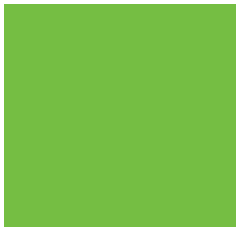
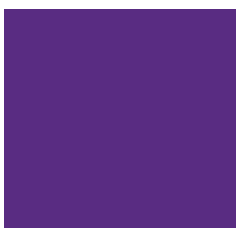


International standards on freedom of expression: *A basic guide for legal practitioners in Latin America and the Caribbean*





ABOUT CIMA

The **Center for International Media Assistance (CIMA)**, at the National Endowment for Democracy, works to strengthen the support, raise the visibility, and improve the effectiveness of independent media development throughout the world. The center provides information, builds networks, conducts research, and highlights the indispensable role independent media play in the creation and development of sustainable democracies. An important aspect of CIMA's work is to research ways to attract additional US private sector interest in and support for international media development.

CIMA convenes working groups, discussions, and panels on a variety of topics in the field of media development and assistance. The center also issues reports and recommendations based on working group discussions and other investigations. These reports aim to provide policymakers, as well as donors and practitioners, with ideas for bolstering the effectiveness of media assistance.

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**National Endowment
for Democracy**
Supporting freedom around the world

International standards on freedom of expression:

A basic guide for legal practitioners in Latin America and the Caribbean

OCTOBER 2018

ABOUT THIS GUIDE

This guide is a result of the online course "International legal framework of freedom of expression, access to public information and protection of journalists," which was created by the efforts of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and 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), in partnership with the Knight Center for Journalism in the Americas at the University of Texas at Austin, United States.

This guide does not include bibliographical references, but its contents were obtained above all from the following sources:

- Materials from the UNESCO online course "[International legal framework of freedom of expression, access to public information and protection of journalists](#)."
- Annual and thematic reports produced by the special rapporteur for freedom of expression of the IACHR.
- "[The right to freedom of expression: Advanced course for judges and legal practitioners in the Americas. Curriculum guide and study materials](#)," 2017. Catalina Botero, Federico Guzmán, Sofía Jaramillo, and Salomé Gómez. Dejusticia with support from the Open Society Foundations and Universidad de los Andes (in Spanish).
- "[Toolkit on freedom of expression, access to information and safety of journalists for judicial schools](#)," 2017. UNESCO and the Ibero-American Network of Judicial Schools (RIAIEJ).

ABOUT THE AUTHOR

Silvia Chocarro is a consultant on themes linked to freedom of expression. For nearly 20 years, she has been promoting the right to freedom of expression by coordinating programs to strengthen the media, providing advice to international and civil society organizations in their advocacy work, producing reports, and practicing journalism. Dr. Chocarro is global advisor on international bodies for the international freedom of expression network IFEX. She has also worked for UNESCO, where she participated in the drafting of the *United Nations plan of action on the safety of journalists and the issue of impunity*. This experience resulted in her doctoral thesis on the role of the United Nations in promoting the safety of journalists, 1945–2015, with which she obtained her Ph.D. in journalism at the Complutense University of Madrid.



ACKNOWLEDGMENTS

CIMA expresses its gratitude to UNESCO and the Office of the Special Rapporteur for Freedom of Expression of the IACHR for their collaborations. We are particularly thankful to Edison Lanza, special rapporteur for freedom of expression of the IACHR, and also to Guilherme Canela, regional advisor for communication and information at the UNESCO office in Montevideo. Their contributions and support in reviewing the contents of this guide were essential. CIMA is also thankful for the contributions of Frank La Rue, assistant director-general of communications and information at UNESCO, and Catalina Botero, law school dean at the University of Los Andes.

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UNclimatechange / Flickr / CC BY 2.0
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JUSTICE AND FREEDOM OF EXPRESSION GO HAND IN HAND IN THE CONSOLIDATION OF DEMOCRACY

"In vain does one throw a net before the eyes of those who have wings."

Gabriela Mistral (1889–1957)

Finding the truth: this is a goal judges share with journalists. They also share values such as independence, transparency, and accuracy—concepts deeply embedded in the work of both professions.

The award-winning British-Indian writer Salman Rushdie—who became a prominent figure in the freedom of expression movement after publishing his work *The Satanic Verses*—stated in an interview to the *Times of India* that freedom of expression and democratic rule of law are the very foundations of any open society. "If you don't have those things," he said, "you don't have a free country."

This reasoning is reflected in the Sustainable Development Goals, approved by the General Assembly of the United Nations in 2015. Its target 16.10—"Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements"—clearly states that democratic development and consolidation are impossible without ensuring a democratic rule of law and freedom of expression.

The conviction that an independent judiciary branch and a free, plural, and independent media environment are essential for protecting and promoting all human rights brought CIMA, UNESCO, and the IACHR Special Rapporteurship for Freedom of Expression together to strengthen two fundamental pillars of contemporary democracies: justice and freedom of expression.

Thanks to the committed efforts of many actors, over 5,000 legal practitioners from Ibero-America have received training on the international standards on freedom of expression. In the context of this joint initiative, judicial schools from the entire region have incorporated this issue into their work agendas, and a database on comparative jurisprudence in Spanish has been established. The Ibero-American Summit has highlighted the value of these efforts and recommends that its members must join hands to ensure national compliance with the international standards on freedom of expression and access to public information, including on the internet.

This basic guidebook is a result of these efforts. It is also a product of the intention to realize what at first seemed to be nearly impossible, though we dared to try: the endeavor to gather the wealth of over 70 years of international jurisprudence on freedom of expression in a concise and clear way, and to outline a roadmap for legal practitioners so their decisions can be aligned with these international standards.

We hope this guide will be a helpful addition to other important tools that are already available to judges, prosecutors, and attorneys, as well as other Ibero-American and Caribbean legal practitioners. We are confident that it will become a relevant reference in the continuous work to strengthen democracy, the rule of law, and the right to freedom of expression in the region.

Enjoy the report!



Mark Nelson
Executive Director
CIMA



Lidia Britto
Director
UNESCO, Regional Office of Montevideo



Edison Lanza
Special Rapporteur for Freedom of Expression
IACHR

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1. An introduction to the right to freedom of expression

The right to freedom of expression is crucial for the exercise of other rights, but also for the full realization of our humanity. It is the cornerstone of every free and democratic society.

What is the right to freedom of expression? It is the right to

- Express ideas and opinions, and transmit information of all kinds;
- Access, seek, and receive information; and
- Impart information and ideas regardless of borders and through any medium of expression.

*Like every human right, the right to freedom of expression is **universal** and **inalienable**. It is also **indivisible** and **interdependent** in its linkages to all other human rights.*

Universal:

Inherent to all human beings without exception

Inalienable:

Cannot be suppressed, except in unusual circumstances and always under the safeguards of due process

Indivisible and interdependent:

The progress of one right facilitates progress for the others; conversely, the denial of one right negatively affects the others

Why is it so fundamental?

- **It is essential for the full realization of our humanity.** Without the right to freedom of expression, the most basic of our liberties—the right to think and share our views with other people—would be denied.
- **It is an essential condition for democracy.** A democratic system could not function without the full and effective participation of citizens in the context of a free and plural society. To ensure participation in this process, we all must have access to the means of self-expression, as well as to the information that enables us to make decisions regarding the society in which we want to live.
- **It is indispensable for the exercise of other key rights.** Without ensuring the right to freedom of expression, it would not be possible to fulfill other rights, for instance, the rights to freedom of association and participation in public affairs. The denial of the right to freedom of expression would also impair the exercise of other rights, such as the right to education and health.

Three basic elements of freedom of expression

- It is a right of each person, and it would not be just to restrict it to a group of individuals or those with certain professions.



As the Inter-American Court of Human Rights (I/A Court H.R.) emphasized in the **Case of Tristán Donoso v. Panamá**, the American Convention on Human Rights ensures the right to freedom of expression to “every individual, irrespective of any other consideration; so, such guarantee should not be limited to a given profession or group of individuals. Freedom of expression is an essential element of the freedom of the press, although they are not synonymous and exercise of the first does not condition exercise of the second.”

www.corteidh.or.cr/docs/casos/articulos/seriec_193_esp.pdf

- It has two dimensions, one individual and one collective. A consequence of having these two dimensions is that one of them must not be undermined by invoking the preservation of the other as a justification.



I/A Court H.R.'s Advisory Opinion OC-5/85 on the **compulsory membership in an association prescribed by law for the practice of journalism** highlights 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. It is equally true that the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view.”

www.corteidh.or.cr/docs/opiniones/seriea_05_esp.pdf

- The right to freedom of expression entails duties and responsibilities, but restrictions to it are legitimate only when they are based on very specific criteria.



Inter-American jurisprudence has determined that the interpretation of limitations to freedom of expression must be “judged by reference to the legitimate needs of democratic societies and institutions” since “freedom of expression is essential to any democratic form of government.”

www.cidh.oas.org/annualrep/94span/cap.V.htm

The three obligations of states

- **To respect** the right or refrain from interfering in its enjoyment
- **To protect** and exercise due diligence to prevent, punish, investigate, and compensate for the damage or harm caused by individuals or private entities
- **To fulfill** the right or take positive and proactive measures to make it effective

Furthermore, **states are obligated to fulfill the international standards and treaties** they have signed or adhered to. In these cases, they must recognize that the respective regional or international bodies are authorized to act on behalf of these standards and treaties. To attain this aim, their national legal frameworks must adopt mechanisms capable of successfully implementing these decisions, for instance, by adopting constitutional clauses that explicitly refer to the international norms, or by judicial decisions at the national level.



Key texts on the right to freedom of expression

The international framework:

Article 19. The Universal Declaration of Human Rights (1948)

"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."

<http://www.un.org/en/universal-declaration-human-rights/>

Article 19. International Covenant on Civil and Political Rights (1966)

1. Everyone shall have the right to hold opinions without interference.
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, in print, in the form of art, or through any other medium of one's 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."

<https://treaties.un.org/doc/publication/untc/volume%20999/volume-999-i-14668-english.pdf>

The inter-American framework:

Article 4. American Declaration of the Rights and Duties of Man (1948)

"Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever." <https://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm>

Article 13. American Convention on Human Rights (1969)

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."

<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>

Article 4. Inter-American Democratic Charter (2001)

"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." http://www.oas.org/charter/docs/resolution1_en_p4.htm

Essential sources of international and inter-American standards

The websites of the following United Nations (UN) and inter-American bodies provide the fundamental texts regarding the standards and treaties that are sources of law, including soft law—the set of nonbinding norms, linked to the right to freedom of expression.

