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Old Standards, New Challenges: Keys to Addressing Internet Disinformation in Inter-American Jurisprudence

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Abstract

On May 3, 2020, as part of World Press Freedom Day and just a few months into an unprecedented health emergency, the UN Secretary-General stated that disinformation had become the "second pandemic."[1] More recently, a resolution of the United Nations Human Rights Council described disinformation as "a threat to democracy."[2]

In the Inter-American sphere, the Inter-American Commission on Human Rights (hereinafter, IACHR) highlighted that the region is at a turning point, characterized in large part by a widespread deterioration of public debate fueled by disinformation[3].

Although there is currently no jurisprudence in the Inter-American system that directly analyzes disinformation on the Internet, it is possible to find some insights in contentious cases, advisory opinions, and substantive reports from the Inter-American Court of Human Rights (hereinafter, the Court) that shed light on the standards that should guide potential legal disputes on this issue. This document analyzes some of the various standards that the Inter-American Commission and the Court have developed when studying the application of Article 13 of the American Convention, which could be significant for analyzing disinforma-

1 UN, "'Antidote' to False COVID-19 Facts Guides Nations in Life-or-Death Decisions, Secretary-General Says, Calling for Guaranteed Press Freedom on Global Day," May 3, 2020, https://press.un.org/en/2020/sgsm20069.doc.htm.

2 UN, "El papel de los Estados en la lucha contra los efectos negativos de la desinformación en el disfrute y la efectividad de los derechos humanos," A/HRC/RES/49/21, April 8, 2022.

3 IACHR, "La CIDH advierte un punto de inflexión de la libertad de expresión en internet y convoca a diálogo en la región," press release 26/21, February 5, 2021. Retrieved from: https://www.oas.org/es/cidh/jsForm/?File=/es/cidh/prensa/comunicados/2021/026.asp

tion in the region. It focuses on states' international obligations, both to act and to refrain from action concerning disinformation, as derived from Inter-American jurisprudence. The document is based on the premise that any executive, legislative, or judicial state measure that attempts to address this issue must consider a protective view of the right to freedom of expression due to the predominant role this right plays in democratic societies. As noted by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Irene Khan, "The right to freedom of opinion and expression is not part of the problem; it is the objective and the means for combating disinformation."[4]

The paper will first provide the conceptual framework for disinformation. It will then analyze standards on the right to freedom of expression emerging from: (i) contentious cases of the Inter-American Court; (ii) advisory opinions of the Inter-American Court; (iii) substantive reports of the Inter-American Commission; and (iv) thematic reports of the Inter-American Commission, which, as soft law instruments, have provided the first legal reflections on the subject within the Inter-American human rights system. The development of the various standards and their application to disinformation will be organized thematically, for which eleven (11) relevant categories have been selected for study. The work also systematizes—as conclusions and recommendations—the main guidelines or directives the Inter-American human rights system provides for states in their approach to this issue.

A. Conceptual Approach to Disinformation: Background and Relevance of the Discussion

As early as 1859, in his famous essay On Liberty, John Stuart Mill addressed the problem of false discourse in societies.[5] The English philosopher argued that ideas, even if false, are important in social construction and progress.[6] To silence an opinion because one is certain it is false, says JM Mill, is equivalent to asserting that the truth one possesses is absolute truth.[7] Along these lines, Mill states that

> "…But the peculiar evil of silencing the expression of an opinion is,

[4] UN, Informe de la Relatora Especial sobre la promoción y protección del derecho a la libertad de opinión y de expresión, Irene Khan, "La desinformación y la libertad de opinión y de expresión," A/HRC/47/25, April 13, 2021, para. 83.

[5] John Stuart Mill, *On Liberty*, 1859 (David Bromwich & George Kateb eds., 2003), pp. 86, 89.

[6] Id. in pp. 88—91.

[7] Id. in p. 88.

> that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it."[8]

Although it is a practice that has existed for a long time,[9] in recent years, the phenomenon of disinformation has acquired certain particularities due to the amplifying capacity, speed of dissemination, and increasingly sophisticated tools provided by the internet.[10] Similarly, in his book Liars, Professor Cass Sunstein argues that lying, as such, has surrounded humanity since time immemorial, but today its impact is different as its reach is amplified like never before through digital platforms with enormous power of dissemination, reaching billions of users.[11]

Although there is no universally accepted legal definition of the conduct it encompasses, an explanation accepted by many experts on the subject suggests that it involves the mass dissemination of false information (a) to deceive the public, (b) with knowledge of its falsity, and (c) attempting to appear formal and authentic.[12] While it is not the purpose of this essay to delve into the scope of this concept, it is important to highlight that in some cases disinformation has been equated with "fake news."[13] It has been distinguished from the term "misinformation," for which there is no equivalent in Spanish but which refers to misleading information created or disseminated without the intention of manipulating or causing harm.[14]

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8 John Stuart Mill, *supra* note 5.

9 Historically, disinformation has been closely linked to propaganda or the manipulation of information, and is especially prevalent in highly polarized regimes or to justify anti-democratic governments. See Robert Darnton, "The True History of Fake News," The New York Review, February 13, 2017, retrieved from: https://www.nybooks.com/daily/2017/02/13/the-true-history-of-fake-news/; *See also* Julia Posetti & Alice Matthews, "A Short Guide to the History of 'Fake News' and Disinformation," Int'l Ctr. for Journalists ed., 2018, pp. 1—15; UN, Informe de la Relatora Especial Irene Khan, *supra* note 4, para. 2.

10 Soroush Vosoughi et al., "The Spread of True and False News Online," American Association for Advancement on Science, 2018, pp. 1146—50.

11 Cass R. Sunstein, *Liars*. *Falsehoods and Free Speech in an Age of Deception*, Oxford University Press, 2021.

12 OAS, Office of the Special Rapporteur for Freedom of Expression, "Guía para garantizar la libertad de expresión frente a la desinformación deliberada en contextos electorales," 2019, pp. 10 and 13. See also Carlos Cortés et al., "Noticias falsas en Internet: la estrategia para combatir la desinformación," in *Internet y derechos humanos III: aportes para la discusión en América Latina*, 2019, p. 69; Yola Verbruggen, "Fake News," International Bar Association, June 16, 2017, retrieved from: https://www.ibanet.org/article/0adbdb24-c0c2-4cc8-bef8-e9b172dcf12a.

13 UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, Special Rapporteur on Freedom of Expression of the OAS, and Special Rapporteur for Freedom of Expression and Access to Information of the ACHPR, "Declaración Conjunta Sobre Libertad De Expresión Y "Noticias Falsas" ("Fake News"), Desinformación Y Propaganda," March 3, 2017.

14 Cherilyn Ireton & Julie Posetti, "Journalism, 'Fake News' & Disinformation," UNESCO, 2018, pp. 7 and 44.

The fact that there is still no clear and concise definition of what constitutes disinformation has led to difficulties in finding appropriate responses to the phenomenon. As Khan argues, "the concept (…) is open to abuse, and (…) the magnitude and nature of the problem are questioned due to the lack of sufficient data and research."[15] Khan also points out that the lack of clarity and consensus on what constitutes disinformation reduces the effectiveness of responses and leads to approaches that endanger the right to freedom of expression; therefore, she considers it essential to clarify the concept within the framework of international human rights law.[16] Similarly, the Center for Studies on Freedom of Expression and Access to Information (CELE) has emphasized that "attempts by states to legally address 'disinformation' should first clarify the term, precisely to avoid overly broad legislation and/or arbitrary application of existing legislation, which amounts to censorship."[17]

Catalina Botero points out that "disinformation in politics affects the decision-making process since it compromises the ability to make political choices in a rational manner."[18] Similarly, Sunstein says that certain "falsehoods" can be harmful insofar as they can distort the understanding of fundamental issues in democratic life[19], endanger public health, undermine and even destroy the process of self-governance, leading people to "lose faith in leaders and their policies, and even in the government itself," and "obstruct the ability to think, as citizens, about what to do in the face of a crisis."[20] This narrative, which argues that disinformation corrupts democratic states by preventing citizens from making free, rational and informed decisions, has been widely spread to claim that democracies around the world are facing a profound crisis, which some have termed the "post-truth era."[21]

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15 UN, Informe de la Relatora Especial Irene Khan, *supra* note 4, para. 3.

16 Ibid, para. 14.

17 Del Campo, "Panel de Alto Nivel del Consejo de Derechos Humanos de la ONU realizado el pasado 28 de junio de 2022," Centro de Estudios en Libertad de Expresión y Acceso a la Información (CELE), 2022, retrieved from: https://observatoriolegislativocele.com/panel-de-alto-nivel-del-consejo-de-derechos-humanos-de-la-onu/.

18 Catalina Botero Marino, "La regulación estatal de las llamadas "noticias falsas" desde la perspectiva del derecho a la libertad de expresión," in *Libertad de expresión: a 30 años de la opinión consultiva sobre la colegiación obligatoria de periodistas*, Ismael Paredes ed., 2017, pp. 65 and 66.

19 Cass R. Sunstein, *Liars*. *Falsehoods and Free Speech in an Age of Deception*, Oxford University Press, 2021, p. 7.

20 Cass R. Sunstein, "Falsehoods and the First Amendment," *Harvard Journal of Law & Technology*, 2020, p. 394.

21 CNN, "Macron warns US Congress: There's no Planet B," YouTube, April 25, 2018, retrieved from: https://www.youtube.com/watch?v=XYTx4DrBhzM (Speech by the President of France, Emmanuel Macron: "To protect our democracies, we have to fight against the ever-growing virus of fake news, which exposes our people to irrational fear and imaginary risks. And let me attribute the first copyright for the expression 'fake news', especially here. Without reason, without truths there is no real democracy. Because democracy is about true choices and rational decisions. The corruption of information is an attempt to corrode the very spirit of our democracies;" see also Johan Farkas & Jannick Schou, *Post-Truth, Fake News and Democracy: Mapping the Politics of Falsehood,* Routledge & Taylor & Francis Group eds., 1st ed., 2019, p. 1.

The internet has played a key role in current discussions about disinformation.[22] This has to do with its open, decentralized, and neutral nature, which makes it a space where anyone can become an "author" of content capable of reaching millions of users, and where public conversation is no longer "moderated," for example, by professional journalism or traditional media.[23] This paradigm shift in the information ecosystem undoubtedly brought new challenges to the free flow of information.[24] However, as will be discussed throughout this paper, any regulation, public policy or judicial decision on this matter must be based on the legal foundations that protect the right to seek, receive and disseminate ideas and information.[25]

B. How to Analyze Disinformation on the Internet from the Perspective of the Inter-American Legal Framework

Over the past three decades, the Inter-American Commission and Court have analyzed the scope of the right to freedom of expression through specific cases and have progressively developed a series of standards applicable to different situations.[26] Neither the Commission nor the Court has defined, in legal terms, what constitutes disinformation or clarified the international obligations of states regarding this phenomenon.[27] Nevertheless, the existing body of jurisprudence provides some insights into what standards should guide potential legal controversies about disinformation.[28]

1. On the Role of Freedom of Expression in Democratic Societies

Perhaps one of the most widely accepted precepts on freedom of expression in the Inter-American human rights system is its direct and structural connection

[22] Vosoughi et al., *supra* note 10, pp. 1146—50; Ramiro Álvarez Ugarte and Agustina Del Campo, "Noticias falsas en internet: acciones y reacciones de tres plataformas," CELE, 2021, pp. 2-4.

[23] IACHR, Informe de la Relatoría Especial para la Libertad de Expresión, "Estándares para una Internet Libre, Abierta e Incluyente," OEA/Ser.L/V/II/CIDH/RELE/INF.17/17, March 15, 2017, para. 81.

