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Challenges to Freedom of Expression within the Inter-American System A Jurisprudential Analysis

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This article builds upon a prior article, *Freedom of Expression in the Inter-American System for the Protection of Human Rights*, published by the author in 2001.

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ABSTRACT

Freedom of expression is a "cornerstone upon which the very existence of a democratic society rests" [citation omitted]. Its importance takes on a special meaning in the Western Hemisphere where numerous societies are building and developing democracies while coping with the legacy of authoritarianism, which exercised a profound institutional and cultural influence in the region. This article critically examines the Inter-American system of Human Rights, systematizing its jurisprudence while providing an analytical framework designed to fully realize this essential human right. Finally, this article proposes a series of measures to help achieve that important objective.

I. INTRODUCTION

Freedom of expression is a "cornerstone upon which the very existence of a democratic society rests."¹ Its importance takes on a special meaning in the Western Hemisphere, where numerous societies are building and developing democracies while coping with the legacy of authoritarianism, which had a deep institutional and cultural influence throughout the region. The approach taken by authorities towards freedom of expression serves as a social barometer of what direction change might take. Traditionally, serious economic, political, social, and security problems have been used to justify authoritarianism and validate the rejection of a pluralistic view of

1. 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-05/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 70 (13 Nov. 1985), available at http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf [hereinafter Advisory Opinion OC-05/85].

society for which freedom of expression is essential. In contrast to strongmen who govern without checks and balances, or the case of political or military vanguards who purport to “lead their nations or people,” a human rights framework offers an alternative which postulates that the rule of law, including the right to free expression, represents both the values of human dignity and a path of action to confront societal problems.

In the human rights approach, freedom of expression is a necessary check to powerful executives and societal elites who monopolize information. It allows the free and pluralistic flow and dissemination of information essential to informed choices, facilitates individual participation in the democratic process, and strengthens civil society. In the Western Hemisphere, the adoption of the American Declaration of the Rights and Duties of Man in 1948 and the American Convention on Human Rights (Pact of San José, Costa Rica) in 1969 created a regional normative framework in the human rights arena, freely adopted by member states of the Organization of American States (OAS). Despite the human rights obligations and norms set forth in these documents, the region as a whole has yet to reach full compliance with the protection of the right to freedom of expression, including the adoption of a normative framework that guarantees a pluralistic society so that expression does not become an exclusive function of governmental power or private monopolies.²

Often, the right of freedom of expression is either inadequately protected under domestic law or the rules designed to protect it are disregarded.³ Measures that seriously infringe upon the right to freedom of expression include: prior censorship; contempt laws;⁴ the seizing or barring of publications; excessive subsequent liability for libel and slander; absence of an effective normative framework that concerns monopolies of information and guarantees pluralism; and procedures that subject the free expression or dissemination of information to government control.⁵

2. American Convention on Human Rights, *signed* 22 Nov. 1969, O.A.S. Doc. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1976) O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (*entered into force* 18 July 1978), *available at* http://www.oas.org/en/iachr/mandate/basic_documents.asp [hereinafter American Convention]; American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, *signed* 2 May 1948, O.A.S. Doc. OEA/Ser.L/V/II.71 (1988) [hereinafter American Declaration]; *Report of the Office of the Special Rapporteur for Freedom of Expression 2010*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II, doc. 5, ch. II (4 Mar. 2011), *available at* www.cidh.oas.org/annualrep/2010eng/RELATORIA_2010_ENG.pdf [hereinafter *2010 Report of the Special Rapporteur*].
3. *Report of the Office of the Special Rapporteur for Freedom of Expression 2006*, Inter-Am. Comm’n H.R., O.A.S. Doc. OEA/Ser.L/V/II.127, doc. 4, rev. 1, ch. I (3 Mar. 2007), *available at* <http://www.cidh.oas.org/annualrep/2006eng/Rapporteurship%20for%20Freedom%20of%20Expression.pdf> [hereinafter *2006 Report of the Special Rapporteur*].
4. The phrase “contempt laws” is used to refer to what are known as *leyes de desacato* in Spanish. Generally speaking, *leyes de desacato* punish “offensive” expressions directed at public officials. *Id.* ch. II, ¶ 32.
5. Advisory Opinion OC-05/85, *supra* note 1, ¶ 54.

Through the exercise of prior censorship, bureaucracies decide what individuals can see, read, write, and produce by invoking such justifications as "national security," "public order," "protection of morals," "truth in information," and "personal honor." However, because the possibilities for abusing prior censorship are so great, enduring promotion of free debate is preferable to risking censorship's "protective" suffocation of the free expression of ideas.⁶

Contempt or *desacato* laws penalize "offensive" expression directed at public officials or against private individuals concerning matters relevant to the society at large. Contempt laws are currently included in the criminal codes of the following seven Latin American countries: Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Nicaragua, and Venezuela.⁷ Although punishing criticism was a logical corollary for authoritarian governments, it is incompatible with the development of a full democracy. Allowing criticism free from fear of punishment—especially when directed at authority or matters of public interest—reaffirms, *inter alia*, egalitarian principles and ensures that public officials carry out their duties with transparency and responsibility.⁸ Conversely, the threat or imposition of penal sanctions suffocates democracy and responds to an authoritarian logic incompatible with the tenets of pluralistic society.

Subsequent and disproportionate liability in cases of libel and slander is often imposed under the guise of "defense of honor."⁹ Such abuse severely curtails the right of free expression of ideas.¹⁰ Monopolization of information by governments or private actors abusively defines and ignores the pluralism of democratic societies. However, the attacks against expression are not limited to a deficient regulatory framework. Unfortunately, many crimes committed against journalists, including assassination, go unpunished.¹¹ "Silencing" journalists threatens the population as a whole and is a stark

6. See generally COMM. TO PROTECT JOURNALISTS, available at <http://www.cpj.org>; WORLD PRESS FREEDOM COMM., available at <http://www.wpfc.org/>.

7. CODIGO PENAL, art. 162 (Bol.), available at http://www.oas.org/juridico/MLA/sp/bol/sp_bol-int-text-cp.html; CODIGO PENAL, art. 331 (Braz.), available at http://www.oas.org/juridico/mla/pt/bra/pt_bra-int-text-cp.pdf; CODIGO PENAL, arts. 144.1, 204 (Cuba), available at http://www.gacetaoficial.cu/html/codigo_penal.html; CODIGO PENAL, arts. 128, 230–33 (Ecuador), available at http://www.oas.org/juridico/MLA/sp/ecu/sp_ecu-int-text-cp.pdf; CODIGO PENAL, arts. 347–49 (Nicar.), available at http://www.oas.org/juridico/mla/sp/nic/sp_nic-int-text-cp.html; CODIGO PENAL, arts. 368–69 (Dom. Rep.), available at http://www.suprema.gov.do/PDF_2/codigos/Codigo_Penal.pdf; CODIGO PENAL, art. 223 (Venez.), available at <http://www.cicpc.gov.ve/files/documentos/6-CODIGOPENAL.pdf>.

8. Report of the Office of the Special Rapporteur for the Freedom of Expression 1998, Inter-Am. Comm'n H.R., O.A.S. Doc. OEA/Ser.L/V/II.102. doc. 6, ch. IV, § A, at 35–36 (16 Apr. 1999), available at <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=134&ID=1> [hereinafter 1998 Report of the Special Rapporteur].

9. *Id.* at 35–36.

10. *Id.*

11. *Id.* at 48.

reminder that anyone, including the most visible, can be eliminated if they dare to fully exercise their right to free expression.¹²

Other *de facto* "measures" that seriously infringe upon freedom of expression include economic measures that punish or reward the press for its ideas, as well as tolerating public and private monopolies in information media.¹³ These grave normative and factual shortcomings in the legal protection for freedom of expression still exist within many domestic legal systems, reaffirming the need for international and, in this case, regional protections of this fundamental freedom.

This article will analyze the rules and institutions that protect freedom of expression in the Western Hemisphere, namely those contained in the Inter-American system for the Protection of Human Rights (Inter-American system). It will briefly describe the Inter-American system, its organs, and the regulatory framework that applies to freedom of expression, while systematizing the relevant jurisprudence within that system. Finally, this article will conclude by proposing a series of measures necessary to achieve full enforcement of freedom of expression norms.

In the realm of free expression, crucial actors are not limited to members of the OAS or its regional political organs. The analysis shows a complex reality with initiatives adopted by domestic and transnational NGOs, the press, the judiciary, members of parliament, and individuals who, resorting to the regional system, use its procedures to demand implementation of international norms. Expression, like all rights, is not given or granted, but rather is the result of aspirations to a life worth living and hence a life worth fighting for. The regional system, through its framework for protection and possibilities for action has become a valuable tool at the international level for channeling those aspirations, but more needs to be done to ensure full protection of the right to freedom of expression.¹⁴

12. See *Attacks on the Press in 1999*, COMM. TO PROTECT JOURNALISTS, 22 Mar. 2000, available at http://www.cpj.org/attacks99/frameset_att99/rightframe_att99.html (discussing results of worldwide survey by the Committee to Protect Journalists). Since 2000, 511 journalists have been killed worldwide. *Journalists Killed since 1992*, COMM. TO PROTECT JOURNALISTS, 6 Dec. 2010, available at: <http://cpj.org/killed/>. For example, in 2006 alone, nineteen journalists from member states were murdered. See generally, COMM. TO PROTECT JOURNALISTS, available at <http://cpj.org/killed/>.

13. 1998 Report of the Special Rapporteur, *supra* note 8, at 26.

14. The contributions of the Inter-American system have proceeded through different phases. The first phase was denouncing dictatorship, and mass and gross violations of human rights such as disappearances, torture, and the absence of political rights.

The Inter-American system of protection of human rights itself then transitioned from a denunciation of dictatorships to a rejection of its legacy, which included attempts to cover the crimes of the past with a shroud of impunity. The defeat of dictatorship led to a process of democratic transitions and resulted in elected governments in all of the countries of the region, except Cuba.

II. THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

The international protection of human rights developed after World War II in response to the tragic failure of an international system that was based on the principle of absolute sovereignty, which excluded the acts of a government against its own citizens from the protections of human rights.¹⁵ The grave consequences of this flawed approach (e.g., genocide, mass and gross violations of human rights) led to the development of international rules and institutions designed to identify and protect the rights of all individuals.¹⁶

A. Organs

The Inter-American system is a combination of human rights norms, institutions, and procedures created by the OAS member states, based upon the American Declaration¹⁷ and the American Convention.¹⁸ The organs responsible for supervising compliance with the established rules are the Inter-American Commission on Human Rights¹⁹ ("the Commission") and the Inter-American Court of Human Rights²⁰ ("the Court"). The task of guaran-

Rejection of impunity meant that no one—not even those who had administered fear and repression—could be above the law, and that everyone should answer for their crimes. In the interest of populations that had been prevented from speaking and receiving pluralistic information, the Inter-American system reinvigorated the value of the right to freedom of expression (e.g., defining the content of the right and creating the officer of the Special Rapporteur).

The third phase, where the system finds itself now, purports to contribute to the expansion of democracy, building on the human rights tradition to fully incorporate vulnerable groups (e.g., indigenous peoples, women, and the poor) into the enjoyment of rights. In this phase, freedom of expression continues to play a key role. Democracy requires free elections, but free elections are not enough. Democracy also requires separation of powers, an independent and impartial judiciary, and a congress to provide a sufficient check on executive power. It requires a vibrant civil society whose potential cannot be achieved in the absence of free expression. This third phase of change, building on the expansion of human rights, is being challenged by claims to change that stress charismatic actors, or centralization of power leading to restrictions on expression, and its subordination to governments.

While these three phases generally allow us to understand the focus of the Inter-American system in different historic periods, it is important to note that these phases are not strictly separated. There are diverse elements of these phases in each of the countries in the region.

15. Claudio Grossman, *Building the World Community: Challenges to Legal Education and the WCL Experience*, 17 AM. U. INT'L L. REV. 815, 822 (2002).

16. See generally LOUIS HENKIN, *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* (1981).

17. American Declaration, *supra* note 2.

18. American Convention, *supra* note 2.

19. *Id.* art. 33(a).

