

## CHAPTER V

### PRINCIPLES ON THE REGULATION OF GOVERNMENT ADVERTISING IN THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

1. There are various ways to unlawfully affect freedom of expression, ranging from the extreme of radical suppression through acts of prior censorship to less evident mechanisms that are more subtle and sophisticated. Article 13.3 of the American Convention on Human Rights refers specifically to those indirect mechanisms “tending to impede the communication and circulation of ideas and opinions.” Indeed, that article establishes that:

The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

2. Indirect means of restriction are hidden behind apparently legitimate actions that, nevertheless, are taken for purposes of placing conditions on the exercise of freedom of expression of individuals. When that happens, it results in the violation of Article 13.3 of the Convention. As the Inter-American Court of Human Rights (hereinafter “Inter-American Court” or “Court”) has held, “any governmental action that involves a restriction of the right to seek, receive and impart information and ideas to a greater extent or by means other than those authorized by the Convention”<sup>1</sup> violates freedom of expression.

3. The organs of the inter-American system have addressed the “indirect” means of censorship prohibited by Article 13.3 of the American Convention. Interpreting the above-cited Article 13.3, Principle 5 of the Declaration of Principles on Freedom of Expression adopted by the Inter-American Commission on Human Rights (hereinafter “IACHR”), establishes that “Prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression.” Principle 13 states that “The exercise of power and the use of public funds by the state, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans; the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law.”<sup>2</sup>

4. These means of restriction were also examined by the IACHR’s Office of the Special Rapporteur for Freedom of Expression, which called attention in its 2003 Annual Report to those

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<sup>1</sup> 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. 55.

<sup>2</sup> In the same manner, Principle 7 of the Declaration of Chapultepec (adopted by the Hemispheric Conference on Free Speech held in Mexico City on March 11, 1994) explicitly establishes that: “Tariff and exchange policies, licenses for the importation of paper or news-gathering equipment, the assigning of radio and television frequencies and the granting or withdrawal of government advertising may not be used to reward or punish the media or individual journalists.” Although it is not legally binding, the Declaration is a statement of intent and support by numerous leaders for the right to freedom of expression.

“obscure, quietly introduced obstructions [that] do not compel investigation, nor do they receive [...] widespread censure.”<sup>3</sup> This Office also addressed the issue in its 2008<sup>4</sup> and 2009 Reports.<sup>5</sup>

5. The case law of the Inter-American Court has on several occasions condemned the adoption of government measures that constitute indirect means of restriction on freedom of expression. Accordingly, for example, it has condemned the mandatory requirement that journalists be members of a professional association,<sup>6</sup> the arbitrary use of the regulatory powers of the State when they have been used to intimidate the directors of a media outlet, or to revoke the citizenship of the director of a medium as a result of the editorial slant of the programs it broadcasts.<sup>7</sup> It has also questioned the statements of government officials when, given the context, those statements may constitute “forms of direct or indirect interference or harmful pressure on the rights of those who seek to contribute [to] public deliberation through the expression and [dissemination] of their thoughts.”<sup>8</sup> The Inter-American Court has further held that the disproportionate or discriminatory access to “accreditations or authorizations for the written media to participate in official events”<sup>9</sup> would be an indirect restriction.

6. In the same vein, the IACHR has explained that a single government act may simultaneously be a limitation on freedom of expression contrary to the requirements of Article 13.2 of the American Convention, as well as an indirect or subtle means of restricting freedom of expression. For example, the imposition of criminal penalties for certain expressions that are contrary to the interests of the government—which is a direct limitation to this freedom according to Article 13 insofar as it is unnecessary and disproportionate—is also an indirect limitation of this right; its “chilling” and silencing effects on future expressions, which restrict the circulation of information, produce the same results as direct censorship.<sup>10</sup> Along the same lines, the IACHR has stated that the prosecution of persons, including journalists and members of the media, for the mere act of investigating, writing, and publishing information in the public interest violates freedom of expression by discouraging public debate on matters of interest to society. The simple threat of

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<sup>3</sup> IACHR, *2003 Annual Report*. OEA/Ser. L/V/II.118. Doc. 70, December 29, 2003. Volume III: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, Chapter V (*Indirect Violations of Freedom of Expression: Discriminatory Allocation of Official Publicity*), para. 1.

<sup>4</sup> IACHR, *2008 Annual Report*. OEA/Ser.L/V/II.134. Doc. 5, February 25, 2008. Volume II: *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), paras. 86 *et seq.* and 129 *et seq.*

<sup>5</sup> IACHR, *2009 Annual Report*. OEA/SER.L/V/II. Doc.51, December 30, 2009. Volume II: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, Chapter III (Inter-American Legal Framework Regarding the Right to Freedom of Expression), paras. 97 *et seq.* and 157 *et seq.*

<sup>6</sup> 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. 76.

<sup>7</sup> I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*. Judgment of February 6, 2001. Series C No.74, paras. 158-163.

<sup>8</sup> I/A Court H.R., *Case of Ríos et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 194, para. 139; I/A Court H.R., *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 195, para. 151.

<sup>9</sup> 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. 346; 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. 375.

<sup>10</sup> IACHR. Arguments before the Inter-American Court in the *Case of Herrera Ulloa v. Costa Rica*. Transcribed in: I/A Court H.R., *Case of Herrera-Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, paras. 101.2.a), 101.2.e) & 101,2.k); IACHR. Arguments before the Inter-American Court in the *Case of Ricardo Canese v. Paraguay*. Transcribed in: I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 72.i).

being criminally prosecuted for critical expressions concerning matters of public interest may give rise to self-censorship, given its “chilling effect.”<sup>11</sup>

7. The UN, OSCE and OAS Rapporteurs on Freedom of Expression have also addressed the issue of indirect restrictions on freedom of expression by State authorities. For example, in their 2002 Joint Declaration they stated that “Governments and public bodies should never abuse their custody over public finances to try to influence the content of media reporting; the placement of public advertising should be based on market considerations.” Although the bodies of the inter-American system have not issued any express decisions to date on the issue of media regulation and the requirements that must be met in order not to violate freedom of expression, the 2003 Joint Declaration of the UN, OSCE and OAS Rapporteurs on Freedom of Expression addressed this issue specifically, condemning “attempts by some governments to limit freedom of expression and to control the media and/or journalists through regulatory mechanisms which lack independence or otherwise pose a threat to freedom of expression.”

8. Finally, it should be noted that indirect restrictions may arise from the acts of private persons—for example, when there is a monopoly on materials such as newsprint that are essential to the operation of the industry, or when private persons block and hinder the distribution of printed media. In this regard, the Inter-American Court has held that Article 13.3 imposes an obligation upon the States to guarantee this right in the context of dealings among private individuals that could give rise to indirect limitations to freedom of expression: “Article 13(3) of the [American] Convention imposes of the State obligations to guarantee, even in the realm of the relationships between individuals, since it not only covers indirect governmental restrictions, but also ‘individual...controls’ that produce the same result.”<sup>12</sup> Read in conjunction with Article 1.1 of the American Convention, this implies, in the Court’s judgment, that the Convention is violated not only when the State imposes, through its agents, indirect restrictions on the circulation of ideas or opinions but also when it allows the establishment of private controls that give rise to a restriction of freedom of expression.<sup>13</sup>

#### **A. The case of government advertising**

9. The arbitrary and discriminatory allocation of government advertising was one of the first mechanisms of indirect censorship addressed by the inter-American system. Indeed, the Office of the Special Rapporteur for Freedom of Expression devoted a special chapter in its 2003 Annual Report to the examination of the phenomenon, and concluded that “indirect obstruction through distribution of official publicity acts as a strong deterrent to freedom of expression.”<sup>14</sup> As the Office of the Special Rapporteur stated at that time:

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<sup>11</sup> IACHR, Arguments before the Inter-American Court in the *Case of Palamara Iribarne v. Chile*. Transcribed in: 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. 64.e); IACHR. Arguments before the Inter-American Court in the *Case of Herrera Ulloa v. Costa Rica*. Transcribed in: I/A Court H.R., *Case of Herrera-Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 101.2).