[24] Ibid para. 86.

[25] Ibid paras. 81—88.

[26] I/A Court H.R., "Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 16: Libertad de pensamiento y de expresión," 2021.

[27] Ibid.

[28] Ibid.

with democracy. Why is the right to freedom of expression so valuable in a democracy? Many authors have delved into the subject through a legal, literary, and philosophical perspective.[29] Generally speaking, one of the main theses is based on the idea that, in a democracy, citizens have an interest in listening to, discussing, and refuting as much information, ideas, and points of view as possible, even when they consider the opinions expressed to be politically, morally, or personally offensive.[30] These pieces of information, opinions, and ideas can be presented not only through traditional media but also in novels, poems, music, or film. Some authors have even maintained that a government that does not effectively guarantee the right to freedom of expression cannot be considered a democratic government.[31] Roberto Saba argues that a self-governance system requires people to reflect and decide collectively on the best solutions to public problems.[32] This search for answers—Saba says—"is enriched to the extent that the exchange of ideas and perspectives is more varied and representative of the diversity of existing points of view, and is impoverished when these points of view are reduced in quantity and variety."[33] The decline of public debate results in the malfunctioning of the political system and in the quality of collective decisions.[34] This view of freedom of expression holds that it is a prerequisite of the democratic system.[35]

The Inter-American Court has referred on several occasions to the democratic function of freedom of expression and has considered that

> […] "Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its

[29] Sunstein, *supra* note 11; Álvarez Ugarte et al., *supra* note 33; Bernecker, Sven et al. (ed.), *The Epistemology of Fake News*, Oxford, 2021; Don Fallis, "What Is Disinformation?," in *Library Trends*, vol. 63 no. 3, 2015, pp. 401-426; John Bowers & Jonathan Zittrain, "Answering Impossible Questions: Content Governance in an Age of Disinformation," in *Harvard Kennedy School Misinformation Review*, 2020.

[30] Nigel Warburton, *Free Speech: a very short introduction*, Oxford University Press, 2009, p. 3.

[31] Ronald Dworkin, "The right to ridicule," *New York Review of Books*, March 23, 2006.

[32] "El valor de la libertad de expresión," Interview with Roberto Saba and Owen Fiss by Andrea Repetto, *Revista Apuntes de Derecho*, No. 7, Facultad de Derecho de la Universidad Diego Portales, 2000, pp. 32-34.

[33] Ibid.

[34] Ibid.

[35] Ibid.

options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free."[36]

The Court has also held that democracy cannot function without the full and free exercise of freedom of expression. In this regard, it was emphatic in stating that "freedom of expression is embedded in the primary and fundamental public order of democracy, which is inconceivable without free debate"[37] and that the democratic system envisioned in the American Convention requires respect for the right of individuals to freely express themselves and for the right of society as a whole to receive information.[38]

The connection between freedom of expression and democratic governance can also be understood through what this right helps prevent: the entrenchment of authoritarian regimes. In various cases, including Herrera Ulloa v. Costa Rica, the Inter-American Court established that "Without effective freedom of expression, exercised in all its forms, democracy is enervated, pluralism and tolerance start to deteriorate, the mechanisms for control and complaint by the individual become ineffectual and, above all, a fertile ground is created for authoritarian systems to take root in society."[39]

In a broader sense, the Court has also noted that "In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning."[40] In other words, the very concept of fundamental freedoms is inseparable from—or cannot be understood without considering—the system of principles that inspires it, namely, the democratic form of government."[41]

The first conclusion that this section allows us to draw is that, following the Court's reasoning, disinformation, understood as a phenomenon that seeks to undermine the

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[36] I/A Court H.R, *case Claude Reyes y otros vs. Chile Fondo, Reparaciones y Costas*, Judgment of September 19, 2006. Series C No. 151, para. 85; *Case Herrera Ulloa Vs. Costa Rica Excepciones Preliminares, Fondo, Reparaciones y Costas, Judgment of July 2, 2004, Series C, No. 107*, paras. 112 and 113.

[37] I/A Court H.R., Opinión Consultiva OC-5/85, supra note 52, para. 69.

[38] Ibid.

[39] I/A Court H.R., *Herrera Ulloa Caso, supra* note 64, para. 116; I/A Court H.R., *Ricardo Canese Vs. Paraguay, Merits, Reparations and Costs,* Judgment of August 31, 2004 Series C No. 111, para. 86; *Ríos Case*, *supra* note 263, para. 105; *Perozo Case*, *supra* note 39, para. 116. See also IACHR, Report No. 130/99, Case No. 11,740, Case of Víctor Manuel Oropeza, November 19, 1999

[40] I/A Court H.R., Opinión Consultiva OC-8/87, supra note 49, para 26.

[41] Ibid.

ideal of a fully informed society and, therefore, the foundations of democracy, is an issue that must be addressed from the perspective of the right to freedom of expression.

2. On the Role of Journalism and Media in Democratic Societies

The Inter-American system has also addressed the relationship between journalism, freedom of expression, and democracy. For the Court, journalism is the primary and principal manifestation of freedom of expression.[42] According to the court, "The practice of professional journalism cannot be differentiated from freedom of expression. On the contrary, both are obviously intertwined, for the professional journalist is not, nor can he be, anything but someone who has decided to exercise freedom of expression in a continuous, regular and paid manner."[43]

Inter-American jurisprudence has indicated on several occasions that the media play an essential role "as vehicles for the exercise of the social dimension of freedom of expression in a democratic society," and it is, therefore, essential that they encompass the widest range of information and opinions.[44] Given this central role that they have in a democracy, jurisprudence has also established that "they must exercise the social function that they perform responsibly."[45] Journalistic activity must be governed by ethical conduct, but such conduct may in no case be imposed by states.[46] In Advisory Opinion 5-85, when ruling on the compulsory membership in an association prescribed by law for the practice of journalism in Costa Rica, the Court carried out one of the most valuable analyses on the scope of the right to freedom of expression. Among other matters, it explored for journalists to provide truthful information as part of a regime of professional ethics and responsibility founded on the common good.[47] The core question at that time was: is the right to freedom of expression, under Article 13 of the American Convention, sufficient "by itself" to enable a person to practice professional journalism?[48] According to the State of Costa Rica, the preliminary

[42] I/A Court H.R., Opinión Consultiva OC-5/85, supra note 52, para. 71.

[43] Ibid, para 74.

[44] I/A Court H.R., *case "Ivchar Bronstein vs. Peru, Fondo, Reparaciones y Costas,* Judgment of February 6, 2001, Series C No. 74, para. 149; *Herrera Ulloa Case*, *supra* note 64, para. 117; *Ricardo Canese Case*, *supra* note 67, para. 94.

[45] I/A Court H.R., *Herrera Ulloa Case*, *supra* note 64, para. 117; Fontevecchia Case, para. 44.

[46] IACHR, Declaración de Principios sobre Libertad de Expresión, 2000.

[47] I/A Court H.R., Opinión Consultiva OC-5/85, *supra* note 52.

[48] Ibid, paras. 11-15; Republic of Costa Rica, Ministry of Foreign Affairs and Worship, Request for an Advisory Opinion from the Government of Costa Rica to the Inter-American Court of Human Rights, 1985.

answer to that question was negative.[49]

According to the State of Costa Rica, the practice of certain professions, including journalism, entails certain duties "toward the community and the social order."[50] This would justify the requirement of a special qualification, regulated by law, for its practice.[51] The opposite, in the opinion of the state, would be to consider journalism as "a separate, unique, privileged profession" and the exercise of journalism as "an absolute, unrestricted right outside the regulatory action of the law," which could imply that a journalist becomes "a danger to others and to public order and security."[52] The Court stated that establishing "a code that would assure the professional responsibility and ethics of journalists and impose penalties for infringements of such a code" is valid under the Inter-American legal framework.[53] The Court also considered that "it may be entirely proper for a State to delegate, by law, authority to impose sanctions for infringements of the code of professional responsibility and ethics."[54] However, as far as journalists are concerned, the restrictions in Article 13.2 and the specific characteristics of this profession, related to its instrumental and structural role in democracy, must be taken into account.[55]

In Dr. Bruce McColm's dissenting opinion on Background Report 17/84 in the case of Schmidt v. Costa Rica—the same case that would later lead to Advisory Opinion 5/85, the Commissioner stated: "Because the practice of journalism is so intertwined with the exercise of the freedom of expression (…), it is fundamentally different in nature from the legal or medical professions." (…) "When a journalist or press organ is bound by prior permission or license by a government-approved or sanctioned body, there brings with such regulations a serious and dangerous limitation of a right that is inalienable."[56]

The Inter-American Court also elaborated on the duties that the right to freedom of expression entails for journalists in the exercise of their profession. In this re-

[49] I/A Court H.R., Opinión Consultiva OC-5/85, supra note 52, paras. 60-62.

[50] Ibid. p. 22.

[51] Ibid. p. 22.

[52] Ibid. p. 19.

[53] I/A Court H.R., Opinión Consultiva OC-5/85, supra note 52, para. 80.

[54] Ibid.

[55] Ibid.

[56] IACHR, Resolution No. 17/84, Case No. 9178, Dissenting opinion of Dr. Bruce McColm, October 3, 1984

gard, in the case of Kimel v. Argentina, the Court noted that "journalists have the duty to verify reasonably, though not necessarily in an exhaustive manner, the truthfulness of the facts supporting their opinion."[57] This implies, at the very least, the duty of sustaining "equity and diligence in the search for information and the verification of the sources" and to "keep a critical distance from sources and match the information against other relevant data."[58] In the words of the Court, citizens have the right not to receive a manipulated version of the facts.[59]

The IACHR also upheld this standard by stating that what is required [of journalists] is a minimum degree of confirmation, in accordance with what the case warrants and the existing circumstances, which gives the reporter the conviction that the facts are not manifestly implausible. To determine the latter, one could consider, for example, the quantity, quality, and nature of the source consulted. (…) Such [controversial or erroneous] speech will be protected by the right to freedom of expression and information, as long as the act is carried out with reasonable diligence and in good faith.[60]

Citing the European Court, the Inter-American Court also acknowledges that freedom of expression does not guarantee unlimited protection for journalists, even in matters of public interest.[61] Journalists "must, when exercising their duties, abide by the principles of responsible journalism; namely, to act in good faith, provide accurate and reliable information, objectively reflect the opinions of those involved in a public debate, and refrain from pure sensationalism."[62]

Today, citizens frequently question the media's vital role and ethical responsibility to report accurately and prevent the spread of disinformation.[63] The media—as vehicles and intermediaries of information, opinions, and ideas that circulate in

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57 I/A Court H.R., *Kimel Case*, *supra* note 47, para. 79.

58 Ibid.

59 Ibid.

60 IACHR, Informe No. 148/19, Caso 12.971, Informe de fondo Ronald Moya Chacón y Freddy Parrales Chaves con respecto a Costa Rica [text in Spanish, Internal translation], OEA/Ser.L/V/II.173 Doc. 163, September 28, 2019, Para. 59.

61 I/A Court H.R., case *Granier y otros (Radio Caracas Televisión) Vs. Venezuela,Excepciones Preliminares, Fondo, Reparaciones y Costas, Judgment of June 22, 2015, Series C, No. 293, Para.* 139, citing ECHR, *Novaya Gazeta y Borodyanskiy Vs. Rusia*, No. 14087/08, Judgment of 28 March 2013, para. 37.