20. *Id.* art. 33(b).

teeing the protection of human rights, including compliance with decisions of the Court and the Commission, falls to the political organs of the OAS, especially its General Assembly.²¹

The Commission supervises compliance with the rules through its case system,²² country reports,²³ recommendations to member states,²⁴ reports on the interpretation of human rights obligations,²⁵ and, for freedom of expression in particular, through the activities of the Office of the Special Rapporteur for Freedom of Expression.²⁶ The Court reviews cases presented to it by the

21. American Convention, *supra* note 2. Article 41(g) provides that the Commission "submit an annual report to the General Assembly of the [OAS]." *Id.* art. 41. Likewise, Article 65 establishes that in each regular session "the Court shall submit, for the Assembly's consideration, a report on its work during the previous year." *Id.* art. 65. It should be noted that the performance of these organizations relative to fortifying freedom of expression has been inadequate. See *El Sistema Interamericano y los Derechos Humanos en la Región (The Inter-American System and Human Rights Law in the Region)*, in *LA LUCHA CONTRA LA POBREZA EN AMÉRICA LATINA (THE WAR AGAINST THE POOR IN LATIN AMERICA)* (Bernardo Kliksberg ed., 2000).
22. American Convention, *supra* note 2, arts. 44–51. The Commission opens cases either on its own initiative or in response to petitions filed by individuals affected by the violation of any right covered by the American Convention. See Claudio Grossman, *Strengthening the Inter-American Human Rights System: The Current Debate (Fortaleciendo el Sistema Interamericano de Derechos Humanos: El Debate Actual)* 92 AM. SOC'Y INT'L L. PROC. 186, 188 (1998). Once the Commission analyzes a case, it publishes an opinion with respect to the existence of the alleged violation and offers recommendations to the responsible member state. If the state does not comply with the recommendation, the Commission may also prepare a second report and offer the state a second opportunity to comply. If the state still does not comply, the Commission may publicly reveal the result of the report and its recommendations. This is the only possibility that exists relative to those states that have not ratified the American Convention. For states that have ratified the American Convention, the Commission may opt to either publish the report or present it to the Court within three months after the first report is approved. When it appears before the Court, the role of the Commission changes from that of judge to that of plaintiff. It acts in the name and in representation of the victim (generally designating the original complainants as its legal advisers). This case mechanism is one of the most efficient means available to the Commission to review individual human rights violations. *Id.* at 188–89. See also THOMAS BUERGENTHAL ET AL., *PROTECTING HUMAN RIGHTS IN THE AMERICAS* 97 (1982).
23. BUERGENTHAL ET AL., *supra* note 22, at 140. Member states may write the Commission to visit a country. These invitations may result from requests made by political organs, Commission requests for an invitation, or the state's own initiative. A country visit is a highly visible event directed at mobilizing public opinion. The visit is followed by the publication of a report. This type of mechanism is useful for responding to massive and serious violations of human rights that require swift mobilization of public opinion. *Id.*
24. American Convention, *supra* note 2, art. 41. The Commission also prepares proposals for declarations and treaties. Grossman, *supra* note 22, at 187–88.
25. Office of the Special Rapporteur for Freedom of Expression, *Inter-American Legal Framework Regarding the Right to Freedom of Expression*, O.A.S. Doc. OEA/Ser.LV/II CIDH/RELE/INF.2/09, at 10 (30 Dec. 2009).
26. Grossman, *supra* note 22, at 189. The Commission has named working groups and special rapporteurs to confront problems having a "collective component," including a working group on prisons along with special rapporteurs on issues concerning women and indigenous populations, as well as freedom of expression. All of the rapporteurs are members of the Commission except the Special Rapporteur on Freedom of Expression. See *1998 Report of the Special Rapporteur*, *supra* note 8, at 7.

Commission and by member states that have recognized its jurisdiction.²⁷ As of 2009, 120 contentious cases had been brought to the Court.²⁸

1. *The Inter-American Commission*

Individuals may file a petition against an American state before the Commission when one or more of his or her internationally protected rights have been violated. These include rights contained in both the American Convention and the American Declaration.²⁹

The Convention establishes procedures to submit and process individual petitions, including admissibility, the possibility of a friendly settlement, public and private hearings, discussion on the merits, and a report.³⁰

Once the Commission determines a petition is admissible, it opens a case. The Commission can place itself at the disposal of the parties at all times to facilitate reaching a friendly settlement. If the parties are unable to reach a settlement that satisfies the Commission, it will consider the substance of the allegations. If the Commission finds that the state has violated a right protected by the Convention, it will adopt a report that includes measures the state must implement to correct these violations. The report adopted by the Commission is final for those states that have not ratified the American Convention or, having ratified that treaty, have not accepted the jurisdiction

27. Grossman, *supra* note 22, at 188. The following countries have recognized the competency of the Court: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Chile, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. *Id.* at 188 n.8.

28. For a list of cases resolved or pending before the Court, see *Annual Report of the IACHR 2009*, Inter-Am. Comm'n H.R., O.A.S. Doc., OEA/Ser.LN/II, doc. 51, rev. 1 (30 Dec. 2009), at 6, available at http://www.corteidh.or.cr/docs/informes/eng_2009.pdf [hereinafter *2009 Annual Report*]. The Court, like the Commission, can adopt provisional measures in cases where the risk is "grave and imminent." See American Convention, *supra* note 2, art. 63(2) (providing that "[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration," and "[w]ith respect to a case not yet submitted to the Court, it may act at the request of the Commission"). For example, in 2008 alone, the Court ordered provisional measures in forty-one cases.

29. As of 2010, the following twenty-four countries have ratified this document: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Uruguay, and Venezuela. As of 26 May 1999 Trinidad and Tobago suspended its ratification over the death penalty issue. Petitions brought against the remaining states may only be brought to the Commission. These states are: Antigua and Barbuda, Bahamas, Belize, Canada, Cuba, Guyana, St. Kitts & Nevis, St. Lucia, St. Vincent & Nevis, Trinidad and Tobago, and the United States. Because both documents protect the right to freedom of expression, the interpretations of both the Court and Commission under either document are applicable to both. See American Convention, *supra* note 2, art. 13; American Declaration, *supra* note 2, art. 4.

30. *Id.*

of the Court. As an application of international law by a treaty based organ, this report has, as a minimum, persuasive value.³¹

The importance of the Commission's reports under the American Declaration has been strengthened by Advisory Opinion OC-10/89, which was adopted by the Court on 14 July 1989. That Advisory Opinion states, *inter alia*, that at least some, if not all, of the rights included in the American Declaration have acquired normative value considering that the Declaration spells out the human rights obligations of states under the OAS Charter, which has been ratified by every state in the Hemisphere.³² Moreover, the explicit mention of freedom of expression in the Democratic Charter adopted on 11 September 2001, as well as the creation of the Office of the Special Rapporteur for Freedom of Expression (the only permanent rapporteur in the Americas to protect a single right) by the Summit of the Americas in April 1998, persuasively demonstrates the normative value of this important right.³³

In the case where states have ratified the American Convention but not declared their acceptance of the Court's compulsory jurisdiction, the normative value of the Commission's Final Report is grounded in the treaty. The same applies when states have accepted jurisdiction, the Commission decides not to bring a case to the Court, and the state itself, which has been found responsible for violating a human right, does not refer the case to the Court.

2. The Inter-American Court

The Inter-American Court is competent to hear petitions submitted by the Commission or by state parties to the American Convention that have accepted its jurisdiction.³⁴ The Court has both advisory and contentious

31. See generally THOMAS BUERGENTHAL ET. AL, *LA PROTECCIÓN DE LOS DERECHOS HUMANOS EN LAS AMÉRICAS* (1990).

32. "The General Assembly of the OAS has repeatedly recognized that the American Declaration is a source of international obligations for OAS member states." Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 7, ¶ 42 (14 July 1989), available at http://www.corteidh.or.cr/docs/opiniones/seriea_10_ing1.doc (quoting OAS/GS Resolution 314 (VII-0/77), OAS/GS Resolution 371 (VIII-0/78), OAS/GS Resolution 370 (VIII-0/78), and Inter-American Convention to Prevent and Punish Torture, O.A.S.T.S. No. 67, Preamble, (*entered into force* 28 Feb. 1987), available at <http://www.unhcr.org/refworld/docid/3ae6b3620.html>).

33. DECLARATION OF SANTIAGO, Second Summit of the Americas (18–19 Apr. 1998), in *Official Documents of the Summit Process from Miami to Santiago*, Vol. 1, Office of Summit Follow-up, available at <http://www.summit-americas.org/chiledec.htm>.

34. The Court was established in 1979 in San Jose, Costa Rica, an autonomous judicial institution of the Inter-American system. As of 2010, the following twenty-one states have accepted the Court's jurisdiction: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. See *2009 Annual Report*, *supra* note 28, at 3.

jurisdiction. In its contentious role, cases arise from the proceedings at the Commission level. If the state does not comply with the Commission's report within three months, the Commission may decide to bring the case to the Court and/or publish the report. The Court's judgments are binding and may not be appealed. The Court retains jurisdiction over cases where it has decided to monitor compliance.³⁵

In its advisory role, the Court may interpret the Convention as well as any other human rights treaties in force in the member states. It may also review the compatibility of such treaties with the domestic laws of member states.³⁶ Twenty-one advisory opinions have been adopted to date.³⁷ Two advisory opinions directly relate to freedom of expression: Advisory Opinion OC-05/85, "*Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*" ("Advisory Opinion OC-05/85") and Advisory Opinion OC-07/86, "*Enforceability of the Right to Reply or Correction*" ("Advisory Opinion OC-07/86").³⁸ These Opinions contribute to defining the scope of the human rights obligations assumed by the states—including the right to freedom of expression. In its first decision concerning this right, the

As provided in the Commission's Rules of Procedure, revised in 2001, the Commission will not present a case to the Court if so decided by the majority of the Commission's members (four out of seven). If the case is not sent to the Court or if it has been adopted and the country has not complied with the Commission's report, the Commission may decide to publish its findings.

35. 2009 Annual Report, *supra* note 28, at 3.

36. American Convention, *supra* note 2, art. 64(1), (2). Article 64 establishes that:

1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

37. For a list of the Court's advisory opinions, see Judgments and Opinions, Inter-Am. Ct. H.R. (ser. A), available at <http://www.corteidh.or.cr/opiniones.cfm>.

38. Advisory Opinions OC-5/85 and OC-7/86 also refer to the right to freedom of expression and further interpret its legal regime. In Advisory Opinion OC-5/85, the Court recognized journalism as a "principal manifestation of freedom of expression." It further concluded that the compulsory membership to a *colegio* or an association as a prerequisite to practice journalism would violate the right of an individual who seeks to disseminate his or her information and ideas, as well as "the right of the public at large to receive information without any interference." Advisory Opinion OC-05/85, *supra* note 1, ¶¶ 71, 81; Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights), Advisory Opinion OC-07/86, (ser. A), No. 7, ¶ 25, Inter-Am. Ct. H.R. (29 Aug. 1986), available at http://www.corteidh.or.cr/docs/opiniones/seriea_07_ing.doc [hereinafter Advisory Opinion OC-07/86]. In Advisory Opinion OC-07/86, the Court stated, "in regulating the application of the right of reply or correction, the States Parties must respect the right of freedom of expression." However, the Court cautioned state parties to not "interpret the right of freedom of expression so broadly as to negate the right of reply [or correction]."

Court declared that compulsory membership in a professional association for the practice of journalism violates the Convention.³⁹

3. *The Office of the Special Rapporteur*

The Office of the Special Rapporteur for Freedom of Expression ("Special Rapporteur") was created by the Commission in 1998 to protect and promote freedom of expression in the Americas.⁴⁰ The Special Rapporteur's principal activities include: 1) the preparation of general and specific thematic reports; 2) the creation of a hemispheric network for the protection of freedom of expression; 3) visits to OAS member states to observe the freedom of expression climate; and 4) the promotion of the right to freedom of expression among OAS member states.⁴¹ Unlike other rapporteurships, the office is dedicated exclusively to the protection and promotion of freedom of expression.⁴²

The Office of the Special Rapporteur has contributed significantly to the protection of freedom of expression and shed further light on the interpretation of both the American Declaration and the American Convention. Its annual reports provide in-depth analysis of the overall situation of freedom of expression throughout the hemisphere, as well as the specific trends affecting the development of this right in the region. In October 2000, the Commission, interpreting the American Convention, adopted the Declaration of Principles on Freedom of Expression to guide the activities of the Special Rapporteur.⁴³ This document sets forth thirteen principles to govern freedom of expression in the Americas.⁴⁴ Because these principles were adopted unanimously by an authoritative organ of the OAS—the Inter-American Commission on Human Rights—treaty obligations have presumptively normative value. On the other hand, nothing could prevent a state from challenging its value by requesting an Advisory Opinion from the Court or challenging them in a concrete case. These principles, however, have yet to be challenged, thus strengthening the argument that their legal value has been confirmed.

39. Advisory Opinion OL-05/85, *supra* note 1.

40. 1998 Annual Report, *supra* note 19, ch. II, § 5.

41. 1998 Report of the Special Rapporteur, *supra* note 8, at 9–10.

42. Further reinforcing the importance that the Commission places on freedom of expression, its Special Rapporteur is the only Rapporteur that works on a full-time basis.

