to ensure’ one of the objectives listed in subparagraphs (a) or (b) must be judged by reference to the legitimate needs of democratic societies and institutions. (...) The just demands of democracy must consequently guide the interpretation of the American Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions.”⁶⁷³

85. Now, the adjective “necessary” is not synonymous with “useful,” “reasonable” or “convenient.”⁶⁷⁴ In order for a limitation be legitimate, it must be established that there is clear and compelling need for its imposition; that is, it must be established that the legitimate and compelling objective cannot reasonably be accomplished by any other means less restrictive to human rights.

⁶⁷² IA Court H. R., Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. paras. 120-23; IA Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 46.

⁶⁷³ IA Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 44.

⁶⁷⁴ IA Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 46; IA Court H. R., Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. para. 122; IACHR, Annual Report 1994. OEA/Ser.LV.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

86. The requirement of “necessity” also means that the full exercise and scope of the right to freedom of expression must not be limited beyond what is strictly indispensable in guaranteeing the full exercise and scope of the right to freedom of expression.⁶⁷⁵ This requirement suggests that the restrictive measure taken should be the least serious measure available “to safeguard essential legally protected interests from the more serious attacks which may impair or endanger them.” Otherwise, the restriction would imply abuse of power by the State.⁶⁷⁶ In other words, among the various options available for reaching the same objective, the State should choose the one that least restricts the right protected by Article 13 of the Convention..

87. In addition, any limitation to the right to freedom of expression must be an appropriate instrument for meeting the aim pursued through its imposition; that is, it must be a measure that is effectively conducive to attaining the legitimate and compelling objectives in question. In other words, the limitations must be suitable to contribute to the achievement of the aims compatible with the American Convention, or be capable of aiding in the accomplishment of such aims.⁶⁷⁷

88. Limitations to freedom of expression must not only be appropriate to meet their stated objectives and necessary. In addition, they must be strictly proportionate to the legitimate aims that justify them, and must be closely tailored to the accomplishment of that aim, interfering to the least possible extent with the legitimate exercise of the

⁶⁷⁵ I/A Court H. R., Case *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 3, 2008. Series C No. 177. para. 83; I/A Court H. R., Case of *Palamara-Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135. para. 85; I/A Court H. R., Case of *Herrera-Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. paras. 121- 122; I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 46.

⁶⁷⁶ I/A Court H. R., Case of *Tristán Donoso Vs. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193. para. 119.

⁶⁷⁷ I/A Court H. R., Case *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 3, 2008. Series C No. 177.

freedom.⁶⁷⁸ To determine the strict proportionality of the restrictive measure, it must be determined whether the sacrifice of freedom of expression it entails is exaggerated or excessive in relation to the advantages obtained through such measure.⁶⁷⁹

89. According to the Inter-American Court, in order to establish the proportionality of a restriction when freedom of expression is limited for purposes of preserving other rights, three factors must be examined: (i) the degree to which the competing right is affected (serious, intermediate, moderate); (ii) the importance of satisfying the competing right; and (iii) whether the satisfaction of the competing right justifies the restriction to freedom of expression. There are no a priori answers or formulas of general application in this field. The results of the analysis will vary in each case; in some cases freedom of expression will prevail, and in others the competing right will prevail.⁶⁸⁰ If the subsequent imposition of liability in a specific case is disproportionate, or does not conform to the interests of justice, there is a violation of Article 13.2 of the American Convention.

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

⁶⁷⁸ I/A Court H. R., Case *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 3, 2008. Series C No. 177. para. 83; I/A Court H. R., Case of *Palamara-Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135. para. 85; I/A Court H. R., Case of *Herrera-Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. para. 123; I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 46; IACHR, Arguments before the Inter-American Court of Human Rights in the Case of *Herrera Ulloa v. Costa Rica*, cited in I/A Court H. R., Case of *Herrera-Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. para. 101.1).b).

⁶⁷⁹ I/A Court H. R., Case *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 3, 2008. Series C No. 177. para. 83

⁶⁸⁰ I/A Court H. R., Case *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 3, 2008. Series C No. 177. para. 84.

indirect mechanisms such as those proscribed by Article 13.3 of the Convention; and they must be exceptional.

[Corruption and Human Rights. OEA/Ser.L/V/II. Doc. 236. 6 December 2019](#)

388. Ensuring citizen participation in the oversight of elections is fundamental for greater transparency and the legitimacy of representative democracy. Such participation can help limit opportunities for fraudulent and corrupt maneuvers. Accordingly, the possibilities of oversight are fundamental for preventing corruption in the political sphere. The IACHR recognizes a clear trend⁶⁸¹ on the part of the states of the hemisphere to regulating the activities of nongovernmental organizations in light of the important role they play in a democracy.⁶⁸² Similarly, political parties are also subject to an array of transparency provisions on the financing of their activities including election campaigns, and of their activities with other political organizations.

390. The political parties, as key actors in a democracy, require special regulation of their operations. This holds, in particular, for access to information and political party financing, due to the use of public funds to which they have access, and the impact that private financing could have on the exercise of power.

[Standards for a Free, Open, and Inclusive Internet. OEA/Ser.L/V/II. CIDH/RELE/INF.17/17.15 March 2017.](#)

166. Access to information is also a means by which other rights can be effectively exercised, including the economic, social, and cultural

⁶⁸¹ See, for example: OAS. First Workshop: Model Law on Access to Public Information 2.0. Sixth Module: Political Parties, Trade Unions, and other Mandated Persons. Working Paper. 2018.

⁶⁸² Extra-state organs that play a role in democratic life may include trade unions, juridical persons of private law that receive public funds or engage in political lobbying, new forms of state management (such as PPPs), professional associations, and notaries. See: OAS. Second Workshop: The Gender Perspective in the Model Law of Access to Public Information 2.0. Working Papers: Compilation of recommendations made during the workshop in Santiago, Chile (April 16 and 17, 2018).

rights of vulnerable or historically excluded groups⁶⁸³ and civil and political rights.⁶⁸⁴ Lack of access to information can contribute to or even constitute a violation of other rights enshrined in the Convention. For example, when vulnerable groups lack access to information, it may affect their right to live a life free from violence and discrimination. In the case of women, for example, the Commission has held that the exercise of the right of access to information is closely linked to the prevention of discrimination and violence suffered by this group, as well as access to justice for victims.⁶⁸⁵

168. States must respect the principles of maximum disclosure, making disclosure of information the default and classification of information the exception.⁶⁸⁶ The subjects compelled by the right to access to information must also act in good faith and “interpret the law in such a way that it meets the aims of the right of access and that they ensure the strict application of the right, provide the necessary measures of assistance to petitioners, promote a culture of transparency, contribute to making public administration more transparent, and act with due diligence, professionalism, and institutional loyalty.”⁶⁸⁷

170. The Inter-American Court has established that the State has an obligation to respond to all requests for access and to provide its reasoning in cases in where, for a reason permitted under the

⁶⁸³ IACHR. Office of the Special Rapporteur for Freedom of Expression. *The Inter-American Legal Framework Regarding the Right to Access to Information*. Second Edition. OEA/Ser.LV/II. CIDH/RELE/INF. 9/12. March 7, 2011. Para. 5.

⁶⁸⁴ Organization of American States. General Assembly. *Access to Public Information: Strengthening Democracy*. Resolution AG/RES. 2121 (XXXV-Q05). June 7, 2005.

⁶⁸⁵ IACHR. Annual Report 2015. Report of the Special Rapporteur for Freedom of Expression 2015. Chapter III (Access to Information, Violence Against Women, and the Administration of Justice in the Americas). OEA/Ser.LV/II Doc. 48/15. December 31, 2015. Para. 38.

⁶⁸⁶ Inter-American Court. Case *Claude-Reyes et al. v. Chile*. Judgment of September 19, 2006. Merits, Reparations and Costs. Series C No. 151.

⁶⁸⁷ IACHR. *Access to Information on Reproductive Health from a Human Rights Perspective*. OEA/Ser.LV/II. Doc.61. November 22, 2011). Para. 16.

Convention, it limits access in a specific case.⁶⁸⁸ The Commission, meanwhile, has said that the right to access to information is not fully satisfied by a State response declaring that the information requested does not exist. When it comes to information that the State has an obligation to keep, it must describe the actions it took in attempting to recover or reconstruct information that may have been lost or illegally removed. Should it fail to justify the situation, the right to access to information is understood to have been violated.⁶⁸⁹

173. The right to access to information also entails a duty of active transparency that falls to the State: the obligation to make information in the public interest available. The Inter-American Commission has held that “the obligation to provide information proactively lays the groundwork for the States’ obligation to provide public information that is essential for people to be able to exercise their fundamental rights or satisfy their basic needs in this area.”⁶⁹⁰

Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas. OAS/Ser.L/V/II.rev.2. Doc. 36. 12 November 2015

218. The rights to equality and freedom of expression are “mutually supportive”⁶⁹¹ and have an “affirmative relationship,” as they make a “complementary and essential contribution to the securing and safeguarding of human dignity.”⁶⁹² In this regard, the Inter-American

⁶⁸⁸ Inter- American Court. Case Claude-Reyes et al. v. Chile. Judgment of September 19, 2006. Merits, Reparations and Costs. Series C No. 151. Para. 77.

⁶⁸⁹ IACHR. Annual Report 2015. Report of the Special Rapporteur for Freedom of Expression 2015. Chapter III (Access to Information, Violence Against Women, and the Administration of Justice in the Americas). OEA/Ser.LV/II Doc. 48/15. December 31, 2015. Para. 110.

⁶⁹⁰ IACHR. Annual Report 2015. Report of the Special Rapporteur for Freedom of Expression 2015. Chapter III (Access to Information, Violence Against Women, and the Administration of Justice in the Americas). OEA/Ser.LV/II Doc. 48/15. December 31, 2015. Para. 52; IACHR. Access to Information on Reproductive Health from a Human Rights Perspective. OEA/Ser.LV/II. Doc.61. November 22, 2011). Para. 25.

⁶⁹¹ 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.

⁶⁹² Article 19. The Camden Principles on Freedom of Expression and Equality. April 2009.

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.⁶⁹³ 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 as a core element of democracy.⁶⁹⁴

Reports on Merits

Report No. 60/18. Case 12.709. Merits. Juan Carlos Flores Bedregal and family. Bolivia. May 8, 2018.

98. Inter-American jurisprudence has recognized that the right to access information protects the right of victims and their family members, as well as society as a whole, to be access information on grave human rights violation that is stored in State archives, even if said archives are kept in security agencies or military or police

⁶⁹³ 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.LV/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 OC5/85 of November 13, 1985. Series A No. 5, para. 50; IACHR, Annual Report 1994. OEA/Ser.LV.88. Doc. 9 rev. 1. February 17, 1995. Chapter V.

⁶⁹⁴ 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.LV/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.

facilities.⁶⁹⁵ That presupposes a set of positive obligations or actions to take, above all in contexts involving a transition to a democratic State governed by the rule of law.⁶⁹⁶

Annual reports

Annual Report of the Office of the Special Rapporteur for Freedom of Expression, 2002. Chapter IV. Freedom of Expression and Poverty.

36. Consequently, before placing restrictions on this form of expression, member states must conduct a rigorous analysis of the interests they seek to protect with those restrictions, while at the same time bearing in mind the high level of protection warranted by freedom of expression as a right that guarantees citizen participation and oversight of the state's actions in the public arena.

Joint declarations

Joint declaration on freedom of expression and elections in the digital age of the (UN), the (OSCE) and the OAS) Special Rapporteurs, adopted on April 30, 2020.

v. State actors should ensure that the media enjoys robust access to sources of official information and to candidates for public office, and does not face undue barriers to their ability to disseminate such information and ideas [...].

iii. All publicly-owned media should, during election periods, ensure that the public is informed about election matters, respect strict rules of fairness, impartiality and balance, and grant all parties and candidates equitable opportunities to communicate directly with the public, either for free or at subsidised rates.

⁶⁹⁵ IACHR, The Right to the Truth in the Americas, OEA/Ser.L/V/II.152, Doc. 2, August 13, 2014, para. 107ff; IACHR, Special Rapporteurship for Freedom of Expression, El derecho de acceso a la información en el marco jurídico interamericano [The right to access information in the Inter-American Legal Framework] (second edition). para. 77; IACHR, Special Rapporteurship for Freedom of Expression, Annual Report (2010), Chapter III, Access to Information on human rights violations.

⁶⁹⁶ IACHR, The Right to the Truth in the Americas, OEA/Ser.L/V/II.152, Doc. 2, August 13, 2014, para. 110 ff.

2. Right to peaceful protest

118. The Inter-American System has already recognized that there is a relationship between political rights, freedom of expression, the right of assembly and freedom of association, and that these rights, together, make the democratic game possible.⁶⁹⁷ In particular, the Commission has considered on numerous occasions that the expression of opinions, the dissemination of information and the articulation of demands are central objectives of protests and public demonstrations. In this sense, the IACHR and its Office of the Special Rapporteur for Freedom of Expression have reiterated that freedom of expression is not conceivable without free debate and without dissent having the full right to demonstrate, so that the right to demonstrate is protected by the right to freedom of expression.⁶⁹⁸

119. The following is a summary of standards on the general protection of protest and peaceful public demonstrations under a democratic state under the rule of law.

Thematic reports

Protest and Human Rights. OEA/Ser.L/V/II IACHR/RELE/INF.22/19. September 2019

20. [...] Protest is often an important means of action and the pursuit of legitimate objectives by organizations and groups, and as such can also be protected by the right to freedom of association⁶⁹⁹ provided for in Article XXII of the American Declaration of the Rights and Duties of Man and in Article 16 of the American Convention on Human Rights. This protection, moreover, has specific dimensions, such as trade

⁶⁹⁷ IACHR. Protest and Human Rights. OEA/Ser.L/V/II IACHR/RELE/INF.22/19. September 2019, para. 17

⁶⁹⁸ Protest and Human Rights Report: Standards on the rights involved in social protest and the obligations that should guide the state response. OEA/Ser.L/V/II. IACHR/RELE/INF.22/19. September 2019, para. 18

⁶⁹⁹ In relation to the duty of the States to ensure the right of association, the Inter-American Court has said that freedom of association protects “the right to join with others in lawful common pursuits, without pressure or interference that may alter or impair the nature of such purpose” (I/A Court H.R., Case of Kawas Fernández v. Honduras. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 143).

union rights and the right to strike.⁷⁰⁰ The Human Rights Council has recognized the link between freedom of association and protest, stating that “Other rights that may be applicable in case of peaceful protests include, for instance, the right to freedom of association.”⁷⁰¹ The Inter-American Court of Human Rights [...] has held that freedom of association “establishes the right of assembly and is characterized by authorizing individuals to create or take part in entities or organizations in order to act collectively to achieve very diverse purposes, provided they are legitimate.”⁷⁰² This entails “the right and the freedom to associate in order to seek together a lawful purpose, without pressure or interference that can alter or [distort] this purpose.”⁷⁰³

21. This Commission underscores that the lawful and legitimate aims of freedom of association include public demonstrations and social protests. The protection granted to the freedom of association extends throughout the life of the association and includes enabling the exercise of the purposes for which it was established.⁷⁰⁴ Such protection may include associations that are not supported by a formal institutional or legal structure. It should be noted that the formal

⁷⁰⁰ Article XXII of the American Declaration of the Rights and Duties of Man; Article 8 of the Additional Protocol to the American Convention in the Area of Economic, Social, and Cultural Rights – “Protocol of San Salvador”; Article 23 of the Universal Declaration of Human Rights; Article 22 of the International Covenant on Civil and Political Rights; Article 8 of the International Covenant on Economic, Social and Cultural Rights. See: General Assembly, Report of the Special Representative of the Secretary-General on human rights defenders, 13 August 2007, A/62/225, para. 12.

⁷⁰¹ Human Rights Council, Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests, Report of the United Nations High Commissioner for Human Rights, 21 January 2013, A/HRC/22/28, para. 4.

⁷⁰² IA Court H.R., Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009, para. 169.

⁷⁰³ Cfr. Case of Baena Ricardo, et al., supra note 46, para. 156; Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 144; Case of Kawas Fernández, supra nota 35, para. 143; IA Court H.R., Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009, para. 170.

⁷⁰⁴ IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.LV/II. Doc. 66 (December 31, 2011), para. 155; ECHR, United Communist Party of Turkey and Others v. Turkey, No. 19392/92, para. 33.

organizations that make up our pluralistic democratic societies arise, for the most part, through gradual processes of institutionalization.

22. [...] The right to freedom of association has particular dimensions when it comes to specific groups and collectives or specific forms of protest. One example of this is trade unions and strikes, respectively. In this field, the right of association is especially protected by Article 8 of the Additional Protocol to the American Convention in the Area of Economic, Social, and Cultural Rights – “Protocol of San Salvador.” The right to freedom of trade union association consists of “freedom of association consists basically of the ability to constitute labor union organizations, and to set into motion their internal structure, activities and action program, without any intervention by the public authorities that could limit or impair the exercise of the respective right.” The right to strike is one of the expressions of this right, and has been considered one of the most common forms of exercising the right to protest. The specific protection afforded to indigenous peoples’ forms of association and organization under the United Nations Declaration on the Rights of Indigenous Peoples, and their forms of demonstration and protest when related to specially protected rights, such as their cultural identity and lands, should be interpreted in the same regard.⁷⁰⁵

23. [...] Protest in the context of the consolidation of democracies in the region is a fundamental tool of political participation and of the right to “participate in the conduct of public affairs,” both in terms of the InterAmerican Democratic Charter⁷⁰⁶ and under Article 23 of the American Convention. The Human Rights Council has also maintained that “Other rights that may be applicable in case of peaceful protests include (...) the right (...) to take part in the conduct of public affairs

⁷⁰⁵ United Nations General Assembly. Declaration on the Rights of Indigenous Peoples. (A/61/L.67 and Add.1). 107th plenary meeting, 13 September 2007.

⁷⁰⁶ Article 2 of the Inter-American Democratic Charter states that “Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.” Article 6 states, “It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.”

(Article 25).⁷⁰⁷ Protest as a form of participation in public affairs is especially relevant for groups of people historically discriminated against or marginalized.

24. [...] Protest is also an essential mechanism for guaranteeing economic, social, cultural, and environmental rights. The struggles for the right to land, the right to a healthy environment, demonstrations against economic reforms and labor flexibilization, among many other things, have led thousands of human rights advocates, as well as student, social, and rural leaders to organize in order to fight for the enjoyment of their rights.⁷⁰⁸ The most impoverished sectors of our hemisphere face discriminatory policies and actions, their access to information on the planning and execution of measures that affect their daily lives is in its infancy, and in general the traditional channels of participation to publicly voice their complaints are often limited. Against this backdrop, in many countries of the hemisphere, social protest and mobilization have become tools for petitioning public authorities as well as channels for the public condemnation of abuses or violations of human rights.⁷⁰⁹

25. [...] A protest may encompass other specific rights linked to the groups, actors, or interests involved, such as gender equality in women's movements, or rights protecting migrants, children and adolescents, or indigenous peoples. Protest has also been—and remains—a fundamental tool in the region for different population groups to express

⁷⁰⁷ Human Rights Council, *Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests*, Report of the United Nations High Commissioner for Human Rights, 21 January 2013, *AHRC/22/28*, para. 4. The Human Rights Council has further stated, “Acknowledging also that participation in peaceful protests can be an important form of exercising the rights to freedom of peaceful assembly, of expression, of association and of participation in the conduct of public affairs,” and “Recognizing that peaceful protests can make a positive contribution to the development, strengthening and effectiveness of democratic systems and to democratic processes, including elections and referendums.” Whereas clauses of Resolution 25/38 adopted by the Human Rights Council. The promotion and protection of human rights in the context of peaceful protests. *AHRC/RES/25/38*. 11 April 2014.

⁷⁰⁸ IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, *OEA/Ser.LV/II.124*, March 7, 2006, para. 215.

⁷⁰⁹ IACHR, Chapter IV, *Annual Report 2002*, Vol. III “Report of the Office of the Special Rapporteur for Freedom of Expression,” *OEA/Ser. LV/II. 117*, Doc. 5 rev. 1, para. 29.

their identity and challenge intolerance and discrimination, such as LGBTIQ people and populations of African descent.

38. Limitations on social protest must be necessary in a democratic society for the achievement of the compelling aims they pursue, and strictly proportionate to those aims.⁷¹⁰ The requirement of necessity “in a democratic society” is expressly provided for both in Articles 15 and 16 on freedom of peaceful assembly and freedom of association, and in Articles 29 and 32 of the American Convention.⁷¹¹ In the opinion of the Court, “It follows from the repeated reference to ‘democratic institutions,’ ‘representative democracy’ and ‘democratic society’ that the question whether a restriction on freedom of expression imposed by a state is ‘necessary to ensure’ one of the objectives listed in subparagraphs (a) or (b) [of art. 13.2 of the ACHR] must be judged by reference to the legitimate needs of democratic societies and institutions. [...] The just demands of democracy must consequently guide the interpretation of the [American Convention] and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions.”⁷¹²

Reports on Merits

Report No. 6/20. Case 12.727. Merits. Antonio Tavares Pereira et al. Brazil. March 3, 2020

70. [...] the Commission has pointed out that the right to peaceful protest constitutes "a channel that allows individuals and different groups in society to express their demands, dissent and complain about the government, their particular situation, as well as access to and compliance with political rights and economic, social, cultural

⁷¹⁰ IACHR, Office of the Special Rapporteur for Freedom of Expression, *The Inter-American Legal Framework regarding the Right to Freedom of Expression*, 2010, para. 67.

⁷¹¹ Cf. IACHR. Annual Report 1994. Chapter V: Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights. Title IV. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995.

⁷¹² I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, paras. 42 & 44.

and environmental rights".⁷¹³ Thus, freedom of expression is intrinsically related to the right of assembly. Likewise, the Commission has pointed out that the right to free demonstration and peaceful protest are essential elements of the functioning and very existence of the democratic system and, therefore, should not be interpreted restrictively.⁷¹⁴

74. The right of assembly and freedom of expression are also essential for the expression of political and social criticism of the activities of the authorities. For this reason, human rights can hardly be defended in contexts in which the right to peaceful assembly is restricted. Moreover, as already noted, the exercise of the right of assembly is basic to the exercise of other rights, such as freedom of expression. Consequently, restrictions on the exercise of these rights constitute serious obstacles to the possibility of individuals claiming their rights, petitioning and promoting the search for changes or solutions to the problems that affect them.

Admissibility Reports

Report No. 134/23. Petition 433-13. Admissibility. Isy Obed Murillo Mencías and others. Honduras. August 1, 2023

32. [...] the Inter-American Court emphasizes that in situations of institutional rupture, after a coup d'état, the relationship between the rights of assembly and freedom of thought and expression is even more manifest, especially when they are exercised jointly with the purpose of protesting against the actions of the state powers contrary to the constitutional order and to demand the return of democracy. Demonstrations and related expressions in favor of democracy must have the maximum possible protection.⁷¹⁵

⁷¹³ IACHR. Protest and Human Rights. OEA/Ser.LV/II. CIDH/RELE/INF.22/19. September 2019. Para. 330.

⁷¹⁴ IACHR. Protest and Human Rights. OEA/Ser.LV/II. CIDH/RELE/INF.22/19. September 2019. Para. 330.

⁷¹⁵ According to the Inter-American Court of Human Rights, "Jurisprudence Notebook of the Inter-American Court of Human Rights No. 16: Freedom of thought and expression". 2021, para. 160.

Annual Reports

Annual Report of the Inter-American Commission on Human Rights 2005. Volume III: Report of the Rapporteurship for Freedom of Expression. Chapter V: Public demonstrations as an exercise of freedom of expression and freedom of assembly.

91. [...] societal participation through public demonstrations is important for the consolidation of democratic life of societies. In general, as an exercise of freedom of expression and freedom of assembly, it is of crucial social interest, which in turn leaves the State with very narrow margins to justify restrictions on this right.⁷¹⁶ [...].

Annual Report of the Inter-American Commission on Human Rights, 2015, Chapter IV.A. Use of Force.

