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The Role of the OAS Special Rapporteur for Freedom of Expression in Promoting Democracy in the Americas

SANTIAGO A. CANTON*

INTRODUCTION

Freedom of expression is key to guaranteeing the protection of other basic rights central to a developing democracy. Free exchange of ideas is vital for the formation of public opinion. Access to information plays an important role in fostering transparency in government and combating corruption. Due to its central role in developing democracy, freedom of expression requires sweeping protection and minimal restrictions.

This article examines freedom of expression in the Americas through the work of the Office of the Special Rapporteur for Freedom of Expression. The Office is part of the Inter-American Commission on Human Rights of the Organization of American States. Part I explains the mandate and activities of the Office of the Special Rapporteur. Part II examines several significant principles of freedom of expression and advocates legal and other reforms to strengthen freedom of expression in the Americas.

I. OFFICE OF THE SPECIAL RAPPORTEUR

This part will describe the development of the Office of the Special Rapporteur for Freedom of Expression as well as its mandate. It will also discuss my recent activities as the Special Rapporteur. First, I would like to explain a little bit about the Office: how and why the Office was created, what its mandate covers, what types of activities it typically undertakes, and what it has accomplished. I hope that this

* Ambassador Santiago A. Canton is the Executive Secretary of the Inter-American Commission on Human Rights and the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, Organization of American States. This article is based on a speech given at the University of Miami School of Law, January 26, 2001. The speech was part of a conference sponsored by the Center for the Study of Human Rights, "The Role of a Free Press and Freedom of Expression in the Development and Consolidation of Democracies in Latin America." I would like to thank the University of Miami School of Law for inviting me to this conference. I would also like to thank Professor Irwin P. Stotzky, Director of the Center for the Study of Human Rights, and Associate Dean Stephen J. Schnably, moderator of the morning panel of the conference.

background will provide some insight as to how to address issues of freedom of expression within a regional human rights system.

A. *Origins and Development of the Office*

The decision to create the Office of the Special Rapporteur for Freedom of Expression in the inter-American system was made after two decades of major political change in the Americas. People throughout the hemisphere had turned their backs on oppressive, authoritarian regimes and ushered in more open, democratically-chosen governments via transparent elections. Free and fair elections became the preferred path to democracy. Unfortunately, although such elections are a prerequisite for democracy, they are not in and of themselves sufficient to guarantee a true democracy.

For the continued development of stable and participatory democracy, additional elements inherent to democratic society must be fostered: recognition and respect for human rights; effective and independent legislative and judicial branches of government; a party system that facilitates open lines of communication between citizens and leaders; an active civil society; and, above all, wide-ranging freedom of expression and access to information to ensure that all citizens can make informed decisions.

Freedom of expression can be described as having two key aspects. First, it is a very important right in and of itself. But it is also an important guarantee for the respect of other rights; it protects them by controlling and assuring their observance. Weak public institutions, official corruption, and other problems often prevent human rights violations from being brought to light and punished. In countries affected by such problems, the press has become the main check on authorities and individuals alike, playing a crucial role in bringing to light illegal or abusive acts previously unnoticed, ignored, or perpetrated by authorities. This often puts members of the press at great personal risk.

Concerning the importance of freedom of expression, the Inter-American Court of Human Rights has stated 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 *CONDITIO SINE QUA NON* for the development of political parties, trade unions, scientific and cultural associations and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society

that is truly free.¹

In response to the strong support of the governments of the hemisphere, the Inter-American Commission on Human Rights (the Commission) created the Office of the Special Rapporteur for Freedom of Expression in 1998.² Shortly thereafter, at the Second Summit of the Americas, held in Chile in 1998, the heads of state and government reaffirmed the crucial importance of freedom of expression for the consolidation of democracy.³ They expressed their concern about the state of this right in their countries, commended the recent creation of the Office of the Special Rapporteur, and committed to support its activities.⁴

The Commission created the Office of the Special Rapporteur for Freedom of Expression in an exercise of its authority and competence.⁵ The Commission is an organ of the Organization of American States (OAS), whose primary function is to promote the observance and defense of human rights and to serve as the OAS's advisory body on this subject.⁶ The Commission's authority derives mainly from the American Convention on Human Rights,⁷ the American Declaration of the Rights and Duties of Man,⁸ and the Charter of the Organization of American States.⁹ The Commission investigates complaints of human rights violations, renders its findings on those complaints, conducts on-site visits, prepares draft treaties and declarations on human rights, and prepares reports on the situation of human rights in the countries of the

1. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, Inter-Am. C.H.R. A5, para. 70 (1985).

2. Declaration of Santiago, Second Summit of the Americas, April 18-19, 1998, *compiled in OFFICIAL DOCUMENTS OF THE SUMMIT PROCESS: FROM MIAMI TO SANTIAGO* Vol. I (Office of Summit Follow-up, Organization of American States 1998).

3. Plan of Action, Second Summit of the Americas, April 18-19, 1998, Santiago, Chile, *available at* <http://www.summit-americas.org/chileplan.htm>.

4. Annual Report of the Inter-American Commission on Human Rights 1998, Vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression, at 5-6, Inter-Am. C.H.R., OEA/Ser. L/V/II.102, doc. 6 rev. (1999), *available at* <http://www.cidh.org/annualrep/98eng/Table of Contents.htm> [hereinafter 1998 Report].

