

FREEDOM OF EXPRESSION IN THE AMERICAS

CHOOSING THE NEXT SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION

The Inter-American Commission on Human Rights (IACHR) will select a new Special Rapporteur on Freedom of Expression at its 151st session this July. This bulletin, jointly produced by **the Center for Justice and International Law (CEJIL)**, **the Due Process of Law Foundation (DPLF)**, and **the Open Society Justice Initiative**, seeks to bring greater transparency to the process and provide information to the public about the candidates' views.

As organizations committed to strengthening the Inter-American human rights system, we believe that civil society has a vital role to play in ensuring that the election of the system's officials – its commissioners, judges, and special rapporteurs – is transparent, guarantees diversity, and promotes candidates of the highest competence.

The [Office of the Special Rapporteur](#) was established by the IACHR in October 1997 to promote and protect the right to freedom of thought and expression in the Americas, with the recognition that this right is the “cornerstone upon which the very existence of a democratic society rests.”

Its work includes compiling annual reports on the state of freedom of expression throughout the Americas, as well as writing country-specific reports. The Office also analyses complaints of violations received by the IACHR and advises the Commission on cases, including requests for “precautionary measures.” The Special Rapporteur also conducts on-site visits to countries in order to gather information, and to promote an understanding of the need to protect the right to free expression.

[Resolution 04/06 of 2006](#) establishes the rules that guide the appointment process for the Special Rapporteur. Article 15 of the IACHR's Rules of Procedure states that the Special Rapporteur is selected by an absolute majority of the Commission's members, and that the grounds for this selection must be made public. Upon selection, the Special Rapporteur serves a three-year term, which may be renewed for one additional term.

This informational bulletin presents the views of four out of the six candidates standing for the Special Rapporteurship on Freedom of Expression. Each was asked the same four questions, which appear in their entirety below. All of the respondents replied in Spanish.

1. What role does freedom of expression play in the protection and promotion of human rights?
2. What do you think are the key issues or challenges currently facing the field of freedom of expression?
What strategies do you believe should be used to tackle these issues?
3. How should the Special Rapporteur on Freedom of Expression encourage and guarantee a plurality of voices in public debate, particularly of those social groups that have been traditionally marginalized?
4. The protection of and penalties for whistleblowers, particularly in the context of national security, have received a great deal of attention lately. What principles do you think should guide the disclosure of classified information to the public?

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Candidate did not provide answers.

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1. In my opinion, freedom of expression is a means for the realization of other human rights. The relationship between the effective exercise of freedom of expression and the preservation of democracy as a core value of modern societies has been the subject of multiple political and legal statements in the international arena. Although this understanding of freedom of expression in certain circumstances may seem simply rhetorical, in my view it has a very particular purpose: to guarantee the free movement of ideas. Based on this, the formation of public opinion and accountability by the authorities for their actions is an irreplaceable tool to ensure the effective exercise of other human rights by 1) empowering citizens on the prerogatives that are inherent to their condition as people and on the limits of the exercise of public power; 2) guaranteeing that human rights defenders can fulfill their task without fear of persecution or reprisal; and 3) promoting a culture of tolerance that requires social interaction, accepting and enjoying our differences, and respecting the expressions and opinions of others as a necessary prerequisite for achieving these collective goals.

2. Without trying to be exhaustive, I believe that whoever succeeds Catalina Botero as Special Rapporteur should address urgently the need to design oversight and support mechanisms for national investigation processes in order to avoid the growing impunity for attacks on human life, integrity, and freedom of social communicators (*los comunicadores sociales*). Such a strategy should be complemented with promoting the use of preventive mechanisms for rights violations before the Inter-American system, and the dissemination of warnings about threats against journalists and others who work in the information field. Another problem that I think should be addressed with urgency is the proliferation in the region of efforts to criminalize social protest. In this sense, I consider that an appropriate strategy would be to promote international standards on protected speech, the principle of strict legality and non-retroactivity of criminal law, minimum guarantees of due process, review

