E. Right to Freedom of Expression

1. International Human Rights Law

264. The right to freedom of expression is stated in broad terms in Article IV of the American Declaration of the Rights and Duties of Man[1] and Article 13 of the American Convention on Human Rights.[2] These instruments provide the following with respect to freedom of expression:

> American Declaration
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> Article IV. Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.
>
> American Convention
>
> Article 13.1. 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.

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[1] American Declaration, *supra* note 63.

[2] American Convention on Human Rights, *supra* note 61.

265. In order to aid the Commission in the interpretation of these two articles, the Office of the Special Rapporteur for Freedom of Expression of the IACHR developed the Declaration of Principles on Freedom of Expression.[3] The Declaration, approved by the Commission during its 108th period of sessions in October 2000, is a set of 13 principles detailing the requirements of freedom of expression according to international law and jurisprudence. Key provisions of the Declaration of Principles include:

> 2. Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights. All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.
>
> 3. Every person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
>
> 4. Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.
>
> 5. Prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression. […]
>
> 8. Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.
>
> 9. The murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression. It is the duty of the state to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation.

266. The right to freedom of expression is also protected in various other international human rights instruments, including Article 19 of the Universal

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[3] Declaration of Principles on Freedom of Expression, in BASIC DOCUMENTS, *supra* note 13, at 189.

Declaration of Human Rights,[4] Article 19 of the International Covenant on Civil and Political Rights,[5] and Article 10 of the European Convention on Human Rights.[6] A comparison of Article 13 of the American Convention with each of the foregoing provisions shows "the extremely high value that the Convention places on freedom of expression"[7] and that "the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas."[8]

267. Respect for and protection of freedom of expression plays a fundamental role in strengthening democracy and guaranteeing human rights by offering citizens an indispensable tool for informed participation. 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 exercise of freedom of expression has become the main means by which illegal or abusive acts previously unnoticed, ignored or perpetrated by authorities are exposed. As the Inter-American Court of Human Rights stated:

> [F]reedom of expression is a cornerstone upon which the very existence of a democratic society rests. . . . 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.[9]

268. The Inter-American Court has emphasized that there are two aspects to the right 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.[10]

269. The European Court of Human Rights, in a decision cited by the Inter-American Court and the Inter-American Commission, has declared that protection of freedom of expression must encompass not only favorable information or ideas, but also those that "offend, shock or disturb" because "[s]uch are the

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[4] Universal Declaration of Human Rights, *supra* note 65.

[5] International Covenant on Civil and Political Rights, *supra* note 66.

[6] European Convention on Human Rights, *supra* note 137. Although the OAS member states are not parties to this instrument, it nevertheless constitutes a pertinent comparative reference concerning the international protection of the right to freedom of expression. The jurisprudence of the European Court of Human Rights interpreting Article 10 is also useful to inform the interpretation of Article 13 of the American Convention in areas which have not yet been addressed or fully developed in the inter-American system. However, the higher value placed on freedom of expression in the inter-American system must also be taken into account.

[7] Advisory Opinion OC-5/85, *supra* note 152, para. 50.

[8] Advisory Opinion OC-5/85, *supra* note 152, para. 50.

[9] Advisory Opinion OC-5/85, *supra* note 152, para. 70.

[10] Advisory Opinion OC-5/85, *supra* note 152, paras. 30-32.

demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'"[11] Stifling unpopular or critical ideas and opinions restricts the debate that is essential to the effective functioning of democratic institutions.

270. The exercise of freedom of expression and information without discrimination by all sectors of society enables historically marginalized sectors to improve their conditions. The right to freedom of expression is also "essential for the development of knowledge and understanding among peoples, that will lead to a true tolerance and cooperation among the nations of the hemisphere[.]"[12]

271. As indicated in the introductory chapter on human rights of this report, freedom of expression is not included in the list of rights that are non-derogable in states of emergency in Article 27 of the American Convention. However, any restrictions on freedom of expression in the context of an emergency situation must conform to the requirements of proportionality, scope, and non-discrimination set forth in Article 27.[13] In imposing such restrictions on the right to freedom of expression, States should also bear in mind the importance of freedom of expression in guaranteeing other fundamental human rights.

a. Prior Censorship

272. Article 13 of the American Convention expressly prohibits prior censorship except for the regulation of access to public entertainments for the moral protection of childhood and adolescence.[14] The Inter-American Court has indicated that prior censorship constitutes an extreme violation of the right to freedom of expression because "governmental power is used for the express purpose of impeding the free circulation of information, ideas, opinions or news [. . .] Here the violation is extreme not only in that 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."[15] As discussed in the section on freedom of expression and terrorism below, however, there could arise in an validly-declared state of emergency some situations in which national security or public order would permit limited censorship.

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[11] Eur. Ct. H.R., Handyside v. United Kingdom, Judgment of December 7, 1976, Ser. A Nº 24, para. 49. *See also* I/A Court H.R., Olmedo Bustos *et. al* Case ("Last Temptation of Christ"), Judgment of February 5, 2001, Series C Nº 73, para. 69; IACHR, Annual Report 1994, Report on the Compatibility of Desacato Laws with the American Convention on Human Rights, OEA/Ser.L/V/II.88., Doc. 9 rev (1995), 197, 204-205.

[12] Declaration of Principles on Freedom of Expression, *supra* note 641, Preamble.

[13] For a discussion of derogation under inter-American human rights instruments, *see supra* Part II(B), paras. 49-52.

[14] *See* American Convention on Human Rights, *supra* note 61, Article 13(4).

[15] Advisory Opinion OC-5/85, *supra* note 152, para. 54.

273. Notwithstanding the explicit exception regarding the protection of minors, measures designed to prevent the dissemination of expressions violate the American Convention.[16] As the Commission has stated:

> The prohibition of prior censorship, with the exception present in paragraph 4 of Article 13, is absolute and is unique to the American Convention, as neither the European Convention nor the Covenant on Civil and Political Rights contains similar provisions. The fact that no other exception to this provision is provided is indicative of the importance that the authors of the Convention attached to the need to express and receive any kind of information, thoughts, opinions and ideas.[17]

[16] Olmedo Bustos *et al.* Case, *supra* note 649, para. 70.

[17] Case 11.230, Report Nº 11/96, Francisco Martorell (Chile), Annual Report of the IACHR 1996 (regarding ban on entry into circulation and distribution of a book that was allegedly defamatory), para. 56.

b. Subsequent Liability

274. Article 13(2) of the American Convention, while explicitly prohibiting prior censorship,[18] allows for subsequent penalties to be applied under limited circumstances. Such penalties must 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."[19]

275. The requirement that a subsequent penalty be "expressly established by law", also included in Article 10 of the European Convention on Human Rights, has been interpreted by the European Court of Human Rights to mean that the basis for subsequent liability must be "formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[20] This does not mean that the subsequent penalty must specifically be provided for in legislation passed by the legislature; it may be contained in common law, administrative regulations or similar sources. It must, however, be reasonably precise and accessible to the public.[21]

276. Two of the possible justifications for subsequent liability for expressions are relevant to the context of fighting terrorism: public order and national security. "Public order" has been defined by the Inter-American Court of Human Rights "as a reference to the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles."[22] The Court has also stated that:

> [T]hat same concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole. Freedom of

[18] With the exception provided for in Article 13(4) of the American Convention. *See* previous section on prior censorship.

[19] American Convention on Human Rights, *supra* note 61, Article 13(2).

[20] Eur. Court H.R., Sunday Times v. United Kingdom, Judgment of April 26, 1979, Ser. A Nº 30, para. 49.

[21] *See, e.g., Id*., paras. 49-53 (finding that a principle formulated in common law but not previously applied to a case with similar facts was reasonably foreseeable). *See also* Eur. Court H.R., Rekvényi v. Hungary, Judgment of May 20, 1999, Reports of Judgments and Decisions 1999-III, p 423, para. 34 (stating that the level of precision required depends on the content of the instrument in question, its subject matter, and the number and status of those to whom it is addressed, and finding that a constitutional provision containing vague terms was sufficiently precise when read in conjunction with complementary laws and administrative regulations); Eur. Court H.R., Hashman and Harrup v. United Kingdom, Judgment of November 25, 1999, Reports of Judgments and Decisions 1999-VIII, at 1, paras. 29-43 (finding that the interference with freedom of expression was not compatible with Article 10 of the European Convention because the definition of the offense was overly vague and therefore not adequately "prescribed by law").

[22] Advisory Opinion OC-5/85, *supra* note 152, para. 64. *See also supra* Part II(B), para. 55 (discussion on contrast of concept of public order with the civil law concept of "ordre public").

> expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard.[23]

277. Subsequent liability can be based on “national security” if "its genuine purpose or demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government."[24] The application of the concepts of public order and national security in practice will be discussed further in the section on the right to freedom of expression and terrorism.