5. *See id.* at 5-6.

6. Charter of the Organization of American States (1948) (as amended by the Protocol of Buenos Aires 1967, Protocol of Cartagena de Indias 1985, Protocol of Washington 1992, Protocol of Managua 1993) ch. XV, art. 106 [hereinafter OAS Charter].

7. American Convention on Human Rights ("Pact of San Jose, Costa Rica"), Nov. 22, 1969, at 1144, Organization of American States, at OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979) [hereinafter American Convention].

8. American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Res. XXX, adopted by the Ninth Int'l Conference of American States, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, at 17, OEA/Ser.L.V/II.82 doc.6 rev. 1 (1992) [hereinafter American Declaration].

9. OAS Charter, *supra* note 6, ch. XV, art. 106 (establishing the Inter-American Commission on Human Rights).

region.¹⁰ At its 98th Special Session in March 1998, the Commission determined what the general characteristics and functions of the Office of the Special Rapporteur would be and decided to create a voluntary fund to assist the Office economically.¹¹ In 1998, the Commission appointed me to the position of Special Rapporteur for Freedom of Expression. I assumed this position on November 2, 1998.¹²

Although the Office of the Special Rapporteur operates within the juridical framework of the Commission, it is a permanent office with functional independence and its own budget.¹³ I believe that this independence has been a critical aspect of the success of the Office. The Commission itself is an independent body, with seven Commissioners selected by the General Assembly in their individual capacities.¹⁴ It has given a great degree of independence to my Office allowing me to be more effective in addressing problems of freedom of expression in all of the countries in the region.

B. *The Mandate of the Office*

In creating the Office of the Special Rapporteur, the Commission's main objective was to reinforce and protect the observance, respect, and development of freedom of expression in the Americas, especially given the fundamental role that right plays in building and strengthening the democratic system of government and in protecting other rights.

The mandate of the Office of the Special Rapporteur, as assigned by the Commission, consists of the following points:

(1) PREPARATION OF A GENERAL REPORT.¹⁵

The general report, prepared annually, assesses the status of freedom of expression in the hemisphere and identifies the major challenges to the full enjoyment of this right. The report also recognizes progress in legislation and practices pertaining to freedom of expression in OAS member states. In addition, the report mentions general and specific violations of freedom of expression in member states. The Office of the Special Rapporteur drafts these reports on the basis of information gath-

10. American Convention, *supra* note 7, ch. VII.

11. See 1998 Report, *supra* note 4, at 5-6.

12. *Id.* at 6.

13. *Id.* at 5.

14. See American Convention, *supra* note 7, arts. 40-41. See also Statute of the Inter-American Commission of Human Rights arts. 2-3.

15. Office of the Special Rapporteur for Freedom of Expression, Mandate and Competence of the Office of the Special Rapporteur for Freedom of Expression, available at <http://www.cidh.oas.org/Relatoria/default.htm> [hereinafter Mandate and Competence].

ered through governmental agencies, non governmental organizations (NGOs), individual interviews, and on-site visits.

(2) PREPARATION OF SPECIFIC REPORTS BY SUBJECT MATTER.¹⁶

These reports include in-depth analyses of specific themes concerning freedom of expression. Sometimes special reports are written on the status of freedom of expression in particular countries.

(3) COLLECTION OF ALL INFORMATION NEEDED FOR THE ELABORATION OF THESE REPORTS.¹⁷

Along with members of my staff, I visit different countries to assess the status of freedom of expression within their borders. During these visits, we meet with government representatives and representatives of NGOs and the media, as well as individuals who are interested in freedom of expression. We may undertake these visits independently, as an Office, or in collaboration with the Commission,¹⁸ which makes on-site visits to assess the general human rights situation in particular countries. We also receive information daily from a large network of human rights and freedom of expression NGOs.

(4) PROMOTION OF FREEDOM OF EXPRESSION.

As an organization for the promotion of human rights, as charged by the Commission, the Office also presents papers at conferences and seminars, instructs civil servants, professionals, and students on the work being done by the Commission and the Office of the Special Rapporteur in the area of freedom of expression, and prepares promotional materials. The Office has participated in numerous national, regional, and international projects to promote freedom of expression. The Office also issues press releases highlighting significant threats to freedom of expression. These press releases are available to a wide audience through the Internet.¹⁹

(5) EXPEDITIOUS PRESENTATION OF INFORMATION TO THE COMMISSION ON URGENT SITUATIONS THAT CALL FOR THE ADOPTION OF "PRECAUTIONARY MEASURES" OR "PROVISIONAL MEASURES."²⁰

"Precautionary measures" are measures requested of the member

16. *Id.*

17. *Id.*

18. *Id.*

19. See the Commission's website, Freedom of Expression, at <http://www.cidh.org/Relatoria/English/Home.htm>.

20. Mandate and Competence, *supra* note 15.

states by the Commission to protect individuals threatened or at risk of being harmed physically or of suffering some other type of irreparable damage. The Commission may also ask the Inter-American Court of Human Rights to order “provisional measures” in urgent cases that involve danger of irreparable harm to persons.

