

Freedom of Expression Standards for Free and Inclusive Broadcasting

Office of the Special Rapporteur for Freedom of Expression
Inter American Commission on Human Rights



Organization of
American States

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FREEDOM OF EXPRESSION STANDARDS FOR FREE AND INCLUSIVE BROADCASTING

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FREEDOM OF EXPRESSION STANDARDS FOR FREE AND INCLUSIVE BROADCASTING

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TABLE OF ACRONYMS AND REFERENCES

African Commission or ACHPR:	African Commission on Human and Peoples' Rights
American Convention:	American Convention on Human Rights
American Declaration:	American Declaration of the Rights and Duties of Man
Declaration of Principles:	Declaration of Principles on Freedom of Expression
European Convention:	European Convention on Human Rights and Fundamental Freedoms
European Court:	European Court of Human Rights
IACHR:	Inter-American Commission on Human Rights
Inter-American Court:	Inter-American Court of Human Rights
OAS:	Organization of American States
OSCE:	Organization for Security and Cooperation in Europe
Office of the Special Rapporteur:	Office of the Special Rapporteur for Freedom of Expression
UN:	United Nations
UNESCO:	United Nations Educational, Scientific and Cultural Organization

FREEDOM OF EXPRESSION STANDARDS FOR FREE AND INCLUSIVE BROADCASTING

A. Introduction

1. Article 13 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) enshrines the right to freedom of expression and indicates that this right can be exercised *through any medium*. Effectively, Article 13 of the Convention establishes that the right to seek, receive, and impart information and ideas of all kinds can be exercised “orally, in writing, in print, in the form of art, or *through any other medium of one’s choice*.” Accordingly, Principles 1 and 6 of the Declaration of Principles recognize that every individual has the right to an equal opportunity to receive, seek and impart information through any *communication* medium without discrimination.

2. Likewise, more than 20 years ago, the Inter-American Court found that “freedom of expression goes further than the theoretical recognition of the right to speak or to write. It also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible.”¹ The Inter-American Court has also indicated that the media plays an essential role as a vehicle or instrument for the exercise of freedom of expression and information – in its individual and collective aspects – in a democratic society.² Indeed, the media has the task of distributing all variety of information and opinion on matters of general interest. The public has a right to receive and assess this information and opinion independently.³ In this sense, regional jurisprudence and doctrine have reiterated that the existence of a free, independent, vigorous, pluralistic, and diverse media is essential for the proper functioning of a democratic society.⁴

3. On this point, it is important to recall that the democratic scope of freedom of expression recognized in international human rights law implies both the power of individuals to express their thoughts, as well as the power to seek, receive, and impart information and ideas of all kinds, whether orally, in print, through the mass media, or in any other medium they choose. This democratic scope of freedom of expression recognizes a collective component that includes the public’s right to receive (and the right of those who express themselves through a medium of communication, to impart) the greatest possible diversity of information and ideas.

4. In this sense, the right to freedom of expression is based on one hand on the right to establish or use a media outlet to exercise freedom of expression and, on the other, on society’s right to have access to a free, independent, and pluralistic media that allows for the most and most diverse information. In other words, the media –and especially the audio-

¹ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 31. Emphasis added.

² I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 117; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment February 6, 2001. Series C No. 74, para. 149.

³ I/A Court H.R., *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. para. 153

⁴ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. paras. 216-230. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

visual media⁵ perform an essential function in guaranteeing the freedom of expression of individuals, as the media serve to distribute individuals' thoughts and information while at the same time allowing them access to the ideas, information, opinions, and cultural expressions of other individuals.

5. Currently, the exercise of the right to freedom of expression through the media is a guarantee that is fundamental for advancing the collective deliberative process on public issues. In this sense, the strengthening of the guarantee of freedom of expression is a precondition for the exercise of political rights, as well as a precondition to the right for participation to be informed and reasoned. Indeed, in contemporary societies, the media play a lead role in this deliberation, as they allow individuals to access both the relevant information and a variety of perspectives that are necessary for reaching reasonable and informed conclusions on public matters.⁶

6. However, the exercise of the right to freedom of expression through the mass media is not solely a guarantee of the democratic process. It also allows for individual independence in other aspects of the life of each person. Effectively, freedom of expression exercised through the media allows for individuals to express and receive different visions of the world (aesthetic, moral, cultural, etc.) and form independent outlooks for choosing their own life path.

7. The essential role, then, that the media plays in promoting real democratic debate on public matters and facilitating the decision-making process on private and individual matters is clear. For this reason, the Inter-American Court has been emphatic in ruling that freedom and diversity must be guiding principles in the regulation of broadcasting,⁷ as well as in indicating that media activity must be guided and protected by the standards of freedom of expression law. In this respect, the Inter-American Court has held that, "It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom...."⁸ Therefore, any regulation of – and any public policy in general concerning – the media must be evaluated according to the guidelines and directives imposed by the right to freedom of expression.

8. The same doctrine has been laid out repeatedly by the IACHR and its Office of the Special Rapporteur, whose reports have put forward the important role of the State in regulating the radioelectric spectrum to ensure free, independent, vigorous, plural, and diverse broadcasting. In this sense, and as mentioned previously, all individuals have the

⁵ According to the International Telecommunications Union, "radio broadcasting" includes free-to-air radio and television. Meanwhile, "audiovisual communications services" can include all visual and audio communication media, regardless of the technology they use for broadcasting. Although many of the standards laid out in this document can be applied to all audiovisual communication media, for the purposes of this report, the term "radio broadcasting" is used broadly as a generally accepted term.

⁶ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

⁷ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5.

⁸ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. paras 31 and 34.

right to establish or join media outlets, and those outlets requiring the use of the spectrum should be subject to clear, transparent, and democratic regulation that ensures the greatest enjoyment of this right by the greatest number of people, thereby also ensuring the greatest circulation of information and opinions. Indeed, and as previously indicated, the regulation of the radioelectric spectrum must simultaneously guarantee freedom of expression of the greatest number of people or perspectives, equality of opportunities in media access, and the right of contemporary societies to plural and diverse information.⁹ In order to achieve these objectives, States must submit themselves to a serious of rules, without which it would be impossible to grant all the guarantees mentioned. Both the Inter-American Court and the IACHR have paid special attention to detailing these guidelines and directives. The following part of this document gathers the doctrine and jurisprudence of these specialized bodies to develop further some of the principles posed by them.

B. General aims and limits of State broadcasting regulation

9. The IACHR has recognized the State's authority to regulate broadcasting. This authority includes not only the possibility of defining the method of handling concessions, renewals, or revocation of licenses,¹⁰ but also the planning and implementation of public policy related to broadcasting, as long as the guidelines set by the right to freedom of expression are followed.¹¹

10. Broadcasting regulation normally includes procedures related to access, renewal, or revocation of licenses, the requirements for access to licenses, conditions under which they can be used, the composition and authority of the enforcement authority, and oversight, among other subjects. As these aspects of broadcasting regulation can mean restrictions on the right to freedom of expression, in order to be legitimate they must be provided for in a clear and precise law; have the freedom and independence of the media as an aim, as well as the equity and equality of access to the mass communication; and establish only those subsequent limits to freedom of expression that are necessary, appropriate, and proportional for the legitimate aim they pursue.¹² The following paragraphs specify each of the requirements that broadcasting regulation must fulfill in order to meet the parameters set forth by the right to freedom of expression.

1. Nature of broadcasting regulation

11. Inter-American jurisprudence has highlighted that for the protection, guarantee, and promotion of human rights, it is not enough that States simply abstain from "engaging in actions or favoring practices that may in any way be aimed, directly or indirectly, at creating situations in which certain groups or persons are discriminated against or arbitrarily excluded, *de iure* or *de facto*, from enjoying or exercising the right to freedom

⁹ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. paras. 184-187. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

¹⁰ This report uses the terms "concessions," "licenses," "authorizations" and "permits" interchangeably, although it is recognized that they may have different meanings in each country of the region.

¹¹ "The Commission recognizes the State's prerogative to administer the wave bands, to previously establish the duration of concessions and to decide on their renewal at the end of those periods." (IACHR, Press Release N° 29/07. May 25, 2007). Available at: <http://www.cidh.oas.org/Comunicados/Spanish/2007/29.07sp.htm>.

¹² IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. para. 82. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

of expression.” In addition, States have an obligation to “adopt affirmative measures (legislative, administrative, or of any other nature), in a condition of equality and non-discrimination, to reverse or change existing discriminatory situations that may compromise certain groups’ effective enjoyment and exercise of the right to freedom of expression.”¹³

12. The State’s authority to regulate broadcasting is based on, *inter alia*, the “duty to guarantee, protect, and promote the right to freedom of information, pursuant to conditions of equality and non-discrimination, and the right of society to access all types of information and ideas.”¹⁴ In this way, the broadcasting regulation that the State can and should create would form a framework under which the broadest, freest, and most independent exercise of freedom of expression for the widest variety of groups and individuals is possible. The framework should function in such a way that it guarantees diversity and plurality while simultaneously ensuring that the State’s authority will not be used for censorship.

2. General requirements for broadcasting regulation compatible with the provisions for limiting freedom of expression found in Article 13.2 of the American Convention

13. Freedom of expression is not an absolute right¹⁵ and therefore can be regulated and restricted. The general framework establishing the conditions under which State regulation is legitimate is found in Subparagraphs 2, 3, 4 and 5 of Article 13 of the American Convention.¹⁶ Specifically, Subparagraph 2 holds that, “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.” For its part, Subparagraph 3 states that, “The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint,

¹³ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. para. 230. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

¹⁴ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. para. 216. Emphasis added. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

¹⁵ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 54; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 79; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 120; I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 106; I/A Court H. R., *Case of Apitz-Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 5, 2008 Series C No. 182. para. 131; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17. February 1995. Chapter V.

¹⁶ I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 120; I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 35; IACHR. Report No. 11/96. Case 11.230. Merits. Francisco Martorell. Chile. May 3, 1996. para. 55; IACHR, Arguments before the Inter-American Court of Human Rights in the *Case Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.a); IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009, p. 135. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

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.”

14. Inter-American jurisprudence has developed a series of guidelines for analyzing the legitimacy of restrictions of freedom of expression and their compatibility with the American Convention. These guidelines are applicable to the regulation of broadcasting, as broadcasting is a means of exercising freedom of expression. According to the Office of the Special Rapporteur for Freedom of Expression, “The standards for the admissibility of restrictions are applied to all of the constitutive elements of freedom of expression in its diverse manifestations. Thus, for example, limitations imposed upon the expression of a person’s own thoughts and ideas, access to information, the dissemination and circulation of information and upon the communications media must all meet these conditions,” as must every manifestation of State power (laws, administrative acts and judicial rulings) over the exercise of a right.¹⁷

15. The first general standard that both regulations and restrictions must meet in order to be legitimate according to the American Convention is compatibility with democratic principles; in other words, they “must incorporate the just demands of a democratic society.”¹⁸ In analyzing this general standard, the jurisprudence of the system has identified three specific conditions derived from Article 13.2, known as the “three-part test”: (1) The limitation must have been precisely and clearly defined through formal and material law; (2) the limitation must be designed to achieve imperative objectives authorized by the American Convention; and (3) the limitation must be necessary in a democratic society, adequate to meet the objective it pursues, and strictly proportional for meeting that objective. Finally, the inter-American system has established that these three standards must be met simultaneously, and that it is the responsibility of the State authority imposing the limits to demonstrate that these standards have been met.¹⁹

16. The following paragraphs apply these specific standards to the regulation of radio broadcasters.

3. Regulation of radio must be prescribed by law with clear and precise language

17. Because it can imply a limitation of the exercise of the right to freedom of expression, the regulation of broadcasting must be previously established in law that is explicit, restrictive, precise, and clear, both in a material and in a formal sense.²⁰ The Inter-

¹⁷ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 61. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>, which makes reference to the I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 36; and I/A Court H. R., *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141. para. 165.

¹⁸ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

¹⁹ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. paras. 61-66. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

²⁰ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. paras. 39-40; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 120; IACHR. Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V; IACHR. Report No. 11/96. Case 11.230.

American Court's Advisory Opinion 6/86 is applicable in this regard. The opinion states that the expression "laws" does not mean any legal norm, but rather those general statutes passed by a democratically elected legislature provided for under procedures established in the Constitution and concerned with the common good.²¹

18. It is crucial that the legal framework provide citizens with legal certainty and set forth in the clearest and most precise terms possible the conditions for exercising the right and the limitations to which broadcasting is subject.²² Thus, for example, in regulating the integration of the enforcement authorities, or the procedures for accessing or renewing licenses, or the power of the public authorities, the language of the statute must avoid vagueness and ambiguities that would allow for potential arbitrary actions that discriminate against an individual, group, or sector in broadcasting. The law must establish the substantive aspects of regulation; that is, it should not delegate the definitions of policies central to broadcasting to the enforcement authority. The enforcement authority may only interpret or specify the substantive aspects defined clearly and beforehand in the law.²³

Merits. Francisco Martorell. Chile. May 3, 1996. para. 55; IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 72.a); Also see IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. paras. 63-68. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

²¹ I/A Court H.R., *The Word "Laws" in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6. para. 22.

²² In the same sense *cf.* the jurisprudence of the European Court of Human Rights, which holds that, "According to its settled case-law, this expression, which is also used in Articles 10 and 11 of the Convention [European Convention for the Protection of Human Rights and Fundamental Freedoms] [...] not only require that an interference with the rights enshrined in these Articles should have some basis in domestic law, but also refer to the quality of the law in question. That law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." European Court of Human Rights, judgment *Glas Nadezhda Eood and Elenkov v. Bulgaria*, no. 14134/02, § 45, E.C.H.R (11/10/2007). Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=prof&highlight=Glas%20%20Nadezhda%20%20Eood%20%20Elenkov%20%20v.%20%20Bulgaria%20%2014134/02&sessionid=39864985&kin=hudoc-en>.

²³ The general rule that requires restrictions to be defined by law in its formal sense "does not necessarily negate the possibility of delegations of authority in this area, provided that such delegations are authorized by the Constitution, are exercised within the limits imposed by the Constitution and the delegating law, and that the exercise of the power delegated is subject to effective controls, so that it does not impair nor can it be used to impair the fundamental nature of the rights and freedoms protected by the Convention" (I/A Court H.R., *The Word "Laws" in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6. para. 36). In this sense, the European Court of Human Rights has recognized that laws granting completely discretionary authority to regulate radio broadcasting are incompatible with the European Convention. The court indicated that, "Domestic law must also afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise. (...) It must furthermore provide adequate and effective safeguards against abuse, which may in certain cases include procedures for effective scrutiny by the courts." *Case of Glas Nadezhda Eood and Elenkov v. Bulgaria*, no. 14134/02, § 46, E.C.H.R (11/10/2007). Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=prof&highlight=Glas%20%20Nadezhda%20%20Eood%20%20Elenkov%20%20v.%20%20Bulgaria%20%2014134/02&sessionid=39864985&kin=hudoc-en>.

19. On this point, the IACHR has held that, “Vague, ambiguous, broad or open-ended laws, by their mere existence, discourage the dissemination of information and opinions out of fear of punishment, and can lead to broad judicial interpretations that unduly restrict freedom of expression.”²⁴

20. In their 2007 joint declaration, the freedom of expression rapporteurs of the UN, the OSCE, the OAS and the African Commission emphasized that, “Transparency should be a hallmark of public policy efforts in the area of broadcasting. This should apply to regulation, ownership, public subsidy schemes and other policy initiatives.”²⁵

4. When it can affect the right to freedom of expression, regulation of broadcasting is only legitimate if it pursues an aim set forth in the American Convention.

