

ANNUAL REPORT OF THE OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION 2004

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INTRODUCTION

1. The Office of the Special Rapporteur on Freedom of Expression (hereinafter, “the Rapporteurship”) was created by the Inter-American Commission on Human Rights (IACHR) in October 1997, during its ninety-seventh regular session. Since then, the Rapporteurship has had backing, not only from the IACHR, but from states, civil society organizations in the Hemisphere, media, journalists, and above all, from the victims of violations of freedom of expression who see the Rapporteurship as offering important support to restore the guarantees needed in order to exercise their rights or to ensure fair settlement of their claims.

2. During 2004, the Office of the Special Rapporteur had a demanding agenda, carrying out more than a dozen journeys to promote freedom of expression and taking part in a similar number of conferences and seminars. Furthermore, in accordance with its mandate, the Rapporteurship assisted the Commission with some of the major petitions and difficult cases it processed. During 2004, the Rapporteurship also published and printed four publications and updated its website.¹ These achievements would not have been possible but for the dedication of office staff and the support of a number of talented interns.²

3. The present report maintains the basic structure of previous years and is in line with the terms of reference established by the IACHR for the work of the Rapporteurship. The report begins with a general introductory chapter. As usual, Chapter II evaluates the status of freedom of expression in the Hemisphere. The third chapter reviews comparative legislation, while the fourth chapter deals with access to information. Chapters V and VII are theoretical studies, requested by the IACHR, of specific issues relating to the interpretation of Article 13 of the American Convention on Human Rights. Finally, Chapter VI, contains the report that the Rapporteurship produces every two years on the situation in the Hemisphere relating to the laws of criminal defamation and contempt (*desacato*). This year, the report also covers the most recent cases before the Inter-American Court of Human Rights in this area.

4. Since its creation, the Rapporteurship has received information from many sources regarding situations that potentially affect the full exercise of freedom of expression, as well as progress made in guaranteeing the exercise of this right. Throughout 2004, the Office of the Special Rapporteur constantly received all kinds of information and evaluated it within the context of the Declaration of Principles on Freedom of Expression, approved by the Commission in the year 2000 as an authorized interpretation of Article 13 of the American Convention on Human Right and an important instrument to help states confront problems and protect the right to freedom of expression. Chapter II of the present report examines the situations reported to the office during 2004. Although the methodology used to produce this chapter remains essentially the same, the way it has been presented and organized has been altered in order to highlight how the reported situations relate to the principles in the Declaration.

5. Throughout its existence, the Rapporteurship has used the situations reported across the Hemisphere to highlight the challenges facing those wishing to exercise their freedom of expression: aggression against journalists, murders of journalists, the absence or

¹ See: www.cidh.org/relatoria

² The Office would like to thank all the interns of 2004 for their hard work and important contributions to the promotion and defense of freedom of expression: Elvira Anderson, Carlos Domínguez, Fayza Elmostehi, Eric Heyer, Sonia Pérez, Julieta Sandoval, Susan Schneider, and Carlos Zelada.

inadequacy of laws to guarantee access to information, and the existence in many states in the region of laws of contempt. Again this year, these situations were repeated. But, as in its 2003 report, the Rapporteurship considers it important also to bring to our attention other threats to freedom of expression in the Americas, such as the concentration of ownership of the media in some parts of the Hemisphere, which directly affects diversity of ideas, and the financial pressures experienced by some media, which can indirectly violate their freedom to disseminate information and the public's freedom to receive it. Furthermore, the situations created by a lack of professionalism by some social communicators become a problem when states are then tempted to use legal mechanisms to control the media. The Rapporteurship stresses how important it is for the media in general and social communicators in particular to accept the challenge entailed in operating a self-regulating activity that is essential for democracy.

6. Chapter III of the current report resumes the Rapporteurship's practice of conducting comparative law studies, with backing from the Heads of State and Government at the Third Summit of the Americas, when they agreed to commit themselves to disseminate comparative jurisprudence.³ The first part of the chapter summarizes jurisprudence of the United Nations Committee on Human Rights relating to freedom of expression, which contributes to the interpretation of this right within the inter-American system, and is also a useful tool for professionals and other interested parties. The second part of the chapter covers the judgments issued under States' domestic laws during 2004, which either tacitly or explicitly incorporate international laws to protect freedom of expression. The publication of these cases might be useful in helping other judges to issue similar judgments with the backing of comparative jurisprudence from Member States.

7. Chapter IV complies with the mandate assigned to the Rapporteurship by OAS General Assembly resolution 1932 (XXXIII-0/03), repeated in 2004 in resolution AG/RES. 2057 (XXXIV-0/04), to continue reporting, in its annual report, on the state of public access to information in the region. This year, in the first part of the report, the Rapporteurship evaluates the relationship between access to information and economic development, and then goes on to review any changes in the region regarding access to information.

8. The Inter-American Court of Human Rights and the IACHR maintain that freedom of expression is an indispensable requisite for the very existence of a democratic society. Historically, freedom of expression has been considered necessary to protect the political stability and progress of society, but the Rapporteurship considers that it is also necessary to be aware that freedom of expression and access to information transcend the political arena and are an essential tool in the economic development of a people. The rights to freedom of expression and access to information prove, almost palpably, the interdependence of human rights as a whole, and are, at the same time, a mechanism that strengthens this interdependence.

9. As indicated above, the concentration of ownership of the media can become a threat to freedom of expression when it limits the diversity of ideas and opinions in a democratic society. In recent years, the Rapporteurship, particularly during its visits to countries, has repeatedly received reports of practices that might be considered to amount to those of a

³ Action Plan, Secretariat for Summit Process, OAS, 7 (April 22, 2001), which can be accessed on <http://www.summit-americas.org/Documents%20for%20Quebec%20City%20Summit/Quebec/plan-e.pdf>.

monopoly or oligopoly. Chapter V of this report looks into the consequences of this type of concentration. To do this, it analyzes the implications, studies the judgments of the European human rights system, and suggests guidelines for the inter-American system.

10. Chapter VII attempts to contribute to the interpretation of the last paragraph of Article 13 of the American Convention on Human rights regarding the prohibition of any propaganda for war and any advocacy of national, racial, or religious hatred.⁴ The report studies the jurisprudence of the European system and of the U.N. Committee on Human Rights to suggest guidelines that would be compatible with the terms in which Article 13 of the American Convention on Human Rights is drafted.

11. Finally, Chapter VI reverts to the traditional evaluation by the Rapporteurship every two years of the laws of criminal defamation and the existence of laws that contemplate a crime of contempt (*desacato*). This year, in addition to evaluating the changes that have taken place on this issue over the last two years in the Hemisphere, a description is included of two relevant judgments handed down by the Inter-American Court of Human rights during 2004 in the cases *Herrera Ulloa v Costa Rica*, and *Canese v. Paraguay*.

12. This hard work by the Rapporteurship has consolidated its role within the Organization of American States as the office for promoting and monitoring respect for freedom of expression in the Hemisphere. This enhanced role is, in turn, generating substantially increased expectations within the Hemisphere regarding the work and performance of the Rapporteurship. Those who work and collaborate with the Rapporteurship are responding to this challenge with dedication and commitment. To meet this demand, we need not only the institutional and political backing that the Rapporteurship has received since its inception, but also financial support because without it, the range and execution of the activities required by its mandate will be impossible. The Rapporteurship does not directly receive funding from the Regular Fund of the OAS and therefore depends to a great extent on voluntary contributions from some states and on contributions from foundations and cooperation agencies for specific projects. Therefore, we must once more exhort all States in the region to follow in the footsteps of those countries that have responded to the appeal from hemispheric summits to support the Rapporteurship. The Plan of Action approved by the Heads of State and of Government at the Third Summit in Quebec City, Canada in April 2001, states that “to strengthen democracy, create prosperity and realize human potential, our Governments will support the work of the inter-American human rights system in the area of freedom of expression through the Special Rapporteur for Freedom of Expression of the IACHR.”

13. The Rapporteurship acknowledges with thanks the financial contributions received in 2004 from Argentina, Brazil, Costa Rica, the United States, and Peru. The Rapporteurship urges the other states once again to contribute their much-needed support. Donations were also received from the Ford Foundation, the Swedish International Development Cooperation Agency (SIDA), the Danish Human Rights Program for Central America (PRODECA), the Spanish Agency for International Cooperation (AECI), and the

⁴ Article 13.5: 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 punished by law.

Swedish NGO Foundation for Human Rights. Some of these contributions will be essential for work to continue in 2005.

14. The present report thus summarizes the dedicated work throughout the year of the staff, the interns, and the partners of the Rapporteurship. The aim of our work continues to be to enhance the environment in which freedom of expression may be exercised, and so strengthen democracy, and ensure the wellbeing and progress of those who live in the Americas. However, for the work of the Office of the Rapporteur to succeed in this aim, there must be a response at the local level in each of the countries in the Americas from states, civil society, social communicators, and each individual, for whom, in the final instance, these pages are written.

CHAPTER I

GENERAL REPORTS

A. Mandate and competence of the Office of the Special Rapporteur for Freedom of Expression

1. The Office of the Special Rapporteur for Freedom of Expression is a permanent office, with functional autonomy and its own budget. The Inter-American Commission on Human Rights created the Office in exercise of its authority and competence. The Office operates within the legal framework of the Commission.¹

2. The Inter-American Commission on Human Rights (IACHR) is an organ of the Organization of American States (OAS) whose principal function is to promote the observance and defense of human rights and to serve as an advisory body to the Organization on this subject. The Commission's authority derives mainly from the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man and the Charter of the Organization of American States. The Commission investigates and rules on complaints of human rights violations, conducts on-site visits, prepares draft treaties and declarations on human rights and prepares reports on the human rights situation in countries in the region.

3. The Commission has addressed issues pertaining to freedom of expression through its system of individual petitions, ruling on cases of censorship,² crimes against journalists and other direct or indirect restrictions on freedom of expression. It has spoken out about threats against journalists and restrictions placed on the media in its special reports, such as the Report on Contempt (*Desacato*) Laws.³ The Commission has also studied the status of freedom of expression and information through on-site visits and in its general reports.⁴ Lastly, the Commission has requested precautionary measures for urgent action to prevent irreparable harm to individuals.⁵ In several cases, such measures were adopted to ensure full enjoyment of freedom of expression and to protect journalists.

4. At its 97th regular session in October 1997, and in exercise of its authority under the Convention and its own Rules of Procedure, the Commission decided, by unanimous vote, to create the Office of the Special Rapporteur for Freedom of Expression (hereinafter "Office of the Special Rapporteur"). It was created as a permanent unit that is functionally autonomous

¹ See Articles 40 and 41 of the American Convention on Human Rights and Article 18 of the Statute of the Inter-American Commission on Human Rights.

² See Inter-American Court on Human Rights, "The Last Temptation of Christ" Case (Olmedo Bustos *et al.* v. Chile). Judgment of February 5, 2001, VII Article 13: Freedom of Expression; Francisco Martorell v. Chile in the Annual Report of the IACHR (1996).

³ IACHR, *Annual Report 1994*, Report on the Compatibility of "*desacato*" laws with the American Convention on Human Rights, OEA/ser.L/V/II.88, Doc. 9 Rev (1995).

⁴ See, *Report on the Situation of Human Rights in Mexico*, OEA/Ser.L/V/II.100 Doc.7 rev., September 24, 1998 and *Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/II. 102 Doc.9 rev.1, February 1996, and more recently, *Justice and Social Inclusion: The Challenges facing Democracy in Guatemala*, OAS/Ser.L/V/II.118 Doc.5 rev.1, December 29, 2003, and *Report on the Situation of Human Rights in Venezuela*, OAS/Ser.L/V.118 Doc.4 rev.1, October 24, 2003.

⁵ Article 25(1) of the Statute of the Commission states that: "In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons."

and has its own operating structure. In part, the Office of the Special Rapporteur was created in response to the recommendations of broad sectors of society in different States throughout the Hemisphere who shared a deep concern over the constant restriction of freedom of expression and information. Moreover, through its own observations regarding the situation of freedom of expression and information, the IACHR perceived serious threats and obstacles to the full and effective enjoyment of this right, which is so vital for the consolidation and advancement of the rule of law. At its 98th special session in March of 1998, the Commission determined what the general characteristics and functions of the Office of the Special Rapporteur would be and decided to establish a voluntary fund for economic assistance for the Office. In 1998, the Commission announced a public competition for the position of Special Rapporteur for Freedom of Expression in the Americas. After evaluating all the applications and interviewing several candidates, the Commission decided to appoint Argentine attorney Santiago Alejandro Canton as Special Rapporteur. He began his work on November 2, 1998. On March 22, after evaluating the applicants in a public competition, the Inter-American Commission on Human Rights (IACHR) appointed Mr. Eduardo A. Bertoni as Special Rapporteur for Freedom of Expression of the IACHR. Mr. Bertoni took office in May 2002, replacing Mr. Santiago Canton, who is currently the Executive Secretary of the IACHR.

5. In creating the Office of the Special Rapporteur, the Commission sought to stimulate awareness of the importance of the full observance of freedom of expression and information in the Hemisphere, given the fundamental role it plays in the consolidation and advancement of the democratic system and in ensuring that other human rights are protected and violations reported; to make specific recommendations on freedom of expression and information to Member States to promote adoption of progressive measures to strengthen this right; to prepare specialized reports and studies on the subject; and to respond quickly to petitions and other reports of violations of this right in an OAS member State.

6. In general terms, the Commission stated that the duties and mandates of the Office of the Special Rapporteur should include, among others: 1. Prepare an annual report on the status of freedom of expression in the Americas and submit it to the Commission for consideration and inclusion in the IACHR's Annual Report to the General Assembly of the OAS. 2. Prepare thematic reports. 3. Gather the information necessary to write the reports. 4. Organize promotional activities recommended by the Commission including, but not limited to, presenting papers at relevant conferences and seminars, educating government officials, professionals and students about the work of the Commission in this area and preparing other promotional materials. 5. Immediately notify the Commission about emergency situations that warrant the Commission's request for precautionary measures or provisional measures that the Commission can request from the Inter-American Court, in order to prevent serious and irreparable harm to human rights. 6. Provide information to the Commission about the processing of individual cases pertaining to freedom of expression.

7. The Commission's initiative in creating a permanent Office of the Special Rapporteur for Freedom of Expression enjoyed the full support of OAS Member States at the Second Summit of the Americas. At the Summit, the Heads of State and Government of the Americas recognized the fundamental role that freedom of expression and information plays in human rights and in a democratic system and expressed their satisfaction at the creation of this Office. In the Declaration of Santiago, adopted in April 1998, the Heads of State and Government expressly stated that:

We agree that a free press plays a fundamental role [in the area of human rights] and we reaffirm the importance of guaranteeing freedom of expression, information, and opinion. We commend the recent appointment of a Special Rapporteur for Freedom of Expression, within the framework of the Organization of American States.⁶

8. At the same Summit, the Heads of State and Government of the Americas also expressed their commitment to support the Office of the Special Rapporteur for Freedom of Expression. The Plan of Action from the Summit contains the following recommendation:

Strengthen the exercise of and respect for all human rights and the consolidation of democracy, including the fundamental right to freedom of expression and thought, through support for the activities of the Inter-American Commission on Human Rights in this field, in particular the recently created Special Rapporteur for Freedom of Expression.⁷

9. At the Third Summit of the Americas held in Quebec City, Canada, the Heads of State and Government ratified the mandate of the Special Rapporteur for Freedom of Expression and added the following:

[Our Governments will] Continue to support the work of the inter-American human rights system in the area of freedom of expression through the Special Rapporteur for Freedom of Expression of the IACHR, as well as proceed with the dissemination of comparative jurisprudence, and seek to ensure that national legislation on freedom of expression is consistent with international legal obligations.⁸

B. The Office of the Special Rapporteur's principal activities

10. Since taking office in November 1998, the Special Rapporteur has participated in numerous events aimed at publicizing the creation and objectives of the Office. Widespread awareness of the existence of the Office of the Special Rapporteur will contribute to its ability to successfully carry out its assigned tasks. Activities to promote and publicize the Office's work mainly consisted of participating in international forums, coordinating activities with non-governmental organizations, advising states on proposing legislation related to freedom of expression and informing the public about the Office of the Special Rapporteur through the press. The main objectives of these activities were to increase the awareness among various sectors of society regarding the importance of the inter-American system for the protection of human rights, international standards governing freedom of expression, comparative jurisprudence on the subject and the importance of freedom of expression for the development of a democratic society.

11. The Office of the Special Rapporteur has become a strong proponent of legislative reform in the area of freedom of expression. Through its relationships with Member States and civil society organizations, the Office has launched a collaborative effort in support of initiatives to amend laws restricting the right to freedom of expression and to adopt legislation that will enhance people's right to participate actively in the democratic process through access to information.

⁶ Santiago Declaration, Second Summit of the Americas, April 18-19, 1998, Santiago, Chile, in "Official Documents of the Process of the Summits from Miami to Santiago", Volume I, Office of the Summit Follow-up, Organization of American States.

⁷ Action Plan, Second Summit of the Americas, April 18-19, 1998, Santiago, Chile, in "Official Documents of the Process of the Summits from Miami to Santiago", Volume I, Office of the Summit Follow-up, Organization of American States.

⁸ Third Summit of the Americas, April 20-22, 2001, Quebec, Canada.

12. The Office of the Special Rapporteur employs various means to protect freedom of expression. In the course of its daily work, the Office: analyzes complaints of violations of freedom of expression received by the Commission and conveys to the Commission its opinions and recommendations with regard to opening cases; follows up on cases open before the Commission pertaining to violations of this right; requests that the Commission solicit precautionary measures from the Member States to protect the personal integrity of journalists and media correspondents who are facing threats or the risk of irreparable harm; makes recommendations to the Commission regarding hearings to be granted during regular sessions and participates with the Commission in hearings having to do with alleged violations of freedom of expression; and works with the parties to achieve friendly settlements within the framework of the Inter-American Commission on Human Rights.

13. Since its creation, the Office of the Special Rapporteur has carried out advisory studies and made recommendations to some Member States regarding the modification of existing laws and Articles that impinge on freedom of expression. The objective in these situations is to make domestic legislation compatible with international standards to more fully protect enjoyment of this right. While preparing its thematic and annual reports, the Office of the Special Rapporteur corresponds with Member States to request information on specific subjects related to freedom of expression.

14. The Office of the Special Rapporteur receives information through its informal hemispheric network on the status of freedom of expression in Member States. Information is submitted by various organizations monitoring this right, journalists and other sources. In cases considered to involve a serious violation of freedom of expression, the Office of the Special Rapporteur issues press releases about the information it has received, expresses its concern to the authorities, and makes recommendations for reinstating this right. In other cases, the Office of the Special Rapporteur directly contacts government authorities to obtain further information and/or to request that the government take measures to rectify the harm that has been inflicted. The Office of the Special Rapporteur has set up a database comprising numerous press agencies, freedom of expression and human rights monitoring organizations, attorneys specializing in the field and universities, among others, for the dissemination of releases and/or any other information considered relevant.

15. Due to the Office of the Special Rapporteur's efforts to publicize its activities and mandate, diverse sectors of civil society have been able to approach the Office to protect their right to impart, disseminate and receive information.

1. Promotion and dissemination activities

16. Following is a description of the main promotion and dissemination activities carried out by the Rapporteurship in 2004.

17. On February 9 and 10, the Special Rapporteur traveled to New Haven, Connecticut to take part in the International Human Rights Program of the Yale Law School, where he gave a lecture on the mandate and activities of the Office of the Special Rapporteur.

18. From February 13-15, 2004, the Special Rapporteur presented a paper at the Annual Meeting of the Knight Center for Journalism in the Americas at the University of Texas at Austin, where the meeting was held.

19. The Special Rapporteur was invited to take part in the mid year meeting and the 60th General Assembly of the Inter-American Press Association (IAPA). The former was held in Los Cabos, Mexico, from March 12-15, 2004, and the latter in La Antigua, Guatemala, from October 22-24, 2004. At this second meeting, the General Assembly of the IAPA reaffirmed its resolute support for the Executive Secretariat of the Inter-American Commission on Human Rights (IACHR) and for its Office of the Special Rapporteur for Freedom of Expression whose work must, according to the declaration, “be distinguished by autonomy and independence, and protected from all forms of interference or pressure, whether political or governmental.” On the same occasion, the IAPA adopted a further resolution to disseminate the jurisprudence of the Inter-American Court of Human Rights in the cases *Canese v. Paraguay* and *Herrera Ulloa v. Costa Rica* and to communicate with the states so that they adopt, within their domestic jurisdictions, the principles laid down in the judgments of the Inter-American Court and to insist on the advisability of decriminalizing offenses that may be committed while exercising freedom of expression.

20. On March 26, 2004, the Inter-American Dialogue held a meeting on *Access to Information in the Americas: Key Principles*, in Washington, D.C., which the Special Rapporteur attended.

21. The Brazilian Chamber of Deputies invited the Special Rapporteur for Freedom of Expression to present a paper as part of the international seminar *Ethics on Television in Democratic Countries*, which was held in Brasilia, Brazil, on April 13, 2004.

22. From April 20-24, 2004, a seminar on privacy was held in Santiago de Chile in which the Special Rapporteur presented a paper.

23. From April 26 to May 2, 2004, the Special Rapporteur traveled to Costa Rica in connection with the sixty-second Regular Session of the Inter-American Court of Human Rights, meeting in San Jose, at which two important cases concerning freedom of expression were heard. On April 28 and 29, the Court heard the oral summing up of the case *Ricardo Canese v. Paraguay*. On April 30, and May 1, the Court heard the oral summing up of the *Herrera Ulloa v. Costa Rica* case.

24. On May 10, 2004, the Special Rapporteur was a panelist at the Hemispheric Summit of National Congresses *Press Freedom in the Americas*, which was held in Washington D.C., co-sponsored by the American University *Washington College of Law*, the Law Library of the United States Congress and the Inter-American Press (IAPA).

25. During 2004, with backing from PRODECA (the Danish Program for Human Rights in Central America), the Office of the Rapporteur carried out a series of promotion and training activities relating to freedom of expression and access to information in Guatemala, Honduras, and El Salvador. From May 23-27, the Special Rapporteur went to Tegucigalpa where, among other things, he took part in a seminar with Costa Rican journalist and academic, Eduardo Ulibarri. From June 22-24, 2004, the Special Rapporteur did similar work in Guatemala, this time with Armando González, the editor of the Costa Rican newspaper, *La*

Nación. On July 12 and 13, the Special Rapporteur took part in another course with Eduardo Ulibarri in San Salvador, with input from the Office of the Special Rapporteur's attorney, Ms. Lisa Yagel. On this occasion, the Rapporteur was received by the President of El Salvador, Elías Antonio Saca González.

26. The Special Rapporteur attended the thirty-fourth regular session of the General Assembly of the Organization of American States (OAS), held in Quito, Ecuador, from June 6-8, at which resolution AG/RES.2057 (XXXIV-O/04), "Access to Public Information: Strengthening Democracy" was approved. During his time in Ecuador, the Rapporteur took part in a plenary panel on June 7 called *Summit for International Leadership in the Americas, 2004*.

27. On June 9 and 10, the Office of the Special Rapporteur's attorney, Ms. Lisa Yagel, traveled to Sweden at the invitation of the Swedish NGO Foundation for Human Rights, the Council for the Development of Social Science Research in Africa (CODESRIA), and the African Commission on Human and Peoples' Rights, to take part in a conference: The African Commission on Human and Peoples' Rights, and the Challenges it Faces in Promoting and Protecting Human Rights. Ms. Yagel spoke about Latin American experience, from the point of view of the Inter-American Commission, and of the Office of the Special Rapporteur for Freedom of Expression.

28. From July 17-24, the Special Rapporteur traveled to Mexico, D.F., to take part in the 120th Special Session of the Inter-American Commission on Human Rights.

29. On September 10, 2004, the Special Rapporteur traveled to New York to take part in a meeting organized by the Office of the Special Rapporteur and held at the headquarters of the Committee to Protect Journalists (CPJ); the organizations that took part were those that had played an active part in presenting writs of *amici curiae* in the case of *Herrera Ulloa v. Costa Rica*. The specific subject of the meeting was: *The Judgment in the Herrera Ulloa-La Nación Case: Impact and Future*. The participating organizations (CPJ, Article 19, the World Press Freedom Committee, Open Society Institute Justice Initiative, the College of Journalists of Costa Rica, the Center for Justice and International Law, and the Costa Rican newspaper *La Nación*) signed a declaration celebrating the judgment of the Inter-American Court and the concurring opinion of its President, Judge Sergio García Ramírez and stating that criminal defamation is a disproportionate and unnecessary response for protecting a reputation. They went on to state that the arena can provide sufficient remedies for those who claim to have been defamed, but there should be no responsibility unless the accused has behaved with disregard for the truth. The declaration also states that civil defamation should provide no special protection for public figures, that in cases of public interest the complainants should be required to show that the defamatory information is false, and that the compensation awarded in a civil court should be in proportion to the damage caused. The organizations committed themselves to work towards completely eliminating the laws of criminal defamation within the Hemisphere and to support and protect journalists who are prosecuted as a consequence of the existence of those laws.

30. On September 27 and 28, 2004, a special meeting was held in Antigua of the Association of Caribbean Mediaworkers (ACM), as part of which, on the second day, there was a module dealing with legal matters. The first Vice President of IACHR, Clare K. Roberts, made a presentation describing the inter-American human rights protection system, and the Office of the Special Rapporteur's attorney, Ms. Lisa Yagel, described the work of the Special Rapporteur and the standards applied by the inter-American system with regard to freedom of expression.

31. The Special Rapporteur was invited to attend the presentation of the Maria Moors Cabot awards made by the Columbia University School of Journalism, in New York, on October 5, 2004. The following day, he took part in an informal discussion on the state of press freedom in Latin America in the Americas program of the Committee to Protect Journalists (CPJ).

32. On November 1, 2004, the Special Rapporteur gave a lecture in the Law School of the Columbia University in New York, sponsored by the *Columbia Latin American Business Association*, and the Columbia University Institute for Human Rights. The paper dealt with the subject: *Freedom of Expression in the Americas: recent judgments by the Inter-American Court of Human Rights and the work of the Office of the Special Rapporteur for Freedom of Expression*.

33. On November 15, in conjunction with the *Woodrow Wilson International Center for Scholars*, the Office of the Special Rapporteur organized a seminar on *The Role of the Mass Media in Consolidating Democracy* in Washington D.C. The seminar studied the role played by the media during the transition to democracy by Latin American countries and the new challenges facing them in their relations with the public and democratic governments.

34. On November 22, at the invitation of the Open Society Institute Justice Initiative, the Special Rapporteur traveled to London, England, to take part in an international meeting covering *Access to Information: From "soft law" to "hard law". International Meeting on Freedom of Information, Litigation, and Promotion Strategies*.

35. On December 11, the Rapporteur was invited to give a keynote lecture on freedom of expression and the mass media in the framework of the Human Rights and Freedom of Expression Course of the Ibero-American University of Mexico. On December 10, he took part in a workshop with academics and personnel from the same university's Human Rights Program and Department of Communications.

2. Presentations made to organs of the Organization of American States

36. On October 7, 2004, during a meeting of the Permanent Council of the OAS and of the Committee on Juridical and Political Affairs a dialogue was established between Member States regarding freedom of expression, with the participation of the Special Rapporteur, who thanked them for the financial backing constantly received by his Office to assist it in carrying out its work. He also stressed the fact that reports from the Office of the Special Rapporteur are considered and approved by the Inter-American Commission on Human Rights sitting in full session, which is a further indication of the support for its work. Furthermore, the Special Rapporteur mentioned that as part of his work, his Office maintains a constant dialogue with Member States and with organizations in civil society.

3. Publications

37. During 2004, the Office of the Special Rapporteur published a range of materials and books to promote freedom of expression in the Americas.

38. In April, while in Costa Rica for the hearings of the Inter-American Court of Human Rights, the Special Rapporteur, together with the Executive Director of the Inter-American Institute of Human Rights, Roberto Cuéllar, made an official presentation of their jointly-published book, *Freedom of Expression in the Americas. The First Five Reports from the Office of the Special Rapporteur for Freedom of Expression*, published under the auspices of PRODECA and of the Swedish International Development Cooperation Agency (SIDA).

39. Within the framework of the project to promote freedom of expression and access to information in Guatemala, Honduras and El Salvador, a leaflet was published containing Chapter VII of the Report of the Inter-American Commission on Human Rights: *Justice and Social Inclusion: The Challenges Facing Democracy in Guatemala*. This chapter describes the status of freedom of expression in Guatemala. This was published with backing from PRODECA and was produced with financial support from ASDI.

40. As part of the same promotion project in Central America and with financial support from PRODECA, a book was published on access to information, which includes the main contributions of the Office of the Special Rapporteur on theoretical aspects of the issue, as well as a CD-Rom containing essential information related to access to information and freedom of expression.

CHAPTER II

THE SITUATION OF FREEDOM OF EXPRESSION IN THE HEMISPHERE

A. Introduction and methodology

1. This chapter describes some aspects related to the situation of freedom of expression in the countries of the Hemisphere. Continuing the tradition of earlier reports, it also contains a table that reflects the number of assassinations of journalists in 2004, the circumstances and presumed motives of these crimes, and the status of the investigations.

2. This year, the Office of the Special Rapporteur has changed the way in which it sets forth the specific situation of each country, starting with the Declaration of Principles on Freedom of Expression, prepared by the Office of the Special Rapporteur for Freedom of Expression and adopted by the Inter-American Commission on Human Rights.¹ This change has been introduced because, since its adoption, the Declaration has emerged as a frame of reference for evaluating the possible violations of the freedom of expression in the Member States. Increasingly, the States, civil society organizations, and private persons invoke its principles to assess progress, regression, or possible violations of this right, and undertake possible actions to support this right. This does not mean that in the previous years the Declaration was not considered a guide, but that this year there was an interest in being more explicit in referring to it. Accordingly, the earlier categories of assassinations, threats, detentions, judicial actions, intimidation, censorship, and legislation contrary to the freedom of expression have given way to the categorization of facts reported to the Office of the Special Rapporteur according to the principle to which they are related. Where relevant, positive actions are treated in a separate section on progress, so as to get a clearer view of the countries in which there was progress, such as the adoption of laws for access to information consistent with the Declaration, draft legislation, and judicial decisions favorable to the full exercise of the freedom of expression. The facts that could be related to Principles 10² and 11³ of the Declaration of Principles on Freedom of Expression were compiled together, considering that in more than a few cases—and as the Office of the Special Rapporteur has indicated—defamation laws are generally invoked for the same purposes as *desacato* laws.⁴

¹ The idea of developing a Declaration of Principles on Freedom of Expression was born out of recognition of the need to set forth a legal framework to regulate the effective protection of the freedom of expression in the Hemisphere, incorporating the leading doctrines recognized in the various international instruments. The Inter-American Commission on Human Rights approved the Declaration prepared by the Office of the Special Rapporteur during its 108th session in October 2000. That declaration is fundamental for interpreting Article 13 of the American Convention on Human Rights. Its approval is not only an acknowledgement of the importance of protecting the freedom of expression in the Americas, but it also incorporates into the inter-American system the international standards for the more effective exercise of this right (see <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=25&IID=1>).

² Principle 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.

³ Principle 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.

⁴ IACHR, *Annual Report 2002*, OEA/Ser.L/V/II.117, Doc. 5 rev. 1, March 7, 2003, Vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter V.

3. This chapter reflects information corresponding to 2004. The Office of the Special Rapporteur for Freedom of Expression receives information from various sources⁵ that describes the situation related to the freedom of expression in the States of the Hemisphere. Once the information is received, and mindful of the importance of the matter, it is analyzed and checked. Once this task is completed, it is grouped based on the principles, and the Office of the Special Rapporteur, for the purposes of this Report, reduces the information to a series of emblematic examples to reflect the situation of each country in relation to respect for and the exercise of the freedom of expression. In most of the cases cited, the sources of the information are given. The omission of some states indicates that no information has been received; their omission should be interpreted only in this light.

4. Finally, the Office of the Special Rapporteur would like to thank each of the States and civil society in the Americas as a whole for sending information on the situation of the freedom of expression. The Office of the Special Rapporteur urges them to continue and expand on these practices for the benefit of future reports.

B. Evaluation

5. In 2004 the exercise of the freedom of thought and expression in the Hemisphere continued to face the same types of problems that have been mentioned by the Office of the Special Rapporteur in recent years, but there was a clear increase, in some countries, of acts of violence against social communicators.

6. Cuba continues to be the only country in the Hemisphere in which the freedom of expression is violated categorically, and, therefore, it is the only state in which it can be said that Principle 1 of the Declaration of Principles on Freedom of Expression is systematically violated.⁶

7. Based on what is reflected in this report, once again cases have been presented of assassinations of journalists killed because of their work. In this connection,

the Office of the Special Rapporteur recalls that Principle 9⁷ is very clear on establishing that assassinations of social communicators violate the rights of individuals and severely restrict the freedom of expression. On four occasions the Office of the Special Rapporteur noted its concern through press releases, particularly in relation to cases that occurred in Brazil, Mexico, and Nicaragua. A total of eleven assassinations are reported in this report (Brazil, 2; Haiti, 1; Mexico, 3; Nicaragua, 2; Peru, 2; Dominican Republic 1), although it should be noted that there were other deaths of social communicators in which the relationship to their professional activity was not sufficiently clarified so as to be able to consider them attacks on the freedom of expression.

⁵ The Office of the Special Rapporteur receives information sent by independent human rights organizations and organizations for the defense and protection of the freedom of expression, independent journalists directly affected, and information request by the Office of the Special Rapporteur of the representatives of the Member States of the OAS, among others.

⁶ Principle 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.

⁷ Principle 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.

8. Physical assaults and threats also continue having a negative impact on the full exercise of the freedom of expression. Principle 9 also emphasizes that such situations restrict this fundamental right. While it is true that in many countries one can find wide-ranging discussion and criticism of government policies in the media, it is no less true that such legitimate activity has brought as a consequence assaults or threats, which are unacceptable in a democratic society. Acts at odds with Principle 9 were reported, in 2004, from a larger number of countries: Argentina, Brazil, Colombia, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, Dominican Republic, Trinidad and Tobago, Uruguay, and Venezuela.

9. As in the preceding year, in 2004 there were public demonstrations in several countries of the Hemisphere. Many of them ended in acts of violence, whose victims of which included journalists, cameramen, and other employees of media outlets who covered these events. Such situations occurred in Venezuela, Haiti, El Salvador, and Peru.

10. Even though state agents may not have been directly involved in the possible violations of Principle 9 mentioned in this report, the Office of the Special Rapporteur notes that it is an obligation, emanating from the American Convention, not only to respect human rights, but also to guarantee their exercise. For that reason, as the Principle in question says: "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." The Office of the Special Rapporteur once again calls on the States to ensure they draw on all legal mechanisms within their reach to carry out this duty, so as to show their unequivocal will to guarantee the free exercise of the freedom of expression. Impunity for such acts should be eradicated in the Hemisphere.

11. In addition, judicial actions continued that may have a chilling effect on the exercise of the freedom of expression. Criminal proceedings against those who criticize matters of public interest, whether by using laws on *desacato*, or those on slander, libel, or criminal defamation, persist in the Hemisphere. In many of the countries of the Hemisphere, the Office of the Special Rapporteur has found the existence or use of these laws including: Brazil, Cuba, Ecuador, Grenada, Honduras, Mexico, Panama, Paraguay, Uruguay, and Venezuela.

12. Such criminal proceedings are feasible given that many Member States continue to have in their criminal law the crime of *desacato* or criminal sanctions for criticizing public officials in the performance of their duties. Nonetheless, in 2004, major progress was seen with the derogation of constitutional support for such laws in Panama and the decriminalization of criticism when voiced by journalists in El Salvador. In Honduras, the Supreme Court, through the Criminal Chamber, ruled in favor of derogating the *desacato* law. In Mexico, to the contrary, the state of Chiapas adopted a legal reform to provide for stiffer penalties for crimes against honor provided for in the Criminal Code. The Member States need to bring their criminal legislation into line with the recommendations that emanate from the Declaration of Principles on Freedom of Expression, and the standards that emanate from the decisions, opinions, and reports of the organs of the inter-American system for the protection of human rights.

13. In the course of 2004, two important judgments on criminal defamation were handed down by the Inter-American Court of Human Rights, in the cases of *Mauricio Herrera v. Costa Rica* and *Ricardo Canese v. Paraguay*, which largely support the opinions that the Commission, and its Office of the Special Rapporteur, have stated with regard to criminal

defamation.⁸ The Office of the Special Rapporteur urges the States to take these precedents into account in possible legal reforms.

14. Principle 8 of the Declaration clearly establishes: “Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.” In 2004, there were worrisome situations in which social communicators were placed on trial for refusing to reveal the identity of their sources. In other cases, their files were searched and their notes were seized, or they were asked to hand them over. Such situations were found in Argentina, Canada, Chile, the United States, Mexico, and Venezuela. By way of contrast, in El Salvador, and in the province of Tucumán, in Argentina, bills were passed that guarantee the confidentiality of sources.

15. Access to public information continued to be on the agenda of several Member States. This right is enshrined in Principle 4⁹ of the Declaration. In Ecuador and the Dominican Republic, laws were adopted providing for access to public information. In Argentina, debate continued on a proposed access-to-information law. Nonetheless, the Office of the Special Rapporteur stated its concern over amendments made to the bill by the Argentine Senate that could be detrimental for access to information. In Honduras, proposed legislation was introduced on the matter.

16. Principle 7 of the Declaration establishes: “Prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments.” The Inter-American Court has also noted that “One cannot legitimately rely on the right of a society to be honestly informed in order to put in place a regime of prior censorship for the alleged purpose of eliminating information deemed to be untrue in the eyes of the censor.”¹⁰ Nonetheless, Venezuela adopted the Law on Social Responsibility in Radio and Television, which contains conditions of accuracy and timing of informational programs, despite repeated reminders by the Office of the Special Rapporteur and by the Inter-American Commission itself that the bill could violate the freedom of expression.

17. While both the Declaration of Principles on Freedom of Expression, at Principle 6,¹¹ and the caselaw of the Inter-American Court of Human Rights have been clear in establishing that the compulsory membership in an association prescribed by law for the practice of journalism is incompatible with Article 13 of the American Convention on Human Rights, in Nicaragua the *Colegio de Periodistas* was established; it was a step towards enforcement of Law 372 of 2000, which requires such compulsory membership, and which continues to be the law in Nicaragua. The Constitutional Chamber of the Supreme Court of Venezuela issued a resolution requiring the compulsory membership in an association prescribed by law for the practice of journalism. Information was also received on the current law including such a requirement in Bolivia.

⁸ See Chapter VIII.

⁹ Principle 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.

¹⁰ I/A Court H.R., Advisory Opinion OC-5/85.

¹¹ Principle 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.

18. As in previous years, during this year the Office of the Special Rapporteur continued to view with concern the possibility that media organizations might not always act responsibly or ethically. It should be reiterated, however, that the media organizations are mainly answerable to the public, not to the government.

19. Principle 12 of the Declaration expressly states that monopolies or oligopolies in the ownership and control of media should be subject to antitrust laws, for they conspire against democracy on restricting the plurality and diversity ensured by the full exercise of the right of all citizens to information. The concentration of media ownership impedes the plural and diverse expression of the various sectors of society. In 2004, the Office of the Special Rapporteur received reports of problems involving the excessive concentration of radio and television ownership in Guatemala. The Office of the Special Rapporteur reiterates the importance of observing this principle.

20. In Mexico, Colombia, and Bolivia, major progress was made towards greater democratization in the assignment of radio frequencies.

21. Principle 5 notes in part: "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 some countries of the region, however, the states have mechanisms for interfering in the expressions of individuals. The clearest case is Cuba, where in 2004 reports continued to come in describing acts of censorship and repression against those with a dissident voice towards the Government.

22. Article 13 of the American Convention on Human Rights expressly prohibits indirect violations of the freedom of expression,¹² this prohibition is echoed in Principle 13 of the Declaration.¹³ In 2004, acts related to this principle were reported in Venezuela, Honduras, Guatemala, Cuba, Costa Rica, and Brazil.

23. As in the previous year, it was found that the journalists' situation is generally more precarious outside of the capital cities, where they face more violence and more frequent direct and indirect pressures, as is the case in Argentina, Brazil, Colombia, Guatemala, Mexico, and Peru.

24. Finally, and as has been noted in previous reports, the Office of the Special Rapporteur continues to consider it necessary to strengthen the political will of the Member States to carry out reforms in their legislation to ensure society the broad exercise of the freedom of expression and information. Democracy requires broad freedom of expression and it

¹² Article 13(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."

¹³ Principle 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.

cannot deepen if mechanisms continue in place that impede its broad exercise. The Office of the Special Rapporteur reiterates the need for the States to assume a more solid commitment to respect this right, so as to achieve the consolidation of democracies in the Hemisphere.

C. Situation of the freedom of expression in the Member States

ARGENTINA

25. The Office of the Special Rapporteur is concerned that in some provinces of Argentina the journalists and other media workers and the citizens could face more difficult conditions for the full exercise of their right to freedom of expression as compared to the situation in the large urban centers, especially Buenos Aires. This becomes clear when one observes the map of reported cases of possible restrictions and pressures, contrary to the free dissemination of information, threats, and attacks on social communicators as well as pressures on journalists to reveal their sources of information.

PRINCIPLE 4 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Access to information in the hands of the state)

26. The Office of the Special Rapporteur has closely followed congressional consideration of a bill on access to information. The bill was approved by the Chamber of Deputies in May 2003. The proposal is aimed at allowing individuals access to the data bases of official organs and it establishes administrative and judicial sanctions for public officials who fail to respond to the requests. In addition, it makes public those laws, decrees, and documents that have been kept secret by the State for more than 10 years, and those not classified based on the need for secrecy. Nonetheless, consideration of that proposed legislation had been held up in the Senate. In its annual report for 2003, the Office of the Special Rapporteur urged the Senate to debate and adopt the bill in question. Finally, the Senate approved the proposal on December 1, 2004, and after making some changes sent it back to the Chamber of Deputies. The Chamber of Deputies can veto the changes made by the Senate by a two-thirds vote. The Office of the Special Rapporteur is concerned about some of the changes made to the bill, especially the exceptions made to the principle of publicity, the requirement the request be justified in a form that would be in the nature of a sworn statement, the introduction of tariffs, and ambiguity in the definition of public information.¹⁴

27. There was a similar situation in the case of the provinces of Santa Fe and Mendoza, where the legislatures have had similar proposals before them. In these cases, the senators also introduced clauses that would require showing a legitimate interest in order to obtain information,¹⁵ what is "legitimate" could be defined by state organs.¹⁶

¹⁴ International Freedom of Information Exchange (IFEX), www.ifex.org, November 9, 2004.

¹⁵ *Asociación para la Defensa del Periodismo Independiente* (PERIODISTAS), October 4, 2004, at www.ifex.org.

¹⁶ In the case of the province of Santa Fe, the clause, introduced August 26, 2004, established that the decision regarding the legitimacy of that interest would be up to a minister-coordinator of the Executive, the Presidents of both chambers of the Congress, and the President of the Judicial branch (see Inter-American Press Association, "Preocupa a la SIP restricción en Santa Fe y satisface decisión judicial en Córdoba," September 1, 2004).

**PRINCIPLE 5 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION
(Prior censorship, interference, direct or indirect pressures)**

28. The Office of the Special Rapporteur received information on a judicial decision¹⁷ in the province of Salta that was said to have prohibited a media outlet from disseminating information about a man accused of murder that could call into question the presumption of innocence.¹⁸

29. In addition, on March 10, 2004, the news program *Telefe Noticias*, was said to have been taken off the air from *Canal 23*, a state-owned station, allegedly by order of the governor of the province of San Luis, when it was reporting on a protest march against the local government's education policy. Instead of the news program, a film was shown.¹⁹

**PRINCIPLE 8 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION
(Right of social communicators to keep sources, notes, and personal and professional files confidential)**

30. On August 6, 2004, the government of the province of Neuquén presented a complaint, before the provincial courts, against the daily newspaper *Río Negro* to reveal the origin of information published in an article on August 4, 2004. The Office of the Special Rapporteur considers it positive that attorney general Ricardo Trinchero dismissed the complaint, asserting that no judicial or police organ could engage in investigative practices that might endanger journalists' privilege of confidentiality.²⁰

**PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION
(Murder, kidnapping, intimidation of and/or threats to social communicators, and material destruction of communications media)**

31. Following are some cases reported to the Office of the Special Rapporteur related to threats to and attacks on the personal integrity of social communicators and against the establishments of media outlets. All the cases mentioned here occurred in the interior.

32. On March 1, 2004, unknown persons threw paint on the car of Alfredo Valdez, host of the program *La Ciudad Despierta* on *Radio Nacional*, in the province of Tierra del Fuego. The car was parked in front of his home. The attack was similar to one that occurred days earlier against Héctor "Lito" Lavia, director and owner of the local daily newspaper *Prensa*,

¹⁷ On February 2, 2004, the editors of *El Tribuno*, in the province of Salta, received a notice in which judge Guillermo Félix Díaz ordered the paper, under threat of fines, to refrain from using "expressions, sentences, phrases, or words that might diminish in any way the presumption of innocence and from publishing the photograph of Francisco José Álvarez," accused of homicide.

¹⁸ *El Tribuno/La Nación*, "Denuncian medida de censura previa contra diario," February 12, 2004, www.lanacion.com and www.eltribuno.com, and Inter-American Press Association, "La SIP rechaza censura impuesta por un juez en Argentina a un periódico," February 6, 2004.

¹⁹ *Instituto Prensa y Sociedad (IPYS)*, "Canal de TV denuncia corte de transmisión en San Luis," June 25, 2004, at www.ipys.org.

²⁰ Reporters without Borders, "Amenazado el secreto de las fuentes en la provincia de Neuquén," August 20, 2004, and "Una decisión judicial reconoce la importancia del secreto de las Fuentes," September 10, 2004, at International Freedom of Information Exchange (IFEX), www.ifex.org.

after it published a report regarding a provincial official.²¹ On March 6, 2004, in the early morning hours, the offices of *El Diario de El Fin del Mundo*, in Ushuaia, also in the province of Tierra del Fuego, were set on fire. The fire destroyed the newsrooms and the administrative offices. According to the forensic report, the fire was intentional. The Federal Government sent the deputy secretary for media, Gabriel Mariotto, to look into the matter. On March 8, Mario Jorge Colazo, Secretary of State for the province, undertook to "investigate in depth and ensure the security of the persons and their property."²²

33. As regards the events in Tierra del Fuego, on March 1, at night, Carmen Miranda, a journalist with *El Diario del Fin del Mundo* and secretary general of the *Sindicato de Prensa* (trade union of media workers) in Ushuaia, province of Tierra del Fuego, was questioned in the street by two members of the investigations service (*Servicio de Investigaciones*) of the Provincial Police. The police wanted to learn the places of residence of other journalists in the city, arguing that they would be able to provide better protection and prevent attacks such as those suffered by Héctor Lavia and Alfredo Valdez. The next day, provincial Secretary of Security Rubén Cena apologized for the inadequacy of the procedure, though he made official the intent to draw up the list of journalists' places of residence.²³

34. In January 2004, cameraman Gustavo Aguirre and journalist Heraldo Cruz, of a local cable television station in the tourist town of Paso de la Patria, Corrientes, were beaten by several individuals. One of the individuals was reportedly identified as the son of the local intendant, and another as the chief of personnel of the local government. The attack occurred when they were taping a news report for the program *Futura TV*.²⁴

35. On June 11, 2004, members of the program *Puntodoc*, on *Canal América*, in Buenos Aires, were attacked by persons from a local night spot reported as an alleged place of sexual exploitation of young women, in the province of Córdoba. The local police refused to take the crime report from the journalists; accordingly, they had no guarantees of security.²⁵

PROGRESS

36. On December 30, 2003, the First Court of Appeals (*Cámara de Apelaciones en lo Civil, Comercial, de Minas y del Trabajo de la Primera Nominación*) of the province of Catamarca, Argentina, overturned the judgment of liability imposed on the publisher of the daily

²¹ *La Nación* (Argentina); "Misión de gobierno a Tierra del Fuego, ante ataque a periodistas," March 12, 2004, at www.lanacion.com.ar.

²² *La Nación* (Argentina); "Misión de gobierno a Tierra del Fuego, ante ataque a periodistas," March 12, 2004, at www.lanacion.com.ar, Committee to Protect Journalists (CPJ), http://www.cpj.org/cases04/americas_cases04/argentina.html.

²³ *La Nación* (Argentina); "Misión de gobierno a Tierra del Fuego, ante ataque a periodistas," March 12, 2004, at www.lanacion.com.ar.

²⁴ *Federación Argentina de Trabajadores de Prensa*, "Grave agresión a periodistas en Paso de la Patria," January 5, 2004, www.fatpren.org.ar.

²⁵ The team, directed by host Daniel Tognetti, investigated persons who by the use of deceit would take girls from the province of Misiones, in northeastern Argentina, to the province of Córdoba to coerce them into prostitution. When the journalists went to the place with a relative of one of the young women, they were attacked by personnel from the establishment. The *Puntodoc* team left in their vehicle. *Asociación para la Defensa del Periodismo Independiente* (PERIODISTAS), June 17, 2004, at www.asociacionperiodistas.org/asociacion/asocia.htm.

newspaper *El Ancaesti*.²⁶ On annulling the judgment, the court considered that, based on the doctrine of actual malice, in no way had the judge's right to honor been harmed, with which the caselaw of Catamarca for the first time accepted that doctrine, which is recognized by the federal Supreme Court of Justice.²⁷

37. On May 6, 2004, the provincial law of Tucumán that protects the journalists' privilege of confidentiality with respect to their sources was adopted.²⁸

38. On June 23, 2004, the law on freedom of the press ("*ley de libertad de imprenta*") was repealed by the governor of San Luis, Alberto Rodríguez Saá, deputies, and senators. That law, which dated from the 1940s, established "press crime" ("*delito de imprenta*") and punishments such as closing, imprisonment, or sequestration of copies for those who publish news that is "subversive, seditious, obscene, immoral, or slanderous."²⁹

39. In September, Judge Raquel Villagra, of the province of Córdoba, issued a judgment favorable to a request for information by the daily newspaper *La Voz del Interior*. The paper had filed a writ of *amparo* against the Public Services Regulatory Entity (ERSEP: *Ente Regulador de Servicios Público*) of the province for delaying, without justification, access to the minutes of the regulatory agency's Board of Directors meetings. According to the judge, the refusal was arbitrary and illegal, while the request of the *La Voz del Interior* was part of the normal exercise of its right to inform.³⁰

40. In November, the Chamber of Deputies of Argentina approved a bill to amend Article 45 of the Law on Radiobroadcasting, declared unconstitutional by the Supreme Court of Justice. The amendment would give social organizations and non-profit organizations access to radio licenses, which would do away with restrictions that require that one be a commercial enterprise to be able to provide radiobroadcasting services. As of the writing of this report, the bill had yet to be approved by the Senate, a necessary step for it to be adopted definitively.³¹

²⁶ The newspaper had published a parody, in a supplement, that made reference to certain conduct by the judge, the truthfulness of which was shown.

²⁷ *El Clarín* (Argentina), "A favor de la libertad de prensa," April 20, 2004, at www.clarin.com.ar.

²⁸ *Asociación para la Defensa del Periodismo Independiente* (PERIODISTAS), analysis of March 2004, at www.asociacionperiodistas.org/asociacion/asocia.htm.

²⁹ *Clarín* (Argentina), "Derogan en San Luis una polémica ley contra la libertad de prensa," June 24, 2004, www.clarin.com.

³⁰ Inter-American Press Association, "Preocupa a la SIP restricción en Santa Fe y satisface decisión judicial en Córdoba," September 1, 2004.

³¹ World Association of Community Radio Broadcasters (AMARC), "AMARC satisfecha con resolución parlamentaria que permite a sociedad civil tener frecuencias de radio y televisión," November 16, 2004, at International Freedom of Information Exchange www.ifex.org.

BOLIVIA

PRINCIPLE 4 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Access to information held by the state)

41. On January 31, 2004, Supreme Decree 27,329 was adopted. Some organizations petitioned the President of the Republic, Carlos Mesa Gisbert, to review it, for it included restrictions such as a prohibition keeping prosecutors from releasing information on a judicial investigation, and it categorized military and economic activities as classified, along with information on activities to ensure territorial integrity and on trade negotiations.³² As this report was being prepared, a bill on access to information prepared by the Presidential Anti-corruption Office was being consulted and reviewed.

PRINCIPLE 6 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Compulsory membership in an association for the practice of journalism)

42. Bolivia requires a university degree in order to work as a journalist, and one must be entered in a National Registry.³³ While according to the information received most of those graduating from programs of study other than social communications can work as journalists, the Office of the Special Rapporteur urges that the provisions establishing those requirements be eliminated, in keeping with the caselaw of the Inter-American Court of Human Rights on this specific issue, and the Declaration of Principles on Freedom of Expression.

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43. On May 14, 2004, the cabinet ministers and the President of the Republic, Carlos Mesa Gisbert, signed a Supreme Decree for Community Radiobroadcasting. In the regulations approved, there are no limitations on power or frequency, accordingly, it gives full access to the country's radio spectrum. The law gives the communities, mostly indigenous and rural, the capacity to run their own radio and television stations and opens the door to such stations having advertising.³⁴

³² *El Diario* (Bolivia), "Decreto sobre transparencia de información será revisado," March 3, 2004, www.eldiario.net, Inter-American Press Association, Country-by-Country Reports, Annual Assembly, at www.sipiapa.com, October 2004.

³³ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, at www.sipiapa.com, October 2004.

³⁴ International Freedom of Expression Exchange (IFEX), May 26, 2004, at www.ifex.org, letter from AMARC-BOLIVIA.

BRAZIL

PRINCIPLE 6 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Compulsory membership in an association for the practice of journalism)

44. In August, a legislative initiative proposed by professional organizations was sent for consideration to the Chamber of Deputies, which sought to oversee the activity of journalists and create a Federal Journalism Council and Regional Journalism Councils in the country's 26 states. The councils proposed would have the authority to "orient, discipline, and oversee" the exercise of journalism, and to impose sanctions on those who exercised it "irresponsibly," through warnings, fines, or suspension of professional registration for up to 30 days, or definitive expulsion. In addition, the proposal required that journalists be registered with the Council as a condition for exercising their profession. Nonetheless, the initiative was not well-received in Congress, where in November different parliamentary groups signed an agreement to vote on and squarely reject the proposal.³⁵

PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Murder, kidnapping, intimidation of and/or threats to social communicators and the material destruction of communications media)

45. This year once again journalists were murdered in Brazil. On April 24, 37-year-old journalist José Carlos Araujo, of *Radio Timbaúba FM*, was murdered. Araujo addressed police-related issues. On April 27, 2004, Helton Jonas Gonçalves de Oliveira was arrested; he had reportedly confessed to the murder,³⁶ and had indicated that it was because Araujo had accused him, on his program *José Carlos Entrevista*, of being responsible for several crimes, which he denied.³⁷ On July 11, 2004, Jorge Lourenço dos Santos, owner and commentator on the radio station *Criativa FM*, was murdered in the state of Alagoas, in the Brazilian Northeast.³⁸ On his program, dos Santos criticized local politicians and businesspersons. He had received death threats and had been targeted in two prior assassination attempts. Dos Santos had also been involved in politics and had run for the local council in a neighboring community.³⁹

46. On August 12, 2004, the daily *A Crítica* of Manaus, state of Amazonas, reported that its journalists had received death threats and had suffered persecution and intimidation. Among those impacted were the team made up of reporter Gerson Dantas, photographer Antônio Lima, and driver Ednelson Arruda.⁴⁰ The paper's columnist Orlando Farias de Lima,

³⁵ *Estado*, "Acordo enterra projeto que cria Conselho Federal de Jornalismo," at www.estado.com.br, November 12, 2004 and Inter-American Press Association, "Preocupa a la SIP proyecto de ley en Brasil, contrario a la libertad de expresión y de prensa," press release of August 10, 2004.

³⁶ The police unit at Timbaúba also established that Gonçalves de Oliveira was assisted by Marcelo Melo, and a third person who allegedly provided them with a motorcycle.

³⁷ Reporters without Borders, "Asesinado un periodista en el Estado de Pernambuco," www.rsf.fr May 5, 2004. Committee to Protect Journalists, *Otro Periodista Asesinado*, April 30, 2004, at <http://www.ifex.org>.

³⁸ Dos Santos was killed in front of his house, in Santana do Ipanema, some 200 kilometers from Maceió.

³⁹ Committee to Protect Journalists, "Periodista radial muere asesinado en el estado nororiental de Alagoas," July 14 2004, at International Freedom of Information Exchange (IFEX), www.ifex.org.

⁴⁰ The team was headed to the district of President Figueiredo to evaluate the conditions of the city and the repercussions of the jailing of the mayor, when it was followed by five cars. The team had to return, escorted by Military Police and the Civilian Police of Manaus.

editor-in-chief Taiza Brito, and other journalists also received death threats, after disseminating information on a police operation that culminated in the detention of several public officials and businesspersons.

PRINCIPLES 10 AND 11 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Use of defamation laws by public officials, and *desacato* laws)

47. This year, the Office of the Special Rapporteur received information on a decision of July 6, 2004, by the Court of Appeals of Pará that confirmed a guilty judgment⁴¹ against journalist Lúcio Flávio Pinto, director of the daily *Jornal Povo* of Belém, the capital of Pará. In 2000, Pinto published information criticizing a decision of a judge who brought the criminal action against him. Pinto appealed the decision to the same Court, but his appeal was rejected. Other remedies being pursued by Pinto may be analyzed in the Court of Appeals and in the Federal Supreme Court.⁴² In previous reports, the Office of the Special Rapporteur has described proceedings against journalists who publish reports and criticisms of public officials, particularly those related to judicial decisions. These proceedings are possible due to the existence of criminal laws that may be invoked by public officials, and which could have a chilling effect for those who wish to participate in the free democratic debate. The Office of the Special Rapporteur urges Brazilian authorities to review this legislation in light of the standards established by the inter-American system.

PRINCIPLE 13 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Indirect violations of the freedom of expression)

48. In May 2004, the Office of the Special Rapporteur expressed its concern through a press release⁴³ regarding the case of journalist Larry Rohter, correspondent of the U.S. newspaper *The New York Times*, whose visa was cancelled on May 11, 2004, by the government of Brazil after he published information on certain personal conduct by the President of Brazil.⁴⁴ The newspaper's attorneys sent a letter to the government, and on May 17, 2004, Minister of Justice Márcio Thomaz Bastos revoked the decision and closed the case.⁴⁵

⁴¹ In February 2003, the 16th Criminal Jurisdiction of the Forum of Belém convicted Pinto and sentenced him to one year in prison, at trial. In its July decision, the appellate court modified the penalty to a fine of some US\$3,500, as it was his first conviction.

⁴² *Asociación por la Defensa del Periodismo Independiente* (PERIODISTAS), "Periodista apela condena penal," July 29, 2004 at www.ifex.org.

⁴³ Press Release of the Special Rapporteur for Freedom of Expression 105/04 at http://www.cidh.org/Office_of_the_Special_Rapporteur/English/Press_Rel04/PRlease10504.htm, *O Estado de Minas*, "Lula só volta atrás com retratacao de jornalista do NYT," (www.uai.com.br), May 13, 2004.

⁴⁴ Law on Foreigners (*Estatuto do Estrangeiro*) (Law 6,815, of August 19, 1980). www.oas.org/juridico/mla/pt/bra/pt, Ministry of Justice of Brazil, "Nota a Imprensa" (www.mj.gov.br/noticias), May 11, 2004.

⁴⁵ Ministry of Justice of Brazil. "Thomas Bastos assina despacho sobre caso New York Times" (www.mj.gov.br/noticias), May 17, 2004, *O Estado de Minas*, "Ministro revoga portaria que cassou visto de Larry Rohter" (www.estadao.com.br), May 17, 2004.