65. The social interest imperative associated with the right to participate in public demonstrations is such that there is a general presumption in favor of its exercise.⁷¹⁷ The right to demonstrate should be permitted even when there is no statutory regulation, and one must not demand of those who want to demonstrate that they

⁷¹⁶ In this respect, the Constitutional Court of Spain has held the following: "...should the public authority decide to forbid the demonstration, it should" a) explain its decision (STCE 36/1982) [Judgment of the Constitutional Court of Spain 36/1982]; ground it, i.e., give the reasons which have led it to the conclusion that the demonstration would give rise to a prohibited breach of the peace, and c) explain why the adoption of necessary preventive measures to avoid this danger and to allow the exercise of this fundamental right, is impossible. In any case, as we had also noted in STCE 66/1995, the competent authority, before prohibiting the exercise of this fundamental right, must, applying criteria of proportionality, propose changes in date, place or duration, so that the assembly can take place; the demonstration can only be forbidden if, under the circumstances of the case, the authority to make changes cannot be exercised. See Tribunal Constitucional Español (TCE), 42/2000, Sentencia del 14 de febrero de 2000, FJ 2 [Constitutional Court of Spain (CCS), 42/2000, Judgment of February 14, 2000, FJ 2].

⁷¹⁷ In that sense the United Nations Human Rights Council urged the states "to promote a safe and enabling environment for individuals and groups to exercise their rights to freedom of peaceful assembly, of expression and of association, including by ensuring that their domestic legislation and procedures relating to the rights to freedom of peaceful assembly, of expression and of association are in conformity with their international human rights obligations and commitments, clearly and explicitly establish a presumption in favour of the exercise of these rights, and that they are effectively implemented." Resolution A/HRC/25/L.20, March 2014, Article 3. Emphasis added.

obtain authorization to do so. This presumption should be clearly established in the states' legal systems.⁷¹⁸

66. As a result of this presumption in favor of the exercise of the right to social protest the state is also obligated to implement adequate mechanisms and procedures to ensure that the freedom to demonstrate can be exercised in practice and not be subject to undue bureaucratic regulation.⁷¹⁹ In those states in which notification or prior notice is called for one must recall that this does not mean that the states only have the positive obligation to facilitate and protect those assemblies notice of which is given. The presumption in favor of the exercise of social protest implies that states must act based on the legality of the protests or public demonstrations and under the assumption that they do not constitute a threat to public order, even in those cases in which they are held without prior notice.⁷²⁰

67. Several countries of the region have laws that authorize police operations aimed at dispersing or restricting protests; such actions can often give rise to a series of human rights violations. The Commission has noted that breaking up a demonstration can only be justified by the duty to protect persons.⁷²¹ The Commission considers that merely

⁷¹⁸ "... the requirement of previous notification should not be transformed into a demand for the prior issuance of a permit by an agent with unlimited discretionary powers. That is to say that a demonstration may not be prevented because it is considered likely to jeopardize the peace or public security or order, without taking into account whether it is possible to prevent the threat to peace or the risk of disorder by altering the original conditions of the demonstration (time, place, etc). Restrictions on public demonstrations must be intended exclusively to prevent serious and imminent danger, and a future, generic danger would be insufficient." IACHR, Chapter IV, 2002 Annual Report, Vol. III "Report of the Office of the Special Rapporteur for the Freedom of Expression," OEA/Ser. L/VII. 117, Doc. 5 rev. 1, para. 34; IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression, 2005, ch. V, para. 95. See also the OSCE standard in relation to holding peaceful assemblies in: OSCE/ODIHR and Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, second edition (Warsaw/Strasbourg, 2010), para. 2.1.

⁷¹⁹ OSCE/ODIHR and Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, second edition (Warsaw/Strasbourg, 2010). Principle 2.2.

⁷²⁰ United Nations, Human Rights Council, Report of the Special Rapporteur on the rights to freedom of assembly and of association, Maina Kiai, A/HRC/23/39, April 24, 2013, para. 50.

⁷²¹ IACHR, *Report on Citizen Security and Human Rights*, December 31, 2009, para. 133.

breaking up a protest is not, in itself, a legitimate aim that justifies that use of force by the security forces.⁷²²

68. Whatever the format adopted by those who exercise this right, the action of the police should have as its main objective facilitating demonstrations and not containing or confronting the demonstrators.⁷²³ Hence, as a general rule police operations organized in the context of protests should be geared to guaranteeing the exercise of this right and to protecting the demonstrators and third persons who are present.⁷²⁴ When a demonstration or protest leads to situations of violence it should be understood that the state was not capable of guaranteeing the exercise of this right. As already noted, the state's obligation is to ensure the processing of the demands and the underlying social and political conflicts so as to channel the claims.⁷²⁵

69. The IACHR has been able to verify that imposing this requirement – incompatible with international law and best practices – has made it possible to automatically dissolve, by the use of force, those public

⁷²² OSCE/ODIHR and Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, second edition (Warsaw/Strasbourg, 2010). Section B, “Explanatory Notes” understands that the imprecision inherent in the concept of “public order” implies that this term cannot be used to justify dispersing demonstrators (para. 70) and that dispersing demonstrators should constitute an extreme measure regulated by express provisions in guidelines for the action of the security forces; these guidelines should establish the specific circumstances that authorize the dispersal and define which are the agents authorized to issue orders to disperse. Para. 165.

⁷²³ As numerous experts in security and civil society organizations have indicated in recent years. See Amnesty International, *Use of Force – Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, p. 150.

⁷²⁴ The Commission, in its Report on Citizen Security and Human Rights, has noted that “The competent institutions of the State have a duty to design operating plans and procedures that will facilitate the exercise of the right of assembly. This involves everything from rerouting pedestrian and vehicular traffic in a certain area, to escorting those who are participating in the mass gathering or demonstration in order to guarantee their safety and make it possible for the activities involved to take place.” (Para. 193).

⁷²⁵ AI, *Use of Force – Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by law enforcement officials*, p. 150.

demonstrations for which permission has not been granted by the authorities.⁷²⁶ [...]

Country reports

Freedom of Expression in Cuba. CIDH/RELE/INF.21/18. December 31, 2018.

195. General prohibitions and the establishment of authorization requirements for individuals to exercise their right to participate in peaceful protests are inherently unnecessary and disproportionate. Nor can its regulation be intended to create the basis for a ban on assembly or demonstration.⁷²⁷ In short, the actions of State agents should not discourage the right to assemble and participate in social protests, but rather facilitate and protect it.⁷²⁸

Situation of Human Rights in Chile. OEA/Ser.L/V/III. Doc. 1/22. January 24, 2022.

153. The IACHR and the Office of the Special Rapporteur have emphasized that, in a democracy, States must act on the basis of the lawfulness of public protests or demonstrations and under the assumption that they do not constitute a threat to public order. This implies an approach focused on strengthening political participation and building greater levels of citizen participation.⁷²⁹

⁷²⁶ IACHR. Hearing on *Human rights and public demonstrations in Chile*. 143rd period of sessions. October 28, 2011. Video available at: <http://www.oas.org/es/cidh/actividades/sesiones.asp>; IACHR. Hearing on *Situation of the right to freedom of expression and information in Venezuela*. 150th regular period of sessions. March 28, 2014; IACHR. Hearing on *Situation of human rights and labor conflicts in Venezuela*. 150th regular period of sessions. March 28, 2014; Universidad Católica Andrés Bello. Center for Human Rights. Licencia para protestar. June 2014.

⁷²⁷ IACHR. Annual Report 2005. Volume III. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter V. "Public Demonstrations as an Exercise of Freedom of Expression and Freedom of Assembly". Paras. 91-92.

⁷²⁸ IACHR. Annual Report 2007. Chapter IV. Venezuela. Paras. 260-261; Annual Report 2015. Chapter IV.A. "The Use of Force". Para. 67.

⁷²⁹ IACHR. Report of the Office of the Special Rapporteur for Freedom of Expression. Protest and Human Rights. OEA/164 Ser.L/V/II IACHR/RELE/INF. 22/19. September 2019. Para. 88.

Situation of Human Rights in Venezuela - "Democratic Institutions, the Rule of Law and Human Rights in Venezuela". OEA/Ser.L/V/II. Doc. 209 31 December 2017

195. In that regard, the IACHR recalls that “in democracies, states should act based on the legality of protests or public demonstrations and under the assumption that they do not constitute a threat to public order.”⁷³⁰ That assumption should be clearly and expressly established in the laws of states and apply to all without discrimination.⁷³¹ If legal provisions are not clear, they should be clarified or, as appropriate, interpreted in favor of those exercising their right to freedom of peaceful assembly and freedom of expression.⁷³² [...]

216. [...], the Commission recalls that States have the obligation to avoid excessive use of force by public law enforcement in protest marches and demonstrations, an obligation that must be taken into account especially in the case of children and adolescents.⁷³³

222. In that regard, the IACHR recalls that the criminalization of legitimate social mobilization and protest through the direct repression of demonstrators is incompatible with a democratic society,⁷³⁴ since the legitimate exercise of the right peacefully to express one's opinion is not a matter of public security. The IACHR emphatically reiterates that the State should publicly recognize and protect the right to peaceful assembly and freedom of expression

⁷³⁰ IACHR, *2016 Annual Report*, Chapter IV.B, Venezuela, para. 160; and Press Release No. R109/17, *The Office of the Special Rapporteur for Freedom of Expression of the IACHR Condemns Arbitrary Restrictions on Freedom of Expression and Assembly in Venezuela*, July 29, 2017.

⁷³¹ IACHR, *2015 Annual Report*, Chapter IV.A, “Use of Force,” para. 65; UN, Human Rights Council, Report of the Special Rapporteur on the rights of freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, 24 April 2013, para. 50; and Report of the Special Rapporteur on the rights of freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, 21 May 2012, para. 26.

⁷³² UN, Human Rights Council, Report of the Special Rapporteur on the rights of freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, 24 April 2013, para. 50.

⁷³³ IACHR, *2015 Annual Report*, Chapter IV.B, Venezuela, para. 134.

⁷³⁴ IACHR, Press Release No. 048/17, *IACHR Urges Venezuela to Guarantee the Right to Protest and to Demilitarize Streets*, April 19, 2017.

without discrimination on the grounds of public opinion and exclude the participation of soldiers and civilian groups in controlling public demonstrations, among other operations.⁷³⁵

223. [...] Social protest is a fundamental tool in the defense of human rights and is essential for engaging in political and social criticism of authorities' activities as well as for establishing positions and plans of action with regard to human rights.⁷³⁶ In particular, the IACHR reiterates that participation in demonstrations has an imperative social interest and forms part of the well-ordered functioning of the democratic system inclusive of all sections of society.⁷³⁷ It also underscores that the relationship between political rights, freedom of expression, and the right of peaceful assembly is plain, especially when they are exercised jointly to demand effective democracy.⁷³⁸

[Situation of Human Rights in Chile. OEA/Ser.L/V/II. Doc. 1/22. January 24, 2022.](#)

90. The Commission recalls that social protest plays a fundamental role in making citizen participation viable in the development and strengthening of democracy. Through it, people have the possibility of expressing ideas, visions or values of dissent, opposition, denunciation or vindication. Similarly, on many occasions and in different countries of the region, protests are used to react to specific acts of violence, evictions, labor issues or other events that have affected rights. It also highlights that the right to demonstrate is strongly associated with activities in defense of human rights, including demands for recognition, protection or exercise of a right. This includes the full

⁷³⁵ IACHR, Press Release No. 048/17, *IACHR Urges Venezuela to Guarantee the Right to Protest and to Demilitarize Streets*, April 19, 2017.

⁷³⁶ IACHR, *2015 Annual Report*, Chapter IV.B, Venezuela, para. 127

⁷³⁷ IACHR, *Democracy and Human Rights in Venezuela*, OEA/SER.L/V/II, Doc. 54, December 30, 2009, para. 118.

⁷³⁸ IACHR, Press Release No. 044/17, *IACHR Urges the Protection of the Right to Protest in Venezuela and Respect for Freedom of Expression*, April 11, 2017.

enjoyment of civil, political, economic, social, cultural and environmental rights.⁷³⁹

276. The IACHR recalls that social protest is legitimate insofar as it is carried out peacefully; given that it constitutes a fundamental element in democracies, any interpretation of the peaceful or non-peaceful nature of a social protest must be broad and not restrictive. On this point, the Commission has pointed out that "the qualifier 'peaceful' must be understood in the sense that persons who commit acts of violence in the context of protests may see their right to demonstrate restricted, temporarily and individually".⁷⁴⁰

[Democracy and Human Rights in Venezuela. OEA/Ser.L/V/II. Doc. 54. December 30, 2009](#)

176. The Commission considers it opportune to recall that the effective exercise of democracy demands as a precondition the full exercise of the rights and fundamental freedoms of the citizens. Thus, the criminalization of legitimate social mobilization and protest, be it through the direct repression of the demonstrators, or through the initiation of judicial proceedings, is incompatible with a democratic society where people have the right to express their opinions.⁷⁴¹

[Gross Human Rights Violations in the Context of Social Protests in Nicaragua. OEA/Ser.L/V/II. Doc. 86. 21 June 2018](#)

54. The Inter-American Commission has recognized that public protest is one of the usual ways of exercising the right of assembly and the right to freedom of expression, as well as a mechanism of political

⁷³⁹ IACHR, Protest and Human Rights, OEA/Ser.L/V/II IACHR/RELE/INF. 22/19, September 2019, paras 1-16.

⁷⁴⁰ IACHR, Protest and Human Rights, para. 84.

⁷⁴¹ IACHR. *Report on the Situation of Human Rights Defenders in the Americas*. March 7, 2006, para. 217.

participation of defense of human rights,⁷⁴² which has an essential social interest in guaranteeing the proper functioning of the democratic system and the defense of human rights.⁷⁴³ In this regard, it has held that public demonstrations and other forms of protest against government plans or policies, far from being a provocation of violence, are common to any pluralistic democracy and deserve maximum protection.⁷⁴⁴

55. Likewise, the Inter-American Court has held that the relationship between the rights of assembly, freedom of expression and political participation, taken as a whole, make the democratic process possible⁷⁴⁵ and “it is even clearer, especially when they are all exercised at the same time in order to protest against actions by the public authorities that are contrary to the constitutional order, and to reclaim the return to democracy.”⁷⁴⁶

56. The compelling social interest overlaying the right to participate in public demonstrations, triggers a general presumption in support of the exercise thereof⁷⁴⁷ and of the State’s obligation to promote a safe and favorable setting for individuals and groups to be able to use public space to express their opinions and make demands, in accordance

⁷⁴² IACHR, *Segundo Informe sobre la Situación de las Defensoras y los Defensores de Derechos Humanos en las Américas*, [Second Report on the Situation of Human Rights Defenders in the Americas], 2011, par. 106; IACHR, Annual Report. Volume II. *Informe de la Relatoría para la Libertad de Expresión, Cap. V. “Las Manifestaciones como Ejercicio de la Libertad de Expresión y la Libertad de Reunión”*, [Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter V, “Statements as Exercises of Freedom of Expression and Freedom of Assembly”], 2005, par. 91, and IACHR, *Informe Anual, Capítulo IV. A “Uso de la Fuerza”*, [Annual Report, Chapter IV. A “Use of Force”], 2014, par. 64 and following.

⁷⁴³ IACHR, *Segundo Informe sobre la Situación de las Defensoras y los Defensores de Derechos Humanos en las Américas*, [Second Report on the Situation of Human Rights Defenders in the Americas], 2011, par. 106.

⁷⁴⁴ IA Court of HR. Case of López Lone et al v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, par. 160.

⁷⁴⁵ IA Court of HR. Case of López Lone et al v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, par. 160.

⁷⁴⁶ IA Court of HR. Case of López Lone et al v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, par. 160.

⁷⁴⁷ IACHR, *Informe Anual, Capítulo IV. A “Uso de la Fuerza”*, [Annual Report, Chapter IV. A “Use of Force”], 2014, par. 121.

with, international norms and standards on the subject matter. The excessive use of force, criminalization and other inappropriate responses of the State to social protests not only undermine rights to freedom of expression and assembly, but also cause serious violations of other fundamental rights such as the right to life, integrity and personal liberty and due process of law and can seriously impact the exercise of social rights.

82. As regards the right to demonstrate, it is a core part of the right to participate in any democratic body or system.⁷⁴⁸ Social tools, such as protests and demonstrations, have developed into important channels for public denunciation of abuse or human rights violations,⁷⁴⁹ and have even led to the incorporation of numerous rights in the progressive development of international human rights law.⁷⁵⁰

138. As the Commission has pointed out on other occasions, the State's obligation is to ensure the processing of the demands and the underlying social and political conflicts so as to channel and resolve the claims of demonstrators. "When a demonstration or protest leads to situations of violence it should be understood that the state was not capable of guaranteeing the exercise of this right."⁷⁵¹ The situation described above reflects the gravity of the political crisis in Nicaragua and the high levels of violence in the country. That makes it even more imperative that the State resolve the conflict and channel demands

⁷⁴⁸ United Nations General Assembly, Report of the Special Representative of the Secretary-General on the situation of human rights defenders, 13 August 2007, A/62/225, par. 5; General Assembly, Report of the Special Representative of the Secretary-General on the situation of human rights defenders, 5 September 2006, A/61/312, par. 56

⁷⁴⁹ IACHR, Annual Report 2005, Volume III, Report of the Office of the Rapporteur for Freedom of Expression, February 27, 2006, OEA/Ser.LV/II.124 Doc. 7, Chapter V, "Public Demonstrations as an Exercise of Freedom of Expression and Freedom of Assembly," par. 1.

⁷⁵⁰ United Nations Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, AHRC/17/28, 23 May 2011, par. 31. They have likewise been considered to perform a decisive role in the protection and promotion of a wide range of human rights. Human Rights Council, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, AHRC/31/66, 4 February 2016, par. 6.

⁷⁵¹ IACHR, *Annual Report, Chapter IV A. "Use of Force"*, 2015, par. 68.

through dialogue. In a democratic State, repression and violence are no way to respond to the demands of its citizens.

Observations and recommendations of the working visit of the IACHR to Colombia on June 8-10, 2021.

24. Peaceful protest has played an essential role in giving visibility to demands that need to be addressed and voices that need to be heard. It has at the same time helped authorities at different levels better understand the issues affecting citizens. The Commission values this moment as an opportunity to strengthen the democratic system and guarantee human rights.

153. The Commission urges the State to avoid using generalizing and prohibitive approaches to the various forms of demonstrating in the exercise of the right to protest, as some protest modalities lead society to listen to certain voices that otherwise would have a difficult time accessing the agenda or taking part in the public discourse.⁷⁵²

156. The IACHR recalls that the fact that demonstrations cause a certain degree of disturbance to daily life (for example, disruptions to traffic and commercial activities) must be tolerated so as to not deprive the right to peaceful assembly of its essence.⁷⁵³ For the Commission, the appropriate “degree of tolerance” cannot be defined in the abstract and therefore it is up to the State to examine the particular circumstances of each case with respect to the scope of the admissible disturbance to daily life.⁷⁵⁴

157. When the eventual disruption of daily life in the heart of the protests extends in terms of time and scope to the point of gravely compromising the guarantee of other rights, such as, for example i) the right to life, ii) the supply of food; and/or iii) the right to health, the State

⁷⁵² IACHR, *Protest and Human Rights*, September 2019, OEA/Ser.LV/II CIDH/RELE/INF. 22/19, para. 10-13.

⁷⁵³ IACHR, *Protest and Human Rights*, September 2019, OEA/Ser.LV/II CIDH/RELE/INF. 22/19, para. 154; IACHR, *Report on Citizen Security and Human Rights*, December 31, 2011, OEA/Ser.LV/II. Doc 57, para. 198.

⁷⁵⁴ European Court of Human Rights - *Case of Primov et al.*, 2014, para. 145.

has an accentuated duty to facilitate all possible mechanisms of dialogue and coexistence for all the rights in tension, with the use of force as a last resort.

158. It is the Commission's view that the State's approach to roadblocks must take an intersectional and interdependent human rights approach in order to prevent situations that affect the protest itself and the rights of third parties who are not participating in it. Preventing violence, providing transparency, and ensuring accountability for the State agents to respond to the protests is crucial for guaranteeing the rights in tension with each other.

159. Therefore, in order to both protect the process itself and prevent violent incidents arising from the protest from potentially having an increasing impact on human rights, the IACHR issues a special call for the authorities to draw a distinction between demonstrators and those who engage in criminal acts. The Commission has indicated that the State is not the only party capable of interfering with the exercise of protest, and in this regard, its obligations extend to protecting demonstrators from violations and abuses at the hands of third parties.⁷⁵⁵

160. Just as the response to roadblocks cannot vacate the right of demonstrators to demonstrate, this form of protest also cannot annul or suspend, de facto, the rights of third persons who are not participating in the demonstrations. The State has a duty to guarantee the protest, as well as to establish the conditions for third parties not participating in the demonstrations to exercise their rights. At the same time, the Commission stresses that it is important for demonstrators using roadblocks to not endanger the lives of other persons and to permit the circulation of goods, services, and essential supplies.

⁷⁵⁵ IACHR, *Protest and Human Rights*, OEA/Ser.LV/II CIDH/RELE/INF. 22/19, September 2019, Para. 53; Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, Maina Kiai, April 14, 2014, A/HRC/26/29, para. 9.

Situation of Human Rights in Peru in the Context of Social Protests.
OEA/Ser.L/V/II. Doc. 57/23. April 23, 2023.

218. Protest plays an important role in democratic societies, particularly in giving greater resonance to the voices of "those who are marginalized or who present an alternative message to established political and economic interests".⁷⁵⁶ People who are members of historically discriminated groups, such as indigenous peoples and peasant communities, are systematically excluded from public debate. These groups do not usually have institutional or private channels to exercise their right to express their ideas and opinions publicly in a serious, vigorous and permanent manner. This also deprives societies of knowing the needs and claims of these groups. In this regard, the United Nations Special Rapporteur on Freedom of Peaceful Assembly and of Association warned that these groups are more exposed to the risk of having their right to freedom of peaceful assembly violated.⁷⁵⁷

219. The exercise of the right to protest by historically discriminated groups frequently encounters as an obstacle that the freedom to choose the modality, form, place and message to carry out peaceful protest is not guaranteed in a broad manner.⁷⁵⁸ Given this circumstance, it is emphasized that the State should not impose prior restrictions or general prohibitions that end up denaturalizing protest or depriving it of its real content.⁷⁵⁹

225. The inter-American legal framework protects various forms of protest, including those that generate a certain disruption of daily life as a way of amplifying voices or making visible social demands that would otherwise hardly enter the agenda or be part of public

⁷⁵⁶ Human Rights Council, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper handling of demonstrations, A/HRC/31/66, 4 February 2016, para. 6.

⁷⁵⁷ United Nations General Assembly, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Freedom of Association, A/74/349, September 11, 2019, para. 44.

⁷⁵⁸ IACHR. Protest and human rights. OEA/Ser.L/V/II. CIDH/RELE/INF. 22/19. September 2019. p. 1.

⁷⁵⁹ IACHR. Observations and recommendations: working visit to Colombia. July 2021. Para. 142.

deliberation.⁷⁶⁰ The occupation of public spaces and the obstruction of roads, such as blockades, have a central place in the peaceful protests of historically discriminated groups precisely because they offer opportunities for attention.⁷⁶¹ However, according to Inter-American standards, the right to protest is not absolute and admits restrictions to protect the human rights of all persons, both those who participate and those who do not participate in protests.

226. The right of assembly requires that it be exercised in a peaceful and unarmed manner.⁷⁶² The non-peaceful nature includes, among others, the use of physical force by some people, which can cause injury, death or serious damage to property.⁷⁶³

227. In this regard, the IACHR condemns the acts of vandalism that included the destruction of public infrastructure and property, the burning of facilities associated with the administration of justice, the destruction of court folders and files, the serious attacks against security agents, and the violations of the rights to life and integrity that were allegedly committed by some private actors in the context of episodes of demonstrations.

228. The simultaneous occurrence of disruptive peaceful protests and violent actions by some individuals poses challenges for States. Such challenges may generate social confusion about the protests. Authorities must have sufficient tools to distinguish one phenomenon from the other and contribute to the social understanding of these events of public interest based on the recognition of their complexity. For example, the right to protest protects the presence of demonstrators who peacefully occupy an airport or public buildings

⁷⁶⁰ IACHR. Protest and human rights. OEA/Ser.LV/II. IACHR/RELE/INF. 22/19. September 2019, para. 13.