21. The jurisprudence of the inter-American system has established that to be legitimate, restrictions to the exercise of a right must pursue one of the objectives expressly provided for in the American Convention, to wit: the protection of the rights of others, national security, the public order, and public health and morality. This applies in the case of limitations placed on a right, as imperative public interest must be present to justify the limitation. These standards are fully applicable in the event that broadcasting regulation establishes a restriction on freedom of expression.²⁶

22. On this point, it is important to note that in the case of restrictions to freedom of expression, it falls to the State to demonstrate both the existence of an impending threat that could cause real harm and that it is crucial to impose the restriction in order to prevent the harm. In this respect, the Office of the Special Rapporteur has previously indicated that any limitation on freedom of expression in the name of one of the aims provided for “must be based on real and objectively verifiable causes that present the certain and credible threat of a potentially serious disturbance of the basic conditions for the functioning of democratic institutions. Consequently, it is not sufficient to invoke mere conjecture regarding possible disturbances of public order, nor hypothetical circumstances derived from the interpretations of the authorities in the face of events that do not clearly present a reasonable threat of serious disturbances (‘anarchic violence’). A broader or more indeterminate interpretation would inadmissibly open the door to arbitrariness and would

²⁴ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 66. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

²⁵ Freedom of Expression Rapporteurs of the UN, OAS, OSCE and the African Commission on Human and Peoples’ Rights (ACHPR), *International Declaration on Diversity in Broadcasting*, December 12, 2007.

²⁶ Inter-American jurisprudence has made a particular effort to specify the correct way of harmonizing the exercise of freedom of expression with “the protection of the rights of others” and “the public order,” for example, in cases where the imposition of subsequent responsibilities regarding effects on the right to honor and reputation due to the exercise of the right to freedom of expression is at issue (see, among others, I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177). Likewise, the bodies of the inter-American system have stated that in order to justify limitations on freedom of expression for the protection of other rights, the rights must “be clearly harmed or threatened, and it is the burden of the authority imposing the limitation to demonstrate that this requirement is satisfied; if there is no clear harm to another’s right, the subsequent imposition of liability is unnecessary” IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 97. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

fundamentally restrict the freedom of expression that is an integral part of the public order protected by the American Convention.”²⁷

23. Likewise, it is crucial that the categories laid out in Article 13.2 are interpreted in accordance with the American Convention. Thus, for example, the Court has ruled that the expression “public order” must be interpreted as “conditions that assure the normal and harmonious functioning of the institutions on the basis of a coherent system of values and principles.”²⁸ In that sense, regulation of broadcasting cannot limit the circulation of news, ideas and opinions that are bothersome, shocking, or disturbing in the name of defending “public order,” since “that concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole. Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard. (...) It is also in the interest of the democratic public order inherent in the American Convention that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected.”²⁹

24. The regulation of broadcasting must aspire to promote and expand the scope of the right to freedom of expression, not restrict it. Thus, its legal framework must ensure that the media can be a vehicle for the free, vigorous, open, plural, and diverse exercise of the freedom of expression. In this respect, the IACHR stated that, “the free circulation of ideas and news is not possible except in the context of a plurality of sources of information and media outlets.”³⁰ As a consequence, regulation must tend to guarantee greater safety for free self expression, without fear of being sanctioned or stigmatized for it, while at the same time promoting greater equality in the conditions of the exercise of freedom of expression. This implies a triple meaning: plurality of voices, diversity of voices, and non-discrimination. The following paragraphs address this standard in greater detail.

a. The purpose of broadcasting regulation must be to guarantee greater security so individuals can express themselves freely and without fear of being sanctioned or stigmatized as a result

25. The goal of broadcasting regulation must be to ensure predictability and legal certainty for those who possess or acquire a license. In this way, they will be able to

²⁷ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. para. 75. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

²⁸ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 68.

²⁹ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 68. In this same sense, the Inter-American Commission has held that a functioning democracy is the best guarantee of public order, and that the existence of a democratic society is based on the cornerstone of the right to freedom of expression: “Desacato laws are incompatible with Article 13 of the American Convention on Human Rights because they suppress the freedom of expression necessary for the proper functioning of a democratic society.” IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

³⁰ IACHR, Application before the Inter-American Court of Human Rights, *Ivcher Bronstein v. Peru*, Case 11.762, p. 27.

exercise their right to freedom of expression freely and without fear of negative consequences in retaliation for their expression. As a consequence, the provisions must be designed in such a way that they offer sufficient guarantees against the possibility of arbitrary State actions. For example, this objective will require: (1) that the provisions establishing rights and obligations be clear and precise; (2) the inclusion of procedures that are transparent and respect due process—allowing for, among other things, judicial review of the any administrative decisions; (3) granting sufficient time for the use of a frequency to allow for the development of the communication project or for recouping the investment made, plus profit; (4) ensuring that while the frequency is in use, no additional requirements will be imposed beyond those that are established by law; and (5) ensuring that no decisions that affect the exercise of freedom of expression will be made as a consequence of editorial stance. These and other guarantees – which will be examined presently – are essential for the existence of truly free and vigorous broadcasting.

b. Broadcasting regulation must aim to ensure equal access to radio frequencies and greater diversity of audiovisual media

26. In the analysis of the legitimacy of the purpose pursued in broadcasting regulation, equality in the exercise of freedom of expression requires three components: plurality of voices (anti-monopoly measures), diversity of voices (social inclusion measures)³¹ and non-discrimination (equal access to processes that apportion frequencies).

27. The need to promote a media landscape free of monopolies is recognized by the IACHR in Principle 12 of the Declaration of Principles, according to which, “Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people’s right to information. In no case should such laws apply exclusively to the media.” Indeed, the Office of the Special Rapporteur for Freedom of Expression has indicated that, “If these media are controlled by a reduced number of individuals, or by only one individual, this situation would create a society in which a reduced number of individuals, or just one, would exert control over the information and, directly or indirectly, on the opinion received by the rest of the people. This lack of plurality in sources of information is a serious obstacle for the functioning of democracy.”³² On this point, one should not lose sight of the fact that this rejection does not refer solely to the private concentration of property. Naturally, if the goal is to guarantee free, independent and pluralistic broadcasting, all of the aforementioned applies—and in a particular way—to processes that concentrate property or control of the media in the hands of the State.

28. However, the adoption of anti-trust measures is not enough to ensure equal access to the media. Article 13 of the Declaration of Principles emphasizes that, “The concession of radio and television broadcast frequencies should take into account

³¹ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. para. 216. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>; In this respect, the Freedom of Expression Rapporteurs of the la UN, la OEA and the OSCE, highlighted the “fundamental importance of diversity in the media to the free flow of information and ideas in society, in terms both of giving voice to and satisfying the information needs and other interests of all, as protected by international guarantees of the right to freedom of expression” (Freedom of Expression Rapporteurs of the UN, OEA y OSCE, *Declaration on Challenges to Freedom of Expression in the New Century*, November 20, 2001).

³² IACHR, Justicia e Inclusión Social: los Desafíos de la Democracia en Guatemala. OEA/Ser.L/V/II.118. Doc. 5 rev. 1. 29 December 2003. Chapter VII. Available at: <http://www.cidh.oas.org/countryrep/Guatemala2003sp/capitulo7.htm>.

democratic criteria that provide equal opportunity of access for all individuals.” In the same sense, the IACHR has indicated that, “One of the fundamental requirements of the right to freedom of expression is the need for a broad **plurality** of information.”³³

29. In this sense, the regulation of broadcasting must be part of a proactive policy of social inclusion that tends to reduce preexisting inequality in access to the media. This means that when in the act of regulating broadcasting, States must take into particular consideration groups with difficulties gaining access. Indeed, one purpose of regulation must be to promote equal conditions of competition among all sectors of society by guaranteeing special rules that allow access to groups traditionally marginalized from mass communication.

30. For their part, in 2001 the freedom of expression rapporteurs of the UN, the OSCE, and the OAS issued a joint declaration specifically addressing diversity in broadcasting. The declaration was a clear message designed to highlight the importance of guaranteeing equal opportunity of media access for all individuals. The declaration indicated that, “Promoting diversity should be a primary goal of broadcast regulation; diversity implies gender equity within broadcasting, as well as equal opportunity for all sections of society to access the airwaves.”³⁴ Likewise, in their 2007 Joint Declaration, the Special Rapporteurs recognized that having different kinds of media outlets (private, public and community) with different reaches (local, national, regional and international) contributed to diversity in freedom of expression. They also recognized that both the undue concentration of the media and arbitrary government interference “constitute a threat to the diversity of the media.”³⁵

31. On this same subject the 2005 UNESCO Convention on the Protection and the Promotion of the Diversity of Cultural Expression is worth citing. The Convention promotes respect for cultural identities, linguistic diversity, religion, and the customs of different sectors of society, and of minority groups in particular. The Convention establishes that, “Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.”³⁶ In its preamble, the Declaration states that, “cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value.” The purpose of

³³ IACHR, Justicia e Inclusión Social: los Desafíos de la Democracia en Guatemala. OEA/Ser.L/V/II.118. Doc. 5 rev. 1. 29 December 2003. Chapter VII. Available at: <http://www.cidh.oas.org/countryrep/Guatemala2003sp/capitulo7.htm>. In this citation, the term “information” is used broadly to include opinions, ideas, artistic and cultural expression, etc. In this respect, the Inter-American Court has found that, “Given the importance of freedom of expression in a democratic society and the responsibility it implies for social communication media firms and for those who professionally exercise these tasks, the State must minimize the restrictions to information and balance, as much as possible, the participation of the different movements present in the public debate, promoting informative pluralism. The protection of the human rights of whoever faces the power of the media, who must exercise the social task it develops with responsibility, and the effort to ensure structural conditions that allow an equal expression of ideas can be explained in these terms” (*Case of Ríos et al. v. Venezuela*, Judgment of January 28, 2009, para. 106).

³⁴ Freedom of Expression Rapporteurs of the UN, OAS and OSCE, *Declaration on Challenges to Freedom of Expression in the New Century*. November 20, 2001.

³⁵ Freedom of Expression Rapporteurs of the UN, OAS and OSCE, *Declaration on Challenges to Freedom of Expression in the New Century*. November 20, 2001.

³⁶ UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Article 4.1.

diversity in broadcasting should be embodied in regulations that, among other things, ensure that enough space is available for broadcasting with different kinds of communications technology. As the Rapporteurs have stated, “In terms of terrestrial dissemination, whether analogue or digital, this implies an appropriate allocation of frequencies for broadcasting uses.”³⁷

32. As previously mentioned, the aim of ensuring the greatest degree possible of pluralism and diversity in broadcasting necessarily depends on anti-discriminatory policy in two complementary senses.

33. On one hand, “States must abstain from engaging in actions or favoring practices that may in any way be aimed, directly or indirectly, at creating situations in which certain groups or persons are discriminated against or arbitrarily excluded, *de iure* or *de facto*, from enjoying or exercising the right to freedom of expression.”³⁸ In this sense, the regulation of broadcasting must prohibit decisions that affect the exercise of freedom of expression based on the editorial stance of a media outlet or the contents of its reporting, or that deliberately blocks a group from access to the media (for example, non-commercial sectors or those that are only local or regional in scope). Thus, in its report on the human rights situation in Guatemala, the IACHR stated that, “auctions based solely on economic criteria or that grant concessions without giving an equal opportunity to all sectors are not compatible with democracy and with the right to freedom of expression and information guaranteed in the American Convention on Human Rights and the Declaration of Principles on Freedom of Expression.”³⁹

34. In addition, States “must adopt affirmative measures (legislative, administrative, or of any other nature), in a condition of equality and non-discrimination, to reverse or change existing discriminatory situations that may compromise certain groups’ effective enjoyment and exercise of the right to freedom of expression. Naturally, such obligations must be carried out within the full respect towards the right of everybody to exercise freedom of expression, pursuant to the terms that have already been clearly defined by Inter-American jurisprudence.”⁴⁰

35. It is therefore clear that the regulation of radio broadcasters must aim to overcome the preexisting inequalities in access to the media, which include, for example, that of economically disadvantaged sectors of society. In this sense, States must not only

³⁷ Joint Declaration on Diversity in Broadcasting. December 12, 2007 Id. The declaration also adds that, “Different types of broadcasters – commercial, public service and community – should be able to operate on, and have equitable access to, all available distribution platforms. Specific measures to promote diversity may include reservation of adequate frequencies for different types of broadcasters, must-carry rules, a requirement that both distribution and reception technologies are complementary and/or interoperable, including across national frontiers, and non-discriminatory access to support services, such as electronic programme guides.”

³⁸ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 230. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>. In general, on the State’s obligation to guarantee rights without discrimination, see I/A Court H. R., *Judicial Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18. paras. 103-104.

³⁹ IACHR, Justicia e Inclusión Social: los Desafíos de la Democracia en Guatemala. OEA/Ser.L/V/II.118. Doc. 5 rev. 1. 29 December 2003. Chapter VII. para. 414. Available at: <http://cidh.org/countryrep/Guatemala2003sp/capitulo7.htm>

⁴⁰ IACHR, *Annual Report 2008, Volume III: “Annual Report of the Office of the Special Rapporteur for Freedom of Expression”* (Chapter V), Chapter III, para. 230.

refrain from discriminating against these sectors, but also promote proactive public policies for social inclusion.

36. In this regard, the Office of the Special Rapporteur has indicated that, “there is a component of freedom of expression to which we are indebted. The individual members of the social groups that have been traditionally marginalized, discriminated against, or that are in a situation of helplessness, are for various reasons systematically excluded from public debate. These groups do not have institutional or private channels for the serious, robust and constant exercise of their right to express publicly their ideas and opinions or to be informed of the issues that affect them. This process of exclusion has also deprived society of knowledge of their interests, of the needs and proposals of those who have not had the opportunity to access democratic debate on an equal footing. The effect of this phenomenon of exclusion is similar to the effect of censorship: silence.”⁴¹

37. Different aspects of radio broadcast regulation are associated with this aim. Thus, for example, the reservation of parts of the radio spectrum for certain sectors of society that are normally excluded and the establishment of special procedures that effectively allow those sectors access to licenses aim toward generating equal opportunities and real equality in the exercise of the right to freedom of expression.

5. Broadcasting regulation should include only restrictions that are necessary, adequate, and proportional for achieving their desired purpose

38. It is established in inter-American system jurisprudence that limitations on freedom of expression must be “necessary in a democratic society,”⁴² appropriate and proportional for the objectives they pursue. In the event that State regulation of broadcasting places limits on freedom of expression, they must respect these three requirements.

39. The requirement of being “**necessary in a democratic society**” implies that in order to be legitimate, the limitation must be imperative, meaning that the same aim (which must, of course, be legitimate) cannot reasonably be achieved through any measure less restrictive of the right. In this sense, a restriction must be “useful,” “reasonable” and “desirable.”⁴³ “Necessary” means that the measure must not limit the right beyond what is strictly indispensable for guaranteeing the full exercise and scope of the right to freedom of expression.⁴⁴

⁴¹ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. para. 100. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>. The Office of the Special Rapporteur considers that such groups include women heads of families who live in poverty, the indigenous, African-Americans, rural communities or neighborhood organizations, and young artists, among others.

⁴² I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. paras. 120-123; and I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 46.

⁴³ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 46; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 122; IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

⁴⁴ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 83; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*.

40. In determining if the restriction imposed by regulation of broadcasting is proportionate, it should be considered whether alternatives less restrictive to freedom of expression are available that would achieve the desired aim. In other words, the measure least restrictive to the right protected by Article 13 of the Convention should be the one chosen.⁴⁵

41. Thus, for example, the establishment of criminal sanctions in cases of violations of broadcasting legislation does not seem to be a necessary restriction. In that sense, it is worth mentioning that both the IACHR and the Inter-American Court have found in every case considering this matter that they have heard and ruled on that using criminal sanctions to protect certain rights violated by the exercise of the right to freedom of expression was disproportionate and unnecessary in a democratic society.

