UNIVERSITÉ DU LUXEMBOURG

LCEL Luxembourg Centre for European Law

INTER-AMERICAN COURT OF HUMAN RIGHTS

REQUEST FOR AN ADVISORY OPINION

Presented by

The Republic of Guatemala

with regard to

Democracy and its Protection under the Inter-American System of Human Rights

WRITTEN OBSERVATIONS

Submitted by the

Luxembourg Centre for European Law

University of Luxembourg

Pursuant to Article 73(3) of the

Rules of Procedure of the Inter-American Court of Human Rights

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I. THE LUXEMBOURG CENTRE FOR EUROPEAN LAW

1. The Luxembourg Centre for European Law[1] ("LCEL" or "the Center") is an interdisciplinary center of the University of Luxembourg, developing cutting-edge research in the field of European law. It was established in 2024 as the successor to the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. The LCEL has researchers from around the world, acting as a forum for a lively community of exceptional lawyers and dedicated professionals with diverse backgrounds. Its founding director is Prof. Takis Tridimas. The LCEL's mission is to combine academic excellence and strategic research in order to better understand, critically appraise, and push the boundaries of the European legal framework. Through its ambitious and rigorous projects, the LCEL seeks to promote innovative dialogue, foster interdisciplinary collaboration, and open up new areas of research and enquiry into European law, bringing to the foreground the true complexity of this field. Another key goal of the Center is to establish dialogue and outreach opportunities with other regional settings outside of Europe, bringing the European legal experience into a broader context of comparativism and engagement. It is pursuant to this goal that the LCEL respectfully submits these written observations.

II. EXECUTIVE SUMMARY

2. These written observations refer to the request for an advisory opinion on democracy submitted by Guatemala to the Inter-American Court of Human Rights ("IACtHR" or "the Court"). The present submission tackles five specific issues that are pertinent to this opinion: (i) the status of democracy as an autonomous human right; (ii) judicial independence; (iii) the combat of digital disinformation; (iv) the fight against corruption; and (v) youth representation and participation.

3. *First*, democracy is an autonomous human right in the Americas. According to the Court's case-law, the states of the region have an international legal obligation to ensure the effective exercise of democracy. This is understood as representative democracy, which encompasses four fundamental and interrelated constitutive elements: (i) effective respect for human rights and fundamental freedoms; (ii) holding of regular elections; (iii) political pluralism; and (iv) separation of powers. In addition to being a legal obligation of states, democracy is also a self-standing justiciable right for two main reasons: (i) democracy is intimately connected to the enjoyment of all human rights protected under the American Convention on Human Rights ("ACHR"), to the effect that democratic backsliding in a state will most likely impact the effective implementation of these rights; and (ii) the right to democracy aims at safeguarding the pillars of representative democracy in the American states, entailing that its material content and scope of protection is sufficiently distinct from existing rights under the ACHR to warrant its separate recognition as an autonomous right.

4. Recognizing democracy as an autonomous right has an added practical value, particularly because a breach of this right does not necessarily depend on the occurrence of a concrete breach of

[1] See <https://www.uni.lu/lcel-en/>.

an existing human right. In other words, the right to democracy as a self-standing right differs from the protection of other human rights, even when these other rights are essential for the existence of a democratic society. Other elements also demonstrate that recognizing democracy as an autonomous right has a practical utility, such as its symbolical function as well as its impact on the substantive scope of the Court's contentious cases, determination of reparations, and monitoring of compliance with judgments.

5. As for the threshold for a breach of the right to democracy, not every human rights violation that has an impact on democracy will constitute a breach of this right. Such a breach only encompasses the gravest violations whose nature and acute gravity prevents or seriously threatens the proper functioning of democracy in the state. In other words, the infringement of the right to democracy will depend on the nature and gravity of the democracy-affecting measures implemented, encompassing an evaluation whether, through these measures, the state substantially negated or impaired one or more of the pillars without which democracy cannot exist. This entails a quantitative and qualitative assessment of the concerned measures and their impact. This assessment is case-dependent, requiring an appraisal of the specific circumstances of the concrete situation at hand.

6. Although the autonomous nature of the right to democracy should be declared by the Court, it must be admitted that recognizing the self-standing justiciability of democracy may have profound implications for the institutions of the Inter-American Human Rights System ("IAHRS"), including the IACtHR. In particular, it risks transforming the Court into a continental judicial guarantor of democratic values across the Americas, potentially granting the Court immense power over the states in the region. While this may be perceived by some as a necessary and welcome development, it is not surprising if others resist this prospect, framing it as an unacceptable overreach by the IACtHR. Therefore, in light of the highly sensitive and consequential nature of the matter and in order to avoid illegitimate overreaches by the Court and widespread backlash by states and the OAS, the IACtHR could adopt a balanced and prudent approach while recognizing the autonomous nature of the right to democracy.

7. *Second*, judicial independence is indispensable for preserving democracy. States have the obligation to ensure that judges are protected from undue influence by other branches of government and private actors. Equally important is the appearance of independence and impartiality by the judiciary, in order to guarantee trust across society that the justice system is operating independently. The following factors *inter alia* are pertinent to assess the independence of the judiciary: (i) the manner of appointment of its members; (ii) the duration of their term of office, especially if they benefit from tenure and irremovability; (iii) the existence of guarantees against outside pressures; and (iv) whether the judicial body presents an appearance of independence. Crucially, states should refrain from instrumentalizing, abusing, or "weaponizing" their justice system for political and electoral purposes, including its use to target political opponents. This constitutes one of the most pressing challenges to democratic stability in the Americas currently.

8. *Third*, disinformation, which is understood as using information known to be false with the intention of deceiving the public, in whole or part, or to cause other harms, constitutes a potent threat

to democracy, particularly in the ongoing era of digital media. States have the obligation to combat the dissemination of disinformation. In this regard, public officials have an obligation to not make, endorse, promote, or disseminate disinformation, especially for electoral purposes. When disinformation disseminated by public or private actors concretely and seriously impacts democracy, particularly in the context of elections, states are required to adopt appropriate measures to safeguard the integrity of public debate, guarantee access to information, and protect substantive rights threatened in the context of democratic deterioration.

9. These measures must be grounded in respect for the right to freedom of expression and the prohibition of censorship. They must be designed and implemented with the understanding that restrictions on the free dissemination of information are appropriate only in exceptional cases, such as when the false information causes an identifiable social harm of such magnitude that there is a compelling public interest warranting a state intervention to restrict it. The use of criminal sanctions must remain exceptional, reserved for extreme harm and malice. States must also ensure that their anti-disinformation measures are provided for by law, pursue a recognized legitimate aim, and are necessary and proportionate to protect this interest, having due regard to the centrality of freedom of expression to democracy. Sufficient guarantees and remedies must be put in place to ensure that responses to disinformation are not instrumentalized against political opponents, journalists, human rights defenders, and civil society actors.

10. Combating disinformation is a shared responsibility of states and private actors, especially technology platforms, social media networks, civil society, the media, and informed citizens. In this regard, anti-disinformation measures must be structural, multidimensional and multi-stakeholder, addressing the root causes and societal tensions that allow disinformation to thrive. States should prioritize the implementation of strategies to build societal resilience and media and information literacy, aimed at empowering individuals across the social fabric, particularly vulnerable groups, to recognize, critically assess, and resist disinformation. In essence, states must prioritize systemic solutions (such as platform regulation, fact-checking, and media literacy) over prohibitions that risk censorship.

11. *Fourth*, corruption may constitute a direct threat to the stability of democracy. As part of their obligation under Article 1 of the ACHR to organize their governmental structure in such a way as to allow the full exercise of human rights, states have the obligation to establish a legal and institutional apparatus to combat corruption. This anti-corruption framework must be established and implemented in full compliance with human rights and other democratic values. If acts of corruption lead to human rights violations, such scenario may constitute in and of itself a breach of the obligation to guarantee human rights under Article 1 of the ACHR. To trigger a violation of this provision there must be a causal link between the acts of corruption and the concrete human rights violations *in casu*, with clearly identified or identifiable victims.

12. Freedom of expression is central to the fight against corruption, since it enables journalists, whistleblowers, human rights defenders, and civil society at large to expose abuses of power and acts of corruption, triggering public debate and potentially the punishment of those responsible. Thus,

reporting on corruption constitutes speech of special public interest and democratic value that deserves heightened protection under the ACHR. States must, as far as reasonable, ensure adequate safeguards for those publicly denouncing corruption, especially concerning their safety and non-retribution.

13. *Fifth*, youth representation and participation are essential for the stability of democracy, particularly because young people have a key role in raising early warnings about threats to democracy and bringing egalitarian, multicultural, and human rights-centered viewpoints. In the long term, greater youth engagement could give rise to more politically engaged adults, enhancing democratic engagement in society as a whole. Accordingly, states could implement the necessary measures to ensure that the youth have the civic space, protection, and support they need to effectively participate in the public sphere, including in institutional spaces of decision- and policy-making.

14. Specifically, states could consider the adoption of strategies and measures to enhance youth representation and participation in civic life, such as reducing the legal voting age, publicity campaigns incentivizing young people to vote and run for elections, reserved seats in parliaments for the youth, legally determined quotas for young candidates, voluntary quotas for political parties, etc. Besides these specific strategies and measures, states could also consider the implementation of structural measures to eliminate systemic barriers and stigmatization that hinder youth engagement, including age discrimination and lack of sensitivity and proper training among governmental officials on how to deal with young people effectively. In developing their policies, states should consider that youth organizations are particularly vulnerable, including to government suppression and lack of institutional stability. The youth has also been disproportionately affected by the COVID-19 pandemic, giving rise to mental health, employment, and education setbacks.

III. INTRODUCTION AND FRAMEWORK

A. On these advisory proceedings

15. On 6 December 2024, pursuant to Article 64(1) of the ACHR, Guatemala submitted to the IACtHR a request for an advisory opinion, posing the following main question: *"Are States obliged to guarantee and promote democracy as a human right protected by the American Convention on Human Rights, as a means for social, political and economic development and the effective exercise of human rights; or, under both assumptions?"*. As explained in the request filed by Guatemala, this question centers around two aspects, each of them dealing with a different legal basis and framing of the obligation of states to ensure democracy. The first aspect is whether democracy is an autonomous human right in the IAHRS and, if yes, what is its material content, legal nature (individual right, collective right, or both), scope of victimhood, and whether this right can be subject to limitations. The second aspect is whether democracy refers to the obligation of establishing and perpetuating a specific social, political and economic system and, if yes, what specific material obligations states are required to fulfill, especially in the context of gender equality, education, political parties, electoral processes and institutions, and combat of misinformation and hate speech online.

B. On these written observations

16. The goal of the present submission is to offer some legal findings on the basis of the European practice pertaining to the subject matter of these advisory proceedings. For the specific purposes of these written observations, the term "European practice" is understood broadly, encompassing any form of conduct by European states and institutions, including treaties, recommendations, resolutions, reports, judicial decisions, and studies.[2] The notion of "institutions" is also defined widely, in order to encompass organizations of regional integration (such as the Council of Europe ("CoE") and the European Union ("EU")) and private research institutions from Europe (such as the European Law Institute ("ELI") and the International Federation for European Law ("FIDE")).

17. Although Guatemala's request for advisory opinion refers specifically to the ACHR, the European practice on democracy is of significance to the IACtHR. This is because, on the basis of Article 29 of the ACHR and the Article 31 of the 1969 Vienna Convention on the Law of Treaties, the IACtHR often uses external, non-American sources for the interpretation of the ACHR, including the practice from other regions.[3] In this regard, the IACtHR also relies on European sources, including European treaties,[4] judgments of the European Court of Human Rights ("ECtHR"),[5] and documents of the CoE.[6] Specifically, in the 2021 *Advisory Opinion on Presidential Reelection Without Term Limits*, a decision in which the IACtHR set important principles of democracy in the Americas, the Court also relied on European treaties,[7] the ECtHR's case-law,[8] and opinions of the European Commission for Democracy through Law ("Venice Commission").[9] Nevertheless, one must have in mind the contextual and legal distinctions between Europe and the Americas, meaning that legal developments in Europe, whether by political, judicial and academic bodies, are not automatically or necessarily transposable to the Americas in general or the IAHRS in specific. The LCEL took this element into account in preparing the present written observations.

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[2] This wide understanding of practice was inspired by how the International Law Commission defined "general practice" as a constituent element of customary international law (International Law Commission, Draft conclusions on identification of customary international law (2018), conclusions 4-6).

[3] On the use of external sources by the IACtHR: Garcia Maia, "Challenging the Use of External Sources by the Inter-American Court of Human Rights", (2023) 72(4) ICLQ 977-1011; Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law", (2010) 21(3) EJIL 585-604; Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights", (2008) 19(1) EJIL 101-123.

[4] *Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 15, 2020. Series C No. 407, para. 169, footnote 251; *Spoltore v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 9, 2020. Series C No. 404, para. 95, footnote 108.

[5] *Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples*. Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 77; *Rights and guarantees of children in the context of migration and/or in need of international protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, paras 180, 229, 237.

[6] *Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 81; *Differentiated approaches with respect to certain groups of persons in detention*. Advisory Opinion OC-29/22 of May 30, 2022. Series A No 29, para. 114.

[7] *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights*. Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28, para. 94, footnote 116.

[8] *Ibid*., para. 95.

[9] *Ibid*., paras 100-102, 121, 136, 143.

18. The issues addressed by the present written observations are merely exemplificative. They were selected for their significance for an advisory opinion on democracy in the Inter-American regional context. The LCEL recognizes the existence of multiple other issues which are equally significant for a democratic society that are not explicitly addressed here solely due to constraints of length and concision. These other issues include gender representation; political inclusion of minorities, particularly indigenous communities; the role of political parties; electoral disenfranchisement; elections and electoral authorities; separation of powers; rule of law; states of emergency; among others. The LCEL hopes that the IACtHR will give due regard to these other elements in its advisory opinion, even though they are not addressed in these observations in detail.

19. Lastly, the LCEL notes that some of the legal positions and findings expressed in the present observations refer solely to the Inter-American regional context, as they were developed and tailored taking into account the political, conventional, and jurisprudential developments in the Americas, especially the case-law of the IACtHR. Some of these positions and findings do not necessarily apply in or are automatically transposable to the European context, including the CoE and the EU.

IV. DEMOCRACY AS AN AUTONOMOUS HUMAN RIGHT

20. In its 2008 judgment in *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, the IACtHR rejected the existence of a "right to democracy" in the IAHRS, clarifying that the concept of democracy has been used by the Court only for the interpretation of the ACHR's substantive provisions. Thus, the democratic principle alone would not trigger a declaration of a self-standing violation under the contentious jurisdiction of the Court.[10] The present submission argues that the IACtHR's jurisprudence has developed since this judgment, to the point that the Court could now recognize the existence of an autonomous right to democracy. This claim is based on two key arguments: **(A)** democracy is a legally binding obligation in the Americas; and **(B)** there is sufficient basis to claim that democracy is a self-standing justiciable right in the IAHRS.

A. Democracy as a legally binding obligation in the Americas

21. Even though the Inter-American Democratic Charter expressly states that "[t]he peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it",[11] it has been stressed that this Charter does not have binding legal force, being a mere recommendatory resolution.[12] In fact, in its past jurisprudence the IACtHR has employed the

[10] *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 222.

[11] *López Lone et al. v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 151 ("Thus the Inter-American Democratic Charter refers to the peoples' right to democracy, and also stresses the importance, under representative democracy, of the permanent participation of the citizenry within the framework of the legal and constitutional order in force").

[12] Escobar, "Towards a Human Right to Democracy? Some Initial Thoughts on Guatemala's Request for Advisory Opinion to the Inter-American Court of Human Rights" (*EJIL: Talk!*, 25 June 2025) <https://www.ejiltalk.org/towards-a-human-right-to-democracy-some-initial-thoughts-on-guatemalas-request-for-advisory-opinion-to-the-inter-american-court-of-human-rights/>.

democratic principle as a guiding principle and an interpretive guideline for the ACHR.[13] The Court also relied on the Inter-American Democratic Charter as authentic interpretation to the ACHR and other treaties, since that legal instrument contains the interpretation of the norms pertaining to democracy that the members of the Organization of American States ("OAS") set forth.[14] These developments confirm that the democratic principle is crucial for the interpretation of the ACHR, but the Court had not established explicitly that democracy is an international obligation legally binding upon states of the region.

22. However, the IACtHR's position evolved in 2020 and 2021, when the Court finally determined that democratic governance is legally binding upon the American states: "the effective exercise of democracy in the Americas is an international legal obligation to which States have consented, in exercise of their sovereignty, and is no longer solely a matter of domestic, internal or exclusive jurisdiction".[15] Accordingly, whereas there is an ongoing debate whether general international law imposes upon states an obligation to ensure democratic governance in their domestic jurisdiction, in the American regional context this debate seems to have been settled by the IACtHR, with the understanding that democracy is a legally binding regional obligation in the Americas.

23. Two arguments corroborate the autonomous international legal obligation to ensure democracy in the Americas. *First*, one can find numerous provisions in binding legal instruments recognizing democracy as the political system that states in the region are required to implement. For instance, the preamble and five articles to the ACHR refer to democracy,[16] assuming it to be the form of government in which the full respect for human rights is possible.[17] Likewise, the OAS Charter, the founding instrument of the organization, also posits the democratic principle.[18] Thus, preservation of democracy is a treaty-based obligation of American states.

24. *Second*, the Court clarified that democracy is part of the political identity of the region, to the effect that gross deviations from the democratic principle infringe on the cornerstone and *raison d'être* of the regional integration system under the OAS, especially its commitment to human rights protection and pluralism. The Court explained that the democratic principle constitutes "the type of political organization chosen by the States of the Americas to attain the values that the system wishes to promote and protect, including the full exercise of human rights".[19] The Court further elucidated

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[13] *Members and Militants of the Patriotic Union v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 27, 2022. Series C No. 455, para. 308.

[14] *San Miguel Sosa et al. v. Venezuela*. Merits, Reparations and Costs. Judgment of February 8, 2018. Series C No. 348, para. 114; *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights*. Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28, para. 52.

[15] *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights*. Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28, para. 55; *Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the consequences for State human rights obligations*. Advisory Opinion OC-26/20, November 9, 2020. Series A No. 26, para. 72.

[16] *American Convention on Human Rights (Pact of San José)* (1969), arts. 15, 16, 22, 29, and 32.

[17] *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights*. Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28, para. 48.

[18] *Charter of the Organization of the American States* (1948), preamble and arts. 2 and 3.