United Nations

- **General Assembly.** The General Assembly is the main deliberative policy-making and representative body of the United Nations.
<http://www.un.org/en/ga/>
- **Security Council.** The Security Council has primary responsibility for maintaining international peace and security. Under the UN Charter, all member states agree to accept and fulfill the decisions of the Security Council, which has 15 members, including five permanent members.
<http://www.un.org/en/sc/>
- **Human Rights Council.** The Human Rights Council is an intergovernmental body within the United Nations system made up of 47 states responsible for promoting and protecting human rights around the globe.
<https://www.ohchr.org/en/hrbodies/hrc/pages/home.aspx>
- **Universal Periodic Review.** The Universal Periodic Review is a process driven by the UN member states under the auspices of the Human Rights Council, which provides the opportunity for each state to declare what actions they have taken to improve the human rights situation in their countries and to fulfill their human rights obligations. In addition to the state assessments, recommendations are made at the Universal Periodic Review.
<https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>
- **Special Procedures.** The Special Procedures of the Human Rights Council are independent human rights experts with mandates to report and give advice on human rights from a thematic or country-specific perspective. The following Special Procedures are of particular interest:
 - Special rapporteur on the promotion and protection of the right to freedom of opinion and expression <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>
 - Special rapporteur on the right to privacy <https://www.ohchr.org/en/issues/privacy/sr/pages/srprivacyindex.aspx>
 - Special rapporteur on the situation of human rights defenders <https://www.ohchr.org/en/issues/srhrdefenders/pages/srhrdefendersindex.aspx>
- **Treaty Bodies.** The human rights treaty bodies are committees of independent experts who monitor the implementation of the core international human rights treaties. Each state party to a treaty has an obligation to take steps to ensure that everyone in the state can enjoy the rights set out in the treaty. One of the most relevant treaty bodies linked to the right to freedom of expression is the following:
 - The Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights (1966) and its Optional Protocols by its state parties. <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>

- **UNESCO.** The United Nations Educational, Scientific and Cultural Organization (UNESCO) is the UN agency with the mission of facilitating “the free circulation of words and images” (UNESCO Constitution, 1945). Its General Conference establishes norms and standards on freedom of expression and access to public information. UNESCO also counts on international conventions related to these rights, such as the “Convention on the protection and promotion of the diversity of cultural expressions.”
<https://en.unesco.org/>
<https://en.unesco.org/creativity/convention>

The Inter-American System

The bodies of the Organization of American States (OAS) include its General Assembly, the Permanent Council, the General Secretariat, and the Inter-American Commission on Human Rights (IACHR). The Inter-American Human Rights System also includes the Inter-American Court of Human Rights.

- **Inter-American Commission on Human Rights.** The IACHR’s mission is to promote and protect human rights in the Americas. It is composed of seven independent members. Its work is structured on many pillars, among them the tasks of monitoring the situation of human rights on the continent, assessing individual petitions regarding human rights violations, establishing precautionary measures, and referring cases and advisory opinion requests to the Inter-American Court of Human Rights.
<http://www.oas.org/en/iachr/>
- **Office of the Special Rapporteur for Freedom of Expression.** The Office of the Special Rapporteur for Freedom of Expression has the general mandate of implementing activities to promote and protect the right to freedom of opinion and expression. Its activities include visiting OAS member states, issuing reports, and providing technical assistance.
<http://www.oas.org/en/iachr/expression/index.asp>
- **The Inter-American Court of Human Rights.** The I/A Court H.R. is an autonomous judicial institution of the OAS whose purpose is to apply and interpret the American Convention on Human Rights. The court has both a judicatory and advisory mandate. It consists of seven judges individually elected by the OAS General Assembly.
<http://www.corteidh.or.cr/index.php/en#>



Photo: Inter-American Court of Human Rights / Flickr / CC-BY-SA 2.0

1. An introduction to the right to freedom of expression

Learn more: The Sustainable Development Goals

The Sustainable Development Goals (SDGs) adopted by the General Assembly of the United Nations in 2015 are a set of 17 goals and 169

targets with the aim of improving the world's social, economic, and environmental conditions by 2030. SDG target 16.10 commits to “ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements” as a path to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”



<https://sustainabledevelopment.un.org/sdgs>

10 key challenges to freedom of expression

1. **Discrimination** based on a person's religious belief, sexual identity, gender, or any characteristic of a disadvantaged individual or group that prohibits the enjoyment of their right to freedom of expression as a result
2. Illegitimate **governmental control** mechanisms over the media
3. **Commercial pressures** that threaten the media's ability to disseminate public interest content
4. **Lack of support** for public service and community broadcasters
5. **Violence** against journalists and impunity in connection with crimes against them
6. Legal and administrative limits to the **right to access public information**
7. The **criminalization of defamation** by imposing restrictions on criticizing the government or public officials, as well as beliefs and religions
8. Abusive **restrictions** on the right to freedom of expression based on justifications such as national security, the fight against terrorism, hate speech, and violent extremism
9. The **risk of surveillance**, the challenge of maintaining online personal security, and the role of new actors such as internet service providers and other intermediaries on the internet
10. Lack of **universal access** to information and communication technologies

Source: List updated by the author based on the challenges identified in 2010 by the special rapporteurs on freedom of expression of the United Nations, Inter-American Commission on Human Rights, Organization for Security and Co-operation in Europe, and the African Commission on Human and Peoples' Rights.

<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=784&IID=1>

Important note:

The right to freedom of expression is a universal right. It is not an exclusive right of certain groups, such as journalists or artists. However, due to the relevant role these groups play in society in connection with their exercise of this right, they receive special attention when they are deprived of it.



Selected readings

General comment no. 34. Article 19: Freedoms of opinion and expression. 2011. UN Human Rights Committee.

<http://undocs.org/en/CCPR/C/GC/34>

Presentation of the inter-American legal framework regarding the right to freedom of expression. 2009. Catalina Botero. IACHR, OAS.

<http://www.oas.org/en/iachr/expression/topics/standards.asp>

National case law on freedom of expression. 2017. Edison Lanza. IACHR, OAS.

http://www.oas.org/en/iachr/expression/docs/publications/jurisprudencia_eng.pdf

El derecho a la libertad de expresión. Curso avanzado para jueces y operadores jurídicos en las Américas. Propuesta de guía curricular y materiales de estudio. 2017. Catalina Botero, Federico Guzmán, Sofía Jaramillo y Salomé Gómez. Dejusticia con el apoyo de Open Society Foundations y la Universidad de los Andes.

www.dejusticia.org/wp-content/uploads/2017/05/Gui%C3%A1-Curricular-Versio%C3%81n-Final-.pdf

Caja de herramientas para escuelas judiciales iberoamericanas: formación de formadores en libertad de expresión, acceso a la información y seguridad de periodistas ["Toolkit on freedom of expression, access to information and safety of journalists for judicial schools"]. 2017. UNESCO and the Ibero-American Network of Judicial Schools (RIAIEJ).

<http://unesdoc.unesco.org/images/0025/002515/251593S.pdf>

Declaration of principles on freedom of expression. 2000. IACHR, OAS.

<https://www.oas.org/en/iachr/mandate/basics/declaration-principles-freedom-expression.pdf>

Background and interpretation of the Declaration of Principles. 2000. IACHR, OAS.

<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=132&ID=1>

Freedom of thought and expression in the case law of the Inter-American Court of Human Rights, 4th edition. Inter-American Press Society. 2016. Sergio García Ramírez & Alejandra Gonza. A 2007 edition in Spanish is available at the I/A Court H.R website under the title: La libertad de expresión en la jurisprudencia de la Corte Interamericana de Derechos Humanos. 2007.

<http://www.corteidh.or.cr/sitios/libros/todos/docs/libertad-expresion.pdf>

I/A Court H.R. **Case of Herrera Ulloa v. Costa Rica.** Judgment of July 2, 2004.

http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf

I/A Court H.R. **Case of Tristán Donoso v. Panamá.** Preliminary objection, merits, reparations, and costs. Judgment of January 27, 2009.

http://corteidh.or.cr/docs/casos/articulos/seriec_193_ing.pdf



Resources

Inter-American Court of Human Rights. Includes a case law database.

<http://www.corteidh.or.cr/index.php/en>

Case law databank on freedom of expression. Global Freedom of Expression, Columbia University, in collaboration with UNESCO's Office in Montevideo (Uruguay) and Dejusticia, with the support of Catalina Botero, Dean at the Law School at Universidad de los Andes (Colombia), the Foundation for Press Freedom, and Universidad Externado de Colombia.

<https://globalfreedomofexpression.columbia.edu/cases/>

Center for International Media Assistance (CIMA), an initiative of the National Endowment for Democracy (NED). Washington, DC, United States. Research, assessment, and promotion center on the development of independent media.

www.cima.ned.org

IFEX. Global network of civil society organizations that defend and promote freedom of expression and information.

<https://ifex.org/>

ARTICLE 19. International nongovernmental organization (NGO) dedicated to defending freedom of expression and information.

www.article19.org

Freedom House. Works to defend human rights and democratic change, and monitors the situation of press and internet freedom around the world. Produces the annual reports "Freedom of the press" and "Freedom on the net."

freedomhouse.org

Center for Studies on Freedom of Expression and Access to Information (CELE). Universidad de Palermo, Argentina.

<https://www.palermo.edu/cele/english/>

Universal Human Rights Index. Database with human rights recommendations issued by the three key pillars of the United Nations human rights protection system: the treaty bodies established under the international human rights treaties, the Special Procedures, and the Universal Periodic Review of the Human Rights Council.

<http://uhri.ohchr.org/en/>



Cases

I/A Court H.R. **Compulsory membership in an association prescribed by law for the practice of journalism.** Advisory Opinion OC-5/85 of November 13, 1985.

http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf

2. Protecting journalists: The role of the judiciary

National courts are key actors in the development and implementation of international and regional standards on human rights.

According to the interpretation of the I/A Court H.R., local justice systems can expand on and strengthen the content of national constitutional norms and laws, and, accordingly, the content of the available international instruments themselves. National judges also play an important role in the process of implementing the international legal framework on human rights in the domestic context of their countries.