An example of a situation in which precautionary measures were successfully used to protect freedom of expression is the case of Guatemalan attorney Ronal Ochaeta and his family. On April 16, 1999, the Commission granted precautionary measures on behalf of Mr. Ochaeta and his family. Mr. Ochaeta had worked on the important Recuperation of Historical Memory Project (REMHI) report with Monsignor Juan José Gerardi Conedera. The first anniversary of the latter’s murder was being commemorated when, on April 16, three unidentified and armed individuals violently burst into the home of Mr. Ochaeta. They threatened and assaulted his maid, seized one of his daughters, and searched his house. The individuals indicated that they had brought Mr. Ochaeta a message which consisted of a slab of concrete and stone. As a result of this aggression, the Commission requested that Guatemala adopt precautionary measures necessary to preserve the lives and personal integrity of the persons named. On April 27, Guatemala informed the Commission of the measures that had been adopted. These measures consisted principally of uniformed personnel deployed to keep a constant watch on the Ochaeta residence. The Commission received information on this matter until the persons concerned left the country.

Although precautionary and provisional measures to remedy violation of freedom of expression have been applied in only a few circumstances, they have been invoked increasingly since the creation of the Office of the Special Rapporteur three years ago. For example, on March 1, 2001, the Office assisted the Commission in requesting precautionary measures from the Costa Rican government in the case of journalists Mauricio Herrera Ulloa and Fernán Vargas Rohmoser of the Costa Rican newspaper *La Nación*. The case related to an allegedly defamatory article written by Mr. Herrera Ulloa and published in *La Nación* about the former honorary ambassador of Costa Rica to the Atomic Energy Commission. The article was based on information gathered from respected European media sources. Mr. Herrera Ulloa was sentenced to 120 days fine. His name was ordered to be inscribed in the Judicial Criminal Register for reproducing information that questioned the moral integrity of the former honorary ambassador. In addition, because it published the story, *La Nación* was ordered to pay the legal fees of the plaintiff’s attorney and to remove the Internet link to the

articles on its website. Additionally, *La Nación* was ordered to establish a link to their website and the published verdict.

The Commission maintained that the actions against Mr. Herrera Ulloa and Mr. Vargas Rohrmoser could constitute “irreparable damage” to their individual rights and irreparable damage to the Costa Rican citizens who have been deprived of access to information regarding the actions of their public officials. Accordingly, the Commission asked the Costa Rican government to suspend the enforcement of the sentence until the Commission had an opportunity to analyze the case, to refrain from any action to include Mr. Herrera Ulloa’s name in the Judicial Criminal Register, and to refrain from any other act that would affect the freedom of expression of Mr. Herrera Ulloa and *La Nación*.

In spite of the request for precautionary measures, the Costa Rican court did not suspend the order to enforce the sentence, leaving open the possibility that it could be carried out at any time. To prevent this, on March 28, 2001, the Commission, with the assistance of the Office of the Special Rapporteur, requested further provisional measures from the Inter-American Court of Human Rights. The President of the Inter-American Court issued a resolution on April 6, 2001 ordering that a hearing be held on May 22, 2001 on the issue of provisional measures, and requesting that the Costa Rican court take no further action until this hearing was held and the Inter-American Court issues a decision. On April 24, in compliance with the resolution, the Costa Rican court issued an order suspending the sentence until the Inter-American Court issues its decision. The hearing was held on May 22, 2001 with the participation of a representative of the Office of the Special Rapporteur. On September 7, 2001 the Inter-American Court decided to adopt precautionary measures in favor of the petitioners.²¹ The state has stayed the verdict.

The Special Rapporteur will continue to ask the Commission to invoke the mechanisms of precautionary measures and provisional measures where freedom of expression is threatened. This will both encourage the development of freedom of expression and improve the effectiveness of these mechanisms.

21. Resolución de la Corte Interamericana de Derechos Humanos, Solicitud de Medidas Provisionales de la Comisión Interamericana de Derechos Humanos Respecto de la República de Costa Rica, case del Periódico “La Nación” (Sept. 7, 2001), available at <http://www.corteidh.or.cr> (on file with author).

(6) PROVISION OF INFORMATION REGARDING INDIVIDUAL CASES
RELATED TO FREEDOM OF EXPRESSION PRESENTED TO
THE COMMISSION.

The Office gathers information about contentious cases relating to freedom of expression that are filed before the Commission and provides the Commission with a legal opinion about the issues presented. There are currently over forty freedom of expression-related cases open before the Commission. The Office also participates in the friendly settlement procedures that the Commission undertakes in individual cases. In the area of freedom of expression, the Commission negotiated an important friendly settlement in the case of *Horacio Verbitsky v. Argentina*.²² Mr. Verbitsky was convicted of criminal disrespect, or *desacato*, in relation to an article he had published in the *Página 12* newspaper regarding then-Argentine Supreme Court Minister Augusto Belluscio. As provided for in Article 48(f) of the Convention, the Commission placed itself at the disposal of the parties as an intermediary. In the settlement, the petitioner, Verbitsky, renounced all claims to moral damages in exchange for the passage of a law repealing the criminal disrespect provisions in the Argentine Penal Code and the reversal of his sentence through application of the new law to his case. In addition, both parties asked the Commission to issue a report on the compatibility of the Argentine disrespect provisions with Article 13 of the American Convention. The Argentine government passed the law repealing the criminal contempt provisions and applied this to Verbitsky's case. The Commission later issued a general report on the compatibility of criminal disrespect laws with Article 13.²³ This report has become one of the Commission's most important legal documents relating to freedom of expression. Following on the legal analysis that arose out of the friendly settlement in the *Verbitsky* case, the Office of the Special Rapporteur is currently working with the Commission to negotiate a friendly settlement between the government of Argentina and a number of journalists who have been convicted of criminal libel and slander for their reporting on issues of public interest.

