FREEDOM OF EXPRESSION IN THE INTER-
AMERICAN SYSTEM FOR THE PROTECTION OF
HUMAN RIGHTS

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Freedom of expression is one of democracy's fundamental values. Its importance takes on special connotations in nations where the separation of powers is fragile. This is particularly true in many Western Hemisphere nations - in transition from long years of dictatorships - that have political systems characterized by weak judicial and legislative branches which fail to provide effective counterweights to an all-powerful executive branch.

Argentine social scientist Guillermo O'Donnell has characterized such systems as "delegative democracies," where a charismatic figure assumes the presidency after relatively free elections, and then governs without the traditional counterweights normally associated with a representative democracy. Inherent in such "delegative democracies" is a risk of backsliding into authoritarianism. Faced with serious problems with no easy solutions, the popular enthusiasm that leads to the election of such charismatic leaders is tempered by subsequent disillusion.

Since judicial and legislative powers in these nations are so weak, freedom of expression - essential to every society - functions as the fundamental counterweight. It allows information to be gathered and disseminated, strengthens civil society, and facilitates individual participation in the democratic process.

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The importance of this right is diminished, however, if it is inadequately protected under domestic law, or if the rules designed to protect it are not respected. Prior censorship, contempt laws, and excessive subsequent liability for defamation, libel, and slander are examples of measures that seriously infringe upon the right to freedom of expression.

Through the exercise of prior censorship, bureaucracies decide what individuals can see, read, write, and produce by invoking such justifications as "national security," "public order," "national morals," "truth in information," and "personal honor." Since the possibility for abusing prior censorship is so great, enduring the exaggeration of free debate seems better than risking censorship's "protective" suffocation.

Contempt laws currently in force in seventeen countries in the region penalize "offensive" expression directed at public officials. Punishing critics of authority was a logical corollary that affirmed the superior power of those who exercised it both in absolute monarchies based on divine right and in dictatorships of a certain stripe. In a democracy, however, criticism free from fear of punishment - especially when directed at authority - reaffirms egalitarian principles and ensures that public officials carry out their duties with transparency and responsibility. Conversely, the threat or imposition of penal sanctions suffocates democracy and responds to an authoritarian logic that is incompatible with democratic tenets.

Rather than resort to prior censorship, some nations allow the subsequent imposition of liability in cases of defamation, libel, and slander. If such liability - under the guise of defense of honor - is exorbitant, however, its interference with the free expression of ideas is comparable to that of prior censorship.

Any of these measures can seriously affect or even destroy freedom of expression. They are promulgated within a juridical context that provides

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3. The phrase "contempt laws" is used to refer to what are known as leyes de desacato in Spanish. Generally speaking, leyes de desacato punish offensive expressions directed at public officials. Id. at ch. IV, sec. A.


7. Id.
norms under which their application is authorized under certain circumstances. But such a context is clearly absent when crimes committed against journalists - including assassination - go unpunished. This brutal method of "silencing" journalists - one hundred fifty have been assassinated in the region during the last ten years - also intimidates nations as a whole by demonstrating the possible tragic consequences that can result from the free expression of ideas.

Freedom of expression is also seriously diminished by such de facto measures as threats, economic measures that punish or reward the press for its ideas, and public and private monopolies in information media. In addition, the serious inadequacies to protect freedom of expression that exist within domestic legal systems designed to protect freedom of expression reaffirm the need for international - in this case hemispheric - protection of this fundamental freedom.

International protection of human rights has developed since World War II as a consequence of the tragic failure of international order based on absolute sovereignty. As international protection of human rights developed, international rules have been adopted and international institutions have been created to oversee the process. The purpose of this article is to analyze freedom of expression from the perspective of the rules and institutions that have been created to supervise human rights in the Western Hemisphere, known as the Inter-American System for the Protection of Human Rights ("Inter-American System"). In view of this purpose, this article will discuss the regulatory framework that applies to freedom of expression in the Inter-American System by systematizing relevant jurisprudence which, due to its recency, has not been sufficiently studied and disseminated. The rules that regulate the right to freedom of expression in the Inter-American System will also be examined with reference to how the rules have been interpreted by the organs created to supervise compliance with them. Finally, this article will outline a series of measures adopted to achieve full compliance with the applicable norms to strengthen protection of this important freedom in the Western Hemisphere.

8.  *Id.* at ch. IV, sec. C.
9.  *Id.*
II. THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

A. Organs

The Inter-American System is a combination of norms and institutions that apply to Western Hemisphere nations. The applicable rules consist principally of the American Convention on Human Rights12 ("American Convention") and the American Declaration on Rights and Duties of Man13 ("American Declaration"). The institutions involved are the organs responsible for supervising compliance with the established rules: the Inter-American Commission on Human Rights14 ("the Commission") and the Inter-American Court for Human Rights15 ("the Court"). In addition to these supervisory organs, the political organs of the Organization of American States ("OAS") - consisting of the Permanent Council and the General Assembly - also share in the responsibility of guaranteeing compliance with the rules designed to protect human rights, including the right to freedom of expression.16 The task of guaranteeing protection of human rights, including compliance with decisions of the Court and the Commission, falls to the political organs, especially the General Assembly.17 As a result, the Court and the Commission submit their reports to the General Assembly for approval.18

To assist in guaranteeing compliance with the rules relative to freedom of expression, the Commission created a special office dedicated to the protection of the right to freedom of expression in 1998, called the Special Rapporteur for Freedom of Expression19 ("Special Rapporteur").