Silencing the messenger

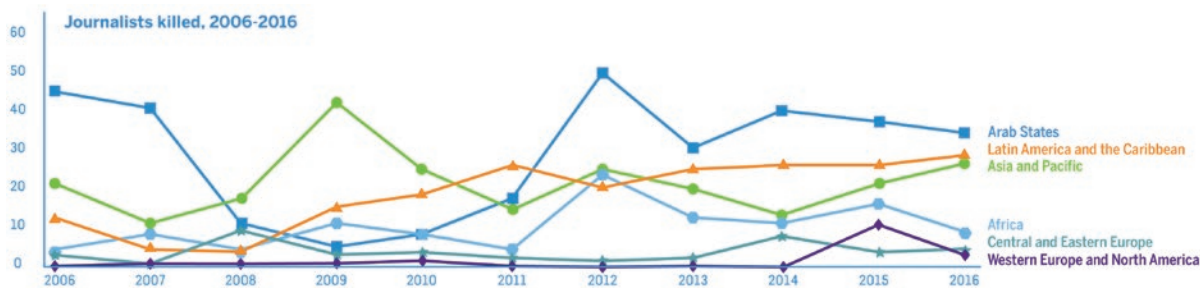
According to UNESCO figures, in the 10 years between 2007 and 2016, 845 journalists were murdered around the world. In Latin America alone, 192 journalists were killed. In addition to these figures, thousands of attacks have been made against individuals exercising journalism in the forms of torture, threats, intimidation, harassment, kidnapping, forced disappearance, and arbitrary arrest, among others. Many actors were behind such attacks, including criminal organizations, national and local authorities, and other political or economic groups willing to silence journalists. Except for some specific periods (see graph on page 11), most attacks did not take place during armed conflicts, but in contexts in which informing the society about corruption, organized crime, human rights violations, and the destruction of the environment, among other themes, is dangerous and sometimes deadly.

Killing a journalist is the most extreme form of censorship.

Any attack against a journalist violates not only their right to life and personal integrity, but also their right to disseminate information and the public's right to receive that information. Therefore, it is also an infringement of the principles of transparency and accountability and everyone's right to participate in public debates, all of which are essential in a democracy.

Violence against journalists has a triple effect:

- It **infringes** the right of victims to express and disseminate their ideas, opinions, and information
- It **violates** the public's right to seek and receive information
- It produces an **intimidating effect** that results in silence and self-censorship among communicators



Source: "Time to break the cycle of violence against journalists: highlights from the UNESCO Director-General's 2016 report on the safety of journalists and the danger of impunity." UNESCO. 2016.

Impunity as the biggest enemy

Justice systems play a crucial role in the protection of journalists. One of the most serious problems of violence against journalists is impunity for those committing the crimes.

A lack of due diligence in the investigation, prosecution, and punishment of those responsible for attacks against journalists produces a violation of the right to justice, and of the judicial guarantees of affected individuals and their relatives. Moreover, each time an act of violence against the press is not investigated, and each time one of its perpetrators is not brought before justice, it is an invitation to new aggressions. It is essential to bring to justice not only the perpetrators of violent acts, but also their intellectual authors.



The I/A Court H.R. has reiterated on many occasions that impunity—"meaning the total lack of investigation, prosecution, capture, trial and conviction"—fosters "chronic recidivism of human rights violations, and total defenselessness of victims and their relatives." For this reason, the I/A Court H.R. warns states that "the State has the obligation to use all the legal means at its disposal." **Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala.**

http://www.corteidh.or.cr/docs/casos/articulos/seriec_37_ing.pdf

Nine in every 10 cases involving the killing of a journalist go unpunished.

What is journalism?

According to the I/A Court H.R. (Advisory Opinion OC-5/85), journalism is a primordial and central manifestation of our freedom of expression, and for this reason, it cannot be conceived merely as the provision of a service to the public. For Frank La Rue (2012), journalism as an activity and a profession "constitutes a necessary service for any society, as it provides individuals and society as a whole with the necessary information to allow them to develop their own thoughts and to freely draw their own conclusions and opinions."

<http://www.undocs.org/en/A/HRC/20/17>



In the **Case of Vélez Restrepo and Relatives v. Colombia**, the I/A Court H.R. stated that "journalism can only be exercised freely when those who carry out this work are not victims of threats or physical, mental or moral attacks or other acts of harassment."

http://www.corteidh.or.cr/docs/casos/articulos/seriec_248_ing%20.pdf

Who is a journalist?

Journalism is an activity exercised by all individuals "who observe and describe events, document and analyse events, statements, policies, and any propositions that can affect society, with the purpose of systematizing such information and gathering of facts and analyses to inform sectors of society or society as a whole" (Frank La Rue, 2012).

<http://www.undocs.org/en/A/HRC/20/17>



According to **General Comment No. 34 on Article 19 of the Universal Declaration of Human Rights** (2011), many people exercise the journalism function, such as professional or full-time analysts and reporters, blog authors, and other individuals who independently publish in the press, on the internet, or through other media outlets.

<https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

The three obligations of states

Prevention

- Adopt a public discourse that helps prevent violence against journalists and unequivocally repudiates attacks against individuals who engage in journalism
- Ensure security forces respect journalists
- Fulfill the right to the confidentiality of information sources, and of journalists' personal and professional notes and files
- Criminally punish violence against journalists and media workers
- Produce quality data, and collect and maintain accurate statistics linked to violence against journalists, to be used in the design, implementation, and assessment of efficient public policies



In the **Case of Vélez Restrepo and Family v. Colombia** (2012), the I/A Court H.R. affirmed that the obligation of ensuring a right entails the juridical duty to “take reasonable steps to prevent human rights violations, to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction in order to identify those responsible, to impose the appropriate punishments, and to ensure adequate reparation for the victim.” The court also noted that “states have the obligation to adopt special measures of prevention and protection for journalists subject to special risk owing to the exercise of their profession.”

http://www.corteidh.or.cr/docs/casos/articulos/seriec_248_ing%20.pdf

Protection

- Identify risks and warn the involved journalist(s) about their existence, assess the risks' characteristics and origin, decide and adopt the necessary protection measures for specific cases in an appropriate timeframe
- Pay special attention to the situation of journalists exposed to extraordinarily high risk as a result of the type of activities they perform
- Establish special protection programs to assist these groups in cases of chronic or systemic abuse.



In the **Case of Ríos et al. v. Venezuela** (2009), the I/A Court H.R. explained that it is not enough for the state to merely order the adoption of protective measures to fulfill its obligation to protect, since these, by themselves, do not “prove the State has effectively protected the beneficiaries.” The state must also ensure that the ordered measures of protection are executed efficiently.

http://www.corteidh.or.cr/docs/casos/articulos/seriec_194_ing.pdf

Promotion of justice

- Adopt an institutional framework capable of adequately assigning the necessary responsibilities to investigate and judge such crimes
- Act with due diligence and fully investigate whether crimes were motivated by the exercise of journalism
- Undertake investigations in a reasonable timeframe, avoiding delays and unjustified impediments
- Eliminate legal obstacles to investigative efforts; punish the most serious crimes against journalists in a way that is proportionate and effective
- Facilitate the participation of victims or their relatives in the investigations



In the **Case of Víctor Manuel Oropeza** (Report No. 130/99), the IACHR affirms that the state “must send a strong message to society that there shall be no tolerance for those who engage in human rights violations of this nature,” and that the homicide of a journalist “constitutes an aggression against all citizens inclined to denounce arbitrary acts and abuses to society, aggravated by the impunity” of its perpetrators.

<https://www.cidh.oas.org/annualrep/99eng/Merits/Mexico11.740.htm>

Source: Violence against journalists and media workers: Inter-American standards and national practices on prevention, protection and prosecution of perpetrators. 2013. Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, Organization of American States.

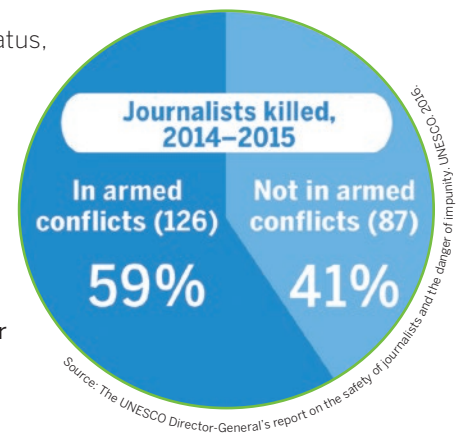
Violence in conflict situations

Journalists who document events in conflict zones should lose neither their civilian status, nor the resulting protection that international humanitarian law confers on them.

Protocol I Additional to the Geneva Conventions of 1949, relating to the protection of victims of international armed conflicts, states in Article 79 on measures of protection for journalists:

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 A (4) of the Third Convention."

<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6E95E63184FD05C8C12563CD0051E0FB>



Violence against female journalists

In their actions to fulfill the obligations to prevent, protect, investigate, prosecute, and criminally punish those responsible for crimes against journalists, it is important that states address the **specific needs and risks faced by women**. Though they do not constitute a majority of homicide victims, female journalists are subjected to certain attacks, such as sexual abuse, because they are women.

In many cases, women do not report such facts to the authorities due to fear of stigma or reprisal.

According to inter-American jurisprudence, states have a **special obligation to act with due diligence in cases of violence against women**, and public authorities must receive adequate training on gender issues.



Source: The safety of journalists and the danger of impunity. Report by the director-general to the Intergovernmental Council of the IPDC, 2014-2015. 2016. UNESCO. http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/IPDC/ipdc_council_30_4_en_02.pdf.

Learn more: Protection mechanisms in Latin America

UNESCO and the Office of the Special Rapporteur for Freedom of Expression of the IACHR-OAS recommend the establishment of special mechanisms to protect journalists. In Latin America, some countries have already created a number of such mechanisms:

- Colombia (2000). Legal framework on the protection of journalists in Colombia. journalistsprotection.org
- Mexico (2012). Protection mechanism for human rights defenders and journalists. www.gob.mx/defensorasyperiodistas
- Honduras (2015). Law on the protection of human rights defenders and journalists. www.tsc.gob.hn/leyes/Ley_Proteccion_defensores_der_humanos_periodistas_op_just.pdf

Important note:

When a person who exercises journalism becomes the victim of an attack, the first line of investigation to be followed and exhausted must cover the possibility that the attack was linked to his or her journalistic practice.



Selected readings

Violence against journalists and media workers: Inter-American standards and national practices on prevention, protection and prosecution of perpetrators. 2014. IACHR, OAS.

http://www.oas.org/en/iachr/expression/docs/reports/2014_04_22_violence_web.pdf

UN plan of action on the safety of journalists and the issue of impunity. 2012. UN.

https://en.unesco.org/sites/default/files/un-plan-on-safety-journalists_en.pdf

UNESCO director-general's report on the safety of journalists and the danger of impunity. 2016. UNESCO.