278. With respect to the requirement of "necessity," the Inter-American Court of Human Rights has interpreted this to mean that a subsequent penalty is more than just "useful," "reasonable" or "desirable."[25] Rather, the government must show that such a penalty is the least restrictive of possible means to achieve the government's compelling interest.[26] The penalty "must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees."[27] Moreover, the provision "must be so framed so as not to limit the right protected by Article 13 more than is necessary. . . . [T]he restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it."[28] This is an extremely high standard and any provisions imposing subsequent liability for the exercise of freedom of expression must be carefully examined using this proportionality test in order to prevent undue limitations of this fundamental right.

c. Confidentiality of Sources

279. Freedom of expression is understood as encompassing the right of journalists to maintain the confidentiality of their sources. It is the social communicator’s right not to reveal information or documentation that has been

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[23] Advisory Opinion OC-5/85, *supra* note 152, para. 69.

[24] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (November 1996), *available in* http://www.article19.org/docimages/511.htm, last visited 11 August 2002 [hereinafter Johannesburg Principles], Principle 2(a). For a discussion regarding the authoritative nature of the Johannesburg Principles, see infra note 687. *See also* Kate Martin and Andrzej Rzeplinski, Principles of Oversight and Accountability, in IN THE PUBLIC INTEREST: SECURITY SERVICES IN A CONSTITUTIONAL DEMOCRACY, Project of the Helsinki Foundation for Human Rights, Warsaw, Poland, in cooperation with the Center for National Security Studies, Washington, DC, January 6, 1998.

[25] Advisory Opinion OC-5/85, *supra* note 152, para. 46.

[26] Advisory Opinion OC-5/85, *supra* note 152, para. 46.

[27] Advisory Opinion OC-5/85, *supra* note 152, para. 46.

[28] Advisory Opinion OC-5/85, *supra* note 152, para. 46.

received in confidence or in the course of research. Professional confidentiality allows journalists to assure sources that they will remain anonymous, reducing fears they may have of reprisals for disclosing information. As a result, journalists are able to provide the important public service of collecting and disseminating information that would not be made known without protecting the confidentiality of the sources. Confidentiality, therefore, is an essential element of the work of the journalist and of the role society has conferred upon journalists to report on matters of public interest.[29] The European Court of Human Rights has recognized the importance of the protection of journalistic sources as "one of the basic conditions for press freedom [.]"[30] The European Court stated:

> Without such protection, sources may be deterred from assisting the press in informing the public in matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (Article 10) of the Convention unless it is justified by an overriding requirement in the public interest.[31]

280. The Inter-American Commission on Human Rights has also indicated that the protection of sources is a part of the general guarantee of press freedom when it approved the Declaration of Principles on Freedom of Expression.[32] It should be emphasized that this right does not constitute a duty, as the social communicator does not have the obligation to protect the confidentiality of information sources, except for reasons of professional conduct and ethics.[33]

d. Access to Information

281. As stated earlier, the right to freedom of expression includes both the right to disseminate and the right to seek and receive ideas and information. Based on this principle, access to information held by the State is a fundamental right of individuals and States have the obligation to guarantee it.[34] In terms of the

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[29] IACHR, Annual Report 2000, vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression, [hereinafter 2000 Special Rapporteur Report] OEA/Ser.L/V/II.114, Doc. 20 rev., at 24. *See also* Felipe Fierro Alvídez, *El derecho y la libertad de expresión en México, debates y reflexiones (The law and freedom of expression in Mexico, debates and reflections)*, REVISTA LATINA DE COMUNICACIÓN SOCIAL, Dec. 2000, available at http://www.ull.es/publicaciones/latina/04fierro.htm.

[30] Eur. Court H.R., Goodwin v. United Kingdom, Judgment of March 27, 1996, Reports of Judgments and Decisions, Nº 7 1996-II, at 483, para 39.

[31] Goodwin v. United Kingdom, *supra* note 668, para. 39.

[32] *See* Declaration of Principles on Freedom of Expression, *supra* note 641, Principle 8.

[33] *See* 2000 Special Rapporteur Report, *supra* note 667, at 24.

[34] *See* Declaration of Principles on Freedom of Expression, *supra* note 641, Principle 4; *See also* Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussein, UN doc. E/CN.4/1999/64, 29 January, 1999. The UN Special

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specific objective of this right, it is understood that individuals have a right to request documentation and information held in public archives or processed by the State, in other words, information considered to be from a public source or official government documentation.

282. "To guarantee freedom of expression without including freedom of information would be a formal exercise, denying both effective expression in practice and a key goal which free expression seeks to serve."[35] The right to freedom of information is closely related to the principle of transparency in the administration of government activities. In a democracy, the State is a vehicle for ensuring the common good, deriving its powers from the consent of the governed. In this context, the owner of the information about public administration is the individual who has delegated the management of public affairs to his or her representatives. The principle of transparency requires governments to play the role of service-provider, furnishing all duly requested information that has not been temporarily classified as exempt from the exercise of this right.[36]

283. 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 or democratic oversight of government management. 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."[37]

284. As a fundamental component of the right to freedom of expression, access to information must be governed by the "principle of maximum disclosure."[38] In other words, the presumption should be that information will be disclosed by the

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Rapporteur on the protection and promotion of the right to freedom of expression stated that the right to seek and receive information "imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems--including film, microfiche, electronic capacities, video and photographs--subject only to such restrictions as referred to in article 19, paragraph 3, of the International Covenant on Civil and Political Rights." *Id*., para. 12.

[35] Toby Mendel, *Freedom of Information as an Internationally Protected Right* (2000), *available at* http://www.article19.org/docimages/627.htm.

[36] *See* IACHR, Annual Report 2001, Vol. II, Report of the Office of the Special Rapporteur for Freedom of Expression [hereinafter 2001 Special Rapporteur Report], OEA/Ser.L./V/II.114, Doc. 5 rev. 1, at 72; 2000 Special Rapporteur Report, *supra* note 667, at 18.

[37] *See* ALICIA PIERINI ET AL., HABEAS DATA: *DERECHO A LA INTIMIDAD* (HABEAS DATA: THE RIGHT TO PRIVACY), *Editorial Universidad* (Buenos Aires 1999), at 31.

[38] Article XIX, The Public's Right to Know: Principles on Access to Information Legislation (June 1999), available in http://www.article19.org/docimages/1113.htm [hereinafter Freedom of Information Principles], Principle 1. Article XIX is a global non-governmental organization dedicated to promoting freedom of expression and access to official information. Its Freedom of Information Principles have been used widely by international organizations and NGOs. *See*, *e.g.* IACHR, Annual Report 1999, Vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression [hereinafter 1999 Special Rapporteur Report], OEA/Ser.L/V/II.111, Doc. 3 rev., Vol. III, at 88; Commission on Human Rights Resolution 2001/47, UN Commission on Human Rights, 57th Sess., Supp. Nº 3, at 209, E/CN.4/RES/2001/47 (2001), preamble.

government. Specifically, as noted in the chapter on the right to personal liberty and security, information regarding individuals arrested or detained should be available to family members, counsel and other persons with a legitimate interest in such information.[39]

285. Limited restrictions on disclosure, based on the same criteria that allow sanctions to be applied under Article 13, may be included in the law. The burden of proof is on the State to show that limitations on access to information are compatible with the inter-American standards on freedom of expression.[40] As in the case of subsequent restrictions on expressions, the most often-invoked rationales for limiting access to information in the context of fighting terrorism will be public order and national security. The specific content of such restrictions will be discussed in the section of this chapter on freedom of expression and terrorism.

286. The restrictions must be expressly defined in the law and "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."[41] This means that not only must the restriction relate to one of these aims, it must also be shown that the disclosure threatens "to cause substantial harm to that aim"[42] and that "the harm to the aim must be greater than the public interest in having the information."[43] This is essentially the proportionality test enunciated above in the section on subsequent liability for expressions. Whenever information is denied based on the foregoing analysis, an opportunity for independent review of the decision should be provided.[44]

287. An additional aspect of the right to access to information is "a presumption that all meetings of governing bodies are open to the public."[45] This presumption is applicable to any meeting in which decision-making powers are exercised, including administrative proceedings, court hearings, and legislative proceedings.[46] Any limitations on openness of meetings should be subject to the same requirements as the withholding of information.[47]

288. Finally, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information,[48] which the Commission, like other

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[39] *See* discussion, *supra* Part II(B), para. 122.

[40] *See*, eg, Johannesburg Principles, *supra* note 662, Principle 1(d).

[41] American Convention on Human Rights, *supra* note 61, Article 13(2).

[42] Freedom of Information Principles, *supra* note 676, Principle 4.

[43] Freedom of Information Principles, *supra* note 676, Principle 4.

[44] Freedom of Information Principles, *supra* note 676, Principle 5.

[45] Freedom of Information Principles, *supra* note 676, Principle 7.

[46] *See* Freedom of Information Principles, *supra* note 676, Principle 7.

[47] *See* Freedom of Information Principles, *supra* note 676, Principle 7.