17. It should be noted that the performance of these organizations relative to fortifying freedom of expression has been inadequate. See El Sistema Interamericano y los Derechos Humanos en la Region [The Inter-American System and Human Rights Law in the Region], in LA LUCHA CONTRA LA POBREZA EN AMERICA LATINA [THE WAR AGAINST THE POOR IN LATIN AMERICA] (Bernardo Kligsberg ed., 2000).
18. American Convention, supra note 12, at arts. 41, 65. Article 41 provides at section (g) that the Commission "submit[s] an annual report to the General Assembly of the Organization of American States." Id. at art. 41. Likewise, Article 65 establishes that in each regular session "the Court shall submit, for the Assembly's consideration, a report on its work during the previous year." Id. at art. 65.
B. The Juridical Regime

The right to freedom of expression in the Inter-American System is fundamentally established by Articles 13 and 14 of the American Convention and by Article 4 of the American Declaration. Article 13 of the American Convention expressly establishes that:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

   a. respect for the rights or reputations of others; or

   b. the protection of national security, public order, or public health or morals.

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

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal 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.20

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Article 14 adds the following:

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.21

Finally, Article 4 of the American Declaration provides that "[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever."22

The American Convention applies to the countries in the Western Hemisphere that have ratified it. Those countries are Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Dominica, Chile, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.23 In contrast, the American Declaration is used in the United States, Canada, and the following Caribbean countries: Antigua and Barbuda, the Bahamas, Belize, Cuba, Guyana, Saint Kitts, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago.24 This article will focus on the protections of the right to freedom of expression found in the American Convention. Although freedom of expression is also a right under the American Declaration, its formulation therein is more general. As a result, only the American Convention provides the type of specificity that permits its content and scope to be established, a fundamental norm of this important right.

The Commission supervises compliance with the rules through its case system,25 country visits,26 recommendations to member States,27 and through the

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21. Id. at art. 14.
22. American Declaration, supra note 13, at art. 4.
24. Id. at 188 n.9.
25. American Convention, supra note 12, at arts. 44–51. The Commission opens cases either on its own initiative or in response to petitions filed by individuals affected by the violation of any right covered by the American Convention. Grossman, supra note 23, at 188. Once the Commission analyzes a case, it
activities of the rapporteurs. The Court reviews cases presented to it by the Commission and by member States that have recognized its competency. At present, thirty-eight contentious cases have been brought by the Commission, and one case has been brought by the government of Costa Rica. The Court, like the Commission, can adopt preventative measures in cases where the risk is "grave and imminent." To date the Court has adopted such measures in twenty cases.

publishes an opinion with respect to the existence of the alleged violation and offers recommendations to the responsible member State. If the State does not comply with the recommendation, the Commission may also prepare a second report and offer the State a second opportunity to comply. If the State still does not comply, the Commission may publicly reveal the result of the report and its recommendations. This is the only possibility that exists relative to those States that have not ratified the American Convention. For States that have ratified the American Convention, the Commission may opt to either publish the report or present it to the Court within three months after the first report is approved. Grossman, supra note 23, at 188. When it appears before the Court, the role of the Commission changes from that of judge to that of complainant. It acts in the name and in representation of the victim (generally designating the original complainants as its legal advisers). This case mechanism is one of the most efficient means available to the Commission to review individual human rights violations. See also Thomas Buergenthal et al., Protecting Human Rights in the Americas 97 (1982).

26. Buergenthal, supra note 25, at 140. Visits to a particular country are the result of a formal invitation by the country, which originates either at the request of the political organs of the OAS, or on the initiative of the country, or the Commission. Grossman, supra note 23, at 187–88. A country visit is a high visibility event directed at mobilizing public opinion. The visit is followed by the publication of a report. This type of mechanism is useful for massive and serious violations of human rights that require swift mobilization of public opinion.


28. American Convention, supra note 12, at art. 41. The Commission has named work groups and special rapporteurs to confront problems having a "collective component," including a work group on prisons along with special rapporteurs on issues concerning women and indigenous populations, as well as freedom of expression. Grossman, supra note 23, at 189. All of the rapporteurs are members of the Commission except the Special Rapporteur on Freedom of Expression. 1998 Report of the Special Rapporteur, supra note 2, at ch. IV, sec. C.

29. Grossman, supra note 23, at 188. The following countries have recognized the competency of the Court: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Chile, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. Id. at n.8.


31. American Convention, supra note 12, at art. 63(2) (providing that "[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration," and "[w]ith respect to a case not yet submitted to the Court, it may act at the request of the Commission").

The Court also prepares "advisory opinions" to interpret human rights treaties in the Western Hemisphere and to review the compatibility of such treaties with the domestic laws of member States. Fifteen advisory opinions have been adopted to date. The advisory opinions that have been most important in the area of the right to freedom of expression are Advisory Opinion OC-05/85, "Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism" ("Advisory Opinion OC-05/85") and Advisory Opinion OC-07/86, "Enforceability of the Right to Reply or Correction" ("Advisory Opinion OC-07/86").

The office of the Special Rapporteur was created by the Commission in 1998 to protect and promote freedom of expression in the Americas. In October 2000, the Commission - interpreting the American Convention - adopted the Declaration of Principles on Freedom of Expression to guide the activities of the Special Rapporteur. The Special Rapporteur's principal activities include: 1) the preparation of general and specific thematic reports; 2) the creation of a hemispheric network for the protection of freedom of expression; 3) visits to OAS member States to observe the freedom of expression climate; and 4) the promotion of the right to freedom of expression among OAS members. Underscoring the importance that the Commission places on freedom of expression, its Special Rapporteur works on a full-time basis.