of compliance with human rights conventions, evolutive interpretation of human rights instruments, and the necessary interaction of domestic law and international law in order to ensure proper balancing of values where the legitimate exercise of the right to protest is concerned. Although recently a series of standards on freedom of expression on the Internet and social networks have been developed both regionally and universally, it is indisputable that there is significant work to be done in very specific areas such as the allocation of responsibilities to intermediaries; the tension between the protection of honor and dignity as well as personal rights to self-image and freedom of expression; leaking and blocking of content under national security or similar arguments; and the novel legal concept of the "right to forget." I think that the Rapporteurship should – through its thematic and country reports, and in the context of individual cases – inform the subjective interpretations that states could make of these new issues.

3. On this issue, the role of the Rapporteurship is to continue to develop standards on democratizing access to freedom of expression and to present proposals to states in the region, paying attention to the specificities of each country in order to ensure a plurality of voices in public debate. Now, this democratization must not become a pretext to silence critical voices. Recently, several countries in our region have adopted laws that – under the stated purpose of suppressing media monopolies, or guaranteeing the existence of community media – can be used to muzzle the independent press. In order to guarantee the progressive elimination of private media monopolies, states do not have to establish mechanisms of prior censorship of the dissemination of information or opinions; states do not have to impose content and abuse the communication instruments granted by law to state entities; states do not have to punish the failure to expose official "truths" or their criticism, let alone create new monopolies through the seizure of private media or creating unjustified public media. It is essential to empower traditionally marginalized groups on the advantages of exercising their freedom of expression as a way to bring to the fore their public claims and receive a response from the authorities. For that purpose, it is not enough to adopt legislation that ensures in writing the establishment of community media; it is also necessary that the state creates the material conditions for its effective existence, such as providing special terms for the acquisition of equipment or frequencies. States should not be afraid of a plurality of information sources, taking into account that debate and exposure to diverse views on matters of public interest contributes to the detection of problems in the administration of the state and to the identification of solutions that can satisfy society as a whole.

4. I consider that when addressing issues of public interest, measures sanctioning or discouraging whistleblowers (*informantes de irregularidades*) are simply unacceptable. The argument of national security may in no circumstance prevent an entire society from knowing acts of public power that directly threaten or violate their rights, nor can it justify measures of retaliation against people who contribute, through their complaints, to the accountability of public authorities and the full participation of citizens in the administration of public affairs. Only in scenarios where the information disclosed could jeopardize the rights or safety of others, or where there is a compelling public interest, could some criteria of exception apply to consider the information in question as secret or classified. Furthermore, liability on the person who discloses the information should only be civil or administrative, never criminal.

In such a case, internally what is considered a matter of national security should be delimited in advance, and by law, to ensure that such qualification is not made arbitrarily and randomly by officials; further, each particular case should be subject to strict judicial scrutiny, free from interference by other powers of the state, in order to establish the extent to which there is the potential for substantial damage to collective interests from the disclosure of classified information. If, based on the analysis of the concrete situation, the supervisory authority concludes that such risk does not exist, or that disclosure is justified by the importance of making the classified

information known to the public, the state should apply the criteria of transparency in enabling access to the information, and assisting in its dissemination.

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Candidate did not provide answers.

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1. Based on the principle of indivisibility and interdependence of human rights, freedom of expression has an instrumental role in the protection of other human rights. By saying this, I am referring not only to the guarantees for the exercise of civil and political rights, but also to the activities related to denouncing, monitoring and promoting economic, social, cultural and environmental rights.

According to various instruments of the Inter-American system of human rights and consistent jurisprudence of the Inter-American Court of Human Rights, freedom of expression is characterized as having an individual as well as a collective dimension. In its individual dimension, freedom of expression guarantees the right of each person to express their own thoughts, ideas and information; in the collective or social dimension, it guarantees the right of society to seek and receive any information, to know the thoughts, ideas and information of others, and to be well-informed.