⁷⁶¹ United Nations General Assembly, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Freedom of Association, A/74/349, September 11, 2019, para. 46.

⁷⁶² IACHR. Protest and human rights. OEA/Ser.LV/II. IACHR/RELE/INF. 22/19. September 2019, para. 12.

⁷⁶³ United Nations Human Rights Committee, CCPR/C/GC/37, General Comment n. 37 (2020, on the right to peaceful assembly (art. 21), September 17, 2020, para. 15.

without destroying the infrastructure. In any case, if these actions extend in time and manner to the point of seriously compromising the rights to life, integrity, health and supply, the State may take measures to guarantee the rights in tension.

230. As the IACHR has emphasized on previous occasions, the choice of a form of protest cannot lead to the de facto annulment or suspension of the rights of third parties who do not participate in the demonstrations.⁷⁶⁴ It is the duty of the State to guarantee the right to protest, as well as to provide conditions for the exercise of the rights of third parties who do not participate in the demonstrations.⁷⁶⁵

232. The IACHR recognizes how difficult it can be to harmonize rights in tension. However, it has also indicated to States that they should avoid generalized and indiscriminate measures to restrict protest and in particular the prohibition of the use of lethal force. In the case of violence on critical infrastructure, operational plans of action must be in accordance with the principles of use of force such as legality, necessity and proportionality.

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[Protest and Human Rights. OEA/Ser.L/V/III IACHR/RELE/INF.22/19. September 2019](#)

Social protest is a core element for the existence and consolidation of democratic societies and is protected by a constellation of rights and freedoms, which the inter-American system guarantees both in the American Declaration of the Rights and Duties of Man and in the American Convention on Human Rights.

Indeed, the rights to freedom of expression, peaceful assembly, and association guarantee and protect various forms—individual and

⁷⁶⁴ In a similar sense, the IACHR has previously expressed its opinion: IACHR. Observations and recommendations: working visit to Colombia. July 2021, para. 160.

⁷⁶⁵ In a similar sense, the IACHR has previously expressed its opinion: IACHR. Observations and recommendations: working visit to Colombia. July 2021, para. 160.

collective—of publicly expressing opinions, dissenting, demanding compliance with social, cultural, and environmental rights, and affirming the identity of groups that have historically been discriminated against. Protest also plays a central role in defending democracy and human rights. According to the instruments of the inter-American system, the joint exercise of these fundamental rights makes the free exercise of democracy possible.

4. Protest is also closely linked to the promotion and defense of democracy. In particular, the Inter-American Court has recognized that in situations involving a breakdown of the democratic institutional order, protest should be understood to “[correspond] not only to the exercise of a right, but also to compliance with the obligation to defend democracy.”⁷⁶⁶

23. Right to political participation: Protest in the context of the consolidation of democracies in the region is a fundamental tool of political participation and of the right to “participate in the conduct of public affairs,” both in terms of the InterAmerican Democratic Charter⁷⁶⁷ and under Article 23 of the American Convention. The Human Rights Council has also maintained that “Other rights that may be applicable in case of peaceful protests include (...) the right (...) to

⁷⁶⁶ IA Court H.R., *Case of López Lone et al. v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, paras. 148 et seq.

⁷⁶⁷ Article 2 of the Inter-American Democratic Charter states that “Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.” Article 6 states, “It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.”

take part in the conduct of public affairs (Article 25).”⁷⁶⁸ Protest as a form of participation in public affairs is especially relevant for groups of people historically discriminated against or marginalized.

[A Hemispheric Agenda for the Defense of Freedom of Expression. OEA/Ser.L/V/II. CIDH/RELE/INF. 4/09. 25 February 2009](#)

69. Social protest is one of the most effective forms of collective speech. Indeed, in some circumstances it is also the only way in which certain groups can be heard. Indeed, when faced with institutional frameworks that do not favor participation, or in the face of serious barriers to access to more traditional forms of mass communication, public protest appears to be the only medium that really allows sectors of society traditionally discriminated against or marginalized from public debate to have their point of view heard and appreciated. [...]

[Second Report on the Situation of Human Rights Defenders in the Americas. OEA/Ser.L/V/II. Doc. 66. 31 December 2011](#)

106. With regards to the frequent detentions of human rights defenders for their participation in protest demonstrations, the Commission notes that public protest is one of the usual ways of exercising the right of assembly and the right to freedom of expression, and that it has an essential social interest in guaranteeing the proper functioning of the democratic system. Thus, expressions against the government's proposed laws or policies, far from being an incitement to violence, are an integral part of any pluralistic democracy.⁷⁶⁹

⁷⁶⁸ Human Rights Council, Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests, Report of the United Nations High Commissioner for Human Rights, 21 January 2013, AHRC/22/28, para. 4. The Human Rights Council has further stated, “Acknowledging also that participation in peaceful protests can be an important form of exercising the rights to freedom of peaceful assembly, of expression, of association and of participation in the conduct of public affairs,” and “Recognizing that peaceful protests can make a positive contribution to the development, strengthening and effectiveness of democratic systems and to democratic processes, including elections and referendums.” Whereas clauses of Resolution 25/38 adopted by the Human Rights Council. The promotion and protection of human rights in the context of peaceful protests. AHRC/RES25/38. 11 April 2014.

⁷⁶⁹ IACHR, 2009 Annual Report of the Special Rapporteur on Freedom of Expression, Chapter II, Evaluation of the state of Freedom of Expression in the Hemisphere, December 2009, para. 708.

Report on the Situation of Human Rights Defenders in the Americas. OEA/Ser.L/V/II.124. Doc. 5 rev.1.7 March 2006.

217. The Commission wishes to reiterate that the effective exercise of democracy requires as a precondition the full exercise of the fundamental rights and freedoms of citizens. Criminalizing legitimate social mobilization and social protest, whether through direct repression of the demonstrators or through an investigation and criminal prosecution, is incompatible with a democratic society in which persons have the right to express their opinion.

Protest and Human Rights. OEA/Ser.L/V/II IACHR/RELE/INF22/19. September 2019

294. The Internet is now a fundamental communication tool that enables people to link up and connect in an adaptable, fast, and effective manner, and is considered a tool with unique potential for the exercise of freedom of expression. Among the new powers enabled by the Internet are the ability to associate and assemble that people have acquired in the digital age, which in turn enhances the full realization and enjoyment of other civil, political, economic, social, and cultural rights. Meetings and associations in the digital age can be organized and held without prior notice, on short notice, and at low cost. The Internet is also now a fundamental tool for monitoring and reporting human rights violations during demonstrations and meetings.

295. The Internet can be seen and analyzed as a means of organization or as an enabling platform for protests. In practice, it works as a means of disseminating, convening, and publicizing meetings and physical gatherings (using social networks, blogs, or forums, for instance) to be carried out in a tangible public place, expanding the boundaries of participation. The Internet also offers the possibility of organizing an online protest, providing a common meeting space, shortening distances and times, and simplifying formalities and

agendas.⁷⁷⁰ Both settings must be protected and promoted to the extent that they contribute to the full exercise of human rights.⁷⁷¹

296. The international standards developed within the inter-American system and the universal system on the rights to freedom of expression, association, and peaceful assembly are fully applicable to the Internet.⁷⁷²

297. In recent years there have been various instances of protest on the Internet that include email chains, petitions, demonstrations, and campaigns developed on social networks, etc. In the same way that States must ensure access to public spaces—such as streets, roads, and public squares—for the holding of gatherings, they must also ensure that the Internet is available and accessible to all citizens in order to provide a space for the organization of associations and assemblies for purposes of taking part in the political life of the country.⁷⁷³

298. Limitations on access to the Internet before or after peaceful gatherings, including total or partial disconnections, the slowdown of Internet service, and the temporary or permanent blocking of different sites and applications, constitute unlawful restrictions on the rights of association and assembly.⁷⁷⁴ The United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion

⁷⁷⁰ Instituto Nacional de Derechos Humanos (INDH), *Internet y Derechos Humanos, Serie de Cuadernillos de Temas Emergentes* [National Human Rights Institute, Internet and Human Rights, Emerging Topics Booklet Series] (December 2013), p. 29

⁷⁷¹ Instituto Nacional de Derechos Humanos (INDH), *Internet y Derechos Humanos, Serie de Cuadernillos de Temas Emergentes* [National Human Rights Institute, Internet and Human Rights, Emerging Topics Booklet Series] (December 2013), p. 29.

⁷⁷² United Nations, Human Rights Council, Resolution 24/5, *The rights to freedom of peaceful assembly and of association*, UN Doc. A/HRC/RES/24/5 (8 October 2013). See also: United Nations, Human Rights Council, *Report of the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association*, Maina Kiai, UN Doc. A/HRC/20/27 (21 May 2012), para. 84, recommendation k.

⁷⁷³ United Nations, Human Rights Council, *Report of the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association*, Maina Kiai, UN Doc. A/HRC/23/39 (24 April 2013), para. 82(d).

⁷⁷⁴ United Nations, Human Rights Council, *Report of the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association*, Maina Kiai, UN Doc. A/HRC/20/27 (21 May 2012).

and Expression has stressed the need to ensure access to the Internet at all times, including during periods of political unrest.⁷⁷⁵

Childhood, Freedom of Expression and the Media. OEA/Ser.L/V/III IACHR/RELE/INF.23/19 February 2019

39. The IACHR, in its on-site visits and thematic hearings, has been paying attention to the growing participation of children and adolescents in the public sphere through the manifestation of their opinions, demands and political positions on issues of public interest or issues that affect them. This growing participation is observed through demonstrations, protests in their different modalities, or in the use of social networks, all of which implies recognition of the useful effect that the Convention on the Rights of the Child and the American Convention have had on to universality the right to freedom of expression.

Police Violence against Afro-descendants in the United States. OEA/Ser.L/V/III. Doc. 156. 26 November 2018

239. Of special concern to the Commission is the use of force to contain or repress social protests and public demonstrations that seek to give an outlet to discontent and struggles to vindicate fundamental rights,⁷⁷⁶ such as demonstrations protesting racial discrimination or impunity for police violence in the US.⁷⁷⁷ In a democracy, State authorities should act under the assumption that protests or public demonstrations do not constitute a threat to public order, with an approach focused on building the highest levels of citizen participation, with the streets and plazas considered privileged places for public expression.⁷⁷⁸

⁷⁷⁵ United Nations, Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, UN Doc. A/HRC/17/27 (16 May 2011), para. 79.

⁷⁷⁶ Id. at para. 2.

⁷⁷⁷ See *supra* paras. 119-126.

⁷⁷⁸ IACHR, *Annual Report 2015, Chapter IV: The Use of Force*, Mar. 17, 2016, para. 64.

Joint declarations

2013 Joint Statement on Violence Against Journalists and Communicators in the Framework of Social Demonstrations

The Special Rapporteurs note that in the context of demonstrations and situations of social unrest, the work of journalists and media workers, as well as the free flow of information through alternative media such as the social networks, is essential to keeping the public informed of the events. At the same time, it plays an important role in reporting on the conduct of the State and of law enforcement authorities toward the protesters, preventing the disproportionate use of force and the abuse of authority.

Attacks against journalists who cover these events violate both the individual aspect of freedom of expression—insofar as they prevent journalists from exercising their right to seek and disseminate information, and creates a chilling effect—as well as its collective aspect—in that they deprive society of the right to know the information that journalists obtain. The Offices of the Special Rapporteurs have thus acknowledged that, given the importance of the work done by journalists who cover these events, the State must afford them the highest degree of protection in order for them to perform their duties. This obligation is not limited to granting specific protective measures to journalists; it also includes the duty to create the necessary conditions to mitigate the risks of practicing their profession in such situations.

[...]

The rights of freedom of assembly and freedom of expression, guaranteed by the American Convention on Human Rights and the International Covenant on Civil and Political Rights, are fundamental, and guaranteeing them is a vital condition to the existence and proper functioning of a democratic society. A State may impose reasonable limitations on demonstrations for purposes of ensuring that they are conducted peacefully, or to disperse those that turn violent, provided that such limits are governed by the principles of legality, necessity,

and proportionality. In addition, the breaking-up of a demonstration must be warranted by the duty to protect individuals, and authorities must use the measures that are safest and least harmful to the demonstrators. The use of force at public demonstrations must be an exception, used under strictly necessary circumstances consistent with internationally recognized principles.

Resolutions

[Resolution 1/08. Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Adopted by the IACHR on March 13, 2008.](#)

Principle XVI. Freedom of expression, association and reunion
Persons deprived of liberty shall have the right to freedom of expression in their own language, association, and peaceful assembly, subject to the limitations that are strictly necessary in a democratic society to protect the rights of others or public health or morals, and maintain public order, internal security, and discipline in places of deprivation of liberty, as well as subject to other limitations permitted by law and international human rights law.

[Resolution 1/2020. Pandemic and Human Rights in the Americas. Adopted by the IACHR on April 10, 2020.](#)

Recognizing that under certain circumstances, it may become essential, in order to achieve sufficient social distancing, to restrict the full enjoyment of rights such as the right of assembly and freedom of movement in physical public or community spaces if not absolutely necessary for the provision of essential supplies or medical care.

3. Public space: right of assembly

120. The right of assembly is enshrined in Article XXI of the American Declaration of the Rights and Duties of Man and Article 15 of the American Convention on Human Rights. This right protects the peaceful, intentional and temporary congregation of persons in a determined space for the achievement of a common objective, including protest. As such, it is indispensable for the collective expression of people's opinions and points of view and is of essential importance for the

consolidation of the democratic life of societies. Therefore, it is of imperative social interest⁷⁷⁹ .

121. The following is a summary of the Commission's standards that illustrate the various forms of assembly that are protected by the inter-American instruments.

Country reports

Nicaragua: Concentration of Power and Weakened Rule of Law. OEA/Ser.L/V/II. Doc. 288. 25 October 2021

154. In that regard, both the Inter-American Court and the Commission have recognized the relationship between political rights, freedom of expression, the right of assembly, and freedom of association, and that together these rights make the democratic process possible. Especially in situations of institutional breakdown, the relationship between these rights is even more evident, especially when they are exercised together to protest against the action of state powers that is inconsistent with the constitutional order, or to demand the restoration of democracy. As the Inter-American Court has held, “the lack of an effective guarantee of freedom of expression weakens the democratic system and undermines pluralism and tolerance; that the mechanisms of citizen control and denunciation may become inoperative and, ultimately, this creates fertile ground for authoritarian systems to take root.”⁷⁸⁰ The IACHR urges the State of Nicaragua to restore the legal status of civil society organizations, as well as to cease the repression against the media, human rights organizations and individuals considered to be members of the opposition.

Democracy and Human Rights in Venezuela. OEA/Ser.L/V/II. Doc. 54.30 December 2009

1081. The Inter-American Democratic Charter recognizes that the right of workers to associate freely to protect and promote their interests is

⁷⁷⁹ IACHR. Protest and Human Rights. OEA/Ser.L/V/II IACHR/RELE/INF.22/19. September 2019, para. 19.

⁷⁸⁰ IA Court HR. Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs. Judgment of February 8, 2018. Series C No. 348, par. 154.

essential for the full realization of democratic ideals. The American Convention on Human Rights recognizes this right in Article 16, as does Article 8 of the Protocol of San Salvador. The latter international instrument establishes that states must guarantee the right of workers to organize trade unions and to affiliate with the one of their choice, and that no one may be compelled to belong to a trade union. The Protocol also provides that states must allow trade unions to function freely, and that the exercise of trade union rights may be subject only to such limitations and restrictions that are established by law and necessary in a democratic society for safeguarding public order or for protecting public health or morals or the rights and freedoms of others.

Thematic reports

Report on Citizen Security and Human Rights. OEA/Ser.L/V/II. Doc. 57.31 December 2009

209. Neighborhood associations, community organizations, development commissions, unions, sports clubs, religious organizations, networks or interest groups are, by their nature, an important social resource. These types of groups rely on bonds of trust and reciprocity, which better prepares them to intervene to prevent or stop some of the factors that enable violence and crime. These types of social organization are also more conducive to enabling non-violent solutions to interpersonal or group conflicts at the local level. Various forms or modes of community participation in actions related to citizen security, in exercise of the right of association and the right to participate in government must be via previously agreed and clearly established channels. The main purpose is to strengthen the rule of law and the institutions of democracy. Society's involvement in matters related to citizen security must be confined exclusively to social, community or situational prevention of violent or criminal conduct, helping to create a climate of tolerance and respect and helping to correct the cultural, social or economic risk factors. The Commission wants to emphasize the fact that in the rule of law, the use of force and other legitimate means of coercion are reserved exclusively for the public authorities, who must exercise them in accordance with the standards discussed earlier in this report. As the Commission sees it,

States are not fulfilling their duties to protect and ensure human rights when they allow, encourage or tolerate private groups that usurp the essential functions of the institutions within the system for the administration of justice or the police force. The recent history of the Hemisphere has seen practices of this type, which have caused extensive and systematic violations of human rights. Therefore, it is the duty of a democratic state to exercise strong control over such groups, to prevent them from operating and, where necessary, to apply the appropriate penalties under its criminal laws.

[Inter-American Principles on Academic Freedom and University Autonomy. Adopted by the Commission during the 182nd Regular Session, held from December 6 to 17, 2021.](#)

Privately managed institutions of higher education must seek and protect pluralism and diversity of perspectives within their respective academic communities; give wide publicity to the principles and values that guide their academic activities and share with their academic community in advance and explicitly the issues that openly contradict their identity. The States, through the law, shall establish the scope and limits of the right to freedom of association for privately managed institutions of higher education, as well as the minimum requirements that promote their quality, the guarantee of human rights and the protection of democracy, in accordance with international norms and standards and in harmony and complementarity with the present Principles of Academic Freedom.

[Freedom of expression in the Americas: the first five reports of the Office of the Special Rapporteur for Freedom of Expression](#)

The Inter-American Commission has held that the concept of representative democracy is based on the principle that the people are the holders of political sovereignty and that in the exercise of this sovereignty they elect their representatives to exercise political power. These representatives are also elected by the citizens to implement specific political measures, which in turn implies that there has been a broad debate on the nature of the policies to be implemented -freedom

of expression- among organized political groups -freedom of association- who have had the opportunity to express themselves and meet publicly -right of assembly. For their part, the validity of the aforementioned rights and freedoms requires a legal and institutional order in which the laws take precedence over the will of the rulers and in which there is control of some institutions over others in order to express the purity of the expression of the will of the people -the rule of law-.⁷⁸¹

[Second Report on the Situation of Human Rights Defenders in the Americas. OEA/Ser.L/V/II. Doc. 66. 31 December 2011](#)

128. The right of assembly [...] is essential to the enjoyment of various rights such as freedom of expression, the right of association, and the right to defend human rights. Political and social participation through the exercise of freedom of assembly is critical to the consolidation of democratic life in societies and thus contains a keen social interest.⁷⁸²

4. Internet

122. Technological advances have made the Internet a tool that has exponentially facilitated the exercise of freedom of expression in all its dimensions, diversifying and multiplying the means of communication, the potentially global audience, reducing costs and time, in addition to offering unbeatable conditions for innovation and the exercise of other fundamental rights.⁷⁸³ Therefore, the following is a summary of the standards developed by the IACHR, considering the major impact that the Internet has on the exercise of freedom of expression, to protect the possibilities of receiving, seeking and disseminating information through this medium.

Country reports

[Situation of Human Rights in Guatemala OEA/Ser.L/V/II. Doc. 208/17 31 December 2017](#)

⁷⁸¹ IACHR Annual Report 1990-1991, Chapter V, Section III, "Human Rights, Political Rights and Representative Democracy in the Inter-American System", OEA/Ser.L/V/II.79.rev.1/Doc. 12, 22 February 1991, original: Spanish.

⁷⁸² IACHR, Report on the Situation of Human Rights Defenders in the Americas, para. 60.

⁷⁸³ IACHR. Standards for a free, open and inclusive Internet. OEA/Ser.LV/II. IACHR/RELE/INF.17/17. March 15, 2017, para. 80.

305. As indicated on previous occasions, the IACHR recalls that the concentration of the media in a few hands has a negative impact on democracy and freedom of expression, as expressly stated in principle 12 of the Declaration of Principles on Freedom of Expression of the IACHR “[m]onopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people’s right to information.” Since its first statement on the issue, the Inter-American Court has ruled that the existence of any monopoly on the ownership or administration of the media, whatever the form it intends to adopt, is prohibited, and acknowledged that States must actively intervene to avoid concentration of ownership in the media sector.⁷⁸⁴

306. In this regard, the IACHR had indicated that, “If the media is controlled by a reduced number of individuals, or by only one individual, this situation would create a society in which a reduced number of individuals, or just one, would exert control over the information and, directly or indirectly, on the opinion received by the rest of the people. This lack of plurality in sources of information is a serious obstacle for the functioning of democracy. Democracy requires the confrontation of ideas, debate and discussion. When this debate does not exist, or is weakened by the lack of sources of information, the main pillar for the functioning of democracy is harmed.”⁷⁸⁵

Thematic reports

Freedom of Expression and Internet. OEA/Ser.L/V/II. CIDH/RELE/INF/11/13. 31 December 2013

⁷⁸⁴ 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. Serie A No. 5. Para. 33-34; 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. 117.

⁷⁸⁵ IACHR. *Justice and Social Inclusion: The Challenges of Democracy in Guatemala*. Chapter VII (The Situation of Freedom of Expression), para. 419.

62. Thus for example, invoking public order so as to place restrictions on an individual (subsequent liability) based on the person's exercise of the right to distribute information over the Internet requires proving the existence of real and objectively verifiable causes that present at the very least a sure and credible threat of a potentially serious disturbance of the basic conditions for the operation of democratic institutions. In this sense, in order to impose subsequent liability for the exercise of the fundamental right to freedom of expression on the Internet - or in any other area - it is not sufficient to invoke mere conjecture of eventual violations of order, nor hypothetical circumstances derived from interpretations of the authorities regarding facts that are not clearly defined - for example, a clear and objective risk of grave disturbances ("anarchic violence") pursuant to the terms of Article 13(5) of the Convention.

[Standards for a Free, Open, and Inclusive Internet. OEA/Ser.L/V/II. CIDH/RELE/INF.17/17.15 March 2017](#)

81. The main impact of the internet on freedom of expression is the way in which it increases the ability to receive, seek and impart information. It enables the collaborative creation and sharing of content – it is world where anyone can be an author and anyone can publish and it helps them communicate, collaborate and exchange views and information. This represents, the ‘democratization’ of freedom of expression as public speech is no longer moderated by professional journalists or gatekeepers. In this way the internet has become a powerful democratizing force, transforming freedom of expression by creating: new capacities to create and edit content (across physical boundaries), often bypassing censorship controls, which creates new possibilities for realizing human potential; new abilities to organize and mobilize (strongly underpinning other rights such as the right to freedom of association); and new possibilities to innovate and generate economic development (underpinning social and economic rights).

82. The Inter-American Commission has maintained for more than a decade that "the right to freedom of expression in the terms

established by article 13 of the American Convention equally protects both traditional media and the widespread expression via Internet.⁷⁸⁶

83. The Joint Declaration on Freedom of Expression and the Internet contains the general principle that “Freedom of expression applies to the Internet, as it does to all means of communication. Restrictions on freedom of expression on the Internet are only acceptable if they comply with established international standards, including that they are provided for by law, and that they are necessary to protect an interest which is recognized under international law (the ‘three-part’ test).”⁷⁸⁷

107. Strict liability, which holds the intermediary liable for any content on its platform that is considered unlawful,⁷⁸⁸ is incompatible with the American Convention because it is disproportionate and unnecessary in a democratic society.⁷⁸⁹ These types of regimes encourage intermediaries to monitor and censor their own users.⁷⁹⁰

135. According to the regional standards, prior censorship is prohibited except for the protection of minors at public events, and any restriction must be established by law, clearly and in detail. It must also be

⁷⁸⁶ IACHR. Complaint before the Inter-American Court of Human Rights against Costa Rica. Case No. 12.367, “la Nación” Mauricio Herrera Ulloa and Fernan Vargas Rohmoser. 28 January 2002. Para. 97.

⁷⁸⁷ 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 Freedom of Expression and the Internet. 1 June 2011.

⁷⁸⁸ UNESCO. *Fostering Freedom Online: The role of Internet Intermediaries*. Unesco Series on Internet Freedom. Internet Society (2014). Page. 40.