[19] *Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the consequences for State human rights obligations*. Advisory Opinion OC-26/20, November 9, 2020. Series A No. 26, para. 72.

that democracy has a broad and systemic function towards "the progressive development of the inter-American system, as the foundational premise of the regional organization, since this principle is enshrined in the OAS Charter - the constitutive treaty and fundamental instrument of the inter-American system".[20]

25. Conclusively, the establishment and preservation of democracy is an international legal obligation enforceable upon the American states. Besides a treaty-based obligation, the democratic principle is part of the OAS's identity and has a practical utility for enabling the existence and proper functioning of the OAS's legal and political order, particularly the human rights protection system under the ACHR. This finding is without prejudice to the legal status of democracy in other regions or at the global level.

B. Democracy as a self-standing justiciable right in the Americas

26. As a legal and analytical framework to assess the existence of a new right, three specific elements should be considered. First, the determination of the *right holder*: the individuals or other actors entitled to benefit from the right and to make legal claims for its enforcement. Second, the determination of the *substantive legal content of the right*, defining the specific entitlements and obligations that the concerned right entails. Third, the identification of the *duty-bearer*, those who are responsible for the implementation of the right and that can be held accountable for its infringement. This three-prong framework could offer valuable guidance in the assessment of the existence of an autonomous right to democracy.

27. Accordingly, to demonstrate that the IACtHR can enter a legal finding that democracy is a self-standing justiciable right, four points will be discussed: **(1)** the Court's jurisprudential method to identify new autonomous rights; **(2)** the material content of the right to democracy; **(3)** the threshold for a breach of this right; and **(4)** the practical added value of the right to democracy.

1. The IACtHR's method to identify new autonomous rights

28. In its recent case-law, the IACtHR has recognized numerous autonomous rights that are not explicitly recognized in any human rights instrument under the Court's jurisdiction, including the ACHR.[21] Although the Court's reasoning to recognize these new rights varies from case to case, two cross-cutting elements are most commonly found: (i) the protection and effective exercise of human rights already conventionally recognized encompass the proposed autonomous right in question, that is, the material content of the new autonomous right is an essential normative condition or component for the enjoyment and effectiveness of other rights already present in the text of the concerned legal

[20] *Ibid.*

[21] For example: *The Content and Scope of the Right to Care and its Interrelationship with Other Rights*. Advisory Opinion AO-31/25 of June 12, 2025. Series A No. 31, para. 112 (right to care); *Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 18, 2023, para. 586 (right to informational self-determination); *Lagos del Campo v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340, para. 146 (right to work and job security); *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 62 (right to a healthy environment).

instruments; and (ii) the fragmented treatment of the proposed autonomous right—limited to the partial dimensions within other recognized rights—is insufficient, as it does not capture the full scope of the material content of the proposed right, nor does it provide adequate guarantees for its implementation and protection.[22] In these circumstances, it is warranted to recognize the proposed right as an autonomous right. Considering that the latter is closely linked and materially encompassed by human rights already conventionally recognized, the Court has jurisdiction over the autonomous right in question: this right is justiciable before the IACtHR. In summary, the Court's jurisprudence entails two key elements: (i) the proposed autonomous right must be sufficiently linked to existing rights to justify their justiciability before the Court; and, at the same time, (ii) the proposed right must be sufficiently distinct from existing rights to justify their separate recognition as an autonomous right.

29. Other specific factors that the Court considered to recognize new autonomous rights include: (i) the textual, teleological, systematic, and evolutive interpretation of the ACHR;[23] (ii) the *pro persona* principle;[24] (iii) if the right can be derived from the joint reading of provisions and rights under the ACHR;[25] (iv) if the right is sufficiently connected with the enjoyment of other rights guaranteed by the ACHR;[26] (v) if the right is recognized in the domestic laws of states of the region;[27] (vi) if the right is recognized in treaties from the region or outside;[28] (vii) if other human rights bodies recognized the right;[29] and (viii) if there is sufficient practical reason, including distinction from other recognized rights, to recognize the concerned new autonomous right.[30]

30. Importantly, in the 2021 *Advisory Opinion on Presidential Reelection Without Term Limits*, the Court rejected the claim that presidential reelection without term limits is as an autonomous right,[31] under the following arguments: (i) there is no mention of presidential reelection without term limits in any international treaty, whether from the region or outside, especially the ACHR;[32] (ii) there was no discussion regarding presidential reelection in the preparatory work for the ACHR;[33] (iii) the majority

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[22] *The Content and Scope of the Right to Care and its Interrelationship with Other Rights*. Advisory Opinion AO-31/25 of June 12, 2025. Series A No. 31, paras 108-112.

[23] *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights*. Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28, para. 92; *Lagos del Campo v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340, para. 146.

[24] *The Content and Scope of the Right to Care and its Interrelationship with Other Rights*. Advisory Opinion AO-31/25 of June 12, 2025. Series A No. 31, para. 112.

[25] *Ibid.*

[26] *Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 18, 2023, para. 975.

[27] *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 58; *Lagos del Campo v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340, para. 145.

[28] *Ibid.*

[29] *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 65.

[30] *Ibid.*, paras 62-63.

[31] *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights*. Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28, para. 102.

[32] *Ibid.*, paras 92, 94.

[33] *Ibid.*, para. 92.

of the OAS member states place term-limits on presidential reelection;[34] (iv) given the lack of sufficient and uniform state practice, there is no regional customary international law recognizing presidential reelection without term limits;[35] and (v) "in the absence of a basis in international and domestic law, its recognition as a general principle of law must also be ruled out".[36]

31. Pursuant to the IACtHR's previous jurisprudence on the identification of new autonomous rights, the right to democracy could be recognized as an autonomous right. Importantly, the legal and factual circumstances surrounding the right to democracy are fundamentally different from the presidential reelection without term limits, which the Court rejected as an autonomous right in 2021. The IACtHR asserted that "[t]he interdependence between democracy, the rule of law, and the protection of human rights is the basis of the entire system of which the [ACHR] forms part".[37] This entails that respect for the democratic principle is intimately linked to the enjoyment of all rights under the ACHR, to the effect that democratic decline in a state will most likely hinder the effectiveness of human rights across society. More than that, democracy and human rights protection are mutually reinforcing: while democracy is a form of political organization that most effectively promotes the full exercise of human rights, there is no democracy without respect for human rights.[38] In fact, some human rights in particular operate as indispensable normative prerequisites for a democratic society, including freedom of thought and expression, freedom of association, political rights, judicial independence, right to judicial protection, among others.[39]

32. As an autonomous right, the right to democracy protects the elements necessary for the preservation of representative democracy (as defined below[40]), even in the absence of breaches to the rights of individuals. Although effective respect for human rights is a key element for a democratic society, democracy encompasses other components that are deserving of legal protection on their own (such as political pluralism and separation of powers), not only because they could impact the effectiveness of human rights. In other words, the right to democracy protects the essential components of democracy as such, not only because democracy is important for the effective enjoyment of human rights under the ACHR or because democratic decline would negatively affect such enjoyment, but because of democracy's importance for the stability and peace in the region. Under the legal and institutional framework of regional integration put in place by the OAS, democracy is a value and an obligation in itself. A key implication of this understanding is that, as discussed further below,[41] a breach of the right to democracy does not necessarily depend on the occurrence of a breach of a human right. Accordingly, the right to democracy as an autonomous right differs from the protection of other rights, even when these other rights are essential for the existence of a democratic society.

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[34] *Ibid.*, para. 98.
[35] *Ibid.*, para. 99.
[36] *Ibid.*
[37] *Ibid.*, para. 46.
[38] *Ibid.*, para. 66.
[39] *Ibid.*, paras 57-65.
[40] See section IV.B.2 below.
[41] See section IV.B.4 below.

33. Regarding the other elements that the IACtHR referred to to recognize autonomous rights, it is important to reiterate that the democratic principle has been acknowledged in the ACHR, the OAS Charter, and numerous non-binding instruments adopted by the OAS General Assembly,[42] especially the Inter-American Democratic Charter. International treaties also refer to the democratic principle, such as the International Covenant on Civil and Political Rights,[43] the International Covenant on Economic, Social and Cultural Rights,[44] the European Convention on Human Rights,[45] the Treaty on European Union,[46] and the African Charter on Democracy, Elections and Governance. Lastly, the democratic principle was recognized in the national constitution of numerous states in the region, such as Brazil,[47] Uruguay,[48] Honduras,[49] Panama,[50] Chile,[51] Colombia,[52] Nicaragua,[53] and Bolivia.[54] Several of these states also consider attacks against the democratic order as criminal acts.[55]

34. In view of the foregoing, democracy constitutes an autonomous right protected by the ACHR and justiciable before the IACtHR.

2. The material content of the right to democracy

35. Objectors to an autonomous right to democracy claim that the content of such purported right remains fundamentally undefined or, at best, overly general and abstract, being, therefore, incapable of operating as a legal yardstick for judicial review.[56] Two arguments can be offered to refute this position.

36. *First*, it is impossible to deny that, in a broader sense, the meaning of democracy and the concrete scope of its obligational content remains disputed and open-ended. However, this finding, in and of itself, does not deny the justiciability of the right to democracy, since the lack of a defined

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[42] *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights*. Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28, para. 51.
[43] *International Covenant on Civil and Political Rights* (1966), arts 14, 21, 22.
[44] *International Covenant on Economic, Social and Cultural Rights* (1966), arts 4, 8.
[45] *European Convention on Human Rights* (1950), preamble and arts 6, 8-11.
[46] *Treaty on European Union* (2007), art. 2.
[47] Brazil, Constituição da República Federativa, art. 1.
[48] Uruguay, Constitución de la República, art. 82.
[49] Honduras, Constitucion Politica, art. 1.
[50] Panama, Constitución Política de la República de Panamá, art. 1.
[51] Chile, Constitución Política de la República de Chile, art. 4.
[52] Colombia, Constitución Política de la República de Colombia, art. 1.
[53] Nicaragua, La Constitución Política de La República de Nicaragua, arts 2, 13, 117.
[54] Bolivia, Constitución Política del Estado, arts 1, 11.
[55] Peru, Código Penal, arts. 346-359-C; Brazil, Constituição da República Federativa, art. 5(XLIV); Argentina, Codigo Penal de la Nacion Argentina, Ley 11.179, art. 226; Paraguay, Codigo Penal de Paraguay, Ley Nº. 1.160/97, art. 273; Ecuador, Código Orgánico Integral Penal, art. 336.
[56] European Commission for Democracy through Law (Venice Commission), "*Amicus curiae* brief for the Inter-American Court of Human Rights on democracy as a human right, as a means for social, political and economic development and the effective exercise of human rights, or as both" (2025), paras 31-45, <https://www.coe.int/en/web/venice-commission/-/opinion-1245>; Escobar, "Towards a Human Right to Democracy? Some Initial Thoughts on Guatemala's Request for Advisory Opinion to the Inter-American Court of Human Rights" (*EJIL: Talk!*, 25 June 2025) <https://www.ejiltalk.org/towards-a-human-right-to-democracy-some-initial-thoughts-on-guatemalas-request-for-advisory-opinion-to-the-inter-american-court-of-human-rights/>.

legal content does not necessarily prevent the establishment of a justiciable right.[57] The ACHR contains numerous rights whose direct effect is linked to broad, complex, and undefined notions, such as "life",[58] "privacy",[59] "honor",[60] "dignity",[61] "family",[62] "property",[63] and "equal protection"[64]. The IACtHR never denied the justiciability and direct effect of these rights on the basis of the undefined and general nature of their conventional formulations. It is up to the IACtHR to define and concretize these rights through its decisions. As the Advocate General of the Court of Justice of the EU ("CJEU"), Tamara Ćapeta, concluded, "the interpretation of indeterminate notions is an ordinary activity for courts, and, given the indeterminacy often present in norms of a constitutional nature, it is one of the core tasks of constitutional courts".[65]

37. This does not mean, of course, that the IACtHR is acting arbitrarily in interpreting existing rights or recognizing new ones, since its judges do not operate in a vacuum, but they decide by employing a series of legal interpretative techniques to guide their reasoning, particularly the rules of treaty interpretation under Articles 31-33 of the Vienna Convention on the Law of Treaties. Another important point is that the IACtHR operates within or as part of a broader legal context that includes other regional and international legal rules.[66] It is unsurprising that the Court often relies on these other instruments to substantiate its judicial work, including the specification of the substantive content of human rights under its jurisdiction. Lastly, the ongoing discussions on the meaning of democracy did not prevent the IACtHR from elevating democracy to the status of a legally binding obligation in the region.[67]

38. *Second*, despite the still controversial nature of democracy in a wider sense, the substantive content of the democratic principle in the specific American context is already largely concretized. The IACtHR's case-law has already established important guidance on what the content of the right to democracy actually encompasses, at least in the region. On the basis of a systemic interpretation of available legal instruments and past case-law, the Court determined that, in the region, democracy means representative democracy,[68] which comprises the following four fundamental and interrelated

[57] See *European Commission v. Hungary*, Opinion of Advocate General Ćapeta. Court of Justice of the European Union, Case C-769/22. 5 June 2025, para. 205.
[58] *American Convention on Human Rights (Pact of San José)* (1969), art. 4.
[59] *Ibid.*, art. 11.
[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid.*, art. 17.
[63] *Ibid.*, art. 21.
[64] *Ibid.*, art. 24.
[65] *European Commission v. Hungary*, Opinion of Advocate General Ćapeta. Court of Justice of the European Union, Case C-769/22. 5 June 2025, para. 206.
[66] See Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law", (2010) 21(3) EJIL 585-604.
[67] See section IV.A above.
[68] *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights*. Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28, paras 65, 69.

elements: (i) effective respect for human rights and fundamental freedoms;[69] (ii) holding of regular elections;[70] (iii) political pluralism;[71] and (iv) separation of powers.[72]

39. It must be stressed that these elements were recognized by the IACtHR in light of the endemic reality and legal developments of the Americas, meaning that the automatic transplantation of this definition of democracy to other regions is unwarranted. It suffices to say here that the IACtHR's case-law offers important specification as to what the content of a right to democracy in the American context specifically will entail. Granted, the elements recognized by the Court pursuant to the democratic principle remain largely broad and underdeveloped, particularly for the purposes of direct effect in the context of judicial review of state actions. However, as argued above, generality is not in and of itself sufficient ground to set aside the justiciability of the right to democracy. The further specification of these elements should take place in the context of the Court's future cases and the political dialogue between member states, within or outside the institutional framework of the OAS.

3. The threshold for a breach of the right to democracy

40. As already mentioned, numerous human rights are intimately associated with the proper functioning of democracy in a state. It is our position that, despite their importance for a democratic society, not every violation of these rights necessarily entails a violation of the right to democracy, but only those violations whose very nature and acute gravity entails that the proper functioning of democracy in the state is prevented or seriously threatened. To borrow the wording used by CJEU Advocate General Ćapeta, there are some extreme cases in which the state crosses some "red lines",[73] meaning that the human rights violations in question and their consequences are of such a degree of seriousness and impact that the very democratic order in that state is hindered. To properly function as an autonomous right, the right to democracy should focus on these more extreme cases.

41. Let's consider a hypothetical situation. One can assume that every violation of freedom of expression might have implications for democracy, since the free flow of information in the public space is key for any democratic society. Nevertheless, not every violation of freedom of expression will be serious enough in terms of nature and impact to prevent the functioning of democracy as such in the state. For instance, censoring one ordinary individual from speaking on behalf of a certain legitimate political agenda certainly breaches freedom of expression, but this scenario will not meaningfully impact the democratic system as a whole if numerous other individuals remain unimpeded to propagate the concerned political agenda. However, if the state censors the leadership of this political agenda or implements a series of measures to systematically eliminate this legitimate political agenda as a whole from the political space, one has room to argue that democracy as such is hindered in this more extreme scenario. The same could be said if the censorship of that ordinary individual was made in such a particular way as to have a chilling effect across society, silencing a

[69] *Ibid*., para. 70.
[70] *Ibid*., para. 72.
[71] *Ibid*., paras 76-79.
[72] *Ibid*., paras 80-82.
[73] *European Commission v. Hungary*, Opinion of Advocate General Ćapeta. Court of Justice of the European Union, Case C-769/22. 5 June 2025, paras 212, 233.

significant number of people associated with this political agenda for fear of retribution or stigmatization.

42. The IACtHR recognized in its jurisprudence this distinction between "ordinary" human rights violations and those that affect the cornerstone of democracy, preventing the very existing of a democratic society. One example was the significant judgment in *Constitutional Tribunal (Camba Campos et al.) v. Ecuador* (2013), a case dealing with the swift (in the space of only two weeks) and collective removal of the judges of the three high courts in Ecuador, i.e., the Constitutional Tribunal, the Supreme Court of Justice, and the Electoral Tribunal. The judges were removed by a resolution of the National Congress, even though it lacked the competence to do so, without any valid legal grounds, and without any form of due process. The National Congress's subsequent attempt to retroactively legitimize the arbitrary dismissal through an impeachment process was invalid due to the numerous irregularities in the proceedings.[74] The judges were also prevented from using the judicial remedy of *amparo* to counter the decision by Congress that had dismissed them.[75] As summarized by Judge Eduardo Ferrer Mac-Gregor in his partially dissenting opinion, the removal of the judges was "the result of a political alliance aimed at creating a judicial apparatus that was favorable to the political majority of the time, as well as to prevent the criminal proceedings against the President in office and a former President".[76]

43. Given the extreme seriousness of the facts, the Court saw the need to clarify in its judgment that this case was "different from those of previous cases relating to the arbitrary removal of isolated judges"[77], warranting an assessment of "the context in which the facts surrounding the removal of the judges from office occurred, because this will be useful to understand the reasons or grounds on which this decision was made".[78] Aligned with the fact that the judges were dismissed in a period of acute political crisis in Ecuador,[79] the Court stressed that the arbitrary manner in which their removal was carried out indicates a clear "intention of a parliamentary majority to exercise greater control over the Constitutional Tribunal and to facilitate the termination of the justices of the Supreme Court".[80] This is because "the resolutions of Congress [removing the judges] were not adopted based on the exclusive assessment of specific factual information and in order to ensure proper compliance with the laws in force, but sought a very different end related to an abuse of power aimed at obtaining control of the Judiciary".[81] The result was "a destabilization of both the Judiciary and the country in general and [an intensification of] the political crisis, with the negative effects that this entailed for the protection of the rights of the population".[82] Ultimately, the Court determined that the collective dismissal of the

[74] *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2013. Series C No. 268, para. 219.
[75] *Ibid.*, para. 212.
[76] *Ibid.*, para. 64.
[77] *Ibid.*, para. 207.
[78] *Ibid.*, para. 210.
[79] *Ibid.*, para. 211.
[80] *Ibid.*, para. 219.
[81] *Ibid.*
[82] *Ibid.*

judges "constitute[d] an attack not only on judicial independence but also on the democratic order",[83] causing "a destabilization of the democratic order"[84] due to the resulting "rupture of the separation and independence of the branches of government".[85]

44. Two recent cases also worth mentioning are *Capriles v. Venezuela* (2024) and *Mantilla v. Nicaragua* (2024), dealing with structural manipulations of the electoral process, including of the institutions that oversee such process, to favor the incumbent candidate (Nicolás Maduro in Venezuela and Daniel Ortega in Nicaragua). In light of the broader and serious context of democratic decline in these two states, with a marked concentration of power in the hands of the Executive Branch,[86] the Court concluded that these measures constituted "an abusive use of the state apparatus"[87] and "severely compromised electoral integrity, thus undermining confidence in the rules and the guarantee of rotation in the exercise of executive power that they should have protected".[88] Ultimately, the Court found that the institutional and democratic deterioration in Nicaragua and Venezuela was of such an intense degree that it became necessary to apply the collective guarantee mechanism, in which the Court urged "the international community and, in particular, to the OAS and the other members of the inter-American system to assist and cooperate in order to ensure due compliance with this judgment".[89] This collective guarantee "is a general obligation of protection among both the States Parties to the [ACHR] and the OAS Member States to ensure the effectiveness of those instruments, which constitute an obligation *erga omnes*".[90]

45. The common feature of these three cases is the extreme nature and scale of the human rights violations identified, entailing that their occurrence seriously destabilized the indispensable pillars for the proper functioning of a democratic order. In these cases, the concerned pillars were separation of powers (judicial independence) and the integrity of the electoral process. The reasoning of the IACtHR indicates that the facts of these specific cases do not refer to "ordinary" infringements of separation of powers and political rights, but they constitute extraordinary violations, so extreme in scale and gravity that the very functioning of democracy is shattered. These extreme cases are the business of the right to democracy.