In the broad terms of Article 13 of the Convention, freedom of expression has a structural relationship to democracy and human rights. There is a relationship with democracy because the formation of public opinion, citizen control of public functions, and the participation of people, civil society, trade unions and other social groups in matters of public interest all derive from freedom of expression. Similarly, both the Inter-American Commission on Human Rights and the Inter-American Court have assigned freedom of expression a central role in the system of protection of human rights, to the extent that the absence, or lack of full enjoyment, of this freedom is considered one of the causes that contributes most to the violation of other rights. More recently,

public access to information on the status of economic, social, environmental and cultural rights in different states has been considered an essential tool in monitoring the progressive implementation of these rights.

2. I think that the problems and challenges that freedom of expression faces in the region can be grouped as follows: violence and aggression against journalists and human rights defenders (present in some Central and South American countries); the use of criminal law to penalize expression, protest and criticism (also present in the Caribbean); debate about new regulatory frameworks to promote diversity and pluralism, and the strengthening of public and community media (a current topic in South America, Mexico and the Caribbean); and the battle against the culture of secrecy that persists in all countries of the region, even though significant advances have been made (with the adoption of laws, the creation of enabling bodies, local jurisprudence). There is concern, however, that some states extend secrecy for reasons of national security and persecute those who disclose information (*informantes*) as the flipside of this development.

Likewise, we must pay attention to the many discussions on freedom of expression and the Internet. In 2013 the Office of Special Rapporteur included in its annual report a study on the Internet and freedom of expression that contains standards for the evaluation and analysis of particular situations. The main challenge, then, is to consolidate the Internet as a space of protection and respect for human rights.

Regarding the strategies to address these challenges, the mandate of the Special Rapporteur includes the coordination of activities with member states and the review of the situation of freedom of expression in each country. With this role, it is necessary to find a balance between the ability to react to emergencies (precautionary measures, communications, among other mechanisms), and to promote working together with all stakeholders, including and especially with the states themselves. The Inter-American Commission and the Rapporteurship can play an important role in advising; in supporting actions to establish or strengthen regulatory frameworks and public policies consistent with standards; in building agendas; in collaborating to establish consensus; in reclaiming/defending its technical work; and, in a broader sense, acting as a broker between parties.

3. The need to provide greater media diversity and pluralism in the region's democracies means that people not only have access to the media in order to express themselves freely, but also that they have access a variety of sources of information and opinion.

To achieve this objective, the Inter-American standards establish various instruments. Among them: the need to limit the formation of oligopolies and monopolies, thereby providing conditions for access to the media by a variety of opinions and social sector entities; and the need to promote the coexistence of different types of media in terms of their ownership, nature and purpose.

In line with the promotion of diversity, the Inter-American standards also recommend that states promote direct ownership of social media by communities and indigenous peoples, along with the adoption of objective measures for them to be sustainable. States should legally recognize community media and consider re-reserving bandwidth (*reservas de espectro*) for this type of media as well as fair access to licenses that take into account the different conditions that exist for non-commercial private media.

The Inter-American Commission and Court, and particularly the Office of the Special Rapporteur for Freedom of Expression, have emphatically stated that, in order to realize freedom of expression in the region, there must be more than just the simple recognition of these three objectives (recognition of community media, bandwidth reserves, fair access to licenses). There must also be affirmative actions to guarantee their interrelationship.

4. The exercise of freedom of thought and expression in a democratic society includes the right not to be harassed because of complaints or criticisms against public officials, and this protection must be much broader when the complaints relate to allegations of human rights violations.

The allegations and revelations about the existence of massive cyber-surveillance systems and state abuses in the name of national security make evident the need to urgently build standards for the protection of people who bring to light information that is of public interest and those who denounce irregularities or violations of people's rights. For their part, states are obliged to introduce reforms to protect the right to privacy.