42. Likewise, when broadcasting regulation provides for limitations to the right to freedom of expression, these restrictions must be **appropriate** for accomplishing the aim sought through their imposition. In this sense, regulation must be an instrument that is conducive to and adequate for accomplishing the legitimate and imperative objectives that they pursue.⁴⁶

43. Likewise, for restrictions to freedom of expression that regulate broadcasting to be legitimate, they must be **strictly proportional** to the aim that justifies them and adhere closely to the accomplishment of that aim. They must interfere as little as possible with the legitimate exercise of the freedom they restrict.⁴⁷ In this regard, each case must be analyzed to determine whether the restriction or sacrifice of freedom of expression "it entails is exaggerated or excessive in relation to the advantages obtained through such measure."⁴⁸

44. Though there is no general formula that allows for an *a priori* conclusion on whether a restriction is proportional or not, according to the Inter-American Court, the proportionality of a restriction that limits freedom of expression in order to preserve other

Judgment of November 22, 2005. Series C No. 135. para. 85; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. paras. 121-122; I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 46.

⁴⁵ Cf. IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. paras. 80-83. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

⁴⁶ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 83.

⁴⁷ I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 83; I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 85; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 123; I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 46.

⁴⁸ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 81. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>; I/A Court H. R., *Case Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 3, 2008. Series C No. 177. para. 83.

rights must be established through the evaluation of three factors: (i) the degree to which the other right is affected (serious, intermediate, moderate); (ii) the importance of satisfying the other right; and (iii) whether the satisfaction of the other right justifies restricting freedom of expression.⁴⁹

45. Based on the discussion thus far, it is clear that, according to the principles developed by the inter-American system for the protection of human rights, States have the authority and the duty to regulate broadcasting. Likewise, the IACHR and the Inter-American Court have already set forth guidelines according to which regulation must comply with a series of requirements in order to meet the standards imposed by the right to freedom of expression: regulation must be established by a law, in the formal and material sense, which is clear and precise; and its purpose must be to guarantee legal certainty in the exercise of freedom of expression, as well as promote and guarantee equal access to the exercise of the right, which implies that the regulation must aim to achieve diversity and plurality of voices.

C. On the enforcement and oversight authority in charge of broadcasting

46. State regulation of broadcasting must meet a series of requirements in order to be compatible with the parameters imposed by the right enshrined in Article 13 of the American Convention. In this sense, the protection of the right to freedom of expression requires that the enforcement and oversight authority in charge of this regulation respect certain basic conditions as a guarantee of the adequate development of the right. Effectively, barriers to or limitations on the exercise of freedom of expression can arise not only from the legal framework but also from the abusive practices of enforcement bodies.

47. The legal norms on broadcasting in the majority of the countries in the region recognize the government's competence to apply the respective provisions in two essential areas: the development and implementation of certain communication policies (enforcement) and the control of existing regulations (oversight). It is worth noting that although in some cases a "regulation authority" is named, in keeping with the standards of the inter-American system previously examined, State regulation that substantially affects the right to freedom of expression must be enshrined in a law in the formal sense—that is, in a statute passed by a legislative body provided for in the Constitution. The enforcement and oversight authority could in all cases be vested with the authority to specify the circumstances in which the substance of the radio broadcast policy—defined clearly in the law beforehand—will be applied.⁵⁰

48. The broadcasting authority in charge of enforcement and oversight must be independent of both government influence and of the influence of private groups linked to public, private/commercial or community broadcasting.⁵¹ It must be a deliberative body that

⁴⁹ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 82. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

⁵⁰ Cf. I/A Court H.R., *The Word "Laws" in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6. para. 36. Also, Cf. European Court of Human Rights, *Case of Glas Nadezhda Eood and Elenkov v. Bulgaria*, no. 14134/02, § 45, E.C.H.R (11/10/2007). Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=prof&highlight=Glas%20|%20Nadezhda%20|%20Eood%20|%20Elenkov%20|%20v.%20|%20Bulgaria%20|%2014134/02&sessionid=39864985&kin=hudoc-en>.

⁵¹ In this respect, Recommendation Rec(2000)23 of the Committee of Ministers of the Council of Europe, cited by the European Court of Human Rights, holds that, "The rules governing regulatory authorities for the

ensures plurality in its composition. It must be subject to clear, public and transparent procedures, as well as to the imperatives of due process and strict judicial review.⁵² Its decisions must be public, in accordance with existing legal norms, and adequately justified.⁵³ Finally, the body must be accountable for and give public account of its activities. In regard to the enforcement authority, the Inter-American Commission has indicated that, "it is fundamental that the bodies with oversight or regulatory authority over the communications media be independent of the executive branch, be fully subject to due process and have strict judicial oversight."⁵⁴

49. Given the importance of this subject, it is worthwhile to focus for a moment on each of its several aspects.

1. The enforcement and oversight authority must be independent and autonomous of political and economic power

50. The Special Rapporteurs for Freedom of Expression of the United Nations, the Organization of American States, and the Organization for Security and Cooperation in Europe remarked in their joint declaration in 2001 that "Broadcast regulators and governing bodies should be so constituted as to protect them against political and commercial interference."⁵⁵

broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests." Council of Europe. Committee of Ministers. *Appendix to Recommendation Rec(2000)23 of the Committee of Ministers to member states*. Paragraph 3. December 20, 2000. Available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2000\)23&Language=lanEnglish&Ver=original&Site=CM&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2000)23&Language=lanEnglish&Ver=original&Site=CM&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75).

⁵² The European Court of Human Rights has ruled on the characteristics that the regulatory, enforcement, and oversight authority of the communications sector should have, setting forth the same terms found in this document. Thus, for example, in the case of *Glas Nadezhda Eood and Elenkov v. Bulgaria*, the Court recalled that Recommendation Rec(2000)23 of the Committee of Ministers of the Council of Europe established the independence and the regulatory functions of radio broadcasting regulators, recommending that member states, *inter alia*, "include provisions in their legislation and measures in their policies entrusting the regulatory authorities for the broadcasting sector with powers which enable them to fulfil their missions, as prescribed by national law, in an effective, independent and transparent manner, in accordance with the guidelines set out in the appendix to this recommendation" (*Glas Nadezhda Eood and Elenkov v. Bulgaria*, no. 14134/02, § 33, E.C.H.R (11/10/2007). Available at: <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=39864985&skin=hudoc-en>.

⁵³ In this sense, Recommendation Rec(2000)23 of the Committee of Ministers of the Council of Europe has indicated that "27. All decisions taken and regulations adopted by the regulatory authorities should be duly reasoned, in accordance with national law; open to review by the competent jurisdictions according to national law; made available to the public." Council of Europe. Committee of Ministers. *Appendix to Recommendation Rec(2000)23 of the Committee of Ministers to member states*. para. 27. December 20, 2000. Available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2000\)23&Language=lanEnglish&Ver=original&Site=CM&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2000)23&Language=lanEnglish&Ver=original&Site=CM&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75).

⁵⁴ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 82. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

⁵⁵ Freedom of Expression Rapporteurs of the UN, OEA y OSCE, *Declaration on Challenges to Freedom of Expression in the New Century*, November 20, 2001. Similarly, Cf. Recommendation Rec(2000)23 of the Committee of Ministers of the Council of Europe, according to which, "The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests." Council of Europe. Committee of Ministers. *Appendix to Recommendation Rec(2000)23 of the Committee of Ministers to member states*. para 3. December 20, 2000. Available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2000\)23&Language=lanEnglish&Ver=original&Site=CM&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2000)23&Language=lanEnglish&Ver=original&Site=CM&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75)

51. Effectively, given the importance of the functions they perform, it is crucial that bodies charged with enforcing policy and overseeing regulatory compliance in broadcasting be independent of the influence of both political power and economic interest groups. In this respect, in a 2007 joint declaration on diversity and broadcasting, the four freedom of expression rapporteurs indicated that "Regulation of the media to promote diversity, including governance of public media, is legitimate only if it is undertaken by a body which is protected against political and other forms of unwarranted interference, in accordance with international human rights standards."⁵⁶

52. Consequently, it is crucial that the broadcasting oversight and enforcement authority be subjected to neither political interference from the government nor private sector interference from those with ties to broadcasting. For this reason, it is necessary for the rules that govern the creation and operation of this body to ensure that it will have sufficient operating, organizational and administrative guarantees to maintain independence from the pressures of both the political majority and economic interest groups.

53. Several measures serve to ensure the independence of this body and strengthen its legitimacy. For example, it is important that it be a deliberative body whose members are selected through a transparent process that allows for citizen participation and is guided by adequate objectives, as well as criteria selected in advance.⁵⁷ It also must establish strict standards regarding ineligibility, incompatibility and conflicts of interests to ensure independence from both the government and other sectors linked to broadcasting.⁵⁸ It should be clear that the officials working in this body are subject only to the authority of the law and the Constitution. Set terms of service for the body's members, which do not coincide with the terms of those responsible for their appointment and which are separate and staggered, are recommended. Likewise, mechanisms for dismissal of members should be provided for, and those mechanisms should be transparent, should only be activated in the event of serious offences previously established by law, and should ensure due process, especially judicial review, in order to ensure that they are not used arbitrarily or as retaliation for the body's decisions.⁵⁹ Lastly, it is essential to ensure that the body has enforcement

⁵⁶ Freedom of Expression Rapporteurs of the UN, OAS, OSCE y CADHP, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

⁵⁷ Regarding the selection process for the officials who make up the radio broadcasting enforcement authority, the Committee of Ministers of the Council of Europe indicated that, "Furthermore, rules should guarantee that the members of these authorities: are appointed in a democratic and transparent manner; may not receive any mandate or take any instructions from any person or body; do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them." Council of Europe. Committee of Ministers. *Appendix to Recommendation Rec(2000)23 of the Committee of Ministers to member states*. paras. 3-5. December 20, 2000. Available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2000\)23&Language=lanEnglish&Ver=original&Site=CM&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2000)23&Language=lanEnglish&Ver=original&Site=CM&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75)

⁵⁸ Regarding the importance of establishing a system of standards to guarantee the independence and impartiality of the radio broadcasting enforcement authority, the Committee of Ministers of the Council of Europe stated that, "For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that: regulatory authorities are under the influence of political power; members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority." Council of Europe. Committee of Ministers. *Appendix to Recommendation Rec(2000)23 of the Committee of Ministers to member states*. Rule 4. December 20, 2000. Available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2000\)23&Language=lanEnglish&Ver=original&Site=CM&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2000)23&Language=lanEnglish&Ver=original&Site=CM&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75).

⁵⁹ According to Recommendation Rec(2000)23 of the Committee of Ministers of the Council of Europe, "dismissal [of members of the enforcement authority] should only be possible in case of non-respect of the rules of

authority and the capacity for autonomous functional, administrative, and financial oversight, as well as a set budget that is guaranteed by law and ample enough for the body's mandate. Finally, the body must be required to publicly account for its actions.

2. The enforcement and oversight authority must proceed with transparency and respect for due process

54. Another guarantee of the due protection of the right to freedom of expression exercised through broadcasting is that the public authority with power to enforce regulations and supervise broadcasting activity act in a manner that is public and transparent, respectful of due process, and subject to strict judicial review.⁶⁰

55. Thus, in defining policies or planning measures to administer broadcasting, State bodies must be transparent and public, and have mechanisms for periodically giving an account of their actions. State bodies must guarantee the effective participation of civil society in the decision-making process. Depending on the institutional design of each country, the public giving of accounts of these bodies could take place before Parliament, the attorney general, the comptroller or even before a national human rights institution like the ombudsman's office.

56. In this sense, it is worth repeating that in their 2007 joint declaration, the Special Rapporteurs for Freedom of Expression stated that, "Transparency should be a hallmark of public policy efforts in the area of broadcasting. This should apply to regulation, ownership, public subsidy schemes and other policy initiatives."⁶¹ Transparent procedures include those that are previously set forth in regulations, that prescribe objective and clear standards of evaluation (for example, for assigning or revoking a license), that provide for public hearings, that ensure citizen access to public information, and that require sufficient justification for decisions, among other requirements.

57. Meanwhile, considering that the functions of the State body include oversight of regulatory compliance and dealing with offenses and punishment, it is crucial that this authority respect the guarantees of due process enshrined in Article 8.1 of the American Convention. Specifically, regulation must allow individuals affected by decisions to present evidence in their defense, access well-founded rulings issued within a reasonable time period, and appeal the decisions made by the authority, among other guarantees. On this last point, it is crucial that in all cases the person affected has access to an adequate and effective recourse for challenging administrative decisions that could compromise their right to freedom of expression, in keeping with Article 25 of the American Convention.

D. On assigning and renewing frequency concessions

incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal. Furthermore, dismissal on the grounds of an offence connected or not with their functions should only be possible in serious instances clearly defined by law, subject to a final sentence by a court."

⁶⁰ In this sense, Recommendation Rec(2000)23 of the Committee of Ministers of the Council of Europe states that, "27. All decisions taken and regulations adopted by the regulatory authorities should be duly reasoned, in accordance with national law; open to review by the competent jurisdictions according to national law; made available to the public." Council of Europe. Committee of Ministers. *Appendix to Recommendation Rec(2000)23 of the Committee of Ministers to member states*. para. 27. December 20, 2000. Available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2000\)23&Language=lanEnglish&Ver=original&Site=CM&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2000)23&Language=lanEnglish&Ver=original&Site=CM&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75).

⁶¹ Freedom of Expression Rapporteurs of the UN, OAS, OSCE y CADHP, *Joint Declaration on Diversity in Broadcasting*. December 12, 2007.

58. The assignation of radio and television licenses must be guided by democratic criteria and procedures that are pre-established, public and transparent. The criteria and procedures must serve as a check on possible State arbitrariness and guarantee equal opportunities for all individuals and sectors who wish to take part. In this regard, the Inter-American Commission's Declaration of Principles on Freedom of Expression emphasizes that, "The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals."

59. To promote equal opportunity access to the media, affirmative measures should be provided for so that the three sectors of broadcasting can access licenses under equitable conditions; they must include democratic standards and transparent procedures for assigning licenses, and must establish conditions for use of the concessions that are reasonable and non-discriminatory.

1. Assignation criteria and procedure

60. The assignation of radio or television licenses is a decision that has a definitive impact on the right to freedom of expression in both its dimensions: the right of everyone to freely express themselves and the right to receive a variety of ideas and opinions. Both access to the media for those who request a frequency and society's right to receive plural information (in keeping with Article 13 of the Convention) depend on this decision. Effectively, when it assigns frequencies, the State decides which voice the public will be able to hear in the coming years. As a consequence, this process defines the conditions under which the democratic deliberation necessary for the informed exercise of political rights will be carried out, as well as the sources of information that will allow individuals to make informed decisions on their personal preferences and life paths.

61. The interests at stake demonstrate the enormous importance of the license assignation process. It is for this reason that the process must be strictly regulated by law, characterized by transparency,⁶² and guided by objective, clear, public, and democratic standards.⁶³ In this same sense, the procedure for granting a license must include sufficient

⁶² Freedom of Expression Rapporteurs of the UN, OAS, OSCE and CADHP, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007. In this same sense, the Committee of Ministers of the Council of Europe stated, "One of the essential tasks of regulatory authorities in the broadcasting sector is normally the granting of broadcasting licenses. The basic conditions and criteria governing the granting and renewal of broadcasting licenses should be clearly defined in the law." It continues, "The regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner. The decisions made by the regulatory authorities in this context should be subject to adequate publicity." Council of Europe. Committee of Ministers. *Appendix to Recommendation Rec(2000)23 of the Committee of Ministers to member states*. paras. 13 and 14. December 20, 2000. Available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2000\)23&Language=lanEnglish&Ver=original&Site=CM&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2000)23&Language=lanEnglish&Ver=original&Site=CM&BackColorIntranet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75).