46. This approach to the right to democracy — focused on the more extreme circumstances that give rise to democratic destabilization — is also helpful to frame the states' margin of freedom in

[83] *Ibid.*, para. 207.
[84] *Ibid.*, para. 221.
[85] *Ibid.*
[86] *Gadea Mantilla v. Nicaragua.* Merits, Reparations and Costs. Judgment of October 16, 2024. Series C No. 543, para. 124; *Capriles v. Venezuela.* Preliminary Objections, Merits, Reparations and Costs. Judgment of October 10, 2024. Series C No. 541, para. 195.
[87] *Capriles v. Venezuela.* Preliminary Objections, Merits, Reparations and Costs. Judgment of October 10, 2024. Series C No. 541, para. 141; *Gadea Mantilla v. Nicaragua.* Merits, Reparations and Costs. Judgment of October 16, 2024. Series C No. 543, para. 106.
[88] *Gadea Mantilla v. Nicaragua.* Merits, Reparations and Costs. Judgment of October 16, 2024. Series C No. 543, para. 108.
[89] *Gadea Mantilla v. Nicaragua.* Merits, Reparations and Costs. Judgment of October 16, 2024. Series C No. 543, para. 159; *Capriles v. Venezuela.* Preliminary Objections, Merits, Reparations and Costs. Judgment of October 10, 2024. Series C No. 541, para. 196.
[90] *Gadea Mantilla v. Nicaragua.* Merits, Reparations and Costs. Judgment of October 16, 2024. Series C No. 543, para. 159.

determining their own political system. States can still promote a lively political and constitutional dialogue in their national jurisdictions about how to organize their respective government and state apparatus. However, there are certain structural elements that the states cannot derogate from, because doing so would go against their common decision to uphold representative democracy in the Americas. In other words, there are some "red lines" that the states cannot cross if they are committed to having a democratic system in their domestic jurisdictions.[91]

47. The logical question to be asked following this approach is: which criteria should the Court apply to determine if a human rights violation or a series of these breaches constitute such heightened infringement capable of preventing the functioning of democracy? Which specific threshold of seriousness or impact should be applied here? Three observations are pertinent.

48. *First*, the determination of a breach of the right to democracy will depend on the nature and gravity of the measures implemented, encompassing an evaluation whether, through these measures, the state substantially negated or impaired one or more of the pillars without which democracy cannot exist. This entails a quantitative and qualitative assessment: (i) the quantitative dimension could explore the number of rights infringed and victims affected, the duration of the violation and its effects, among other factors; and (ii) the qualitative facet could focus on the nature of the rights violated, the seriousness of the violations, if the infringement is systemic and has widespread effects across society, etc. Overall, this assessment can only be made on a case-by-case basis, in light of the concrete circumstances of each case. Accordingly, it is not necessary and even warranted to attempt to establish *in abstracto* a precise method or exhaustive set of criteria to determine if a state breaches the right to democracy. The general standard that the state substantially negates or impairs one or more of the pillars without which democracy cannot exist is sufficient at this stage.[92]

49. *Second*, although the determination of a *numerus clausus* or closed list of criteria for finding a breach of the right to democracy is a futile and unhelpful exercise, there are some explicative factors that the Court could consider as guidance for its assessment. The *in casu* pertinence of each of these factors will depend on the specific circumstances of the case. Naturally, the Court will be required to consider additional elements as the case demands. These explicative factors include: (i) the intention or motivation of those conceiving and implementing the measure, as inferred from the circumstances of the case or spelled-out in statements, instructions or other documentation; (ii) if the measure was implemented systematically by the state, i.e., if the measure was an isolated act or part of a broader pattern of multiple or repeated actions intended to hinder, or with the effect of hindering, democracy; (iii) if the measures are the result of an advance plan, agreement or any form of coordinated effort between the interested political actors; (iv) if the measures disproportionately target specific groups, particularly if they are perceived as political opponents; (v) whether the measure disproportionately favors a certain political agenda or actor, particularly if they are in power when the measure was designed and implemented; (vi) if the measures involve the significant use of the state apparatus or

[91] *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights*. Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28, para. 86.
[92] *European Commission v. Hungary*, Opinion of Advocate General Ćapeta. Court of Justice of the European Union, Case C-769/22. 5 June 2025, para. 245.

public resources, such as intelligence services and military, police, and other security forces; (vii) whether the measure has structural, widespread, or large-scale consequences that go beyond the individual victims of the case and affect society as a whole; (viii) whether the measure was implemented in a broader context of political crisis or democratic decline; among others.

50. *Third*, even though a violation of the right to democracy may encompass a series of repeated and different breaches of the ACHR and of the OAS Charter, there are certain measures that, given their very nature, their isolated implementation will likely prevent democracy from functioning properly. Examples might include the elimination of freedom of the press; eradication of separation powers; marginalization or exclusion of an entire group in society; open-ended suspension of elections; widespread, systematic or violent persecution of political opponents; the implementation of a *coup d'état* against democratically elected heads of state or government; among others.

4. The added value of the right to democracy

51. Objectors to an autonomous right to democracy deny that recognizing such right will bring any added value or meaningful practical effect. As the argument goes, recognizing such autonomous right is moot because democracy is already sufficiently protected through litigation on the basis of existing human rights that ensure a democratic society.[93]

52. This position is arguably unconvincing. The right to democracy would protect the elements necessary for the preservation of a democratic society, even in the absence of concrete breaches to the rights of individuals. Whereas effective respect for human rights is a key element for any democratic society, democracy encompasses other components that are deserving of legal protection on their own, such as political pluralism and separation of powers. In other words, the right to democracy protects the essential components of democracy as such, not only because democracy is important for the effective enjoyment of human rights or because democratic decline would negatively affect such enjoyment, but because of democracy's importance for stability and peace in the Americas. Under the legal and institutional framework of regional integration put in place by the OAS, democracy is a value and an obligation in itself, not only a by-product of other rights or the mere political background necessary for the enjoyment of these rights. Thus, recognizing a right to democracy would affirm democracy as an enforceable legal rule, not just a political ideal. It would also signal that undemocratic practices are not only politically unfortunate, but also legally unacceptable.

53. A key implication of this understanding is that a breach of the right to democracy does not necessarily depend on the occurrence of a concrete breach of a human right. For example, as the Court indicated in its *Advisory Opinion on Presidential Reelections Without Term Limits*, indefinite presidential re-elections may impact the right to democracy, as they may reduce accountability and weaken democratic turnover and legitimacy.[94] However, on the individual level, the citizens are still free to

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[93] Venice Commission, "*Amicus curiae* brief for the Inter-American Court of Human Rights on democracy as a human right, as a means for social, political and economic development and the effective exercise of human rights, or as both" (2025), paras 31-45, <https://www.coe.int/en/web/venice-commission/-/opinion-1245>.

[94] *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights*. Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28, paras 127-148.

vote regularly, create and join parties, and run for office. This means that indefinite presidential re-election may hinder democracy without necessarily and concretely affecting individual rights. In fact, in its advisory opinion, the IACtHR concluded that enabling presidential reelection without term limits is contrary to the ACHR and American Declaration of the Rights and Duties of Man, as this practice violates principles of representative democracy.[95] To enter such a finding, the Court did not scrutinize how presidential reelection without term limits would contravene individual rights. The mere combined findings that, one, democracy is a legal obligation under the IAHRS and, two, presidential reelection without term limits negatively impacts democracy were sufficient for the Court to declare a violation of the ACHR.

54. Another example could be the institutional weakening of parliamentary oversight over the executive power. This could negatively impact democratic stability and separation of powers, while not directly affecting the personal sphere of rights of individuals. Consequently, the right to democracy as an autonomous right differs from the protection of other rights, even when these other rights are essential for the existence of a democratic society, such as political rights, freedom of association, and freedom of expression.

55. In this regard, the right to democracy has both an individual but also a collective dimension. In its individual connotation, the right to democracy refers to the fact that most attacks against the democratic order will not remain in the abstract or at the institutional level only, but they will likely also impact the exercise of individual human rights, affecting the personal sphere of rights of numerous individual members of society. On the other hand, in its collective dimension, the right to democracy refers to the preservation of the democratic system as a societal interest linked to the population as a whole.

56. Other elements also demonstrate that a self-standing finding of a breach of the right to democracy has a meaningful utility. This self-standing finding would have a symbolic purpose by highlighting the particular significance of the infringement, as the concerned wrongful acts not only breach individual rights but they also de-stabilize the democratic system as a whole. It would also serve a diagnostic purpose by capturing more accurately the contextual causes of the human rights violations in question. Considering that human rights litigation often focuses on individual rights, it may lose sight of the more structural threats to democracy in the background, such as the slow dismantling of judicial independence and authoritarian consolidation. Litigation based on the right to democracy may address these structural elements more efficiently and fully, encapsulating systemic breaches that could easily be overlooked in the context of individual rights claims alone.

57. In this regard, democracy-based litigation could have a more effective preventive function: while individual rights claims are often reactive, being raised after the violations already took place, a right to democracy would allow courts and monitoring bodies to intervene earlier, addressing erosion of democratic institutions before it leads to large-scale rights violations. This could also empower the IAHRS and other international monitoring bodies to defend democracy against backsliding, as states

[95] *Ibid.*, para. 149(4).

could be held legally accountable for undermining democratic governance as a whole. Specifically with regards to the IACtHR's framework for monitoring compliance with judgments, a judicial finding that the right to democracy was violated would allow this monitoring compliance mechanism to follow-up on the progress of the state towards democratic reconstruction.

58. The right to democracy could also have an impact on the determination of reparations in the case, especially for ensuring that these reparations take a more structural or systemic scope to address the underlying democratic decline as the root cause for the resulting human rights violations. Lastly, while individual rights often focus on present claimants, democracy could be seen as preserving a system of self-rule for the future. In this perspective, a right to democracy also emphasizes intergenerational justice, ensuring that persons currently in power do not dismantle democracy for generations yet to come.

59. Lastly, leaving aside the technical legal aspects of recognizing democracy as an autonomous right, an equally important question is the political desirability of such recognition. One must admit that a potential implication of recognizing the self-standing justiciability of democracy is that it may greatly empower the IACtHR, the Inter-American Commission on Human Rights ("IACHR"), and other regional monitoring bodies. Regarding in particular the IACtHR's framework for monitoring compliance with judgments, a judicial finding by the Court that the right to democracy was undermined would allow this compliance mechanism to follow-up on the progress of the state towards democratic reconstruction in the long-term. In essence, recognizing the self-standing justiciability of democracy as an autonomous right may transform the IACtHR in a continental judicial guarantor of democratic values across the Americas, potentially granting the Court immense power over the states in the region. While this may be perceived by some as a necessary and welcome development, it is not surprising if others resist this prospect, framing it as an unacceptable overreach by the IACtHR. In light of the highly sensitive and consequential nature of the matter, the Court could adopt a balanced and prudent approach while recognizing the autonomous nature of the right to democracy.

C. Findings

60. In light of the above, the Court could consider recognizing in the advisory opinion that:

- as asserted in the IACtHR's previous case-law, "the effective exercise of democracy in the Americas is an international legal obligation to which States have consented, in exercise of their sovereignty, and is no longer solely a matter of domestic, internal or exclusive jurisdiction".[96] This is a treaty-based obligation, as posited in the OAS Charter and the ACHR, as well as a key element of the political identity of the region, as asserted in the Inter-American Democratic Charter.

- pursuant to the Court's recent case-law on the ascertainment of new autonomous human rights, democracy constitutes an autonomous justiciable right in the Americas. Two arguments

[96] *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights*. Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28, para. 55; *Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the consequences for State human rights obligations*. Advisory Opinion OC-26/20, November 9, 2020. Series A No. 26, para. 72.

corroborate this conclusion: (i) democracy is intimately connected to the enjoyment of all human rights protected under the ACHR, to the effect that democratic backsliding in a state will most likely impact the effective implementation of these rights; and (ii) the right to democracy aims at safeguarding the pillars of representative democracy in the American states, entailing that its material content and scope of protection is sufficiently distinct from existing rights under the ACHR to warrant its separate recognition as an autonomous right.

- in terms of its material content, the right to democracy refers to the protection of representative democracy, which encompasses four fundamental and interrelated elements: (i) effective respect for human rights and fundamental freedoms; (ii) holding of regular elections; (iii) political pluralism; and (iv) separation of powers. The fact that these elements are general in nature is not sufficient, in and of itself, to deny the existence and justiciability of democracy as an autonomous right, since the lack of specific legal content does not necessarily prevent the establishment of a justiciable right. It is up to the IACtHR, the OAS, and states to further specify and concretize this right. In this regard, the Inter-American Democratic Charter offers valuable guidance on the meaning and content of the right to democracy.

- recognizing democracy as an autonomous right has an added practical value, particularly because a breach of this right does not necessarily depend on the occurrence of a concrete breach of an existing human right. In other words, the right to democracy as a self-standing right differs from the protection of other human rights, even when these other rights are essential for the existence of a democratic society. Other elements also demonstrate that recognizing democracy as an autonomous right has a practical utility, such as its symbolical function as well as its impact on the substantive scope of the Court's contentious cases, determination of reparations, and monitoring of compliance with judgments.

- as for the subjective holder of the right to democracy, the latter has an individual and collective dimension. In its individual connotation, the right to democracy refers to the fact that most attacks against the democratic order will not remain in the abstract or at the institutional level only, but they will likely also impact the exercise of individual human rights, affecting the personal sphere of rights of numerous individual members of society. In its collective dimension, the right to democracy refers to the preservation of the democratic system as a societal interest linked to the population as a whole.

- as for the threshold for a breach of the right to democracy, not every human rights violation with an impact on democracy will constitute a breach of that right. Such breach only encompasses the gravest violations whose nature and acute gravity prevents or seriously threatens the proper functioning of democracy in the state. In other words, the infringement of the right to democracy depends on the nature and gravity of the democracy-affecting measures implemented, encompassing an evaluation whether, through these measures, the state substantially negated or impaired one or more of the pillars without which democracy cannot exist. This entails a quantitative and qualitative assessment of the concerned measures and their impact. This assessment is case-dependent, requiring an appraisal of the specific circumstances of the concrete situation at hand.

- the right to democracy remains a highly sensitive and consequential matter, with the potential to have profound implications for the institutions of the IAHRS, including the IACtHR. Although the autonomous nature of the right to democracy should be recognized, a balanced and prudent approach is warranted in order to avoid illegitimate overreaches by the Court and widespread backlash by states and the OAS.

V. JUDICIAL INDEPENDENCE

A. The link between judicial independence and furthering democracy

61. It is widely agreed that separation of powers is a key component for the preservation of democracy.[97] As a corollary of separation of powers, the long-term sustainability of democratic institutions lies in the independence and impartiality of the judicial system of the state, requiring that the judiciary is committed to uphold the rule of law and is free from undue external pressure. In this regard, the Venice Commission explained that:

> judicial independence is not a prerogative or privilege granted in the judge's own interest, but is a fundamental principle, an essential element of any democratic state, a pre-condition of the rule of law and the fundamental guarantee of a fair trial. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law. The judiciary must be independent to fulfil its role in relation to the other state powers, society in general, and the parties to litigation. It is therefore not only an element based on the rule of law, but also the pre-condition for the guarantee that all individuals (and the other state powers) will enjoy equality and have access to a fair trial before impartial courts. Decisions which remove basic safeguards of judicial independence are unacceptable even when disguised.[98]

62. The significance of judicial independence for the democratic rule of law is recognized in Article 3 of the Inter-American Democratic Charter, which lists, as essential elements of representative democracy, "access to and the exercise of power in accordance with the rule of law" and "the separation of powers and independence of the branches of government". This provision implies that judicial independence constitutes a democratic institutional guarantee that is fundamentally linked to the wider notion of separation of powers.[99] It follows that, given the important role that judges play in a democracy, the judiciary must benefit from a genuine separation and independence from the political powers embedded in the executive and legislative branches of government.[100] As said by Judge Eduardo Ferrer Mac-Gregor Poisot, a former President of the IACtHR, "[j]udicial independence […]

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[97] *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2013. Series C No. 268, para. 221; *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights*. Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28, paras. 80-84.

[98] Venice Commission, "Republic of Moldova, *Amicus Curiae* Brief for the Constitutional Court on the Criminal Liability of Judges" (2017), para. 17.

[99] *Ríos Avalos et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of August 19, 2021. Series C No. 429, para. 86 ("one of the main objectives of the separation of public powers is, precisely, to guarantee the independence of the judicial authorities").

