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# TABLE OF CONTENTS

<b>EDITORIAL</b>	<b>8</b>
<b><u>DOSSIER - HUMAN RIGHTS, DIGNITY, AND EQUALITY: A DIALOGUE BETWEEN LATIN AMERICA AND EUROPE</u></b>	
<b>TOO MUCH LOVE WILL KILL YOU: SERÁ A COMPLEXIDADE INIMIGA DA PROTEÇÃO DE DIREITOS HUMANOS?</b>	<b>14</b>
<i>Rui Guerra da Fonseca</i>	
<b>CONVENCIONALIZACIÓN DEL DERECHO PRIVADO Y PRIVATIZACIÓN DEL DERECHO DE LOS DERECHOS HUMANOS: UN DESAFÍO FUTURO PARA LA PROTECCIÓN CABAL DE LOS DERECHOS HUMANOS</b>	<b>28</b>
<i>Jose Humberto Sahian</i>	
<b>FREEDOM OF SPEECH AND ITS DIGITAL TRANSFORMATION AND PROTECTION: GUIDELINES AND PRINCIPLES FROM THE INTER-AMERICAN COURT OF HUMAN RIGHTS CASE-LAW AND OTHER HUMAN RIGHT PROTECTION BODIES</b>	<b>52</b>
<i>Walter Arevalo Ramirez Andrés Rousset Siri</i>	
<b>FALSA OBJECCIÓN DE CONCIENCIA Y OBSTRUCCIÓN DE SERVICIOS: EL LATENTE RETROCESO DE LOS DERECHOS SEXUALES Y REPRODUCTIVOS DE LA MUJER/</b>	<b>79</b>
<i>Betzabé Araya Peschke</i>	
<b>AVANCES Y DESAFÍOS EN LA REGULACIÓN Y PROTECCIÓN DE DERECHOS FRENTE A LA VIOLENCIA OBSTÉTRICA: UNA MIRADA HACIA LATINOAMÉRICA Y LA UNIÓN EUROPEA</b>	<b>108</b>
<i>Romina Gallardo Duarte</i>	

**LA PROSTITUCIÓN Y LA VIOLENCIA CONTRA LAS MUJERES Y LAS NIÑAS: ANÁLISIS DEL INFORME DE LA RELATORA ESPECIAL SOBRE LA VIOLENCIA CONTRA LAS MUJERES Y LAS NIÑAS, CON ÉNFASIS EN LA SITUACIÓN DE LA UNIÓN EUROPEA Y MERCOSUR** 131

*Pablo Guerra*

**BARRERAS EN EL ACCESO A LA JUSTICIA PARA LAS PERSONAS CON DISCAPACIDAD EN ARGENTINA** 150

*Celeste Carla Dimeglio*

**LA ACCESIBILIDAD URBANA PARA LAS PERSONAS CON DISCAPACIDAD: UNA ARQUITECTURA INTELIGENTE COMO DERECHO HUMANO A LA MOVILIDAD** 172

*Angel Oscar Piazza*

**AVANCES Y DESAFÍOS EN LA DEFENSA DE LOS DERECHOS INDÍGENAS Y DE LAS MINORÍAS EN AMÉRICA LATINA Y EUROPA: UN ESTUDIO COMPARATIVO DE LA JURISPRUDENCIA ENTRE ECUADOR Y NORUEGA** 193

*Byron Castillo*

*Sebastián Fernando Arguello Escobar*

*Shirley Paola Romero Molina*

**VICTIMOLOGÍA Y DERECHOS HUMANOS: ANÁLISIS CRÍTICO DE LA GRAVE DESPROTECCIÓN DE LA VÍCTIMA EN EL PROCESO PENAL PERUANO Y SU COMPARATIVA CON EL ESTÁNDAR EUROPEO** 217

*David Jared Gallo Ahumada*

*Christian Louis Pérez Morales*

**CONTROLE DE CONVENCIONALIDADE E EMERGÊNCIA CLIMÁTICA: ANÁLISE DA JURISPRUDÊNCIA PRO PERSONA NO CASO KLIMASENIORINNEN** 240

*Amon Elpídio da Silva*

*Jamile Bergamaschine Mata Diz*

**MIGRACIONES, REMESAS Y AGENDA CLIMÁTICA** 265

*Leila Devia*

**EL IMPACTO DE LA INTELIGENCIA ARTIFICIAL EN LOS DERECHOS  
FUNDAMENTALES EN LAS RELACIONES LABORALES: REGULACIÓN  
VIGENTE Y NUEVOS DESAFÍOS** **278**

*Ana Rosa Rodriguez  
Silvina Lujan Rigali*

**PRINCIPLE OF NON-DISCRIMINATION IN THE EUROPEAN UNION:  
THE HORIZONTAL EFFECT OF THE DIRECTIVES IN THE LIGHT OF  
THE JURISPRUDENCE OF THE ECJ**  
**305**

*Fabiana Félix Ferreira*

**ARTICLES**

**EL DERECHO INTERNACIONAL PRIVADO EN LA UNIÓN EUROPEA:  
ANÁLISIS DE SU EVOLUCIÓN** **339**

*Roberto Ruiz Díaz Labrano*

**DIGNIDAD DIGITAL PÓSTUMA: PRESENCIA HUMANA Y AVATARES  
DE INTELIGENCIA ARTIFICIAL GENERATIVA EN CHATBOTS. UN  
DIÁLOGO ENTRE AMÉRICA Y EUROPA** **374**

*Julio Jesús Mormontoy Pérez*

**MODELIZACIÓN REGULATORIA: PALPITANDO LA INFLUENCIA DE LA  
DIGITAL SERVICES ACT EN AMÉRICA LATINA**  
**400**

*Matías González Mama  
Ramiro Álvarez Ugarte*

**SELECTION PROCESSES AND REPRESENTATIVENESS WITHIN THE  
FRAMEWORK OF JUDICIAL INDEPENDENCE: A LATIN AMERICAN  
EMPIRICAL STUDY** **434**

*Aline Beltrame de Moura  
Naiara Posenato  
Nuno Cunha Rodrigues*

## **INTERVIEW**

### **PROTEGIENDO DERECHOS Y FORTALECIENDO LA DEMOCRACIA: LA FUNCIÓN INSTITUCIONAL DE PROTEX FRENTE A LA TRATA DE PERSONAS EN ARGENTINA**