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33. American Convention, supra note 12, at art. 64(1), (2). Article 64 establishes that:
   1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.
   2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.


Moreover, since the Special Rapporteur is not one of the seven commissioners who are responsible for the overall supervision of rights protected under the American Convention, the office is dedicated exclusively to the protection and promotion of freedom of expression.41

As the following sections of this article illustrate, these organs have interpreted the scope of the American Convention's rules on freedom of expression as prohibiting prior censorship and authorizing subsequent imposition of liability. In the process, they have established the scope of permissible restrictions on this right that may apply in emergency situations, as well as the existence of a right to correction or reply. They have also repeatedly affirmed that in the Inter-American System there is a strong connection between the right to freedom of expression and the development of democracy.42

1. The Scope of Freedom of Expression

Subsection one of Article 13 of the American Convention establishes the right of individuals to think and express themselves freely.43 It also explains exactly what freedom of expression means - "to seek, receive, and impart information and ideas of all kinds, regardless of frontiers" - and emphasizes that the medium used is irrelevant, since expression can be communicated "either orally, in writing, in print, in the form of art, or through any other medium of one's choice."44

Both the Court and the Commission have interpreted this provision of the American Convention. In Advisory Opinion OC-5/85, for example, the Court considered "whether there is a conflict or contradiction between compulsory membership in a professional association as a necessary requirement to practice journalism . . . and the international norms."45

The Commission, for its part, has interpreted the scope of the right to freedom of expression in the following cases: Jehovah's Witnesses v. Republic of Argentina,46 Francisco Martorell v. Chile,47 Hector Felix Miranda v. Mexico,48 Juan Pablo Olmedo v. Chile,49 Horacio Verbitsky v. Argentina,50

41. Id.
43. American Convention, supra note 12, at art. 13(1).
44. Id.
Victor Manuel Oropeza v. Mexico,51 and Baruch Ivcher Bronstein v. Peru.52 On February 6, 2001, the Inter-American Court of Human Rights (to which the Ivcher Bronstein case had been referred by the Commission) confirmed the Commission's finding that Peru was responsible for violating Mr. Ivcher's right to freedom of expression.53 The interpretative work of both of these organs has established the following characteristics of the scope of freedom of expression in the context of the Inter-American System.

a. Special Dual Character

The Court has found that freedom of expression possesses a special dual character, in that it not only involves the right of individuals to express themselves, but also the right of everyone to receive information and ideas.54 As such, a violation of the right to freedom of expression not only violates an individual right, but also "a collective right to receive any information whatsoever and to have access to the thoughts expressed by others."55

The Commission has also had several opportunities to discuss the dual character of freedom of expression. In Martorell, where censorship of the book Impunidad diplomática [Diplomatic Impunity] was at issue, the Commission asserted that:

Article 13 establishes a dual right: the right to express thoughts and ideas, and the right to receive them. Therefore, arbitrary interference that infringes this right affects not just the individual right to express information and ideas but also the right of the community as a whole to receive information and ideas of all kinds.56

In Ivcher Bronstein, the Israeli-born Peruvian citizen owner of a television station was arbitrarily deprived of Peruvian nationality in order to impede the exercise of his property rights. In this case, the Commission asserted it was
clear the marked social character of this fundamental right has both an individual perspective as well as a much broader one that is related to the cultural framework society imposes upon it, that is, all who seek out and receive information or opinions emitted by journalists.\(^5\) As such, all of society is the victim in the case of a violation of freedom of expression.\(^5\)

The dual character of freedom of expression was reiterated by the Commission in the *Oropeza* case, where a Mexican journalist was assassinated for allegedly criticizing government authorities in his newspaper column, which included references to links between the police and drug trafficking.\(^5\)

The Commission affirmed that freedom of expression is universal and involves a legal concept that aids everyone, whether individually or collectively, to express, transmit, or disseminate thoughts, and, in parallel and correlative form, that freedom to inform oneself is universal and involves the collective right to receive information communicated by others without interference or distortion.\(^6\)

### b. Indivisibility of Expression and Dissemination

In Advisory Opinion OC-05/85, the Court affirmed the following:

> [E]xpression 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. The importance of the legal rules applicable to the press and to the status of those who dedicate themselves professionally to it derives from this concept.\(^6\)

It added that "[f]or the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions."\(^6\)

In *Martorell*, the Commission determined:

> [T]he decision to ban the entry, circulation and distribution of the book *Impunidad diplomática* in Chile violates the right to impart "information and ideas of all kinds," a right that Chile is bound to respect as a State party to the American Convention. In other words, the decision is an unlawful restriction of the right to freedom of

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62. *Id.* at para. 32.
expression, in the form of an act of prior censorship disallowed by Article 13 of the Convention.63

In Miranda, the co-director of a Mexican weekly publication was assassinated for authoring and publishing opinions critical of the government.64 The Commission declared that freedom of thought and of expression under Inter-American jurisprudence involves the freedom to voice and disseminate ideas, as well as the complimentary freedom that every citizen has to receive such information without illegal or unjustified interference.65

c. Irrelevance of Medium Employed

The American Convention provides that freedom of thought and of expression includes the right to disseminate information and ideas by any means.66 In Advisory Opinion OC-05/85, the Court affirmed that "freedom of expression . . . cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible."67 For its part, the Commission asserted in the complaint it filed in the Ivcher Bronstein case that the American Convention consecrates the right to disseminate information and ideas in artistic form or by any other means.68

d. Protection of Individual Ideas and Those of Others

In protecting freedom of expression, no distinction is made between protecting an individual’s ideas and those of third parties. Protection is afforded to the expression of opinions, thoughts, and ideas of all kinds, without distinguishing whether they are one’s own thoughts or those of others. The Commission explained its position with respect to this point in its complaint before the Inter-American Court of Human Rights in the Ivcher Bronstein case. It asserted that Article 13 reflects a broad interpretation of freedom of expression and personal autonomy, the object of which is to protect and foment access to information, ideas, and expressions of all types, in order to fortify the democratic process.69 Respect for these freedoms is not limited to allowing the circulation of "acceptable" opinions and ideas.70 The duty not to interfere with