⁷⁸⁹ IACHR. Annual Report 2013. Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013 Chapter IV (Freedom of Expression and the Internet). OEA/Ser.LV/II.149. Doc. 50. 31 December 2013.

⁷⁹⁰ IACHR. Annual Report 2013. Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013 Chapter IV (Freedom of Expression and the Internet). OEA/Ser.LV/II.149. Doc. 50. 31 December 2013. Para. 98. Also, see for example, the decision by the Argentinian Supreme Court in the María Belén Rodríguez v. Google Inc. case. In its decision the Court held that: “establishing a strict liability regime in this activity would ultimately discourage the existence of ‘search engines’, which fulfill an essential role in the right to seek, receive and impart information and opinions freely on the Internet”. Corte Suprema de Justicia de la Nación. Rodríguez, Maria Belen c/ Google Inc. s/ daños y perjuicios. October 28, 2014.

suitable, proportionate, and necessary for the accomplishment of a legitimate aim in a democratic society. It is not enough for the measure to be useful; it must be the least restrictive one. The protection of personal data is a legitimate aim for the establishment of restrictions to the right to freedom of expression. Nevertheless, any limitation on the right to freedom of expression— whether to protect privacy, as in the case of personal data, or honor and reputation— must respect the three-part test as developed by the inter-American case law and doctrine: it must be legally established in a law, both substantively and procedurally; it must be necessary and suitable, and it must be proportionate. Limitations on freedom of expression must also be ordered by a competent, independent, and impartial judge or court, with all due process guarantees.

155. Restrictions on the rights to freedom of expression and access to knowledge on the Internet in connection to copyright protection must comply with the requirements established in the American Convention.⁷⁹¹ These limitations must pass the interAmerican system's three-prong test: a) formal and material legality and legitimate objective; b) necessity in a democratic society and; c) proportionality. Moreover, there must be sufficient judicial control over the restriction in all cases with respect to due process guarantees, including user notifications.⁷⁹²

175. The Internet has become “one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies.”⁷⁹³ The formation of an inclusive information society requires universal ability to access and

⁷⁹¹ IACHR. Annual Report 2013. Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013 Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 76.

⁷⁹² IACHR. Annual Report 2013. Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013 Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 55.

⁷⁹³ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 2.

contribute information, ideas, and knowledge so citizens can participate in discussions on public affairs and be part of the decision-making process.⁷⁹⁴ The Internet offers a new opportunity for developing policies on proactive transparency and dissemination of information and ideas of all kinds. Its speed, decentralization, and low cost allow both the State and private parties to disseminate information without barriers of borders, opportunity, or bureaucracy that once hampered such circulation.⁷⁹⁵

176. Access to public information over the Internet empowers citizens to actively participate in democratic State's decision-making processes.⁷⁹⁶ The nature of the Internet enables an increase in the amount of information that is publicly available, allowing it to be mass distributed at low-cost and published dynamically in such a way that it can be worked on and with.⁷⁹⁷ Governments should also examine the possibility of publishing data in a way that is machine-readable, and is made available under an open license such as Creative Commons. Machine-readable data is that which can be interpreted by computer code without the need for special equipment or operating systems. This allows the data to be accessed by the citizen to extract the information relevant to them, rather than use information that is constructed around the needs of a bureaucracy.

177. Access to information must also be guaranteed without discrimination. States must therefore ensure multilingualism and that

⁷⁹⁴ World Summit on the Information Society. Declaration of Principles, Building the Information Society: a global challenge in the new Millennium. Geneva 2003- Tunis 2005. Doc. WSIS-03/GENEVA/4-E. December 12, 2003. Para. 24.

⁷⁹⁵ IACHR. Annual Report 2013. Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013 Chapter IV (Freedom of Expression and the Internet). OEASer.LV/II.149. Doc. 50. December 31, 2013.

⁷⁹⁶ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. AHRC/17/27. May 16, 2011. Para. 23.

⁷⁹⁷ UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. Joint Declaration on Access to Information and on Secrecy Legislation. December 6, 2004. See also, World Summit on the Information Society. Tunis Commitment. Doc. WSIS-05/TUNIS/DOC/7-E. November 18, 2005. Para. 11.

the information is accessible over the Internet for persons with disabilities, as developed previously.

212. Internet surveillance in any of its forms or nuances constitutes interference in the private lives of people and, when conducted illegally, can also affect the rights to due process and a fair trial, freedom of expression, and access to information.⁷⁹⁸ It is recognized both regionally and universally that illegal or arbitrary surveillance and interception and collection of personal data affect not only the right to privacy and freedom of expression but can also run contrary to the precepts of a democratic society.⁷⁹⁹ The United Nations Human Rights Committee has warned of the negative effects that surveillance, interception of communications and collection and analysis of personal data can have—particularly when performed indiscriminately—on the enjoyment and exercise of human rights.⁸⁰⁰

221. Measures to limit the right to privacy online, surveillance in particular, must be necessary in a democratic society in order to be legitimate.⁸⁰¹ In this regard, the interAmerican system has held that it is not sufficient for the measures to be useful, reasonable, or convenient.

⁷⁹⁸ IACHR. Annual Report 2013. Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013 Chapter IV (Freedom of Expression and the Internet). OEA/Ser.LV/II.149. Doc. 50. December 31, 2013

⁷⁹⁹ United Nations. General Assembly. The right to privacy in the digital age. UN Doc. A/RES/68/167. 18 December 2013. Para. 4. Available at: <http://www.un.org/en/ga/68/resolutions.shtml>, and IACHR. Annual Report 2013. Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013 Chapter IV (Freedom of Expression and the Internet). OEA/Ser.LV/II.149. Doc. 50. December 31, 2013.

⁸⁰⁰ International Covenant on Civil and Political Rights. General Comment N° 31, The Nature of the General Obligation Imposed on States Parties to the Covenant. UN Doc. CCPR/C/21/Rev.1/Add.13. March 29, 2004. Para. 10. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=CCPR%2FC%2F21%2FRev.1%2FAdd.13&Submit=Search&Lang=E

⁸⁰¹ Necessary and Proportionate Coalition. Necessary & Proportionate, International Principles on the Application of Human Rights to Communications Surveillance. May, 2014.

Rather, they must meet a clear and pressing need in order to achieve the legitimate objectives being pursued.⁸⁰²

[Guide to guarantee freedom of expression regarding deliberate disinformation in electoral contexts. OEA/Ser.D/XV.22. OEA/Ser.G CP/CAJP/INF.652/19. October 2019.](#)

The inter-American human rights system has concluded that freedom of expression is characterized as a right with two dimensions: an individual one, which concerns the expression of one's thoughts, ideas, and information; and a collective or social dimension, consisting of the right of society to procure and receive information, to know the thoughts, ideas, and information of others and to be well informed. The Internet is one of the technologies that has most enhanced the exercise of freedom of expression, given that it turned millions of people who were passive recipients of information into active participants in the public debate⁸⁰³.

It is necessary to draw attention to the need to differentiate between advertising for commercial purposes and electoral advertising: while the former is linked to the operation of a market for goods and services, the latter relates to an essential process for democracy. The electoral process is fundamental for democracy and there may be a legitimate interest of the state in establishing restrictions proportional to certain types of electoral publicity within the framework of those processes. [...]

[...] Electoral authorities play a central role for modern democracy. [...]. Avoid holding intermediaries responsible for the fact that deliberate misinformation circulates on their platforms, which can trigger the dynamics of "private censorship." Likewise, it is recommended that the

⁸⁰² 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. 46; IACHR. Annual Report 2008. 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.LV/II.134 Doc. 5 rev. 1. February 25, 2009. Para. 86.

⁸⁰³ Cf. IACHR, Standards for a Free, Open and Inclusive Internet. Washington D.C., Office of the Special Rapporteur for Freedom of Expression of the IACHR. 2016, para. 81.

control they exercise meets the general requirements of the inter-American standards of human rights regarding freedom of expression. That is, that the restrictions on this right are minimal, especially in the context of the electoral debate, and only be applied as the result of provisions established through laws in a formal and material sense, that are precise enough and in compliance with compelling objectives through which this means can only be achieved, and not by less restrictive ways of the law in question.⁸⁰⁴

[Freedom of expression in the Americas: The First Five Reports of the Office of the Special Rapporteur for Freedom of Expression](#)

The foundations of this doctrine are also to be found in the importance of freedom of expression and information for the existence of a democratic society. Democracy requires that public debate be fluid and wide-ranging. Publicity of information provided by third parties should not be restricted by the threat of holding the informant responsible simply for reproducing what was stated by another. This would undoubtedly imply an unnecessary restriction that considerably limits the right of all people to be informed.

Joint declarations

[Joint Declaration on Freedom of Peaceful Assembly and of Association and Misuse of Digital Technologies \(2023\)](#)

Acknowledging the power of technologies to advance the participation in the democratic space of individuals, civil society, and especially marginalized groups and communities;

Expressing further concern about the misuse of artificial intelligence technologies (AI) – such as algorithm-driven systems in content moderation, social media filtering, and surveillance - and the challenges these pose to civic space and democracy; Noting that the affordances of algorithmic systems permit the suppression, blocking or promotion of specific content, and the risk that these systems are used

⁸⁰⁴ Cf. IACHR, *Inter-American Legal Framework Regarding the Right to Freedom of Expression*, cit., Para. 67.

to silence or suppress democratic expression and civic engagement in democratic processes.

43. Take measures to prevent and duly investigate and prosecute online abuse against women exercising their fundamental freedoms, which constitutes a direct attack on women's visibility and full participation in public life, and in turn undermines democracy.

5. Hate Speech and Incitement to Violence

123. Both the Commission and the Court have established that freedom of expression is not an absolute right. In this regard, Article 13 of the American Convention expressly provides—in its paragraphs 2, 4 and 5—that it may be subject to certain limitations, and establishes the general framework of conditions that such limitations must meet in order to be legitimate. Article 13(2), in particular, expressly provides for the possibility of subsequent liability for the abusive exercise of freedom of expression. Likewise, Article 13.5 of the Convention identifies speech that is not protected by freedom of expression, such as war propaganda and advocacy of hatred that constitutes incitement to violence⁸⁰⁵.

124. In this regard, the following is a summary of standards that shed light on what constitutes hate speech and incitement to violence prohibited by the Convention, as well as the conditions that exist with respect to the limitations on freedom of expression to prevent its abusive exercise.

Merits Reports

[Report No. 112/12. Case 12.828. Marcel Granier et al. Venezuela. November 9, 2012.](#)

124. [...] from a substantive perspective, the Commission recalls that Article 1(1) of the American Convention prohibits any discrimination in the enjoyment of the rights enshrined therein on the grounds, *inter alia*, of "political or any other opinion. Additionally, the Inter-American Commission and Court have consistently held that speech on matters of public interest enjoys a higher level of protection under Article 13 of

⁸⁰⁵ IACHR. Report No. 112/12. Case 12.828. Marcel Granier et al. Venezuela. November 9, 2012, para. 156.

the Convention.⁸⁰⁶ However, freedom of expression is not absolute,⁸⁰⁷ and in exceptional circumstances, such as those contemplated in Article 13(5) of the Convention, restrictions on this matter could be considered possible even when the expressions in question are of a political nature.⁸⁰⁸

Report No. 27/18. Case 12.127. Merits. Vladimiro roca Antiniez and others. Cuba. 24 February 2018

95. [...] Article 125 (c) of the Cuban Criminal Code uses vague terms to define "incitement" to the commission of crimes related to national security. In particular, the provision does not differentiate expressions of apology from those that directly and intentionally incite violence. The Inter-American Commission has considered that the imposition of sanctions for the abuse of freedom of expression for incitement to violence - such as incitement to commit crimes, breach of public order

⁸⁰⁶ IACHR Court. Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135. para. 83; IA Court H.R., Case of Herrera Ulloa v. Costa Rica. Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. para. 125; IA Court H.R., Case of Ivcher Bronstein v. Costa Rica. Case of Ivcher Bronstein v. Peru. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74. para. 155; IACHR, Annual Report 1994. OEA/Ser.LV/II.88. Doc. 9 rev. 17 February 1995. Chapter V; IACHR, Pleadings before the Inter-American Commission on Human Rights in the Case of Herrera Ulloa v. Costa Rica, cited by the IA Court H.R., Case of Herrera Ulloa v. Costa Rica. Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. para. 101(2)(c).

⁸⁰⁷ IACHR Court. Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 54; Case of Fontevecchia and D'Amico v. Argentina. Merits, Reparations and Costs. Judgment of November 29, 2011. Series C No. 238, para. 43.

⁸⁰⁸ Based on international doctrine and jurisprudence, the IACHR has indicated that the imposition of sanctions for incitement to violence would be appropriate when "current, certain, objective and convincing evidence" demonstrates "the clear intention to commit a crime and the current, real and effective possibility of achieving its objectives". IACHR, Office of the Special Rapporteur for Freedom of Expression. Inter-American Legal Framework on the Right to Freedom of Expression. OEA/Ser.LV/II IACHR/RELE/INF. 209. December 30, 2009, para. 58. Available at:

<http://www.oas.org/es/cidh/expresion/docs/publicaciones/>

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HO%20A%20LA%20LIBERTAD%20DE%20EXPREERTAD%20DE%20EXPRESION%20ESP%20FINAL%20porta da.doc.pdf.

Regarding the distinction between protected political speech and incitement to violence, see also, ECtHR, Case of Incal v. Turkey, Application No. 22678/93, Judgment of 9 June 1998; Case of Sürek and Özdemir v. Turkey, Judgment of 8 July 1999, Application Nos. 23927/94, 24277/94; Case of Arslan v. Turkey, Judgment of 8 July 1999, Application No. 23462/94.

or national security - must have as legal requirement the actual, certain, objective and conclusive proof that the person was not simply expressing an opinion - however hard, unjust or disturbing - but that he/she had a clear intention to commit a crime and the actual, real and effective possibility of achieving those objectives.⁸⁰⁹ Acting otherwise would mean admitting the possibility of punishing opinions, and all the States would be authorized to suppress any kind of thought or expression critical of the authorities that, like anarchism and opinions radically opposed to the established order.⁸¹⁰

97. The IACHR has explicitly reiterated that “vague, ambiguous, broad or open-ended laws, by their mere existence, discourage the dissemination of information and opinions out of fear of punishment, and can lead to broad judicial interpretations that unduly restrict freedom of expression,” and lead to abuse as a means of silencing ideas and information critical of the government. This Commission has also underscored that the regulation of these types of criminal concepts requires the strict definition of the punishable conduct, so that it cannot be used to criminalize, through abusive interpretations, those associations that are critical of public authorities.⁸¹¹

Admissibility Reports

Report No. 168/21. Petition 906-16. Admissibility. Fábio de Jesús Ribeiro. Brazil. 13 August 2021

19. Although in principle all forms of speech are protected by the right to freedom of expression, the IACHR recalls that the right to freedom of expression is not an absolute right and is subject to limitations,

⁸⁰⁹ In this regard, see the following cases from the European Court of Human Rights: *Karatas v. Turkey* [GC], no. 23168/94. ECHR 1999-IV; *Gerger v. Turkey* [GC], no. 24919/94, July 8, 1999; *Okçuoglu v. Turkey* [GC], no. 24246/94, July 8, 1999; *Arslan v. Turkey* [GC], no. 23462/94, July 8, 1999; *Erdogdu v. Turkey*, no. 25723/94, § 69, ECHR 2000 – VI. See also IACHR, *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, para. 77.

⁸¹⁰ IACHR. *The Inter-American Legal Framework regarding the Right to Freedom of Expression*, para. 58

⁸¹¹ IACHR, *Criminalization of Human Rights Defenders*, OEA/Ser.LV/II. Doc. 49/15, December 31, 2015, para. 141.

specifically those established in Articles 13.2 and 13.5 of the American Convention, governed by several standards. As for Article 13.5, the Commission has held that States are required to adopt legislation to punish advocacy of hatred that constitutes “incitements to lawless violence or to any other similar action.”⁸¹² In contrast, as per Article 13.2 of the American Convention, other intolerant expressions or comments 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, may be subject to the imposition of subsequent sanctions of a civil or administrative nature, or to remedies such as the right to correction and reply, in order to ensure the rights to dignity and nondiscrimination of a particular group of society, including LGBTI persons,⁸¹³ in strict adherence to the requirements of legality, necessity and proportionality. Additionally, in principle, when a public official makes stigmatizing statements about a particular group of persons, their right to freedom of expression can be infringed, given the chilling effect that such speech can have.

20. Based on the foregoing, in the view of the IACHR, when a public official makes public statements that stigmatize or discriminate against persons because of their sexual orientation, gender identity or expression in terms of form, content and scope, among other criteria, measures must be taken which, in keeping with the principles of legality, necessity and proportionality as established in Article 13.2 of the American Convention, enable the offended parties to bring civil or administrative proceedings, or pursue a remedy for correction of the record and reply, in order to restore their rights. The IACHR reiterates that only in the event of advocacy of hatred that constitutes incitements to lawless violence or other similar actions, as defined and prohibited under Article 13.5 of the American Convention, can

⁸¹² See IACHR, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, November 12, 2015, paragraphs 235, 237 and 238

⁸¹³ IACHR, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, November 12, 2015, paragraphs 230 and 232.

measures of a criminal nature be taken, with a high threshold for the imposition of punishment.

21. Moreover, in keeping with the holdings of the European Court of Human Rights, the IACHR has stated that for parliamentary immunity to be consistent with human rights standards, it must i) pursue a legitimate objective (such as, to protect the freedom of expression of a member of parliament in performance of his or her mandate, and ii) be used in a proportionate way.⁸¹⁴ It further noted that decisions based on this legal concept must be adequately reasoned, inasmuch as the duty to state grounds is a guarantee associated with the proper administration of justice, which protects citizens' right to be tried for reasons provided by law, and ascribes credibility to judicial decisions in the sphere of a democratic society.⁸¹⁵ In the case at hand, the IACHR does not have sufficient information, thus far, to enable it to examine the grounds cited by the Municipal Council of Feira de Santana in order to determine whether or not immunity was used as grounds for the decision in accordance with the State's international obligations.

Annual Reports

Annual Report 2015. Report of the Office of The Special Rapporteur for Freedom of Expression. Chapter IV. Hate speech and incitement to violence against lesbian, gay, bisexual, trans and intersex persons in the Americas

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

⁸¹⁴ IACHR, Report No. 10/19, Merits, Márcia Barbosa de Souza and Her Family, Brazil, February 12, 2019, paragraph 57; and Judgment by the European Court of Human Rights (Second Section), Case of A v. United Kingdom, Application N° 35373/97 of 17, December 2002

⁸¹⁵ IACHR, Report No. 10/19, Merits, Márcia Barbosa de Souza and Her Family, Brazil, February 12, 2019, paragraph 59.

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.”⁸¹⁶

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.

[Annual Report of the Rapporteurship for Freedom of Expression, 2010. Chapter II.B. Evaluation of the state of freedom of expression in the Member States](#)

46. As the Office of the Rapporteur has indicated in a letter to the State of Bolivia, “racism and discrimination are a cultural phenomenon and the product of long historical processes of exclusion and domination. A report compiled by the United Nations on racial discrimination concluded that ‘the principle causes of racism and racial discrimination and apartheid are profoundly rooted in the historical past and determined by a variety of economic, political, social and cultural

⁸¹⁶ UNESCO. *Countering Online Hate Speech*. 2015, pp. 10 -11.

factors.⁸¹⁷ In effect, and as this office has expressed in a letter to the State, “The role of the media as channelers of information, ideas, and opinions is fundamental for developing narratives that value diversity and reject racism and arbitrary discrimination.”⁸¹⁸

47. The Office of the Special Rapporteur has expressed its concern over the spread of racist speech through media outlets. In this sense, in its 2009 Annual Report, the Office of the Special Rapporteur recalled that the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people concluded that expression with racist content is “frequent in some mass media outlets” in Bolivia.⁸¹⁹ In this sense, the Office of the Special Rapporteur condemned messages with “racist content that could incite discrimination or violence, particularly when they come from social communicators or journalists, since they help form public opinion.”⁸²⁰ The Office of the Special Rapporteur examined different communication and training measures taken by Bolivian authorities toward refuting prejudicial speech that stigmatized indigenous communities and their systems for administering justice, as recognized in the Constitution of the Plurinational State of Bolivia.⁸²¹

48. The Office of the Special Rapporteur notes that the Law against Racism and All Forms of Discrimination includes mechanisms for prevention and education as valuable instruments for refuting racist

⁸¹⁷ United Nations, report on the seminar, “Political, Historical, Economic, Social and Cultural Factors Contributing to Racism, Racial Discrimination and Apartheid,” Geneva, December 1990.

⁸¹⁸ Letter sent by the Office of the Special Rapporteur to the Plurinational State of Bolivia on November 11, 2010 (on file at the Office of the Special Rapporteur).

⁸¹⁹ IACHR Monitoring Report - Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia, para. 138. Available at: <http://www.cidh.oas.org/annualrep2009sp/Cap.V.Indice.htm>; Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. Rodolfo Stavenhagen. Preliminary note on the mission to Bolivia, November 25 - December 7, 2007. A/HRC/6/15/Add.2. December 11, 2007, pp. 2-3.

⁸²⁰ IACHR Annual Report 2009. Volume II: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter II, para. 60.

⁸²¹ IACHR. Annual Report 2009. Volume II: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter II, para. 60.

speech and for encouraging the development of a society based on the principles of diversity, pluralism, and tolerance. These measures, which the law promotes principally in Article 6, appear to be more effective than the purely coercive ones that seek to punish those who express certain speech. The educational measures strike at the cultural root of the problem: in the struggle against discrimination, it is more effective for fair words to be heard promoting equal respect for all persons without distinction of race, sex, or religion, as opposed to silencing the iniquitous words that promote racism and discrimination. Likewise, it has been demonstrated that the criminal prosecution of those who express themselves in that way can cause those individuals to be seen as victims rather than victimizers, which could end up radicalizing the groups to which they belong.⁸²²

49. Article 13.5 of the American Convention establishes the limits for prohibiting racist and discriminatory speech. In effect, in order to avoid using the right to punish to silence uncomfortable or simply offensive ideas, it is necessary that they constitute “advocacy of hatred” intended not simply to express an idea, but to incite violence. In this way, the Convention prohibits the so-called “crime of opinion.”

50. In light of this provision, the offensiveness of speech in and of itself is not sufficient reason to restrict it. 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. This is the logic of the American Convention, as expressed by the Inter-American Court in the case of *The Last Temptation of Christ*, where it held that freedom of expression protects not just “the information or ideas that are favorably received or considered inoffensive or indifferent, but also for those that shock, concern or offend the State or any sector of the population. Such are the requirements of pluralism, tolerance and

⁸²² In this respect, see Agnés Callamard, *Striking the Right Balance*, available at: www.article19.org/pdfs/publications/hate-speech-reflections.pdf

the spirit of openness, without which no ‘democratic society’ can exist.⁸²³ In order to enable a vigorous debate it is necessary to guarantee greater diversity and pluralism in access to the media.⁸²⁴

51. It is worth recalling that any limit to freedom of expression, especially those that could include serious sanctions such as prison sentences or the closure of a media outlet, must meet three basic guarantees: they must be applied by a body that is independent of the Executive Branch that has structural guarantees of independence and autonomy; they must respect the principles of due process; and they must include sanctions that are proportional. Also, several reports issued by this office, as well as judgments of the IACHR and the Inter-American Court of Human Rights, have held that every limitation on freedom of expression must be established beforehand in a law and established explicitly, strictly, precisely and clearly⁸²⁵, both formally and in practice.⁸²⁶ This means that the law’s text should clearly establish the grounds for subsequent liability to which the exercise of freedom of expression could be subjected. Vague or ambiguous legal norms may

⁸²³ Inter-American Court, Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile. Judgment dated February 5, 2001. Series C No. 73, para. 69, citing the European Court of Human Rights.

⁸²⁴ See IACHR. Annual Report 2009. Report of the Special Rapporteur for Freedom of Expression. Chapter VI (Freedom of Expression and Broadcasting), OEA/Ser.LV/II. Doc.51. December 30, 2009, para 24-37. Available at: <http://www.cidh.oas.org/pdf%20files/RELEAnual%202009.pdf>

⁸²⁵ 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. LV/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).