**466**

*Santiago Deluca*

## **CRITICAL REVIEW**

### **DÍAZ, B. C., DIR. DERECHO DE FAMILIA INTERNACIONAL EN UN CONTEXTO DE CRECIENTE MIGRACIÓN: CUESTIONES VINCULADAS CON EL REGLAMENTO 2019/111. ARANZADI, 2024.**

**475**

*Raúl Lafuente Sánchez*

# FREEDOM OF SPEECH AND ITS DIGITAL TRANSFORMATION AND PROTECTION:

guidelines and principles from the Inter-American Court Of Human Rights case-law and other human right protection bodies<sup>1</sup>

*Walter Arevalo Ramirez<sup>2</sup>*

*Andrés Rousset Siri<sup>3</sup>*

**ABSTRACT:** This article examines the evolving landscape of freedom of expression in the digital era, focusing on the challenges posed by hate speech and the regulatory roles of states and digital platforms. Drawing upon the case-law of the Inter-American Court of Human Rights and principles established by other international and regional human rights bodies, including a dialogue with European experiences, it analyzes the delicate balance between protecting free speech and countering harmful discourse online. In the context of the workshop and special dossier on “Digital Transformation and Innovative Solutions” of the Latin American Journal of European Studies, the article synthesizes key principles regarding permissible restrictions on expression—emphasizing legality, legitimacy, necessity, and proportionality—and explores the specific responsibilities of digital intermediaries in moderating content while safeguarding fundamental rights. Ultimately, the article underscores the ongoing need for international cooperation and the development of guiding principles to navigate these complex issues, ensuring both the robust exercise of freedom of expression in digital spaces and the protection of democratic values against the dangers of online hate speech.

**KEYWORDS:** Freedom of Expression; Digital Era; Hate Speech.

1. W. A. Ramirez, A. R. Siri, “Freedom of speech and its digital transformation and protection: guidelines and principles from the Inter-American Court of Human Rights case-law and other human right protection bodies,” *Latin American Journal of European Studies* 5, no. 1 (2025): 52 et seq.
2. Profesor Principal de Derecho Internacional Público en la Facultad de Jurisprudencia de la Universidad del Rosario (Colombia), Presidente de la Academia Colombiana de Derecho Internacional. Asociado del Instituto Hispano-Luso-Americano de Derecho Internacional. <https://orcid.org/0000-0002-8501-5513>.
3. Profesor titular de Derecho Internacional Público. Universidad Nacional de Cuyo (Argentina). <https://orcid.org/0000-0003-1435-9922>.

## **LA LIBERTAD DE EXPRESIÓN Y SU TRANSFORMACIÓN Y PROTECCIÓN DIGITAL: DIRECTRICES Y PRINCIPIOS DE LA JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS Y OTROS ORGANISMOS DE PROTECCIÓN DE DERECHOS HUMANOS**

**RESUMEN:** Este artículo examina el panorama cambiante de la libertad de expresión en la era digital, centrándose en los desafíos que plantea el discurso de odio y los roles regulatorios de los estados y las plataformas digitales. Basándose en la jurisprudencia de la Corte Interamericana de Derechos Humanos y en los principios establecidos por otros órganos internacionales y regionales de protección de derechos humanos, incluyendo un diálogo con experiencias europeas, el documento analiza el delicado equilibrio entre la protección de la libertad de expresión y la lucha contra el discurso dañino en línea. En el contexto del workshop y el dossier especial sobre “Transformación Digital y Soluciones Innovadoras” de la Revista Latin American Journal of European Studies, el artículo sintetiza principios clave con respecto a las restricciones permisibles a la expresión —enfaticando la legalidad, la legitimidad, la necesidad y la proporcionalidad— y explora las responsabilidades específicas de los intermediarios digitales en la moderación de contenido, al tiempo que salvaguardan los derechos fundamentales. Finalmente, el artículo subraya la necesidad de cooperación internacional y el desarrollo de principios rectores para navegar por estos complejos problemas, asegurando tanto el ejercicio robusto de la libertad de expresión en los espacios digitales como la protección de los valores democráticos contra los peligros del discurso de odio en línea.

**PALABRAS CLAVE:** Libertad de Expresión; Era Digital; Discurso de Odio;

**ÍNDICE:** Introduction; 1. Framing the evolution of the content of freedom of speech in several international instruments; 2. Unprotected discourse; 2.1 Hate speech as unprotected discourse in the European Commission Against Racism and Intolerance; 2.2 Hate speech before the Inter-American Court of Human Rights; 3. Protected discourse; 3.1 Protected discourse before the Inter-American Court of Human Rights; 4. State interference in matters of freedom of expression; 5. State interference to speech and information in the digital space of internet: guidelines and principles; Final Considerations; References.

### **INTRODUCTION**

The issue of freedom of speech, which is not a particularly new legal topic in the scope of the Inter-American Court of Human Rights, nowadays, in the digital age, has become a complex matter. Digital platforms offer what appears to be an unlimited space for individuals to express themselves freely. This allows the voices of millions of users to share their experiences, exert pressure, or try

to influence politics, leading to active responses unlike anything seen before.<sup>4</sup> Several authors recall the Arab Spring as one of the initial moments of this tendency of live message-and-reaction with the masses.<sup>5</sup> This new form of communication and reaction currently happens through various channels and involves several relevant actors, from official government accounts to completely anonymous users.

However, freedom of speech in this new world of immediate “reactions”, “posts” and “comments” faces new unprecedented challenges due to the increasing prevalence of online commentary that ranges from demands directed at authorities and from defamatory statements to mere insults. This new environment faces the increasing of extreme discourse that propagates violence or hatred towards specific groups, thereby undermining fundamental principles such as tolerance and diversity, which are cornerstone to traditional media activities, now disrupted by new technologies.

The imperative to reconcile freedom of expression, as a “conventional right” under Article 13 of the American Convention on Human Rights (namely “Freedom of Thought and Expression”), exercised in any form, with the safeguarding of individuals against proscribed speech has become critical in our hyper-connected society. This presents a significant challenge to our regional system of international human rights protection, particularly concerning the State’s role as the guarantor of human rights.