C. *Activities of the Office*

In the short time that it has been in existence, my Office has made a notable impact on the hemispheric protection of freedom of expression. We have given attention to some of the most troubling situations in the

22. Case 11.012, Inter-Am. C.H.R. 40, OEA/Ser.L/V/II.88 Doc. 9 rev. 1 (1990).

23. *Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights*, at 210-23, Inter-Am. C.H.R. OAS/Ser.L/VIII.88, doc. 9 rev. (1995) [hereinafter *Report on Compatibility*].

hemisphere. Several states in the region have used the information we have provided to make changes in their laws and have embraced my Office as a source of technical assistance in addressing issues of concern.²⁴

(1) REPORTS OF THE OFFICE OF THE SPECIAL RAPPORTEUR

Thus far, I have issued three annual reports covering the events of 1998, 1999, and 2000. All three reports were adopted by the Commission and included as part of its annual reports.²⁵ In the 1998 Annual Report, I emphasized my initial concerns in relation to the conditions of freedom of expression in the Americas. I focused my analysis on countries where the right of freedom of expression had been seriously threatened. I also noted the principal methods of coercion used against freedom of expression, including murder, criminal disrespect laws, and compulsory membership laws. I emphasized the escalating numbers of threats against and assassinations of journalists and called upon the OAS member states to create a system of accountability and effective investigation of violent acts or threats against journalists, the media, and other social communicators.²⁶

In the 1999 Report, I surveyed the status of freedom of expression in the hemisphere, concentrating on the internal legislation of the member states. In addition, the 1999 Report addressed three main categories of restrictions and threats to freedom of expression and used these categories to classify member states based on the severity of their restrictions. The categories are: (1) States without freedom of expression; (2) States where freedom of expression was severely limited; and (3) States with fewer restrictions on freedom of expression. I also referred to some progress made in defending freedom of expression.²⁷ The 1999 Report established a foundation of basic legal principles related to prior restraint, contempt laws, and libel and slander laws. It called upon member states to modify domestic laws and practices in accordance with

24. The Office of the Special Rapporteur has participated in the discussion of different drafts of laws related to freedom of expression, such as the access to information bill that will be considered in the Guatemalan Congress and the bill on decriminalization of libel and slander currently pending in Argentina.

25. See 1998 Report, *supra* note 4; Annual Report of the Inter-American Commission on Human Rights 1999, Vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression, Inter-Am. C.H.R., OEA/Ser. L/V/II.106, doc. 3 rev. (2000), available at <http://www.cidh.org/Relatoria/English/Home.htm> [hereinafter 1999 Report]; Annual Report of the Inter-American Commission on Human Rights 2000, Vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression, Inter-Am. C.H.R., OEA/Ser.L/V/II.111, doc. 20 rev. (2001), available at <http://www.cidh.org/Relatoria/English/AnnualReport2000/TableofContent2000.htm> [hereinafter 2000 Report].

26. See generally 1998 Report, *supra* note 4.

27. See 1999 Report, *supra* note 25, at 35-48.

international legal standards on the protection of freedom of expression, such as Article 13 of the American Convention.²⁸ Additionally, it advocated efforts to facilitate public access to state documents, such as freedom of information acts, in order to reinforce democratic institutions by increasing the transparency of governmental activities. The Report also touched on specialized themes, including the application of free speech norms to the Internet and the protection of the right of women to freedom of expression.²⁹ The 1999 Report also restated the main obstacles to freedom of expression in the hemisphere: murders, assaults, and threats against journalists that still frequently occur in the region. Moreover, the Report emphasized the responsibility of member states for the abuses or acts committed against journalists.³⁰ Thus, the purpose of the 1999 Report was to bring some of the major problems in the region to public attention and to highlight the changes needed to make the hemisphere's democracies stronger.

The 2000 Report was included as Volume III of the Annual Report of the Inter-American Commission.³¹ It highlighted the progress in reforming the state of freedom of expression and information, as evidenced by the many member-state requests for recommendations from the Office. Various states have expressed their intentions to introduce legislative reforms to increase the protection of freedom of expression within their borders. The Report also noted that many of these reforms have been slow in becoming a reality.³² The Report reaffirmed the Special Rapporteur's concern over the assassination of journalists and other violations of freedom of expression.³³ It also expressed concern about the judiciary's role in various countries in silencing free expression, in particular, the frequent use of criminal slander and libel laws to silence criticism of public officials.³⁴ Finally, the 2000 Report highlights the adoption of the Declaration of Principles on Freedom of Expression.³⁵ The principles will be discussed in more detail below.

The Office is currently working on a thematic report on access to information and habeas data.

28. American Convention, *supra* note 7.

29. 1999 Report, *supra* note 25, at 17-33.

30. *See id.* at 48-53.

31. 2000 Report, *supra* note 25, at 5, para. 4.

32. *Id.* at 5, para. 3.

33. *Id.* at 5, para. 4.

34. *Id.* at 5-6, para. 5.

35. The full text of the Declaration is available at <http://www.cidh.org/Básicos/principles.htm> (print version forthcoming).