[48] Johannesburg Principles, *supra* note 662.

international authorities, considers to provide authoritative guidance for interpreting and applying the right to freedom of expression in light of considerations of national security,[49] confirm that access to information dictates that "[a]ny restriction on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law. In particular, governments may not prevent journalists or representatives of intergovernmental or non-governmental organizations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law are being, or have been, committed."[50] Access to information also dictates that journalists have access to conflict areas, disaster sites and other such locations unless to give them such access would pose a "clear risk to the safety of others."[51]

e. Habeas Data

289. In addition to the general right to access to information in the hands of the government, every person has the right to access to information about himself or herself, whether this is in the possession of a government or private entity.[52] Often called the right to *habeas data,* this right includes the right to modify, remove, or correct such information due to its sensitive,[53] erroneous, biased, or discriminatory nature.[54] 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.[55]

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[49] The Johannesburg Principles constitute a set of voluntary principles drafted by a committee of international experts on human rights and media law, and are frequently invoked by the UN Commission on Human Rights (see, e.g., Commission on Human Rights Resolution 2002/48, UN Commission on Human Rights, 58th Sess., UN Doc. E/CN.4/RES/2002/48 (2002), Preamble; Resolution 2001/47, UN Commission on Human Rights, *supra* note 676), the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (*See*, *e.g.*, Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution 1993/45, UN Commission on Human Rights, 52nd Sess., E/CN.4/1996/39, 22 March 1996, para. 4.), the UN Special Rapporteur on the independence of judges and lawyers (*See*, *e.g.*, Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, Addendum, Report on the mission to Peru, UN Commission on Human Rights, 54th Sess., E/CN.4/1998/39/Add.1, 19 February 1998, introduction.) and the Special Representative of the Secretary-General on human rights defenders (*See*, *e.g.*, Report submitted by Ms. Hina Jilani, Special Representative of the Secretary-General on human rights defenders in accordance with Commission resolution 2000/61, UN Commission on Human Rights, 57th Sess, E/CN.4/2001/94, 26 January 2001, para. 14).

[50] Johannesburg Principles, *supra* note 662, Principle 19.

[51] Johannesburg Principles, *supra* note 662, Principle 19.

[52] Declaration of Principles on Freedom of Expression, *supra* note 641, Principle 3.

[53] "Sensitive information" is understood as anything having to do with the private life of the person.

[54] *See* PIERINI *ET AL.*, *supra* note 675, at 16.

[55] *See* 2001 Special Rapporteur Report, *supra* note 674, at 75.

290. In recent years, recourse to the action of *habeas data* has become a fundamental instrument for investigation into human rights violations committed during past military dictatorships in the Hemisphere. Family members of disappeared persons have used *habeas data* actions to obtain information concerning government conduct, to learn the fate of disappeared persons, and to exact accountability. Thus, these actions constitute an important means to guarantee the "right to truth."[56]

291. With respect to the relationship between the right to the truth and Article 13(1) of the American Convention, the Inter-American Commission on Human Rights argued before the Inter-American Court in the Barrios Altos case that:

> [T]he right to truth is founded in Articles 8 and 25 of the Convention, insofar as they are both "instrumental" in the judicial establishment of the facts and circumstances that surrounded the violation of a fundamental right. It also indicated that this right has its roots in Article 13(1) of the Convention, because that article recognizes the right to seek and receive information. With regard to that article, the Commission added that the State has the positive obligation to guarantee essential information to preserve the rights of the victims, to ensure transparency in public administration and the protection of human rights..[57]

292. In addition, the action of *habeas data* imposes certain obligations for entities that process information: the obligation to use the data for specific, explicitly stated objectives, and the obligation to guarantee the security of the data against accidental, unauthorized access or manipulation. In cases where entities of the state or the private sector obtain data improperly and/or illegally, the petitioner must have access to that information, even when classified, so that individuals have control over data that affects them. The action of *habeas data* as a mechanism for ensuring the accountability of security and intelligence agencies within this context provides a means to verify that personal data has been gathered legally. The action of *habeas data* entitles the injured party, or his family members, to ascertain the purpose for which the data was collected and, if collected illegally, to determine whether the responsible parties are punishable. Public disclosure of illegal practices in the collection of personal data can have the effect of preventing such practices by these agencies in the future.[58]

293. In order for the action of *habeas data* to be effective, the administrative hurdles that complicate or frustrate the obtention of information must

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[56] *See*, *e.g.*, I/A Court of H.R., *Barrios Altos* Case (*Chumbipuma Aguirre et al. v. Peru)*, Judgment of March 14, 2001, Series C Nº 75.

[57] *Id*., para. 45.

[58] See Victor Abramovich and Christian Courtis, *El acceso a la información como derecho*, 10 CUADERNOS DE ANÁLISIS JURÍDICO, 197, 206 (*Escuela de Derecho, Universidad Diego Portales*, Santiago, Chile 2000).

be eliminated, and simple, easily accessible systems enabling individuals to request information inexpensively must be put in place. The result, otherwise, would be to establish a formal mechanism that, in practice, would not facilitate access to information.

294. As in the case of access to information generally, any restrictions preventing the exercise of the right to *habeas data* must meet the standards of necessity and proportionality.[59] Under most circumstances, individuals exercising the action of *habeas data* should not be required to indicate why the information is being requested. The mere existence of personal data in public or private records is ordinarily a sufficient reason in itself for the exercise of this right.[60]

295. The *habeas data* writ has acquired even greater significance with the emergence of new technologies. 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 correct or modify any incorrect or outdated information contained in electronic databases.

f. Protection of Journalists and Communications Media

296. The Inter-American Court has noted that it is primarily through the communications media that a society exercises its right to freedom of expression.[61] Therefore, "the conditions of its use must conform to the requirements of this freedom,"[62] meaning that the freedom and independence of journalists and media must be guaranteed.[63] According to the Inter-American Court:

> [F]reedom of expression is not exhausted in the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate method to disseminate thought and allow it to reach the greatest number of persons. . . . Furthermore, it is essential that the journalists who work in the media should enjoy the necessary protection and independence to exercise their functions comprehensively, because it is they who keep society informed, and this is an indispensable requirement to enable society to enjoy full freedom.[64]

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[59] *See* discussion *supra* para. 286.

[60] *See* MIGUEL ANGEL EKMEKDJIAN, *DERECHO A LA INFORMACIÓN: REFORMA CONSTITUCIONAL Y LIBERTAD DE EXPRESIÓN, NUEVOS ASPECTOS, Ediciones Depalma*, Buenos Aires (1996) at 114.

[61] Advisory Opinion OC-5-85, *supra* note 152, para 34.

[62] Advisory Opinion OC-5-85, *supra* note 152, para. 34.

[63] Advisory Opinion OC-5-85, *supra* note 152, para. 34.

[64] I/A Court H.R., Ivcher Bronstein Case, Judgment of February 6, 2001, Series C Nº 74, paras. 147-150. In the case of Ivcher Bronstein, the Court indicated that "the resolution that annulled Mr. Ivcher's nationality constituted an indirect means of restricting his freedom of expression, as well as that of the journalists who worked and conducted investigations for *Contrapunto* of Peruvian television's *Channel 2*." *Id*., para. 162. Additionally, the Court concluded that "[b]y separating Mr. Ivcher from the control of *Channel 2* and excluding the *Contrapunto* journalists, the State not only restricted their

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297. As such, States have a special responsibility to protect journalists and communications media from attacks, intimidation and threats.[65] The murder, abduction, intimidation and threatening of journalists, as well as the destruction of press materials, are most often carried out with two concrete aims. The first is to eliminate journalists who are investigating attacks, abuses, irregularities, or illegal acts of any kind committed by public officials, organizations, or non-state actors. This is done to ensure that the investigations are not completed or never receive the public debate they deserve, or simply as a form of reprisal for the investigation itself. Secondly, such acts are used as an instrument of intimidation to send an unmistakable message to all members of civil society engaged in investigating attacks, abuses, irregularities, or illicit acts of any kind. These practices seek to silence the press in its watchdog role, or render it an accomplice to individuals or institutions engaged in abusive or illegal actions. Ultimately, the goal of those who engage in these practices is to keep society from being informed about such occurrences, at any cost.[66]

298. Under the American Convention on Human Rights and other international law instruments, States have the obligation to effectively investigate the events surrounding the murder of and other violent acts against journalists and to punish the perpetrators. The Inter-American Court has maintained that the investigation:

> . . . must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.[67]

299. The Inter-American Commission on Human Rights has asserted that a State's failure to carry out an effective and thorough investigation of the murder of a journalist and to apply criminal sanctions against the material and intellectual authors is particularly serious in terms of the impact this has on society. This type of crime has an intimidating effect not just on journalists, but on all citizens, because it inspires fear of reporting attacks, abuses, and illegal activities of any kind. This effect can only be avoided by concerted government action to punish those responsible for murdering journalists. In this way, States can send a strong, direct message to society that there will be no tolerance for those who engage in such a grave violation of the right to freedom of expression.[68]

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right to circulate news, ideas and opinions, but also affected the right of all Peruvians to receive information, thus limiting their freedom to exercise political options and develop fully in a democratic society." *Id*., para. 163.