CANADA

PRINCIPLE 8 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (The right of social communicators to keep sources, notes, and personal and professional files confidential)

49. The Office of the Special Rapporteur received information during 2004 on subpoenas of and proceedings brought against journalists which could have a detrimental effect on the right to keep sources of information, files, and personal notes confidential. As the Office of the Special Rapporteur has indicated: "The main foundation of the right to confidentiality is that within the scope of their work, and in order to provide the public with the information needed to satisfy the right to information, journalists are performing an important public service when collecting and disseminating information that would not be divulged were the confidentiality of sources not protected. This right to confidentiality involves providing legal guarantees to sources to ensure their anonymity and to avoid possible reprisals against them for divulging certain information to the press. Confidentiality, therefore, is essential to journalists' work, and to the role that society has conferred upon them to report on matters of public interest."⁴⁶

50. On January 21, 2004, the residence of Juliet O'Neill, of the daily *Ottawa Citizen*, was searched by the Royal Canadian Mounted Police. The search was pursuant to a judicial order and with the intent of discovering the governmental source who allegedly leaked information to O'Neill.⁴⁷ After the search, documentation was seized that included information on her contacts, including phone numbers, and her computer files were copied. The searches were said to have been carried out under the Security of Information Act, which prohibits the possession and dissemination of secret government information, for which the journalist and the newspaper could be subject to criminal charges.⁴⁸

51. On December 1, 2004, *Hamilton Spectator* journalist Ken Peters was found guilty of contempt of court after refusing to reveal a confidential source for a publication on problems in a retirement home. Former local council member Henry Merling identified himself as the journalist's source. On December 7, a sanction was imposed that entailed paying US\$31,600. It was a civil matter, so it was decided not to bring criminal charges.⁴⁹

CHILE

⁴⁶ Office of the Special Rapporteur for Freedom of Expression, press release of December 8, 2004.

⁴⁷ In 2003, O'Neill published reports on the case of Maher Arar, a Canadian citizen of Syrian origin who had been deported to Syria by the U.S. authorities in 2002, where, according to Arar, he was tortured. According to O'Neill's Article, the RCMP had identified links between Arar and the Al-Qaeda network.

⁴⁸ Committee to Protect Journalists (CPJ), www.cpj.org, January 22, 2004, "Canadá: CPJ condena allanamiento de policía a la oficina y residencia de una reportera del *Ottawa Citizen*," and *Ottawa Citizen* of January 20, 2004, <http://www.canada.com/ottawa/ottawacitizen/news/story.html?id=097e31a7-1ac2-4fdb-9daf-75b458fac7c7>.

⁴⁹ Reporters without Borders, "Un journaliste condamné pour avoir protégé ses sources: Reporters sans frontières dénonce un dangereux précédent," December 8, 2004.

PRINCIPLE 8 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Social communicators' right to keep sources, notes, and personal and professional files confidential)

52. On April 26, 2004, two hard drives used by journalist Jorge Molina Sanhueza and by editor-in-chief Lino Solís de Ovando G. were seized from the e-daily *El Mostrador.cl*, to copy and analyze the computers' content in the context of an investigation into an attack on the embassy of Brazil that took place March 24, 2004.⁵⁰ The seizure was pursuant to the Anti-Terrorist Act.⁵¹

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53. The daily *El Comercio* of Lima and the Asociación Nacional de Prensa of Chile brought a motion against Chile's National Director of Customs to gain access to documents concerning alleged irregularities in the importation of a car for a Peruvian legislator. On July 9, 2004, the Third Civil Court of Valparaíso granted the motion for *amparo* and indicated that access to public information was included in Article 13 of the Constitutional Organic Law of the General Bases of State Administration (*Ley Orgánica Constitucional de Bases Generales de la Administración del Estado*).⁵²

COLOMBIA

54. Since it was established, the Office of the Special Rapporteur has been reporting an anguishing annual account of the murders of journalists and media workers in Colombia, particularly those in which the relationship between their work in media and the crime was most apparent. This year, the Office of the Special Rapporteur received information on four assassinations of journalists and other media workers, without, as of the date of this report, having received confirmation of details so as to be able to establish a clear relationship between the homicides and their work as journalists.

55. The Office of the Special Rapporteur has received, with concern, the reports from different civil society organizations on impunity in cases of murders of and threats to journalists, as well as complaints regarding the sluggishness of the investigations and the delays in the judicial proceedings. The Office of the Special Rapporteur calls on the Colombian authorities to step up their efforts to undertake diligent and effective investigations that make it possible to identify and punish the persons responsible for these acts, and to establish clearly the motives in those cases in which there is no certainty as yet. The murder of social communicators has a profound chilling effect on society, even in those cases in which there is doubt (and in those cases precisely because of the doubt) as to the relationship between the crime and the victim's work in media. This effect is amplified if the citizens observe that these homicides are in impunity. The Inter-American Court of Human Rights has noted: "...the State has the obligation to use all the legal means at its disposal to combat that situation [of impunity], since impunity

⁵⁰ Weeks earlier, with authorization from the publication, detectives from the Department of Investigations had already reviewed the computers.

⁵¹ Reporters without Borders (RSF), May 3, 2004, at www.rsf.org, *El Mostrador* (Chile), www.elmostrador.cl.

⁵² Inter-American Press Association (SIP), Country-by-Country Reports, Annual Assembly, at www.sipiapa.com.

fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.”⁵³

56. Also of concern to the Office of the Special Rapporteur is that, in addition to the already-complex situation that the situation of armed conflict poses to the full exercise of the freedom of expression, threats and assaults have been increasingly common as a result of reports by news media and journalists of corruption cases involving public officials in the exercise of their duties.

PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media)

57. The Office of the Special Rapporteur considers worrisome the large number of cases reported that are related to this principle, which have diverse causes and are reported in different regions of the country. Journalists and media outlets continue to receive threats and suffer attacks in the context of the armed conflict, but also as a result of their reports of organized crime and corruption. Some journalists were forced to abandon their places of residence and even to flee the country, as has been the case of Cristian Herrero Nariño, Claudia Julieta Duque, and Luis Alberto Castaño. As for this last case, the program that Castaño directed on the radio was the only news programming in the municipality of Líbano, in Tolima, and it was suspended when he left.⁵⁴

58. On September 7 and 8, 2004, independent journalist Claudia Julieta Duque received anonymous threats by phone. Duque had already been followed by vehicles. She continued to receive threats and continued to be followed; then, on November 17, she received a phone threat warning that they would kill her daughter. Since 1999 Duque has suffered intimidation, when she began to investigate the assassination of journalist and humorist Jaime Garzón. In the course of her investigations, she has pointed to the Administrative Security Department (*Departamento Administrativo de Seguridad*, (DAS)).⁵⁵ Considering the level of the threats and the difficulties plaguing the investigation, Duque opted to leave Colombia in November.⁵⁶

59. The Office of the Special Rapporteur received information on cases of kidnappings, abductions, and threats in the context of the armed conflict. Among the journalists who were kidnapped or abducted, apparently by armed groups, have been Julien Fouchet, of

⁵³ Inter-American Court of Human Rights, *Paniagua Morales et al. v. Guatemala Case*.

⁵⁴ On September 9, 2004, Luis Alberto Castaño, director of information for the community radio station *Café 93.5*, was forced to leave the municipality of Líbano, in the department of Tolima, due to threats received and the alleged existence of a plan by the paramilitaries to assassinate him.

⁵⁵ Reporters without Borders, “Una periodista víctima de repetidas amenazas,” at http://www.rsf.fr/Article.php3?id_Article=11364, September 10, 2004, and Inter-American Press Association, Country-by-Country Reports, Annual Assembly, at: www.sipiapa.com, October 2004.

⁵⁶ Fundación para la Libertad de Prensa, “Amenazas obligan al exilio de periodistas,” <http://www.ifex.org/es/content/view/full/62914>, November 30, 2004.

Radio Nova,⁵⁷ detained in Santa Marta⁵⁸; Inés Peña,⁵⁹ of *Enlace 10*, kidnapped and tortured in Barrancabermeja,⁶⁰ and Luis Carlos Burbano Carvajal, of *Caracol Noticias Televisión* and his cameraman *Mauricio Mesa Lancheros*.⁶¹ The Office of the Special Rapporteur received reports of threats against Garibaldi López⁶²

and Diego Waldrón⁶³ of *Calor Estéreo*,⁶⁴ Barrancabermeja; the daily newspaper *El Nuevo Día*,⁶⁵ in Ibagué,⁶⁶ and Luis Alberto Castaño, mentioned above.⁶⁷

⁵⁷ Reporters without Borders, www.rsf.org, February 19, 2004, Reporters without Borders, www.rsf.org, citing information from the French news agency AFP, Reporters without Borders, www.rsf.org, February 28, 2004, http://www.rsf.org/Article.php3?id_Article=9296.

⁵⁸ On January 15, 2004, Julien Fouchet, 27 years of age, of French origin, who worked with *Radio Nova* and was a law student in Bogotá, Colombia, disappeared when at the Sierra Nevada de Santa Marta, situated by the Caribbean coast. The French Embassy officially announced his disappearance February 18, 2004. On February 27, 2004, a French diplomatic source finally reported that Fouchet had been released.

⁵⁹ Committee to Protect Journalists, www.cpi.org, February 4, 2004. An analysis of the freedom of the press in Colombia presented by FLIP in February 2004 denounced threats and attacks on the freedom of the press. See <http://www.flip.org.co/informes/2004/Enero.PDF>.

⁶⁰ On January 28, 2004, armed paramilitaries from the *Autodefensa Unidas de Colombia* (AUC) kidnapped journalist Inés Peña, 22 years of age, in Barrancabermeja, Santander, in northeastern Colombia. Peña hosts the *Cultura por la vida* segment on the news program *La Mohana*, produced on the private channel *Enlace 10*. On her program she levels criticisms at the paramilitaries in the region, in addition to denouncing human rights violations. She also works with youths on human rights issues, and is a leader of the *Organización Femenina Popular*. Peña and the organization she led had been threatened previously. The police in Barrancabermeja initiated an investigation into the incident.

⁶¹ On October 10, 2004, Luis Carlos Burbano Carvajal of *Caracol Noticias Televisión* and his cameraman *Mauricio Mesa Lancheros* were held for several hours by members of the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) in the municipality of La Divina Pastora, by the border between the departments of Nariño and Putumayo, in southern Colombia. They were producing a story on a painter's exhibit in the upper Putumayo region. Burbano was wearing his vest and ID identifying him as a journalist; even so, the members of the FARC accused him of doing work not related to journalism. They were released the next day.

⁶² On February 9, 2004, Garibaldi López, director of two radio programs on *Calor Estéreo: Actualidad en Estéreo* and *Controversia*, was threatened. That day a phone call was received at his home supposedly from the *Autodefensas Unidas de Colombia* (AUC) in which they told him: "The first was José Emeterio Rivas [journalist assassinated in April 2003], the second will be Garibaldi López, and the third Diego Waldrón." López covers various issues, including human rights violations by paramilitaries.

⁶³ On February 14, 2004, journalist Diego Waldrón, 37 years of age, director of the weekly *Siete Días* and host of the radio program *Noticias Calientes* broadcast by *Calor Estéreo* in Barrancabermeja, in northern Colombia, received a death threat at home, by the alleged bodyguard of someone close to the mayor's office. The threat was said to have been in retaliation for his comments on designations in the municipal police. He was warned to halt the criticisms of local officials or accept the consequences.

⁶⁴ Committee to Protect Journalists (CPJ), March 5, 2004, <http://www.cpi.org/cases04/americas/cases04/colombia.html>, Reporters without Borders, www.rsf.org, February 25, 2004, Committee to Protect Journalists (CPJ), www.cpi.org.

⁶⁵ On August 17, 2004, *El Nuevo Día*, a daily newspaper in the city of Ibagué, received a death threat by email that had the letterhead of the *Autodefensas Unidas de Colombia*. The email made reference to an Article from a news agency published in the paper that referred to the alleged purchase by the paramilitary group known as "Centaurus" of another group called "El Bloque de Tolima." The spokespersons for the Bloque Centauro denied responsibility for the threat.

⁶⁶ *Fundación para la Libertad de Prensa*, (FLIP), "Diagnóstico de la libertad de prensa, agosto de 2004," at www.flip.org, September 16, 2004.

⁶⁷ Reporters without Borders, "Black-out informativo en una ciudad del Departamento de Tolima," in http://www.rsf.org/Article.php3?id_Article=11477, September 29, 2004, and Inter-American Press Association, Country-by-Country Reports, Annual Assembly, at: www.sipiapa.com, October 2004.

60. The Office of the Special Rapporteur was also informed of several cases in the city of Cúcuta, in Norte de Santander, by the border with Venezuela. One of these was the case of Cristian Herrera Nariño,⁶⁸ who received several threats that led him to leave the country.⁶⁹ Journalist Jorge Elías Corredor Quintero,⁷⁰ director of the program *El Pregón del Norte*, was the target of an assassination attempt in which his step-daughter was killed.⁷¹ In June, journalists Olga Lucía Cotamo, director of regional information for RCN in Cúcuta, Angela Echeverri, host, and Fernando Fonseca, all of RCN in Cúcuta,⁷² received a threat by a pamphlet that was apparently signed by the *Ejército de Liberación Nacional* (ELN).⁷³

61. The Office of the Special Rapporteur was informed of other cases such as that of threats to journalist and human rights defender Ademir Luna,⁷⁴ and which also extended to taxi driver Fabián Correo,⁷⁵ in the Magdalena Medio region; and the case of columnist Luis Eduardo Gómez,⁷⁶ who was said to have received threats from officials in the municipality of Arboletes,⁷⁷ Silvio Sierra Sierra,⁷⁸ threatened in the city of Popayán,⁷⁹ and Geovanny Serrano,⁸⁰ intimidated

⁶⁸ Reporters without Borders, "Varios periodistas amenazados en Cúcuta (Norte de Santander)," in: http://www.rsf.fr/Article.php3?id_Article=10650, June 16, 2004, *Fundación para la Libertad de Prensa* (FLIP), "Diagnóstico de la libertad de prensa, septiembre 2004," at: www.flip.org, October 7, 2004.

⁶⁹ In March and April, Cristian Herrera Nariño, in charge of the judicial section of the daily *La Opinión*, of Cúcuta, received six anonymous threats and insults after publishing, in April, an article about the increase in car theft in the city. On June 10, Herrera and his photographer Carlos Patiño were assaulted by an agent from the judicial police (DIJIN) while they were taking photographs of an alleged drug trafficker during a police operation. That same night, two men passed by Herrera's home to warn him not to publish the photographs. In addition, he had been warned of a plan to assassinate him. Finally, in September, Herrera opted to leave Colombia.

⁷⁰ Committee to Protect Journalists (CPJ), April 27, 2004, http://www.cpj.org/news/2004/Colombia27apr04na_Sp.html, and Inter-American Press Association, Country-by-Country Reports, www.sipiapa.com.

⁷¹ On April 22, 2004, at night, two men arrived at the home of journalist Jorge Elías Corredor Quintero, who directs the radio program *El Pregón del Norte* for the radio station *La Voz del Norte* in the city of Cúcuta. One of the men took out a weapon and shot at him. Corredor tried to defend himself but a bullet hit his step-daughter Livy Sierra Maldonado, 20 years old, who died instantly. He was under police protection, and the security forces offered 50 million pesos (about US\$19,000) as a reward for information leading to the arrest of the killers.

⁷² International Freedom of Expression Exchange, www.ifex.org, June 11, 2004, "Amenazados periodistas de RCN en Cúcuta," Reporters without Borders, "Varios periodistas amenazados en Cúcuta (Norte de Santander)," at http://www.rsf.fr/Article.php3?id_Article=10650, June 10, 2004, and Inter-American Press Association, Country-by-Country Reports, Annual Assembly, at: www.sipiapa.com, October 2004.

⁷³ On June 8, 2004, threats were made, by means of a pamphlet, against Olga Lucía Cotamo, director of regional information, Angela Echeverri, host, and Fernando Fonseca, journalist and manager, all of the local RCN station in Cúcuta. According to information received by the Office of the Special Rapporteur, the threat declared them military targets because of their alleged political sympathy for President Álvaro Uribe, and they were threatened to leave the country. That pamphlet was left during the nighttime hours at the local radio station. It was denounced by the respective authorities. The pamphlet was apparently signed by the *Frente Carlos Germán Velasco* of the *Ejército de Liberación Nacional* (ELN).

⁷⁴ Reported by the *Corporación Regional para la Defensa de los Derechos Humanos* (CREDHOS) in Barrancabermeja, Colombia, on March 30, 2004. See http://www.caritaspanama.org/accionesolidaria/credho_sos_periodista.htm.

⁷⁵ On March 29, 2004, in the Magdalena Medio region, at night, two men got in a taxi that belonged to Eduardo Luna, the father of journalist and human rights defender Ademir Luna, and driven by Fabián Correo. They mistook Correo for Ademir Luna, had him turn into a dead-end street, where they threatened to kill him. Correo insisted on identifying himself by his name. The assailants transmitted a death threat for Luna and then left him. Correo reported the incident to the police.

⁷⁶ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, at: www.sipiapa.com, October 2004.

⁷⁷ On September 21, 2004, Luis Eduardo Gómez, director and owner of *Revista Urabá* and columnist with the local daily newspaper of Arboletes, in the department of Antioquia, denounced having received threats from officials of the local government after he reported on irregularities in the local administration.

⁷⁸ *Fundación para la Libertad de Prensa*, "Diagnóstico de la libertad de prensa, octubre de 2004," at: www.flip.org.

⁷⁹ On October 14, 2004, in the city of Popayán, in southwestern Colombia, Silvio Sierra Sierra, host of the program *Quéjese* on *Radio Super* and correspondent for the daily *El País*, of Cali, was threatened. The intimidation was received by the continued...

by unknown persons.⁸¹ On October 2, 2004, *Semana* magazine reported in an editorial that some of its journalists had received threats, yet it was impossible to determine if they were from drug traffickers or members of the military. In addition, according to the magazine, several telephone conversations had been illegally wiretapped.⁸²

PROGRESS

62. In November, a process of awarding radio frequencies began for 400 community radio stations in different communities of Colombia, which would join 476 such radio stations already existing in the country.⁸³ The Office of the Special Rapporteur considers this process auspicious in light of Principle 12 of the Declaration of Principles on Freedom of Expression, according to which the assignment of radio and television frequencies should consider democratic criteria that guarantee equal opportunities for all individuals to access them.

63. On October 12, 2004, the Constitutional Court handed down a ruling in which it recognized journalism as a profession, but rejected all the articles of a bill that sought to set *a priori* requirements, such as having an official journalist card, or compulsory certification by the State. One is a journalist, according to the Constitutional Court, if he or she is involved in handling information, independent of having a university degree; recognition as such does not depend on the Government.⁸⁴ This judgment is consistent with Principle 6 of the Declaration of Principles on Freedom of Expression, which states, in part: "Compulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression."

COSTA RICA

PRINCIPLE 13 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Indirect violations of the freedom of expression)

64. During the month of May 2004, the Office of the Special Rapporteur received information that the government had decided not to place public announcements in the daily newspaper *La Nación*,⁸⁵ which may have been a reprisal for that paper's critical attitude.⁸⁶ The

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National Police, in the form of an anonymous phone call warning of an alleged planned to assassinate Sierra. His program has included accusations concerning common criminals and gangs in Popayán.

⁸⁰ Assessment of the freedom of press in Colombia presented by FLIP in February 2004 on threats and attacks on the freedom of press, <http://www.flip.org.co/informes/2004/Enero.PDF>.

⁸¹ On January 17, 2004, Geovanny Serrano, journalist with the *Sindicato de Trabajadores de las Empresas Públicas de Cali* (Sintraemcali), who has worked for *Caracol*, *Colmundo Radio*, *Todelar* and *Telepacífico*, in Valle del Cauca, east of Bogotá, received threats from unknown persons by telephone. The threats came after the broadcast of a television program in which he denounced alleged irregularities in municipal enterprises of Cali. In early 2003, Serrano had also denounced threats against him.

⁸² Reporters without Borders, "Los periodistas de *Semana* amenazados y vigilados Telefónicamente," October 5, 2004, in http://www.rsf.fr/Article.php3?id_Article=11518.

⁸³ World Association of Community Radio Broadcasters (AMARC), at: <http://www.ifex.org/es/content/view/full/62665>, November 19, 2004, at International Freedom of Information Exchange (IFEX), www.ifex.org.

⁸⁴ Inter-American Press Association. Country-by-Country Reports, Annual Assembly 2004. At www.sipiapa.org, October 2004.

⁸⁵ Asked by the press, then-Minister of the Presidency Ricardo Toledo asserted that the definition of investment in media was based on "scientific criteria" related to credibility, circulation, and price (he noted as means of measurement a survey of the continued...

Office of the Special Rapporteur recalls that the American Convention prohibits restrictions on the freedom of expression by indirect means.

CUBA

65. During 2004, the Office of the Special Rapporteur continued to receive reports of acts of repression and censorship of those who wish to express themselves freely in Cuba. Since its creation, the Office of the Special Rapporteur has noted that Cuba is the only country of the Hemisphere in which one can state categorically that there is no freedom of expression. This characterization still holds this year.

66. Cuba is the only country in the Hemisphere in which there is an evident and clear violation of Principle 1 of the Declaration of Principles on Freedom of Expression, which recognizes: "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." Not having a society open to pluralism in Cuba entails, therefore, a clear and systematic violation of the freedom of expression.

67. The prison conditions of dissidents who were detained and placed on trial in 2003, among them several journalists, continue to be objects of concern to the international community. Several detainees began hunger strikes to protest their conditions of detention,⁸⁷ including Léster Téllez Castro,⁸⁸ Manuel Vázquez Portal,⁸⁹ Normando Hernández González,⁹⁰ and Fabio Prieto Llorente.⁹¹

68. Last year (2004) saw the release⁹² of independent journalists Carlos Alberto Domínguez González,⁹³ Carmelo Díaz,⁹⁴ Manuel Vázquez Portal,⁹⁵ Raúl Rivero, and Oscar

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Internet search engine Google, measurements of the Office of the Presidency, as well as the unit price of a page). Those criteria were refuted by the National Chamber for Measurements of the National Institute of Advertising and other specialists in advertising.

⁸⁶ *La Nación*, "Gobierno justifica distribución de su propaganda en medios," May 28, 2004, at: www.nacion.com, *La Nación*, "Refutan criterios de Gobierno para pautar su publicidad," June 1, 2004, at: www.nacion.com.

⁸⁷ Inter-American Press Association (IAPA), press release, January 23, 2004, Committee to Protect Journalists (CPJ), "Periodista preso se declara en huelga de hambre," May 7, 2004, at www.cpi.org, Reporters without Borders (RSF), May 26, 2004, at www.rsf.org, Reporters without Borders (RSF), "Fabio Prieto Llorente ha puesto fin a su huelga de hambre," September 4, 2004, at http://www.rsf.fr/Article.php3?id_Article=11235.

⁸⁸ On January 12, 2004, independent journalist Léster Téllez Castro, director of the *Agencia de Prensa Libre Avileña* (APLA), began a hunger strike to protest his imprisonment for almost two years without having been tried.

⁸⁹ On April 30, 2004, journalist Manuel Vázquez Portal, one of the independent journalists convicted in April 2003 and sentenced to 18 years in prison, and member of the independent news agency *Grupo de Trabajo Decoro*, declared he was going on a hunger strike to protest his prison conditions.

⁹⁰ On May 7, 2004, journalist Normando Hernández González, director of the agency *Colegio de Periodistas Independientes de Camagüey (CPIC)*, and sentenced to 25 years in prison in 2003, began a hunger strike to protest his transfer to a cell with common criminals; it ended May 26.

⁹¹ On August 11 2004, journalist Fabio Prieto Llorente declared he was initiating a hunger strike over his conditions of detention; he ended it on September 2.

⁹² Reporters without Borders (RSF), June 11, 2004, at www.rsf.org, Reporters without Borders (RSF), June 24, 2004, at www.rsf.org, Reporters without Borders (RSF), June 23, 2004, www.rsf.org, Reporters without Borders (RSF), November 30, at: http://www.rsf.fr/Article.php3?id_Article=11972, Committee to Protect Journalists, "Liberados el escritor Raúl Rivero y el periodista Oscar Espinosa Chepe," November 30, 2004, at www.cpi.org.

Espinosa Chepe.⁹⁶ The release of these persons is positive, but as of the preparation of this report, of the 75 dissidents detained in 2003, 60 remain imprisoned, including 24 journalists, and the risk persisted that those released might go back to prison since they are subject to rules that keep them from expressing themselves freely. These circumstances indicate that the structural reasons for the violation of the freedom of expression persist in Cuba.

PRINCIPLE 5 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Prior censorship, interference, or direct or indirect pressures)

69. In January, the Office of the Special Rapporteur received information on searches of the homes of journalists and independent libraries in which several books, political pamphlets, and instruments of communication such as radios and fax machines were seized.⁹⁷ The agents warned that no information should be put out regarding the searches and seizures.⁹⁸

70. In the course of the year, several communicators were reportedly intimidated with the possibility that they might be targeted by trials similar to those faced by the dissidents detained in 2003. Some journalists were forced to sign letters in which they undertook not to continue their work of disseminating information, under threat of being tried on charges of violating the Law for the Protection of the National Independence and Economy of Cuba.⁹⁹ These include Isabel Rey of *CubaPress*, who was accused of disseminating “enemy propaganda.” Similar pressures were received by Fara Armenteros,¹⁰⁰ director of the news agency *Unión de Periodistas y Escritores de Cuba Independientes (UPECI)*,¹⁰¹ Héctor Riverón

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⁹³ On June 8, 2004, independent journalist Carlos Alberto Domínguez González, of the agency *Cuba Verdad*, was released after spending 27 months in prison, having been detained on February 23, 2003, as he was considered guilty of *desacato* and public disorder. He was imprisoned yet charges were never brought against him.

⁹⁴ On June 18, 2004, independent journalist Carmelo Díaz Fernández was released after 15 months in prison after being detained and sentenced in March 2003. He was given extra-penitentiary leave for health reasons; this is the legal equivalent of having one's residence under surveillance. He is the director of the *Agencia de Prensa Sindical Independiente de Cuba (APSIC)*.

⁹⁵ On June 23, 2004, independent journalist Manuel Vázquez Portal was released after being given extra-penitentiary leave for health reasons. This release is conditional and lasts for the time considered necessary. He was detained on March 19, 2003. The Chamber for Crimes against State Security of the People's Provincial Court of Havana convicted him and sentenced him, on April 4, 2004, to 18 years of prison, pursuant to Law 88, of acts against national independence. He was accused of having published Articles on the website *cubanet.org*, collaborating with *Radio Martí*, a radio station broadcast by the U.S. federal government to Cuba, having received transfers in dollars from the United States as payment for his articles, and visiting regularly with officials from the U.S. Interests Section in Havana. Vázquez is co-founder of *CubaPress*, of the *Cooperativa de Periodistas Independientes*, and he established the *Grupo de Trabajo Decoro*, a press agency devoted to current literary and cultural affairs.

⁹⁶ On November 29 and 30, journalists Raúl Rivero and Oscar Espinosa Chepe, detained during the wave of repression in March 2003, were released, on extra-penitentiary authorization, for health reasons. Espinosa Chepe, 64 years old, was in the hospital of the *Combinado del Este* prison in Havana, as of September 2004. Rivero, 59 years of age, had been transferred to that same medical center on November 26, 2004. Chepe was warned to refrain from engaging in journalism.

⁹⁷ On January 28, 2004, several journalists' homes were searched by state security agents, including that of José Antonio Reyner, in *El Cuabito*, where the agents found a journalist's tape recorder, a Samsung radio, and books, for which a document was drawn up according to which he would be subject to the courts. Also searched was the home of Robert Perera, where the “*Mártires del 13 de Marzo*” library is located; books were seized. All the books containing political writings, and a fax machine, were taken from the home of Ana María Espinosa Escobedo.

⁹⁸ *La Voz de Oriente* (Cuba), “*Realiza la seguridad del Estado registros y decomisos a periodistas independientes en Santiago*,” January 29, 2004.

⁹⁹ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, at www.sipiapa.com.

¹⁰⁰ On April 16, she was harassed and threatened by state security agents in Havana. Three individuals stopped her and questioned her about her work as a journalist, and she was warned that she could be placed on trial for her publications.

of the agency *Libertad en Las Tunas*, *CubaPress* correspondent Jesús Álvarez, Gilberto Figueredo, correspondent of the agency *Lux-info-Press*,¹⁰² Juan González González, assistant director of the agency *Línea Sur Press*, and journalist Carlos Serpa Maceira.¹⁰³

71. Some of the wives of the political prisoners detained in 2003, who have spoken out against the detentions and the prison conditions of their family members and husbands, were reportedly subject to repressive acts, such as subpoenas and measures to thwart the meetings of prisoners' family members.¹⁰⁴

PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Murders, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media)

72. The Office of the Special Rapporteur received information on mistreatment of the dissident prisoners which in some cases, as mentioned above, has led some of them to stage hunger strikes. Among those targeted by the assaults and reported to the Office of the Special Rapporteur are Normando Hernández González (director of the *Colegio de Periodistas Independientes*, who works with *CubaNet*), Adolfo Fernández Saín and Víctor Rolando Arroyo, who on January 26, 2004, were beaten by an officer at the Kilo 5½ prison, resulting in damage to their health.¹⁰⁵ After the beating, Hernández was confined to a prison cell for 100 days. On September 1, journalist Víctor Rolando Arroyo, sentenced to 26 years in prison, was assaulted by officers at the Guantánamo prison, and was later confined for 15 days to solitary confinement.¹⁰⁶ On October 13, 2004, journalist Juan Carlos Herrera, sentenced to 20 years in prison, was beaten by six prison officers at the Kilo 8 prison in Camagüey, for demanding that his rights be respected in the prison.

PRINCIPLES 10 AND 11 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Use of defamation laws by public officials, and *desacato* laws)

73. On April 26, 2004, convictions were handed down against human rights activists and independent journalists accused of *desacato* for expressions directed against the president of Cuba, resistance, disobedience, and public disorder. The persons convicted were detained on March 4, 2002, when they peacefully protested the beating of journalist Jesús Álvarez Castillo, in the province of Ciego de Ávila. Those sentenced included Juan Carlos González

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¹⁰¹ Committee to Protect Journalists, May 11, 2004, at www.cpi.org.

¹⁰² In July, they were stopped by the police and warned of the possibility of being placed on trial because of the information they put out. See Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, in www.sipiapa.com.

¹⁰³ On July 22, 2004, he was threatened, apparently by a state security agent, who warned him that he would shoot him if he continued disseminating information outside of Cuba. See Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, at www.sipiapa.com.

¹⁰⁴ On May 22, 2004, journalist María Elena Alpízar was detained by the police in Havana when she was on her way to cover the activities of the so-called "Ladies in White," as the women with family members in prison are called. Alpízar was sent to Placetas, where she lives. An activist was fined for putting her up in her home. See Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, at www.sipiapa.com.

¹⁰⁵ *Cubanet* (Cuba), February 6, 2004, www.cubanet.org.

¹⁰⁶ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, at www.sipiapa.com.

Leiva, sentenced to four years of house arrest; Delio Laureano Requiño Rodríguez, sentenced to two years and six months of prison with release on probation, and Virgilio Mantilla Arango, of the *Fundación Cubana de Derechos Humanos*, sentenced to seven years of imprisonment. Lázaro Iglesias Estrada and Carlos Brizuela Yera, of the *Colegio de Periodistas Independientes of Camagüey*, Ana Peláez García, and Odalmis Hernández Márquez, of the *Fundación Cubana de Derechos Humanos*, were sentenced to three years of imprisonment. Brothers Antonio and Enrique García Morejón, of the *Movimiento Cristiano de Liberación*, and promoters of the Varela Project,¹⁰⁷ as well as Léster Téllez Castro, of the *Agencia de Prensa Libre Avileña*, were sentenced to three years and six months in prison.¹⁰⁸

PRINCIPLE 13 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Indirect violations of the freedom of expression)

74. Since January 24, 2004, the use of the regular phone network, invoiced in pesos, has been prohibited for connecting to the Internet. Web access is now available only to persons directly authorized by the "person with responsibility of an organ or organization of the central administration." The Cuban government decided this to fight clandestine use of the Internet.¹⁰⁹ In addition, it asked Etecsa, the only Cuban telecommunications operator, to employ "all technical means necessary" to detect and impede access to the Internet by unauthorized persons.¹¹⁰

75. Some journalists reported that the authorities had been conditioning the issuance of housing permits or rationing cards to pressure them. Such is the case of independent journalists María Elena Alpízar,¹¹¹ Juan Carlos Garcell Pérez,¹¹² and Richard Roselló, who works with *Cubanet* and *Carta de Cuba*.¹¹³

ECUADOR

¹⁰⁷ The Varela Project proposes a referendum on the freedom of expression and association, the possibility of establishing companies, the release of all political prisoners, and an amendment to the electoral law. In May 2002, 11,000 signatures had been obtained.

¹⁰⁸ *Observatorio para la Protección de los Derechos Humanos*, press release, May 5, 2004.

¹⁰⁹ To access the Internet, Cubans are still able to use Internet cafes. Yet it costs US\$2.50 for 15 minutes, inaccessible for the vast majority of the population.

¹¹⁰ Reporters without Borders (RSF), January 15, 2004, at www.rsf.org.

¹¹¹ On February 9, 2004, she reported that she was being subjected to a campaign of harassment by state security. In Havana she was not given the ration card that is generally distributed in December upon presentation of the expired card from the previous year, and one's ID card. She was also required to show her ownership of her residence, a requirement only for those who have changed domicile, even though Alpízar has lived in the same house for almost 35 years. See *Cubanet*, February 19, 2004.

¹¹² On March 18, 2004, Garcell Pérez, resident in Sagua de Tánamo, province of Holguín, denounced that he and his family were being stalked, forcing him to leave his mother-in-law's house on Calle de Moa, in Holguín, since agents from the State Security Department indicated that he was there illegally. See *Cubanet* (Cuba), March 19, 2004, www.cubanet.org.

¹¹³ In April 2004, he was expelled from a residence for the third time, by the state security political police, who said that he was there illegally. See *Cubanet* (Cuba), April 13, 2004.

PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media)

76. In early 2004, the Office of the Special Rapporteur received information on two cases of threats to and assassination attempts directed against journalists. On January 26 and 27, 2004, Miguel Rivadaneira, director of *Radio Quito*, received several death threats.¹¹⁴ Rivadaneira reported that he had received threats since late 2003. The Office of the Special Rapporteur values the public condemnation of this act by government authorities, who ordered it be investigated. Information was also received about the attack on Carlos Muñoz Insúa, executive president of *Telesistema*, which took place February 9, 2004, in which his driver, Ricardo Mendoza, was killed.¹¹⁵ This attack was claimed by the Milicias Revolucionarias del Pueblo,¹¹⁶ a self-proclaimed terrorist group, which accused *Telesistema* of not broadcasting its communiqués, and threatened to carry out other attacks against communications media and journalists.¹¹⁷

77. On April 4, 2004, during the coverage of several riots in prisons in five cities of Ecuador, journalist Daniel Montalvo and cameraman Eduardo De la Cruz, of *TC Televisión*, reporter Freddy Paredes and cameraman Robert Molina, of *Teleamazonas*, and cameraman Robert Tapia along with his assistant Carlos Torres, of *Cablevisión*, were taken hostage in a women's prison in Quito.¹¹⁸ Torres, Paredes, and Molina were released in consideration of health problems on April 10. The others were released the next day.¹¹⁹

PRINCIPLES 10 AND 11 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Use of defamation laws by public officials and *desacato* laws)

78. On October 29, 2004, the Supreme Court of Justice of Ecuador upheld the guilty verdict against journalist Rodrigo Fierro Benítez, imposed December 12, 2003, and in which he was sentenced to 30 days in prison for the crime of slander (*injurias calumniosas*) against former president León Febres Cordero, and ordered to pay US\$100 in costs. The members of the Supreme Court suspended execution of the sentence imposed on Fierro since he had no criminal record, and because the sentence was no more than six months.¹²⁰

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¹¹⁴ The anonymous threats were apparently related to an interview with one of the generals of the Ecuadorian armed forces concerning possible arms trafficking in which Army involvement was suspected.

¹¹⁵ Two armed men shot at Carlos Muñoz Insúa's car; he was not injured.

¹¹⁶ Agence France Presse, at Reporters without Borders, February 13, 2004, www.rsf.fr.

¹¹⁷ International Freedom of Expression Exchange (IFEX), February 13, 2004, Reporters without Borders, February 13, 2004, at www.rsf.org.

¹¹⁸ The journalists were trying to interview some of the women in prison when they were taken, but they were allowed to continue to broadcast. On April 8, however, *Teleamazonas* decided not to continue disseminating information from the prison until the team was released.

¹¹⁹ Committee to Protect Journalists, April 14, 2004, at www.cpj.org.

¹²⁰ *La Hora*, "Corte Analiza recurso de Casación en Caso Fierro Benítez" (www.lahora.com.ec), January 23 2004, Committee to Protect Journalists, "La Corte Suprema ratifica sentencia contra periodista," November 11, 2004, at www.cpj.org.

79. On May 11, 2004, the Ecuadorian President Lucio Gutiérrez gave his approval to the Organic Law on Transparency and Access to Public Information. The Office of the Special Rapporteur issued a press release on May 21, 2004, in which it stated that such laws "must also be accompanied by regulations and interpretations that are adequate to guarantee respect for principles such as the principle of maximum disclosure, a presumption of publicity with respect to meetings and official documents...."¹²¹ The Office of the Special Rapporteur will continue to observe the process of implementing that law, which is necessary, as a practical matter, for the law to come fully into force.

EL SALVADOR

PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media)

80. The Office of the Special Rapporteur was informed that on April 28, 2004, several journalists covering the taking of the Metropolitan Cathedral in downtown San Salvador by trade unions had been physically assaulted. In addition, a car belonging to the team from *Noticiero Teledos* was destroyed, and the vehicle of *TCS Noticias* was damaged. Both are owned by *Telecorporación Salvadoreña*. Photographic equipment belonging to journalists with print media was also stolen and destroyed.¹²²

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81. On October 28, 2004, a reform was adopted to add Article 187-A¹²³ to the Code of Criminal Procedure of El Salvador, which protects the right of journalists to keep their sources confidential when they are called to testify in judicial proceedings. This reform was reportedly adopted after several cases in which pressure was brought to bear by judges on journalists to reveal their sources of information.

82. On the same date, an amendment was adopted to Article 191 of the Criminal Code decriminalizing the dissemination of unfavorable opinions by the press. The Rapporteur had informed the President of the Republic, Antonio Saca, during a meeting in July 2004, of his concern regarding the existence of laws on defamation and *desacato* in El Salvador's criminal legislation.

UNITED STATES

¹²¹ Office of the Special Rapporteur for Freedom of Expression, Press Release PREN/106/04; http://www.cidh.org/Office_of_the_Special_Rapporteur/Spanish/Compren10604.htm.

¹²² *Asociación de Periodistas de El Salvador* (APES), April 28, 2004, press release.

¹²³ Article 187-A. "Professional journalists and those persons who, though having another profession, practice journalism, shall have the right to refrain from testifying about the facts that have come to their attention by the exercise of their profession or trade, under penalty of nullity.

Similarly, professional journalists and those persons who, though having another profession, practice journalism, will have the right to refrain from revealing to any police authority, public official, or judicial official the source of the information that appears in the news, opinions, reportage, editorials they may publish in the legitimate exercise of their right to inform."

**PRINCIPLE 5 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION
(Prior censorship, interference, and direct or indirect pressure)**

83. From August 29 to September 2, in the context of protests during the Republican National Convention in New York City, several journalists were detained by the police. Some were held for several hours, and there was confusion as to the accreditations that would be recognized as valid (some journalists had accreditation from the New York City Police, while others had been accredited by the organizers of the Republican Convention). Those detained included Moisés Saman, *Newsday* photographer; Jeannette Warner and Tim Kulick of *Associated Press* and the photographer who accompanied her; Daniel Jones, of *WRDR radio*; Jennifer Whitney, of the Internet news service *Narco News Bulletin*; Nick Gehring and Beth Rankin, unaccredited journalists with the *Daily Kent Stater* of Kent State University; freelance photojournalist Geoffrey O'Connor; Kelley Benjamin, of a weekly newspaper out of Tampa, Florida; and Daniel Cashin of *Democracy Now*.¹²⁴ The Office of the Special Rapporteur was also informed of a large number of demonstrators being detained that week. The interference that those detentions may have caused in the free flow of plural information in the context of an electoral process is of concern to the Office of the Special Rapporteur.

84. In late 2004, Iranian human rights defender and Nobel Peace Prize winner Shirin Ebadi filed suit against the Treasury Department for keeping her from publishing a book in the United States. The Department's Office of Foreign Assets Control (OFAC) had warned some publishing houses, in late 2003 and early 2004, that they might face some type of legal consequence for editing writings from countries subject to trade sanctions (Cuba, Iran, and Sudan), but not for printing or publishing them.¹²⁵ In April 2004, the Treasury Department rectified its position, noting that the style corrections were permitted, and peer review for academic publications.¹²⁶ Finally, on December 17, the Treasury Department amended the regulations to allow the publishing houses to enter into contracts with writers from those countries so long as they are not representatives of their governments.¹²⁷

**PRINCIPLE 8 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION
(Right of social communicators to keep sources of information, notes, and personal and professional files confidential)**

85. In the course of 2004, the Office of the Special Rapporteur received information on several journalists who were subpoenaed to court to reveal their sources of information. In some cases they were held in contempt, including criminal contempt, for keeping their sources confidential. One such case merited a pronouncement by the Office of the Special Rapporteur in a press release of December 8; it involved a journalist from television station *WJAR-TV10*, Jim Taricani. On March 16, 2004, Taricani was fined US\$1,000 a day by District Judge Ernest C.

¹²⁴ Reporters Committee for Freedom of the Press, "Convention ends with numerous and lengthy journalist detainments," September 3, 2004, at: <http://www.rcfp.org/news/2004/0903rncarr.html>.

¹²⁵ The New York Times, www.nytimes.com February 28, 2004, <http://www.nytimes.com/2004/02/28/national/28PUBL.html?ex=1078977845&ei=1&en=Geebed16934e1508>

¹²⁶ U.S. Center of PEN International, at International Freedom of Information Exchange: <http://www.ifex.org/es/content/view/full/62553>.

¹²⁷ The New York Times, "Government Eases Rules on Writers in Sanctioned Nations," December 18, 2004, at: <http://query.nytimes.com/mem/tnt.html?oref=login&tntget=2004/12/16/books/16rule.html&intemail>.

Torres, of the United States District Court of Rhode Island, who found him in civil contempt for his refusal to reveal the name of the source who gave him a video showing an official from the mayor's office in Providence receiving a bribe from an informant for the Federal Bureau of Investigation (FBI).¹²⁸ The tape in question was protected by an order that prohibited its broadcast as it was part of an investigation into corruption. As Taricani persisted in his refusal to reveal the source, on November 4, 2004, Judge Torres began a criminal action for the crime of obstruction of justice (criminal contempt), of which he was convicted on November 18, 2004. After this verdict, Joseph Bevilacqua, a local attorney, admitted to having provided him the FBI tape. Nonetheless, on December 9, Taricani received the verdict sentencing him to six months house arrest.

86. Another case involved journalists Tim Russert,¹²⁹ host of *NBC's* news program *Meet the Press*, Judith Miller, of *The New York Times*, and Matthew Cooper, of *Time* magazine, who on May 21, 2004, were subpoenaed by a grand jury in the context of an investigation to determine who revealed the identity of an undercover CIA agent in 2003 to several journalists. Federal Judge Thomas F. Hogan, of the U.S. District Court for the District of Columbia, found Cooper¹³⁰ and Miller guilty of contempt, in August and October, respectively, after they refused to reveal their sources and hand over documentation. Hogan ordered their arrest until they agree to testify and for up to 18 months. *Time* magazine was ordered to pay a penalty of US\$1,000 daily for its refusal to hand over documentation that had been sought by the prosecutors investigating the case. The judgment was appealed. On December 8, 2004, the Circuit Court of Appeals for the District of Columbia heard oral arguments. As of the writing of this report, no decision had been issued.¹³¹

87. In August 2004, U.S. District Court Judge Thomas Penfield Jackson held the following journalists in contempt of court: Josef Hebert of *Associated Press*, James Risen and Jeff Perth of *The New York Times*, Robert Drogan of the *Los Angeles Times*, and Pierre Thomas CNN. The journalists were ordered to pay US\$500 daily for refusing to reveal their sources of information in relation to information concerning Wen Ho Lee,¹³² a nuclear scientist who in 1999 was working at the Los Alamos National Laboratory, in New Mexico.¹³³

88. A similar case involved the *Associated Press*, *National Public Radio*, and *CBS*, which in December received subpoenas to produce documents and testimony in the trial brought by Steven J. Hatfill against former Attorney General John Ashcroft and other public

¹²⁸ International Freedom of Expression Exchange, www.ifex.org, citing Reporters without Borders, April 2, 2004.

¹²⁹ Russert agreed to speak with prosecutors in August; they did not ask that he reveal any source.

¹³⁰ In August 2004, Cooper had testified on a specific source after the source released him of the pledge of confidentiality, but in October he was ordered to turn over his notes.

¹³¹ Committee to Protect Journalists, "Contempt ruling dismissed: source waives confidentiality," at: <http://www.cpj.org/news/2004/USA24aug04na.html>. "Judge Holds *Times* reporter in contempt in CIA case," October 7, 2004, at: <http://www.cpj.org/news/2004/USA07oct04na.html>.

"Judge Orders Second Journalist to Jail," October 13 2004, at: <http://www.cpj.org/news/2004/USA13oct04na.html>. Reporters Committee for Freedom of the Press, "Appeals court hears case over sources in CIA operative disclosure," December 8, 2004, at: <http://www.rcfp.org/news/2004/1208inregr.html>.

¹³² Lee had been suspected of espionage, but the charges were never brought.

¹³³ Committee to Protect Journalists, "Contempt ruling sends disturbing message worldwide," August 18, 2004, at <http://www.cpj.org/news/2004/USA18nov04na-2.html>.

officials, for having been declared a “person of interest” in the investigation into the anthrax attacks that occurred in 2001. Hatfill invoked the Privacy Act. District Judge Reggie B. Walton ordered about 100 federal prosecutors, FBI agents, and federal employees connected to the investigation to sign documents in which they agreed to waive any confidentiality agreement with reporters.¹³⁴

89. As noted by the Office of the Special Rapporteur in its pronouncement over the Taricani case: “The main foundation of the right to confidentiality is that within the scope of their work, and in order to provide the public with the information needed to satisfy the right to information, journalists are performing an important public service when collecting and disseminating information that would not be divulged were the confidentiality of sources not protected. This right to confidentiality involves providing legal guarantees to sources to ensure their anonymity and to avoid possible reprisals against them for divulging certain information to the press. Confidentiality, therefore, is essential to journalists' work, and to the role that society has conferred upon them to report on matters of public interest.”¹³⁵

90. On April 7, 2004, Antoinette Konz of the *Hattiesburg American*, and Denise Grones of *Associated Press*, after covering a speech by Supreme Court Justice Antonin Scalia, in Hattiesburg, Mississippi, received orders from U.S. marshals to destroy their tape of the speech.¹³⁶ The journalists took the case to the courts. On September 10, 2004, the Justice Department recognized that it had violated the federal law, and that the reporters and their employees would receive US\$1,000 for damages and attorney's fees. The Privacy Protection Act prohibits the government from searching or seizing journalists' tools of the trade, unless the journalist has committed a crime, or if in so doing one can prevent a death or serious bodily injury.¹³⁷

GRENADA

PRINCIPLES 10 AND 11 DE THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Use of defamation laws by public officials, and *desacato* laws)

91. In May 2004, the director of the Government Information Service, Selwyn Noel, warned the media that they could face legal proceedings if they reproduced an Article published May 15 in *KYC News* (a Miami-based newspaper) that included reports of alleged irregularities said to have been committed by the Prime Minister of Grenada, Keith Mitchell. On May 27, 2004, journalist Leroy Noel was arrested and detained at the Saint George's police post for questioning on his responsibility in disseminating information that appeared in the weekly *Spice Isle Review* related to Mitchell's alleged corruption. Leroy Noel was released after being questioned for four hours. Nonetheless, the journalist's lawyer did not discard the possibility that

¹³⁴ Reporters Committee for Freedom of the Press, “Media subpoenaed in anthrax case,” December 17, 2004, at: <http://www.rcfp.org/news/2004/1217hatfil.html>.

¹³⁵ Office of the Special Rapporteur for Freedom of Expression, press release of December 8, 2004.

¹³⁶ Justice Scalia's policy is to prohibit the taping of his speeches, but at that event he had given no such indication. Scalia apologized.

¹³⁷ Reporters Committee for Freedom of the Press, “Government concedes wrongdoing in tape seizure,” September 15, 2004, at: <http://www.rcfp.org/news/2004/0915hattie.html>.

his client might be detained once again or sued for defamation.¹³⁸ On June 2, Noel received an anonymous death threat suggesting he stop writing about the Prime Minister. Related to the same case, on June 1, 2004, Odette Campbell, host and program director, announced she was stepping down from her position at the *Grenada Broadcasting Network (GBN)*, in which the state is a 40% shareholder. That was her response to a one-week suspension after protesting against the government threat to bring charges against anyone who reproduces information implicating the prime minister in the above-mentioned corruption case.¹³⁹

GUATEMALA

92. According to information received by the Office of the Special Rapporteur, in 2004 there was an improved climate for the exercise of the freedom of expression in Guatemala, in relation to 2003. Nonetheless, there continued to be some cases of attacks on journalists, and there are worrisome aspects, such as the monopoly over open television.

93. In July, the Guatemalan State admitted to the Inter-American Court of Human Rights its responsibility in the assassination of journalist and politician Jorge Carpio Nicolle, which occurred in 1993.

PRINCIPLE 4 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Access to information held by the state)

94. On May 7, 2004, the municipality of Quetzaltenango made known its decision to refuse to provide information about the work of its offices, and to impede coverage of its working meetings. The prohibition was reportedly adopted after publications about the increase in the value of the stipends for the council sessions.¹⁴⁰

PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media)

95. Based on the information received by the Office of the Special Rapporteur, several journalists suffered assaults during their coverage of the conflicts and confrontations between the police and certain social groups. On August 31, 2004, in the department of Retalhuleu, journalists Mario Morales of *Nuestro Diario* and Edward Morales of *Guatavisión* were assaulted and had their cameras taken when they were covering an eviction from a farm. Four police and seven campesinos died in that incident. On that occasion, the following journalists were threatened and assaulted: Fredy Rojas of *Prensa Libre*, William Meoño and Marvin Guillén, of *Nuestro Diario*, Mynor Toc and Luis Romero of *Cable DX*, and Gerardo Montenegro, a journalist with *El Regional*.¹⁴¹ A similar incident occurred on August 14, 2004,

¹³⁸ Reporters without Borders (RSF), June 3, 2004, www.rsf.org, and International Freedom of Expression Exchange (IFEX), June 1, 2004, at www.ifex.org.

¹³⁹ Reporters without Borders (RSF), June 3, 2004, www.rsf.org.

¹⁴⁰ Centro de Reportes Informativos sobre Guatemala, "Comuna de Quetzaltenango niega información a la prensa," www.cerigua.org, May 7, 2004.

¹⁴¹ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, at www.sipiapa.com. Committee to Protect Journalists, September 9, 2004, at www.cpi.org, Centro de Reportes Informativos sobre Guatemala (CERIGUA), "Periodistas agredidos por policías," at International Freedom of Information Exchange, www.ifex.org.

when journalists from *Prensa Libre*, *El Periódico*, and the Office of the Human Rights Ombudsperson (*Procuraduría de Derechos Humanos*) were assaulted as they witnessed at a confrontation between vendors in the informal economy and members of the Transit Police in Guatemala City.¹⁴²

96. Two cases of threats to local journalists that were reported to the Office of the Special Rapporteur from the Alta Verapaz region. On May 29, 2004, journalist Eduardo Maaz Bol, correspondent for *Radio Punto y Correo del Norte* and *Radio Mía*, in Cobán, received a death threat from a group allegedly linked to organized crime that operates in the zone. The group, not identified, gave him a deadline for carrying out the threat.¹⁴³ On September 13, 2004, also in Cobán, journalist and correspondent Ángel Martín Tax, reporter for *Radio Sonora* and correspondent for *Prensa Libre* and *Nuestro Diario*, was the object of threatening telephone calls, which were received at a colleague's telephone number. They gave him 24 hours to leave the place. Tax had received threats in 2003.¹⁴⁴

97. Another case of threats reported in Guatemala occurred September 25, 2004. That day the director of the magazine *Panorama*, in Retalhuleu, César Augusto López Valle, received a death threat, apparently from a member of the Association of Military Veterans (*Asociación de Veteranos Militares*) of Guatemala, who warned him about information he had put out concerning the activities of that group.¹⁴⁵

PRINCIPLE 12 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Existence of monopolies or oligopolies, and the lack of democratic criteria in assigning radio frequencies)

98. The Office of the Special Rapporteur received information on proceedings brought against community radio stations. As the Commission has noted before, community radio stations are positive because they foster the culture and history of the communities, so long as they do so legally.¹⁴⁶ The Office of the Special Rapporteur reiterates the importance of establishing democratic criteria for the assignment of radio frequencies.

PRINCIPLE 13 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Indirect violations of the freedom of expression)

99. On February 26, 2004, the mayor of the city of Flores, in Petén, had reportedly gone, accompanied by another official, to the home of the owner of the radio station *Radio Petén*, and reportedly demanded of him that he return the property where the radio station was

¹⁴² Centro de Reportes Informativos sobre Guatemala (CERIGUA), "Policías agreden a periodistas", August 17 2004, at International Freedom of Information Exchange, www.ifex.org.

¹⁴³ Asociación de Periodistas de Guatemala, "Periodistas amenazados de muerte," press release by International Freedom of Information Exchange (IFEX), June 2, 2004.

¹⁴⁴ Centro de Reportes Informativos sobre Guatemala (CERIGUA), "Periodista recibe amenazas de muerte," September 22, 2004, at International Freedom of Information Exchange, www.ifex.org.

¹⁴⁵ Centro de Reportes Informativos sobre Guatemala, "Periodista Asesinado, Otro Amenazado," October 1, 2004, at International Freedom of Information Exchange, www.ifex.org.

¹⁴⁶ IACHR, "Justicia e Inclusión Social: Los desafíos de la democracia en Guatemala." Chapter VII, "La Situación de la libertad de expresión en Guatemala." OEA/Ser. L/V/II.118 Doc. 5 rev. 2, December 29, 2003.

located in exchange for a 30-year usufruct contract. The official was said to have warned that he would expropriate the property after the radio station reported that the local government had contracted machinery owned by the mayor to repair some streets.¹⁴⁷

¹⁴⁷ "Alcalde de Flores intenta Expropiar inmueble de Radio Petén," *Periodistas Frente a la Corrupción*, at: <http://portal-pfc.org/infex>, March 23, 2004.

PROGRESS

100. On January 30, 2004, the Twelfth Criminal Court acquitted Bruce Harris, then-Regional Director for Latin America of Casa Alianza (Covenant House), in a trial that began in 1997.¹⁴⁸

HAITI

101. The situation of instability that Haiti suffered in early 2004, in the framework of a series of demonstrations and disputes between the opposition and pro-government groups, led to a climate of violence that had a negative impact on the work of journalists and the media. At that time there were grave incidents, such as the death of a journalist, attacks, assaults, and threats against social communicators, as well as the destruction of media facilities. These incidents led several media to suspend their operations or shut down entirely. The situation was the subject of a pronouncement by the Office of the Special Rapporteur in a press release of January 22, 2004.

102. While in the last months of the year the situation was more stable, the Office of the Special Rapporteur is still concerned about the reports on the situation in some regions of the interior, with a major presence of irregular armed groups¹⁴⁹ said to be threatening the work of journalists.

103. In its 2003 report on the Situation of Freedom of Expression in Haiti, the Office of the Special Rapporteur had recommended to the State that it should “[a]dopt the measures needed to bring about a complete, exhaustive, and independent inquiry into the assassinations of journalists Jean Léopold Dominique and Brignol Lindor, and particularly to protect the persons linked to these proceedings.” Nonetheless, the Office of the Special Rapporteur is concerned that the investigations went nowhere in 2004, and particularly that it was reported that many documents that have been introduced as evidence in the April 3, 2000 murder of journalist Jean Dominique have disappeared.

PRINCIPLE 5 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Prior censorship, interference, and direct or indirect pressure)

104. After the departure of former president Jean Bertrand Aristide, acts were reported against those who were identified as favorable to the former president or critical of the rebels. This was the case of the correspondent of *Tropic FM*, Charles Edmón Prosper, who in May 2004 was arrested as he was accused of belonging to a group of journalists critical of the rebels.¹⁵⁰ In addition, on May 18, several police and a justice of the peace shut down the offices of *Radio Ti Moun* and *Télé Ti Moun*, which belonged to the Aristide Foundation for Democracy

¹⁴⁸ Harris had been sued by attorney Susana Luarca, who asked that he be imprisoned and made to pay US\$125,000 in civil damages after reports by Harris regarding adoptions of children in Guatemala. See International Federation for Human Rights, www.fidh.org, February 2, 2004.

¹⁴⁹ Reporters without Borders, “*Recuperada la libertad de prensa: una esperanza que hay que mantener*,” July 2004, at www.rsf.fr, Committee to Protect Journalists, http://www.cpi.org/Briefings/2004/haiti_7_04/haiti_7_04.html.

¹⁵⁰ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, at: http://www.sipiapa.com/espanol/pulications/informe_haiti2004o.cfm, and Committee to Protect Journalists, May 26, 2004.

(founded by Jean Bertrand Aristide) and prevented its employees from entering the offices.¹⁵¹ These two media had suspended their broadcasts on February 29, 2004, after Aristide's departure from Haiti.¹⁵²

PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media)

105. As mentioned, the first months of the year saw a series of acts of violence and threats to journalists which even led to the suspension or shutdown of the media for which they worked. Several communications media, mainly broadcasters, were attacked and looted, and even set afire, in many cases leading to their suspension or definitive shutdown. The events of those months took the life, on March 7, 2004, of the journalist for the Spanish television network *Antena 3*, Ricardo Ortega, in Port-au-Prince, after he was shot while covering a protest.¹⁵³ In that same incident, the photographer for the U.S. daily *Sun Sentinel*, Michael Laughlin, was wounded.¹⁵⁴ The Office of the Special Rapporteur received information reporting the detention of two persons allegedly responsible for those incidents.¹⁵⁵

106. During those weeks, also wounded were Roberto Andrade, of *Televisa* of Mexico, Carlos Loret, and cameramen Raúl Guzman and Jorge Pliego, of *TV Azteca*, also of Mexico, a photographer with *Agence France Presse (AFP)*,¹⁵⁶ and Claude Bellevue, of *Radio Ibo*,¹⁵⁷ when they were covering a student demonstration in Port-au-Prince.

107. Among the attacks on and assassination attempts targeting social communicators, on February 21, 2004, attacks were reported against the director of *Radio Hispagnola*, in Trou du Nord, and the correspondent of the radio station *Radio Métropole*, Pierre Elisem, in Cap-Haïtien, after he denounced having received threats.¹⁵⁸ On February 24, 2004, journalist Michel Jean and cameraman Sylvain Ricard, of *Radio Canada*, were shot at in northern Port-au-Prince.¹⁵⁹ On February 25, 2004, journalist Jenny Favélus and cameraman Claude Cléus, of *Télé Haïti*, were threatened and attacked when they sought to reach the

¹⁵¹ Committee to Protect Journalists, "Cameraman detained without charge," June 2, 2004.

¹⁵² Reporters without Borders, "Al día siguiente de la partida de Jean-Bertrand Aristide la prensa continúa en alerta," March 1, 2004, at www.rsf.org.

¹⁵³ Armed persons opened fire on the demonstrators, resulting in seven dead and about 30 wounded.

¹⁵⁴ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, at: http://www.sipiapa.com/espanol/publications/informe_haiti2004o.cfm, Reporters without Borders, "Muerto un periodista español, herido un fotógrafo norteamericano," March 8, 2004, and "Detenido un inspector de policía en la investigación sobre la violencia que causó la muerte de Ricardo Ortega," March 28, 2004, at www.rsf.org.

¹⁵⁵ On March 22, the police detained Yvon Antoine, and on March 28, 2004, division inspector Jean-Michel Gaspard, both for allegedly being linked to the events of March 7.

¹⁵⁶ This happened February 20, 2004. The demonstrators threw rocks at them and forced them to turn over their material. Reporters without Borders, "Muerto un periodista español, herido un fotógrafo norteamericano," March 8, 2004, at www.rsf.org, Committee to Protect Journalists, "CPJ decries increasing violence against journalists," at www.cpi.org.

¹⁵⁷ He was wounded with shrapnel. Reporters without Borders, "Fin de semana sangriento para la libertad de prensa: siete periodistas agredidos y tres radios incendiadas," February 23, 2004, at www.rsf.org.

¹⁵⁸ Reporters without Borders, "Fin de semana sangriento para la libertad de prensa: siete periodistas agredidos y tres radios incendiadas," February 23, 2004, at www.rsf.org.