43. Inter-American Declaration of Principles on Freedom of Expression, Inter-Am. Comm'n H.R., 108th Reg. Sess., approved 19 Oct. 2000, available at <http://www.iachr.org/declaration.htm>.

44. *Id.*

B. The Legal Regime

The right to freedom of expression in the Inter-American system is regulated by Articles 13 and 14 of the American Convention,⁴⁵ as well as in Article 4⁴⁶ of the American Declaration.⁴⁷ This section will focus on the protection of the right to freedom of expression under the American Convention. Its analysis is helpful, however, in understanding the overall regime protecting this right, which includes the American Declaration. Several factors have led to the emergence of a unified legal regime on the right to freedom of expression. The Convention elaborates the content of human rights obligations laid down by the American Declaration, including the right to freedom

45. Article 13 of the American Convention expressly states:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public 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;

Article 14 adds:

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

American Convention, *supra* note 2, arts. 13, 14.

46. Article 4 of the American Declaration provides that "[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever." American Declaration, *supra* note 2, art. 4.
47. With the 11 September 2001 approval of the Inter-American Democratic Charter, the political organs of the OAS were given the possibility of suspending a government's membership in the case of mass and grave human rights violations. In particular, the Democratic Charter specifically mentions freedom of expression as a right to be protected. Inter-American Democratic Charter, *adopted* 11 Sept. 2001, OEA/Ser.G/CP-1, at 11 (2003), available at <http://cidh.org/Basicos/English/Basic23.IA%20Domocratic%20Charter.htm> [hereinafter Democratic Charter].

of expression. In addition, the interpretations and scope of this right under both documents are conducted by the same organ, i.e., the Commission.⁴⁸ As a result, a unified regime has emerged.

The Court has interpreted freedom of expression in cases such as: *Baruch Ivcher-Bronstein v. Peru*,⁴⁹ *Juan Pablo Olmedo v. Chile (The Last Temptation of Christ)*,⁵⁰ *Palamara-Iribarne v. Chile*,⁵¹ *Herrera-Ulloa v. Costa Rica*,⁵² *Canese v. Paraguay*,⁵³ *Claude Reyes v. Chile*,⁵⁴ *Kimel v. Argentina*,⁵⁵ *Perozo et al. v. Venezuela*,⁵⁶ *Ríos et al. v. Venezuela*,⁵⁷ *Tristán-Donoso v. Panamá*,⁵⁸ *Valle-Jaramillo et al. v. Colombia*,⁵⁹ *Usón-Ramírez v. Venezuela*,⁶⁰ and *López-Álvarez v. Honduras*.⁶¹

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48. See generally 1998 Report of the Special Rapporteur, *supra* note 8; The Democratic Charter, *supra* note 47, art. 4. The Inter-American Declaration of Principles on Freedom of Expression, an important framework for the interpretation of the right to freedom of expression, was unanimously adopted by the principal organ of the OAS in 2001. It provides valuable insight into the different ways in which the Commission views the duties of states concerning freedom of expression. Resorting to classical notions of the theories of sources of international law, the value of this interpretation is that of the opinions of international law publicists, as a minimum. Inter-American Declaration of Principles on Freedom of Expression, *supra* note 43.
 49. *Ivcher-Bronstein v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 54 (6 Feb. 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_54_ing.doc. On 6 February 2001, the Inter-American Court of Human Rights (to which the *Ivcher-Bronstein* case had been referred by the Commission) confirmed the Commission's finding that Peru was responsible for violating Ivcher's right to freedom of expression.
 50. *Olmedo-Bustos et al. v. Chile ("The Last Temptation of Christ")*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73 (5 Feb. 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.doc.
 51. *Palamara-Iribarne v. Chile*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 135 (22 Nov. 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.doc.
 52. *Herrera-Ulloa v. Costa Rica*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107 (2 July 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.doc.
 53. *Canese v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 111 (31 Aug. 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.doc.
 54. *Claude-Reyes et al. v. Chile*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151 (19 Sept. 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc.
 55. *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177 (2 May 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.
 56. *Perozo et al. v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 195 (28 Jan. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_195_ing.pdf.
 57. *Ríos et al. v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 194 (28 Jan. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_194_ing.pdf.
 58. *Tristán-Donoso v. Panamá*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193 (27 Jan. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_193_ing.pdf.
 59. *Valle-Jaramillo et al. v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192 (27 Nov. 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_192_ing.pdf.
 60. *Usón-Ramírez v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193 (20 Nov. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_207_ing.pdf.
 61. *López-Álvarez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141 (1 Feb. 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_141_ing.pdf.

The Commission has interpreted the right to different aspects of freedom of expression in cases such as:⁶² *Jehovah's Witnesses v. Republic of Argentina*,⁶³ *Martorell v. Chile*,⁶⁴ *Hector Felix Miranda v. Mexico*,⁶⁵ *Horacio Verbitsky v. Republic of Argentina*,⁶⁶ *Alejandra Matus Acuña and Others v. Chile*,⁶⁷ *Victor Manuel Oropeza v. Mexico*,⁶⁸ *Dudley Stokes v. Jamaica*,⁶⁹ and *Hugo Bustíos Saavedra v. Peru*,⁷⁰ among others.

1. *The Scope of Freedom of Expression*

Subsection one of Article 13 of the American Convention establishes the right of individuals to think and express themselves freely.⁷¹ It also details what freedom of expression means—"to seek, receive, and impart information and ideas of all kinds, regardless of frontiers"—and emphasizes that the medium used is irrelevant, as expression can be communicated "either orally, in writing, in print, in the form of art, or through any other medium of one's choice."⁷²

The jurisprudence of the Commission and the Court interprets the right to freedom of expression as prohibiting prior censorship and authorizing only the subsequent imposition of liability, except in exceptional situations laid down by Article 13(4) for the "moral protection" of young people.⁷³ It has

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62. Some cases were not referred to the Court; however, these Commission reports provide relevant criteria concerning freedom of expression.
 63. *Jehovah's Witnesses v. Republic of Argentina*, Case 2137, Inter-Am. Comm'n H.R., Report No. 45/78, OEA/Ser.L.V/II.47 (1978), available at <http://cidh.org/annualrep/78eng/Argentina.2137.htm>. This case is based on the rights protected in the American Declaration.
 64. *Martorell v. Chile*, Case 11.230, Inter-Am. Comm'n H.R., Report No. 11/96, OEA/Ser.L/V/II.95, doc. 7 rev. (1996), available at <http://cidh.org/annualrep/96eng/Chile11230.htm>.
 65. *Miranda v. Mexico*, Case 11.739, Inter-Am. Comm'n H.R., Report No. 5/99, OEA/Ser.L.V/II.102 doc. 6 (1998), available at <http://www.cidh.oas.org/annualrep/98eng/Merits/Mexico11739.htm>.
 66. *Verbitsky v. Republic of Argentina*, Case 11.012, Inter-Am. Comm'n H.R., Report No. 22/94, OEA/Ser.L.V/II.88 doc. 9, rev.1, at 40 (1995), available at <http://cidh.org/annualrep/94eng/Argentina11012.htm>.
 67. *Alejandra Matus Acuña et al. v. Chile*, Case 12.142, Inter-Am. Comm'n H.R., Report No. 90/05, OEA/Ser.L/V/II.124 doc. 5 (2005), available at <http://cidh.org/annualrep/2005eng/Chile12142eng.htm>.
 68. *Oropeza v. Mexico*, Case 11.740, Inter-Am. Comm'n H.R., Report No. 130/99, OEA/Ser.L.V/II.106 doc. 6 (1999), available at <http://cidh.org/annualrep/99eng/Merits/Mexico11.740.htm>.
 69. *Dudley Stokes v. Jamaica*, Case 12.468, Inter-Am. Comm'n H.R., Report No. 23/08, OEA/Ser.L/V/II.131 doc. 29 (2008), available at <http://www.cidh.oas.org/annualrep/2008eng/Jamaica12468eng.htm>.
 70. *Hugo Bustíos Saavedra v. Peru*, Case 10.548, Inter-Am. Comm'n H.R., Report No. 38/97, OEA/Ser.L/V/II.98 doc. 6 rev. (1997), available at <http://www.iachr.org/annualrep/97eng/Peru10548.htm>.
 71. American Convention, *supra* note 2, art. 13(1).
 72. *Id.*
 73. American Convention, *supra* note 2, art. 13(4) (providing 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").

also established the scope of permissible restrictions of this right that may apply in emergency situations.⁷⁴ All forms of speech are protected by the right to freedom of expression, including speech that is offensive, shocking, or disturbing to the state or other groups.⁷⁵ The Inter-American system has found that freedom of expression includes the right to denounce human rights violations by public officials.⁷⁶ This highlights the connection between the Inter-American system's role in protecting speech and guaranteeing access to justice, which are both crucial to the fight against impunity.⁷⁷

The Inter-American system has also identified three different types of specially protected speech, which include: "(a) political speech and speech involving matters of public interest; (b) speech regarding public officials in the exercise of their duties and candidates for public office; and (c) speech that is an element of the identity or personal dignity of the person expressing herself."⁷⁸ All of these forms of specially protected speech demonstrate the connection existing between speech and democracy; they encourage vibrant debate. Candidates and public officials should be subject to more public and voter scrutiny because they chose to enter into the public domain. The effort to protect speech that is connected to identity is intended to protect vulnerable groups, highlighting the fact that democracy is strengthened when everyone in society is heard and counts. These categories of speech are particularly relevant in the balancing of different factors for the assessment of liability. Both the Commission and Court have repeatedly affirmed that in the Inter-American system there is a strong connection between the right to freedom of expression and democracy.⁷⁹

The interpretative work of the Commission and the Court has resulted in the following characteristics of the scope of freedom of expression within the context of the Inter-American system:⁸⁰ (a) special dual character; (b) indivisibility of expression and dissemination of ideas; (c) multiplicity of

74. Office of the Special Rapporteur for the Freedom of Expression, *Inter-American Legal Framework Regarding the Right to Freedom of Expression*, Inter-Am. Comm'n H.R., OEA/Ser.LV/II/CIDH/RELE/INF. 2/09, ¶ 67 (2010), available at <http://www.cidh.org/relatoria/showarticle.asp?artID=169&IID=1>.

75. *Id.* ¶ 29–30.

76. *Id.* ¶ 42.

77. See *Barrios Altos v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75 (14 Mar. 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf. Following the process of elections that took place after the period of rampant human rights violations in the 1970s, there were amnesty laws passed in many countries to cover the perpetrators of these crimes with immunity. The Inter-American Court ruled that this was against the Convention.

78. *Inter-American Legal Framework Regarding the Right to Freedom of Expression 2010*, *supra* note 74, ¶ 32.

79. Advisory Opinion OC-05/85, *supra* note 1, ¶ 39.

80. Some of these characteristics may overlap with later sections. The author has deemed it advisable to keep these sections separate either because supervisory organs have done so or so as to clarify a topic.

forms of expression; (d) protection of the means required to disseminate ideas; (e) protection of reproduction of expression; (f) exclusion of direct and indirect restrictions; and (g) incompatibility of public and private monopolies in information media with the right to freedom of expression.

a. Special Dual Character

Freedom of expression possesses a special dual character in that it not only involves the right of individuals to express themselves, but also the right to receive information and ideas.⁸¹ Thus, as the Court explains in its Advisory Opinion OC-05/85, a violation of the right to freedom of expression not only infringes on an individual right, but also on "a collective right to receive any information whatsoever and to have access to the thoughts expressed by others."⁸²

The Court advanced this interpretation in the case *The Last Temptation of Christ*, where it held that "freedom of expression is a way of exchanging ideas and information between persons; it includes the right to try and communicate one's point of view to others, but it also implies everyone's right to know opinions, reports, and news."⁸³

The Commission has had several opportunities to discuss this characteristic further. In the case of *Martorell v. Chile*, where censorship of the book *Impunidad Diplomática (Diplomatic Impunity)* was at issue, the Commission asserted that, "arbitrary interference that infringes this right affects not just the individual right to express information and ideas but also the right of the community as a whole to receive information and ideas of all kinds."⁸⁴

The *Baruch Ivcher-Bronstein v. Peru* case expands on this dual character. The case was initiated when the Peruvian government deprived the majority shareholder and director of the Peruvian television channel Frecuencia Latina-Canal 2 (Latin Frequency-Channel 2) of his Peruvian nationality. The government's action was in retaliation for the channel's broadcast of various reports of human rights violations committed by the Fujimori regime in Peru during 1990–2000.⁸⁵ Because foreigners could not own television or radio stations in Peru, the removal of Ivcher-Bronstein's Peruvian citizenship resulted in his forced withdrawal from the directorship of the channel.