64. Miranda, Case 11.739, Inter-Am. C.H.R., at para. 3.
65. Id. at para. 48.
66. American Convention, supra note 12, at art. 13(1).
69. Id.
70. Id.
the voicing of opinions and the dissemination of information, as well as the enjoyment of the right to access information of all types, extends to the circulation of information and opinions, and does not require the personal approval of whoever represents the authority of the state in a given moment. 71

e. Multiplicity of Forms of Expression

The right to freedom of expression is not limited to verbal expression; all types of expression are protected, including silence. 72 An example of the judicially established scope of the protection is found in the case of Jehovah's Witnesses. 73 In 1976, the Argentine military dictatorship promulgated Decree No. 1867/76, which prohibited the public exercise of the Jehovah's Witness religion in Argentina. 74 The government alleged this religion was based on principles contrary to the Argentine nationality and basic state institutions. 75 As a result of the decree, followers of the religion were persecuted. 76 More than three hundred children were expelled from school after being accused of refusing to swear allegiance to the country or to sing the Argentine national anthem, opting instead for silence because their religion prohibited them from engaging in such veneration of national symbols. 77 Pursuant to Resolution No. 02/79, the Commission condemned the action of the Argentine government, which it considered to be responsible for the alleged violations. 78

f. Exclusion of Direct and Indirect Restrictions

Subsection three of Article 13 of the American Convention prohibits restrictions on freedom of expression that are carried out by indirect means designed to impede communication. 79 The Ivcher Bronstein case provides an example of an indirect restriction on freedom of expression. As discussed above, this important case was initiated based on a decision of the Peruvian government which deprived the majority shareholder and director of Peruvian television channel Frecuencia Latina-Canal 2 [Latin Frequency-Channel 2] of his Peruvian nationality because the channel broadcast various reports of human rights violations by the Fujimori government. 80 Pursuant to the legislation,

71. Id.
72. American Convention, supra note 12, at art. 13(1).
74. Id.
75. Id.
76. Id.
77. Id.
78. Jehovah's Witnesses, Case 2137, Inter-Am. C.H.R.
79. American Convention, supra note 12, at art. 13(3).
80. See generally Ivcher Bronstein Complaint, supra note 68.
foreigners could not own television or radio stations, and the revocation of Ivcher Bronstein's Peruvian citizenship resulted in his withdrawal from the directorship of the channel, the firing of the journalists who had produced critical programs, and the cessation of the broadcast of negative news about the Peruvian government. The Commission decided the case on December 9, 1998, finding that the right to freedom of expression was violated and recommending that Peru immediately reinstate Ivcher Bronstein’s Peruvian citizenship. In the face of the government’s refusal to comply, the case was presented to the Court on March 31, 1999 and, as stated above, the Court confirmed the Commission’s decision that Peru was responsible for violating Bronstein’s rights.

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

The existence of public and private monopolies impedes the dissemination of individual ideas as well as the reception of the opinions of others. As a result, the existence of monopolies in the communications industry is inconsistent with freedom of expression. Both the Court and the Commission have affirmed this. In Advisory Opinion OC-05/85, the Court stated the following:

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.

In *Ivcher Bronstein* the Commission affirmed that the free circulation of ideas is only conceivable where there are multiple sources of information as well as respect for the communications media. It explained it is not enough

81. *Id.*
82. *Id.*
83. *See generally Ivcher Bronstein Sentence, supra* note 53.
85. *Ivcher Bronstein Complaint, supra* note 68, at 28.
to guarantee the right to found or direct organs dedicated to public opinion; it is also necessary that journalists and all those professionals working in the communications media be able to do so with the protections that the free and independent exercise of this work requires.  

2. Prohibition of Prior Censorship

One of the principal characteristics of the protection of freedom of expression in the Inter-American System is that it does not allow prior censorship. Subsection two of Article 13 of the American Convention provides that freedom of expression cannot be restricted a priori by any means or under any excuse without being subject to the subsequent imposition of liability.

This prohibition on prior censorship implies an acknowledgment that there is a danger in creating “filters” to decide what individuals can hear, see, or read. Such a danger does not simply disappear when specific rules that permit prior censorship in certain cases are adopted, and justifications like “national security,” “morality,” or “good habits” are easily used as pretexts to eliminate or seriously limit the free expression of ideas.

Certainly, this danger is even greater when the domestic agencies are in charge of prior censorship. In an attempt to limit this danger, the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”) was adopted in 1953 shortly after the end of World War II. The European Convention allowed prior censorship but established an organ charged with supervising the validity of freedom of expression and the application of prior censorship in certain enumerated situations. In practice, European organizations have been reluctant to apply prior censorship norms,

86. Id.
87. American Convention, supra note 12, at art. 13(2).

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

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

Id. at art. 10.
signaling a broad interpretation of freedom of expression which minimizes the censorship option. 89

In the Western Hemisphere, both the Court and the Commission have had the opportunity to interpret matters involving the prohibition on prior censorship, from which the following characteristics are evident.