62 Ibid.

63 "Journalists and fact-checkers must play key role as disinformation is professionalized," International Press Institute, September 30, 2020, retrieved from: https://ipi.media/journalists-and-fact-checkers-must-play-key-role-as-disinformation-is-professionalized/; Cristina Tardáguila et al., "Who's 'mainly' responsible for curbing disinformation?," Poynter, January 23, 2020, retrieved from: https://www.poynter.org/fact-checking/2020/whos-mainly-responsible-for-curbing-disinformation/.

societies—naturally face daily challenges related to disinformation.[64] In response to this issue, Inter-American jurisprudence establishes that journalists have duties of ethical responsibility not to disseminate false information knowing that it is false. Particularly, as the Court stated, journalism must be conducted in a "responsible and ethical" manner given that in a contemporary society the media "not only inform, but can also suggest by the way in which they present the information how it is to be assessed."[65] As key actors in the functioning of democracy, journalists and the media have a duty to address the challenges arising from disinformation responsibly and ethically, without disregarding the basic guarantees of the right to freedom of expression.

3. Actual Malice

In the matter of subsequent legal liability, the Inter-American Commission holds that in cases where a state seeks to impose sanctions on journalists for alleged abuse in disseminating information involving public officials and public affairs, the judge must apply the "actual malice" standard, developed by the United States Supreme Court in the case New York Times v. Sullivan (1964). The Commission has ratified the actual malice standard on several occasions.[66]

Under the actual malice standard, "the public official or public figure who alleges harm must demonstrate that the person who made the statement did so with full intent to cause harm and with knowledge that false information was being disseminated or with a blatant disregard for the truth of the facts."[67] Furthermo-

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[64] "New Pen America report shows journalists are alarmed, overwhelmed, and changing their approaches, amid the disinformation," *Pen America*, April 14, 2022, retrieved from: https://pen.org/press-release/new-pen-america-survey-shows-journalists-are-alarmed-overwhelmed-and-changing-their-approaches-amid-the-disinformation-surge/; "Hard News: Journalists and the Threat of Disinformation," *Pen America*, no date, retrieved from:https://pen.org/report/hard-news-journalists-and-the-threat-of-disinformation/; "Las noticias falsas en las campañas electorales, un reto para la prensa y la democracia," *ONU News*, May 3, 2019, retrieved from: https://news.un.org/es/story/2019/05/1455281.

[65] I/A Court H.R., *Granier Case*, *supra* note 90, para. 139, citing ECHR, *Stoll Vs. Suiza* [Gran Sala], No. 69698/01, Judgment of December 10 2007, para. 104, and ECHR, *Novaya Gazeta y Borodyanskiy Vs. Rusia*, No. 14087/08, Judgment of 28 March 2013, para. 42.

[66] I/A Court H.R., Informe de fondo Ronald Moya Chacón, *supra* note 89, para. 64; I/A Court H.R., Informe Anual 1999, Informe de la Relatoría Especial para la Libertad de Expresión, Capítulo II (Evaluación sobre el estado de la Libertad de Expresión en el Hemisferio), OEA/Ser.L/V/II. 106. Doc. 3, April 13, 2000, p. 22; Informe Anual 2002, Informe de la Relatoría Especial para la Libertad de Expresión, Capítulo V (Leyes de Desacato y Difamación criminal), OEA/Ser.L/V/II.117, Doc.> 1 rev. 1, March 7, 2003, Para. 18; I/A Court H.R., "Marco jurídico…," *supra* note 41, para. 109; I/A Court H.R., Office of the Special Rapporteur for Freedom of Expression, "Libertad de expresión e internet," OEA/Ser.L/V/II.149. Doc. 50, December 31, 2013, Para. 72.

[67] I/A Court H.R., *Case Moya Chacón y Otros Vs. Costa Rica, Excepciones preliminares, Fondo, Reparaciones y Costas, Judgment of May 23, 2022, Series C, No. 451, Para.* 53.

re, "actual malice must be demonstrated by the person claiming harm, that is, there is no presumption regarding knowledge of the falsity or negligent disregard for potential falsehood."[68] The person alleging that a false statement violated their rights must bear the burden of proving that the statements in question were untrue and that they effectively caused harm.[69] Regarding this last point, the Commission has insisted that applying an *exceptio veritatis* —i.e., the possibility to prove the truth of the statement—should not imply a reversal of the burden of proof that contradicts this principle.[70] While the person disseminating the information is not obligated to prove the veracity of what is published, if accused of falsehood, they have the opportunity of presenting evidence to refute it.[71]

The Commission has also stressed that if freedom of expression is misused in a way that harms the rights of others, the response should employ the least restrictive measures necessary to address the harm: first, the right to rectification or reply, enshrined in Article 14 of the American Convention.[72] If this is not sufficient, and grave harm caused with intent to harm or with blatant disregard for the truth is demonstrated, civil liability mechanisms may be applied.[73]

Regarding criminal liability, the Court holds that the use of criminal law against journalists "is not conventionally appropriate" to protect the honor of an official.[74] Based on the precedent set in Álvarez Ramos v. Venezuela and subsequently in the cases Palacio Urrutia v. Ecuador and Baraona Bray v. Chile, the Court determined that the Convention directly prohibits the imposition of criminal sanctions in this particular context.[75] The reasoning is that imposing subsequent liability for expressions made in social media on matters of public interest "would directly or indirectly produce intimidation that, ultimately, would limit freedom of expression and prevent public scrutiny of actions that violate the legal system,

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[68] IACHR, Informe de fondo Ronald Moya Chacón, *supra* note 89, para. 65.

[69] IACHR, "Marco jurídico…," *supra* note 41, para. 109; I/A Court H.R., *Case Kimel*, *supra* note 47, para. 78; I/A Court H.R., *Case Tristán Donoso Vs. Panamá*, para. 120.

[70] IACHR, "Marco jurídico…," *supra* note 41, para. 109; I/A Court H.R., Case Tristán Donoso, *supra* note 98, paras. 125 and 126.

[71] IACHR, "Marco jurídico…," *supra* note 41, para. 109; I/A Court H.R., Case Tristán Donoso, *supra* note 98, paras. 125 and 126.

[72] IACHR, "Marco jurídico…," *supra* note 41, paras. 79 and 108.

[73] IACHR, "Marco jurídico…," *supra* note 41, paras. 79 and 109-110.

[74] I/A Court H.R., *Case Álvarez Ramos Vs. Venezuela, Excepción Preliminar, Fondo, Reparaciones y Costas, Judgment of August 30, 2019, Series C, No. 380, Para.* 121; *Case Palacio Urrutia Vs. Ecuador, Fondo, Reparaciones y Costas,* Judgment of November 24, 2021 Series C No. 446, para. 120; *Case Baraona Bray Vs. Chile, Excepciones Preliminares, Fondo, Reparaciones y Costas, Judgment of November 24, 2022, Series C, No. 481, Paras.* 128 and 129.

[75] I/A Court H.R., *Case Palacio Urrutia*, *supra* note 104, para. 9 (concurring opinion of Judges Eduardo Ferrer Mac-Gregor Poisot and Ricardo C. Pérez Manrique).

such as, for example, acts of corruption and abuses of authority, among others."[76]

Actual malice, however, "must be applied in civil cases, but also in criminal cases brought to establish subsequent liability for alleged abusive use of freedom of expression."[77] This is without prejudice to the Commission's considerations regarding the use of criminal law in these cases, deeming it[78] "unnecessary and disproportionate, and also a means of indirect censorship given its chilling and deterrent impact on debate concerning matters of public interest and the defense of rights."[79]

4. On the Requirement of Truthfulness in Information and the Distinctions between Opinions and Factual Information

The concept of a "right to truthful information" has been debated for years in the region, sometimes as a way of reacting to news articles containing inaccurate, imprecise, misleading, erroneous, or, in some cases, "sensationalist" information.[80] More recently, debates surrounding the requirement for truthful information have also extended to internet users and the extent to which they could be legally sanctioned for false or misleading statements on social media.[81] The standards outlined by the Inter-American human rights system help shed light on this issue.

It should be first noted that no international instrument requires the right to freedom of expression to be based on the truthfulness of the content conveyed.[82] Article 13 of the American Convention itself expressly states that the right to freedom of expression "shall not be subject to prior censorship but shall be subject to subsequent imposition of liability."[83] The Inter-American Court, in analyzing

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[76] I/A Court H.R., *Case Baraona Bray Vs. Chile*, *supra* note 104, para. 109.

[77] IACHR, Informe de fondo Ronald Moya Chacón, *supra* note 95, para. 65.

[78] Arguments of the IACHR before the Inter-American Court in the Herrera Ulloa case, transcribed in: I/A Court H.R., Case Herrera Ulloa, *supra* note 64, para. 101.2); arguments of the IACHR before the Inter-American Court in the Ricardo Canese case, transcribed in: I/A Court H.R., *Case Ricardo Canese*, supra note 67, para. 72.h).

[79] IACHR, "Marco jurídico…," *supra* note 41, para. 114.

[80] *Libertad de expresión en las Américas…*, *supra* note 37, p. 162.

[81] Júlio Lubianco, "Once leyes y proyectos de ley contra la desinformación en América Latina implican multas, cárcel y censura," *LatAm Journalism Review*, December 16, 2020, retrieved from: https://latamjournalismreview.org/es/articles/leyes-contra-desinformacion-america-latina/; Louis W. Tompros et al., "The constitutionality of criminalizing false speech made on social networking sites in a post Alvarez, social media-obsessed world," in *Harvard Journal of Law & Technology*, Vol. 31, No. 1, 2017.

[82] UN, OSCE, OAS, "Declaración conjunta sobre libertad de expresión y elecciones en la era digital," *supra* note 23; UN OSCE, OAS, ACHPR, "Declaración Conjunta Sobre Libertad De Expresión Y"Noticias Falsas," Desinformación Y Propaganda," *supra* note 13.

[83] Convención Americana sobre Derechos Humanos, art. 13.

Article 13, has emphatically reiterated that this right is not subject to prior conditions, but that all liability that may arise from its exercise must be subsequent.[84] Several ideas that are crucial for analyzing the phenomenon of disinformation today emerge from this concept.

First, regarding "truthfulness," it is imperative to distinguish between statements that relate to verifiable facts and those that are opinions or value judgments. According to the Court, truth or falsehood pertains only to facts.[85] In a similar sense, the Special Rapporteur for Freedom of Expression has stated that "In the latter case [value judgments], it is impossible to speak of the veracity of the information. Requiring truthfulness could lead to virtually automatic censorship of all information that cannot be proved."[86] The opposite could imply the removal of practically all political debate, which is largely based on ideas and opinions of a clearly subjective nature.[87] There is consensus in international human rights law regarding the preemptive protection of opinions, even erroneous ones.[88] The UN Human Rights Committee, in analyzing Article 19 of the International Covenant on Civil and Political Rights, concerning the right to freedom of opinion and expression, specified that "restrictions on the right to freedom of opinion should never be imposed"[89] and that the Covenant "does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events."[90] The European Court of Human Rights ruled along the same lines in the case of Lingens v. Austria, holding that "the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof [of veracity]."[91]

Secondly, the Inter-American System rests on the idea that "the right to disseminate information and ideas is not limited to correct statements."[92] Any prior qualification imposed on information—such as "truthfulness"—can limit the free flow of information, opinions, and ideas that a democratic society aspires to pro-

84 I/A Court H.R., Opinión Consultiva OC-5/85, supra note 52, para. 38.

85 I/A Court H.R., *Kimel Case*, *supra* note 47, paras. 92 and 93.

86 IACHR, Declaración de Principios sobre Libertad de Expresión, 2000.

87 *Libertad de expresión en las Américas…*, *supra* note 37, p. 164.