<sup>12</sup> 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. 367; 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. 340.

<sup>13</sup> 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. 48.

<sup>14</sup> IACHR, *2003 Annual Report*. OEA/ Ser. L/ V/ II.118. Doc. 70, December 29, 2003. Volume II: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, Chapter V (*Indirect Violations of Freedom of Expression: Discriminatory Allocation of Official Publicity*), para. 13.

"[...] this topic merits special attention in the Americas, where media concentration has historically promoted the abuse of power by governments in the placement of their advertising revenue."<sup>15</sup>

10. The arbitrary placement of government advertising, like other means of indirect censorship, operates based on different types of *needs* that the communications media have in order to function and *interests* that can affect them. It is a form of pressure that acts as a *reward* or *punishment*, the purpose of which is to place conditions on the editorial slant of a media outlet according to the will of the party exerting the pressure.

11. As mentioned previously, mechanisms of indirect censorship are often hidden behind the apparently legitimate exercise of state authority, and many such mechanisms are exercised by government employees in a discretionary manner. These forms of indirect censorship are therefore particularly difficult to detect, as there is often no clear line between the legitimate exercise of a power and the unlawful restriction of a right. From this point of view, a legitimate State power can be a violation of the right to freedom of expression if (a) the exercise of such power was motivated by the editorial position of the affected party, and (b) the purpose of exercising such power was to place conditions on the free exercise of the right to freedom of thought and expression. In the case of the allocation of government advertising, a case of indirect censorship occurs when such allocation is done with discriminatory aims according to the editorial position of the media outlet included in or excluded from such allocation, and with the purpose of imposing conditions on its editorial position or line of reporting.

12. In order to determine whether the exercise of those powers has resulted in a violation of freedom of expression, it is necessary to examine the context. Indeed, the Inter-American Court has held that "when evaluating an alleged restriction or limitation to freedom of expression, the Court should not restrict itself to examining the act in question, but should also examine this act in the light of the facts of the case as a whole, including the circumstances and context in which they occurred."<sup>16</sup> Following the same reasoning, it has held that "the restrictive method set forth in Article 13.3 is not exhaustive nor does it prevent considering 'any other means' or indirect methods of new technologies (...). In order for there to be a violation to Article 13.3 of the Convention it is necessary that the method or means effectively restrict, even if indirectly, the communication of ideas and opinions."<sup>17</sup>

13. Years after the initial assessment this Office made with respect to the issue of government advertising, the problem still persists in many of the region's countries. Although progress has been made with some legal reforms and best practices, the inadequate regulation in most countries of the Americas tends to favor discretion in the allocation of state advertising budgets, which in some cases are measured in millions of dollars. Various civil society organizations from the region noted this at a hearing held before the IACHR on October 29, 2010 in Washington

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<sup>15</sup> IACHR, *2003 Annual Report*. OEA/ Ser. L/ V/ II.118. Doc. 70, December 29, 2003. Volume II: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, Chapter V (*Indirect Violations of Freedom of Expression: Discriminatory Allocation of Official Publicity*), para. 2.

<sup>16</sup> I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*. Judgment of February 6, 2001. Series C No.74, para. 154. Similarly, see: 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.

<sup>17</sup> Cf. 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. 48. Cf. also 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. 340.

D.C.<sup>18</sup> It was indicated at that time that the lack of adequate regulation is the main reason advertising budgets can be used to influence the content of the communications media.

14. The absence of legal provisions regulating the allocation of advertising was noted by the Supreme Court of Argentina in the case of *Editorial Río Negro S.A. v. Provincia de Neuquén*, in which the Court held that the Province of Neuquén had violated the freedom of expression of a newspaper when it withdrew government advertising as a consequence of critical coverage. The Supreme Court held that the Province of Neuquén had to establish an appropriate legal framework to limit the discretion of public servants and prevent this type of arbitrariness.<sup>19</sup>

15. Likewise, the Supreme Court of Chile ruled on a claim filed by *Punto Final* magazine against the allocation of government advertising by some ministries. In that case, the Court found that the Chilean legal system grants government employees “a wide margin of discretion” and recommended that investments in government advertising be made “according to transparent and non-discriminatory criteria.”<sup>20</sup> In addition, in 2006, the Chilean National Congress created a Special Investigative Commission on Government Advertising, which recommended the establishment of a legal regime with clear rules determining criteria and mechanisms for the allocation of government advertising. Finally, in Mexico the National Human Rights Commission (CNDH) said that the state enterprise *Petróleos Mexicanos* had suspended government advertising in the magazine *Contralínea* as a result of an investigation into possible cases of corruption there. The CNDH asserted that it is necessary for the state enterprise “to have objective, clear, transparent, and non-discriminatory criteria for the granting and placement of government advertising in the different communications media, both online and in print.”<sup>21</sup>

16. In addition, at the hearing before the IACHR, the requesting organizations indicated that in the countries of the region the State is, on many occasions, one of the main—if not the only—advertiser in the market, which gives it a disproportionate weight and enormously increases the potential for government advertising to place conditions on the media.

17. One of the countries in the region that has a regulatory framework worth examining is Canada. Although it was established through regulations to the Financial Administration Act, the *Communication Policy* of the Government of Canada defines the objective of government communication and establishes criteria for the planning and allocation of government advertising. Indeed, the regulations establish that State communication must aim to “meet the information needs of the public” and to inform citizens, with due regard for “freedom, openness, security, caring and respect.”<sup>22</sup> The regulations provide that the institutions covered by them must provide information free of charge when it is needed by individuals to access public services; when the information explains the rights, entitlements, and obligations of individuals; when it consists of personal information requested by the individual whom it concerns; and when it is necessary in order for

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<sup>18</sup> IACHR. Public hearing held on October 29, 2010 in Washington D.C. on “Indirect Censorship and Government Advertising in the Americas.” The hearing was requested by the Open Society Justice Initiative, the *Asociación por los Derechos Civiles* (Argentina); the *Centro de Archivos y Acceso a la Información Pública* (Uruguay) and the *Grupo Medios y Sociedad* (Uruguay); the *Fundación para la Libertad de Prensa* (Colombia); the *Instituto Prensa y Sociedad* (Peru); Article 19 (Mexico); the *Fundación Pro Acceso* (Chile); the *Centro de Análisis e Investigación Fundar* (Mexico) and the *Instituto de Prensa y Libertad de Expresión* (Costa Rica).

<sup>19</sup> See: Supreme Court of Argentina, *Case of Río Negro*, Judgment of September 5, 2007.

<sup>20</sup> See: Supreme Court of Chile, Appeal 9148/09, Judgment of April 22, 2010.

<sup>21</sup> National Human Rights Commission, Recommendation 57/2009 of September 14, 2009.