(a. Defense of Honor is Excluded as a Basis for Prior Censorship)

In Martorell, the Commission affirmed that subsequent imposition of liability was the only restriction authorized by the American Convention to protect society from offensive opinions, as well as limiting the abusive exercise of this right. 90 The Commission reiterated its interpretation of Article 13 in the Olmedo case, also brought against Chile. The case involves prior censorship of the movie The Last Temptation of Christ, and a decision in the case is pending. 91 Also awaiting judgment before the Commission is a third Chilean case in which the book The Black Book of Chilean Justice by Alejandra Matus was confiscated and its distribution banned. 92

According to the Special Rapporteur's 1998 report:

When legislating the protection of honor and dignity referred to in Article 11 of the American Convention - and when applying the relevant provisions of domestic law on this subject - States Parties have an obligation to respect the right of freedom of expression. Prior censorship, regardless of its form, is contrary to the system that Article 13 of the Convention guarantees. 93

In Martorell, the Commission also expressed its opinion on the duty to protect the right to honor and dignity and its possible conflict with the right to freedom of expression. The government of Chile and the Chilean judiciary maintained that in the event of a conflict between Articles 11 and 13 of the American Convention, the former must prevail. 94 The Commission rejected this theory, and advanced its interpretation that the rights included in those two articles of the American Convention do not present a conflict of different

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89. See, e.g., 1998 Report of the Special Rapporteur, supra note 2, at ch. II, sec. B(3) (citing Sunday Times Case, Eur. Ct. H.R., (ser. A) (1979) and discussing how, in interpreting Article 10 of the European Convention, the European Court for Human Rights "concluded that 'necessary,' while not synonymous with 'indispensable,' implied 'the existence of a 'pressing social need' and that for a restriction to be 'necessary' it is not enough to show that it is 'useful,' 'reasonable' or 'desirable'").
92. Id. at ch. III.
93. Id. at ch. II, sec. B(5).
principles between which one would have to choose.\textsuperscript{95} Accordingly, the Commission quoted the European Court which, in a similar case, considered "it was faced not with a choice between conflicting principles, one of which is freedom of expression, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted."\textsuperscript{96}

\textit{b. Authorized Exceptions}

Without prejudicing its overall prohibition on prior censorship, the American Convention permits the following exceptions: 1) censorship of public entertainment for the exclusive purpose of regulating access to such events to protect the morals of children and adolescents;\textsuperscript{97} and 2) prohibition of propaganda promoting war or advocating racial, moral, or religious hatred which incites violence toward individuals or groups.\textsuperscript{98} These exceptions, however, are only permitted within the framework of the Inter-American System if they conform to the requirements of legality, necessity, reality or imminence, or valid purpose.

In order to conform to the legality requirement, the exception must be authorized by law, in the event that decrees or other administrative measures prove insufficient. The requirement of necessity implies an evaluation of the pertinence of the measure on a case-by-case basis in order to exclude improperly motivated prohibitions. If a State can give the required protection through the police force or if there is no imminent danger, the restriction on freedom of expression will not satisfy the requirement of necessity. The reality or imminence requirement refers to measures that are adopted in light of actually existing conditions or conditions that are certain to occur, not mere hypothetical situations which might affect the morals of children or adolescents (in public entertainments) or which incite violence in terms of Article 13. The valid purpose exception corresponds to cases involving children where protection of morals is at issue, while in the case of advocacy of war or racial or religious hatred the protection at issue is that of individuals or groups at whom the violence is directed.

\textsuperscript{95} \textit{Id.}

\textsuperscript{96} \textit{Id.} at para. 71, n.5 (quoting \textit{Sunday Times Case}, Eur. Ct. H.R., (ser. A) (1979)).

\textsuperscript{97} \textit{American Convention, supra} note 12, at art. 13(4) (providing that "[n]otwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence").

\textsuperscript{98} \textit{Id.} at art. 13(5) (providing that "[a]ny propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law").
3. The Impact of Situations of Emergency on Freedom of Expression

The scope of regulations concerning emergency situations is of great importance to the protection of rights in general, and to the protection of freedom of expression in particular. Emergency situations - where it is argued that a threat exists against the life of the nation itself - permit certain restrictions on rights, including the right of freedom of expression.

In the Western Hemisphere - for many reasons, among them political instability - emergency situations have been abused. As a result, the American Convention has regulated the exception extensively. Article 27 of this Convention establishes the conditions that must exist in order for an emergency to be declared, the rights that can never be suspended in such a situation, and the requirements that must be met to suspend other rights. The enumerated conditions under which such an emergency can be declared are strict. Specifically, the declaration must be preceded by an event of exceptional seriousness that affects in a real or imminent way the continued existence of the State as a whole.

Article 27 also specifies that certain rights cannot be temporarily removed in any event, and others that can only be limited as authorized by the American Convention, provided that certain conditions listed in the treaty are met. The

99. American Convention, supra note 12, at art. 27. Article 27 provides as follows:
1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

Id.