¹⁵⁹ Reporters without Borders, "Muerto un periodista español, herido un fotógrafo norteamericano," March 8, 2004.

offices of that station. On March 12, Lyonel Lazarre, correspondent for *Radio Solidarité* and the *Agence Haïtienne de Presse* in Jacmel, in southern Haiti, was held and beaten, allegedly by former soldiers.¹⁶⁰ On March 13, 2004, the home of Elysée Sincère, correspondent for *Radio Vision 2000* in Petit Goave, was shot at. One of her family members was wounded.¹⁶¹

108. The facilities of several communications media were also the target of attacks. On January 13, 2004, eight radio stations and one television network left the air due to the destruction, in Boutilliers, in upper Port-au-Prince, of the transmission equipment by a commando of armed men. The media knocked off the air were: *Radio Commerciale*, *Radio Plus*, *Radio Kiskeya*, *Magic Stereo*, *Signal FM*, *Mélodie FM*, *Radio Ti Moun*, *Idoie FM*, and *Radio Galaxie*. The television network *Télé Ti Moun*¹⁶² also had to stop broadcasting. These persons¹⁶³ allegedly destroyed the equipment using mallets and hammers.

109. Among the radio stations hit by arson during January and February, some of them after being threatened or looted, were *Radio Pyramide* and *Radio America*,¹⁶⁴ *Lumière de la jeunesse saint-marcoise (LJS)* and *Radio Delta*¹⁶⁵ in the city of Saint Marc, north of

Port-au-Prince; *Radio Vision 2000*¹⁶⁶ in Cap-Haïtien; *Radio Hispagnola*, in Trou du Nord,¹⁶⁷ and *Radio Echo 2000*,¹⁶⁸ in the city of Petit-Goave. Also looted and attacked were *Radio Afrika* and *Radio Télé Kombit*,¹⁶⁹ in Cap Haïtien; *Radio Pasion* in Léogane,¹⁷⁰ *Radio Vision 2000*, *Radio*

¹⁶⁰ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, at: http://www.sipiapa.com/espanol/pulications/informe_haiti2004o.cfm.

¹⁶¹ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, at: http://www.sipiapa.com/espanol/pulications/informe_haiti2004o.cfm, Committee to Protect Journalists, March 24, 2004, at www.cpi.org.

¹⁶² Reporters without Borders, "Neuf médias victimes d'actes de sabotage," January 14, 2004.

¹⁶³ On January 26, the National Coalition for Haitian Rights reported alleged anomalies in the action of the prosecutorial office in charge of the investigation, which pointed to former government officials. NCHRhaiti, "Sabotage of Broadcasting Equipment of Radio and Televisión in Boutilliers: NCHR denounces the actions of the State Prosecutor," January 26, 2004, OAS Special Mission in Haiti.

¹⁶⁴ On January 15, Radio Pyramide was allegedly attacked by partisans of the opposition who, after staging a demonstration against the government of Jean Bertrand Aristide, entered the radio station, destroyed the equipment, and threatened to kill the staff and the director. The Police had to intervene. *Radio America* operated out of the home of prosecutor Freneau Cajuste, which was set on fire. See Reporters without Borders, "Deux radio privées incendiées à Saint-Marc," January 16, 2004.

¹⁶⁵ They were set afire on January 17 and 18, 2004, allegedly by sympathizers of the then-government of the Lavalas party. See Reporters without Borders, "Reporteros sin Fronteras alarmada por el grave deterioro de la situación de la libertad de prensa," February 11, 2004, at www.rsf.org.

¹⁶⁶ On February 7, 2004, the antenna was destroyed and set on fire by unknown persons. See Reporters without Borders, "Reporteros sin Fronteras alarmada por el grave deterioro de la situación de la libertad de prensa," February 11, 2004, at www.rsf.org.

¹⁶⁷ It was set on fire February 22, one day after its director was the target of an assassination attempt.

¹⁶⁸ On February 26, 2004, alleged partisans of Aristide set its offices on fire. Reporters without Borders, "Al día siguiente de la partida de Jean-Bertrand Aristide la prensa continúa en alerta," March 1, 2004, at www.rsf.org.

¹⁶⁹ On February 22, 2004, the offices of these radio stations were looted, purportedly by rebel groups, see Committee to Protect Journalists, "CPJ decries increasing violence against journalists," at www.cpi.org.

¹⁷⁰ Reporters without Borders, "Al día siguiente de la partida de Jean-Bertrand Aristide la prensa continúa en alerta," March 1, 2004, at www.rsf.org.

Kiskeya,¹⁷¹ *Radio ibo*, and *Radio Signal FM*¹⁷² in Port-au-Prince; and the facilities of *Télé Haïti*,¹⁷³ from which *Radio France International* (RFI)¹⁷⁴ also operated in Port-au-Prince.

110. The threats to journalists and media reached the point that some radio stations were forced to suspend their work. This was the case of *Radio Métropole*,¹⁷⁵ in Port-au-Prince; *Sud FM*,¹⁷⁶ in Cayes; and *Radio Sans-Souci* and *Radio Cap Haïtien*.¹⁷⁷ The Office of the Special Rapporteur also received information about threats to radio station *Paradis FM* and community radio station *Claudy Museau*, in Cayes,¹⁷⁸ *Radio Caraïbes*

FM,¹⁷⁹ and *Radio Solidarité*.¹⁸⁰ In addition, Yves Marie Jasmin¹⁸¹ of *Radio Métropole* was subject to intimidation.

111. Other incidents reported to the Office of the Special Rapporteur were the detention, on April 16, of the correspondent of *Radio Solidarité* in Mirebalais, allegedly by a group of former soldiers,¹⁸² as well as the arrest, by Haiti's transition government, on May 28, 2004, of the cameraman for *Télé Ti Moun*, Aryn Laguerre, though no charges were brought against him (the Government alleges that he had bullets on him).¹⁸³ On August 30, Lyonel

¹⁷¹ From February 27 to 29, 2004, the main offices of *Radio Vision 2000*, of Port-au-Prince, was the target of attacks with machine-gun fire, allegedly by partisans of Fanmi Lavalas, and a fire, which forced it to suspend its broadcasts temporarily. These attacks also provoked the temporary suspension of the transmissions of *Radio Kiskeya*. See Reporters without Borders, "Al día siguiente de la partida de Jean-Bertrand Aristide la prensa continúa en alerta," March 1, 2004, at www.rsf.org.

¹⁷² On February 29, 2004, *Radio Ibo* of Port-au-Prince was forced to suspend its broadcasts after being attacked. That same day, *Radio Signal FM* was targeted by gunfire. See Reporters without Borders, "Al día siguiente de la partida de Jean-Bertrand Aristide la prensa continúa en alerta," March 1, 2004, at www.rsf.org.

¹⁷³ Reporters without Borders, "Al día siguiente de la partida de Jean-Bertrand Aristide la prensa continúa en alerta," March 1, 2004, at www.rsf.org.

¹⁷⁴ RFI temporarily suspended its broadcasts from Haiti.

¹⁷⁵ On February 29 *Radio Métropole* received threats that forced it to suspend its broadcasts for two hours.

¹⁷⁶ On January 14, 2004, the Office of the Special Rapporteur received information on threats to Jean Robert Ballant, director of *Sud FM*, a radio station in Cayes. Ballant had allegedly been threatened by armed individuals who warned him that they would attack his station, for they considered that he worked for the opposition. The threats forced the radio station to shut down. The individuals also threatened to attack all of the radio stations that are members of the National Association of Media of Haiti. Committee to Protect Journalists, February 27, 2004, at www.cpi.org.

¹⁷⁷ Committee to Protect Journalists, February 26, 2004, at www.cpi.org.

¹⁷⁸ Committee to Protect Journalists, February 27, 2004, at www.cpi.org.

¹⁷⁹ Copy of the communication of January 21, 2004, from the directors of *Radio Caraïbes* to the National Police, in which the directors of *Radio Caraïbes FM* informed the National Police of Haiti of an alleged plot to set fire to the radio station and to murder some of its journalists. The station requested police protection.

¹⁸⁰ On February 26, it reported threats against it.

¹⁸¹ On January 19, the Office of the Special Rapporteur received information that *Radio Métropole* journalist Yves Marie Jasmin was receiving continuous death threats.

¹⁸² He was finally released on April 19, at the request of the Association of Journalists of Haiti. See Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, at: http://www.sipiapa.com/espanol/publications/informe_haiti2004o.cfm, Committee to Protect Journalists, April 16, 2004, at www.cpi.org.

¹⁸³ Committee to Protect Journalists, "Cameraman detained without charge," June 2, 2004.

Louis, a journalist with the weekly *Haïti en Marche*, was assaulted in Cité-Soleil, a marginal neighborhood of Port-au-Prince, allegedly by a group of sympathizers of former president Jean Bertrand Aristide.¹⁸⁴

HONDURAS

PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media)

112. On March 12, 2004, in the city of San Pedro Sula, journalist Edgardo Castro of *Canal 6*, was wounded by a youth who approached him and shot at him five times; one of the shots slightly wounded him. The Honduran police reported on March 17, 2004, that sectors of organized crime were thought to be involved in the attack.¹⁸⁵

113. On October 1, 2004, the facilities of the daily newspaper *La Tribuna*, in Tegucigalpa, were the target of two shots fired from a police vehicle. The police were said to have characterized the act as in the nature of a “contingency” caused by a “cobra” agent who was handling the weapon while reviewing his equipment. The Ministry of Security investigated the case.¹⁸⁶ Several reporters from the paper had received threatening phone calls.

114. Beginning November 24, 2004, journalist Jhony Lagos, director of *El Libertador*, reported being followed and receiving phone calls with death threats.¹⁸⁷

115. In December 2004, journalist Rodolfo Montalbán of the station *STC Noticias* reported that he had received threats. He reported receiving a phone call on November 21 in which he was warned that he should stop criticizing the mayor of Tegucigalpa.¹⁸⁸

PRINCIPLES 10 AND 11 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Use of defamation laws by public officials and *desacato* laws)

116. The Office of the Special Rapporteur was concerned at the increase in the number of criminal defamation charges being brought against journalists by public officials or in cases related to publications of public interest.

117. On February 18, 2004, journalist Renato Álvarez, of the program *Frente a Frente*, broadcast on *Corporación Televicentro*, was convicted of defamation and slander in a proceeding brought by a political leader of the governing Partido Nacional and former deputy Eduardo Sarmiento, who was on a list of 15 persons mentioned in a report disseminated by Álvarez in June 2003. The journalist was sentenced to two years and eight months in prison; however the judges suspended the sentence, conditioned on his conduct during the next five

¹⁸⁴ Committee to Protect Journalists, October 4, 2004, at www.cpi.org.

¹⁸⁵ One month earlier, Castro and his colleague Davis Yáñez had been threatened while covering a story on the dismemberment of corpses, which was presumed to be the work of gangs. See *Periodistas Frente a la Corrupción* (PFC), www.portal-pfc.org.

¹⁸⁶ The incident occurred after the newspaper published a series of reports on organized crime.

¹⁸⁷ *Comité por la Libre Expresión* (C-Libre), December 9, 2004.

¹⁸⁸ *Comité por la Libre Expresión* (C-Libre), December 7, 2004.

years, in which there must be no recidivism on his part. Accessory penalties were imposed on Álvarez, including the suspension of civil rights such as *patria potestas*, the administration of his assets, the right to vote, and the choice to run for public office, at the same time as he was ordered to pay personal costs and other expenses caused by the trial. The sentence was appealed to the Supreme Court. Álvarez had been acquitted in another trial, on charges of crimes against honor, in January 2004,¹⁸⁹ over the same publication.

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118. On March 19, 2004, the Supreme Court, through the Chamber for Criminal Matters, ruled in favor of repealing the *desacato* law, which is found at Article 345 of the Criminal Code, in Honduras, considering that it represents a breach of the freedom of expression by creating a privilege that unnecessarily protects public officials in the exercise of their duties, and violates the principle of equality established in the Constitution.¹⁹⁰ The Rapporteur for Freedom of Expression had requested information from the Honduran State on this case.¹⁹¹

119. On October 26, 2004, a proposed access-to-public information act was introduced to Congress by consensus of the five delegations of political parties represented in the legislative body.¹⁹² The bill was forwarded to a committee that will study it and issue an opinion.¹⁹³

MEXICO

PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media)

120. This year, the Office of the Special Rapporteur received information on violent acts against social communicators, especially in the interior. Particularly worrisome are reports on murders of journalists, some possibly in retaliation for their coverage of organized crime. In such cases, the Office of the Special Rapporteur was informed that the federal authorities had undertaken investigations and had placed great value on the condemnation of such acts at the highest levels of the Government. The Office of the Special Rapporteur made public its concern in a press release of September 2, 2004.

121. On March 19, 2004, the editorial director of the daily *El Mañana*, of Nuevo Laredo (state of Tamaulipas), Roberto Javier Mora García, was assassinated. Mora, 44 years of

¹⁸⁹ *Periodistas Frente a la Corrupción* (PFC), www.portal-pfc.org, Reporters without Borders, "Reporteros sin Fronteras protesta por la condena de Renato Álvarez," February 20, 2004, at www.rsf.org.

¹⁹⁰ *Comité por la Libre Expresión* (C-Libre), "Corte emite resolución favorable para derogar figura del desacato," April 14, 2004, at c-libre@multivisionhn.net.

¹⁹¹ Foreign Minister Leonidas Rosa Bautista, answered the Rapporteur's request on April 27, 2004, and sent the Court's opinion favorable to derogating Article 345 of the Criminal Code.

¹⁹² On May 20, 2004, the President of the National Congress, Porfirio Lobo Sosa, had received the proposed Law on Access to Public Information from the organization *Comité por la Libre Expresión* (C-Libre).

¹⁹³ *El Tiempo* (Honduras), "Proyecto de ley de acceso a la información," May 21, 2004, at www.tiempo.hn, *Comité por la Libre Expresión* (C-Libre), October 27, 2004.

age, had published various articles on organized crime. Two of his neighbors, identified as Mario Medina Vásquez, a U.S. citizen, and Hiram Olivero Ortiz, were detained on March 26, 2004.¹⁹⁴ The Office of the Special Rapporteur received expressions of concern from civil society organizations regarding the seriousness of the investigation in this case.¹⁹⁵

122. On June 22, 2004, the editor of the weekly *Zeta*, Francisco Javier Ortiz Franco, was murdered in Tijuana, Baja California.¹⁹⁶ Ortiz was a co-founder and editorial writer of *Zeta*, where he wrote about drug-trafficking and corruption.¹⁹⁷ On June 29, 2004, the Office of the Attorney General of Baja California appointed a special judge to investigate the homicide. Nonetheless, on August 18, the federal authorities took over the case because of its possible relationship with organized crime.¹⁹⁸

123. On August 31, 2004, columnist Francisco Arratia Saldierna, 55 years of age, died of a heart attack after having been brutally beaten in the city of Matamoros, by the border with the United States. Arratia published his columns in four newspapers in the state of Tamaulipas: *El Imparcial* and *El Regional*, in Matamoros, and *Mercurio* and *El Cinco*, in Ciudad Victoria. He also published an Internet publication, *En Línea Directa*, he was a schoolteacher, and he had a used car business. Arratia wrote about corruption, organized crime, and education. According to the reports received by the Office of the Special Rapporteur, he had been tortured prior to being pushed out of a vehicle. On September 24, Tamaulipas police arrested Raúl Castelán Cruz, in the city of Matamoros, who confessed to having participated in Arratia's murder, saying the crime was motivated by his columns. On September 30, the federal authorities took over the investigation due to a possible nexus between the assassination and organized crime.¹⁹⁹

124. On January 12, 2004, Irene Medrano Villanueva, of the newspaper *El Sol*, of Culiacán (state of Sinaloa), received a death threat by telephone. The next day, two individuals damaged her vehicle. The intimidation by telephone recurred on January 22.²⁰⁰ Medrano had published articles on child prostitution; threats against her have been reported since then.²⁰¹

¹⁹⁴ Comisión en Memoria, in Reporteros sin Fronteras, "Un nuevo elemento inquietante en la investigación sobre el asesinato del periodista José Roberto Mora," June 4, 2004, www.rsfr.fr.

¹⁹⁵ *El Mañana*, "EU exige a Fox investigar asesinato," May 21, 2004. www.elmanana.com.mx, Comisión en Memoria, in Reporteros Sin Fronteras, "Un nuevo elemento inquietante en la investigación sobre el asesinato del periodista José Roberto Mora," June 4, 2004, www.rsfr.fr, *El Mañana* of Nuevo Laredo, "Da positivo muestra de sangre dice PGJE," May 12, 2004, www.elmanana.com.mx, Comisión en Memoria, in Reporters without Borders, "Un nuevo elemento inquietante en la investigación sobre el asesinato de José Roberto Mora," June 4, 2004, www.rsfr.fr.

¹⁹⁶ *El Universal*, "Exigen indagación seria del crimen de periodista," www.eluniversal.com, June 23, 2004, ZETA, Press release, www.zetatijuana.com, June 22, 2004; *El Universal*, "Exigen indagación seria del crimen de periodista," www.eluniversal.com, June 23, 2004.

¹⁹⁷ *El Universal*, "Tijuana: matan a periodista del semanario Zeta," www.eluniversal.com, June 23, 2004, and Committee to Protect Journalists, at www.cpi.org, *El Universal*, "Ofrece Fox ayuda a pesquisas," www.eluniversal.com, June 23, 2004, Reporters without Borders, "Asesinato de Francisco Javier Ortiz Franco: las pistas de Zeta," www.rsfr.fr, June 28, 2004.

¹⁹⁸ Committee to Protect Journalists, at: <http://www.cpi.org/killed/killed04.html#unconfirmed>, Agence France Presse, *El Universal*, "Demanda SIP investigación asesinato de periodista," www.wluniversal.com.mx, June 23, 2004.

¹⁹⁹ Committee to Protect Journalists, at: <http://www.cpi.org/killed/killed04.html>.

²⁰⁰ Reporters without Borders, "Reporteros sin Fronteras preocupada por las amenazas recibidas por la periodista Irene Medrano Villanueva," www.rsfr.fr, February 3, 2004.

²⁰¹ Committee to Protect Journalists (CPJ), "El CPJ preocupado por amenazas a periodista," February 11, 2004, at International Freedom of Information Exchange (IFEX): <http://www.ifex.org/es/content/view/full/56747>.

125. On July 12, 2004, unknown persons tried to set afire the home of Gerardo Ponce de León Moreno, columnist with the weekly *Crítica*, in Hermosillo, Sonora. The incident did not cause major damages to the house. Ponce found an anonymous note with a threat related to his work. Ponce has made comments on matters involving local politics, security, and corruption.²⁰²

126. On May 22, 2004, alleged police agents attacked the director of *Diario Tribuna*, Martín Serrano Herrera. The newspaper, in the city of Jalapa, had published articles that tied public officials in Veracruz to alleged acts of corruption and enrichment.²⁰³

127. On May 23, 2004, Maximiliano Cortez Zepeda, of *Radio Variedades*, and Mario Solís Espinoza and Edgar Badilio Mena, of the *Diario de Colima*, were attacked by about 20 youths, apparently led by a relative of a former governor of the state of Colima. The journalists were pursued by the youths and beaten repeatedly, apparently in retaliation for their work as journalists.²⁰⁴ The State Director of Public Security, Fernando Díaz Cendejas, admitted that the attack occurred in front of police agents, but denied that he prohibited them from stopping it.²⁰⁵

128. In June, Álvaro Delgado, a journalist with the magazine *Proceso*, received threats by email²⁰⁶ allegedly related to his investigations into the infiltration of extreme right-wing groups in power.²⁰⁷

129. On September 9 and 11, the main door and two windows of the facilities of the newspaper *Frontera de Tijuana*²⁰⁸ were destroyed by weapons fire.

130. On November 1, in the state of Tabasco, Víctor Manuel Ulín Fernández, who publishes the column *Sin Remitente*, in the daily *La Verdad del Sureste*, was kidnapped for several hours by two individuals who beat him, threatened him because of the information he had put out, and simulated his execution. Ulín has taken a position against the local governor.²⁰⁹

131. On November 17, 2004, in the state of Sinaloa, politician Saúl Rubio Ayala was celebrating his victory in the election for local deputy when he denounced the stories that

²⁰² Committee to Protect Journalists, at http://www.cpj.org/cases04/americas_cases04/mexico.html.

²⁰³ Reporters without Borders, "La libertad de prensa amenazada en las provincias," June 2, 2004, www.rsf.fr.

²⁰⁴ *El Universal*, "Hijos de ex funcionario golpean a periodistas," May 25, 2004, www.eluniversal.com.mx.

²⁰⁵ *La Jornada*, "Sobrinio de Moreno Peña golpea a tres periodistas de Colima," May 28, 2004, www.jornada.unam.mx.

²⁰⁶ Committee to Protect Journalists at: http://www.cpj.org/cases04/americas_cases04/mexico.html.

²⁰⁷ In 2003, Delgado published the book "*El Yunque, la ultraderecha en el poder*," in which he made reference to a movement called "el Yunque," with anti-communist positions and an anti-semitic agenda. In June, Delgado had published information in the magazine and had made comments on the radio on possible relationships between this group and the organizers of an anti-crime march. On June 30, Delgado received another threat from the same email address as the June 25 threats, and on July 21 he received another one in which an offer was made to sell him information about "el Yunque."

²⁰⁸ Inter-American Press Association, "Preocupación de la SIP por agresiones contra periódico del norte de México," September 21, 2004. On June 7, unknown persons abandoned a car in the newspaper's parking lot with 800 kilos of marijuana, which was interpreted by the paper as an act of intimidation.

²⁰⁹ Inter-American Press Association, "La SIP deplora violencia contra periodistas en México," November 24, 2004. At International Freedom of Information Exchange: <http://www.ifex.org/es/content/view/full/62772>.

appeared in the newspaper *El Debate*, set fire to some copies, and insulted its two journalists Resina Ávila and Alonso Sánchez, who were there, and called on his followers to assault them. Ávila and Sánchez had to be protected by the police in order to leave.²¹⁰

PRINCIPLES 10 AND 11 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Use of defamation laws by public officials and *desacato* laws)

132. On May 26, 2004, in the state of Chiapas, a stiffening of the penalty for those guilty of crimes of defamation or libel entered into force, to up to nine years prison and a fine of up to 1,000 times the minimum daily wage. These penalties reflect an amendment to the Criminal Code of Chiapas, which was passed February 17, 2004. Before the change, a person guilty of defamation or slander was subject to a sanction of imprisonment of two to five years and a fine of 75 times the minimum daily wage. With the change, the prison term is from three to nine years, and the fine ranges from 100 to 1,000 times the minimum daily wage. Other provisions include the obligation of the owners of communications media, independent of whether they have committed violations, to print the complete judgment, in the same space or time where the crime for which the trial took place was disseminated.²¹¹

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133. On March 19, 2004, the Government of Baja California joined the special group reviewing the murder of journalist Héctor Félix Miranda, which occurred in 1988. It joined as the result of the agreements reached in a hearing before the Inter-American Commission on Human Rights in October 2003. The group was constituted on March 15, 2004, by the government of Mexico and the Inter-American Press Association, to clear up the crime that took Miranda's life as well as the crime in which Víctor Manuel Oropeza, also a journalist, was killed.²¹²

134. On March 30, 2004, the Supreme Court and the Federal Judicial Council adopted the regulation that allows for public review of judicial proceedings and resolutions adopted in litigation.²¹³ The regulation includes posting the rulings on the Internet. The regulation was issued as part of compliance with the Federal Law on Transparency and Access to Public Information, promulgated in June 2002.

135. The Office of the Special Rapporteur has received information on progress in the negotiations for the Government to continue the process of awarding frequencies to community radio stations. In December, the Government of Mexico issued five permits for indigenous community radio stations. In its 2003 report, the Office of the Special Rapporteur had described the complaints it had received over the delays in the process of assigning frequencies to community radio stations. Despite some difficulties during the year in the dialogue process that

²¹⁰ Inter-American Press Association, "*La SIP deplora violencia contra periodistas en México*," November 24, 2004. At International Freedom of Information Exchange: <http://www.ifex.org/es/content/view/full/62772>.

²¹¹ *Libertad de Información México-A.C.*, May 26, 2004, www.limac.org.mx.

²¹² Centro Nacional de Comunicación Social (CENCOS), "*Reabren en BC el caso de crimen de periodista*," at International Freedom of Expression Exchange (IFEX), www.ifex.org, March 21, 2004.

²¹³ *El Universal*, "*Toda la información del Poder Judicial es pública*," www.eluniversal.com.mx, March 31, 2004, Inter-American Press Association, "*Complace a la SIP aprobación de nuevo reglamento del Poder Judicial mexicano sobre acceso a la información*," April 21, 2004.

got under way between the government and representatives of these media, the Office of the Special Rapporteur considers it auspicious that, as it has been informed,²¹⁴ progress is taking place in the negotiations to facilitate the operation of these radio stations, and towards the consideration of more democratic criteria in assigning radio frequencies, as indicated by Principle 12 of the Declaration of Principles on Freedom of Expression. The Office of the Special Rapporteur urges the State to continue the negotiation process and to take into account the preliminary observations made by the Special Rapporteur upon the conclusion of his official visit in August 2003, and taken up by the Office of the United Nations High Commissioner for Human Rights in its assessment of the human rights situation in Mexico.

NICARAGUA

PRINCIPLE 6 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Compulsory membership in an association for the practice of journalism)

136. In December 2004, the Board of Directors of the *Colegio de Periodistas* was installed, constituting that organ, and, therefore, making it possible to enforce Law 372, whose Article 6 requires journalists to join the Colegio as a condition for exercising their profession. It had not been possible to enforce that law, on the books since 2000, because the Colegio had not been formed. A lawsuit was filed challenging the constitutionality of this law, which has yet to be resolved. The Office of the Special Rapporteur recalls that the Inter-American Court of Human Rights, in its advisory opinion OC-5/85, determined that the requirement of compulsory membership in an association as a condition for working as a journalist violates Article 13 of the American Convention on Human Rights.²¹⁵

PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media)

137. On February 10, journalist Carlos José Guadamuz Portillo was murdered; he was 59 years old, and hosted the program “*Dardos al centro*” [“Darts to the Bull’s Eye”], broadcast on *Canal 23*, in Managua, Nicaragua. The person responsible was identified as William Hurtado García, who confessed to the crime.²¹⁶ On April 19, 2004, Hurtado García was convicted and sentenced to 21 years in prison for the crimes of murder and attempted murder of Guadamuz and his son, who was accompanying him.²¹⁷ The Office of the Special Rapporteur learned that Guadamuz had received death threats earlier.²¹⁸

²¹⁴ See: World Association of Community Radio Broadcasters (AMARC), “AMARC reconoce señales positivas del gobierno mexicano para reconocer radios comunitarias,” October 29, 2004; at International Freedom of Expression Exchange (IFEX), <http://www.ifex.org/es/content/view/full/62232>.

²¹⁵ *Diario La Prensa*, “UPN Y APN pretendieron que votaran sólo sus afiliados,” December 11, 2004, at www.laprensa.com.ni, and Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, www.sipiapa.com.

²¹⁶ Committee to Protect Journalists, www.cpj.org, February 11, 2004, Committee to Protect Journalists (CPJ), www.cpj.org, *El Nuevo Diario*, www.elnuevodiario.com, April 20, “Condenan a 21 años a William Hurtado.”

²¹⁷ *La Prensa* www.laprensa.com.ni, April 20, 2004, “21 años de cárcel a William Hurtado,” *La Prensa* www.laprensa.com.ni, May 12, 2004, “Testigos certifican cooperación en caso Guadamuz.”

²¹⁸ Committee to Protect Journalists (CPJ), www.cpj.org, February 10, 2004, “La policía estaría investigando la vinculación de Ortega con la muerte de Guadamuz,” http://www.cpj.org/cases04/americas_cases04/nica.html.

138. On November 9, 2004, the correspondent for the daily papers *La Prensa* and *Hoy*, María José Bravo, was murdered outside the elections office in the city of Juigalpa, department of Chontales, when covering the protests of political groups over the results of the November 7 elections in Juigalpa. That same day, the police arrested Eugenio Hernández González, former mayor of the municipality of El Ayote, as the main suspect in the assassination, along with two other suspects. As of the writing of this report, the motive of the murder had not been determined.²¹⁹

139. In August 2004, the Office of the Special Rapporteur received information on acts of intimidation against journalist Sergio León Corea, correspondent of *La Prensa* in Bluefields. León published information on a criminal gang. In 2003, the Office of the Special Rapporteur also received information on threats to and intimidation of León.²²⁰

140. On August 20, 2004, journalist Mirna Velásquez, of *La Prensa*, was intimidated by a judge from Managua, who reportedly warned her that he had information about her activities and that they would continue watching her, after she reported on complaints against him.²²¹

PANAMA

PRINCIPLE 4 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Access to information held by the state)

141. On January 4, 2004, the President of the Supreme Court of Panama, César Pereira Burgos, announced restrictions on journalists who cover the Supreme Court, based on the argument that abuses were being committed in the handling of information. Among the measures, only one journalist per media outlet will be accredited to cover the Judicial

branch.²²² The provisions were rejected by several journalists' organizations in Panama,²²³ as of this writing the Office of the Special Rapporteur has not received any information on changes.

PRINCIPLES 10 AND 11 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Use of defamation laws by public officials and *desacato* laws)

²¹⁹ Committee to Protect Journalists, "Matan a reportera frente a oficina electoral," November 10, 2004, www.cpj.org, Reporters without Borders, November 10, 2004, "Una periodista muerta por disparos mientras cubría manifestaciones post-electorales," November 10, 2004, www.rsf.org at International Freedom of Information Exchange, <http://www.ifex.org/es/content/view/full/62428>.

²²⁰ Committee to Protect Journalists, August 27, 2004, "Preocupan al CPJ denuncias de intimidación a periodista," at: International Freedom of Information Exchange: <http://www.ifex.org/es/content/view/full/60955>.

²²¹ PROBIDAD, "Juez intimida a periodista," August 31, 2004, at International Freedom of Information Exchange, <http://www.ifex.org/es/content/view/full/60990>, and Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, at www.sipiapa.com.

²²² Inter-American Press Association, at International Freedom of Expression Exchange (IFEX),

"Preocupación de la SIP por restricciones a la información judicial," www.ifex.org, January 13, 2004.

²²³ *El Siglo*, "Periodistas cuestionan a Pereira Burgos," www.elsiglo.com, January 8, 2004.

142. On March 24, 2004, the founder of the daily *La Prensa*, Roberto Eisenmann Jr., was compelled to appear before the Attorney General (Fiscal General) to answer in a libel and slander action brought against him by the Procurador General, José Antonio Sosa.²²⁴ Eisenmann was compelled to testify since he had failed to heed three previous subpoenas, for which he was found in contempt. An order preventing Eisenmann from leaving the country has been in force since January 15, 2004.²²⁵

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143. On November 15, 2004, Legislative Act No. 1 of July 27, 2004, was promulgated; accordingly, the Constitution of Panama was amended, and the constitutional basis for laws on *desacato* was removed. That reform occurred after a request from the Human Rights Ombudsperson of Panama. The change also introduced in the Constitution the right of access to public information, and the *habeas data* action.²²⁶

144. In the area of access to public information, in 2004, Decree 124 of May 21, 2002, was repealed. In 2003, the Office of the Special Rapporteur had expressed concern because that law was at odds with some of the principles established in Panama's law on access to public information.

PARAGUAY

PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media)

145. On April 20, journalist Bernardo Vera Roa of radio *Tavaguá FM* in Ciudad del Este, to the east of Asunción, was the victim of a kidnapping by three persons, torture, and death threats. While he was held, it was demanded of him that he reveal the addresses of three social leaders who he had interviewed. Vera Roa was released the next morning.²²⁷

146. On May 20, 2004, the daily *ABC Color* received an anonymous phone call on the alleged placement of an explosive artifact at the newspaper's offices, which turned out to be false.²²⁸

147. On July 29, 2004, photographer Daniel Duarte of the daily *La Nación* was physically assaulted, his equipment destroyed, and his material taken after covering a political

²²⁴ Reporters without Borders, "Reporteros sin Fronteras denuncia el acoso judicial contra la prensa," www.rsf.fr, March 25, 2004.

²²⁵ Committee to Protect Journalists, March 24, 2004, at www.cpi.org.

²²⁶ Communication from the Special Delegate for Freedom of Expression and Access to Information of the Office of the Human Rights Ombudsman of the Republic of Panama, Guido Rodríguez, December 14, 2004.

²²⁷ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, at www.sipiapa.com.

²²⁸ Neike (Paraguay), "Otra falsa amenaza de bomba, ahora en ABC Color," May 20, 2004, at www.neike.com.py. The phone call was said to have been made by a person who identified himself as homosexual and who was bothered by the way the religion section handled information.

meeting in Asunción. His assailants were said to have been youth leaders from the Colorado party.²²⁹

PRINCIPLES 10 AND 11 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Use of defamation laws by public officials and *desacato* laws)

148. In February 2004, journalists Nacha Sánchez and Mabel Rehnfeldt, of the daily *ABC Color*, were sued by former Paraguayan President Juan Carlos Wasmosy, who also sought compensation for moral injury in the amount of US\$10 million. Sánchez and Rehnfeldt published a series of articles on the handling of fuel during the Wasmosy administration. In April, the newspaper filed a motion to dismiss the suit.²³⁰

PROGRESS

149. On May 23, 2004, the Court of Appeals overturned the order to pay a fine of US\$15,000 imposed, in October 2003, by Judge Dionisio Nicolás Frutos on the director of the daily *ABC Color*, Aldo Zuccolillo, in an action brought by former minister Juan Ernesto Villamayor for publications related to a financial scandal at the *Banco Nacional de Trabajadores*. In releasing the director of ABC of the punishment, it was considered that the complaint was brought by a public official, and that the publications called into question referred to a matter of general interest. According to the judgment, the newspaper's publications (which date back to 1999) could not constitute the crime "because the media, based on their function of providing information, are within their right to disseminate all kinds of news."²³¹

PERU

PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media)

150. In 2004, as in prior years, the Office of the Special Rapporteur received information on threats to and assault on journalists in the interior, particularly in the context of social protest or as the result of reports alleging corrupt practices by local officials. In two cases, the social communicators had to leave the regions in which they worked. The Office of the Special Rapporteur also received reports on two cases of assassinations that could be related to the journalists' professional work.

151. On February 14, 2004, Antonio de la Torre Echandía, who directed the news program *El equipo de la Noticia*, broadcast by *Radio Orbita*, was assassinated in the Pampac neighborhood, in Yungay, Ancash, north of Lima.²³² According to the investigations, Moisés David Julca had been identified as the alleged direct perpetrator of the murder. Another suspect

²²⁹ *Sindicato de Periodistas del Paraguay*, "SPP repudia agresión a reportero gráfico perpetrada por dirigentes del partido de gobierno," July 30, 2004 at: International Freedom of Information Exchange, www.ifex.org.

²³⁰ *Sindicato de Periodistas del Paraguay* (SPP), press release, "Coacción e intento de censura previa," February 6, 2004.

²³¹ *ABC Color* (Paraguay), "Tribunal notifica la sentencia que exime de pena a director de ABC," May 24, 2004, at www.abc.com.py, Inter-American Press Association, Country-by-Country Reports, Annual Assembly, October 2004, at www.sipiapa.com.

²³² Committee to Protect Journalists, April 6, 2004, http://www.cpi.org/cases04/americas_cases04/peru.html.

was the mayor, Amaro León, who allegedly was the mastermind. As of the writing of this report, Julca was at large, as was the mayor's daughter, Enma León Martínez, who is also being investigated.²³³

152. On April 21, 2004, Alberto Rivera Fernández, 54 years of age, was assassinated; he directed the program *Transparencia* broadcast daily on the *Oriental* radio station in the city of Pucallpa in the department of Ucayali, east of Lima, and president of the journalists' association (*Federación de Periodistas*) of that region.²³⁴ On June 1, the police detained Roy Gavino Cullqui Saurino, and three days later Martín Ignacio Flores Vásquez. The first worked as a journalist and public relations director for the municipal government, and the second as an employee of the municipal water and sewerage company.²³⁵

153. The Office of the Special Rapporteur received reports of several cases of attacks and threats in the Ancash region, in northern Peru. In late January and early February, journalists from local media received threats and were assaulted, allegedly by members of a vigilante group in the locality of Santa, after the communicators covered the suspension of the local mayor by the municipal council.²³⁶ From April 20 to 28, 2004, journalist Rocío Vásquez Goicoechea, of *Las Últimas Noticias*, a daily in El Chimbote, received several threats on her cell phone, and at home. Unknown persons tried to run her over on April 27. The acts of intimidation occurred after Vásquez published a report on illegal fishing.²³⁷ On June 15, 2004, in Pomabamba, journalist Fernando Valverde Lavado, of *El Equipo de la Noticia*, received a threat by phone in which he was told he had two days to leave the region, or he would meet the same fate as his colleague Antonio de La Torre, who was assassinated on February 14. Valverde had undertaken investigations into local officials. He left the city.²³⁸ On June 19, 2004, journalists Fredy Valenzuela Robles, reporter with *Noticiero Regional* on the channel ATV, Luis Hermosa Gloria of the news program on *Canal 2*, and Ladizlao Cruz Villachica, reporter with *Radio Armonía*, were assaulted in the city of Caraz while covering confrontations between

²³³ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, at www.sipiapa.com, October 2004. *Asociación Nacional de Periodistas de Perú* (ANP), March 22, 2004, "Alcalde de Yungay acusado por muerte del periodista Antonio de la Torre Echandia," and IFEX, February 23, which cites RSF, "Reporteros sin Fronteras condena asesinato de periodista." International Freedom of Expression Exchange, www.ifex.org, March 22, 2004, which cites the Latin American human rights section of the International Federation of Journalists (IFJ), *Instituto de Prensa y Sociedad*, www.ipys.org, April 7, 2004, "Perú: Identificado y con orden de captura otro de los asesinos del periodista Antonio de la Torre."

²³⁴ According to information received from the Office of the Special Rapporteur, Rivera was assassinated when two men entered a glass store he owned, and one by them shot him in the chest several times. There were no signs of robbery. In late May, the police had declared that the killing was a crime of passion, but this hypothesis was later refuted. See Committee to Protect Journalists, April 23, 2004, http://www.cpj.org/cases04/americas_cases04/peru.html and Inter-American Press Association, Country-by-Country Reports, Annual Assembly, at www.sipiapa.com, October 2004.

²³⁵ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, at www.sipiapa.com, October 2004, and Reporters without Borders, "Tres nuevas detenciones en el caso del asesinato de Alberto Rivera Fernández," June 9, 2004, at www.rsf.fr.

²³⁶ The mayor had become entrenched with his officials in City Hall. On February 2, when they attempted to evict him, the journalists were attacked with bricks cast from inside the place, but none was injured. *Asociación Nacional de Periodistas de Perú*, February 2, 2004, "Perú: Periodistas hostilizados y agredidos en Chimbote," at: *Instituto de Prensa y Sociedad*, www.ipys.org.

²³⁷ *Instituto Prensa y Sociedad*, "Amenazan de muerte a periodista de Chimbote," April 28, 2004, at International Freedom of Expression Exchange, www.ifex.org. On August 2, the Office of the Fourth Provincial Prosecutor of Santa, archived the case. *Asociación Nacional de Periodistas del Perú*, "Fiscalía archiva caso de periodista amenazada," alert of August 6, 2004.

²³⁸ *Instituto Prensa y Sociedad*, "Periodista obligado a dejar su ciudad tras amenaza de muerte," August 3, 2004, at International Freedom of Information Exchange, www.ifex.org.

demonstrators and police; the demonstrators were expressing their rejection of the local mayor's performance.²³⁹

154. Following are other cases reported during the year to the Office of the Special Rapporteur.

155. In February 2004, journalist Jaime Díaz and cameraman Jaime Vidal Torres, of the evening news team for *Frecuencia Latina*, of *Canal 2*, were assaulted by unknown persons in the early morning hours. The assailants apparently sought to keep them from covering an emergency in the district of San Borja, in Lima.²⁴⁰

156. On February 7, 2004, in Chepen, José Mendoza Saldaña, director of the news program *El Informativo* on the radio station *Estación Latina*, was reportedly assaulted by the director of transit of the local government, who reportedly beat him and publicly threatened to kill him. Days earlier, relatives of the director of transit had burst into the radio station to threaten him over information that had been broadcast related to the official's performance.²⁴¹

157. On March 11, 2004, the regional director of education for Junín, Juan Carvo Iparraguirre, and his two children, reportedly attacked journalist Ginés Barrios Alderete and his wife, Clorinda Romero Quispe, who were wounded in the face and on the head.²⁴²

158. On May 23, 2004, in the district of Ilave, Puno region, in southeast Peru, a group of persons attacked journalists Juan Rizo Patrón and Dante Piaggio of *El Comercio*, Elena Cano and Daniel Contreras of *La Razón*, and Mónica Cépeda and Óscar Echevarría of *Frecuencia Latina*. The journalists were attacked with stones when they were covering a demonstration.²⁴³ The next day, several journalists who covered the demonstrations were hit with stones, among them the correspondent for the daily *La República*, Christian Ticona Coahuila, who suffered a deep wound in the head. Also present were reporters from the daily *Correo* and the magazine *Caretas*. The journalists had to be evacuated from Puno.²⁴⁴

159. On July 1, 2004, in the context of a demonstration by teachers in the city of Huamanga, Ayacucho region, in southwestern Peru, several social communicators who were covering the event were attacked. They included José Atauje, correspondent for *América Televisión*, whose materials were taken from him; a cameramen from the program *Confirmado Regional* of *Radio Televisión Peruana* in Ayacucho; Rocío Paredes, of *Radio Televisión Peruana*; Walter Huayanay, owner of *Radio Televisión Atlantis Canal 25*, and his cameraman. These attacks occurred after a confrontation with the police, who threw tear gas at the teachers

²³⁹ *Instituto de Prensa y Sociedad*, www.ipys.org, June 30, 2004.

²⁴⁰ *Asociación Nacional de Periodistas de Perú*, February 24, 2004 at: International Freedom of Expression Exchange, www.ifex.org.

²⁴¹ International Freedom of Expression Exchange, www.ifex.org, February 11, 2004.

²⁴² The incident occurred during a press conference called by Barrios to report on an incident involving Carvo and a student that took place in 1997. Carvo apologized for the attack and accepted that he had assaulted the student.

²⁴³ International Freedom of Expression Exchange, www.ifex.org, May 25, 2004, and *Instituto de Prensa y Sociedad*, www.ipys.org, May 25, 2004.

²⁴⁴ *Instituto Prensa y Sociedad*, "Hieren gravemente a periodista durante violenta protesta," May 26, 2004, at International Freedom of Expression Exchange, www.ifex.org.

to drive them out of the offices of the regional government, the local government, and the police station, which had been taken over by the demonstrators.²⁴⁵

160. From November 20 to 29, 2004, Renán Palacios, a journalist with *Radio Constelación*, of Ica, to the south of the Peruvian capital, received 19 messages on his cell phone with death threats. Even though he sought protection from the police sub-station on November 23, he obtained no result. He had to leave and take refuge in Lima.²⁴⁶

²⁴⁵ *Instituto Prensa y Sociedad*, "Reporteros agredidos mientras cubrían manifestación," July 6, at International Freedom of Information Exchange (IFEX).

²⁴⁶ Since August, Palacios had been denouncing alleged irregularities in the running of the *Instituto Nacional de Cultura* of Ica. On November 12, the brother of the Institute's administrator "advised" him not to continue reporting on the matter. See Reporters without Borders, "Un periodista obligado a refugiarse en Lima a causa de las amenazas recibidas," at http://www.rsf.fr/Article.php3?id_Article=12001, December 2, 2004.

DOMINICAN REPUBLIC

161. In September 2004, the intervention of the newspaper *Listín Diario* of Santo Domingo was ended, after a Supreme Court decision ordered that it be returned to its owners. The company *Editora Listín Diario*, which owns *Listín Diario* and other media, was intervened in May 2003, based on accusations of financial irregularities and violations by its owners through the Banco Intercontinental (Baninter). The newspapers *Última Hora*, *El Financiero*, and *El Expreso*, which were also part of the group, were shut down by the government in office at that time.²⁴⁷ In its 2003 report, the Office of the Special Rapporteur had included information about this situation.

PRINCIPLE 5 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Prior censorship, interference, and direct or indirect pressure)

162. On January 12, 2004, a radio program, "*El Poder de la Tarde*," was shut down by order of the Minister of Press of the Presidency, Luis González Fabra. The program was broadcast by *Radio Cielo*, a radio station that has been administratively intervened by the government, as it is owned by one of the companies of the owner of the bankrupt Banco Intercontinental.²⁴⁸

PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media)

163. In the months of September and October, the Office of the Special Rapporteur received reports that in Azua, in the southern Dominican Republic, a journalist had been assassinated, several had been targets of violent acts, and others had reported receiving threats.²⁴⁹ The Office of the Special Rapporteur also received information on expressions of repudiation voiced at the highest levels of the government, and offers by the authorities to provide protection for the journalists.

164. On September 14, 2004, journalist Juan Emilio Andujar was assassinated in front of the offices of *Radio Azua*, in Azua. Andujar, who was a correspondent for *Listín Diario* and hosted the weekly program *Encuentro Mil 60*, was accompanied by his colleague Juan Sánchez, who survived the attack. Andujar had reported on a crime wave in which six journalists had been threatened. A reporter for *Enriquillo Radio*, Juan Luis Sención, who witnessed the attack and sought to help Andujar, was also attacked by the same persons and had to be hospitalized.²⁵⁰

²⁴⁷ Inter-American Press Association, "*La SIP saluda el fin de la intervención estatal en el Listín Diario*," September 8, 2004.

²⁴⁸ The program's host, César Medina, had reported that the administrator of the radio station had confirmed the order given by the official. See Inter-American Press Association, "*Preocupa a la SIP cierre de un programa radial*," at International Freedom of Expression Exchange, IFEX, www.ifex.org, January 12, 2004.

²⁴⁹ Among the threatened journalists are Domingo Corcino, Héctor Caamaño, Narciso Mariñez, Christian Ramírez, and Rafael Vargas.

²⁵⁰ One of the alleged assailants was killed in an exchange of gunfire with the police, while another was at large as of the preparation of this report. International Freedom of Information Exchange (IFEX), at: <http://www.ifex.org/es/content/view/full/61451> and Committee to Protect Journalists, "*El CPJ insta a las autoridades investigar a fondo asesinato de periodista*," September 20, continued...

165. Another case involved Euri Cabral, director of *Canal 23* and host of the radio program *El gobierno de la mañana* on *Radio Z-101*, who on the night of September 29, 2004, was travelling in his vehicle in Santo Domingo when two persons on a motorcycle shot at him several times. He had received death threats earlier.²⁵¹

TRINIDAD AND TOBAGO

PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media)

166. On June 15, 2004, Phil Britton, cameraman for Trinidad and Tobago Television (TTT), was reportedly attacked by a person accused of drug trafficking. In addition to being beaten, his equipment was damaged. Apparently, Britton sought help from the authorities who were near the court house, but no one came to his aid.²⁵²

URUGUAY

PRINCIPLES 10 AND 11 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Use of defamation laws by public officials and *desacato* laws)

167. The Office of the Special Rapporteur received information that during 2004, more than a dozen journalists were subject to criminal prosecution. One media outlet and two reporters were required to disseminate court judgments. In addition, four journalists and one media outlet were ordered to compensate public officials for information whose veracity was not doubted.²⁵³

168. These included the case of Marlene Vaz, columnist with the weekly *Opción Cero*, of Río Branco, department of Cerro Largo, who on April 22 was found guilty of defamation and libel and sentenced to 20 months in prison; the sentence was suspended and commuted to one year under police surveillance. Vaz was sued by Jorge Antonio Rivas, an official with the local council.²⁵⁴ She was also ordered to publish, on her own account, the court judgment in *Opción Cero* and in another newspaper in Melo, the capital of the department. On June 30, 2004, the Court of Appeals threw out the conviction for defamation but affirmed the judgment for libel; accordingly, the sentence was reduced to 10 months in prison, suspended.

...continuation

2004, www.cpi.org, and Inter-American Press Association, "Condena la SIP asesinato y agresiones contra periodistas," www.sipiapa.com, September 15, 2004.

²⁵¹ Reporters without Borders, "RSF preocupada por intento de asesinato contra director de canal de television," October 5, 2004, at <http://www.ifex.org/es/content/view/full/6172>.

²⁵² Trinidad Express, <http://www.trinidadexpress.com/>, June 15, 2004, "Licks for Camarea."

²⁵³ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, http://www.sipiapa.com/espanol/pulications/informe_uruguay2004o.cfm.

²⁵⁴ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, http://www.sipiapa.com/espanol/pulications/informe_uruguay2004o.cfm, and Committee to Protect Journalists, at www.cpi.org, June 16, 2004.

169. On March 10, 2004, in the department of San José, journalists Raúl Alejandro Laguna y Susana Tomás Falero, of the program *Agendario*, were ordered to pay compensation to two persons who had been accused of having mistreated a woman in an interview with her. The conviction was based on the argument that the interview should not be broadcast without verifying the accuracy of the accusations.²⁵⁵ In addition, the journalists were ordered to pay compensation of US\$1,200 for moral injury. According to the information received by the Office of the Special Rapporteur while preparing this report, the ruling was appealed.

170. In May 2004, a criminal action was brought against journalists Ignacio Álvarez and Gustavo Escanlar of the program *Las cosas en su sitio*, on *Radio Sarandí* of Montevideo, for defamation and libel by a journalist.²⁵⁶ The plaintiff sought a three-year prison sentence. She also brought a civil action against the radio station and the journalists for US\$150,000. The trial ended in an order for the journalists to read a retraction on their program and to publish it in the daily *El País*.

171. On August 13, in the department of Salto, journalist Diego Fernández and the daily newspaper *La República* were ordered to pay US\$4,000 to four officials of a customs post, after having published a document from the local police that had a heading indicating that it was confidential. The customs officials mentioned in the document felt that their honor had been injured, and they instituted proceedings against the police chief and the journalist. The judge acquitted the police, but found the journalist liable for “moral injury.” The judgment was appealed. According to the judgment: “Although the media may try to answer that there is no information or document whatsoever that cannot be disseminated, that secrecy is not consistent with a democratic society, and similar arguments, clearly there are specific circumstances in which confidentiality—if not secrecy—may be in the nature of things, and its violation is only possible by the use of unlawful means.”

172. On September 22, 2004, journalists Ignacio Álvarez, Gabriel Pereyra, and Cecilia Bonino of the program *Zona Urbana*, of *Canal 10*, were indicted on charges of defamation and libel by an official of the state postal service.

173. On December 14, in Paysandú, journalist Carlos Digliani of the weekly *El Regional* was convicted and sentenced to five months in prison for defamation and libel, after a complaint filed by the local intendant. According to information received by the Office of the Special Rapporteur, the ruling was to be appealed.

VENEZUELA

174. In 2004, the IACHR published a report on the situation of human rights in Venezuela²⁵⁷ that included a chapter of the situation of the freedom of expression in Venezuela, which was prepared by the Office of the Special Rapporteur at the Commission’s request. The Office of the Special Rapporteur is concerned that many of the situations described in that report and in the Annual Report on 2003 are continuing to recur. Some of these led the IACHR

²⁵⁵ Inter-American Press Association, Country-by-Country Reports, Annual Assembly, http://www.sipiapa.com/espanol/pulications/informe_uruguay2004o.cfm.

²⁵⁶ On the program allusions were apparently made to the sexuality of the journalist in a joking tone.

²⁵⁷ See: <http://www.cidh.org/Relatoria/listDocuments.asp?categoryID=10>.

to issue precautionary measures or to seek the adoption of provisional measures by the Inter-American Court of Human Rights to protect the fundamental rights of media workers.²⁵⁸ Therefore, Venezuela continues to be a country of special concern for the Office of the Special Rapporteur.

175. This year, threats against and assaults on social communicators who were covering political demonstrations and elections continued. In addition, public messages were repeated, at the highest levels of the State, particularly from President Hugo Chávez, against the media, and which could be misinterpreted by his followers.²⁵⁹ The Office of the Special Rapporteur reiterates, as it did in its report for 2003, that the government's perceptions about the lack of impartiality and political motivations in the coverage of some media, particularly on political events, in no way justify restrictions or attacks on the freedom of expression.

PRINCIPLE 4 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Access to information held by the State)

176. The Office of the Special Rapporteur received information that the *Programa Venezolano de Educación-Acción en Derechos Humanos* (PROVEA) had brought five *amparo* actions before the Supreme Court to invoke the right of petition. These included one against the Human Rights Ombudsman of Venezuela, who in September had refused to provide information on human rights violations.²⁶⁰

PRINCIPLE 6 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Compulsory membership in an association prescribed by law for the practice of journalism)

177. On July 27, 2004, the Constitutional Chamber of the Supreme Court of the Bolivarian Republic of Venezuela handed down a resolution upholding the compulsory membership in a professional association for the exercise of journalism. The decision declared inadmissible a motion for annulment brought against several articles of the Law on the Exercise of Journalism. The Office of the Special Rapporteur issued a press release expressing its concern over the decision of August 2, 2004, and recalling that the Inter-American Court of Human Rights, in its Advisory Opinion OC-5/85 on the compulsory membership of journalists

²⁵⁸ In the case of the television station *Globovisión*, on August 3, 2004, the President of the Inter-American Court granted urgent provisional measures, which were ratified by the Court on September 4. In the case of *El Nacional* and *Así es la Noticia*, the Inter-American Court granted provisional measures in a resolution of July 6, 2004.

²⁵⁹ The Office of the Special Rapporteur received information that on February 14, 2004, President Hugo Chávez threatened to take control of the antennas that broadcast the signal of *Globovisión* and *Venevisión* if the opposition carried out activities similar to those of April 11, 2002, when there was a coup d'état. After the recall referendum, the elections director, Jorge Rodríguez, stated that he would send to prison anyone who spoke of electoral fraud. After these and other statements describing any number of complaints about the referendum were published in the daily *El Universal* of September 26, 2004, President Chávez, in his weekly radio and television program "*Aló Presidente*," stated that the editor of *El Universal*, Andrés Mata "has no homeland ... and is playing to the transnational interests that are eager to make themselves the owners of Venezuela."

²⁶⁰ On September 23, 2004, the *Programa Venezolano de Educación-Acción en Derechos Humanos* (PROVEA) brought an *amparo* action after the refusal of the Human Rights Ombudsman to respond to a request for information, made on May 27, 2004. PROVEA had sent a written communication to the Office of the Human Rights Ombudsman requesting general information on cases of human rights violations, and some statistical data to be used by PROVEA in preparing its annual report on the human rights situation in Venezuela. On September 24, 2004, the Office of the Human Rights Ombudsman issued a communiqué by which it noted that the Organic Law on the Office of the Human Rights Ombudsman establishes at its Article 64 that the information in the Office of the Human Rights Ombudsman is confidential, and that the annual report of that office is available to the public.

stated: "...a law licensing journalists, which does not allow those who are not members of the 'colegio' to practice journalism and limits access to the 'colegio' to university graduates who have specialized in certain fields, is not compatible with the Convention. Such a law would contain restrictions to freedom of expression that are not authorized by Article 13(2) of the Convention and would consequently be in violation not only the right of each individual to seek and impart information and ideas through any means of his choice, but also the right of the public at large to receive information without any interference."

PRINCIPLE 7 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Prior conditioning of truthfulness, impartiality, or timeliness by the states)

178. In April 2004 the political organization *Un Solo Pueblo* asked the National Telecommunications Commission (CONATEL) to institute an administrative proceeding against *Canal 8*, state-owned, for not transmitting accurate information.²⁶¹

179. On concluding its 121st regular session, in October 2004, the IACHR reiterated its concern over the Draft Law on Social Responsibility in Radio and Television, which at that time was being debated in the National Assembly of Venezuela. As the IACHR indicated at that time, several articles of the law did not reflect the international standards for the protection of human rights, the caselaw of the inter-American system on the subject, or the recommendations of the IACHR.²⁶² Despite these observations by the IACHR and the recommendations that have been made since 2003 in several press releases, letters, and reports of the Office of the Special Rapporteur and the Commission,²⁶³ the National Assembly of Venezuela adopted the draft law, known as the "Law on Contents," in November. The Inter-American Commission on Human Rights, in a press release of November 30, after receiving a report from the Office of the Special Rapporteur on the law, stated its concern over the adoption of the legislation, as it contains conditions on accuracy and timeliness of information programs. The Inter-American Court of Human Rights, in its advisory opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism of 1985 (OC-5/85), noted: "One cannot legitimately rely on the right of a society to be honestly informed in order to put in place a regime of prior censorship for the alleged purpose of eliminating information deemed to be untrue in the eyes of the censor." The law in question establishes extensive limitations on the content of radio and television programs that could undermine provisions of the American Convention. In addition, as the IACHR indicated, the use of vague terms, together with the existence of sanctions that could be excessive, may have a chilling effect on the informational work of the media and journalists, limiting the flow of information to Venezuelan society on matters of public interest. The IACHR also expressed its concern over the creation of a Bureau of Social Responsibility (*Directorio de Responsabilidad Social*) and a Council on Responsibility (*Consejo de Responsabilidad*) with very broad powers. The Commission concludes that, as it is a bill that imposes numerous

²⁶¹ *Globovisión*, www.globovision.com, April 12, 2004, "Un Solo Pueblo solicitó a CONATEL apertura de procedimiento contra el canal 8."

²⁶² Press Release 23/04 of the Inter-American Commission on Human Rights at: <http://www.cidh.oas.org/Comunicados/Spanish/2004/23.04.htm>.

²⁶³ See *Informe sobre Derechos Humanos en Venezuela*, at: <http://www.cidh.oas.org/relatoria/listDocuments.asp?categoryID=10>; Press Release 111/04 of the Office of the Special Rapporteur for Freedom of Expression, at: <http://www.cidh.oas.org/relatoria/showArticle.asp?artID=287&IID=2>, and Annual Report of the IACHR 2003, Volume III, Chapter II, at: <http://www.cidh.oas.org/relatoria/showArticle.asp?artID=139&IID=2>.

sanctions, the powers it grants to the oversight and sanctioning organs, the majority of whose members are state representatives, may limit the full exercise of the freedom of expression.²⁶⁴

180. The Office of the Special Rapporteur echoes the concern of the Commission and the disquiet of many international organizations for the promotion of the freedom of expression²⁶⁵ as it calls on the Venezuelan authorities to review that legislation in light of the standards set forth in many reports, decisions, opinions, and judgments of the organs of the inter-American system for the protection of human rights in regard to the freedom of expression.

**PRINCIPLE 8 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION
(Right of every social communicator to keep confidential his or her sources, notes, and personal and professional files)**

181. On June 11, 2004, there was a search of the offices of the *Venevisión* television network by officials from the Investigations Division (*División de Investigaciones*) of the National Guard, based in La Guadalupe, in Caracas. The search was part of a follow-up on investigations into the incursion of Colombian paramilitaries into Venezuelan territory.²⁶⁶ On June 23, 2004, a commission formed to investigate the search suspended 11 agents of the intelligence service known as the DISIP (*Dirección de los Servicios de Inteligencia y Prevención*) for having acted beyond the scope of their authority when they carried out the search of the television station in a search for weapons,²⁶⁷ and for having allowed the place to be contaminated on allowing the television press that was present to enter the place searched.²⁶⁸

**PRINCIPLE 9 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION
(Murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media)**

182. In February and March 2004, the groups that constitute the opposition to the government of President Hugo Chávez Frías organized many demonstrations in different parts of the country, several of which led to confrontations between sympathizers of the Government and the opposition. In this context, several journalists and media workers were assaulted or threatened. The Office of the Special Rapporteur received reports that more than 20 social communicators, media, and media workers in general received some sort of threat during the demonstrations and disturbances. While it is true that in some cases reported one cannot conclude that the assaults were aimed directly against the journalists who were covering those events, in other cases one can conclude that they were. This situation led the Inter-American Commission to issue a press release on March 3, 2004, expressing its concern over the acts of violence and urging the authorities to guarantee the security of the journalists and media

²⁶⁴ Press Release 25/04 of the IACHR, at: <http://www.cidh.oas.org/Comunicados/Spanish/2004/25.04.htm>.

²⁶⁵ Reporters without Borders, http://www.rsf.fr/Article.php3?id_Article=11641, Human Rights Watch, www.hrw.org; and Inter-American Press Association, www.sipiapa.com.

²⁶⁶ *El Universal*, www.eluniversal.com, June 11, 2004.