[100] *Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135. para. 145.

represents an inseparable element for the consolidation – and very existence – of a genuine constitutional and democratic rule of law".[101]

63. In terms of scope, the requirement of judicial independence and impartiality refers to the obligation to ensure that individuals and society at large do not have any reasonable doubt as to the imperviousness of the judges to external factors, in particular to any direct or indirect undue influence over them and their decisions by the other branches of government (the legislature and the executive) and private parties.[102] As the ECtHR[103] and the CJEU[104] clarified, the requirement of independence and impartiality should be assessed not only as a matter of fact but also taking into account the appearance of independence and impartiality. The central element here is the confidence which the courts in a democratic society must inspire in the public that justice is being served in an independent and impartial way. As the ECtHR repeatedly stated, "justice must not only be done, it must also be seen to be done".[105] The following factors are pertinent to assess the independence of the judiciary: (i) the manner of appointment of its members; (ii) the duration of their term of office; (iii) the existence of guarantees against outside pressures; and (iv) whether the judicial body presents an appearance of independence.[106]

B. European developments

64. Multiple European institutions have consistently maintained the link between democracy and judicial independence, including the ECtHR,[107] the CJEU,[108] the Venice Commission,[109] the

[101] *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2013. Partially Dissenting Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot. Series C No. 268, para. 1.
[102] *Asociația 'Forumul Judecătorilor din România' and Others v Inspecția Judiciară and Others*, Judgment of the Court (Grand Chamber), CJEU, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19. 18 May 2021, para. 212.
[103] *Sramek v. Austria* (Application no. 8790/79), Judgment, ECtHR, 22 October 1984, para. 42; *Clarke v. United Kingdom* (Application no. 23695/02, Decision as to the admissibility, ECtHR, 25 August 2005; *Micallef v. Malta* (Application no. 17056/06), Judgment, ECtHR, 15 October 2009, para. 98.
[104] *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, Judgment of the Court (Grand Chamber), CJEU, Joined Cases C-585/18, C-624/18 and C-625/18, 19 November 2019, para. 128; *Asociația 'Forumul Judecătorilor din România', YN v Consiliul Superior al Magistraturii,* Judgment of the Court (First Chamber), CJEU, Case C-216/21, 7 September 2023, para. 64.
[105] *De Cubber v. Belgium* (Application no. 9186/80), Judgment, 26 October 1984, para. 26; *Gazeta Ukraina-Tsentr v. Ukraine* (Application no. 16695/04), Judgment, 15 July 2010, para. 32.
[106] *Langborger v. Sweden* (Application no. 11179/84), Judgment, 22 June 1989, para. 32; *Kleyn and Others v. the Netherlands* (Applications nos. 39343/98, 39651/98, 43147/98 and 46664/99), Judgment, 6 May 2003, para. 190
[107] *Oleksandr Volkov v. Ukraine* (Application no. 21722/11), Judgment, 9 January 2013, para. 199 (judicial independence is "one of the most important values underpinning the effective functioning of democracies").
[108] *European Commission v Republic of Poland*, Judgment of the Court (Grand Chamber), CJEU, Case C-204/21, 5 June 2023, paras 94, 99, 102; *European Commission v Republic of Poland*, Judgment of the Court (Grand Chamber), CJEU, Case C-791/19, 15 July 2021, para. 60.
[109] Venice Commission, "Serbia, Opinion on the Draft Amendments to the Constitutional Provisions on the Judiciary" (2018), para. 11 ("In order for a democratic state to function properly, it is essential that it has to have an independent, fair and impartial judiciary that is trusted by the people. To achieve this end, it is crucial that the judiciary be committed to upholding the rule of law and be free from political pressure or bias"). See also Venice Commission, "Report on the Independence of the Judicial System – Part I: The Independence of Judges" (2010); Venice Commission, "Rule of Law Checklist" (2016).

Consultative Council of European Judges,[110] the European Parliament,[111] the CoE Committee of Ministers,[112] and the ELI.[113] This link was made plain in Principle 5 of the Reykjavík Principles for Democracy, which imposes on states the obligation to "ensure independent, impartial and effective judiciaries. Judges must be independent and impartial in the exercise of their functions, and free from external interference, including from the executive".[114]

C. Relevance in the American context

65. This section will address: **(1)** the case-law of the IACtHR and **(2)** some American contextual and political developments on the link between judicial independence and democracy.

1. Jurisprudential developments

66. Besides using the Inter-American Democratic Charter as an interpretative framework to the ACHR in general[115] and to judicial independence in specific,[116] the IACtHR has recognized the democratic pedigree of judicial independence in multiple decisions.[117] In *Ríos Ávalos et al. v. Paraguay*, the Court determined that

> without judicial independence the rule of law does not exist and democracy is not possible […] because judges must have adequate and sufficient guarantees to exercise their function to decide the disputes

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[110] Consultative Council of European Judges (CCJE), "Opinion No. 1 (2001) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges" (2001); CCJE, "Opinion No. 10(2007) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society" (2007).

[111] European Parliament, Resolution of 13 November 2018 on the rule of law in Romania (2018) ("whereas the independence of the judiciary is enshrined in Article 47 of the Charter of Fundamental Rights and Article 6 of the ECHR, and is an essential requirement of the democratic principle of the separation of powers").

[112] CoE Committee of Ministers, Recommendation CM/Rec(2010)12 and explanatory note - judges: independence, efficiency and responsibilities (2010), para. 69 <https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d>.

[113] ELI, "ELI-Mount Scopus European Standards of Judicial Independence" (2024) ("Judicial independence is an essential pillar of democracy and the rule of law. It is fundamental to guaranteeing a fair trial and effective judicial protection for every person").

[114] CoE, "Reykjavík Principles for Democracy" (2023) <https://www.coe.int/en/web/steering-committee-on-democracy/10-principles-for-democracy>.

[115] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 44 ("any fair demands by democracy must […] guide the interpretation of the Convention and, particularly, those provisions that are critically related to the preservation and operation of democratic institutions"); *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 222.

[116] *Ríos Avalos et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of August 19, 2021. Series C No. 429, para. 91; *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2013. Series C No. 266, para. 179.

[117] *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2013. Series C No. 268, para. 207; *Constitutional Court v. Peru*. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71, paras. 111-112; *Ríos Avalos et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of August 19, 2021. Series C No. 429, para. 91; *López Lone et al. v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302. para. 194; *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2013. Series C No. 266, para. 154,

> that occur in society in accordance with the law. The lack of independence and respect for their authority is synonymous with arbitrariness.[118]

67. The consolidated case-law of the IACtHR has also maintained that the separation of powers and judicial independence relate not only to the consolidation of the democratic system, but also to the preservation of human rights.[119] The Court explained that the obligation to ensure rights pursuant to Article 1(1) of the ACHR imposes upon the state the burden to organize its entire governmental apparatus, in particular all structures through which public powers are exercised, in such a way as to allow the state to guarantee the free and full exercise of human rights.[120] When seen in light of this obligation to ensure rights, "judicial independence stands out as an essential element of the organization of the governmental apparatus without which the State is unable to ensure the free and full exercise of rights. Consequently, judicial independence is essential for the protection and effective guarantee of human rights".[121]

68. Moreover, the IACtHR determined that the principle of judicial independence has a dual dimension: one institutional and another individual. While the former refers to the autonomous exercise of the judicial function by the judiciary as a system, the latter concerns the individual members of the judiciary, i.e., the person of the specific judge. Both dimensions are intertwined and equally aim at ensuring that the jurisdictional function is exercised, by the judicial system as whole and by individual judges in particular, free of undue interferences by actors outside the judiciary.[122] Specifically, the Court indicated that judicial independence encompasses the following guarantees for judicial authorities: (i) an adequate appointment procedure; (ii) tenure and irremovability, and (iii) protection from external pressures.[123]

2. Contextual and political developments

69. In empirical terms, the link between judicial independence and democracy has never been so important in the Americas, particularly in light of the recent measures in several countries in the region aimed at undermining the judiciary, including its ability to operate independently.[124] These measures include the arbitrary removal of judges and prosecutors without due process, appointments of judges

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[118] *Ríos Avalos et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of August 19, 2021. Series C No. 429, para. 91.
[119] *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2013. Series C No. 268, para. 221; *Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 68.
[120] *Ríos Avalos et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of August 19, 2021. Series C No. 429, para. 90.
[121] *Ibid.*
[122] *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2013. Series C No. 268, para. 198; *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 55; *Cordero Bernal v. Peru*. Preliminary Objection and Merits. Judgment of February 16, 2021. Series C No. 421, para 71.
[123] *Ríos Avalos et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of August 19, 2021. Series C No. 429, para. 87.
[124] IACHR, "IACHR Asks Ecuador to Ensure Judicial Independence in the Face of Organized Crime Interference" (2024) <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2024/100.asp>; IACHR, "Peru: IACHR expresses concern over constitutional accusations against justice operators and calls for respect for due process guarantees" (2023) <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2023/129.asp>; IACHR, "Peru: IACHR expresses concern over investigation against National Justice Board and calls for due process" (2023) <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2023/222.asp>.

and prosecutors who fail to meet applicable standards, and undue outside interventions to influence judicial decisions.[125] In this regard, the IACHR expressed concern with the implementation of recent institutional reforms of the judiciary in multiple states that may hinder judicial independence. One of the most flagrant examples is Venezuela, where a series of legal and administrative reforms, carried out over the course of many years, decimated the independence of the Venezuelan judicial system.[126] The IACHR[127] and a UN independent fact-finding mission[128] asserted that, as a result of these reforms, "instead of providing protection to victims of human rights violations and crimes, the justice system [in Venezuela] has played a significant role in the State's repression of Government opponents". Recently, the IACHR also criticized systemic judicial reforms in El Salvador[129] and Mexico[130] for their potential impact on judicial independence.

70. In December 2023, the IACHR also denounced another alarming pattern across the region: the instrumentalization of the justice system to guarantee and perpetrate impunity, especially in the context of corruption, and even for political-electoral purposes.[131] The Commission concluded that "[t]he manipulation of the justice system for these purposes represents one of the most pressing challenges for today's democracies, since, under the guise of legality, the principle of separation of powers and judicial independence are deeply affected".[132] The recent process of deterioration of the democratic institutions and judicial independence in Guatemala is a critical example.[133] In 2024, the

[125] IACHR, "IACHR: Protecting democracy means protecting the independence of the judiciary" (2024) <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2024/216.asp>.
[126] IACHR, "Five Years After Protests Over the Suspension of National Assembly Powers, Venezuela Must Restore Judicial Independence" (2022) <https://www.oas.org/fr/CIDH/jsForm/?File=/en/iachr/media_center/PReleases/2022/070.asp>; IACHR, "IACHR Expresses Concern Over Reform of Organic Law of Supreme Court of Justice of Venezuela" (2022) <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2022/034.asp>; International Commission of Jurists (ICJ), "Venezuela: the authorities must stop undermining judicial independence" (2022) <https://www.icj.org/venezuela-the-authorities-must-stop-undermining-judicial-independence/>.
[127] IACHR, "IACHR Expresses Concern Over Reform of Organic Law of Supreme Court of Justice of Venezuela" (2022) <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2022/034.asp>.
[128] UN Human Rights Council, "Report of the independent international fact-finding mission on the Bolivarian Republic of Venezuela", A/HRC/48/69, 16 September 2021, para. 119, <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFMV/A.HRC.48.69_EN.pdf>.
[129] IACHR, "IACHR and UN expert reject legislative reforms that remove judges and prosecutors in El Salvador and calls for respect of guarantees for judicial Independence" (2021) <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/234.asp>.
[130] IACHR, "IACHR expresses concerns over judiciary reform in Mexico and warns of threats to judicial independence, access to justice, and rule of law" (2024) <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2024/213.asp>.
[131] IACHR, "Resolution 3/23 - Doc. 32: Human Rights, the instrumentalization of the Justice System and the serious risks to the Rule of Law in Guatemala" (2023).
[132] *Ibid.*, I. Introduction.
[133] IACHR, "Preliminary Observations: On-site visit to Guatemala" (2024), paras.17-27 <https://www.oas.org/en/iachr/reports/pdfs/2024/preliminary_observations_guatemala.pdf>; IACHR, "Resolution 3/23 - Doc. 32: Human Rights, the instrumentalization of the Justice System and the serious risks to the Rule of Law in Guatemala" (2023).

IACHR also warned against the widespread infiltration of organized crime in the judiciary in Ecuador, especially through corruption of judges and other judicial officials.[134]

D. Findings

71. In light of the above, the Court could consider recognizing in the advisory opinion that:

- judicial independence is inseparable from democracy for three reasons: (i) it is an indispensable condition for separation of powers; (ii) it protects the rule of law, especially in ensuring the impartial application of the law across society; and (iii) it seeks to preserve human rights and freedoms, including through reparations to victims and liability for those responsible for breaches of these rights and freedoms.

- judicial independence is a matter of fact and perception. Besides the obligation to ensure that judges are protected from the actual occurrence of undue influence by other branches of government or private actors, equally important is the appearance of independence and impartiality by the judiciary, in order to guarantee trust across society that the justice system is operating independently. The central element is the confidence which the courts in a democratic society must inspire in the public that justice is being served in an independent and impartial way.

- The following factors *inter alia* are pertinent to assess the independence of the judiciary: (i) the manner of appointment of its members; (ii) the duration of their term of office, especially if they benefit from tenure and irremovability; (iii) the existence of guarantees to protect against outside pressures; and (iv) whether the judicial body presents an appearance of independence.

- states should refrain from instrumentalizing, abusing, or "weaponizing" their justice system for political and electoral purposes, including its use to target political opponents. This constitutes one of the most pressing challenges to democratic stability in the region currently.

VI. THE COMBAT OF DIGITAL DISINFORMATION

A. The link between fighting disinformation and furthering democracy

72. In 1985, the IACtHR determined that "a society that is not well informed is not a society that is truly free".[135] The European Commission also warned that "[a] well-functioning, free, and pluralistic information ecosystem, based on high professional standards, is indispensable to a healthy democratic debate".[136] Accordingly, it is widely recognized that disinformation, understood "as false information

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[134] IACHR, "IACHR Asks Ecuador to Ensure Judicial Independence in the Face of Organized Crime Interference" (2024) <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2024/100.asp>.

[135] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 70.

[136] European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling online disinformation: a European Approach", COM(2018) 236 final (2018), 16 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236>.

that is disseminated intentionally to cause serious social harm",[137] can hinder democracy. In 2022, the UN Human Rights Council determined that "disinformation is a threat to democracy that can suppress political engagement, engender or deepen distrust towards democratic institutions and processes, and hinder the realization of informed participation in political and public affairs".[138] In 2023, Pedro Vaca Villarreal, the IACHR Special Rapporteur for Freedom of Expression, labeled the spread of disinformation as "one of the main challenges for modern democracies",[139] since "it is becoming impossible to establish common ground for public debate and determine decisively what is true and what is false".[140] Specifically, disinformation threats democracy because it (i) erodes trust in public institutions, the media, science and empirical evidence; (ii) affects policy-making processes by skewing public opinion; (iii) hinders the ability of citizens to make informed decisions; (iv) fabricates or exacerbates societal tensions, polarization, and distrust; (v) promotes radical and extremist ideas and activities; and (vi) impairs freedom of expression.[141]

73. Although disinformation is a multifaceted phenomenon that is still not yet fully understood, one can affirm that, whereas disinformation has always been present in the public space, digital media, particularly social media platforms, brings uniquely complex challenges.[142] Digital media allows false content to spread faster, wider, and more effectively, especially with regards to sensitive political issues.[143] As summarized by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, "disinformation is not a new phenomenon. What is new is that digital technology has enabled pathways for false or manipulated information to be created, disseminated and amplified by various actors for political, ideological or commercial motives at a scale, speed and reach never known before".[144]

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[137] UN Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, "Disinformation and freedom of opinion and expression", A/HRC/47/25, 13 April 2021, para. 15.

[138] Human Rights Council, "Resolution 49/21: Role of States in countering the negative impact of disinformation on the enjoyment and realization of human rights", A/HRC/RES/49/21, 8 April 2022, preamble.

[139] IACHR, Special Rapporteur for Freedom of Expression, "Disinformation, Pandemic, and Human Rights", OEA/Ser.L/V/II, CIDH/RELE/INF.25/23 (2022), 35 <https://www.oas.org/en/iachr/expression/reports/Disinformation-pandemics.pdf>.

[140] *Ibid.*

[141] European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling online disinformation: a European Approach", COM(2018) 236 final (2018), 16 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236>.

[142] Török, "The Fight against Disinformation in the Council of Europe, and the Relevant Case Law of the European Court of Human Rights", in Krotoszynski, Jr., Koltay and Garden (eds.), *Disinformation, Misinformation, and Democracy: Legal Approaches in Comparative Context* (CUP, 2025), 161 ("A broad consensus has emerged in recent years that although rumours, conspiracy theories and fabricated information are far from new, in the changed structure and operating mechanisms of the public sphere today we are faced with something much more challenging than anything to date, and the massive scale of this disinformation can even pose a threat to the foundations of democracy").

[143] European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling online disinformation: a European Approach", COM(2018) 236 final (2018), 16 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236>.

[144] UN Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, "Disinformation and freedom of opinion and expression", A/HRC/47/25, 13 April 2021, para. 2.

74. Digital media also facilitates the creation of personalized information spheres capable of becoming powerful echo chambers that allow disinformation campaigns to thrive.[145] Besides the effects of digital media, other contextual reasons could provide a breeding ground for the spread of disinformation nowadays: (i) the rapid societal changes that cause anxiety in the population, such as economic insecurity, rising extremism, and cultural shifts;[146] (ii) the undergoing profound transformations in the media sector, caused particularly by the decline of professional journalism and the rise of new platforms online;[147] and (iii) the business models of Internet companies, which is largely centered on the exploitation of personal information.[148]

75. Crucially, disinformation is not neutral or organic in society, but it is often the result of political fabrication to further the objectives of a certain ideological agenda or economic interest. Accordingly, it is unsurprising that governments, politicians, political parties, and other political players often make use of disinformation, since it may enhance their capacity to increase contact with their audience and influence the citizenry's views.[149] State actors rely on disinformation for a myriad of reasons: legitimize their rule; enforce populist narratives; spread fear and anxiety; harass and discredit political opponents, human rights supporters and the media; gather support for their more radical policies; mask the consequences of policy decisions by creating confusion and division; and shift blame for mistakes or the undesirable consequences of certain policies.[150]

B. European developments

76. This section will address: **(1)** the case-law of the ECtHR and **(2)** some European contextual and political developments on misinformation.

1. Jurisprudential developments

77. The evaluation of the ECtHR's jurisprudence will be divided into two parts: **(a)** general aspects; and **(b)** some specific elements.

a. General aspects

78. Although the ECtHR does not have a specific judgment on the issue of disinformation in the digital ecosystem, there are many judgments that may offer relevant guidance. In the first place, the

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[145] European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling online disinformation: a European Approach", COM(2018) 236 final (2018), 16 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236>.