<sup>22</sup> Communication Policy of the Government of Canada, August 1, 2006, available at,

<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12316&section=text#cha1>.

citizens to understand changes to laws, policies, programs, or services.<sup>23</sup> It further establishes that the duty to inform includes the duty to do so effectively, which means that the information must be presented in a way that is clear and easy to understand, and it must be objective, relevant, and useful.<sup>24</sup> The regulations also provide that communications and advertising campaigns must be planned within the framework of each entity's annual plan of activities;<sup>25</sup> they also suspend advertising during general elections and prohibit advertising campaigns that disseminate the messages of political parties.<sup>26</sup>

18. Peru has also had a law in place to regulate government advertising since August of 2006.<sup>27</sup> The aim of the law is, among other things, to establish general criteria for the use of funds budgeted for government advertising. The law requires that campaigns be planned, and that the selection of media outlets for such campaigns be justified on technical grounds. In addition, the law prohibits the earmarking of public funds to support a political party or a candidate for elected office. It also prohibits those government employees in charge of the agencies conducting the advertising campaigns from appearing in the ads that are disseminated in the media. Finally, the law contains transparency provisions and penalties for government employees who fail to comply with the duties and obligations prescribed therein.

19. Similar provisions can be found, for example, in Spain and the United Kingdom. In Spain, Act 29 on Institutional Communication and Advertising, enacted in December 2005, establishes a regulatory framework that defines the objectives of government advertising. It establishes that such advertising cannot be used to "highlight administrative achievements"<sup>28</sup> and it prohibits government advertising during election periods.<sup>29</sup> In the United Kingdom, although there is no law regulating the institutional communication of the State, there is a regulatory framework in the so-called "Propriety Guides," which regulate the activities of the communications staff of different State agencies, including the promotion of advertising campaigns. These guidelines establish criteria for advertising campaigns carried out by the State, which must never be "political" in nature.

20. These regulatory frameworks—though not perfect—establish certain basic parameters that often tend to prevent institutional communication from being used for electoral purposes or as a means to exert pressure on journalists and the media. An adequate legal regime to address the placement of government advertising must necessarily decrease the discretion of public servants to place ads, so that public funds are not used in a manner that restricts freedom of expression.

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<sup>23</sup> Communication Policy of the Government of Canada, August 1, 2006, section 2.

<sup>24</sup> Communication Policy of the Government of Canada, August 1, 2006, section 3.

<sup>25</sup> Communication Policy of the Government of Canada, August 1, 2006, section 13.

<sup>26</sup> Communication Policy of the Government of Canada, August 1, 2006, section 23.

<sup>27</sup> Act 28.874, Perú, enacted on August 14, 2006. Available at: [http://www.censuraindirecta.org/web\\_files/download/articulos/adjuntos/Ley-28874-de-Publicidad-Estatal-pdf-1586.pdf](http://www.censuraindirecta.org/web_files/download/articulos/adjuntos/Ley-28874-de-Publicidad-Estatal-pdf-1586.pdf). It should be noted that the law has not resulted in the elimination of discretion in the allocation of government advertising, in part because of the absence of regulations thereto.

<sup>28</sup> Act 29/05 on Institutional Communication and Advertising, enacted on December 29, 2005, article 4.1.a, available in PDF format at <http://www.boe.es/boe/dias/2005/12/30/pdfs/A42902-42905.pdf>.

<sup>29</sup> Act 29/05 on Institutional Communication and Advertising, enacted on December 29, 2005, available in PDF format at <http://www.boe.es/boe/dias/2005/12/30/pdfs/A42902-42905.pdf>.

21. With the exceptions of Peru and Canada, the countries of the hemisphere do not have specific laws addressing this issue.<sup>30</sup> As stated in the 2003 Annual Report of the Office of the Special Rapporteur, “Most OAS countries lack specific legislation on the issue of allocation of official publicity.”<sup>31</sup> That report concluded that the absence of such regulation could “create the danger of an excessive discretionary power in decision-making bodies, which could give way to discriminatory allocations of official publicity.”<sup>32</sup>

22. Although some jurisdictions have made progress toward legal reform in this area, no great strides have been made. In Chile, for example, the legal reform process began with a detailed study conducted by the Special Investigative Commission on Government Advertising, which was made public in 2008. The Special Commission found that the advertising budgets were allocated in a discretionary manner, which was possible due to the lack of clear rules defining the criteria and mechanisms of allocation. The Special Commission recommended the drafting of a bill “that regulates the official advertising of the administrative bodies of the State, including public enterprises and the Municipalities.”<sup>33</sup>

23. In Colombia the issue has been addressed at the local level, in the city of Cartagena and in the department of Caldas. In Cartagena, for example, the municipality has made progress with the implementation of provisions issued in 2008 that created an official committee and established several criteria for the placement of government advertising.<sup>34</sup> At the departmental level, on April 6, 2009, the government of Caldas issued Order 0020, whereby mechanisms were established for the placement of advertising by the centralized and decentralized entities at the departmental level, and an advertising advisory committee was created.<sup>35</sup>

24. Finally, a bill was introduced in Uruguay proposing the regulation of the allocation of government advertising,<sup>36</sup> and in mid-2010 the government of José Mujica again took up the initiative and undertook to promote a bill drafted by the Ministry of Industry, Energy and Mining. At the time of this report’s drafting, the bill remained pending.

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<sup>30</sup> The Peruvian law is Act 28.874, enacted on August 14, 2006, available at [http://www.censuraindirecta.org/web\\_files/download/publicaciones/archivo/Ley-28-874-pdf-1589.pdf](http://www.censuraindirecta.org/web_files/download/publicaciones/archivo/Ley-28-874-pdf-1589.pdf); Cabinet Office, Propriety Guidance, available at: [http://tna.europarchive.org/20070807115016/http://www.cabinetoffice.gov.uk/government\\_communication/propriety/guidance.pdf](http://tna.europarchive.org/20070807115016/http://www.cabinetoffice.gov.uk/government_communication/propriety/guidance.pdf).

<sup>31</sup> IACHR, *2003 Annual Report*. OEA/Ser. L/V/II.118. Doc. 70, December 29, 2003. Volume II: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, Chapter V (*Indirect Violations of Freedom of Expression: Discriminatory Allocation of Official Publicity*), para. 56. See, in particular, paras. 24 *et seq.*, where it is explained that the few provisions regulating the issue in most of the countries of the region do not specifically aim to prevent government advertising from becoming a means of indirect censorship.

<sup>32</sup> IACHR, *2003 Annual Report*. OEA/Ser. L/V/II.118. Doc. 70, December 29. Volume II: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, Chapter V (*Indirect Violations of Freedom of Expression: Discriminatory Allocation of Official Publicity*), para. 56.

<sup>33</sup> National Congress of Chile. Chamber of Deputies. Report of the Special Investigative Commission on Government Advertising, 2007, p. 134.

<sup>34</sup> IACHR, *2009 Annual Report*. Volume II: *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), para. 114.

<sup>35</sup> See: Medioslatinos, “*Gobernación colombiana reglamenta distribución equitativa de la publicidad oficial*”, April 23, 2009, available at <http://www.medioslatinos.com/modules/news/article.php?storyid=2336>.

<sup>36</sup> IACHR, *2009 Annual Report*. OEA/Ser.L/V/II Doc.51, December 30, 2009. Volume II: *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*), para. 503.