²⁶⁷ A total of 26 Smith and Wesson revolvers, one .38 caliber revolver, two pistols, one sports rifle, one FN30 carbine, and one .12 caliber shotgun were found there.

²⁶⁸ *El Universal*, June 24, 2004, "Suspenden a 11 Disip que allanaron a Venevisión," at: http://www.eluniversal.com/2004/06/24/ccs_art_24278F.shtml.

workers so that they could continue their work of informing Venezuelan society. On March 8, 2004, the Public Ministry of Venezuela issued measures of protection for 27 individuals—15 journalists, five cameramen, and seven photographers—who were injured or assaulted while covering incidents from February 27 to March 3, 2004.²⁶⁹ Following are some of the incidents reported to the Office of the Special Rapporteur.

183. On February 12, 2004, journalist Víctor Sierra, of the daily *Cambio de Siglo*, was assaulted by antiriot police while covering a demonstration²⁷⁰ of university students who asked the National Electoral Council to respond positively to the request for a referendum to revoke the presidential mandate.

184. On February 27, 2004, in the context of a march in opposition to President Hugo Chávez, cameraman Carlos Montenegro of the *Televen* network suffered a gunshot wound to the leg, in the Bello Monte area of Caracas.²⁷¹ Photographer Luis Vladimir Gallardo of the regional daily *El Impulso* was wounded by shot in the back and face when a tear-gas bomb hit him in the back. These two cases occurred when the National Guard tried to disperse a demonstration in opposition to the government using tear gas and shot.

185. That same day, Berenice Gómez, a journalist with the Caracas daily *Últimas Noticias*, was beaten along with the driver (unidentified) from the same daily.²⁷² Three workers (two of them minors) from the community radio station *Radio Perola*, of Caracas, who had received death threats by telephone and email, were assaulted by eight individuals, who allegedly belonged to the organizations *Bandera Roja*, *Acción Democrática*, and *Primero Justicia*, which oppose the government of President Chávez.²⁷³

186. On February 28, 2004, Jorge Ortuño, photographer with the regional daily *Avance*, was threatened by directors of the National Guard (GN: *Guardia Nacional*) while covering protests in the area of San Antonio de los Altos, near Caracas, and had to leave the place while working after receiving an order from a soldier. Tito Díaz was hit by shot fired by GN officers after witnessing how some officials were assaulting an individual.²⁷⁴ In that same place, another *Avance* photographer, Juan Calabres, also had to maneuver to avoid being hit by shot. On March 1, Antonio González, photographer with *Avance*, had guns trained on him and was threatened by military personnel.²⁷⁵

²⁶⁹ *Instituto de Prensa y Sociedad*, www.ipys.org, March 8, 2004.

²⁷⁰ International Freedom of Expression Exchange, February 13, 2004, and IFEX alert dated February 16, 2004, “*Policías antimotines golpean a periodista*,” at: <http://www.ifex.org/es/content/view/full/56841/>.

²⁷¹ *Instituto de Prensa y Sociedad*, www.ipys.org, March 5, 2004.

²⁷² Gómez received death threats and had his equipment taken by alleged sympathizers of President Chávez when traveling along Avenida Andrés Bello in Caracas. *Instituto de Prensa y Sociedad*, www.ipys.org, March 5, 2004.

²⁷³ *Instituto de Prensa y Sociedad*, www.ipys.org, March 8, 2004.

²⁷⁴ Initially they tried to take his camera, they then beat him with the butt of their weapons, and finally they fired shot at him.

²⁷⁵ *Instituto de Prensa y Sociedad*, www.ipys.org, March 8, 2004.

187. On Sunday, February 29, 2004, photographer Billy Castro and journalist Wilmar Rodríguez, both of the daily *Impacto*,²⁷⁶ were attacked. That same day Janeth Carrasquilla, correspondent for *Globovisión*, received a head injury in the city of Valencia when she was covering an opposition demonstration that turned violent when the protesters confronted the GN.²⁷⁷

188. On February 29, 2004, Juan Barreto, photographer with *Agence France Presse* (AFP), received a bullet wound while covering disturbances in the Plaza Altamira in

Caracas.²⁷⁸ That same day Felipe Izquierdo, cameraman for the international television network *Univisión*, received a bullet wound in the foot while covering a protest staged by the opposition to the government of President Hugo Chávez near the Plaza Francia in Altamira, in eastern Caracas.²⁷⁹

189. On March 1, 2004, journalist Jhonny Figarrella of the *Globovisión* television network was threatened with a weapon while covering a demonstration in opposition to President Chávez that turned violent; he was later injured by a tear-gas bomb that hit him in the chest while he was working in the Caurimare district, in Caracas. That same day photographer Henry Delgado of the daily *El Nacional* had his camera taken from him by members of the GN while he was covering a demonstration organized by opponents to the Chávez government in the Terrazas del Ávila area of Caracas. In the same place journalist Edgar López was assaulted; he is a reporter with the daily *El Nacional*, for whom he was covering the demonstration.²⁸⁰

190. On March 2, 2004, Frank Molina, cameraman with *Televen*, was beaten and had his camera taken from him.²⁸¹ That same day Juan Carlos Aguirre, a journalist with the Caracas television outlet *CMT*, was wounded when beaten by GN soldiers while covering protests in opposition to the government of Hugo Chávez in Altamira, in eastern Caracas. Along with Aguirre was the cameraman for the same station, Alejandro Marcano, who had his equipment taken from him. After the protest, the National Guard fired tear gas and shot at them.²⁸²

²⁷⁶ Castro was beaten and kicked by a group of persons who presumably support President Hugo Chávez, when covering a protest outside the Chamber of Commerce in the city of Anaco, in the state of Anzoátegui. Castro filed a complaint with the local prosecutor's office.

²⁷⁷ *Instituto de Prensa y Sociedad*, www.ipys.org, March 2, 2004.

²⁷⁸ The bullet hit him in the chest but, as he was wearing a bulletproof vest, the projectile rebounded and he suffered injuries to his hand. The shot was said to have been fired by a youth who was participating in a demonstration organized by supporters of the opposition to the government of President Hugo Chávez. *Instituto de Prensa y Sociedad*, www.ipys.org, March 1, 2004.

²⁷⁹ *Instituto de Prensa y Sociedad*, www.ipys.org, March 1, 2004.

²⁸⁰ GN forces seized his notebook, and then a group of sympathizers of President Chávez insulted him, shouted at him, and hit him in the head and chest. *Instituto de Prensa y Sociedad*, www.ipys.org, March 1, 2004.

²⁸¹ Molina filmed from a distance a group of 20 hooded armed persons who were traveling in several vehicles in the area of El Marqués, in eastern Caracas, where along with another journalist he was covering protests opposing the government of President Hugo Chávez; they were firing shots in streets and buildings. The unknown persons seized the taped material. *Instituto de Prensa y Sociedad*, www.ipys.org, March 5, 2004, Committee to Protect Journalists, www.cpj.org, March 5, 2004.

²⁸² *Instituto de Prensa y Sociedad*, www.ipys.org, March 3, 2004.

191. On March 2, 2004, Víctor Yépez and Adda Pérez, owners and hosts of Radio Máxima FM, in the city of Ojeda, in the northeastern part of the department of Zulia, were attacked by sympathizers of the opposition to the government of Hugo Chávez, who were participating in a protest. Yépez and Pérez sought precautionary measures from the IACHR, which were granted on March 11, 2004.²⁸³

192. On March 2, 2004, the main facility of the state-owned television station *Venezolana de Televisión (VTV)* was attacked, as denounced by the company in a press conference. According to the information received, the persons responsible had been opponents to the government of Hugo Chávez; they shot several times and threw bottles, stones, and Molotov cocktails at the offices of the station and at the personnel, who emerged unscathed.²⁸⁴

193. On March 3, 2004, Carlos Colmenares, cameraman with *Canal Radio Caracas Televisión (RCTV)*, was injured while covering a protest in opposition to the government of Hugo Chávez, at the Plaza Francia of Altamira, in eastern Caracas. Colmenares was with other journalists when he received a gunshot wound in the right ankle.²⁸⁵ Precautionary measures had previously been issued by the IACHR on behalf of Colmenares.²⁸⁶

194. On March 3, Ana Marchese, photographer with the daily *Correo de Caroni*, was wounded while covering a march called by the opposition in Ciudad Bolívar, capital of the state of Bolívar, in southern Venezuela. She was injured by a tear-gas canister that was fired to disperse the demonstrators.²⁸⁷

195. On March 6 and 7, 2004, several threats were made to the workers at *Radio Llovizna (FM 95.7)* in the city of Guayana, in the state of Bolívar.²⁸⁸

196. On May 21, 22, 23, 28, 29, and 30, 2004, the signatures of Venezuelans on petitions to request a referendum on revoking the mandate of President Hugo Chávez underwent a verification process (known as “*reparos de firmas*”). Several journalists were assaulted while covering that process. There were also acts of violence against journalists during the referendum held in August.

197. Among the journalists assaulted during the coverage of that process were Sandra Sierra and Pedro Rey of the news program *Notitarde*, assaulted May 29.²⁸⁹ Minutes

²⁸³ Yépez and Pérez, a couple and co-owners of the station, went to their home, in an apartment complex, in their vehicle. The opposition sympathizers blocked their way and burned tires; when they tried to enter their house the demonstrators shouted at and insulted them, saying they were pro-government, and then beat and intimidated them. Committee to Protect Journalists, www.cpi.org, April 2, 2004.

²⁸⁴ Committee to Protect Journalists www.cpi.org, March 5, 2004.

²⁸⁵ Based on the trajectory of the bullet, it is presumed that it came from one of the nearby buildings.

²⁸⁶ *Instituto de Prensa y Sociedad*, www.ipys.org, March 4, 2004.

²⁸⁷ *Instituto de Prensa y Sociedad*, www.ipys.org, March 5, 2004.

²⁸⁸ The threats were made Saturday night February 6 and/or Sunday morning February 7. A group of armed individuals appeared in front of the radio stations at approximately 10 p.m. and took aim at the people who were entering and leaving. This action continued until 10 a.m. International Solidarity Network of AMARC, of March 10, which cites the *Red Venezolana de Medios Comunitarios (RVMC)*, which is affiliated with AMARC.

later, Marta Palma Troconis and Joshua Torres of *Globovisión* were assaulted in the same place.²⁹⁰ Nahjla Isaac Pérez and Johathan Fernández of the regional channel *TVS* were also assaulted in San Diego, state of Carabobo.²⁹¹

198. On June 3, 2004, around noon, several persons attacked the facilities of *Radio Caracas Televisión (RCTV)*, located in Quinta Crespo.²⁹² That same day, about 20 persons went to the main offices of the daily papers *El Nacional* and *Así es la Noticia*.²⁹³

199. During the same process it was reported that a vehicle had been burned at Plaza O'Leary in Caracas that was owned by the daily paper *Meridiano*.²⁹⁴

200. On June 27, 2004, Romelia Matute, of the state-owned *Radio Nacional de Venezuela (RNV)*, was attacked, apparently by opponents of the government of Hugo Chávez.²⁹⁵ She filed a complaint with the prosecutor's office.

201. On August 11, government sympathizers attacked a team from *Globovisión* after their coverage, in Caracas, of a meeting between government officials and international observers on the recall referendum.²⁹⁶ That same day, Spanish photographer Eduard Giménez

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²⁸⁹ On May 29, they were attacked in the municipality of Sucre, east of Caracas, by several persons who were allegedly followers of the government. After a few minutes the police arrived and after firing three shots into the air established security around the journalists. See Inter-American Press Association, Country-by-Country Reports, at: http://www.sipiapa.com/espanol/pulications/informe_venezuela2004o.cfm and Committee to Protect Journalists, http://www.cpj.org/cases04/americas_cases04/ven.html, June 9, 2004.

²⁹⁰ Troconis and Torres were beaten about the head, arms, and legs by government sympathizers who wanted to keep the journalists from reporting from the location. The attack did not stop until they took Torres's camera from him.

²⁹¹ According to the information received by the Office of the Special Rapporteur, the attacks were by government sympathizers. The journalists were pushed, beaten, and insulted, as a result of which they had to seek refuge in a commercial establishment, until the police escorted them out. See Committee to Protect Journalists, http://www.cpj.org/cases04/americas_cases04/ven.html, June 9, 2004, and Inter-American Press Association, Country-by-Country Reports, at: http://www.sipiapa.com/espanol/pulications/informe_venezuela2004o.cfm.

²⁹² A dozen government sympathizers had thrown stones and other objects at the channel's locale, and crashed a truck into the entrance; they then set it on fire.

²⁹³ Stones and objects were hurled at them, causing damage to the building; they burned a delivery truck, and damaged several employees' vehicles and office equipment. The attackers were presumably sympathizers of the government of Hugo Chávez, who were protesting over the announcement of the CNE that the opposition had reached the number of signatures to require a referendum to recall the mandate of President Hugo Chávez. See *Globovisión*, www.globovision.com, June 3, 2003, "Disturbios en el centro de Caracas, atacan sedes de Alcaldía Mayor y medios," Committee to Protect Journalists, http://www.cpj.org/cases04/americas_cases04/ven.html, June 4, 2004.

²⁹⁴ *Venevisión*, www.venevision.com, June 3, 2004, and *El Nacional*, June 3, 2004.

²⁹⁵ She was covering an activity organized by government followers who were rallying support with a view to the referendum held August 15 when, according to the reports received, she was attacked by opposition sympathizers, who took her press credential and tape recorder, and beat her. Committee to Protect Journalists, http://www.cpj.org/cases04/americas_cases04/ven.html, July 2, 2004.

²⁹⁶ According to the reports received by Office of the Special Rapporteur, Tony Vergara and Juan Camacho, technical staff of the channel, were leaving the meeting and headed to their vehicle when a group of government sympathizers took aim at them with pistols, broke the windows of their car, beat them, and sprayed them with gas. They also took their identification and a radio transmitter. The other members of the team, Ana Karina Villalba, José Umbria, and Ademar Dona, were also threatened in the incident. See Committee to Protect Journalists, http://www.cpj.org/cases04/americas_cases04/ven.html, August 24, 2004, and *Instituto de Prensa y Sociedad*, www.ipys.org, "Agreden a equipo de Globovisión en inmediaciones de sede de la vicepresidencia," August 16. At: International Freedom of Expression Exchange, www.ifex.org.

was assaulted while photographing a political activity in opposition to President Hugo Chávez in downtown Caracas for a media outlet from Barcelona, Spain.²⁹⁷

202. In addition, the Office of the Special Rapporteur and the IACHR received information on cases of attacks on media and journalists outside of the context of the referendum process. Among those affected by acts of violence were Joshua Torres, cameraman, and Sullivan Peña, camera assistant, for *Globovisión*²⁹⁸; Euro Lobo, of the Mérida-based television channel *OMC*²⁹⁹; Félix Carmona, cameraman Jorge Santos, and driver Andrés Pérez Cova, of *El Universal*³⁰⁰; cameraman Daniel Díaz, and his assistant, Esteban Córdoba, of *Venevisión*³⁰¹; Dariana Bracho, of *La Verdad* of Maracaibo³⁰²; Alberto

Almao and Víctor Henríquez, technical staff of *Globovisión*³⁰³; Nelson Bocaranda, of *Radio*

²⁹⁷ A woman and a hooded man dragged him to a motorcycle and took him away, forcibly, in the vehicle. Minutes later, GN forces set out in pursuit, to rescue him until Giménez fell from the motorcycle. See *Instituto de Prensa y Sociedad*, www.ipys.org, "Agreden a fotógrafo español durante acto político," August 17, 2004. At: International Freedom of Expression Exchange, www.ifex.org.

²⁹⁸ On January 18, 2004, a team of reporters from *Globovisión* television was assaulted, as stones and pipes were thrown at them, and they were shot at, as they were covering a celebration marking the anniversary of the opposition party Movimiento Al Socialismo (MAS). The team emerged unscathed. According to reports received by the Office of the Special Rapporteur, a group of persons surrounded the vehicle in which Joshua Torres, cameraman, and Sullivan Peña, camera assistant, were traveling near Plaza Bolívar in the historic center of Caracas. They were filming the moment when a woman wearing an orange t-shirt of the opposition was being beaten with sticks. The team was able to get away in the vehicle, but they were struck. As they were moving away, a bullet became lodged in one of the rear doors of the vehicle. They had apparently been attacked by men wearing government symbols. Torres and Peña filed a complaint with the prosecutor's office of Caracas. See *Instituto de Prensa y Sociedad*, www.ipys.org, January 19, 2004, International Freedom of Expression Exchange, www.ifex.org, January 20, 2004, "Equipo reportero atacado," <http://www.ifex.org/es/content/view/full/56297>, Committee to Protect Journalists, www.cpi.org, January 30, 2004.

²⁹⁹ On January 29, 2004, journalist Euro Lobo was assaulted; he works for the *OMC* television channel in Mérida, capital of the state of Mérida, in southwestern Venezuela. The incident occurred when he was covering a protest. He said he was threatened by presumed sympathizers of the *Movimiento Quinta República*, who beat him in the face when he was covering a demonstration by an opposition party. *Instituto de Prensa y Sociedad*, www.ipys.org, February 11, 2004, International Freedom of Expression Exchange, www.ifex.org, February 13, 2004 "Golpeado periodista de televisión regional." <http://www.ifex.org/es/content/view/full/56781/>.

³⁰⁰ On May 10, 2004, the team from the daily *El Universal*, made up of reporter Félix Carmona, cameraman Jorge Santos, and driver Andrés Pérez Cova, had been assaulted and received death threats in southeast Caracas from members of military intelligence (DIM: *Dirección de Inteligencia Militar*) when they came upon a group of soldiers while they were covering the search of the home of a deputy from the opposition to the government of Hugo Chávez. According to the information received, the staff of the DIM had trained their weapons on and beaten the journalists, and damaged part of their equipment, which was ultimately taken from them. See *Instituto de Prensa y Sociedad*, www.ipys.org, May 14, 2004, Committee to Protect Journalists, www.cpi.org, May 25, 2004.

³⁰¹ On July 12, 2004, by the Universidad de Zulia, in western Venezuela, a group of hooded persons approached *Venevisión* cameraman Daniel Díaz and his assistant Esteban Córdoba, and held them for several hours. While they were being held, they were threatened with 9 mm pistols and .38 caliber revolvers, and warned that "here in the university we don't want any media." The reporters were left in one of the schools, while their pick-up truck was looted and burned. See *Instituto de Prensa y Sociedad*, www.ipys.org, "Equipo periodístico de televisión atacado," July 16, 2004. At: International Freedom of Expression Exchange, www.ifex.org.

³⁰² On July 16, 2004, journalist Dariana Bracho of the daily *La Verdad* of Maracaibo, in western Venezuela, reported having received seven death threats by phone in the previous two days. Bracho said she had received the threats after the Superior Military Prosecutor for the states of Zulia and Falcón, National Guard captain Gherson Francisco Chacón Paz, sent her a notice on July 13 indicating that on July 14 she should appear before the Intelligence Division of Regional Command No. 3 to explain the content of an Article published by the newspaper. The information in question described a document in which the chief of Regional Command No. 3 of the GN was prohibited from discussing the guerrillas. *Instituto de Prensa y Sociedad*, www.ipys.org, "Amenazan de muerte a periodista del diario La Verdad de Maracaibo," July 20, 2004. At: International Freedom of Expression Exchange, www.ifex.org.

*Onda 107.9 FM*³⁰⁴; as well as a team of reporters from the state-owned *Venezolana de Televisión (VTV)*.³⁰⁵

PRINCIPLES 10 AND 11 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION (Use of defamation laws by public officials and *desacato* laws)

203. On March 22, 2004, journalist Patricia Poleo, director of the daily *El Nuevo País*, went to testify before a military court on charges brought against her by the military prosecutor, Lt. Esaúl Olivares Linares, who accused her of instigating rebellion and defamation of the national armed forces after Poleo revealed a video showing a group presumably of Cuban citizens in Venezuelan military facilities. Poleo's defense counsel asked to have the case removed to a civil court, as Poleo is not part of any military body.³⁰⁶ The armed forces accused her of committing an outrage against the institution.³⁰⁷

204. On May 25, 2004, the 11th Court of Review of the Criminal Circuit for Caracas convicted Ibéyise Pacheco, a columnist with *El Nacional*, and sentenced her to nine months in prison for continuing and aggravated defamation. An action was brought against her by Col. Angel Alberto Bellorín, after she published her weekly column *En Privado* dated June 15, 2001, in which she accused Col. Bellorín of having falsified the grade of an exam when he was a law student. In addition, in February 2002, she wrote that he had obtained several promotions by irregular means.³⁰⁸

205. On October 11, 2004, retired army general Francisco Usón Ramírez was convicted and sentenced to five years and six months of prison for the crime of committing an outrage against the armed forces, provided for in Article 505 of the Code of Military Justice.³⁰⁹ He was also disqualified from political participation and from receiving awards. The accusation was based on a statement made on the program *La Entrevista* with Marta Colomina on April 16,

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³⁰³ On September 17, 2004, they were assaulted while covering a protest by employees of a government educational program called Misión Ribas. The demonstrators, once they realized they were taping the demonstration from inside a vehicle, surrounded and insulted them. They also threw fireworks at them, damaging the vehicle. The National Guard, on hearing the explosions, arrived on the scene, dispersed the demonstrators, and allowed the workers to leave. *Instituto de Prensa y Sociedad*, www.ipys.org, "Agreden a técnicos del canal Globovisión," September 21, 2004. At: International Freedom of Expression Exchange, www.ifex.org.

³⁰⁴ On October 15, 2004, Nelson Bocaranda, who directs his radio program *Los Run Runes de Nelson*, broadcast by *Radio Onda 107.9 FM*, reported having received threats due to his comments against the administration of the mayor of El Hatillo – east of Caracas- Alfredo Catalá. *Instituto de Prensa y Sociedad*, www.ipys.org, "Amenazan de muerte a periodista por denuncias contra alcaldía," October 20. At: International Freedom of Expression Exchange, www.ifex.org.

³⁰⁵ On October 31, 2004, a team of reporters was covering the election in Caurimare, east of Caracas, to choose governors and mayors, when a group of persons threw objects at them. *Instituto de Prensa y Sociedad*, www.ipys.org, "Agreden a equipo reporteril de televisora estatal," November 5. At International Freedom of Expression Exchange, www.ifex.org.

³⁰⁶ *Instituto de Prensa y Sociedad*, www.ipys.org, March 26, 2004, "Venezuela: periodista imputada por fiscal militar."

³⁰⁷ Inter-American Press Association, Country-by-Country Reports, at: http://www.sipiapa.com/espanol/publications/informe_venezuela2004o.cfm.

³⁰⁸ Reporters without Borders, May 27, 2004, "Dos periodistas amenazadas con penas de cárcel," http://www.rsf.org/Article.php3?id_Article=10468.

³⁰⁹ Article 505 – "one who in any way libels, offends, or disrespects the National Armed Forces or any of their units shall have a penalty of three to eight years imprisonment."

2004, when he stated that the soldiers being held in the Combat Engineers Battalion at Forte Mara in Zulia had been burned with a flame-thrower.³¹⁰

206. On November 11, 2004, journalist Manuel Isidro Molina, of the weekly *La Razón*, was notified by Chief Military Prosecutor Eladio Aponte that a case had been initiated against him for defamation and libel of the national armed forces. On November 7, Molina published a column according to which retired Air Force Col. Silvino Bustillos, who had been disappeared since November 1, had been tortured and murdered at military intelligence offices (*Dirección de Inteligencia Militar*) in Caracas. On November 8, Bustillos contacted his family members, informing them that he was well, but in hiding. The next day the journalist rectified the information in his column, acknowledging an "involuntary error."³¹¹ Notwithstanding that rectification, Molina was summonsed to the Office of the Chief Military Prosecutor on November 19.

207. The Office of the Special Rapporteur is also concerned about consideration by the National Assembly of Venezuela of a proposed reform to the Criminal Code, whose text was approved in the second round of debate during the regular sessions of December 2 and 9, 2004. This bill stiffens the penalties for the crimes of defamation and libel. As appears from the text approved thus far, the maximum prison term for the crime of defamation is increased to four years, from 18 months. As for criminal libel, in the text approved the maximum sentence was increased from one week to one year.³¹²

**PRINCIPLE 13 OF THE DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION
(Direct or indirect pressures aimed at silencing the flow of information are incompatible with the freedom of expression)**

208. In May 2004, the Venezuelan Congress discussed the possibility of stripping four journalists of Venezuelan nationality. The persons in question are media entrepreneur Gustavo Cisneros, and journalists Napoleón Bravo, Marta Colomina, and Norberto Maza; the last two are of Spanish and Uruguayan origin, respectively. The proposal was made by legislator Iris Varela, who said it was based on her characterization of the journalists as anti-patriotic. A request from Congress would need to be followed up at the Office of the Attorney General of the Republic.³¹³

209. In early June 2004, journalist Poleo was once again called to testify before a military prosecutor in relation to the incursion of Colombian paramilitaries in Venezuela.³¹⁴ On June 3, 2004, Poleo testified for three hours before a military prosecutor as it was presumed that she was linked to the incursion of Colombian paramilitaries into Venezuela, and on an alleged meeting to conspire against the Venezuelan government, and in which she had allegedly participated, along with some Venezuelan military officers who were also being

³¹⁰ *El Universal*, General Francisco Usón fue condenado a 5 años y 6 meses de cárcel, October 12, 2004.

³¹¹ Instituto Prensa y Sociedad (IPYS), www.ipys.org, November 18, at: International Freedom of Expression Exchange, www.ifex.org.

³¹² The approved text is available at the website of the National Assembly of Venezuela. <http://www.asambleanacional.gov.ve/ns2/leyes.asp?id=559>.

³¹³ Inter-American Press Association (IAPA), May 20, 2004.

³¹⁴ *El Universal*, June 3, 2004 "Citan a Patricia Poleo por caso de paramilitares," http://www.eluniversal.com/2004/06/03/pol_art_03108C.shtml.

investigated.³¹⁵ The IACHR requested information from the Venezuelan government on the situation of Patricia Poleo, to verify that there is due process in her case.³¹⁶

D. Murders of media workers

MEDIA WORKERS MURDERED IN 2004

INFORMATION ON THE JOURNALISTS	PLACE AND DATE	FACTS OF THE CASE	BACKGROUND	STATUS OF THE INVESTIGATION
José Carlos Araujo , <i>Timbaúba Radio</i>	Timbaúba, Pernambuco state, BRAZIL. 24 April 2004	Two armed subjects shot José Carlos Araujo outside his residence.	In accordance with the information received, Araujo had made charges related to local crime.	On 27 April 2004 Helton Jonas Goncalvez de Oliveira was arrested and confessed to the murder. Goncalvez stated that the homicide was due to the fact that, in his program <i>José Carlos Entrevista</i> , Araujo had accused him of being the principal perpetrator of several crimes, which he denied. The Commissariat of Timbaúba also established that Goncalves de Oliveira had been helped by Marcelo Melo, and a third subject had facilitated a motorcycle.
Jorge Lourenço dos Santos , owner and commentator of <i>Criativa FM</i>	Santana do Ipanema, Alagoas state, BRAZIL. 11 July 2004.	Dos Santos was murdered in front of his house, having been shot four times. The assassin fled in a vehicle. The journalist was transported to a local hospital where he died soon after arriving.	In his program, dos Santos criticized politicians and local entrepreneurs. The journalist had received death threats and been attacked twice before. Dos Santos had also gotten involved in politics, having run for alderman in a nearby locality.	At the time of the writing of this report, the Rapporteur had not received information on the status of the investigation. However, he did receive information that a civil society request had been made for federal authorities to get involved in the investigation.

³¹⁵ *El Universal*, June 4, 2004 "Poleo declaró durante tres horas en fiscalía Militar," http://www.eluniversal.com/2004/06/04/pol_art_04107A.shtml.

³¹⁶ *El Universal*, www.eluniversal.com, oif June 14, 2004, "Abogados de Poleo denuncian violación del debido proceso."

INFORMATION ON THE JOURNALISTS	PLACE AND DATE	FACTS OF THE CASE	BACKGROUND	STATUS OF THE INVESTIGATION
Ricardo Ortega , journalist of the Spanish chain <i>Antenna 3</i>	Port-au-Prince, HAITI 7 March 2004	According to the information received, Ortega was covering a demonstration in Port-au-Prince when armed subjects opened fire on a group of people. Some 30 people were wounded and seven were killed, among them Ricardo Ortega, who was shot.	The instability reigning in Haiti in early 2004, within the framework of demonstrations and disputes between the opposition and pro-government groups, generated an environment of violence that affected the work of social communicators and the media. During that period, serious incidents such as attacks, assaults, and threats were directed at social communicators, including several foreign correspondents.	On 22 March 2004, the police detained Yvon Antoine, and on 28 March 2004, division inspector Jean-Michel Gaspard, both for their presumed involvement in the events of 7 March.
Roberto Javier Mora García , editorial director of the daily paper <i>El Mañana</i> .	Nuevo Laredo, Tamaulipas state, MEXICO. 19 March 2004.	The journalist was stabbed in front of his house. None of his belongings were taken.	The journalist had published various articles on organized crime, but had not received any threats beforehand.	Two neighbors of the journalist, identified as Mario Medina Vásquez, a citizen of the United States, and Hiram Olivero Ortíz, were detained on 26 March 2004. The Rapporteur received queries from civic organizations regarding the seriousness of the investigation.
Francisco Javier Ortiz Franco , editor/publisher of the weekly paper <i>Zeta</i> .	Tijuana, Baja California, MEXICO. 22 June 2004	An unidentified subject whose face was covered shot him four times in the head and neck, in the presence of his two children, who were unharmed.	Ortíz was co-founder and an editorial writer on the subjects of the drug traffic and corruption. In 1997, Jesus Blancornelas, director of the weekly paper, was victim of an attack that killed his friend and bodyguard Luis Valero Elizalde.	On 29 June 2004, the District Attorney's Office in Baja California appointed a Special Judge to investigate the homicide. However, on 18 August, federal authorities took over the case because of the possible relationship between the murder and organized crime.

INFORMATION ON THE JOURNALISTS	PLACE AND DATE	FACTS OF THE CASE	BACKGROUND	STATUS OF THE INVESTIGATION
Francisco Arratia Saldierna , columnist of <i>El Imparcial</i> and <i>El</i>	City of Matamoros, Tamaulipas, MEXICO. 31 August 2004.	Arratia died of a cardiac arrest after being brutally beaten. The columnist had been tortured before he was thrown out of a vehicle.	Arratia wrote on corruption and organized crime.	On 24 September, the police of Tamaulipas arrested Raúl Castelán Cruz in the city of Matamoros. He confessed to having participated in

INFORMATION ON THE JOURNALISTS	PLACE AND DATE	FACTS OF THE CASE	BACKGROUND	STATUS OF THE INVESTIGATION
<i>Regional</i> and, in Matamoros, of <i>Mercurio</i> and <i>Cinco</i> , as well as the web page, <i>En Línea Directa</i> .				Arratia's murder and that the crime had been motivated by Arratia's articles. On 30 September, federal authorities took over the investigation because of the possible link between the murder and organized crime.
Carlos José Guadamuz Portillo , director of Channel 23's program " <i>Dardos al Centro</i> ."	Managua, NICARAGUA. 10 February 2004.	The journalist was shot several times when he arrived at the channel.	The Rapporteur received information that the journalist had already received death threats.	William Hurtado García, who confessed to the crime, was identified as the responsible party. On 19 April 2004, Hurtado García was sentenced to 21 years prison for the crimes of murder and attempted homicide against Guadamuz and his son, who was with the journalist.
María José Bravo , correspondent of the daily papers <i>La Prensa</i> and <i>Hoy</i>	Juigalpa, Chontales Department, NICARAGUA. 9 November 2004	The journalist was shot at close range when covering the demonstrations of political groups against the results of the 7 November elections in the municipality.	The Rapporteur did not receive information on threats or incidents prior to the murder.	The police detained Eugenio Hernández González, former mayor of the municipio of El Ayote, as the main suspect of the murder and two other suspects. At the time this report was being written, the motive of the murder had not been determined.
Antonio de la Torre Echandía , director of the news show <i>El Equipo de la Noticia</i> , broadcast by <i>Radio Orbita</i> .	Yungay, Ancash, PERU. 14 February 2004.	De la Torre was stabbed by two subjects as he was leaving a party.	De la Torre had received telephone threats and previously been the target of attacks. The journalist had disseminated criticisms about Amaro León, mayor of Yungay.	According to the investigation, Moisés David Julca had been identified as the presumed perpetrator of the murder. The mayor of the locality, Amaro León, was also detained as the presumed intellectual author. At the time of the writing of this report, Julca was in flight, as was the mayor's daughter, Enma León Martínez, also under investigation.

INFORMATION ON THE JOURNALISTS	PLACE AND DATE	FACTS OF THE CASE	BACKGROUND	STATUS OF THE INVESTIGATION
Alberto Rivera Fernández, director of the program <i>Transparencia</i> , broadcast by <i>Radio Oriental</i> .	Pucallpa, Ucayali, PERU. 21 April 2004.	Rivera was murdered when two men entered his glass store and one of them shot him several times in the chest. There was no evidence of theft in the place.	Rivera was a controversial radio commentator who criticized local authorities. In January 2004, he had participated in a demonstration against the authorities of the province of Colonel Portillo. The demonstrators had caused damages to the municipality building and the municipio sued some of them, including Rivera. The commentator had accused the municipality of corruption.	In late May, the police had declared that the crime had been a crime of passion but this hypothesis was subsequently discarded. On 1 June, the police arrested Roy Gavino Cullqui Saurino and three days later Martín Ignacio Flores Vásquez. The first was a journalist and public relations officer for the municipality, the second an employee of the municipal potable water and sewerage company.
Juan Emilio Andujar, correspondent of <i>Listín Diario</i> and director of the weekly radio program <i>Encuentro Mil 60</i>	Azua, DOMINICAN REPUBLIC. 14 September 2004.	Andujar was murdered by armed subjects riding motorcycles, who shot him in front of the offices of <i>Radio Azua</i> . At the time he was with his colleague, Juan Sánchez, who survived the attack.	In September and October, in Azua, southern Dominican Republic, several communicators had been the targets of violent incidents and others reported that they had received threats. Andujar had reported on the crime wave of threats against six journalists.	One of the presumed attackers died in a shoot out with the police, while another was still in flight at the time this report was written.

CHAPTER III

JURISPRUDENCE¹

A. Summary of the recent jurisprudence on freedom of expression of the United Nations Human Rights Committee

1. Introduction

1. The following sections summarize the recent jurisprudence on freedom of expression provided by the United Nations Human Rights Committee that is most applicable to freedom of expression issues in the Americas. The inclusion of these sections in this chapter responds to an attempt by the Special Rapporteur for Freedom of Expression to encourage comparative law case studies in compliance with the mandate of the Heads of State and Government conferred at the Third Summit of the Americas held in Quebec, Canada, in April 2001. During the Summit, the Heads of State and Government ratified the mandate of the Special Rapporteur for Freedom of Expression, and further decided that the States will:

[...] support the work of the inter-American human rights system in the area of freedom of expression through the Special Rapporteur for Freedom of Expression of the IACHR, as well as proceed with the dissemination of comparative jurisprudence, and seek to ensure that national legislation on freedom of expression is consistent with international legal obligations.²

2. The Special Rapporteur for Freedom of Expression regards the Committee's jurisprudence on the right to freedom of expression as a valuable source that can shed light on the interpretation of this right in the Inter-American system, and serve as a useful tool for legal practitioners and interested persons.

3. Two key declarations that comprise the International Bill of Rights pertain to the freedom of expression: the Universal Declaration of Human Rights (hereinafter the "UDHR") and the International Covenant on Civil and Political Rights (hereinafter the "ICCPR"). The United Nations General Assembly adopted the UDHR in 1948.³ The negotiating states adopted the ICCPR and opened it for signature, ratification and accession on December 16, 1966.⁴ The ICCPR entered into force on March 23, 1976,⁵ and has been ratified by 152 countries.⁶

¹ This chapter was made possible through the assistance of Fayza Elmostehi, a third-year law student at Syracuse University's College of Law, who provided research and initial drafting of this report, and Eric Heyer, a second-year law student at The George Washington University, who provided additional research and final drafting of this report. Both were interns in the Office of the Special Rapporteur for Freedom of Expression during 2004. The Office thanks them for their contributions. Some of the summaries of the cases contained in this chapter have been primarily based on the summaries of cases offered by Article XIX, a London-based non-governmental organization committed to promoting freedom of expression and access to official information. The summaries of the cases by Article XIX are available at <http://www.Article19.org>.

² Plan of Action, Secretariat for the Summit Process, OAS, 7 (April 22, 2001), available at <http://www.summit-americas.org/Documents%20for%20Quebec%20City%20Summit/Quebec/plan-e.pdf>.

³ See G.A. Res. 217(III)(A), U.N. GAOR, 3d Sess., at 74 U.N. Doc. A/810 (1948), available at <http://www.unhchr.ch/udhr/lang/eng.pdf>.

⁴ See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (hereinafter "ICCPR").

⁵ See *Id.*

⁶ Status of Ratifications of the Principal International Human Rights Treaties, Office of the U.N. High Commissioner for Human Rights, 12 (June 9, 2004), available at <http://www.unhchr.ch/pdf/report.pdf>.

4. The American Convention on Human Rights (hereinafter the “American Convention”), the UDHR, and the ICCPR each have specific provisions regarding the right to freedom of expression. These are delineated in Article 13 of the American Convention,⁷ Article 19 of the UDHR, and Articles 19 and 20 of the ICCPR⁸. However, the format of the Articles differs greatly: while Article 13 of the American Convention contains a specific list of exceptions to the general principle established in the first paragraph of the Article, its counterpart in the UDHR is formulated in very general terms. The first two subparts of Article 19 of the ICCPR are identical to those found in the American Convention, but the American Convention, in the subsequent subparts, provides greater elaboration than the ICCPR on permissible restrictions. Article 20 of the ICCPR echoes the sentiments of Article 13(5) of the American Convention by placing a prohibition on “[a]ny propaganda for war” and on “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”⁹ Moreover, the Articles have a very different reach, as Article 13 of the American Convention creates a virtually complete ban on prior censorship that is absent in both the UDHR and the ICCPR.¹⁰

5. The higher regard in which the American Convention holds the right to freedom of expression as compared to both the UDHR and the ICCPR makes it imperative that the rules derived from the jurisprudence of the United Nations Human Rights Committee be understood as minimum standards required by the right to freedom of expression, but never as a limitation on the enjoyment of greater protection of freedom of expression. This approach is consistent with the view adopted by the Inter-American Court of Human Rights on the simultaneous applicability of international treaties. In this regard, the Court affirmed, following the rule of interpretation set out in subparagraph (b) of Article 29 of the American Convention, that:

[. . .] if in the same situation both the American Convention and another treaty are applicable, the rule most favorable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.¹¹

2. Cases under the International Covenant on Civil and Political Rights

6. Almost all cases concerning freedom of expression under the United Nations Human Rights Committee’s jurisdiction are introduced under Article 19 of the ICCPR. Article 19 provides for the right to freedom of expression in the following way:

1. Everyone shall have the right to hold opinions without interference.

⁷ For the text of Article 13 of the American Convention on Human Rights, see annex.

⁸ Article 19 of the ICCPR contains the same language as Article 19 of the UDHR.

⁹ ICCPR, *supra* note 3, at Article 20(1)-(2).

¹⁰ Article 13(2) of the American Convention provides, in part: “The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship” American Convention on Human Rights, 1144 U.N.T.S. 123, Article 13(2) (1969) (hereinafter “ACHR”).

¹¹ Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, para. 52 (Nov. 13, 1995), *available at* http://www1.umn.edu/humanrts/iachr/b_11_4e.htm.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.¹²

7. The following section refers to cases recently decided by the United Nations Human Rights Committee (hereinafter “the Committee”) on subjects related to the right to freedom of expression. The selection of the issues in these cases corresponds to the importance of their proper understanding in tackling the difficulties faced by the countries in the Americas at the current stage of development of the right to freedom of expression.

8. The subjects treated in this section are loosely grouped in the following categories, according to the basis of the Committee’s analysis of the complaint: (a) criminal defamation; (b) access to judicial information; (c) censorship; (d) access to forum and media for public demonstration or dissent; and (e) political participation. It should be noted that a number of these cases could fall into multiple categories because of their factual circumstances.

9. The cases portrayed are only a sampling of the over fifty cases available on the subjects treated in the jurisprudence of the Committee.¹³ The cases below have been selected to best illustrate the Committee’s interpretation of the right to freedom of expression as laid out by Article 19 of the ICCPR. In these recent cases, the Committee analyzes whether there has been a violation of the right to freedom of expression by evaluating whether the restrictions imposed come within the ambit of Article 19.

a. Criminal defamation

i. *Kankanamge v. Sri Lanka* (2004)

10. In *Kankanamge v. Sri Lanka*,¹⁴ the Committee held that to keep indictments for criminal defamation pending for a practicing journalist for a period of several years left the journalist in a situation where he was prone to uncertainty and susceptible to intimidation (a “chilling effect,” in the Committee’s words), thereby violating his right to freedom of expression under Article 19.

¹² ICCPR, *supra* note 3, at Article 19.

¹³ See generally Netherlands Institute of Human Rights Documentation Centre, available at [http://sim.law.uu.nl/SIM/CaseLaw/CCPRcase.nsf/\(Article\)?OpenView&Start=30](http://sim.law.uu.nl/SIM/CaseLaw/CCPRcase.nsf/(Article)?OpenView&Start=30); Article 19: The Global Campaign for Freedom of Expression, available at <http://www.Article19.org>; World Legal Information Institute, available at <http://www.worldlii.org/>; Office of the UN High Commissioner for Human Rights, available at <http://www.ohchr.org/english/>.

¹⁴ United Nations Human Rights Committee, International Covenant on Civil and Political Rights; Communication No. 909/2000: Sri Lanka (Jurisprudence), U.N. Doc. CCPR/C/81/D/909/2000 (2004) (*Kankanamge v. Sri Lanka*), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/2cf5dad9e10965ddc1256f01004c859d?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/2cf5dad9e10965ddc1256f01004c859d?Opendocument).

11. The petitioner was a journalist and the editor of the newspaper “Ravaya.” From 1993 to 2000, the petitioner claimed that he had been indicted several times for allegedly having criminally defamed ministers and high-level officials of the police and other governmental departments in Articles and reports published in his newspaper. He claimed that these indictments were designed to harass him, having been transmitted from the Attorney General to Sri Lanka’s High Court without the obligatory assessment of facts and exercise of discretion required under Sri Lankan statutory law. The petitioner claimed that the motivation of harassment was particularly evident because of the following facts, among others: (1) the offense is normally tried in the Magistrate Court (a lower court); (2) the Attorney General’s approval is required for filing defamation proceedings in the Magistrate Court; (3) the charge is amenable to settlement when tried before the Magistrate Courts, but not before the High Court.

12. At the time of his initial petition, December 17, 1999, three criminal indictments were pending against the petitioner before the High Court. These indictments were all served on the petitioner during the period between June 1996 and September 1997. Despite the fact that the indictments were all withdrawn as of June 25, 2004, the Committee decided to rule on the case during its July, 2004 session. Previously, many other indictments against the petitioner were either withdrawn or discontinued.

13. The Committee considered the indictments against the petitioner to all be related to Articles in which he allegedly defamed high State party officials and to be directly attributable to the exercise of his profession of journalist. Thus, the Committee ruled, the indictments were directly attributable to the exercise of the petitioner’s right to freedom of expression. Given the nature of the petitioner’s profession and the circumstances of the case (especially the fact that previous indictments had been lodged, then withdrawn or discontinued), the Committee concluded that to keep pending the indictments for the criminal offense of defamation for a period of several years left the petitioner in a situation where he was prone to uncertainty and susceptible to intimidation, despite his efforts to have the indictments terminated. This situation, the Committee concluded, had a “chilling effect” which unduly restricted the author’s exercise of his right to freedom of expression and violated the State party’s obligations under Article 19 of the ICCPR.

ii. *Paraga v. Croatia* (2001)

14. In *Paraga v. Croatia*,¹⁵ the Committee held that the mere institution of criminal slander proceedings against an opponent of the political party in power for referring to the current President as a “dictator” was insufficient for the Committee to find a violation of Article 19. While a statute that criminalized the dissemination of false information could lead to restrictions that go beyond those permissible under Article 19, paragraph 3 of the ICCPR, sufficiently specific information must be provided by the petitioner for the Committee to be able to make that determination.

15. In this case, the petitioner was a long-time human rights activist who had been persecuted under the former communist government of Yugoslavia. In 1990, he re-organized

¹⁵ United Nations Human Rights Committee, International Covenant on Civil and Political Rights; Communication No. 727/1996: Croatia (Jurisprudence), U.N. Doc. CCPR/C/71/D/727/1996 (2001) (*Paraga v. Croatia*), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/43ca3525ebaeac5c1256a6c00282bd1?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/43ca3525ebaeac5c1256a6c00282bd1?Opendocument).

the Croatian Party of Rights (“HSP”), which had been banned by the government since 1929. He became the party’s president.

16. Mr. Paraga’s petition detailed a long history of repeated physical attacks and bombings that targeted him, police detentions, and criminal charges that were allegedly politically motivated. A number of events in particular led to his claim under Article 19 of the ICCPR, only some of which were reviewable by the Committee due to the date of entry into force of the Optional Protocol for Croatia. On April 21, 1992, the petitioner was summoned for having labeled the President of Croatia as a “dictator.” The court procedures on criminal slander charges (for “dissemination of false information”) brought against him arising out of this incident were only terminated seven years later, after he had filed his petition with the Committee. On October 7, 1997, the County Court of Zagreb began criminal proceedings against the petitioner for “spreading false information.” The petitioner and the Croatian government gave conflicting accounts of whether these proceedings had yet been terminated when the case was considered by the Committee.

17. The criminal statute which prohibited the dissemination of false information (Article 191 of the Penal Code) stated that the act could have been “committed by a person who transmits or spreads news or information known by the person to be false, and likely to disturb a greater number of citizens, and also intended to cause such disturbance.”

18. In examining the Article 19 claims based on the slander proceedings, the Committee concluded that while the State had not refuted that the proceedings were instituted against the petitioner because he had referred to the President of Croatia as a dictator, it was unable to conclude that Croatia had indeed violated Article 19 of the ICCPR. The Committee “observe[d]” that the Penal Code provision under which the proceedings were instituted could, in some circumstances, lead to restrictions that go beyond those permissible under Article 19, paragraph 3 of the ICCPR. Nevertheless, the petitioner failed to provide enough sufficiently specific information for the Committee to conclude that the mere institution of proceedings itself violated Article 19. In making its decision, the Committee took note of the fact that the charges had later been dismissed.

b. Access to judicial information

i. *Lovell v. Australia* (2004)

19. In *Lovell v. Australia*,¹⁶ the Committee held that a lawyer who represented a litigant in a domestic civil lawsuit and who had publicly distributed allegedly confidential information that he had acquired as part of the proceeding’s discovery process and was fined by the Australian courts as a result did not have his right to freedom of expression violated under Article 19.

20. An Australian labor union retained the petitioner, also an Australian, when it became involved in legal proceedings against a steel producer called Hamersly Iron. Hamersly

¹⁶ United Nations Human Rights Committee, International Covenant on Civil and Political Rights; Communication No. 920/2000: Australia (Jurisprudence), U.N. Doc. CCPR/C/80/D/920/2000 (2004) (*Lovell v. Australia*), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/badf5356c414b004c1256e98004a9152?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/badf5356c414b004c1256e98004a9152?Opendocument).

commenced the proceedings against the union and a number of its officials seeking injunctions and compensatory damages on a number of grounds. As part of the trial process, Hamersly made available for discovery by the union and its officials all internal documents that were relevant to the case and for which Hamersly could not claim privilege. Both Lovell and the union obtained and inspected the documents. Hamersley alleged that the petitioner and the union revealed some of the contents of the documents publicly via radio interview, in newspaper Articles, and in a series of briefings prepared for union members. By doing so, Hamersly alleged, the petitioner had committed contempt of court, since such actions were prohibited by the implied rules of discovery.

21. The petitioner (and the union) were convicted of two counts of contempt of court. The first count was for the misuse of the documents, since the rules of procedure provided that their contents could not be communicated other than for the purposes of the litigation for which they were discovered. The second contempt count was for interference with the due administration of justice. The interference charge was based on the notion that by disclosing the documents' contents, the petitioner: (1) intentionally placed improper pressure on Hamersly in the main proceedings, (2) invited public prejudgment of the issues, and (3) created the tendency for witnesses to be frightened off.

22. To defend himself, the petitioner argued that once the documents were referred to in open court, they had become part of the public domain and there were no longer any limitations on their use. He also argued that Hamersly waived its right to claim confidentiality when it responded to accusations made by the petitioner based on information contained in the documents. He claimed that his use of the information was consistent with his right to political communication. The petitioner lost and was fined AUD\$40,000.

23. In defending the claim, the state of Australia claimed that the law of contempt is a permissible restriction to the right of freedom of expression under Article 19 of the ICCPR because it ensures that the interference with an individual's private rights brought about by the discovery process is balanced by the requirement to only use the discovered documents for the purposes for which they were turned over.

24. In its opinion, the Committee held that the petitioner was exercising his right to free expression when he transmitted the information read in open court through different media. The Committee referred to Article 19, paragraph 2, which includes "the freedom to speak, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media," as the basis for its conclusion.

25. The Committee noted that for any restriction on free expression to be justified under Article 19, paragraph 3 of the ICCPR, it must: (1) be provided for by law; (2) address one of the aims enumerated in paragraph 3(a) and 3(b) of paragraph 19; and (3) be necessary to achieve the legitimate purpose. Here, the circumstances met these criteria. As to (1) and (2), contempt of court is an institution provided by law that restricts free expression to achieve the goals of confidentiality of a party or the integrity of the court or public order. As to (3), the documents at issue were never officially adduced into evidence, and so their contents were never included in the published record of the case. The fact that only the litigating parties and their attorneys had access to the contents at issue is significant and shows the role of confidentiality interests in the Australian court's decision. The Human Rights Committee thus concluded that there was no violation of the ICCPR by Australia.

c. Censorship

i. *Laptsevich v. Belarus* (2000)

26. In *Laptsevich v. Belarus*,¹⁷ the Committee held that a statute that required publishers of literature that would be produced in large print runs to obtain and present information for their publications which could only be procured from the administrative authorities restricted the publisher's freedom to impart information in violation of Article 19, paragraph 2 of the ICCPR.

27. The petitioner, who was the chairman of the local branch of an opposition political party, was approached by police on March 23, 1997, while distributing leaflets devoted to the anniversary of the proclamation of independence of the People's Republic of Belarus in the city center in Mogilev, Belarus. The officers confiscated all copies of the leaflet that were still in the petitioner's possession and charged him with a violation of Article 172(3) of the Code of Administrative Offenses for disseminating leaflets not bearing the required publication data. The petitioner was fined 390,000 rubles.

28. The statute under which the petitioner was sanctioned was set out in Article 26 of the Act on the Press and Other Mass Media. It required every edition of a "printed periodical publication" to contain: (1) the name of the publication; (2) its founder(s); (3) the full name of the editor or his deputy; (4) the serial number of the edition and date of issue and, for newspapers, the date when sent to press; (5) the price per issue or the indication "price not stipulated" or "free"; (6) the print run; (7) the index number (for editions distributed by mail delivery services; (8) the publisher's and printer's full addresses; and (9) the registration number.

29. Article 1 of the same Act stated that "printed periodical publications" means:

newspapers, journals, brochures, almanacs, bulletins, and other publications with unvarying titles and serial numbers, appearing not less than once per year . . .

The regulations established by this Act for printed periodical publications shall apply to the periodical distribution in print runs of 300 copies and over of texts drafted with the help of computers and the information collected in their data bank and bases, and to other mass information media whose output is distributed in the form of printed communications, posters, handbills, and other material.

30. Under Article 172(3) of the Administrative Offenses Code, it was an administrative offense to disseminate printed material which either was not produced in accordance with the established procedure, did not indicate the required publication data or contained matter detrimental to the State, public order, or the rights and lawful interests of private individuals.

¹⁷ United Nations Human Rights Committee, International Covenant on Civil and Political Rights; Communication No. 780/1997: Belarus (Jurisprudence), U.N. Doc. CCPR/C/68/D/780/1997 (2000) (*Laptsevich v. Belarus*), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/cc98a0722c3d4c62c125690c003636a2?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/cc98a0722c3d4c62c125690c003636a2?Opendocument) (English); [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.68.D.780.1997.Sp?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.68.D.780.1997.Sp?Opendocument) (Spanish); and [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.68.D.780.1997.Fr?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.68.D.780.1997.Fr?Opendocument) (French).

31. The Human Rights Committee concluded that Article 26 of the Press Act, because it required publishers to obtain information for their publications which could only be procured from the administrative authorities, restricted the author's freedom to impart information, thereby violating Article 19, paragraph 2 of the ICCPR. While the Committee refrained from reevaluating the findings of the Belorussian courts as to whether Article 172(3) of the Administrative Offenses Code applied to the petitioner, it stated that even if the sanctions imposed were permitted under the domestic law, the state must show that they were necessary for one of the legitimate aims set out in Article 19, paragraph 3. The Committee concluded that the sanctions imposed for failure to comply with the Press Act could not be deemed necessary for the protection of public order or for respect of the rights or reputations of others, and so the State had violated Article 19 of the ICCPR.

ii. *Hak Chul Shin v. Republic of Korea* (2004)

32. In *Hak Chul Shin v. Republic of Korea*,¹⁸ the Committee held any State party that seeks to demonstrate that a form of expression protected by Article 19, poses a threat to one of the enumerated purposes listed in Article 19, paragraph 3 must show in a "specific fashion" the precise nature of the threat.

33. In this case, the Committee found in favor of a South Korean artist, Hak-Chul Shin, whose painting had been confiscated by the government of the Republic of Korea. The Committee held that the painting was protected by Article 19, paragraph 2, since it was an idea imparted "in the form of art." In the judgment of the Committee, even though the artist's arrest and the confiscation of his painting occurred through application of the law, none of the acceptable justifications for restriction of the right to freedom of expression under Article 19, paragraph 3, including protection of national security or public order, applied in this case.

34. The painting at issue portrayed the Korean peninsula divided into northern and southern sections. The southern section portrayed a farmer planting rice behind a bull which plowed a field. In the painting, the bull was trampling on the movie character E.T., Rambo, foreign tobacco, Coca-Cola, Japanese samurai, Japanese singing and dancing girls, then-U.S. President Ronald Reagan, then-Japanese Prime Minister Nakasone, the then-President of the Republic of Korea, Doo Hwan Chun, tanks and nuclear weapons, and men that were interpreted by the Republic of Korea's Supreme Court as symbolizing the "landed class and the comprador capitalist class." The Supreme Court interpreted these representations, among others, as symbolizing foreign power, including American and Japanese imperialism. The painting showed the farmer sweeping the symbols into the sea. Behind him, he sets up wire entanglements (taken by the Supreme Court to represent the 38th parallel's boundary between the Republic of Korea and the Democratic People's Republic of Korea (DPRK)).

35. The upper portion of the painting portrayed the northern section of the Korean peninsula. This included a peach in a forest of leafy trees where pigeons roost "affectionately." In another portion of the forest is drawn Bak-Doo-San, known as the "Sacred Mountain of Rebellion" that is located in the DPRK. The mountainside contains flowers in full bloom and

¹⁸ United Nations Human Rights Committee, International Covenant on Civil and Political Rights; Communication No. 926/2000: Republic of Korea (Jurisprudence), U.N. Doc. CCPR/C/80/D/926/2000 (2004) (*Hak Chul Shin v. Republic of Korea*), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/963903e05b5730b4c1256ed100485df9?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/963903e05b5730b4c1256ed100485df9?Opendocument) (English) and [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.80.D.926.2000.Sp?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.80.D.926.2000.Sp?Opendocument) (Spanish).

below it are a lake and a straw-roofed house. By the house, farmers are setting up a feast and sitting or dancing, and children are playing around them.

36. After completing the painting, Shin distributed it in various formats and it became widely publicized. In August 1989, the Security Command of the National Police Academy arrested Shin on a warrant. He was indicted for an alleged breach of Article 7 of the National Security Law, because the painting allegedly constituted an “enemy-benefiting expression.” Article 7 of the National Security Law provides, *inter alia*:

Any person who has benefited the anti-State organization by way of praising, encouraging or siding with or through other means the activities of an anti-State organization, its member or a person who had been under instruction from such organization, shall be punished by imprisonment for not more than seven years. ... Any person who has, for the purpose of committing the actions stipulated in paragraphs 1 through 4 of this Article, produced, imported, duplicated, processed, transported, disseminated, sold or acquired documents, drawings or any other similar means of expression shall be punished by the same penalty as set forth in each paragraph.

37. After Shin was acquitted by a trial court and the acquittal was upheld, the Supreme Court of the Republic of Korea accepted the case. The Supreme Court held that a re-trial should occur, as Article 7 is breached when “the expression in question is actively and aggressively threatening the security and country or the free and democratic order.” Upon re-trial, Shin was convicted and sentenced to probation. The Court ordered his painting confiscated and destroyed.

38. Shin argued that his painting was meant simply to portray his dream of peaceful unification and democratization of his country based on his experience of rural life during childhood. During the trial, the government characterized the painting as depicting opposition to a corrupt, militaristic south and urging structural change towards a peaceful, farming-based life in the north. It thus labeled the painting an incitement to “communization” of the Republic of Korea. At trial, both sides presented individuals they represented as art experts to lend credence to their interpretations of the painting’s significance.

39. The artist argued that the Supreme Court’s finding that the painting was “active and aggressive” failed to meet the objective standard articulated by Article 19(2) of the ICCPR. Under paragraph 2, in order to justify infringement of the right to freedom of expression, his conviction must have been “necessary” for purposes of national security.

40. The Committee concluded that its jurisprudence illustrated that any State party must demonstrate in “specific fashion” the precise nature of the threat the artist’s conduct posed to any of the enumerated purposes of Article 19, paragraph 3. Because the government of the Republic of Korea did not even attempt to make an individualized justification for the seizure of the painting and the painter’s arrest, the Committee found a violation of the painter’s right to freedom of expression.

d. Access to public fora and media for demonstration or dissent

i. *Zundel v. Canada* (2003)

41. In *Zundel v. Canada*,¹⁹ the Committee held that although the right to freedom of expression, as enshrined in Article 19, paragraph 2, extends to the choice of medium, it does not amount to an “unfettered right” of any individual or group to hold public press conferences upon the grounds of official government buildings or property or to a right to have one’s views broadcast to others from such a forum.

42. The petitioner in this case was a German citizen born in 1939 who had resided in Canada since 1958. The petitioner was a self-described publisher and activist who sought to defend Germans against what he considered to be false atrocity allegations concerning German conduct during World War II. The petitioner maintained an American-based internet website known as the “*Zundelsite*.” One of the Articles posted on that site, as an example, was entitled “Did Six Million Jews Really Die?” The Article disputed that six million Jews were killed during the Holocaust.

43. In May, 1997, after a Holocaust survivor had lodged a complaint with the Canadian Human Rights Commission against the petitioner’s website, the Canadian Human Rights Tribunal initiated an inquiry into the complaint. During the hearings on the complaint, the Tribunal refused to permit the author to raise a defense of truth by proving that the statements on the “*Zundelsite*” were true. The Tribunal considered that it was not appropriate to debate the truth or falsity of the statements on the website because this would only add delay, cost, and offense to those who were allegedly victimized by the statements.²⁰

44. Shortly after the Tribunal’s hearings were concluded, the petitioner booked the Charles Lynch Press Conference Room in the Centre Block of the Parliament buildings through the Canadian Parliamentary Press Gallery, a non-governmental and non-profit organization to which the day-to-day administration of the Canadian Parliament’s press facilities has been delegated. The petitioner claimed that he met the criteria for booking the conference room.

45. In a press release announcing the press conference that he planned to hold there, dated June 3, 1998, the petitioner stated that he would discuss the interim ruling of the Human Rights Tribunal refusing to admit the defense of truth. In part, the press release read:

The New Inquisition in Toronto! Government tries to grab control of the Internet!

Ernst Zundel is told by the Canadian Human Rights Commission and its tribunal:

- Truth is not a defense

¹⁹ United Nations Human Rights Committee, International Covenant on Civil and Political Rights; Communication No. 953/2000: Canada (Jurisprudence), U.N. Doc. CCPR/C/78/D/953/2000 (2003) (*Zundel v. Canada*), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/18ba764d3ac4df65c1256d87002bcf49?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/18ba764d3ac4df65c1256d87002bcf49?Opendocument) (English) and [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.78.D.953.2000.Sp?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.78.D.953.2000.Sp?Opendocument) (Spanish) (hereinafter “*Zundel*”).