[146] *Ibid.*

[147] *Ibid.*

[148] IACHR, Special Rapporteur for Freedom of Expression, "Disinformation, Pandemic, and Human Rights", OEA/Ser.L/V/II, CIDH/RELE/INF.25/23 (2022), 17 <https://www.oas.org/en/iachr/expression/reports/Disinformation-pandemics.pdf>.

[149] Marwick and Lewis, "Media Manipulation and Disinformation Online", Data & Society Research Institute (2017) <https://datasociety.net/wp-content/uploads/2017/05/DataAndSociety_MediaManipulationAndDisinformationOnline-1.pdf>.

[150] Santana and Mitozo, *Disinformation and democracy: The strategies for institutional dismantle in Brazil (2018–2022)* (Routledge, 2024).

ECtHR recognized that the internet is uniquely valuable to foster public debate, as it may enhance the public's access to and dissemination of information.[151] Yet, the Court also noted that the internet brings unique challenges to democracy, being potentially more dangerous than the traditional media and non-digital means of information dissemination.[152]

79. The key legal provision here is freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). Importantly, this right is not absolute and may — and, in certain circumstances, must — be limited or balanced with conflicting policy objectives, such as the fight against illegal or harmful content.[153] Overall, these limitations to speech must pursue one of the legitimate aims enumerated in applicable human rights instruments and be necessary in a democratic society.[154] In this regard, the ECtHR has established a high threshold to limit speech, especially if the information relates to public interest or the speaker is a public figure or a journalist.[155] This high threshold means that freedom of expression applies "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also […] those that offend, shock or disturb the State or any sector of the population".[156] This is imperative to secure the necessary elements of "pluralism, tolerance and broadmindedness without which there is no 'democratic society'".[157]

80. In light of this high threshold of protection, Article 10 of the ECHR safeguards speech even when the truthfulness of the information can be called into question.[158] This is particularly the case if the dissemination of information takes place during election periods, when the unrestricted flow of information is crucial. The case *Salov v. Ukraine* (2005) should be noted here. It concerns an individual who, in the context of a presidential election in Ukraine, disseminated false information about one of the candidates. He was later prosecuted for spreading such falsehoods, under the argument that it

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[151] *Cengiz and Others v. Turkey* (Applications nos. 48226/10 and 14027/11), Judgment, ECtHR, 1 December 2015, para. 52 ("user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression").

[152] *Editorial Board of PravoyeDelo and Shtekel v Ukraine* (Application no. 33014/05), ECtHR, Judgment, 5 May 2011, para. 63 ("The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter, undeniably, have to be adjusted according to the technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned").

[153] *European Convention on Human Rights* (1950), art.10(2) ("The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary").

[154] Registry of the ECtHR, "Guide on Article 10 of the European Convention on Human Rights: Freedom of expression" (2022), para. 61 <https://rm.coe.int/guide-on-article-10-freedom-of-expression-eng/native/1680ad61d6>.

[155] *Wingrove v. United Kingdom* (Application no. 17419/90), Judgment, ECtHR, 25 November 1996, para. 58 ("there is little scope under Article 10 para. 2 of the Convention for restrictions on political speech or on debate of questions of public interest").

[156] *Handyside v United Kingdom* (Application no. 5493/72), Judgment, ECtHR, 7 December 1976, para. 49.

[157] *Ibid.*

[158] Milanovic, "Viral Misinformation and the Freedom of Expression: Part I" (*EJIL: Talk!*, 13 April 2020) <https://www.ejiltalk.org/viral-misinformation-and-the-freedom-of-expression-part-i/>.

unduly interfered with the citizens' right to vote and the electoral process. The ECtHR ruled that his criminal prosecution amounted to a breach of freedom of expression. The Court stressed the fact that the statement in question "was not produced or published by the applicant himself"[159] and that there was no evidence that "he was intentionally trying to deceive other voters and to impede their ability to vote during the […] elections".[160] Even though the information was, as a matter of fact, untrue, the '[applicant] had not known whether this information was true or false while he was discussing it with others".[161] Lastly, the concerned dissemination had a "minor" social impact[162] and took place in the context of the presidential elections, a period in which the free circulation of information is of paramount importance.[163] As a matter of law, the ECtHR concluded that

> Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention.[164]

81. *Salov v. Ukraine* offers at least two important lessons to deal with online misinformation. The first is that the simple fact that the disseminated information is inaccurate or false is not, in and of itself, sufficient ground to conclude that such information does not constitute protected speech under Article 10 of the ECHR.[165] The second lesson is that a differentiation between misinformation and disinformation is warranted. While disinformation refers to "verifiably false, inaccurate or misleading information deliberately created and disseminated to cause harm or pursue economic or political gain by deceiving the public",[166] misinformation refers to "verifiably false, inaccurate or misleading information disseminated without an intention to mislead, cause harm, or pursue economic or political gain; users who share misinformation generally believe it to be true".[167] It follows from these definitions that the key factor for the distinction between misinformation and disinformation is not the falsehood of the disseminated information as such, since both notions (misinformation and disinformation) equally encompass the diffusion of false, inaccurate or misleading information. The key factors are rather: (i) the nature and magnitude of the social harms that the false information causes; (ii) the directness of the causal link between the false information and the harm; and (iii) the purpose or motive of the relevant agents who engaged in the spread of the false information.

82. Numerous aspects in *Salov v. Ukraine* indicate that the ECtHR's finding that the spread of falsehoods in the case was protected by Article 10 of the ECHR derives from the fact that the

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[159] *Salov v. Ukraine* (Application no. 65518/01), Judgment, ECtHR, 6 September 2005, para. 113.
[160] *Ibid.*
[161] *Ibid.*, para. 114.
[162] *Ibid.*
[163] *Ibid.*
[164] *Ibid.*, para. 113.
[165] Milanovic, "Viral Misinformation and the Freedom of Expression: Part I" (*EJIL: Talk!*, 13 April 2020) <https://www.ejiltalk.org/viral-misinformation-and-the-freedom-of-expression-part-i/>.
[166] CoE Steering Committee for Media and Information Society (CDMSI), "Guidance Note on countering the spread of online mis- and disinformation through fact-checking and platform design solutions in a human rights compliant manner" (2023), 6 <https://edoc.coe.int/en/internet/11885-guidance-note-on-countering-the-spread-of-online-mis-and-disinformation-through-fact-checking-and-platform-design-solutions-in-a-human-rights-compliant-manner.html>.
[167] *Ibid.*

circumstances *in casu* entailed misinformation rather than disinformation: (i) the applicant did not create the false information; (ii) there was no evidence that he had knowledge that the information was false or that he deliberately aimed at misleading or deceiving the voters by spreading such information; and (iii) the false information did not cause any significant harm. The fact that the ECtHR stressed these specific elements to not enter a finding of violation of Article 10 of the ECHR by Ukraine could mean that if the circumstances of the case were different, amounting to disinformation rather than misinformation, the Court could be willing to conclude that the spread of false information, in the specific form of disinformation, is not protected speech and, thus, it could be restricted by the state.

83. However, restrictions on false information are appropriate only in exceptional cases, when the false information causes an identifiable social harm of such an extent that there is a "pressing social need" warranting a state intervention to restrict it.[168] Following the ECtHR's settled jurisprudence, these limitations must be prescribed by law, pursue a legitimate aim enumerated in applicable human rights instruments, and be necessary and proportionate.[169] It is also important to stress that the default rule is always allowing the free dissemination of speech, meaning that anti-disinformation restrictions must be carefully designed and implemented to reduce collateral effects on otherwise protected speech. It follows that blanket bans on the dissemination of false information — without, for example, making the nuanced distinction between disinformation and misinformation — will likely fail the necessity and proportionality tests, since such bans entail an indiscriminate treatment of false information and, thus, they unduly infringe on freedom of expression.[170] Lastly, the appropriateness of the imposed measure is a highly context-dependent assessment, based on a complex myriad of factors that may vary from society to society and from state to state.[171] This is particularly true with regards to the need for more intrusive speech-restricting measures and criminalization.

84. In conclusion, the good faith and unharmful spread of false information should not necessarily be curtailed or met with criminal sanctions, in order to avoid negative consequences on free speech. At the same time, the dangers of disinformation to public debate and democratic institutions should also not be overlooked. The analysis whether certain remark should be considered prohibited disinformation is highly contextual and case-dependent, depending mainly on the nature of the

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168 *The Sunday Times v. the United Kingdom (no. 1)* (Application no. 6538/74), Judgment, ECtHR, 26 April 1979, para. 59.

169 Milanovic, "Viral Misinformation and the Freedom of Expression: Part I" (*EJIL: Talk!*, 13 April 2020) <https://www.ejiltalk.org/viral-misinformation-and-the-freedom-of-expression-part-i/>.

170 *Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda*, UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, (2017), para 2.a ("General prohibitions on the dissemination of information based on vague and ambiguous ideas, including 'false news' or 'non-objective information', are incompatible with international standards for restrictions on freedom of expression […] and should be abolished").

171 Milanovic, "Viral Misinformation and the Freedom of Expression: Part III" (*EJIL: Talk!*, 14 April 2020) <https://www.ejiltalk.org/viral-misinformation-and-the-freedom-of-expression-part-iii/> ("the impact of misinformation will vary from society to society, and so must state responses. Some might need more speech-restrictive measures, many will not – just like, say, it is justifiable for Germany to criminally punish the denial of the Holocaust, but most states do not need to do so. The virulence of the infodemic is simply not uniform").

information as such, the nature and scale of the impact it causes, the directness of the causal link between the speech and the harm, and the purpose of the actors who engaged in the fabrication and dissemination of falsehoods. This would imply that states should not commit, and should take measures to prevent, deliberate misinformation campaigns, understood as organized efforts aimed at disseminating, on a sufficiently large scale, information known to be false or unsupported by a sufficient factual basis, for the deliberate purpose to deceive, spread confusion, or derive economic gain.

b. Some specific elements

85. Three specific aspects of the ECtHR's jurisprudence warrant assessment in the discussion of disinformation: (i) the distinction between statements of fact and value judgments; (ii) abuse of rights; and (iii) the distinction between commercial and non-commercial information.

86. *First*, the ECtHR developed a distinction between statements of fact and value judgments/personal opinions, in order to offer a higher degree of protection to the latter. The key difference is that the existence of facts can be demonstrated or refuted through tangible evidence, while the truth of a value judgment is not susceptible to proof.[172] This entails that requiring proof of the truth of a value judgment constitutes an unreasonable demand which, in practical terms, is impossible to be fulfilled. For this reason alone, requiring such proof infringes freedom of opinion.[173] In other words, given that opinions remain outside the realm of objective verification, they are deserving of a more robust protection in comparison to false assertions of fact. It follows that if a national legislation or judicial decision fails to make the distinction between value judgments and statements of fact, treating them equally in terms of demonstrability, this legislation or decision is likely unlawful, for it amounts to an indiscriminate approach to the assessment of speech and, thus, a breach of freedom of expression.[174]

87. The determination whether a certain piece of information constitutes a factual allegation or a value judgment in a specific case will depend on the concrete circumstances at hand and the general tone of the statements.[175] It is particularly important to stress that there is a presumption that remarks about matters of public interest constitute value judgments rather than statements of fact, simply because they refer to the public interest and, thus, they warrant greater protection.[176]

88. However, even statements that constitute a value judgment may be restricted if considered excessive. This will be case when the statement does not have a sufficient factual basis to support it.[177]

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[172] *McVicar v. the United Kingdom* (Application no. 46311/99) Judgment, ECtHR, 7 May 2002 para. 83; *Lingens v. Austria* (Application no. 9815/82) Judgment, ECtHR, 8 July 1986, para. 46.
[173] *Morice v. France* (Application no. 29369/10) Judgment, ECtHR, 23 April 2015 para. 126; *Dalban v. Romania* (Application no. 28114/95) Judgment, ECtHR, 28 September 1999, para. 49; *Oberschlick v. Austria* (Application no. 11662/85) Judgment, ECtHR, 23 May 1991, para. 63.
[174] *OOO Izdatelskiy Tsentr Kvartirnyy Ryad v. Russia* (Application no. 39748/05) Judgment, ECtHR, 25 April 2017, para. 44; *Reichman v. France* (Application no. 50147/11) Judgment, ECtHR, 12 July 2016, para. 72.
[175] *Brasilier v. France* (Application no. 71343/01) Judgment, ECtHR, 11 April 2006, para. 37.
[176] *Paturel v. France* (Application no. 54968/00) Judgment, ECtHR, 22 December 2005, para. 37.
[177] *Pedersen and Baadsgaard v. Denmark* (Application no. 49017/99) Judgment, ECtHR, 17 December 2004, para. 76.

The necessity of a link between a value judgment and its supporting facts is a complex and case-dependent assessment, varying according to the specific circumstances of the case.[178] Importantly, the applicability of the requirement of a sufficient factual basis for value judgments must be assessed taking into account the proportionality of the interference with freedom of expression in light of the particular context of the case. For instance, if the statements were made in the context of or related to political debate on matters of general interest, these statements deserve a greater degree of protection, meaning that the requirement of a sufficient factual basis should be applied more restrictively or not applied at all. This is especially true in the context of elections, in which debating over the actions and ideologies of candidates is of fundamental importance. In this particular context, statements by candidates, elected officials and journalists deserve protection even when they lack a clear basis in fact.[179]

89. *Second*, besides the distinction between statements of fact and value judgments, the ECtHR established another argumentative avenue to assess the lawfulness of limitations on speech: the application of Article 17 of the ECHR (prohibition of abuse of rights), which determines that one's freedom of expression must be limited to the extent that it disproportionately impacts others' fundamental rights.[180] This rationale has been applied to allow states to curtail the dissemination of hateful, racist, xenophobic, and totalitarian ideas. If the situation deals with this type of harmful speech, the Court centers its analysis predominantly on Article 17, sometimes not even referring to Article 10. The reason for this is clear: while a genuine and lively political debate contributes to a functioning democracy, the dissemination of hateful, discriminatory and anti-democratic speech that seeks to abolish the rights of others is a barrier to democracy and, thus, it should be categorically excluded from the public sphere. Therefore, allowing such harmful speech under the guise of Article 10 could destabilize the very democratic principles upon which the ECHR is founded.[181]

90. Restrictions on disinformation could *a priori* be approached under the guise of the abuse clause under Article 17 of the ECHR but only if its false content consists of this specific and restricted type of harmful speech, such as racist and subversive content. A clear example in the ECtHR's jurisprudence is the prohibition of Holocaust denial, which is often approached under Article 17 instead of Article 10 of the ECHR.[182] Nevertheless, a broad application of Article 17 as a blunt tool to combat disinformation could be problematic.[183] Besides the fact that "disinformation" as such is a

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[178] *Feldek v. Slovakia* (Application no. 29032/95) Judgment, ECtHR, 12 July 2001, para. 86.
[179] *Lombardo and Others v. Malta* (Application no. 7333/06) Judgment, ECtHR, 24 April 2007, para. 60.
[180] *European Convention on Human Rights* (1950), art. 17 ("Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention").
[181] Shattock, "Should the ECtHR Invoke Article 17 for Disinformation Cases?" (*EJIL: Talk!*, 26 March 2021) <https://www.ejiltalk.org/should-the-ecthr-invoke-article-17-for-disinformation-cases/>.
[182] See *Garaudy v. France* (Application no. 65831/01), Decision as to the admissibility, ECtHR, 24 June 2003.
[183] Cannie and Voorhoof, "The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?", (2011) 29(1) Netherlands Quarterly of Human Rights 54-83; Shattock, "Should the ECtHR Invoke Article 17 for Disinformation Cases?" (*EJIL: Talk!*, 26 March 2021) <https://www.ejiltalk.org/should-the-ecthr-invoke-article-17-for-disinformation-cases/>; Verza, "Case law for policy making: an overview of ECtHR principles when countering disinformation", European Digital Media Observatory (2022), 7-8 <https://edmo.eu/wp-content/uploads/2022/01/Case-law-for-policy-making-Report-2022.pdf>.

notion difficult to conceptualize with sufficient precision, another significant challenge is that, different from the speech usually covered by Article 17, the deliberate spread of information that is known to be false will not necessarily be unlawful in all instances. This entails that restrictions upon disinformation, particularly if the information as such is not unlawful, must be assessed under the traditional three-pronged test — (i) prescription by law; (ii) legitimate aim; and (iii) necessity in a democratic society — including the "pressing social need" and proportionality principles. The blunt application of Article 17 of the ECHR to disinformation would likely set these safeguards aside, leading to unnecessary uncertainty and harms to the free flow of information that a democratic order requires.

91. *Third*, the ECtHR has also maintained a distinction between commercial and non-commercial information in the application of Article 10 of the ECHR. This difference is necessary because speech with a purely commercial nature is not intended to contribute to a debate on matters of public interest, entailing that states have a broader discretion to limit speech in commercial matters and advertising.[184] Thus, if the concerned disinformation is considered to be akin to commercial advertising and it is not part or does not have a clear function in the political debate in the state, the state has a wider margin of appreciation to regulate or restrict such disinformation. This finding is even more compelling when disinformation is deliberately disseminated by automated and bot accounts on behalf of specific actors, transforming disinformation into a sophisticated method of online propaganda.

2. Political developments

92. The ELI stressed that "[p]ublic authorities must provide an effective legal framework against disinformation".[185] In this regard, the EU and the CoE have adopted a series of measures to tackle disinformation as a means to protect democracy in Europe. For instance, in 2023 the CoE adopted the Guidance Note on countering the spread of online mis- and disinformation through fact-checking and platform design solutions in a human rights compliant manner.[186] In 2018, the European Commission had recognized the complexity of the challenge of fighting disinformation without hindering freedom of speech.[187] Importantly, the Commission called for a nuanced approach, stressing that false or inaccurate content may still be protected under freedom of expression, particularly in the context of elections. This entails that disinformation must be addressed differently than illegal content,

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[184] *markt intern Verlag GmbH and Klaus Beermann v. Germany* (Application no. 10572/83), Judgment, 20 November 1989, para. 33; *Sekmadienis Ltd. v. Lithuania* (Application no. 69317/14), Judgment, 30 January 2018, para. 73.

[185] ELI, "Charter of Fundamental Constitutional Principles of a European Democracy" (2024), principle 6 <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Charter_of_Fundamental_Constitutional_Principles_of_a_European_Democracy.pdf>.

[186] CoE Steering Committee for Media and Information Society (CDMSI), "Guidance Note on countering the spread of online mis- and disinformation through fact-checking and platform design solutions in a human rights compliant manner" (2023) <https://edoc.coe.int/en/internet/11885-guidance-note-on-countering-the-spread-of-online-mis-and-disinformation-through-fact-checking-and-platform-design-solutions-in-a-human-rights-compliant-manner.html>.