25. The absence of adequate regulatory frameworks makes it possible for the previously mentioned abuses to be committed in the allocation of government advertising. In Honduras, for example, following the coup d'état of June 28, 2009, the *de facto* government stopped placing government advertising with media outlets that were unsympathetic to the coup.<sup>37</sup>

26. The absence of adequate regulatory frameworks has led to legal challenges to the arbitrary allocation of government advertising in several countries. As mentioned earlier, one of the principal precedents at the local level is the case of *Editorial Río Negro S.A. v. Provincia de Neuquén*, decided by the Supreme Court of Argentina in September 2007. That case dealt with a lawsuit filed by the Río Negro newspaper against the Province of Neuquén, which had suspended its placement of advertising in that paper as a consequence of an exposé on corruption that it had published. In that case, the Supreme Court held that if the State decides to place government advertising, it must do so based on two constitutional criteria:

"1) [I]t cannot manipulate advertising, placing it with and withdrawing it from some media [based on] discriminatory criteria; 2) it cannot use advertising as an indirect means of affecting freedom of expression."<sup>38</sup>

27. The Court, citing this office's 2003 Annual Report, found that "The State cannot allocate advertising funds arbitrarily, based on unreasonable criteria,"<sup>39</sup> and it held that such arbitrary allocation "amounts to pressure that, far from preserving the integrity of public debate, places it at risk, unfairly and indirectly affecting freedom of the press and the legitimate interest that the *Río Negro* newspaper and its readers have in the conduct of the political officials of that province in the performance of their duties."<sup>40</sup>

28. The opinion expressed by the Supreme Court of Argentina in the *Río Negro* case was echoed by the IV Chamber of the Federal Court of Appeals for Administrative Matters of Argentina, which decided the case filed by *Editorial Perfil* against the national government based on its exclusion from the receipt of government advertising as a consequence of its critical stance. In that case, the judges of the IV Chamber held that "the government must prevent acts that are intentionally or exclusively aimed at limiting the exercise of freedom of the press, as well as those that lead indirectly to that result. In other words, it is sufficient for the government act to have such a motive in order for it to infringe upon that freedom. Accordingly, the financial constriction or bankruptcy of the newspaper is not necessary [...]."<sup>41</sup> These cases were preceded by detailed studies that documented, through requests for access to public information, the means by which

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<sup>37</sup> IACHR, 2009 Annual Report. OEA/Ser.L/V/II Doc.51, December 30, 2009. Volume II: *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*), para. 346.

<sup>38</sup> Supreme Court of Argentina, *Case of Río Negro*, Judgment of September 5, 2007, conclusion of law No. 11.e.

<sup>39</sup> Supreme Court of Argentina, *Case of Río Negro*, Judgment of September 5, 2007, conclusion of law No. 4.

<sup>40</sup> Supreme Court of Argentina, *Case of Río Negro*, Judgment of September 5, 2007, conclusion of law No. 9.

<sup>41</sup> IV Chamber of the Federal Court of Appeals for Administrative Matters. February 10, 2009. Case No. 18.639/2006: *Editorial Perfil S.A. y otro contra EN – Jefatura Gabinete de Ministros – SMC sobre amparo ley 16-986*; considerando 11; Asociación por los Derechos Civiles. February 11, 2009. *Caso Perfil: un fallo en contra de la censura indirecta*. Available at: [http://www.adc.org.ar/sw\\_contenido.php?id=513](http://www.adc.org.ar/sw_contenido.php?id=513); Committee to Protect Journalists. February 19, 2009. *Argentine court orders official ads into critical publications*. Available at: <http://cpj.org/2009/02/argentine-court-orders-official-ads-into-critical.php>; Inter American Press Association. February 12, 2009. *Satisface a la SIP fallo en Argentina sobre publicidad oficial*. Available at: [http://www.sipiapa.org/v4/index.php?page=cont\\_comunicados&seccion=detalles&id=4136&idioma=sp](http://www.sipiapa.org/v4/index.php?page=cont_comunicados&seccion=detalles&id=4136&idioma=sp).

government advertising was allocated.<sup>42</sup> This type of research is vitally important to identify the regulatory deficiencies or the arbitrary allocations by States that tend to indirectly influence the content of the media.

29. It is possible to find additional case law in countries such as the United States. In the case of *El Día v. Rossello*, the United States Court of Appeals for the First Circuit held that the withdrawal of government advertising from the *El Día* newspaper by Puerto Rico Governor Pedro Rossello's administration—as a consequence of the paper's criticism of the governor—was a clear violation of freedom of expression guaranteed by the First Amendment of the Constitution of the United States.<sup>43</sup> In that respect, the Court of Appeals found that “using government funds to punish political speech by members of the press and to attempt to coerce commentary favorable to the government [runs] afoul of the First Amendment.”<sup>44</sup> The Court further held that “clearly established law prohibits the government from conditioning the revocation of benefits [in this case, State advertising] on a basis that infringes constitutionally protected interests.”<sup>45</sup>

30. Likewise, in India, in the case of *Ushodaya Publications Private Ltd. v. Government of Andhra Pradesh and Others*, the High Court of the State of Andhra Pradesh held that, while it is not mandatory for the State to take out government advertising, it cannot allocate that budget in a discriminatory manner in the event that it decides to do so. Indeed, the Court found that a legal provision that gives absolute discretion in the placement of advertising to a single public servant “violates Article 14” of the Constitution, which guarantees the right to equality.<sup>46</sup> The Court recalled that the Supreme Court of India had held that the guarantee of freedom of expression would be infringed upon “either by placing restraint upon it directly or by placing restraint upon something which is an essential part of that freedom.”<sup>47</sup>

31. An impartial and independent judiciary is fundamental to the prevention of abuses, and specific cases of discrimination in which advertising budgets are allocated with the aim of punishing critical expressions may be redressed before the courts; however, the structural response to this type of threat to freedom of expression must come from appropriate legal frameworks. In this respect, in the *Río Negro* case, the Supreme Court of Argentina ordered the Province of Neuquén to present to the Court an appropriate legal framework to regulate the allocation of government advertising. It is not enough for the judges to redress the harm caused; rather, it is necessary to demand that the governments that carry out these types of discriminatory practices submit to clear rules so that the violations are not repeated. The ongoing jurisdiction of the judges who decide these cases, in order to promote and supervise the establishment of an appropriate legal framework, can be a fundamental tool in the furtherance of effective legal reform

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<sup>42</sup> See: *Una Censura Sutil. Abuso de la publicidad oficial y otras restricciones a la libertad de expresión en Argentina*. Asociación por los Derechos Civiles/Open Society Justice Initiative. Buenos Aires: Porter y Cía., 2005; & *El Precio del Silencio. Abuso de publicidad y otras formas de censura indirecta en América Latina*. Asociación por los Derechos Civiles / Open Society Justice Initiative. Buenos Aires: Porter y Cía., Colección Reformas Legales, 2008.

<sup>43</sup> *El Día, Inc. v. Rossello*, 165 F.3d 106 (1st Cir. 1999).

<sup>44</sup> *El Día, Inc. v. Rossello*, 165 F.3d 106, 109 (1st Cir. 1999).

<sup>45</sup> *El Día, Inc. v. Rossello*, 165 F.3d 106, 110 (1st Cir. 1999).

<sup>46</sup> Andhra Pradesh High Court, *Ushodaya Publications Private Ltd. v. Government of Andhra Pradesh and Others*, decision of October 10, 1980, para. 19.

<sup>47</sup> Andhra Pradesh High Court, *Ushodaya Publications Private Ltd. v. Government of Andhra Pradesh and Others*, decision of October 10, 1980, para. 8.

in this area.<sup>48</sup> Nevertheless, the best way to address the issue is for the legislative branch to draft an appropriate regulatory framework.