⁶³ In this sense, the Committee of Ministers of the Council of Europe has recommended that, "The regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner. The decisions made by the regulatory authorities in this context should be subject to adequate publicity." Recommendation Rec(2000)23, Committee of Ministers of the Council of Europe, December 20, 2003, para. 14.

guarantees against arbitrary actions, including the obligation to justify decisions that grant or deny requests, as well as adequate judicial review of these decisions.⁶⁴

62. The following paragraphs briefly explain some of the principles that should guide this process.

63. First, the criteria that should guide the assignation of licenses must be clearly and precisely provided for in the relevant laws, in such a way as to protect petitioners from arbitrary action. Indeed, the procedures must be transparent, clear and have predetermined deadlines. Likewise, the requirements for obtaining a license should be set forth in clear and precise laws that prevent discriminatory political factors that could, for example, affect assignation on account of the political, religious or other ideas of the person requesting the license. In this respect, the IACHR's Declaration of Principles on Freedom of Expression states that, "The exercise of power (...) by the state (...) (in) the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law."

64. The assignation criteria and procedure must be limited to establishing only those requirements that are necessary for the accomplishment of a legitimate aim.

65. Likewise, the criteria for assigning licenses must have the fostering of plurality and diversity of voices as one of its goals, and the requirements for granting licenses cannot be a disproportionate barrier to achieving this goal. Thus, for example, when the money offered or the economic criterion is the principle or exclusionary factor for the granting of all radio or television frequencies, it jeopardizes equal access to the radio spectrum and discourages pluralism and diversity. Although these criteria could be considered objective and non-discretionary, when they are used to assign all radio frequencies they result in the exclusion of broad segments of society from the process of access to the media. In this respect, the IACHR has indicated that, "auctions based solely on economic criteria or that grant concessions without equal opportunity to all sectors are not compatible with democracy and with the right to freedom of expression and information guaranteed in the American Convention on Human Rights [...] and the Declaration of Principles on Freedom of Expression."⁶⁵

66. For the same reasons indicated in the previous paragraphs, procedures for assigning licenses should not include technical or administrative requirements that are unreasonable and require all license holders to hire technicians or specialists. Such

⁶⁴ Similarly, the European Court of Human Rights has found that, "As regards licensing procedures in particular, the Court reiterates that the manner in which the licensing criteria are applied in the licensing process must provide sufficient guarantees against arbitrariness, including the proper reasoning by the licensing authority of its decisions denying a broadcasting licence." Cf. European Court of Human Rights, *Meltex Ltd. & Mesrop Movsesyan v. Armenia* (Judgment June 17, 2008), para. 81 *in fine*. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbk&action=prof&highlight=Meltex%20|%20Ltd.%20|%20Mesrop%20|%20Movsesyan%20|%20v.%20|%20Armenia&sessionId=40594356&skin=hudoc-en>.

⁶⁵ IACHR, Justicia e Inclusión Social: los Desafíos de la Democracia en Guatemala. OEA/Ser.L/V/II.118. Doc. 5 rev. 1. 29 December 2003. Chapter VII. para. 414. Available at: <http://cidh.org/countryrep/Guatemala2003sp/capitulo7.htm>. Also, the mechanism of an auction has been declared unconstitutional by the Supreme Court of Justice of Mexico, as it "violates the principles of fair competition by favoring the economic aspect of assignation. It also harms freedom of expression." The judgment analyzes the constitutionality of Article 17 of a decree that modifies the April 11, 2006, Federal Telecommunications Act (www.scjn.gob.mx).

requirements indirectly raise an economic barrier to access to radio frequencies. Neither should geographic distance serve as a barrier to access to licenses by, for example, requiring rural media outlets to travel to the capital to file a request.

67. Finally, the decision to accept or reject a request for the assignation of a radio frequency should always be public, justified by the law and subject to strict judicial review. On this point, it is crucial for the enforcing authority to supply objective and sufficient justification so that all individuals are protected against the possibility of arbitrary actions.⁶⁶

2. Recognition of the different sectors

68. The democratic scope of freedom of expression recognized in the American Convention includes not only the right of all individuals to freely express themselves, but also the right of the public to receive the maximum variety of information and ideas possible. This means, among other things, that the regulation of broadcasting should include setting aside space on the spectrum for a diverse system of media outlets that can together represent a society's diversity and plurality of ideas, opinions, and cultures.

69. In this sense, the different kinds of media (public and independent of the executive, private for-profit, and community or private non-profit) must be recognized and have equitable access to all available transmission technology, including the new digital dividend.⁶⁷ This document will later elaborate on aspects of each of those sectors. For now, it is enough to point out that the main idea is to achieve the greatest possible diversity in mass communications. To achieve that diversity, conditions must exist for the creation of truly public broadcasting, independent of political power and executive influence, as well as private commercial and non-profit radio that is free, vigorous, and independent.

3. Conditions of use required

70. Legal granting of access to a license is not enough to guarantee freedom, pluralism and diversity if there are provisions establishing arbitrary or discriminatory conditions for the use of the license.

71. Thus, for example, excessively short time limits on concessions would be arbitrary, as they make it difficult for commercial media to recoup their investment or establish a profitable business. Likewise, excessively short time limits would make it difficult for community or social radio stations to truly carry out their projects. Also, concessions that do not lead to contracts that expressly include the rules of use of the license or the conditions under which the rules can be amended can open the door to arbitrary decisions.

72. Some examples of discriminatory limitations would include those provided for by law or established in practice that allow certain kinds of restrictions regarding content,

⁶⁶ The European Court of Human Rights has ruled on this issue, stating that, "The Court considers that a licensing procedure whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression." Cf. European Court of Human Rights, *Meltex Ltd. & Mesrop Movsesyan v. Armenia* (Judgment of June 17, 2008), para. 83 in fine. Available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=prof&highlight=Meltex%20|%20Ltd.%20|%20Mesrop%20|%20Movsesyan%20|%20v.%20|%20Armenia&sessionId=40594356&skin=hudoc-en>.

⁶⁷ Freedom of Expression Rapporteurs of the UN, OAS, OSCE and ACHPR, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

broadcasting power, territorial reach or access to financing, without sufficient, objective and reasonable justification in pursuit of one of the legitimate ends provided for in the American Convention

73. It is always crucial that the administrative, economic and technical requirements for the use of a license be strictly necessary for guaranteeing its proper functioning, clearly and precisely provided for in the regulations, and not subject to modification without justification during the term of the license.

4. On the renewal of licenses

74. The Inter-American Commission has already recognized that States have authority to administer the radio spectrum and, specifically, to establish beforehand the duration of the concessions, as well as to decide whether to renew the concessions when the terms expire.⁶⁸ In the event the regulations include the possibility of renewing or extending the term of licenses, as with the assignation process the renewal or extension procedure must be regulated by law; be transparent; be guided by objective, clear and democratic criteria; and ensure due process.⁶⁹

75. In this sense, every decision on this subject must be justified objectively and submitted to a process that is public and respects due process. In this regard, the freedom of expression rapporteurs of the UN, the OAS, the OSCE and the African Commission have held that in these processes, "in accordance with the principle of equality of opportunity, states must promote open, independent and transparent procedures with clear, objective and reasonable criteria that avoid any political discrimination on the basis of the editorial line of a media outlet."⁷⁰

76. In particular, regulations must include set time periods and objective criteria in order to prevent uncertainty from becoming an instrument for exerting undue pressure on media outlets that wish to renew their licenses. Likewise, the procedure for reviewing license renewals must provide prior notice sufficiently in advance, as well as guarantee that others may compete for the license along with the individual wishing to renew it. If it has been demonstrated that all the regulations were followed and all the commitments assumed in seeking the license were met, the fact of holding a license can be viewed positively during the procedure evaluating the request for renewal.

77. The decision of whether to renew a license must be analyzed in each case according to its compatibility with the objective of fostering plurality and diversity of voices, particularly in countries or regions with media outlets concentrated in few hands, with a prohibition on punishment for the editorial stance or reporting of a media outlet. In this respect, the Office of the Special Rapporteur for Freedom of Expression has recommended that State regulation of broadcasting include "democratic criteria that guarantee equal opportunity to all individuals in the access and operation of these media outlets, under equitable conditions, without disproportionate and unreasonable restrictions" and that "the

⁶⁸ IACHR, Press Release N° 29/07, "IACHR Concerned about Freedom of Expression in Venezuela," May 25, 2007. Available at: <http://www.cidh.oas.org/Comunicados/Spanish/2007/29.07sp.htm>.

⁶⁹ Freedom of Expression Rapporteurs of the UN, OAS, OSCE and ACHPR, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

⁷⁰ Freedom of Expression Rapporteurs of the UN, OAS, OSCE and ACHPR, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

assignment, withdrawal or non-renewal of frequencies or licenses for discriminatory or arbitrary reasons be prevented.”⁷¹ For this reason, it is crucial that, in order to avoid arbitrary actions, regulations establish the criteria that guide decisions on requests or renewals of licenses beforehand and in a manner that is clear.

78. Finally, to diminish further the possibility of arbitrary actions, the procedure for examining requests for renewals of licenses must be carried out by a body with all the characteristics laid out earlier in this document. Among these characteristics, independence from political power and sectors linked to broadcasting are especially noteworthy. Likewise, there must be a transparent and public mechanism for carrying out hearings in which the public opinion can be heard. It is also crucial to allow for the right of those who wish to renew their licenses to be heard and offer evidence before any decision is made. The right to access to a well-founded decision within a reasonable time period should be guaranteed, as should subsequent judicial review.

E. Digital transformation

79. Technological development provides a fundamental opportunity to guarantee access to frequencies for people or sectors that are generally marginalized or excluded. The challenge now, and in the immediate future, is to transform the current inequality in the exercise of the right to freedom of expression into a digital opportunity for all.

80. The goal of the technological transformation in broadcasting should be to ensure that the new digital dividend makes optimal use of the spectrum to guarantee the greatest possible plurality and diversity. For this, the States should establish specific legal mechanisms to advance the switchover to digital broadcasting services. These regulations should provide for a migration program that takes into account the needs and capacities of the different actors involved in this process, as well as the level of application of the new technologies. In particular, the States should evaluate the broadcasting possibilities arising from the use of the digital dividend, and consider this technological change an opportunity to increase the diversity of voices and enable new sectors of the population to access communications media.⁷² At the same time, the States should take measures to prevent the

⁷¹ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 106. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

⁷² On this point, the Declaration of Principles of the World Summit on the Information Society (WSIS – Geneva, 2003), convened by the UN General Assembly in Resolution 56/183 of December 21, 2001, states that: “We are [...] fully aware that the benefits of the information technology revolution are today unevenly distributed between the developed and developing countries and within societies. We are fully committed to turning this digital divide into a digital opportunity for all, particularly for those who risk being left behind and being further marginalized.” (Principle 10). It adds that “In building the Information Society, we shall pay particular attention to the special needs of marginalized and vulnerable groups of society, including migrants, internally displaced persons and refugees, unemployed and underprivileged people, minorities and nomadic people. We shall also recognize the special needs of older persons and persons with disabilities.” (Principle 13).

It is also pertinent to cite European Parliament Resolution 2007/2253 of September 25, 2008, on concentration and pluralism in the media in the European Union, in which the European Parliament: “Calls for a balanced approach to the allocation of the digital dividend to ensure equitable access for all players, thereby safeguarding media pluralism” (2007/2253(INI), para. 47). Likewise, in Resolution 2003/2237, on the risk of breaches of freedom of expression and information in the Union, particularly in Italy (section 2 of Article 11 of the Charter of Fundamental Rights) the European Parliament, “Notes that digital media will not automatically guarantee greater choice, because the same media companies that already dominate the national and global media markets also control the dominant content portals on the Internet, and since the promotion of digital and technical literacy

cost of the transition from analog to digital technology from limiting the capacity of the communications media in terms of the financial costs.

81. On this point, in their 2007 Joint Declaration, the Special Rapporteurs on Freedom of Expression of the UN, the OSCE, the African Commission, and the OAS stressed that “[c]onsideration of the impact on access to the media, and on different types of broadcasters, should be taken into account in planning for a transition from analogue to digital broadcasting. This requires a clear plan for switchover that promotes, rather than limits, public interest broadcasting. Measures should be taken to ensure that digital transition costs do not limit the ability of community broadcasters to operate.”⁷³

82. Additionally, it should be borne in mind that the States of the region have acknowledged the importance of taking measures to reduce the digital divide among countries. Thus, in Resolution 2440 of the OAS General Assembly, the States agreed, among other things, that the Inter-American Telecommunication Commission (CITEL) should continue supporting the States in the adaptation of their technologies and standards to achieve optimal use of the spectrum.⁷⁴

F. Public media

83. Public media can (and should) play an essential part in ensuring the plurality and diversity of voices necessary in a democratic society. Its role is essential when providing high-quality content that is not necessarily commercial, and that reflects the informational, educational and cultural needs of the people. However, for public media really to be able to perform their role, they must be independent of the executive branch; truly pluralistic; universally accessible; with funding adequate to the mandate provided for by law; and they must provide community participation and accountability mechanisms at the different levels of content production, distribution and receipt.

84. On this point, in their 2007 Joint Declaration on Diversity in Broadcasting, the Special Rapporteurs on Freedom of Expression of the UN, the OAS, the OSCE and the African Commission maintained: “Special measures are needed to protect and preserve public service broadcasting in the new broadcasting environment. The mandate of public service broadcasters should be clearly set out in law and include, among other things, contributing to diversity, which should go beyond offering different types of programming and include giving voice to, and serving the information needs and interests of, all sectors of society. Innovative funding mechanisms for public service broadcasting should be explored which are sufficient to enable it to deliver its public service mandate, which are guaranteed in advance on a multi-year basis, and which are indexed against inflation.”⁷⁵

1. Mandate set by law

are strategic issues for the development of lasting media pluralism, and expresses concern about the switching off of the analogue frequencies in some parts of the Union” (2003/2237(INI), para. 7).

⁷³ Special Rapporteurs on Freedom of Expression of the UN, OAS, OSCE and ACHPR, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

⁷⁴ “Telecommunication Development in the Region to Reduce the Digital Divide” (AG/RES. 2440 (XXXIX-O/09)).

⁷⁵ Special Rapporteurs on Freedom of Expression of the UN, OAS, OSCE and ACHPR, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

85. First, it is important that the States regulate public media activity by law. The law must establish objectives and mandates that are complementary to, and not competitive with, private media—especially commercial media.

86. The law should also ensure: (1) the independent or non-governmental nature of the public media system; (2) programming aspects geared toward the public interest; (3) that the public media system is free of charge; (4) coverage throughout the State's territory; and (5) the regulation of its form of financing. The existence of clear legal guidelines simultaneously strengthens the communication design of the public media system.