²⁰ *Citron v. Zundel*, Canadian Human Rights Tribunal, interim decision of May 25, 1998 (cited in *Zundel*, supra note 19, at para. 2.2).

- Intent is not a defense
- That the statements communicated are true is irrelevant!

46. It appeared that part of the petitioner's motivation in holding the press conference was to have it broadcast on the national cable television channel that typically covered press conferences taking place in the conference room in question.

47. Following the press release, several members of Parliament were contacted by individuals protesting against the author's use of the Conference Room. The Press Gallery refused to cancel the booking of the room, so the House of Commons passed the following unanimous motion: "That this House order that Ernst Zundel be denied admittance to the precincts of the House of Commons during and for the remainder of the present session." As a result, the petitioner was banned from holding his press conference in the Charles Lynch Press Conference Room. Instead, he held an informal press conference outside the Parliament buildings on the sidewalk.

48. The crux of the State's argument was that the petitioner's right to freedom of expression had not been violated because he was still able to express his views outside of the parliamentary precincts. The State also argued that the restriction was legally mandated under Article 4 of the International Convention of the Elimination of All Forms of Racial Discrimination, which requires states party to take measures to suppress the dissemination of ideas based on racial discrimination and hatred. The State also argued that exclusion from Parliament also served the purpose of protecting public order and public morals under Article 19, paragraph 3 of the ICCPR.

49. In considering the claim, the Human Rights Committee determined that it was incompatible with Article 19 of the ICCPR and therefore inadmissible *ratione materiae* under Article 3 of the Optional Protocol. The Committee reasoned that although the right to freedom of expression, as enshrined in Article 19, paragraph 2, extends to the choice of medium, it does not amount to an unfettered right of any individual or group to hold press conferences within the Parliamentary precincts, or to have such press conferences broadcast by others. The Committee noted that the petitioner, after having been banned

from the press conference room, remained at liberty to hold a press conference elsewhere. Thus, the Committee concluded that the petitioner's claim fell outside the scope of the right to freedom of expression as protected in Article 19, paragraph 2.²¹

²¹ For another recent case involving allegations that the right to freedom of expression includes the right to access to a national audience, see United Nations Human Rights Committee, International Covenant on Civil and Political Rights; Communication No. 693/1996: Republic of Korea (Jurisprudence), U.N. Doc. CCPR/C/78/D/693/1996 (2003) (Nam v. Republic of Korea), *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/5bcf0b9f51e658d3c1256dab002dd959?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/5bcf0b9f51e658d3c1256dab002dd959?Opendocument) (English) and [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.78.D.693.1996.Sp?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.78.D.693.1996.Sp?Opendocument) (Spanish) (holding that while the right to write and publish textbooks intended for use at school falls under the protection of Article 19, a middle school language teacher did
continued...

ii. *Kivenmaa v. Finland* (1994)

50. In *Kivenmaa v. Finland*,²² the Committee decided that although Article 19 authorizes a restriction by the law of freedom of expression in certain circumstances, when the state party has not referred to a law that allows this freedom to be restricted for a reason permissible within the meaning of Article 19, a violation of Article 19 will be established. While the petitioner's raising of a banner was an exercise of freedom of expression, the State party failed to invoke a law that was based on a restriction permitted under the ICCPR.²³

51. On September 3, 1987, on the occasion of a visit of a foreign head of state and his meeting with the president of Finland, Kivenmaa and about 25 members of her political organization gathered amid a larger crowd across from the presidential palace where the leaders were meeting. They distributed leaflets without interference but, when they raised a banner critical of the visitor's human rights record, the police immediately took it down and charged Kivenmaa with holding a public meeting without prior notification in violation of the Act on Public Meetings. Although she argued that she did not organize a public meeting, but only demonstrated her criticism of the alleged human rights allegations, she was subsequently convicted and fined for this offence on the basis that Kivenmaa's group could be regarded as a public meeting because its behavior distinguished it from the crowd. Her conviction was upheld on appeal and the Supreme Court subsequently denied leave to appeal.

52. The Committee stated that a requirement to notify the police of an intended demonstration in a public place six hours before its commencement may be compatible with the ICCPR. However, in the instant case, there was a gathering of only a handful of people; this could not be regarded as a demonstration. The Committee implicitly accepted that the right to express opinions may be exercised by the raising of a banner. However, the State party failed to refer to a law allowing the restriction of freedom of expression and failed to show how the restriction was necessary to safeguard the rights and national imperatives set forth in Article 19(2)(a) and (b). Consequently, the Committee held that, as the raising of the banner was an exercise of the right to freedom of expression and no law was invoked allowing its restriction in the present case, there was a violation of Article 19.

iii. *Ross v. Canada* (2000)

...continuation

not have a right to have his language book considered by the Korean Ministry of Education for use as the national curricular textbook).

²² United Nations Human Rights Committee, International Covenant on Civil and Political Rights; Communication No. 412/1990: Finland (Jurisprudence), U.N. Doc. CCPR/C/50/D/412/1990 (1994), available at <http://www1.umn.edu/humanrts/undocs/html/vws412.htm>.

²³ *Kivenmaa v. Finland*, Interights Int'l Human Rights Law 24 (March 31, 1994), available at <http://www.worldlii.org/int/cases/IHRL/1994/24.html> ("comment").

53. In *Ross v. Canada*,²⁴ the Committee held that generally lawful domestic restrictions pertaining to freedom of expression, although vaguely constructed, will not automatically be assumed to be a violation of Article 19. The protection of the “rights and reputations of others” discussed in Article 19, paragraph 3 need not relate to the rights of a single, identifiable person. Rather, the rights or reputations of others may be related to other persons or to a community as a whole. Additionally, the exercise of the right to freedom of expression carries with it special duties, particularly for school teachers. The influence exerted by school teachers may justify restraints in order to ensure that legitimacy is not given by the school system to the expression of discriminatory views.

54. *Ross v. Canada* involved an educator whose writings and public speaking engagements gained him local notoriety for views that were considered by some to be intolerant of Jews and Judaism. He was transferred to a non-classroom position as a result of complaints by students and threatened with loss of his job if he were to write or speak publicly against Judaism or its followers. The Supreme Court of Canada eventually ruled on his case, holding that the punishment was constitutional and did not abridge his constitutional guarantee to freedom of expression.

55. In its decision, the Committee noted the vague criteria that were used to remove the author from his teaching position. The Committee noted the thorough domestic legal proceedings in which the petitioner had been actively involved and concluded that it was not for the Committee to re-evaluate the findings of the Canadian Supreme Court on the vagueness issue. The Committee also noted that the legitimate aim of the State was the protection of the rights and reputations of other, observing that the rights of a single, identifiable person need not be invoked for this permissible justification for a restriction on freedom of expression under Article 19. The restrictions on the petitioner thus had the legitimate aim of protecting the Jewish community's right to an education in the public school system free from bias, prejudice, and intolerance, the Committee concluded. Finally, in considering the necessity component of the restriction, the Committee noted that teachers have special duties and responsibilities in the exercise of their rights within the school system, especially when young students are involved. Therefore, the removal of the author from his teaching position was necessary, as a causal link had been shown between the “poisoned environment” for Jewish children in the School District and the expressions of the petitioner. For these reasons, the restriction did not constitute a violation of the petitioner's right to freedom of expression.

iv. *Howell v. Jamaica* (2003)

56. In *Howell v. Jamaica*,²⁵ the Committee focused on the practical effect of an order for the removal of all writing instruments from inmates in a Jamaican prison, holding that because the petitioner could write letters soon after the order was issued, the Committee could not hold that there was a violation of Article 19.

²⁴ United Nations Human Rights Committee, International Covenant on Civil and Political Rights; Communication No. 736/1997: Canada (Jurisprudence), U.N. Doc. CCPR/C/70/D/736/1997 (2000) (*Ross v. Canada*), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/29712c8ddea3414dc12569ad003d0316?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/29712c8ddea3414dc12569ad003d0316?Opendocument) (English); [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.70.D.736.1997.Sp?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.70.D.736.1997.Sp?Opendocument) and (Spanish); and [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.70.D.736.1997.Fr?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.70.D.736.1997.Fr?Opendocument) (French).

²⁵ United Nations Human Rights Committee, International Covenant on Civil and Political Rights; Communication No. 798/1998: Jamaica (Jurisprudence), U.N. Doc. CCPR/C/79/D/798/1998 (2003) (*Howell v. Jamaica*), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/ad7541d870f817f8c1256de2003a7c90?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ad7541d870f817f8c1256de2003a7c90?Opendocument).

57. The petitioner, Floyd Howell, was a Jamaican citizen detained on death row in a Jamaican prison at the time of the submission of his petition. He was subsequently released on February 27, 1998. The petitioner alleged that on March 5, 1997, while a prisoner on death row in the prison, he was subject to a severe beating by two groups of 20 and 60 prison guards with wooden instruments. He claimed that he, along with other prisoners, was beaten because of an escape attempt initiated by four other inmates. The petitioner alleged that on March 20, 1997, the superintendent issued a “standing order” that prohibited all inmates from keeping either papers or writing implements in their cells. Nevertheless, the petitioner was able to write a letter to his counsel dated March 21, in which he recounted the events of the previous weeks. He was also able to write correspondence to a friend that was dated April 17, 1997 and August 15, 1997. The petitioner claimed that the standing order of the superintendent depriving him of his writing implements was in violation of his right “to seek, receive, and impart information . . . in writing.”

58. In considering the petition, the Committee focused on the practical effect of the alleged “standing order” of the prison superintendent. It concluded that because the petitioner was able to communicate with his counsel within one day of the issuance of the order and later with both counsel and a friend, the Committee could not conclude that the petitioner’s rights under Article 19(2) had been violated.

e. Political participation

i. *Yong Joo Kang v. Republic of Korea* (2003)

59. In *Yong Joo Kang v. Republic of Korea*,²⁶ the Committee held that the application of an “ideology conversion system” to a prisoner convicted of espionage for the distribution of publicly available information violated the petitioner’s right to freedom of expression.

60. The petitioner, along with other acquaintances, was an opponent of the State party’s military regime. In 1984, he distributed pamphlets criticizing the regime and the use of security forces to harass him and others. In January, March, and May 1985, he distributed dissident publications covering issues of a political, economic, social, and historical nature.

61. On July 1, 1985, the petitioner was arrested without warrant by the Agency for National Security Planning (ANSP). He was held for 36 days incommunicado and alleged that he suffered torture and mistreatment at the hands of his interrogators. During that time he confessed to being a spy for North Korea, and contended that his confession was coerced by torture. He was later tried for alleged violations of the National Security Law and convicted to life imprisonment, with the Seoul Criminal District Court relying upon his confessions. In its holding, the court found that the petitioner had “become a member of an anti-State organization” and that dialogue and meeting with other regime critics constituted the crime of “praising, encouraging, or siding with the anti-State organization,” and the crime of “meeting with a member of the anti-State organization.” Finally, the court also concluded that the distribution of publications amounted to “espionage.”

²⁶ United Nations Human Rights Committee, International Covenant on Civil and Political Rights; Communication No. 878/1999: Republic of Korea (Jurisprudence), U.N. Doc. CCPR/C/78/D/878/1999 (2003) (*Yong Joo Kang v. Republic of Korea*), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/165781d479d57a35c1256d880034285d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/165781d479d57a35c1256d880034285d?Opendocument) (English) and [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.78.D.878.1999.Sp?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.78.D.878.1999.Sp?Opendocument) (Spanish).

62. The petitioner's domestic appeals were dismissed at both the intermediate and Supreme Court levels. The petitioner was finally released in 1999 after his communication had been submitted to the Human Rights Committee.

63. The petitioner's Article 19 claim was based in part on his conviction under the National Security Law for his gathering and divulging of "state or military secrets" (espionage). As part of his claim in this regard, the petitioner noted that the information regarded as "secret" was publicly known. But, due to the Supreme Court's interpretation of the notion of "secret," the prosecution did not consider it necessary to establish that release of the information would threaten national security. The petitioner claimed that it could scarcely be necessary for the protection of national security to censor ideas that were publicly known, and so his conviction and imprisonment fell outside the scope of the legitimate restriction on expression enumerated in Article 19, paragraph 3.

64. The other basis for the petitioner's Article 19 claim was the "ideology conversion system" that he alleged he was forced to undergo while in prison. Having been identified as a communist "confident criminal," the system was designed to induce change in his political opinion through measures such as extended solitary confinement. The 1991 Regulation on the Classification and Treatment of Convicts reclassified the petitioner's detention regime to "those who have not shown signs of repentance after having committed crimes aimed at destroying the free and democratic basic order by denying it." In his complaint, the petitioner rejected the characterization of being a "communist." He claimed that he was held in solitary confinement for 13 years for his refusal to "convert" his political beliefs. He argued that the coercion to change his political views, and the withholding of benefits (such as the possibility of parole) unless he "converted," amounted to violations of his right to freedom of conscience.

65. As part of his claim, the petitioner presented a report by the Special Rapporteur of the Commission on Human Rights on the Promotion and Protection of the Right to Freedom of Opinion and Expression. The report encouraged the repeal of the National Security Law and suggested that the State party cease "the practice of requesting prisoners who allegedly hold political opinions repugnant or unpalatable to the establishment to renounce such opinions" and recommended that "all prisoners who are held for their exercise of the right to freedom of opinion and expression" be released unconditionally.²⁷

66. The Committee concluded that the "ideology conversion system" to which the author had been subjected while serving out his sentence was coercive and applied in a discriminatory fashion with the goal of altering the political opinion of an inmate by offering inducements of preferential treatment within prison and an improved possibility of parole. The Committee concluded that the State party had failed to justify the system as necessary for any of the permissible limiting purposes enumerated in Articles 18 and 19, and so the system restricted freedom of expression and manifestation of belief on the discriminatory basis of political opinion. The Committee thus concluded that the circumstances of the case constituted a violation of Article 19, paragraph 1.

²⁷ Special Rapporteur of the Commission on Human Rights on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. E/CN.4/1996/39/Add.1, paras 12-26, 46 (Nov. 21, 1995).

ii. *Svetik v. Belarus* (2004)

67. In *Svetik v. Belarus*,²⁸ the Committee held that advocating boycott of local elections as a form of political expression falls within the ambit of the right to freedom of expression as guaranteed by Article 19.

68. The petitioner was a representative of a non-governmental organization called the Belarusian Helsinki Committee (BHC) in the city of Krichev, Belarus. On March 24, 1999, the national newspaper "*Narodnaya Volya*" (People's Will) published a declaration that criticized the authorities in power and appealed to the public not to take part in upcoming local elections as a protest against the electoral law, which the declaration claimed was incompatible with the Belarusian constitution and international norms. The declaration was written and signed by representatives of hundreds of Belarusian political and non-governmental organizations, including the petitioner.

69. The petitioner was later summoned to the Krichev prosecutor's office to explain his signature. He claimed that only two of the four non-governmental organizations in Krichev that signed the declaration were called to the office, and that these two were considered to belong to the political opposition. On April 26, the petitioner was summoned to the city's district court and charged with an offense under the Belarusian Code on Administrative Offenses. The charge was an administrative sanction for public appeals calling for the boycott of elections. He was fined the equivalent of two minimum monthly salaries. The judge threatened to sentence him to the maximum penalty (five times that he was given), as well as to report him to his employer if he did not confess his guilt. After confessing his guilt, the petitioner appealed his decision to a regional court, which dismissed his appeal on the grounds that his confession was not obtained under duress. The petitioner's complaint to the Supreme Court resulted in the conviction being upheld.

70. The Committee framed the issue in this case as whether punishing a call to boycott a particular election is a permissible limitation of the freedom of expression.

71. The Committee noted that Article 25(b) of the ICCPR guarantees the right of every citizen to vote.²⁹ It stated that in order to protect this right, States parties to the ICCPR should prohibit intimidation or coercion of voters by strictly enforced penal laws. The application of such laws constitutes, in principle, a permissible limitation on freedom of expression that is necessary for respect of the rights of others. Nonetheless, intimidation and coercion must be distinguished from encouraging voters to boycott an election.

²⁸ United Nations Human Rights Committee, International Covenant on Civil and Political Rights; Communication No. 927/2000: Belarus (Jurisprudence), U.N. Doc. CCPR/C/81/D/927/2000 (2004) (*Svetik v. Belarus*), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/18a47c57f4693987c1256f0000482f30?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/18a47c57f4693987c1256f0000482f30?Opendocument).

²⁹ Article 25 states, in part: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors"

ICCPR, *supra* note 3, at art. 25(a)-(b).

72. The Committee went on to note that voting was not compulsory in Belarus and that the declaration that the petitioner signed did not affect the possibility of voters to freely decide whether or not to participate in the particular local election. The Committee thus concluded that the limitation of the liberty of expression in this case did not legitimately serve one of the reasons enumerated in Article 19, paragraph 3, of the ICCPR, and that the petitioner's rights under Article 19, paragraph 2, had thus been violated.

73. In a concurring opinion, Sir Nigel Rodley sought to point out that it was his hope that the language of the Committee's opinion did not unwittingly indicate that a system of compulsory voting would of itself justify the enforcement of a law that would punish advocating for the boycott of an election. Rodley cited examples where it may be theoretically beneficial to pass a law requiring all citizens to vote and where there are "honourable reasons" for opposing regular participation in an electoral process believed to be illegitimate. He summed up his views by saying that "[m]uch will depend on the context within which a particular system is established." Finally, he stated that the Committee could not and should not begin to make judgments on matters such as when it is permissible to advocate non-cooperation with a particular electoral process in a particular jurisdiction. He concluded that:

in any system it must always be possible for a person to advocate non-cooperation with an electoral exercise whose legitimacy that person may wish to challenge. . . It would be inconsistent with Article 19 to prevent the advocacy of any means of non-cooperation as a challenge to the process itself.

B. Domestic jurisprudence of the Member States

1. Introduction

74. The Office of the Special Rapporteur for Freedom of Expression has pursued the aim of furthering comparative law studies as a way of contributing to the flow of information between the Member States regarding the international standards which govern the right to freedom of expression, in the hope that it will lead to a deeper understanding and establishment of the right to freedom of expression in the Americas. Following these initiatives, the Office of the Special Rapporteur for Freedom of Expression has included in its 2004 Annual Report a Chapter describing the jurisprudence of the United Nations system under Article 19 of the International Convention on Civil and Political Rights and presenting decisions of local courts from the Member States that essentially uphold the standards of freedom of expression.

75. In this section, the report refers to the States' domestic jurisprudence, and it includes certain decisions by local tribunals that were handed down during 2004 and that reflect the importance of respecting freedom of expression as protected in the American Convention.

76. This section highlights some court decisions that have expressly or implicitly taken account of international standards protecting freedom of expression. In other words, this section is not a critique of judicial decisions, but rather an attempt to show that in many cases those standards are indeed considered. The Rapporteur hopes that this attitude will prevail among other judges in the Hemisphere.

77. As a final thought, it will be clear that not all opinions in the decisions quoted are shared by the Office of the Special Rapporteur for Freedom of Expression, but that the Office

agrees with the fundamentals of the decisions. As a second point, there is no doubt that there are many other cases that could have been summarized in this report. The selection has been somewhat arbitrary, both for reasons of space and for lack of sufficient information. The Rapporteur's Office urges States to provide it in the future with more judicial decisions enforcing the Inter-American system of protection of freedom of expression, so that this section can be expanded in subsequent annual reports.

78. The organization of this section takes account, as it must, of the standards arising from interpretation of Article 13 of the Convention.³⁰ The standards referred to have been further developed by the jurisprudence of both the Commission and the Court. Many of those standards have been included in the Declaration of Principles on Freedom of Expression.³¹ For these reasons, the categories described below are related to the various principles of that Declaration. In this report, the categories selected are: (a) the right to access public information; (b) criminal defamation of public officials; (c) journalistic secrets.

79. This report covers case law from Mexico, Costa Rica, and Argentina. In each of the categories, the relevant principle is quoted from the Declaration, followed by a short summary of the facts of the case, and extracts from the decision of the domestic court.

a. Right of access to information

80. Declaration of Principles on Freedom of Expression. Principle 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."

81. Deciding body: Superior Chamber of the Electoral Tribunal of the Federal Judiciary. Decision of June 25, 2004. Court record SUP-JDC-041-2004.

82. Facts of the case. The first judicial decision in this case was based on the contents of the Law on Transparency and Access to Public Government Information. In this instance, a journalist, Jorge Arturo Zárate Vite, requested the Federal Elections Institute for information on the monthly salaries or incomes and benefits provided to the national leadership of all registered political parties. The Committee of the Council on Transparency and Access to Information of the General Council of the Federal Elections Institute refused to provide him the information, saying that the information was not physically under its control. The court rejected the decision of the Committee and upheld the right of the journalist to access the information requested.

83. Decision (pertinent paragraphs)

It is important to mention that, the right of transparency and access to public government information [recognized in 2002] [...] entitles the citizen to access information on the activities of national political parties through the Federal Elections Institute.

³⁰ For the text of Article 13 of the American Convention on Human Rights, see annex.

³¹ See IACHR, *Annual Report of the Inter-American Commission on Human Rights 2000, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression*, OEA/Ser.LN/II.111, Doc. 20 rev., April 16, 2001, Chapter II.

[...] [O]ne of the purposes for which said law was designed was to ensure that society too should have the real possibility to monitor government activities via the right to information. [Inasmuch as political parties are public-interest entities], it is inadmissible to deprive or restrict certain basic rights of citizens inherent to their fundamental public subjective right of access to certain information on political parties, since ... this information also permits responsible, informed, and, therefore, free, participation in government and elections.

[. . .] Indeed, the Superior Chamber finds that, as a citizen, the plaintiff has legal standing under Articles [...] 19 (2) of the International Covenant on Civil and Political Rights, and 13 (1) of the American Convention on Human Rights . . . [B]ased on those provisions it must be concluded that all Mexican citizens, as part of their fundamental rights of suffrage and of their freedom of association for political purposes and of politico-electoral affiliation, have the right to information concerning political parties, such as their organization, workings, resources, statutes, etc.

b. Criminal defamation and public officials

84. Declaration of Principles on Freedom of Expression. Principle 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."

85. Deciding body: Criminal Court of the First Judicial Circuit of San José, Costa Rica. Decision of August 24, 2004. Court record 96-000006-190PE.

86. Facts of the case. This ruling was issued after the decision of the Inter-American Court of Human Rights in the case of *Herrera Ulloa v. Costa Rica*, and it is described in more detail in the section on 'desacato' laws and criminal defamation herein.

87. Decision (pertinent paragraphs)

Based on the Judgment of July 2, 2004, issued by the Inter-American Court of Human Rights, the TRIBUNAL resolves:

The Inter-American Court of Human Rights, in a judgment of July 2, 2004, nullified in all respects, including its scope as regards third parties, the decision of this tribunal issued at 14:00 on November 12, 1999. Based on the foregoing, the orders of the Court were to: a) strike out the proceeding against Mr. Mauricio Herrera Ulloa registered at entry 01, Vol. 136, page 395 of the Judicial Register and Archive; b) revoke the fine of 300,000 colones that don Mauricio was ordered to pay; c) nullify the order to publish the operative part of said decision in the newspaper *La Nación*, under the section titled "*El País*"; d) revoke the order to *La Nación* to remove the Internet link at *La Nación Digital* web site between the name Przedborski and the disputed Articles; e) Annul the order to *La Nación* to create a link at *La Nación Digital* between the disputed Articles and the operative part of the decision; f) nullify the order to pay court costs and attorney's fees; and, g) annul the order to pay 60 million colones in reparation for moral injury caused. As regards points 5 to 13 of the above-cited decision, insofar as responsibility for compliance does not belong to the tribunal, the parties concerned should pursue matters with the appropriate authorities. So ordered.

c. Confidentiality of journalistic sources

88. Declaration of Principles on Freedom of Expression. Principle 8. “Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.”

89. Deciding body: General Prosecutors' Office, Province of Neuquén.
Decision of September 8, 2004. Court File 11761-4.

90. Facts of the case. According to the opinion of Prosecuting Attorney Dr. W. Richard Trinchera, the case:

[. . .] was initiated as a result of a complaint filed with this agency on August 4, 2004, by the Minister of Security and Labor of the province [of Neuquén], who requested an investigation with a view to protecting his good name and honor, as a result of an Article published in the morning paper, *Río Negro*, of that same day, on the premise that the contents of that Article were wholly false. The complaint requests the investigation of the aforementioned newspaper, in order to determine which journalist wrote it; who supplied the information; and if meetings took place between *Río Negro* journalists, justice officials, Sagarzasu, and technical advisors of the latter. The complaint further requests that employees of the judiciary, in particular those who work in office of the prosecutor for crimes against public administration, be summonsed for questioning, in order for them to provide information on the procedure for the release of information to the press, which journalists frequent the offices of the agency, and on what legal authority information is provided.

It also sought the investigation of the possible use of false accusations to defame public servants of the provincial executive branch as a deliberate maneuver to tarnish reputations and reap political gain, so that although the accused are finally cleared by the courts, their reputations are badly injured because the news is carried by the press over months or even years.

91. Decision (pertinent paragraphs)

[. . .] I should make clear the position of this office with respect to the complainant's request regarding an investigation of the person or persons who supplied the information that enabled the newspaper to publish the Article in question. No judicial or police authority may or should adopt measures in an enquiry that jeopardize the confidentiality of journalistic sources, particularly since the reform of the Constitution in 1994, which protects unconditionally the personal information of registered journalists and, more importantly, protects the knowledge of where such information was obtained. In other words, the Argentine Constitution (Article 43, penultimate paragraph) protects the secrecy of the source from which the information in the journalist's possession came. The freedom to receive information (that, together with the freedom to impart information, is part of the right to freedom of thought and expression) is also recognized at Article 13(1) of the American Convention on Human Rights (also known as the Pact of San José, Costa Rica), an international instrument with the same rank as the Constitution (Article 75(22) of the Argentine Constitution).

CHAPTER IV

REPORT ON ACCESS TO INFORMATION IN THE HEMISPHERE: ACCESS TO INFORMATION AND ECONOMIC DEVELOPMENT¹

A. Introduction

1. The Office published in its 2003 Annual Report a chapter entitled “Report on Access to Information in the Hemisphere.”² In that report, the Special Rapporteur aimed at setting a theoretical background of the right of access to information and stated that “guaranteeing public access to state-held information is not only a pragmatic tool that strengthens democratic and human rights norms and promotes socioeconomic justice; it is also a human right protected under international law.”³ Also, that report proposed to summarize the “situation of the Member States in relation to the right to freedom of information, in an effort to record the development of the States in this area.”⁴

2. In June 2004 the General Assembly of the OAS adopted Resolution 2057, entitled “Access to Public Information: Strengthening Democracy.” This Resolution extends the efforts affirmed by the former Resolution on the subject, and encourages OAS Member States to implement legislation or other provisions providing citizens with broad access to public information. The General Assembly instructed the Special Rapporteur for Freedom of Expression to “continue to report on the situation regarding access to public information in the region in the annual report of the IACHR.”⁵

3. The Office of the Special Rapporteur for Freedom of Expression has prepared this report in compliance with its mandate as established by the General Assembly and to continue contributing to the discussion on the issue. As in previous reports, first there is a theoretical approach to the theme and then an update on the situation of access to information in the region.

4. Although the previous reports have focused on the relevance of access to information laws for the strengthening of democratic regimes, because of their provision of a framework that contributes to the establishment of policies of transparency, this report will argue in favor of access to information laws as a relevant tool for economic development.

5. This report is based on the works of international institutions, private firms, and authors that are recognized worldwide. Having in mind the arguments that are mentioned below, the Office of the Special Rapporteur for Freedom of Expression thinks that it is time to

¹ This chapter was made possible through the research and first drafting of María Rosario Soraide Durán, a recent graduate in political science with a specialization in international relations from *Universidad Católica Argentina*. She was an intern at the Office of the Special Rapporteur for Freedom of Expression during 2003. The Office thanks her for her contributions. The Office would also like to thank Alberto Blanco, MS in Urban Studies & Planning, Massachusetts Institute of Technology (MIT); and Marie Cavanaugh, Managing Director, Sovereign Ratings, Standard & Poor's, for their insights on some of the topics addressed in this Report.

² Inter-American Commission on Human Rights, Annual Report 2003, Vol. III, Report of the Special Rapporteur for Freedom of Expression, Chapter IV: *Report on Access to Information in the Hemisphere*, pages 135-154.

³ *Id.*, para. 8.

⁴ *Ibid.*, para. 5.

⁵ OAS, AG/RES. 2057 (XXXIV-O/04), *Access to Information: Strengthening Democracy*, para. 7. Available at <http://www.oas.org/main/main.asp?sLang=E&sLink=.../documents/eng/documents.asp>.

reinvigorate the efforts to strengthen freedom of expression in general, and the right of access to information in particular, seeing it not only as an essential right on the political field, but also as a crucial element for economic development.

B. Access to information and economic development

6. Do access to information laws and their implementation have any impact on a country's economic development? The Office of the Special Rapporteur for Freedom of Expression finds that the answer is an affirmative one, as will be proven in this report from three different perspectives. First, the report will focus on information as an essential element for markets to function efficiently. Second, the impact of access to information on an economy will be analyzed within the framework of the governance approach to economics. Finally, this study will examine if access to information laws could influence economic outcomes in a more indirect way, by acting on the perceptions of firms that provide country risk assessments and sovereign ratings – given that these agencies consider issues related to governance and access to information when assigning a grade to a country.

1. Information and markets

7. For a market to be well-functioning and efficient, information flows are crucial. Inadequate information increases transaction costs that limit market opportunities⁶ and, as noted by Roumeen Islam:

More information allows better analysis, and better monitoring and evaluation of events which are significant for people's economic and social well-being. It allows economic and political decision-makers to evaluate opportunities and manage risks better. It allows for the possibility that decisions in economic and political markets will enhance social welfare.⁷

8. Continuing with Islam's argument, the information that is available to decision-makers and how they use it is critical for the shaping of their expectations, which give rise to particular actions in the economic arena that will in turn affect subsequent outcomes. Several studies have shown that information has decisive effects on stock markets, bank loans, interest rates, and even crisis prevention or prediction. There is a correlation between economic data availability and well-functioning markets, since the former gives rise to better decisions on the part of investors, consumers, and producers, as it enables them to better evaluate market conditions for their products.⁸

9. Information that is economically relevant could include data regarding prices, publication of firms' accounts, etc. However, agents also need information relative to laws and regulations, governmental processes, public agencies, public procurement contracts, policy implementation and its consequences, etc. in order to make appropriate economic decisions. In this sense, governments are central actors when it comes to the availability of significant information.

⁶ See The World Bank, "World Development Report 2002. Building Institutions for Markets," published by Oxford University Press for The World Bank, New York, *Overview*.

⁷ See Islam, Roumeen, "Do More Transparent Governments Govern Better?" Policy Research Working Paper No. 3077, The World Bank, Washington D.C., June 2003, page 2.

⁸ *Id.*

10. In this same line, Joseph Stiglitz, who views information as a public good and recognizes that, like with other public goods, "...government has an important role in the provision of information,"⁹ explains that in complex modern economies, prices do not communicate all relevant information. Governments generally collect meaningful data about economic growth, the unemployment rate, the inflation rate, etc., but this information influences people's opinion about the government. For example, if the data show increasing inequality, citizens may question the government's distribution policies. Therefore, Stiglitz warns that governments could be induced to distort or restrict disclosure of such information.¹⁰ This is a situation in which "asymmetries of information" exist, meaning that all interested parties do not have access to the same amount of information.

11. Joseph Stiglitz, George Akerlof, and Michael Spence were awarded the 2001 Nobel Prize for their studies on the economic implications of asymmetries of information, and for developing a fundamental change of paradigm in economic studies: Information Economics.¹¹

12. Stiglitz uses the Information Economics paradigm to make an analogous description of the asymmetries of information which appear in relation to political processes. He makes reference to an asymmetry of information existing between those who govern and those who these are supposed to serve, finding it similar to the one between company managers and shareholders. He explains that just as information asymmetries allow company managers to follow policies that are convenient for their own interest rather than for the interest of shareholders, such asymmetries give government officials the possibility of choosing to pursue policies guided by their own interests rather than by the interests of citizens. Finally, Stiglitz concludes that "[i]mprovements in information and the rules governing its dissemination can reduce the scope for these abuses in both markets and in political processes"¹² and that "better and timelier information results in better, more efficient resource allocations."¹³

13. The World Bank's 2002 Development Report, entitled "Building Institutions for Markets," arrives at the same conclusion.¹⁴ Moreover, this report also addresses the theory that access to information could represent a stabilizing force in financial markets, since these information flows "...may be able to mitigate global financial volatility and crises..."¹⁵

14. Similarly, a chapter of the International Monetary Fund's April 2003 "World Economic Outlook," entitled "Growth and Institutions," notes that countries with more transparent government operations find it easier to attract foreign direct investment. And thanks to this relatively stable inflow, they may be less vulnerable to sudden withdrawals of capital

⁹ See Stiglitz, Joseph, "Transparency in Government" in *The Right to Tell: The Role of Mass Media in Economic Development*, The World Bank Institute, Washington D.C., November 2002, page 28.

¹⁰ *Id.*

¹¹ For further insight on this model see: Stiglitz, Joseph, "Information and Change in the Paradigm in Economics;" Akerlof, George, "Behavioral Macroeconomics and Macroeconomic Behavior;" and Spence, Michael, "Signaling in Retrospect and the Structure of Markets," all in *The American Economic Review*, Vol. 92, No. 3, June 2002.

¹² *Id.*, page 28.

¹³ *Id.*, page 35.

¹⁴ See The World Bank, "World Development Report 2002. Building Institutions for Markets," published by Oxford University Press for The World Bank, New York, page 189:

"...better information flows can improve resource allocation..."

¹⁵ *Id.*

flows, to capital account crises, and to the destabilizing effects of international investors' "herding behavior."¹⁶ In a 2001 publication, the IMF stated that "lack of transparency was a feature of the buildup to the Mexican crisis of 1994-95 and of the emerging market crises of 1997-98" due to the fact that "inadequate economic data, hidden weaknesses in financial systems, and a lack of clarity about government policies and policy formulation contributed to a loss of confidence that ultimately threatened to undermine global stability."¹⁷

15. In fact, many point to a lack of transparency as being one of the causes of the Asian and the Russian financial crises of 1997 and 1998 that had major spill-over effects onto Western economies.

16. Gaston Gelos and Shang-Jin Wei, for example, present statistical proof that, in general, international funds prefer to hold more assets in markets which are more transparent and that herding behavior is less prevalent in countries with a higher transparency in comparison to those that are more opaque.¹⁸ They find evidence to support the view that during the Russian crisis and—to a lesser extent—during the Asian crisis, international investors tended to withdraw more strongly from countries that showed a higher degree of opacity.¹⁹

17. Don Tapscott and David Ticoll also address the Asian and Russian crises, explaining that "Western politicians, economists, and media identified emerging economy corruption, nepotism, and favoritism—along with poor corporate governance—as drivers of the meltdown. Lack of disclosure by companies, commercial banks, and even central banks had fanned the crisis,"²⁰ adding that this caused the IMF to proclaim transparency as the "golden rule for a globalized economy"²¹ and to start monitoring the financial and banking systems of the developing world.

18. Recognizing how a transparent and stable economic and regulatory environment leads also to efficiency in the private sector, the IMF now promotes transparency in financial transactions involving government budgets, central banks, and the public sector in general. The IMF also lends its assistance regarding improvements in accounting, auditing and statistical systems.²² In this sense, access to information laws can contribute to the IMF's aim of increasing transparency in public sector activities and in the environment in which these occur, as well as to an improvement in the effectiveness of public resources management.²³

¹⁶ See International Monetary Fund, "World Economic Outlook. April 2003. Growth and Institutions," Washington D.C., Chapter 3: *Growth and Institutions*; pages 104-105.

¹⁷ International Monetary Fund, "IMF Survey Supplement," Vol. 30, Washington D.C., September 2001, pages 7-8.

¹⁸ See Gelos, R. Gaston and Wei, Shang-Jin, "Transparency and International Behavior," IMF Working Paper 02/174, IMF, Washington D.C., 2002, page 7: "Herding is typically defined as investors taking decisions which they would not take if they did not observe other market participants taking them."

¹⁹ *Id.*

²⁰ See Tapscott, Don and Ticoll, David, "The Naked Corporation. How the Age of Transparency will Revolutionize Business," Chapter 2: *Transparency versus opacity: the battle*, Free Press, New York, 2003.

²¹ Transparency is, in fact, one of the principles on which the IMF bases its policy advice, these being: transparency, simplicity, accountability and fairness (according to the Guidance Note on The Role of the IMF in Governance Issues approved by its Executive Board on July 25, 1997).

²² See International Monetary Fund, "Good Governance. The IMF's Role," Washington D.C., January 1997.

²³ See IMF, *supra*, note 16, page 116.

19. Furthermore, Tapscott and Ticoll list what they call “lessons” learnt by the international policy community from the Asian crisis regarding the costs of opacity:

First, opacity combined with corruption and self-dealing can cause deep and sustained economic crisis. Second, opacity hurts businesses and raises their transaction costs. Investors lose trust, withdraw from capital markets, and increase the price they exact from companies for loans and investments. Third, opacity costs taxpayers—businesses and consumers—as governments are forced to intervene with bailouts and social safety nets, while their cost of borrowing increases due to the opacity risk premium.²⁴

2. Institutions and governance

20. The hypothesis of access to information laws having a positive influence on economic outcomes is also verified through the abundant literature explaining the relevance of institutional factors on economic performance.

21. Rodrik and Subramanian explain that there are three lines of thought for addressing the cause of the great difference in the average incomes between the world's richest and poorest countries.²⁵ First, there is the theoretical line that views geography as the key determinant.²⁶ A second view emphasizes international trade as the motor of productivity and income growth. Lastly, a third line of thought focuses on institutions.²⁷ After analyzing the three hypotheses, Rodrik and Subramanian conclude that “the quality of institutions overrides everything else.”²⁸

22. What is meant by “institutions”? This term has been subject to different definitions.

23. For example, 1993 Nobel Prize Winner Douglass C. North gives a broad definition, describing them as the formal and informal rules governing human interactions, or, in his own words: “Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction. In consequence, they structure incentives in human exchange, whether political, social or economic.”²⁹

24. On the other hand, narrow definitions, which are centered on specific organizational entities, procedural devices and regulatory frameworks, also exist.³⁰

²⁴ See Tapscott and Ticoll, *supra*, note 20, page 51.

²⁵ See Rodrik, Dani and Subramanian, Arvind, “The Primacy of Institutions (and what this does and does not mean)” in *Finance and Development*, IMF, Washington D.C., June 2003, pages 31-34.

²⁶ Recent writings by Jared Diamond and Jeffrey Sachs represent this hypothesis.

²⁷ This approach is strongly associated with Douglass C. North, and has been recently used in econometric studies by authors like Daron Acemoglu, Simon Johnson, and James Robinson.

²⁸ Rodrik, Dani and Subramanian, Arvind, *supra*, note 25, page 31.

²⁹ North, Douglass C., “Institutions, Institutional Change and Economic Performance,” Cambridge University Press, Cambridge, 1990, page 3.

³⁰ See IMF, *supra*, note 16, page 97.

25. At an intermediate level, there is a line of thought which focuses on perceptions and assessments of public institutions, “especially about how well they function and what their impact is on private sector behavior.”³¹ According to this view, “institutions are defined in terms of the degree of property rights protection, the degree to which laws and regulations are fairly applied, and the extent of corruption.”³² This approach has been adopted by many of the recent works on the determinants of economic development.

26. There is an important line of research that evidences the strong correlation between good institutions and economic development and growth.

27. Namely, the IMF in its World Economic Outlook of April 2003 finds that a high correlation exists between institutional quality and the level of income (GDP per capita); economic growth (GDP growth); and a lower volatility of growth (measured as the average standard deviation of the annual growth rate of GDP per capita).³³ And, as Edison concludes, “These results suggest that economic outcomes could be substantially improved if developing countries strengthened the quality of institutions.”³⁴

28. Having recognized the significance of good governance and having discussed what its role should be regarding this issue,³⁵ the IMF now devotes efforts to the promotion of good governance in its member countries. The IMF limits its involvement to the economic aspects of governance and contributes to its consolidation through policy advice, technical assistance, and the promotion of transparency in financial transactions involving the government budget, central bank, and public sector in general.³⁶ Thus, acknowledging that weak institutions obstruct growth and the implementation of effective macroeconomic policies, most of the programs presently supported by the IMF include conditions intended to confront institutional weaknesses, to fight corruption and reduce other forms of rent-seeking, and to promote governance.³⁷

29. In the same line as the IMF, Kaufman and Kraay conclude that there is a strong positive correlation between governance quality and per capita income across countries.³⁸ But they warn that while this causal effect runs from better governance to higher per capita income, there is no effect as such in the opposite direction. This highlights the relevance of governance

³¹ *Id.*

³² See Edison, Hali, “Testing the links. How strong are the links between institutional quality and economic performance?” in *Finance and Development*. IMF, Washington D.C., June 2003, pages 35- 37 (This Article draws on Chapter 3 of the “IMF’s World Economic Outlook. April 2003. Growth and Institutions”, *supra*, note 16).

³³ See IMF, *supra*, note 16.

³⁴ See Edison, *supra*, note 32, page 35.

³⁵ On July 25, 1997, the IMF Executive Board approved a document entitled “The Role of the IMF in Governance Issues: Guidance Note.”

³⁶ See IMF, *supra*, note 22.

³⁷ See IMF, *supra*, note 16, page 116.

³⁸ See Kaufmann, Daniel and Kray, Aart, “Growth Without Governance,” Policy Research Working Paper WPS 2928, The World Bank, Washington D.C., November 2002.

for economic development, but denies the usual assumption that higher incomes *per se* lead to further advances in terms of governance, creating a kind of “virtuous circle.”³⁹

- The quality of governance: including level of corruption, political rights, public sector efficiency, and regulatory burdens.
- The degree of legal protection of private property and the enforcement of these laws.
- The limits (institutional and others) placed on political leaders.⁴⁰

30. How are access to information laws related to the institutional perspective on economic performance determinants? The answer can be better understood by analyzing the way in which institutional quality is measured. According to the IMF, recent works have generally considered three relatively broad measures of institutions:

31. These are not objective measures; rather, they result from subjective perceptions and assessments of country experts or are based on assessments coming from surveys carried out by international organizations or NGO's and responded to by residents of a given country.⁴¹

32. The measure that refers to the quality of governance is known as the *aggregate governance index*, and it was presented in studies by Kaufmann, Kraay, and Zoido-Lobaton.⁴² This approach is based on a broad definition of governance “as the traditions and institutions by which authority is exercised in a country,” including “1) the process by which governments are selected, monitored, and replaced, 2) the capacity of the government to effectively formulate and implement sound policies, and 3) the respect of citizens and the state for the institutions that govern economic and social interactions among them.”⁴³ Data is drawn from indicators constructed by different international organizations, political and country risk agencies, think tanks, and NGO's⁴⁴ and is organized into six clusters, corresponding to six aspects of governance. The components of each cluster are then combined, resulting in 6 aggregate governance indicators:

- 1) Voice and accountability. This includes indicators measuring the extent to which citizens can participate in the choice of their government and have political rights and civil liberties. It also takes into account measures of independence of the media, which “serves an important role in monitoring those in authority and holding them accountable for their actions.”⁴⁵

³⁹ *Id.*, page 25 “...improvements in institutional quality or governance are unlikely to occur merely as a consequence of economic development...”; “...as long as the established elites within a country reap private benefits from the *status quo* of low-quality institutions, there is little reason to expect that higher incomes will lead to demands for better governance....”

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Kaufmann, Daniel, Kraay, Art, and Zoido-Lobaton, Pablo, “Aggregating Governance Indicators,” Policy Research Working Paper, WPS 2195, The World Bank, Washington D.C., October 1999 and “Governance Matters,” Policy Research Working Paper, WPS 2196, The World Bank, Washington D.C., October 1999.

⁴³ See Kaufmann, Kraay and Zoido Lobaton, *supra*, note 38, page 1.

⁴⁴ These sources include, for instance: Political Risk Services (PRS Group), Standard & Poor's, Economist Intelligence Unit, Business Environment Risk Intelligence (BERI), Freedom House, Heritage Foundation, etc. For a complete list of these sources and details about the variables they measure, see Kaufmann, Kray, and Zoido-Lobaton, *supra*, note 42, pages 28-60; and Kaufmann, Daniel and Kray, Aart, *supra*, note 38, page 8.

⁴⁵ See Kaufmann, Daniel and Kray, Aart, *supra*, note 38, page 6.

- 2) Political stability and absence of violence. This refers to the likelihood that the government will not be destabilized or overthrown by violent or unconstitutional means.
- 3) Government effectiveness. This includes perceptions of the quality of the delivery of public services and of how competent and politically independent civil service is, of the quality of the bureaucracy, and of the credibility of the government's commitment to policies.
- 4) Regulatory quality: This contains measures of the incidence of market-unfriendly policies (price controls, inadequate bank supervision, burdens caused by excessive regulation on foreign trade, business development, etc.).⁴⁶
- 5) Rule of law. This includes indicators measuring the extent to which agents have confidence in and abide by the rules of society, including perceptions of the incidence of violent and non-violent crime, the effectiveness of the judiciary and its predictability, and contract enforcement.
- 6) Control of corruption⁴⁷. This measures perceptions of corruption, conventionally understood as "the exercise of public power for private gain."⁴⁸ Corruption is seen as a fault in governance because it "is often a manifestation of a lack of respect on the part of both the corrupter (typically a private citizen or firm) and the corrupted (typically a public official) for the rules that govern their interactions."⁴⁹

33. In a chapter of the World Economic Forum's 2003-2004 Global Competitiveness Report, Daniel Kaufmann uses these indicators to show the extent to which governance matters, concluding that a country that significantly improves key governance aspects could expect, in the long-run, a dramatic increase in per capita income and in other social dimensions.⁵⁰

34. The relationship between access to information laws and the quality of governance can be better understood when taking into account some of the specific perceptions that enter the analysis based on the aggregate governance index. The voice and accountability cluster, for instance, includes measures to which access to information laws are closely related, such as democratic accountability, whether business is kept informed of important development in rules and policies, transparency of the business environment, and transparency in terms of the government communicating its intentions successfully.⁵¹

35. Furthermore, the relevance of access to information laws considered from the governance approach can also be addressed from a different angle. Studies which relate governance factors to economic outcomes usually emphasize their view of corruption as a failure in institutional quality and as having an adverse effect in the economic field.

36. In fact, the aggregate governance index contains measures regarding corruption, such as: corruption among public officials; effectiveness of anticorruption initiatives; corruption

⁴⁶ This category is also named "Regulatory burden" in some papers by Kaufmann, Kraay, and Zoido-Lobaton.

⁴⁷ This category is also named "Graft" in some papers by Kaufmann, Kraay, and Zoido-Lobaton.

⁴⁸ Kauffman, D. and Kray, A., *supra*, note 38, page 6.

⁴⁹ *Id.*, page 7.

⁵⁰ Kaufmann, Daniel, "Governance Redux: The Empirical Challenge" in *The Global Competitiveness Report 2003-2004*, World Economic Forum, Geneva.

⁵¹ For a complete and detailed list of the sources and the specific indicators taken into account to construct the aggregate governance index, see Kauffman, Aart, and Zoido-Lobaton, "Governance Matters," *supra*, note 42, pages 28-60.

in the political system as a “threat to foreign investment;” frequency of “additional payments” to “get things done;” irregular, additional payments connected with import and export permits, business licenses, exchange controls, tax assessments, police protection or loan applications; effects of corruption on “attractiveness of country as a place to do business;” etc. Therefore, access to information laws could reduce or prevent corruption, diminishing its adverse economic effects and also improving a country's performance regarding the control of corruption cluster of the aggregate governance index.

37. It is time to examine what Mauro expresses when he asks, “Why worry about corruption?”⁵² In other words, why should corruption be seen as negative from an economic perspective? Mauro, when examining corrupt public conduct, states that it “discourages investment, limits economic growth, and alters the composition of government spending, often to the detriment of future economic growth.”⁵³ It is important to understand how the concept of rent-seeking enters his explanation.⁵⁴ Although some rent-seeking activities are neither illegal nor immoral, but perfectly legal competition for rents (such as lobbying and advertising), others are clearly illegal (bribery, corruption, black markets, smuggling, etc.).⁵⁵ Rent-seeking activities are carried out, for example, by firms that spend a lot of money trying to convince legislators to grant them monopolies or to restrict competition in another way that will generate rents. On the other hand, bureaucrats and authorities try to position themselves in a restricted monopoly where they can be bribed for issuing an import license, giving a subsidy, approving an expenditure, etc.⁵⁶

38. Mauro synthetically lists the consequences of corruption that cause economic growth to slow:⁵⁷

- Corruption as a tax. If businessmen interpret corruption as a kind of tax, this will discourage investment, consequently slowing down economic growth.⁵⁸ This occurs because, if a bribe is a prerequisite to start an enterprise in the country, it could be expected that corrupt public officials will claim part of the gains resulting from the investment. Further, even if a businessman is still willing to invest in such an economy, the private marginal product of capital will decrease because of the bribes that have to be paid (acting as a tax on the proceeds of the investment), lowering the investment rate in this way also. Mauro presents quite shocking evidence from regression

⁵² See Mauro, Paolo, “Why Worry about Corruption?,” in *Economic Issues* No.6, International Monetary Fund, Washington D.C., February 1997.

⁵³ *Id.*, page 3.

⁵⁴ *Id.*, page 2: Rent is understood here as economic rent, which is “the extra amount paid (over what would be paid for the best alternative use) to somebody or for something useful whose supply is limited by nature or through human ingenuity.”

⁵⁵ Coolidge, Jacqueline and Rose-Ackerman, Susan “High-level rent-seeking and corruption in African Regimes: Theory and Cases”, Policy Research Working Paper, WPS 1780, The World Bank, Washington D.C., 1999; and Krueger, Anne, “The Political Economy of the Rent-Seeking Society” in *The American Economic Review*, Vol. 64, No. 3, June 1974, page 291.

⁵⁶ See Mauro, *supra*, note 52.

⁵⁷ *Id.* and Mauro, Paolo, “Corruption and Growth” in *The Quarterly Journal of Economics*, Vol. 110, No.3, August 1995, p. 681-712.

⁵⁸ See also Shleifer, Andrei and Vishny, Robert W., “Corruption” in *The Quarterly Journal of Economics*, Vol. 108, No 3, August 1993, p.599-617. These authors add that corruption is even more distortionary and costly than taxation, due to its illegality and the need to be kept secret. “The demands of secrecy can shift a country's investments away from the highest value projects, such as health and education, into potentially useless projects, such as defense and infrastructure, if the latter offer better opportunities for secret corruption”; and “can also cause leaders of a country to maintain monopolies, to prevent entry, and to discourage innovation by outsiders if expanding the ranks of the elite can expose existing corruption practices,” page 616.

analyses, stating that if a country were to improve its corruption index by two points, investment would increase by four points, therefore improving employment and economic growth.⁵⁹

- Misallocation of talent. The more talented and educated may choose to carry out rent-seeking activities rather than productive ones.
- Reduced effectiveness of aid flows. Aid could be oriented to unproductive government expenditures.
- Loss of tax revenue. This occurs when corruption is exercised through tax evasion or tax exemptions. This could also have negative consequences regarding budgetary issues.
- Decrease in the quality of infrastructure and public services because of the corruption related to public procurement contracts.
- Distortion in the composition of government expenditures. Officials may choose expenditures according to the potential for receiving bribes rather than based on public welfare motives.

39. Kaufmann and Kraay disaggregate four different dimensions of corruption: bribery in obtaining services; in public procurement; in the budget process; and in shaping the policy, legal, and regulatory framework.⁶⁰ They call this last type of corruption “state capture,” which they define as “the undue and illicit influence of the elite in shaping the laws, policies, and regulations of the state.”⁶¹ State capture differs from the typical view of corruption as an attempt to influence the implementation of laws and regulations through bribery. Kaufmann and Kray consider state capture a major challenge to governance, because if an elite benefits from misgovernment, then “any possible impact of income growth on governance could be offset by the effect of the elite’s negative influence.”⁶²

40. In order to understand the relevance of access to information laws for economic development while regarding corruption as a negative element, what has already been thoroughly addressed in the Chapters dedicated to Access to Information in previous Reports of the Office of the Special Rapporteur for Freedom of Expression must be remembered at this point: access to information laws contribute to prevent and fight corrupt practices.⁶³ This statement has been supported not only by the Office of the Special Rapporteur for Freedom of Expression. The World Bank’s 2002 World Development Report highlights the importance of access to information when it notes that:

To understand and anticipate market movements, investors require timely and accurate information on company financial indicators and macroeconomic data. Similarly, information on asset ownership, government contracts, and public agency expenditures helps the public monitor government officials. Information on price and product standards helps consumers select products.

⁵⁹ See Mauro, Paolo, *supra*, note 52.

⁶⁰ See Kaufmann and Kraay, *supra*, note 38.

⁶¹ *Id.*, page 26. A recommended reading for further analysis of state capture and a categorization of the different forms of corruption is Hellman, Joel S., Jones, Geraint, and Kaufmann, Daniel, “Seize the State, Seize the Day. State Capture, Corruption and Influence in Transition” Policy Research Working Paper, WPS 2444, The World Bank, Washington D.C., September 2000.

⁶² *Id.*, page 27.

⁶³ Inter-American Commission on Human Rights, Annual Report 2001, Volume II, Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III: *Report on Action with Respect to Habeas Data and the Right to Access to Information in the Hemisphere*; and Annual Report 2003, Vol. III, Report of the Special Rapporteur for Freedom of Expression, Chapter IV: *Report on Access to Information in the Hemisphere*.

Records of health inspections, school performance, and environmental data help citizens make informed social choices.⁶⁴

41. Moreover, this report establishes that “open information sharing can improve governance and reduce corruption”⁶⁵ and that corruption undermines market functioning in three ways: (1) by acting as a tax—distorting the choice between activities, and decreasing the benefits resulting from investment (both private and public); (2) by eroding competition—since competition depends on a continuous entry of new firms, and when these must pay bribes to begin operating in the market, many may decide not to enter; and (3) by damaging the legitimacy of the state and lowering its capacity to provide institutions that support markets.

42. Finally the report states that “lack of information breeds corruption,” since:

[W]ithout information on the prices that are supposed to be charged for public services...individuals cannot determine if they are being overcharged. Without information about the details of regulations, individuals are vulnerable to bureaucratic harassment and demands for bribes. Without widespread information on the extent of public wrongdoing, the public disgust with corruption that is essential to implementing reforms is slow to form.⁶⁶

43. Roumeen Islam analyzes the effects of availability of information on governance through two different aspects of this topic: the way in which governance is affected by the availability of basic economic data; and the way governance is affected by a country's legal framework regarding access to information.⁶⁷

44. First, she explains that the more data are available, the better governance could be expected: better data enables the citizenry to judge government policies, affecting the support given to the government and determining for how long it stays in power. This makes governments more accountable. In other words, “People are most likely to demand governments that govern better and governments have more of an incentive to do well.”⁶⁸ Islam lists further reasons in support of her claim that data availability affects governance by stating, for example, that it improves coordination between members of government, policy design, the formulation of objectives, and evaluation of policy alternatives. Regarding access to information laws, the author highlights their importance for increasing information flows and, consequently, citizen monitoring of government performance.

45. The results at which Roumeen Islam arrives after a number of statistical regressions are certainly useful for the purpose of the present study. For instance, she finds that more transparent governments⁶⁹ perform better on a broad number of indicators of the aggregate governance index which was described previously in this paper: voice and

⁶⁴ See The World Bank, *supra*, note 6, page 189.

⁶⁵ *Id.*, page 101.

⁶⁶ *Id.*, page 109.

⁶⁷ See Islam, Roumeen, *supra*, note 7.

⁶⁸ *Id.*, page 5.

⁶⁹ Measured according to the degree and frequency of the availability of data, by means of an index constructed on the base of representative variables (such as GDP, unemployment, foreign direct investment, etc.) considered important for the judgment and monitoring of economic policy outcomes. This index represents how much economic information governments are willing to disclose.

accountability; government effectiveness; regulatory quality; control of corruption; and rule of law. Moreover, Islam constructs an access to information index (based on a country's adoption of a freedom of information law), because she believes that even if governments publish economic data, this information could not be sufficient for people to judge and monitor them, while a freedom of information law provides access to further data other than the simply economic. Islam finds that the presence of this type of law shows a correlation with the aggregate governance index. The correlation is not only with the “voice and accountability” and “control of corruption” clusters, but also with “regulatory quality” and “government effectiveness,” presenting the highest correlation with the voice and accountability indicator.⁷⁰ Therefore, she concludes that a freedom of information law positively affects governance quality and that “countries that have freedom of information laws are much more likely to be well governed.”⁷¹

46. Hence, according to Roumeen Islam, as a higher degree of transparency and freedom of information laws contribute to governance, and as it has been empirically evidenced that governance is correlated to growth, “extrapolating, there is a close relationship between better information flows and how fast economies grow.”⁷²

3. Impact of governance factors on risk assessments

47. Factors related to governance are also taken into account by agencies that provide country risk assessments and sovereign ratings. In fact, the aggregate governance index that was described previously draws many institutional indicators from some of these agencies.

48. These firms have clearly positioned themselves as crucial actors in the international economic arena—where foreign direct investment flows and capital movements play an essential role—and their assessments highly influence the level of foreign investment that a country is able to attract and retain and the cost of borrowing money in international financial markets.

49. A number of the institutional variables that enter these firms' country risk analyses and sovereign ratings are related to access to information laws. Some representative examples will be described next.

50. Political Risk Services (PRS Group), one of the main providers of country risk assessments, produces the International Country Risk Guide (ICRG). The ICRG rates 22 variables, grouping them in three subcategories: the Political Risk Index, the Financial Risk Index, and the Economic Risk Index. These three indexes are also combined to create a Composite Political, Financial, and Economic Risk Rating. The Political Risk Index consists of 12 variables, including democratic accountability and corruption. According to the ICRG methodology, the higher the number of points a country is assigned, the lower is the risk that exists. The Political Risk rating contributes 50% of the composite rating, and the Financial and Economic indexes each contribute 25%.⁷³

⁷⁰ See Islam, Roumeen, *supra*, note 7, page 33.

⁷¹ *Id.*, page 32.

⁷² *Id.*, page 36.

⁷³ See www.icrgonline.com and Kaufmann, Aart, and Zoido-Lobatón, *supra*, note 42, pages 48 and 49.

51. Business Environment Risk Intelligence (BERI) constructs a rating related to the business environment called the Business Risk Service. It is separated into three indexes, one of which, the Political Risk Index, includes a category which corresponds to “mentality,” including xenophobia, nationalism, corruption, nepotism, willingness to compromise, etc.⁷⁴

52. The Economist Intelligence Unit (EIU), which produces analyses and forecasts of the political, economic, and business environments of different countries, provides its Country Risk Service and its Country Forecasts, which among their measurements include: transparency/fairness (named “legal system” in Country Forecasts) and corruption.⁷⁵

53. DRI/McGraw-Hill (DRI), is a unit of Standard & Poor’s that offers economic consulting and information services for business, financial, and government decision makers worldwide. In 1996, DRI launched the Country Risk Review (CRR), a quarterly publication on country risk assessments. Among the different sources of risk that it lists, the category “losses and costs of corruption” is included.⁷⁶

54. In today’s globalized economy, country risk assessments have achieved an outstanding relevance regarding decision-making related to investment choices. Actors such as institutional investors, multinational firms, banks, importers and exporters, etc. consult these assessments in order to calculate how different sources of risk might affect their business and investments now and in the future.⁷⁷

55. Firms like Standard & Poor’s, Moody’s, and Fitch also construct sovereign credit ratings. These are assessments of a government’s ability and willingness to service its debt in full and on time and are a forward-looking estimate of default probability.⁷⁸

56. The grade given to a country in these ratings is not a minor issue, since it has an impact on the costs a government must face to borrow money in the international financial markets. The greater the degree of risk, the higher interest rate the sovereign has to pay for its borrowings, given the increase in the probability of nonpayment.⁷⁹ This contributes not only to an increase in the payment of the interest of public debt, but also to an increase in the minimum cost of borrowing money in the local financial market. Moreover, given the high cost or the impossibility of borrowing money in international markets, the state has the need to borrow

⁷⁴ See Kaufmann, Aart, and Zoido-Lobaton, *supra*, note 42, pages 29 and 30.