32. As explained previously, the State's improper use of regular powers for purposes of restricting fundamental rights is facilitated to the extent that government employees have an excessive degree of discretion. If such powers are duly regulated, exercised in a transparent fashion, and subject to adequate supervision, the potential for their use as a means of indirect restriction is significantly decreased. Below, the Office of the Special Rapporteur presents a series of basic principles that adequate regulations on the subject should follow. These principles, based on inter-American standards and on comparative experiences, set minimum criteria, the implementation of which would enable the deactivation of one of the principal mechanisms of State interference in the content of the media.

## **B. Guiding principles on government advertising**

33. Clear and transparent legal frameworks that prevent arbitrariness in decision-making are required to reduce the discriminatory or arbitrary earmarking of public funds. On this point, the Office of the Special Rapporteur has stated that "insufficiently precise laws and unacceptable discretionary powers constitute freedom of expression violations. [When] laws pertaining to allocation of official publicity are unclear or leave decisions to the discretion of public officials (...) there exists a legal framework contrary to freedom of expression."<sup>49</sup> The principles explained below further develop this doctrine.

### **1. Establishment of specific, clear, and precise laws**

34. States must adopt specific legal rules on government advertising at each level of government. The lack of a specific and adequate legal framework to define the objectives, allocation, placement, and oversight of government advertising allows for the arbitrary use of these funds to the detriment of freedom of expression.

35. Article 2 of the American Convention imposes upon the member States the general duty to bring its domestic laws into line with the Convention, and to adopt "such legislative or other measures as may be necessary to give effect to those rights or freedoms." The 2003 Annual Report of the Office of the Special Rapporteur for Freedom of Expression remarked that "the member States need to have a greater political will to carry out reforms in their legislation guaranteeing every society the full exercise of freedom of expression and information."<sup>50</sup> In the same report, and with respect to government advertising, the Office of the Special Rapporteur stated: "The multitude of alleged cases is evidence of the widespread nature of alleged indirect violations of freedom of expression. These possible indirect violations are promoted by the lack of legal regulations that provide adequate remedies for the discriminatory allocation of official publicity, as these legal voids give way to excessive discretionary power on behalf of the decision-making authorities."<sup>51</sup>

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<sup>48</sup> This is, for example, what the Argentine Supreme Court did in the above-cited case of *Editorial Río Negro S.A. v. Provincia de Neuquén*.

<sup>49</sup> IACHR, 2003 *Annual Report*. Volume III: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter V. Para. 23.

<sup>50</sup> IACHR, 2003 *Annual Report*. Volume III: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter II, para. 18

<sup>51</sup> IACHR, 2003 *Annual Report*. Volume III: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter V. Para. 86.

36. States therefore have the duty to adopt clear and specific legal guidelines as a comprehensive part of their duty to guarantee the exercise of freedom of expression. With regard to government advertising, this means adequate regulation of the mechanisms of production and allocation of government advertising with the objective of limiting the excessive discretion that allows for the violation of the right to freedom of thought and expression. Best practices, informal mechanisms, flawed or dispersed regulations and—in general—the implementation of general rules on ad placement to reduce discretion and abuses in government advertising are not enough to prevent violations of freedom of expression.

37. These legal frameworks must define government advertising simply and inclusively. They must establish, for example, that government advertising includes any communication, announcement, or ad space purchased with public funds, in any media and in any format.

38. These regulations must cover the different stages associated with the production, placement, dissemination, and oversight of public or private sector advertising paid for with public money.

39. The specific legal rules on government advertising must incorporate the principles of public interest, transparency, accountability, nondiscrimination, efficiency, and the good use of public funds.

40. The legal framework must include an exhaustive description of its scope of application. This should include public bodies at all levels of government, including those belonging to the Executive, Legislative, and Judicial Branches; constitutional or statutory bodies; decentralized agencies; self-governing entities; business corporations capitalized with state funds, and any other legal entity that engages in advertising with money from public coffers, such as state enterprises.

41. The regulations should also include appropriate penalties for the violation of their provisions.

## **2. Legitimate objectives of government advertising**

42. States should use government advertising to communicate with the public and to provide information through the media about the services they provide and the public policies they pursue, for purposes of meeting their goals and guaranteeing the right to information and the exercise of the rights of the beneficiaries of such policies or the community. Government advertising should consist of information in the public interest, the purpose of which is to meet the legitimate aims of the State, and it must not be used for discriminatory purposes, to violate the human rights of the public, or for electoral or partisan purposes.

43. In a democratic society the citizens have the right to know about—that is, to be informed of—official activities, the policies of the government, and the services provided by the State. The Office of the Special Rapporteur for Freedom of Expression has maintained that “the use of the media to transmit information is an important and useful tool for States.”<sup>52</sup> As the Office of the Special Rapporteur stated in its 2009 Annual Report, the State must at least provide information regarding:

“(a) the structure, function, and operating and investment budget of the State; (b) the information needed for the exercise of other rights—for example, those pertaining to the

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<sup>52</sup> IACHR 2003 Annual Report. Volume III: Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter V, para. 3.

requirements and procedures surrounding pensions, health, basic government services, etc.; (c) the availability of services, benefits, subsidies or contracts of any kind; and (d) the procedure for filing complaints or requests, if it exists. This information should be [complete], understandable, [simply written], and up to date. Also, given that significant segments of the population do not have access to new technologies, yet many of their rights [may] depend on obtaining information on how to [assert] them, in these circumstances the State must find [effective] ways to fulfill its obligation of [active] transparency."<sup>53</sup>

44. Therefore, the purpose of government advertising must be useful to the public, and the government must use the media, platforms, and formats that best guarantee access to and dissemination of information according to the purpose and characteristics of each campaign.

45. The information transmitted in government advertisements must be clear and cannot be deceptive; in other words, it must not lead its audience to error, or be used for purposes other than legitimate and non-discriminatory communication with the public. It must also not be easily confused with the symbols, ideas, or images used by any political party or social organization, and it must be identified as government advertising, with express mention of the sponsoring entity. State advertising may not be the veiled propaganda of those who control the government or of their interests, nor should it be used to stigmatize sectors of the population that oppose or are critical of the government.<sup>54</sup>

### 3. Criteria for the allocation of government advertising

46. The States must establish procedures for the contracting and allocation of government advertising that reduce discretion and prevent suspicion of political favoritism in its distribution. Advertising funds must be allocated according to pre-established criteria that are clear, transparent, and objective. Government advertising must never be allocated by the States as a reward or punishment for the editorial and reporting content of the media. Such use must be explicitly penalized. Decision-making responsibility for placing and allocating government advertising must not lie solely in the hands of political staff; rather, public servants with specialized technical backgrounds in the field should also participate.

47. Advertising funds must never be distributed with discrimination—whether positive or negative—based on the editorial slant of the media outlet. As principle 13 of the Declaration of Principles on Freedom of Expression holds, “The arbitrary and discriminatory placement of official advertising (...) with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law.”

48. In the same vein, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE [Organization for Security and Cooperation in Europe] Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression stated in a joint declaration that

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<sup>53</sup> IACHR. *2009 Annual Report*. Volume II: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter IV (The Right of Access to Information)*, paras. 32 et seq.

<sup>54</sup> There are studies demonstrating that during election periods there is an increase in the propagandistic use of government advertising, as well as its discriminatory allocation to strengthen sympathetic media. As such, it is necessary for the specific laws on the subject to establish mechanisms to prevent ad campaigns—which should serve the public interest—from being used as tools for garnering votes, as the use of public funds for such purpose would violate the principle of fairness and equality of conditions that must prevail in an electoral race. To this end, it would be possible to establish provisions regulating the suspension of advertising for a reasonable period of time during political campaigns and the elections, except in cases where there is a legal duty to inform or an emergency regarding which it is necessary to communicate a certain message.