81. Advisory Opinion OC-05/85, *supra* note 1, ¶ 30.

82. *Id.*

83. Olmedo-Bustos et al. v. Chile, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 66 (5 Feb. 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.doc.

84. Martorell v. Chile, Case 11.230, Inter-Am. Comm'n H.R., Report No. 11/96, OEA/Ser.L/V/II.95, doc. 7 rev., ¶ 53 (1996), available at <http://cidh.org/annualrep/96eng/Chile11230.htm>.

85. See generally Ivcher-Bronstein v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 54 (6 Feb. 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_54_ing.doc.

The new owners fired the journalists who had produced the programs and ceased the broadcast of negative news about the regime.⁸⁶

While litigating this case, the Commission asserted that the social character of the right to freedom of expression was much broader than its individual aspects; it protects all those who seek out and receive information or opinions emitted by the media.⁸⁷ In this case, the Commission argued, and the Court upheld, that all of society is victimized when an individual's freedom of expression is violated.⁸⁸

The Commission expanded upon this interpretation in *Oropeza v. Mexico*. In that case, the Commission affirmed that freedom of expression is a universal legal concept in which individuals are able to express, transmit, receive, and disseminate thoughts.⁸⁹ Accordingly, both the Commission and the Convention have consistently reaffirmed the dual character of the right of freedom of expression.

b. Indivisibility of Expression and Dissemination of Ideas

In Advisory Opinion OC-05/85, the Court defined the scope of indivisibility of expression and dissemination, stating: "restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely."⁹⁰ Furthermore, it asserted that the importance of the legal rules applicable to the press derives from this concept.⁹¹ Finally, it added that "[f]or the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions."⁹²

The Court had an opportunity to expand on this issue in *Palamara Iribarne v. Chile*. In that case, the Chilean government had seized and destroyed all hard and electronic copies of the book *Ethics and Intelligence Services* and prohibited its distribution.⁹³ The Court held that in guaranteeing the right to freedom of expression, the state must not only protect the

86. *Id.*

87. *Id.* ¶ 31.

88. See generally *Ivcher-Bronstein v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 54.

89. *Oropeza v. Mexico*, Case 11.740, Inter-Am. Comm'n H.R., Report No. 130/99, OEA/Ser.L.V/II.106 doc. 6, ¶ 51 (1999), available at <http://cidh.org/annualrep/99eng/Merits/Mexico11.740.htm> (citing *Annual Report 1980–1981*, Inter-Am. Comm'n H.R., OEA/Ser.L.V/II, at 122). In this case, a Mexican journalist was allegedly assassinated for criticizing government authorities in his newspaper column, which included references to links between the police and drug trafficking. *Id.* ¶ 2.

90. Advisory Opinion OC-05/85, *supra* note 1, ¶ 31.

91. *Id.*

92. *Id.* ¶ 32.

93. *Palamara-Iribarne v. Chile*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 2 (22 Nov. 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.doc.

individual expression itself, but also its dissemination "through whichever appropriate medium."⁹⁴

The Commission took an analogous approach in *Martorell v. Chile*, where it stated that "the decision to ban the entry, circulation, and distribution of the book 'Impunidad diplomática' in Chile violates the right to impart 'information and ideas of all kinds,'"⁹⁵ protected under the right to freedom of expression.

As these cases demonstrate, the jurisprudence of the Inter-American system has strongly upheld the indivisibility of expression and dissemination of ideas.

c. Multiplicity of Forms of Expression

The right to freedom of expression is not limited to verbal expression; all types of expression are protected, including silence.⁹⁶ The *Jehovah's Witnesses v. Republic of Argentina* case is an example of the broad scope of the right to freedom of expression developed by the Inter-American jurisprudence.

In 1976, the Argentine military dictatorship promulgated Decree No. 1867/76, which prohibited the public exercise of the Jehovah's Witness religion in Argentina.⁹⁷ The government alleged that this religion was based on principles contrary to the Argentine nationality and basic state institutions.⁹⁸ As a result of the decree, followers of the religion were persecuted.⁹⁹ More than 300 children were expelled from school after being accused of refusing to swear allegiance to the country or to sing the Argentine national anthem.¹⁰⁰ The students opted instead for silence because their religion prohibited them from engaging in such veneration of national symbols.¹⁰¹ Pursuant to Resolution No. 02/79, the Commission condemned the action

94. *Id.* ¶ 73.

95. *Martorell v. Chile*, Case 11.230, Inter-Am. Comm'n H.R., Report No. 11/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 59 (1996), available at <http://cidh.org/annualrep/96eng/Chile11230.htm>. Similarly, in *Miranda v. Mexico*, the Commission found that the failure to investigate and punish the mastermind behind the assassination of a journalist constituted an illegal interference with the right of every citizen to "receive information freely and to learn the truth about the events that took place." *Miranda v. Mexico*, Case 11.739, Inter-Am. Comm'n H.R., Report No. 5/99, OEA/Ser.L/V/II.102 doc. 6, ¶ 56 (1998), available at <http://www.cidh.oas.org/annualrep/98eng/Merits/Mexico 11739.htm>. In that case, the co-director of a Mexican weekly publication (*Zeta*) was assassinated for authoring and publishing opinions critical of the government.

96. American Convention, *supra* note 2, art. 13(1).

97. *Jehovah's Witnesses v. Republic of Argentina*, Case 2137, Inter-Am. Comm'n H.R., Report No. 45/78, OEA/Ser.L/V/II.47, ¶ 1 (1978), available at <http://cidh.org/annualrep/78eng/Argentina.2137.htm>.

98. *Id.*

99. *Id.* ¶¶ 2, 4-7.

100. Claudio Grossman, *Freedom of Expression in the Inter-American System for the Protection of Human Rights*, 25 *NOVA L. REV.* 411, 426 (2001).

101. *Id.*

of the Argentine government, which it considered to be responsible for the alleged violations.¹⁰²

As exemplified by the Commission's resolution in the *Jehovah's Witnesses* case, all forms of expression, including silence, are protected under the right to freedom of expression.

d. Protection of the Means Necessary to Disseminate Ideas

Having asserted the right to disseminate opinions and ideas, both the Commission and the Court determined that the American Convention provides that freedom of thought and expression includes the right to disseminate information and ideas by any means.¹⁰³ In Advisory Opinion OC-05/85, the Court affirmed that "freedom of expression . . . 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."¹⁰⁴ The Commission asserted in its complaint in the *Baruch Ivcher-Bronstein v. Peru* case, discussed above, that the American Convention consecrates the right to disseminate information and ideas in an artistic form or by any other means.¹⁰⁵

e. Protection of Reproduction of Information

The right to freedom of expression includes the right to reproduction of expression originating from others. In the *Herrera-Ulloa v. Costa Rica* case, the state of Costa Rica convicted the petitioner on the criminal charge of defamation based on the contents of several articles published by the newspaper *La Nación*.¹⁰⁶ These articles, which previously appeared in the Belgian press, attributed illegal acts to Costa Rica's honorary representative to the International Atomic Energy Agency in Austria.¹⁰⁷ Costa Rican law required that the petitioner prove the veracity of the facts reported in the European press and later reproduced in *La Nación* in order to avoid liability.¹⁰⁸ The Court found this standard to be incompatible with Article 13 of the Convention and that it "has a deterrent, chilling and inhibiting effect on all those who practice journalism . . . [that] obstructs public debate on issues of interest to society."¹⁰⁹

102. *Jehovah's Witnesses v. Republic of Argentina*, Case 2137, Inter-Am. Comm'n H.R., Report No. 45/78, OEA/Ser.L.V/II.47, ¶ 1.

103. American Convention, *supra* note 2, art. 13(1).

104. Advisory Opinion OC-05/85, *supra* note 1, ¶ 31.

105. *Ivcher-Bronstein v. Peru*, Inter-Am. Ct. H.R., Complaint of the Inter-Am. Comm'n H.R., at 27 (on file with author) [hereinafter *Ivcher-Bronstein Complaint*].

106. *Herrera-Ulloa v. Costa Rica*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 3 (2 July 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.doc.

107. *Id.*

108. *Id.* ¶ 132.

109. *Id.*

In *Dudley Stokes v. Jamaica*, the petitioner, Dudley Stokes, editor of several prominent Jamaican newspapers, reprinted an article published by the Associated Press about a US investigation into kickbacks allegedly given to the former Jamaican Minister of Tourism, Eric Abrahams.¹¹⁰ The Associated Press withdrew the report the day after it was published, but did not send notice to the Jamaican media.¹¹¹ Three days after the story was published in Jamaica, the petitioner published a statement based on a denial issued by Abrahams.¹¹² However, a trial court found him guilty of libel and awarded Abrahams J\$80.7 million.¹¹³ Stokes appealed the amount of damages originally awarded and obtained a reduction to J\$35 million. Subsequently, the Commission found that the petitioner never appealed the domestic finding of his guilt and, therefore, this issue was deemed "not exhausted in domestic courts" and was not considered by the Commission.¹¹⁴ Despite having found the petition admissible in 2004 to address issues of proportionality of the damages, the Commission ultimately denied the petitioner's request for a hearing and found the state did not violate the petitioner's right to freedom of expression.¹¹⁵ The Commission's decision raises serious procedural and substantive issues because it did not afford a hearing to the petitioner and determined that issues of proportionality should be decided by domestic legal systems without providing any guidance in that regard. Since Jamaica has not accepted the Court's compulsory jurisdiction, the decision was final. However, as discussed below, in *Kimel v. Argentina* the Court had the opportunity to do what the Commission failed to do: develop the notion of proportionality.¹¹⁶

Penalizing the reproduction of information originating from third parties, in the absence of malice or grave negligence, would seriously restrict the free flow of ideas in an increasingly complex global reality where information flows from multiple and often distant actors. The exclusion of liability for reproducing this type of information does not, however, imply excluding liability of those with whom the information originated (e.g., malicious statements of fact) or the liability of those who reproduce such information with malice or grave negligence.¹¹⁷

110. *Dudley Stokes v. Jamaica*, Case 12.468, Inter-Am. Comm'n H.R., Report No. 23/08, OEA/Ser/L/V/II.131 doc. 29, ¶ 18 (2008), available at <http://www.cidh.oas.org/annualrep/2008eng/Jamaica12468eng.htm>.

111. *Id.* ¶ 50.

112. *Id.* ¶¶ 55–56.

113. *Id.* ¶ 25.

114. *Id.* ¶ 80.

115. *Id.* ¶¶ 16, 83.

116. See *infra* note 149 and accompanying text.

117. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

f. Exclusion of Direct and Indirect Restrictions

Subsection three of Article 13 of the American Convention prohibits restrictions on freedom of expression that are carried out by indirect means designed to impede communication.¹¹⁸ The Special Rapporteur for Freedom of Expression has defined indirect measures as those that, although not “designed strictly speaking to restrict the freedom of expression . . . [n]onetheless, in practice . . . have an adverse impact on the free circulation of ideas.”¹¹⁹ Unlike direct restrictions, these are harder to detect and consequently, rarely investigated.

The *Baruch Ivcher-Bronstein v. Peru* case, discussed above, provides an example of an indirect restriction on freedom of expression. In this case, the government did not use traditional restrictions such as libel, contempt laws, censorship, or political persecution to silence Bronstein. Instead, the regime stripped him of his nationality to achieve this goal.¹²⁰

Since then, the Inter-American jurisprudence has expanded on the concept of indirect restrictions. In the *Canese v. Paraguay* case, the Commission recognized punitive measures as an indirect restriction to freedom of expression. Mr. Canese was a journalist who wrote about allegations of corruption against the powerful presidential candidate Juan Carlos Wasmosy. Canese was fired from the newspaper where he worked and criminal proceedings were brought against him. He was sentenced to four months imprisonment and not allowed to leave Paraguay. The Commission stated that “[t]he inhibiting effect of the punitive measure can generate self-censorship of a person who wishes to speak out, which produces almost the same effect as direct censorship: ‘opinions do not circulate.’”¹²¹ In that case, the Court determined that “the criminal proceeding, the consequent sentence imposed on Canese . . . and the restrictions to leave the country during almost eight years and four months constituted an indirect means of restricting his freedom of thought and expression.”¹²² Using that law to the fullest extent, the government limited “the open debate on topics of public interest or concern and restricted Canese’s exercise of freedom of thought and expression to omit his opinions for the remainder of the electoral campaign.”¹²³

In one of the most recent cases addressing indirect restrictions, *Perozo et al. v. Venezuela*, the Court noted that there must be an actual restriction

118. American Convention, *supra* note 2, art. 13(3).

119. *Report of the Special Rapporteur for Freedom of Expression* 2004, Inter-Am. Comm’n H.R., O.A.S. Doc. OAS/Ser.LV/II.122. doc. 5, rev. 1, ch. V, ¶ 9 (2005), available at <http://www.cidh.oas.org/relatoria/docListCat.asp?catID=39&ID=1> [hereinafter 2004 Report of the Special Rapporteur].