The Joint Declaration issued in 2010 by the Rapporteurs on Freedom of Opinion and Expression of all the human rights protection systems expresses the view that when "whistleblowers, as government employees, disclose information about violations of the law, cases of grave corruption, the existence of serious threats to health, safety or the environment, or a breach of human rights or international humanitarian law, should be protected against legal, administrative or employment-related sanctions if they act in good faith."

It also adds that "any attempt to impose additional sanctions against those who disseminate classified information should be grounded in previously established laws applied by impartial and independent bodies with full guarantees of due process, including the right to appeal the judgment."

States, then, should take necessary steps to ensure that anyone can report abuses and human rights violations securely, and without fear of reprisal.

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1. The legal framework, the principles, and the case-law provided by the Inter-American human rights protection system make it the most generous one with regard to freedom of expression. In recognizing the dual aspects of this right, the Inter-American Court has held that knowledge of the opinions of others, or the information held by others, is as important as the right to disseminate one's own beliefs or information, and it reaffirmed that every act of communication involves both aspects simultaneously.

This understanding of freedom of expression entails guaranteeing individual fulfillment in choosing a life plan and personal satisfaction in undertaking activities having to do with art, culture, science, and education, among other things. But the role that freedom of expression plays as a cornerstone of democratic life is also fundamental, to the point that the extent to which it is respected acts as a true gauge of the rule of law.

Accordingly, its exercise is inseparable from the enjoyment of other fundamental rights, such as the right to participation, to identity (ethnic, sexual, linguistic, religious), to nondiscrimination, to the use of public space. At

the same time, freedom of expression—in its aspect that concerns the right to access to information—must be seen as an extremely important tool in the protection and realization of economic, social, and cultural rights.

Its value can be substantiated—the case-law is rich in this respect—in matters of environmental information, access to housing, justice, and healthcare (including sexual and reproductive healthcare), the right to petition, to form a trade union—this connection having been recognized by the European Court—and to information for the protection of the rights of migrants and indigenous peoples, among others.

2. Observing the status of the exercise of freedom of expression in the Americas corroborates a variety of situations. Journalists continue to be murdered, attacked, and threatened. So do non-journalists who exercise their right to expression, as well as media outlets of all sizes, especially in the provincial areas of our countries. There are still cases of judicial and administrative censorship, criminalization, and monetary sanctions with intimidating effects. There are persistent barriers and obstacles to access to information, particularly in connection with access to the truth in countries that are rebuilding their histories through transitional justice and memory processes. Another key issue is the role of freedom of expression in upholding and guaranteeing the exercise of other rights and its substantial contribution to ensuring the transparency of government.

We face additional challenges like espionage, invasions of privacy, and interference with the media; universal access to the Internet; literacy and the narrowing of the digital divide; processes of convergence and transition to digital media; the multiplication of screens and producers and the challenges this presents for pluralism and sustainability; the promotion of community and public media; the role and structure of enforcement authorities; the protection of journalists' actions—especially investigation, and not just in the traditional media outlets; the emergence of new media and social networks and the need to create mechanisms to ensure their recognition and protection, expanding the classic doctrine of freedom of expression. Possible working alternatives include making crimes against freedom of expression federal offenses, making them comparable to crimes against human rights defenders, and ensuring that both types of offenses are not subject to statutes of limitation; specific protection mechanisms already implemented in countries across the region; and absolute mutual understanding with civil society organizations and human rights organizations.

3. It is complicated to think that the Rapporteur can, by him or herself, ensure a plurality of voices. Rather, I picture the Office of the Special Rapporteur as a body for the promotion and dissemination of standards, regulatory frameworks, and best practices, in addition to the role it might have in assisting the Commission and in potential submissions to the Court. All of this is consistent with the Principles of Freedom of Expression issued by the IACHR in 2000, particularly—but not solely—principles 12 and 13, the Joint Declarations of the Rapporteurs (especially those of 2001 and 2007), and the rules that the Office of the Special Rapporteur included in its 2009 Annual Report, as well as the underpinnings of Advisory Opinion 5/85 regarding nondiscrimination and non-exclusion, that this is not merely a declamatory right.