<https://en.unesco.org/themes/safety-journalists/dgreport>

Joint declaration on crimes against freedom of expression. 2012. Rapporteurs of the UN, OAS, Organization for Security and Co-operation in Europe (OSCE), and African Commission on Human and Peoples' Rights (ACHPR).

<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=905&IID=1>

Silenced zones: Highly dangerous areas for the exercise of freedom of expression. 2017. Edison Lanza. IACHR, OAS.

http://www.oas.org/en/iachr/expression/docs/publications/zonas_silenciadas_eng.pdf

The Minnesota Protocol on the investigation of potentially unlawful death. The revised United Nations manual on the effective prevention and investigation of extralegal, arbitrary, and summary executions. 2016. Office of the United Nations High Commissioner for Human Rights.

<https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>



Cases

I/A Court H.R. **Case of Vélez Restrepo and Family v. Colombia.** Preliminary objection, merits, reparations, and costs. Judgment of September 3, 2012.

http://www.corteidh.or.cr/docs/casos/articulos/seriec_248_ing%20.pdf

I/A Court H.R. **Case of Manuel Cepeda Vargas v. Colombia.** Preliminary objections, merits, reparations, and costs. Judgment of May 26, 2010.

http://www.corteidh.or.cr/docs/casos/articulos/seriec_213_ing.pdf

IACHR. **Case of Manoel Leal de Oliveira v. Brazil.** Report No. 37/10 of March 17, 2010.

<http://www.cidh.org/annualrep/2010eng/BRPU12308EN.DOC>

IACHR. **Case of Héctor Félix Miranda v. Mexico.** Report No. 5/99 of April 13, 1999.

<http://www.cidh.org/annualrep/98eng/merits/mexico%2011739.htm>

IACHR. **Case of Víctor Manuel Oropeza v. Mexico.** Report No. 130/99 of November 19, 1999.

<https://www.cidh.org/annualrep/99eng/Merits/Mexico11.740.htm>

I/A Court H.R. **Case of Carvajal Carvajal and Others v. Colombia.** Judgment of March 13, 2018. Merits, reparations, and costs (in Spanish).

http://www.corteidh.or.cr/docs/casos/articulos/seriec_352_esp.pdf



Resources

Ibero-American Network of Judicial Schools. A network of judicial schools from Ibero-America, based in Argentina.

www.riajej.com

Recorded killings and status of judicial inquiries 2006–2015. UNESCO.

[uploads.knightlab.com/storymaps/7f10de50036ef042961e18c9f07492a6/report/index.html](http://storymaps/7f10de50036ef042961e18c9f07492a6/report/index.html)

Reporters without Borders. International NGO aimed at defending freedom of expression and information.

<https://rsf.org/en>

Committee to Protect Journalists. International NGO that promotes press freedom worldwide.

www.cpi.org

Index on Censorship. NGO that promotes the defense of freedom of expression in the world, with a particular focus on journalists and artists.

www.indexoncensorship.org

PEN International. A worldwide association of writers who defend the right to freedom and expression and promote literature.

www.pen-international.org

Inter-American Press Association. An organization of media companies that defends freedom of the press in the Americas.

<https://en.sipiapa.org/contenidos/home.html>

Foundation for Press Freedom. A Colombian organization that defends freedom of the press.

<http://www.flip.org.co/index.php/en/>

An interview with

Frank La Rue

UNESCO'S ASSISTANT DIRECTOR-GENERAL FOR COMMUNICATION AND INFORMATION
FORMER UNITED NATIONS RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO
FREEDOM OF OPINION AND EXPRESSION

Which issue related to the right to freedom of expression is most frequently misunderstood?



One of the biggest misconceptions is the idea that it is exclusively a right of those who exercise journalism. That is not the case. Freedom of expression is everyone's right, although journalists do perform a crucial role in connection with it.

Next, there is confusion about the definition of a journalist. Based on international standards, those practicing journalism cannot be legally required to fulfill specific criteria such as having an academic degree, a compulsory membership or affiliation in a professional association, or a registration accredited by the state. The most threatening of these requirements is registration, since it becomes a mechanism of control by the state. Membership in a professional guild, association, or union on a voluntary basis is a good thing, but such membership cannot be compulsory.

Finally, obtaining a degree is indeed desirable, but to consider it mandatory would not be compatible with the exercise of the rights to freedom of expression and access to public information.

Regarding possible criteria for the exercise of journalism, some have claimed that a code of ethics should be required. What are your views on this?

The difference between human rights and ethics is that human rights are a compulsory standard, whereas ethics is a voluntary option for certain values. The existence of codes of ethics is important and desirable, but they cannot be imposed by the state, since, by so proceeding, they would be converted into laws and thus cease to be ethics.

More recently—and even more so with the expansion of social networks—it seems there is not a clear boundary between an unpleasant or offensive expression, which cannot be punished from the perspective of the international standards, and, on the other hand, what is known as hate speech. From what point on can an expression be characterized as hate speech?

What's important to understand on this topic is that hate speech must be seen as an exception. Even the terminology we use isn't appropriate since the phenomenon is really incitement to hatred—in the sense that it incites an act of aggression against another person or group of people.

In such cases, malice must also be identifiable, in the sense of a deliberate willingness to harm a person or group of people toward whom the hate speech is directed. And in addition to malice, there must be a deliberate intention to incite other people to harm this person or group of people. There must also be strong evidence of real harm, especially when such harm is imminent.

The problem is that if incitement to hatred is not seen as an exception, either prohibitions could be developed that undermine the right to freedom of expression, or people could refrain from expressing themselves freely from fear of being punished.

*“To protect freedom of expression,
hate speech has to be treated as an exceptional case.”*

3. The exception: Restrictions to freedom of expression and access to public information

As a principle, all speech is covered by the right to freedom of expression, independent of whether it contains shocking, unacceptable, indecent, offensive, unpleasant, or rude elements. Tolerance and a spirit of openness are among the basic features of pluralism that define democracy.

The triple test: How can we know if a restriction is legitimate?

Inter-American case law has resulted in a test encompassing three conditions that must be fully complied with for a restriction to the right to freedom of expression to be admissible under the American Convention on Human Rights:

- **Principle of legality.** Any restriction to the freedom of expression must be expressly, straightforwardly, and clearly prescribed by law in its formal and material aspects. In cases of an absolute prohibition on prior censorship, the law that establishes a restriction to freedom of expression can refer only to the need for subsequent liabilities.
- **Principle of legitimacy.** Any restriction must serve to attain the imperative objectives expressly enumerated in the American Convention on Human Rights to ensure the protection of the rights of others, national security, public safety, public health, and morals.
- **Principle of necessity and proportionality.** Any restriction must be strictly necessary in a democratic society for the attainment of its imperative aims. It must also be strictly proportionate to the aim pursued, and reasonably suited to the attainment of its imperative aim. The test of necessity is applied in a stringent way, and requires a demonstrated imperative or absolute need to introduce restrictions.



The UN Human Rights Committee explains that, regarding restrictions to freedom of expression, “the relation between right and restriction and between norm and exception must not be reversed” (General Comment No. 34).



According to the 2011 *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, any restriction “must be formulated in a way that makes clear that its sole purpose is to protect individuals from hostility, discrimination or violence, rather than to protect belief systems, religions or institutions as such from criticism.”

https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

Possible cases of disproportionate restrictions:

- A law enacted by the legislative branch establishes the compulsory membership of journalists to a professional association
- A criminal sentence condemns a journalist for the crime of defamation or contempt, for publishing an article denouncing an alleged case of corruption involving a public official
- A criminal lawsuit is filed against a person on the charge of terrorist praise or incitement to hatred as a consequence of his or her satirical comments
- A censorship board decides to block the screening of a film with content that a particular religion considers to be offensive
- Military authorities refuse to provide information to a judicial investigation on a case of forced disappearance
- Restrictions are established on what judges can say in the exercise of their functions
- In a criminal condemnation, an accessory punishment is imposed that prohibits an individual from owning or working at a media outlet or company



Photo: Rural Press Agency / Flickr / CC BY-NC-ND 2.0

Restrictions on freedom of expression must be the exception and never the rule.

What do the international standards establish?

Freedom of expression may be subject to restriction under some strict conditions. Under the international legal framework, limits to the exercise of this right are established by the following international instruments:

International Covenant on Civil and Political Rights

Article 19.3. "The exercise of the rights . . . 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."

Article 20.

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

American Convention on Human Rights

Article 13.2. "The exercise of the right . . . 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;
- b) The protection of national security, public order, or public health or morals."

Article 13.4. "Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence."

Article 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 punishable by law."

<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>

3. The exception: Restrictions to freedom of expression and access to public information

Five clarifications regarding restrictions to the right to freedom of expression

1. The prohibition of prior censorship

States must not establish prior, preventive, or preliminary restrictions to the right to freedom of expression, except for the cases typified under the international standards, such as the moral protection of childhood and adolescence (Article 13.4 of the American Convention on Human Rights).

<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>



In the Case of “**The Last Temptation of Christ**” (**Olmedo Bustos and Others**) v. Chile (2002), the I/A Court H.R. reviewed the prohibition imposed by Chilean judicial authorities on the screening of the motion picture *The Last Temptation of Christ* at the request of a group of citizens who sought to protect the images of Christ and the Catholic Church. The I/A Court H.R. stated that the right to freedom of expression protects both favorable information and information that may be considered to be shocking or offensive to society. The court concluded that Chilean authorities had authorized an act of prior censorship, which is proscribed by Article 13 of the American Convention on Human Rights.

http://corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf

2. The prohibition of indirect censorship

“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.” (American Convention on Human Rights, Article 13.3.)



In the Case of **Ivcher Bronstein v. Peru** (2001), the I/A Court H.R. ruled that Baruch Ivcher Bronstein’s right to exercise his freedom of expression had been violated. Ivcher Bronstein, the majority shareholder of Channel 2, *Frecuencia Latina*, had his Peruvian nationality title revoked by the state so that, according to the country’s laws, he could no longer continue to be the channel’s majority shareholder, and therefore no longer control its editorial direction.

http://www.corteidh.or.cr/docs/casos/articulos/seriec_74_ing.pdf

3. Incitement to national, racial, or religious hatred (hate speech)

International law does not yet agree on a universal definition of incitement to hatred, but it is unanimously held that its prohibition must be an exception. Incitement to hatred is frequently linked to expressions that incite the infliction of harm (particularly discrimination, hostility, or violence) based on the identification of the victim as someone belonging to a particular social or demographic group. In 2012, the UN special rapporteur on freedom of expression stated his concern regarding the existence and recourse to laws that repress the right to freedom of expression as a means to combat hate speech. Article 20 of the ICCPR and Article 13.5 of the American Convention on Human Rights define such restrictions.