101. American Convention, supra note 12, at art. 27; see also Claudio Grossman, El Regimen Hemisferico Sobre Situaciones de Emergencia, 1993 SERVICO EDITORIAL DEL INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 155.
requirements prescribed by the American Convention for the temporary suspension of rights - including freedom of expression - are: 1) necessity (there must absolutely not exist any other possible alternatives in the case at hand); 2) temporarity (in the event temporary suspensions of rights are valid strictly for the amount of time limited); 3) proportionality (in virtue of the requirement the measures cannot constitute an excessive reaction on the part of the authorities in light of the existing emergency); 4) compatibility (with other duties imposed by international law); 5) non-discrimination; and 6) submission to law by authorities (since the temporary suspension of rights supposes actions by authorities consistent with law declared for reasons of general interest and for the purpose for which they have been established). In this setting, the invocation of an emergency to limit freedom of expression requires a case-by-case analysis to ensure compliance with the legal requirements which authorize the limitation.

4. Subsequent Liability

The Inter-American System’s prohibition on prior censorship does not exclude the subsequent imposition of liability. But when subsequent liability is of an exaggerated degree, it effectively “gags” individuals faced with the threat of danger that is inherent in freedom of expression. Consequently, the American Convention establishes specific requirements tied to the validity of subsequent liability. These requirements are: 1) legality; 2) democratic legitimacy; 3) necessity; 4) proportionality; 5) subjective content; 6) differentiation between opinions based on facts and value judgments; 7) preclusion of liability for reproduction of information; and 8) incompatibility with contempt laws.

a. Legality

Article 13 of the American Convention provides that the subsequent imposition of liability should be “expressly established by law.” This is confirmed in Article 30 which provides the restrictions that “may be placed on the enjoyment or exercise of the rights or freedoms recognized [in the American Convention] may not be applied except in accordance with the purpose for which such restrictions have been established.” In its Advisory Opinion OC-6/86, “The Word “Laws” in Article 30 of the American Convention on Human
"Grossman"

Rights," the Court held that the criteria of Article 30 are applicable in all cases in which the word "law" or a similar phrase is used by the American Convention for the purpose of the restrictions which the Court itself authorizes with respect to each one of the protected rights.105

Different consequences arise from this concept of legality. First, the norm that prohibits a given action cannot have a hierarchy inferior to that of the norm that recognizes the right, for example, a decree or an ordinance. Second, there is a prohibition on retroactive application, based on the notion that no one can be responsible for conduct that when undertaken did not involve liability.

b. Democratic Legitimacy

Article 13 requires that in order for the imposition of subsequent liability to be valid under the Convention, the ends sought to be achieved must be legitimate.106 In Advisory Opinion-05/85, the Court affirmed that this principle should be understood as one requiring public authorities to conduct themselves in strict conformity with general juridical norms created by the constitutional procedures and organs established by each State party.107 Moreover, the principle of legality is inseparably linked to that of legitimacy in democratic societies, by virtue of the international system on which the American Convention is based. Thus, the effective exercise of representative democracy, translates, inter alia, into respect for minority participation and the public good.108

c. Necessity

Article 10 of the European Convention for the Protection of Rights and Fundamental Freedoms uses the expression "necessary in a democratic society," while Article 13 of the American Convention omits those specific terms.109 In Advisory Opinion OC-05/85, the Court sustained that this difference in terminology is not relevant since the European Convention does not contain any provision comparable with Article 29 of the American Convention.110 As a

106. American Convention, supra note 12, at art. 13.
107. Advisory Opinion OC-06/86, supra note 104.
108. Id.
109. Id. at para. 45.
110. Id. at para. 44. Article 29, clauses c) and d) of the American Convention provide as follows: No provision of this Convention shall be interpreted as:
   c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
   d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.
consequence, the "necessity" of subsequent liability will depend upon whether it is oriented towards satisfying a compelling public interest within the framework of representative democracy. Among the options that may be used to meet this objective, the most closely tailored one should be chosen. Finally, whether "public order," "public morals," "national security," "public health," or some other concept is invoked to establish subsequent liability, such expressions should be subject to an interpretation strictly tied to the "just demands" of "a democratic society," that of course includes freedom of expression.

**d. Proportionality**

Subsequent liability should be in proportion to the end sought, whether the end is to assure respect for individual rights or the reputation of third parties, protection of national security, public order, or public health or morals. This requirement has great importance, since excessive fines, detention, and imprisonment can have the same chilling effect as prior censorship. What can be gathered from this is that respect for freedom of expression is not only assured by prohibitions on prior censorship and the adoption of subsequent liability, but also that the imposition of these sanctions must be coherent and proportional to the punished conduct.

**e. Subjective Content**

The subsequent imposition of liability requires the existence of "actual malice," which implies acting with intent (positive intention to violate the facts) or with serious negligence (having been able to foresee the falsity of the facts). In its report on contempt, the Commission indirectly established the requirement for the existence of "actual malice" when it noted the exception that truth (exceptio veritatis) may be used as a defense is insufficient to protect freedom of expression. In fact, the exception requires the journalist involved to prove the defense, thus effectively placing the burden of proof on the defendant. In the opinion of the Commission, the burden of proof should be placed on the plaintiff, not on the defendant.

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Id. at art. 29(e), (d).
111. Advisory Opinion OC-05/85, supra note 35, at para. 46.
113. Id.
114. Id.
115. See Id.
f. Differentiation Between Opinions of Fact and Value Judgments

If there were liability for expressing value judgments, freedom of expression would be seriously curtailed. In effect, value judgments imply that each individual has a right to express opinions and interpretations that he or she believes are adequate. This type of expression is protected in broad terms by Article 13, which asserts that freedom of expression involves "the freedom to seek, receive, and impart information and ideas of all kinds." Value judgments, since they are subjective, do not create liability because they do not assert facts. They are simply subjective opinions which individuals can freely determine to be valid or invalid. In the system created by the American Convention, there is an explicit right not only to "receive" information but also to "disseminate" opinions. If subsequent imposition of liability were permitted in the case of the dissemination of value judgments, it would not only inhibit the person who expresses the opinion, but also inhibit debate that allows different opinions to be expressed, a form of expression that enhances society.