(2) SITE-VISITS

I have participated in two on-site visits with the Commission that yielded significant state-specific reports — one to Peru and one to Paraguay. During these visits, I met with representatives of the governments, civil society, non-governmental organizations, and the media. After these visits, I produced reports on the status of freedom of expression in each country. These reports were included in the Commission's Reports on the Situation of Human Rights in Peru and Paraguay.³⁶ At the request of individual governments, I have also taken numerous other trips independent of the Commission. As a result of my visits, each of the countries I have visited has made significant strides towards making its laws more hospitable to freedom of expression.

For instance, in April 2000, the president of Guatemala invited me to assess the situation of freedom of expression there. As a result of my preliminary report,³⁷ the President of Guatemala asked my Office for legal assistance in modifying the Guatemalan laws with respect to freedom of expression. The government subsequently submitted an "access to information" bill to the legislature.³⁸

I have also visited Panama, where some positive developments have taken place since the 1998 Report. The 1998 Report questioned a number of anachronistic Panamanian laws that constituted legal obstacles to the full exercise of the right to freedom of expression.³⁹ Public officials frequently used those laws to silence their critics and to harass journalists and the press.⁴⁰ The new administration of President Mireya Moscoso expressed its intention to repeal all of these laws and the country has, in fact, repealed two of them.⁴¹ Panama demonstrated its willingness to consider further legal reform by inviting me to examine the status of freedom of expression and information in Panama in depth. I visited again in July 2000 and June 2001 as part of a delegation from the Commission and suggested further reforms. The great majority of these laws, however, are still in force in Panama and public officials continue

36. See *Second Report on the Situation of Human Rights in Peru*, at 135-61, Inter-Am. C.H.R. OEA/Ser.L/V/II.106, doc. 59 rev. (2000); *Tercer Informe Sobre la Situación de los Derechos Humanos en Paraguay*, [Third Report on the Situation of Human Rights in Paraguay], ch. 4, Inter-Am. C.H.R., OEA/Ser.L/VII.110, doc. 52 (2001), available at <http://www.cidh.oas.org/countryrep/Paraguay01sp/indice.htm>.

37. See Press Release 24/00, Preliminary Evaluation of Freedom of Expression in Guatemala, (2000), available at <http://www.cidh.org/Relatoria/English/AnnualReport2000/AnnexII2000.htm> (print version forthcoming).

38. 2000 Report, *supra* note 25, at 60, para. 27.

39. 1998 Report, *supra* note 4, at 26.

40. See *id.* at 28.

41. 1999 Report, *supra* note 25, at 35.

to use them against journalists.⁴²

In Argentina, I was invited to attend a plenary session of the Argentine Senate to share my views on a bill to decriminalize libel and slander.⁴³ The Argentine Senate is now examining this bill to amend the libel and slander law. My Office is urging continued action on this bill, which could serve as an example to other nations of the hemisphere and become one of the most important advances for freedom of expression and information in the years ahead.

(3) PROMOTION OF LEGAL REFORM

In Chile, my Office's efforts to bring about press law reform have met with recent success. In April 2001, the Chilean Senate passed a new press law that eliminated the criminal disrespect provisions of Article 6(b) of the State Security Law. These provisions had been frequently criticized by my Office.⁴⁴ When this law enters into force, it will have a direct effect in case of Chilean journalist Alejandra Matus.⁴⁵ Ms. Matus is currently in exile in the United States and faces charges under Article 6(b) in connection with her book, *El Libro Negro de la Justicia Chilena* [*The Black Book of Chilean Justice*]. I have worked with the Commission on her behalf to attempt a friendly settlement with the Chilean government. Additionally, I encouraged the Commission to ask for precautionary measures to protect the editors of Matus's publishing house, *Editorial Planeta*.⁴⁶ With the repeal of the criminal disrespect

42. According to recent information, there are currently more than seventy journalists in Panama with criminal charges for libel and slander pending against them. See, e.g., Yuriela Sagel, *Ejecutivo Evalúa Indulto Para Periodistas Demandados* [*Executive Evaluates Demand for Pardon of Journalists*], EL PANAMA AMERICA, May 4, 2001, available at <http://www.elpanama.com.pa/archive/05042001/nation08.html>.

43. "Conferencia sobre Leyes de Difamación Criminal en Latinoamérica" June 7-10, 2000 Buenos Aires, Argentina. See generally Committee to Protect Journalists (CPJ), Argentina 2000: Country Report, at <http://www.cpj.org/attacks00/americas00/Argentina.html> (last visited Oct. 8, 2001) (the proposed bill would eliminate criminal defamation in the case of public figures and introduce the actual malice and neutral reporting standards).

44. See *id.*

45. See Alejandra Matus, *The Black Book of Chilean Justice*, 56 U. MIAMI L. REV. 329 (2001) (giving a personal account of the struggle for freedom of expression in Chile). Matus is now back in Chile and the book is no longer banned. The detention order against Matus has been lifted. Charges against the editors of *Editorial Planeta* have been dropped and charges against Matus temporarily dismissed. See Committee to Protect Journalists, Attacks on the Press in 2001, available at <http://www.cpj.org>.