[65] Declaration of Principles on Freedom of Expression, *supra* note 641, Principle 9.

[66] *See* Case 11.739, Report N° 50/99, Hector Felix Miranda (Mexico), Annual Report of the IACHR 1998.

[67] Velásquez Rodríguez Case, *supra* note 249, para. 177.

[68] *See* Miranda, *supra* note 704, para. 52.

2. International Humanitarian Law

a. Protection of Journalists and Media Installations During Armed Conflict

300. The following section will discuss the rules applicable under international humanitarian law that pertain to journalists and media installations, principally in connection with the protections applicable to civilians and civilian objects. Most of these protections, in particular those dealing with the principle of distinction, are applicable to situations of both international and non-international armed conflicts.[69]

301. Under the rules and principles of international humanitarian law, applicable in both international and non-international armed conflicts, journalists are considered to be civilians and are entitled to the rights that this status implies, including those analyzed in other sections of this report.[70] Journalists retain this civilian status so long as they "take no action adversely affecting their status as civilians."[71] Those journalists who serve as war correspondents accredited to a particular armed force in an international armed conflict are entitled to prisoner of war status if they fall under the power of the enemy.[72] Any other journalist who is captured by an enemy power may only be detained if criminal proceedings are to be instituted against him or her or if imperative reasons of security justify internment.[73] The status of journalists with respect to internal armed conflict is not explicitly defined,[74] however, journalists should be considered civilians in this type of conflict as well, so long as they do not engage in acts of hostility or participate directly in hostilities.[75] It should be emphasized that the dissemination of information or the expression of opinions in favor or in disfavor of a party involved in the conflict

[69] *See supra,* Part II(C), para. 65.

[70] *See* Additional Protocol I, *supra* note 68, Article 79; Additional Protocol II, *supra* note 36, Article 13. *See also supra* Part II(C), para. 65 dealing with the principles of distinction and proportionality; Tadić AC Decision Jurisdiction, *supra* note 163, paras. 117-119. *See also* Gasser, H.-P., "The protection of journalists engaged in dangerous professional missions: Law applicable in periods of armed conflict" in INTERNATIONAL REVIEW OF THE RED CROSS, Nº 232, 1983, at 3-21, cited in SASSOLI & BOUVIER, *supra* 162 at 427. "[T]he instruments of international humanitarian law make no statements on the justification or legality of journalistic activities in times of war. […] In other words, humanitarian law does not protect the journalists [sic] function but protects men engaged in this activity." *Id*. at 427.

[71] Additional Protocol I, *supra* note 68, Article 79(2).

[72] Third Geneva Convention, *supra* note 67, Article 4(A)(4).

[73] *See* Gasser, *supra* note 708, at 429.

[74] Article 3 common to the Geneva Conventions, *supra* notes 36, 67; Additional Protocol II, *supra* note 36, Article 13.

[75] *See* Gasser, *supra* note 708, at 427. *See also* Article 4 and Article 13 Additional Protocol II, *supra* note 36.

cannot be considered as hostile acts and cannot render the person expressing such views or opinions a legitimate military objective.[76]

302. Of course, journalists often assume risks that ordinary civilians do not, by virtue of their profession. According to Hans Peter Gasser, "[a] journalist may [...] lose, not his right to protection as a civilian, but *de facto* protection if he stays too close to a military unit [...] since that unit is a lawful target of enemy attack (unless the proportionality rule prohibits the attack – Article 51, par. 5 (b)). He thus acts at his own risk. The same applies to journalists who approach military targets."[77] The important point is that although journalists do not benefit from protections over and above those granted to ordinary civilians, they must never be the direct object of an attack, so long as engaged in vocational activities, in accordance with the principle of distinction.[78]

303. Media installations, such as television and radio stations, may be entitled to protection as civilian objects under international humanitarian law.[79] Parties to a conflict are required to distinguish between civilian objects, which may not be attacked, and military objectives, which may be.[80] Civilian objects are "all objects which are not military objectives," as defined by Article 52, paragraph 2 of Protocol I. Military objectives are those that "by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[81] Objects which are normally considered "civilian objects" may become legitimate military objectives if they are "being used to make an effective contribution to military action;"[82] however, in case of doubt about such use, it must be presumed that it is not being so used.[83] While media installations are not specifically mentioned as civilian objects, they should generally be considered as such, since their nature and location is generally not military-related, and since they are generally not used for military purposes or to make an effective

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[76] IACHR Report on Colombia (1999), *supra* note 110, at 87, Ch. IV, Section C(2)(d).

[77] *See* Gasser, *supra* note 708, at 428.

[78] *See supra,* Part II(C), *supra* para. 65 discussing the principle of distinction. *See also* Additional Protocol I, *supra* note 68, Articles 51, 52; Additional Protocol II, *supra* note 36, Article 13. *See also* Tadić AC Decision Jurisdiction, *supra* note 163, paras. 117-119.

[79] *See* Additional Protocol I, *supra* note 68, Articles 52-56, 85(3); Additional Protocol II, *supra* note 36, Article 13. *See also supra* Part II(C), para. 65 concerning the principles of necessity, humanity, distinction and proportionality.

[80] Additional Protocol I, *supra* note 68, Article 48. *See also supra* Part II(C), para. 65 dealing with the principles of distinction and proportionality; Tadić AC Decision Jurisdiction, *supra* note 163, paras. 117-119.

[81] Additional Protocol I, *supra* note 68, Article 52(2). *See also* Additional Protocol II, *supra* note 36, Article 13.

[82] Additional Protocol I, *supra* note 68, Article 52(3). *See also* Additional Protocol II, *supra* note 36, Article 13.

[83] Additional Protocol I, *supra* note 68, Article 52(3).

contribution to the military action. However, if media installations are used as part of a command and control or other military function, they may become legitimate military targets subject to direct attacks.

b. Right to Know Fate of Relatives

304. Another aspect of international humanitarian law that relates to the right to freedom of expression in international armed conflicts, in particular the right to information, is the right of families to know the fate of their relatives.[84] Under Article 122 of the Third Geneva Convention, each Party to a conflict, as well as each neutral or non-belligerent power receiving such persons in its territory, must establish an official Information Bureau for prisoners of war in its power. This Bureau is charged with gathering information regarding "transfers, releases, repatriations, escapes, admissions to hospital, and deaths" of prisoners of war and answering inquiries concerning prisoners of war.[85] In addition, a Central Prisoners of War Information Agency must be established in a neutral country to facilitate the transfer of information about prisoners of war to their home countries.[86] In cases of death of prisoners of war, Article 120 of the Third Geneva Convention provides for specific procedures to be followed regarding preparation of the death certificate, forwarding of the information to the Prisoner of War Information Bureau, medical examination of the body, and proper burial. The Detaining Power must establish a Graves Registration Service so that graves may be found.[87] The Fourth Geneva Convention contains similar requirements with respect to maintaining information concerning the fate of civilians interned in the course of armed conflict.[88]

305. Under Article 33 of Protocol I, Parties to a conflict have the duty to "search for the persons who have been reported missing by an adverse Party" and to hand over information obtained about such persons to an agency of the International Committee of the Red Cross, a national Red Cross agency, or the Protecting Power.[89] Parties also have the responsibility of gathering information about individuals who have been held in captivity or who have died during or as a result of the hostilities, to facilitate the process of answering requests for information.[90] Additionally, the Parties to a conflict must "endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield

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[84] Additional Protocol I, *supra* note 68, Article 32.

[85] Third Geneva Convention, *supra* note 67, Article 122.

[86] Third Geneva Convention, *supra* note 67, Article 123.

[87] Third Geneva Convention, *supra* note 67, Article 120.

[88] *See* Fourth Geneva Convention, *supra* note 36, Article 136 (requiring the establishment of an Information Bureau); Article 140 (requiring the establishment of a Central Information Agency); Articles 129-131 and 136-141 (setting forth the types of information that must be recorded, particularly in the case of the death of an internee, and the methods of transmission to the Protecting Power or home country of the internee).

[89] Additional Protocol I, *supra* note 68, Article 33(1), (3).

[90] Additional Protocol I, *supra* note 68, Article 33(2).

areas, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse Party while carrying out these missions in areas controlled by the adverse Party."[91] Finally, Additional Protocol I contains a provision requiring the establishment of an International Fact-Finding Commission to "enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol[.]"[92] The foregoing rights and responsibilities complement and reinforce in times of war the "right to truth" under human rights law, described earlier.

c. Right to Send and Receive Information

306. In international armed conflicts, prisoners of war have the right to write to their families immediately after capture and inform them of their "capture, address and state of health"[93] and to send and receive cards and letters.[94] These cards and letters may be limited in number if it is deemed necessary, but may not be limited to fewer than two letters and four cards monthly, not including the "capture card."[95] The detaining power may censor communications.[96] In cases in which written communication is not feasible due to distance or other problems, prisoners of war must be permitted to send telegrams.[97] Interned individuals have similar rights to communicate with family members.[98] Additionally, the Fourth Geneva Convention provides for the right of "[a]ll persons in the territory of a Party to the conflict, or in a territory occupied by it" to correspond with family members[99] and requires Parties to the conflict to facilitate communications between family members dispersed as a result of the war.[100] This is subject to limited circumstances in which protected persons detained in occupied territory may properly be regarded as forfeiting their rights of communication under the Fourth Geneva Convention.[101] These rights promote certain objectives similar to those promoted by the "right to truth" by providing relatives with means by which to receive information about the fate of family members.