5. Exclusion of Liability for Reproduction of Information

The need to exclude liability for the reproduction of the opinions of third parties is undeniable. To hold those who reproduce the opinions of third parties liable would seriously limit freedom of expression, given that it would force those who reproduce the opinions of others to set up verification systems to assure the veracity of each opinion. These verification systems would prove to be notoriously onerous for a complex and diverse society where a vast influx of information proceeds from divergent sources. It should be noted, however, that within the framework of the American Convention, the exclusion of liability for reproducing the opinions of third parties does not, of course, imply curtailing the liability of the individual who made such statements in the first place.

h. Incompatibility of Contempt Laws with the American Convention

Seventeen OAS member states still have contempt laws that provide punishment for offensive expressions directed at public officials in the fulfillment of their duties. The Commission has emphatically decreed that such laws are incompatible with freedom of expression, both through its case system as well as in its Report on the Compatibility of "Desacato" [Contempt]
Laws with the American Convention on Human Rights ("Report on Contempt Laws").

In the Verbitsky case, an Argentine journalist was sentenced to one month in prison after being found guilty of contempt when he published an article in the newspaper Página 12 [Page 12] in which he referred to an Argentine Supreme Court justice as "disgusting." Subsequent to the rejection of his appeal, Verbitsky brought a complaint before the Commission. After several meetings, the parties arrived at a common proposal for friendly settlement, which was successfully fulfilled when the sentence against Verbitsky was revoked and all its effects were annulled, and when the contempt statute was abolished. The Commission accepted this amicable resolution due to its compatibility with the requirement that friendly settlements would adequately protect the human rights in conformity with the American Convention.

In its Report on Contempt Laws, the Commission stated that contempt laws contradict the principle that a properly functioning democracy is the best guarantee of social harmony and the rule of law, and contempt laws, when applied, directly affect the type of open debate guaranteed by Article 13 that is essential to the existence of a democratic society. Moreover, invoking the concept of social harmony to justify contempt laws goes directly against the logic that sustains freedom of expression and thought. The Commission emphasized that critical expressions not related to an official's position may be subject to civil liability for slander and defamation, just as is the case with other citizens.

For his part, the Special Rapporteur stated in his 1998 report that "[t]he contempt laws seek to avoid debate as well as the scrutiny or criticism of state officials," and that "contempt laws, instead of protecting freedom of expression or [sic] civil servants limit freedom of expression and weaken the democratic system."
5. The Right to Access Information

The right to access information is fundamental to the ongoing development of democracy. This right is found in subsection one of Article 13 of the American Convention, which provides that the right to freedom of expression includes the freedom to seek out and receive information of all kinds.\textsuperscript{128} With respect to this issue, the Court has noted that "a society that is not well informed is not a society that is truly free."\textsuperscript{129} Restrictions on access to information in the hands of public or private institutions (e.g., credit institutions) must be "judged by reference to the legitimate needs of democratic societies and institutions."\textsuperscript{130} This implies that the existence of an absolute prohibition on access to information is incompatible with the American Convention. Although limited restrictions are possible (e.g., national security), as with other exceptions, they should be narrowly constructed and subject to judicial review in all cases.

To guarantee the right of access to information, the Special Rapporteur has proposed as a remedy the writ of \textit{habeas data}.\textsuperscript{131} Although neither the Commission nor the Court has yet interpreted what form the proposed remedy will take, this fact does not in any way prevent the actual exercise of the right to access information in the hands of government or private entities.

6. Right of Correction and Reply

Having established freedom of expression and thought in Article 13, the American Convention provides for a right of correction and reply in Article 14.\textsuperscript{132} In Advisory Opinion OC-07/86 the Court asserted:

\begin{itemize}
  \item The United Nations Rapporteurs for Freedom of Expression for the Organization for Security and Cooperation in Europe, and the OAS Special Rapporteur stated in a joint resolution that laws exist in many countries, such as contempt laws, that unduly limit the right to freedom of expression, and they prevailed upon the States to amend those laws in order to bring them in line with their international obligations. \textit{1999 Report of the Special Rapporteur, supra} note 4, \textit{at} Annex 2.
  \item \textit{128. American Convention, supra} note 12, \textit{art.} 13(1).
  \item \textit{129. Advisory Opinion OC-05/85, supra} note 35, \textit{at para.} 70.
  \item \textit{130. Id. at para.} 42.
  \item \textit{132. American Convention, supra} note 12, \textit{at art.} 14.
\end{itemize}
The inescapable relationship between these articles can be deduced from the nature of the rights recognized therein since, in regulating the application of the right of reply or correction, the States Parties must respect the right of freedom of expression guaranteed by Article 13. They may not, however, interpret the right of freedom of expression so broadly as to negate the right of reply proclaimed by Article 14(1).11

The Court added that the right to reply guarantees respect for freedom of expression in both its individual and shared dimensions:

In the individual dimension, the right of reply or correction guarantees that a party injured by inaccurate or offensive statements has the opportunity to express his views and thoughts about the injurious statements. In the social dimension, the right of reply or correction gives every person in the community the benefit of new information that contradicts or disagrees with the previous inaccurate or offensive statements. In this manner, the right of reply or correction permits the re-establishment of a balance of information, an element which is necessary to the formation of a true and correct public opinion. The formation of public opinion based on true information is indispensable to the existence of a vital democratic society.13

While the Court has not had the opportunity to apply the law of correction to a contentious case, its Advisory Opinion OC-07/86 fixes certain elements that establish the existence of this right. It is important to reiterate that the right of correction cannot legitimately include value judgments. It should also be noted that there are many ways of expressing opinions, so assuring correction by the same means (e.g., location, size, format) inadequately protects freedom of expression.