⁸²⁶ 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.

affect protected speech insofar as they allow their interpreters discretion to determine the scope of the rights which may be affected by the norm.

Country reports

[Second Report on the Situation of Human Rights in Peru. OEA/Ser.L/V/II.106. Doc. 59 rev. 2 June 2000.](#)

18. The Commission has already stated its views on the compatibility of *desacato* laws with the American Convention⁸²⁷, and has established that such laws are incompatible with the standards established in Article 13 of the Convention. Specifically, it stated:

the Commission finds that the State's use of its coercive powers to restrict speech lends itself to abuse as a means to silence unpopular ideas and opinions, thereby repressing the debate that is critical to the effective functioning of democratic institutions. Laws that criminalize speech which does not incite lawless violence are incompatible with freedom of expression and thought guaranteed in Article 13, and with the fundamental purpose of the American Convention of allowing and protecting the pluralistic, democratic way of life.⁸²⁸

[Third report on the situation of Human Rights in Paraguay. OEA/Ser./L/VII.110.doc. 52. 9 March 2001](#)

75. [...] the Special Rapporteur wishes to express his concern with respect to the propensity of the media to become political and economic tools of the various power sectors to the detriment of its main function, which is to inform society. In addition, the Special Rapporteur wishes to remind those who exercise the freedom of expression that the American Convention on Human Rights prohibits all propaganda for war and any advocacy of national, racial, or

⁸²⁷ IACHR, Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights, OEA/Ser.LV/II.88, Doc. 9 rev. (1995), pp. 210-233. Annex D. See also Annual Report of the IACHR, 1998, Vol. III, Report of the Special Rapporteur for Freedom of Expression, p. 37.

⁸²⁸ *Id.*

religious hatred that constitutes an incitement to violence. It is observed with concern that some of the complaints received may fall into this category.

[Situation of Human Rights in Venezuela - "Democratic Institutions, the Rule of Law and Human Rights in Venezuela". OEA/Ser.L/V/II. Doc. 209, 31 December 2017](#)

279. The IACHR notes with concern the proliferation of legal provisions in the Venezuelan legal system that restrict the right to freedom of expression under ambiguous and overly broad definitions of concepts such as national security, public order, or hate speech. In most cases, these are laws adopted by the executive branch without a legislative process with a broad consultation and public debate. This type of norms gives the administrative authorities in charge of applying them a discretion incompatible with the full validity of the right to freedom of expression⁸²⁹. Indeed, the provisions examined do not limit the discretion of the executive authorities to determine the meaning of these concepts, which is a synonym of Government or official political power interest⁸³⁰.

Annual Reports

[Annual Report of the Office of the Special Rapporteur for Freedom of Expression, 2004, Chapter VII. Hate Speech and the American Convention on Human Rights.](#)

28. Article 13 as a whole also contains concrete provisions governing restrictions on expression, and such provisions take precedence over the conclusions drawn from the jurisprudence of other legal systems when evaluating paragraph 5's ban on "advocacy of national, racial

⁸²⁹ IACHR, Office of the Special Rapporteur for Freedom of Expression, [The Inter-American Legal Framework Regarding the Right to Freedom of Expression](#), 2009.

⁸³⁰ United Nations, [The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights](#), 1985. According to the [Global Principles on National Security and the Right to Information](#) ("Tshwane Principles"), of June 12, 2013, "It is good practice for national security, where used to limit the right to information, to be defined precisely in a country's legal framework in a manner consistent with a democratic society". The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted in November 1996, expresses itself in similar terms.

or religious hatred that constitute incitement to violence.” The Inter-American Court in the Case of the Last Temptation of Christ, for example, noted that paragraph 4 “establishes an exception to prior censorship, since it allows it in the case of public entertainment, but only in order to regulate access for the moral protection of children and adolescents,” so for “all other cases, any preventive measure implies the impairment of freedom of thought and expression.”⁸³¹ This means that restrictions on freedom of expression can be made only through subsequent imposition of sanctions for those guilty of abusing this freedom, [...].

46. [...] the American Convention diverges from the European Convention and the ICCPR on a key point, and this difference limits the application of the jurisprudence from the U.N. and the E.U. The text of Article 13(5) discusses hate propaganda that constitutes “incitement to lawless violence or to any other similar action,” suggesting that violence is a requirement for any restrictions. The European Convention and the ICCPR, meanwhile, do not have such a narrowly drawn requirement. The ICCPR outlaws speech that incites to “discrimination, hostility or violence,” thus covering a range of speech that falls short of violence. The European Convention, meanwhile, allows for conditions and restrictions that are “necessary in a democratic society” and lists several ends that justify these restrictions, including national security, territorial integrity and public safety. The greater reach of the ICCPR and the European Convention demonstrate these two systems’ willingness to justify restrictions on speech that do not fit into the American Convention’s narrow category of “incitement to lawless violence.” It follows that while the jurisprudence of the U.N. and the EU can be helpful with the definition of “incitement” and “violence,” not all of the U.N.-and EUbacked restrictions on expression would fall under Article 13(5) of the American Convention. Some of the relevant EU and U.N. decisions restricting speech on national security grounds may be justified under

⁸³¹ [IA Court of H.R., Case of the Last Temptation of Christ \(Olmedo Bustos et al. v. Chile\), Judgment of February 5, 2001, para. 70.](#)

Article 13(2) of the American Convention, which allows for restrictions based on national security and the maintenance of public order.

Thematic reports

[Special Report on the Situation of Freedom of Expression in Cuba. OAS/SER.L/V/II. CIDH/RELE/INF.21/18. December 31, 2018.](#)

212. The Office of the Special Rapporteur recalls that the mandatory blocking or suspension of entire websites, platforms, conduits, IP addresses, domain name extensions, ports, network protocols, or any other type of application, as well as measures aimed at removing links, data, and web sites from the server on which they are hosted, constitute a restriction that will be admissible only in exceptional cases.⁸³² In exceptional cases of clearly illegal content or speech that is not covered by the right to freedom of expression—such as war propaganda and hate speech inciting violence, direct and public incitement to genocide, and child pornography—the adoption of mandatory measures to block and filter specific content is admissible.⁸³³

[Report on Terrorism and Human Rights. OEA/Ser.L/V/II.116. Doc. 5 rev. 1 corr. 22 October 2002.](#)

323. Article 13 of the American Convention clearly requires that "propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action" should be considered offenses punishable by law."⁸³⁴ However, laws that broadly criminalize the public defense (apologia) of

⁸³² United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Cooperation in Europe (OSCE), Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. Joint Declaration on Freedom of Expression and the Internet. Point 3(a); IACHR. Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III. OEA/Ser.LV/II. Doc. 51. December 30, 2009. Para. 149; IACHR. Annual Report 2010. Volume I. Chapter IV. OEA/Ser.LV/II. Doc. 5 corr. 1. March 7, 2011. Para. 822.

⁸³³ IACHR. Office of the Special Rapporteur. Freedom of Expression and the Internet. OEA/Ser.LV/II. CIDH/RELE/INF. 11/13. December 31, 2013. Para. 85.

⁸³⁴ American Convention on Human Rights, *supra* note 61, Article 13(5).

terrorism or of persons who might have committed terrorist acts, without considering the element of incitement “to lawless violence or to any other similar action,”⁸³⁵ are incompatible with the right to freedom of expression.⁸³⁶

325. Several important principles emerge [...], that are necessary for states to apply when constructing anti-terrorism legislation allowing subsequent penalties on expression. First, the basis for subsequent liability must be defined with adequate precision. Second, the states must apply a balancing test to determine the proportionality of the sanction in comparison with the harm sought to be prevented. The case summaries illustrate the ways in which the proportionality test required by international human rights law may be applied in practice. Factors that must be considered include: the dangers presented by the speech within the context of the situation (war, fighting terrorism, etc); the position of the individual making the speech (military, intelligence, official, private citizen, etc.) and the level of influence he or she may have on members of society; the severity of the sanction in relation to the type of harm caused or likely to be caused; the usefulness of the information to the public; and the type of media used. A journalist or other third party who merely transmits statements made by another party should not be subject to sanctions except in very limited circumstances. Additionally, statements that implicate the government in wrongdoing deserve a high level of protection, as public scrutiny of governmental actions is one of the most important democratic values. Even in cases in which the person disclosing the information obtained it through a confidential disclosure, the person may not be punished if the public's interest in having the information is greater than the harm done from disclosing it.⁸³⁷ Finally, legislation that broadly criminalizes the public defense (apologia) of terrorism or of persons who might have committed terrorist acts without

⁸³⁵ *Id.*

⁸³⁶ See, e.g., Report of the Commission of International Jurists on the Administration of Justice in Peru, *supra* note 561, at 24.

⁸³⁷ Johannesburg Principles, *supra* note 662, Principle 15.

requiring an additional showing of incitement “to lawless violence or to any other similar action”⁸³⁸ should be avoided.⁸³⁹

The Inter-American Legal Framework regarding the Right to Freedom of Expression. OEA/Ser.L/V/II. CIDH/RELE/INF. 2/09. 30 December 2009

58. Propaganda for war and advocacy of hatred that constitute incitements to lawless violence. Article 13.5 of the Convention expressly states that “[a]ny propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.” The IACHR has said, following the settled international doctrine and jurisprudence on the subject, that the imposition of sanctions for the abuse of freedom of expression under the charge of incitement to violence (understood as the incitement to commit crimes, the breaking of public order or national security) must be backed up by actual, truthful, objective and strong proof that the person was not simply issuing an opinion (even if that opinion was hard, unfair or disturbing), but that the person had the clear intention of committing a crime and the actual, real and effective possibility of achieving this objective.⁸⁴⁰ Acting otherwise would mean admitting the possibility of punishing opinions, and all the States would be authorized to suppress any kind of thought or expression critical of the authorities that, like anarchism and opinions radically opposed to the established order, question the existence of current institutions. In a democracy, the legitimacy and strength of institutions are strengthened by the force of the public debate over their operation, not by its suppression.

⁸³⁸ American Convention on Human Rights, *supra* note 61, Article 13(5).

⁸³⁹ See *supra*, para. 323.

⁸⁴⁰ On this issue, see the following cases of the European Court of Human Rights: *Karatas v. Turkey* [GC], no. 23168/94. ECHR 1999-IV; *Gerger v. Turkey* [GC], no. 24919/94, 8 July 1999; *Okçuoglu v. Turkey* [GC], no. 24246/94, 8 July 1999; *Arslan v. Turkey* [GC], no. 23462/94, 8 July 1999, *Erdogdu v. Turkey*, no. 25723/94, § 69, ECHR 2000 – VI. Also see IA Court H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, Series A No. 5. para. 77.

Furthermore, the inter-American case law has clearly established that, in order to impose any kind of penalty in the name of the defense of public order (understood as security, public health or morals), it is necessary to show that the concept of “order” that is being defended is not an authoritarian, but a democratic order understood as the existence of the structural conditions that enable all people to exercise their rights in freedom, with neither discrimination nor fear of punishment as a consequence thereof. In effect, for the Inter-American Court, generally speaking, public order cannot be invoked to suppress a right guaranteed in the American Convention, to denaturalize it or to deprive it of its real content. If this concept is invoked as a source of limitations to human rights, it must be interpreted in a way strictly attached to the fair demands of a democratic society that keeps in mind the equilibrium among the interests at stake and the need to preserve the object and goals of the American Convention.⁸⁴¹

61. Freedom of expression is not an absolute right.⁸⁴² Article 13 of the American Convention provides expressly—in paragraphs 2, 4 and 5—that it can be subject to certain limitations, and establishes the general framework of the conditions required for such limitations to be

⁸⁴¹ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 67.

⁸⁴² I/A Court H. R., *Case Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 3, 2008. Series C No. 177. para. 54; I/A Court H. R., *Case of Palamara-Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135. para. 79; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. para. 120; I/A Court H. R., *Case of Tristán Donoso Vs. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193. para. 110; I/A Court H. R., *Case of Ríos et al. Vs. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194. para. 106; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195. para. 117; IACHR, *Annual Report 1994*. OEA/Ser.LV.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

legitimate.⁸⁴³ The general rule is set forth in paragraph 2, according to which “[t]he exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals.” Paragraph 4 provides that “[n]otwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence;” and paragraph 5 establishes that “[a]ny propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.”

[A Hemispheric Agenda for the Defense of Freedom of Expression. OEA/Ser.L/V/II. CIDH/RELE/INF.4/09. 25 February 2009](#)

64. [...] the international standards that allow for the establishment of limits to free expression refer to the protection of the reputation of individual persons and not of beliefs or institutions that, in and of themselves, do not enjoy the right to reputation. For this reason, restrictions to freedom of expression must not be used to protect particular institutions or abstract notions, concepts or beliefs such as national symbols or cultural or religious ideas, unless the criticism in reality amounts to the advocacy of national, racial or religious hatred that incites violence.

⁸⁴³ I/A Court H. R., Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. para. 120; I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 35; IACHR. Report No. 11/96. Case 11.230. Merits. Francisco Martorell. Chile. May 3, 1996. para. 55; IACHR, Arguments before the InterAmerican Court of Human Rights in the Case of Ricardo Canese v. Paraguay, cited in I/A Court H. R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111. para. 72.a)

Freedom of Expression and the Internet. OEA/Ser.LV/II. CIDH/RELE/INF.11/13. 31 December 2013

135. [...] the anonymity of the sender would in no way protect those who disseminate child pornography, engage in prowar propaganda or the advocacy of hatred that constitutes the incitement of violence, or the direct and public incitement of genocide.⁸⁴⁴ This kind of speech is not protected by the American Convention, and anonymity cannot protect its issuers from the legal consequences established—in accordance with international human rights law - [...].

Standards for a Free, Open, and Inclusive Internet OEA/Ser.LV/II. CIDH/RELE/INF.17/17.15 March 2017

66. Nevertheless, instances of online discrimination against particularly vulnerable groups, including women,⁸⁴⁵ children, the LGBTI community, migrants, disabled persons, and others have also been documented. The States must take measures to foster equality and nondiscrimination both “online” and “offline,” prohibiting hate speech that incites violence, documenting instances of discrimination, and promoting tolerance through social programs, training, and education.⁸⁴⁶

72. Article 13 of the American Convention protects not only inoffensive or innocuous expressions but also those that “offend, shock or disturb the State or any other sector of the population,” in the understanding that they are necessary in a democratic, open, plural, and tolerant

⁸⁴⁴ 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.LV/II. Doc. 51. December 30, 2009. Para. 58 et seq.

⁸⁴⁵ United Nations. General Assembly. Resolution 68/181. Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: protecting women human rights defenders. UN Doc. A/RES/68/181. 30 January 2014, available at: <http://www.un.org/es/ga/68/resolutions.shtml>; IACHR. Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015. Chapter IV (Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas) OEA/Ser.LV/II. Doc. 48/15. 31 December 2015.

⁸⁴⁶ IACHR. Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015. Chapter IV (Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas) OEA/Ser.LV/II. Doc. 48/15. 31 December 2015.

society.⁸⁴⁷ According to the inter-American legal framework, the right to freedom of expression also encompasses and protects erroneous, mistaken, and false speech, without prejudice to the subsequent liability that may arise as a result.⁸⁴⁸ The States have the primary obligation to remain neutral with respect to the content of speech, ensuring that there are no people, groups, ideas, or means of expression that are excluded a priori from public discourse.⁸⁴⁹

75. The IACHR discourage the use of the criminal law to criminalize speech, and promotes the implementation of alternative measures such as the right of reply, and the imposition of subsequent liability in the form of proportionate civil penalties, especially cases involving public servants and specially protected speech. In those cases, “actual malice,” understood as the publication of erroneous or defamatory content with knowledge that it was false or inaccurate, must also be proven.⁸⁵⁰

79. In its report on Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, the Office of the Special Rapporteur underscored that article 13(5)

⁸⁴⁷ IACHR. Annual Report 2008. 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.LV/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 232. See also, Inter-American Court of Human Rights, Case of Herrera-Ulloa v. Costa Rica. Judgment of July 2, 2004, Series C No. 107. Para. 113; Inter-American Court of Human Rights. Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Judgment of February 5, 2001. Series C No. 73. Para. 69; Inter-American Court of Human Rights. Case Rios et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194. Para.105; Inter-American Court of Human Rights. Case of Perozo et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195. Para. 116; IACHR. Annual Report 1994. Chapter V (Report on the Compatibility of “Desacato” (Contempt) Laws with the American Convention on Human Rights) Title III, OEA/Ser. LV/II.88. doc. 9 rev. 17 February 1995.

⁸⁴⁸ IACHR. Annual Report 2008. 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.LV/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 228.

⁸⁴⁹ IACHR. Annual Report 2008. 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.LV/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 231.

⁸⁵⁰ IACHR. Annual Report 2008. 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.LV/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 261.

requires the States to enact laws punishing the advocacy of hatred that constitutes the incitement of violence or any other similar action.⁸⁵¹ It clearly distinguishes this type of speech from other expressions that do not strictly amount to the “incitement of violence” and therefore would fall not within the scope of that clause but rather under 13(2), which protects the reputation and rights of others.⁸⁵² According to the consistent case law of the Inter-American Court and the Commission, the States may impose pecuniary and non-pecuniary reparations or other alternative measures in cases involving expressions that do not constitute the incitement of violence, but the criminalization of this type of speech is not considered advisable.⁸⁵³

87. The Joint Declaration on Freedom of Expression and the Internet, states that forcing the blocking or suspension of entire websites, platforms, channels, IP addresses, domain name extensions, ports, network protocols, or any other kind of application, as well as measures intended to eliminate links, information and websites from the servers on which they are stored, all constitute restrictions that are prohibited and exceptionally admissible only strictly pursuant to the terms of article 13

⁸⁵¹ IACHR. Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015. Chapter IV (Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas) OEA/Ser.LV/II. Doc. 48/15. 31 December 2015. Para. 18.

⁸⁵² IACHR. Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015. Chapter IV (Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas) OEA/Ser.LV/II. Doc. 48/15. 31 December 2015. Para. 18.

⁸⁵³ IACHR. Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015. Chapter IV (Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas) OEA/Ser.LV/II. Doc. 48/15. 31 December 2015. Para. 14 to 19.

of the American Convention.⁸⁵⁴ The Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda indicates that these measures “can only be justified where it is provided by law and is necessary to protect a human right or other legitimate public interest, including in the sense of that it is proportionate, there are no less intrusive alternative measures which would protect the interest and it respects minimum due process guarantees.”⁸⁵⁵

121. The Office of the Special Rapporteur is of the opinion that only through a sustained and comprehensive policy that goes beyond legal measures and includes preventive and educational measures will it be possible to effectively combat hate speech and ensure the right of individuals to equality and nondiscrimination both on the Internet and offline.⁸⁵⁶ Measures like these “strike at the cultural root of systematic discrimination. As such, they can be valuable instruments in identifying

⁸⁵⁴ IACHR. Annual Report 2013. Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013 Chapter IV (Freedom of Expression and the Internet). OEA/Ser.LV/II.149. Doc. 50. 31 December 2013. Para. 84; United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. Joint Declaration on Freedom of Expression and the Internet. Point 3 (a) ; 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.LV/II. Doc. 51. December 30, 2009. Para. 149; IACHR. Annual Report 2010. Volume I. Chapter IV (Human Rights Developments in the Region). OEA/Ser.LV/II. Doc. 5, rev. 1. March 7, 2011. Para. 822 .

⁸⁵⁵ 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 Freedom of Expression and "Fake News", Disinformation and Propaganda. March 2017.

⁸⁵⁶ IACHR. Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015. Chapter IV (Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas) OEA/Ser.LV/II. Doc. 48/15. 31 December 2015. Para. 38; Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Conclusions and Recommendations. October 5, 2012. Para. 11; United Nations. General Assembly. Report of the United Nations Special Rapporteur for the promotion and protection of freedom of opinion and expression. UN Doc. A/67/357. September 7, 2012. Para. 33.

and refuting hate speech and encouraging the development of a society based on the principles of diversity, pluralism, and tolerance.”⁸⁵⁷

123. The blocking or filtering of content to combat hate speech are measures of last resort, and should only be used when necessary and proportionate to the compelling aim they pursue.⁸⁵⁸ The States that take such measures should also design them in such a way that they do not affect legitimate speech that warrants protection.⁸⁵⁹

125. Combating hate speech requires empowering users to identify and condemn it in public discourse without blocking legitimate speech, thus creating more inclusive forums of expression.

229. Without prejudice to this, States can take measures to fully identify a person during a judicial investigation, as long as doing so is within the framework of proportionality.⁸⁶⁰ For example, anonymity can be lifted when the speech is not protected by the right to freedom of expression—such as propaganda calling for war, hate speech that incites violence, incitements to genocide, child pornography—⁸⁶¹ or subject to subsequent liability in a way that is in keeping with the American Convention.

⁸⁵⁷ IACHR. Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015. Chapter IV (Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas) OEA/Ser.L/V/II. Doc. 48/15. 31 December 2015. Para. 36.

⁸⁵⁸ IACHR. Annual Report 2013. Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013 Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 85.

⁸⁵⁹ IACHR. Annual Report 2013. Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013 Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 85.

⁸⁶⁰ IACHR. Annual Report 2013. Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013 Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 135.

⁸⁶¹ IACHR. Annual Report 2013. Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013 Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 135.

229. [...] 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 Office of the Special Rapporteur for 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.⁸⁶²

260. [...] 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

⁸⁶² 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.LV/II. Doc. 51. December 30, 2009, paras. 58-59. IACHR, Annual Report 2014: Chapter V: Follow-up to the 2012 Jamaica Report, para. 238.

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.

261 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.

248. The Commission and its Office of the Special Rapporteur for 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.⁸⁶³ As previously stated by the Office of the Special Rapporteur on Freedom of Expression, 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.⁸⁶⁴

⁸⁶³ 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.

⁸⁶⁴ 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.LV/II. Doc. 5. March 4, 2011, para. 48.

254. [...] 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.⁸⁶⁵ [...]

259. 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.⁸⁶⁶ [...]

[Violence and Discrimination against Women and Girls. OEA/Ser.L/V/III. Doc. 233. 14 November 2019](#)

14. Analyze emerging forms of violence and discrimination, such as, inter alia, hate speech, on-line violence, street harassment, and obstetric violence. Analyze their impact at the regional and local level, proceed to address them conceptually, and, as necessary, adopt appropriate responses in terms of prevention, protection, punishment, and redress.

[Protest and Human Rights Report. OEA/Ser.L/V/III. CIDH/RELE/ INF.22/19. September 2019](#)

70. In the case of protest, the promotion of national, racial or religious hatred, advocacy of discrimination, hostility, or violence should not be understood exclusively in terms of speech. In addition to promoting a type of speech, protest involves a gathering of people that takes place

⁸⁶⁵ IACHR, Press Release No. 153A/14, 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. 153/14. December 17, 2014.

⁸⁶⁶ 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.

in a certain space and time, in direct interaction with others present. This involves a potential threat to physical or psychological integrity, or the exercise of rights by third parties depending on the chosen place, time, or manner of protest.

Inter-American Principles on Academic Freedom and University Autonomy. Adopted by the Commission during the 182nd Regular Session, held from December 6 to 17, 2021.

Academic freedom expressly excludes any propaganda for war or advocacy of hatred against any person or group of persons on any grounds, including national, ethnic, racial, religious, sex, gender, gender identity, sexual orientation, or any other grounds that constitute incitement to violence or any other unlawful action. Qualifying speech as pro-war propaganda or hate speech will require strict compliance with the threshold test contained in the United Nations Rabat Plan of Action.

Joint declarations

Joint Declaration On Publishing Confidential Information, Openness of National and International Public Bodies, Freedom of Expression and Cultural/Religious Tensions, and Impunity in Cases of Attacks Against Journalists (2006).

Freedom of Expression and Cultural/Religious Tensions

- The exercise of freedom of expression and a free and diverse media play a very important role in promoting tolerance, diffusing tensions and providing a forum for the peaceful resolution of differences. High profile instances of the media and others exacerbating social tensions tend to obscure this fact.
- Governments should refrain from introducing legislation which makes it an offence simply to exacerbate social tensions. Although it is legitimate to sanction advocacy that constitutes incitement to hatred, it is not legitimate to prohibit merely offensive speech. Most countries already have excessive or at least sufficient 'hate speech' legislation. In many countries, overbroad rules in this area are abused by the

powerful to limit non-traditional, dissenting, critical, or minority voices, or discussion about challenging social issues. Furthermore, resolution of tensions based on genuine cultural or religious differences cannot be achieved by suppressing the expression of differences but rather by debating them openly. Free speech is therefore a requirement for, and not an impediment to, tolerance.