In the Case of **Jersild v. Denmark** (1994), the European Court of Human Rights established that the condemnation of journalist Jens Olaf Jersild by the state of Denmark was unnecessary in the context of a democratic state. During a radio show, Olaf Jersild interviewed three young people who made racist and offensive statements against immigrants and other minorities, calling them “animals.” The European Court ruled that the journalist’s goal had not been to incite listeners towards violence, but only to inform them.

<https://globalfreedomofexpression.columbia.edu/cases/jersild-v-denmark/>

4. Contempt (*desacato*) laws are an illegitimate restriction on freedom of expression

Contempt, or *desacato*, laws are those that criminalize expressions that either offend or insult public officials in the exercise of their functions. The inter-American standards consider *desacato* laws to unjustifiably grant public officials a protective right that is not available to other members of society. *Desacato* laws restrict freedom of expression both directly and indirectly. Not only do they lead to threats of arrest or fines for individuals who insult or offend a public official, but the fear of criminal punishment discourages citizens from expressing their opinions regarding public interest issues and problems.



In the **Case of Kimel v. Argentina** (2008), the I/A Court H.R. ruled that the Argentine state had abused its punitive powers by imposing on journalist and historian Eduardo Kimel one year of imprisonment in addition to an excessive fine for the crime of libel. Kimel was criminally sentenced for having criticized in a book the judge who had investigated a massacre during the Argentine military dictatorship. The I/A Court H.R. stated that the measure was unnecessary and disproportionate, thus violating the journalist's right to freedom of expression. As a consequence, the court ordered the state of Argentina to reform its criminal legislation regarding the need to protect the honor and reputation of others, since this legislation violated the doctrine of strict legality.

http://corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf

5. In cases of defamation crimes, civil—not criminal—laws must prevail

According to the IACHR, using criminal law to punish people for speech related to public interest issues, public officials, candidates to public positions, or politicians violates Article 13 of the American Convention on Human Rights. For its part, the I/A Court H.R. does not deny the possibility of criminal proceedings, but considers their use to be disproportionate in relation to the crime in most cases. Civil punishments for defamation must not lead to an inhibiting effect on freedom of expression. They must seek to restore harmed reputations, instead of compensating claimants or punishing defendants. In particular, judges should prioritize the use of nonpecuniary penalties and apply pecuniary penalties only in strict proportion to the inflicted harm.



In the **Case of Herrera Ulloa v. Costa Rica** (2004), the I/A Court H.R. ruled that a violation of freedom of expression and a disproportionate punishment had occurred to journalist Herrera Ulloa, who was criminally sentenced for defamation after reproducing in a Costa Rican newspaper accusations of corruption that originally appeared in the European press against the consul of Costa Rica at the International Atomic Energy Agency in Belgium. Among other measures, the I/A Court H.R. ordered that the criminal procedures against Herrera Ulloa be annulled.

http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf

Important note:

Considering the fundamental role of freedom of expression in a democratic society, the subsequent imposition of penalties for speech linked to themes of public interest must be, as much as possible, civil instead of criminal, since the latter discourages the free exercise of the right to express opinions and disseminate public information.

Learn more: The UN Rabat Plan of Action

The **UN Rabat Plan of Action**—on the prohibition of advocacy of national, racial, or religious hatred that constitutes incitement of discrimination, hostility, or violence—establishes several criteria that must be taken into consideration by legislators, public prosecutors, and judges in their work assessing criminally prohibited speech.

See the complete document at www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

3. The exception: Restrictions to freedom of expression and access to public information



Selected readings

The inter-American legal framework regarding the right to freedom of expression. 2009. Catalina Botero. IACHR, OAS.

<http://www.oas.org/en/iachr/expression/docs/publications/INTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf>

Hate speech and incitement to violence against lesbian, gays, bisexual, trans and intersex persons in the Americas. Chapter IV of the Annual report of the Inter-American Commission on Human Rights. 2015. Edison Lanza. IACHR, OAS.

<http://www.oas.org/en/iachr/expression/docs/reports/annual/annualreport2015rele.pdf>

Criminal law and freedom of expression; public deliberations, democracy, and criminal law. Catalina Botero. Presentation at the seminar "Freedom of expression and the judiciary branch," held on April 7-8, 2018, in Rio de Janeiro, Brazil (in Spanish).

knightcenter.utexas.edu/mooc/Libex15/Modulo3/M4PonenciaBrasilVFinal.pdf

Report on the compatibility of "desacato" laws with the American Convention on Human Rights. 1994. IACHR, OAS.

<http://www.cidh.org/annualrep/94eng/chap.5.htm>

Libertad de expresión, legislación sobre medios de comunicación y difamación. 2015. International Press Institute.

ipi.media/libertad-de-expresion-legislacion-sobre-medios-de-comunicacion-y-difamacion/

Critics are not criminals. 2016. Committee to Protect Journalists.

<https://cpj.org/reports/2016/03/critics-are-not-criminals.php>

"Hate speech" explained: A toolkit. 2015. ARTICLE 19.

<https://www.article19.org/data/files/medialibrary/38231/'Hate-Speech'-Explained---A-Toolkit-%282015-Edition%29.pdf>

Countering online hate speech. 2015. Iginio Gagliardone, Danit Gal, Thiago Alves, and Gabriela Martínez. UNESCO.

unesdoc.unesco.org/images/0023/002332/233231e.pdf



Cases

I/A Court H.R. **Case of Kimel v. Argentina.** Judgement of May 2, 2008.

http://corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf

I/A Court H.R. **Case of Ricardo Canese v. Paraguay.** Judgement of August 31, 2004.

http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf

I/A Court H.R. **Case of López Lone et al. v. Honduras.** Judgment of October 5, 2015.

http://www.corteidh.or.cr/docs/casos/articulos/seriec_302_ing.pdf

IACHR. **Case of Adriana Beatriz Gallo, Ana María Careaga, and Silvia Maluf de Christin v. Argentina.** Report No. 43/15 of July 28, 2015.

<http://www.oas.org/en/iachr/decisions/2015/arpu12632gen.docx>

Supreme Court of Justice of Mexico. **Judgment of Case Acámbaro on the limits to the right to information.** Amparo Directo en Revisión 2044/2008.

www.scjn.gob.mx/Transparencia/XVII%20Sentencias%20y%20criterios%20%20Sentencia_/ADR_2044_2008_PS.pdf

European Court of Human Rights. **Case of Otegi Mondragón v. Spain.** March 15, 2011.

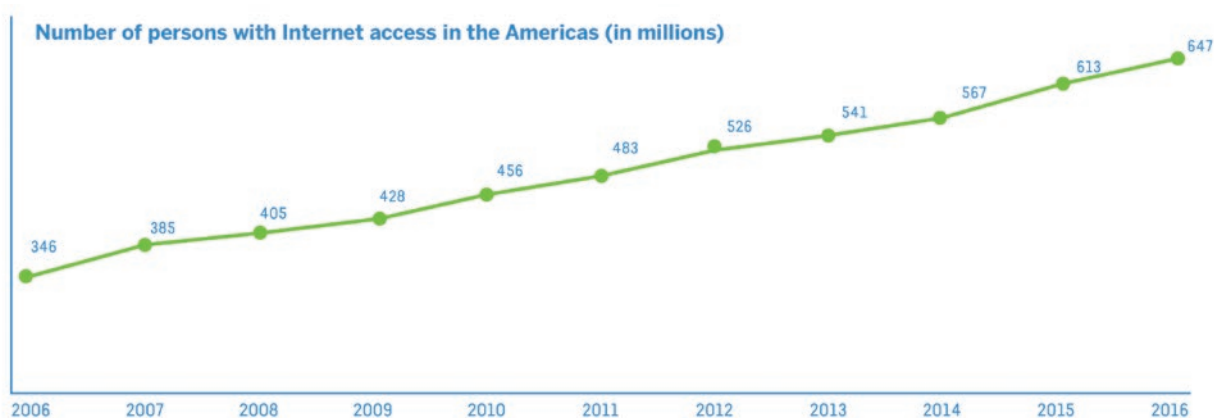
<https://www.legal-tools.org/doc/3ad0a6/pdf/>

4. Upholding freedom of expression on the internet

The internet has a huge potential to expand freedom of expression—as a means of disseminating and exchanging ideas, and of seeking and receiving information of all kinds.

The increasing expansion of the internet throughout the world, and especially in the Americas, makes it an indispensable instrument for the full exercise of human rights. For this reason, policies and practices related to the internet must be based on the observance and guarantee of human rights—and, particularly, the right to freedom of expression, which enables and facilitates the exercise of other rights on the internet.

The special rapporteurs on freedom of expression of the UN, OAS, OSCE, and ACHPR, as well as the UN Human Rights Committee, have stated that regulations established for other media forms—such as telephone, radio, and television—must never be directly transposed to the internet. Instead, regulations must be specifically tailored to this medium to address its distinctive features.



Source: International Telecommunications Union

The six guiding principles of upholding freedom of expression on the internet

- **Universal access.** States must enable access to the web for everyone—which means expanding the internet’s infrastructure as well as everyone’s access to the necessary technologies for its use—to promote digital literacy and ensure linguistic plurality.
- **Pluralism and diversity.** Any measure that could affect the internet must be aimed at ensuring that more—instead of fewer—people, ideas, opinions, and pieces of information can be involved in public deliberations through this medium.
- **Equality and nondiscrimination.** States must ensure that neither the law nor social, economic, or cultural conditions will create barriers—based on ideology, gender, race, language, or geographic location, among others—that restrict the right of everyone to use the internet.
- **Privacy.** The right to privacy—according to which no individual must be subjected to arbitrary or abusive interference in his or her private life, family, household, or correspondence—is an assumption behind the exercise of the right to online freedom of expression, which must be protected by the law and strictly fostered by public policies.
- **Free and open web—transparency and neutrality on the internet.** The principle of web neutrality is based on the commitment that neither states nor private actors will favor access by some users over others to the data that circulate on the internet. This principle ensures the equality of access to online information for everyone. It is a duty of the state to adopt the legislative, administrative, judicial, or other measures that may be necessary to ensure that web neutrality is enforced.
- **Multisector governance.** Internet governance must be a multisector process with the participation of states, private actors, civil society, and individual users.