46. See 1999 Report, *supra* note 25, at 44-46. On June 18, 1999, the Inter-American Commission on Human Rights asked Chile to adopt precautionary measures on behalf of Bartolo Ortiz and Carlos Orellana, the General Manager and Editor-in-Chief of the *Planeta* Publishing Company, respectively. Specifically, the IACHR requested that the arrest warrants issued for both persons be withdrawn, as well as the decision to institute proceedings against them for publication of *El Libro Negro de la Justicia Chilena*. For subsequent developments, see Matus, *supra* note 45.

provisions in Article 6(b), I believe this case will come to a quick resolution. My Office continues to be concerned, however, about a number of other criminal disrespect provisions, as well as other provisions that limit freedom of expression, that remain in force in Chile.

In July 2001, the Deputy of Legislative Power in Paraguay contacted my Office for legal advice on reforming Paraguay's recently passed Law on Transparency. My Office provided general technical assistance based on international legal standards relating to access to information.

(4) OTHER REGIONAL AND INTERNATIONAL EFFORTS

In addition to calling violations to the attention of states and assisting and encouraging them in addressing these violations, my Office has also been successful in developing and strengthening the regional and international frameworks for freedom of expression. This will enable us to have even greater impact in the future.

To illustrate how a well-organized hemispheric information network can help to resolve problems of violations of freedom of expression, I want to share the following story about the case of the Peruvian radio broadcaster Johny Pezo. Mr. Pezo was forced by the *Movimiento Revolucionario Tupac Amaru* (MRTA) to broadcast one of their statements.⁴⁷ Mr. Pezo decided to read the statement after he was told that he would be killed if he refused. He informed the audience that he was broadcasting the statement against his will.⁴⁸ Having read the statement, he reported the incident to the police. Two days later, he was arrested and charged with inciting crime.⁴⁹

Upon learning about his detention and verifying the facts, the Peruvian Press and Society Institute (IPyS) hired a lawyer to defend Johny Pezo, and reported the incident to the international community, including my Office. Through the Peruvian Mission to the OAS, I expressed my concern about Mr. Pezo's case to the Peruvian authorities. Finally, Mr. Pezo was released and cleared of the accusations.⁵⁰ Cooperation between civil society organizations and my Office brought this incident to our attention and allowed us to resolve the situation quickly.

My Office also engages in cooperative efforts to promote and protect freedom of expression outside of our hemisphere. In late November 1999, Article 19, a London-based non-governmental organization focusing on freedom of expression issues around the world, invited me to

47. See 1998 Report, *supra* note 4, at 34.

48. *Id.*

49. *Id.*

50. *Id.*

participate in the seminar entitled "*International Mechanisms for Promoting Freedom of Expression*." The event was attended by two other defenders of freedom of expression and information: Abid Hussain, United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, and Freimut Duve, the Organization for Security and Cooperation in Europe Representative on Freedom of the Media.⁵¹ We analyzed the major problems and challenges facing freedom of expression and information in the various regions of the world.⁵² We agreed to meet annually and to coordinate our efforts by conducting joint activities for better protection and promotion of the right to freedom of expression and information. At the end of the seminar, we signed a joint statement calling for respect for freedom of expression "as a fundamental international human right and a basic component of a civil society based on democratic principles."⁵³

II. INTER-AMERICAN DECLARATION OF PRINCIPLES OF FREEDOM OF EXPRESSION

My Office recently promulgated the Declaration of Principles on Freedom of Expression.⁵⁴ This document was approved by the Commission at its 108th regular session in October 2000.⁵⁵ The purpose of this document is to further assist the Commission and the Inter-American Court of Human Rights with the interpretation of the freedom of expression provisions of the American Declaration and American Convention, as well as to guide the development of jurisprudence.

A. *Content of Preamble and Principles*

The preamble stresses the role of free speech in a developing democracy: "AWARE that consolidation and development of democracy depends upon the existence of freedom of expression."⁵⁶ The principles are provided to aid states in effectively protecting freedom of expression, which is "not a concession by the States but a fundamental right."⁵⁷

The Declaration is composed of thirteen principles, including: the right of access to information about oneself; the right to access to information held by the state; the duty of states to provide information; the prohibition of prior censorship; the rejection of prior conditions on the dissemination of information, such as veracity, timeliness, or impartial-

51. 1999 Report, *supra* note 25, at 78.

52. *Id.*

53. *Id.*

54. For the full text of the Declaration see 2000 Report, *supra* note 25, at 15-34.

55. *Id.* at 18.

56. *Id.* at 15.

57. *Id.* at 16.

ity; the duty of the state to prevent and punish severe violations of freedom of expression, such as assassination, kidnapping, intimidation, and other threats directed at journalists; the rejection of disrespect, or *desacato*, laws; and the elimination of monopolies or oligopolies in the ownership and control of the means of communication.⁵⁸

The then-President of the Commission, Dr. Helio Bicudo, emphasized the importance of this Declaration, “which constitutes a fundamental document that will serve as an instrument for the defense of freedom of expression within the Inter-American system.”⁵⁹ The Declaration represents a major step forward for freedom of expression. It not only constitutes a recognition of the importance of freedom of expression in the Americas, but also establishes international standards for more effective protection of the exercise of this right. In the coming months, my Office will encourage governments in the region to adopt these principles as well.

B. *Selected Principles & Implications for Democracy*

(1) ACCESS TO INFORMATION: PRINCIPLES 3 & 4

Principle 3. Every person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.

Principle 4. Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.⁶⁰

The first of these principles refers to the habeas data writ. The habeas data writ comprises three elements: (1) the right of every person to undisturbed privacy; (2) the right of every person to have access to information about himself or herself contained in public or private databases and to modify, remove, or correct such information due to its

58. *Id.* at 16-17.