88 UN, "Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution. Promotion and protection of the right to freedom of opinion and expression," E/CN.4/1995/32, December 14, 1994, para. 19; CCPR, Observación general No. 34, *supra* note 43, para. 49; European Court of Human Rights (ECtHR), *Lingens v. Austria*, Series A No. 103, Judgment of July 8, 1986, para. 46; I/A Court H.R., *Case Kimel*, *supra* note 47, para. 93.

89 CCPR, Observación general No. 34, supra note 43, para. 49.

90 Ibid.

91 ECtHR, *supra* note 122, para. 46, Judgment of July 8, 1986.

92 UN, OSCE, OAS, ACHPR, "Declaración conjunta sobre libertad de expresión e Internet," *supra* note 48.

tect.[93] Truthfulness is not, therefore, a condition that can be legally demanded of journalists, media outlets or individuals who express themselves publicly.[94]

Requiring truthfulness as a necessary condition for the dissemination of information would imply arguing that there is a single, unquestionable truth, and, consequently, it would affect the debate, the exchange, and the plurality of ideas, opinions, and information.[95] As the Special Rapporteur for Freedom of Expression rightly warns, "If the need to report only the truth is imposed in advance, the possibility of engaging in the necessary debate to achieve it is precisely denied."[96] Likewise, the Inter-American Commission has pointed out in the merits report Ronald Moya Chacón and Freddy Parrales v. Costa Rica that "the dissemination of erroneous information in good faith is inevitable in a pluralist, free and democratic society"[97] and that "imposing a requirement of absolute truth for the exercise of the right to freedom of expression, especially in relation to matters of public interest, such as abuse of power and corruption, would affect the very essence of this right."[98]

In AO-5/85 the Court states that it "is contradictory in principle to invoke a restriction on freedom of expression as a means to guarantee it, because it is to ignore the radical and primary character of that right as inherent in each individual human being, although it is also an attribute of society as a whole. A control system for the right to freedom of expression in the name of a supposed guarantee of the correctness and veracity of the information that society receives can be a source of great abuses and, basically, it violates the right to information that society has."[99]

The Court holds that it is not lawful to invoke society's right to be honestly informed 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."[100] These arguments have been echoed by the IACHR and its Special Rapporteur for Freedom of Expression (RFOE) recently to provide recommendations to states on the

[93] IACHR, Informe de fondo Ronald Moya Chacón, *supra* note 89, para. 51-54; I/A Court H.R., Opinión Consultiva OC-5/85, *supra* note 52, para. 77.

[94] IACHR, Informe de fondo Ronald Moya Chacón, *supra* note 89, paras. 51-54.

[95] *Libertad de expresión en las Américas…*, *supra* note 37, p. 67.

[96] Ibid, p. 68.

[97] I/A Court H.R., *Case Moya Chacón*, *supra* note 96, para. 52.

[98] Ibid.

[99] Ibid.

[100] Ibid, para. 33.

complexities presented by regulating the dissemination of false information.[101] The Special Rapporteur has also addressed this issue in various joint declarations by the mandates of Freedom of Expression Rapporteurs in recent years. In essence, they maintain that general prohibitions on the dissemination of information based on vague and ambiguous concepts, such as "fake news" or "falsehoods," are incompatible with international standards on freedom of expression and should be repealed.[102]

Rules that require the veracity of information as a condition for determining the legitimacy of certain expressions are incompatible with the Inter-American legal framework. This principle is not new, nor does it constitute an exclusively jurisprudential development. Article 13 establishes the right to information and ideas of all kinds. The reasoning for rejecting protection based on truthfulness is widely accepted among jurists, academics, and civil society in the region. This is perhaps one of the main starting points for addressing disinformation on the internet in the region.

5. On Protected and Especially Protected Speech under the Inter-American Human Rights System

Article 13 of the Convention protects expressions, ideas, or information "of all kinds." For the Inter-American human rights system, all forms of speech are, in principle, protected by the right to freedom of expression, regardless of their content. This premise, also known as the Presumption of coverage *ab initio*, implies that freedom of expression protects not only information and ideas that are favorable or considered harmless or indifferent but also those that offend, disturb, shock or displease, or disturb the state or any person or sector of the population.[103] Likewise, the presumption of coverage *ab initio* means that, in principle, all expressions are protected regardless of their truth or falsity.[104]

Notwithstanding the above, the Inter-American Court has held that certain

[101] OAS, "Guía para garantizar la libertad de expresión…," *supra* note 12.

[102] UN, OSCE, OAS, ACHPR, "Declaración Conjunta Sobre Libertad De Expresión Y"Noticias Falsas," "Desinformación Y Propaganda," *supra* note 13; UN, OSCE, OAS, "Declaración conjunta sobre libertad de expresión y elecciones en la era digital," *supra* note 23.

[103] I/C Court H.R., *Case Lagos del Campo Vs. Perú*, *Excepciones Preliminares, Fondo, Reparaciones y Costas*, Judgment of August 31, 2017, Series C, No. 340, Para. 96.

[104] UN, Informe de la Relatora Especial Irene Khan, *supra* note 4, para. 38.

types of speech have enhanced protection or are "especially protected" by the right to freedom of expression. In general, these are speeches that are of particular importance for the exercise of other human rights or for the consolidation, functioning and preservation of democracy.[105] In Inter-American jurisprudence, especially protected types of speech include (a) political speech and speech on matters of public interest; (b) speech regarding public officials in the exercise of their duties and about candidates for public office; and (c) speech that constitutes an element of the personal identity or personal dignity of the speaker.[106]

According to the Inter-American Court, it is "logical and appropriate that statements concerning public officials and other individuals who exercise functions of a public nature should be accorded, in the terms of Article 13(2) of the Convention, a certain latitude in the broad debate on matters of public interest that is essential for the functioning of a truly democratic system."[107] "In a democratic system, the acts or omissions of the Government should be subject to rigorous examination, not only by the legislative and judicial authorities, but also by public opinion," explains the Court.[108] The main consequence of this premise is that any type of limitation on these types of speech[109] should be evaluated with special care, the state must refrain more strictly from imposing restrictions on these forms of expression, and entities and officials within the state, as well as those who aspire to hold public office, due to the public nature of their duties, must have a higher threshold of tolerance for criticism.[110]

The differentiated protection threshold for public officials and public figures is because they have voluntarily exposed themselves to more rigorous public scrutiny. Consequently, they are subject to heightened risks of being the target of criticism since their activities leave the private sphere and enter the public arena.[111] For this reason, the Inter-American Court states, "In the context of the public debate, the margin of acceptance and tolerance of criticism by the State itself, and by public officials, politicians and even individuals who carry out activities

[105] IACHR, "Marco jurídico…," *supra* note 41, para. 32.

[106] Ibid.

[107] I/A Court H.R., *Herrera Ulloa Case*, *supra* note 64.

[108] I/A Court H.R., *Case Ivcher Bronstein*, *supra* note 72, para. 155.

[109] I/A Court H.R., Case Lagos del Campo, *supra* note 136, para. 109.

[110] I/A Court H.R., *Herrera Ulloa Case*, *supra* note 64, para. 125; I/A Court H.R., *Case Ricardo Canese*, supra note 67, para. 102.

[111] I/A Court H.R., *Herrera Ulloa Case*, *supra* note 64, para. 129.

subject to public scrutiny, must be much greater than that of individuals."[112]

In facing dilemmas regarding restrictive measures on freedom of expression related to disinformation, Inter-American jurisprudence requires an analysis of the nature of the expressions—if they are opinions or factual information—their public interest value, and their impact on the public sphere. All of this must be assessed under a test of legality, necessity, and proportionality.[113] On this aspect, a report by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression noted that "This does not mean that disinformation in the context of political speech can never be restricted, but that any such restriction requires a high threshold of legality, legitimacy, necessity and proportionality." It even adds, "For instance, electoral laws may justifiably forbid the propagation of falsehoods relating to electoral integrity, but such a restriction must be narrowly construed, time-limited and tailored so as to avoid limiting political debate."[114]

Finally, given that the legal dilemmas of disinformation may involve opinions, it is worth noting that the Human Rights Committee has stated that "The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events."[115] The Inter-American Court of Human Rights addressed this point in the Kimel case, where it stated that opinions cannot be subject to sanction, "even more so where it is a value judgment on the actions of a public official in the performance of his duties."[116]

6. On Speech Not Protected by the Right to Freedom of Expression in the Inter-American Human Rights System

As mentioned above, the Inter-American human rights system understands that all forms of speech are, in principle, protected by the right to freedom of expression and that there are no prior conditions for this right. However, Article 13.5 of the American Convention explicitly mentions a series of expressions not covered by this right:

[112] I/A Court H.R., *Case Ricardo Canese*, supra note 67, para. 103.

[113] I/A Court H.R., *Kimel Case*, *supra* note 47, para. 86.

[114] UN, Informe de la Relatora Especial Irene Khan, *supra* note 4, para. 42.

[115] CCPR, Observación general No. 34, supra note 43, para. 49.

[116] I/A Court H.R., *Kimel Case*, *supra* note 47, para. 93.

> "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."

While Article 13.4 states that:

> "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."

As can be seen, the American Convention mentions only three types of prohibited speech and, therefore, it excludes *ex ante* from the scope of protection of the right to freedom of expression: (a) war propaganda;[117] (b) advocacy of national, racial or religious hatred that constitutes incitement to violence or any other similar illegal action against any person or group of persons;[118] and (c) child pornography.[119] The dissemination of false information does not fall into any of these categories nor does it constitute, in itself, a prohibited category of speech.

Professor and former Special Rapporteur for Freedom of Expression of the IACHR, Catalina Botero, points out that "fake news" is, in principle, protected by the general presumption of coverage of the right to freedom of expression.[120] And she warns:

It is true that, in some cases, so-called "fake news" may fall under one of the categories of unprotected speech. However, these are exceptional cases in which it is necessary to demonstrate that, regardless of the truth or falsehood of the information, it constitutes one of the types of prohibited speech. In other words, "fake news" does not constitute an independent category of unprotected speech.[121]

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[117] ICCPR, art. 20(1); ACHR, art. 13(5).

[118] ICCPR, art. 20(2); ACHR, art. 13(5); Convención para la prevención y la sanción del delito de genocidio art. III(c), December 9, 1948, 78 U.N.T.S. 277.

[119] Convención sobre los derechos del niño, 34(c); Protocolo Facultativo de la Convención sobre los derechos del niño relativo a la venta de niños, la prostitución infantil y la utilización de niños en la pornografía, art. 3.1(c).

[120] Botero Marino, *supra* note 29, p. 72.

[121] Ibid.

The dissemination of false information can be a tool used deliberately to incite violence, discrimination or hostility towards various groups.[122] The United Nations Rabat Plan of Action is an instrument that can serve as a guide for interpreting Article 13 of the ACHR, even in cases involving the dissemination of false information.[123] The Plan suggests a six-part "threshold test" to assess the "severity" of an expression alleged to be "hate speech," and therefore to determine whether it falls within the categories of speech prohibited by international law.[124] The six factors of analysis are: (1) the social and political context; (2) the position or social status of the speaker; (3) intent to incite the audience to take action against a particular group; (4) content and form of the speech; (5) extent of the dissemination of the speech; and (6) likelihood of harm, including imminence. The Rabat Plan of Action provides an analytical framework that may be useful to guide decisions by the Inter-American Court in cases related to hate speech and disinformation.[125]

7. On Indirect Restrictions on Freedom of Expression

Article 13.3 of the American Convention provides that

> "The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, 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."[126]

According to the Court, indirect means represent "more subtle forms of restriction on the right to freedom of expression" promoted by state authorities or by private individuals.[127] Inter-American jurisprudence has held that the list

[122] UN OSCE, OAS, ACHPR, "Declaración Conjunta Sobre Libertad De Expresión Y"Noticias Falsas," Desinformación Y Propaganda," *supra* note 13.