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[91] Additional Protocol I, *supra* note 68, Article 33(4).

[92] Additional Protocol I, *supra* note 68, Article 90.

[93] Third Geneva Convention, *supra* note 67, Article 70.

[94] Third Geneva Convention, *supra* note 67, Article 71.

[95] Third Geneva Convention, *supra* note 67, Article 71. *See also* Additional Protocol II, *supra* note 36, Article 5(2)(b).

[96] Third Geneva Convention, *supra* note 67, Articles 71, 76.

[97] Third Geneva Convention, *supra* note 67, Article 71.

[98] Fourth Geneva Convention, *supra* note 36, Article 106 (providing the right to send an "internment card"); Article 107 (providing for the right to send letters or cards).

[99] Fourth Geneva Convention, *supra* note 36, Article 25

[100] Fourth Geneva Convention, *supra* note 36, Article 26.

[101] *See* Fourth Geneva Convention, *supra* note 36, Article 5 (providing that "[w]here in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activities hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.").

307. Prisoners of war also have the right to receive "articles of a religious, educational or recreational character which may meet their needs, including books, devotional articles, scientific equipment, examination papers . . . and materials allowing prisoners of war to pursue their studies or their cultural activities."[102] This right is also protected in the case of interned persons.[103]

308. Finally, prisoners of war have the right to make known to their captors or to the Protecting Power requests and complaints about the conditions of their captivity.[104] These communications are not to be "considered to be a part of the correspondence quota referred to in Article 71."[105] Moreover, even if such requests or complaints are determined to be unfounded, "they may not give rise to any punishment."[106] Prisoners of war are also entitled to have representatives selected from among their members, who represent them "before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organizations which may assist them."[107] These representatives may also "send periodic reports on the situation in the camps and the needs of the prisoners of war to the representatives of the Protecting Powers."[108] Interned individuals also have the right to present petitions to the detaining authorities regarding their conditions of internment, without fear of reprisal[109] and are entitled to select the members of an Internee Committee to represent their interests before the Detaining and Protecting Powers.[110] Such rights complement and reinforce the function of freedom of expression in that they serve to allow oversight of the activities of the parties to a conflict for the protection of individuals' rights.

3. The Right to Freedom of Expression and Terrorism

309. Terrorism is a serious problem affecting public order and in some cases, national security. Therefore, some subsequent limitations on freedom of expression or access to information related to fighting terrorism may be justified as measures that are necessary to protect the public order or national security. Such measures must satisfy the strict test required by Article 13(2), set forth earlier in this chapter.[111]

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[102] Third Geneva Convention, *supra* note 67, Article 72.

[103] Fourth Geneva Convention, *supra* note 36, Article 108.

[104] Third Geneva Convention, *supra* note 67, Article 78.

[105] Third Geneva Convention, *supra* note 67, Article 78.

[106] Third Geneva Convention, *supra* note 67, Article 78.

[107] Third Geneva Convention, *supra* note 67, Article 79.

[108] Third Geneva Convention, *supra* note 67, Article 78.

[109] Fourth Geneva Convention, *supra* note 36, Article 101.

[110] Fourth Geneva Convention, *supra* note 36, Article 102.

[111] *See* discussion, *supra* paras. 274-278, relating to the requirements imposed by Article 13(2) of the American Convention in order to impose subsequent liability for speech.

310. As has been reiterated throughout this report, the human rights guarantees found in the American Convention, the American Declaration and other international instruments apply fully in the context of addressing terrorism unless there is a legally declared state of emergency and the right limited is a derogable right. Again, although the right to freedom of expression is a derogable right in states of emergency, States considering suspending any aspect of this right should always bear in mind the importance of freedom of expression for the functioning of democracy and guaranteeing other fundamental rights.

311. Among the restrictions of freedom of expression that states are likely to impose in the context of fighting terrorism are prior censorship of publications related to terrorist activity or anti-terrorism strategies, subsequent liability for publication or dissemination of information or opinions related to such issues, withholding by the government of information related to such issues, restrictions on access to hearings and other governmental meetings on terrorism-related issues, and limitations on the right of journalists to protect their sources in order to assist law enforcement efforts. Such restrictions may or may not be compatible with Article 13 of the American Convention. Particularly in the case of prior censorship, compatibility with Article 13 will depend on whether or not a lawfully declared state of emergency exists.

a. Prior Censorship

312. As previously noted, Article 13 of the American Convention contains a virtually complete ban on prior censorship, which is not found in other international human rights instruments and which indicates the high regard the drafters of the Convention had for the right to freedom of expression. While there are no exceptions in this Article for national security or public order reasons, there could arise in the context of an emergency situation, validly declared under Article 27, some situations in which national security or public order arguably would permit limited censorship. There is no jurisprudence in the inter-American system that specifically speaks to this issue, however, cases from the United States and from the European human rights system demonstrate the high level of scrutiny that any prior censorship must be given.

313. The jurisprudence of the United States is of particular relevance to the present discussion mostly because, in addition to containing an abundant quantity of cases on the issue of prior censorship, it deals with principles that are similar to those provided for in Article 13 of the American Convention. Notwithstanding the fact that the US Supreme Court has contemplated the possibility of prior restraint for national security reasons,[112] it has never upheld such

[112] Near v Minnesota 283 U.S. 697 (1931). The U.S. Supreme Court noted in a hypothetical example that "[n]o one would question but that a government might prevent [. . .] the publication of the sailing dates of transports or the number and location of troops." *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) according to which, in the United States, the party wishing to impose a prior restraint, such as an injunction against publication, bears a "heavy burden of showing justification" for its imposition.

an injunction on these grounds. The high level of scrutiny given to prior restraints on expression is illustrated by the important "Pentagon Papers" case, where the Court struck down an injunction to prevent the publication of portions of a classified government report during the Vietnam War.[113] In that case, one member of the Court considered that "absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result" would be acceptable.[114] Other members considered that the government had not satisfied the heavy burden of showing that the publication would surely result in direct, immediate, and irreparable damage to the nation.[115]

314. The case law of the European Human Rights system can serve as a relevant indicator of the application of the issue of prior censorship at the regional level, in particular considering its considerable number of cases dealing with freedom of expression. Notwithstanding the fact that the European Human Rights System does not recognize the same absolute ban on prior censorship as in the inter-American system, its institutions have also been reluctant to allow prior restraints on dissemination of expression, as illustrated in the "Spycatcher cases."[116] In those cases, the European Court of Human Rights rejected injunctions based

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[113] *See* New York Times Co. v. United States, 403 U.S. 713 (1971) (the "Pentagon Papers" case). In the "Pentagon Papers" case, the Court struck down an injunction to prevent two major newspapers from printing portions of a classified government report entitled "History of U.S. Decision-Making Process on Vietnam Policy." The case arose at the height of the Vietnam War when domestic opposition to the war was at its peak [*See* MARC A. FRANKLIN AND DAVID A. ANDERSON, MASS MEDIA LAW: CASES AND MATERIALS (5th ed. 1995), at 85].

[114] New York Times Co., 403 U.S., at 725-26 (Brennan, J., concurring).

[115] Justice Stewart voted for allowing disclosure, stating, "I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people." [New York Times Co., 403 U.S. at 728, 730 (Stewart, J. concurring)]. Justice White took a similar position, stating that he did not doubt that the disclosure of the documents would cause harm to the national interest, but that "the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases" [New York Times Co., 403 U.S. at 730, 731 (White, J., concurring)]. *But See* United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), dismissed as moot 610 F.2d 819 (7th Cir. 1979). In that case, The Progressive, a magazine, was enjoined for six months from publishing an article entitled "The H Bomb Secret: How We Got It, Why We're Telling It." The article contained information on the design and manufacture of the H-bomb. The magazine claimed, however, that the information was gathered from a number of publicly available sources. Nevertheless, the judge in the Federal District Court (first instance) found that the government had "met the test enunciated by two Justices in the New York Times case, namely grave, direct, immediate and irreparable harm to the United States" [Progressive, Inc., 467 F. Supp. at 996]. This was due to the fact that the magazine had gathered the information related to making the bomb in a format that would make it possible for other countries to expedite their manufacturing of the bomb. The judge found that this was analogous to the hypothetical situation posed in Near v. Minnesota [*supra* note 750]. The case was ultimately dismissed, however, when a newspaper in Madison, Wisconsin published essentially the same information [see FRANKLIN AND ANDERSON, *supra* note 751, at 95.].