120. *Ivcher-Bronstein* Complaint, *supra* note 105.

121. *Canese v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No.111, ¶ 72(g) (31 Aug. 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.doc.

122. *Id.* ¶ 107.

123. *Id.* ¶ 106.

of speech in order for a violation to occur.¹²⁴ In this case the Court found that the government of Venezuela had not violated the victim's rights *per se*, but it had failed its obligation to protect them from indirect restrictions by private actors.¹²⁵

In addition, the Special Rapporteur for Freedom of Expression has been investigating new indirect means employed to restrict this right as they emerge in the region. In its 2003 Annual Report, the Rapporteur evaluated how the unregulated use of official publicity could be transformed into a restriction. For example, the abuse of funding distribution policies to benefit those who favor the government or its agents punishes those media agencies that seek a more critical approach. The Rapporteur illustrated that although "[t]here exists no inherent right to receive government advertising revenue . . . [the state] cannot deny publicity income only to specific outlets based on discriminatory criteria."¹²⁶

*g. Incompatibility of Public and Private Monopolies in
Information Media with the Right to Freedom of Expression*

Both the Court and the Commission have confirmed that the existence of public and private monopolies impedes the dissemination of individual ideas as well as the reception of the opinions of others. As a result, the existence of monopolies in the media industry is inconsistent with freedom of expression. In Advisory Opinion OC-05/85, the Court stated that "[i]t is the mass media that make[s] the exercise of freedom of expression a reality."¹²⁷ To ensure that this medium is not restricted, the Court determined that there must be "a plurality of means of communication, the barring of all monopolies . . . and guarantees for the protection of the freedom and independence of journalists."¹²⁸

In *Baruch Ivcher-Bronstein v. Peru*, the Commission affirmed that the free circulation of ideas is only conceivable where there are multiple sources of information in addition to respect for the media.¹²⁹ The Commission explained that it is not enough to guarantee the right to establish mass media;

124. See *Perozo et al. v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 195, ¶ 118 (28 Jan. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_195_ing.pdf. See also *Rios et al. v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 194, ¶ 108 (28 Jan. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_194_ing.pdf.

125. *Perozo et al. v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 195, ¶ 161.

126. *Report of the Special Rapporteur for Freedom of Expression 2003*, Inter-Am. Comm'n H.R., O.A.S. Doc. OAS/Ser.LV/II.118, doc. 70, rev. 2, vol. III, ch. V, ¶ 12 (2003), available at <http://www.cidh.oas.org/relatoria/docListCat.asp?catID=23&IID=1> [hereinafter *2003 Report of the Special Rapporteur*].

127. Advisory Opinion OC-5/85, *supra* note 1, ¶ 34.

128. *Id.*

129. *Ivcher-Bronstein Complaint*, *supra* note 105, at 28.

it is also necessary that journalists and other professionals working in the media be able to do so with the protections that the free and independent exercise of free expression this work requires.¹³⁰ Furthermore, the Special Rapporteur has stated that “assignments of radio and television broadcast frequencies should consider democratic criteria that guarantee equal opportunities of access for all individuals.”¹³¹ In a further expansion of the right of freedom of expression, the Inter-American Court, in the case of *Kimel v. Argentina*,¹³² stated that the “plurality of the media and the prohibition of all types of monopolies in relation thereto, whatever be the form they may adopt, is imperative.”¹³³ The Court thereby established a positive state obligation to adopt a normative framework that would guarantee the exclusion of monopolies in information media.

2. Prohibition of Prior Censorship

One of the principal characteristics of the right of freedom of expression in the Inter-American system is that it only allows for prior censorship when used to regulate public entertainment in order to safeguard the morals of children and adolescents.¹³⁴ Subsection two of Article 13 of the Convention provides that freedom of expression cannot be subject to prior censorship, but “shall be subject to subsequent imposition of liability.”¹³⁵ The Declaration of Principles holds that direct or indirect prior censorship restricts the

130. *Id.*

131. 2004 Report of the Special Rapporteur, *supra* note 119, ch. V, ¶ 36, citing a 2003 press release on an official visit to Honduras by the Special Rapporteur for Freedom of Expression. Press Release, Office of the Special Rapporteur on the Freedom of Expression, Inter-Am. Comm’n H.R., Upon Concluding his Official Visit to Honduras, the Special Rapporteur for Freedom of Expression Urges the Government to Abolish the Required Association of Journalists and the Crime of *Desacato* (2003), available at <http://www.cidh.org/relatoria/showarticle.asp?artID=114&IID=1>.

132. *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177 (2 May 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.

133. *Id.* ¶ 57 n. 51. See also Advisory Opinion OC-05/85, *supra* note 1, ¶ 34.

134. Paragraph 4 of Article 13 of the American Convention states: “Notwithstanding 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.” American Convention, *supra* note 2, art. 13(4). The rejection of prior censorship is so strong in the Inter-American system that paragraph 5 provides only subsequent criminal punishment for war propaganda and incitements to racial and religious hatred:

Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

American Convention, *supra* note 2, art. 13(5).

135. *Id.* art. 13(2).

free circulation of ideas and opinions, which violates the right to freedom of expression.¹³⁶

This prohibition responds to the danger of creating filters capable of determining what individuals can hear, see, or read. Therefore, the American Convention rejects resort to justifications such as "national security," "morality," or "good habits" that could easily be used as pretexts to eliminate or encroach upon the free expression of ideas.¹³⁷

In the Western Hemisphere, both the Court and the Commission have had the opportunity to interpret the prohibition of prior censorship including: (a) the exclusion of the defense of honor as a basis for prior censorship; and (b) identifying the scope of authorized exceptions.

a. Exclusion of Defense of Honor as a Basis for Prior Censorship

Some state parties have used the right to privacy found in Article 11 of the Convention¹³⁸ as a basis for restricting the right to freedom of expression

136. 2006 Report of the Special Rapporteur, *supra* note 3, ch. II, ¶ 41, quoting Inter-American Declaration of Principles on Freedom of Expression, *supra* note 43, principle 5.

137. In contrast to the Americas, the European Convention for the Protection of Human Rights and Fundamental Freedoms allows for exceptions in specific situations when "prescribed by law and . . . necessary in a democratic society." These exceptions, that as such need to be interpreted restrictively, are subject to scrutiny by the European Court. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 222, Eur. T.S. No. 5 (*entered into force* 3 Sept. 1953) [hereinafter European Convention]. Article 10 states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id. art. 10. However, in practice, European organs have been reluctant to apply prior censorship norms, signaling a broad interpretation of freedom of expression that minimizes the censorship option. See, e.g., 1998 Report of the Special Rapporteur, *supra* note 8, ch. II, § B(3) (citing *The Sunday Times v. the United Kingdom*, 2 Eur. Ct. H.R. 245 (1979) and discussing how, in interpreting Article 10 of the European Convention, the European Court for Human Rights "concluded that 'necessary,' while not synonymous with 'indispensable,' implied 'the existence of a 'pressing social need' and that, for a restriction to be 'necessary,' it is not enough to show that it is 'useful,' 'reasonable,' or 'desirable'").

138. American Convention, *supra* note 2, art. 11:

1. Everyone has the right to have his honor respected and his dignity recognized.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

3. Everyone has the right to the protection of the law against such interference or attacks.

protected in Article 13. The basis of their argument is that defense of honor should be excluded from the prior censorship prohibition.

The state of Chile, for example, set forth this argument in *Martorell v. Chile*. The Chilean government and judiciary maintained that in the event of a conflict between Articles 11 (right to privacy) and 13 (right to freedom of expression) of the American Convention, the former must prevail.¹³⁹ In deciding the case, the Commission rejected this theory and advanced its interpretation that the rights included in those two articles of the American Convention do not present a conflict of different principles from which one must be chosen.¹⁴⁰ Accordingly, the Commission quoted the European Court on Human Rights, which, in a similar case, considered that it was “faced not with a choice between conflicting principles, one of which is freedom of expression, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.”¹⁴¹

The Commission reiterated this interpretation of Article 13 in its arguments in *The Last Temptation of Christ*.¹⁴² In that case, the Chilean government prohibited the distribution of the film “The Last Temptation of Christ,” arguing it did so to protect the “honor and reputation of Christ.”¹⁴³ The Commission, in turn, replied that the “honor of the individual should be protected without prejudicing the exercise of freedom of expression and the right to receive information.”¹⁴⁴ In deciding the case, the Court upheld the Commission’s reasoning and stated that the prohibition of the movie “The Last Temptation of Christ” constituted prior censorship in violation of Article 13 of the Convention.¹⁴⁵

The Special Rapporteur acknowledged this interpretation in the 1998 report. In that report, the Rapporteur noted that states must respect the right to freedom of expression when legislating the protection of honor and dignity contained in Article 11 of the Convention and applying domestic law on the subject.¹⁴⁶

b. Scope of Authorized Exceptions

The American Convention authorizes the following exception to its prohibition of prior censorship: censorship of public entertainment for the exclusive

139. *Martorell v. Chile*, Case 11.230, Inter-Am. Comm’n H.R., Report No. 11/96, OEA/Ser.L/V/II.95, doc. 7 rev., ¶ 63 (1996), available at <http://cidh.org/annualrep/96eng/Chile11230.htm>.

140. *Id.* ¶¶ 62, 65, 75.

141. *Id.* ¶ 71 n.5 (quoting *The Sunday Times v. the United Kingdom*, 2 Eur. Ct. H.R. 245 (1979)).

142. *Olmedo-Bustos et al. v. Chile*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 61 (5 Feb. 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.doc. The Commission argued subsequent liability is “only admissible in a restricted way, when necessary to ensure respect for the rights or reputation of others.” See also *id.* ¶ 61(e).

143. *Id.* ¶ 61(h).

144. *Id.* ¶ 61(i).

145. *Id.* ¶ 72.

146. *1998 Report of the Special Rapporteur*, *supra* note 8, at 21.

purpose of regulating access to such events to protect the morals of children and adolescents.¹⁴⁷ This exception, however, is only permitted within the framework of the Inter-American system if it conforms to the requirements of legality, necessity, reality or imminence, or valid purpose.¹⁴⁸

In order to conform to the legality requirement, the exception must be authorized by law. Accordingly, decrees or other administrative measures would be insufficient. The requirement of necessity implies a case-by-case evaluation of the pertinence of the measure, taking into account the peculiarities of each situation, and considering the lack of other less restrictive means available to achieve the same valid purposes in order to exclude improperly-motivated prohibitions. The reality or imminence requirement refers to measures that are adopted in light of actually existing conditions or those that are certain to occur, not mere hypothetical situations that may affect the morals of children or adolescents (in public entertainments). The valid purpose exception corresponds to cases involving children where protection of morals is at issue. As of 2010, neither the Commission nor the Court has had the opportunity to further interpret this provision.

3. Subsequent Liability

The Inter-American system's prohibition on prior censorship does not exclude subsequent imposition of liability. But when subsequent liability is disproportionate, it effectively "gags" individuals who are faced with the threat of serious "retaliation" for expressing their opinions, producing a chilling effect for society at large. The American Convention sets forth specific requirements to establish the validity of subsequent liability. These requirements have been reflected in the jurisprudence of the Court. One of the latest cases in which the Court addressed subsequent liability is *Kimel v. Argentina*.¹⁴⁹ Kimel is an investigative historian who published a book entitled *La Masacre de San Patricio* in 1989.¹⁵⁰ The book analyzed the killings of five clergymen of the Palotine Order that occurred 4 July 1976 during the military dictatorship in Argentina.¹⁵¹ Kimel examined the judicial investigation into the massacre and referred to a judicial decision adopted on 7 October 1977.¹⁵² He raised questions concerning the behavior of the federal judge in charge of this case, alleging that the judge had complied with formal requirements, but because of pressure from the military regime had not investigated the truth.¹⁵³ The judge brought a criminal action against Kimel for defamation

147. American Convention, *supra* note 2, art. 13(4).

148. See *id.* art. 27.

149. *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No.177 (2 May 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.

150. *Id.* ¶ 41.

151. *Id.*

152. *Id.* ¶¶ 41–42.