⁷⁵ *Id.*, pages 38 and 39.

⁷⁶ *Id.*, page 33.

⁷⁷ See www.icrgonline.com

⁷⁸ See Beers, David T., Cavanaugh, Marie, and Ogawa, Takahira, “Sovereign Credit Ratings: A Primer,” Standard & Poor’s, Sovereigns; April 3, 2002.

⁷⁹ For a study on the influence of sovereign ratings on borrowing costs, see Cantor, Richard and Packer, Frank, “Determinants and Impact of Sovereign Credit Ratings” in *Economic Policy Review*. Federal Reserve Bank of New York, October 1996, Vol.2, Iss. 2. The authors state that sovereign credit ratings influence sovereign bond spreads: “Sovereign yields tend to rise as ratings decline,” page 4. They find that the effect of rating announcements isn’t diluted by market anticipation, because these announcements independently affect market spreads: when changes in ratings take place, they are followed by statistically significant bond spread movements in the expected direction. They also find that the impact of rating announcements is highly significant on speculative-grade sovereigns, but statistically insignificant on investment grade sovereigns; and that a greater effect is seen if an agency’s announcement confirms one that came from another agency, or a previous rating announcement.

money locally, resulting in a “crowding out” effect: the government reaps resources that would otherwise be available for the private sector, also causing the local interest rates to rise. All of this has negative effects on investment, on the level of economic activity, and on the economic growth rate.

57. A decrease in a country's grade given by ratings from firms such as Standard & Poor's, Fitch, and Moody's also causes a reduction in capital flows. This is the case because most of the major international investors—such as hedge funds or pension funds—operate within regulations that limit their investments to obligations from sovereign governments or private issuers that have been assigned an “investment grade.”

58. Furthermore, sovereign ratings affect the ratings of borrowers of the same nationality, and, therefore, their access to international capital markets. Agencies rarely rate a provincial government, municipality, or private company with a better grade than the one assigned to its country.⁸⁰ According to Fitch, “The sovereign rating forms a ceiling above which it is not possible for other borrowers resident in that country to rise;” thus, it is important because “even if the government itself does not want access to the world financial markets: it sets the parameters within which the private sector can operate.”⁸¹ Standard & Poor's explains that the ratings that entities in a country are assigned are most frequently the same as the sovereign's rating or lower, even though there are some specific cases in which an entity's grade may be higher than the one assigned to the sovereign.⁸²

59. Standard & Poor's includes in its sovereign rating methodology perceptions related to governance issues and access to information. For example, transparency in economic policy decisions and objectives is one of the variables that Standard & Poor's takes into account in its political risk assessments, acknowledging that “the stability, predictability, and transparency of a country's political institutions are important considerations in analyzing the parameters for economic policymaking.”⁸³ The methodology also addresses factors such as the fiscal sector's timeliness and transparency in reporting. This last aspect is included in another category of the sovereign rating analysis, referred to as “fiscal flexibility” and, as explained by S&P, lower scores correspond to countries where government money is not spent effectively “because of constitutional rigidities, political pressures, or corruption.”⁸⁴

60. In fact, a Standard & Poor's publication specifically addresses the impact of governance issues on a government's creditworthiness.⁸⁵ It explains that governance factors that are related to the capacity and willingness to service debt are taken into account when analyzing the probability of a government's default. The Article presents examples in which improved governance resulted in a rise in creditworthiness, and vice versa. Disclosure of

⁸⁰ *Id.*

⁸¹ See Fitch, “Sovereign Ratings. Rating Methodology,” 2002, page 2.

⁸² See Beers, David T., Cavanaugh, Marie, and Ogawa, Takahira, *supra*, note 78, page 1.

⁸³ *Id.*, page 4. Political Risk is one of the 10 analytical categories in Standard & Poor's sovereign ratings methodology profile.

⁸⁴ *Id.*, page 6.

⁸⁵ See Chambers, John and Richter, Monica, “Public Sector's Governance's Impact on Sovereigns' and Local Governments' Creditworthiness,” Standard & Poor's, 23 June 2003, page 1: “Creditworthiness is defined as the capacity and willingness to service debt in full and on time, without recourse to involuntary exchanges or other forms of debt relief.”

information and transparency on fiscal matters, on monetary policy, and on the external sector of the economy are listed among the governance aspects that have consequences in a country's creditworthiness.

61. To sum up: a wide number of variables enter the different analyses on country risk and sovereign ratings, with each given a specific weight according to the relative importance of their contribution to risk. Some of the factors that are taken into account are related to access to information. They are not generally considered among the most critical indicators shaping the assessments about a given country, and it definitely cannot be concluded that improvements in access to information alone will result in a better risk grade. However, if a country is willing to achieve an upgrade in its qualification or to prevent a decrease in it, when designing its overall strategy it could certainly take into account governance variables such as the ones previously listed—which could be improved by implementing access to information laws.

C. Conclusions

62. The potential impact of access to information laws on an economy has been illustrated in this report by taking different approaches.

63. First, the economic relevance of access to information laws has been shown by considering the importance of information flows for the efficient functioning of markets. Better information lowers transaction costs and gives rise to better decision-making and resource allocation. Transparency has also been highlighted as an element which helps to mitigate financial market volatility. As governments are in control of data that is economically meaningful (ranging from measures such as economic growth or inflation rate to information regarding laws, regulations, policies, objectives, etc.), disclosure of such information is crucial for economic outcomes.

64. Second, the economic impact that access to information laws can have has also been verified by addressing this issue through the governance approach. First, it has been explained that the aggregate governance index includes variables within the “voice and accountability” cluster to which access to information laws clearly contribute in a positive manner. Furthermore, it has also been highlighted that access to information laws can be seen as a tool to fight corrupt practices, reducing the opportunities for these kinds of activities—that have adverse economic effects—and improving a country's performance in the “control of corruption” governance indicator. In addition, evidence has been presented regarding some correlation between freedom of information laws and the “regulatory quality” and the “government effectiveness” indicators. To conclude, if an advance in governance results in better economic outcomes, and if access to information laws give rise to improvements in different governance dimensions, it follows that these laws represent a positive contribution to economic development.

65. Finally, this study has also addressed the fact that firms which provide country risk assessments and sovereign ratings also consider governance aspects when assigning a grade to a given country. Taking this into account, access to information laws could be seen as influencing economic outcomes in a more indirect way, also. These laws can act on agencies' perceptions of governance and influence their assessments, which in turn have crucial

economic implications. These assessments affect the level of investment that an economy attracts and retains and the cost of borrowing money for both state and private actors.

D. Access to information in the Member States: an update of the 2003 Annual Report

66. The General Assembly of the OAS resolved, in Paragraph 7 of Resolution 2057, entitled "Access to Public Information: Strengthening Democracy," to instruct the Special Rapporteur for Freedom of Expression to "continue to report on the situation regarding access to public information in the region in the annual report of the IACHR."⁸⁶ Pursuant to this mandate, in an effort to record the developments of the States in this area during 2004, this section of this report will summarize an update of the situation of the Member States in relation to the right of access to information.

67. To this end, on September 7, 2004, and following the procedure adopted for the 2001 and 2003 Annual Report, an official letter was issued to the permanent missions of the OAS Member States, requesting them to provide an update of the information previously received at the Office regarding legislation, jurisprudence, and existing practices related to access to information in their countries within 30 days. The information received from the States has been integrated with research done by media sources and non-governmental organizations in order to provide an overview of the situation in each Member State.

68. The Special Rapporteur includes in this annual report only the laws that the Member States of the Organization of American States passed during 2004 with respect to the right of access to information. In this account, Ecuador⁸⁷ and the Dominican Republic⁸⁸ have passed laws related to this right, which demonstrates that the topic of access to information has continued receiving attention during 2004.

69. The Office has received information that other States such as Argentina,⁸⁹
Bolivia,⁹⁰ Guatemala,⁹¹ Honduras,⁹² Nicaragua,⁹³

⁸⁶ OAS, AG/RES. 2057 (XXXIV-O/04), para. 6 and 7.

⁸⁷ The "*Ley Orgánica de Transparencia y Acceso a la Información Pública*" was promulgated by the president of Ecuador on May 10, 2004 and was brought into effect through its publication in the Official Registry on May 18, 2004. The Special Rapporteur issued a press release on May 21, 2004 recognizing the promulgation of laws on access to information as an important step to contribute to the transparency of governmental actions. Moreover, the Special Rapporteur stressed that these laws must also be accompanied by regulations and interpretations that are adequate to implementing the law. See: <http://www.cidh.oas.org/relatoria/showArticle.asp?artID=129&IID=1>. Also, we received information that on October 25, 2004 the final draft of the regulation ("*reglamento*") of the law was finished and sent to a number of institutions in Ecuador for their opinion. See: <http://www.presidencia.gov.ec/noticias.asp?noid=3825> (in Spanish).

⁸⁸ On July 15, 2004, the General Act for Free Access to Public Information ("*Ley General de Libre Acceso a la Información Pública*"), Act No. 200-04 was passed. The Office of the Special Rapporteur has been reviewing the Act and, although it recognizes the importance of laws on access to information, it is concerned about the requirement to express the motivation in order to request information as established in Article 7(d) of the Act. The Office is aware of a draft regulation for the implementation of the Act and expects that this new legislation adequate the Act to guarantee respect for principles on access to information.

⁸⁹ A bill on access to information was approved by the House of Representatives of the Argentinean Congress in May 2003 and sent to the Senate for review. On December 1, 2004 the Senate passed the bill with a few modifications and resent to the House of Representatives for a review of the changes. The House can veto the changes by a special majority of two thirds of the representatives' votes. The Office of the Special Rapporteur has been reviewing the bill and is deeply concerned about the changes approved by the Senate. Particularly, the Office notes with concern that bill fails to establish publicity as a principle of information by incorporating new exceptions to publicizing information. It also observes that by requiring the applicant to express the reason to requesting the information and by giving the application form the character of sworn declaration, there is a danger of restricting the access to the information. The Office is also concerned about the establishment of fees, which might vary according to the reasons continued...

Paraguay,⁹⁴ and Uruguay⁹⁵ are currently considering similar legislation, and civil society has been vigilant in observing the States' progress.

70. Moreover, on September 1, 2004, the State of Panama issued the Executive Decree 335, which repealed Executive Decree 124 of May 21, 2002. The Office of the Special Rapporteur had expressed its concern regarding certain regulatory Articles of Executive Decree 124 in its 2003 Annual Report.⁹⁶ The Office also received information that on January 4, 2004 the Jamaican Access to Information Act was brought into effect and is being implemented on a phased basis, its full implementation is expected to be accomplished in July 2005. Currently it is in effect in 20 Ministries and Agencies.

71. As of the deadline given for the Member States to provide the information requested in the official letter issued on September 7, 2004, the Office of the Special Rapporteur for Freedom of Expression has only received information from the States of Colombia, El Salvador, Panama and Peru, out of all the member countries of the Organization of American States. The Special Rapporteur greatly appreciates the efforts of these States in gathering the requested information, and encourages all Member States of the OAS to collaborate in the preparation of future studies by this Office in order to comply with their mandate and to better take advantage of the conclusions derived from them. The Special Rapporteur would also like to notice that all information received after the deadline will be taken into consideration and examined by the Office in due time.

72. As the Office of the Special Rapporteur expressed in previous reports, since 2001 the issue of access to information has created greater debate amongst the civil societies of Member States, and several states have adopted positive measures towards the implementation of this right. However, it is important to insist that Member States need to display greater political willingness to work toward amending their laws and ensuring that their

...continuation

given to access the information and could also restrict the access to information. Finally the Office notices that ambiguity of the concept of public information in the bill, allowing the citizen to request information to any institution that "pursues a public interest, a general utility, a common good or that serve a public function or have public information" (own translation). Accordingly, the ambiguity of the concept could make the law inapplicable or undermine the meaning of a law of access to public information. Also see 2003 Annual Report, *Supra* 2, para. 62-67.

⁹⁰ The Supreme Decree of Transparency and Governmental Access to Information ("*Decreto Supremo de Transparencia y Acceso a la Información Gubernamental*"), approved in January 2004 is being fully re-discussed due to the criticisms of its lack of amplitude. Moreover, the draft of a bill on access to information, elaborated by the Presidential Anticorruption Delegation ("Delegación Presidencial Anticorrupción") is in process of consultation and review. See: <http://www.redinter.org/inforid/en-foco/1.htm>

⁹¹ See 2003 annual Report, *supra* 2, para. 128-134.

⁹² On October 26, 2004, the Legislative Chamber of Honduras, acknowledged the bill on Access of State-held Information elaborated by C-Libre. See: <http://probidad.org/index.php?seccion=comunicados/2004/011.html>. Also see 2003 Annual Report, *Supra* 2, para. 135-139.

⁹³ The bill is currently being studied by the Justice Commission of the National Assembly of Nicaragua. See 2003 Annual Report, *supra* 2, para. 149-156. Also see: <http://probidad.org/regional/index.php?seccion=legislacion/2001/042.html>

⁹⁴ Inter-American Press Association, Press Release: *IAPA keeps watch on regulation and use of laws on effective access to public information*, November 5, 2004.

⁹⁵ See 2003 Annual Report, *supra* 2, para. 189-195. Also see: <http://probidad.org/regional/index.php?seccion=legislacion/2002/041.html>

⁹⁶ See 2003 Annual Report, *supra* 2, para. 163-164.

societies fully enjoy freedom of expression and information. Democracy requires broad freedom of expression, and that cannot be pursued if mechanisms that prevent its generalized enjoyment remain in force in our countries.

CHAPTER V

INDIRECT VIOLATIONS OF THE FREEDOM OF EXPRESSION: THE IMPACT OF THE CONCENTRATION OF MEDIA OWNERSHIP¹

A. Introduction

1. Continuing its study of indirect violations of the freedom of expression, the Office of the Special Rapporteur for Freedom of Expression has prepared the following report on the concentration of media ownership and its impact on the free circulation of ideas. This study aims to describe initial approaches to the issue, considering that it merits special attention, and proposes joint efforts for the Member States to develop measures on the concentration of media ownership.

2. In recent years, the Office of the Special Rapporteur has been receiving a steady flow of reports of certain monopolistic and oligopolistic practices related to media ownership in some of the Member States.² In effect, in its previous report covering 2003, the Office of the Special Rapporteur for Freedom of Expression insisted that concentration of media ownership is a practice that runs counter to democracy and pluralism, as it impedes the diverse expression of the various sectors of society.³

3. This report consists of two parts. In the first part we review and spell out some basic conceptual issues concerning concentration of media ownership and freedom of expression; this will enable us, in the second part, to evaluate the extent to which this human right is negatively impacted by such concentration, and consequently to provide insight for seeking solutions. The second part analyzes the main problems that have arisen in the European and inter-American systems for the protection of human rights in relation to the concentration of media ownership, to then draw some conclusions taking stock of the main challenges, all with a view to making suggestions and recommendations to help address them.

4. Along these lines, this report seeks to further a current of opinion favorable to the full observance of the freedom of expression, reaffirming that its exercise is not only an

¹ A preliminary draft of this chapter was initially researched and written by Carlos J. Zelada, a recent graduate from the Masters of Law program at Harvard University, and an attorney with a law degree from the *Pontificia Universidad Católica del Perú*. He did the research for this report while working as an intern with the Office of the Special Rapporteur for Freedom of Expression in 2004. The Office is grateful for his valuable contribution.

² See: Annual Report of the Inter-American Commission on Human Rights 2000. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter IV: Evaluation of the Situation of Freedom of Expression in the Hemisphere/Guatemala, para. 120; Annual Report of the Inter-American Commission on Human Rights 2001. Volume II. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter II: Evaluation of the Situation of Freedom of Expression in the Hemisphere/Guatemala, paras. 114-117 / Honduras, para. 155; Annual Report of the Inter-American Commission on Human Rights 2002. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter II: Evaluation of the Situation of Freedom of Expression in the Hemisphere, para. 20 / Guatemala, para. 55; Inter-American Commission on Human Rights 2003. *Justicia e Inclusión Social: Los Desafíos de la Democracia en Guatemala*. Chapter VII: *La Situación de la Libertad de Expresión*, pp. 193-195, paras. 415-419; Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter II: Evaluation of the Situation of Freedom of Expression in the Hemisphere / United States, para. 107 / Honduras, para. 184 / Mexico, Annex 7: Press Releases, PREN/89/03: Preliminary Observations of the Special Rapporteur for Freedom of Expression, upon Concluding his Official Visit to Mexico, p. 301.

³ Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter II: Evaluation of the Situation of Freedom of Expression in the Hemisphere, para. 17.

expression of human dignity, but also one of the essential pillars of the democracy. The analysis set forth herein may be supplemented in the future by specific studies on certain situations.

B. Part I: Basic issues

1. Direct and indirect violations of the freedom of expression

5. In its previous report,⁴ the Office of the Special Rapporteur on Freedom of Expression noted that in terms of violations of the freedom of expression, one often finds conduct which over time has been considered “typical” of violations of this right. All of these are measures which have been designed to impose direct restrictions on the exercise of the freedom of expression.

6. As the Inter-American Court of Human Rights has noted, these occur

when governmental power is used for the express purpose of impeding the free circulation of information, ideas, opinions or news. Examples of this type of violation are prior censorship, the seizing or barring of publications and, generally, any procedure that subjects the expression or dissemination of information to governmental control.⁵

7. The assassination of journalists is also included in this category. Most of the instruments that refer to the freedom of expression, under both domestic and international law, have been framed in these terms.

8. Over time, however, indirect forms of restricting the freedom of expression have appeared. In this respect, the American Convention on Human Rights notes at Article 13(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.

9. These measures, unlike the previous ones, have not been designed strictly speaking to restrict the freedom of expression. In effect, *per se* they do not constitute a violation of this right. Nonetheless, in practice they have an adverse impact on the free circulation of ideas which is rarely investigated, and, accordingly, harder to detect. The concentration of media ownership is one such indirect restriction on or threat to the freedom of expression.

2. The freedom of expression as a foundation for plurality in information

10. For several years it has been said that the concentration of media ownership is one of the greatest threats to pluralism and to the diversity of information. The freedom of expression is closely related to the problem of concentration of ownership, though this is

⁴ Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter V: Indirect Violations of Freedom of Expression: Discriminatory Allocation of Official Publicity, pp. 187-209

⁵ I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism [hereinafter: “Compulsory Membership of Journalists...”] (Articles 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, para. 53.

sometimes hard to perceive because of the subtle nature of the connection, which has to do with what we know as “plurality” or “diversity” of information.

11. In this respect, the Inter-American Court of Human Rights has stated:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition *sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.⁶

12. Similarly, the Declaration of Principles on Freedom of Expression drawn up by the Office of the Special Rapporteur for Freedom of Expression of the OAS in 2000 notes in the first part of Principle 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.**⁷

13. Along the same lines, in 2001, the UN Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe (OSCE), and the Special Rapporteur on Freedom of Expression of the OAS signed a joint declaration in which they stated:

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;

⁶ I/A Court H.R., Compulsory Membership of Journalists..., op. cit., para. 70. The emphasis is in the original.

⁷ Emphasis added.

Broadcast regulators and governing bodies should be so constituted as to protect them against political and commercial interference.⁸

14. Plurality is the essential characteristic of the freedom of expression in democracy. The freedom of expression is a condition for transparency, the effective existence of alternatives, accountability, and the rational participation of citizens in political systems. In this regard, the free circulation of ideas is guaranteed “when the citizen finds himself or herself in the position of being able to form an opinion on the decisive issues and when he or she knows enough about the conduct of the authorities to be able to approve or reject their performance in office. The freedoms of expression and information guarantee the existence of free and plural public opinion, this being an essential condition for the existence of a plural and democratic society, without which freedom of conscience and the dignity of the person are unthinkable.”⁹

15. In effect, the media enable individuals to be able to form their own political opinion and then to compare it with the opinions of others. Only an informed individual can make an assessment and freely embrace one or another position in the political spectrum. The need for more information, together with the freedom to be able to express and exchange points of view, are of vital importance in the decision-making processes in which the various members of society take part. The exercise of the freedom of expression by the citizens of a state depends directly on the media providing information freely and independently.

16. It is important that the mass media “can truly be an instrument for freedom of expression. It is the mass media that makes the exercise of freedom of expression a reality and therefore the media must adapt itself to the requirements of this right.”¹⁰

17. Following this trend, in recent years it has been understood that one of the fundamental requirements of the freedom of expression is the need for a broad plurality of information and opinions available to the public. And this is why monopolistic or oligopolistic control of the media may have a serious detrimental impact on the requirement of plurality in information. When the sources of information are seriously reduced in number, as in the case of oligopolies, or when there is a single source, as in the case of monopolies, the possibility that the information being disseminated will have the benefits of being compared with information from other sectors is limited, imposing a *de facto* limitation on the right of all society to information.¹¹ The existence of monopolies or oligopolies, public or private, thus constitutes a serious obstacle to the dissemination of one’s own thinking, and to receiving different opinions.

18. In effect, if these media are controlled by a limited number of individuals or social sectors, or just one, the result is a lack of plurality that hampers the functioning of democracy. Democracy requires a confrontation of ideas, debate, and discussion. When this debate is non-

⁸ Annual Report of the Inter-American Commission on Human Rights 2001. Volume II. Report of the Office of the Special Rapporteur for the Freedom of Expression, Annex 5: International Mechanisms for Promoting Freedom of Expression, Joint Declaration: Challenges to Freedom of Expression in the New Century, pp. 167-168.

⁹ Juan José Solozabal, *Aspectos Constitucionales de la libertad de expresión y el derecho a la información*. In: *Revista Española de Derecho Constitucional* No. 23, 1988, p. 141.

¹⁰ Annual Report of the Inter-American Commission on Human Rights 2000. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter II: Declaration of Principles on Freedom of Expression, p. 33, para. 53.

¹¹ *Id.*

existent or is weakened because of a limited number of sources of information, the “the main pillar of democratic government” is being attacked.¹²

19. As the Inter-American Court of Human Rights has noted,

... 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.”¹³

20. Yet the freedom of expression also implies that the citizens are able to accede to diverse sources of information, including opinions and ideas, as well as a variety of forms and outlets for artistic and cultural expression. As has been noted, “culture in a broad sense influences society in subtle ways, building the basis on which we form our opinions.”¹⁴ Uniformity in the mass media strengthens conformity and discourages evaluation of other perspectives and opinions.

21. As will be examined below, this is how the problem is understood in the European system for the protection of human rights. In the European regional framework, the domestic and international instruments initially used to report only direct violations have been reinterpreted with singular efficacy in order to combat these new forms of restrictions on the freedom of expression.

3. Concentration of media ownership

a. Introduction

22. It is common to find that diverse competitors in a market engage in a variety of operations—such as mergers and acquisitions—to improve their market position and to reach a larger number of consumers. In many cases, the number of competitors in a market is quite limited. This may occur naturally; in other cases, however, it is the result of operations that seek to concentrate control of the market in a few hands. The second case has been called “concentration,” a concept that applies to the mass media market.

23. There is an intense struggle among the media to keep the attention of their audience (readers, television viewers, or radio listeners). Competition among the various media is often responsible for the way in which information is presented to the public, at times giving priority to form (for example advertising or sensationalism) over content. Despite the large amount of information processed in the press rooms of the daily newspapers, radio stations, and television networks, at times members of the public have the impression that they are reading, hearing, or seeing the same headlines everywhere. In some cases this is due to the

¹² Inter-American Commission on Human Rights 2003. *Justicia e Inclusión Social: Los Desafíos de la Democracia en Guatemala*. Chapter VII: *La Situación de la Libertad de Expresión*, p. 195, para. 419.

¹³ I/A Court H.R., *Compulsory Membership of Journalists...*, *op. cit.*, par. 56.

¹⁴ Council of Europe. Media diversity in Europe. Report prepared by the AP-MD (Advisory Panel to the Council of Europe Steering Committee on the Mass Media (CDMM) on media concentration, pluralism and diversity questions). Strasbourg, December 2002, para. 12. Available at [http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/2_Thematic_documentation/Media_pluralism/H_APMD\(2003\)001%20E%20Media%20Diversity.asp#TopOfPage](http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/2_Thematic_documentation/Media_pluralism/H_APMD(2003)001%20E%20Media%20Diversity.asp#TopOfPage)

fact that these media only repeat the information that has been previously provided by local or foreign news agencies. In others, the media simply focus their attention on a limited number of events, to the exclusion of all others.

24. The concentration of media is not new in contemporary societies. As has been noted in a recent study in Europe: "Media concentration is not a new phenomenon characteristic of modern societies. What is actually new is an almost 'incestuous relationship between politics and the media.' Politicians use (and abuse) media for their own political promotion. Today it is virtually impossible to seize power without the help from the media. Media owners, on the other hand, use media in their possession to promote and advocate their own political standpoints, and exploit politicians to realize their private (corporate) interests. By answering the question of who the biggest media owners are we answer the question of who holds the reins of power."¹⁵

25. In view of these arguments, the Office of the Special Rapporteur expresses its concern over the danger that the concentration of media ownership may pose to the formation of public opinion.

b. Economic dimensions

26. Concentration is essentially an economic phenomenon. When concentration is not adequately regulated in a given sector, it becomes an oligopoly, and in extreme cases, a monopoly. Concentration has a paradoxical impact on the efficiency of the markets. On the one hand, it reduces the number of market participants; on the other hand, it allows for the existence of larger economic units, which in many cases are financially and structurally better equipped to take on the demands and risks of a globalized economy.

27. Concentration may be vertical. In such cases integration is through a company that controls the whole set of independent economic entities at the different levels of production of a given product. For example, in the mass media it happens when a single company controls all the other companies that (1) produce (newspapers, magazines, books, films, and television production studios), (2) distribute (local distribution networks and cable companies), and (3) distribute (telephone companies, cable and satellite systems) information to consumers.¹⁶

28. Concentration may also occur horizontally, when the different companies on the same level of production merge. For example, when a single company controls all or most of the networks that distribute information to consumers in a given area, keeping competitors from carrying out their activities. Even though there may be competitors, they cannot compete with the larger company, for sooner or later they will begin to experience losses, precisely because of the larger company's dominant market position.

c. Political dimensions

¹⁵ Sandra B. Hrvatin. Citizens before Corporations, p. 33. Round Table on Media Pluralism, Zagreb (Croatia), 28 November 2003. Challenges and Opportunities for Media Diversity and Pluralism: Controlling Concentrations and Ensuring Transparency. Organized by the Institute for International Relations, Zagreb and Media Division, and the Council of Europe. Available at http://www.imo.hr/culture/conf/medconf02/Media_Diversity_and_Pluralism.pdf

¹⁶ The example is drawn from Ben H. Bagdikian. The Media Monopoly (6th edition, 2000), pp. xvi-xvii.

29. Concentration also entails a political dimension. Under certain circumstances, the dominant position of a company in the market may be of great interest for certain groups in society. For example, the state may place different administrative obstacles in the way to keep new competitors from having access to the media market. This is especially important for the competitors already in the market. These mechanisms, commonly called forms of “structural censorship,” pose a grave threat to the freedom of expression.

30. This phenomenon is often repeated in the cases of vertical concentration, where, for example, all the machinery for the production and distribution of daily newspapers is in the hands of a few firms, making it almost impossible for new competitors to access the market. As has been noted, “concentration raises the entry barriers for new companies and is thus stifling competition. The inter-dependency of politics and the media tends to block any form of creative media policy.... Concentration is also a clear and present danger to media pluralism and diversity.”¹⁷

31. In addition, this threat may be posed when the state-owned or public companies decide to withdraw their investments in publicity in newspapers and in radio and television stations.¹⁸ In some small markets, economic independence may be negatively affected by concentration of ownership. To protect the markets in general, and the mass media in particular, certain regulatory mechanisms have been introduced, proposing, for example, percentage limits on equity ownership in a given company.

¹⁷ OSCE, Representative on Freedom of the Media. *The Impact of Media Concentration on Professional Journalism* (2003), p. 30.

¹⁸ Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter V: Indirect Violations of Freedom of Expression: Discriminatory Allocation of Official Publicity, loc. cit.

d. Conceptual notes

32. Though there is no final definition, major contributions have been made in Europe that have allowed for the emergence of a certain consensus regarding the definition of the concentration of media ownership. Of all the proposals put forth, the “operative” definition of the Council of Europe has won the widest acceptance. It notes:

In relation to media concentrations, the notion of pluralism is understood to mean the scope for a wide range of social, political and cultural values, opinions, information and interests to find expression through media. Pluralism may be internal in nature, with a wide range of social, political and cultural values, opinions, information and interests finding expression within one media organisation, or external in nature, through a number of such organisations, each expressing a particular point of view.¹⁹

33. This definition of concentration of media ownership is considered negative precisely because it is counterposed to the idea of plurality in the dissemination of ideas.²⁰ Concentration is seen, then, as the negation of plurality, which is a hallmark of the freedom of expression. In this framework, it has been noted that “without plurality of voices and opinions in the media, the media cannot fulfill their contributory role in democracy.... Pluralism is thus a basic general rule of European media policy.”²¹

34. According to a recent study by the OSCE,²² the foregoing definition provides us with two key concepts. First, that the concentration of media ownership cannot be determined by traditional economic factors, such as ownership alone. Second, if pluralism and diversity of media should be protected, a certain level of concentration can be allowed to the extent that it enables the companies engaged in media operations to offer better services in the marketplace.

35. Even so, in the European context, though one may expect some positive consequences from concentration, these will be possible only if the information offered to the public is independent. In this regard: “Although concentration in the mass media sector has some advantages (the preservation of media enterprises threatened with closure, the establishment of groups capable of confronting international competition, etc.), the phenomenon of media concentrations, in particular as regards its multimedia form, may reach a threshold beyond which pluralism of information sources (freedom of information and expression) may be threatened.”²³

36. In the inter-American system, major efforts have been made inspired by this perspective. The Office of the Special Rapporteur for Freedom of Expression has stated that “a plurality of media and the prohibition of any monopoly in this area, whatever form it should take, is indispensable for the exercise of freedom of expression ... with a view to providing a full

¹⁹ Council of Europe. Pluralism and Media Concentrations in the Internal Market. The Green Paper (1992).

²⁰ OSCE. The Impact of Media Concentration ..., *op. cit.*, p. 30.

²¹ Council of Europe, Media Diversity..., *op. cit.*, Executive Summary and para. 10.

²² OSCE. The Impact of Media Concentration ..., *op. cit.*, pp. 30-32.

²³ Council of Europe. Committee of Experts on Media Concentrations and Pluralism. Cited by: OSCE. The Impact of Media Concentration..., *op. cit.*, p. 31.

guarantee for the exercise of freedom of expression and information for all of ... society.”²⁴ Similarly, the Rapporteurship has stated that “assignments of radio and television broadcast frequencies should consider democratic criteria that guarantee equal opportunities of access for all individuals.”²⁵

37. In addition, and on the occasion of a joint declaration signed in 2001 by the U.N. Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of Media of the OSCE, and the Special Rapporteur for Freedom of Expression of the OAS, it was noted: “Effective measures should be adopted to prevent undue concentration of media ownership.”²⁶

38. Similarly, the Declaration of Principles on Freedom of Expression prepared by the Office of the Special Rapporteur for Freedom of Expression of the OAS in the year 2000 notes in the first part of Principle 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.

39. Principle 5 notes in its second part:

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.

40. Certain considerations are required by the very nature of each type of media outlet. In the case of electronic media, the administration of the radio spectrum by the state presupposes a positive posture on the part of the state—the concession of radio frequencies – which could have a direct impact on the greater or lesser concentration of the media. This is not the case of the written media, for example, where the principal posture of the state is negative, i.e. refraining from taking action.

C. Part II. The economic concentration of media ownership in the European and inter-American frameworks

1. The concentration of media ownership and international instruments

²⁴ Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Annex 7: Press Releases, PREN/89/03: Preliminary Observations of the Special Rapporteur for Freedom of Expression, upon Concluding his Official Visit to Mexico, p. 301.

Earlier the Office of the Special Rapporteur had stated that “the existence of monopolistic practices in the mass media, whether in television, radio, or the written press, is not compatible with the free exercise of the right to freedom of expression in a democratic society.” See: Annual Report of the Inter-American Commission on Human Rights 2000. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Annex 2: Press Releases, PREN/24/00: Preliminary Evaluation of Freedom of Expression in Guatemala, p. 139, para. 20.

²⁵ Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Annex 7: Press Releases, PREN/91/03: Upon concluding his visit to Honduras, the Special Rapporteur urges the government to abolish the required association of journalists and the crime of *desacato*, p. 309.

²⁶ Annual Report of the Inter-American Commission on Human Rights 2001. Volume II. Report of the Office of the Special Rapporteur for the Freedom of Expression, Annex 5: Institutional Mechanisms for Promoting Freedom of Expression, *op. cit.*, p. 168.

41. In the first efforts to legislate on human rights related to the media, the freedom of expression was understood as the right to have a written press system free of any government influence. The greatest fear was precisely that governments would subject the print media to prior censorship. When radio and television were incorporated into the field of communication, this right progressively came to encompass these sectors. All these fears, however, referred to direct violations of the freedom of expression.²⁷

42. The main international human rights instruments that refer to the freedom of expression, both universal and regional, and which address the concentration of media ownership tend to treat it as primarily related to indirect violations of the freedom of expression.

43. As we will see below, with the exception of the American Convention, none of the general instruments—universal or inter-American—explicitly embraces this perspective. In one way or another, however, it is possible to find some nuanced references referring to plurality in the other instruments. In the regional sphere, some of them have taken up this aspect, especially in the European system.

44. There is no mention of the concentration of media ownership in the American Declaration of the Rights and Duties of Man (1948)²⁸ or in the Universal Declaration of Human Rights (1948).²⁹

45. A more detailed formulation can be found in the International Covenant on Civil and Political Rights (1966), which states at Article 19(2):

²⁷ Francisco Fernández Segado, *El Sistema Constitucional Español* (1991) p. 318. The freedom of expression has been recognized by various international human rights instruments, which “to the letter” adopt a “unifying” position in relation to the content of the freedom of expression, without distinguishing it from the freedom of information. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms, and the American Convention on Human Rights all provide for the right to freedom of expression formulated basically in these terms. The regional instruments in the European and inter-American systems were also designed fundamentally to address direct violations of this right. The most recent constitutional theory, however, tends to distinguish the two rights, assuming a “dual” position that affirms that they are generic manifestations of a right to free communication.

These documents thus embrace a unitary conception of the freedom of expression, which broadly speaking would include both the free communication of ideas and opinions, and the freedom of information, whose purpose is the transmittal of facts or data.

The Inter-American Court of Human Rights, in its Advisory Opinion OC-5/85, has recognized that the freedom of expression has a dual nature, having both an individual dimension and a social dimension: Para. 31: “In its individual dimension, freedom of expression goes further than the theoretical recognition of the right to speak or to write. It also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible. When the Convention proclaims that freedom of thought and expression includes the right to impart information and ideas through ‘any... medium,’ it emphasizes the fact that the expression and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely....” Para. 32: “In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.”

²⁸ Which notes at its Article IV: “Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”

²⁹ Which indicates at its Article 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart **information and ideas of all kinds**, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.³⁰

46. Of the regional instruments, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is an important point of reference. Article 10 of the European Convention provides:

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

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

47. Finally, the American Convention on Human Rights (1969) notes at Article 13(1) that:

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.³¹

48. It should be noted that the American Convention on Human Rights has a distinct feature at Article 13(3), the only provision of the general human rights instruments that expressly condemns violations of the freedom of expression by indirect means. It reads:

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.

49. As we will see in the section on the caselaw of the inter-American system, the Inter-American Court has been able to develop some of the problems provoked by concentration in terms of hampering the free circulation of ideas.

50. None of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms refers expressly to a right to plurality and diversity in the mass media. Nonetheless, it is widely accepted in the caselaw of the European Court of Human Rights that without free and independent media, the fundamental rights of citizens to expression, opinion, and information may be dangerously limited.

51. We must note, moreover, that membership in the European Union is conditioned on compliance with certain democratic standards, including those referring to the freedom of

³⁰ Emphasis added.

³¹ Emphasis added.

expression. Article F.2 of the Treaty of the European Union incorporates the provisions of the European Convention on Human Rights as general principles of European Community law.

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

52. The legal gap in the Council of Europe context has been partially covered with the adoption, in the framework of the European Union, of the Charter on Fundamental Rights, a document which, and which notes that freedom of and plurality in the mass media should be respected. Including plurality as part of the freedom of expression in the framework of the European Union, and in the general standards on free competition, introduces an important methodological standards for domestic and regional legislation. The Charter of Fundamental Rights of the European Union (2000) states at Article 11 that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

53. In 1997, the Office of the Representative on Freedom of Media was established in the context of the OSCE, in recognition of the fundamental role of the freedom of expression for European democracies. Its mandate recognizes:

The participating States reaffirm the principles and commitments they have adhered to in the field of free media. They recall in particular that freedom of expression is a fundamental and internationally recognized human right and basic component of a democratic society and that free, independent and pluralistic media are essential to a free and open society and accountable systems of government.³²

54. Similarly, in 1998 the Inter-American Commission on Human Rights created the Office of the Special Rapporteur for Freedom of Expression. In establishing the Rapporteurship, the Commission sought to stimulate awareness of the importance of full observance of freedom of expression and information in the Hemisphere, given the fundamental role it plays in the consolidation and advancement of the democratic system and in ensuring that other human rights are protected and violations reported.”

55. Under its auspices, the Declaration of Principles on Freedom of Expression were drawn up; Principle 12 refers explicitly to economic concentration of media ownership.

2. The European experience

a. The caselaw of the European system

³² OSCE, Mandate of the OSCE Representative on Freedom of the Media. Decision N° 193 of the Permanent Council of November 5, 1997.

56. In Europe, Article 10³³ of the European Convention on Human Rights sets forth the basic framework for pluralism in the mass media. The cases that will be examined below are merely some of those available from the extensive caselaw of the European Court of Human Rights.

57. As we have already indicated, the text of Article 10 of the European Convention on Human Rights contains no explicit reference to diversity or plurality in the media as elements of the freedom of expression. This approach has been arrived at through interpretations of Article 10 by the European Court of Human Rights.

58. On some occasions the Court has made reference to the freedoms of “broadcasting” and of the “press” in this context. In both cases, the references were based on the second sentence of the first paragraph of Article 10. Initially, the European Court interpreted Article 10(1) to establish that the freedom of “broadcasting” derived from the freedom of expression as well as freedom of enterprise, i.e. from the freedom to privately pursue broadcasting activities.³⁴

59. Subsequent judgments of the Court show a trend to express the freedoms linked to the media as part of an individual right to freedom of expression established at Article 10(1) of the European Convention on Human Rights and Fundamental Freedoms.

60. A more functional approach to these freedoms, i.e. taking them as means of promoting the freedom of information and democracy strictly speaking, has also been recently applied, but in connection with the second paragraph of Article 10. In effect, under Article 10(2), the Court has been pointing out the importance of plurality in the freedom of expression as a decisive element for consolidating democracy.

³³ Article 10:

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

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

³⁴ This perspective is at odds with the “functional” approach to the media under the constitutional courts in Germany and Italy. In general, at this level the right to broadcast is perceived as “a liberty that serves other purposes,” i.e. as a right “functional” in nature. This is based on the idea that the freedom to broadcast, like other freedoms in the realm of the mass media, is aimed at ensuring the right to information, and, therefore, should allow public access and the free flow of information, in the interest of democracy. No connection whatsoever is established with some of the rights to free enterprise. For these constitutional courts, freedom in the communications media implies that society should have access to a free system of communication that provides balanced, objective, and varied information, as demanded by democracy. The founding principle is that such a free system guarantees diversity in the media. The state is obligated to take regulatory measures that ensure in the broadest terms a framework for private communications media, if, as a practical matter, this has not been attained in fact.

61. The following cases have been selected to illustrate the European Court's interpretation of the right to freedom of expression in the framework of the plurality to which we have been referring in this report.³⁵

62. A first especially representative case in the European context is *Lentia Informationsverein et al. v. Austria* (Judgment of November 24, 1993). In this case, the Court addressed a series of petitions brought by natural and juridical persons against Austria in relation to alleged violations of Article 10 of the European Convention on Human Rights. The petitioners' application to establish radio and television stations in Austria had been rejected, for under the domestic laws and regulations, that right was restricted to the Austrian Broadcasting Corporation. The complainants alleged that it constituted a monopoly incompatible with Article 10 of the European Convention.

63. The Court initially considered that having rejected applications to establish radio and television stations constituted "interference" with petitioners' right to impart information and ideas. Yet this was not sufficient to determine a violation of Article 10 of the European Convention. The underlying issue was whether the interference with the exercise of this right was justified, in precise terms, within the framework of the freedom of expression.

64. The petitioners alleged that the monopoly established on behalf of the Austrian Broadcasting Corporation was detrimental to pluralism and artistic diversity. They argued that "true progress towards attaining diversity of opinion and objectivity was to be achieved only by providing a variety of stations and programs."³⁶

65. The Court held that the monopoly in place in Austria was incompatible with Article 10 of the Convention:

The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive.... Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor.

Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need.

³⁵ The complete text of these cases can be examined at the website of the European Court of Human Rights, available at <http://www.echr.coe.int/>

Some of the cases mentioned in this report are summarized in: Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter III: Jurisprudence, Section A: Summary of the Jurisprudence of the European Court of Human Rights on Freedom of Expression, pp. 103-130, paras. 1-72.

³⁶ Para. 31: "... the rules in force in Austria, and in particular the monopoly of the Austrian Broadcasting Corporation, essentially reflect the authorities' wish to secure political control of the audio visual industry, to the detriment of pluralism and artistic freedom." Para. 37: "...to protect public opinion from manipulation it was by no means necessary to have a public monopoly.... On the contrary, true progress towards attaining diversity of opinion and objectivity was to be achieved only by providing a variety of stations and programs...." Para. 38: "this is a pretext for a policy which, by eliminating all competition, seeks above all to guarantee to the Austrian Broadcasting Corporation advertising revenue, at the expense of the principle of free enterprise."

...

The Court considers that the interferences in issue were disproportionate to the aim pursued and were, accordingly, not necessary in a democratic society.³⁷

66. Since then, and quite consistently, the Court has been highlighting the role that the freedom of expression and especially pluralism play in a democratic society. For example, in the case of *Piermont v. France* (Judgment of April 27, 1995),³⁸ the Court noted:

...freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society."³⁹

67. Similarly, in *Perna v. Italy* (Judgment of May 6, 2003), the Court emphasized:

Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.⁴⁰

68. In the matters of *Castells v. Spain* (Judgment of April 23, 1992),⁴¹ *Thorgeir Thorgeirson v. Iceland* (Judgment of June 25, 1992), *Bladet Tromsø and Stensaas v. Norway* (Judgment of May 20, 1999),⁴² *Fressoz and Roire v. France* (Judgment of January 21, 1999),

³⁷ Para. 38: "The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive.... Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor."

Para. 39.: "Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restriction means that they can only be justified where they correspond to a pressing need."

Para. 43. "The Court considers that the interferences in issue were disproportionate to the aim pursued and were, accordingly, not necessary in a democratic society."

³⁸ The summary of the case can be found at Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter III, Section A: Summary of the Jurisprudence of the European Court of Human Rights on Freedom of Expression: Jurisprudence, pp. 108-109, paras. 18-19.

³⁹ Para. 76.

⁴⁰ Para. 39.

⁴¹ A summary of the case may be found at: Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter III, Section A: Summary of the Jurisprudence of the European Court of Human Rights on Freedom of Expression: Jurisprudence, pp. 120-121, paras. 44-46.

⁴² A summary of the case can be found at: Annual Report of the Inter-American Commission on Human Rights 2003. Volume III. Report of the Office of the Special Rapporteur for the Freedom of Expression, Chapter III, Section A: Summary of the Jurisprudence of the European Court of Human Rights on Freedom of Expression: Jurisprudence, pp. 122-124, paras. 51-53.

Janowski v. Poland (Judgment of January 21, 1999), and *Scharsach and News Verlagsgesellschaft* (Judgment of November 13, 2003), the Court has continued to reaffirm the above-mentioned principles, especially the fundamental public watchdog role of the media in democracies.

69. In these more recent judgments, the European Court of Human Rights has been according priority to the role the mass media play in a social, political, cultural, and democratic context. This has been done mainly through the provision of Article 10(2).

70. As has been noted: "The European Court of Justice considers that, in the light of Article 10.2 of the Convention, there is a compelling public interest in the maintenance of a pluralistic radio and television system ... which justifies restrictions on fundamental freedoms. Article 10 of the Convention accordingly not only enshrines an individual right to media freedom, but also entails a duty to guarantee pluralism of opinion and cultural diversity of the media in the interests of a functioning democracy and of freedom of information for all. Pluralism is thus a basic general rule of European media policy."⁴³

b. The concentration of media ownership in Europe: Institutional framework

71. The concept of pluralism as part of the freedom of expression has been recognized both in the Council of Europe and in the European Union. While most of the decisions of the Council of Europe have been merely policy guidelines based on general principles, the directives of the European Union, once ratified by the national legislatures, become binding on their members.

The European Union

72. The European Union's approach is framed within the obligation to guarantee cultural diversity in Europe. This is why the community directive "Television Without Frontiers (TWF) was introduced in 1989. Through it, the European Commission required that at least half of the programming of broadcasters be of European origin. Nonetheless, this measure was not that well received by the European governments. In effect, even if the national authorities wanted to limit the process of economic concentration, they also pursued other objectives, such as preserving their domestic markets."⁴⁴

73. The dilemma faced by the European Union Member States requires that they strike a balance between an appropriate level of concentration that would enable them to protect their local broadcasting markets and the need to place limits on concentration to preserve pluralism in information.

⁴³ Council of Europe. Media diversity..., *op. cit.*, para. 10: "The European Court of Justice considers that, in the light of Article 10.2 of the Convention, there is a compelling public interest in the maintenance of a pluralistic radio and television system, which justifies restrictions on fundamental freedoms. Article 10 of the Convention accordingly not only enshrines an individual right to media freedom, but also entails a duty to guarantee pluralism of opinion and cultural diversity of the media in the interests of a functioning democracy and of freedom of information for all. Pluralism is thus a basic general rule of European media policy."

⁴⁴ There is considerable pressure from some regulatory agencies to declare that this is an illegal measure in the context of the European Union. The purpose of this is to have telecommunications be considered as a common commercial activity, subject to free trade agreements in the GATT and WTO framework. Hence the interest of the European Union in having a common framework on these issues for all the European states as soon as possible. A more updated version of the TWF directive is currently being studied, to that end.

74. In 1990, the European Parliament published the resolution entitled *Media Takeovers and Mergers* (OJ C 68/137-138. 15), which placed special emphasis on the need to establish restrictions on the communications media not only for economic reasons, but mainly to guarantee plurality of information and freedom of the press.

75. Nonetheless, several jurisdictional conflicts have arisen in this context. For example, the European Commission Green Book entitled "Pluralism and Media Concentration in the Single Market" (1992) defined the mass media as part of the "services industries of the European Union," and accordingly subjected it to regulation by the European Union organs in charge of ensuring against economic concentration in the region, as well as the "Rules of the Single European Market." Under these instruments, the EU's intervention in media ownership is restricted only when it is guaranteed that the measures to be taken foster greater efficiency in the domestic markets. Pluralism is not the focus.

76. In this context, the domestic laws aimed at ensuring plurality in the mass media are considered by the European Commission a hindrance to achieving an efficient and unified telecommunications market for Europe. In the above-mentioned Green Book the Commission affirmed that safeguarding pluralism in the communications media is not an objective of the Community nor does it fall within its jurisdiction."

77. The European Parliament reaffirmed its position in 1994 with the resolution *On the Commission Green Paper "Pluralism and Media Concentration in the Internal Market"* (OJ C 44/179. 14). Nonetheless, there is widespread resistance on the part of the Member States to accept a common framework regarding economic concentration applicable to the media. The European Parliament continued its negotiations, insisting on the dangers posed by concentration to pluralism of information. As a result, the Commission proceeded to debate a new directive entitled *Media Ownership*.

78. Finally, in 2003 the matter was discussed once again as part of the agenda of both institutions. Once again the Commission's approach was to consider regulation of the media as a strictly economic matter, controlled, therefore, by competition law. This has spurred a broad response by the Council of Europe, the European Parliament, and the OSCE, who believe the approach should accord priority to plurality of information as an essential component of the freedom of expression.

The Council of Europe

79. The Council of Europe has been making major efforts to regulate some aspects related to freedom of expression and the European Convention on Human Rights and Fundamental Freedoms. The goal in this framework is to harmonize principles so as to offer a common framework to the European states. Yet none of these instruments refers to economic concentration directly.

80. The Council of Europe began its first debates on economic concentration in 1989. Like Television Without Frontiers, the goal was to be able to reach certain policy agreements that would make it possible to build a platform for reaching common agreements on regulation, looking to the future. To this end, the Council of Europe Steering Committee on the Mass Media (CDMM) was constituted. Initially the project consisted of examining pluralism

within the common framework for the regulation of mass media and media ownership in each member country. Several questionnaires were distributed to the Member States to achieve this objective. Nonetheless, the methodology used was harshly criticized, ultimately leading to the project's demise.

81. Nonetheless, the Council of Europe has published some studies, statistics, and reports that examine the issue of the economic concentration of the mass media. Only once has a regulatory text been adopted, the Recommendation on Transparency, in 1994.

82. The Council of Europe has set in motion an interesting supervisory mechanism through a network of national delegates in each Member State who report on media structures and regulations related to economic concentration. A Committee of Experts of the Council analyzes and develops the material provided by the national delegates. The Committee can suggest measures to the CDMM, and to other members of the Council, including the Council of Ministers, which is responsible for media policies. Nonetheless, this organ is temporary and may be dissolved at any moment.

83. As we have already seen, in the context of the European Union the approach to media issues is somewhat different, further from the human rights dimension that has characterized the Council of Europe's approach. The European Union perceives the problem in the context of economic integration and the establishment of an internal common market.

84. This perspective, however, is not at odds with the purposes of the Council of Europe. For example, since the late 1980s, the European Parliament has been promoting initiatives to halt the rapid growth of economic concentration in the media, but from the perspective of pluralism as an essential element of European identity. The conflict that has arisen with the European Commission, however, has hindered further progress.

3. The inter-American experience

a. The caselaw of the inter-American system

85. The Inter-American Court of Human Rights has had the opportunity to address the issue of the concentration of media ownership tangentially, on a few occasions, through its caselaw. Decisions in contentious cases as well as advisory opinions contain references to pluralism and concentration of media ownership.

86. Of key importance in the inter-American sphere is Advisory Opinion OC-5/85, of November 13, 1985, on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, in which the Inter-American Court of Human Rights stated:

If freedom of expression requires, in principle, that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media, it must be recognized also that such media should, in practice, be true instruments of that freedom and not vehicles for its restriction. 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.

...

Furthermore, given the broad scope of the language of the 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."⁴⁵

87. In the same advisory opinion, the Court held, with respect to "indirect" violations of the freedom of expression, that

Article 13(2) must also be interpreted by reference to the provisions of Article 13(3), which is most explicit in prohibiting restrictions on freedom of expression by "indirect methods and means... tending to impede the communication and circulation of ideas and opinions." Neither the European Convention nor the Covenant contains a comparable clause....

Article 13(3) does not only deal with indirect governmental restrictions, it also expressly prohibits "private controls" producing the same result.... Hence, a violation of the Convention in this area can be the product not only of the fact that the State itself imposes restrictions of an indirect character which tend to impede "the communication and circulation of ideas and opinions," but the State also has an obligation to ensure that the violation does not result from the "private controls" referred to in paragraph 3 of Article 13.

...

that same concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole. Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard.⁴⁶

88. It should be reiterated that Principle 12 of the Declaration of Principles on Freedom of Expression, prepared by the Office of the Special Rapporteur for Freedom of Expression of the OAS, notes that:

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.

89. As regards plurality as part of the freedom of expression, in the *Baruch Ivcher Case*, the Inter-American Court of Human Rights held as follows:

Regarding the second dimension of the right embodied in Article 13 of the Convention, the social element, we should indicate that freedom of expression is a medium for the exchange of ideas and information between persons; it includes the right to try and communicate one's points of view to others, but it implies also everyone's right to know opinions, reports and news.⁴⁷

90. In addition, in the case of *Herrera Ulloa v. Costa Rica*, the Court noted:

⁴⁵ I/A Court H.R., *Compulsory Membership of Journalists...*, *op. cit.*, paras. 34 and 56.

⁴⁶ I/A Court H.R., *Compulsory Membership of Journalists...*, *op. cit.*, paras. 47, 48 and 69.

⁴⁷ I/A Court H.R., *Baruch Ivcher Case*, para. 148. In its application to the Inter-American Court of Human Rights in the case of Baruch Ivcher Bronstein against the Republic of Peru, Case 11.762, p. 21, the Commission noted: "the free circulation of ideas and news is inconceivable without a plurality of news sources and without respect for the media. But guaranteeing the right to establish or operate media will not suffice. Journalists and, in general, all those who have made the media their career have to have adequate protection for the freedom and independence that this profession demands."

So there is agreement among the different regional systems for the protection of human rights and the universal system in terms of the essential role of the freedom of expression in the consolidation and dynamics of a democratic society. Without effective freedom of expression, materialized in all its terms, democracy vanishes, pluralism and tolerance begin to break down, the mechanisms for citizen review and complaints become inoperative, and clearly fertile ground begins to be laid for authoritarian systems to take root in society.⁴⁸

b. The concentration of media ownership in the Americas in the Declaration of Principles on Freedom of Expression

91. Principle 12 of the Declaration of Principles prepared by the Rapporteurship in 2000 notes:

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.**⁴⁹

92. The Rapporteurship specifies that the last sentence should be read and interpreted in light of the object and purpose of Principle 12, which emphasizes the inconsistency between monopolies and oligopolies in the mass media and the freedom of expression and democratic standards that ensure equitable distribution in their ownership.

93. Principle 12 is based on the notion that if there were monopolies and oligopolies in the mass media, only a small number of individuals or social sectors could exercise control over the information that is made available to society. Accordingly, individuals could be deprived of the right to receive information from other sources.

94. The Office of the Special Rapporteur for Freedom of Expression of the OAS considers that this provision does not represent any limitation whatsoever on the duty of the state to guarantee, through its legislation, plurality in media ownership, insofar as monopolies and oligopolies "as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information." Nonetheless, the Office of the Special Rapporteur is of the view that the competition law framework can often prove insufficient, particularly with regard to the awarding of radio frequencies. It does not, therefore, stand in the way of an antitrust regulatory framework that includes provisions to guarantee plurality, mindful of the special nature of the freedom of expression. In light of Principle 12, the states should not adopt special provisions in the guise of antitrust laws for the media whose actual purpose and effect is to limit the freedom of expression.

D. Conclusions

1. The Office of the Special Rapporteur reiterates that monopolistic and oligopolistic practices in mass media ownership have a serious detrimental impact on the freedom of expression and on the right to information of the citizens of the Member States, and are not compatible with the exercise of the right to freedom of expression in a democratic society.

⁴⁸ I/A Court H.R., *Herrera Ulloa Case*, Judgment of July 2, 2004, para. 116.

⁴⁹ Emphasis added.

2. The continuous complaints received by the Office of the Special Rapporteur in relation to monopolistic and oligopolistic practices in mass media ownership in the region indicate that there is grave concern in several sectors of civil society with respect to the impact that concentration of media ownership may represent where it comes to ensuring pluralism as an essential element of the freedom of expression.

3. The Office of the Special Rapporteur for Freedom of Expression recommends to the OAS Member States that they take measures to impede monopolies and oligopolies in media ownership, and adopt effective mechanisms for implementing them. Such measures and mechanisms must be compatible with the framework of Article 13 of the Convention and Principle 12 of the Declaration of Principles of Freedom of Expression.

4. The Office of the Special Rapporteur for Freedom of Expression considers it important to develop a legal framework that establishes clear guidelines for defining criteria for a balancing test that accords weight to both efficiency in the broadcasting market and pluralism in information. The establishment of mechanisms for supervising these guidelines will be fundamental for ensuring pluralism in the information that is made available to society.

5. The Rapporteurship for the Freedom of Expression will continue to review these practices as they evolve.

CHAPTER VI

“*DESACATO*” LAWS AND CRIMINAL DEFAMATION

A. Introduction

1. Since its inception, the Office of the Special Rapporteur has devoted particular attention to restrictions on the full exercise of freedom of expression occasioned by the application of laws on “*desacato*” (contempt) and criminal defamation in the Hemisphere. Every biennium,¹ the Office of the Rapporteur prepares an analysis of progress in implementation of recommendations from previous years, in particular as regards abolitions and legal reforms for the domestic adoption of the standards of the inter-American system in the area of freedom of expression. The Office of the Special Rapporteur intends to continue this follow-up every two years, since that is a prudent time to allow the Member States to move ahead with the necessary legislative procedures to make the recommended abolitions or adjustments of their laws.

2. In the last biennium, few countries have taken purposeful steps to abolish the crime of *desacato*. In some states, legislative reform processes have stalled or restrictive judicial interpretations have been adopted. In other countries, the interpretations of the courts have recognized the incompatibility of “*desacato*” with the due guarantees of freedom of expression; however, those decisions have not been echoed in legislative reforms. Nevertheless, while the successful abolition of *desacato* laws may not have been the norm in the Hemisphere, in those countries where it has come about, the elimination of this crime has entailed a very significant stride toward the creation of a favorable climate for the full exercise of freedom of expression.

3. It is also a source of concern for the Office of the Rapporteur that laws on broadly termed “offenses against honor” are used for the same purposes as *desacato* laws; in other words to silence criticism. This is clear from the widespread use of these mechanisms among public officials in many countries in the Hemisphere. The potential favorable impact of abolishing the crime of *desacato* could be limited, not only by the existence of laws on offenses against honor that are incompatible with the basic guarantees necessary to ensure that free discussion of ideas is not deterred by intimidation, but also by restrictive judicial interpretations.

4. In 2004, the Inter-American Court of Human Rights issued two judgments in which it found that freedom of expression had been violated in two cases that concerned prosecution for criminal defamation. In light of the foregoing, after first reviewing the theoretical arguments in favor of abolition of *desacato* laws and reform of laws on the protection of honor, the Office of the Special Rapporteur sets out the arguments of the Court in both cases. Finally, in keeping with custom, the report summarizes the progress in this area by some countries that has been brought to the attention of the Rapporteur.

¹ See Annual Reports of the Office of the Special Rapporteur for Freedom of Expression of 1998, 2000, and 2002.

B. Theoretical argument

1. Subsequent liability under the American Convention on Human Rights

5. Article 13 of the American Convention on Human Rights enshrines the right of freedom of expression and contains a shorter list of possible restrictions to this right than other international instruments on human rights².

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.

(...).

6. It can be determined from this Article that the imposition of subsequent liability must be based on clear, pre-existing laws, should pursue legitimate ends consistent with this Article, and be necessitated by a compelling governmental interest³.

7. Laws that determine subsequent liability must be precisely drawn so as to enable individuals to predict with reasonable certainty in advance possible liability for their expressions.⁴ Ambiguity or lack of clarity can create a degree of uncertainty that could deter people from divulging opinions or information and actively participating in democratic discussion.

8. The notion of necessity must be interpreted in the framework of a democratic society,⁵ which needs and is nurtured by the broad circulation of ideas and opinions. Therefore, such liability should be imposed only when no other less restrictive means exist by which to

² Inter-Am. Ct. H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, par. 45.

³ Inter-Am. Ct. H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, *supra* note 2, par. 46, and IACHR, *Annual Report 1994*, "Report on the Compability of 'Desacato' Laws with the American Convention on Human Rights", OEA/Ser.L/V/II.88, Doc. 9 rev. (1995).

⁴ Article 19, *Principles on Freedom of Expression and Protection of Reputation*, London, July 2000, in: www.Article19.org, Principle 1.1.

⁵ Cf. Inter-Am. Ct. H.R.. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, *cf. supra* note 2, par. 46; European Court of Human Rights, *The Sunday Times*, 26 April 1979. Series A, No. 30, par. 59; Article 19, *Principles on Freedom of Expression and Protection of Reputation*, *supra* note 4, Principle 1.3.

protect the legitimate reputation interest, and it must be in accordance with the principle of proportionality.

9. Article 13(3) also contains an important limit on imposition of subsequent liability, since it should not become an indirect mechanism tending to impede the communication and circulation of ideas and opinions.⁶ On the contrary, free democratic discussion and plurality require a degree of tolerance for the expression of ideas, information and opinions that might be considered offensive, particularly in respect of public office and those who hold it.

10. Protection of a person's honor is subject to the foregoing considerations, which are echoed in Principle 10 of the Declaration of Principles on Freedom of Expression, prepared by the Office of the Special Rapporteur and adopted in 2000 by the Inter-American Commission on Human Rights.