[187] European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling online disinformation: a European Approach", COM(2018) 236 final (2018) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236>.

where removal of the content itself is often warranted.[188] In this regard, the Commission proposed four overarching principles and objectives:

- First, to improve transparency regarding the origin of information and the way it is produced, sponsored, disseminated and targeted in order to enable citizens to assess the content they access online and to reveal possible attempts to manipulate opinion.

- Second, to promote diversity of information, in order to enable citizens to make informed decisions based on critical thinking, through support to high quality journalism, media literacy, and the rebalancing of the relation between information creators and distributors.

- Third, to foster credibility of information by providing an indication of its trustworthiness, notably with the help of trusted flaggers, and by improving traceability of information and authentication of influential information providers.

- Fourth, to fashion inclusive solutions. Effective long-term solutions require awareness-raising, more media literacy, broad stakeholder involvement and the cooperation of public authorities, online platforms, advertisers, trusted flaggers, journalists and media groups.[189]

93. In December 2020, the European Commission presented its Democracy Action Plan, aimed at empowering citizens and building more resilient democracies across the EU. One of its three priorities was countering disinformation by, *inter alia*, "[b]oosting media literacy, raising awareness and support for civil society".[190] In 2018, the EU also adopted the Code of Practice on Disinformation, a non-binding document issued by the European Commission and signed by 42 online platforms, advertising groups, and civil society organizations, such as Meta (Facebook/Instagram/Messenger/WhatsApp), Google (Google Advertising/Search/YouTube), and TikTok.[191] The Code's goal is to establish self-regulatory standards to fight disinformation, focusing on, *inter alia*, demonization through measures aimed at preventing disinformation actors from profiting via advertising revenues; greater transparency of political advertising; ensuring integrity of services, including through mechanisms to enhance the detection and removal of manipulative practices used to spread disinformation, such as fake accounts, bots, and impersonation; and empowering users, researchers, and fact-checkers. Following a series of reforms, including a significant strengthening in 2022,[192] in February 2025 the European Commission and the European Board for Digital Services

[188] *Ibid.*
[189] *Ibid.*
[190] European Commission, "European Democracy Action Plan" (2020), 2 <https://www.europarl.europa.eu/legislative-train/carriage/european-democracy-action-plan/report?sid=9101>.
[191] European Commission, "Signatories of the 2022 Strengthened Code of Practice on Disinformation" (16 June 2022) <https://digital-strategy.ec.europa.eu/en/library/signatories-2022-strengthened-code-practice-disinformation>.
[192] European Commission, "The 2022 Code of Practice on Disinformation" (2025) <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>.

endorsed the integration of the Code of Practice on Disinformation as a Code of Conduct on Disinformation into the framework of the Digital Services Act (DSA).[193]

94. In conclusion, these measures reveal that the EU's and the CoE's anti-disinformation strategy focuses on more structural or systemic measures to raise resilience against disinformation, including via partnerships with online platforms. Except in very limited cases, prohibitions of content dissemination are usually avoided. As András Koltay explained,

> Within the framework of the protection of freedom of expression in Europe, according to the current doctrine, deliberate lies (intentional publication of untruthful information) may not be subject to a general prohibition. This does not mean that it is not permissible in certain circumstances to prohibit false factual statements but that a general prohibition is usually understood to be incompatible with the doctrine of freedom of speech.[194]

95. Bernát Török also concluded that European institutions seem to assume that significantly restricting communication in the fight against disinformation would inevitably breach freedom of speech.[195] He added that these institutions are aware that "solving the aggravating problem of disinformation cannot be achieved by means of restricting public discourse. It is difficult to imagine such wide-scale interventions without violating the basic principles of the democratic formation of public opinion, and the problem in any case has deeper roots than could be successfully countered by enforcing new prohibitions".[196] This appears to be a reasonable assessment.

C. Relevance in the American context

96. This section will address: **(1)** some American contextual and political developments and **(2)** the case-law of the IACtHR that could be relevant for the combat of misinformation.

1. Political and contextual developments

97. The severe challenge of misinformation to democratic stability in Latin America, particularly the election process, is a widely documented phenomenon. Studies have reported that, recently, local political actors have harnessed social media in order to carry out digital disinformation campaigns,

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[193] European Commission, "The Code of Conduct on Disinformation" (2025) <https://digital-strategy.ec.europa.eu/en/library/code-conduct-disinformation>.

[194] Koltay, "Freedom of Expression and the Regulation of Disinformation in the European Union", in Krotoszynski, Jr., Koltay and Garden (eds.), *Disinformation, Misinformation, and Democracy: Legal Approaches in Comparative Context* (CUP, 2025), 137.

[195] Török, "The Fight against Disinformation in the Council of Europe, and the Relevant Case Law of the European Court of Human Rights", in Krotoszynski, Jr., Koltay and Garden (eds.), *Disinformation, Misinformation, and Democracy: Legal Approaches in Comparative Context* (CUP, 2025), 188.

[196] *Ibid.*, 195.

particularly during the electoral process,[197] in Argentina,[198] Brazil,[199] Cuba,[200] El Salvador,[201] Mexico,[202] and Venezuela.[203] Scholars indicate that the combination of three key factors made Latin America particularly vulnerable to online disinformation. *First*, there is a general low trust in governmental institutions and traditional media after decades of poor governance and high degrees of corruption.[204] By 2022, only 19% of people in major Latin American countries believe the professional media to be independent from political influence.[205] Besides lack of trust, there has also been a widespread decline of traditional journalism in the region due to financial constraints, giving rise to more informal and less institutionalized forms of media.[206]

98. *Second*, the region is plagued by an acute level of societal and political polarization. The latter favors the spread of misinformation due to its tendency to create echo chambers in society, which, in turn, stimulates the uncritical propagation of disinformation among like-minded people.[207] Polarization also makes citizens less willing to engage with their political counterparts and more susceptible to accepting information uncritically if it aligns with their beliefs. Although political polarization has grown worldwide, it has disproportionally affected Latin America, giving rise to more divisive, confrontational, and polarized societies in the region.[208] In 2023, the UNDP reported:

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[197] Renzullo N., "Digital Disinformation Trends in Latin America: Organisation, Goals, and Policy Pushback", German Institute for Global and Area Studies (GIGA) (2025), 6 <https://pure.giga-hamburg.de/ws/files/53387773/DigiTraL_Policy_Study_05-Renzullo.pdf>.

[198] Amado, "Citizen's participation on social media against state-sponsored disinformation during the pandemic in Argentina", in Echeverría *et al.* (eds.), *State-Sponsored Disinformation Around the Globe: How Politicians Deceive their Citizens* (Routledge, 2024), 157-173.

[199] Santana and Mitozo, *Disinformation and democracy: The strategies for institutional dismantle in Brazil (2018–2022)* (Routledge, 2024); Ozawa *et al.*, "How Disinformation on WhatsApp Went from Campaign Weapon to Governmental Propaganda in Brazil", (2023) 9(1) *Social Media + Society*.

[200] Pérez and Gámiz, "From censorship to disinformation: Cuba's official discourse on contentious activism", in Echeverría et al. (eds.), *State-Sponsored Disinformation Around the Globe: How Politicians Deceive their Citizens* (Routledge, 2024), 317-332.

[201] Luna, "¡Ya está aquí! el monstruo de la (des)información en El Salvador: asciende retos, alcances y posibilidades de la alfabetización mediática e informacional", (2019) 13 *Abierta Anuario de Investigación* 70-102.

[202] Iida *et al.*, "Fake news and its electoral consequences: A survey experiment on Mexico", (2024) 39(3) *AI & Society* 1065-1078; Sánchez and Pereyra-Zamora, "Infodemics in Mexico: A look at the 'Animal Político' and 'Verificado' fact-checking platforms", (2022) 81(8) *Health Education Journal* 982-992.

[203] Berwick, "An Autocrat's Playbook: Nicolás Maduro's Use of Social Media to Erode Venezuelan Democracy", (2024) *Berkeley Undergraduate Journal* 38(1) 1-23; Torrealba and Viloria, "Disinformation in Venezuela: Media Ecosystem and Government Controls", (2024) <https://www.cries.org/wp-content/uploads/2024/06/010-Mariela-Torrealba-Ysabel-Viloria.pdf>.

[204] Lupu *et al.*, "Social Media Disruption: Messaging Mistrust in Latin America", (2020) 31(3) *Journal of Democracy* 160-171.

[205] Suárez, "Politización de la desinformación en contextos de información devaluada. El caso Latinoamérica", (2022) 4(17) *Revista Internacional de Comunicación y Desarrollo* 1-18.

[206] IACHR, Special Rapporteur for Freedom of Expression, "Disinformation, Pandemic, and Human Rights", OEA/Ser.L/V/II, CIDH/RELE/INF.25/23 (2022), 35 <https://www.oas.org/en/iachr/expression/reports/Disinformation-pandemics.pdf>.

[207] Barberá, "Social Media, Echo Chambers, and Political Polarization", in Tucker and Persily (eds.), *Social Media and Democracy* (CUP, 2020), 34-55.

[208] Sarsfield *et al.,* "Introduction: The New Polarization in Latin America", 2024(66) *Latin American Politics and Society*, Special Issue 2: The New Polarization in Latin America: Sources, Dynamics, and Implications for Democracy, 1-23; McCoy, "Latin America's Polarization in Comparative Perspective", 2024(66) *Latin American Politics and Society*, Special Issue 2: The New Polarization in Latin America: Sources, Dynamics, and Implications for Democracy, 161-178.

> Growing political polarization is a global trend, however, LAC [Latin America and the Caribbean] is the region in which polarization has increased the most in the last 20 years. In the early 2000s, LAC scored well below the global average and was the second least polarized region in the world. Starting around 2015, however, polarization started to grow faster than the global average, surpassing it around 2017. Today, LAC is amongst the most polarized regions in the world, second to only Eastern Europe and Central Asia.[209]

99. *Third*, the rise of populism in the region since the early 2000s, from both ends of the political spectrum (left and right).[210] Populism promotes disinformation because propaganda is a necessary tool to boost the polarization, suspicion, and us-versus-them mentality that are characteristic of populist discourses.[211] Populism also fosters institutional dismantling and discreditation of legitimate institutions, as populist governments cement their power not through the rule of the law and public institutions, but through the messianic faith in leaders who personalize the "the will of the people".[212]

2. Jurisprudential developments

100. The assessment of the IACtHR's case-law will be divided into the following parts: **(a)** general aspects; **(b)** the role of truthfulness; **(c)** the prohibition of prior censorship; **(d)** the exceptional use of criminal sanctions; and **(e)** the existing case-law on disinformation

a. General aspects

101. The IACtHR has consistently maintained that freedom of thought and expression under Article 13 of the ACHR is crucial for any democratic society, particularly with regards to public-interest matters.[213] As for the substantive content of this freedom, it protects not only "the right to seek, receive, and disseminate ideas and information of any kind, but also to receive information and be informed about the ideas and information disseminated by others".[214] The IACtHR also explained that the democratic value of freedom of thought and expression stems from the fact that this right has both an individual and a social dimension: "on the one hand, it requires that no one may be arbitrarily harmed or impeded from expressing his own thought and, therefore, it represents a right of

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[209] UNDP, "'With me, or against me': The intensification of political polarization in Latin America and the Caribbean" (28 February 2023) <https://www.undp.org/latin-america/blog/me-or-against-me-intensification-political-polarization-latin-america-and-caribbean>.

[210] Campos and Casas, "Rara Avis: Latin American populism in the 21st century", (2021) 70 *European Journal of Political Economy* 1-18; Suárez, "Politización de la desinformación en contextos de información devaluada. El caso Latinoamérica", (2022) 4(17) *Revista Internacional de Comunicación y Desarrollo* 1-18.

[211] Flew, "The Global Trust Deficit Disorder: A Communications Perspective on Trust in the Time of Global Pandemics", (2021) 71(2) *The Journal of Communication* 163-186.

[212] Suárez, "Politización de la desinformación en contextos de información devaluada. El caso Latinoamérica", (2022) 4(17) *Revista Internacional de Comunicación y Desarrollo* 1-18; Curato and Fossati, "Authoritarian Innovations: Crafting support for a less democratic Southeast Asia", (2020) 27(6) *Democratization* 1006-1020.

[213] *Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, paras. 112 and 113; *Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, paras. 82 and 83; *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 87.

[214] *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 53.

every individual; on the other hand, it implies a collective right to receive any information and to know the expression of the thought of others".[215]

102. The democratic function of freedom of expression became clear in *Kimel v. Argentina*, when the Court regarded "the right to freedom of thought and expression as a milestone of democracy".[216] It also stated that "freedom of expression is embedded in the primary and fundamental public order of democracy, which is inconceivable without free debate".[217] In *Claude-Reyes et al. v. Chile*, the Court further explained that

> [f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.[218]

103. Echoing the ECtHR, in *Canese v. Paraguay* the IACtHR stressed the importance of freedom of thought and expression in the context of electoral campaigns, reasoning that this freedom constitutes "the cornerstone for the debate during the electoral process, since [it] become[s] an essential instrument for the formation of public opinion among the electorate, strengthen[s] the political contest between the different candidates and parties taking part in the elections, and [is] an authentic mechanism for analyzing the political platforms proposed by the different candidates".[219] In this regard, in 2019, the IACHR adopted the Guide to Guarantee Freedom of Expression Regarding Deliberate Disinformation in Electoral Contexts.[220]

b. The role of truthfulness

104. The application of prior conditions to expression, including truthfulness, violates the freedom of expression under Article 13 of the ACHR,[221] meaning that the protection under this right is not limited to correct statements and information only, but it also applies to untrue assertions. As summarized by Paula Roko, "[t]ruthfulness is not […] a condition that can be legally demanded of journalists, media outlets or individuals who express themselves publicly".[222] The main implication

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[215] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 30; *"The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73, para. 64;

[216] *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 78.

[217] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 69.

[218] *Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 85.

[219] *Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 88.

[220] IACHR Special Rapporteur for Freedom of Expression, "Guide to guarantee freedom of expression regarding deliberate disinformation in electoral contexts" (2019) <https://www.oas.org/en/iachr/expression/publications/Guia_Desinformacion_VF%20ENG.pdf>.

[221] IACHR Special Rapporteur for Freedom of Expression, "Background and Interpretation of the Declaration of Principles", Principle 7, <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=132>.

[222] Roko, "Old Standards, New Challenges: Keys to Addressing Internet Disinformation in Inter-American Jurisprudence", Centro de Estudios en Libertad de Expresión y Acceso a la Información, Palermo University Law School (2024), 16

here is that broad restrictions on speech on the basis of vague and amorphous concepts, such as "fake news" or "falsehoods", constitute an unacceptable interference on freedom of expression and, thus, they contradict the ACHR. As argued by the IACtHR,

> it would be a contradiction to invoke a restriction to freedom of expression as a means of guaranteeing it. Such an approach would ignore the primary and fundamental character of that right, which belongs to each and every individual as well as the public at large. A system that controls the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right to information that this same society has.[223]

105. Following the case-law of the ECtHR, the IACtHR also differentiates between statements of facts and opinions or value judgments, claiming that truth or falsehood applies solely to the former.[224] Moreover, the IACtHR also recognizes that certain types of speech deserve enhanced protection or are especially protected by Article 13 of the ACHR, because they refer to matters of public interest.[225] In *Herrera-Ulloa v. Costa Rica*, the Court determined that "it is logical and appropriate that statements concerning public officials and other individuals who exercise functions of a public nature should be accorded, in the terms of Article 13(2) of the Convention, a certain latitude in the broad debate on matters of public interest that is essential for the functioning of a truly democratic system".[226]

106. However, the IACtHR noted that truthfulness may become an important value of public debate in certain circumstances, despite the fact that truthfulness of the content conveyed is not a general and necessary condition for protection under Article 13 of the ACHR. In *Kimel v. Argentina*, the Court determined that journalists have a due diligence obligation to substantiate or fact-check their sources: "journalists have the duty to verify reasonably, though not necessarily in an exhaustive manner, the truthfulness of the facts supporting their opinion".[227] Crucially, the Court recognized "the right [of citizens] not to receive a manipulated version of the facts".[228] This entails that "journalists have the duty to keep a critical distance from sources and match the information against other relevant data".[229] In other words, before publishing, they should carry out a minimum degree of confirmation

<https://www.palermo.edu/Archivos_content/2024/cele/septiembre/2024_09_30_addressing_internet_disinformation_CELE.pdf>.

[223] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 77.

[224] *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, paras. 92 and 93.

[225] *Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 103 ("in the case of public officials, individuals who exercise functions of a public nature, and politicians, a different threshold of protection should be applied, which is not based on the nature of the subject, but on the characteristic of public interest inherent in the activities or acts of a specific individual. Those individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate. Therefore, in the context of the public debate, the margin of acceptance and tolerance of criticism by the State itself, and by public officials, politicians and even individuals who carry out activities subject to public scrutiny, must be much greater than that of individuals.")

[226] *Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 128.

[227] *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 79.

[228] *Ibid.*

[229] *Ibid.*

to verify that the facts are not wholly implausible.[230] This entails that untruthful information published by a journalist may still be protected speech, as long as such publication was carried out with reasonable diligence and in good faith.[231]

107. What is key here is that journalists comply with the principles of responsible and ethical journalism, that is, "to act in good faith, provide accurate and reliable information, objectively reflect the opinions of those involved in a public debate, and refrain from pure sensationalism".[232] The more precise standard that the IACtHR applies to determine if a journalist should be punished for the dissemination of damaging falsehoods involving public officials and public affairs is extreme negligence or actual malice,[233] namely "the public official or public figure who alleges harm must demonstrate that the person who made the statement did so with full intent to cause harm and with knowledge that false information was being disseminated or with a blatant disregard for the truth of the facts".[234]

108. In *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, the Court extended this rationale to statements by state authorities, indicating that such authorities have the obligation to "verify in a reasonable manner, although not necessarily exhaustively, the truth of the facts on which their opinions are based".[235] Importantly, the Court added that "this verification should be performed subject to a higher standard than that used by private parties, given the high level of credibility the authorities enjoy and with a view to keeping citizens from receiving a distorted version of the facts".[236] Hence, public officials have a heightened burden of verification in exercising the right to freedom of expression, precisely because of their governmental position. It follows that public officials should not make, endorse, or propagate statements that they know, or should reasonably know, are disinformation.[237]

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[230] Roko, "Old Standards, New Challenges: Keys to Addressing Internet Disinformation in Inter-American Jurisprudence", Centro de Estudios en Libertad de Expresión y Acceso a la Información, Palermo University Law School (2024), 11 <https://www.palermo.edu/Archivos_content/2024/cele/septiembre/2024_09_30_addressing_internet_disinformation_CELE.pdf>.