153. *Id.* ¶ 42.

or alternatively “false imputation of a publicly actionable crime,” both of which are punishable by up to three years in prison according to Argentine Criminal Code.¹⁵⁴ Kimel was found guilty of the latter and sentenced on 25 September 1995 to one year in prison and payment of 20,000 pesos.¹⁵⁵ The Court found that the sentence violated the right to freedom of thought and expression laid down by the American Convention.¹⁵⁶ On the basis of *Kimel*, and other court decisions discussed below, the following requirements for subsequent liability can be identified: 1) legality; 2) democratic legitimacy; 3) necessity; 4) proportionality; 5) value judgments; 6) differentiation between opinions based on facts and value judgments; 7) preclusion of liability for reproduction of information; and 8) strict regulation of contempt laws. These requirements protect the right to freedom of expression in general, including, “those that offend, shock or disturb the majority.”¹⁵⁷

Moreover, in the application of these requirements in a given case, special consideration must be given to protected speech including, “(a) political speech and speech involving matters of public interest; (b) speech regarding public officials in the exercise of their duties and candidates for public office; and (c) speech that is an element of the identity or personal dignity of the person expressing herself.”¹⁵⁸ This type of speech is essential for democracy, and accordingly must be subject to rigorous scrutiny.

a. Legality

Article 13 of the American Convention provides that the subsequent imposition of liability should be expressly established by law.¹⁵⁹ This is confirmed in Article 30,¹⁶⁰ which provides that the restrictions “placed on the enjoyment or exercise of the rights or freedoms recognized [in the American Convention] may not be applied except in accordance with the purpose for which such restrictions have been established.”¹⁶¹

154. *Id.* ¶ 43.

155. *Id.* ¶ 45.

156. *Id.* ¶ 95.

157. 1994 Annual Report of the Inter-Am. Ct. H.R., O.A.S. Doc. OEA/Ser.L/V/88, doc. 9, rev. 1, ch. V, (1995), available at <http://www.cidh.oas.org/annualrep/94eng/TOC.htm>.

158. Office of the Special Rapporteur for Freedom of Expression, *Inter-American Legal Framework Regarding the Right to Freedom of Expression*, *supra* note 25, at 10.

159. American Convention, *supra* note 2, art. 13(2).

160. *Id.* art. 30, which provides:

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

161. *Id.* See also The Word “Laws” in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-06/86, Inter-Am. Ct. H.R. (ser. A) No. 6 (9 May 1986), available at http://www.corteidh.or.cr/docs/opiniones/seriea_06_ing.doc [hereinafter Advisory Opinion OC-06/86].

The Court's Advisory Opinion OC-6/86, *The Word "Laws" in Article 30 of the American Convention on Human Rights*, establishes that "the criteria of Article 30 are applicable to all those situations where the word "laws" or comparable expressions are used in the [American] Convention in referring to the restrictions that the Convention itself authorizes with respect to each one of the protected rights."¹⁶² Different consequences often arise from this concept of legality. First, subsequent liability can be imposed only by statute and not by an act of the executive. Second, a statute has less normative value than a constitution and hence cannot narrow a constitutional norm. Third, there is a prohibition on the retroactive application of restrictions, based on the notion that no one can be responsible for conduct that, when undertaken, was not illegal.

In *Kimel v. Argentina*, the Court had an opportunity to refer to subsequent liability. The Court emphasized that the law must be clearly established, and must provide clear guidance to individuals as to what constitutes permissible conduct.¹⁶³ Again, in the case *Usón-Ramírez v. Venezuela*, decided in November 2009, the Court found that the Venezuelan law under which a former General in the Venezuelan army was convicted of "slander against the National Armed Forces" was far too vague to meet the legality threshold of Article 13.¹⁶⁴ Usón-Ramírez was sentenced to five years and six months in prison for speaking on television about alleged criminal conduct that took place at a military prison and "dishonoring the Venezuelan military."¹⁶⁵ The Court ruled that the statute was too ambiguous to meet the legality requirement because it did not clearly establish the elements of the crime, nor did it specify the *mens rea* needed for conviction.¹⁶⁶

b. Democratic Legitimacy

The principle of legality is inextricably linked to that of legitimacy. Article 13 requires that in order to be valid, the imposition of liability must also be legitimate.¹⁶⁷ In Advisory Opinion-05/85, the Court affirmed that this principle should be understood as one requiring public authorities to conduct themselves in strict conformity with the requirements set forth in both the constitutional and Inter-American systems.¹⁶⁸ In the Americas, legitimacy

162. *Id.* ¶ 17.

163. *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No.177, ¶¶ 63–66 (2 May 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.

164. *Usón-Ramírez v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶¶ 38, 56–57 (20 Nov. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_207_ing.pdf.

165. *Id.* ¶ 38.

166. *Id.* ¶ 56.

167. American Convention, *supra* note 2, art. 13.

168. Advisory Opinion OC-06/86, *supra* note 161.

requires the effective exercise of a representative democracy, including *inter alia*, respect for divergent views.¹⁶⁹

c. Necessity

The need for subsequent liability will depend on its origin and purpose, namely, whether it is oriented toward satisfying a compelling public interest within the framework of a representative democracy. Among the means that may be employed to meet this objective, the least restrictive should be chosen.¹⁷⁰ Finally, whether “public order,” “public morals,” “national security,” “public health,” or some other concept is invoked to establish subsequent liability, such expressions should be subject to an interpretation strictly tied to the just demands of a democratic society which, of course, include freedom of expression.

Although the American Convention does not explicitly state the “necessity” requirement, the Court established that this requirement applies to every article in the American Convention pursuant to Article 29.¹⁷¹ The latter states that all articles of the Convention must be interpreted as protecting representative democracy.¹⁷² The Court, in its jurisprudence, acknowledged the difference in terminology between the American Convention and Article 10 of the European Convention, which uses the expression “necessary in a democratic society.”¹⁷³ The Court found that this difference is irrelevant since the European Convention does not contain any provision comparable with Article 29 of the American Convention.

Unfortunately, the Court in *Kimel* and *Usón-Ramírez* did not rule that criminal sanctions for speech violated the American Convention.¹⁷⁴ However, in *Kimel*, the Court declared that criminal sanctions should be reserved for extremely serious conduct, and be based upon information that “shows the absolute necessity to resort to criminal proceedings.”¹⁷⁵ In *Usón-Ramírez* the Court expanded the right to honor to include not only individuals, but

169. *Id.*

170. Advisory Opinion OC-05/85, *supra* note 1, ¶ 46.

171. *Id.* ¶ 44. Article 29 of the American Convention provides as follows:

No provision of this Convention shall be interpreted as:

...
(c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or

(d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

American Convention, *supra* note 2, art. 29(c), (d).

172. Advisory Opinion OC-05/85, *supra* note 1, ¶ 44.

173. *Id.* ¶¶ 44–45.

174. *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No.177, ¶ 78 (2 May 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.

175. *Id.*

also the government itself, reiterating that it did not rule criminal liability out completely, but created a high threshold for imposing criminal liability to protect the government's right to honor.¹⁷⁶ In *Tristán-Donoso v. Panama* the Court noted that factors such as the extreme seriousness of the conduct, actual malice, and unfair damage caused can be used to evaluate the necessity of criminal proceedings.¹⁷⁷ After evaluating those factors, the Court found that the criminal punishment imposed on Tristán-Donoso was unnecessary.¹⁷⁸ Therefore, while criminal liability has not been excluded, the Court has developed strict requirements to evaluate whether there is "absolute necessity" to resort to criminal law. Thus far, the Court has not found absolute necessity in any case.

d. Proportionality

Subsequent liability should be in proportion to the end sought, whether the end is to assure respect for individual rights, the reputation of third parties, or the protection of "national security," "public order," "public health," or "morals." This requirement has great importance, since excessive fines, detention, and imprisonment can have the same chilling effect as prior censorship.

In *Kimel v. Argentina*, the Court carefully balanced under a "strict proportionality" standard Kimel's right to express his opinion against the right of the judge to have his honor respected, considering that both rights are protected in the American Convention.¹⁷⁹ The Court found that the violation of Kimel's right to freedom of expression outweighed the alleged impairment of the right to have one's honor respected.¹⁸⁰ The harsh criminal sanction in *Usón-Ramírez* was disproportionate to the goal of protecting the military's honor, according to the Court, and proportionality should guide the behavior of the state when exercising its punitive power.¹⁸¹

e. Value Judgments

The subsequent imposition of liability requires the existence of "actual malice," understood as (i) the intentional disregard for the truth of facts,

176. *Usón-Ramírez v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 69 (20 Nov. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_207_ing.pdf.

177. See *Tristán-Donoso v. Panama*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 120 (27 Jan. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_193_ing.pdf.

178. *Id.*

179. *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177, ¶ 58 (2 May 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.

180. *Id.* ¶ 94.

181. *Usón-Ramírez v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 87 (20 Nov. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_207_ing.pdf.

or (ii) serious negligence.¹⁸² In its report on contempt, the Commission addressed the issue and established the “actual malice” standard as the only one compatible with the Convention.¹⁸³ In its analysis, the Commission found that the *exceptio veritatis*, or the need for the defendant to prove the truthfulness of his statements, is abusive.¹⁸⁴ It argued that asking such proof from the defendant shifts the burden of proof from the plaintiff to the defendant against well-established legal principles. Moreover, in criminal cases, it affects the defendant’s presumption of innocence until guilt is proven.¹⁸⁵

In *Kimel*, while the court did not exclude the possibility of criminal sanctions, it stated explicitly that this possibility requires satisfaction of several factors, including “actual malice.”¹⁸⁶ In *Tristán-Donoso v. Panama* the Court confirmed this approach.¹⁸⁷ Tristán-Donoso stated that Attorney General of Panama intercepted his phone calls without any legal authorization. A court in Panama however, determined that this was false and imposed a criminal punishment and duty to compensate on Tristán-Donoso. The Court determined that this was disproportionate, because when Tristán-Donoso made this statement it was a reasonable determination without malice or grave negligence.¹⁸⁸

f. Differentiation Between Opinions of Fact and Value Judgments

Value judgments do not create liability because they do not assert facts. They are simply subjective opinions that individuals can freely determine to be valid or invalid. This type of expression is protected in broad terms by Article 13, which asserts that freedom of expression involves “the freedom to seek, receive, and impart information and ideas *of all kinds*.”¹⁸⁹

In the Inter-American system, there is an explicit right not only to “receive” information, but also to “disseminate” opinions.¹⁹⁰ If subsequent imposition of liability were permitted in the case of the dissemination of

182. 1999 Report of the Rapporteur for Freedom of Expression, Inter-Am. Comm’n H.R., O.A.S. Doc. OEA/ser.L.V/II.106, doc. 6, ch. II, § B(1)(a) (1999), available at <http://www.cidh.org/relatoria/showarticle.asp?artID=135&IID=1> [hereinafter 1999 Report of the Special Rapporteur].

183. *Id.* ch. II, § B(1)(b).

184. *Id.*

185. *Id.*

186. *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No.177, ¶ 78 (2 May 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.

187. *Tristán-Donoso v. Panama*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 120 (27 Jan. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_193_ing.pdf.

188. *Id.* ¶ 126.

189. American Convention, *supra* note 2, art. 13(1) (emphasis added).

190. *Id.* art. 13(1).

value judgments, it would inhibit both the person who expresses the opinion and the debate in which different opinions are expressed. In *Kimel* the Court stated:

The opinions expressed by Mr. Kimel can neither be deemed to be true nor false. As such, an opinion cannot be subjected to sanctions, even more so where it is a value judgment on the actions of a public official in the performance of his duties. In principle, truthfulness or falseness may only be established in respect of facts. Hence, the evidence regarding value judgments may not be examined according to truthfulness requirements.¹⁹¹

In the case of *Usón-Ramírez*, the Court emphasized that it is in the best interest of the public that the government be freely subject to public scrutiny.¹⁹² The Court emphasized that opinions and reports about the government should be allowed into the public discourse with great leeway to foster a “truly democratic society.”¹⁹³

g. Strict Regulation of Contempt Laws with the American Convention

Contempt laws provide punishment for offensive expressions directed at public officials in the fulfillment of their duties and are currently in force in at least nine OAS member states.¹⁹⁴ The Commission has repeatedly asserted, through its case law as well as in its *Report on the Compatibility of “Desacato” [Contempt] Laws with the American Convention on Human Rights* (“Report on Contempt Laws”), that such laws are incompatible with freedom of expression.¹⁹⁵

The Commission’s report followed the friendly settlement in the *Horacio Verbitsky v. Republic of Argentina* case that resulted in the elimination of Argentina’s contempt law.¹⁹⁶ In that case, an Argentine journalist was sentenced to one month in prison after being found guilty of contempt when he referred to an Argentine Supreme Court justice as “disgusting” in a national newspaper, *Página 12*.¹⁹⁷ The Commission found that contempt

191. *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No.177, ¶ 93 (2 May 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.

192. *Usón-Ramírez v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 83 (20 Nov. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_207_ing.pdf.

193. *Id.*

194. *2006 Report of the Special Rapporteur*, *supra* note 3, ch. II, at 19, ¶ 33.