The dangers of the involvement of the State in the regulation of freedom of speech in those new contexts have been studied by recent literature. As Petit explains, when discussing the criminalization of freedom of expression—and its evaluation under international law—the focus lies on state actions that (i) penalize the exercise of free speech without justifiable cause (i.e., lacking a legitimate basis for limitation) or (ii) penalize the exercise of free speech with

4. Iraidá Giménez, “La libertad de expresión y las redes sociales a la luz del Sistema Interamericano de Derechos Humanos”, in *Valores (y temores) del estado de derecho: libertad de expresión vs. delitos de opinión en derecho internacional*, ed. Eulalia Petit de Gabriel (España: Aranzadi, 2023), 243.

5. Gadi Wolfsfeld, Elad Segev, and Tamir Sheaffer, “Social Media and the Arab Spring: Politics Comes First,” *The International Journal of Press/Politics* 18, no. 2 (2013): 115–137.



excessive measures (i.e., where a legitimate ground for restriction exists, but the measure is disproportionate). These actions frequently manifest as acts of state's agencies in the form of censorship, control or closure of media outlets, or the persecution of journalists. However, more often in current times, this control is "delegated" to private actors, for instance, in the moderation of content on social media platforms.<sup>6</sup>

The conformity with international law of these types of state actions (understood as the "conventionality"<sup>7</sup> of the measures, under the American Convention) that restrict freedom of expression has been examined through the strict interpretation of the necessity and proportionality of the limitations in relation to the protected values and the institutional nature of freedom of expression as the backbone of the rule of law in democratic systems, especially when the sanctions are of a criminal nature.<sup>8</sup> Understanding how freedom of speech has been framed in the context of international law<sup>9</sup> is fundamental to analyze its relation with the current tendencies and risks of the digital era.

In the following sections, the present contribution examines the evolving landscape of freedom of expression in the digital era, focusing on the challenges posed by hate speech and the regulatory roles of states and digital platforms. Drawing upon the case-law of the Inter-American Court of Human Rights and principles established by other international and regional human rights bodies, it analyzes the delicate balance between protecting free speech and countering harmful discourse online.

The study synthesizes key principles regarding permissible restrictions on expression—emphasizing legality, legitimacy, necessity, and proportionality—and

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6. Walter Arévalo Ramírez and Andrés Rousset Siri, *Criterios interamericanos sobre la libertad de expresión en tiempos digitales*, in *Derecho y tecnología: desafíos en la era digital* (Bogotá: Editorial Universidad del Rosario, 2025). This chapter served as a preliminary research work for the present article.
  7. Walter Arévalo Ramírez and Andrés Rousset Siri, "Compliance with Advisory Opinions in the Inter-American Human Rights System," *AJIL Unbound* 117 (2023): 298–302.
  8. Eulalia Petit de Gabriel, ed., *Valores (y temores) del estado de derecho: libertad de expresión vs. delitos de opinión en derecho internacional* (España: Aranzadi, 2023), 18.
  9. Walter Arévalo et al., *International Human Rights Law*, in *Public International Law* (London: Routledge, 2024), 531–614.

explores the specific responsibilities of digital intermediaries in moderating content while safeguarding fundamental rights. Ultimately, the article underscores the ongoing need for international cooperation and the development of guiding principles to navigate these complex issues, ensuring both the robust exercise of freedom of expression in digital spaces and the protection of democratic values against the dangers of online hate speech.

## **1. FRAMING THE EVOLUTION OF THE CONTENT OF FREEDOM OF SPEECH IN SEVERAL INTERNATIONAL INSTRUMENTS**

From the first human rights instruments created under the auspices of international organizations after the Second World War, including Article 19 of the Universal Declaration of Human Rights and Article IV of the American Declaration of the Rights and Duties of Man, the right to freedom of speech has had an indisputable prominence, recognizing the right of individuals to hold and express opinions without being bothered for their content, as well as to receive and/or disseminate information by any means.<sup>10</sup>

Subsequently, over time, the declarations were followed by conventions (at the regional and universal levels) placing the obligation on states to respect and guarantee this right, prohibiting - in general - prior censorship, guaranteeing a sphere of neutrality and against unduly interference that prevents indirect censorship, and establishing a system of proportional and subsequent liabilities as a response for those cases where the opinions expressed affect the honor or reputation of other individuals, national security, public order, or public health and safety.

From the regional treaties perspective, within the Inter-American System, Article 13 of the American Convention on Human Rights regulates these cases in its paragraphs 2, 3, 4, and 5 in the following terms:

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10. Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (III), December 10, 1948, 14-25.

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.

For its part, the European Convention indicates in article 9.2 that: "2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

Finally, the African Charter on Human and Peoples' Rights, indicates in its article 9: "Article 9 1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law".

Article 19.3 of the International Covenant on Civil and Political Rights indicates;

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Beyond the text of the treaties, it is fundamental to categorize the different standards of protection implied in these articles and which types of discourse are covered or protected.

Authors as Abramovich, citing the criteria established by the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, argue that speeches (in general) can be classified according to the degree of protection given to them by the conventional right of freedom of expression, between two extremes ranging from “unprotected” to “protected”, explained in the following sections.

## 2. UNPROTECTED DISCOURSE

The content of a discourse not protected by international law relating freedom of speech, must be legally prohibited, and therefore it is not protected by the conventional guarantees emanating from treaties, implying that states - in the face of these discourses - have broad powers of intervention: establishing personal liabilities, regulate mechanisms for its censorship or limiting its circulation. In particular, the aforementioned author has stated that restrictive measures against violent hate speech that targets discriminated groups find a solid additional basis in the state’s obligation to prevent the violation of the right to life and physical integrity, which in turn entails the specific duty to act with due diligence in order to avoid the materialization of risks of violence, which includes, in a broader sense, the duty to act to reverse widespread patterns and practices of violence developed by state bodies and individuals.<sup>11</sup>

Nonetheless, Abramovich warns (in line with the dichotomy raised above), that the possibility of establishing and applying mechanisms of prior censorship to violent hate speech is, however, a debated issue, especially when some

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11. Víctor Abramovich, *Dilemas jurídicos en la restricción de los discursos de odio*, in Víctor Abramovich, María José Guembe, and María Capurro Robles, *El límite democrático de las expresiones de odio* (Buenos Aires: TESEO, 2021), 28, 39.