- More specifically:
 - o Antitrust rules provided for in Principle 12—under conditions set by the Rapporteurs in 2007—with regard to ownership as well as rules on access to rights to transmit events of public interest as set forth in the European Audiovisual Media Services Directive.
 - o Rules adopting the mechanisms that, according to this same principle, are a form of lawful access to frequency concessions and the removal of restrictions. Such is the case of the auctioning of frequencies, to which the IACHR has objected since 2001.

- Removal of restrictions on electrical power, frequencies, access to lawful financial resources, and issues that continue to exist in the laws governing community media in the regulatory systems of various countries in the region.
- Adopt transparent rules to subsidize pluralism without it being confused with government advertising.
- Promote “must carry” and “must offer” rules to prevent the consolidation of dominant positions through the exclusive control of channels or content.
- Access to essential facilities such as paper and distribution routes for small media outlets.

4. The Rapporteurs on Freedom of Expression, jointly and individually, have acknowledged that significant progress has been made from the Syracuse (1984) and Johannesburg (1995) Principles to the Tshwane Principles (2013), and they must be taken as progressive standards in order for the Office of the Special Rapporteur to maintain this same focus on the topic.

Special emphasis must be made when the information concerns the exercise of the right to information on human rights violations. In that case, the priority must be absolute. Concealment and the obstruction of the right to the truth must not be allowed under any circumstances – not even by invoking compliance with duties to maintain confidentiality. In this respect, in the cases of societies that might still be facing the legacy of dictatorships and authoritarian governments, the role of the Office of the Special Rapporteur to convey the importance of the rights enshrined in Article 13 of the American Convention and its current standards is crucial.

- As I indicated first and foremost, based on the Tshwane Principles, I would assert that the legal frameworks should provide as follows:
 - Information should be kept secret only if its disclosure imposes a substantial and identifiable risk of significant harm to a legitimate national security interest, established by authorities with sufficient, legally defined status.
 - Information concerning serious violations of human rights or humanitarian law must always be disclosed and there must not be any rule that requires it to be kept secret.
 - The public should have access to information on surveillance programs.
 - No government entity should be categorically exempt from the disclosure obligation.
 - Public servants who expose government abuses, and act in the public interest, should be shielded from retaliation.
 - Any denial of access to information should be subject to judicial review.
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[Resume](#)

1. As the Inter-American Commission and Inter-American Court have established, freedom of expression not only plays a central role in the validity of human rights due to its instrumental character, as it serves to protect other fundamental rights, but it is also a “pillar of democracy,” aiming for the free flow of ideas, opinions and information, which is the foundation of all democratic systems. For example, freedom of expression is an essential requirement in exercising our right to regularly elect our representatives and authorities.

Even though freedom of expression is a right for all, its exercise by journalists and the media in the dimension of freedom of the press without a doubt plays a central role in the validity of democracy and fundamental rights. Written, broadcast, televised and digital journalism are the channels through which we as citizens inform ourselves, support, monitor or condemn our authorities, as well as groups of economic, professional or religious power or any other power of this kind, when they threaten our rights.

A large part of grave violations of human rights, acts of corruption or abuses of power perpetrated in our countries are known and reported thanks to the effort and courageous labor of independent or investigative journalism. In the case of Peru, my country, independent journalism played a central role in reporting grave violations of human rights, authoritarianism and corruption in the eighties and nineties. In this sense, the person that is elected as the next Special Rapporteur for Freedom of Expression of the IACHR should be completely independent from the governments and de facto powers and should enter the position without any political ties or previous ideologies, except the ideology of human rights, which is aligned with neither the left nor the right.

2. There are many current challenges facing freedom of expression in the Americas and the Caribbean that could be listed and would take up more than the allowed space for the response. Therefore, I will refer to the N° 47/14 Press Release published by the Special Rapporteur for Freedom of Expression of the IACHR on May 3, 2014, in reference to the World Press Freedom Day, which ratifies an agenda of shared pending challenges.