[116] Eur. Court H.R., Observer and Guardian v. the United Kingdom, Judgment of November 26, 1991, Ser. A Nº 216, and Eur. Court H.R., Sunday Times v. United Kingdom (Nº 2), Judgment of October 24, 1991, Ser. A Nº 217 [the "Spycatcher cases"]. "Spycatcher" was a book containing the memoirs of a former senior member of the British Security Service (M15). It dealt with "the operational organisation, methods and personnel of M15 and also included an account of alleged illegal activities by the Security Service" [Observer and Guardian, *supra*, para. 11]. The applicant newspapers complained that a temporary injunction on the publication of information obtained from the book was a restriction that was incompatible with freedom of expression.

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on national security grounds as incompatible with freedom of expression, considering that the injunctions could not be deemed to be necessary to protect national security because the publication in question had been published in another state, destroying the confidentiality of the material.

315. Given these examples, it should be clear that even during a state of emergency, the interest of the public in having information generally outweighs the need to keep it secret. Moreover, once the information becomes in any way public, the interest of the public in having access to the information is generally deemed to outweigh the need to prevent more widespread dissemination.

b. Subsequent Penalties

316. As stated previously, the imposition of subsequent penalties for the dissemination of expressions must 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 heath or morals."[117] These requirements apply in the context of addressing terrorism, unless a state of emergency has been lawfully declared. There are several problems that are typically associated with subsequent penalties aimed at anti-terrorism, or those based generally on "public order" or "national security", the main rationales used to justify subsequent penalties for speech in the context of terrorism. First, as noted earlier in this chapter, the requirement that any subsequent penalties must be established by law means that it must be foreseeable to the communicator that a particular expression may give rise to legal liability. As noted by one author, "[o]ne problem with order and security laws is that they are often very broad and/or vague. This means they can potentially be abused by governments to suppress legitimate criticism and that they exert a chilling effect as citizens steer well clear of the potential zone of application to avoid censure. To some extent this is a function of the difficulty of defining with any degree of precision in a law of general application the exact parameters of the public order or national security threat in issue."[118] An overly broad or vague provision may not fulfill the requirement of foreseeability and therefore may violate the terms of Article 13(2).

317. More frequently, the problems presented by laws imposing subsequent liability on expressions in the context of fighting terrorism relate to the issue of proportionality of the penalties. Too often, penalties are excessive in relation to the type of harm they are designed to prevent.

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The European Court found that because the book had been published in the United States, the confidentiality of the material was essentially destroyed and the injunction could not be deemed to be necessary to protect national security. In the Observer and Guardian case, the Court found that a temporary injunction was valid up until the time of the publication abroad. *Id*. at para. 65.

[117] American Convention on Human Rights, *supra* note 61, Article 13(2).

[118] Toby Mendel, *Criminal Content Restrictions*, (January 1999), *available at* http://www.article19.org/docimages/629.htm.

318. The Inter-American Commission on Human Rights addressed this issue in a terrorism-related situation in the case of Rodolfo Robles Espinoza and sons.[119] General Robles suffered numerous repercussions, including Court Martial proceedings against him for various crimes, including insubordination, insulting a superior, undermining the Nation and the Armed Forces, abusing his authority, making false statements, and dereliction of duty because he denounced abuses committed by the Peruvian army and intelligence services in the context of fighting terrorism. The Inter-American Commission found that these repercussions constituted a serious violation of General Robles' right to freedom of expression. The Commission noted that "undermining the Armed Forces or insulting a superior are appropriate terms when applied to the crimes for which they were created, in order to maintain a level of discipline suitable to the vertical command structure needed in a military environment, but that they are totally inappropriate when used to cover up allegations of crimes within the Armed Forces."[120] The Commission further noted that the right to freedom of expression, although it may be subject to reasonable subsequent penalties in accordance with the terms of the Convention, is broader when the "statements made by a person deal with alleged violations of human rights."[121] Thus, the requirement of proportionality of the penalty was not met.

319. The European Court of Human Rights addressed a similar issue in the case of Sürek v. Turkey (Nº2),[122] dealing with the subsequent sanctions imposed for the publication of a document suggesting the misconduct of officials involved in counter-terrorism policies. The Court determined that, given the terrorist threat present in a part of the country at the time, the said provision had the legitimate aim of protecting national security, territorial integrity, and the rights of others.[123] However it found that that the sanction was not proportionate to the aims of the law because of the greater importance of bringing to light wrongdoings by public officials.[124]

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[119] Case 11.317, Report N° 20/99, Rodolfo Robles Espinoza and sons (Peru), Annual Report of the IACHR 1998. General Robles was the head of the Army Instruction School (COINDE) and former commander of the Third Military Region based in Arequipa, and was technically the third most senior officer in the Peruvian army in 1993. In May of 1993, he publicly revealed, by means of an open letter, the existence of a "death squad," known as the "Colina Group," set up by Peru's National Intelligence Service (SIN) and comprising members of the SIN and the Armed Forces. The "Colina Group" was aimed at physically eliminating terrorists.

[120] Robles Espinoza Case, *supra* note 757, para. 151.

[121] Robles Espinoza Case, *supra* note 757, para. 146.

[122] Eur. Court H.R., Sürek v. Turkey (Nº 2), Judgment of July 8, 1999, Application Nº 24122/94.

[123] Sürek Case (Nº 2), *supra* note 760, para. 29.

[124] Sürek Case (Nº 2), *supra* note 760, para. 39. While the Court recognized the importance of protecting the officials from reprisals by keeping their identities secret, it also recognized that the public has a right to know about misconduct of officials. As some of the information at issue had already been disclosed in other sources, the Court found that the likelihood of the officials receiving adequate

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320. The analysis may be different in a case in which the party, who has a duty of confidentiality, reveals information for reasons other than exposing the wrongdoing of public officials. In Hadjianastassiou v. Greece, [125] for example, a case dealing with the private sale by a military officer of arms-related data, the European Court, in assessing the reasonableness or propriety of the sanction at issue, considered that the disclosure of information that may reveal a state's interest, technological knowledge, or progress in the manufacture of a weapon could cause considerable damage to national security. It also noted that, while members of the military enjoy a right to freedom of expression, special conditions are attached to military life and specific 'duties' and 'responsibilities' are incumbent on members of the armed forces. As a result, in this case the Court determined that the sanction was not unreasonable or improper.[126]

321. Also pertinent to the issue of subsequent penalties are limitations on the dissemination of expressions that could be considered to be supportive of violence or of violent groups. The European Court's approach to such cases has been to evaluate, in light of the circumstances, the likelihood that such statements will cause violence. In Incal v. Turkey,[127] for example, the Court recognized the

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protection as a result of the imposition of this sanction was outweighed by the public's interest in having the information. *Id*. at para 40.

[125] Eur. Court H.R., Hadjianastassiou v. Greece, Judgment of November 23, 1992, Ser. A Nº 252. The applicant was a captain in the air force and an officer in charge of a project for the design and production of a guided missile. He provided a technical study that he had written on the guided missile to a private company. He was convicted of disclosing military secrets and sentenced to two-and-a-half years of prison, which was reduced on appeal.

[126] Hadjianastassiou v. Greece, *supra* note 763, paras. 45-47. For a U.S. case dealing with subsequent liability for revealing government information in breach of fiduciary duty, see Snepp v. United States, 444 U.S. 507 (1980). Snepp was a former employee of the Central Intelligence Agency (CIA) who had signed an agreement that he would not publish any information relating to the CIA without prepublication clearance. Without receiving prior authorization from the CIA, he published a book about CIA activities in Vietnam. The government did not contend that the information contained in the book was classified or that Snepp did not have a right to publish it. Rather it claimed that "in light of the special trust reposed in him and the agreement that he signed, Snepp should have given the CIA an opportunity to determine whether the material he proposed to publish would compromise classified information or sources." *Id*. at 511. The Supreme Court recognized that the requirement of prepublication clearance was essential to the CIA for guaranteeing its intelligence sources that any confidential information that they provide will remain secret. In the absence of such a guarantee, the CIA's ability to obtain information from such sources would be seriously impaired, causing irreparable damage to American intelligence operations and, as a result, the U.S. Government as a whole. Thus, the Court allowed a constructive trust on the profits from the book.

[127] Incal v. Turkey, *supra* note 574, at 1547. In this case, the applicant was a member of the executive committee of the People's Labour Party (HEP), which printed leaflets denouncing the government's treatment of Kurds and called upon Turkish and Kurdish "democratic patriots" to take action against this situation by forming "neighbourhood committees based on the people's own strength." *Id*., para. 10. A sample of the leaflets was submitted to the Izmir security police, who considered that the leaflet "contained separatist propaganda capable of inciting the people to resist the government and commit criminal offenses" *Id*., para. 12. The leaflets were seized and criminal proceeding were instituted against the applicant and others involved in the printing for "attempting to incite hatred and hostility through racist words" in violation of provisions of the Criminal Code, the Prevention of Terrorism Act and the Press Act. *Id*., para. 15.

difficulties inherent in fighting terrorism, but nevertheless decided that a subsequent penalty based on anti-terrorism legislation violated the Convention, taking into account the sanction's severity,[128] the fact that prior approval was sought, the importance of free speech to political parties, and the importance of greater openness to criticism with respect to the government.[129] The Court also considered that the document, although containing strongly worded criticism, did not clearly incite "to the use of violence, hostility or hatred between citizens."[130] In Zana v. Turkey,[131] in contrast, the Court found no violation of the right to freedom of expression because it considered that, in light of all of the circumstances of the case, the impugned statements could indicate support for violence and "had to be regarded as likely to exacerbate an already explosive situation[.]"[132]

322. The United States Supreme Court has developed an even stricter test in cases dealing with expression deemed to be supportive of violence or of violent groups, requiring not only a showing of incitement to violence, but also a showing of a clear intent to do so. This test resulted from several key decisions, including Schenck v. United States,[133] Abrams v. United States,[134] and Brandenburg

[128] Incal Case, *supra* note 574, para. 56. In addition to a prison sentence of 6 months, 20 days, the applicant was fined, his drivers' license was temporarily revoked and he was barred from the civil service, among other consequences.