87. It is important to emphasize that in their 2009 Joint Statement on the Media and Elections, the Special Rapporteurs on Freedom of Expression recognized, for example, that during election periods, the public media have certain specific obligations to ensure that society has access to plural, impartial and balanced information that reflects the platforms of the different political parties and candidates.⁷⁶

2. Independence

88. Second, insofar as it has been recognized that freedom of expression necessarily requires a broad plurality of information,⁷⁷ it is essential to guarantee that these public media are *independent* of the government. In the opinion of the Inter-American Commission, the independence of public media likewise contributes to their credibility and legitimacy. On this point, it is important to recall that in accordance with Principle 12 of the Declaration of Principles on Freedom of Expression, the existence of private or *public monopolies or oligopolies* is a serious obstacle to both the adequate dissemination of thought and the receipt of diverse opinions. In the words of the Office of the Special Rapporteur: “Both the Inter-American Court and the Inter-American Commission on Human Rights have stated that freedom of expression requires that the communications media be open to all without discrimination or, more precisely, that no individual or group be excluded from access to such media. They also require certain conditions so that the media can truly be an instrument for freedom of expression.”⁷⁸

89. In that regard, the States must orient public media toward the mandate of plurality and diversity of expressions and information, which necessarily entails that they not be subject to the arbitrary interference of the government or the private broadcasting sector. Thus, public radio and television cannot be used as tools of government communication or propaganda; rather, they must be autonomous forums for culture and information that act in the service of society as a whole. Their programming should: (1) disseminate artistic, cultural, scientific, academic and educational productions of general interest, carried out

⁷⁶ Special Rapporteurs on Freedom of Expression of the UN, OAS, OSCE and ACHPR, *Joint Statement on the Media and Elections*, May 15, 2009. It is also relevant to cite European Parliament Resolution 2007/2253 of September 25, 2008, on concentration and pluralism in the media in the European Union, in which the European Parliament: “Calls on the Member States to support high-quality public broadcasting services which can offer a real alternative to the programmes of commercial channels and can, without necessarily having to compete for ratings or advertising revenue, occupy a more high-profile place on the European scene as pillars of the preservation of media pluralism, democratic dialogue and access to quality content for all citizens” (2007/2253(INI), para. 32).

⁷⁷ See, e.g., IACHR, *Justicia e Inclusión Social: los Desafíos de la Democracia en Guatemala*. OEA/Ser.L/V/II.118. Doc. 5 rev. 1. 29 December 2003. Chapter VII, para. 419. available in Spanish at: <http://cidh.org/countryrep/Guatemala2003sp/capitulo7.htm>. It should again be explained that this in this cite, the term “information” is considered in the broad sense, and includes opinions, ideas, artistic and cultural expressions, and so on.

⁷⁸ IACHR, *Declaration of Principles on Freedom of Expression*, October 2000, Section B: Interpretation, para. 53.

around the country; (2) provide information on issues of public interest; and (3) reflect society's political, social, geographic, religious, cultural, linguistic and ethnic diversity.⁷⁹

90. To ensure the autonomy of the public media, the independence of their news or editorial line should be established by law.⁸⁰ Likewise, notwithstanding the fact that each State can determine the most appropriate institutional design, it is important that all of the broadcasting media administered by the State are supervised by an independent authority, whose members are elected through a competitive and transparent procedure according to professional suitability and ethics.⁸¹ The law should provide for a strict system governing eligibility, incompatibility and conflicts of interest. The States must also consider objective and transparent requirements and procedures for the appointment and removal of the directors of each public medium, who should not be freely appointed and removed by the national executive branch.

3. Universal access and adequate funding

91. The system of public radio and television channels must strive to be free and reach the State's entire territory in order to guarantee the rights to freedom of expression and access to information for all people under its jurisdiction, without discrimination based on social, economic or geographic conditions.

92. For the public media system to conform to the standards of the right to freedom of expression enshrined in Article 13 of the Convention, it must not only guarantee the plurality and diversity of voices in its programming; it must also ensure that the greatest number of people can access it. In this respect, the States must promote access to public media for those people who live in areas where there are no other communications media because, for example, it is not a profitable business for the private sector.

93. The State must ensure that these media have sufficient and stable public funds. Public funding adequate to the mandate established by law is a guarantee against the arbitrary interference of the public and private sectors. In that regard, although other, complementary forms of funding (such as advertising) can be anticipated, they cannot make their public service mission conditional upon the determination of content. In addition, the public service broadcasters also must have a stable and autonomous financial budget that prevents arbitrary interferences from the government sector.

4. Transparency and accountability

⁷⁹ In that sense, Article 15 of the Universal Declaration on the Rights of Indigenous Peoples establishes that: "1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information," and Article 16 states: "1. [...]; 2. *States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.*"

⁸⁰ In this regard, the Special Rapporteurs on Freedom of Expression maintained that the arbitrary interference of government is "a threat to diversity of the media" (see: Special Rapporteurs on Freedom of Expression of the UN, OAS, OSCE and ACHPR, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007).

⁸¹ In terms of the board membership of public media, the following recommendation of the Council of Europe is relevant: "The rules governing the status of the boards of management of public service broadcasting organisations, especially their membership, should be defined in a manner which avoids placing the boards at risk of any political or other interference" (Council of Europe, Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting).

94. The public media must act transparently. This means, on one hand, that the States must guarantee access to information on all aspects related to their administration (except the guarantees inherent to journalism, such as the confidentiality of news sources); and on the other hand, that they must provide for mechanisms of accountability and citizen participation, such as by providing for the receipt of proposals and comments or complaints from the audience.

95. As we saw in Section IV.3, *supra*, the States must act in a public and transparent manner in all matters relating to broadcasting activity since, as the Special Rapporteurs on Freedom of Expression established in their 2007 Joint Declaration, “transparency should be a hallmark of public policy efforts in the area of broadcasting. This should apply to regulation, ownership, public subsidy schemes and other policy initiatives.”⁸²

G. Community broadcasting

96. The right to freedom of expression requires that the States not only refrain from performing acts that prevent the exercise of the right but also take measures to guarantee its exercise under conditions of equality and nondiscrimination.⁸³ Thus, for example, obstacles preventing certain sectors of society from accessing the media must be removed. At the same time, the State must actively promote the bringing of disadvantaged or currently marginalized groups into the media.

97. On several occasions, the IACHR and the Office of the Special Rapporteur have recognized that community media perform an essential function in our hemisphere for different sectors of society to exercise their rights to freedom of expression and access to information.⁸⁴ In those declarations they have established that it is necessary for States to legally recognize community media, for spectrum to be reserved for these types of media, and for there to be equal access to licenses that recognize the distinct nature of private non-commercial media.⁸⁵

1. Importance and characteristics

98. In the Chapter entitled “Freedom of Expression and Poverty,” the 2002 Annual Report of the Office of the Special Rapporteur stated:

⁸² Special Rapporteurs on Freedom of Expression of the UN, OAS, OSCE and ACHPR, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

⁸³ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 230. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>. On the general obligation of the State to guarantee rights without discrimination, see: I/A Court H. R., *Judicial Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18. paras. 103-104.

⁸⁴ See, e.g., IACHR, *Justicia e Inclusión Social: los Desafíos de la Democracia en Guatemala*. OEA/Ser.L/V/II.118. Doc. 5 rev. 1. 29 December 2003. Chapter VII. para. 414. Available at: <http://cidh.org/countryrep/Guatemala2003sp/capitulo7.htm>; IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2002. OEA/Ser.L/V/II.117. Doc. 1 rev. 1. 7 March 2003. Chapter. IV. para. 41. Available at: <http://www.cidh.org/RELATORIA/showarticle.asp?artID=138&IID=1>

⁸⁵ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2007. OEA/Ser.L/V/II.131. Doc. 34 rev. 1. 8 March 2008. Chapter III, conclusions and recommendations, para 5. Available at: [http://www.cidh.oas.org/annualrep/2007eng/Annual Report 2007.VOL.II%20ENG.pdf](http://www.cidh.oas.org/annualrep/2007eng/Annual%20Report%202007.VOL.II%20ENG.pdf)

The freedom of individuals to debate openly and criticize policies and institutions guards against abuses of human rights. Openness of the media not only advances civil and political liberties—it often contributes to economic, social, and cultural rights. In some instances, the use of the mass media has helped drive public awareness and bring pressure to bear for the adoption of measures for improving the quality of life of the population’s most vulnerable or marginalized sectors. // However, the traditional mass media are not always accessible for disseminating the needs and claims of society’s most impoverished or vulnerable sectors. Thus, community media outlets have for some time been insisting that strategies and programs that address their needs be included on national agendas.⁸⁶

99. Later in this report, the Office of the Special Rapporteur observed:

The growing need for expression felt by majorities and minorities that lack media access, and their claims on the right to communication, to the free expression of ideas, and to the dissemination of information makes it necessary to seek access to goods and services that will ensure basic conditions of dignity, security, subsistence, and development.⁸⁷

100. In the same regard, the IACHR’s 2003 Report on “Justice and Social Inclusion: The challenges to democracy in Guatemala” states that:

The Commission and its Office of the Special Rapporteur understand that community radio is positive because it promotes the culture and history of communities, provided that they do so within a legal framework. The Commission recalls that the issuance or renewal of broadcast licenses must be subject to a clear, fair and objective procedure that takes into consideration the importance of the media so that all sectors of society [...] may participate in an informed manner in the democratic process. In particular, community radio is of great significance for the promotion of national culture, development and the education of different communities [...].⁸⁸

101. In the 2007 Annual Report, the Office of the Rapporteur asserted that legal provisions regulating community broadcasting must recognize the special nature of these media and contain, as a minimum, the following elements: (a) simple procedures for obtaining licenses; (b) no demand of severe technological requirements that would prevent them, in practice, from even being able to file a request for space with the State; and (c) the possibility of using advertising to finance their operations. In this Report, the Office of the Special Rapporteur recommended that the States: “Legislate in the area of community broadcasting to assign part of the spectrum to community radio stations, and to ensure that democratic criteria be taken into account in assigning these frequencies that guarantee equal opportunity for all individuals in accessing them.”⁸⁹

⁸⁶ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2002. OEA/Ser.L/V/II.117. Doc. 1 rev. 1. 7 March 2003. Chapter. IV. paras. 37-38. Available at: <http://www.cidh.org/RELATORIA/showarticle.asp?artID=138&IID=1>

⁸⁷ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2002. OEA/Ser.L/V/II.117. Doc. 1 rev. 1. 7 March 2003. Chapter. IV. para. 41. Available at: <http://www.cidh.org/RELATORIA/showarticle.asp?artID=138&IID=1>

⁸⁸ IACHR, Justicia e Inclusión Social: los Desafíos de la Democracia en Guatemala. OEA/Ser.L/V/II.118. Doc. 5 rev. 1. 29 December 2003. Chapter VII. para. 414. Available at: <http://cidh.org/countryrep/Guatemala2003sp/capitulo7.htm>

⁸⁹ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2007. OEA/Ser.L/V/II.131. Doc. 34 rev. 1. 8 March 2008. Chapter III. para. 6. Available at: http://www.cidh.oas.org/annualrep/2007eng/Annual_Report_2007.VOL.II%20ENG.pdf

102. All of these elements are contained in the Joint Declaration on Diversity in Broadcasting, signed by the Rapporteurs for Freedom of Expression of the UN, OAS, OSCE, and ACHPR in December of 2007. The Office of the Special Rapporteur further added that: "Along the same lines, there is a need for legislation that appropriately defines the concept of community radio and that includes its social purpose, its nature as comprised of non-profit entities, and its operational and financial independence."⁹⁰

103. Finally, the Office of the Special Rapporteur stated in its 2008 Annual Report that:

The individual members of the social groups that have been traditionally marginalized, discriminated against, or that are in a situation of helplessness, are for various reasons systematically excluded from public debate. These groups do not have institutional or private channels for the serious, robust and constant exercise of their right to express publicly their ideas and opinions or to be informed of the issues that affect them. This process of exclusion has also deprived society of knowledge of their interests, of the needs and proposals of those who have not had the opportunity to access democratic debate on an equal footing. The effect of this phenomenon of exclusion is similar to the effect of censorship: silence.⁹¹

104. For all of the reasons mentioned, it has been recognized that community media perform an essential function not only in the process of social inclusion but also as mechanisms to promote culture and history, and for the development and education of different communities.⁹²

105. In particular, community media are fundamental in order to guarantee effective respect for the freedom of expression and access to information of the indigenous peoples of our region. In this regard, let us recall that Article 16 of the Universal Declaration on the Rights of Indigenous Peoples,⁹³ as well as Article VIII.2 of the Draft American Declaration on the Rights of Indigenous Peoples⁹⁴ (approved by the Inter-American Commission on February 25, 2007), recognize the right of indigenous peoples to establish their own communications media in their own languages. However, community media do not serve only indigenous peoples. As the Office of the Special Rapporteur stated in its 2008 Report, people who are excluded or marginalized include, for example, female heads

⁹⁰ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2007. OEA/Ser.L/V/II.131. Doc. 34 rev. 1. 8 March 2008. Chapter III. para. 5. Available at: [http://www.cidh.oas.org/annualrep/2007eng/Annual Report 2007.VOL.II%20ENG.pdf](http://www.cidh.oas.org/annualrep/2007eng/Annual%20Report%202007.VOL.II%20ENG.pdf)

⁹¹ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. para. 100. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

⁹² IACHR, Justicia e Inclusión Social: los Desafíos de la Democracia en Guatemala. OEA/Ser.L/V/II.118. Doc. 5 rev. 1. 29 December 2003. Chapter VII. para. 414. Available at: <http://cidh.org/countryrep/Guatemala2003sp/capitulo7.htm>

⁹³ Article 16 of the Universal Declaration on the Rights of Indigenous peoples states that "1. *Indigenous peoples have the right to establish their own media in their own languages* and to have access to all forms of non-indigenous media without discrimination. 2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity" (emphasis added).

⁹⁴ Article VIII.2 of the Draft American Declaration on the Rights of Indigenous Peoples establishes that "The states shall take measures and ensure that broadcast radio and television programs are broadcast in the indigenous languages in the regions where there is a strong indigenous presence, *and to support the creation of indigenous radio stations and other media.*" (emphasis added).

of households who live in poverty (or extreme poverty), who do not have the means to express their needs or interests and who must bear the brunt of a sexist culture often nurtured by the powerful flow of information and opinions to which they do not have access; people of African descent who live in marginalized areas and must endure the consequences of deeply racist cultures without being able to decisively influence the debates that would help reverse processes of discrimination; rural or neighborhood communities organized around the purpose of overcoming outrageous conditions of social marginalization who cannot learn of successful alternatives for collective action or adequately inform society of their needs and proposals; and people with serious physical or mental handicaps, whose needs and interests are systematically excluded from collective deliberation. In short, there are millions of people whose freedom of expression is not sufficiently ensured, all of which leads to a fundamental flaw in the process of democratic deliberation.⁹⁵

2. Legal recognition

106. Many laws in the countries of our region still contain disproportionate barriers or prohibitions that prevent the non-commercial private sectors from accessing the media. It is therefore important that the regulation of broadcasting recognize expressly the right of non-profit organizations to own audiovisual media. As the Office of the Special Rapporteur for Freedom of Expression of the OAS has stated, "These cases deal with a [legal framework] to promote the vitality of democracy if we bear in mind that the communicative process must satisfy not only the consumer needs of society's inhabitants (legitimate entertainment needs, for example) but also their information needs."⁹⁶

107. In that regard, in their Joint Declaration on diversity in broadcasting, the Special Rapporteurs on Freedom of Expression of the UN, OAS, OSCE, and ACHPR stressed that "community broadcasting must be recognized expressly under the law as a distinct media form." They similarly indicated that "different types of broadcasters – commercial, public service and community – should be able to operate on, and have equitable access to, all available distribution platforms," including the new digital dividend.⁹⁷

108. The law must define appropriately the concept of community media, including its non-commercial and social purpose, and its financial and operating independence from the state and from economic interests.⁹⁸ The law must also: (1) provide simple procedures for obtaining licenses; (2) refrain from demanding strict technological requirements that prevent access to them; and (3) allow for the possibility of using different sources of funding, such as advertising, as a means to finance operations.⁹⁹ In any case, the

⁹⁵ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. para. 101. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

⁹⁶ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 107. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

⁹⁷ Special Rapporteurs on Freedom of Expression of the UN, OAS, OSCE and ACHPR, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

⁹⁸ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2007. OEA/Ser.L/V/II.131. Doc. 34 rev. 1. 8 March 2008. Chapter III. para. 5. Available at: <http://www.cidh.oas.org/annualrep/2007eng/Annual%20Report%202007.VOL.II%20ENG.pdf>

⁹⁹ On this matter, the Office of the Special Rapporteur has stated that, "It is indispensable to remove all disproportionate or discriminatory restrictions that prevent radio and television operators of all kinds to fully

law must include sufficient guarantees to prevent such media from becoming dependent on the State through government funding.