7. The Link Between Freedom of Expression and Democracy

Both the Court and the Commission have established that there is an inherent link between freedom of expression and democracy.135 In Advisory Opinion OC-05/85, the Court affirmed:

134. Id. at Separate Opinion of Judge Hector Gros Espiell, at para. 5.
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 conditio 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.¹³⁶

In his 1998 Annual Report, the Special Rapporteur stated:

Freedom of expression certainly holds a prominent position among the different requirements for a participatory and stable democracy. If it does not exist, it becomes impossible to develop the other elements needed to deepen democracy. Thus, freedom of expression has often been said to be the fundamental freedom underlying the very existence of democratic society.¹³⁷

In concluding the report, the Special Rapporteur asserted, "[c]onsolidation of democracy in the hemisphere is closely related to freedom of expression. When freedom of expression is limited, the development of democracy is interrupted, since the free debate of ideas and opinion among citizens is impeded."¹³⁸

The link between freedom of expression and democracy has been part of a development process, within the context of the OAS, that membership is only open to democratic states. An important milestone in this process was reached when OAS Resolution 1080 was adopted in Santiago, Chile in 1991.¹³⁹ The resolution allows a series of measures to be adopted in cases where the constitutional process of a country breaks down.¹⁴⁰

III. CONCLUSION

The interpretation of the American Convention by both the Court and the Commission confirms the existence of a legal framework in the Inter-American System designed to protect freedom of expression. The application of this framework to specific cases is a fundamental requirement and cornerstone of democracy, illustrating the scope of this important freedom. Achieving

¹³⁶. Advisory Opinion OC-05/85, supra note 35, at para. 70.
¹³⁸. Id. at ch. V.
¹⁴⁰. Id.
complete freedom of expression in the Western Hemisphere requires that States fully comply with existing regional norms and that they integrate them into domestic law. Such compliance and integration constitutes adherence to the obligations that member States freely contracted to meet through ratification of the American Convention. To fully meet their obligations, States should implement the following policies.

First, slander, libel, and defamation should be decriminalized. Within the framework of a participatory society, the interchange of ideas in political debate is a fundamental mechanism by which full exercise of freedom of expression can be attained. Slander, libel, and defamation laws have been used to chill this mechanism, and the criticism that it can engender, based on the justification that the offended parties exercise a public function. This stance is contrary to the principles established in Article 13 of the American Convention. Moreover, civil actions are an alternative that provides sufficient protection to those who are subjected to intentional attacks on their honor or reputation.

Second, States should avoid allowing subsequent liability to have a chilling effect on freedom of expression. Article 13 of the American Convention establishes that prior censorship is incompatible with full freedom of expression, and strictly enumerates the circumstances in which it can be applied. Strict compliance with permissible exceptions is fundamental to prevent the conversion of the exception into the general rule, taking into account that the exceptions exist only for use in specific cases, since the general principle is full freedom of expression.

Third, public and private monopolies in information media should not be permitted. As this article illustrates, the existence of public and private monopolies works against the creation of an atmosphere that allows for the interchange of diverse opinions. To achieve this objective, anti-monopolistic laws should be developed and strictly enforced.

Fourth, access to information should be guaranteed. The creation of domestic laws that guarantee free access to information in the hands of government and private organizations is fundamental to achieving full protection of freedom of expression. Since it has moved beyond the initial phase of creating rules and establishing their normative context, the challenge that now faces the Inter-American System for the protection of human rights is the full application of those rules and norms. In this new phase of international supervision, the system requires a combination of measures that will assure the effectiveness of the Special Rapporteur, provide training to civil servants, judges, and journalists, provide for the adoption of urgent measures (in cases of possible irreparable harm), strengthen the case system, and provide for increased action by political organs.

There are a number of ways these objectives can be achieved. One way is by allowing the Special Rapporteur to visit countries where freedom of
expression is seriously threatened without the need to seek prior permission or receive an invitation from the State. Another is to finance the office of the Special Rapporteur to guarantee that it has sufficient resources to function properly. In addition, lawyers and judges should be trained to invoke and apply international norms in domestic law. This training in both the jurisprudence and procedure of the Inter-American System can play a preventative role by fostering internal resolution of problems without the need to involve international organs.

The Commission should also promulgate preventative measures in the case of threats against journalists. If the measures are not applied, the cases should be submitted immediately to the Court in order to raise international awareness of this type of threat. All cases involving freedom of expression should be taken to the Court if the State involved does not accept the opinions and recommendations of the Commission. This will open more possibilities for enforcing compliance with international norms. Finally, the OAS political organs should adopt measures directed at States that do not comply with decisions of the Commission and the Court on freedom of expression issues. The political organs, at a minimum, should place these issues on the agenda and discuss them, and also adopt measures of a political nature to promote this freedom, for example, international sanctions.

There is an ongoing debate about which rights are the most important. Regardless of whether non-derogable rights or economic, social, cultural, civil, or political rights take precedence, the discussion itself is only possible if the right to freedom of expression exists. That is why the right is so crucial, and why there is a need to ensure full respect for it in the Western Hemisphere.