Internet universality is an internet development model aimed at supporting the public interest. It is based on four principles: **human rights, openness, accessibility, and multistakeholder participation (ROAM).***

Human rights:

Respect for international human rights standards

Openness:

Absence of restrictions and openness of technical standards, software, data, and resources

Accessibility:

Quality access at an affordable cost, without discrimination

Multistakeholder participation:

Active participation by states, the private sector, civil society, academia, and users

* UNESCO adopted this concept in 2013.

Key challenges to ensuring the right to freedom of expression on the internet

1. Private sector

The private sector plays an unprecedented role as a mediator of the right to freedom of expression on the internet. In this sense, companies must be committed to respecting and promoting human rights in their internal policies, the design of their products, the development of their businesses, the training of their employees, and other relevant internal processes.



The Guiding Principles on Business and Human Rights (UN Human Rights Council, 2011) states that “Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”

https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

2. Intermediaries

Transmitting content over the internet is dependent upon intermediaries, that is, the companies that enable people to connect to the web. Intermediaries include internet service providers and website hosting services, social networks, and search engines. These entities are fundamentally tied to everyone's access to the internet.

2.1. Intermediaries should not be liable for the content they transmit. If necessary, those who generate unlawful content, not the intermediaries, should be prosecuted. It would be disproportionate and thus incompatible with the American Convention on Human Rights to ascribe such liability to intermediaries. The liability regime, in all cases, must agree with the triple test of legality, necessity, and proportionality.

2.2. Intermediaries should not be responsible for monitoring the content they help convey since this would impair the services they offer and, in practical terms, lead to the practice of filtering or blocking content on the internet.

2.3. Intermediaries should define clear and transparent service conditions for internet users for all aspects related to the rights to freedom of expression and privacy. In this regard, they must be allowed to publicize the requests they receive from governmental agencies to provide data related to their users. Whenever they believe that such requests would violate human rights, intermediaries should be allowed to question their legality. Of course, intermediaries must comply with a judicial order or mandamus if they receive one.

2.4. States should seek uniformity in their standards regarding intermediary liability as an essential element to maintain a free, open, and global internet. Whenever it is necessary to settle liability issues, a competent judge must be the one "closest" to each case, that is, someone with jurisdiction at the location where an affected party lives, where content was created, or where the content's author resides. Judges should avoid "libel tourism" or "forum-shopping," by which they argue that they are not the competent authority to settle a case in the absence of verifiable substantial damage or harm in their jurisdiction.



The report **Freedom of expression and the internet** (2013), produced by the Special Rapporteur's Office of the IACHR, explains the issue of intermediaries in further detail:

http://www.oas.org/en/iachr/expression/docs/reports/2014_04_08_internet_eng%20_web.pdf



In the **Case of María Belén Rodríguez v. Google Inc.** (2014), the Supreme Court of Justice of Argentina stated that "establishing an objective liability-regime in this activity would definitely discourage the existence of search engines, which play an essential role in the right to seek, receive and disseminate information and opinions freely on the Internet."

www.stf.jus.br/repositorio/cms/portaIStfInternacional/newsletterPortaIInternacionalJurisprudencia/anexo/Fallo_R.522.XLIX_Corte_Suprema_da_Argentina_28_oct._2014.pdf



In the **Case of Ariel Bernardo Sujarchuk v. Jorge Alberto Warley** (2013), the Supreme Court of Justice of Argentina ruled that it was not acceptable to establish a loss and damage liability for a blogger who introduced and hosted on his blog unlawful content produced by a third party, since his blog clearly indicated the internet sites where he had found that information.

www.saij.gob.ar/jurisprudencia/FA13000107-sujarchuk_warley_danos-federal-2013.htm



The **Manila Principles on Intermediary Liability** (2015), proposed by civil society, recommend that states should not restrict internet content without an order by a judicial authority, and that content restriction requests should be clear, unambiguous, and follow due process (Principles 2 and 3).

<https://www.manilaprinciples.org/>

3. Filters and blocking

As a rule, neither states nor intermediaries should filter or block internet content. However, in some exceptional cases, a judicial authority may establish such measures in a transparent and impartial way, when they become necessary and proportionate to the attainment of imperative aims. Filtering or blocking internet content as ways to counter hate speech should be used only as measures of last resort.



In the **Case of Cengiz v. Turkey** (2015), the European Court of Human Rights ruled that blocking YouTube in Turkey is a violation of the right to freedom of expression.

<https://globalfreedomofexpression.columbia.edu/cases/cengiz-v-turkey/>

4. Upholding freedom of expression on the internet

4. The “right to be forgotten”

The so-called right to be forgotten is the result of a ruling by the Court of Justice of the European Union, which determined that Google and other search engines are “responsible” for the treatment of personal data appearing on internet sites. This means that anyone may request to remove specific personal information from the internet search engines—though it will not disappear from its original source—whenever such removal does not affect the public interest. More accurately, this could be called the right to not be indexed by search engines. This ruling—which applies only in Europe—has resulted in controversy and is not unanimously endorsed (please read the interview with Edison Lanza on page 37).



For the IACHR special rapporteur for freedom of expression, “the application to the Americas of a private system for the removal and de-indexing of online content with such vague and ambiguous limits is particularly problematic in light of the wide regulatory margin of the protection of freedom of expression provided by Article 13 of the American Convention on Human Rights.”

5. Intellectual property and copyright

Intellectual property (IP) and copyright laws are particularly relevant to discussions of freedom of expression on the internet. If, on the one hand, there is a public interest in upholding IP and copyright laws, it is also important to respect freedom of expression, cultural rights, and access to public information on the other. The main challenge is reaching a balance between these needs.



The UN Committee on Economic, Social and Cultural Rights (General Comment No. 17) states: “intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.”

<https://www.refworld.org/docid/441543594.html>

6. Privacy and data protection

Internet operations depend on the creation, storage, and administration of personal and other types of data. This means that a huge quantity of information related to individuals can be intercepted, stored, and assessed both by states and third parties. For this reason, states have the obligation to respect and protect the right to privacy in the digital age, and to adopt or adapt their laws and practices with this purpose in a transparent way. States must also adopt positive measures to inform citizens about their rights and how their personal data are treated on the internet.



7. Surveillance, monitoring, and interception programs

Surveillance programs are legitimate only in exceptional cases. Considering their huge potential to invade and violate privacy and freedom of expression, surveillance programs must be carefully designed and implemented, and strictly monitored. Surveillance programs must always seek to attain a legitimate aim in response to an objective, concrete, and serious risk. It must also be established that surveillance is necessary to avoid this specific risk.

8. Encryption and anonymity

Anonymity is a means of protecting privacy. It can also encourage freedom of expression by facilitating public participation. When people can remain anonymous, they can avoid eventual reprisals in connection with expressing an opinion. States may adopt measures to identify an individual in a reliable way in the context of a judicial investigation, while always observing a proportionate course of action. Encryption also aims to protect information privacy in the digital age. States should not adopt measures that restrict the ability of individuals to protect themselves, except in a few situations, and as long as those measures are legal, necessary, and proportionate.

When are restrictions legitimate?

Five basic conditions

1. **Clear and explicit legal provision.** Any restriction on the right to freedom of expression on the internet must be provided by a clear and precise law, which cannot allow for ambiguity or interpretative maneuvers should public authorities intervene.
2. **Legitimate, imperative aims.** Introducing restrictions to internet communications are allowed only when such restrictions are necessary for the attainment of one of the legitimate aims provided by Article 13.2 of the American Convention on Human Rights. Restrictions can be made only by interpreting their reach in accordance with the jurisprudence of the system, and not in broad or vague terms.
3. **Test of necessity, proportionality, and reputability.** When assessing the necessity, proportionality, and reputability of an internet restriction as a means of attaining an imperative aim, a comprehensive perspective must be adopted with a focus not only on the rights of individuals and broadcasters, and on the effects such a restriction would have on their freedom of expression, but also, and particularly, on the impacts it would have on the system as a whole, considering the way the web is structured and operates.
4. **Jurisdiction.** Considering the interactive nature of the internet, its regulation inevitably leads to legal issues linked to the jurisdiction of states to regulate it or impose other types of limitations. From the perspective of IACHR's special rapporteur, the states with the closest jurisdictional linkages to the content in question may exercise their authority over it.
5. **Due process and judicial control.** Any measure to restrict content on the internet must be fully transparent. Measures must also be adopted in agreement with the applicable legal procedures and subjected both to administrative control—by autonomous, independent, and reputable agencies—and judicial control.

Learn more: The Internet of Things

The Internet of Things is a networking capability through which electronic chips are incorporated into products, such as home appliances, enabling information to be sent to and from them over the internet. This process creates the challenge of designing effective policies that support the public interest, which may include some necessary protections for individual users and their human rights. The Internet of Things is also linked to some ethical challenges and involves a fundamental commitment to transparency.

Important note:

The UN Human Rights Council has reiterated that all human rights are protected on the internet, particularly the right to freedom of expression, and including the issue of security.

<http://undocs.org/en/A/HRC/RES/38/7>



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Ibero-American Network of Judicial Schools.

www.riaej.com

Internet Governance Forum. A multisector platform webpage for discussing public policies on the internet.

www.intgovforum.org

World Intellectual Property Organization. UN organization with the mandate of addressing intellectual property issues.

www.wipo.int

Digital rights. Latin American NGO that promotes human rights in the digital environment (in Spanish).

www.derechosdigitales.org

An interview with

Catalina Botero

DEAN OF THE LAW SCHOOL AT THE UNIVERSITY OF LOS ANDES (COLOMBIA)

FORMER SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION OF THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS



Would criminal law be applicable in cases of defamation against public officials?

The norms that punish libel, that is, criminal defamation, are extremely far-reaching. They usually punish speech that may, for instance, offend another individual and harm his or her honor or prestige. If such norms were to be applied to journalistic investigations in connection, for instance, with human rights violations or corruption scandals—because a public official mentioned feels offended—journalists could end up facing criminal lawsuits on a permanent basis. Such lawsuits can be quite costly and severely harm the exercise of journalism. For this reason, in all cases in which the I/A Court H.R. examined the situation of individuals punished for supposedly offending the honor of public officials, it established that it was disproportionate to apply criminal law to the exercise of journalism. If a journalist publishes false information either knowing that it is false or totally disregarding the truth, he or she will not remain unpunished and one may file a lawsuit against this person in order to obtain a compensation.