[123] UN, Informe anual de la Alta Comisionada de las Naciones Unidas para los Derechos Humanos, "Informe de la Alta Comisionada de las Naciones Unidas para los Derechos Humanos acerca de los talleres de expertos sobre la prohibición de la incitación al odio nacional, racial o religioso," A/HRC/22/17/Add.4, January 11, 2013, para. 29 (apendix).

[124] Ibid.

[125] Ibid.

[126] ACHR, art. 13

[127] I/A Court H.R., *Granier Case*, *supra* note 90, para. 162.

of restrictive means in Article 13.3 is not exhaustive and does not preclude the consideration of other indirect means or methods, including those arising from new technologies.[128] Thus, for example, the Court has considered that indirect means include, among others, the decision that nullified the nationality status of the majority shareholder of a television channel;[129] the criminal proceedings, the subsequent conviction imposed for more than eight years, and the travel restrictions for eight years against a presidential candidate;[130] and the administrative summary investigation, the decision to suspend the authorization for newspaper publications and the decision to terminate a military officer's contract early.[131]

The IACHR Declaration of Principles on Freedom of Expression also mentions other examples of indirect means or methods, including "The exercise of power and the use of public funds by the state, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans, the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression,"[132] and mandates their prohibition by law.

The conventional prohibition of indirect restrictions on freedom of expression places certain limits on the powers of states to take measures against disinformation.[133] The IACHR's Office of the Special Rapporteur for Freedom of Expression understands, for example, that imposing liabilities on digital platforms for the content published by users could constitute an indirect means of restricting freedom of expression since it "would be to radically discourage the existence of the intermediaries necessary for the Internet to retain its features of data flow circulation."[134] Likewise, it "creates strong incentives for the private censorship of a wide range of legitimate expression."[135] Therefore, under Article 13.3, states

[128] I/A Court H.R., *Perozo Case*, *supra* note 39, para. 367.

[129] I/A Court H.R., *Case Ivcher Bronstein*, *supra* note 72, para. 162.

[130] I/A Court H.R., *Case Ricardo Canese*, supra note 67, para. 107.

[131] I/A Court H.R., *Case Palamara Iribarne Vs. Chile Fondo, Reparaciones y Costas*, Judgment of November 22, 2005, Series C No. 135, para. 94.

[132] IACHR, Declaración de Principios sobre Libertad de Expresión, 2000.

[133] Agustina Del Campo, "Content Moderation and private censorship: standards drawn from the jurisprudence of the Inter-American Human Rights system," Submission to the United Nations Special Rapporteur on the Protection and Promotion of Freedom of Opinion and Expression, David Kaye, CELE, December 2017, https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/ContentRegulation/CELE.pdf.

[134] IACHR, "Libertad de expresión e internet," *supra* note 95, para. 97.

[135] Ibid. para. 98.

should refrain from pressuring, suggesting, or indirectly imposing restrictions on users and content removal obligations on platforms to mitigate disinformation.[136]

8. On the Obligation of States Regarding the Freedom of Expression of Individuals and Companies

As noted in the previous section, Article 13.3 prohibits restrictions on the right to freedom of expression, whether from state actors or from "private controls."[137] The Court has noted that this provision should be read in conjunction with the obligation to respect and ensure rights established in Article 1 of the Convention.[138] While the obligation of respect on the part of states implies "the concept of the restriction of the exercise of state power" and the abstention from "undermining," "violating" or "penetrating" the "individual domains" and those "inviolable attributes" of the individual;[139] the obligation to ensure "implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[140]

a. State Liability for Third-Party Acts

A state may be internationally liable for a human rights violation not only when the violation is perpetrated by its own agents or institutions but also when the acts or omissions that violate a particular right are committed by a private individual if the state failed to exercise due diligence to reasonably prevent the violation and to protect individuals or a group of people from private acts.[141] In the context of freedom of expression, this means that a state may violate Article 13 of the American Convention not only by imposing restrictions aimed at directly or indirectly preventing the circulation of ideas and opinions but also by failing to ensure that there are no violations of freedom of expression by private individuals.[142]

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[136] Del Campo, *supra* note 167, p. 7.

[137] I/A Court H.R., *Granier Case*, *supra* note 90, para. 162.

[138] I/A Court H.R., Opinión Consultiva OC-5/85, supra note 52, para. 48.

[139] I/A Court H.R., *Case Velasquez Rodríguez Vs. Honduras. Fondo,* Judgment of July 29, 1988, Series C No. 4, para. 165.

[140] Ibid, para. 166.

[141] Ibid, para. 172.

[142] I/A Court H.R., Opinión Consultiva OC-5/85, supra note 52, para. 48.

While the Court recognizes that international responsibility may also arise from acts by private individuals that are not in principle attributable to the state, it has also specified that "a State cannot be held responsible for all the human rights violations committed between private individuals within its jurisdiction" and that there is no "unlimited responsibility" for any act or fact of individuals.[143] In this regard, attention must be paid to the specific circumstances of each case to determine whether the state had "awareness of a situation of real and imminent danger for a specific individual or group of individuals" and "the reasonable possibilities of preventing or avoiding that danger."[144]

In the case of Perozo v. Venezuela, the Inter-American Court analyzed the violation of Article 13.3 of the American Convention regarding actions attributable to private individuals and state agents.[145] It specified that this article imposes obligations on the state to ensure rights, even within the scope of relations between private individuals.[146] The Court observed that most of the alleged violations of Article 13 of the Convention had been committed by private individuals, to the detriment of journalists and members of news teams of a Venezuelan media outlet.[147] It further specified that the international responsibility of the state "may be generated by acts in violation committed by third parties, which in principle would not be attributable to it," and that this may occur "if the State fails to comply, through actions or omissions by its agents when they are in the position of guarantors," with the obligations of respect and guarantee.[148]

b. Obligations to Ensure Protection against Private Sector Actions

In the universal field of human rights protection, the Human Rights Committee holds that the obligation to respect the right to freedom of expression implies the state's duty to "ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to applica-

[143] I/A Court H.R., *case López Lone y otros vs. Venezuela, Fondo, Reparaciones y Costas*, Judgment of September 26, 2018, Series C No. 362, para. 138.

[144] I/A Court H.R., *Case Masacre de Pueblo Bello Vs. Colombia*, *Fondo, Reparaciones y Costas*, Judgment of January 31, 2006, Series C No. 140, para. 123.

[145] I/A Court H.R., *Case Perozo*, *supra* note 39.

[146] Ibid. para. 367.

[147] Ibid. para 119.

[148] Ibid. para 120.

tion between private persons or entities."[149] While the Inter-American Court has not yet heard cases alleging the violation of Article 13.3 due to "private controls" attributable to Internet platforms, the Court's jurisprudence provides some elements to interpret this legal dilemma in light of the American Convention. As previously mentioned, in the Perozo case, the Court stated that the listing of "restrictive means" in Article 13.3 is not exhaustive and does not preclude considering "any other means" or indirect methods arising from new technologies.[150]

Bertoni points out that "the 'private controls' that could undermine the exercise of freedom of expression referred to in AO-5/85 thirty years ago are gaining significant relevance in the digital age."[151] This refers mainly to actions related to content filtering or blocking or abusive moderation of content.[152] Bertoni argues that it is incompatible with the Inter-American System to leave the restriction of content circulation in the hands of private entities, as this could lead to state responsibility due to the potential infringement on freedom of expression by these private actors.[153] The inaction of the signatory states of the American Convention on Human Rights may lead to international responsibility for failing in their due diligence and prevention obligations to avoid or stop such rights violations.[154]

The scope of the prohibition in Article 13.3 may depend in part on the meaning or interpretation given to the term "abuse" of private controls referred to in the Convention.[155] Some consider that "it may be desirable to tolerate and even to encourage purely voluntary action by Internet service providers (…) to address misuse of their services by third party users that harms the rights of others, even if such action may impede some expression."[156]

The question raised here is whether some measures adopted by platforms based on self-regulatory mechanisms—such as the decision to remove sexually expli-

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[149] CCPR, Observación general No. 34, *supra* note 43, para. 7.

[150] I/A Court H.R., *Case Perozo*, *supra* note 179, para. 367.

[151] Eduardo Bertoni, "OC-5/85: su vigencia en la era digital," [Internal translation] in *Libertad de expresión: a 30 años de la opinión consultiva sobre la colegiación obligatoria de periodistas*, Ismael Paredes ed., 2017, p. 42.

[152] Eduardo Bertoni, "Liability of Non-State Actors for Violations of the Freedom of Expression," Observatorio Latinoamericano de Regulación, Medios y Convergencia (OBSERVACOM), November 2021, p. 15, retrieved from: https://www.observacom.org/wp-content/uploads/2021/12/Liability-of-Non-State-Actos-for-Violation-of-Freedom-of-Speech.-E.-Bertoni.pdf.

[153] Bertoni, *supra* note 186, p. 42.

[154] Bertoni, *supra* note 187, p. 15.

[155] "'Regardless of frontiers'…," *supra* note 185, pp. 42 and 43.

[156] Ibid. ("…it may be desirable to *tolerate and even to encourage* purely voluntary action by Internet service providers, Web hosts and other technological intermediaries to address misuse of their services by third party users that harms the rights of others, even if such action may impede some expression" [My emphasis.])

cit content that violates the terms of service but not prohibited by international law—would constitute an "abuse of private controls" under the American Convention and the Court's jurisprudence.[157]

In AO-5/85, the Court noted that freedom of expression can also be affected "when due to the existence of monopolies or oligopolies in the ownership of communications media, there are established in practice "means tending to impede the communication and circulation of ideas and opinions.""[158] The Court could apply this premise to address the tensions of rights that arise in the digital ecosystem.

c. On the State's Obligation to Supervise Corporate Activities

More recently, in 2021, the Court issued two significant decisions on business and human rights, in which it analyzed the attribution of international responsibility to states for human rights violations arising from the activities of private companies, outside the scope of the right to freedom of expression.[159] The Court questioned whether "the rules of attribution of international responsibility, as traditionally established, whereby responsibility is primarily attributed to the State, should remain unchanged."[160] In the Miskito Divers v. Honduras case, the Court established that states have the obligation to regulate, supervise and oversee the practice of dangerous activities by private companies that pose significant risks to the human rights of individuals under their jurisdiction[161]; additionally, they must adopt legislative and other measures to prevent human rights violations committed by private companies;[162] and they must investigate, punish, and remedy such violations when they occur.[163]

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[157] Ibid.

[158] I/A Court H.R., Opinión Consultiva OC-5/85, supra note 52, para. 56.

[159] Cases Buzos Miskitos vs. Honduras and Martina Vera Rojas vs. Chile. Both decisions follow the precedent set in 2015 in the Case of Kaliña and Lokono v. Suriname, in which the Court applied the United Nations Guiding Principles on Business and Human Rights. See Salvador Herencia-Carrasco and Kelsea Gillespie, "El régimen de empresas y derechos humanos en la Corte Interamericana de Derechos Humanos: análisis del 2021 y perspectivas para el 2022," *Agenda Estado de Derecho*, January 28, 2022, retrieved from: https://agendaestadodederecho.com/el-regimen-de-empresas-y-derechos-humanos-en-la-corte-interamericana-de-derechos-humanos/.