3. Reservation of spectrum and equality of access and use of licenses

109. Given the existing conditions of exclusion, the States must take positive measures to include the non-commercial sectors in the communications media.¹⁰⁰ These measures include ensuring broadcast spectrum frequencies for the different types of media, and providing specifically for certain frequencies to be reserved for the use of community broadcasters, especially when they are not equitably represented in the spectrum. On this note, the Office of the Special Rapporteur has insisted upon the need for broadcasting regulations to establish the duty to allocate part of the spectrum to community media.¹⁰¹

110. Another measure that the State should promote to create fair opportunities for real equality in the exercise of the right to freedom of expression enshrined in Article 13 of the American Convention is the establishment of special procedures enabling the non-commercial sectors to gain access to licenses. Accordingly, there should be procedures that do not demand strict technological requirements that, in practice, have a discriminatory effect on those sectors, thus preventing them from even applying for a license. To the contrary, the requirements for accessing licenses should consider the specific needs of community broadcasters.

111. As explained in a previous section of this document, in its 2003 report *Justicia e Inclusión Social: los Desafíos de la Democracia en Guatemala* [Justice and Social Inclusion: the Challenges for Democracy in Guatemala], the IACHR stated that “the issuance or renewal of broadcast licenses must be subject to a clear, fair and objective procedure that takes into consideration the importance of the media so that all sectors of society [...] may participate in an informed manner in the democratic process. [...] Therefore, the auctions that consider solely financial criteria, or which grant concessions without a fair opportunity for all sectors, are incompatible with democracy and with the right to freedom of expression and information guaranteed in the American Convention on Human Rights and in the Declaration of Principles on Freedom of Expression.”¹⁰² The Special Rapporteurs on Freedom of Expression of the UN, OAS, OSCE, and African Commission asserted similar criteria in their 2007 Joint Declaration on Diversity in Broadcasting.¹⁰³

accomplish the commercial, social or public mission they undertake.” IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. para. 106. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

¹⁰⁰ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 230. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

¹⁰¹ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2007. OEA/Ser.L/V/II.131. Doc. 34 rev. 1. 8 March 2008. Chapter III. para. 5. Available at: <http://www.cidh.oas.org/annualrep/2007eng/Annual%20Report%202007.VOL.II%20ENG.pdf>

¹⁰² IACHR, *Justicia e Inclusión Social: los Desafíos de la Democracia en Guatemala*. OEA/Ser.L/V/II.118. Doc. 5 rev. 1. 29 December 2003. Chapter VII. para. 414. Available at: <http://cidh.org/countryrep/Guatemala2003sp/capitulo7.htm>

¹⁰³ Special Rapporteurs on Freedom of Expression of the UN, OAS, OSCE and ACHPR, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

112. Moreover, the mere legal recognition of access to a license is not enough to guarantee freedom of expression if there are discriminatory or arbitrary conditions on the use of licenses that severely limit the ability of the private non-profit sectors to utilize the frequencies, as well as the general public's right to receive the broadcasts. The right to freedom of expression recognized in Article 13 of the American Convention prohibits the placing of arbitrary or discriminatory limits on the use of community broadcast licenses.¹⁰⁴ As such, the regulation must allow these communications media to have different sources of funding. This includes the possibility of accepting advertising insofar as there are other guarantees that prevent unfair competition with other radio stations, and provided that it does not interfere with their social purpose.¹⁰⁵ Likewise, it is necessary to ensure that state funding does not dissolve the independence of community radio, since that would entail the loss of the genuine community value of this broadcasting sector.

113. Finally, other arbitrary restrictions on the use of the licenses must be removed, such as limitations on the use of minority or indigenous languages by the communications media directed specifically at different communities.

H. Private commercial broadcasting

114. Article 13 of the American Convention provides for the right of all people to establish mass media in order to exercise thereby their freedom of expression. The right to establish and administer mass media is thus covered by the same reinforced guarantees that protect freedom of expression. In this respect, democratic societies must be inclined toward free, independent and plural broadcasting that is reinforced against arbitrary interferences and responsibly meets the legitimate, reasonable and proportionate obligations imposed upon it under the law and the Constitution.

115. All persons who exercise their right to freedom of expression through media that use frequencies have the right to be considered under equal conditions in a frequency allocation process that is transparent, clear, predetermined and observant of due process. Licenses must be subject to reasonable and proportionate conditions of use, and must allow the use of the frequency for a sufficient period of time for the individual to regain his investment and profitability. The authority charged with implementing the pertinent provisions must meet the conditions of independence and impartiality mentioned earlier in this document. Rules that regulate or limit the exercise of broadcasting must be established clearly in a law and must be clear, concise and necessary in a democratic society. Finally, there must be suitable and effective means of judicial recourse in order to remove any obstacle or repair any harm caused to those who legitimately exercise their right to freedom of expression in this manner.

I. The duty of the State to prevent monopolies or oligopolies in broadcasting

116. Monopolies or oligopolies in the media violate the freedom of expression enshrined in Article 13 of the American Convention, in that they hinder the diversity and plurality of voices necessary in a democratic society.¹⁰⁶ As such, both the IACHR and the

¹⁰⁴ See also: Principle 13 of the Declaration of Principles, which prohibits any type of direct or indirect pressure aimed at silencing the dissemination of information by journalists or other members of the media.

¹⁰⁵ Special Rapporteurs on Freedom of Expression of the UN, OAS, OSCE and ACHPR, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

¹⁰⁶ IACHR, *Declaration of Principles on Freedom of Expression*, October 2000, Principle No. 12: "Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust

Inter-American Court have maintained the importance of state intervention to guarantee competition and promote plurality and diversity. The effective measures that the States must take include the enactment of antitrust laws that limit the concentration of ownership and control of the broadcast media.

117. It is clear that the concentration of ownership of the media leads to the uniformity of the content that they produce or disseminate. Therefore, more than 20 years ago, the Inter-American Court held that any monopoly in the ownership or administration of the media is prohibited, regardless of the form it takes.¹⁰⁷ The Court also recognized that the States must actively intervene in order to prevent monopolies in the media sector. Thus, the region's highest court of justice held that "given the broad scope of the language of the American Convention, freedom of expression can also be affected without the direct intervention of the State. This might be the case, for example, when due to the existence of monopolies or oligopolies in the ownership of communications media, there are established in practice 'means tending to impede the communication and circulation of ideas and opinions.'"¹⁰⁸

118. The Special Rapporteurs on Freedom of Expression also spoke out against monopolies in the media in their joint declarations of 2001,¹⁰⁹ 2002¹¹⁰ and 2007. They specifically maintained in the third declaration that, "in recognition of the particular importance of media diversity to democracy, special measures, including anti-monopoly rules, should be put in place to prevent undue concentration of media or cross-media ownership, both horizontal and vertical."¹¹¹

laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information."

¹⁰⁷ In this regard, the Inter-American Court has established that "It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, *inter alia*, a plurality of means of communication, *the barring of all monopolies thereof, in whatever form*, and guarantees for the protection of the freedom and independence of journalists [...]" and "It is equally true that the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view" I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 33.

¹⁰⁸ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 56; See also: IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2004. OEA/Ser.L/V/II.222. Doc. 5 rev. 23 February 2005. Chapters IV. Available at: <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=459&IID=1>

¹⁰⁹ "Effective measures should be adopted to prevent undue concentration of media ownership" (Special Rapporteurs on Freedom of Expression of the UN, OAS, and OSCE, Joint Declaration: *Challenges to Freedom of Expression in the New Century*, November 20, 2001).

¹¹⁰ The Special Rapporteurs declared that they were cognizant of "the threat posed by increasing concentration of ownership of the media and the means of communication, in particular to diversity and editorial independence" (Special Rapporteurs on Freedom of Expression of the UN, OAS, and OSCE, *Joint Declaration on Freedom of Expression and the Administration of Justice, Commercialisation and Freedom of Expression, and Criminal Defamation*, December 10, 2002).

¹¹¹ Special Rapporteurs on Freedom of Expression of the UN, OAS, OSCE and ACHPR, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007. Also of interest to the IACHR are the Resolutions adopted by the European Parliament on the matter, such as Resolution 2007/2253 of September 25, 2008, on concentration and pluralism in the media in the European Union, in which the European Parliament: "3. Notes that the European media landscape is subject to continuing convergence, as regards both the media and markets; 4. Highlights that the concentration of ownership of the media system creates an environment favouring the monopolisation of the advertising market, introduces barriers to the entry of new market players and also leads to uniformity of media

119. Specifically, the States must prevent monopolies or oligopolies and consider the existence of such conditions when determining the allocation or renewal of licenses. Accordingly, in the Joint Declaration on Diversity in Broadcasting the Special Rapporteurs on Freedom of Expression explained that antitrust measures “should also involve active monitoring, taking ownership concentration into account in the licensing process, where applicable, prior reporting of major proposed combinations, and powers to prevent such combinations from taking place.”¹¹²

120. However, the controls and restrictions imposed to prevent monopolies or oligopolies should not unnecessarily limit the growth, development or economic viability of the commercial broadcasting sector. In this respect, Article 13.3 of the American Convention provides: “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.” The Inter-American Court has also held that “any governmental action that involves a restriction of the right to seek, receive and impart information and ideas to a greater extent or by means other than those authorized by the Convention” is a violation of freedom of expression.¹¹³

121. In any case, the existence of broadcasting regulations that respect the requirements set forth in the initial sections of this document, and the existence of enforcement and oversight authorities that meet the conditions expanded upon in this document, will protect commercial radio and television channels from abusive interference and arbitrary decisions.¹¹⁴

J. Government advertising and other forms of broadcast funding

122. Advertising—including state advertising—is a source of income that is very relevant to the viability or development of the media.¹¹⁵ At the same time, the use of the

content; 5. Points out that the development of the media system is increasingly driven by profit-making and that, therefore, societal, political or economic processes, or values expressed in journalists' codes of conduct, are not adequately safeguarded; considers, therefore, that competition law must be interlinked with media law, in order to guarantee access, competition and quality and avoid conflicts of interests between media ownership concentration and political power, which are detrimental to free competition, a level playing field and pluralism.” In the same vein, in the Resolution on the risk of breaches of freedom of expression and information in the Union, particularly in Italy (section 2 of Article 11 of the Charter of Fundamental Rights) (2003/2237(INI)), the European Parliament stated that it: “30. Welcomes the contribution of commercial media to innovation, economic growth and pluralism, but notes that the increase in the concentration of the media, including multimedia multinationals and cross-border ownership, threatens media pluralism.”

¹¹² Special Rapporteurs on Freedom of Expression of the UN, OAS, OSCE and ACHPR, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

¹¹³ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 55.

¹¹⁴ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. para. 107. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

¹¹⁵ “Media outlets' production costs are high, and the most lucrative way to cover these expenses is through extensive advertising. Traditionally, government advertising budgets have comprised a substantial percentage of media outlets' total advertising investments. Generally, exact numbers of advertising expenditures are not available to the public. Yet, there are reports from many media outlets that they receive 40-50% of their

media to transmit information of public interest is an important and useful tool for States.¹¹⁶ It is therefore essential to ensure that government advertising not be used to punish media that are independent or critical of the government, or as a covert subsidy that benefits, directly or indirectly, the media that are aligned with or agreeable to the authorities.¹¹⁷

123. It is necessary to recall that Principle 5 of the IACHR's Declaration of Principles on Freedom of Expression states that "prior censorship, *direct or indirect interference in or pressure* exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression." In interpreting the scope of this principle,¹¹⁸ the IACHR has made clear that "According to this principle, it is unacceptable for economically powerful sectors or the State to exert economic or political pressure aimed at influencing or limiting the expression of individuals or the mass media. In this regard, the Inter-American Commission has stated that the use of authority to limit the expression of ideas lends itself to abuse, since stifling unpopular or critical ideas and opinions restricts the debate that is essential to the effective functioning of democratic institutions."¹¹⁹

124. Likewise, Principle 13 of the Declaration of Principles on Freedom of Expression provides that "The exercise of power and the use of public funds by the state, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans; the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law. The means of communication have the right to carry out their role in an independent manner. Direct or indirect pressures exerted upon journalists or other social communicators to stifle the dissemination of information are incompatible with freedom of expression."

125. On numerous occasions, the IACHR and the Office of the Special Rapporteur for Freedom of Expression have pointed to the use of advertising in the region as one of the

revenue from the government." IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2003. OEA/Ser.L/V/II.118. Doc. 70 rev. 2. 29 December 2003. Chapter V. para. 4. Available at: <http://www.cidh.org/relatoria/showarticle.asp?artID=139&IID=1>

¹¹⁶ "There are two types of government publicity: unpaid and paid. 'Unpaid' publicity includes press releases, the texts of legislation or legislative body meetings, and information which carries government support but which may be paid for by a private party. There are often legal obligations for national media sources to release this publicity, as a condition of the media outlets' use of the state's available frequencies and airwaves. Such conditions are usually included in states' fundamental broadcasting and press laws. 'Paid' publicity includes paid advertising in the press, on radio and on television, government-produced or -sponsored software and video material, leaflet campaigns, material placed on the Internet, exhibitions, and more." IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2003. OEA/Ser.L/V/II.118. Doc. 70 rev. 2. 29 December 2003. Chapter V. para. 3. Available at: <http://www.cidh.org/relatoria/showarticle.asp?artID=139&IID=1>

¹¹⁷ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. para. 77. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

¹¹⁸ IACHR. Declaration of Principles on Freedom of Expression. October, 2000. Section B: Interpretation. para. 27.

¹¹⁹ IACHR, Annual Report 1994. OEA/Ser.L/V.88. Doc. 9 rev. 1. 17 February 1995. Chapter V.

possible manifestations of indirect restrictions on the right to freedom of expression.¹²⁰ The Special Rapporteurs from all of the regional and universal systems for the protection of human rights have also warned of this phenomenon throughout the world. Accordingly, in their 2002 Joint Declaration, they affirmed that “governments and public bodies should never abuse their custody over public finances to try to influence the content of media reporting; the placement of public advertising should be based on market considerations.”¹²¹ In their 2007 Joint Declaration on Diversity in Broadcasting, they stated that “It should be illegal for the media to discriminate, on the basis of political opinion or other recognised grounds, in the allocation of and charging for paid political advertisements.”¹²²

126. In that respect, the right to freedom of expression enshrined in Article 13 of the American Convention prohibits the States from making decisions with respect to broadcasting based on a medium's news or editorial line.¹²³ It follows that government advertising cannot be allocated by the States in a discriminatory manner to reward or punish broadcasters according to their expressions or programming.

127. In other words, the IACHR notes that, although there is no intrinsic right to receive State funding through advertising, the discriminatory allocation of government advertising based on the radio or television channel's news or editorial line is a violation of the right to free expression guaranteed by the American Convention.

128. To the contrary, the States should decide what they communicate, and where they communicate their messages to society, based on objective criteria regarding the best way to transmit this information most effectively, and absolutely independently of the news or editorial content of the medium it hires for such purposes.¹²⁴

129. The Office of the Special Rapporteur has found that “in the framework of distribution criteria, there are both negative and positive discriminatory allocations of publicity. Negative allocation would be given to an individual or media outlet in order to induce them to not report unfavorably on those in power. Positive allocation requires the recipient to engage in favorable expression in order to receive government revenue.”¹²⁵ Both of those cases involve a violation of freedom of expression.