195. *1994 Annual Report of the Inter-Am. Ct. H.R.*, O.A.S. Doc. OEA/Ser.L/V.88, doc. 9, rev. 1, ch. V, (1995) available at <http://www.cidh.org/annualrep/94eng/chap.5.htm> [hereinafter *Report on Contempt Laws*].

196. *Id.* ¶ 20.

197. *Verbitsky v. Republic of Argentina*, Case 11.012, Inter-Am. Comm’n H.R., Report No. 22/94, OEA/Ser.L/V/II.88 doc. 9, rev. 1, ¶¶ 1, 19 (1995), available at <http://cidh.org/annualrep/94eng/Argentina11012.htm>. The English version of the case points out that

laws, when applied, directly affect the type of open debate guaranteed by Article 13 that is essential to the existence of a democratic society.¹⁹⁸ The Special Rapporteur expanded on the issue and stated that “contempt laws seek to avoid debate as well as the scrutiny or criticism of state officials,” and that these laws, “instead of protecting freedom of expression or civil servants limit freedom of expression and weaken the democratic system.”¹⁹⁹

The Court further clarified the issue in *Canese v. Paraguay*, finding that a different threshold of protection of reputations should be applied to public officials, individuals who exercise functions of a public nature, and politicians.²⁰⁰ This threshold is not based on the nature of the subject, but rather on the characteristic of public interest inherent in the activities or acts of a specific individual.²⁰¹

Furthermore, in *Herrera-Ulloa v. Costa Rica*, the Court observed that those individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized. Their activities go beyond the private sphere and fall within the realm of public debate.²⁰²

The Court in *Kimel* acknowledged that while protection of a person's honor and reputation are legitimate ends, “public officials should be more

the Spanish word used in Verbitsky's article was “asqueroso” and explains that the term can mean either disgusting or disgusted. Horacio Verbitsky, *Cicatrices de Dos Guerras*, PÁGINA 12, 6 Mar. 1988.

198. *Report on Contempt Laws*, *supra* note 195, § 4(A).

199. 1998 *Report of the Special Rapporteur*, *supra* note 8, ch. IV, § A, at 42. In a press release, the Special Rapporteur stated his opposition to an Argentine court decision that sentenced the journalist Eduardo Kimel to one year in jail and a fine. Press Release, Office of the Special Reporter for Freedom of Expression, Inter-Am. Comm'n H.R., *The Rapporteur for Freedom of Expression Expresses his Opposition to Judicial Decision in Argentina* (16 Apr. 1999), available at <http://www.summit-americas.org/human%20rights/freedom-expression-1999.htm>. He noted that the Court has stated that, in a democratic society, political and public figures should be more open to public scrutiny and criticism, and that open debate, which is crucial to a democratic society, must necessarily include those persons who participate in the creation or the application of public policy. *Id.* Since these individuals are at the center of public debate and are knowingly exposed to public scrutiny, they must display greater tolerance toward criticism. *Id.*

The United Nations Rapporteurs for Freedom of Expression for the Organization for Security and Cooperation in Europe, and the OAS Special Rapporteur stated in a joint resolution that laws exist in many countries, such as contempt laws, that unduly limit the right to freedom of expression, and they urged states to amend those laws in order to bring them in line with their international obligations. 1999 *Report of the Special Rapporteur*, *supra* note 182, Annex 2, available at <http://www.summit-americas.org/human%20rights/freedom-expression-1999.htm>.

200. *Canese v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 100 (31 Aug. 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.doc.

201. *Id.*

202. *Herrera-Ulloa v. Costa Rica*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 129 (2 July 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.doc.

tolerant of criticism from individuals.”²⁰³ However, the Court found in *Usón-Ramírez* that Venezuela does have a legitimate interest in protecting the military’s honor and that imposing subsequent liability on freedom of expression may be justified.²⁰⁴ In both cases, while the Court did not exclude criminal sanctions, it set the bar high,²⁰⁵ a jurisprudential approach reiterated in *Tristán-Donoso v. Panama*.²⁰⁶

4. The Right to Access Information

The right to access information is fundamental to the ongoing development of democracy. It is found in subsection one of Article 13 of the American Convention, which provides that the right to freedom of expression includes the freedom to seek out and receive information of all kinds.²⁰⁷

With respect to this issue, the Court has noted that “a society that is not well informed is not a society that is truly free.”²⁰⁸ Restrictions on access to information held by public or private institutions (e.g., credit institutions) must be “judged by reference to the legitimate needs of democratic societies and institutions.”²⁰⁹ This implies that the existence of an absolute prohibition on access to information is incompatible with the American Convention. Although exceptions and limited restrictions are possible (e.g., for national security reasons), they should be narrowly interpreted and subject to judicial review in all cases.

The Inter-American Court was the first international tribunal to recognize the right to freedom of information as part of the right to freedom of expression in the case of *Claude Reyes v. Chile*. In that case, Reyes requested information from the Chilean Foreign Investment Committee regarding a deforestation project that he alleged could be detrimental to the environment and sustainable development of Chile.²¹⁰ The Chilean government failed to provide some of the requested information and did not give a

203. *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No.177, ¶ 68 (2 May 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.

204. *Usón-Ramírez v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 66 (20 Nov. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_207_ing.pdf.

205. *Id.* ¶¶ 56, 66, 69, 83, 87; *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No.177, ¶ 78 (2 May 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.

206. *Tristán-Donoso v. Panama*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 112 (27 Jan. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_193_ing.pdf.

207. American Convention, *supra* note 2, art. 13(1).

208. Advisory Opinion OC-05/85, *supra* note 1, ¶ 70.

209. *Id.* ¶ 42.

210. *Claude-Reyes et al. v. Chile*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 3 (19 Sept. 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc.

reason for withholding it.²¹¹ The Court held that the Chilean government's failure to provide part of the requested information constituted a violation of "the right to freedom of thought and expression embodied in Article 13 of the American Convention to the detriment [of the petitioner], and failed to comply with the general obligation to respect and ensure the rights and freedoms established in Article 1(1) thereof."²¹² In 2005, Chile reformed its Constitution in an effort to adapt its laws to the American Convention. The Constitution now establishes "that the confidentiality or secrecy of information must be established by law, [which is] a provision that did not exist at the time of the facts of this case."²¹³

Prior to the Court's decision, several other non-jurisdictional bodies had built on the right to freedom of information. The Commission began developing this right as a "means of guaranteeing the right to protection against information that is abusive, inaccurate, or prejudicial to individuals."²¹⁴ In continuing with this process, the Commission also established a right to "access to public and private databases for the purpose, as necessary, of updating, correcting, removing, or reserving information about the individual concerned. This action, known as *habeas data*, was introduced as a modality of the '*amparo*' process for the protection of personal privacy."²¹⁵

The Commission expanded on this interpretation in its *Report on Terrorism and Human Rights*. In that report, the Commission established that "access to information held by the State is a fundamental right of individuals and States have the obligation to guarantee it."²¹⁶

211. *Id.* ¶ 3.

212. *Id.* ¶ 103.

213. *Id.* ¶ 100.

214. 1999 *Report of the Special Rapporteur*, *supra* note 182, ch. II, § B(3); 2001 *Annual Report of the Special Rapporteur for Freedom of Expression*, ch. III, ¶ 26, available at <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=570&IID=1> [hereinafter 2001 *Report of the Special Rapporteur*].

215. 2001 *Report of the Special Rapporteur*, *supra* note 214, ch. III, ¶ 26; accord 1999 *Report of the Special Rapporteur*, *supra* note 182, ch. II, § B(3). In addition, the action of *habeas data* imposes certain obligations for entities that process information: the obligation to use the data for specific, explicitly stated objectives, and the obligation to guarantee the security of the data against accidental, unauthorized access or manipulation. In cases where entities of the state or the private sector obtain data improperly and/or illegally, the petitioner must have access to that information, even when classified, so that individuals have control over data that affects them. The action of *habeas data* as a mechanism for ensuring the accountability of security and intelligence agencies within this context provides a means to verify that personal data has been gathered legally. The action of *habeas data* entitles the injured party, or his family members, to ascertain the purpose for which the data was collected and, if collected illegally, to determine whether the responsible parties are punishable. Public disclosure of illegal practices in the collection of personal data can have the effect of preventing such practices by these agencies in the future.

216. *Report on Terrorism and Human Rights*, Inter-Am. Comm'n H.R., O.A.S. Doc. OAS/Ser.L/V/II.116, doc. 5, rev. 1, ¶ 281 (2002).

The Commission developed the principle of full disclosure on the rule regarding access to information, which creates a legal presumption in favor of publicizing state-held information and imposes three conditions on restrictions to the principle: legality, proportionality, and legitimacy. It also asserted a need for judicial recourse for the review of a rejection to an information request.²¹⁷

In analyzing another aspect of the right to information, the Office of the Special Rapporteur for Freedom of Expression held in its 2003 Annual Report that "[t]he right of access to information is also a component of the right to know the truth."²¹⁸ The Report further noted:

[T]he right to know the truth is a collective right that ensures society access to information that is essential for the workings of democratic systems[. . .]. It is also a private right for relatives of the [human rights] victims, which affords a form of compensation, in particular, in cases where amnesty laws are adopted. . . . Access to state-held information is similarly necessary to prevent future abuses by government officials and also to ensure that effective remedies against such abuses are guaranteed.²¹⁹

5. Right of Correction and Reply

Having established freedom of expression and thought in Article 13, the American Convention provides for a right of correction and reply in Article 14.²²⁰ In Advisory Opinion OC-07/86, the Court asserted that these articles are inescapably related: "in regulating the application of the right of reply or correction, the states parties must respect the right of freedom of expression guaranteed by Article 13. They may not, however, interpret the right of freedom of expression so broadly as to negate the right of reply proclaimed by Article 14(1)."²²¹

The Court added that the right to reply guarantees respect for freedom of expression in both its individual and shared dimensions. In the individual dimension, the Court recognizes that this right "guarantees that a party injured by inaccurate or offensive statements has the opportunity to express his [or her] views and thoughts about the injurious statements."²²² The Court further recognized that in the social dimension this right gives every person

217. *Report of the Special Rapporteur for Freedom of Expression 2003*, Inter-Am. Comm'n H.R., ch. IV, ¶ 3, available at <http://www.cidh.org/relatoria/showarticle.asp?artID=139&IID=1> [hereinafter *2003 Report of the Special Rapporteur*]. See also *Claude-Reyes et al. v. Chile*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 53 (19 Sept. 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc.

218. *2003 Annual Report of the Special Rapporteur*, *supra* note 217, ch. IV, ¶ 14.

219. *Id.*

220. American Convention, *supra* note 2, art. 14.

221. Advisory Opinion OC-07/86, *supra* note 38, ¶ 25.

222. *Id.* ¶ 5 (Separate Opinion of Judge Hector Gros Espiell).

“the benefit of new information that contradicts or disagrees with the previous inaccurate or offensive statements.”²²³ In this respect, the right acts as a balance of information which is needed for the public to form a true and correct opinion.²²⁴

While the Court has not had the opportunity to apply the law of correction to a contentious case, its Advisory Opinion OC-07/86 confirms certain elements of this right.²²⁵ First, the right of correction cannot legitimately include value judgments. Second, since there are many ways of expressing opinions, the correction or reply may not always be accomplished through the same means (e.g., location, size, format).

6. Emergency Situations and Their Impact on Freedom of Expression

The regulation of emergency situations is of great importance to the protection of rights in general and to the protection of freedom of expression in particular. Emergency situations arise when there is a threat against the life of the nation. These situations permit restrictions on human rights, including the right to freedom of expression.

In the Western Hemisphere, the emergency exception has been regularly abused. Imaginary threats and real emergencies have become the arguments of choice for justifying abuses and often mass and gross violations of human rights.²²⁶ Attempting to curb those abuses, the American Convention regulates emergencies extensively. Article 27 of this Convention sets forth the conditions required to validly declare an emergency, lists non-derogable rights, and the requirements that must be met to suspend other rights.²²⁷

223. *Id.*

224. *Id.*

225. *Id.*

226. See generally Claudio Grossman, *Situaciones de Emergencia en el Hemisferio Occidental: Propuestas para Fortalecer la Protección de Derechos Humanos*, in *DERECHO CONSTITUCIONAL COMPARADO MÉXICO-ESTADOS UNIDOS* 175 (James Frank Smith ed., Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas 1990).