[231] *Ibid.*

[232] *Granier et al. (Radio Caracas Television) v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, para. 139.

[233] See Carter, "Actual Malice in the Inter-American Court of Human Rights", (2013) 18(4) *Communication Law and Policy* 395-423.

[234] *Moya Chacón et al. v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 23, 2022. Series C No. 451, para. 53.

[235] Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 131.

[236] *Ibid.* See also *Ríos et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 194, para. 139.

[237] Roko, "Old Standards, New Challenges: Keys to Addressing Internet Disinformation in Inter-American Jurisprudence", Centro de Estudios en Libertad de Expresión y Acceso a la Información, Palermo University Law School (2024), 38 <https://www.palermo.edu/Archivos_content/2024/cele/septiembre/2024_09_30_addressing_internet_disinformation_CELE.pdf>.

c. The prohibition of prior censorship

109. Article 13(2) of the ACHR determines that "[t]he exercise of the [freedom of thought and expression] shall not be subject to prior censorship but shall be subject to subsequent imposition of liability". This provision is unique to the ACHR, since no other international human rights instrument contains a broad prohibition of prior censorship such as this. The only textual exception to this prohibition can be found in Article 13(4), which determines that "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".[238] The IACtHR has steadily held that any other preventive measure that entails prior censorship breaches freedom of thought and expression under Article 13 of the ACHR.[239] Accordingly, the main challenge here is how to accommodate the fight against disinformation and the prohibition of prior censorship.

110. In this regard, the ACtHR has maintained that "the freedom of thought and expression is not an absolute right",[240] as Articles 13 and 30 of the ACHR foresee the possibility of establishing restrictions to freedom of expression, whose legality is conditioned on three requirements:[241] (i) a legal basis, entailing that the restrictions "must be expressly, previously and strictly limited by law";[242] (ii) the legitimate aim; and (iii) the necessity of the measure in a democratic society, namely the measure "should in no way restrict, beyond what is strictly necessary, the full exercise of freedom of expression or become either direct or indirect means of prior censorship".[243] This last condition also requires showing of "a compelling public interest" justifying the restriction.[244] This entails that it is not enough that a law performs a useful or desirable purpose, but it is rather necessary that the restriction is "justified by reference to collective purposes which, owing to their importance, clearly outweigh the social need for the full enjoyment of the right that Article 13 guarantees and do not limit the right established in this Article more than is strictly necessary".[245] Therefore, "the restriction must be proportionate to the interest that justifies it and closely tailored to accomplishing this legitimate objective, interfering as little as possible with the effective exercise of the right to freedom of expression".[246] The imposition of measures to safeguard the integrity of public information and fight disinformation must be adopted in light of these standards.

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238 Additionally, Article 13(5) of the ACHR refers to speech not protected by the right to freedom of expression under Article 13, that is, "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".

239 Roko, "Old Standards, New Challenges: Keys to Addressing Internet Disinformation in Inter-American Jurisprudence", Centro de Estudios en Libertad de Expresión y Acceso a la Información, Palermo University Law School (2024), 29 <https://www.palermo.edu/Archivos_content/2024/cele/septiembre/2024_09_30_addressing_internet_disinformation_CELE.pdf>.

240 *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 54.

241 Hennebel and Tigroudja, *The American Convention on Human Rights: A Commentary* (OUP, 2022), 485.

242 *Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 79.

243 *Ibid.*

244 *Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 96.

245 *Ibid.*

246 *Ibid.*

d. The exceptional use of criminal sanctions

111. The IACtHR has maintained that, given the importance of preserving the free of flow of ideas, the imposition of criminal sanctions is an exceptional measure of last resort (*ultima ratio*) to punish the abusive exercise of the right to freedom of expression.[247] In *Kimel v. Argentina*, the Court recognized that there could be circumstances in which criminal punishment, including deprivation of liberty, would be warranted.[248] Nonetheless, "this possibility should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception".[249]

e. The case-law on disinformation

112. The IACtHR addressed disinformation specifically in its *Advisory Opinion on Climate Emergency and Human Rights*, issued on 29 May 2025. Even though the Court focused on the link between disinformation and environmental risks, the opinion offers important insights in the area of democracy protection. Perhaps the most important lesson from the Court's reasoning is that combating disinformation requires the recognition of the complexity of this phenomenon as well as the need for a multifaceted array of societal interventions, involving the state and private actors. In this regard, the Court adopted four different but complementary perspectives with regards to the fight against disinformation. The first perspective refers to the obligation of states to not disseminate disinformation themselves:

> States must ensure that information related to the climate emergency issued by public authorities is clear, accurate, reliable, accessible, and timely, thereby enabling the public to exercise democratic and critical scrutiny over its content. The Court underscores that States must serve as conduits of science-backed information. In this regard, they must refrain from disseminating information that is not supported by the best available science or by pertinent local, traditional, or indigenous knowledge.[250]

113. The second perspective refers to the obligation of states to prevent and stop the dissemination of disinformation by private actors, through the implementation of measures in full compliance with human rights, especially freedom of thought and expression. The Court explained that Article 13 of the ACHR protects "the fundamental right of society to receive truthful information from diverse sources, essential for informed and democratic decision-making".[251] When disinformation hinders this collective aspect, the state must take adequate counter-disinformation measures, in order to guarantee access to information and protect substantive rights threatened in the context of the democratic backsliding. In the words of the Court:

> When false or misleading information impairs public understanding of the climate emergency and its impacts on rights such as life, health, and a healthy environment, States are obliged to adopt appropriate measures to safeguard the integrity of public information, while simultaneously upholding freedom of

[247] *Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 73.
[248] *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 78.
[249] *Ibid.*
[250] *The Climate Emergency and Human Rights*. Advisory Opinion AO-32/25 of May 29, 2025. Series A No. 32, para. 525.
[251] *Ibid.*, para. 526.

> expression and avoiding censorship. States must exercise due diligence in fulfilling this obligation, given the importance of disseminating truthful information in light of the impacts of climate change and their responsibilities regarding prevention and protection for individuals under their jurisdiction.[252]

114. The Court stressed that counter-disinformation measures imposed by the state must comply with freedom of expression, meaning that states "must refrain from imposing restrictions that, under the pretext of combating disinformation, amount to prior censorship or arbitrarily or disproportionately limit freedom of expression".[253] In other words, state measures to counter disinformation must not prevent "a pluralistic, open, and robust public debate".[254]

115. The third perspective recognizes that, given the serious risks arising from disinformation and other forms of informational manipulation, private actors also have an important role, alongside the state, in the combat of disinformation.[255] The IACtHR explained that "access to truthful and reliable information in the [public sphere] requires the joint commitment of both States and private actors to prevent and counter disinformation".[256] Specifically, "the Court call[ed] upon civil society, the media, and other actors within the informational sphere to play an active role in generating and disseminating reliable content concerning climate change, based on the best available science and the recognition of indigenous, traditional, and local knowledge".[257] In this regard, the Court stressed the importance of fact-checking tools and other mechanisms for monitoring the quality and accuracy of information, since these instruments may strengthen informational transparency and public trust.[258]

116. The fourth perspective focusses on media and information literacy by society at large, recognizing the importance that "users [of online content providers] acquire the skills and knowledge necessary to interact critically, safely, and consciously with digital content".[259] The Court stressed that states cannot achieve this goal alone, urging them to collaborate with businesses, digital technology developers, technology platforms, social media networks, and the media towards enhancing media and information literacy among the population.[260]

D. Findings

117. In light of the above, the Court could consider recognizing in the advisory opinion that:

- Article 13 of the ACHR has an individual and social dimension, entailing that society as a whole has the fundamental right to receive truthful information from diverse sources. This is essential for informed decision-making in the context of democratic processes, especially elections.

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[252] *Ibid.*
[253] *Ibid.*, para. 527.
[254] *Ibid.*
[255] *Ibid.*, para. 528.
[256] *Ibid.*, para. 529.
[257] *Ibid.*, para. 528.
[258] *Ibid.*
[259] *Ibid.*, para. 529.
[260] *Ibid.*

- disinformation should receive different treatment than misinformation, as the former entails the mass dissemination of information knowing it to be false and with the intention of deceiving the public, in whole or part, or cause other harms. By its turn, misinformation refers to the spread of false, inaccurate, or misleading information without intent to deceive or cause harm. States have greater latitude to restrict disinformation.

- the differentiation between disinformation and misinformation aligns with the consolidated understanding that, as a general rule, Article 13 of the ACHR also protects untrue or false information. Given its bad faith and harmful consequences, disinformation is less deserving of protection under this provision, granting to states greater margin to curtail this type of information.

- disinformation poses a threat to democracy, because: (i) it erodes trust in public institutions, science, and media; (ii) skews public opinion and policy-making; (iii) fosters public confusion; (iv) hinders informed decision-making by the population and authorities; (v) fuels polarization, extremism, and radicalization in society; and (vi) undermines freedom of expression itself.

- digital media has radically intensified the dangers of disinformation to democracy, as it allows the rapid and wide dissemination of falsehoods as well as the targeted distribution of untrue information to specific groups, giving rise to personalized echo chambers. This is particularly important with regards to vulnerable groups, as their members often face structural barriers in accessing reliable and culturally appropriate information.

- public officials have an obligation to not make, endorse, promote, or disseminate disinformation, especially for electoral purposes. This includes an obligation to not use disinformation to legitimize power, discredit opponents, or spread fear. This obligation should be implemented in light of the heightened burden of verification that public officials have while exercising their right to freedom of expression.

- when disinformation concretely and seriously impacts democracy, particularly in the context of elections, states are required to adopt appropriate measures to safeguard the integrity of public debate, guarantee access to information, and protect substantive rights threatened in the context of democratic deterioration. These measures must be designed and implemented with the understanding that restrictions on the free dissemination of information are appropriate only in exceptional cases, when the false information causes an identifiable social harm of such a serious extent that there is a compelling public interest warranting a state intervention to restrict it. These measures must be grounded in respect for the right to freedom of expression and the prohibition of censorship, as regulated in Article 13 of the ACHR and understood in the jurisprudence of the IACtHR. States must ensure that their anti-disinformation measures are provided for by law, pursue a recognized legitimate aim, and are necessary and proportionate to protect this interest, having due regard to the centrality of freedom of expression to democracy.

- anti-disinformation measures must not encompass the imposition of restrictions that, under the pretext of combating disinformation, entail prior censorship and arbitrarily or disproportionately

limit freedom of expression. These measures must differentiate between statements of facts and opinions or value judgments, with the understanding that requiring truth, proof or verification of opinions or value judgments constitutes an unreasonable demand that infringes freedom of expression. Also, states should avoid the imposition of blanket bans or broad prohibitions of speech, especially when based on vague notions, such as "fake news". Sufficient guarantees and remedies must be put in place to ensure that responses to disinformation are not instrumentalized against political opponents, journalists, human rights defenders, and civil society actors.

- to be effective, anti-disinformation measures must be structural, multidimensional and multi-stakeholder, addressing the root causes and societal tensions that allow disinformation to thrive. Thus, states should consider the implementation of strategies to build societal resilience and media and information literacy, aimed at empowering individuals across the social fabric to recognize, critically assess, and resist disinformation on their own. In essence, states must prioritize systemic solutions (such as platform regulation, fact-checking, and media literacy) over prohibitions that risk censorship.

- combating disinformation is a shared responsibility of states and private actors, especially technology platforms, social media networks, civil society, the media, and informed citizens. In this regard, technology companies and governments must collaborate to put in place mechanisms for monitoring the quality and accuracy of information, fact-checking tools that reinforce public trust and informational transparency and accountability, and mechanisms to detect and remove manipulative practices used to spread disinformation, such as fake accounts and bots.

- Even in the context of disinformation, criminal sanctions must remain exceptional, reserved for extreme harm and malice.

VII. THE COMBAT OF CORRUPTION

A. The link between fighting corruption and furthering democracy

118. Although international law lacks a standard definition of corruption, a widely used concept[261] is the broad definition proposed by Transparency International: corruption is "the abuse of entrusted power for private gain".[262] Three key arguments demonstrate the connection between fighting corruption and enhancing democracy. *First*, corruption could undermine democratic institutions indirectly, in that individuals and the society as a whole will lose faith in such institutions if they are

[261] UN Human Rights Council, "Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights", A/HRC/28/73, 5 January 2015, para. 5; ELI, "Charter of Fundamental Constitutional Principles of a European Democracy" (2024), 66 <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Charter_of_Fundamental_Constitutional_Principles_of_a_European_Democracy.pdf>.
[262] Transparency International, "What is corruption?" <https://www.transparency.org/en/what-is-corruption>.

tainted by corruption. This lack of popular confidence means that the legitimacy of the democratic order and the rule of law is undercut, making them more vulnerable to undemocratic attacks.[263]

119. *Second*, corruption destabilizes two core aspects of the rule of law: the equal application of the law across the social fabric and the prohibition of abuse of power by public officials.[264] This is particularly alarming when corruption affects the judicial system, since corruption by the members of the judiciary could undermine the effectiveness of the human rights of access to court and fair trial before an independent, impartial and competent tribunal.[265]

120. *Third*, the mismanagement of public funds that corruption promotes could undercut the state's economic and financial ability to fulfill its human rights obligations, particularly socio-economic rights. In 2021, the CoE Commissioner for Human Rights, Dunja Mijatović, stressed that this third aspect is not socially neutral, since corruption hinders the enjoyment of human rights by vulnerable or historically excluded groups more acutely:

> Corruption is rightly called one of the most insidious social phenomena. It erodes trust in public institutions, hinders economic development and has a disproportionate impact on the enjoyment of human rights, particularly by people that belong to marginalised or disadvantaged groups such as minorities, people with disabilities, refugees, migrants and prisoners. It also disproportionately affects women, children and people living in poverty, in particular by hampering their access to basic social rights such as healthcare, housing and education.[266]

121. The IACHR identified multiple interconnected ways in which corruption may lead to the destabilization or weakening of democracy in the region: (i) corruption prevents the proper functioning of the democratic institutional framework of the state, since the state machinery and finances are improperly put at the service of the public officials or private parties engaged in corruption; (ii) corruption hinders the rule of law, as it affects the principle of legality, the independence of public officials, and the ideal that authorities' legitimacy is based on their pursuit of the common good; (iii) corruption has a direct impact on citizen trust in democratic institutions; (iv) corruption, especially within the judicial system, may lead to an unequal application of the law and impunity for illegal acts, giving rise to a vicious cycle of violence and generalized perception of impunity; and (v) systematic corruption may affect the state's financial ability to fulfill its human rights obligations, particularly in the field of socio-economic rights such as health, food, education and

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[263] ELI, "Charter of Fundamental Constitutional Principles of a European Democracy" (2024), 66-67 <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Charter_of_Fundamental_Constitutional_Principles_of_a_European_Democracy.pdf>; UN Human Rights Council, "Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights", A/HRC/28/73, 5 January 2015, para. 20(c).

[264] ELI, "Charter of Fundamental Constitutional Principles of a European Democracy" (2024), 66 <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Charter_of_Fundamental_Constitutional_Principles_of_a_European_Democracy.pdf>.

[265] UN Human Rights Council, "Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights", A/HRC/28/73, 5 January 2015, para. 19.

[266] CoE Commissioner for Human Rights, "Human Rights Comments: Corruption undermines human rights and the rule of law" (2021), <https://www.coe.int/en/web/commissioner/-/corruption-undermines-human-rights-and-the-rule-of-law>.

housing.[267] Similar to the CoE Commissioner for Human Rights, the IACHR noted this last aspect may lead to discrimination, since these systematic human rights consequences of corruption disproportionately affect historically excluded groups with low-incomes.[268]

122. Regarding the Americas specifically, the IACHR reported that "the most important impacts of corruption in the region [is the] harm to State institutions particularly in the administration of justice and elections systems, with the resulting impacts on the exercise of political rights".[269] It is important to stress that the proper administration of justice and the adequate running of elections are cornerstones of a democratic society.

B. European developments

123. This section will address: **(1)** some European political developments and **(2)** the case-law of the ECtHR on the link between corruption and democracy.

1. Political developments

124. European instruments and institutions have recurrently upheld that there is a close link between democracy and the fight against corruption. The preamble of the 1997 Twenty Guiding Principles for the Fight against Corruption,[270] the 1999 Criminal Law Convention on Corruption[271] and the 1999 Civil Law Convention on Corruption[272], all adopted by the CoE, explicitly referred to the perils that corruption poses to democracy. In 2003, the CoE Committee of Ministers also noted that corruption constitutes "a serious threat" to democracy and the stability of democratic institutions in Europe.[273] In 2018, the European Parliament, an EU institution, stated that "the nature and scope of corruption may differ from one [EU] Member State to another, but it harms the EU as a whole and its economy and society, hampers economic development, undermines democracy, and damages the rule of law".[274]

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[267] IACHR, "Corruption and Human Rights in the Americas: Inter-American Standards", OEA/Ser.L/V/II. Doc. 236, 6 December 2019, paras. 125-135 <https://www.oas.org/en/iachr/reports/pdfs/CorruptionHR.pdf>.
[268] *Ibid.*, para. 9 ("Corruption has a particular effect on people experiencing poverty who, due to their vulnerability, suffer the consequences of corruption to a greater degree. Effectively, generally speaking, corruption has a differentiated impact on the enjoyment and exercise of human rights for the various groups that are vulnerable or have experienced historical discrimination").
[269] *Ibid.*, para. 4.
[270] CoE Committee of Ministers, "Resolution (97) 24 on the Twenty Guiding Principles for the fight against Corruption, Committee of Ministers" (1997), preamble ("Aware that corruption represents a serious threat to the basic principles and values of the Council of Europe, undermines the confidence of citizens in democracy, erodes the rule of law, constitutes a denial of human rights and hinders social and economic development").
[271] *Criminal Law Convention on Corruption* (1999), preamble ("Emphasising that corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society").
[272] *Civil Law Convention on Corruption* (1999), preamble ("Emphasising that corruption represents a major threat to the rule of law, democracy and human rights, fairness and social justice, hinders economic development and endangers the proper and fair functioning of market economies").
[273] CoE Committee of Ministers, "Recommendation Rec(2003)4 to member states on common rules against corruption in the funding of political parties and electoral campaigns" (2003), preamble.
[274] European Parliament, "Resolution on the rule of law in Romania" (13 November 2018), para. R.