“governments and public bodies should never abuse their custody over public finances to try to influence the content of media reporting; the placement of public advertising should be based on market considerations.”<sup>55</sup>

49. Although the media have no intrinsic right to receive advertising funds, the Office of the Special Rapporteur for Freedom of Expression has asserted that “when a state allocates [such funds] in discriminatory ways [...] the [...] right to freedom of expression is infringed.”<sup>56</sup>

50. The awarding of government advertising is discriminatory and constitutes indirect censorship when it is based on the opinions issued by the media outlet or other reasons not justified by the objectives of the advertising in question, such as a personal or political affinity. In other words, as the Office of the Special Rapporteur for Freedom of Expression has maintained, a non-discriminatory decision is one based “on criteria ‘substantially related’ to the prescribed viewpoint-neutral purpose [of the advertising to be placed].”<sup>57</sup>

51. Campaigns must be decided upon based on clear, public allocation criteria established prior to the advertising decision. At the time of placing the ad, the State must provide a clear, written explanation of the parameters used, and the manner in which they were applied.

52. The allocation criteria must include and evaluate different factors, such as the profile of the campaign’s target population, the prices, and the circulation or audience of the respective medium. In any case, the criteria must be clearly set forth in the relevant provision, together with a balancing mechanism that specifies how the different allocation variables are to be weighed, thus reducing the discretion of the participating government employee or body.

53. An overriding criterion of the State must be to consider the audience or target population of the advertising campaign. Government advertising forms part of the freedom of information of the public, which has the right to be adequately informed of the activities and services of the State. Therefore, government advertising should be oriented toward the effectiveness of the message. In other words, the message should be received by the audience that the campaign seeks to reach. The target population determines the range of eligible media; then, among other variables, the State must consider the size of the circulation or audience—which should be broad and comprehensive—and the price, which must never exceed the price paid by a private advertiser.

54. To the extent that the allocation criteria require measurements, the legal framework must guarantee that they are comprehensive measurements that encompass different types of media, and that they are performed using objective and reliable criteria. Accordingly, they could be performed by credible, impartial institutions. The measurements should include data on small, community, and local media, so that their use as a tool for awarding advertising contracts does not become an indirect barrier to the exercise of freedom of expression by excluding such media from

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<sup>55</sup> International Mechanisms for Promoting Freedom of Expression, December, 2002. See: Annex to the 2001 Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/II.114, Doc. 5 rev. 1, April 16, 2002.

<sup>56</sup> IACHR. 2003 Annual Report. Volume III: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter V, para. 12.

<sup>57</sup> IACHR. 2003 Annual Report. Volume III: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter V, para. 11. Similarly, see: Supreme Court of Argentina, *Case of Rio Negro*, Judgment of September 5, 2007, which states: “There is a right against the arbitrary allocation [of government advertising] or the indirect violation of freedom of the press through financial means. The first option for a State is whether or not to advertise, and this decision remains within the sphere of State discretion. If it decides to advertise, it must meet two constitutional criteria: 1) it cannot manipulate advertising, placing it with and withdrawing it from some media based on discriminatory criteria; 2) it cannot use advertising as an indirect means of affecting freedom of expression.”

receiving government advertising. From this perspective, discrimination in the distribution of advertising based on the model under which the media operate is unacceptable. In this respect, the exclusion of community or alternative broadcast media in the allocation of the advertising budget due to the mere fact that they operate under non-commercial criteria constitutes unacceptable discrimination under the American Convention. These media outlets must be included under equal conditions in the selection processes and allocation criteria in consideration of their coverage or audience.

55. Finally, the management of advertising funds should not be under the control of political appointees who report directly and solely to the executive authorities in power. That encourages excessive discretion and leads to favoritism in the allocation of such funds. Therefore, in addition to having pre-established criteria and procedures, it is necessary for technical specialists to share in the responsibility for handling and allocating advertising. Although it is reasonable for political staff to participate in the general shaping of campaigns, given that they deal with public policies, the design and handling of technical issues (planning, media plan, placement in the media, and other matters) should be left to technical staff specializing in those tasks.

#### **4. Adequate planning**

56. The regulatory provisions must require that the different State agencies plan government advertising adequately. The decision to grant public funds for government advertising must be made in a transparent and justified manner, and must allow for public oversight. It must be justified based on the existence of advertisements and campaigns that meet real and specific communication needs.

57. A lack of planning favors the abuse of government advertising by increasing the discretion exercised by the public servants who have the authority to distribute it.

58. States must make use of the funds earmarked for government advertising through specific and necessary campaigns, in accordance with the principle of the public utility of government advertising. Therefore, such campaigns should be specified within the appropriate plans.

#### **5. Contracting mechanisms**

59. States must allocate advertising funds through open, transparent, and non-discriminatory procedures, bearing in mind the characteristics of each jurisdiction. Only in exceptional cases, and in the event of fully justified emergencies or unforeseen events, may States avail themselves of closed or direct contracting systems.

60. States must purchase advertising spots in the media through pre-established procedures that prevent arbitrary decisions. All of the stages involved in the contracting process must be public, so that procedural oversight may be exercised by the bidders, the community, the supervisory bodies, and the public administration itself. Transparency in these contracting processes is fundamental so that they can be called into question if any irregularities surface. Accordingly, the law regulating them must provide for suitable and effective administrative and judicial appeals.

61. The design of the procedures must bear in mind the geographical and market conditions of each jurisdiction. The States must seek to comply with the principle of competitive bidding inherent in government contracting, barring exceptional situations listed exhaustively in the law.

62. The contracting mechanisms should be sufficiently flexible to address the different situations that may require a rapid response in terms of communication by the State. The direct hiring of sole suppliers must only be used in cases of emergency or extreme urgency, and those situations must be defined in the applicable provisions in order to prevent their abuse. In these cases, transparency requirements must be maximized.

63. The States must follow objective, predetermined, and transparent selection rules in choosing advertising agencies or other subcontractors involved in the process of producing or distributing government advertising. Likewise, States must guarantee that intermediary agents adhere to the principles and criteria set forth under the law for the contracting of government advertising. All contracts must be approved, at the final instance, by government employees with technical training whose conduct and decisions would pass administrative and judicial review.

64. The States can establish supplier registries or information systems, in which the media, programs, and intermediary agents can enroll. All of the information recorded in these databases must be considered public. Enrollment in the registries must be done for the exclusive purpose of facilitating the transparency and objectivity of the contracting process. The registration requirements must be those that are strictly necessary to successfully carry out an objective selection process. Disproportionate or discriminatory requirements are in no way admissible.

## 6. Transparency and access to information

65. Individuals have the right to know all of the information on government advertising that is in the State's possession. Therefore, the State must promote the transparency of information concerning government advertising in two ways. First, it must periodically publish all of the relevant information on contracting criteria, reasons for allocation, budgets, expenses, and advertising contracts. This must include the amounts spent on advertising, broken down according to media outlets, advertising campaigns, and contracting entities. Second, it must guarantee easy access to the information with respect to each request made by the general public.