- Professional and self-regulatory bodies have played an important role in fostering greater awareness about how to report on diversity and to address difficult and sometimes controversial subjects, including intercultural dialogue and contentious issues of a moral, artistic, religious or other nature. An enabling environment should be provided to facilitate the voluntary development of self-regulatory mechanisms such as press councils, professional ethical associations and media ombudspersons.

Tenth Anniversary Joint Declaration: Ten key challenges to freedom of expression in the next decade (2010).

Laws making it a crime to defame, insult, slander or libel someone or something, still in place in most countries (some ten countries have fully decriminalised defamation), represent another traditional threat to freedom of expression. While all criminal defamation laws are problematical, we are particularly concerned about the following features of these laws:

[...]

- f) Use of the notion of group defamation to penalise speech beyond the narrow scope of incitement to hatred.

[...]

Equal enjoyment of the right to freedom of expression remains elusive and historically disadvantaged groups – including women, minorities, refugees, indigenous peoples and sexual minorities – continue to struggle to have their voices heard and to access information of relevance to them. We are particularly concerned about:

a) Obstacles to the establishment of media by and for historically disadvantaged groups.

b) The misuse of hate speech laws to prevent historically disadvantaged groups from engaging in legitimate debate about their problems and concerns.

[...]

[Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation \(2008\)](#)

The concept of ‘defamation of religions’ does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own.

Restrictions on freedom of expression should be limited in scope to the protection of overriding individual rights and social interests, and should never be used to protect particular institutions, or abstract notions, concepts or beliefs, including religious ones.

Restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

[Joint Declaration on Universality and the Right to Freedom of Expression \(2014\)](#)

[...] freedom of expression, in concert with the right to protection from discrimination, which is a non-derogable human right, protects the rights of all individuals and groups in society to express viewpoints which differ, however strongly, from those of the majority, as long as these do not violate legitimate restrictions on free speech, for example those relating to incitement to hatred;

[Joint declaration on freedom of expression and responses to conflict situations \(2015\)](#)

a. All criminal restrictions on content – including those relating to hate speech, national security, public order and terrorism/extremism – should conform strictly to international standards, including by not providing special protection to officials and by not employing vague or unduly broad terms.

[Joint Declaration on Freedom of Expression and Countering Violent Extremism \(2016\).](#)

d. States should not restrict reporting on acts, threats or promotion of terrorism and other violent activities unless the reporting itself is intended to incite imminent violence, it is likely to incite such violence and there is a direct and immediate connection between the reporting and the likelihood or occurrence of such violence. States should also, in this context, respect the right of journalists not to reveal the identity of their confidential sources of information and to operate as independent observers rather than witnesses. Criticism of political, ideological or religious associations, or of ethnic or religious traditions and practices, should not be restricted unless it involves advocacy of hatred that constitutes incitement to hostility, violence and/or discrimination. States should review their laws and policies to ensure that any restrictions on freedom of expression which are claimed to be justified by reference to CVE/PVE robustly meet these standards.

[Joint Declaration on media independence and diversity in the digital age \(2018\).](#)

a. Restrictions on what may be disseminated through the media should be imposed only in accordance with the test for such restrictions under international law, namely that they be provided for by law, serve one of the legitimate interests recognised under international law, and be necessary and proportionate to protect that interest.

f. Restrictions on freedom of expression which rely on notions such as "national security", the "fight against terrorism", "extremism" or "incitement to hatred" should be defined clearly and narrowly and be subject to judicial oversight, so as to limit the discretion of officials when applying those rules and to respect the standards set out in sub-

paragraph (a), while inherently vague notions, such as "information security" and "cultural security", should not be used as a basis for restricting freedom of expression.

[Joint Declaration on politicians and public officials and freedom of expression \(2021\)](#)

i. Political parties should adopt and enforce measures, such as codes of conduct, which set minimum standards of behaviour for their officials and candidates for elected office, including to address speech that promotes intolerance, discrimination or hatred, or constitutes disinformation which is designed to limit freedom of expression or other human rights.

ii. Political parties should consider introducing or participating in cross-party initiatives aimed at countering intolerance, discrimination and dis/misinformation, and promoting intercultural understanding, social inclusion and respect for diversity.

iii. Politicians and public officials should not make statements that are likely to promote intolerance, discrimination or dis/misinformation and should, instead, take advantage of their leadership positions to counter these social harms and to promote intercultural understanding and respect for diversity.

[Joint Declaration on Freedom of Expression and Gender Justice \(2022\)](#)

b. Sex and gender should be recognized as protected characteristics for the prohibition of advocacy of hatred that constitutes incitement to discrimination, hostility or violence under Article 20(2) of the ICCPR, and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. Misogyny should be prohibited if it meets the threshold established by Articles 19(3) and 20(2) of the ICCPR.

[Joint Statement on Freedom of the Media and Democracy by UN, OSCE, OAS-IACHR, ACHPR and ACHPR Rapporteurs \(2023\)](#)

h) The media can play a key role in promoting human rights, diversity and equality, including gender justice in society, as well as enhancing social cohesion and peacebuilding. At a time when racial, ethnic, religious, and gender discrimination is accelerated by digital technologies, media efforts to address discrimination are even more important. Through reporting on women's and various minority perspectives, covering discrimination and violence against women, minorities, or historically marginalized communities, debunking harmful stereotypes, tackling hate speech and dismantling prejudices, the media can contribute to combating discrimination, exclusion, inequality and injustice. In order to carry out this role effectively, media outlets themselves should be more inclusive and representative of the societies they serve.

i) Manipulating public opinion through disinformation, misinformation, and hate speech in or by the media erodes social cohesion and democratic governance, and can threaten national, regional and global peace and security. Weaponization of information for spreading hate speech and propaganda, especially propaganda for war, has no place in democracy. On the contrary, free and independent media can play an important role as fact checkers against disinformation and propaganda and so help to repairing declining trust in democratic institutions.

j) Specific fact-checking initiatives within the media for ex post verification of public interest claims can play a key role in protecting democratic debate and addressing discrimination and/or hate speech.

Resolutions

Resolution 1/2020. Pandemic and Human Rights in the Americas. Adopted by the IACHR on April 10, 2020.

22. Ensure that no emergency measure is, per se or as the result of its effects, discriminatory or counter to international law. A state of emergency must not be used to produce propaganda in favor of war, or serve as an apologia for national, racial or religious hatred, inciting to discrimination, hostility or violence.

Resolution 2/21. Protection of Haitian Persons in Human Mobility: Inter-American Solidarity. Adopted by the IACHR on October 24, 2021.

37. States should redouble their efforts to prevent xenophobia, discrimination, and related forms of intolerance based on ethnic-racial origin, gender, sexual orientation, disability, language, socioeconomic status, or situation of human mobility.

38. The foregoing duty includes the obligation to refrain from and avoid any action that promotes direct or indirect discrimination,, or that is permissive of violence against persons in the context of human mobility, such as hate speech or the dissemination of stereotyped images or narratives related to Haitian national origin and Afro-descendent ethnic-racial origin.

D. CIVIC SPACE: ASSOCIATION FOR THE DEFENSE OF HUMAN RIGHTS, TRANSPARENCY AND ACCOUNTABILITY

125. The Commission has recognized that the concept of civic space refers to the actual circumstances that make citizen participation in a society possible at a given moment and time. It is constituted by those legal, political, administrative, economic, and cultural factors that determine the form and operational, physical and digital, modalities of the setting in which the different actors of civil society effectively participate in the life of their community. On that regard, the determination regarding the opening or closing of civic space in a State depends on the legal conditions and factual circumstances that favor or restrict the exercise of those rights identified as enabling individuals and groups to play a meaningful role in their societies and contribute to decision-making processes in matters that affect them, in particular: freedom of expression, the right of assembly, freedom of association, and the right to participate in the conduct of public affairs.⁸⁶⁷

126. The IACHR recalls that freedom of association, recognized in the American Convention on Human Rights and in the American Declaration, is a fundamental right linked to any democratic system. This right is characterized by the fact that it guarantees that individuals may create and participate in entities or organizations with the objective of acting collectively in pursuit of the most diverse purposes.

⁸⁶⁷ Closure of civic space in Nicaragua. OAS/Ser.LV/II. Doc. 212/23 September 23 of 2023, para. 42 and 43.

Therefore, any restriction on the exercise of this right must be provided for by law, pursue a legitimate aim and, in short, be necessary and proportional in any democratic society.⁸⁶⁸

127. The Commission has also pointed out that it is through the exercise of the right of assembly that people can exchange opinions, express their positions on human rights and agree on plans of action, either in assemblies or in public demonstrations. Therefore, the defense of human rights, as a legitimate issue of interest to all people and which seeks the participation of all of society and the response of state authorities, finds in the exercise of this right a fundamental channel for its activities. Likewise, the right of assembly is essential for the expression of political and social criticism of the activities of the authorities, so that the defense of human rights can hardly be exercised in contexts where the right to peaceful assembly is restricted. Furthermore, the exercise of the right of assembly is basic to the exercise of other rights such as freedom of expression and the right of association.⁸⁶⁹

128. For the purposes of the compendium, the following is a selection of standards regarding the obligation to protect the right to association for the promotion and defense of human rights, as well as the obligation to ensure transparency and accountability in a democratic state under the rule of law, and as necessary conditions for maintaining the openness of civic space.

1. Association for the promotion and defense of human rights and democracy

129. The Commission has defined human rights defenders as those who promote or seek in any way the realization of human rights and fundamental freedoms recognized at the national or international level. The criterion that identifies who should be considered a human rights defender is the activity carried out by the person and not other factors such as receiving remuneration for their work, or whether or not they belong to a civil organization. This concept is also applicable to justice operators as defenders of access to justice for thousands of victims of human

⁸⁶⁸ IACHR. Press Release No. 088/22. [*IACHR rejects the cancellation of 25 legal status of organizations, which deepens the closure of democratic spaces in Nicaragua*](#). April 26, 2022

⁸⁶⁹ IACHR. [*Report on the Situation of Human Rights Defenders in the Americas*](#). OEA/Ser.LV/II.124. Doc. 5 rev.1, March 7, 2006, para. 52.

rights violations,⁸⁷⁰ since the IACHR has recognized that the defense of human rights is exercised from different sectors of civil society, and in some cases, from state institutions.⁸⁷¹

130. The defense of human rights in the region is still characterized by a hostile climate, being considered the deadliest region in the world for those who defend human rights.⁸⁷² Consequently, both the Commission and the OAS General Assembly have pronounced on several occasions on the need to protect human rights defenders in the performance of their duties.⁸⁷³

131. The Commission, through all its competencies, has pronounced extensively on the obligations of States to protect the right to association for the promotion and defense of human rights. Therefore, for the purposes of this compendium, a brief selection is made of standards on the subject that are considered illustrative of the right to defend rights, the State's obligations to protect defenders from violence and criminalization, the limits not permitted by international law that hinder the operation of civil society and non-governmental organizations, and the necessary strengthening of national human rights institutions.

A. The work of human rights defenders and the right to defend rights

132. In the exercise of its mandate, the Commission has identified the protection of the work of human rights defenders as one of the issues of greatest concern and monitoring. Therefore, considering the importance of the work of human rights defenders for the consolidation of democracy and the rule of law, both nationally and internationally, the Commission has defined the right to defend human rights as the possibility of freely and effectively promoting and defending rights and freedoms

⁸⁷⁰ IACHR. *Criminalization of the work of human rights defenders*. OEA/Ser.LV/II.. Doc. 49/15, 31 December 2015, para. 19.

⁸⁷¹ IACHR. *Grave human rights violations in the context of the social protests in Nicaragua*. OEA/Ser.LV/II. Doc. 86, 21 June 2018, para. 260.

⁸⁷² IACHR. *Pandemic and Human Rights*. OEA/Ser.LV/II. Doc. 396, September 9, 2022, para. 114.

⁸⁷³ IACHR. *Second Report on the Situation of Human Rights in Peru* OEA/Ser.LV/II.106. Doc. 59 rev., June 2, 2000, para. 133. *Criminalization of the work of human rights defenders*. OEA/Ser.LV/II.. Doc. 49/15, 31 December 2015, para. 25.

whose acceptance is undisputed, as well as those new rights whose formulation is still under discussion.⁸⁷⁴

133. The following are pronouncements of the IACHR that expand the scope of the right to defend rights, and that refer to special protection obligations for defenders who are in a particularly vulnerable situation.

Thematic reports

Report on the Situation of Human Rights Defenders in the Americas. OEA/Ser.L/V/II.124. Doc. 5 rev. 1. 7 March 2006.

36. The observance of human rights is a matter of universal concern, accordingly, the right to defend those rights may not be subject to geographical restrictions. The states must guarantee that the persons under their jurisdictions may exercise this right domestically and internationally. In addition, the state must guarantee that persons are able to promote and protect any or all human rights, including both those whose acceptance is unquestioned, and new rights or components of rights whose formulation is still a matter of debate.

37. The Commission has indicated that the defense of human rights and the strengthening of democracy require, among other things, that the citizens have broad knowledge of the work of the various organs of the state, such as budgetary aspects, the extent of attainment of the objectives proposed and the plans and policies of the state to improve society's living conditions.⁸⁷⁵ [...] The defense of human rights involves the ability to make criticisms and proposals to improve the functioning of the state and to seek to call attention to any obstacle or impediment to the promotion and attainment of any human rights.⁸⁷⁶

38. As a corollary, those persons individually or collectively have the right to protest the rules, policies, and practices of public officials and private actors who violate human rights. [...]. In addition, those persons

⁸⁷⁴ IACHR. *Pandemic and Human Rights*. OEA/Ser.L/V/II. Doc. 396, September 9, 2022, para. 107.

⁸⁷⁵ IACHR, Annual Report 2001. OEA/Ser.L/V/II.114, doc. 5 rev. 1, April 16, 2002, Vol. II, Chapter III.

⁸⁷⁶ Article 8.

have the right to seek the effective protection of domestic and international provisions to protect human rights and oppose any type of activity or action that causes human rights violations.⁸⁷⁷ This right involves the possibility of going before international organs that protect human rights and monitor international treaties, without any type of obstacle or reprisal.

39. In addition, individuals and groups have the right to promote the protection and attainment of human rights through actions geared to society. As one component of this principle, persons have the right to publish, make known, and disseminate publicly to third persons their opinions and knowledge with respect to human rights, and to debate and develop new principles and ideas in this respect, and promote their acceptance. Accordingly, human rights defenders have the right to verify by themselves the existence of abuses, to meet with victims, witnesses, and experts (such as lawyers or forensic physicians), to speak with the authorities, study documentation, and carry out any type of investigation for the purpose of obtaining objective information. Similarly, individuals and groups have the right to offer and provide professional legal counsel or other advice and assistance relevant to the defense of the human rights and fundamental freedoms of third persons.⁸⁷⁸ In addition, this right includes the possibility of engaging in activities of representation, accompaniment, self-management, and search for recognition of communities and individuals who have been victims of human rights violations and other acts of discrimination and exclusion.

40. In order to carry out these activities, human rights defenders have the right to seek and obtain economic resources to finance their work. The states must guarantee the exercise of this right in the broadest possible manner, and promote it, for example, through tax exemptions to organizations dedicated to protecting human rights. Fundraising activities to finance the work of human rights defenders, such as the

⁸⁷⁷ Articles 9 and 12.

⁸⁷⁸ See [United Nations Declaration on Defenders, Article 9](#). See also, [Basic Principles on the Role of Lawyers](#), especially principle 16.

production and sale of books, reports, and newspapers on human rights, collecting professional fees, donations, and receiving legacies from individuals and organizations, and the contributions of foreign governmental and non-governmental organizations, among others, should be considered legitimate.

[Criminalization of the Work of Human Rights Defenders. OEA/Ser.L/V/II. Doc. 49/15. 31 December 2015](#)

91. It is also essential that States recognize publicly and unequivocally the importance of the role played by human rights defenders to guarantee democracy and the rule of law in society, and that the States' commitment be reflected in all levels of government, whether at the municipal, state or national level and in all areas of power - executive, legislative or judicial - as well as through education and outreach activities aimed at all State agents, society in general, and the media to raise awareness about the importance and legitimacy of the work of human rights defenders and their organizations.⁸⁷⁹

226. [...] Launching recognition campaigns is a particularly important action to take adopt within the communities where human rights defenders work to eliminate the stigma and reduce the risk that weighs on them as a result of the processes of criminalization to which they have been subjected.

[Pandemic and Human Rights OEA/Ser.L/V/II. Doc. 396. September 9, 2022.](#)

108. For its part, the Inter-American Court of Human Rights has pointed out that the right to defend human rights and the correlative duty of States to protect it are related to the enjoyment of several rights contained in the American Declaration of the Rights and Duties of Man and in the American Convention on Human Rights, such as life, personal integrity, freedom of expression, association, judicial

⁸⁷⁹ IA 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, Recommendation No. 6.

guarantees and judicial protection, which, as a whole, constitute the vehicle for the realization of this right, and allow the free exercise of activities for the defense and promotion of human rights⁸⁸⁰.

Reports on Merits

Report No. 45/17. Case 10.455. Merits. Valentín Basto Calcerón and others. Colombia. 25 May 2017

166. Specifically, the Inter-American Court has mentioned, among the actions that should be taken by the States to guarantee the activities in defense of human rights, the duty to provide “the necessary means for human rights defenders to conduct their activities freely; to protect them when they are subject to threats in order to ward off any attempt on their life or safety; to refrain from placing restrictions that would hinder the performance of their work, and to conduct serious and effective investigations of any violations against them, thus preventing impunity.”⁸⁸¹ [...]

Country reports

Report on the Situation of Human Rights in Venezuela. OEA/Ser.L/V/II.118. Doc. 4 rev. 1. 24 October 2003.

226. The OAS member states have acknowledged the important role that human rights defenders play in fostering greater awareness and observance of basic rights and, consequently, in safeguarding democracy and the values of the inter-American system.

230. The Commission must note that human rights defenders play a key role in the process of ensuring the rule of law. The actions of defenders – in protecting individuals and groups who fall victim to human rights violations, in publicly denouncing injustices that affect large sectors of society, in the necessary civic control they exert over

⁸⁸⁰ IA Court H.R., IA Court H.R. Case of Escaleras Mejía et al. v. Honduras. Judgment of September 26, 2018. Series C No. 361.

⁸⁸¹ IA Court H.R., Case of Kawas Fernández v. Honduras. Merits, Reparations, and Costs. Judgment of April 3, 2009. Series C No. 196, para. 145; IA Court H.R., Case of Nogueira de Carvalho and one other Judgment of November 28, 2006. Series C No. 161, para. 77.

public officials and democratic institutions, and in other activities – make them irreplaceable players in constructing a solid and lasting democratic society.

Situation of Human Rights in Mexico. OEA/Ser.L/V/II. Doc. 44/15. 31 December 2015

367. The IACHR has noted that human rights defenders make a pillar that is essential for the strengthening and consolidation of democracies, since the ends of their work concerns society as a whole and is for its benefit. Therefore, when a person is not allowed to defend human rights, the rest of society is affected. The Commission also recalls that the work of defenders is essential for building a solid, long lasting democratic society. They are protagonists in the process to fully obtain the Rule of Law and strengthening of democracy.

Fifth Report on the Situation of Human Rights in Guatemala. OEA/Ser.L/V/II.111. Doc. 21 rev. 6 April 2001.

24. In light of the importance of this work and the need to protect those who carry it out, the Commission has repeatedly emphasized the need for full implementation of the collective commitment expressed by the member States in the General Assembly Resolution concerning “Human Rights Defenders in the Americas’ Support for the Individuals, Groups, and Organizations of Civil Society Working to promote and Protect Human Rights in the Americas.”⁸⁸² This resolution sets forth the undertaking of the States of the hemisphere to take the measures necessary to protect the lives, personal security, and freedom of expression of those who work to ensure fundamental rights. Within the UN framework, the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms is

⁸⁸² AG/RES. 1671 (XXIX-099); see *Annual Report of the IACHR 1999*, OEA/Ser.LV/II.106, Doc. 3 rev., Apr. 13, 2000, paras. 11-12; see also, *Report on the Situation of Human Rights in Colombia*, OEA/Ser.LV/II.102, Doc. 9 rev. 1, 26 Feb. 1999, ch. VII.

a further manifestation of the commitment of States to ensure the protection of human rights defenders in the discharge of that work.⁸⁸³

Situation of Human Rights in Honduras. OEA/Ser.L/V/II.Doc. 42/15. 31 December 2015

65. The State must publicly acknowledge that the exercise of the promotion and defense of human rights is a legitimate action and that, in exercising these actions, human rights defenders do not act against state institutions or the State but, on the contrary, promote the strengthening of the rule of law and the enlargement of the rights and guarantees of all people. All state authorities and local officials should be aware of the principles governing the activities of defenders and their protection, as well as guidelines for compliance.

Situation of Human Rights in Cuba. OEA/Ser.L/V/II. Doc. 2. 3 February 2020

326. However, the IACHR notes with concern that LGBTI people and human rights defenders working on issues of sexual orientation, gender identity and/or expression, and sexual characteristics still suffer violence, discrimination, restrictions on their rights of assembly and association, and curtailment of their freedom of expression and dissemination of thought. It also notes the efforts of groups that often have a negative impact on the design of laws and policies aimed at guaranteeing the rights of such persons. In this regard, the Commission recalls that under the principles of equality and non-discrimination inherent to democratic societies, States have an obligation to advance protections and guarantees for the rights of LGBTI persons and other minorities, even if it goes against the sentiments and opinions of the majority of society.

⁸⁸³ General Assembly Resolution 53/144, ARES/53/144, 8 March 1999.

Annual Reports

Annual Report of the Inter-American Commission on Human Rights, 2021, Chapter IV.B Nicaragua

132. The IACHR recalls that acts against women defenders exerts a differentiated impact, in view of the degree of their vulnerability because of the conditions of historical discrimination they have sustained and the impact of gender stereotypes on their role in society.⁸⁸⁴ The Commission has also noted that, in addition to the multiple vulnerabilities they encounter because of their gender and other intersectional factors, women defenders are exposed to an incremental risk of suffering from acts of violence, threats, harassment, assaults, and other violations of the right to live a life without violence, especially in militarized contexts and countries immersed in conflict.⁸⁸⁵ Regarding this, the IACHR has been emphatic about urging the state to fulfill its obligations to eliminate structural risk factors encountered by women, as well as its duty to protect and ensure reinforced due diligence when investigating incidents of violence against women journalists and human rights defenders to guarantee their human rights, as well as their activities, which are key for the development of democracy and the rule of law.⁸⁸⁶

Resolutions

Resolution No. 3/2021. Climate Emergency: Scope and Inter-American Human Rights Obligations. Adopted by the IACHR on December 31, 2021.

29. States must recognize the centrality of the leadership of children, adolescents, and young people, as well as their movements, in the

⁸⁸⁴ IACHR. Informe sobre la Situación de las Defensoras y Defensores de Derechos Humanos en las Américas [Report on the Situation of Human Rights Defenders in the Americas], OEA/Ser.LV/II.124. Doc. 5 rev.1, March 7, 2006, para. 46.

⁸⁸⁵ IACHR. Violencia y discriminación contra mujeres, niñas y adolescentes: Buenas prácticas y desafíos en América Latina y en el Caribe [Violence and Discrimination against Women and Girls: Best Practices and Challenges in Latin America and the Caribbean], OEA/Ser.LV/II. Doc. 233, November 14, 2019, para. 127.

⁸⁸⁶ IACHR. Towards Effective Integral Protection Policies for Human Rights Defenders. OEA/Ser.LV/II. Doc. 207/17. December 29, 2017.

fight against climate change. States must generate the necessary protection mechanisms to guarantee that children and adolescents can exercise their activism and defense of environmental rights, also promoting their inclusion and participation in decision-making spaces.