59. See Press release, Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights Approves Declaration of Principles of Freedom of Expression (Oct. 19, 2000), available at <http://www.cidh.org/Relatoria/English/AnnualReport2000/AnnexII2000.htm> (last visited Dec. 1, 2001).

60. All of the principles cited in this section are quoted from the 2000 Report, *supra* note 25, at 20-30.

sensitive,⁶¹ erroneous, biased, or discriminatory nature;⁶² and (3) the right of every person to use the habeas data writ as a mechanism to ensure accountability.⁶³

The right to access to and control over personal information is essential in many areas of life, since the lack of legal mechanisms for the correction, updating or removal of information can have a direct impact on the right to privacy, honor, personal identity, property and accountability in information gathering.⁶⁴

As new technologies emerge and become more widespread, the habeas data writ acquires even greater significance.

Widespread use of computers and the Internet has meant that the State and private sector can gain rapid access to a considerable amount of information about people. It is therefore necessary to ensure that there are specific channels for rapid access to information that can be used to modify any incorrect or outdated information contained in electronic databases.⁶⁵

Technology also gives rise to the obligation to protect data from unauthorized access.⁶⁶

In addition to correcting information, the habeas data writ can increase government accountability. The procedure can monitor the activities of state security or intelligence agencies to verify the legality of methods employed.⁶⁷ It should be noted that there are no threshold requirements for requesting the information. The mere existence of the data is sufficient to trigger a right to access the data, whether it be located in private or public records.⁶⁸

Principle 4 addresses access to information held by the state. As the Inter-American Court of Human Rights has pointed out, "a society that is not well informed is not a society that is truly free."⁶⁹ Based upon this principle, access to information held by the state is a fundamental right of all individuals, and states have the obligation to guarantee it. In terms of the specific objective of this right, it is understood that

61. *Id.* at 20. "Sensitive information" is understood as anything having to do with the private life of the person.

62. See ALICIA PIERINI ET AL., *HABEAS DATA: DERECHO A LA INTIMIDAD* 16 (1999).

63. See VÍCTOR ABRAMOVICH & CHRISTIAN COURTIS, *EL ACCESO A LA INFORMACIÓN COMO DERECHO* 7 (2000).

64. 2000 Report, *supra* note 25, at 20, para. 12.

65. *Id.* at 20, para 13.

66. *Id.*

67. *Id.* at 20-21, para. 13.

68. *Id.* at 21, para. 16.

69. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, Inter-Am. C.H.R. A5, para. 70 (1985).

individuals have a right to request documentation and information held in public archives or processed by the state.

This right acquires even greater significance when viewed in light of the principle of transparency in public administration. If the state is a vehicle for ensuring the common good, deriving its powers from the consent of the governed, the owner of the information is the individual who has delegated the management of public affairs to his or her representatives. The principle of transparency requires a service-oriented approach to public administration. This entails providing whatever information has been previously, properly, and explicitly requested, as long as the information sought is not temporarily exempted.⁷⁰ Without the information that every person is entitled to, it is clearly impossible to exercise freedom of expression as an effective vehicle for civic participation and oversight of government management. Oversight is even more necessary given that cases of corruption implicating governments represent a major obstacle to strengthening democracies. Lack of effective oversight "gives rise to conduct that runs counter to the essence of a democratic state and opens a door to wrongdoing and unacceptable abuses."⁷¹ Ensuring access to information held by the state contributes to greater transparency of government activities and an attendant decrease in government corruption.

Principle 4 also sets the limits that states must adhere to when they refuse to release information. Because government transparency is an essential element for strengthening democratic institutions, any limitations on access to state-held records must be the exception. Exceptions should be clearly established by law, and grounded on real and imminent danger to national security. To assure this, every attempt to restrict access to information should be analyzed on a case-by-case basis. According to the interpretation of the Inter-American Court of Human Rights, restrictions on freedom of expression and information "must be judged by reference to the legitimate needs of democratic societies and institutions," since freedom of expression and information is indispensable for any form of democratic government.⁷² Therefore, states must ensure that, in a situation of national emergency, denial of state-held information will be imposed only for the time period absolutely necessary and that the information will be provided once the emergency situa-

70. See POMEY SANCHEZ & LUIS ALBERTO, *EL DERECHO DE ACCESO DE LOS CIUDADANOS A LOS ARCHIVOS Y REGISTROS ADMINISTRATIVOS* 109 (1989).

71. *Id.* at 31 (translation supplied by author).

72. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Inter-Am. C.H.R. A5, para. 42 (1985).

tion has passed.⁷³ The Special Rapporteur recommends that information a state deems as “classified” be reviewed by an independent legal entity capable of weighing the interest of protecting civil rights and freedoms against national security concerns.

(2) NO PRIOR CONDITIONS ON SPEECH: PRINCIPLES 5 & 7

Principle 5: Prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression.

Principle 7: Prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments.

These principles recognize that subsequent imposition of liability is the only permissible restriction on freedom of expression. Such liability must conform to Article 13 of the American Convention⁷⁴ and must be expressly established by law, aimed at legitimate ends, and accomplished by means narrowly tailored to achieve those ends.⁷⁵

73. American Convention, *supra* note 7, ch. IV, art. 27 (contemplating a state’s obligations under emergency circumstances).