positions consider that even in these cases the absolute prohibition of prior censorship that characterizes the Inter-American regional human rights system prevails. Abramovich points out, for example, that the English version of Article 13.5 of the American Convention does not establish a duty to legally prohibit hate speech, and only imposes the possibility to sanction these conducts as offense, which would point to responsibilities subsequent to the expression, without enabling censorship. Hence, the Spanish and English texts of the Convention leave a gap of interpretation between “prohibit” (implying a previous intervention from the State) or “punish” (meaning an assessment that must be undertaken after the speech, and dealing with the consequences in a space of posterior, subsequent liability):

Spanish	English
<i>Estará <b>prohibida</b> por la ley toda propaganda en favor de la guerra y toda apología del odio nacional, racial o religioso que constituyan incitaciones a la violencia o cualquier otra acción ilegal similar contra cualquier persona o grupo de personas, por ningún motivo, inclusive los de raza, color, religión, idioma u origen nacional</i>	<i>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 <b>punishable</b> by law</i>

Table 1. Comparison.

## 2.1 Hate speech as unprotected discourse in the European Commission Against Racism and Intolerance

The effect and legality of prior censorship and other available mechanisms is linked to the phenomenon of hate speech, that is, expressions that exceed any interpersonal offense that could give rise to a civil claim for slander or libel, and rather imply aggravated manifestations with general effects (linguistic pain).<sup>12</sup> These speeches represent a direct attack on a group of people because of

12. Uładzislau Belavusau, “Instrumentalisation of Freedom of Expression in Postmodern Legal Discourses,” *European Journal of Legal Studies* 3, no. 1 (2010): 149.

their race, religion, nationality, sexual orientation, among others, and also incite violence against these groups or sectors of the population.<sup>13</sup>

Without a universally agreed-upon definition, the Committee of Ministers of the Council of Europe's description of this phenomenon is often cited, appearing in the majority of scholarly works. It states that "hate speech" should be understood as any form of expression that spreads, incites, promotes, or justifies racial hatred, xenophobia, antisemitism, or other forms of hatred based on intolerance. This includes intolerance expressed through aggressive nationalism and ethnocentrism, discrimination, and hostility towards minorities, immigrants, and people of immigrant/foreign origin.<sup>14</sup>

The European Commission against Racism and Intolerance, in its General Policy Recommendation No. 15 on combating hate speech, defined hate speech as:

Considering that hate speech is to be understood for the purpose of the present General Policy Recommendation as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status;<sup>15</sup>

It is worth adding that Recommendation No. 15 of the European Commission against Racism and Intolerance of the Council of Europe recognizes as a special form of hate speech those cases in which said speech takes the form of a public denial, trivialization, justification, or condoning of crimes of genocide, crimes against humanity, or war crimes, whose existence has been recognized by national or international courts by final judgments.

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13. Yessica Esquivel Alonso, "El discurso del odio en la jurisprudencia del Tribunal Europeo de Derechos Humanos," *Cuestiones Constitucionales*, no. 35 (2016).

14. Committee of Ministers of the Council of Europe, *Recommendation No. R (97) 20*, October 30, 1997.

15. European Commission against Racism and Intolerance (ECRI), *General Policy Recommendation No. 15 on Combating Hate Speech*, December 8, 2015.

## 2.2 Hate speech before the Inter-American Court of Human Rights

In this regard, the Inter-American Court of Human Rights has stated that violence exercised for discriminatory reasons<sup>16</sup> has the effect or purpose of impeding or nullifying the recognition, enjoyment, or exercise of the human rights and fundamental freedoms of the person subjected to such discrimination, regardless of whether said person self-identifies with a particular category or not. Furthermore, this violence, fueled by hate speech, can give rise to hate crimes.<sup>17</sup>

For instance, The Vicky Hernández v. Honduras case before the Inter-American Court of Human Rights<sup>18</sup> concerned the 2009 extrajudicial execution of Vicky Hernández, a transgender woman and human rights activist, during a curfew imposed after the Honduran coup d'état. The Court found Honduras responsible for her death, citing the context of violence and discrimination against LGBTQ+ individuals, particularly transgender women sex workers, and the state's failure to conduct a proper investigation. In a landmark ruling, the Court recognized that the violence was motivated by her gender identity and that the lack of investigation was influenced by prejudice. It ordered Honduras to provide reparations to Vicky's family, implement measures to protect transgender people, including anti-discrimination training for security forces and allowing legal gender recognition, and to conduct a thorough investigation into her death.

The central issue raised in the specific case of hate speech revolves around whether its prohibition is necessary and reasonable from the perspective of the right to freedom of expression. This involves navigating a spectrum of positions,

16. Inter-American Court of Human Rights, *Case of Vicky Hernández et al. v. Honduras*, Judgment of March 26, 2021, Series C No. 422, para. 70.

17. Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, Advisory Opinion OC-24/17 of November 24, 2017, Series A No. 24, para. 47. "Obligaciones estatales en relación con el cambio de nombre, la identidad de género, y los derechos derivados de un vínculo entre parejas del mismo sexo (interpretación y alcance de los artículos 1.1, 3, 7, 11.2, 13, 17, 18 y 24, en relación con el artículo 1 de la Convención Americana sobre Derechos Humanos)."

18. Walter Arévalo, Verena Kahl, and Andrés Rousset Siri, *Inter-American Human Rights System, in Public International Law: A Multi-Perspective Approach* (London: Taylor and Francis, 2024), 583–591.

ranging from those that focus on the harms of inciting hatred to those that emphasize the detriments of restricting freedom of expression.<sup>19</sup>

To address this dilemma, the UN Strategy and Plan of Action for 2020 on hate speech recognizes three levels of lawful and unlawful expression.

The most serious level encompasses the advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence, and therefore violates Article 20(2) of the International Covenant on Civil and Political Rights. The intermediate level includes other forms of incitement to hatred that may only be prohibited by regulations provided by law, which pursue a legitimate aim, and which are necessary and proportionate. At the lower level is speech that is offensive, shocking, or disturbing, but which should not be legally restricted.<sup>20</sup>

When studying these approaches, authors as Valeria Thus explain that this approach aims to prevent racial discrimination or the violation of human dignity through human rights education measures and the promotion of intercultural dialogue, especially by undertaking positive actions to avoid racial discrimination and removing barriers that hinder understanding between people of different cultures.<sup>21</sup> In summary, the starting point for defining hate speech is clear, but there are differences in how it is treated within states and within the scope of protection systems.