66. All of the information on government advertising that is held by the State is public information. Therefore, the State has a positive obligation to provide the information on government advertising that is in its possession; correlatively, access to that information must be considered a fundamental individual right that the State is required to guarantee. The State has the obligation to provide the public with the maximum quantity of information on this subject voluntarily,<sup>58</sup> as well as the duty to provide individuals with an administrative procedure for accessing public information.<sup>59</sup>

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<sup>58</sup> Cf. *2004 Joint Declaration of the UN, OSCE and OAS Special Rapporteurs for Freedom of Expression*: "(...) Public authorities should be required to publish pro-actively, even in the absence of a request, a range of information of public interest. Systems should be put in place to increase, over time, the amount of information subject to such routine disclosure.); Inter-American Juridical Committee. Resolution 147 of the 73<sup>rd</sup> Regular Session: Principles on the Right of Access to Information. August 7, 2008, paragraph 4 ("Public bodies should disseminate information about their functions and activities – including, but not limited to, their policies, opportunities for consultation, activities which affect members of the public, their budget, and subsidies, benefits and contracts – on a routine and proactive basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable.").

<sup>59</sup> See: IACHR. 2009 Annual Report. Volume II: Annual Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter IV (The Right of Access to Information), para. 26 ("The full satisfaction of the right of access to information requires States to include in their legal systems an effective and adequate legal recourse that can be used by all individuals to request the information they need. In order to guarantee the true universality of the right to access, this recourse must include several characteristics: (a) it must be a simple recourse that is easy for everyone to access and only [demand] basic requirements, like a reasonable method of identifying the requested information or providing the personal details necessary for the administration to turn over the requested information to the petitioner; (b) it must be free or have a cost low enough so as not to discourage requests for information; (c) it must establish tight but reasonable deadlines for authorities to turn over the requested information; (d) it must allow requests to be made orally in the event that they cannot be made in writing—for example, if the petitioner does not know the language or does not know how to write, or in cases of

In addition, administrative and judicial appeal processes that are simple, effective, expedited, and not unduly burdensome must be available to challenge the decision of any authority who denies access to information in such cases.<sup>60</sup>

67. As the Office of the Special Rapporteur for Freedom of Expression has stated, “States must keep in mind that transparency is vitally needed. The criteria used by government decision-makers to distribute publicity must be made public. The actual allocation of advertising and sum totals of publicity spending should also be publicized, to insure fairness and respect for freedom of expression.”<sup>61</sup>

68. For purposes of enforcing the right of access to information held by the State, the entire public sector should be considered to be “the State.” In this respect, “the right of access to information applies to all public bodies, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory bodies, bodies which are owned or controlled by government, and bodies which operate with public funds or which perform public functions.”<sup>62</sup> As the Office of the Special Rapporteur for Freedom of Expression maintained in its 2009 Annual Report, “the right of access to information generates obligations at all levels of government, including for public authorities in all branches of government, as well as for autonomous bodies. This right also affects those who carry out public functions, provide public services, or manage public funds in the name of the State. Regarding the latter group, the right to access [to] information obligates them to turn over information exclusively on the handling of public funds, the provision of services in their care, and the performance of public functions.”<sup>63</sup>

69. Private entities must bear in mind that when they take part in contracting procedures for government advertising, certain information strictly related to the contracting process—which might otherwise be considered private—becomes public in nature. All information relating to the issue of government advertising must be public.

70. The type of information covered by the right of access to public information on government advertising must include, but is not limited to, “the information that is in the care of, possession of, or being administered by the State; the information that the State produces, or the information that it is obliged to produce; the information that is under the control of those who administer public services and funds and pertains to those specific services or funds; and the information that the State collects and that it is obligated to collect in the exercise of its

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...continuation

extreme urgency; (e) it must establish an obligation for administrators to advise the petitioner on how to formulate the request, including advising the petitioner on the authority competent to reply to the request, up to and including filing the request for the petitioner and keeping the petitioner informed of its progress; and (f) it must establish an obligation to the effect that in the event that a request is denied, it must be reasoned and there must be a possibility of appealing the denial before a higher or autonomous body, as well as later challenging the denial in court.”)

<sup>60</sup> See: IACHR. 2009 Annual Report. Volume II: Annual Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter IV (The Right of Access to Information), para. 29 (“The remedy should [...] (a) review the merits of the controversy to determine whether the right of access was inhibited, and (b) in the affirmative case, order the corresponding government body to turn over the information. In these cases, the [appeals] should be simple and quick, since the expeditious delivery of the information is indispensable for the fulfillment of the functions this right presupposes.”). See also: I/A Court H.R., *Case of Claude Reyes, et al.* Judgment of September 19, 2006, Series C No. 151, para. 137.

<sup>61</sup> IACHR 2003 Annual Report. Volume III: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter V. Para. 90.

<sup>62</sup> Inter-American Juridical Committee. Resolution 147 of the 73<sup>rd</sup> Regular Session: Principles on the Right of Access to Information. August 7, 2008. Paragraph 2.

<sup>63</sup> IACHR. 2009 Annual Report. Volume II: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, Chapter IV (*The Right of Access to Information*), para. 19.

functions.”<sup>64</sup> Information considered relevant includes “all information, defined broadly to include everything which is held or recorded in any format or medium and which communicates or contains meaning.”<sup>65</sup>

71. All information concerning the “what,” “how,” “why” and “how much” of a government advertisement or campaign must be public. As such, all of the following must be made transparent: the budgets approved for advertising, which must be published voluntarily and proactively; advertising expenses, which must be subject to detailed and periodic reports that break down expenses by entities, campaigns, headings, and media outlets; the strategic plans of the advertising campaigns which must be based on real communication needs and objectives. The contracting processes also must be transparent, and the public must be easily able to access specific data about them, including objectives, price, duration, media bids and media outlets in which ads are placed, advertising agencies involved, audience or circulation data, results in cases in which a subsequent evaluation is conducted, and so on.<sup>66</sup> The selection criteria that the State or intermediary agency used in choosing the media outlet for each government advertisement must especially be disclosed. The information must be presented in such a manner that it can be obtained completely, in an accessible and timely manner, and it should be easy to find.

## **7. External oversight of the allocation of government advertising**

72. The States must establish mechanisms for external oversight by an autonomous body, thus enabling an exhaustive monitoring of the distribution of government advertising. Such controls must include periodic audits of the government’s expenditures and practices with regard to the contracting of advertising, as well as special reports on the relevant practices of the State that have adequate legislative or parliamentary oversight. The States must establish appropriate penalties for failure to comply with the law, as well as appropriate remedies for identifying and disputing illegal allocations of government advertising.

73. The governments must provide a public accounting of their expenditures and the manner in which advertising funds are used. Accordingly, it is necessary to establish clear and public external oversight mechanisms that report on the legality and the appropriateness of state advertising. The controls should include periodic audits (annually, in principle) performed by administrative agencies or bodies that have the institutional, organizational, and functional guarantees to operate independently of the government in power and the economic or social powers that be.<sup>67</sup> In order to ensure the greatest transparency with regard to these types of controls, the reports of the supervisory bodies must also be public and available to all citizens through the Internet.

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<sup>64</sup> IACHR. 2009 Annual Report. Volume II: Annual Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter IV (The Right of Access to Information), para. 21.

<sup>65</sup> IACHR. 2009 Annual Report. Volume II: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, Chapter IV (*The Right of Access to Information*), para. 22. Inter-American Juridical Committee. Resolution 147 of the 73<sup>rd</sup> Regular Session: Principles on the Right of Access to Information. August 7, 2008. Paragraph 3.

<sup>66</sup> For example, in Canada, this information is included in the “Annual Report”, an exhaustive document containing details of expenditures by state bodies, expenditures by media type, suppliers contracted, and specific data on each important campaign, among other items. In Spain, Act 29/2005 requires the preparation of an Annual Report that includes the campaigns, their costs, the awardees of contracts entered into, and the corresponding media plans.