However, the attempt to start a criminal lawsuit in these cases could lead to the silencing of critical journalism itself.

When a journalist is killed, is there a specific set of procedures judges should follow?

Yes, definitely. States have the obligation to fully investigate, in all cases, the hypothesis that the journalist was killed as a consequence of his or her journalistic work. This is particularly important in cases where journalists were investigating public interest issues such as corruption, organized crime, and public safety and order. When journalists are murdered, we frequently notice that this hypothesis is not exhaustively pursued, and investigations are then redirected toward other hypotheses. In these instances, the cases usually end in impunity since the state did not comply with its obligation to investigate the key hypothesis that the journalist was killed due to the exercise of his or her profession.

When we exercise our right to access public information, should we justify the reasons for which we are seeking such access?

Any person has the right to access public information, which truly belongs to all citizens, and the state has the obligation of making it available. In a democratic society, the state has an obligation to be accountable, and the way of doing so is by being transparent, that is, by providing its citizens with information on how it manages public affairs. Only in quite exceptional cases, in which an utter necessity surpasses a strict judgment of proportionality, could the state temporarily classify information.

And what if someone happens to disclose information held classified by the state?

When someone discloses classified information in good faith with the purpose of denouncing corruption or human rights violations by the state, this person needs to be protected against reprisals. In these types of cases linked to serious human rights violations or corruption, the secrecy obligation is subordinate to the protection of human rights.

What happens if the state believes the disclosure of this information threatens public security?

The state cannot arrest a person for revealing serious human rights violations, based on the assumption that he or she was acting against national security, since the biggest threat to national security is the human rights violation itself. Information on serious human rights violations is not subject to secrecy.

“The secrecy obligation is subordinate to the protection of human rights.”

5. The right to access public information

The right to access public information is a fundamental right protected by Article 19 of the Universal Declaration of Human Rights and by Article 13 of the American Convention on Human Rights.

Basic elements of the right to access public information

All people have the right to access information at public institutions, and the exercise of this right is vital for transparency and citizen participation in public affairs.

- **Access to public information is a universal right.** Whenever we request access to public information, no individual or institution has the right to ask us why we are requesting it. Moreover, anyone who accesses public information also has the right to disseminate it.
- **All public authorities are obligated to abide by the international provisions on the right to access public information.** According to the Inter-American Juridical Committee ([RES.14/7 LXXIII-O/08](#)), this includes “the executive, legislative and judicial branches at all levels of government, constitutional and statutory bodies, bodies which are owned or controlled by government, and organizations which operate with public funds or which perform public functions.” It also includes all individuals who perform public functions.
- **The right to access public information also applies to information under state custody, administration, or possession,** including the information states produce or are obligated to produce, the information under possession of entities that administer public services and resources, and the information states collect or are obligated to gather to fulfill their functions and duties.

The right to access public information is the rule, and secrecy is the exception.

Why is it so important?

- Access to public information is a key element in the construction and consolidation of democracy and active citizenship. Without access to information, people cannot make informed decisions regarding their own lives.
- Access to public information is indispensable as it enables people to learn about their rights, and how these rights must be exercised and protected.

Guiding principles

- **Principle of maximum disclosure.** Access to public information must be maximized by a regime of strictly limited exceptions, which must be regulated by law in a clear and precise way. This means states have the duty to provide a justification when they restrict access to any information—and not the opposite. Some essential rules of interpretation stem from the principle of maximum disclosure. For instance, in cases of conflict between rules or juridical gaps, the right to access public information must prevail.



In the **Case of Gomes Lund et al. v. Brazil** (2010), the I/A Court H.R. ruled that Brazil violated Article 13 of the American Convention on Human Rights by refusing to share information on the circumstances of the disappearances of members of the Araguaia Guerrilla, a political and activist movement for which participants were tortured and killed during the period of the military dictatorship. The Brazilian government referred to the country's Amnesty Act of 1979 as grounds for not providing the requested information, and alleged providing such information would threaten national security. However, the I/A Court H.R. ruled that states cannot withhold information under the rationale of secrecy for national security reasons in cases of public information requests related to human rights violations.

http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf

<https://globalfreedomofexpression.columbia.edu/cases/gomes-lund-v-brazil/>

- **Principle of good faith.** When a citizen asks the state to disclose information, states must act in a way that effectively satisfies the spirit and aims of the right to access public information. If a state cannot provide the requested information, it must explain why it is withholding this information.



In the **Case of Claude Reyes v. Chile** (2006), the I/A Court H.R. ruled that the Chilean government violated the right to freedom of expression and the right to access and receive public information to the members of an environmental organization, since the state did not provide a satisfactory justification for refusing to allow access to information under its custody.

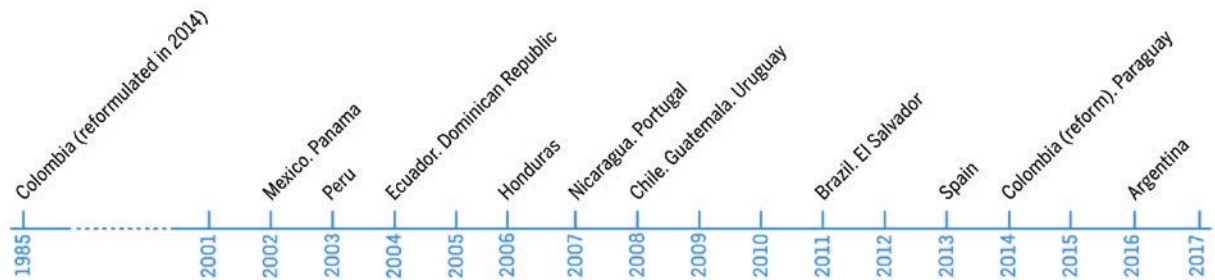
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The eight obligations of states

- **Responding** in a timely, complete, and accessible way to information requests.
- **Having a simple, quick, and free or low-cost mechanism** that enables compliance with the right to access public information.
- **Ensuring a reliable and effective judicial review of denied requests**, with a mandate to settle the merits of controversies and order the delivery of public information in cases in which the right to access public information was violated.
- **Being actively transparent**, at least regarding issues including the structure, function, and budget of state activities and investments; information requests regarding the exercise of other rights, or offers of services, benefits, subsidies, or contracts of other types; and the procedure for filing complaints or requesting consultations.
- **Producing or gathering information** that is necessary to fulfill state duties.
- **Promoting a culture of transparency**, including by supporting campaigns to promote, implement, and ensure the right to access public information.
- **Adjusting implementation** by means of a plan that enables the real and effective fulfillment of the right to access public information within a reasonable timeframe, while ensuring the proper storage and maintenance of information, and quality training for the public employees who must fulfill this right.
- **Ensuring the domestic legal structure** meets the international standards on accessing public information.

Laws and decrees on access to information in Ibero-America



Source: Freedominfo.org

On possible restrictions: Openness as the rule and secrecy as the exception

- The right to access public information can be restricted only in **exceptional and strictly necessary cases**, which must be previously **established by clear and precise laws**. In this sense, the burden of proof for justifying a refusal of access to information must revert to the state body to which the information was requested, and negative replies must be presented in writing. A legal system governing restrictions to the right to access public information should be able to demonstrate how a refusal remains in accordance with the American Convention on Human Rights.
- Every restriction must surpass a **proportionality test**:

Step 1:

A restriction must be related to one of the legitimate aims that justify it.

Step 2:

It must demonstrate that disclosing the requested information would risk leading to substantial damage in relation to this legitimate aim.

Step 3:

It must demonstrate that such damage in relation to this aim surpasses the public interest of disclosing the requested information.

- Restrictions must be temporary and/or expire once the justification is no longer valid.
- Every restriction must have a legitimate aim. International standards recognize the legitimacy of restricting access to information based on the protection of national security, public order, public health, public morals, and the rights of others.

The right to access public information is a universal right, in all places.



The five types of information that can be legitimately retained for national security reasons

1. Information regarding **ongoing defense operations and military capacity issues** during the period when this information is operationally useful.
2. Information related to the production, competence, or use of **weaponry and other military systems**, including communications systems.
3. Information linked to specific measures to **safeguard the state's territory, critical infrastructure, or national institutions** that play an essential role in protecting against threats, the use of force, or sabotage, whenever their effectiveness depends on their confidentiality.
4. Information belonging to or stemming from **intelligence operations**, sources, and methods, when they are related to national security issues.
5. Information related to **national security issues transmitted by a foreign state or intergovernmental mechanism** and followed by an express warning about its confidential nature, and other diplomatic communications related to national security issues.

For more information, please read Global principles on national security and the right to information (Tshwane principles). 2013. Open Society Foundations. <https://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>

Learn more: The role of whistle-blowers

A **whistle-blower** is someone who exposes information related to violations of the legal order; corruption; the existence of a serious threat to public health, national security, or the environment; or violations of human rights or international humanitarian law. Whistle-blowers must be protected from legal, administrative, and labor retaliations, under the presumption that they are acting in good faith. Other individuals, such as journalists, who access and disclose confidential information because they consider it to be in the public interest, must not be punished for violating secrecy rights, unless they have committed a crime as a means of obtaining such information. Any attempt to impose subsequent liabilities on persons who disseminate confidential information must be based on laws previously established by unbiased and independent bodies following the applicable due process guarantees.

Source: Joint statement on Wikileaks. 2010. Special rapporteurs on freedom of expression of the UN and OAS. <http://www.oas.org/pt/cidh/expressao/showarticle.asp?artID=889&IID=4>

Important note:

The writ of habeas data is particularly relevant in the digital age. It allows anyone to modify, eliminate, or correct information considered sensitive, mistaken, biased, or discriminatory with the purpose of preserving the rights to privacy, honor, personal identity, personal goods, and accountability at the moment of gathering information.



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I/A Court H.R. **Case of Omar Humberto Maldonado Vargas and Others v. Chile.** Judgment of September 2, 2015.