It should be noted that the American Convention only permits prior censorship – without any type of discussion – in cases of public performances with the exclusive purpose of regulating access to them for the moral protection of children and adolescents, as derived from Article 13.4 of the American Convention on Human Rights.

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19. Walter Arévalo Ramírez and Andrés Rousset Siri, *Criterios interamericanos sobre la libertad de expresión en tiempos digitales*.

20. United Nations, *United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences* (2020), <https://perma.cc/3BQ3-YQ3L>.

21. Valeria Thus, "Daño negacionista y Derecho Penal: resignificando la lesividad en el siglo de los genocidios," *Revista Jurídica de la Universidad de Palermo* 18, no. 2 (2018): 43.



In all other cases – as the Inter-American Court has pointed out – any preventive measure implies a detriment to freedom of thought and expression.

The “Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile case before the Inter-American Court of Human Rights concerned the Chilean Supreme Court’s order to censor the film “The Last Temptation of Christ”<sup>22</sup> for allegedly offending religious beliefs and public morals. The IACHR ruled against Chile, finding that the censorship violated Article 13 of the American Convention on Human Rights, which guarantees freedom of thought and expression and strictly limits prior censorship. The Court emphasized that the protection of morals cannot justify measures that suppress freedom of expression without considering the specific context and the potential harm caused by the expression, asserting that prior censorship is only permissible in very limited circumstances concerning the protection of children and adolescents in public performances, which was not the case with the film. This ruling underscored the high threshold for restricting artistic expression and the importance of balancing freedom of expression with other legitimate interests.

### 3. PROTECTED DISCOURSE

Protected speech refers to speech regarding which state intervention is not permitted or should be minimal, exceptional, and based on mechanisms of accountability subsequent to the expressive act. This includes expressions related to criticism of the government, public officials, or those aspiring to be such, or those who participate in the formulation of policies, as well as political discourse in general and any expression that concerns matters of public interest.

The case-law of regional human rights protection bodies tends to hold that a distinction must be made between restrictions that are applicable when the object of the expression concerns a private individual and, on the other hand, when it is a public figure, such as a politician. This is because public figures, by

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22. Inter-American Court of Human Rights, *Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile*, Judgment of February 5, 2001, Series C No. 73, para. 70.

virtue of their role and exposure to public scrutiny, generally have a higher threshold for what constitutes acceptable criticism compared to private individuals.

For instance, the European Court of Human Rights has stated that the limits of acceptable criticism are broader with regard to a politician than for a private individual. Unlike the latter, politicians inevitably and knowingly open themselves up to close scrutiny of their words and deeds by journalists and the public, and consequently, they must demonstrate a greater degree of tolerance.<sup>23</sup>

In this regard, it has been pointed out that expressions concerning public officials or other individuals exercising functions of a public nature must enjoy, under the terms of Article 13.2 of the American Convention, a wider margin for open debate on matters of public interest, which is essential for the functioning of a truly democratic system. This does not mean, in any way, that the honor of public officials or public figures should not be legally protected, but rather that it must be protected in accordance with the principles of democratic pluralism.

### **3.1 Protected discourse before the Inter-American Court of Human Rights**

In these terms, the Inter-American Court has held that the emphasis of this different threshold of protection does not lie in the status of the subject, but in the public interest nature of the activities or actions of a particular person. Those individuals who influence matters of public interest have voluntarily exposed themselves to more demanding public scrutiny and, consequently, are exposed to a greater risk of criticism, as their activities move out of the realm of the private sphere and into the sphere of public debate.<sup>24</sup>

In *Herrera Ulloa v. Costa Rica*, the Inter-American Court of Human Rights addressed the criminal conviction of journalist Mauricio Herrera Ulloa for publishing articles that quoted a Belgian newspaper accusing a Costa Rican diplomat

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23. European Court of Human Rights, *Case of Lingens v. Austria*, Judgment of July 8, 1986, Application no. 9815/82, para. 42.

24. Inter-American Court of Human Rights, *Case of Herrera Ulloa v. Costa Rica* (Preliminary Objections, Merits, Reparations, and Costs), Judgment of July 2, 2004, Series C No. 107, para. 128.

of corruption. The Court found that Costa Rica violated Herrera Ulloa's right to freedom of expression under Article 13 of the American Convention on Human Rights. It emphasized the importance of freedom of expression for journalists reporting on matters of public interest, particularly concerning public officials, and established that the standards for restrictions on such expression are very high. The Court ruled that Costa Rica's criminal sanctions were disproportionate and ordered the State to annul the conviction, pay compensation to Herrera Ulloa, and reform its legislation to ensure compatibility with international human rights standards.

Between these extremes lies the rest of protected speech, which refers to expressions of all kinds (not only favorable information and ideas, considered harmless or indifferent, but also those that offend, shock, or disturb)<sup>25</sup> that occur between private individuals, outside of the two special cases mentioned in the previous sections.

#### **4. STATE INTERFERENCE IN MATTERS OF FREEDOM OF EXPRESSION**

Freedom of expression is regulated, within the framework of the Inter-American system, in Article 13 of the Convention. This norm establishes that this right "includes freedom to seek, receive and impart information and ideas of all kinds..." These terms literally establish that those under the protection of the Convention have not only the right and the freedom to express their own thoughts, but also the receive information. Therefore, when the freedom of expression of an individual is illegally restricted, not only is the right of that individual being violated, but also the right of everyone to "receive" information and ideas.

State measures that have the effect of blocking or impeding the access to information and ideas has been the subject of previous advisory proceedings before the Inter-American System, for instance in its Advisory Opinion OC-5/85,<sup>26</sup>

25. European Court of Human Rights, *Case of Castells v. Spain*, Application no. 11798/85, Judgment of April 23, 1992, paras. 42 and 46.

26. Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 of the American Convention on Human

the Inter-American Court of Human Rights addressed the compatibility of the compulsory licensing of journalists with Article 13 of the American Convention on Human Rights, which guarantees freedom of thought and expression. The Court concluded that the mandatory licensing of journalists is incompatible with the Convention, as it constitutes a restriction on the right of all individuals to seek, receive, and impart information and ideas, and unduly limits who can fully exercise freedom of expression in the journalistic field. The advisory opinion emphasized that journalism is a fundamental tool for a democratic society and should be accessible to all, without the need for prior authorization or membership in a professional association.

The case law of the Inter-American Court has reinforced the double effect, both individual and collective, of freedom of expression and speech; “This requires, on the one hand, that no one be arbitrarily impaired or prevented from manifesting their own thought and thus represents a right of each individual; but it also implies, on the other hand, a collective right to receive any information and to know the expression of the thoughts of others.”<sup>27</sup>

Both for traditional forms of speech and the newly expressions of speech and communication in the digital era, is fundamental to establish the most relevant standards from the Inter-American System regarding the interference of the State and other actors in freedom of speech. Article 13.2 of the American Convention prohibits prior censorship (except for the case provided for in Article 13.4) and enables, instead, a regime of subsequent responsibilities in specifically delimited situations. The application of this regime of subsequent responsibilities must always adhere to three conditions established by the ACHR:

(a) the limitations must be established by laws drafted in a clear and precise manner:

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*Rights*), Advisory Opinion OC-5/85, November 13, 1985, para. 30.

27. Inter-American Court of Human Rights, *Case of Kimel v. Argentina* (Merits, Reparations, and Costs), Judgment of May 2, 2008, Series C No. 177, para. 53. Inter-American Court of Human Rights, *Case of Álvarez Ramos v. Venezuela* (Preliminary Objection, Merits, Reparations, and Costs), Judgment of August 30, 2019, Series C No. 380, para. 94.

The Inter-American Court has stated that the grounds for subsequent liability must be expressly, unequivocally, and previously established by law, and that criminal law is the most restrictive and severe means of establishing liability for unlawful conduct regarding speech.

In other words, the restrictions must be described with sufficient clarity to allow the individual to adapt their conduct to the norms and for those responsible for applying them to determine which forms of expression are legitimately restricted and which are not. That is to say, the sanction that could befall a person for their statements – for example, for defaming another – must be clear, so that anyone can decide whether or not to act accordingly.

In the case of *Kimel v. Argentina*, the Inter-American Court of Human Rights ruled that Argentina violated journalist Eduardo Kimel's right to freedom of expression by convicting him of libel for criticizing a judge's handling of a massacre investigation in his book. The Court emphasized that such criticism of public officials on matters of public interest warrants a high degree of protection and that the criminal sanctions imposed were a disproportionate restriction on his freedom of expression. The ruling established that the state's use of criminal law to sanction critical speech should be a last resort and must adhere to strict standards of necessity and proportionality, ultimately ordering Argentina to reform its criminal legislation regarding defamation to align with international human rights standards and to provide reparations to Kimel.

In the *Palamara Iribarne v. Chile* case, the Inter-American Court of Human Rights ruled that Chile violated journalist Marcelo Palamara Iribarne's right to freedom of expression by criminally convicting him for defamation after he published a book critical of the military and intelligence services. The Court emphasized the importance of protecting speech on matters of public interest, especially regarding the conduct of public officials, and found that criminal sanctions in this context were a disproportionate restriction on freedom of expression. The IACHR ordered Chile to take measures to harmonize its defamation laws with the American Convention on Human Rights, prioritizing non-criminal sanctions

and ensuring that any restrictions on speech are necessary and proportionate to a legitimate aim.<sup>28</sup>

In the *Ricardo Canese v. Paraguay* case, the Inter-American Court of Human Rights ruled that Paraguay violated Ricardo Canese's right to freedom of expression by imposing a criminal conviction for defamation based on statements he made during a political campaign criticizing a former president's involvement in a financial institution (consorcio). The Court emphasized the heightened protection afforded to political discourse and criticism of public figures, stating that the limits of acceptable criticism are wider in this context. It found that Paraguay's criminal defamation laws, as applied in this case, were a disproportionate restriction on freedom of expression and not necessary in a democratic society. The Court ordered Paraguay to annul the conviction, pay compensation to Canese, and bring its defamation laws in line with the American Convention on Human Rights, prioritizing non-criminal sanctions and ensuring that restrictions on speech serve a legitimate purpose and are strictly proportionate.

(b) the limitations must be aimed at achieving the compelling objectives authorized by the American Convention.

It has been argued on this point that the restriction must be proportional to the interest it justifies and closely tailored to the achievement of that legitimate objective, interfering to the least possible extent with the effective exercise of the right to freedom of thought and expression.

In the *Álvarez Ramos v. Venezuela* case, the Inter-American Court of Human Rights found Venezuela responsible for violating the right to freedom of expression of journalist Luis Álvarez Ramos, who was dismissed from his public television job after expressing critical opinions about the government. The Court emphasized that the dismissal constituted indirect censorship, as it aimed to silence critical voices and discourage others from expressing similar views. It reiterated the importance of freedom of expression in a democratic society, particularly for journalists, and held that sanctions for expressing opinions

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28. Inter-American Court of Human Rights, *Case of Palamara Iribarne v. Chile* (Merits, Reparations, and Costs), Judgment of November 22, 2005, Series C No. 135, para. 79.

on matters of public interest must be proportionate and not undermine the exercise of this fundamental right. The IACHR ordered Venezuela to reinstate Álvarez Ramos or provide adequate compensation, and to take measures to prevent similar violations, ensuring that public employees are not penalized for expressing their opinions.

(c) the limitations must be necessary in a democratic society for the achievement of the objective they pursue, strictly proportional to the aim sought, and suitable for achieving said objective:

Since its first judgment on the matter, the Inter-American Court has held that for a restriction on free expression to be compatible with the American Convention, it must be necessary in a democratic society, understanding “necessary” as to mean the existence of a compelling social need that justifies the restriction.

For its part, proportionality has generally been addressed from the perspective of excessive responses applied under criminal law, mainly when criminal convictions and inclusion in criminal records are applied as a consequence of subsequent liabilities (this is generally in cases of particularly protected speech).