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. This principle clearly introduces the so-called dual system of protection of honor, according to which, public persons or private persons who have voluntarily exposed themselves to increased scrutiny on the part of society must be more tolerant of criticism, in order also to enable the social control necessary to ensure that the powers of government are exercised in an efficient and appropriate manner. The protection of a person's honor in such cases should be invoked in a civil proceeding because a criminal sanction could impede the control of public office necessary in a democratic society. This principle also adopts the standard of the "actual malice" doctrine, which considers that civil penalties should be imposed on expressions about public officials and only when information is published in the knowledge that it is false, there is express intent to cause injury, or there is gross negligence in ascertaining the truth.⁷ Therefore, in light of this principle and the precepts on which it is based, the imposition of criminal penalties on offenses against public officials in relation to the performance of their duties would be contrary to the principles of necessity and proportionality in the framework of a democratic society.

2. Incompatibility of *desacato* laws with Article 13 of the American Convention on Human Rights

12. The offense of *desacato* is recognized in several criminal codes in the Hemisphere. It consists of the criminal punishment of insults to public officials in the performance of their functions. In some cases it is even considered a publicly actionable offense; in other words, the state accusatory bodies (attorney general, state prosecutors) are responsible for pressing charges. This offense, therefore, means that the entire state law

⁶ Inter-Am. Ct. H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, cf. *supra* note 2, par. 47.

⁷ Cf. IACHR, *Annual Report 2000. Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter II, App. B.

enforcement apparatus is activated to punish anyone who criticizes public officials or their performance, which patently contradicts the principle of democratic control of those who exercise the powers of government.

13. In 1995,⁸ the Inter-American Commission on Human Rights issued a report in which it mentioned that laws that recognize the crime of *desacato* are incompatible with Article 13 of the American Convention on Human Rights, since it found that they are at odds with the principle of necessity and do not pursue legitimate ends. The IACHR concluded that such norms lend themselves to abuse as a means to silence unpopular ideas and opinions, thereby repressing the debate that is critical to the effective functioning of democratic institutions.⁹

14. *Desacato* laws grant a protection to public officials that is not available to the rest of society, and inverts the democratic principle whereby government –and, therefore, public officials-- are subject to public scrutiny, in order to preclude or control abuse of power. Citizens have the right to criticize and scrutinize the attitudes of officials in so far as they relate to public office. Such laws can discourage those who wish to participate in public debate for fear of lawsuits or penalties, particularly when they fail to distinguish between facts and value judgments. Proving the veracity of these statements, inasmuch as the burden of truth is on the speaker, does not lessen this effect, in particular in cases of value judgments, which are not susceptible of proof.¹⁰ In the words of the Commission “(...) the threat of criminal liability for dishonoring the reputation of a public functionary even as an expression of a value judgment or an opinion, can be used as a method to suppress criticism and political adversaries.” According to the Commission, a properly functioning democracy is the greatest guarantee of public order and, therefore, invoking the concept of “public order” to defend *desacato* laws is in opposition to the logic underlying the protection of freedom of expression and thought guaranteed in the American Convention¹¹.

15. Since its creation, the Office of the Special Rapporteur has examined the problem of *desacato* laws because of the danger that they could become a mechanism to stifle pluralistic and democratic debate on affairs of government. Principle 11 of the Declaration of Principles on Freedom of Expression addresses this problem:

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.

16. The concerns of the Commission and the Office of the Special Rapporteur are shared by other intergovernmental agencies and civil society organizations from all over the world, which have issued a declaration in this regard and advocated the repeal of these laws.¹² In spite of the foregoing, these laws persist in several states in the Americas.

⁸ In the framework of a friendly settlement of September 20, 1994, on a petition lodged by journalist Horacio Verbitsky against the Argentine Republic for having convicted him of the crime of *desacato*, the parties requested the Commission to present its opinion on the compatibility or incompatibility of the crime of *desacato* with the American Convention on Human Rights.

⁹ *Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights*, *supra* note 3.

¹⁰ IACHR, *Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights*, *supra* note 3. *Id.*

¹¹ *Id.*

¹² In 1999, the UN Special Rapporteur on Freedom of Opinion and Expression, together with his counterpart from the OSCE, the Representative on Freedom of the Media, and the Office of the Special Rapporteur for Freedom of Expression of the
continued...

3. Criminal defamation offenses (slander, libel, etc.)

17. In its previous reports the Office of the Special Rapporteur has mentioned its concern over the use of laws on criminal defamation, including slander and libel, for the same purpose as *desacato* laws. Generally speaking, these criminal classifications refer to the false imputation of criminal offences or of expressions that damage the honor of a person. In the Hemisphere, practice has shown that many public officials resort to the use of such norms as a mechanism to deter criticism. As the Office of the Special Rapporteur has said in previous reports, “the possibility of abuse of such laws by public officials to silence critical opinions is as great with this type of law as with *desacato* laws.”¹³

18. The protection of honor, in abstract, may be considered a legitimate interest. However, when a state’s law enforcement apparatus seeks the criminal punishment of statements on regarding matters of public interest, the legitimacy of the criminal penalty is weakened, either because there is no pressing social interest to justify it, or because it becomes a disproportionate response, or it constitutes an indirect restriction.¹⁴

19. From the point of view of criminal dogma, *desacato* is simply a type of libel or slander in which the victim is a public official. This special condition does not arise in the case of other offenses against honor, although these can be applied in cases where public officials, public figures, or, in general, matters of public interest are concerned.¹⁵ It is clear that consideration of the possible effects of criminal pivotal in the decisions of the organs of the inter-American system, inasmuch as it can discourage the exchange of opinion and free democratic debate. Hence there is a need to decriminalize speech that criticizes state officials, public figures, or, in general, matters of public interest.¹⁶ In this connection the Commission has said:

...continuation

IACHR, issued a joint declaration recommending the review of these laws by the states. In 2001, the UN Special Rapporteur on Freedom of Opinion and Expression issued a declaration on this issue, as did the World Bank in its World Development Report 2002. Other organizations have also made clear their position, such as the Inter-American Press Association in the Declaration of Chapultepec, and Article 19 in its Principles on Freedom of Expression and Protection of Reputation. Furthermore, in 2002, a group of organizations signed a declaration inviting states to abolish laws that restrict criticism or provide greater protection for the honor of public officials. These organizations included the Alliance of Independent Journalists of Indonesia, *Association de Journalistes du Burkina*; Canadian Journalists for Free Expression, Canada; Center for Human Rights and Democratic Studies, Nepal; Center for Media Freedom and Responsibility, Philippines, *Centro Nacional de Comunicación Social*, Mexico; Committee to Protect Journalists, United States; Ethiopian Free Press Journalists Association, Ethiopia; *Fédération professionnelle des journalistes du Québec*, Canada; Free Media Movement, Sri Lanka; Freedom House, United States; Freedom of Expression Institute, South Africa; Independent Journalism Center, Moldova and Nigeria; Index on Censorship, United Kingdom; *Instituto Prensa y Sociedad*, Peru; International Federation of Journalists, Belgium; International Federation of Library Associations and Institutions (IFLA)-Free Access to Information and Freedom of Expression (FAIFE); International Press Institute; *Journalistes en danger*, Democratic Republic of the Congo; Media Institute of Southern Africa, Namibia; Pacific Islands News Association, Fiji Islands; *Asociación para la Defensa del Periodismo Independiente* (PERIODISTAS), Argentina; Press Union de Liberia; Thai Journalists Association, Thailand; *Timor Lorosa’e Journalists Association*, West African Journalists Association, Senegal; and World Press Freedom Committee of the United States.

¹³ IACHR, *Annual Report of the Inter-American Commission on Human Rights 2002. Vol. III. Report of the Office of the Special Rapporteur for Freedom of Expression*. OEA/Ser.L/V/II.117 Doc. 5 rev. 1, March 7, 2003. (Hereinafter, Annual Report 2002) Chapter V, par. 17.

¹⁴ IACHR, *Annual Report 2002*, *supra* note 13, Chapter V, par. 23.

¹⁵ IACHR, *Annual Report 2002*, *supra* note 13, Chapter V, par. 21.

¹⁶ IACHR, *Annual Report 2002*, *supra* note 13, Chapter V, par. 22.

[C]onsidering the consequences of criminal sanctions and the inevitable chilling effect they have on freedom of expression, criminalization of speech can only apply in those exceptional circumstances when there is an obvious and direct threat of lawless violence. (...)

The Commission considers that the State's obligation to protect the rights of others is served by providing statutory protection against intentional infringement on honor and reputation through civil actions and by implementing laws that guarantee the right of reply. In this sense, the State guarantees protection of all individual's privacy without abusing its coercive powers to repress individual freedom to form opinions and express them.¹⁷

20. The intention here is not to deny that persons in public office have honor, but that its possible injury is outweighed by another right—in this case freedom of expression to which society gives precedence.¹⁸ At all events, attacks on the honor and reputation of persons can be protected by means of civil sanctions, provided they are proportional and take actual malice into consideration.

C. Jurisprudence of the Inter-American Court of Human Rights

21. In 2004, the Inter-American Court for the first time heard and ruled on two cases connected with possible violations of freedom of expression arising from the application of criminal defamation laws. The two judgments constitute a guiding light for states in any reform processes instituted in this area.

1. General precedents of the Court prior to 2004

22. In July 1985, the government of Costa Rica requested the Court for an advisory opinion relating to the interpretation of Article 13 of the American Convention as regards the compulsory membership in an association prescribed by law for the practice of journalism. This advisory opinion became the cornerstone of the jurisprudence,¹⁹ decisions, and reports of the inter-American system in matters concerning freedom of expression. This advisory opinion, OC-5/85, developed the contents of freedom of expression and sketched out its two dimensions: individual and social. The former has to do with the right of every individual to express their opinions and circulate them by any means. The latter concerns a collective right to receive information of any kind and to know the opinions of others.²⁰ These contents have been echoed in subsequent decisions of the Court.

23. With respect to subsequent liability, OC-5/85 examines the requisites established by the American Convention, and mentions that its imposition requires the existence of previously established grounds for liability expressly and precisely defined by law, that the ends sought are legitimate in accordance with the Convention, and that they are necessary to ensure

¹⁷ IACHR, *Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights*, cf. *supra* note 8

¹⁸ Cf. IACHR, *Annual Report 2002*, *supra* note 13, Chapter V. par. 26.

¹⁹ Inter-Am. Ct. H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, cf. *supra* note 2.

²⁰ Inter-Am. Ct. H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, cf. *supra* note 2, par. 30-32.

those ends.²¹ The Court also mentioned that the imposition of such liability must be consistent with the principle of necessity in a democratic society, and, therefore, it is not sufficient simply to demonstrate its usefulness or timeliness since it should not limit the exercise of freedom of expression except to the extent strictly necessary.

24. In the judgment in the case *Baruch Ivcher Bronstein v Peru* of 2001,²² the Court, invoking the jurisprudence of the European Court of Human Rights, said that “[freedom of expression] should not only be guaranteed with regard to the dissemination of information and ideas that are received favorably or considered inoffensive or indifferent, but also with regard to those that offend, are unwelcome or shock the State or any sector of the population.”²³ The Court was also of the opinion that freedom of expression leaves a very reduced margin to any restriction of political discussion or discussion of matters of public interest.²⁴

a. **Herrera Ulloa Case v Costa Rica (2004)**

25. In 1995,²⁵ Mauricio Herrera Ulloa, a journalist with *La Nación* newspaper, published a series of articles in which he partially reproduced information that appeared in the Belgian media on alleged wrongdoings by Félix Przedborski Chawa, a Costa Rican honorary diplomat to the International Atomic Energy Organization in Austria. The official sued the journalist for the crime of defamation, libel and publication of offensive material, and brought a civil action holding both Herrera and *La Nación* to joint and several liability. On May 29, 1998, the Criminal Court of the First Judicial Circuit of San José acquitted the journalist for lack of the *mens rea* necessary to constitute the crimes of defamation, libel and publication of offensive material. This first judgment was appealed in cassation and overturned in a decision of May 7, 1999, which ordered a retrial. The proceeding was reopened and on November 12, 1999, the Criminal Court of the First Judicial Circuit of San José issued a judgment in which it disallowed the defense of the truth (*exceptio veritatis*),²⁶ found the journalist Herrera to be guilty on four counts of publication of offensive materials, in the modality of defamation. The reporter and the newspaper were also held jointly and severally liable in the civil action and ordered to provide compensation for the alleged injury to honor caused. The judgment also required the Herrera Ulloa to publish the operative parts of the decision in *La Nación*. The newspaper was ordered to remove the Internet link at *La Nación Digital* web site between the name Przedborski and the disputed articles, and to create a link between the disputed articles and the operative parts of the decision. As a result of this judgment and by Costa Rican law, it was required to include the name of the journalist in the Judicial Register of Criminals. The decision was appealed in cassation and upheld by the Third Chamber of the Supreme Court of Justice in a ruling of January 24, 2001.²⁷

²¹ Inter-Am. Ct. H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, cf. *supra* note 2, par. 39.

²² Inter-Am. Ct. H.R., *Ivcher Bronstein Case*. Judgment of February 6, 2001, Series C, No. 74.

²³ *Id.* par. 152.

²⁴ *Id.* par. 155.

²⁵ The disputed information was published on May 19, 20, and 21, and December 13, 1995.

²⁶ Judgment 1320-99 of the Criminal Court of the First Judicial Circuit of San José, Group Three, of 14:00 hours on November 12, 1999.

²⁷ Decision 2001-00084 of the Third Chamber of the Supreme Court of Justice of 14:35 on January 24, 2001.

26. In March 2001, the journalist Herrera Ulloa and representatives of *La Nación* lodged a petition with the Inter-American Commission on Human Rights.²⁸ On January 28, 2003, the Commission submitted an application to the Inter-American Court against the State of Costa Rica, in which it requested the Court to decide, *inter alia*, if the State had violated Article 13 of the American Convention on Human Rights; to quash the conviction; and order reparation for the victims.²⁹ On July 2, 2004, the Inter-American Court issued a judgment in which it found that the Costa Rican State had violated the right to freedom of expression of Mauricio Herrera Ulloa,³⁰ and ordered, *inter alia*, the nullification in all respects of the judgment of November 12, 1999, that convicted the journalist.³¹

27. In its considerations, based on its jurisprudence in this area, the Inter-American Court, reiterated the essential role of freedom of expression in a democratic society.

Without effective freedom of expression, materialized in every respect, democracy disappears, plurality and tolerance begin to fall apart, the mechanisms for citizen control and reporting start to become a dead letter, and, ultimately, fertile ground is created for authoritarian systems to begin to take root in society.³²

28. The Court also held that those who engage in activities and influence situations of public interest are, of necessity, more exposed to public scrutiny and discussion than private individuals, as that exposure is essential for democracy to function. "Persons who influence issues of public interest have voluntarily exposed themselves to closer public scrutiny and, therefore, are at greater risk of criticism, since their activities move out of the private sphere and into the sphere of public debate."³³ The Court clarifies that this does not mean that the honor of public officials should not be subject to legal protection, but that such protection should be

²⁸ While processing the petition, the Commission requested the Inter-American Court to order provisional measures on behalf of Mauricio Herrera. On September 7, 2001, the Inter-American Court adopted provisional measures in which it was resolved to:

1. Request the State Costa Rica to take without delay all necessary steps to remove the name of Mr. Mauricio Herrera Ulloa from the Judicial Register of Criminals until the organs of the inter-American system of human rights reached a final decision in the case.
2. Request the State of Costa Rica to suspend the order to publish in *La Nación* newspaper the operative part of the conviction issued by the Criminal Court of the First Judicial Circuit of San José on November 12, 1999, and to suspend the order to create a "link" at *La Nación Digital* between the disputed Articles and the operative part of this judgment."

²⁹ Several international organizations that promote and defend freedom of expression, as well as journalists' associations and media organizations submitted *amici curiae* briefs. They include the Committee to Protect Journalists, the Hearst Corporation, the Miami Herald Publishing Company, *El Nuevo Día*, *La Prensa*, the *Reforma Group*, Reuters Ltd., *El Tiempo*, Tribune Company, *Asociación para la Defensa del Periodismo Independiente* (PERIODISTAS), Inter-American Press Association, *Colegio de Periodistas de Costa Rica*, Article 19 Global Campaign for Free Expression, Center for Justice and International Law (Cejil), World Press Freedom Committee, and Open Society Justice Initiative.

³⁰ Judge Sergio García Ramírez issued a concurring reasoned vote in the case in question.

³¹ On August 24, 2004, the Criminal Court of the First Judicial Circuit of San José issued a ruling in compliance with the decision of the Inter-American Court, in which it ordered the cancellation of the registration of Herrera in the Judicial Register of Criminals and the other provisions contained in the judgment of November 12, 1999.

³² Inter-Am. Ct. H.R., *Herrera Ulloa Case v. Costa Rica*. Judgment of June 2, 2004, Series C, No. 107, par. 116.

³³ *Id.*, par. 129.

consistent with the principles of democratic plurality. The distinction in this instance is founded, therefore, not on the nature of the individual, but on public interest in their activities or actions.³⁴

29. The Court further considered that *exceptio veritatis* had been disallowed in the criminal proceeding against Herrera Ulloa because the journalist had failed to show the veracity of the facts attributed by the Belgian media to the Costa Rican former diplomat. The Court determined that such a requirement constituted an excessive limitation on freedom of expression, since it had a “deterrent, intimidating and inhibitory effect” on journalists and, therefore, impeded discussion of matters of public interest.³⁵

b. Ricardo Canese Case v Paraguay (2004)

30. In August 1992, in the framework of the political campaign for the 1993 presidential elections, the candidate Ricardo Nicolás Canese Krivoshein made statements to the Paraguayan media in which he questioned the suitability of his rival, the candidate Juan Carlos Wasmosy, to whom he attributed alleged irregularities in connection with the construction of the Itaipu binational hydroelectric plant and his alleged links to the family of former dictator Alfredo Stroessner. Part of the construction of the plant was entrusted to the company CONEMPA, whose board of directors Wasmosy had chaired. On October 23, 1992, the directors of CONEMPA filed suit against Canese for the crimes of defamation and slander. In a judgment of March 22, 1994, the First Lower Criminal Court convicted Canese, finding him guilty of both offenses, sentenced him to four months in prison, and ordered him to pay a fine and costs. The Court also imposed civil penalties on him. The decision was appealed and on November 4, 1997, the Third Chamber of the Court of Criminal Appeals decided to recategorize the crimes of which Canese was accused and, classifying them as defamation, reduced the prison term to two months and lowered the fine. This decision also prompted multiple appeals from the parties. On May 2, 2001, the Criminal Chamber of the Supreme Court of Justice dismissed a motion for annulment, refused a motion for review, and, in response to a motion for appeal, confirmed the decision and judgment of November 4, 1997. During the trial, Ricardo Canese was denied the possibility of travel outside the country on several occasions.

31. The Inter-American Commission on Human Rights received the petition in the case on July 2, 1998. After the appropriate processing, on June 12, 2002, the Commission submitted an application to the Court against the State of Paraguay,³⁶ in which it requested it to determine if the State had violated, *inter alia*, Article 13 of the American Convention on Human Rights.

32. On August 12, 2002, Ricardo Canese and his attorneys filed a motion for review with the Criminal Chamber of the Supreme Court of Justice of Paraguay. On December 11, 2002, the Criminal Chamber accepted the motion for review, annulled the judgments of March 22, 1994, and November 4, 1997, absolved Mr. Canese, and struck all the proceedings in the case from the record. As part of its reasoning, the court said that the new Criminal Code—in

³⁴ *Id.*, par. 129.

³⁵ *Id.*, par. 132 y par. 133.

³⁶ Several international organizations that promote and defend freedom of expression, as well as journalists' associations and media organizations submitted *amici curiae* briefs. They include, *Asociación por los Derechos Civiles* (ADC), Inter-American Press Association, and *Asociación para la Defensa del Periodismo Independiente* (PERIODISTAS).

force since February 1999-contained grounds for exemption from criminal liability in cases of public interest.

33. On August 31, 2004, the Inter-American Court of Human Rights handed down a judgment in which it found the State of Paraguay guilty, *inter alia*, of violation of the right to freedom of thought and expression to the detriment of Ricardo Canese, and ordered the payment of an indemnity to Mr. Canese, as well as costs.³⁷

34. The judgment of the Court reiterated the concept that a greater margin of tolerance should exist in the case of statements and opinions expressed in the course of public debate and on matters of public interest.³⁸

35. In its considerations regarding Article 13 of the American Convention, the Inter-American Court underscored the importance of freedom of expression in the framework of an electoral campaign, insofar as it constitutes "(...) an essential tool for the formation of public opinion among voters, strengthens the political race among the various candidates and parties taking part in the elections, and becomes a genuine instrument for analysis of the political platforms put forward by the different candidates, which enables greater transparency and oversight of future authorities and their administration."³⁹ The Court mentioned the need to protect freedom of expression in the framework of an election because everyone should be able to investigate and question the capacity and suitability of the candidates, and to disagree and challenge their proposals, in order to form an opinion with prior to casting a vote.⁴⁰

36. According to the judgment in question, Ricardo Canese was referring to a matter of public interest in his statements,⁴¹ and the media, in transmitting them to the voters, helped to ensure that the electorate had more information and "different opinions on which to base decisions."⁴²

37. In this case, the Court determined that not only the conviction imposed on Canese for eight years, but also the restrictions that prevented him from leaving the country, and the criminal trial itself constituted "an unnecessary and excessive punishment for the statements made by the alleged victim in the framework of an electoral campaign (...); as well as limiting open debate on matters of public interest and concern and restricting Mr. Canese in the exercise of freedom of thought and expression for the remainder of the electoral campaign."⁴³ It is clear from the reasoning contained in the judgment that the Court did not consider that any pressing social interest existed that might warrant criminal penalization.

38. Furthermore, the Court found that the criminal punishment, prosecution and restraint from leaving the country amounted to indirect methods of restricting the freedom of

³⁷ Ad-hoc Judge Emilio Camacho Paredes made public his concurring reasoned vote.

³⁸ *Cf. Ricardo Canese Case v. Paraguay*. Judgment of August 31, 2004, series C, No. 111, par. 97.

³⁹ *Id.*, par. 88.

⁴⁰ *Id.*, par. 90.

⁴¹ *Id.*, par. 93.

⁴² *Id.*, par. 94.

⁴³ *Id.*, par. 106.

expression of Mr. Canese, who, after the conviction was handed down, had been dismissed from the media organization where he worked.

D. Progress in reforms and judicial interpretations in light of the standards of the inter-American system for protection of human rights

39. While the successful abolition of *desacato* laws and reform of laws on offenses against honor have not been the norm in the Hemisphere, in those countries where they have been accomplished, the foregoing has entailed a very significant stride toward the creation of a favorable climate for the full exercise of freedom of expression and consolidation of democracy. These changes are encouraging, and in some cases, reveal an emerging pattern of significant change in political culture. Particularly noteworthy are the cases of El Salvador, Panama and Peru. In other states, by contrast, legislative reform processes have stalled or restrictive judicial interpretations have been adopted.

40. On October 28, 2004, the Legislative Assembly of El Salvador adopted a reform of Article 191 of the Criminal Code, in order to exclude criminal classification of unfavorable opinions or ideas on concerns of public interest expressed or circulated by journalists and published in the media in the regular exercise of their activities. The media were also excluded from liability. The new approved Article provides:

Art. 191.- Unfavorable opinions in the form of political, literary, artistic, historical, scientific, religious, or professional criticism, or unfavorable ideas expressed by individuals via any medium in exercise of the right to freedom of expression, are not punishable provided that the way in which they are made is not intentionally libelous or slanderous intent or an attempt to attack the privacy or reputation of a person.

Also not punishable are unfavorable opinions in the form of political, literary, artistic, historical, scientific, religious, or professional criticism, or unfavorable ideas expressed or circulated by journalists through news, reports, journalistic investigations, articles, editorials, caricatures, and, in general, any notes by journalists published in print, broadcast, and electronic media, in the exercise of their duty to inform the public by virtue of the right to information or in the exercise of their position or function.

In none of the situations governed by the foregoing clauses shall any type of liability to criminal prosecution be incurred by any print, broadcast and electronic media for publication of the above-mentioned opinions or ideas, or any that they publish in the legitimate exercise of their right to inform the public.” (Italics added. The last two paragraphs were introduced by the reform in question).

41. In the case of Panama, the Office of the Special Rapporteur has mentioned its specific concern about the existence and use of defamation (libel and slander) and *desacato* laws, which had enabled a number of individuals to be prosecuted, harassed and jailed for expressing their opinions. In 2003, in a report adopted on the situation of freedom of expression in Panama, the Office of the Special Rapporteur recommended that the Panamanian State repeal all *desacato* laws⁴⁴. Of particular concern was that *desacato* was recognized in Article 33 of the Panamanian Constitution, which said:

⁴⁴ IACHR, *Report on the Situation of Freedom of Expression in Panama*. Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.117, Doc. 47, July 3, 2003, par. 160.

The following persons may impose summary penalties in the cases and terms strictly provided by law:

1. Government servants with command and jurisdictional powers, who may fine or have arrested any person who insults or acts offensively toward them in course of the performance of their functions or in any act that results from the performance thereof.

42. In 2004, through the efforts of the Ombudsman of Panama, the Legislative Assembly approved the elimination of that provision. The constitutional reform was published in the Official Gazette of November 15, 2004.⁴⁵ The Office of the Special Rapporteur underscores the importance of this progress on the part of the Panamanian State and urges its authorities to continue these processes, in order to derogate all provisions that recognize *desacato*. It also invites the authorities to set in motion the necessary processes to amend the laws on libel and slander with respect to expressions directed at public officials, public figures, or private persons who voluntarily become involved in affairs of public interest, with a view to moving progressively toward their decriminalization. This reform is needed in the country given the high number of defamation suits filed against journalists, social communicators and media collaborators.⁴⁶ On August 25, 2004, the then-President of Panama, Mireya Moscoso pardoned 87 journalists through Executive Decree 317.⁴⁷ The very existence of these defamation laws, combined with the precedent set by the above-mentioned lawsuits, could be profoundly intimidating and curb the full exercise of freedom of expression, given the possible uses to which such provisions lend themselves.

43. In its 2003 annual report, the Office of the Special Rapporteur mentioned that Peru had been the only country that year to abolish the crime of *desacato*. The process initiated in 2002 also led to a recommendation from the Committee on Human Rights of the Peruvian Congress, which cited the arguments of the IACHR and the recommendations of the Office of the Special Rapporteur on the need to abolish this classification.⁴⁸ The abolition was approved on May 1, 2003. The eliminated Article provided:

Whoever, threatens, injures or otherwise gives offense to the dignity or decorum of a public official as a result or in the course of the exercise of their functions, shall be sentenced to imprisonment for a term not to exceed three years.

If the offended party is the president of the one of the branches of government, the penalty shall not be less than two years nor more than four years.

44. The Rapporteur has also received information on judicial decisions that are consistent in some respects with its recommendations and those of the Commission,⁴⁹

⁴⁵ Report of the Special Delegate for Freedom of Expression and Access to Information attached to the Office of the Ombudsman of the Republic of Panama, December 14, 2004.

⁴⁶ In its 2002 report, the Office of the Special Rapporteur, citing a report prepared by the Special Delegate for Freedom of Expression attached to the Office of the Ombudsman of Panama, mentioned some 90 lawsuits against journalists, communicators or media collaborators.

⁴⁷ *La Prensa*, August 26, 2004, in *Periodistas Frente a la Corrupción* (PFC), "87 periodistas indultados", <http://portal-pfc.org/index.php?seccion=perseguidos/2004/051.html>

⁴⁸ Opinion of the Committee on Human Rights on bills 3573/2002-CR and 4054/2002-CR proposed for the abolition of Article 374 of the Criminal Code, Congress of Peru, November 15, 2002.

⁴⁹ Chapter II of this report mentions several cases in the sections on progress in the situation of freedom of expression in each country.

particularly in the area of offenses against honor. As regards the crime of *desacato*, the Office of the Special Rapporteur notes the decision of March 19, 2004, of the Supreme Court of Justice of Honduras, whose Criminal Chamber ruled in favor of the abolition of *desacato* as recognized in Article 345 of the Criminal Code of Honduras. The Honduran Court considered that the provision afforded unnecessary protection to public officials in the exercise of their functions. The Office of the Special Rapporteur urges the Honduran State to take account of the arguments and recommendation of this domestic tribunal and, in light of the jurisprudence of the inter-American system, to abolish the crime of *desacato*.

45. In contrast, the Constitutional Chamber of the Supreme Court of Justice of Venezuela, in a decision of July 15, 2003, validated the crime of *desacato* in its examination of a motion for nullity on grounds of unconstitutionality filed against several Articles of the Criminal Code that recognize this crime or permit other provisions of criminal law to be used in the same way and for the same purposes. The Commission expressed its disquiet at this decision in its Report on the Situation of Human Rights in Venezuela.⁵⁰

46. The Office of the Special Rapporteur has not received information that any states other than those mentioned in this report have concluded legal reforms in the past biennium to abolish the crime of *desacato* or amend laws on offenses against honor. However, it has received information about the processing of law bills to that end in Peru, Costa Rica and Chile, as well as within some federated countries. The Office of the Special Rapporteur is worried at continuous reports of judicial proceedings in several countries in the Hemisphere instituted against journalists, communicators, or private citizens who express opinions on matters of public interest. The Office of the Special Rapporteur urges the Member States to move forward with legislative reform processes underway and to adopt all the measures necessary to ensure full exercise of freedom of expression, bearing in mind the jurisprudence of the inter-American system.

⁵⁰ See: <http://www.cidh.org/Relatoria/listDocuments.asp?categoryID=10>

CHAPTER VII

HATE SPEECH AND THE AMERICAN CONVENTION ON HUMAN RIGHTS¹

A. Introduction: Purpose and context of the report

1. Hate speech, or speech designed to intimidate, oppress or incite hatred or violence against a person or group based on their race, religion, nationality, gender, sexual orientation, disability or other group characteristic, knows no boundaries of time or place. From Nazi Germany to the Ku Klux Klan in the United States to Bosnia in the 1990s to the 1994 genocide in Rwanda, hate speech has been deployed to harass, persecute and justify the deprivation of human rights, and at its most extreme, to rationalize murder. In the wake of the German Holocaust, and with the rise of the Internet and other modern media helping to facilitate the dissemination of hate speech, many governments and inter-governmental bodies have attempted to limit the harmful effects of this type of expression. These efforts, however, naturally collide with the right to freedom of expression guaranteed by numerous treaties, national constitutions and domestic laws.

2. In the Americas, the American Convention on Human Rights provides for a broad measure of freedom of expression under Article 13 by guaranteeing the right to “seek, receive and impart information and ideas of all kinds” through any medium.² Article 13 protects this freedom by banning prior censorship and indirect restrictions and by allowing for subsequent imposition of liability in only a small, finite set of exceptions, such as those designed to protect national security, public order and the rights and reputations of others. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have further refined this freedom through their jurisprudence of recent decades.

3. This broad mantle of freedom of expression, however, is not absolute. The American Convention—like many international and regional covenants—declares hate speech to be outside the protections of Article 13 and it requires States parties to outlaw this form of expression. Paragraph 5 of Article 13 provides:

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 offenses punishable by law.³

4. The Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights at the Organization of American States has also made declarations on this area of expression. In a joint statement with the United Nations’ Special Rapporteur on Freedom of Opinion and Expression and the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, the Special

¹ This chapter was made possible through the research and first drafting of Susan Schneider, a second year law student at George Washington University. She was an intern at the Office of the Special Rapporteur for Freedom of Expression during 2004. The Office thanks her for her contributions.

² American Convention on Human Rights [hereinafter American Convention], in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L/V/II.4 rev. 9 (Jan. 31, 2003) [hereinafter BASIC DOCUMENTS], Article 13.1, 13.2.

³ *Id.*, Article 13.5.

Rapporteur recognized that expression that incites or promotes “racial hatred, discrimination, violence and intolerance” is harmful, and that crimes against humanity are often accompanied or preceded by these forms of expression. The Joint Statement noted that laws governing hate speech, given their interference with freedom of expression, should be “provided by law, serve a legitimate aim as set out international law and be necessary to achieve that aim.” It further noted that hate speech, in accordance with international and regional law, should, at a minimum conform to the following guidelines:

- no one should be penalised for statements which are true;
- no one should be penalized for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance
- no one should be subject to prior censorship; and
- any imposition of sanctions by courts should be in strict conformity with the principle of proportionality⁴

5. The basic outlines of hate speech under Article 13(5), unlike the similar provisions found in international treaties and domestic law, have yet to be interpreted or developed in depth by the Inter-American Court or Inter-American Commission. Given the lack of Inter-American jurisprudence on this area of freedom of expression, the Special Rapporteur for Freedom of Expression endeavors to explore its possible confines through a study of comparative case law from the United Nations Human Rights Committee and the European Court of Human Rights. As with other comparative case law studies, the Special Rapporteur for Freedom of Expression considers these systems’ extensive jurisprudence on the right to freedom of expression as valuable sources that can illuminate the interpretation of this right in the Inter-American system.

6. The Special Rapporteur for Freedom of Expression also aims to encourage comparative case law studies in compliance with the mandate of the Heads of State and Government conferred at the Third Summit of the Americas held in Quebec, Canada, in April 2001. During the Summit, the Heads of State and Government ratified the mandate of the Special Rapporteur for Freedom of Expression, and further held that the States “will support the work of the Inter-American System of Human Rights in the area of freedom of expression, and through the Special Rapporteur for Freedom of Expression of the IACHR, will proceed to disseminate comparative case law studies, and will further endeavor to ensure that national laws on freedom of expression are consistent with international legal obligations.

B. Hate speech under the framework of United Nations

1. International treaties and conventions

⁴ Joint statement on racism and the media, by the UN Special Rapporteur in Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression, February 27, 2001, available in the <http://www.article19.org/docimages/951.htm>.

7. In the realm of international law, like in the Inter-American system, freedom of expression enjoys broad protection. Article 19 of the Universal Declaration on Human Rights provides that “[e]veryone has the right to freedom of opinion and expression,” which includes the right to hold opinions without interference and the right to seek, impart and receive information regardless of the medium. These rights have been defined in greater detail by international and regional treaties,⁵ such as the Rome Statute of the International Criminal Court⁶ and the International Covenant on Civil and Political Rights (ICCPR).

8. The ICCPR, which opened for signature in 1966 and which has been in force since 1976, closely mirrors the text of Article 13 of the American Convention by guaranteeing the right to freedom of expression via any medium.⁷ At the same time, the ICCPR—like the American Convention—provides room for restrictions on freedom of expression. Article 19 notes that freedom of expression “carries with it special duties and responsibilities” and thus is subject to restrictions, such as those necessary to respect others’ rights or reputation or to protect national security, morals or public order.⁸ Like the American Convention, the ICCPR also provides for restrictions on freedom of expression by prohibiting war propaganda and the advocacy of national, racial or religious hatred. But where the American Convention provides for a ban on advocacy of these hatreds when they incite lawless violence “or any other similar action,” Article 20 of the ICCPR goes beyond violence: it prohibits such hatred when it constitutes incitement to “discrimination, hostility or violence.”⁹ The United Nations Human Rights Committee noted in its General Comments that advocacy of these kinds of hatred falls under Article 20 whether the aims are “internal or external to the State concerned.”¹⁰

9. The International Convention on the Elimination of all Forms of Racial Discrimination (CERD), in its efforts to halt racial hatred, provides further scope for restrictions on freedom of expression.¹¹ Article 4 requires signatories to condemn propaganda and groups that are based on “ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form.”¹² The CERD further requires parties to make, *inter alia*, “dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin” punishable by law.¹³

⁵ Prosecutor v. Nahimana, Barayagwiza and Ngeze, Judgment and Sentence, ICTR-99-52-T, para. 983 (ICTR Trial Chamber, Dec. 3, 2003).

⁶ Article 6 of the Rome Statute of the International Criminal Court provides that any act – including one that causes serious mental harm – “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group” constitutes genocide, and thus falls under the jurisdiction of the ICC. Rome Statute for the International Criminal Court, U.N. Doc. A/Conf. 183/9, July 17, 1998.

⁷ International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR (Supp. No 16), UN doc. A/6316 (1966), 999 U.N.T.S. 171.

⁸ *Ibid.*, Article 19.

⁹ *Ibid.*, Article 20.

¹⁰ General Comments, U.N. GAOR Hum. Rts. Comm., U.N. Doc. CCPR/C/21/Rev.1 (1989)

¹¹ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, GA Res. 2106 A(XX), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

¹² *Ibid.*, Article 4.

¹³ *Ibid.*

10. Restrictions on hate-motivated speech have also been upheld by the United Nations Human Rights Committee in its jurisprudence on Articles 19 and 20 of the ICCPR. In a number of cases, the Committee, which provides non-binding views on the implementation of the ICCPR, has upheld limitations on hate speech when it was deemed necessary to meet the goal of protecting the rights and reputations of others.

11. In *Ross v Canada*, for example, the U.N. Human Rights Committee ruled that the publication of anti-Jewish views could fall within the scope of the ICCPR's ban on advocacy of national, racial and religious hatred that constitutes incitement to discrimination, hostility or violence.¹⁴ The petitioner, Malcolm Ross, was a teacher in Canada for 15 years, during which time he published books and made public statements denigrating the Jewish faith and heritage.¹⁵

12. A parent from Ross' school district filed a complaint against the School Board alleging that it condoned Ross' anti-Semitic views by failing to take action against him, and thus discriminated against Jewish students.¹⁶ After an evaluation by a Board of Inquiry, Ross was removed from the classroom and assigned a non-teaching position.¹⁷ Ross appealed the decision, but the Supreme Court ultimately ruled to uphold the Board of Inquiry's finding of discrimination by the school board.¹⁸ Ross filed a complaint with the U.N. Human Rights Committee, alleging that the denial of his right to express his religious views violated Article 19 of the ICCPR.¹⁹

13. In its considerations of the merits of the case, the Committee noted that there were three issues requiring analysis.²⁰ First, the Committee had to consider whether Ross' freedom of expression was in fact restricted by his removal from his job.²¹ The Committee said that because the loss of a teaching post was a "significant detriment" and the loss in this case was the result of the expression of Ross' views, the act was in fact a restriction under Article 19.²²

14. The second issue was whether the restrictions on Ross' right to freedom of expression met the conditions set out in paragraph 3 of Article 19: that it was provided by law and that it aimed to respect the rights and reputation of others or protect national security, public order or public health or morals.²³ The Committee took its cues from the Supreme Court on the

¹⁴ Views of the Human Rights Committee, U.N. GAOR Hum. Rts Comm., 70th Sess., U.N. Doc. CCPR/C/70/D/736/1997 (2000).

¹⁵ *Ibid.*, para. 2.1, 4.2.

¹⁶ *Ibid.*, para 2.3.

¹⁷ *Ibid.*, para. 4.1-4.3.

¹⁸ *Ibid.*, para. 4.6-4.8.

¹⁹ *Ibid.*, para. 5.1.

²⁰ *Ibid.*, para. 11.1-11.6.

²¹ *Ibid.*, para. 11.1.

²² *Ibid.*

²³ *Ibid.*, para. 11.2.

question of an adequate legal framework for the charges against Ross, noting that the Court found sufficient basis in domestic law to sustain the order to remove Ross from his job.²⁴ With respect to the issue of the restrictions' aims, the Committee concluded that they were designed to protect the rights and reputations of those of the Jewish faith, "including the right to have an education in the public school system free from bias, prejudice and intolerance."²⁵

15. The final question in *Ross v. Canada* was whether the restrictions on Ross' freedom of expression were necessary to protect the right or reputations of those of the Jewish faith.²⁶ The Committee noted that under Article 19 of the ICCPR, the right to freedom of expression carries special duties and responsibilities, and this was especially pertinent in the context of a school system with young students.²⁷ Given that the Supreme Court had found it reasonable to expect a causal link between the authors' anti-Jewish publications and "the poisoned school environment" felt by Jewish students in the district, the Committee ruled that Ross' removal from his job could be considered a necessary restriction.²⁸

16. In *Faurisson v France*, the Committee also ratified restrictions on freedom of expression connected to hate speech. Robert Faurisson, a professor of literature, was prosecuted under France's "Gayssot Act," which amended an 1881 Freedom of Press Law and made it a crime to contest the existence of certain crimes against humanity under which Nazi leaders were convicted by the International Military Tribunal at Nuremberg.²⁹ In a magazine interview, Faurisson expressed his belief that the gas chambers used to exterminate Jews in Nazi concentration camps during World War II were "a myth."³⁰ The Court of Appeal of Paris (Eleventh Chamber) upheld the conviction, prompting Faurisson to file a petition with the Committee contending that the "Gayssot Act" inhibited his right to freedom of expression.³¹

17. The Committee addressed the same three issues as in *Ross v. Canada*: whether it was provided by law, whether it targeted one of the aims laid out in paragraph 3 of Article 19 and whether it was necessary to achieve a legitimate purpose.³² With respect to the first issue, the Committee said the restriction on Faurisson's freedom of expression was clearly provided for by the "Gayssot Act" of July 13, 1990.³³ The Committee also noted that his conviction "did not encroach upon his right to hold and express an opinion in general" but was based instead on the violation of the rights and reputations of others, so it satisfied the requirements of paragraph 3.³⁴

²⁴ *Ibid.*, para. 11.4.

²⁵ *Ibid.*, para. 11.5.

²⁶ *Ibid.*, para 11.6.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Views of the Human Rights Committee, U.N. GAOR Hum. Rts Comm., 58th Sess., U.N. Doc. CCPR/C/58/D/550/1990 (1996), para. 2.1-2.3.

³⁰ *Ibid.*, para. 2.6.

³¹ *Ibid.*, para. 2.7, 3.1.

³² *Ibid.*, para. 9.4.

³³ *Ibid.*, para. 9.5.

³⁴ *Ibid.*, para. 9.6.

18. Regarding the third issue—whether the restriction was necessary – the Committee highlighted France's arguments that the Gayssot Act was designed to fight racism and anti-Semitism and that the denial of the Holocaust was the “principle vehicle for anti-[S]emitism.”³⁵ The Committee said that in light of the absence of arguments undermining France's position, it was satisfied that the restriction on freedom of expression was necessary, and thus there was no violation of Article 19.³⁶

19. Finally, in *J.R.T. and the W.G. Party v. Canada* the Committee considered the case of a Canadian who used tape-recorded messages to warn callers of the dangers of “international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles.”³⁷ J.R.T.'s petition contested the termination of his telephone service under the Canadian Human Rights Act of 1978, which made it a “discriminatory practice” to use the telephone in a way that might expose others to hatred or contempt on the basis of, *inter alia*, race, national or ethnic origin and religion.³⁸ The Committee declared the petition to be inadmissible because the opinions that J.R.T. wanted to disseminate by telephone “clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the [ICCPR] to prohibit.”³⁹

³⁵ *Ibid.*, para. 9.7.

³⁶ *Ibid.*, para. 10.

³⁷ *J.R.T. and the W.G. Party v. Canada*, Communication No. 104/1981, U.N. Doc. Supp. No. 40 (A/38/40-) at 231 (1983), para. 2.1.

³⁸ *Ibid.*, para 2.2.

³⁹ *Ibid.* para. 8.

C. The International Criminal Tribunal for Rwanda (ICTR) and the International Military Tribunal at Nuremberg

20. At its most extreme, hate speech can be used as a weapon to incite, promote or further the extermination of a group of people, as was seen in both Nazi Germany and in the 1994 genocide in Rwanda. Both atrocities prompted the creations of international tribunals to prosecute those responsible, and these prosecutions included direct rulings on the crime of “incitement to genocide.” While this heinous crime is an egregious and infrequent form of the hate speech more commonly targeted by international conventions and domestic law, the decisions of the two tribunals on incitement to genocide can be valuable in guiding decisions about the more standard types of hate speech.

21. The International Military Tribunal at Nuremberg was the result of a 1945 agreement between the United Kingdom, the United States, France and the Soviet Union aimed at prosecuting war criminals for crimes against peace, war crimes and crimes against humanity.⁴⁰ One case heard by the Tribunal was that of Julius Streicher, a strident supporter of the Nazis who called for the annihilation of the Jewish race and incited Germans to persecute Jews through speeches and Articles.⁴¹ Streicher, for example, called someone of Jewish origin a “parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind.”⁴² While Streicher denied having knowledge of mass executions of Jews, the Tribunal ruled that Streicher’s incitements to murder and extermination clearly constituted “persecution on political and racial grounds in connection with war crimes” as defined by the Tribunal’s Charter, and were thus crimes against humanity.⁴³ Streicher was sentenced to death.⁴⁴

22. Fifty years later, the International Criminal Tribunal for Rwanda was established by a U.N. Security Council Resolution of 1994 in the wake of a variety of reports showing that genocide and other “systematic, widespread and flagrant violations” of international humanitarian law were committed in Rwanda.⁴⁵ The Statute for this Tribunal empowered it to prosecute those who committed genocide, which covered killing, infliction of serious bodily or mental harm and other acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”⁴⁶ Within the category of genocide-related crimes, the Statute specifically establishes that “direct and public incitement to commit genocide” as a punishable offense.⁴⁷

23. The ICTR weighed this crime in the 2003 decision of *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*. Nahimana was charged with a series of crimes, including “direct and public incitement to genocide,” for broadcasts

⁴⁰ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

⁴¹ The Avalon Project, Judgment: Streicher. Available at www.yale.edu/lawweb/avalon/imt/proc/judstrei.htm

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Prosecutor v. Nahimana, Barayagwiza and Ngeze, ICTR-99-52-T, para. 981.

⁴⁵ U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994).

⁴⁶ *Ibid.*, art. 2.

⁴⁷ *Ibid.*

made on a Rwandan radio station known as RTLM, which called on listeners to take against action the enemy and which later became known as “Radio Machete.”⁴⁸ Barayagwiza was also charged with various crimes, including incitement to genocide, in connection with activities at the RTLM radio station and of his political party, the *Coalition pour la Defense de la Republique* (CDR), which promoted the killing of Tutsi civilians.⁴⁹ Ngeze was likewise charged with crimes that included incitement to genocide for publications made in the newspaper *Kangura*, whose writings were underpinned by ethnic hatred, fearmongering and calls to violence against the Tutsis.⁵⁰ The Tribunal ultimately found that all three men acted with the “intent to destroy, in whole or in part, the Tutsi ethnic group.”⁵¹ Additionally, because Nahimana was responsible for programming at RTLM, it found him guilty of direct and public incitement to genocide.⁵² Barayagwiza, as one of the main founders of CDR, and Ngeze, who was founder, owner and editor of *Kangura*, were also found guilty of the same.⁵³

24. In its analysis of the publications and broadcasts made by the defendants, the ICTR evaluated the speech and its context, and then drew a line between “discussion of ethnic consciousness” on one hand and “promotion of ethnic hatred” on the other, a distinction that could be applied to future cases.⁵⁴ The decision is also pivotal because it held members of the media responsible for more than just their expression – it made them accountable for the effect of their speech, namely the genocide that resulted.⁵⁵ The Tribunal thus deemed the perpetrators of incitement to genocide as guilty as if they had committed genocide themselves.⁵⁶

D. Hate speech under the European Convention on Human Rights

25. The European Convention for the Protection of Human Rights and Fundamental Freedoms, designed to lay out a framework for the enforcement of rights set out in the Universal Declaration of Human Rights, provides for the right to freedom of expression, as well as its limits. Under Article 10, the European Convention stipulates that freedom of expression includes the right to hold opinions, to receive and impart information and ideas “without interference by public authority,” although it notes that these freedoms carry “duties and responsibilities.”⁵⁷ The Article then provides a broad list of possible limits to freedom of expression:

[These freedoms] may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of

⁴⁸ Prosecutor v. Nahimana, Barayagwiza and Ngeze, ICTR-99-52-T, para.5, 18, 1031.

⁴⁹ *Ibid.*, para. 6, 9, 1035.

⁵⁰ *Ibid.*, para. 7, 10, 1036.

⁵¹ *Ibid.*, para 969.

⁵² *Ibid.*, para. 1033.

⁵³ *Ibid.*, para. 1035, 1038.

⁵⁴ Catharine A. MacKinnon, International Decision: Prosecutor v. Nahimana, Barayagwiza and Ngeze, 98 A.J.I.L. 325 at 329.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 (ETS No. 5), 213 U.N.T.S. 222. Article 10.

health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁵⁸

26. The European Convention, therefore, is similar to the ICCPR in its provisions for freedom of expression, but it does not address advocacy of national, religious or racial hatred that incites discrimination, hostility or violence. But the European Court of Human Rights' jurisprudence has analyzed extensively the theme of hate speech based on the intersection of Article 10 of the European Convention and domestic laws banning these forms of incitement.⁵⁹ In these decisions, the Court has utilized the standards of Article 10(2) to determine when restrictions on freedom of expression are justified: an interference with freedom of expression violates Article 10 unless it is "prescribed by law," is designed to carry out at least one of the aims laid out in Article 10(2) and is "necessary in a democratic society." The Court has repeatedly defined "necessary" as a "pressing social need" and has evaluated interferences based on whether they are "proportionate to the legitimate aims pursued."

27. In *Jersild v. Denmark*, the European Court found that laws targeting hate speech had been applied too broadly in the case of a journalistic program on racist youths.⁶⁰ Jens Olaf Jersild was a journalist with a Danish television and radio network who interviewed three members of the youth group "Greenjackets" for a television news program.⁶¹ During the interview the three youths made derogatory statements about immigrants and ethnic groups in Denmark, calling some of the groups "animals."⁶² Jersild was charged with aiding and abetting the youths in their violation of a Danish law prohibiting threats, insults or degradation against a group of people based on their race, color, national or ethnic origin or belief.⁶³ In his complaint to the European system, Jersild claimed that his conviction for this crime violated Article 10 of the European Convention.⁶⁴ The Court noted that Danish law did provide for the crime for which Jersild was charged, and that the interference had the legitimate aim of protecting the reputation or rights of others as laid out in Article 10(2).⁶⁵ With respect to the final element of Article 10(2) – whether the measures were necessary in a democratic society – the Court emphasized two points as background. First, it noted that it was "particularly conscious" of the importance of fighting racial discrimination.⁶⁶ It also emphasized that Denmark's obligations under Article 10 had to be interpreted "so as to be reconcilable" with its obligations under the CERD.⁶⁷ At the same time, however, the Court noted that a critical consideration was whether the expression, when viewed as a whole, "appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas." It concluded that the program did not appear to have such an intent, as shown by the program's introduction, and was designed instead to expose a

⁵⁸ *Ibid.*

⁵⁹ See Prosecutor v. Hanimana, Barayagwiza and Ngeze, ICTR-99-52-T, para. 991.

⁶⁰ Eur. Ct. H.R., *Jersild v. Denmark*, Judgment of 22 August 1994, Application No. 15890/89.

⁶¹ *Ibid.*, para 10.

⁶² *Ibid.*, para. 12.

⁶³ *Ibid.*, para. 12.

⁶⁴ *Ibid.*, para. 25.

⁶⁵ *Ibid.*, para. 27.

⁶⁶ *Ibid.*, para. 30.

⁶⁷ *Ibid.*, para. 30.

particular group of youths and their lives.⁶⁸ As a result of this, the Court ruled that the government's justifications for Jersild's conviction did not establish that the interference with freedom of expression was "necessary in a democratic society."⁶⁹

28. In *Incal v. Turkey*, the European Court upheld a citizen's right to criticize the government when it fell short of inciting violence, hostility or hatred. Ibrahim Incal was a Turkish lawyer and a one-time member of the executive committee of the People's Labour Party (the HEP).⁷⁰ In 1992 the executive committee drafted a leaflet to distribute in the city of Izmir criticizing the actions of local authorities, whom the HEP accused of attempting to drive the Kurds out of the cities.⁷¹ It called on "Kurdish and Turkish democratic patriots to assume their responsibilities" and oppose this so-called war against the proletariat.⁷² The HEP executive committee asked the authorities for permission to distribute the leaflet, but the National Security Court enjoined the distribution and later convicted Incal and eight other HEP committee members for attempting to incite hatred and hostility through racist words.⁷³ Incal later filed a petition within the European system alleging, *inter alia*, that his criminal conviction violated his right to freedom of expression as guaranteed by Article 10 of the European Convention.⁷⁴ The Court again weighed whether this interference with freedom of expression met the provisions of Article 10(2): that it is "prescribed by law," that it is designed to carry out at least one of the aims laid out in Article 10(2) and that it is "necessary in a democratic society."⁷⁵ The participants all agreed that the interference was prescribed by the Criminal Code and the Press Act, so it was therefore prescribed by law.⁷⁶ Although the parties did not present arguments on the aim of the law, so the Court assumed the goal was to prevent disorder, a legitimate aim under Article 10. The Court found, however, that the final requirement—that the law was necessary in a democratic society—was not satisfied. The Court noted that Article 10.

is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.⁷⁷

29. In light of these principles and the context of the leaflet, the Court found that the appeals to Kurds and others could be seen as urging the population to "band together to raise certain political demands." But while the meaning of "neighborhood committees" was unclear, the Court found that the appeals could not be viewed as "incitement to the use of violence, hostility or hatred between citizens."⁷⁸ The Court also noted that the limits of criticism directed at

⁶⁸ *Ibid.*, para. 33.

⁶⁹ *Ibid.*, para. 37.

⁷⁰ Eur. Ct. H.R., Case of *Incal v. Turkey*, Judgment of June 9, 1998, Application No. 22678/93.

⁷¹ *Ibid.*, para. 10.

⁷² *Ibid.*, para. 10.

⁷³ *Ibid.*, para. 11, 12.

⁷⁴ *Ibid.*, para. 38.

⁷⁵ *Ibid.*, para. 40.

⁷⁶ *Ibid.*, para. 41.

⁷⁷ *Ibid.*, para. 46.

⁷⁸ *Ibid.*, para. 50.

the government are wider than those targeting private citizens. It concluded that Incal's conviction was disproportionate to the government's purported aim, and thus unnecessary in a democratic society.⁷⁹

30. The European Court made a similar finding in *Sürek and Özdemir v. Turkey*, a case involving a Turkish publication that had published an informative interview with a leader of an illegal political group, the Kurdistan Workers' Party (PKK).⁸⁰ Kamil Tekin Sürek was a major shareholder and Yücel Özdemir the editor-in-chief of *Haberde Yorumda Gerçek*, a weekly review.⁸¹ In the wake of the interview, in which the PKK leader vowed to continue waging war against the Turkish state as long as the state resisted the will of the Kurds, Turkish authorities charged Sürek and Özdemir with dissemination of separatist propaganda and terrorist views, a violation of the Prevention of Terrorism Act of 1991.⁸² The European Court, in its review of the applicants' claim that their freedom of expression was violated, applied the Article 10(2) criteria to find that the violations were prescribed by law and they had the legitimate aim of maintaining national security and public order.⁸³ With respect to the third requirement—that the measures be “necessary in a democratic society”—the Court noted that this requires there to be a “pressing social need,” and this element was missing in the case at hand.⁸⁴ The Court first reiterated that Article 10(2) provides little room for restrictions on political speech or debate on questions of public interest.⁸⁵ It then noted that the interview in question could not be seen to incite violence or hatred, and instead they had a “newsworthy content which allowed the public both to have an insight into the psychology of those who are the driving force behind the opposition to official policy in south-east Turkey,” and could not be seen to incite violence or hatred.⁸⁶ The Court ruled, therefore, concluded that the Turkish authorities' reasons for the applicants' conviction was not sufficient to justify the interference with freedom of expression.⁸⁷

31. In *Arslan v. Turkey*, the Court again found that criticism of the government falling short of incitement to violence and hatred could not be justifiably restricted. Günay Arslan, a Turkish citizen, wrote a book entitled *History in Mourning: 33 Bullets*, which discussed Turkey's oppression of the Kurds.⁸⁸ Arslan was convicted of disseminating separatist propaganda by intending to incite those of Kurdish descent to rebel against the state.⁸⁹ In the Court's review of the case, it found that Arslan's conviction under The Prevention of Terrorism Act met the Article 10(2) requirement that the interference with freedom of expression be prescribed by law.⁹⁰ The Court also found that because of the “sensitivity of the security situation” in southeast Turkey,

⁷⁹ *Ibid.*, para. 59.

⁸⁰ Eur. Ct. H.R., Case of Sürek and Özdemir v. Turkey, Judgment of July 8, 1999, Application No. 23927/94, 24277/94.

⁸¹ *Ibid.*, para. 8.

⁸² *Ibid.*, para. 10, 12, 23.

⁸³ *Ibid.*, para. 47, 51.

⁸⁴ *Ibid.*, para. 60.

⁸⁵ *Ibid.*, para. 60.

⁸⁶ *Ibid.*, para. 61.

⁸⁷ *Ibid.*, para. 61.

⁸⁸ Eur. Ct. H.R., Case of Arslan v. Turkey, Judgment of July 8, 1999, Application No. 23462/94, para. 10.

⁸⁹ *Ibid.*, para. 19.

⁹⁰ *Ibid.*, para. 37.

the government had the legitimate aims of protecting national security and territorial integrity and preventing disorder in its restrictions of freedom of expression.⁹¹ Regarding the requirement that the restriction be necessary in a democratic society, the Court noted that book was a literary historical narrative, and while it was not a neutral depiction of facts, the book's intended criticism of the Turkish authorities fell within the realm of political speech and questions of public interest, areas where there is little room for restriction under Article 10.⁹² Ultimately the Court found that the book contained a "hostile tone" and "acerbic passages," but it did not incite to violence or armed resistance.⁹³ That, along with the severe prison term of one year and eight months, led the Court to conclude that the conviction was "disproportionate to the aims pursued and accordingly not 'necessary in a democratic society.'"⁹⁴

32. The European Court has also ruled to uphold restrictions on freedom of expression based on national security concerns. In *Zana v. Turkey*, for example, the Court found that a former government official's freedom of expression could be limited when likely to aggravate a tense security situation. Mehdi Zana, a former mayor of the Turkish town of Diyarbakir, told journalists from prison that he supported the "national liberation movement" of the Kurdistan Workers' Party (PKK) but did not support massacres.⁹⁵ He then added that "[a]nyone can make mistakes, and the PKK kill women and children by mistake."⁹⁶ Turkey's National Security Court sentenced Zana to prison for violating the Criminal Code's ban on public incitement of hatred and hostility and its prohibition against belonging to armed groups or organizations.⁹⁷ The Court, applying the standards of Article 10(2) in its review of the case, found that the limitation on Zana's freedom of expression was prescribed by law⁹⁸ and that the restrictions were legitimate since they could be justified on national security and public safety grounds in light of the "serious disturbances" taking place in southeast Turkey.⁹⁹ The Court then looked to the content of Zana's statements to determine if it was necessary in a democratic society.¹⁰⁰ It noted that Zana's statements were contradictory and vague, but that they also "coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey."¹⁰¹ Because Zana was the former mayor of Diyarbakir, his support of the PKK could be viewed "as likely to exacerbate an already explosive situation" in the region, leading the Court to conclude that Zana's conviction was the result of a "pressing social need" and proportionate to a legitimate aim.¹⁰²

⁹¹ *Ibid.*, para. 40.

⁹² *Ibid.*, para. 45, 46.

⁹³ *Ibid.*, para. 48.

⁹⁴ *Ibid.*, para. 50.

⁹⁵ Eur. Ct. H.R., Case of *Zana v. Turkey*, Judgment of Nov. 25, 1997, Application No. 18954/91, para. 12.

⁹⁶ *Ibid.*, para 12.

⁹⁷ *Ibid.*, para. 27, 31.

⁹⁸ *Ibid.*, para. 37.

⁹⁹ *Ibid.*, para 41.

¹⁰⁰ *Ibid.*, para. 56.

¹⁰¹ *Ibid.*, para. 59.

¹⁰² *Ibid.*, para. 61, 62.