[129] Incal Case, *supra* note 574, paras. 46-59.

[130] Incal Case, *supra* note 574, para. 50.

[131] Eur. Court H.R., Zana v. Turkey, Judgment of November 25, 1997, Reports of Judgments and Decisions Nº 57 1997-VII, at 2533. The case dealt with the conviction and 12-month sentence of a locally-known political figure for violating a provision of the criminal code against defending "an act punishable by law as a serious crime" and "endangering public safety" *Id*. at para. 26. At the time, serious disturbances were occurring in Southeast Turkey between security forces and the Workers' Party of Kurdistan (PKK) and ten of eleven provinces in that area were under military rule. The applicant had stated in an interview that was later published, "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK can kill women and children by mistake […]". *Id*. at para. 12.

[132] Zana Case, *supra* note 769, para. 60. The court also noted that the applicant had only served 1/5 of his sentence, creating a further argument for proportionality.

[133] 249 U.S. 47 (1919). This case dealt with convictions under the Espionage Act of June 15, 1917 for the distribution of leaflets that were said to attempt to cause and to cause in fact insubordination in the military and to obstruct recruiting and enlistment of troops during war against Germany. In enunciating its rule, the Supreme Court stated: "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced". *Id*. at 52, footnotes omitted, emphasis added. While this case provided an important standard for protecting freedom of expression in the face of restrictions based on national security or public order, it was unclear and the courts often used it to uphold restrictions on freedom of expression on these grounds. *See*, *e.g.*, Frohwerk v. United States, 249 U.S. 204 (1919) and Debs v. United States, 249 U.S. 211 (1919).

[134] 250 U.S. 616 (1919). Justice Holmes, in his famous dissent in the case of Abrams v. United States argued for a narrower interpretation of the rule that would apply equally in situations of war or emergency, taking into account the specific dangers raised by those situations. He stated that "the United States constitutionally may punish speech that produces or is intended to produce a clear and *imminent* danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times. But as against dangers peculiar

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v. Ohio.[135] In the Brandenburg case, the Court rejected the holdings of various earlier cases that had upheld convictions based on mere advocacy of violence or unlawful activity, as opposed to actual incitement.[136] It stated that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[137] Thus, in order to impose subsequent liability for speech, the current U.S. approach specifically requires intent to incite lawless activity and a likelihood of success,[138] which accords more closely to the terms under the American Convention as opposed to other international human rights instruments.

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to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of *immediate* evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned." *Id*. at 627-28 (Holmes, J., dissenting)] He continued, "I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country". *Id*. at 630.

[135] 395 U.S. 444 (1969). The defendant in Brandenburg was the leader of a Ku Klux Klan group who was convicted under the Ohio Criminal Syndicalism law of "'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.'" *Id*. at 444-45. The defendant spoke at a Ku Klux Klan rally that was filmed and broadcast on local and national television. The film showed clips of the rally participants burning a cross and making racist and anti-Semitic statements. Some of the participants, but not the defendant, were carrying firearms. At one point, the defendant made a speech, in which he talked about the size of the Klan and planned marches on Washington, DC, St. Augustine, Florida and Mississippi. He also stated "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengence taken." *Id*. at 447.

[136] Brandenburg specifically overruled the decision in Whitney v. California, 274 U.S. 357 (1927). In that case, the Court considered the legitimacy of a conviction under California's Criminal Syndicalism Act, similar to the statute in Brandenburg. It was found in the lower court that the defendant organized and assisted in "'organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized to advocate, teach, aid and abet criminal syndicalism.'" *Id*. at 360. The charges arose from the defendant's membership in a "radical" branch of the Socialist party. She attended the Socialist Party's national convention in 1919, where the "radical" group, of which she was a member, formed the Communist Labor Party (CLP). The CLP adopted a national Platform and Program advocating "a unified revolutionary working class movement" for the "overthrow of capitalist rule." *Id*. at 363. It primarily advocated the use of strikes to achieve these ends. At a later convention to organize a local chapter of the CLP, the defendant was a member of the resolutions committee and in that capacity, she supported a resolution that would seek to attain the CLP's goals through traditional political means. The proposed resolution was rejected in favor of the national Platform and Program. Whitney remained a member of the Party and testified at the trial "that it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence." *Id*. at 366. The Court, in upholding the conviction, did not review the facts, but held that the statute was constitutional as applied, giving great weight to the determination of the legislature that the acts prohibited posed great danger to the peace and security of the state.

[137] Brandenburg, 395 U.S. at 447.

[138] A U.S. doctrine related to the "clear and present danger" doctrine is the "fighting words" doctrine, set forth in the case of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). "Fighting words" were defined by the Court as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id*. at 572. In this case, Chaplinsky was confronted by a City Marshal while distributing leaflets. During the course of the argument that ensued, Chaplinsky called the Marshall a "God damned racketeer" and a "damned Fascist." *Id*. at 569. The "fighting words" doctrine continues to be valid, but has not been used to sustain a conviction since Chaplinsky.

323. Article 13 of the American Convention clearly requires that "propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action" should be considered offenses punishable by law."[139] However, laws that broadly criminalize the public defense (apologia) of terrorism or of persons who might have committed terrorist acts, without considering the element of incitement "to lawless violence or to any other similar action,"[140] are incompatible with the right to freedom of expression.[141]

324. In addition to imposing subsequent sanctions on the author of a particular expression, states have in some cases imposed sanctions on journalists or others who transmit ideas and information that the state has determined are sanctionable. On this issue, the European Court of Human Rights, in the "Greenjackets" case,[142] held that a penalty of this nature was disproportionate to the objective sought, and indicated further that "[t]he punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so." [143]

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[139] American Convention on Human Rights, *supra* note 61, Article 13(5).

[140] *Id*.

[141] *See, e.g.,* Report of the Commission of International Jurists on the Administration of Justice in Peru, *supra* note 561, at 24.

[142] Eur. Court H.R., Jersild v. Denmark, Judgment of September 23, 1994, Ser. A Nº 298. In that case, the applicant, a journalist, transmitted a television interview with several youths who were members of the Greenjackets, a racist and anti-immigrant group. During the course of the interview the youths made a number of abusive and derogatory statements about immigrants and ethnic groups in Denmark. The applicant was found guilty of aiding and abetting the Greenjackets to disseminate insulting or degrading speech about a racial or ethnic group, an offense under the Penal Code.

[143] Jersild Case, *supra* note 780, para. 35. *See also*, Johannesburg Principles, *supra* note 662, Principle 8, which states "Expression may not be prevented or punished merely because it transmits information issued by or about an organization that a government has declared threatens national security or a related interest." This case should be contrasted with an earlier group of cases declared inadmissible by the European Commission of Human Rights for failure to state a claim under the European Convention. At issue in the cases of Purcell v. Ireland [Eur. Commission H.R, Purcell et al. v. Ireland, Admissibility, Application Nº 15404/89, 70 Dec. & Rep., 262 (1991)], Brind and others v. the United Kingdom [Eur. Commission H.R., Brind and others v. United Kingdom, Admissibility, Application Nº 18714/91, 77A Dec. & Rep. 42 (1994)], and McLaughlin v. the United Kingdom [Eur. Commission H.R., McLaughlin v. United Kingdom, Admissibility, Application Nº 18759/91 (1994) (referred to in Brind Case, *supra*, at 262 and available at http://www.hudoc.echr.coe.int)], were restrictions on broadcasters in the United Kingdom that prevented them from airing interviews with anyone linked to a proscribed organization (i.e., terrorist organization), or with anyone linked to Sinn Fein, a legally constituted political party that supports the Irish Republican Army, a proscribed organization. In Purcell, the broadcasters were also prohibited from reporting on any such interview [Purcell, *supra*, at 265]. In the other cases, the law applied only to directly transmitting such interviews, not to reporting the contents of such interviews [Brind Case, *supra*, at 43-44; McLaughlin Case, *supra*.]. The Government claimed that these restrictions prevented the possibility of terrorists or terrorist groups using broadcast media to affirm the legitimacy of their actions, to encourage support, and to transmit coded messages. The Commission noted in the Purcell case, "In a situation where politically motivated violence poses a constant threat to the lives and security of the population and where the advocates of this violence seek access to the mass media for