In the *Fontevicchia and D’Amico v. Argentina* case, the Inter-American Court of Human Rights ruled that Argentina violated the right to privacy and freedom of expression of journalists Horacio Verbitsky and Eduardo Anguita, and the editor Héctor D’Amico, by ordering them to pay damages for publishing information about the private life of a former president’s son. The Court emphasized that while the right to privacy is important, it must be balanced against the public interest in receiving information, especially when it concerns matters related to public figures, even if indirectly. The IACHR found that the information published, while related to a private matter, had some connection to a matter of public interest and that the judicial sanctions imposed were a disproportionate restriction on freedom of expression. The Court ordered Argentina to adapt its legal framework to ensure a proper balance between the protection of privacy and freedom of expression, particularly in the context of journalistic investigations.<sup>29</sup>

29. Inter-American Court of Human Rights, *Case of Fontevicchia and D’Amico v. Argentina* (Merits, Reparations, and Costs), Judgment of November 29, 2011, Series C No. 238, para. 54.

## **5. STATE INTERFERENCE TO SPEECH AND INFORMATION IN THE DIGITAL SPACE OF INTERNET: GUIDELINES AND PRINCIPLES**

The limits to freedom of expression (mainly the principle of subsequent liability) must be reconciled with the need, in digital times, to guarantee the widest possible and non-discriminatory access to the internet, in order to ensure in this new digital space, the full right to transmit and receive ideas of all kinds (including even prohibited speech).

Article 13 fully applies to communications, ideas, and information disseminated and accessed through the Internet. The online environment has not only made it easier for citizens to express themselves freely and openly,<sup>30</sup> but it also offers excellent conditions for innovation and the exercise of other fundamental rights such as the right to education and freedom of association.<sup>31</sup>

The Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights has maintained that the growing expansion of the internet worldwide, and in the Americas in particular, makes it an indispensable instrument for the full exercise of human rights and contributes to achieving greater levels of social benefits and inclusion. For these benefits to be distributed in an inclusive and sustainable manner among the population, policies and practices in this area must be based on respect for and guarantee of human rights, especially the right to freedom of expression, which enables and makes possible the exercise of other rights on the internet.<sup>32</sup>

In this regard, the Special Rapporteur emphasized that the role of the State in the development of public policies, and the actions of individuals in the digital environment must adhere to the following principles: a) access under

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30. United Nations General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, A/66/290 (August 10, 2011), para. 61.

31. United Nations Human Rights Council, *The Promotion, Protection and Enjoyment of Human Rights on the Internet*, A/HRC/20/L.13 (June 29, 2012), para. 1.

32. Inter-American Commission on Human Rights, Office of the Special Rapporteur for Freedom of Expression, *Standards for a Free, Open and Inclusive Internet*, OEA/Ser.L/V/II, CIDH/RELE/INF.17/17 (2017). United Nations Human Rights Council, *Resolution on the Promotion, Protection and Enjoyment of Human Rights on the Internet*, A/HRC/32/L.20 (June 27, 2016).



equal conditions, b) pluralism, c) non-discrimination, d) privacy, and e) net neutrality and multi-stakeholder governance as cross-cutting components of these principles.<sup>33</sup>

In particular, the principle of net neutrality may be subject to exceptions. Thus, the Special Rapporteur for Freedom of Expression maintained that there should be no discrimination, restriction, blocking, or interference in the transmission of internet traffic, “unless it is strictly necessary and proportionate to preserve the integrity and security of the network; to prevent the transmission of unwanted content at the express request – free and unincentivized – of the user; and to temporarily and exceptionally manage network congestion. In the latter case, the measures employed should not discriminate between types of applications or services.”<sup>34</sup> The European Commission’s proposal for the regulation of the European single market for electronic communications recognizes that “reasonable traffic management encompasses the prevention or impediment of serious crimes, including voluntary actions by providers to prevent access to and distribution of child pornography.”<sup>35</sup>

The considerations explained above imply that not just any type of interconnected network serves the purposes of freedom of expression in the broad terms of Article 13 of the American Convention in the same way. The digital environment must adhere to guiding principles that INSPIRE the aims of the State, the development of public policies, and the actions of individuals. These principles, which are briefly explained below, include access under equal conditions, pluralism, non-discrimination, and privacy. In any case, it is important to

33. Inter-American Commission on Human Rights, Office of the Special Rapporteur for Freedom of Expression, *Standards for a Free, Open and Inclusive Internet*, OEA/Ser.L/V/II, CIDH/RELE/INF:17/17 (2017), para. 13. Inter-American Commission on Human Rights, *Annual Report 2013: Report of the Office of the Special Rapporteur for Freedom of Expression*, OEA/Ser.L/V/II.149, Doc. 50 (December 31, 2013), para. 14.

34. Inter-American Commission on Human Rights, *Annual Report 2013: Report of the Office of the Special Rapporteur for Freedom of Expression*, OEA/Ser.L/V/II.149, Doc. 50 (December 31, 2013), para. 30.

35. European Commission, *Regulatory Framework for Electronic Communications: Regulation of the European Parliament and of the Council Establishing Measures Concerning the European Single Market for Electronic Communications and to Achieve a Connected Continent*, September 11, 2013, 27.

note that all measures that may in one way or another affect access to and use of the Internet must be interpreted in light of the primacy of the right to freedom of expression, especially with regard to discourse that is particularly protected under the terms of Article 13 of the American Convention.<sup>36</sup>

The greater the breadth and openness of internet access, the greater the need to regulate the discursive level of what is said and received. The Inter-American Commission highlighted the three-fold function of the right to freedom of expression in a democratic system: a) as an individual right that reflects the human virtue of thinking about the world from one's own perspective and communicating with each other; b) as a means for open and uninhibited deliberation on matters of public interest; c) as an essential instrument in guaranteeing other human rights, including political participation, religious freedom, education, culture, equality, among others.<sup>37</sup>

Measures devised to block or filter content aimed at combating hate speech are measures of last resort, and should only be adopted when they are necessary and proportionate to the imperative aim they pursue. States that adopt these measures must also design them in such a way that they do not encompass legitimate speech that deserves protection.<sup>38</sup>

The Special Rapporteur has stated on other occasions that only through a comprehensive and sustained policy, which goes beyond legal measures and includes prevention and education mechanisms, can hate speech be effectively combated and the right to equality and non-discrimination of individuals be guaranteed both online and offline.<sup>39</sup>

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36. Inter-American Commission on Human Rights, *Freedom of Expression and the Internet*, OEA/Ser.L/V/II, CIDH/RELE/INF.11/13 (December 31, 2013), para. 14.