74. Article 13; Freedom of Thought and Expression, provides:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice. 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

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

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

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

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

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

American Convention, *supra* note 7, at art.13.

75. 2000 Report, *supra* note 25, at 23, para. 22-23.

There are two aspects to freedom of expression: the right to express thoughts and ideas; and the right to receive them. "Therefore, limitation of this right through arbitrary interference affects not only the individual right to express information and ideas, but also the right of the community as a whole to receive all types of information and opinions."⁷⁶ According to the Inter-American Court of Human Rights, prior censorship is an extreme violation of freedom of expression because: "it violates the right of each individual to express himself, but also because it impairs the right of each person to be well informed, and thus affects one of the fundamental prerequisites of a democratic society."⁷⁷ Similarly, the requirement of absolute truth of information would destroy the core of democratic society. Requiring proof of truth or impartiality would eliminate virtually all public debate based on opinion and other ideas that cannot be proved objectively true.⁷⁸ Even fact-based material would be subject to arbitrary censorship since there may be various accounts or interpretations of a single event.⁷⁹

Moreover, even assuming that it is possible to determine the truth about everything, the debate and exchange of ideas clearly is the best method to uncover this truth and to strengthen democratic systems based on plurality of ideas, opinions and information. Prior imposition of a requirement to report only the truth expressly precludes the possibility of engaging in the debate necessary to reach it.⁸⁰

The existence of penalties for reporting information that is later proved false or erroneous would lead to self-censorship, thereby stunting the growth of democratic exchanges.⁸¹ Therefore, any limitations on speech must be as narrow as possible.⁸²

(3) LAWS TO PROTECT PRIVACY OR REPUTATION: PRINCIPLES 10 & 11

Principle 10: Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communi-

76. 2000 Report, *supra* note 25, at 23, para. 25.

77. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, Inter-Am. C.H.R. A5, para. 54 (1985).

78. 2000 Report, *supra* note 25, at 23, para. 23 and 25, 25.

79. *Id.*

80. *Id.* at 26, para. 33.

81. *Id.*

82. See 1999 Report, *supra* note 25, at 28-30 (discussing extensively the concept of a right to truthful information).

cator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.

Principle 11: Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as “*desacato* laws,” restrict freedom of expression and the right to information.

Principle 10 calls for the type of slander and libel laws familiar in the United States. The “actual malice” standard restricts liability for defamation of public figures to material published with knowledge of falsity or reckless disregard for the truth.⁸³ Similarly, no liability arises for statements of opinion or value judgments (as opposed to factual assertions).⁸⁴ Moreover, the doctrine of faithful reporting means that accurate reproduction of information does not give rise to liability, even if the information is incorrect.⁸⁵ “This doctrine arises from the necessity of freedom of expression and information for the existence of a democratic society. In a democratic society, debate must be fluid and open.”⁸⁶

The openness of debate is even more crucial when public officials are involved. *Desacato* laws punish, by imprisonment or fine, expression that insults or offends a public official.⁸⁷ “Such laws completely invert the parameters of a democratic society in which public officials must be subject to greater scrutiny by society.”⁸⁸ The Inter-American Commission on Human Rights has clearly stated that *desacato* laws are incompatible with Article 13 of the American Convention.⁸⁹

[C]ontrary to the rationale underlying *desacato* laws, in democratic societies political and public figures must be more, not less, open to public scrutiny and criticism. The open and wide-ranging public debate, which is at the core of democratic society necessarily involves those persons who are involved in devising and implementing public policy. Since these persons are at the center of public debate, they knowingly expose themselves to public scrutiny and thus must display a greater degree of tolerance for criticism.⁹⁰

83. 2000 Report, *supra* note 25, at 29, para. 46. See also *New York Times v. Sullivan*, 376 U.S. 255 (1964). For an extensive discussion of the law of freedom of expression, including the dual system of protection and actual malice, as well as decriminalization of libel and slander laws, see 1999 Report, *supra* note 25, at 18-22.

84. 2000 Report, *supra* note 25, at 30, para. 47.

85. *Id.* at 30, para. 49.

86. *Id.*

87. *Id.* at 31, para. 50.

88. *Id.* at 31, para. 52.

89. *Report on Compatibility supra* note 23.

90. *Id.*

III. CONCLUSION

Freedom of expression is indispensable to the development of democracy. The free exchange of ideas is central to democratic governance. Freedom of expression furthers accountability and lessens corruption. Procedures like the habeas data writ provide access to information which can reveal illegal activities of the state. Similarly, the eradication of *desacato* laws will remove one barrier that shielded government officials from criticism and investigation of suspect activity.

The Office of the Special Rapporteur for Freedom of Expression in the Americas has made great strides in protecting freedom of expression in less than three short years. We have identified the major legal problems that exist in the region, and the areas where freedom of expression faces the greatest danger. We have helped governments to correct problems. We have developed clear standards by which freedom of expression should be measured. Moreover, we have played a significant role in creating freedom of expression jurisprudence at the hemispheric level. This should have a “trickle-down effect,” influencing the jurisprudence of the OAS member states.

The keys to our success have been: (1) a broad mandate that allows the office to operate on several levels—international, hemispheric, state-by-state, and individual; and (2) a high level of independence that allows us to operate without political pressure. While challenges remain, the Office of the Special Rapporteur has played a major part in advancing freedom of expression, and therefore developing democracy in the Americas.