¹²⁰ See, e.g., IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2003. OEA/Ser.L/V/II.118. Doc. 70 rev. 2. 29 December 2003. Chapter V. Available at: <http://www.cidh.org/relatoria/showarticle.asp?artID=139&IID=1>

¹²¹ Special Rapporteurs on Freedom of Expression of the UN, OAS, and OSCE, *Joint Declaration on Freedom of Expression and the Administration of Justice, Commercialisation and Freedom of Expression, and Criminal Defamation*, December 10, 2002.

¹²² Special Rapporteurs on Freedom of Expression of the UN, OAS, OSCE and ACHPR, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

¹²³ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 230. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

¹²⁴ “The decision must be made, then, bearing in mind the objective and legitimate purpose that must be accomplished by the publication of the information and not the medium's affinity to the government which, at any time, has the power to [allocate] it.” IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. para. 77. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

¹²⁵ “Negative allocations are content-based forms of coercion that force media outlets to be silent on issues of public interest, whereas positive allocations may artificially distort a public debate by inducing some who otherwise would have taken a contrary position (or chosen not to speak at all) to support the government's views.” IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2003. OEA/Ser.L/V/II.118.

130. It is essential for the States to have specific regulations that set prior and objective criteria for the allocation of government advertising, drafted clearly and precisely, so as to establish predictability for broadcasters and obligations for the State. The law should also provide for competitive and transparent procedures.

131. On this point, the Office of the Special Rapporteur has affirmed that “insufficiently precise laws and unacceptable discretionary powers constitute freedom of expression violations. It is indeed when laws pertaining to allocation of official publicity are unclear or leave decisions to the discretion of public officials that there exists a legal framework contrary to freedom of expression.”¹²⁶ Accordingly, it has indicated that “transparency is vitally needed. The criteria used by government decision-makers to distribute publicity must be made public. The actual allocation of advertising and sum totals of publicity spending should also be publicized, to insure fairness and respect for freedom of expression.”¹²⁷

132. Finally, steps should be taken to prevent government advertising from creating government dependency among the private audiovisual media, whether they are non-profit or for profit. With regard to this issue, it is clear that government advertising can in many cases be the only possible funding alternative for certain small media—which do not appear to be commercially profitable options for private advertisers—or for those that criticize powerful economic groups or businesses.¹²⁸ In such cases, the States should ensure alternative sources of funding to promote the plurality of voices.

K. The sanctions regime

133. The regulation of broadcasting can provide sanctions for failure to comply with any legal obligation or for the commission of a violation or irregularity in the use of licenses. These sanctions are restrictions to freedom of expression. As such, the regulation and enforcement of these sanctions must respect certain requirements in order to be consistent with the American Convention and with the principles established by the inter-American case law.

134. Sanctions for the irregular use of a radio or television license—particularly if they deal with the revocation of licenses—can seriously jeopardize fundamental rights of the individuals involved and create a silencing or “chilling” effect on democratic speech. Insofar as freedom of expression encompasses two aspects—the right to express thoughts and

Doc. 70 rev. 2. 29 December 2003. Chapter V. para. 7. Available at: <http://www.cidh.org/relatoria/showarticle.asp?artID=139&IID=1>

¹²⁶ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2003. OEA/Ser.L/V/II.118. Doc. 70 rev. 2. 29 December 2003. Chapter V. paras. 23 and 86. Available at: <http://www.cidh.org/relatoria/showarticle.asp?artID=139&IID=1>

¹²⁷ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2003. OEA/Ser.L/V/II.118. Doc. 70 rev. 2. 29 December 2003. Chapter V. para. 89. Available at: <http://www.cidh.org/relatoria/showarticle.asp?artID=139&IID=1>. For their part, in their 2007 Joint Declaration, the Special Rapporteurs on Freedom of Expression emphasized that “transparency should be a hallmark of public policy efforts in the area of broadcasting.” (Special Rapporteurs on Freedom of Expression of the UN, OAS, OSCE and ACHPR, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007).

¹²⁸ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2003. OEA/Ser.L/V/II.118. Doc. 70 rev. 2. 29 December 2003. Chapter V. para. 4. Available at: <http://www.cidh.org/relatoria/showarticle.asp?artID=139&IID=1>

ideas and the right to receive them—the restriction of this right by means of an arbitrary interference affects not only the individual right to express ideas and information but also the right of the community in general to receive all kinds of information and opinions.¹²⁹

135. Thus, in order to respect the right to freedom of expression, the infractions and sanctions provided under broadcasting regulations must be legitimate and must be enforced through a procedure that observes the due process of law.

1. Legitimacy of sanctions

136. Some earlier sections of this document examined in detail the requirements that restrictions to freedom of expression must meet, and those requirements are fully applicable to the system of violations and sanctions that may be established in broadcasting regulations. In general terms, in order to be legitimate, the infractions and sanctions imposed by broadcasting regulations must pass the “three-part test” derived from Article 13.2 of the Convention, established by the case law of the bodies of the inter-American system: (1) the sanctions must have been defined in a precise and clear manner by preexisting law; (2) they must serve compelling objectives authorized by the Convention; and (3) the limitation must be necessary in a democratic society to accomplish the compelling objectives pursued, strictly proportionate to the objective pursued, and appropriate to achieve said compelling objective. Likewise, these conditions must be verified simultaneously, and it is incumbent upon the authority imposing the sanctions to demonstrate that all of the requirements have been met.¹³⁰

137. With respect to the requirement that the sanctions be set forth in a clear and precise law, the Inter-American Court has held that under the rule of law the principle of legality—together with the principle of non-retroactivity—governs the acts of all State bodies, in their respective jurisdictions, particularly where the exercise of their punitive power is concerned.¹³¹ It has therefore specified that the requirements of Article 9 of the American Convention must also be observed in the case of government-imposed sanctions.¹³² Indeed, the vagueness of infractions or sanctions established in broadcasting regulations could lead to arbitrariness on the part of the enforcement and oversight authority, thereby jeopardizing the freedom of expression enshrined in Article 13 of the American Convention.

138. Second, in order to be legitimate, the sanctions must aim to accomplish compelling objectives authorized by the American Convention. This means, then, that

¹²⁹ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. paras. 30-32; See also: IACHR, *Declaration of Principles on Freedom of Expression*, October 2000, Section B: Interpretation, para. 23.

¹³⁰ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. paras. 135-136. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

¹³¹ I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 177; I/A Court H.R., *Case of Baena-Ricardo et al. v. Panama. Merits, Reparations and Costs*. Judgment of February 2, 2001. Series C No. 72. para. 107; and I/A Court H. R., *Case of Lori Berenson-Mejía v. Peru. Merits, Reparations and Costs*. Judgment of November 25, 2004. Series C No. 119. para. 126.

¹³² I/A Court H.R., *Case of Baena-Ricardo et al. v. Panama. Merits, Reparations and Costs*. Judgment of February 2, 2001. Series C No. 72. paras. 106-115.

sanctions can neither be established nor applied as punishment for a medium's news or editorial line; nor can licenses be legitimately revoked based on the news or editorial line of the medium. The Office of the Special Rapporteur for Freedom of Expression has maintained that “[t]he use of the [coercive] means of the State to impose a single view of the world or to discourage the open and vigorous deliberation of all matters of public relevance is incompatible with the guiding principles of democratic regimes and, in particular, with the right to freedom of expression enshrined in Article 13 of the American Convention.”¹³³

139. Third, sanctions—including the revocation of a license—must be necessary in a democratic society in order to achieve the compelling aims pursued, strictly proportionate to the aim pursued, and suitable for accomplishing that aim. The standards, firmly rooted in the inter-American system, that sanctions for the abusive use of freedom of expression must always be proportionate, are fully applicable to this issue in that the benefit to the protected interest must outweigh the harm to freedom of expression. The arguments supporting this theory are linked to the imperative of preventing the creation of legal frameworks that allow the State to make arbitrary or disproportionate decisions that have a chilling effect.¹³⁴

140. In particular, the revocation of a license can only be provided for and enforced in cases of serious regulatory noncompliance that has caused real harm to the rights of others. On this point, the inter-American case law has been clear in specifying that when justified restrictions to freedom of expression are established to protect the rights of others, the authorities imposing such limitation must necessarily demonstrate that indeed these rights have been harmed, as, “if there is no clear harm to another’s right, the subsequent imposition of liability is unnecessary.”¹³⁵

141. Likewise, the Inter-American Court and the IACHR have noted on several occasions that the imposition of criminal penalties is extremely onerous to freedom of expression. Insofar as there are alternative measures less restrictive to freedom of expression than provisions that define the violation of broadcasting regulations as criminal conduct, such violations should not give rise to criminal liabilities.

142. The IACHR and the Office of the Special Rapporteur have maintained that the States have “[the] obligation to establish a regulatory framework that promotes free, open, plural and uninhibited speech, which entails the design of institutions that enable, not hinder, the social deliberation of all matters and phenomena of public relevance. None of the above is compatible with the indiscriminate use of criminal law as a mechanism to limiting the free circulation of opinions and information, especially when those refer to public affairs.”¹³⁶

¹³³ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. para. 54. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

¹³⁴ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter IV. para. 57. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

¹³⁵ IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 70. Available at: <http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf>

¹³⁶ IACHR, Press Release No. 57/09, “IACHR and Office of The Special Rapporteur Send Communication to the Venezuelan State Expressing Deep Concern about the Situation of Freedom of Expression,” August 5, 2009. R57/09. Available at: <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=759&IID=2>.

143. In particular, noncompliance with rules set forth in the regulations with respect to content, if they deal with expressions concerning matters of public interest, can never result in criminal sanctions. In addition, the legitimacy of criminal sanctions in cases of broadcasters operating without authorization must be examined in light of the real possibilities of accessing a license. In that regard, delay in the exercise of right to freedom of expression, due, for example, to unjustified or arbitrary obstacles to accessing a license, operates as a clear limit to the potential criminal prosecution of conduct designed to achieve its effect.

2. Due process

144. Because punitive procedures can seriously affect the exercise of freedom of expression, they must provide for all of the due process guarantees enshrined in Articles 8 and 25 of the American Convention.

145. It should be recalled in this regard that, according to the Inter-American Court of Human Rights, “[a]lthough Article 8 of the American Convention is entitled ‘Judicial Guarantees’ [in the Spanish version – ‘Right to a Fair Trial’ in the English version], its application is not strictly limited to judicial remedies, ‘but rather the procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees’ so that a person may defend himself adequately in the face of any kind of act of the State that affects his rights,” and that “although this article does not establish minimum guarantees in matters relating to the determination of rights and obligations of a civil, labor, fiscal or any other nature, the full range of minimum guarantees stipulated in the second paragraph of this article are also applicable in those areas and, therefore, in this type of matter, the individual also has the overall right to the due process applicable in criminal matters.”¹³⁷

146. Further, the central role that freedom of expression plays in the subsistence of the democratic system dictates that certain restrictions that may be valid in certain administrative proceedings (such as, for example, the non-public nature of some part of the case), cannot be valid when the exercise of this right may be affected.¹³⁸

147. In particular, the sanctions enforcement procedure—especially in cases involving the revocation of licenses—1) must be carried out by a body that meets the previously mentioned requirements, especially impartiality and independence from the political branches of government and the broadcasting sector; 2) must be transparent and public, providing, for example, for public hearings; 3) must allow the exercise of the right of defense before any decision is rendered, expressly permitting the opportunity to be heard and to offer evidence; and 4) must allow for subsequent judicial review.

148. Finally, it is necessary to make clear that the prohibition against prior censorship established in Article 13 of the Convention requires that any sanction for noncompliance with regulatory provisions pertaining to content must be applied only subsequent to the broadcast.

¹³⁷ I/A Court H.R., *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 71. paras. 69-70.

¹³⁸ I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. paras. 72-73.

APPENDIX**A. AMERICAN CONVENTION ON HUMAN RIGHTS**

(Signed at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969)

Article 13. Freedom of Thought and Expression

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

B. INTER-AMERICAN DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION

PREAMBLE

REAFFIRMING the need to ensure respect for and full enjoyment of individual freedoms and fundamental rights of human beings under the rule of law;

AWARE that consolidation and development of democracy depends upon the existence of freedom of expression;

PERSUADED that the right to freedom of expression is essential for the development of knowledge and understanding among peoples, that will lead to a true tolerance and cooperation among the nations of the hemisphere;

CONVINCED that any obstacle to the free discussion of ideas and opinions limits freedom of expression and the effective development of a democratic process;

CONVINCED that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of governmental activities and the strengthening of democratic institutions;

RECALLING that freedom of expression is a fundamental right recognized in the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights, the Universal Declaration of Human Rights, Resolution 59 (1) of the United Nations General Assembly, Resolution 104 adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Covenant on Civil and Political Rights, as well as in other international documents and national constitutions;

RECOGNIZING that the member states of the Organization of American States are subject to the legal framework established by the principles of Article 13 of the American Convention on Human Rights;

REAFFIRMING Article 13 of the American Convention on Human Rights, which establishes that the right to freedom of expression comprises the freedom to seek, receive and impart information and ideas, regardless of borders and by any means of communication;

CONSIDERING the importance of freedom of expression for the development and protection of human rights, the important role assigned to it by the Inter-American Commission on Human Rights and the full support given to the establishment of the Office of the Special Rapporteur for Freedom of Expression as a fundamental instrument for the protection of this right in the hemisphere at the Summit of the Americas in Santiago, Chile;

RECOGNIZING that freedom of the press is essential for the full and effective exercise of freedom of expression and an indispensable instrument for the functioning of representative democracy, through which individuals exercise their right to receive, impart and seek information;

REAFFIRMING that the principles of the Declaration of Chapultepec constitute a basic document that contemplates the protection and defense of freedom of expression, freedom and independence of the press and the right to information;

CONSIDERING that the right to freedom of expression is not a concession by the States but a fundamental right;

RECOGNIZING the need to protect freedom of expression effectively in the Americas, the Inter-American Commission on Human Rights, in support of the Special Rapporteur for Freedom of Expression, adopts the following Declaration of Principles:

PRINCIPLES

1. Freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals. Additionally, it is an indispensable requirement for the very existence of a democratic society.
2. Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights. All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.
3. Every person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
4. Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.
5. Prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression.
6. Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression. Journalistic activities must be guided by ethical conduct, which should in no case be imposed by the State.
7. Prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments.
8. Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.
9. The murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental

rights of individuals and strongly restrict freedom of expression. It is the duty of the state to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation.

10. Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.
11. Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as "*desacato laws*," restrict freedom of expression and the right to information.
12. Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.
13. The exercise of power and the use of public funds by the state, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans; the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law. The means of communication have the right to carry out their role in an independent manner. Direct or indirect pressures exerted upon journalists or other social communicators to stifle the dissemination of information are incompatible with freedom of expression.

C. JOINT STATEMENT ON THE MEDIA AND ELECTIONS

The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information,

Having discussed these issues virtually with the assistance of ARTICLE 19, Global Campaign for Free Expression;

Recalling and reaffirming our Joint Declarations of 26 November 1999, 30 November 2000, 20 November 2001, 10 December 2002, 18 December 2003, 6 December 2004, 21 December 2005, 19 December 2006, 12 December 2007, 10 December 2008;

Recognising the importance to democracy, and to holding political parties and leaders accountable, of robust and open debate about all matters of public concern, particularly during election periods;

Emphasising the key role that the media, and in particular broadcasters, play in terms of framing electoral issues, informing the electorate about the main developments, and communicating the platforms, policies and promises of parties and candidates to electors;

Welcoming the continuing global trend towards more democratic elections based on the will of the people expressed through free, equal and universal suffrage;

Stressing that free and fair elections are possible only where the electorate is well informed and has access to pluralistic and sufficient information;

Noting that in many countries the incumbent government benefits from disproportionate and excessively positive media coverage, including because of its control over the media, public and private, or because of its close relationship with the media;

Aware that only a diverse media environment can ensure that all viewpoints and political perspectives are aired during election campaigns;

Concerned about threats to free and open media coverage during elections, including from threats, physical attacks and unduly limiting legal restrictions on freedom of expression;

Cognisant of the important role played in many countries during elections by publicly-owned media, and particularly public service broadcasters, which provide election coverage in accordance with an obligation of balance and impartiality in news, current affairs and other types of programming;

Adopt the following Statement on the Media and Elections:

Overall Environment for Media and Elections

- States should put in place a range of measures, including those highlighted in our Joint Declaration of 12 December 2007, to create an environment in which a pluralistic media sector can flourish. These should include, among others, obligations of transparency of media ownership, licensing of different types of broadcasters to promote diversity, rules to prevent undue concentration of media ownership and measures to promote content diversity among and within media outlets.