30. States must also recognize the essential role that women play as environmental, land and territory defenders in the organization and leadership of processes to defend the healthy environment on the continent. It is the responsibility of States to ensure the effective participation of women environmental defenders and their movements in decision-making processes related to combating climate change, including measures taken for a just transition. In this regard, States must implement public policies and concrete measures that, together with recognizing their contribution, protect them against aggression, attacks and other forms of harassment or gender-based violence in these contexts.

Resolution No. 1/2020. Pandemic and Human Rights in the Americas. Adopted by the IACHR on April 10, 2020.

By virtue of the foregoing, and in the exercise of the functions conferred on it by Article 106 of the Charter of the Organization of American States, and in the application of Article 41.b of the American Convention on Human Rights and Article 18.b of its Statute, the Inter-American Commission on Human Rights offers the following recommendations to the governments of the member states:

[...]

29. Refrain from restricting the work and movement of journalists and human rights defenders, who perform a key function during a public health emergency by reporting on and monitoring the actions of the State. States should not include communicators in restrictions on movement of people, and are obliged to allow all media, regardless of their editorial policy, to have access to official press conferences, except for necessary and proportionate measures to protect health. At the same time, States must honor the confidentiality of sources of information, and should assess the particular risks faced by journalists

and communications workers, and provide adequate bio-protection measures, and, give them priority access to testing of their own health.

B. Violence, criminalization and improper use of criminal law against human rights defenders

134. In recognizing the right to defend rights, the IACHR has emphasized that States have the duty to facilitate the necessary means for human rights defenders to freely carry out their activities; to protect them when they are subject to threats; to refrain from imposing obstacles that hinder their work; and to seriously and effectively investigate violations committed against them by combating impunity.⁸⁸⁷ In this sense, the following standards provide an overview of the general obligations regarding the duty to prevent and protect human rights defenders from acts of violence and criminalization, in their various manifestations.

Precautionary Measures

Resolution No. 8/16. MC 112-16 - Members of COPINH, family members of Berta Cáceres, Honduras, March 5, 2016.

14. The Inter-American Commission wishes to reiterate that attacks on the lives of human rights defenders have a multiplying effect that goes beyond affecting the person of the defender, because when the aggression is committed in reprisal for his or her activity, it produces a chilling effect that extends to those who defend similar causes.⁸⁸⁸ The IACHR considers it important to recall the importance of the work of human rights defenders in the region, placing special emphasis on acts of violence and other attacks against human rights defenders that not only affect the guarantees of every human being, but also

⁸⁸⁷ IACHR. Report on Business and Human Rights: Inter-American Standards. OEA/Ser.LV/II IACHR/REDESCAMNF.1/19, November 1, 2019, para. 47.

⁸⁸⁸ IACHR, "Report on the human rights situation in Honduras," December 31, 2015. Available at: <http://www.oas.org/es/cidh/informes/pdfs/Honduras-es-2015.pdf>

undermine the fundamental role they play in civil society and leave all those for whom they work defenseless.⁸⁸⁹

[Resolution MC 1191-19 - Josefa Esterlina Meza, Tamara Patricia Morazán Martínez and Lizeth de los Ángeles Dávila Orozco, Nicaragua, September 2, 2020.](#)

36. The Commission considers it important to recall that when an authority becomes aware of a situation of risk to the life of a person, it is up to that authority to "identify or assess whether the person subject to threats and harassment requires protection or to refer the matter to the competent authority to do so," which must "provide the person at risk with timely information on the measures available".⁸⁹⁰ The Commission has highlighted the importance of national mechanisms or programs for the protection of human rights defenders, in view of the fact that they can favor a timely and specialized intervention, taking into account all aspects, both contextual and specific, when analyzing the risk situation of a human rights defender.⁸⁹¹

Country reports

[Situation of Human Rights in Honduras. OEA/Ser.L/V/II. Doc. 146. 27 August 2019](#)

155. The Commission recalls that the State [...] has a duty to investigate attacks against human rights defenders, which implies serious, independent and transparent investigations to identify intellectual and material authors prosecute them and guarantee adequate reparation.⁸⁹² At the same time, States have an obligation to

⁸⁸⁹ IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II. Doc 66, December 31, 2011.

⁸⁹⁰ IACHR Court. Case of Luna López v. Honduras. Merits, Reparations and Costs. Judgment of October 10, 2013. Series C. No. 269, para. 127. Available in: http://www.corteidh.or.cr/docs/casos/articulos/seriec_269_esp.pdf

⁸⁹¹ IACHR, "Second Report on the Situation of Human Rights Defenders in the Americas," OEA/Ser.L/V/II, Doc. 66, December 31, 2011, para. 484.

⁸⁹² IACHR, [Criminalization of Human Rights Defenders](#), OEA/Ser.L/V/II, Doc. 49/15, December 31, 2015, paras. 266 and following.

combat impunity in general, and particularly when dealing with human rights defenders, since impunity in this context has a negative impact on other human rights defenders because of the fear it generates, which could directly diminish the possibilities for defenders to exercise their right to defend human rights through complaints.⁸⁹³

[Situation of Human Rights in Guatemala. OEA/Ser.L/V/II. Doc. 208/17. 31 December 2017](#)

164. The IACHR finds that stigmatizing statements against defenders can eventually undermine the right to personal integrity, the right to honor and dignity and the principle of the presumption of innocence. In this regard, the Commission has held that when authorities give statements or issue communiqués publically berating a defender for acts that have not been proven in a court of law, it is an assault on his or her dignity and honor, in as much as his or her work is delegitimized in the eyes of society, thereby affecting his or her human rights defense endeavors. Moreover, the Commission has noted that the repetition of stigmatizing statements can contribute to stoking a climate of hostility and intolerance by different segments of the population, possibly leading to adverse effects on the lives and personal integrity of the defender, by making him or her more vulnerable, because public officials or certain segments of society could construe such statements as instructions, instigation, authorization or support, for the commission of acts against the defender’s life, personal security, or violations of other rights.⁸⁹⁴

165. The IACHR finds that the State must provide defenders with an adequate remedy when they are the targets of stigmatizing statements that could affect their reputation, jeopardize their personal integrity, or give rise to or facilitate their criminalization.

⁸⁹³ IACHR, *Criminalization of Human Rights Defenders*, OEA/Ser.LV/II, Doc. 49/15, December 31, 2015, para. 229. VA Court H.R. Case of Luna López v. Honduras. Judgment of October 10, 2013. Series C No. 269, para. 111.

⁸⁹⁴ IACHR, *Criminalización de la labor de las defensoras y los defensores de derechos humanos*, [‘Criminalization of the work of human rights defenders’], OEA/Ser.LV/II, Doc. 49/15, December 31, 2015, paras. 84-85.

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Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas. OAS/Ser.L/V/II.rev.2. Doc. 36. 12 November 2015

356. The IACHR has also affirmed that States must not tolerate any attempt by public officials to question the legitimacy of the work of human rights defenders and their organizations.⁸⁹⁵ Public officers must refrain from making statements that stigmatize human rights defenders or that suggest that human rights organizations are acting illegally or improperly, simply due to the fact that they work in the promotion and protection of human rights.⁸⁹⁶ Governments should give precise instructions to their officials in this respect and should impose disciplinary sanctions on those who do not comply with such instructions.⁸⁹⁷ Finally, States are called on to guarantee the security of human rights defenders who are especially vulnerable by adopting specific measures of protection based on the activities of those defenders and the risks they routinely encounter.⁸⁹⁸

Criminalization of the Work of Human Rights Defenders. OEA/Ser.L/V/II. Doc. 49/15. 31 December 2015

12. The criminalization of human rights defenders through the misuse of criminal law involves the manipulation of the punitive power of the State by State and non-State actors in order to control, punish, or prevent the exercise of the right to defend human rights. This takes place, for example, through the filing of baseless allegations or complaints based on criminal offenses that do not conform with the principle of legality or criminal offenses that do not meet Inter-

⁸⁹⁵ IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, 2011, p. 232, recommendation No. 5.

⁸⁹⁶ IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, 2011, p. 232, Recommendation No. 5.

⁸⁹⁷ IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, 2011, p. 232, recommendation No. 5.

⁸⁹⁸ IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, 2011, p. 233, recommendation No. 11.

American standards *vis-à-vis* the behaviors they intend to punish. It can also be displayed in the subjection of defenders to extended criminal proceedings and in the use of preventive measures with no procedural ends. The manipulation of criminal law to the detriment of defenders has become an obstacle that merits priority attention from the States, as it intimidates and paralyzes the work of human rights defenders, since their time, resources (financial and otherwise), and energy have to be devoted to their own defense.⁸⁹⁹

194. [...] the Commission considers that States must cease the use of arbitrary detentions as a means of punishment or retaliation against human rights defenders.

[Business and Human Rights: Inter-American Standards. OEA/Ser.L/V/II. IACHR/REDESCA/INF.1/19. November 1, 2019](#)

47. [...] the IACHR and its REDESCA emphasize the need to take into account the standards related to the protection of the right to defend human rights in the field of business and human rights, in particular to identify the possible patterns of attacks, aggressions and obstacles that defenders, community leaders, indigenous peoples, Afro-descendant communities, peasant populations, and justice operators face from businesses or economic actors, in order to prevent and, where appropriate, punish them. The State must establish a clear legal framework that provides for sanctions against businesses that are involved in criminalization, stigmatization, abuses, and violence against those who defend human rights, including private security companies and contractors who act on behalf of the company involved.

[Pandemic and Human Rights. OEA/Ser.L/V/II. Doc. 396. September 9, 2022.](#)

113. The authorities should not use the restrictions imposed during the pandemic to suppress or limit the flow of information or use the crisis situation as a pretext to repress human rights defenders. In this regard,

⁸⁹⁹ IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OASer.LV/II.Doc.66, December 31, 2011, para. 76.

States should recognize that the defense of human rights is an essential activity during times of emergency and ensure that human rights defenders can carry out their work without reprisals, intimidation or threats⁹⁰⁰.

C. Limitations on CSOs and NGOs

135. The Commission has called attention to the importance of the concept of civil society being understood democratically, without unreasonable exclusions or unacceptable discrimination [...] ⁹⁰¹. Therefore, in those cases in which the IACHR has noted the obstruction of the work carried out by civil society organizations, universities and other associations with academic and social purposes, it has stated that the legitimate work of defending human rights is restricted, in addition to leaving the population exposed to greater vulnerability and affecting, among others, the labor rights of people working in the affected entities⁹⁰². In this regard, the following is a summary of IACHR standards on discriminatory practices that limit the actions of CSOs and NGOs and undermine their positive contribution to the defense of human rights.

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Criminalization of Human Rights Defenders. OEA/Ser.L/V/II. Doc. 49/15. 31 December 2015

132. Human rights defenders and organizations defending and promoting human rights should have the right to seek and secure funding and resources from domestic, foreign, or international entities, including individuals, businesses, civil society organizations,

⁹⁰⁰ IACHR Court. Case of Defensor de Derechos Humanos et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 283. para. 142

⁹⁰¹ IACHR. *Report on the Situation of Human Rights in Venezuela*. OEA/Ser.L/V/II.118. Doc. 4 rev. 1. 24 October 2003, para. 223.

⁹⁰² IACHR. *Press Release No. 088/22. IACHR rejects the cancellation of 25 organizations' legal status, which deepens the closure of democratic spaces in Nicaragua*. April 26, 2022 and IACHR. *Press Release No. RD026/22. REDESCA condemns the cancellation of the legal status of 26 universities and associations for academic and social purposes by the National Assembly of Nicaragua*. February 10, 2022

governments, and international organizations.⁹⁰³ This right has been recognized internationally as a positive development, and is independent of whether the organization is registered.⁹⁰⁴

137. The Commission considers that one of the State's duties stemming from the freedom of association is to promote and facilitate the access of human rights organizations to financial cooperation funds, both national and foreign, as well as to refrain from restricting their means of financing.⁹⁰⁵ Additionally, States must allow and facilitate human rights organizations' access to foreign funds in the context of international cooperation, in transparent conditions that take into account the leading role that human rights defenders have in the full achievement of the rule of law and strengthening of democracy.⁹⁰⁶

138. [...] the criminalization of human rights defenders based on receiving foreign funding is prohibited by international law [...].

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Annual Report of the Inter-American Commission on Human Rights, 2022, Chapter IV.B Nicaragua

143. The IACHR recalls that freedom of association, as recognized in the American Convention on Human Rights and the American

⁹⁰³ UN General Assembly, Human Rights Council of the United Nations AHRC/2027, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association, May 21, 2012, para.68.

⁹⁰⁴ Article 6.f of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted in 1981 by the United Nations General Assembly states that "the right to freedom of thought, conscience, religion or belief shall include, in particular [...] the [freedom] to solicit and receive voluntary financial and other contributions from individuals and institutions." In turn, Article 13 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to promote and protect human rights and universally recognized fundamental freedoms, adopted by the United Nations General Assembly, provides "Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration" . See United Nations General Assembly, A/RES/53/144, March 8, 1999.

⁹⁰⁵ IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/VII.Doc. 66, December 31, 2011, para. 179.

⁹⁰⁶ IACHR, Press Release 118/10, *IACHR Concerned over International Cooperation Initiative in Venezuela*, Washington, DC, December 3, 2010.

Declaration, is a fundamental right linked to every democratic system. This right involves ensuring that people create and participate in entities or organizations for the purpose of acting collectively and in the pursuit of most diverse ends. Therefore, any restriction on the exercise of this right must be provided for by law, pursue a legitimate purpose and, in short, be suitable, necessary, and proportional in any democratic society. In this regard, the forced closure of human rights defending organizations, in a context of criminalization for doing their job and the application of laws that are contrary to the ACHR, constitutes a gross violation of this right.⁹⁰⁷

137. Likewise, the IACHR noted that the government imposed arbitrary or illusory procedures and requirements that hinder access to legal recourse, paperwork or even compliance with newly approved rules, all of which relegated organizations to a status of de facto administrative closure. In many instances, the forced closure of organizations has also been carried out through the use of force and confiscation or destruction of assets and properties.⁹⁰⁸

138. As was noted by the IACHR, the forced closure of defender organizations, in addition to curtailing the work of human rights defense, has dire effects on the citizenry, making it more vulnerable in terms of protection and defense of its rights, in a context where the branches of government are aligned with the executive branch and, consequently, there are no limits on the exercise of power or checks

⁹⁰⁷ IACHR, Press Release No. 88/22 - IACHR Rejects the Revocation of the Legal Status of 25 Additional Organizations, Deepening the Shutdown of Democratic Platforms in Nicaragua. Washington, D.C., April 26, 2022.

⁹⁰⁸ IACHR, Press release No. RD26/22 - REDESCA condemns the cancellation of the status of 26 universities and associations for academic and social purposes by the National Assembly of Nicaragua Washington, D.C., February 10, 2022; See IM-Defensoras, Solidaridad feminista internacional ante cancelación ilegal de organizaciones feministas y/o que apoyan o trabajan por los derechos de las mujeres en Nicaragua., [‘International women’s solidarity in the face of illegal forced dissolution of women’ and/or women’s rights support or work organizations in Nicaragua’], April 21, 2022.

on arbitrary acts. Moreover, these measures serve to deepen the economic, social, political, and human rights crisis in the country.⁹⁰⁹

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131. Furthermore, the IACHR also observes with concern the removal of the legal status of civil society organizations that have a long track record defending the human rights of women [...] Said measures constitute gross violations of these organizations' rights to association and freedom of expression and constitute an undermining of the valuable support and protection provided by civil society for the benefit of women, girls, and adolescents victims of gender-based violence and discrimination or who suffer from conditions of structural inequality [...].

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174. The Commission reminds the State that for individuals to fully and freely enjoy the right to freedom of expression, States have the duty to create the legal and real conditions through which human rights defenders, media outlets, and journalists can go about their work freely. In this regard, the IACHR has noted that although the obligation to guarantee the right of association does not prevent a State from regulating the establishment and monitoring of organizations within its jurisdiction, the State must ensure that legal requirements do not prevent, delay, or limit the creation or operation of these organizations.⁹¹⁰

⁹⁰⁹ IACHR, Press Release No. 88/22 - IACHR Rejects the Revocation of the Legal Status of 25 Additional Organizations, Deepening the Shutdown of Democratic Platforms in Nicaragua. Washington, D.C, April 26, 2022.

⁹¹⁰ IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.LV/II. Doc. 66, December 31, 2011, paras. 157 and 163.

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Closure of civic space in Nicaragua. OAS/Ser.L/V/II. Doc. 22/23. September 23 of 2023

177. [...] the Commission considers that the revocation of the legal status of organizations dedicated to the defense of human rights is arbitrary, especially when it results because of the manifestation of positions dissenting from those of the government in power, but compatible with the democratic system in general and the inter-American system for the protection of human rights in particular. In addition, it is an excessive sanction that can prevent or curtail the necessary critical work of human rights defenders and, therefore, has an impact on the rights to freedom of association and freedom of expression of the people who form part of it in its double dimension.

172. The Commission recalls that sanctions, including administrative sanctions, must be formulated in accordance with the principle of legality, i.e., in an express, precise, exhaustive, and prior manner in order to provide legal certainty.⁹¹¹ Regarding the proportionality of administrative sanctions, in the case of minor infractions such as misreporting, these should be preceded by a warning that allows associations to rectify the error or omission within a reasonable period of time. [...]

179. States must also provide an adequate and effective remedy, conducted in accordance with the rules of due process, allowing organizations to challenge before an independent tribunal any decision that restricts the exercise of the right to freedom of association, including sanctions, suspension of operation, or involuntary dissolution

⁹¹¹ Other organizations that were subject to the revocation of their legal status also reported obstacles to submitting information or receiving certifications from the authorities. *IA Court H.R. Case of Norín Catrimán et al. (Leaders, Members, and Activist of the Mapuche Indigenous People) v. Chile. Merits, Reparations, and Costs. Judgment of May 29, 2014. Series C No. 279, par. 162; IA Court H.R., Case of Fermín Ramírez v. Guatemala. Merits, Reparations, and Costs, Judgment of June 20, 2005. Series C No. 126, par. 90*

of the organization.⁹¹² These remedies must be capable of providing redress for the victims of these violations, including restitution, such as the reestablishment of the legal status of an association.

190. The Commission warns that dispossession, damage, or any other form of loss of control over the associations' assets may prevent them from achieving their objectives. For these reasons, state actions that affect the assets of an association as a legal person could have a negative impact on the right to freedom of association of the persons that make up the association if they result in arbitrary interference and affect the right to property established in Article 21 of the ACHR. In this regard, the IACHR recalls that, although the right to property is not absolute, any restriction or limitation must be carried out by the appropriate legal means and in accordance with the parameters established in the American Convention.⁹¹³ When examining a possible violation of the right to private property, the Inter-American Court has established that it must not limit itself to examining only whether there was a formal dispossession or expropriation, but must also verify the real, underlying situation, not just the circumstances denounced.⁹¹⁴

191. The IACHR urges the State to refrain from actions that arbitrarily affect the assets of associations in retaliation for the manifestation of positions dissenting from those of the government, such as the confiscation, seizure, or illegitimate appropriation of property and rights.

197. The IACHR considers that violations of the right to privacy of members of an association may, in turn, imply a separate violation of the right to freedom of association to the extent that they impede the

⁹¹² IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.LV/II. Doc. 66, December 31, 2011, par. 168; IACHR, Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.LV/II.124 , Doc. 5 rev.1, March 7, 2006, par. 342, Recommendation 18.

⁹¹³ IA Court H.R. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 1, 2009. Series C No. 198, par. 84; IA Court H.R. Case of Mémoli v. Argentina. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 22, 2013. Series C No. 265, par. 170.

⁹¹⁴ IA Court H.R. Case of Ivcher Bronstein v. Peru. Merits, Reparations, and Costs. Judgment of February 6, 2001. Series C No. 74, par. 124, and Case of Mémoli v. Argentina, par. 170.

development of the organization's activities. Although the right to privacy is not an absolute right and, consequently, may be restricted by States⁹¹⁵, restrictive measures must be provided for by law, pursue a legitimate aim, and meet the requirements of appropriateness, necessity, and proportionality.⁹¹⁶

198. The Commission considers that States must ensure that the legislation defines in detail the grounds for conducting inspections of civil society organizations, the procedures to be followed, as well as the documentation that the authority may require. Thus, legislation should not allow for vague definitions or grant wide margins of discretion to the authorities that facilitate the misuse of the law. In the opinion of the IACHR, audit functions should be activated when there is a well-founded suspicion of the commission of a serious breach of the law in order to confirm or rule it out, or in cases of tax audits.⁹¹⁷ Within the framework of inspections, respect for the right to privacy of clients, beneficiaries, and association employees must be guaranteed.

207. While foreign funding could raise well-founded concerns for States in terms of taxation or crime prevention, the IACHR emphasizes that the controls and regulations that may be imposed should not be excessively intrusive, disproportionate, or impede the development of legitimate activities of civil society organizations, particularly human rights defenders.

⁹¹⁵ IA Court H.R. Case of Tristán Donoso v. Panama. Preliminary Objection, Merits, Reparations, and Costs. Judgment of January 27, 2009. Series C No. 193, par. 56.

⁹¹⁶ IA Court H.R. Case of Tristán Donoso v. Panama. Preliminary Objection, Merits, Reparations, and Costs. Judgment of January 27, 2009. Series C No. 193, par. 56; IA Court H.R., Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009. Series C No. 200, par. 116; IACHR, Standards for a Free, Open, and Inclusive Internet, OEA/Ser.L/V/II IACHR/RELE/INF.17/17, March 15, 2017, par. 193; In cases of wiretapping, the interAmerican standards have indicated the importance that the adoption of this type of measures be based on law, which must be precise and indicate clear and detailed rules on the matter, such as the circumstances in which such a measure may be adopted, the persons authorized to request it, to order it and to carry it out, and the procedure to be followed, among other elements. IA Court H.R. Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009. Series C No. 200, par. 131.

⁹¹⁷ United Nations, General Assembly, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/70/266, 4 August 2015, para. 52; IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II. Doc. 66, December 31, 2011, par. 182.

217. The Commission has pointed out that while States are empowered to regulate the inscription of organizations within their jurisdictions, the right to freedom of association without interference requires that States must ensure that legal requirements shall not prevent, delay, or restrict the creation or operation of the organizations.⁹¹⁸ In this regard, Principle 4 of the Declaration of Inter-American Principles on the Legal Regime for the Creation, Operation, Financing, and Dissolution of Civil Non-Profit Organizations recognizes that States should establish registry services or independent and autonomous public bodies for the registration or recognition of the legal personality of civil organizations, providing their services with professionalism, impartiality, and transparency. In addition, establishment and registration procedures should be simple, prompt, clear, non-discriminatory, and non-discretionary⁹¹⁹.

2. Strengthening National Human Rights Institutions

136. The Commission has emphasized that National Human Rights Institutions (NHRIs) play an important role in the States of the region as autonomous, independent and pluralistic bodies for the promotion and protection of human rights⁹²⁰. Therefore, the IACHR has called on NHRIs in the Americas to continue working with the independence and autonomy that characterizes these bodies in accordance with the Paris Principles.⁹²¹

137. The Commission has also recognized the need to strengthen mechanisms and points of contact with NHRIs, improving information and communication channels and through technical cooperation, so that joint efforts translate into greater and more effective promotion and protection of human rights throughout the

⁹¹⁸ IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II. Doc. 66, December 31, 2011, par. 157.

⁹¹⁹ OAS, Inter-American Declaration of Principles on the Creation, Operation, Financing, and Dissolution of Non-profit Civil Entities, CJ/RES. 282 (CII-O/23) corr.1, March 9, 2023.

⁹²⁰ IACHR. Press Release No. 235/19. *IACHR greets National Human Rights Institutions that signed the Declaration of Commitment on Technical Cooperation*, September 23, 2019.

⁹²¹ IACHR, Press Release No. 268/22. *IACHR holds IV Dialogue with National Human Rights Institutions of the region*, December 6, 2022. More information on the Paris Principles available at: <https://www.ohchr.org/es/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris>

hemisphere.⁹²² Under this effort, the Declaration of Commitment on Technical Cooperation was adopted and the Mechanism of Points of Contact between the Commission and National Institutions was created. In addition, a series of dialogues have taken place between the Commission and various NHRIs in the region, in order to identify opportunities for coordination, as well as to share and reflect on lessons learned, good practices and challenges.