[160] I/A Court H.R., *Case Buzos Miskitos (Lemoth Morris y Otros) Vs. Honduras*, Judgment of August 31, 2021, Series C No. 432, para. 2 (concurring vote of Judge L. Patricio Pazmiño Freire).

[161] Ibid. paras. 43-36, 55.

[162] Ibid. para. 48.

[163] Ibid.

The Miskito Divers Case is considered a "turning point" in Inter-American jurisprudence, as it is the first decision in which the Court delves into the responsibilities of companies regarding human rights.[164] Although it does not examine possible violations of Article 13 of the American Convention on the right to freedom of expression, the Court provides some argumentative guidelines on the obligations of states *vis-à-vis* the activities of private companies, which could apply to digital platforms.

In several cases, the Court has referred to and incorporated the UN "Principles on Business and Human Rights."[165] These are a valuable instrument in that they clarify the obligations of states concerning the actions of private companies and provide concrete guidelines for businesses regarding human rights.[166] These Principles recognize in particular "The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights."[167] The Guiding Principles aim to "enhancing standards and practices with regard to business and human rights" but in no case should they be interpreted as "creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights."[168] Among other things, they establish that the responsibilities of businesses to respect human rights imply:

- Avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved;[169]
- Avoid causing or contributing to adverse human rights impacts through their

[164] Maysa Zorob and Hector Candray, "Justicia para los buzos miskitos: un punto de inflexión para las empresas y los estándares de derechos humanos de la Corte Interamericana de Derechzos Humanos," Open Global Rights, March 21, 2022, retrieved from: https://www.openglobalrights.org/justice-for-miskito-divers-a-turning-point-for-business-and-human-rights-standards/?lang=Spanish.

[165] I/A Court H.R., *Case Buzos Miskitos (Lemoth Morris y Otros) Vs. Honduras*, Judgment of August 31, 2021, Series C No. 432, para. 47; *Case Pueblos Kaliña y Lokono Vs. Surinam, Fondo, Reparaciones y Costas*, Judgment of November 25, 2015, Series C No. 309, para. 224; *Medio ambiente y derechos humanos* (State obligations about the environment in the framework of the protection and guarantee of the rights to life and personal integrity—interpretation and scope of Articles 4.1 and 5.1, in relation to Articles 1.1 and 2 of the American Convention on Human Rights), Opinión Consultiva OC-23/17, November 15, 2017. Series A No. 23, para. 155.

[166] UN, Office of the High Commissioner for Human Rights, "Principios Rectores sobre las empresas y los derechos humanos", Doc. HR/PUB/11/04, 2011.

[167] Ibid. in 1.

[168] Ibid.

[169] Ibid. Principle 11.

own activities, and address such impacts when they occur;[170]

- Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services by their business relationships, even if they have not contributed to those impacts;[171]
- Business enterprises should have in place policies and processes appropriate to their size and circumstances, including (i) A policy commitment to meet their responsibility to respect human rights; (b) A human rights due diligence process to identify, prevent, mitigate, and account for how they address their impacts on human rights; (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.[172]

This instrument should be used to analyze a potential case before the Inter-American system involving an internet company's actions (or omissions) related to expressions alleged to be disinformation. In particular, within the United Nations framework, the "B-Tech Project" and its various reports provide guidance, references, and resources on how to apply the Guiding Principles in the technology field.[173]

9. On the Prohibition of Prior Censorship and Preventive Control of Information

Article 13.2 of the American Convention provides that the exercise of freedom of expression "shall not be subject to prior censorship but shall be subject to subsequent imposition of liability."[174] This virtually absolute prohibition of prior censorship is not found in other international human rights instruments, which is an indicator of the great importance that the Inter-American Human Rights System places on this right.[175]

The Inter-American Court defines censorship as the radical suppression of free-

[170] Ibid. Principle 13.

[171] Ibid.

[172] Ibid. Principle 15.

[173] UN, Office of the High Commissioner for Human Rights, "Proyecto B-Tech," retrieved from: https://www.ohchr.org/es/business/b-tech-project.

[174] ACHR, art. 13.2.

[175] *Libertad de expresión en las Américas…*, *supra* note 37, p. 209; IACHR, Informe No. 11/96, Case 11.230, Informe de fondo Francisco Martorell con respecto a Chile, May 3, 1996, para. 56.

dom of expression, which occurs "when government power is used to establish means to prevent the free flow of information, ideas, opinions or news."[176] The Inter-American Commission, for its part, understands prior censorship "implies restricting or preventing expression before it has been circulated, so preventing not only the individual whose expression has been censored, but also all of society, from exercising their right to the information."[177]

The only conventionally established exception to prior censorship is that provided for in Article 13.4, relating to the possibility of subjecting public shows to prior censorship by law "for the sole purpose of regulating access to them for the moral protection of childhood and adolescence."[178] Inter-American jurisprudence has consistently reiterated that in all other cases, any preventive measure implies an infringement of freedom of thought and expression.[179] Now, the question arises as to whether the Inter-American Court's strict interpretation of the prohibition of prior censorship also includes those measures by state or non-state actors aimed at removing information from the internet to counter disinformation.

New digital interaction spaces have frequently contributed to accelerating the pace and amplifying the spread of disinformation.[180] In response, various private companies have implemented content control measures on their platforms to prevent and counter disinformation,[181] especially and with particular intensity during the COVID-19 pandemic.[182]

Moderation of content identified as disinformation involves various measures, ranging from adding labels, warnings, or flags, to reducing the circulation and reach of certain posts, and even removing content.[183] These measures have de-

[176] I/A Court H.R., Opinión Consultiva OC-5/85, supra note 52, para. 54; I/A Court H.R., *Case Palamara Iribarne*, supra note 165, para. 68.

[177] IACHR, Informe No. 90/05, Case 12.142, Informe de fondo Alejandra Marcela Matus Acuña con respecto a Chile, October 24, 2005, para. 35.

[178] ACHR, art. 13.4;

[179] I/A Court H.R., *Case "La Última Tentación de Cristo" (Olmedo Bustos y otros) Vs. Chile Fondo, Reparaciones y Costas*, Judgment of February 5, 2001, Series C No. 73, para. 70.

[180] UN, Informe del Secretario General, "Contrarrestar la desinformación para promover y proteger los derechos humanos y las libertades fundamentales," A/77/287, August 12, 2022, para. 46.

[181] Ibid. paras. 46 and 47; Cortés et al., *supra* note 12.

[182] UN, Informe del Secretario General, *supra* note 214, para. 46.

[183] "Información y noticias confiables," YouTube, retrieved from: https://www.youtube.com/howyoutubeworks/product-features/news-information/; "Hard Questions: What's Facebook's Strategy for Stopping False News?," Meta, May 23, 2018, retrieved from: https://about.fb.com/news/2018/05/hard-questions-false-news/; "Our range of enforcement options," Twitter, retrieved from: https://help.twitter.com/en/rules-and-policies/enforcement-options; Cortés et al., *supra* note 12.

finitely raised problems, such as the difficulty in clearly defining what constitutes disinformation and the nature of the content that would fall within this category.[184] Moreover, the measures themselves have also raised questions about their compliance with international human rights standards.[185] For example, the question has been raised as to whether the use of pre-upload filtering systems (i.e., those that filter content before it is published) is compatible with international law.[186] In comparative terms, the Court of Justice of the European Union (CJEU) explored this point in greater depth and ruled that states are authorized, under European law, to remove or block content that has been declared unlawful by a court, and may even remove or block posts that are "identical or similar in content" to that content using "automated search tools and technologies."[187]

Although the Inter-American System has not yet heard any case involving internet content moderation, the purposes of this paper need to consider whether the rules and standards on freedom of expression in the Inter-American System would allow for an interpretation similar to that of the CJEU in a case on disinformation. Some argue that the Inter-American legal framework could in no way support such a decision since the American Convention—unlike the European Convention on Human Rights—explicitly prohibits prior censorship.[188] Indeed, the Special Rapporteur for Freedom of Expression of the IACHR has repeatedly stated that blocking and filtering specific content on the internet is only admissible in exceptional cases, that is, in relation to speech not protected by the right to freedom of expression, such as war propaganda and hate speech that constitutes incitement to violence, direct and public incitement to genocide, and child pornography.[189]

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[184] UN, Informe de la Relatora Especial Irene Khan, *supra* note 4, para. 14.

[185] Catharine Christie et al., "COVID-19 y la libertad de expresión en las Américas," Diálogo Interamericano, 2020, retrieved from: https://www.thedialogue.org/wp-content/uploads/2020/08/Covid-19-y-la-Libertad-de-Expresio%CC%81n-en-las-Ame%CC%81ricas-SP-Final.pdf.

[186] Agustina Del Campo & Paula Roko, "Del cómic a los memes: viejas y nuevas problemáticas en torno al humor y la libertad de expresión," in *Internet y derechos humanos III: aportes para la discusión en América Latina*, 2019, pp. 48 and 49.

[187] Court of Justice of the European Union, *Eva Glawischnig-Piesczek V. Facebook Ireland Limited*, Judgment of October 3, 2019, para. 46.

[188] Evelyn Douek, "The Limits of International Law in Content Moderation," *UC Irvine Journal of International, Transnational, and Comparative Law*, Vol. 6, 2021, p. 55; Brenda Dvoskin, "Why International Human Rights Law Cannot Replace Content Moderation," *Medium*, October 8, 2019, retrieved from: https://medium.com/berkman-klein-center/why-international-human-rights-law-cannot-replace-content-moderation-d3fc8dd4344c.

[189] IACHR, "Libertad de expresión e internet," *supra* note 95, para. 85.

10. On the Use of Criminal Law to Punish the Exercise of Freedom of Expression

Within the Inter-American human rights framework, the right to freedom of expression is not absolute and may incur subsequent liabilities, as outlined in Article 13.2 of the American Convention, particularly in cases of abusive exercise of this right. The Inter-American Court has set forth various guidelines on the conditions that a restriction on the right to freedom of expression must meet in order to be considered conventionally legitimate. In this regard, the Court has stated that

> The grounds for imposing subsequent liability must be expressly, previously and strictly limited by law; they should be necessary to ensure "respect for the rights or reputations of others" or "the protection of national security, public order, or public health or morals," and should in no way restrict, beyond what is strictly necessary, the full exercise of freedom of expression or become either direct or indirect means of prior censorship.[190]

In examining various cases on subsequent liability imposed from the allegedly abusive exercise of the right to freedom of expression, the Court also stated that criminal law "is the most restrictive and severe means to establish liabilities for illicit behavior, particularly when sanctions involve deprivation of liberty." [191] Therefore, the use of criminal law must adhere to the principle of minimal intervention, given the nature of criminal law as *ultima ratio*.[192] According to the Court, in a democratic society, punitive power can only be exercised to the extent strictly necessary to protect the fundamental juridical goods from the most grave attacks that damage or jeopardize it or an imperative social need,[193] since the opposite "would lead to the abusive exercise of the punitive power of the State."[194]

In the Álvarez Ramos case, the Court went even further in this regard, stating that in the case of speech protected for its public interest, such as that related to public officials, the punitive response by the state through criminal law "is not

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[190] I/A Court H.R., *Case Palamara Iribarne*, *supra* note 165, para. 79.

[191] I/A Court H.R, *Case Usón Ramírez Vs. Venezuela, Excepción Preliminar, Fondo, Reparaciones y Costas, Judgment of November 20, 2009, Series C, No. 207, para.* 73.

[192] Ibid.

[193] I/A Court H.R., Opinión Consultiva OC-5/85, supra note 52, para. 46.