From our point of view, there are three principle challenges in the forthcoming period:

- Breaking the information blockade imposed by some political, economic and criminal powers.
 - o Protecting journalists and human rights defenders against assaults and threats.
 - o Continuing to urge states to prevent the criminalization of peaceful social protest and political dissent.
 - o Continuing to urge states to prevent the public and private concentration of the media. The digital dividend can be a window of opportunity for this.
 - o Promoting the adoption of some methods of “positive discrimination” in favor of community broadcasting.
 - o Continuing to urge states to improve cybersecurity, equality and access to the network.
- Deepening the cross-cutting work of the SRFE with other IACHR thematic rapporteurships. Two examples:

- Exploring a possible joint report with the Special Rapporteur for ESCR on the access to information, corruption and social rights.
 - Further linking the promotion of community broadcasting with the protection of the rights of social sectors in situations of vulnerability (indigenous communities, LGBTI, among others).
- Continuing to defend the autonomy and necessary funding of the IACHR and the SRFE. As I have previously stated, the Inter-American System is a victim of its own success and it is understandable that it generates tensions and questions by some states. A dialogue must certainly be maintained and deepened between all the actors in the system, however in an institutional atmosphere of autonomy of the Commission and Rapporteurship that, among other elements, requires necessary funding for its activities.

3. Plurality and diversity in public information are Inter-American principles for the free exercise of freedom of expression; we are not a part of an authentic democratic system if plurality of viewpoints and diversity of social groups that seek to express themselves do not exist. That is why the IACHR, in its *“Declaration of Principles on Freedom of Expression”* of 2000, establishes that *“Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people’s right to information. . . .”* (Principle 12).

Therefore, from my point of view, the SRFE should continue working on two fronts to promote the plurality of voices in the public debate. On one hand, they should continue calling upon states to avoid the excessive concentration of the media, both public and private. We understand that this is an issue that raises controversy in some countries because of the reasonable fear that it will lead to government control of the media that would ultimately stifle free speech or affect other rights like that of property. In light of this, it is key to consider that each country should find an *ad hoc* solution; in some situations auto-regulation will work, in others a dose of public or arbitrary hetero-regulation will be necessary, and in others, the solution could be legal.

The other front is the promotion – through some measures of “positive discrimination” – of community media, so that social groups, specifically, in vulnerable situations can express themselves. On this point, it is indisputable that the states have a role to play in the transparent and equal allocation of radio electric frequencies or the digital dividend.

4. Without a doubt, this is a complex situation because on the one hand, there is the freedom of expression of the informant, as well as the right of society as a whole to know about grave or massive violations of rights, and on the other hand, there is the legitimate concern of the states about protecting the security of its citizens, authorities and infrastructure.

On occasions, national security has been improperly called upon to cover up human rights violations. Recently, this instrumentation has been amplified with new information and communication technologies and the Internet, for example, with massive electronic espionage.

In this respect, the SRFE has already signed various joint statements³ condemning these practices and calling upon states to implement corrective measures designed to protect the communication of citizens and the

³ Joint declaration about freedom of expression and the Internet in 2011; Joint declaration about freedom of expression and the Internet in 2012; Joint declaration about surveillance programs and their impact on freedom of expression in 2013.

neutrality of the Internet. In this sense, the accusers (journalists, officials, etc.) should not be the object of criminalization, but rather deserve protection, as the current SRFE has recently indicated:

“Abstain from punishing journalists, members of the media or members of civil society who have access to and disseminate reserved information about this type of surveillance programs, considering it to be of public interest. Confidential sources and materials associated with dissemination of reserved information must be protected by law... Establish regulations to guarantee that a person associated with the state, who, having the legal obligation to maintain the confidentiality of certain information, merely makes public that which they reasonably consider to be of notable public interest ("whistleblower") will not be the target of legal, administrative or labor sanctions as long as they have acted in good faith, pursuant to international standards on the matter.”⁴



⁴ Press Release N° 47/14 from May 3, 2014.