33. In *Sürek v Turkey (No. 1)*, meanwhile, the Court again found that limitations on hate speech and the “glorification of violence” did not run afoul of Article 10. The applicant was the major shareholder in a company that owned a Turkish weekly review, which published letters to the editor decrying the Turkish authorities’ actions in the troubled southeast of Turkey and calling the authorities a “murder gang.”¹⁰³ Sürek was convicted of disseminating separatist propaganda¹⁰⁴ and filed a complaint with the European Court. The Court found that the restriction on freedom of expression was “prescribed by law” under the Prevention of Terrorism Act 1991¹⁰⁵ and noted that the government’s restrictions of freedom of expression were legitimate given that they could be said to be in pursuit of national security and territorial integrity in a volatile region.¹⁰⁶ With respect to the question of whether the interference was “necessary in a democratic society,” the Court noted that the letters had the clear aim of stigmatizing the other side by using phrases like “the Fascist Turkish army” and “the TC murder gang” along with words like “massacres” and “slaughter.”¹⁰⁷ It also noted that the letters were published against a backdrop of a serious security situation in southeast Turkey, the site of violence disturbances and emergency rule.¹⁰⁸ Given this context, the Court viewed the letters as “capable of inciting to further violence in the region by instilling a deep-seated and irrational hatred against those depicted as responsible for the alleged atrocities.”¹⁰⁹ The Court also highlighted that one of the letters identified people by name, thus exposing them to possible violence. It also noted that while interference is not allowed for information that merely shocks or offends, this case exceeded that standard because it involved hate speech and a “glorification of violence.”¹¹⁰ Finally, the Court remarked that while the applicant did not associate himself with the views of the letter writers, he did provide them with “an outlet for stirring up violence and hatred.”¹¹¹ As a shareholder, the applicant had influence over the publication’s content, and thus was subject to the “duties and responsibilities” laid out in Article 10.¹¹² As a result, the Court found that the penalties could be reasonably viewed as an answer to a pressing social need and thus in proportion to the legitimate aims pursued.¹¹³

E. Application of international and comparative principles to the American Convention

1. Background principles for interpreting the American Convention

34. While the jurisprudence of other legal systems can provide valuable guidance for the interpretation of the American Convention, and it has been frequently cited by the Inter-

¹⁰³ Eur. Ct. H.R., Case of *Sürek v Turkey (No. 1)*, Judgment of July 8, 1999, Application No. 26682/95, para. 11.

¹⁰⁴ *Ibid.*, para. 14, 15.

¹⁰⁵ *Ibid.*, para. 48.

¹⁰⁶ *Ibid.*, para. 52.

¹⁰⁷ *Ibid.*, para. 62.

¹⁰⁸ *Ibid.*, para. 62.

¹⁰⁹ *Ibid.*, para. 62.

¹¹⁰ *Ibid.*, para. 62.

¹¹¹ *Ibid.*, para. 63.

¹¹² *Ibid.*, para. 63.

¹¹³ *Ibid.*, para. 63, 65.

American Commission and the Inter-American Court, it is important to underscore the limits of this approach. The application of legal principles from the United Nations and the European Union to an analysis of the American Convention should not be allowed to chip away at the core freedoms guaranteed by the Convention. This has particular relevance in the case of the ICCPR, which has been ratified by some 30 nations in the Americas. The Inter-American Court has noted the following with respect to the simultaneous application of international treaties:

It is true, of course, that it is frequently useful . . . to compare the American Convention with the provisions of other international instruments in order to stress certain aspects concerning the manner in which a certain right has been formulated, but that approach should never be used to read into the Convention restrictions that are not grounded in its text. This is true even if these restrictions exist in another international treaty.¹¹⁴

35. The Inter-American Court went on to say that if both the American Convention and another international treaty are applicable, “the rule most favorable to the individual must prevail.”¹¹⁵ The Court further noted that because the American Convention stipulates that its provisions should not have a “restrictive effect” on rights laid out in other international instruments, “it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.”¹¹⁶

36. Article 13 as a whole also contains concrete provisions governing restrictions on expression, and such provisions take precedence over the conclusions drawn from the jurisprudence of other legal systems when evaluating paragraph 5’s ban on “advocacy of national, racial or religious hatred that constitute incitement to violence.” The Inter-American Court in the *Case of the Last Temptation of Christ*, for example, noted that paragraph 4 “establishes an exception to prior censorship, since it allows it in the case of public entertainment, but only in order to regulate access for the moral protection of children and adolescents,” so for “all other cases, any preventive measure implies the impairment of freedom of thought and expression.”¹¹⁷ This means that restrictions on freedom of expression can be made only through subsequent imposition of sanctions for those guilty of abusing this freedom, and the subsequent liability must meet four requirements, according to the Inter-American Court:

- a) the existence of previously established grounds for liability;
- b) the express and precise definition of these grounds by law;
- c) the legitimacy of the ends sought to be achieved
- d) a showing that these grounds of liability are “necessary to ensure” the aforementioned ends¹¹⁸

¹¹⁴ I/A Court H.R., Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights), Nov. 13, 1985, Ser. A N° 5 [hereinafter Advisory Opinion OC-5/85], para. 51.

¹¹⁵ *Ibid.*, para. 52.

¹¹⁶ *Ibid.*

¹¹⁷ I/A Court of H.R., *Case of the Last Temptation of Christ* (Olmedo Bustos *et al.* v. Chile), Judgment of February 5, 2001, para. 70.

¹¹⁸ Advisory Opinion OC-5/85, para. 39.

37. It would appear at first glance that the ban on censorship would extend to hate speech in the same way it covers the restrictions on freedom of expression laid out in paragraph 2. But because there is a discrepancy between the English and Spanish language versions of the text of Article 13, the issue requires further analysis.

38. In English, as noted previously, the text of paragraph 5 provides that hate speech “shall be considered as offenses punishable by law,”¹¹⁹ which implies that hate speech can be regulated through the subsequent imposition of liability. In Spanish, however, the same paragraph provides that hate speech “*estará prohibida por la ley*,”¹²⁰ which suggests that hate speech—given that it must be “prohibited”—can be regulated through censorship. The Inter-American Commission, citing a decision from the Inter-American Court, has noted that linguistic differences must be resolved through the various means of interpretation available in international law, including the general and supplementary rules of interpretation that are expressed in Articles 31 and 32 of the Vienna Convention of the Law of Treaties.¹²¹ A full examination of the text of Article 13, therefore, can help to shed light on the exact meaning of paragraph 5. In the Spanish version of the American Convention, paragraph 4 of Article 13 states that public entertainments may be subject to law by prior censorship only for the moral protection of children, “*sin perjuicio de lo establecido en el inciso 2.*”¹²² This reference to paragraph 2 is similar to the English text, which says “notwithstanding the provisions of paragraph 2,”¹²³ and both imply that paragraph 4 was meant to be an exception to paragraph 2. Since paragraph 5 makes no similar exception to paragraph 2 in either Spanish or English, it follows that hate speech is governed by paragraph 2’s imposition of subsequent liability. This view is further supported by the Inter-American Court’s emphatic view that censorship is *only* allowed for the purposes stated in paragraph 4. As noted above, the Court, in its decision in the *Case of the Last Temptation of Christ*, noted that all preventive measures except those provided for in paragraph 4 constitute an impairment of free expression.¹²⁴ The Court made no reference, either explicit or implicit, to hate speech and paragraph 5 as grounds for possible censorship, underscoring that hate speech should be regulated like the other areas of expression provided for in paragraph 2.

39. Two Articles of the American Convention also define the “context” in which Article 13 restrictions must be interpreted.¹²⁵ Article 29 notes that no provision of the Convention shall be interpreted as “precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government” or “excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”¹²⁶ Article 32, meanwhile, notes that “the rights

¹¹⁹ American Convention, Article 13, paragraph 5.

¹²⁰ *Convención Americana sobre Derechos Humanos*, en *DOCUMENTOS BÁSICOS EN MATERIA DE DERECHOS HUMANOS EN EL SISTEMA INTERAMERICANO*, OAS/Ser.L/V/I.4, rev. 10 (31 de enero 2004), art. 13.

¹²¹ See Report N° 92/03, *Eliás Santana et al.* (Venezuela), Annual Report of the IACHR 2003, para. 77, citing I/A Court, “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82, Sept. 24, 1982 (Ser. A) N° 1 (1982), para. 33. The report notes that Article 32 of the Vienna Convention establishes that “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”¹²¹ Article 33.4 of that Convention specifies that “when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”

¹²² Inter-American Convention on Human Rights, Article 13.

¹²³ American Convention, Article 13.

¹²⁴ *Case of the Last Temptation of Christ*, para 70.

¹²⁵ Advisory Opinion OC-5/85, para. 42.

¹²⁶ American Convention, Article 29.

or each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”¹²⁷ The Inter-American Court has further noted that Article 29’s reference to the American Declaration implicates Article XXVIII of the Declaration, which states that “[t]he rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.”¹²⁸ The Court has interpreted this to require that the “just demands of democracy” guide the interpretation of the Convention.¹²⁹ In light of the principles taken from Article 29, the Inter-American Court has concluded that the necessity and legality of restrictions imposed on freedom of expression depend on a demonstration that “the restrictions are required by a compelling government interest” that the means taken are the least restrictive of the options available, and that the restriction is “proportionate and closely tailored to the accomplishment” of a legitimate government objective.¹³⁰

F. U.N. and European approach

40. For the purposes of comparing U.N. and European Union treaties and conventions with the American Convention, a number of basic principles on incitement to discrimination and violence can be culled from the jurisprudence of the United Nations and the European Court. These principles were outlined by the International Criminal Tribunal for Rwanda in the case of *Prosecutor v. Nahimana, et. al.*

41. One central principle is purpose. The ICTR noted that when the purpose behind a material’s transmission was of a “bona fide” nature—used for historical research or to convey news or information, for example—it was not found to constitute incitement.¹³¹ In analyzing intent, the tribunals of the European and the U.N. have looked to the actual language used by the media. In *Faurisson*, for example, the U.N. Human Rights viewed the author’s use of the phrase “magic gas chamber” as an indicator that his comments were motivated by anti-Semitism instead of the search for historical truth.¹³² In *Jersild*, the journalist’s efforts to distance himself from the comments of the racist youths helped lead the European Court to determine the purpose was to provide news, not spread racist views.¹³³ Additionally, the ICTR noted that the European Court of Human Rights, in its decisions on Turkish cases dealing with expression and national security, has drawn a line between language that explains the reasons behind terrorist activities and language that promotes such activities, and here again the language itself is important to determine where the expression falls.¹³⁴ This idea was demonstrated by *Sürek (No. 1)*, in which a newspaper was held responsible for publishing letters from its readers containing volatile language because the Court found that it helped fuel “bloody revenge by stirring up base emotions and hardening already embedded prejudices.”¹³⁵

¹²⁷ *Ibid.*, Article 32.

¹²⁸ American Declaration of the Rights and Duties of Man, in BASIC DOCUMENTS, Article XXVIII.

¹²⁹ Advisory Opinion OC-5/85, para 44.

¹³⁰ *Ibid.*, para. 46.

¹³¹ *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, ICTR-99-52-T, para 1001.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*, para 1002.

¹³⁵ *Ibid.*

42. Second, the context of the expression at issue is also important when considering the validity of restrictions on this expression. The ICTR noted, for example, that context was vital in the decision of the European Court in the *Zana* case—because the former mayor of a Turkish city made comments about massacres at a time when massacres were taking place, the European Court took the view that the statement was “likely to exacerbate an already explosive situation.”¹³⁶ The European Court has also factored in contexts such as the role of political expression or criticism of the government, in which there is room for more protection, and the issue of national security, in which the Court has said there is a “wider margin of appreciation” for authorities to restrict freedom of expression.¹³⁷

43. Finally, the ICTR pointed to causation as an important principle. The ICTR noted that international jurisprudence has not required specific causation connecting “the expression at issue with the demonstration of a direct effect.”¹³⁸ In the *Streicher* case from Nazi Germany, for example, the publication of anti-Jewish statements was not alleged to have had ties to “any particular violence.”¹³⁹ In the Turkish cases considered by the European Court, meanwhile, the expressions at issue were not stated to be causes of particular violence. Instead, the ICTR noted that the “question considered is what the likely impact might be, recognizing that causation in this context might be relatively indirect.”¹⁴⁰

44. With respect to the American Convention, these principles can serve as guideposts in demarcating how far Article 13(5)’s ban on hate speech extends. But it is important to note that the Inter-American Court regards the American Convention’s freedom of expression provisions as more “generous” than their counterparts under the European Convention and the ICCPR. The court has said that a comparison of the three shows “that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas.”¹⁴¹ This idea can be seen, for example, by specifically comparing Article 13 of the American Convention and Article 10 of the European Convention: while Article 13 contains a specific list of exceptions to the general principles established in the first paragraph of the Article, Article 10 is more general, and does not contain Article 13’s almost complete ban on censorship.

45. As a result, the U.N. and European jurisprudence should be used not as limitations on freedom of expression, but as minimum standards.¹⁴² In this sense, the principles of intent, context and causation could prove to be useful guideposts for interpreting Article 13(5) and ensuring that it is not applied too broadly. The Inter-American system could, for example, utilize the “bona fide” distinction used in the U.N. and E.U. jurisprudence that protects hate

¹³⁶ *Ibid.*, para. 1005.

¹³⁷ *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, ICTR-99-52-T, para 1006.

¹³⁸ *Ibid.*, para. 1007.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Advisory Opinion OC-5/85*, para 50.

¹⁴² *Annual Report of the Inter-American Commission on Human Rights 2003*, OEA/Ser.L/V/II.118, doc. 70, rev. 2, Dec. 29, 2003, at 99.

propaganda when its purpose is for historical research or the dissemination of news and information. The European Court's distinction between language that explains terrorism as opposed to language that promotes terrorism could also be applied to the Inter-American system. Context is also an important consideration in any general analysis of speech, given that the same phrase can have two meanings against two different backdrops—what might be benign during tranquil times, for example, may take on the qualities of incitement if the context of a civil war. Finally, the causation element may also prove useful: like its European Union and U.N. counterparts, the Inter-American system could find merit in the argument that a direct link between the speech and ensuing violence is unnecessary to justify limits on speech, given that the harmful effects can be delayed or indirect.

46. At the same time, however, the American Convention diverges from the European Convention and the ICCPR on a key point, and this difference limits the application of the jurisprudence from the U.N. and the E.U. The text of Article 13(5) discusses hate propaganda that constitutes “incitement to lawless violence or to any other similar action,” suggesting that violence is a requirement for any restrictions. The European Convention and the ICCPR, meanwhile, do not have such a narrowly drawn requirement. The ICCPR outlaws speech that incites to “discrimination, hostility or violence,” thus covering a range of speech that falls short of violence. The European Convention, meanwhile, allows for conditions and restrictions that are “necessary in a democratic society” and lists several ends that justify these restrictions, including national security, territorial integrity and public safety. The greater reach of the ICCPR and the European Convention demonstrate these two systems’ willingness to justify restrictions on speech that do not fit into the American Convention’s narrow category of “incitement to lawless violence.” It follows that while the jurisprudence of the U.N. and the EU can be helpful with the definition of “incitement” and “violence,” not all of the U.N.-and EU-backed restrictions on expression would fall under Article 13(5) of the American Convention. Some of the relevant EU and U.N. decisions restricting speech on national security grounds may be justified under Article 13(2) of the American Convention, which allows for restrictions based on national security and the maintenance of public order.

CHAPTER VIII

FINAL CONSIDERATIONS AND RECOMMENDATIONS

1. As the organs of the inter-American system have repeatedly stated, freedom of expression and access to information are vital for democracies in the Hemisphere, because they feed on free discussion of ideas and the widest possible dissemination of information and opinions. The exercise of these rights is needed to ward off corruption and guarantee probity in public office, as well as citizen participation and the economic advancement of the population.

2. In June 2004, the General Assembly of the Organization of American States adopted the Declaration of Quito, which highlighted the fundamental role of the media in the fight against corruption and acknowledged that “access to public information supports government transparency and contributes to preventing impunity by permitting the detection of acts of corruption. ”The States parties to the Declaration pledged to take additional steps to increase government transparency. This Declaration is in line with the Plan of Action of the Third Summit of the Americas, which established the need for states to ensure that journalists and opinion leaders are free to investigate and publish without fear of reprisals, harassment, or retaliatory actions.

3. Nevertheless, despite reiterated recognition of the need to respect and guarantee freedom of expression in the Hemisphere, that freedom cannot yet be called either full or untrammelled. This report shows yet again that murdering and attacking journalists and the misuse of anti-defamation laws by government officials continued to be employed in 2004 as mechanisms for silencing criticism.

4. In recent years, there have been constant references to the benefits for a democratic society of access to public information. This idea was supported, once again, by the OAS General Assembly, in resolution AG/RES. 2057 (XXXIV-O/04), which repeated the exhortation to Member States to introduce the laws or other provisions required to provide citizens with broad access to public information.¹ In 2004, two states enacted access to public information laws and seven other states are reportedly analyzing similar bills.

5. Several countries in the Hemisphere still have “contempt” laws (i.e., laws penalizing offensive expressions directed at public officials). In 2004, three countries in the Hemisphere made great progress in this area, although not all of them fully implemented the parameters established in Principles 10 and 11 of the Declaration of Principles on Freedom of Expression. On the other hand, parallel to the progress referred to, on many occasions officials were seen to resort not to the notion of contempt (*desacato*) as such, but rather to laws against calumny, libel, or defamation to achieve the same end: namely, to silence journalists publishing information on actions of public concern.

6. Thus the problems and violations that have worried the Rapporteurship are still widespread in the Americas: security issues of social communicators and human rights defenders, the existence and invoking of restrictive laws, lack of effective mechanisms for

¹ OAS, resolution AG/RES. 2057 (XXXIV-O/04), Access to Public Information: Strengthening Democracy, operative paragraph 3, which can be accessed at:

<http://www.oas.org/main/main.asp?sLang=E&sLink=../documents/eng/documents.asp>.

obtaining access to public information, concentration of ownership of the media, and the dearth of channels for the effective participation of socially excluded or vulnerable sectors. Therefore, in order to safeguard and strengthen freedom of expression in the Americas, the Rapporteur's Office reiterates the recommendations it made in previous reports:

- a. Conduct serious, impartial, and effective investigations into murders, kidnappings, threats, and acts of intimidation against journalists and other media personnel.
- b. Bring those responsible for the murder of, or acts of aggression against, social communicators to trial by independent and impartial courts.
- c. Publicly condemn such acts in order to prevent actions that might encourage these crimes.
- d. Promote the repeal of laws defining contempt (*desacato*) as a crime, since they limit public debate, which is essential to the workings of democracy, and are not in keeping with the American Convention on Human Rights.
- e. Work for amendment of laws against criminal defamation and calumny to prevent them being applied in the same ways as "contempt" (*desacato*) laws.
- f. Enact laws allowing access to information and complementary rules governing their implementation in line with international standards.
- g. Promote policies and practices that effectively permit freedom of opinion and access to information, along with equal participation by all segments of society in such a way that their needs, views, and interests are incorporated in the design of, and decisions on, public policies.
- h. Finally, the Special Rapporteur recommends that the Member States bring their domestic law into line with the parameters established in the American Convention on Human Rights and that Article IV of the American Declaration of the Rights and Duties of Man and that the IACHR's Declaration of Principles on Freedom of Expression be fully implemented. In this report, the Office of the Rapporteur would like to make a special appeal to states to consider the decisions of the Inter-American Court of Human Rights in 2004.^{2/}

7. The challenge facing the Office in the coming years is to build on the hard work and achievements of the past five. The highly motivated staff of the Office and its interns are the principal, but by no means only, protagonists to take up this challenge. It will require the political, institutional, and financial support of the States in the region. The participation of journalists and members of civil society is also vital, as key players reporting on violations of the right to freedom of expression. Thanks to a concerted effort by all these groups, the Americas will be able to move toward the consolidation of ample freedom of expression and access to information throughout the region.

² See Chapter VI.

8. The Office of the Rapporteur thanks all the states that have worked with it this year, as well as the Inter-American Commission on Human Rights and its Executive Secretariat for their constant support. Lastly, the Rapporteur offers a vote of thanks to all those independent journalists and other media personnel who, day after day, fulfill their important function of keeping society informed.

ANNEXES

1. Complete text of Article 13 of the American Convention on Human Rights
2. Declaration of Principles on Freedom of Expression
3. Declaration of Chapultepec
4. Resolution adopted by the General Assembly XXXIII: Access to Public Information: Strengthening Democracy
5. Joint Declaration by the International Mechanisms for Promoting Freedom of Expression
6. Press Releases

ARTICLE 13 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

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.

**Approved by the Inter-American Commission on Human Rights
during its 108th regular session**

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 requirement 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.

DECLARATION OF CHAPULTEPEC

PREAMBLE

On the threshold of a new millennium, the Americas envision a future rooted in democracy. A political opening has taken hold. Citizens have a heightened awareness of their rights. More than at any time in our history regular elections, governments, parliaments, political parties, labor unions, associations and social groups of every kind reflect the hopes of our people.

In this environment of democratization, several developments engender optimism but also suggest prudence. Institutional crises, inequalities, backwardness, unresolvable frustrations, the search for easy solutions, failure to grasp the nature of democracy and special interest groups constantly threaten the advancements made. They also represent potential hurdles to further progress.

That is why we who share this hemisphere, from Alaska to Tierra del Fuego, must consolidate the prevailing public freedoms and human rights.

Democratic rule must be embodied in modern institutions that represent and respect the citizenry; it must also guide daily life. Democracy and freedom, inseparably paired, will flourish with strength and stability only if they take root in the men and women of our continent.

Without democracy and freedom, the results are predictable: Individual and social life is stunted, group interaction is curtailed, material progress is distorted, the possibility of change is halted, justice is demeaned and human advancement becomes mere fiction. Freedom must not be restricted in the quest for any other goal. It stands alone, yet has multiple expressions; it belongs to citizens, not to government.

Because we share this conviction, because we have faith in the creative force of our people and because we are convinced that our principles and goals must be freedom and democracy, we openly support their most forthright and robust manifestation: Freedom of expression and of the press, whatever the medium of communication.

The exercise of democracy can neither exist nor be reproduced without these. We, the signatories of this declaration, represent different backgrounds and dreams. We take pride in the plurality and diversity of our cultures, considering ourselves fortunate that they merge into the one element that nurtures their growth and creativity: Freedom of expression, the driving force and basis of mankind's fundamental rights.

A free society can thrive only through free expression and the exchange of ideas, the search for and the dissemination of information, the ability to investigate and question, to propound and react, to agree and disagree, to converse and confront, to publish and broadcast. Only by exercising these principles will it be possible to guarantee individuals and groups their right to receive impartial and timely information. Only through open discussion and unfettered information will it be possible to find answers to the great collective problems, to reach consensus, to have development benefit all sectors, to practice social justice and to advance the quest for equality. We therefore vehemently reject assertions which would define freedom

and progress, freedom and order, freedom and stability, freedom and justice, freedom and the ability to govern as mutually exclusive values.

Without freedom there can be no true order, stability and justice. And without freedom of expression there can be no freedom. Freedom of expression and the seeking, dissemination and collection of information can be exercised only if freedom of the press exists.

We know that not every statement and item of information can find its way into the media. We know that the existence of press freedom does not automatically guarantee unrestricted freedom of expression. But we also know that a free press favors an environment that nurtures freedom of expression and thereby benefits all other public freedoms.

Without an independent media, assured of the guarantees to operate freely, to make decisions and to act on them fully, freedom of expression cannot be exercised. A free press is synonymous with free expression.

Wherever the media can function unhindered and determine their own direction and manner of serving the public, there is a blossoming of the ability to seek information, to disseminate it without restraints, to question it without fear and to promote the free exchange of ideas and opinions. But wherever freedom of the press is curtailed, for whatever reasons, the other freedoms vanish.

After a period when attempts were made to legitimize government control over news outlets, it is gratifying to be able to work together to defend freedom. Many men and women worldwide join us in this task. But opposition remains widespread. Our continents are no exception. There are still counties whose despotic governments abjure every freedom, particularly those freedoms related to expression. Criminals, terrorists and drug traffickers still threaten, attack and murder journalists.

But that is not the only way to harm a free press and free expression. The temptation to control and regulate has led to decisions that limit the independent action of the media, of journalists and of citizens who wish to seek and disseminate information and opinions.

Politicians who avow their faith in democracy are often intolerant of public criticism. Various social sectors assign to the press nonexistent flaws. Judges with limited vision order journalists to reveal sources that should remain in confidence. Overzealous officials deny citizens access to public information. Even the constitutions of some democratic countries contain elements of press restriction.

While defending a free press and rejecting outside interference, we also champion a press that is responsible and involved, a press aware of the obligations that the practice of freedom entails.

PRINCIPLES

A free press enables societies to resolve their conflicts, promote their well-being and protect their liberty. No law or act of government may limit freedom of expression or of the press, whatever the medium.

Because we are fully conscious of this reality and accept it with the deepest conviction, and because of our firm commitment to freedom, we sign this declaration, whose principles follow.

1. No people or society can be free without freedom of expression and of the press. The exercise of this freedom is not something authorities grant, it is an inalienable right of the people.

2. Every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.

3. The authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector. No journalist may be forced to reveal his or her sources of information.

4. Freedom of expression and of the press are severely limited by murder, terrorism, kidnapping, intimidation, the unjust imprisonment of journalists, the destruction of facilities, violence of any kind and impunity for perpetrators. Such acts must be investigated promptly and punished harshly.

5. Prior censorship, restrictions on the circulation of the media or dissemination of their reports, forced publication of information, the imposition of obstacles to the free flow of news, and restrictions on the activities and movements of journalists directly contradict freedom of the press.

6. The media and journalists should neither be discriminated against nor favored because of what they write or say.

7. Tariff and exchange policies, licenses for the importation of paper or news-gathering equipment, the assigning of radio and television frequencies and the granting or withdrawal of government advertising may not be used to reward or punish the media or individual journalists.

8. The membership of journalists in guilds, their affiliation to professional and trade associations and the affiliation of the media with business groups must be strictly voluntary.

9. The credibility of the press is linked to its commitment to truth, to the pursuit of accuracy, fairness and objectivity and to the clear distinction between news and advertising. The attainment of these goals and the respect for ethical and professional values may not be imposed. These are the exclusive responsibility of journalists and the media. In a free society, it is public opinion that rewards or punishes.

10. No news medium nor journalist may be punished for publishing the truth or criticizing or denouncing the government.

The struggle for freedom of expression and of the press is not a one-day task; it is an ongoing commitment. It is fundamental to the survival of democracy and civilization in our hemisphere. Not only is this freedom a bulwark and an antidote against every abuse of

authority, it is society's lifeblood. Defending it day upon day is honoring our history and controlling our destiny. To these principles we are committed.

AG/RES. 2057 (XXXIV-O/04)**ACCESS TO PUBLIC INFORMATION: STRENGTHENING DEMOCRACY⁶⁹⁹**

(Adopted at the fourth plenary session, held on June 8, 2004)

THE GENERAL ASSEMBLY,

HAVING SEEN the Report of the Permanent Council to the General Assembly on the Status of Implementation of Resolution AG/RES. 1932 (XXXIII-O/03), "Access to Public Information: Strengthening Democracy" (AG/doc.4339/04);

CONSIDERING that Article 13 of the American Convention on Human Rights provides that "[e]veryone 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";

CONSIDERING ALSO that Article 19 of the Universal Declaration of Human Rights includes the freedom "to seek, receive and impart information and ideas through any media and regardless of frontiers";

RECALLING that the Plan of Action of the Third Summit of the Americas, held in Quebec City in 2001, indicates that governments will ensure that national legislation is applied equitably to all, respecting freedom of expression and access to information of all citizens;

EMPHASIZING that Article 4 of the Inter-American Democratic Charter states that transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy;

NOTING that, in the Declaration of Nuevo León, the Heads of State and Government affirmed that access to information held by the state, subject to constitutional and legal norms, including those on privacy and confidentiality, is an indispensable condition for citizen

⁶⁹⁹ The Bolivarian Republic of Venezuela considers that access to public information held by the state should be fully consistent with Article 13 of the American Convention on Human Rights, which establishes that "[e]veryone 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." Venezuela maintains that a democratic system for access to public information should allow all citizens, without exception, to seek, receive, and impart information. A citizen seeking information is consciously and fully exercising the right to access to information, and the state must promote the adoption of legal provisions guaranteeing the exercise thereof. Likewise, on the basis of the principle of equality before the law, the state must guarantee the same right to the poor, the underprivileged, and the socially disadvantaged. Along these lines, in keeping with said principle of equal participation, Venezuela presented the following proposal: "To instruct the Inter-American Commission on Human Rights to conduct a study on how the state can guarantee all citizens the right to receive public information, on the basis of the principle of the transparency of information, when it is disseminated through the mass media, in the full exercise of the right to freedom of expression and as an effective means of (AG/doc.4339/04) participation." Venezuela regrets that a response to the message of the poor has once again been postponed, as dramatically revealed in the study published by the World Bank, *Paying Attention to the Voice of the Poor*. We share the view of those who claim that refusing to grant the poor and the disadvantaged access to information condemns them to continued social and economic ostracism. Venezuela therefore urges the Inter-American Commission on Human Rights to take the initiative and, under the powers granted to it in the Inter-American Convention on Human Rights, to conduct the aforementioned study and report on the results thereof to the General Assembly at its thirty-fifth regular session.

participation and promotes effective respect for human rights, and, in that connection, that they are committed to providing the legal and regulatory framework and the structures and conditions required to guarantee the right of access to public information;

BEARING IN MIND the adoption of the Declaration of Santiago on Democracy and Public Trust: A New Commitment to Good Governance for the Americas" [AG/DEC. 31 (XXXIII-O/03)], as well as resolution AG/RES. 1960 (XXXIII-O/03), "Program for Democratic Governance in the Americas";

CONSIDERING that the Inter-American Agency for Cooperation and Development (IACD) has been identifying and facilitating access by member state governments to e-government practices that facilitate information and communications technology applications in governmental processes;

CONSIDERING ALSO that the Unit for the Promotion of Democracy (UPD) has been providing support to member state governments in dealing with the topic of access to public information;

NOTING the work accomplished by the Inter-American Juridical Committee (CJI) on this issue, in particular, the document "Right to Information: Access to and Protection of Information and Personal Data in Electronic Format," presented by Dr. Jonathan Fried (CJI/doc.25/00 rev. 1);

RECOGNIZING that the goal of achieving an informed citizenry must be rendered compatible with other societal aims, such as safeguarding national security, public order, and protection of personal privacy, pursuant to laws passed to that effect;

RECOGNIZING ALSO that democracy is strengthened through full respect for freedom of expression, access to public information, and the free dissemination of ideas, and that all sectors of society, including the media, through the public information they disseminate to the citizenry, may contribute to a climate of tolerance of all views, foster a culture of peace, and strengthen democratic governance;

TAKING NOTE of the Declaration of Principles on Freedom of Expression of the Inter-American Commission on Human Rights; and

RECALLING initiatives taken by civil society regarding access to public information, in particular, the Declaration of Chapultepec, the Johannesburg Principles, the Lima Principles, and the Declaration of the SOCIUS Peru 2003: Access to Information,
RESOLVES:

1. To reaffirm that everyone has the freedom to seek, receive, access, and impart information and that access to public information is a requisite for the very exercise of democracy.

2. To reiterate that states are obliged to respect and promote respect for everyone's access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application.

3. To encourage member states, in keeping with the commitment made in the Declaration of Nuevo León and with due respect for constitutional and legal provisions, to prepare and/or adjust their respective legal and regulatory frameworks, as appropriate, so as to provide the citizenry with broad access to public information.

4. To urge member states to take into consideration clear and transparent criteria for exemptions when drafting up and adapting their domestic legislation.

5. To encourage member states to take the necessary measures, through their respective national legislation and other appropriate means, to facilitate the electronic availability of public information.

6. To instruct the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) and the Unit for the Promotion of Democracy to:

- a. Support the efforts of member states that so request in drafting legislation and developing mechanisms in the area of access to public information and citizen participation; and
- b. Assist the Permanent Council in the preparatory work for the special meeting mentioned in paragraph 9.a.

7. To instruct the Special Rapporteurship for Freedom of Expression to continue to report on the situation regarding access to public information in the region in the annual report of the IACHR.

8. To instruct the Inter-American Agency for Cooperation and Development (IACD) to identify new resources to support member states' efforts to facilitate access to public information.

9. To recommend to the Permanent Council that it:

- a. Convene a special meeting with the participation of experts from the states and civil society representatives to promote, impart, and exchange experiences and knowledge with respect to access to public information and its relationship with citizen participation; and
- b. On the basis of the report of the special meeting, and through the Committee on Juridical and Political Affairs, prepare a basic document on best practices and the development of common approaches or guidelines for increasing access to public information.

10. To request the Permanent Council to report to the General Assembly at its thirty-fifth regular session on the implementation of this resolution, which will be carried out in accordance with the resources allocated in the program-budget of the Organization and other resources.

International Mechanisms for Promoting Freedom of Expression

JOINT DECLARATION

by

the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression

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

Recalling and reaffirming their Joint Declarations of 26 November 1999, 30 November 2000, 20 November 2001, 10 December 2002 and 18 December 2003;

Noting the growing recognition of the key right to access information held by public authorities (sometimes referred to as freedom of information), including in authoritative international statements and declarations;

Applauding the fact that a large number of countries, in all regions of the world, have adopted laws recognising a right to access information and that the number of such countries is growing steadily;

Recognising the fundamental importance of access to information to democratic participation, to holding governments accountable and to controlling corruption, as well as to personal dignity and business efficiency;

Condemning attempts by some governments to limit access to information either by refusing to adopt access to information laws or by adopting laws, which fail to conform to international standards in this area;

Stressing the need for informational 'safety valves' such as protection of whistleblowers and protection for the media and other actors who disclose information in the public interest;

Welcoming the commitment of the African Commission on Human and Peoples' Rights to adopt a regional mechanism to promote the right to freedom of expression and noting the need for specialised mechanisms to promote freedom of expression in every region of the world;

Adopt, on 6 December 2004, the following Declaration:

On Access to Information

- The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.
- Public authorities should be required to publish pro-actively, even in the absence of a request, a range of information of public interest. Systems should be put in place to increase, over time, the amount of information subject to such routine disclosure.
- Access to information is a citizens' right. As a result, the procedures for accessing information should be simple, rapid and free or low-cost.
- The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions.
- Public authorities should be required to meet minimum record management standards. Systems should be put in place to promote higher standards over time.
- The access to information law should, to the extent of any inconsistency, prevail over other legislation.
- Those requesting information should have the possibility to appeal any refusals to disclose to an independent body with full powers to investigate and resolve such complaints.
- National authorities should take active steps to address the culture of secrecy that still prevails in many countries within the public sector. This should include provision for sanctions for those who wilfully obstruct access to information. Steps should also be taken to promote broad public awareness of the access to information law.
- Steps should be taken, including through the allocation of necessary resources and attention, to ensure effective implementation of access to information legislation.

- Urgent steps should be taken to review and, as necessary, repeal or amend, legislation restricting access to information to bring it into line with international standards in this area, including as reflected in this Joint Declaration.
- Public authorities and their staff bear sole responsibility for protecting the confidentiality of legitimately secret information under their control. Other individuals, including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information. Criminal law provisions that don't restrict liability for the dissemination of State secrets to those who are officially entitled to handle those secrets should be repealed or amended.
- Certain information may legitimately be secret on grounds of national security or protection of other overriding interests. However, secrecy laws should define national security precisely and indicate clearly the criteria which should be used in determining whether or not information can be declared secret, so as to prevent abuse of the label "secret" for purposes of preventing disclosure of information which is in the public interest. Secrecy laws should set out clearly which officials are entitled to classify documents as secret and should also set overall limits on the length of time documents may remain secret. Such laws should be subject to public debate.
- "Whistleblowers" are individuals releasing confidential or secret information although they are under an official or other obligation to maintain confidentiality or secrecy. "Whistleblowers" releasing information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law should be protected against legal, administrative or employment-related sanctions if they act in "good faith".

Ambeyi Ligabo
UN Special Rapporteur on Freedom of Opinion and Expression

Miklos Haraszti
OSCE Representative on Freedom of the Media

Eduardo Bertoni
OAS Special Rapporteur on Freedom of Expression

PRESS RELEASE

**RAPPORTEURSHIP DEPLORES THE WEAKENING OF
FREEDOM OF EXPRESSION IN HAITI**

Washington, D.C., January 22, 2004. The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR), deplores the attacks against the exercise of the right to freedom of expression in Haiti, as well as the aggressions and acts of intimidation against journalists and the media in the country.

In December and January, the Rapporteurship has been informed of threats against the life and physical integrity of several Haitian journalists. Among them, were Rodson Josselin from *Haïti Press Network*; Nancy Roc, Cossy Roosevelt and Meroné Jean Wickens, from *Radio Métropole*; Fegentz Calès Paul, from *Radio Antilles*; Marie-Lucie Bonhomme, Valéry Numa, Josué Jean and Wendy Richard, from *Vision 2000*; Hans Pierre-Louis and Patrick Chéry, from *Radio Ibo*; Lilianne Pierre-Paul and Sony Bastien, from *Radio Kiskeya*; and Jean Robert Ballant, from *Radio Sud-FM*.

During the last several weeks, the Office has also become aware of many attacks against media assets. The studios of *Radio Delta*, *Radio Lumière de la Jeunesse Saint-Marçoise (LJS)*, *Radio America* and *Radio Pyramide* were set on fire. On January 13, a group of armed men attacked with hammers the radio transmission plants of eight radio stations and a television network around Bouthilliers, in Port-au-Prince. The media attacked, which represent a variety of different viewpoints, are: *Radio Kiskeya*, *Radio Commerciale*, *Radio Signal FM*, *Radio Galaxie*, *Radio Mélodie FM*, *Radio Magic Stéreo*, *Radio Plus*, *Radio Ti-Moun* and *Télé Ti Moun*. In December, the Office of the Special Rapporteur was also informed about several attacks against *Radio Vision 2000*, *Radio Maxima*, *Radio Métropole*, *Radio Caraïbes* and *Radio Kiskeya*.

In a press communiqué released on December 9, the IACHR expressed its concern and emphasized that all Haitians, whatever their political allegiance, are entitled to full and free exercise of their right to freedom of expression in accordance with the Inter-American Convention on Human Rights.

The Office of the Special Rapporteur for Freedom of Expression will continue to follow the situation in Haiti, and will specially inform the Inter-American Commission on Human Rights on this issue during its next period of sessions in February 2004.

PRESS RELEASE

**SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION DEPLORES
ASSASSINATION OF A JOURNALIST IN NICARAGUA**

Washington, D.C., February 13, 2004. The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) of the Organization of American States, deplores the murder of Nicaraguan journalist Carlos José Guadamuz. The Office urges Nicaraguan authorities to take all the necessary measures to ensure that the perpetrators are punished and to reinforce to the maximum the mechanisms to grant effective protection to all journalists that receive threats for performing their valuable work of informing the public, which is essential for democracy and the rule of law.

According to the information received by the Rapporteurship, on Tuesday, February 10, Carlos José Guadamuz was shot five times when he was arriving at the headquarters of *Canal de Noticias de Nicaragua (CDNN, Canal 23)* where he conducted the program *Dardos al Centro* (*"Darts to the target"*). During his program he frequently made critical comments and denunciations on political matters. The journalist had already filed formal complaints of threats against him.

Although there is still no official theory regarding the motives for this act, the Office was informed that the Attorney General's Office has already begun an investigation of the incident and has carried out the preliminary procedural steps, including the detention, at scene of the crime, of the suspected actual perpetrator, who was identified as Augusto Hurtado García.

The Office of the Special Rapporteur recalls that the murder of journalists is the most brutal means of restricting freedom of expression. As stated in Principle 9 of the Declaration of Principles on Freedom of Expression of the IACHR, *"The murder... of and/or threats to social communicators violate the fundamental rights of individuals."* The American Convention on Human Rights, to which Nicaragua is a party, establishes that states have the duty to prevent, investigate, and sanction any violation of the human rights recognized in the Convention.

For these reasons, the Office of the Special Rapporteur urges the Nicaraguan state to continue the investigation until its ultimate resolution. The Office also recalls the commitment made by the Heads of State and Government at the Third Summit of the Americas, whereby the governments ensured *"that journalists and opinion leaders shall be free to investigate and publish without fear of reprisals"*

PRESS RELEASE

FREEDOM OF EXPRESSION IN THE AMERICAS CANNOT BE CHARACTERIZED AS FULL AND FREE OF OBSTACLES ACCORDING TO THE REPORT OF THE OFFICE OF THE SPECIAL RAPPORTEUR APPROVED BY THE IACHR

The annual report of the Office of the Special Rapporteur for Freedom of Expression for 2003, approved by the Inter-American Commission on Human Rights (IACHR), states that "[i]n 2003, the exercise of freedom of thought and expression in the hemisphere continued to experience the same kind of problems that have been mentioned by the Rapporteurship in recent years." The report concludes that freedom of expression in the Americas cannot be characterized as full and free of obstacles.

The Report of the Office of the Special Rapporteur constitutes the third volume of the respective annual report of the Commission. The IACHR announced yesterday the presentation of the document to the Member States of the Organization of American States (OAS).

As in previous years, this volume includes an evaluation of the situation of freedom of expression in the countries that make up the OAS. The report emphasizes that Cuba continues to be the country where one can categorically affirm that there is no freedom of expression, particularly taking into account the detention and sentencing of journalists in the past year.

"Vigorous debate and criticism of government action through the press is found in several countries of the hemisphere, but in Venezuela, Haiti, and Guatemala one finds attacks on critical journalists and media that appear to be motivated by such positions," notes the evaluation of the Office of the Special Rapporteur of the events of 2003.

The report also mentions that seven social communicators were assassinated last year as a result of their work.

Additionally, judicial actions continued to be used in ways that could have a dissuasive effect on the exercise of freedom of expression. Criminal proceedings against those who express themselves critically regarding issues of public interest, whether using "*desacato*" (insult or contempt of public officials) laws, or laws criminalizing libel, slander, defamation, persist in the Hemisphere, as illustrated by the cases mentioned in this report.

In addition, this year's report includes a chapter on access to public information, in compliance with the Resolution AG/Res. 1932 adopted by the XXXIII General Assembly of the OAS, held in Santiago, Chile in June of 2003. In that resolution, the States recommended that the IACHR, through its Office of the Special Rapporteur, carry out an evaluation of the situation of this right in the Member States of the Organization.

The report devotes a chapter to the discriminatory allocation of official publicity as an indirect means to sanction media that express criticism and another chapter to the jurisprudence of the European Court of Human Rights in relation to freedom of expression. It also offers a

summary of the cases processed by the organs of the Inter-American System for the Protection of Human Rights during 2003.

The Rapporteurship is grateful for the collaboration of those States that submitted information to the Office for the development of this report, particularly when in response to specific requests from the Office. The Office of the Special Rapporteur clarifies that some responses were not included because they were received after the IACHR's approval of the report; however, these will be taken into account in future studies. The Office of the Special Rapporteur encourages all States to submit the requested information. Finally, the Office of the Special Rapporteur thanks the nongovernmental organizations, journalists, and other individuals for the information they provided.

Washington, D.C. March 19, 2004

PRESS RELEASE**FREEDOM OF EXPRESSION IN THE AMERICAS CANNOT BE CHARACTERIZED AS FULL AND FREE OF OBSTACLES ACCORDING TO THE REPORT OF THE OFFICE OF THE SPECIAL RAPPORTEUR APPROVED BY THE IACHR**

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Washington, D.C. March 19, 2004

PRESS RELEASE**OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION DEPLORES
ASSASSINATION OF JOURNALIST IN BRAZIL**

Washington, D.C., April 30, 2004. The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) deplores the assassination of the radio journalist José Carlos Araújo, of *Radio Timbaúba FM* last Saturday, April 24, in the city of Mata Norte, state of Pernambuco, in northeastern Brazil.

According to the information received by the Office of the Special Rapporteur, the 37 year-old journalist hosted the police program *J. Carlos Araújo Entrevista*, in which he denounced criminal activities and had reported on the actions of death squads in the region. Araújo had previously been the victim of threats.

Last Saturday night, two subjects on motorcycles approached the journalist as he was leaving a recording studio near his house and shot him four times. The assassins fled.

According to local newspapers and Brazilian organizations, on April 28 the police detained a person who confessed to having assassinated the journalist because the journalist's denunciations had implicated him in criminal activities. Two other suspects remain at large.

The Office of the Special Rapporteur recalls that the assassination of journalists is the most brutal means of restricting freedom of expression. Principle 9 of the Declaration of Principles on Freedom of Expression of the IACHR states that: "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."

The assassination, kidnapping, intimidation or threatening of social communicators have two concrete objectives. On the one hand, they seek to eliminate those journalists that investigate abuses and irregularities in order to curtail those investigations. On the other hand, they seek to be a tool of intimidation directed against all those who engage in investigative journalism.

The Office of the Special Rapporteur urges the Brazilian authorities to continue with the investigations already in progress and to find mechanisms that will effectively protect all social communicators so that they can continue to carry out their valuable work of informing society. In this respect, he recalls the commitment made by the Heads of State and Government at the Third Summit of the Americas, when they stated that the States would ensure "*that journalists and opinion leaders are free to investigate and publish without fear of reprisals.*"

PRESS RELEASE**OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION RECALLS THE IMPORTANCE OF INDEPENDENT JOURNALISM FOR DEMOCRACY**

Washington, D.C., May 3, 2004. On the occasion of World Press Freedom Day, the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) reminds the hemispheric community of importance of free and independent journalism as an essential condition for democracy.

The Inter-American Court of Human Rights, in its advisory opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (OC-5/85), affirmed that a society that is not well-informed is not truly free. "Within this context," added the Court, "journalism is the primary and principal manifestation of freedom of expression of thought."

In this manner, the inter-American tribunal consecrated the link between freedom of the press and freedom of expression, which is an inherent right of all human beings. This idea was reiterated by the IACHR in 2000, when it adopted the Declaration of Principles on Freedom of Expression, which states in its Preamble 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[.]"

"In spite of the importance that the Inter-American System has given to respect for freedom of expression, it is unfortunate that threats, aggressions, assassinations and harassment of journalists continue to occur in the continent. These not only restrict the fundamental rights of journalists, they also have a chilling effect on the informative work of the media."

May 3 was established by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) as World Press Freedom Day, in commemoration of the Windhoek Declaration, approved May 3, 1991.

PRESS RELEASE**OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION EXPRESSES
CONCERN ABOUT THE CANCELLATION OF THE VISA OF A *NEW YORK TIMES* JOURNALIST BY
THE BRAZILIAN AUTHORITIES**

Washington, D.C., May 12, 2004. The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) of the Organization of American States (OAS) expresses its concern about the decision of the Brazilian authorities to cancel the visa of journalist Larry Rother of the U.S. newspaper the *New York Times* as a result of a news article that appeared in the aforementioned newspaper on May 9.

According to the information provided by the Ministry of Justice, the cancellation was based on the application of Article 26 of Law 6815 of 1980. The authorities considered that the article was frivolous, false, and offensive to the honor of the President of the Republic and that, therefore, it caused serious prejudice to the country's image abroad.

Principle 11 of the Declaration of Principles on Freedom of Expression, approved by the IACHR in October of 2000, provides that "Public officials are subject to greater scrutiny by society." Moreover, Principle 13 states that "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."

Regardless of opinions about the content of the article in question, the Office of the Special Rapporteur exhorts the Brazilian authorities to respect the above-mentioned principles in the determination of the visa conditions of foreigners, and to ensure that the legislation regarding these matters does not constitute an obstacle to the exercise of freedom of expression guaranteed by Article 13 of the American Convention on Human Rights.

PRESS RELEASE**APPROVAL OF THE LAW ON ACCESS TO PUBLIC INFORMATION IN ECUADOR
REPRESENTS AN ADVANCE FOR PROMOTING TRANSPARENCY OF GOVERNMENTAL
ACTIONS**

The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) recognizes the recent promulgation of the Organic Law on Transparency and Access to Public Information in Ecuador as an important step to promote transparency of governmental actions in that country.

In June 2003, the General Assembly of the Organization of American States (OAS) adopted Resolution AG/Res. 1932 (XXXIII-O/03), reaffirming that states are obliged to respect and promote respect for access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application. For its part, Principle 4 of the Declaration of Principles on Freedom of Expression of the IACHR states: *"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."*

In concordance with these affirmations, the IACHR and the Office of the Special Rapporteur for Freedom of Expression have promoted the adoption of laws on access to public information by the Member States, as well as effective mechanisms for its efficient exercise, with the understanding that the right to information in the hands of the state is a fundamental aspect for the strengthening of democracies. (See "Report on Access to Information in the Hemisphere" at <http://www.cidh.org/Relatoria/English/Annual Reports/AR03/ChapterIV 2003.htm>).

The promulgation of laws on access to information is an important step to contribute to the transparency of governmental actions. However, these laws must also be accompanied by regulations and interpretations that are adequate to guarantee respect for principles such as the principle of maximum disclosure, a presumption of publicity with respect to meetings and official documents in any format, broad definitions of the type of information that is accessible, reasonable fees and deadlines to give information, independent review of denials, and sanctions for noncompliance. Even when all of these characteristics are present, an access to information law could be unsuccessful without the presence of strong political will to implement it and to give the necessary resources, along with an active civil society.

For this reason, the Office of the Special Rapporteur expects that the auspicious progress begun with the passage of the organic law on transparency and access to public information in Ecuador will be continued with practices and norms that respect the above-mentioned principles, among others.

Washington, D.C., May 21, 2004.

PRESS RELEASE**THE OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION
HIGHLIGHTS THE SUPPORT OF THE OAS GENERAL ASSEMBLY FOR THE RIGHT TO
ACCESS PUBLIC INFORMATION**

Washington, D.C., June 10, 2004 – The Office of the Special Rapporteur for Freedom of Expression at the Inter-American Commission on Human Rights highlights the support of the XXXIV General Assembly of the Organization of American States – held from June 6-8 in Quito, Ecuador – for the right of access to public information through its adoption of the resolution “Access to Public Information: Strengthening Democracy.”

In the June 2003 meeting of the OAS General Assembly in Santiago, Chile, the Member States adopted a resolution in the area of public information reasserting the duties of these States to respect and promote respect for access to public information.

The new resolution approved in Quito extends this effort by encouraging OAS Member States to implement legislation or other provisions providing citizens with broad access to public information. This effort is in harmony with commitments made by the hemisphere's leaders at the last Special Summit of the Americas, held in January in Monterrey, Mexico.

The reform or adoption of domestic provisions, according to the resolution, should be conducted under the principles of clarity and transparency. OAS Member States are also encouraged to seek out and establish electronic means that facilitate access to public information.

The General Assembly entrusted the Special Rapporteur for Freedom of Expression and the Unit for the Promotion of Democracy (UPD) with providing support to Member States, if requested, in the preparation and adoption of federal legislation and other mechanisms designed to strengthen access to public information and civic participation.

The Special Rapporteur also highlights that the resolution renews the promise of OAS member states to respect the right of all persons to access public information and to adopt measures that help strengthen this right. The Special Rapporteur is deeply committed to carrying out this work and supporting Member States in the adoption of legislation in this area.

The Special Rapporteur for Freedom of Expression, Eduardo Bertoni, took part in the XXXIV General Assembly of the OAS as part of the delegation of the Inter-American Commission on Human Rights.

**OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION CONCERNED
ABOUT DECISION OF THE SUPREME COURT OF VENEZUELA UPHOLDING LAW
REQUIRING JOURNALISTS TO JOIN PROFESSIONAL ASSOCIATION**

Washington, D.C., August 2, 2004. The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) expressed regret over the July 27 ruling of the Constitutional Chamber of Venezuela's Supreme Court upholding a law requiring journalists to be licensed by an association prescribed by law in order to practice journalism. The decision declares a constitutional challenge ("*recurso de nulidad*") filed in 1995 against various articles of the Law on the Practice of Journalism of 1994 to be unfounded.

The Inter-American Court of Human Rights, in its fifth consultative opinion of 1985 (known as OC5/85), determined that compulsory membership in an association prescribed by law for the practice of journalism is incompatible with Article 13 of the American Convention on Human Rights, to which Venezuela is a party. The Court noted that "a law licensing journalists, which does not allow those who are not members of the '*colegio*' to practice journalism and limits access to the '*colegio*' to university graduates who have specialized in certain fields, is not compatible with the Convention." The Inter-American Court further added that this type of law "would contain restrictions to freedom of expression that are not authorized by Article 13(2) of the Convention and would consequently be in violation not only [of] the right of each individual to seek and impart information and ideas through any means of his choice, but also the right of the public at large to receive information without any interference."

The principal idea clearly defined in this paragraph has been invoked repeatedly by the Office of the Special Rapporteur since its creation, and it was reiterated by the IACHR in 2000 in its approval of the Declaration of Principles on Freedom of Expression. The Declaration develops the guarantees to freedom of expression under Article 13 of the Convention in greater depth, with Principle 6 of the Declaration noting that "[c]ompulsory membership or the requirement of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression." The same principle further notes that "[j]ournalistic activities must be guided by ethical conduct, which should in no case be imposed by the State."

The Office of the Special Rapporteur regrets that the highest court of justice in Venezuela has upheld a law requiring journalists to be licensed by an association prescribed by law in order to practice journalism because of the implications that this decision could have for the exercise of freedom of expression and of the press in Venezuela.

PREN/109/04

PRESS RELEASE

**OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION DEPLORES
ASSASSINATION OF JOURNALIST IN MEXICO**

The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) of the Organization of American States deplores the assassination of Mexican journalist Francisco Arratia Saldierna. The Office of the Special Rapporteur urges the Mexican authorities to take all the necessary measures to guarantee that

this crime does not go unpunished and to reinforce to the maximum the mechanisms to grant effective protection to all journalists that receive threats for performing their work of informing the public, which is essential for democracy and the rule of law.

The murder of journalists is the most brutal means of restricting freedom of expression. As stated in Principle 9 of the Declaration of Principles on Freedom of Expression of the IACHR, *“The murder... of and/or threats to social communicators violate the fundamental rights of individuals.”* The American Convention on Human Rights, to which Mexico is a party, establishes that states have the duty to prevent, investigate, and sanction any violation of the human rights recognized in the Convention.

According to the information received, Arratia Saldierna was murdered on August 31 in the city of Matamoros, close to the border with the United States of America. The journalist wrote for the newspapers *El Imparcial* and *El Regional*, in Matamoros, and *Mercurio* and *El Cinco*, in Ciudad Victoria, all in the state of Tamaulipas. Arratia Saldierna wrote articles related to government corruption, organized crime and education.

The Office of the Special Rapporteur is concerned about this most recent murder in the interior of the Mexican State. It follows the murders earlier this year of journalists Roberto Mora García and Francisco J. Ortiz, which occurred on March 19 in the city of Nuevo Laredo, and on June 22 in the city of Tijuana, respectively. The Office of the Special Rapporteur views positively the fact that these types of acts have been condemned from the highest governmental offices and that efforts for their complete investigation have been announced. The Office urges the continuation of these initiatives and recommends that both national and local authorities seek mechanisms of prevention so that similar acts do not occur in the future. Finally, the Office urges the competent authorities to investigate the murders that have occurred in Mexico until their ultimate resolution, and recalls the commitment made by the Heads of State and Government at the Third Summit of the Americas, whereby the governments ensured *“that journalists and opinion leaders shall be free to investigate and publish without fear of reprisals. . .”*

Washington, DC, September 2, 2004

PRESS RELEASE**FINANCIAL CONTRIBUTION FROM THE SPANISH
INTERNATIONAL COOPERATION AGENCY**

Washington, D.C., October 5, 2004. The Office of the Special Rapporteur for Freedom of Expression highlights the important financial contribution made by the Spanish International Cooperation Agency (*Agencia Española de Cooperación Internacional – AECI*). The Office wishes to publicly express its gratitude for these special funds, which will be used to develop the "Project for the strengthening of mechanisms to promote and protect freedom of expression in the Americas."

The Office of the Special Rapporteur for Freedom of Expression is a permanent office, with functional autonomy and its own budget, created to operate within the legal framework of the Inter-American Commission on Human Rights to promote the observance and defense of freedom of expression in the hemisphere. The Special Rapporteur is Eduardo Bertoni.

For more information on the Office of the Special Rapporteur for Freedom of Expression, please visit <http://www.cidh.oas.org/relatoria/>

PRESS RELEASE**OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION DEPLORES
ASSASSINATION OF JOURNALIST IN NICARAGUA**

Washington, DC, November 11, 2004. The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) of the Organization of American States deplores the assassination of the journalist María José Bravo, correspondent of the newspapers *La Prensa* and *Hoy* in Juigalpa, department of Chontales, Nicaragua.

According to the information received, the reporter was shot on November 9, 2004 while exiting the Counting Center (“Centro de Cómputos”) of Juigalpa, where she was covering the recounting of the votes in the municipal elections held on November 7. In addition, the information received indicates that the police have detained suspects of the crime, which motivation remains unknown. .

The Office of the Rapporteur recalls that the murder of journalists is the most brutal means of restricting freedom of expression. As stated in Principle 9 of the Declaration of Principles on Freedom of Expression of the IACHR, *“The murder... of and/or threats to social communicators violate the fundamental rights of individuals.”* The American Convention on Human Rights, to which Nicaragua is a party, establishes that states have the duty to prevent, investigate, and sanction any violation of the human rights recognized in the Convention. The Office of the Special Rapporteur understands that in election periods, freedom of expression and the press becomes fundamental to keep society informed.

The Office of the Special Rapporteur views positively the fact that this act has been condemned from the highest governmental offices, which have urged the authorities to conduct a complete investigation and find the responsible for the crime. For these reasons, the Office of the Special Rapporteur urges the Nicaraguan state to continue the investigation until its ultimate resolution and that the competent authorities find means to prevent similar acts in the future.

PRESS RELEASE**THE THREE INTERNATIONAL DEFENDERS OF FREEDOM OF EXPRESSION
APPROVED A JOINT DECLARATION**

Washington, D.C., December 7, 2004. The three international defenders and promoters of Freedom of Expression approved yesterday a joint declaration on access to information.

This year, the United Nations Special Rapporteur on Freedom of Opinion and Expression, Mr. Ambeyi Ligabo; the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE), Mr. Miklos Haraszti; and the Special Rapporteur for Freedom of Expression of the Organization of American States (OAS), Mr Eduardo Bertoni, with the assistance of ARTICLE 19 - Global Campaign for Free Expression, issued the joint statement that adds up to former declarations issued by these offices since 1999.

The Declaration determines the fundamental importance of access to information and applauds the increasing number of countries that have been adopting laws that recognise a right to access information. However, it condemns the attempts by some governments to "limit access to information either by refusing to adopt access to information laws or by adopting laws which fail to conform to international standards in this area". In addition, it establishes that access to information is a citizen's rights and that the procedures for accessing information should be simple, rapid and free or low-cost.

Moreover, the Declaration affirms that "Public authorities and their staff bear sole responsibility for protecting the confidentiality of legitimately secret information under their control. Other individuals, including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information."

To see Joint Declaration, please click the "2004" link below.

PRESS RELEASE**THE OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION
CONCERNED ABOUT POSSIBLE PRISON SENTENCE FOR AMERICAN JOURNALIST
FOR REFUSING TO REVEAL SOURCE**

Washington, D.C., December 8, 2004. The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) is concerned about the possibility that journalist Jim Taricani will be sentenced to up to six months in prison at a hearing scheduled for tomorrow, December 9. Mr. Taricani, a journalist with WJAR, an NBC-affiliated television station in Providence, Rhode Island, had been convicted of criminal contempt on November 18 for refusing to identify his confidential information source.

In March 2004, U.S. District Court Judge Ernest C. Torres held Mr. Taricani in civil contempt after he refused to reveal the identity of the person who gave him an FBI videotape, which was under a protective order prohibiting its disclosure as part of a federal investigation into government corruption. Considering Mr. Taricani's continued refusal to reveal the source, Judge Torres decided to initiate the criminal contempt proceedings on November 4, which led to Taricani's conviction. After Mr. Taricani's conviction, Joseph Bevilacqua Jr, a lawyer in Providence, R.I., came forward to say he was the source of the F.B.I. videotape; however, it is unclear if this revelation will have any effect on Mr. Taricani's sentence.

The Office of the Special Rapporteur recalls that freedom of expression is understood to encompass journalists' right to keep their sources confidential. This is reflected in Principle 8 of the Declaration of Principles on Freedom of Expression of the IACHR, which states, "Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential."

The main foundation of the right to confidentiality is that within the scope of their work, and in order to provide the public with the information needed to satisfy the right to information, journalists are performing an important public service when collecting and disseminating information that would not be divulged were the confidentiality of sources not protected. This right to confidentiality involves providing legal guarantees to sources to ensure their anonymity and to avoid possible reprisals against them for divulging certain information to the press. Confidentiality, therefore, is essential to journalists' work, and to the role that society has conferred upon them to report on matters of public interest.

Given the importance of the right to confidentiality, the Office of the Special Rapporteur is concerned that the criminal conviction and sentencing of Jim Taricani could set a troubling precedent for other cases. If the practice of trying journalists for criminal contempt for refusing to identify sources is consolidated, it would constitute a threat to freedom of the press in the U.S.