138. In this regard, the following is a summary of some of the Commission's pronouncements on NHRIs (whether they are called Procurator's Offices, Ombudsman's Offices, Commissions, etc.) that demonstrate their important role in a democratic State governed by the rule of law.

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126. The Commission reminds the State that national institutions for the protection and defense of human rights play an important role at a national level in the exercise and protection of human rights and democracy. Therefore, and in accordance with the Paris Principles, States must ensure the independence and autonomy of the offices of ombuds and institutions responsible for the defense and promotion of human rights.⁹²³

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87. [...] the IACHR has received information concerning a growing climate of fear over the possibility that the Ombudsman will be dismissed or that the attacks against the work of the Ombudsman's Office will intensify, given that it is identified as one of the last institutions in the country that works independently and impartially,

⁹²² IACHR. Press Release No. 235/19. *IACHR Greets National Human Rights Institutions that Signed the Declaration of Commitment on Technical Cooperation*, September 23, 2019 and IACHR. Press Release No. 268/22. *IACHR holds IV Dialogue with National Human Rights Institutions of the region*, December 6, 2022.

⁹²³ Paris Principles: Principles relating to the status and functioning of national institutions for the promotion and protection of human rights, October 1991.

especially to combat corruption and impunity. In that regard, the IACHR calls on the State to ensure that the Office of the Human Rights Ombudsman has at its disposal, as soon as possible, the budget it needs to carry out its mandate effectively, and specifically calls on the State to cease all acts of intimidation or fear of reprisals over the exercise of its duties.

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Criminalization of the Work of Human Rights Defenders. OEA/Ser.L/V/II. Doc. 49/15 31 December 2015

280. The Commission recalls the importance of national human rights institutions in the prevention of criminalization, which in compliance to the Paris Principles, have the mandate to review the legislation, as well as projects and bills and make the appropriate recommendations to ensure that existing laws respect the fundamental principles of human rights. If necessary, these institutions must recommend the adoption of new legislation, the amendment of legislation in force and the adoption of administrative measures or their modification.⁹²⁴

Public Policy with a Human Rights Approach. OEA/Ser.L/V/II. Doc. 191. 15 September 2018

134. Likewise, the Commission considers that both national human rights institutions and civil society organizations are key actors in monitoring and lobbying the State in relation to budgets and protection of human rights by demanding participation, transparency, accountability, and access to information as democratic components of public policies.⁹²⁵

⁹²⁴ Principles relating to the Status of National Institutions (The Paris Principles).

⁹²⁵ IACHR, Public hearing, Control of Public Spending, Fiscal Policies and Economic, Social and Cultural Rights Guarantees in Latin America, 168th regular session, May 11, 2018. Comments of the IACHR.

Pandemic and Human Rights. OEA/Ser.L/V/II. Doc. 396. September 9, 2022.

104. [...] the IACHR considers that they can play a critical role in the promotion of inter-American standards of protection for those persons or groups in situations of vulnerability, such as children and adolescents, women and those who face situations of structural discrimination, among others.

106. The IACHR has recognized in its Resolution 1/2020 the importance of promoting broad and effective spaces for dialogue with National Human Rights Institutions as a mechanism to establish and consolidate channels for the exchange of best practices in terms of successful strategies and public policies with a human rights approach, timely information, as well as challenges to face the global crisis caused by the outbreak of the COVID-19 pandemic⁹²⁶.

National Mechanisms for the Implementation of Human Rights Recommendations. OEA/Ser.L/V/II. Doc. 8/23. February 26, 2023.

233. The Commission offers some considerations on the existence, characteristics, powers and functioning of the National Mechanisms for the Implementation of International Human Rights Decisions (NIMIDI). Much has been discussed about the similarities of these mechanisms with national human rights institutions (NHRIs) in that they are institutional efforts with a particular nature within the framework of the defense, protection and guarantee of human rights.⁹²⁷

234. In this regard, the Commission considers that, despite their similarity, the two differ in their functions and composition.⁹²⁸ Unlike NHRIs, national implementation mechanisms do not necessarily represent autonomous institutions, but are part of the State structure.

⁹²⁶ IACHR, Pandemic and Human Rights, Resolution 1/2020

⁹²⁷ UN, General Assembly, National institutions for the promotion and protection of human rights, Resolution A/72/181, 147 29 January 2018, paras. 3 and 6.

⁹²⁸ UN, Office of the United Nations High Commissioner for Human Rights, National Reporting and Follow-up Mechanisms. A Practical Guide for Effective State Engagement with International Human Rights Mechanisms, New York and Geneva, 2016, p. 3.

Furthermore, their determinations, functions and resolutions are far from being non-binding measures and are part of a state policy linked to the fulfillment of secondary human rights obligations. However, the Commission also considers that there are certain characteristics that both institutions must assume as part of the state framework focused on guaranteeing the full enjoyment of human rights.

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[Third report on the situation of Human Rights in Paraguay. OEA/Ser.L/VII.110.doc. 52. 9 March 2001](#)

62. The Inter-American Commission on Human Rights considers that the failure to make an appointment to a constitutional organ of such importance as the Human Rights Ombudsman is a grave affront to the rule of law in Paraguay, as said appointment is a mandate, of the Constitution, which is the supreme law of the land. The IACHR also observes that the special majority of the Chamber of Deputies required by the Paraguayan Constitution to designate the Human Rights Ombudsman is not a valid excuse, especially considering that in the case of other constitutional organs that also require special majorities, the necessary political will has been mustered to make the appointment.

[Situation of Human Rights in Venezuela - "Democratic Institutions, the Rule of Law and Human Rights in Venezuela". OEA/Ser.L/V/II. Doc. 209. 31 December 2017](#)

142. The IACHR emphasizes, bearing in mind the Principles relating to the status and functioning of national institutions for the protection of human rights, the fundamental need to guarantee the independence of the PD⁹²⁹ to achieve the protection of the human rights of the population whose rights have been violated⁹³⁰. The Commission expresses its concern over the questioning of the PD's performance of its functions, reiterates the importance of its role in the protection of human rights, and recalls that its establishment constitutes a step

⁹²⁹ The specific case involved the Venezuelan NHRI, known as the Ombudsman's Office (PD).

⁹³⁰ Principle B, Composition and guarantees of independence and pluralism, of the Paris Principles (Principles relating to the status and functioning of national institutions for the protection of human rights).

forward in the consolidation of democratic institutions. It also notes that it is necessary to strengthen its capacity and independence⁹³¹ . [...]

3. Transparency and accountability

139.As noted in Chapter 2 of this compendium, Article 4 of the Inter-American Democratic Charter states that transparency in government activities, probity and government accountability in public administration are, among others, fundamental components of the exercise of democracy.⁹³² In this sense, the IACHR considers that transparency and accountability of public authorities strengthen democratic systems,⁹³³ and has therefore called on States to strengthen transparency and accountability mechanisms as a fundamental principle of public policies with a human rights approach and as a way to guarantee the right of access to information of the population.⁹³⁴

140.In the same sense, the Inter-American Court of Human Rights has established that "the actions of the State must be governed by the principles of publicity and transparency in public administration, which makes it possible for the people under its jurisdiction to exercise democratic control over the State's actions, so that they can question, inquire and consider whether public functions are being properly carried out. Access to information under the control of the State, which is of public interest, can allow participation in public management, through the social control that can be exercised with such access".⁹³⁵

141.There is a close relationship between transparency and accountability, and the right to access to public information, which has been duly developed in section D.1 of this

⁹³¹ IACHR, Press Release 131A/14, Report on the 153rd Period of Sessions of the IACHR, December 29, 2014.

⁹³²Inter-American Democratic Charter, Article 4. Available at: https://www.oas.org/es/democratic-charter/pdf/demcharter_es.pdf.

⁹³³ IACHR. Pandemic and Human Rights. OEA/Ser.LV/II. Doc. 396. September 9, 2022, para. 74.

⁹³⁴ IACHR, Press Release, No. 223/20, IACHR Calls to Combat Corruption and Guarantee Human Rights through Transparency and Accountability in Public Management in Context of COVID-19 Pandemic, September 16, 2020.

⁹³⁵ IACHR. Resolution No. 209. Documents and historical archives of the Inter-American Commission on Human Rights, approved on November 13, 2009; citing the Inter-American Court: IA Court H.R., Case of Claude Reyes et al. Judgment of September 19, 2006. Series C No. 151, para. 86.

compendium. Therefore, in order to avoid duplication, the following are IACHR pronouncements that address transparency and accountability as a mechanism to prevent corruption, whether by state agents or the private sector.

Country reports

[Third report on the situation of Human Rights in Paraguay. OEA/Ser.L/VII.110.doc.52.9 March 2001](#)

41. Corruption is an important element to be taken into account in analyzing the democratic institutional framework of a state, since various member states of the OAS, [...] have recognized that “corruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as at the comprehensive development of peoples” and that fighting corruption “strengthens democratic institutions and prevents distortions in the economy, improprieties in public administration and damage to a society's moral fiber.”⁹³⁶

45. The phenomenon of corruption has to do not only with the legitimacy of public institutions, society, the integral development of peoples, and all other more general aspects [...], but also has a specific impact on the effective enjoyment of human rights in society in general.

[Situation of Human Rights in Venezuela - "Democratic Institutions, the Rule of Law and Human Rights in Venezuela". OEA/Ser.L/V/II. Doc. 209. 31 December 2017](#)

146. As the IACHR has pointed out, fighting corruption is intrinsically linked to the exercise and enjoyment of human rights.⁹³⁷ Likewise, the treaty bodies and special procedures of the United Nations have observed that when corruption is widespread States cannot comply

⁹³⁶ Inter-American Convention Against Corruption, Preamble. That Convention was adopted in Caracas, Venezuela, March 29, 1996, and entered into force June 3, 1996. Paraguay ratified that instrument on January 28, 1997.

⁹³⁷ IACHR, [Resolution 1/17](#), Human Rights and the Fight against Impunity and Corruption, September 12, 2017.

with their human rights obligations.⁹³⁸ Corruption may also be an indirect cause of human rights violations, when an effort is made to elude denunciations of acts of corruption by denying such rights as access to justice and freedom of expression, among others.⁹³⁹ In addition, in an OAS context, combating corruption plays an important part in the implementation of basic commitments undertaken by its member states.⁹⁴⁰ As the Inter-American Democratic Charter asserts: “transparency in government activities, probity, responsible public administration on the part of governments,” inter alia, are “essential components of the exercise of democracy.”⁹⁴¹

147. Impunity encourages and perpetuates acts of corruption. Establishing effective mechanisms for eradicating it is therefore an absolute imperative for guaranteeing human rights and effective access to justice.⁹⁴² It is therefore of the utmost importance that the State take steps to ensure that acts reported are investigated independently, impartially, and promptly, without pressures or discrimination based on membership of certain political parties or on the positions held by those under investigation. Likewise the State is duty-bound to avoid a repetition of these acts of corruption, which means that it is essential to adopt preventive measures. Among the most basic are measures that make it possible to govern in accordance with the principles of openness, transparency, and effective public liability, without which no democratic society can

⁹³⁸ Committee on Economic, Social and Cultural Rights, *Consideration of reports submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations, The Republic of Moldova*, E/C.12/1/ADD.91, December 12, 2003, para. 12; Committee on the Rights of the Child, *Consideration of reports submitted by States Parties under Article 44 of the Convention, Concluding Observations, The Republic of the Congo*, CRC/C/COG/CO/1, October 20, 2006, para. 14; and Special Rapporteur on the Independence of Judges and Lawyers, E/CN.4/2005/52/Add.4, para. 96.

⁹³⁹ International Council on Human Rights Policy and the Graduate School of Public Administration and Public Policy of the Monterrey Institute of Technology and Higher Education, *Corruption and Human Rights: making the connection*, 2009, p. 33.

⁹⁴⁰ IACHR, *Resolution 1/17*, Human Rights and the Fight against Impunity and Corruption, September 12, 2017.

⁹⁴¹ Article 3 of the Inter-American Democratic Charter.

⁹⁴² IACHR, *Resolution 1/17*, Human Rights and the Fight against Impunity and Corruption, September 12, 2017.

function. They are vital for the observance and fully guaranteed exercise of all civil, political, economic, social, cultural, and environmental rights [...].

[Situation of Human Rights in Haiti. OEA/Ser.L/V/II. Doc. 358. August 30, 2022.](#)

105. On the other hand, the IACHR reminds the State of its duty to provide comprehensive protection to persons under its jurisdiction and territory, through practices that combat impunity and guarantee channels of accountability, especially for acts or situations of violence that have occurred with the participation or complicity of police agents. In this regard, the IACHR calls the State's attention [...] to the special duty to prevent, investigate and punish police misconduct with due diligence,⁹⁴³ as well as to guarantee adequate reparations to victims of human rights violations.⁹⁴⁴

[Situation of Human Rights in Chile. OEA/Ser.L/V/II. Doc. 1/22. January 24, 2022.](#)

317. In this regard, the IACHR recalls that the obligation of States to investigate conduct that affects the rights protected in the American Convention is maintained regardless of the agent to whom the violation may eventually be attributed.⁹⁴⁵ Likewise, the Commission recalls the need to implement mechanisms of control and accountability over the actions of State agents in contexts of protest derives from the general obligation to guarantee rights, established in Articles 1(1) of the American Convention; from the right to due process of law, provided in Article 8 of the ACHR and in Article XXVI of the American Declaration; and from the right of access to justice for violations of fundamental

⁹⁴³ IACHR, Report on Citizen Security and Human Rights, OEA/Ser.L/V/II. Doc. 57, December 31, 2009, para. 92.

⁹⁴⁴ IACHR, Police Violence against Afro-descendants in the United States, OEA/Ser.L/V/II. Doc. 156 26 November 2018, para. 250.

⁹⁴⁵ IACHR, Corruption and Human Rights, December 6, 2019, para. 264. IACHR, Right to Truth in 443 America, August 13, 2014, para. 126.

rights, provided in Article 25 of the American Convention on Human Rights, as well as in Article XVIII of the Declaration.⁹⁴⁶

Thematic reports

Report on Business and Human Rights: Inter-American Standards. OEA/Ser.L/V/II. IACHR/REDESCA/INF.1/19. November 1, 2019

48. A human rights-based approach regarding business activities and operations opens a new perspective on efforts for respecting and ensuring such rights, with the dignity and the autonomy of persons as its center. In this sense, ensuring effective mechanisms for transparency and access to information in this field relating to the rights and freedoms that may be at stake, not only in the formulation of legislation and public policies by heads of State, but also in the mechanisms and plans led by the businesses themselves, will be essential in more suitably for identifying and facing the main challenges and risks identified to the realization of human rights, in accordance with the particularities of each context. To this end, access to information includes information that may be necessary for the exercise or protection of human rights in the context of businesses activities, which must be provided in a timely, accessible, and complete manner. In practice, businesses may possess a lot of information regarding the possible human rights impacts of their plans and operations, and often they hold this information exclusively. It is necessary to counteract the imbalance that may exist in the creation, interpretation, and dissemination of information between companies, who act to create and own the information, and communities and the authorities. Such guarantees will be central in processes and actions to prevent, supervise, and where appropriate investigate when there are abuses and violations of human rights.

Labor and Union Rights in Cuba. OEA/Ser.L/V/II. Doc. 53. 5 April 2023

423. [...] In the context of business activities, the availability or lack of State and company official information on due diligence processes

⁹⁴⁶ RELE-CIDH, *Protest and Human Rights*. September 2019, para. 245.

adopted is essential to create solid legal frameworks and concrete public policies to face the challenges in this field. In addition, access to accurate and quality information, and the creation of a tool for citizen control over the functioning of the State and public management,⁹⁴⁷ is a key factor in the exercise and protection of workers' rights against business impacts.⁹⁴⁸

[Pandemic and Human Rights. OEA/Ser.L/V/II. Doc. 396. September 9, 2022.](#)

82. Furthermore, the RELE has shown that an essential international standard related to the duty of active transparency is the use of the open format⁹⁴⁹. In this regard, experts in the field have recommended the need to identify the databases generated by governments in order to work on those that are relevant in addressing public health needs and social impacts; to build repositories that facilitate the publication, consultation and use of data by any person or organization that requires information for their own purposes. In the health crisis, the global scientific community has proven the need for open data to provide evidence and collaborate in government decisions⁹⁵⁰.

Resolutions

[Resolution 3/2021. Climate Emergency: Scope and Inter-American Human Rights Obligations. Adopted by the IACHR on December 31, 2021.](#)

33. To ensure transparency and access to information on the causes and consequences of the global climate crisis, measures to address it, the impacts of projects on the climate and how to achieve them, States have a positive obligation of active transparency to generate timely,

⁹⁴⁷ IACHR, Report: Public policies with a human rights approach, OEA/Ser.L/V/II. Doc. 191, September 15, 2018, par. 74.

⁹⁴⁸ REDESCA-IACHR, Business and Human Rights: Inter-American Standards, 2019, par. 48.

⁹⁴⁹ For more information about open data, see: Government of the State of São Paulo and the Government of the United Kingdom. 119 Open Data Guideline: What is "Open Data"? 2015.

⁹⁵⁰ The Executive Committee of the German Commission for UNESCO has issued a statement stressing that open science is a matter of survival and necessary to overcome the pandemic. See: UNESCO. Open access to facilitate research and information on COVID-19. 2020.

complete, understandable, clear, accessible, culturally appropriate information, truthful and expeditious on adaptation, mitigation and means of implementation on climate change for all people, taking into account the particularities and specific needs of people and groups in situations of vulnerability..

34. All information on development projects that potentially increase global temperature with greenhouse gas emissions should be governed by the principle of maximum publicity. In the same way, they must ensure the progressive strengthening of environmental information systems at the national, subnational, and local levels on greenhouse gas inventories, management and sustainable use of forests, carbon footprint, emission reduction and climate financing, among others.

[Resolution 1/18. Corruption and Human Rights. Adopted by the IACHR on March 2, 2018.](#)

By virtue of the foregoing and in application of Article 41.b of the American Convention on Human Rights, and Article 18 of its Statute, the Inter-American Commission on Human Rights resolves the following:

[...]

2. Transparency, access to information, and freedom of expression

[...]

i. Strengthen their capacities to proactively guarantee access to public information, essential to the fight against corruption, and strengthen their active transparency and accountability mechanisms in relation to expenditures and investments in infrastructure, financing of election campaigns and transparency in the operations of political parties.

ii. Continue enacting laws that allow effective access to public information, especially for those persons or groups of people in vulnerable situations or at great risk, consistent with international standards, and encourage their effective and efficient implementation. Strengthen oversight bodies with guarantees of autonomy and

independence; provide training to public officials and educate the public in order to eradicate the culture of secrecy and with the purpose of providing individuals with the tools to effectively monitor State operations, public management and the fight against corruption.

iii. Establish active transparency obligations in relation to information necessary for effective accountability and the fight against corruption, in particular with regards to: (a) systems for public sector vacancy announcements, hiring, employment and salaries; (b) conflict of interest prevention mechanisms; (c) government contracting, budget management and infrastructure investments; (d) lobbying; (e) identity of corporations and individuals involved in private sector corporate governance and corporate ownership; and (f) the financing of election campaigns and the operations of political parties.

iv. Compile, produce, analyze and periodically disseminate statistics and information on reports of corruption received by different oversight and regulatory agencies, the judiciary and other state mechanisms for the prevention and investigation of corruption, as well as their results.

v. Foster a climate of guarantees for the freedom to report acts of corruption, the development of the practice of investigative journalism and the exercise of the right to seek, receive and impart information related to corruption. This includes guaranteeing the safety of journalists, human rights defenders and activists who investigate and report corruption; repealing so-called “contempt” and criminal defamation laws while ensuring the proportionality of penalties in civil proceedings; ensuring protection for the confidentiality of journalistic sources; and establishing protection systems for corruption whistleblowers.

vi. Guarantee the independence of public and private media outlets and enact laws that promote media diversity and pluralism in line with inter-American standards.

[...]

IV. CONCLUSIONS

IV. CONCLUSIONS

142. The Inter-American Commission, in compliance with its mandate under Article 41 of the ACHR and Article 106 of the OAS Charter to provide advice to States on human rights matters, has decided to prepare this document whose main objective is to provide a tool for technical cooperation aimed at improving and strengthening the legislation, policies, and practices of States in order to advance toward the fullest protection of human rights and democracy.

143. The IACHR prepares compendiums of its pronouncements as a tool for cooperation to promote greater knowledge of inter-American human rights standards. At the same time, it seeks to provide a practical instrument to advance the strengthening of the capacities of actors both at the local level and at the level of the international human rights protection system. Consequently, by compiling standards and jurisprudence in its digests, the Inter-American Commission encourages States to adopt diligent efforts to improve and strengthen their legislation, policies and State practices by applying the legal standards of the inter-American human rights system.

144. In particular, in this compendium the IACHR offers users of the system, State operators of public policies, judges, parliamentarians and other State officials, civil society, social movements, academia, experts, among other relevant actors in the region, an updated and easily accessible reference tool for the use and implementation of standards on the elements that make up representative democracy, a subject of utmost relevance for the region and indispensable for the full exercise of rights.

145. However, in recent years, through its various monitoring mechanisms, the Inter-American Commission has observed in some cases the absence or regression in the protection of human rights closely linked to the democratic rule of law, such as: the separation and independence of powers, the lack of free and informed elections and respect for the pluralistic regime of political parties and organizations, the reduction of democratic spaces for participation, cases of repression and adoption of measures that restrict the rights to freedom of expression, association and assembly, as well as the disproportionate use of states of emergency and exception.

146. In this regard, the Inter-American Commission recalls that the OAS Member States, in adopting the Inter-American Democratic Charter, recognized that representative

democracy is the system in which stability, peace and development are achieved in the region, and that it is essential to the full exercise of fundamental rights. Article 3 of the Charter states that "essential elements of representative democracy are, inter alia, respect for human rights and fundamental freedoms; access to power and its exercise subject to the rule of law; the holding of periodic, free, fair elections based on universal and secret suffrage as an expression of the sovereignty of the people; the pluralistic system of political parties and organizations; and the separation and independence of the branches of government". Likewise, Article 4 establishes that "fundamental components of the exercise of democracy are transparency in government activities, probity, government accountability in public administration, respect for social rights and freedom of expression and of the press".

147. In this regard, the IACHR confirms the fundamental role of the independence and separation of the branches of government and the institutions of control, whose functioning must be ensured at all times, including in contexts of exception and emergency. In particular, the Commission recalls that any human rights violation must be guaranteed access to justice and means of redress. In addition, the Commission emphasizes that the Inter-American system has recognized freedom of expression as a "cornerstone" of any democratic society, so it is essential to create an environment free of threats for the exercise of this right. In the same sense, it has been emphasized that human rights defenders are an essential pillar for the strengthening and consolidation of democracies in the region, so it is necessary to strengthen efforts to curb and reverse practices that threaten and limit their work.

148. On the other hand, the Commission recalls that diverse and inclusive participation is essential to guarantee political rights and the functioning of democracy, so it is a duty to adopt measures to ensure broad participation, without any type of discrimination. To this end, it is essential to implement special actions that guarantee substantive participation and effective incidence in all political decision-making spaces by the most vulnerable and excluded persons and groups. Such participation is not restricted to the electoral sphere; however, it is also necessary to hold peaceful elections and respect the results, recognizing the highest expression of popular sovereignty.

149. In sum, the IACHR reiterates the need for the States to adopt measures promptly and without delay to strengthen democratic institutions under a human rights

approach, in order to comply with international obligations and the Inter-American Democratic Charter. To this end, the Commission reiterates its commitment to collaborate with the American States through technical assistance and cooperation as a tool for institutional strengthening and thus contribute to ensure that the States guarantee real and objective conditions aimed at consolidating democratic institutions, the rule of law, the observance of human rights, and economic and social development throughout the region.

The image features a dark blue background with a faint, light blue illustration of a globe. The globe is tilted, and the continents are visible. In the foreground, there are several small, stylized human figures in various poses, some appearing to be walking or standing. The IACHR logo is centered on the globe. The logo consists of the letters 'IACHR' in a bold, white, sans-serif font. The letter 'H' is uniquely styled, with a vertical pink bar on its right side. To the right of the 'IACHR' text, the words 'Inter-American Commission on Human Rights' are written in a smaller, white, sans-serif font, stacked in three lines.

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