<sup>67</sup> The independence of the oversight bodies is essential in order for them to be able to perform their duties free from pressures of any kind. The mechanisms for guaranteeing that independence are multiple and varied, but we can mention, by way of example: the pre-established terms of mandate; the stability of positions except in cases of serious misconduct; technical suitability; appointments that require the prior approval of a collective body with plural representation; appropriate remunerations; and transparency of action, among other things.

74. The States have a general auditing duty. In the case of public funds earmarked for advertising, certain specific controls must be in place. Essentially, given that state advertising can be used as an instrument to manipulate the media, the States must oversee the appropriate application of the award criteria at the time of allocating advertising contracts. Likewise, governments must demonstrate that they have met the various obligations provided for under the law, and must evaluate periodically the necessity, timeliness, and impact of advertising campaigns, correcting their practices pursuant to that evaluation.<sup>68</sup>

75. The States must establish certain negative consequences for noncompliance with the obligations set forth in provisions regulating government advertising. First, they must actively seek to bring their practices into line with the recommendations made in the audits. Second, failure to comply with the law must be penalized in a manner that is proportionate and appropriate to the infraction committed.<sup>69</sup>

76. The States must have multiple levels of oversight of government advertising. In this respect, the defenders of collective interests must be authorized to challenge inappropriate allocations, and private citizens must be able to call into question, through appropriate procedures, those campaigns they consider unlawful.

## 8. Media pluralism and government advertising

77. The States must establish policies and earmark funds to promote media diversity and pluralism through indirect assistance mechanisms or explicit and neutral subsidies differentiated from government advertising expenditures. Government advertising must not be considered a means of sustenance for the media.

78. Freedom of expression, in addition to protecting the individual right of the issuing party, guarantees the right of all other people to access the greatest quantity and diversity of information and ideas, which is necessary for the robust debate required for a democratic system to function properly. The Inter-American Court specifically underscored this dual dimension—individual and social—of freedom of expression,<sup>70</sup> and both the Court and the Inter-American Commission have held that the absence of pluralism in the sources of information and media is a serious obstacle to the effective exercise of this right.<sup>71</sup>

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<sup>68</sup> Some comparative laws, such as those of Canada, require the performance of subsequent technical evaluations to measure the results in the case of large campaigns (that exceed a certain amount). In that country, all institutions must include such subsequent evaluations as a comprehensive part of the planning of each campaign, in order to ensure that there are sufficient funds to finance them. Cf. *Legislación comparada sobre regulación de publicidad oficial*. ADC. August 2008, p. 14. Available at: [http://www.censuraindirecta.org.ar/sw\\_seccion.php?id=26](http://www.censuraindirecta.org.ar/sw_seccion.php?id=26) [Query: January 2010].

<sup>69</sup> In Australia, for example, the legal system considers a public servant or Ministry to have used public funds inappropriately when such funds are used, or allowed to be used, for advertisements that are inconsistent with the common interest that must prevail in official communications, and it provides for a prison sentence with a pre-established maximum of seven years (*Government Advertising Bill 2005, prohibiting use of taxpayers' money on party political advertising*, A. 14).

<sup>70</sup> "In its individual dimension, freedom of expression goes further than the theoretical recognition of the right to speak or to write. It also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible. [...] In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others." 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 5 (OC5/85) of November 13, 1985, Series A No. 5, paras. 30-33.

<sup>71</sup> According to the Inter-American Court of Human Rights, "It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the

79. Under the parameters of the American Convention, and as the organs of the system have stated repeatedly, States have the duty to promote media pluralism. Accordingly, they must take measures so that the markets in which the media operate are open, plural, diverse, and not overly concentrated.<sup>72</sup>

80. Whether they use tax exemptions, competitive funding systems, assistance, or subsidies, or any other mechanism for promoting pluralism in the media, the allocation procedures must always be fair, open, and public. They must use criteria that are clear, transparent, and neutral with respect to the editorial position or political stance of the content, so as to prevent any kind of arbitrariness. States must never use government advertising as a subsidy, as they have different objectives.

81. In this respect, if the States were to decide to establish a subsidy mechanism to promote pluralism and diversity in the sphere of public communication, such subsidies must be granted in a transparent and non-discriminatory manner. They must be based on objective criteria related to the need to foster a greater diversity of voices through the inclusion of minority and excluded voices representing disadvantaged groups in the marketplace of ideas. Subsidies or assistance of any kind can also become an indispensable mechanism of pressure or influence over the editorial slant, focus, or news coverage of a medium. Therefore, they must be subject to the principles established herein which are consistent with their nature.

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...continuation

result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form (...),” (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. 34). For its part, the Inter-American Commission on Human Rights has said that “the free circulation of ideas and news is inconceivable without multiple sources of information (...).” (IACHR complaint before the Inter-American Court of Human Rights in the *Case of Ivcher Bronstein*, March 31, 1999, p. 28). The IACHR’s Office of the Special Rapporteur for Freedom of Expression has also weighed in on this point, establishing that: “freedom of expression also implies that the citizens are able to accede to diverse sources of information, including opinions and ideas, as well as a variety of forms and outlets for artistic and cultural expression (...),” (IACHR, *2004 Annual Report*. OEA/Ser.L/V/II.122. Doc.5, February 23, 2005. Volume III: *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter V, “*Indirect Violations of Freedom of Expression*,” paras. 18 and 20). Principle 12 of the Declaration of Principles on Freedom of Expression, drafted by the Office of the Special Rapporteur and adopted by the Inter-American Commission in 2000 is particularly relevant in that it states: “Monopolies 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. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.” The Office of the Special Rapporteur has stated that principle 12 “is based on the notion that if there were monopolies and oligopolies in the mass media, only a small number of individuals or social sectors could exercise control over the information that is made available to society. Accordingly, individuals could be deprived of the right to receive information from other sources,” and that, in this respect, “the Office of the Special Rapporteur for Freedom of Expression of the OAS considers that this provision does not represent any limitation whatsoever on the duty of the state to guarantee, through its legislation, plurality in media ownership” (*Annual Report of the Office of the Special Rapporteur for Freedom of Expression* 2004, Chapter V, paras. 93 and 94). Consistent with this is the “Joint Declaration on Diversity in Broadcasting,” issued in December, 2007 by the Inter-American Commission on Human Rights Special Rapporteur on Freedom of Expression, the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression and Access to Information, which underscores “the fundamental importance of diversity in the media to the free flow of information and ideas in society, in terms both of giving voice to and satisfying the information needs and other interests of all (...).”

<sup>72</sup> Cf. I/A Court H.R., *Kimel v. Argentina*. Judgment of May 2, 2008. Series C No. 177, para. 57. “Given the importance of freedom of thought and expression in a democratic society and the great responsibility it entails for professionals in the field of social communications, the State must not only minimize restrictions on the dissemination of information, but also extend equity rules, to the greatest possible extent, to the participation in the public debate of different types of information, fostering informative pluralism.”

82. In particular, they must: (i) be regulated through special, clear, and specific regulations; (ii) arise from legitimate, public, and transparent objectives; (iii) have objective and non-discriminatory distribution criteria; (iv) follow careful planning; (v) have clear, open, transparent, and non-discriminatory allocation criteria; and (vi) have independent and external audit and oversight mechanisms. This ensures that subsidies are not used to influence or place conditions upon the content of media that are in a weaker position financially, and therefore require affirmative action measures to be able to operate, as well as stronger guarantees to ensure independence and strength in the face of political power.