37. Inter-American Commission on Human Rights, *Annual Report 2008: Report of the Office of the Special Rapporteur for Freedom of Expression*, OEA/Ser.L/V/II.134, Doc. 5 rev. 1 (February 25, 2009), paras. 224–226.

38. Inter-American Commission on Human Rights, *Annual Report 2013: Report of the Office of the Special Rapporteur for Freedom of Expression*, OEA/Ser.L/V/II.149, Doc. 50 (December 31, 2013), paras. 83 and 85.

39. Inter-American Commission on Human Rights, *Annual Report 2015: Report of the Office of the Special Rapporteur for Freedom of Expression*, OEA/Ser.L/V/II, Doc. 48/15 (December 31, 2015), para. 36.

Measures such as these “address the cultural root of systematic discrimination, and as such, can constitute valuable instruments for identifying and refuting hate speech and encouraging the development of a society based on the principles of diversity, pluralism, and tolerance.”<sup>40</sup>

Combating hate speech requires empowering users to identify and condemn it in public debate without blocking legitimate discourse, thereby creating more inclusive spaces for expression.<sup>41</sup>

The “Joint Declaration”<sup>42</sup> of 2001 by Abid Hussain, UN Special Rapporteur on Freedom of Opinion and Expression, Freimut Duve, OSCE Representative on Freedom of the Media and Santiago Canton, OAS Special Rapporteur on Freedom of Expression, states that measures governing expressions of hatred, given their interference with freedom of expression, must be “provided by law, serve a legitimate aim under international law and be necessary to achieve that aim.” It adds that expressions of hatred, in accordance with international and regional law, must fall, at a minimum, within the following parameters: a) No one should be punished for telling the truth; b) No one should be punished for disseminating expressions of hatred unless it is proven that they do so with the intention of inciting discrimination, hostility or violence; c) The right of journalists to decide on the best way to transmit information and communicate ideas to the public must be respected, particularly when reporting on racism and intolerance; d) No one should be subjected to prior censorship; and e) Any imposition of sanctions by the justice system must be in strict conformity with the principle of proportionality.

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40. Inter-American Commission on Human Rights, *Annual Report 2015: Report of the Office of the Special Rapporteur for Freedom of Expression*, para. 36. Capítulo IV (Discurso de odio y la incitación a la violencia contra las personas lesbianas, gays, bisexuales, trans e intersex en América).

41. Inter-American Commission on Human Rights, Office of the Special Rapporteur for Freedom of Expression, *Standards for a Free, Open and Inclusive Internet*, OEA/Ser.L/V/II, CIDH/RELE/INF.17/17 (2017), para. 125.

42. United Nations, Organization for Security and Co-operation in Europe, and Organization of American States, *Joint Declaration on Racism and the Media by the Special Rapporteurs on Freedom of Expression*, February 27, 2001.

These Inter-American parameters do not necessarily align with the responses provided for such cases by other regional or universal protection systems. In this regard, the International Convention on the Elimination of All Forms of Racial Discrimination, in its aim to prevent racial hatred, establishes a broader scope for restrictions on freedom of expression compared to the American Convention on Human Rights.

Article 4 requires signatories to condemn propaganda and discrimination by different measures of States, in the following terms: “(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof”.

In the African system, the African Court on Human and Peoples’ Rights established that imprisonment can never be an option in defamation cases, based on the principle of proportionality. However, the same Court indicated that in grave and very exceptional circumstances, such as incitement to international crimes, public incitement to hatred, discrimination, or violence against a person or group based on race, color, religion, or nationality, the state’s response could involve custodial sentences. This suggests a recognition that while freedom of expression is paramount, particularly egregious forms of hate speech may warrant more severe penalties in the African context.<sup>43</sup>

In the *Lohe Issa Konaté v. Burkina Faso* (Judgment of Reparations) case followed the African Court on Human and Peoples’ Rights’ initial ruling that Burkina Faso had violated journalist Lohé Issa Konaté’s right to freedom of expression by imposing a disproportionate criminal penalty for defamation. In the reparations judgment, the Court ordered Burkina Faso to pay Konaté compensation for material and moral damages, including lost income due to imprisonment and the suspension of his newspaper, as well as medical and travel expenses. The

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43. African Court on Human and Peoples’ Rights, *Lohe Issa Konaté v. Burkina Faso* (Judgment on Reparations), Application No. 004/2013, June 3, 2016, para. 165.

Court also mandated the expungement of his criminal record and urged Burkina Faso to review its defamation laws to ensure they comply with international freedom of expression standards, particularly regarding the use of criminal sanctions in such cases.

## FINAL CONSIDERATIONS

Freedom of expression in digital times, particularly in the context of hate speech, is a complex issue that requires a balanced approach. While it is essential to preserve freedom of expression as a pillar of democratic societies, it is also crucial to address and counter hate speech that threatens social cohesion. Digital platforms, as key intermediaries in the online public sphere, must play an active role in regulating such speech, implementing effective policies that protect society without compromising the essence of free expression.

From the analysis of the rulings and norms outlined, it is clear that the right to freedom of expression can be subject to restrictions within a framework of legality, legitimacy, necessity, and proportionality, and that certain expressions – due to their particular gravity – can incur severe sanctions.

Secondly, digital platforms have a crucial role in regulating online hate speech. Although these platforms offer a space for diverse opinions, they must also assume the responsibility of moderating and removing content that promotes hatred and violence. This poses ethical and practical challenges, as the line between legitimate criticism and hate speech is often blurred. However, digital platforms have an obligation to implement clear and transparent policies to address this problem, balancing freedom of expression with the protection of users against harm.

Therefore, it will be the task of international protection bodies (in their specific roles, as well as in their interregional dialogues) to provide guidelines for state action on these issues, in order to achieve a balance between the widest dissemination of ideas through digital means and the safeguarding of discourse that endangers the most essential values of our democracies.

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