[194] I/A Court H.R., *Case Usón Ramírez*, supra note 226, para. 73.

conventionally appropriate" to protect the honor of an official.[195] The case involved an individual who was criminally convicted of aggravated and continuous defamation for publishing an opinion column in a newspaper, which led a former deputy and president of the National Assembly of Venezuela to file a complaint.[196] The Court found the State of Venezuela internationally responsible for violating Tulio Álvarez Ramos's right to freedom of expression—among other rights— and established the criterion that, when it concerns matters of public interest disseminated by journalists, the Convention prohibits the imposition of a criminal sanction to protect the honor of the public officials involved.[197] This precedent was reinforced by the Court in Palacio Urrutia and Moya Chacón, the two most recent rulings on this matter.[198]

The use of criminal charges to combat, limit or discourage certain types of speech that offend, shock, disturb, are unpleasant or disrupt has a long history in the Americas.[199] It is important to analyze the regional precedents that led to the decriminalization of expression in the Americas, and to understand why it is essential to promote these advances and avoid regression in this matter. In the 1990s and early 2000s, the IACHR and its Special Rapporteur for Freedom of Expression focused their efforts on promoting the elimination of the criminal offenses of *desacato* that were in force at that time in several parts of the region.[200] For the Special Rapporteur, the "use of criminal laws to protect the "honor" or "reputation" of ideas or institutions" and "the attempts to apply criminal offenses such as "terrorism" or "treason" to those who have limited themselves to expressing or imparting ideas or opinions that are different—or even radically different—from those held by government authorities" were particularly concerning.[201]

Through various reports, and particularly in a 1994 report, the Commission and the Special Rapporteur pointed out that there is an intrinsic incompatibility between the criminal offense of *desacato* and Article 13 of the American Convention, as it affords those who exercise public office a greater degree of protection

[195] I/A Court H.R., *Case Álvarez Ramos, supra* note 104, para. 121.

[196] Ibid. para. 1.

[197] Ibid. para. 121; I/A Court H.R., *Case Moya Chacón*, *supra* note 96, para. 11 (concurring opinion of Judge Ricardo C. Pérez Manrique).

[198] I/A Court H.R., *Case Palacio Urrutia*, *supra* note 104, para. 120; *Baraona Bray Case*, *supra* note 104, paras. 128 and 129.

[199] María Dolores Miño et. al., *La ley y la palabra. Criminalización de la expresión en América Latina*, Fundamedios, 2012.

[200] Ibid.

[201] IACHR, Informe de la Relatoría Especial para la Libertad de Expresión, "Una agenda hemisférica para la defensa de la libertad de expresión," OEA/Ser.L/V/II CIDH/RELE/INF. 4/09, February 25, 2009, para. 55.

than other citizens, and—by its nature—tends to censor and silence debate on matters of public interest.[202] Over the years, several countries in the region have removed *desacato* from their legislation, including Argentina (1993), Paraguay (1998), Costa Rica (2002), Peru (2003), Honduras (2005), Chile (2005), Guatemala (2006), Panama (2009), Uruguay (2009), and Ecuador (2014).[203] The work of the Commission and the Inter-American Court has also contributed to the elimination of other defamation offenses that seek to protect the honor of public officials, such as slander and libel.[204]

However, in the last decade there has been a new push for legislation or bills that incorporate criminal offenses—or increase the penalties for existing crimes—to respond to alleged abusive exercises of freedom of expression, including disinformation.[205] Based on the findings from the Legislative Observatory on Freedom of Expression, CELE identified that "Many legislative responses to abuses of freedom of expression include the criminalization of the conduct"[206] and aim to address issues in the digital sphere, such as the dissemination of intimate images without consent, online discrimination, and disinformation.[207]

The United Nations Special Rapporteur for Freedom of Expression observed a similar trend and highlighted that state responses to disinformation have often been problematic and have had a detrimental impact on human rights.[208] The IACHR Special Rapporteur for Freedom of Expression emphasized that introducing criminal offenses—likely vague or ambiguous by nature—could not only revert the region to a stance of criminalizing expressions protected under the right to freedom of expression but could also strongly inhibit the free dissemination of ideas, criticism, and information.[209] In CELE's opinion, most legislative initiatives regarding disinformation at the regional level have primarily focused in two directions: the criminalization of expression; and the creation of liability

[202] IACHR, Informe Anual 1994, Capítulo V: Informe sobre la Compatibilidad entre las Leyes de Desacato y la Convención Americana sobre Derechos Humanos, OEA/Ser. L / V / II.88, Doc. 9 rev., February 17, 1995.

[203] Miño et. al., *supra* note 234.

[204] Ibid.

[205] Franco Serra, "La regulación de la libertad de expresión en América Latina: hallazgos, tendencias y desafíos legislativos," CELE, 2022; Agustina Del Campo, "La regulación de internet y su impacto en la libertad de expresión en América Latina," in *Libertad de expresión e internet. Desafíos legislativos en América Latina*, CELE, 2018.

[206] Ibid.

[207] Ibid.

[208] UN, Informe de la Relatora Especial Irene Khan, *supra* note 4, para. 3.

[209] OAS, "Guía para garantizar la libertad de expresión…," *supra* note 12, p. 23.

regimes for intermediary platforms that require them to actively detect and/or immediately block content deemed to be "disinformation"—a category that is often poorly defined.[210]

This growing trend in the use of criminal law to limit freedom of expression was particularly evident in the Americas during the pandemic.[211] In 2020, various states in the region—mainly through their executive branches but also legislative—promoted criminal measures to combat or reduce disinformation on the internet, primarily based on the threat of harm to health and public order.[212] Generally speaking, these measures were framed within "states of emergency," "states of exception," or "states of disaster due to public calamity."[213]

Regulatory experience at the regional level shows that rules seeking to restrict the dissemination of false information often clash with Inter-American rules and standards on the right to freedom of expression, mainly due to the vague and ambiguous notions they provide regarding "disinformation" or "false information," and the disproportionate limitations they impose.[214] Additionally, it is not possible to clearly identify in these rules what the legitimate objective is, in the terms required by Inter-American jurisprudence. Is it the honor and reputation of a person, public order, security, or public morals? Or, rather, is it intended to protect society as a whole from "deception"?[215] As stated in a report by UN Special Rapporteur Irene Khan, "the prohibition of false information is not in itself a legitimate aim under international human rights law."[216] Furthermore, many of the measures to combat disinformation propose criminal sanctions that, due to the lack of clarity and ambiguity, could restrict expressions protected by international human rights law.[217]

A case in Argentina illustrates this idea. During the COVID-19 pandemic, the Argentine government engaged in "cyber patrolling" to identify accounts that

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[210] "Panel de Alto Nivel…," *supra* note 17.

[211] IACHR, Relatoría Especial para la Libertad de Expresión, Informe Anual 2020, OEA/Ser.L/V/II Doc. 28, March 20, 2021; Christie et al., *supra* note 219, pp. 3 and 7; Paula Roko, "El Control Estatal De La (Des)Informacion En Internet En El Contexto De La Pandemia: Un Analisis De Las Tendencias Regionales Bajo Una Perspectiva De Libertad De Expresion," in *American University International Law Review*, Vol. 37, Issue 2, 2022.

[212] Roko, *supra* note 246, p. 269.

[213] Ibid.

[214] Ibid., p. 289; UN, "Regulación de los contenidos en línea," *supra* note 224, para. 13.

[215] Roko, *supra* note 246, p. 289.

[216] UN, Informe de la Relatora Especial Irene Khan, *supra* note 4, para. 40.

[217] Ibid.

spread false information and/or caused public intimidation.[218] In this context, a journalist from the province of Chaco who posted on social media that the city of Roque Sáenz Peña had more cases than officially reported was visited at his home the next day by officers of the National Gendarmerie.[219] The reporter was summoned by the Federal Court for posting on social media "a false news item from an unofficial source."[220] This case also occurred amid criticism of the National Ministry of Security, following a press conference in which its head mentioned that they were monitoring social media for preventive purposes and to gauge "social sentiment."[221] These events bear similarities to those analyzed by the Inter-American Court in the Álvarez Ramos, Palacio Urrutia and Moya Chacón cases.

Some restrictive measures on freedom of expression for reasons related to disinformation could be incompatible with Article 13 of the American Convention on Human Rights. Even in cases classified as "disinformation" or "fake news" by states, it is vital to highlight that according to the standards of the Inter-American Court, authorities cannot impose criminal sanctions for expressions on matters of public interest, as this type of speech enjoys special protection given its importance in a democratic society.[222]

11. On the Protection of the "Dissemination" or "Circulation" of Expressions

The Inter-American Court has also explored the different ways of exercising the right to freedom of expression. As stated in Article 12 of the American Conven-

[218] The term "cyber patrolling" is used to describe what is technically known as open-source information research. In Argentina, this type of investigative technique and intelligence action was regulated in Resolution 31/2018 of the Ministry of Security, which instructed the Cybercrime investigation units of the federal security forces to intervene in a set of crimes through "investigative acts" to be conducted on publicly accessible digital sites. However, on May 31, 2020, the same agency regulated the "Protocolo General para la Prevención Policial del Delito con Uso de Fuentes Digitales Abiertas" [General Protocol for Police Crime Prevention Using Open Digital Sources] in Resolution 144/2020. See Resolution 144/2020 of the Ministry of Security, Boletín Oficial de la República Argentina, May 31, 2020.

[219] "Un periodista de Chaco posteó que habría más casos de Covid-19 y le mandaron a Gendarmería," *Periodismo y Punto*, June 24, 2020, retrieved from: https://periodismoypunto.com/2020/06/ciberpatrullaje-un-periodista-de-chaco-posteo-que-habria-mas-casos-de-covid-19-y-le-mandaron-a-la-gendarmeria/; Cámara de Diputados de Argentina, Draft resolution signed by Representative José Luis Patiño, June 25, 2020, retrieved from: https://www4.hcdn.gob.ar/dependencias/dsecretaria/Periodo2020/PDF2020/TP2020/3125-D-2020.pdf

[220] "Un periodista de Chaco posteó que habría más casos de Covid-19 y le mandaron a Gendarmería," *supra* note 254.

[221] Gustavo Ybarra, "Sabina Frederic reveló que las fuerzas de seguridad realizan"ciberpatrullajes" en las redes sociales para medir el humor social," *La Nación*, April 8, 2020, retrieved from: https://www.lanacion.com.ar/politica/sabina-frederic-advirtio-que-el-cierre-de-rutas-y-de-accesos-es-un-delito-nid2351959.

[222] I/A Court H.R., *Case Palacio Urrutia*, *supra* note 104, para. 115.

tion, this right includes the freedom to "seek, receive and disseminate" information and ideas of all kinds.[223]

In this regard, the Court has indicated that the exercise of the right to freedom of expression is not limited to the theoretical recognition of the right to speak or write but also includes, indivisibly, the right to use "any appropriate method to disseminate thought and allow it to reach the greatest number of persons."[224] According to the Court, the expression and dissemination of thoughts and ideas are indivisible, "so that a restriction of the possibilities of dissemination represents directly, and to the same extent, a limit on the right to free expression."[225]

For the purposes of analyzing expressions disseminated on the internet, this standard is crucial since in many cases, the person who expresses an idea or information through digital media is not the same person who later shares or continues to disseminate it. In social media, the same expression can be replicated by thousands of users, and this is also, in principle, protected by the right to freedom of expression. According to Inter-American jurisprudence, the right to express oneself freely extends not only to those who express an idea or information but also to the person who shares or distributes it by any means.