227. American Convention, *supra* note 2, art. 27. Article 27 provides as follows:

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from *Ex Post Facto* Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

The conditions are strict (a real or imminent threat to the life of a nation) and must satisfy very high standards, namely that the state must show that the normal powerful means at its disposal are insufficient to address events that affect the continuation of civilized life.²²⁸

The requirements prescribed by the American Convention for the timely suspension of rights—including freedom of expression—are: 1) necessity (there must be absolutely no other possible alternatives in the case at hand); 2) timeliness (the suspension of rights is valid strictly for the time required); 3) proportionality (measures adopted cannot be an excessive reaction on the part of the authorities in light of the existing emergency); 4) compatibility (with other duties imposed by international law); 5) non-discrimination; and 6) compliance with the law by the authorities (since the temporary suspension of rights supposes actions by authorities consistent with the law declared for reasons of general interest and for the purpose for which they were established).²²⁹

7. *The Link Between Freedom of Expression and Democracy*

Both the Court and the Commission have established that there is an inherent link between freedom of expression and democracy.²³⁰ As stated early on in this article, in Advisory Opinion OC-05/85, the Court affirmed that “[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests,”²³¹ and that this freedom is essential for the development of political parties, trade unions, scientific and cultural societies, and those who wish to influence the public.²³²

The Commission explained its position with respect to this point in its complaint before the Court in the *Baruch Ivcher-Bronstein v. Peru* case. It asserted that Article 13 reflects a broad interpretation of freedom of expression and personal autonomy, the object of which is to protect and strengthen access to information, ideas, and expressions of all types, in order to fortify the democratic process.²³³ Respect for these freedoms is not limited to al-

228. *Id.* See also *Verbtsky v. Republic of Argentina*, Case 11.012, Inter-Am. Comm’n H.R., Report No. 22/94, OEA/Ser.L.V/II.88 doc. 9, rev.1, ¶ 175 (1995), available at <http://cidh.org/annualrep/94eng/Argentina11012.htm>; American Convention, *supra* note 2, art. 27; Claudio Grossman, *El Régimen Hemisférico Sobre Situaciones de Emergencia*, SERVICIO EDITORIAL DEL INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 155 (1993).

229. American Convention, *supra* note 2, art. 27.

230. *1999 Report of the Special Rapporteur*, *supra* note 182, Vol. III, Annex 5 (1999), available at <http://www.summit-americas.org/human%20rights/freedom-expression-1999.htm>. The Declaration of Chapultepec, drafted by the Inter-American Press Society and adhered to by several member countries, affirms that the battle for freedom of expression and of the press, by whatever means, is an essential cause of democracy and of civilization in the hemisphere.

231. Advisory Opinion OC-05/85, *supra* note 1, ¶ 70.

232. *Id.*

233. *Ivcher-Bronstein Complaint*, *supra* note 105, at 27.

lowing the circulation of "acceptable" opinions and ideas.²³⁴ Furthermore, in *Canese v. Paraguay*, the Commission stated:

The right to freedom of expression is precisely the right of the individual and of the whole community to take part in active, concrete, and challenging debates on all aspects of the normal, harmonious functioning of the society. These debates can often be critical of and even offensive to those who exercise public positions or who are involved in formulating public policy.²³⁵

As stated by the Special Rapporteur, when debate is restricted, the development of democracy is interrupted because the free debate of ideas and opinion among citizens is impeded.²³⁶

The link between freedom of expression and democracy has been part of a development process within the context of the OAS. Currently, only democratic states may become members of that Organization. An important milestone in this process was reached when OAS Resolution 1080 was adopted in Santiago, Chile in 1991.²³⁷ It allows OAS political organs to take active measures, including diplomatic initiatives, when the constitutional process of a country breaks down.²³⁸

The Inter-American Democratic Charter broadens the scope of situations that would warrant OAS actions.²³⁹ The Charter specifically mentions respect for freedom of expression. It was built on the jurisprudence cited above and determined that democracy provides the theoretical and practical ground to guarantee freedom of information, as a necessary structure to secure compliance with human rights.²⁴⁰

234. *Id.*

235. *Canese v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No.111, ¶ 72 (31 Aug. 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.doc.

236. 1998 Report of the Special Rapporteur, *supra* note 8, at 4.

237. Resolution 1080 (XXI-0/91), *Representative Democracy*, OAS Fifth Plenary Session (5 June 1991), available at <http://www.oas.org/juridico/english/agres1080.htm>.

238. *Id.*; Democratic Charter, *supra* note 47, art. 20.

239. See generally Democratic Charter, *supra* note 47.

240. *Id.* art. 4. Consolidation and expansion of democracies in the region will result, if we consider comparative experiences, in the further development of the theoretical basis of the right to freedom of expression. There are several key theories that demonstrate the importance of freedom of expression in a democracy. Among these theorists are US Supreme Court justice Oliver Wendell Holmes, Alexander Meiklejohn, and Vincent Blasi. It is to be expected that further regional theoretical development will evolve throughout the hemisphere as the interpretation of this important right expands. Oliver Wendell Holmes' "Marketplace of Ideas" theory was adopted in the dissent of a US Supreme Court case, *Abrams v. United States* 250 U.S. 616 (1919). In that case, the US Supreme Court upheld a sentence convicting defendants of conspiring to "incite, provoke, and encourage resistance to the United States in [World War I]." Justice Holmes, in his dissent, expounded his theory on the importance of expressing oneself. This theory is that free speech works best when subjected to the pressures and tests of the marketplace. The exception would be if the expressed opinions and exhortations "so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Id.* at 630.

III. CONCLUSION

The interpretations of the American Convention by the Court and the Commission have developed a normative framework designed to protect freedom of expression in the Inter-American system. Achieving full protection of the right to freedom of expression in the Americas requires that states fully comply with existing regional norms, as well as incorporating them into domestic law. To meet these obligations, the following measures are essential.

First, contempt laws should be abolished, and moreover, defamation should result only in civil liability. Although the Inter-American Court has kept a residual possibility for criminal sanctions, the imposition of such sanctions is subject to a stringent test; and in no case brought to its attention has the Court found that the test has been satisfied.²⁴¹ The free interchange of ideas is essential for democratic society, and the possibility of criminal sanctions in matters of public interest has a chilling effect. Furthermore, defending the honor of individuals who act in the public domain through civil sanctions only is preferable, due to the stifling effect that the criminalization of speech has on debate. Because of the tenuous line that exists between private and public matters, there are also advantages to decriminalizing speech in all

Alexander Meiklejohn argued that free speech is essential for self-government. This theory held that people should be free to express their opinions without any fear of a restriction on their speech and that nations should reject libel actions so that all mediums may criticize the government and government officials. Meiklejohn viewed the United States Supreme Court case, *New York Times v. Sullivan*, as "an occasion for dancing in the streets." Quoting Harry Kalven Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUPREME CT. REV. 191, 221 (1954). In *Sullivan*, the US Supreme Court held that a public official could not bring a libel action against critics of his or her official conduct. According to the Court, "whatever is added to the field of libel is taken from the field of free debate." The *Verbitsky* case is an example of the government's use of a contempt law to deter public debate of government officials in the Inter-American system. This case, ultimately resolved in friendly settlements, led to Argentina's revocation of its libel laws and a reversal of Verbitsky's contempt charge.

In 1977, Vincent Blasi expounded his theory that "free speech, a free press, and free assembly" can serve in checking the abuse of power by public officials. The Inter-American Court held that access to public information permits the public to "question, investigate, and consider whether public functions are being performed adequately." See *Claude-Reyes et al. v. Chile*, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 151, ¶ 86 (19 Sept. 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc. In this sense, the Court was adopting Blasi's theory that the right to freedom of expression may be used as a "checking power" on the state.

241. *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177, ¶ 78 (2 May 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf; *Rios et al. v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 194, ¶ 37 (28 Jan. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_194_ing.pdf; *Tristán-Donoso v. Panama*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 112 (27 Jan. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_193_ing.pdf. See also *Valle-Jaramillo et al. v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶¶ 192-197 (27 Nov. 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_192_ing.pdf.

slander and libel laws. Again, the honor of individuals could be defended through civil liability. While no jurisprudence has been developed by the Inter-American Court in this matter, the language of Article 13 requires proportionate sanctions and provides a basis for an interpretation that excludes the application of criminal law.

In the concurring opinion of *Kimel*, Judge Sergio García-Ramírez elaborated on his earlier opinion in *Herrera-Ulloa* and advocated a complete departure from criminal sanctions to civil proceedings.²⁴² He regards the steps taken by the majority in the *Kimel* judgment to limit criminal sanctions as insufficient and urged that the same results can be achieved through the civil courts without the disadvantages that criminal court proceedings carry.²⁴³

Second, subsequent civil liability should also be strictly regulated because it chills freedom of expression. The Court's reasoning in the *Kimel* case has provided a framework for analysis that must be strictly applied.²⁴⁴ As outlined in the "Subsequent Liability" section above, Article 13(2) of the American Convention expressly requires that the restrictions and scope of liability for abuse be determined by law. Broad interpretations of permissible grounds for subsequent liability or disproportionate civil responsibilities negatively impact the free expression of ideas and could have the same impact of prior censorship.

Third, defense of honor should be limited to natural persons and not extended to institutions. Accordingly, it should exclude situations where expression of an opinion is charged as "slander against the National Armed Forces," as in *Usón-Ramírez*.²⁴⁵ Legitimate national security concerns in the framework of a democratic society could be taken into account for the purposes of subsequent liability, but there is no place in the Convention to resort to honor concepts designed to protect individuals.²⁴⁶

Fourth, freedom of expression requires pluralism in the media and rejection of public and private monopolies. To achieve this objective, anti-monopolistic laws should be developed and strictly enforced. Moreover, the Court has found that states have a positive obligation to "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."²⁴⁷ It is im-

242. *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No.177, ¶¶ 19–26.

243. *Id.* ¶¶ 21, 26.

244. *Id.* ¶ 58.

245. *Usón-Ramírez v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 38 (20 Nov. 2009), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_207_ing.pdf.

246. See American Convention, *supra* note 2, art. 13(2)(b). See also American Convention, *supra* note 2, art. 27.

247. *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No.177, ¶ 57.

portant to give guidance to states, the media, and the public in general as to the content of the Court's interpretation.

The Special Rapporteur on Freedom of Expression could play a crucial role in this process. It is within her mandate to present studies and reports to the states or the Commission that contribute to the full realization of freedom of expression. These studies can become, if adopted by the Commission, valid interpretations of the American Convention.

In the conditions of the hemisphere, where authoritarianism is a recent occurrence and we are witnessing new attempts at centralization of power, the importance of a normative framework that secures pluralistic expression cannot be exaggerated. The need to secure pluralistic expression should focus on the addition of voices and not on the suppression of expression, a danger that unfortunately is currently present. The importance of this matter would require the identification of legitimate criteria to ensure pluralistic expression by an authoritative organ like the Inter-American Commission on Human Rights.

Fifth, transparency should be encouraged in the functions of both the government and private organizations. The adoption of domestic laws that guarantee free access to information in the possession of government and private organizations is fundamental to achieving the full protection of freedom of expression.

Finally, the role of the Inter-American system continues to be crucial, providing a venue to promote and protect the right of freedom of expression when a state is unable or unwilling to apply its international obligation. That role, however, needs to be expanded further.

The Office of the Special Rapporteur needs to be strengthened to ensure it receives sufficient resources to function properly. The Office of the Rapporteur is currently mostly grant-funded, which makes long-term planning a challenge. In addition, the Special Rapporteur should be able to perform unannounced visits *in loco* to states—particularly in situations where the lives of journalists are at stake.

Human rights training on the right to freedom of expression for civil servants, judges, lawyers, and journalists is required to invoke and apply international norms in the domestic realm. This training could play a preventative role to the extent that violations of the right of freedom of expression are the result of lack of knowledge of its content.

The Inter-American system should strengthen its petition system on the right to freedom of expression. This may be accomplished by ensuring hearings and prompt decisions of the cases concerning this right, including provisional measures if irreparable harm is present. The system must also denounce lack of compliance with the decisions of supervisory organs by states that have violated the American Convention. At a minimum, the political organs should place on the agenda decisions by the supervisory

organs including violations of the right to freedom of expression. Specific discussion of human rights violations mobilize public opinion and have a potential for negative internal political repercussions for a government. Public discussion also creates space for the adoption of regional measures to protect and promote this freedom, e.g., suspension from participation in the organization when this right has been violated, in accordance with the Democratic Charter.²⁴⁸

The impact of public discussion of violations and the political willingness to act in each case are debatable issues. However, victims perceive the total absence of debate and action by the political organs of the OAS concerning human rights offenses as the worst alternative. Governments that violate human rights do what they can to silence the victims. A debate preceded by the decision of an authoritative organ may not secure remedial action or punishment of the wrongdoer. It may, however, carry the possibility of influencing national and international actors in the long process of achieving human dignity.

248. See Democratic Charter, *supra* note 47, art. 21.