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325. Several important principles emerge from the foregoing discussion that are necessary for states to apply when constructing anti-terrorism legislation allowing subsequent penalties on expression. First, the basis for subsequent liability must be defined with adequate precision. Second, the states must apply a balancing test to determine the proportionality of the sanction in comparison with the harm sought to be prevented. The case summaries illustrate the ways in which the proportionality test required by international human rights law may be applied in practice. Factors that must be considered include: the dangers presented by the speech within the context of the situation (war, fighting terrorism, etc); the position of the individual making the speech (military, intelligence, official, private citizen, etc.) and the level of influence he or she may have on members of society; the severity of the sanction in relation to the type of harm caused or likely to be caused; the usefulness of the information to the public; and the type of media used. A journalist or other third party who merely transmits statements made by another party should not be subject to sanctions except in very limited circumstances. Additionally, statements that implicate the government in wrongdoing deserve a high level of protection, as public scrutiny of governmental actions is one of the most important democratic values. Even in cases in which the person disclosing the information obtained it through a confidential disclosure, the person may not be punished if the public's interest in having the information is greater than the harm done from disclosing it.[144] Finally, legislation that broadly criminalizes the public defense (apologia) of terrorism or of persons who might have committed terrorist acts without requiring an additional showing of incitement "to lawless violence or to any other similar action"[145] should be avoided.[146]

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publicity purposes, it is particularly difficult to strike a fair balance between the requirements of protecting freedom of information and the imperatives of protecting the State and the public against armed conspiracies seeking to overthrow the democratic order which guarantees this freedom and other human rights" [Purcell Case, *supra*, at 279]. It found that the restrictions were acceptable under the Convention because of the seriousness of the terrorist threat and because the limitations did not actually limit the information that was available to the public, but rather they limited the format in which the information was transmitted**.** It should be noted first of all that in many of the foregoing cases, the distinction between subsequent liability, which may be permissible in some circumstances under Article 13 of the American Convention, and prior censorship, which is not permissible, is not clear. The provisions challenged in the Purcell, Brind, and McLaughlin cases seem to have the same effect as a prior restraint. Additionally, it should be noted once again, that although the cases of the European Human Rights system are used here for illustrative purposes, the provisions of the inter-American human rights system with respect to freedom of expression were intended to provide a higher level protection for freedom of expression than those of the European system, as explained by the Inter-American Court of Human Rights which stated that "[a] comparison of Article 13 [of the American Convention] with the relevant provisions of the European Convention (Article 10) and the Covenant (Article 19) indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas." Advisory Opinion OC-5/85, *supra* note 152, para. 50. Some of these cases, had they arisen in the inter-American system, might well have been decided more favorably for freedom of expression.

[144] Johannesburg Principles, *supra* note 662, Principle 15.

[145] American Convention on Human Rights, *supra* note 61, Article 13(5).

[146] *See supra*, para. 323.

c. Protection of sources

326. In the context of fighting terrorism outside of a state of emergency, the confidentiality of sources is subject to the same level of protection that it is normally accorded.[147] In order to compel disclosure, there must be "a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim."[148] The disclosure must be "necessary" within the terms of Article 13(2) of the Convention.

d. Access to Information and *Habeas Data*

327. In the context of fighting terrorism, governments often attempt to restrict access to broad categories of information related to the investigation of suspected terrorists, the gathering of intelligence and the execution of police and military actions. In some of these cases, the government may have a legitimate need to keep information secret in order to protect national security or public order. At the same time, the public's need for information is greater than ever as anti-terrorism actions may be subject to abuse and the public and the press are among the most significant checks on abusive governmental behavior.

328. The Johannesburg Principles[149] provide guidance as to the balancing of these two competing interests. Principle 1(2) states:

> Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.

329. The Johannesburg Principles define legitimate national security interests, stating:

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose or demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or

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[147] *See* discussion *supra* paras. 279, 280, discussing the protection of sources. *See also*, Johannesburg Principles, *supra* note 662, Principle 18, which states "Protection of national security may not be used to compel a journalist to reveal a confidential source."

[148] Goodwin Case, *supra* note 668, para. 46.

[149] Johannesburg Principles, *supra* note 662. For a discussion of the authoritative value of the Johannesburg Principles in interpreting the right to freedom of expression under inter-American human rights instruments, *see supra*, para 288.

> to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.[150]

330. Most access to information laws contain exemptions that allow the State to refuse to release information on the grounds that to do so would damage the State's national security or ability to maintain public order. These exemptions should be applied only to information that clearly affects national security as defined by the foregoing. Moreover, the restriction must not only serve to protect the national security or public order, it must also require that the information should be disclosed unless the harm to one of these legitimate interests would be substantial.[151] Applying these principles, the following could be considered an appropriate restriction based on national security concerns, so long as the other guarantees required by access to information are in place[152]:

> A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so *would, or would be likely to*, cause *serious* prejudice to the defence or national security of [insert name of State].[153]

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[150] Johannesburg Principles, *supra* note 662, Principle 2.

[151] Freedom of Information Principles, *supra* note 676, Principle 4.

[152] *See supra* paras. 285-286 of this report for discussion of requirements for guaranteeing access to information, for example, time limitations on restrictions, independent review of decisions denying access, and severability of non-restricted information from documents containing restricted information.

[153] A Model Freedom of Information Law (July 2001), *available in* http://www.article19.org/docimages/1112.htm (emphasis added), Section 30. The Model Law was drafted by Article 19 in consultation with a large group of international experts and others committed to promoting freedom of information. Compare with the following provisions on national security from the domestic access to information laws of various OAS members states. For example, the Mexican Federal Transparency and Access to Public Government Information Law, signed into law on June 10, 2002, states:

> Article 3. For purposes of this law the following definitions will apply:
>
> [. . .]
>
> Section VI. Classified Information: That information temporarily covered by one of the exemptions outlined in Articles 13 and 14 of this Law;
>
> [. . .]
>
> Section XII. National Security: Actions designed to protect the integrity, stability and permanence of the Mexican State, the democratic governability, external defense and internal security of the Federation, and which are aimed at promoting the general well-being of society and furthering the goals of the constitutional State;
>
> [. . .]
>
> Article 13. Information is categorized as classified if its disclosure could:
>
> I. Compromise national security, public security or national defense;
>
> […]

continued…

331. The Johannesburg Principles acknowledge that, as a result of emergency situations, States may have to impose additional restrictions on access to information, but "only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law."[154] In such cases, States bear the burden of proof in showing that the restrictions are not excessive in light of the exigencies of the situation. As stated earlier, States under lawfully declared emergency situations should take into account the importance of freedom of expression for the functioning of democracy and guaranteeing other fundamental rights when considering suspending any guarantees under Article 13 of the Convention.[155]

332. Like the general right to access to information in the hands of the government, the right to *habeas data* may be subject to restrictions that are necessary to protect national security or public order and are proportionate to the harm intended to be prevented by maintaining the secrecy of the information. In

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> The United States Freedom of Information Act, 5 USC § 552, states:
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> (b) This section does not apply to matters that are
>
> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> […]
>
> (c) (3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

The Panamanian Law 6 of January 22, 2002, establishing norms for transparency in public administration, the action of habeas data and other dispositions (*Gaceta Oficial* Nº 24.476, January 23, 2002) provides:

> Article 14. The information defined by this law as restricted cannot be divulged for a period of 10 years, starting from the date of its classification as such, except when the reasons that justified the restriction cease to exist before the end of this period. The following information will be considered restricted when it is declared as such by a competent official in accordance with the present law:
>
> 1. Information related to national security, in the hands of the security agencies;

[154] Johannesburg Principles, *supra* note 662, Principle 3.

[155] *See* discussion, *see supra*, para. 310.

states of emergency, the State may impose additional restrictions for the time and to the extent required by the exigencies of the situation.

e. Non-discrimination

333. Clearly all of the foregoing standards must be observed without discrimination on the basis of "race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition," as stated in the Declaration of Principles on Freedom of Expression.[156] This report has also addressed, in the section on privacy, the problems with different types of surveillance of individuals even in cases in which there is no reasonable suspicion that they are linked to terrorist activity. A lengthy discussion of such activity is not necessary here, but it should be stated that these types of activities also produce effects on the full enjoyment of the right to freedom of expression.

> Unjustified investigations of political expression and dissent can have a debilitating effect upon our political system. When people see that this can happen, they become wary of associating with groups that disagree with the government and more wary of what they say and write. The impact is to undermine the effectiveness of popular self-government. If people are inhibited in expressing their views, a nation's government becomes increasingly divorced from the will of its citizens.[157]

[156] Declaration of Principles on Freedom of Expression, *supra* note 641, Principle 2. For a discussion of the authoritative status of this Declaration, see *supra* para. 265

[157] Philip B. Heymann, Civil Liberties and Human Rights in the Aftermath of September 11, 2002, HARV. J.L. & PUB. POL'Y 441, 444.