12. On the Differentiated Responsibilities of Public Officials in Exercising the Right to Freedom of Expression

The obligations to ensure, respect, and promote human rights require states to make sure that public officials, when making statements, do not undermine fundamental rights.[226] Although public officials, like all individuals, enjoy the right to freedom of expression in its various forms, they are subject to special duties due to their position.[227] The Inter-American Court has noted that public officials

[223] Convención Americana sobre Derechos Humanos, art. 13.1.

[224] I/A Court H.R., *Case Carvajal Carvajal y otros Vs. Colombia, Fondo, Reparaciones y Costas*, Judgment of March 13, 2018, Series C No. 352, para. 172.

[225] My emphasis.

[226] IACHR, "Marco jurídico…," *supra* note 41, para. 203.

[227] IACHR, Office of the Special Rapporteur for Freedom of Expression, "La Relatoría especial para la libertad de expresión hace un llamado para que las personas que ocupan o aspiran a ocupar cargos de elección popular en Perú contribuyan con su discurso a la protección de los derechos humanos," press release R126/21, May 17, 2021, retrieved from: https://www.oas.org/es/cidh/expresion/showarticle.asp?IID=2&artID=1199; see also "Los principios de candem sobre la libertad de expresión y la igualdad," Article 19, 2009, p. 8. ("Los Estados deberán imponer obligaciones … a los servidores públicos de todos niveles, incluso a los ministros, a que eviten en cuanto sea posible hacer declaraciones que promuevan la discriminación o que socaven la igualdad y el entendimiento intercultural. Para los funcionarios públicos, esto se deberá reflejar en código>

are required to reasonably, though not necessarily exhaustively, verify the facts on which they base their opinions and should do so with even greater diligence than that employed by private individuals, given the high degree of credibility they hold and to prevent citizens from receiving a manipulated version of the facts.[228]

In the case of Ríos et al. v. Venezuela, the Court stressed that when public officials, in the exercise of their office, make use of the means provided by the state to issue their statements and speeches; their pronouncements could be considered "official," without, however, that making them a state policy.[229]

Concerning the phenomenon of disinformation, this standard is particularly relevant. In 2017, the freedom of expression mandates of the United Nations, the Organization of American States, the Organization for Security and Co-operation in Europe, and the African Commission on Human and People's Rights emphasized that "[s]tate actors should not make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda)."[230] In 2021, they also recommended that states "adopt policies which provide for disciplinary measures to be imposed on public officials who, when acting or perceived to be acting in an official capacity, make, sponsor, encourage or further disseminate statements which they know or should reasonably know to be false."[231] They also recommended that public authorities "make every effort to disseminate accurate and reliable information, including about their activities and matters of public interest."[232]

In response to the circulation of allegedly false or misleading information by

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s formales de conducta o en reglas de empleo". [States should impose obligations on public officials at all levels, including ministers, to avoid as far as possible making statements that promote discrimination or undermine equality and intercultural understanding. For civil servants, this should be reflected in formal codes of conduct or employment rules.]); IACHR, "Marco jurídico…," *supra* note 41, paras. 201—05.

[228] I/A Court H.R., *Case Apitz Barbera v. Venezuela. Excepción Preliminar, Fondo, Reparaciones y Costas*, Judgment of August 5, 2008, Series C, No. 182, para. 131; *Case Ríos v. Venezuela, Excepciones Preliminares, Fondo, Reparaciones y Costas*, Judgment of January 28, 2009, Series C, No. 194, Para. 139; *Case Perozo, supra* note 39, para. 151.

[229] I/A Court H.R., *Case Ríos*, *supra* note 263, para. 138.

[230] UN OSCE, OAS, ACHPR, "Declaración Conjunta Sobre Libertad De Expresión Y"Noticias Falsas," Desinformación Y Propaganda," *supra* note 13.

[231] The United Nations (UN) Special Rapporteur on the Protection and Promotion of Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, "Declaración conjunta sobre líderes políticos, personas que ejercen la función pública, y libertad de expresión," October 20, 2021.

[232] Ibid.

public authorities regarding pandemic prevention measures, the IACHR warned that public officials should not make, endorse, promote, or disseminate statements that they know, or should reasonably know, are false, constitute disinformation, or show a manifest disregard for verifiable information.[233]

In the potential consideration of a case on disinformation, the Inter-American Court will need to assess—along with all the aspects mentioned above—who is the issuer or distributor of false content, and take into account the heightened standard of responsibility that public officials have in this regard. On this point, Catalina Botero argues that, from a legal perspective, there is a fundamental difference between the deliberate dissemination of false information by state actors versus that of private individuals, as the former is prohibited under international law, while the latter is, in principle, protected by the right to freedom of expression.[234]

C. Conclusions: Guidelines Provided by the Inter-American Human Rights System for Addressing Disinformation

There are multiple ongoing debates regarding disinformation on the internet, both globally and regionally. Many of them have focused on addressing the role and responsibilities of the various actors involved in its dissemination, such as states, digital platforms, and media outlets. In particular, at the heart of these discussions is whether there are legal obligations to restrict or allow this type of content, and if so, what the scope of these obligations would be and what exceptions might apply.

The debates around disinformation have also challenged international human rights organizations, whose role is to monitor the human rights situation at a regional or global level and to promote that states comply with the standards of respect, protection, and guarantee of fundamental rights. Within the framework of the Inter-American Human Rights System, both the Commission and the Inter-American Court are called upon to analyze many of the current problems related to disinformation, mainly in light of the American Convention on Human Rights and in accordance with their respective mandates and jurisdiction.

The objective of this study has been to present the Inter-American jurispruden-

[233] UN, OSCE, OAS, ACHPR, "Declaración Conjunta Sobre Libertad De Expresión Y"Noticias Falsas", Desinformación Y Propaganda," *supra* note 13; IACHR, "Pandemia y derechos humanos en las Américas," *supra* note 49, para. 34.

[234] Botero Marino, *supra* note 29, p. 70.

ce on freedom of expression considered relevant to analyze the phenomenon of disinformation. It aims to help clarify how to address this phenomenon in a manner that aligns with the American Convention and is compatible with Inter-American human rights standards formulated by the Inter-American Court and Commission. It also seeks to serve as a guide for legislators, policymakers, and judges to inform their bills and decisions, as well as for the private sector, the media, and non-governmental organizations that work on this matter within their respective fields.

The investigation outlined the main interpretations of the Inter-American Court—and, to a lesser extent, the Inter-American Commission—on the scope of Article 13 of the American Convention on the right to freedom of expression. The Court's jurisprudence and the Commission's reports establish obligations, guidelines, and standards that guide the work of three key actors in the area of disinformation: states and public officials, journalists and media outlets, and private internet companies.

13. States and Public Officials

As parties to international treaties, states assume legal obligations and become the primary guarantors of people's rights, responsible for their promotion, respect, and protection. In the Inter-American human rights system, as signatories of the American Convention, states must consider the following aspects when addressing the phenomenon of disinformation:

- They cannot demand the truthfulness of information as a necessary prior condition for people to express themselves. The American Convention does not condition the exercise of the right to freedom of expression on the truthfulness of the content being communicated. On the contrary, Article 13 of the American Convention expressly provides that the right to freedom of expression "shall not be subject to prior censorship but shall be subject to subsequent imposition of liability."
- When assessing subsequent liability for the allegedly abusive exercise of the right to freedom of expression in disinformation cases, states must meet rigorous requirements. In the case of opinions or value judgments, international law does not authorize the imposition of sanctions for erroneous opinions or incorrect interpretations of certain events. In cases of verifiable information,

if the expression is considered false or erroneous on matters of public interest or involving a figure of public interest, it is necessary to prove that the person who made such statements did so with full knowledge of their falsity or with a high probability of their falsity, and with reckless disregard or indifference toward the truth.[235]

- When analyzing a case of disinformation attributable to journalists, the judge should apply the "actual malice" standard. It is established based on at least three elements: (i) verification that the journalist had full knowledge of the falsehood and a reckless disregard or indifference to the truth; (ii) the requirement that the burden of proof falls on the plaintiff or allegedly aggrieved party; (iii) a differentiated consideration of allegedly disinformative expressions about public officials compared to those involving private individuals.
- Public officials have different and elevated responsibilities compared to the rest of the citizenry. They are obliged to verify in a reasonable, though not necessarily exhaustive, manner the facts on which they base their opinions and must do so with even greater diligence than that expected of private individuals, given the high degree of credibility they hold, and to prevent citizens from receiving a manipulated version of the facts.
- In compliance with their duty to guarantee human rights established in Article 1.1 of the American Convention, states are obligated to "monitor and oversee" the practice of activities that may be considered "dangerous" by private companies, which entail significant risks to the human rights of individuals. States may be internationally responsible for failing to protect individuals from the acts of private entities that hinder the enjoyment of freedom of expression.

14. Journalists and Media

- Journalists and media outlets have duties of responsibility and journalistic ethics due to their pivotal role in society, where they "not only inform, but can also suggest by the way in which they present the information how it is to be assessed."[236]

[235] I/A Court H.R., *Case Herrera Ulloa*, *supra* note 64, para. 66.e; IACHR, Office of the Special Rapporteur for Freedom of Expression, Informe Anual del Relator Especial para la Libertad de Expresión, 1999, p. 22.

236 I/A Court H.R., *Granier Case*, *supra* note 90, para. 139, citing ECHR, *Stoll Vs. Suiza* [Gran Sala], No. 69698/01,

- Journalists must verify in a reasonable, though not necessarily exhaustive, manner the news and information they report. This requirement of "reasonable diligence" demands that journalists verify the facts, and conduct a reasonable exercise of investigation and fact-checking to ensure that their reports, interviews, and news stories have sufficient grounding in reality and fairness in the presentation of the information.[237]
- The media and the journalists should self-regulate, not the state that should regulate them.

15. Private Companies

- Companies play an essential role in the political, economic, and social life of countries, and their commitment to respecting and protecting human rights is therefore crucial. International law imposes mandatory limitations and duties on state authorities, which have legal consequences for companies. Internet service providers, in particular, play a vital role in addressing disinformation and must work to mitigate its negative impact on human rights. In this regard, it is worth noting that:
- Companies, through their content moderation practices, can create indirect restrictions on the right to freedom of expression. Under Article 13.3 of the American Convention on Human Rights, these entities must avoid actions that could indirectly restrict this fundamental right.
- Under the UN Guiding Principles on Business and Human Rights, internet companies are called upon to act responsibly to prevent, combat, and counter disinformation. This includes reviewing business models, especially content curation practices and algorithm management that may amplify disinformation; increasing transparency practices; providing appeal and conflict resolution mechanisms regarding content moderation alleged to be disinformation; and promoting due diligence across their various levels, areas, and processes.

Judgment of December 10, 2007, para. 104, and ECHR, *Novaya Gazeta y Borodyanskiy Vs. Rusia*, No. 14087/08, Judgment of March 28, 2013, para. 42.

[237] IACHR, Informe de fondo Ronald Moya Chacón, *supra* note 89, para. 58; I/A Court H.R., *Case Moya Chacón*, *supra* note 96, para. 68.

Analyzing and seeking solutions to the issue of disinformation necessarily requires a human rights perspective, particularly one that protects the right to freedom of expression. As has been argued, "attempts to combat disinformation by undermining human rights are short-sighted and counterproductive. The right to freedom of opinion and expression is not part of the problem, it is the objective and the means for combating disinformation."[238] This work aimed to provide concrete legal tools or instruments to address disinformation in this regard and is also an invitation to continue reflecting on how to combat or counter disinformation in a manner consistent with international human rights standards.

[238] UN, Informe de la Relatora Especial Irene Khan, *supra* note 4, para. 83.