- Laws that unduly restrict freedom of expression contrary to international and constitutional guarantees should be repealed. Where such laws are still in place during election campaigns, the authorities should apply the constitutional or international guarantees that protect freedom of expression.
- States should put in place effective systems for preventing threats and attacks against the media and others exercising their right to freedom of expression, and for investigating such attacks when they do occur, bringing those responsible to justice and compensating victims. This obligation takes on particular significance during election periods.
- The media should be free to report on election-related matters. They should also be exempted from liability for disseminating unlawful statements made directly by parties or candidates – whether in the context of live broadcasting or advertising – unless the statements have been ruled unlawful by a court or the statements constitute direct incitement to violence and the media outlet had an opportunity to prevent their dissemination.
- The obligation of political figures, including candidates, to tolerate a greater degree of criticism than ordinary persons should be clearly reaffirmed during elections.
- A party or candidate which has been illegally defamed or suffered another illegal injury by a statement in the media during an election period should be entitled to a rapid correction of that statement or have the right to seek redress in a court of law.
- It should be illegal for the media to discriminate, on the basis of political opinion or other recognised grounds, in the allocation of and charging for paid political advertisements, where these are permitted by law.
- Oversight of any rules relating to the media and elections should be vested in an independent administrative body which should address any complaints promptly. The decisions of this body should be subject to judicial review.

Public Media

- All publicly-owned media, including public service broadcasters, should be under the following obligations during an election period:
 - To ensure that the electorate are informed about election matters, including the role of elections in a democracy, how to exercise one's right to vote, the key electoral issues, and the policy positions of the various parties and candidates contesting the election. This should normally include reporting that involves questions being put to party leaders and candidates, as well as debates between candidates.
 - To respect strict rules of impartiality and balance, particularly when reporting on the governing party(ies) and on government decisions and actions during an election period. This implies that equal coverage should be given to arguments in favour of both sides in any referendum.
 - To grant all parties and candidates equitable access to the media to communicate their messages directly with the public, either for free or at subsidised rates. Equitable access means fair and non-discriminatory access allocated according to objective criteria for measuring overall levels of support, and includes factors such as timing of access and any fees.

- To ensure that any reporting of opinion polls and election projections is accompanied by sufficient information to allow the electorate to understand properly their significance.

Frank LaRue
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Miklos Haraszti
OSCE Representative on Freedom of the Media

Catalina Botero
OAS Special Rapporteur on Freedom of Expression

Faith Pansy Tlakula
ACHPR Special Rapporteur on Freedom of Expression and Access to Information

D. JOINT DECLARATION ON DIVERSITY IN BROADCASTING

The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information,

Having met with representatives of NGOs, academics and other experts in Amsterdam on 7-8 December 2007, under the auspices of *ARTICLE 19, Global Campaign for Free Expression*, assisted by the *Institute for Information Law (IViR), University of Amsterdam*;

Recalling and reaffirming our Joint Declarations of 26 November 1999, 30 November 2000, 20 November 2001, 10 December 2002, 18 December 2003, 6 December 2004, 21 December 2005 and 19 December 2006;

Stressing the fundamental importance of diversity in the media to the free flow of information and ideas in society, in terms both of giving voice to and satisfying the information needs and other interests of all, as protected by international guarantees of the right to freedom of expression;

Cognisant, in particular, of the importance of diversity to democracy, social cohesion and broad participation in decision-making;

Aware of the potential of new technologies both to serve as vehicles for promoting diversity but also to pose new threats to diversity, including as a result of the digital divide;

Emphasising the complex nature of diversity, which includes diversity of outlet (types of media) and source (ownership of the media), as well as diversity of content (media output);

Recognising the varied contributions that different types of broadcasters – commercial, public service and community – as well as broadcasters of different reach – local, national, regional and international – make to diversity;

Noting that undue concentration of media ownership, direct or indirect, as well as government control over the media, pose a threat to diversity of the media, as well as other risks, such as concentrating political power in the hands of owners or governing elites;

Stressing that independent public service broadcasters will continue to play an important role in promoting diversity in the new digital broadcasting environment, including through their unique role in providing reliable, high-quality and informative programming;

Mindful of the potential for abuse of regulatory systems for the media to the detriment, among other things, of diversity, particularly where oversight bodies are not sufficiently protected against political or other interference;

Concerned about the growth of a number of threats to the viability of public service broadcasting in different countries, which undermine its ability to fulfil its potential to contribute to media diversity, as well as the failure of many countries to recognise community broadcasting as a distinct type of broadcasting;

Adopt, on 12 December 2007, the following Declaration on Promoting Diversity in the Broadcast Media:

General Points

- Regulation of the media to promote diversity, including governance of public media, is legitimate only if it is undertaken by a body which is protected against political and other forms of unwarranted interference, in accordance with international human rights standards.
- Broad public education and other efforts should be undertaken to promote media literacy and to ensure that all members of society can understand and take advantage of new technologies with a view to bridging the digital divide.
- Transparency should be a hallmark of public policy efforts in the area of broadcasting. This should apply to regulation, ownership, public subsidy schemes and other policy initiatives.
- Low-cost technologies that are widely accessible should be promoted with a view to ensuing broad access to new communications platforms. Technological solutions to traditional problems of access –including in relation to hearing or visual disabilities – should be explored and promoted.
- Measures should be put in place to ensure that government advertising is not used as a vehicle for political interference in the media.

On Diversity of Outlet

- Sufficient ‘space’ should be allocated to broadcasting uses on different communications platforms to ensure that, as a whole, the public is able to receive a range of diverse broadcasting services. In terms of terrestrial dissemination, whether analogue or digital, this implies an appropriate allocation of frequencies for broadcasting uses.
- Different types of broadcasters – commercial, public service and community – should be able to operate on, and have equitable access to, all available distribution platforms. Specific measures to promote diversity may include reservation of adequate frequencies for different types of broadcasters, must-carry rules, a requirement that both distribution and reception technologies are complementary and/or interoperable, including across national frontiers, and non-discriminatory access to support services, such as electronic programme guides.
- Consideration of the impact on access to the media, and on different types of broadcasters, should be taken into account in planning for a transition from analogue to digital broadcasting. This requires a clear plan for switchover that promotes, rather than limits, public interest broadcasting. Measures should be taken to ensure that digital transition costs do not limit the ability of community broadcasters to operate. Where appropriate, consideration should be given to reserving part of the spectrum for analogue radio broadcasting for the medium-term. At least part of the spectrum released through the ‘digital dividend’ should be reserved for broadcasting uses.

- The least intrusive effective system for the administration of broadcasting to promote diversity should become used, taking into account reductions in the problem of scarcity. Licensing, justified by reference to the airwaves as a limited public resource, is not legitimate for Internet broadcasting.
- Special measures are needed to protect and preserve public service broadcasting in the new broadcasting environment. The mandate of public service broadcasters should be clearly set out in law and include, among other things, contributing to diversity, which should go beyond offering different types of programming and include giving voice to, and serving the information needs and interests of, all sectors of society. Innovative funding mechanisms for public service broadcasting should be explored which are sufficient to enable it to deliver its public service mandate, which are guaranteed in advance on a multi-year basis, and which are indexed against inflation.
- Community broadcasting should be explicitly recognized in law as a distinct form of broadcasting, should benefit from fair and simple licensing procedures, should not have to meet stringent technological or other license criteria, should benefit from concessionary license fees and should have access to advertising.

On Diversity of Source

- In recognition of the particular importance of media diversity to democracy, special measures, including anti-monopoly rules, should be put in place to prevent undue concentration of media or cross-media ownership, both horizontal and vertical. Such measures should involve stringent requirements of transparency of media ownership at all levels. They should also involve active monitoring, taking ownership concentration into account in the licensing process, where applicable, prior reporting of major proposed combinations, and powers to prevent such combinations from taking place.
- Consideration should be given to providing support, based on equitable, objective criteria applied in a non-discriminatory fashion, to those wishing to establish new media outlets.

On Diversity of Content

- Policy tools could be used, where this is consistent with international guarantees of freedom of expression, to promote content diversity among and within media outlets.
- Consideration should be given to providing support, based on equitable, objective criteria applied in a non-discriminatory fashion, for the production of content which makes an important contribution to diversity. This might include measures to promote independent content producers, including by requiring public service broadcasters to purchase a minimum quota of their programming from these producers.
- An appropriate balance should be struck between protection of copyright and neighbouring rights, and promoting the free flow of information and ideas in society, including through measures which result in a strengthening of the public domain.

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UN Special Rapporteur on Freedom of Opinion and Expression

Miklos Haraszti
OSCE Representative on Freedom of the Media

Ignacio Alvarez
OAS Special Rapporteur on Freedom of Expression

Faith Pansy Tlakula
ACHPR Special Rapporteur on Freedom of Expression

**E. RESOLUTION OF THE GENERAL ASSEMBLY OF THE ORGANIZATION OF
AMERICAN STATES - 2009AG/RES. 2523 (XXXIX-O/09)**

**RIGHT TO FREEDOM OF THOUGHT AND EXPRESSION AND THE IMPORTANCE OF THE
MEDIA**

(Adopted at the fourth plenary session, held on June 4, 2009)

THE GENERAL ASSEMBLY,

HAVING SEEN the Annual Report of the Permanent Council to the General Assembly (AG/doc.4992/09 and addenda);

TAKING INTO ACCOUNT resolutions AG/RES. 2237 (XXXVI-O/06), AG/RES. 2287 (XXXVII-O/07), and AG/RES. 2434 (XXXVIII-O/08), "Right to Freedom of Thought and Expression and the Importance of the Media";

UNDERSCORING the Declaration of Santo Domingo: Good Governance and Development in the Knowledge-Based Society [AG/DEC. 46 (XXXVI-O/06)], adopted on June 6, 2006;

RECALLING that the right to freedom of thought and expression, which includes the freedom to seek, receive, and impart information and ideas of all kinds, is recognized in Article IV of the American Declaration of the Rights and Duties of Man, Article 13 of the American Convention on Human Rights, the Inter-American Democratic Charter (including in Article 4), the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other international instruments and national constitutions, as well as in United Nations General Assembly resolution 59 (I) and resolution 104 of the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO);

RECALLING ALSO that Article IV of the American Declaration of the Rights and Duties of Man states 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";

RECALLING FURTHER that Article 13 of the American Convention on Human Rights states that:

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

BEARING IN MIND principles 10 and 11 of the Declaration of Principles on Freedom of Expression of the Inter-American Commission on Human Rights (IACHR), of 2000, which refer to the decriminalization of "*desacato*" (offensive expressions directed at public officials);

RECALLING the relevant volumes of the annual reports of the IACHR for 2004, 2005, 2006, 2007, and 2008 on freedom of expression, as well as the comments by member states during meetings at which said reports were presented;

TAKING INTO ACCOUNT resolutions 2004/42 and 2005/38, "The Right to Freedom of Opinion and Expression," of the United Nations Commission on Human Rights; and

RECALLING the significance of the studies and contributions approved by UNESCO regarding the contribution of the media to strengthening peace, tolerance, and international understanding, to promoting human rights, and to countering racism and incitement to war,

RESOLVES:

1. To reaffirm the right to freedom of thought and expression and to call upon member states to respect and ensure respect for this right, in accordance with the international human rights instruments to which they are party, such as the American Convention on Human Rights and the International Covenant on Civil and Political Rights, *inter alia*.

2. To reaffirm that freedom of expression and dissemination of ideas are fundamental for the exercise of democracy.

3. To urge member states to safeguard, within the framework of the international instruments to which they are party, respect for freedom of expression in the media, including radio and television, and, in particular, respect for the editorial independence and freedom of the media.

4. To urge those member states that have not yet done so to consider signing and ratifying, ratifying, or acceding to, as the case may be, the American Convention on Human Rights.

5. To reaffirm that free and independent media are fundamental for democracy, for the promotion of pluralism, tolerance, and freedom of thought and expression, and for the facilitation of dialogue and debate, free and open to all segments of society, without discrimination of any kind.

6. To urge member states to promote a pluralistic approach to information and multiple points of view by fostering full exercise of freedom of thought and expression, access to the media, and diversity in the ownership of media outlets and sources of information, through, *inter alia*, transparent licensing systems and, as appropriate, effective regulations to prevent the undue concentration of media ownership.

7. To urge member states to consider the importance of including, in their domestic legal systems, rules about the establishment of alternative or community media and safeguards to ensure that they are able to operate independently, so as to broaden the dissemination of information and opinions, thereby strengthening freedom of expression.

8. To call upon member states to adopt all necessary measures to prevent violations of the right to freedom of thought and expression and to create the necessary conditions for that purpose, including ensuring that relevant national legislation complies with their international human rights obligations and is effectively implemented.

9. To urge member states to review their procedures, practices, and legislation, as necessary, to ensure that any limitations on the right to freedom of opinion and expression are only such as are provided by law and are necessary for respect of the rights or reputations of others or for the protection of national security, public order (*ordre public*), or public health or morals.

10. To recognize the valuable contribution of information and communication technologies, such as the Internet, to the exercise of the right to freedom of expression and to the ability of persons to seek, receive, and impart information, as well the contributions they can make to the fight against racism, racial discrimination, xenophobia, and related and contemporary forms of intolerance, and to the prevention of human rights abuses.

11. To request the Inter-American Commission on Human Rights (IACHR) once again to follow up on and deepen its study of the issues addressed in the relevant volumes of its 2004, 2005, 2006, 2007, and 2008 annual reports on freedom of expression, on the basis, *inter alia*, of the inputs on the subject that it receives from member states.

12. To invite member states to consider the recommendations concerning defamation made by the Office of the Special Rapporteur for Freedom of Expression of the IACHR, namely by repealing or amending laws that criminalize *desacato*, defamation, slander, and libel, and, in this regard, to regulate these conducts exclusively in the area of civil law.

13. To request the Permanent Council to hold a meeting of national authorities in this field with a view to exchanging experiences and information and engaging in political dialogue among the member states on new trends and debates regarding the right to freedom of thought and expression, the importance of the media in the Hemisphere, and the

right of every individual to seek, receive, and impart information. Invitees to that meeting will include members of the Inter-American Court of Human Rights and of the Inter-American Commission on Human Rights, including the Special Rapporteur for Freedom of Expression, and experts from the member states, all for the purpose of sharing their experiences with these issues.

14. To take into consideration the findings of, and views expressed at, the special meetings on freedom of thought and expression, held on February 28 and 29, 2008, and April 23 and 24, 2009, in the framework of the Committee on Juridical and Political Affairs; and to request the Special Rapporteur of the IACHR to report on the conclusions and recommendations issued by the experts at those special meetings, in order to follow up on the matter.

15. To request the Permanent Council to report to the General Assembly at its fortieth regular session on the implementation of this resolution, the execution of which shall be subject to the availability of financial resources in the program-budget of the Organization and other resources.