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<https://globalfreedomofexpression.columbia.edu/cases/asociacion-por-los-derechos-civiles-v-en-pami/>

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www.infojus.gob.ar/descarga-archivo?guid=rstuvwfa-llos-comp-uest-o12000227pdf&name=12000227.pdf

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<http://207.249.17.176/Transparencia/sentencias/AR%20173-2012%20PS.pdf>

Supreme Court of El Salvador. **Case of Umaña v. Presidente de la República.** 13-2012. May 5, 2012.

www.jurisprudencia.gob.sv/visormlx/pdf/13-2012.pdf



Resources

FOIANet. International network of civil society organizations for the right to access to information.

foiadadvocates.net

Freedominfo.org. International network of civil society organizations for the right to access information.

www.freedominfo.org

Transparency and Access to Information Network. A Latin American network for exchanges among public bodies and entities that supervise transparency functions and the right to access public information.

redrta.org

Global Right to Information Rating. A program by Access Info Europe and the Centre for Law and Democracy to gather and provide data related to access to public information around the world.

www.rti-rating.org

Open Government Partnership. A multilateral initiative to promote open government.

www.opengovpartnership.org

6. The more, the better: Pluralism and diversity in the media

Not only is freedom of expression about the rights to speak and write, but it inevitably includes the right to create or use any appropriate medium to disseminate knowledge to the largest possible number of recipients.

Pluralism and diversity in the media

Pluralism and diversity are important in terms of economic ownership, the number and types of media outlets, and the journalistic content available on all platforms. According to international law, states have a positive obligation to promote diversity in the media, which includes an obligation to avoid the undue concentration of media ownership. The purpose of this obligation is to encourage free, independent, and plural media environments that enable access to the broadest and most diverse information possible.



The UN Human Rights Council (2011) states that to avoid violations of the right to freedom of expression, “the State should not have monopoly control over the media and should promote plurality of the media,” and “should take appropriate action . . . to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.”

<http://undocs.org/en/CCPR/C/GC/34>



In the **Case of Granier v. Venezuela** (2015), the I/A Court H.R. attested that “the plurality of media and information is an effective guarantee of the right to freedom of expression. It is a duty of the State to protect and guarantee this assumption (in accordance with article 1.1 of the American Convention), both by minimizing restrictions on information and promoting balanced participation, to enable that the media are open to all without any discrimination. This is a result of the attention to avoid that certain individuals or groups will be, a priori, excluded from participation.”

<https://globalfreedomofexpression.columbia.edu/cases/granier-v-venezuela/>

Three types of media outlets must exist to ensure media pluralism and diversity:

Private:

for-profit, privately owned media



Public: state-owned (instead of government-controlled) not-for-profit media, provided as a public service



Community: not-for-profit, community-owned, and community-based media

11 indicators of a plural and diverse media environment

1. Effective regulations to prevent undue ownership concentration and promote plurality
2. Specific legislation on cross-ownership within broadcasting and between broadcasting and other media sectors to prevent market dominance
3. Regulations recognize the distinction between small and large players in the media market
4. Transparency and disclosure provisions for media companies with regard to ownership, investment and revenue sources
5. Licensing process for the allocation of specific frequencies to individual broadcasters promotes diversity of media ownership and programming content
6. Compliance with international standards
7. Authorities responsible for implementing anti-monopoly laws have sufficient powers e.g. power to refuse license requests and to divest existing media operations where plurality is threatened or where unacceptable levels of ownership concentration are reached
8. Government actively monitors and evaluates the consequences of media concentration
9. Anti-monopoly laws used by regulators to refuse license requests or force divestment of existing media operations in order to avoid excessive concentrations of media ownership
10. Civil society groups and citizens at large actively participate in the promotion and enforcement of measures to foster media pluralism
11. Regulators allocate digital licenses to a diverse range of commercial and noncommercial operators



Source: Media development indicators: A framework for assessing media development, 2008. UNESCO.
<http://unesdoc.unesco.org/images/0016/001631/163102e.pdf>

Diversity and plurality must be the aims of any media regulation.

Key notes on diversity

Article 15.1 of the **United Nations Declaration on the Rights of Indigenous Peoples of 2007** states that "Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information." Moreover, Article 16.2 of the declaration states that "States shall take effective measures to ensure that State-owned media duly reflect Indigenous cultural diversity."

<https://undocs.org/A/RES/61/295>

Principle 7 of UNESCO's **Convention on the Protection and Promotion of the Diversity of Cultural Expressions** states that all cultures should have equal access to the means of expression and dissemination.

https://en.unesco.org/creativity/sites/creativity/files/convention2005_basictext_en.pdf#page=16

The **special rapporteur for freedom of expression of the IACHR** reiterates that any law regulating the media must follow the triple test of legality, necessity, and proportionality.

Three recommendations regarding the concentration of media ownership


1. The media ownership structure should be **transparent**
2. There should be substantive rules to **limit the undue concentration of media ownership** and promote media diversity
3. The rules must be applied by an **independent body** that is protected from political interference

More information in Concentration of media ownership and freedom of expression: Global standards and implications for the Americas. 2017. Toby Mendel, Ángel García Castillejo, and Gustavo Gómez. UNESCO. <http://unesdoc.unesco.org/images/0024/002480/248091E.pdf>

From analog to digital television

The digitalization of television broadcasting produces bandwidth savings that optimize the use of the radioelectric spectrum through which TV content is transmitted. Since the radioelectric spectrum is a limited and scarce resource, such savings increase the potential for its use in terms of increasing both image quality and the availability of television channel options for the population.

Increased spectrum availability also increases the potential for more operators and more diversity in the national media systems, since frequency spectrum limitations—one of the most frequent justifications for creating obstacles to access TV licenses—are now mitigated.

 According to the report ***Freedom of expression standards for the transition to a diverse, plural and inclusive free-to-air digital television***, produced by the Office of the Special Rapporteur for Freedom of Expression of the IACHR, states must consider this technological change “an opportunity to increase the diversity of voices and enable new sectors of the population to access communications media.” The report also reminds us that “one aim of the process of implementing digital television should be to bring about a more diverse and plural system of television media than the one that exists with analogue technologies.”

More information in: Freedom of expression standards for the transition to a diverse, plural and inclusive free-to-air digital television. 2014. Edison Lanza. IACHR, OAS. [http://www.oas.org/en/iachr/expression/docs/publications/Transition to Digital_TV.pdf](http://www.oas.org/en/iachr/expression/docs/publications/Transition_to_Digital_TV.pdf)

Learn more: Media and information literacy

Media and information literacy strengthens the development of free, independent, and plural media outlets and information systems. It is linked to citizens' ability to understand the means of communication and use the necessary tools to interpret them, as well as to their capacity to use digital technologies. The more that citizens understand how the media function, the more prepared they will also be to stand up for a plural and diverse media environment.

Important note:

States have the positive obligation of ensuring a free, plural, and independent media environment and avoiding media concentration. Therefore, it is crucial to guarantee the independence of the agencies that regulate radio and television, which must be collegiate and plural institutions ruled by clear and transparent procedures, and adhere to due process and strict judicial control.



Selected readings

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The regulatory environment for broadcasting: An international best practice survey for Brazilian stakeholders. 2011. Toby Mendel and Eve Salomon. UNESCO.

<http://unesdoc.unesco.org/images/0019/001916/191622e.pdf>

La concentración infocomunicacional en América Latina: Nuevos medios y tecnologías, menos actores. 2017. Observacom.

<http://www.unq.edu.ar/catalogo/415-la-concentraci%C3%B3n-infocomunicacional-en-am%C3%A9rica-latina-2000-2015.php>



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www.corteidh.or.cr/docs/casos/articulos/seriec_293_esp.pdf

Inter-American Commission on Human Rights. **Case of Miguel Ángel Millar Silva and Others (Radio Estrella del Mar de Melinka) v. Chile**. Report No. 77/15, October 28, 2015 (in Spanish).

www.cejil.org/sites/default/files/informe_de_fondo_melinka.pdf



Resources

Latin American Observatory on Regulation, Media, and Convergence (Observacom). A not-for-profit regional initiative that convenes communications experts and researchers. Observacom analyzes public policies and the regulation of information and communication services (in Spanish).

www.observacom.org

An interview with

Edison Lanza

SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Today's societies and, particularly, the exercise of the right to freedom of expression can no longer be understood without considering the role of the internet. Which fundamental principles cannot be overlooked when dealing with cases related to the internet?



The internet is a fundamental vehicle for the exercise of freedom of expression and access to information. For this reason, legal practitioners must understand how this global information network operates. The exercise of these rights on the internet is deeply linked to its decentralized and open design, and also to what we call intermediaries, that is, private companies that manage the platforms through which individuals, institutions, or companies share ideas and information, in addition to entertainment, advertising, and online commerce.

In this context, it is essential for those who administer justice to consider that intermediaries must not be liable for the content publicized by third parties on their platforms. One cannot paralyze a platform or an entire app as a result of specific content, even when it can be considered unlawful—for instance, in a case linked either to child pornography or the privacy of a non-public individual. If we should proceed otherwise, we would be restricting this right, and this decision would be both disproportionate and detrimental to freedom of expression.

What is the “right to be forgotten” on the internet, and what is your opinion of it?

This rather unprecise title, the “right to be forgotten”—since such a right does not actually exist—is linked to the possibility that a person can request the removal of information about him or herself from internet search engines, so that such information will be available only at its original source. This idea was validated by the Court of Justice of the European Union. However, from the perspective of access to information, it is still a problematic idea.

When we look for our own name using a search engine, we will find information on our public life. For instance, I am currently a special rapporteur for freedom of expression and, as such, an international public official. If I should decide one day that the information about me should be removed from a search engine, I would be illegitimately limiting access to public information on me and my public activities. And, even worse than that, we would be opening the possibility that the same could be done by other people who, for instance, may have violated human rights or committed acts of corruption, thus erasing the pasts of individuals who soon could be entrusted with public functions.

The so-called protection of personal data is characterized by the possibility of rectifying or cancelling, under certain conditions, sensitive data at private or public databases with a specific aim (criminal records, commercial records, and so on) with which we may have consented at some point in the past. But the internet itself is not a database. Instead, it is a public and global medium of communications. The judiciary plays a fundamental role in terms of balancing this public interest with the protection of privacy.

Why is protecting the identities of journalistic sources so important?

Protecting the right to keep journalistic sources confidential is a key element for freedom of expression. Those who seek public interest information must count on the confidentiality of their sources to gain access to, search, and investigate public interest issues. Many investigations into corruption have occurred because journalists have accessed classified information disclosed by people under the condition of confidentiality, since the disclosure of that person's identity could lead to retaliation. In these cases, it must be clear that a journalist is not committing an illegal act and, therefore, he or she cannot be liable for disclosing information that the state has declared to be confidential, nor would it be in order to ask one to reveal the sources of his or her information.

“Protecting the right to keep journalistic sources confidential is a key element for freedom of expression.”

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