125. In this regard, the Parliamentary Assembly[275] and the Committee of Ministers[276] of the CoE adopted multiple legal standards with a view of enhancing the fight against corruption and renovating public trust in the aptitude, effectiveness, and efficiency of democratic institutions. Furthermore, the CoE Commissioner for Human Rights,[277] the CoE Group of States against Corruption ("GRECO"),[278] and the Venice Commission[279] made numerous specific recommendations for states to strengthen their anti-corruption frameworks as a means to boost human rights protection and democracy.

126. This robust body of practice culminated in principle 6 of the 2023 Reykjavík Principles for Democracy, which posits the commitment of states to "pursue a relentless fight against corruption, including through prevention, and by holding accountable those exercising public power, and continue fighting organised crime".[280] In its 2024 Charter of Fundamental Constitutional Principles of a European Democracy, whose purpose is "to identify and articulate the constitutional principles which form the foundations of a European liberal democratic State",[281] the ELI also stressed in principle 22 that "[p]ublic authorities must take effective measures to prevent and fight corruption".[282] For the implementation of this principle, the ELI proposed that each state establishes an independent body with oversight and enforcement powers in the field of anti-corruption.[283] In fact, numerous European states already created dedicated anti-corruption agencies in their national jurisdictions.[284]

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[275] CoE Parliamentary Assembly, "Resolution 2170 (2017) on promoting integrity in governance to tackle political corruption" (2017); CoE Parliamentary Assembly, "Recommendation 2105 (2017) on promoting integrity in governance to tackle political corruption" (2017); CoE Parliamentary Assembly, "Resolution 2192 (2017) on youth against corruption" (2017).

[276] CoE Committee of Ministers, "Recommendation CM/Rec(2014)7 on the Protection of Whistleblowers" (30 April 2014).

[277] CoE Commissioner for Human Rights, "Human Rights Comments: Corruption undermines human rights and the rule of law" (2021), <https://www.coe.int/en/web/commissioner/-/corruption-undermines-human-rights-and-the-rule-of-law>.

[278] GRECO, "Addendum to the Fourth Round Evaluation Report on Poland (Rule 34)", (2018) <https://rm.coe.int/addendum-to-the-fourth-round-evaluation-report-on-poland-rule-34-adopt/16808b6128>; GRECO, "Fourth Evaluation Round. Corruption prevention in respect of members of parliament, judges and prosecutors. Evaluation Report. Hungary" (22 July 2015) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c6b9>

[279] Venice Commission, "Georgia - Provisions of the Law on the Fight against Corruption concerning the Anti-Corruption Bureau", CDL-AD(2023)046 (18 December 2023); Venice Commission, "Romania - Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy", CDL-AD(2018)017 (20 October 2018).

[280] CoE, "Reykjavík Principles for Democracy" (2023) <https://www.coe.int/en/web/steering-committee-on-democracy/10-principles-for-democracy>.

[281] ELI, "Charter of Fundamental Constitutional Principles of a European Democracy" (2024), 20 <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Charter_of_Fundamental_Constitutional_Principles_of_a_European_Democracy.pdf>.

[282] *Ibid.*, principle 22.

[283] *Ibid.*, 67.

[284] For a complete list, see: <https://www.coe.int/en/web/greco/national-anti-corruption-authorities>.

2. Jurisprudential developments

127. The ECtHR's jurisprudence has also demonstrated the multiple links between corruption, human rights protection, and democracy.[285] In *Xhoxhaj v. Albania*, the ECtHR ruled that the dismissal of a judge from the Constitutional Court, following the extraordinary vetting of all serving judges and prosecutors nationwide, did not breach the ECHR, since such vetting process was carried out in response to the alarming levels of corruption in the Albanian judiciary, as assessed by the national legislature and other independent observers.[286] The Court agreed that the vetting process and the subsequent dismissal of tainted justice operators were necessary measures to "guarantee the proper functioning of the rule of law, the true independence of the justice system, as well as the restoration of public trust in the institutions of [that] system".[287]

128. In *Kövesi v. Romania*, the ECtHR assessed the dismissal of the chief of the national anticorruption prosecutor's office, after she criticized some legislative reforms that would weaken the judicial system's and the prosecutor's competence to try corruption offences. The Court found that her dismissal violated the ECHR.[288] Crucially, the Court attached particular importance to the anticorruption function that the applicant exercised, holding that her "functions and duties included expressing her opinion on the legislative reforms which were likely to have an impact on the judiciary and its independence and, more specifically, on the fight against corruption conducted by her department".[289]

129. Lastly, in *Khadija Ismayilova (no. 2) v. Azerbaijan*, a case dealing with the imprisonment of a well-known investigative journalist for her criticism of members of the Azerbaijani government and their families for alleged corruption and illegal business activities, the ECtHR found numerous violations of the ECHR. Importantly, the Court determined that a prominent element of the illegal nature of the journalist's imprisonment was the fact that "the actual purpose of [her arrest and detention by state officials] was to silence and to punish [her] for her journalistic activities" revealing the government's involvement in corruption.[290] Hence, the link between corruption, human rights protection, and democracy does not refer only to the state obligation to criminalize, investigate, and prosecute acts of corruption. It also concerns the obligation to protect freedom of speech, in order to allow the press and other stakeholders to denounce and incite debate about corruption. It is evident that reporting acts of corruption in the government is a matter of general interest.

C. Relevance in the American context

130. This section will address **(1)** some American political and quasi-judicial developments and **(2)** the case-law of the IACtHR on the connection between corruption and democracy.

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[285] See Oriolo, "The Contribution of the European Court of Human Rights to the Construction of a Corruption-Free Society", (2024) 25(2-3) *International Criminal Law Review* 442-469.
[286] *Xhoxhaj v. Albania* (Application no. 15227/19), Judgment, 9 February 2021, paras. 375-414.
[287] *Ibid.*, para. 392.
[288] *Kövesi v. Romania* (Application no. 3594/19), Judgment, 5 May 2020, paras. 211-212.
[289] *Ibid.*, para. 205.
[290] *Khadija Ismayilova v. Azerbaijan (No. 2)* (Application no. 30778/15) Judgment, 27 February 2020, para. 119.

1. Political and quasi-judicial developments

131. In 2017, the OAS General Assembly Resolution AG/RES. 2905, titled "Strengthening Democracy", explicitly stated that "corruption undermines the legitimacy of public institutions and constitutes a threat to democracy, peace, the rule of law, and justice, as well as to the overall development of peoples".[291] The 1996 Inter-American Convention against Corruption also recognized in its preamble that "fighting corruption strengthens democratic institutions" and "representative democracy, an essential condition for stability, peace and development of the region, requires, by its nature, the combating of every form of corruption in the performance of public functions, as well as acts of corruption specifically related to such performance". The United Nations Convention against Corruption, ratified by virtually all OAS members,[292] also explicitly determined that corruption "undermin[es] the institutions and values of democracy, ethical values and justice and jeopardiz[es] sustainable development and the rule of law".[293]

132. From as early as 2001, the IACHR has maintained a link between the fight against corruption and the protection of democracy and human rights.[294] This body of work peaked in the late 2010s, when the Commission adopted two resolutions on the matter[295] and the 2019 Report "Corruption and Human Rights in the Americas: Inter-American Standards",[296] in which the Commission asserted that, in order to protect their democratic institutions, "societies must prevent and repress the corrupt practices—both individual and/or structural— that affect the guarantee of human rights under the rule of law".[297] The IACHR also addressed corruption-related human rights violations in specific country reports, including Guatemala[298] and Honduras.[299]

2. Jurisprudential developments

133. The assessment of the IACtHR's case-law on corruption will be divided into three parts: **(a)** the obligation to guarantee human rights; **(b)** the obligation to respect human rights; and **(c)** the freedom of thought and expression.

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[291] OAS General Assembly, "Resolution AG/RES. 2905 ("Strengthening Democracy") (2017) <https://www.oas.org/en/sla/dil/docs/AG-RES_2905_XLVII-O-17_ENG.pdf>.
[292] Only one OAS member state has not ratified the Convention against Corruption: Saint Vincent and the Grenadines.
[293] *United Nations Convention against Corruption* (2003), First preambulatory clause.
[294] IACHR, "Corruption and Human Rights in the Americas: Inter-American Standards", OEA/Ser.L/V/II. Doc. 236, 6 December 2019, para. 72 <https://www.oas.org/en/iachr/reports/pdfs/CorruptionHR.pdf>.
[295] IACHR, "Resolution 1/18 - Corruption and Human Rights" (2018); IACHR, "Resolution 1/17 - Human Rights and the Fight Against Impunity and Corruption" (2017).
[296] IACHR, "Corruption and Human Rights in the Americas: Inter-American Standards", OEA/Ser.L/V/II. Doc. 236, 6 December 2019, paras. 125-135 <https://www.oas.org/en/iachr/reports/pdfs/CorruptionHR.pdf>.
[297] *Ibid*., para. 126.
[298] IACHR, "Observaciones Preliminares: Visita in loco a Guatemala", OEA/Ser.L/V/II.doc.124/24 (2024) <https://www.oas.org/es/cidh/informes/pdfs/2024/observaciones_preliminares_guatemala.pdf>.
[299] IACHR, "Informe Situación de Derechos Humanos en Honduras", OEA/Ser.L/V/II Doc.9/24 (2024), paras. 77-86 <https://www.oas.org/es/cidh/informes/pdfs/2024/informe-honduras.pdf>.

a. The obligation to guarantee human rights

134. In *López Mendoza v. Venezuela* (2011), the IACtHR referred to corruption in broad terms, simply stating, in a footnote of the judgment, that the assumption that "the fight against corruption is of great importance" constitutes a general interpretative framework for the ACHR as a whole.[300] The Court offered more details in *Ramírez Escobar et al. v. Guatemala* (2018), a case dealing with the impact of corruption on child adoption and how such impact hindered the enjoyment of the human rights of children and their biological parents. The judgment reads as follow:

> this Court highlights the negative consequences of corruption and the obstacles it represents for the enjoyment and effective enjoyment of human rights, as well as the fact that corruption of state authorities or private providers of public services affects a particular way to vulnerable groups. In addition, corruption not only affects the rights of individually affected individuals, but also has a negative impact on the entire society, to the extent that "the confidence of the population in government is broken and, over time, in the democratic order and the rule of law". In this sense, the Inter-American Convention against Corruption establishes in its preamble that "representative democracy, an indispensable condition for the stability, peace, and development of the region, by its nature, requires combating all forms of corruption in the exercise of public functions, as well as acts of corruption specifically linked to such exercise". The Court recalls that States must adopt measures to prevent, punish and eradicate corruption effectively and efficiently.[301]

135. This rationale from *Ramírez Escobar et al.* could be the argumentative basis for the IACtHR to take another important step forward *vis-à-vis* the role of corruption in human rights violations and democracy: analogous to its case-law on judicial independence, the Court could link the duty to prevent corruption with the obligation to guarantee human rights under Article 1 of the ACHR.[302] Since *Velásquez Rodríguez v. Honduras* (1989), the Court has interpreted this provision very broadly, as imposing on states the obligation to organize their entire governmental structure in such a way as to allow the state to efficiently ensure the full exercise of human rights by the whole population.[303] If the fight against corruption is approached through the obligation to ensure rights under Article 1 of the ACHR, having a legal and institutional apparatus to combat corruption constitutes an essential element of the organization of the state to ensure the protection and effective guarantee of human rights, in the sense of Article 1.

136. Moreover, the existence of corruption in the state, when it leads to human rights violations, should be considered a key element in the determination of a breach of the obligation to guarantee human rights under Article 1 of the ACHR. In other words, the state's failure or negligence to prevent corruption as such breaches Article 1 when it is determined that the corruption in question caused violations of human rights protected by the ACHR.[304] To trigger a violation of Article 1 of the ACHR there must be a causal link between the instances of corruption and the concrete human rights violations *in casu*, with clearly identified or identifiable victims. This is particularly important because

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[300] *López Mendoza v. Venezuela*. Merits, Reparations, and Costs. Judgment of September 1, 2011. Series C No. 233, footnote 208.
[301] *Ramírez Escobar et al. v. Guatemala*. Merits, Reparations and Costs. Judgment of March 9, 2018. Series C No. 351, paras. 241-242.
[302] Reyes, "State Capture through Corruption: Can Human Rights Help?", (2019) 113 *AJIL Unbound* 331-335, 334-335.
[303] *Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, para. 166.
[304] Reyes, "State Capture through Corruption: Can Human Rights Help?", (2019) 113 *AJIL Unbound* 331-335, 334-335.

individualization of the alleged victims is an admissibility requirement before the IACHR and the IACtHR.[305]

137. Approaching corruption through the language of human rights and Article 1 of the ACHR may have three central advantages. *First*, it could introduce new mechanisms for monitoring and litigation, complementing the traditional criminal justice approach to tackling corruption. In particular, the institutional and normative framework for human rights protection, whether national, regional or universal, could be extended and leveraged as anti-corruption tools. This is particularly compelling because existing human rights mechanisms are generally more robust than anti-corruption frameworks.[306] As Anne Peters concluded:

> Regional human rights courts and bodies offer potential for legal accountability and responsibility for corruption-related harms, helping to bridge the significant enforcement gap in anti-corruption efforts. Most importantly, domestic courts, through the application of human rights law, can compel legislative and executive actions akin to the judicial decisions in climate litigation, thereby imposing more effective anticorruption measures.[307]

138. *Second*, the language of human rights may ensure greater concreteness to the anti-corruption agenda, mainly by disrupting the perception of corruption as a victimless crime that affects only the public order, the proper governance of public affairs, and society at large.[308] In this traditional conception, individual victims remain invisible and voiceless, particularly because, in most national legal systems, criminal and civil cases on corruption do not provide standing for or the identification of the victims of the adjudicated acts of corruption. The human rights approach argued here offers a framework to explore the concrete human impacts of corruption, indicating that, besides the damage to the abstract public order or society as a whole, corruption can affect the rights of specific individuals and communities.[309]

139. *Third*, the application of Article 1 of the ACHR in corruption-related cases may inform the nature and scope of the reparations and guarantees of non-repetition imposed upon the respondent state. Besides measures in favor of the directly injured victims, the Court could order the implementation of structural measures which transcend individual harms and tackle the systemic corruption that hinders the enjoyment of human rights more broadly. These wider measures could

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[305] IACHR, Report No. 57/08, Petition 283-06. Inadmissibility. Mario Roberto Chang Bravo. Guatemala. July 24, 2008, para. 38.

[306] Peters, "Human rights and corruption: Problems and potential of individualizing a systemic problem", (2024) 22(2) *International Journal of Constitutional Law* 538-561, 560; Reyes, "State Capture through Corruption: Can Human Rights Help?", (2019) 113 *AJIL Unbound* 331-335, 334.

[307] Peters, "Human rights and corruption: Problems and potential of individualizing a systemic problem", (2024) 22(2) *International Journal of Constitutional Law* 538-561, 560.

[308] IACHR, "Corruption and Human Rights in the Americas: Inter-American Standards", OEA/Ser.L/V/II. Doc. 236, 6 December 2019, para. 487 <https://www.oas.org/en/iachr/reports/pdfs/CorruptionHR.pdf> ("it is impossible to view corruption as a victimless illegal activity; when cases and/or systems of corruption appear, it is necessary for states to make the utmost efforts to identify the victims, ascertain the damage caused, and take adequate measures to remedy it").

[309] Peters, "Human rights and corruption: Problems and potential of individualizing a systemic problem", (2024) 22(2) *International Journal of Constitutional Law* 538-561, 561; Reyes, "State Capture through Corruption: Can Human Rights Help?", (2019) 113 *AJIL Unbound* 331-335, 335.

include, depending on the circumstances of the case, the adoption of anti-corruption laws and institutional reforms to introduce mechanisms for access to information and transparency.

b. The obligation to respect human rights

140. The case *Andrade Salmón v. Bolivia* (2016) dealt with a series of criminal trials against the applicant for charges of corruption. The Court identified numerous human rights violations in connection with these proceedings, such as the rights to property, honor and dignity, liberty, and due process. The Court determined that, whereas it is legitimate and necessary for states to combat corruption, the actions that the state undertakes in order to pursue this goal must always be carried out through legal means and with full respect for the human rights of the accused.[310] Acting otherwise could disrupt the very democratic institutions and values that the anti-corruption measures aim to protect.[311]

141. Therefore, in parallel to the claim above that the states should set up an institutional and normative framework to fight corruption as part of their obligation to guarantee human rights under Article 1 of the ACHR, it is equally important to stress that the states also have the obligation, under the same provision, to ensure that this anti-corruption framework is established and implemented in full compliance with human rights and other democratic values.[312] In specific terms, sufficient guarantees must be put in place to ensure that the anti-corruption state apparatus, especially the criminal justice system, is not instrumentalized for political aims, including for the purpose of silencing the opposition and the media or excluding potential candidates from the election process.[313] Such instrumentalization may seriously hinder key elements of a functioning democracy, such as judicial independence, freedom of speech, pluralism, and political rights.

c. Freedom of thought and expression

142. The case *Viteri Ungaretti et al. v. Ecuador* (2023) dealt with a whistleblower who suffered multiple sanctions, including deprivation of liberty, persecution, harassment, and dismissal from military service, for denouncing corruption in the armed forces of Ecuador. In its judgment, the IACtHR echoed the ECtHR in *Khadija Ismayilova (no. 2) v. Azerbaijan*, by making a link between fighting corruption and protecting freedom of expression. In the view of the Court, considering that

[310] *Andrade Salmón v. Bolivia*. Merits, Reparations and Costs. Judgment of December 1, 2016. Series C No. 330, para. 178.
[311] *Ibid.* ("The healthy fight against corruption and the desirable prosecution of crimes against public administration cannot be perverted by being diverted into a resource harmful to democracy by subjecting politically active individuals to an indefinite and uncertain procedural situation, with the result of excluding them from the democratic political struggle. The very objective of combating corruption, in the face of situations that could turn the zeal for transparency in the management of public affairs into an anti-democratic instrument, requires extreme care and even abbreviation of what is usually considered a reasonable time for the process, in defense of the democratic health of any rule of law").
[312] *Ibid.*, Concurrent Opinion of Judge Sierra Porto, paras. 5-6 ("States have the obligation to combat and discourage corruption, but without violating the rights of those accused or prosecuted, nor affecting the promotion and defense of democracy. This implies that proceedings against persons accused of crimes related to acts of corruption must be conducted in strict compliance with the rights recognized in the American Convention, especially the rights to personal liberty (Article 7), to judicial guarantees (Article 8), and to judicial protection (Article 25)").
[313] *Ibid.*, para. 6.

corruption "threatens the rule of law, democracy, and human rights",[314] states must "create a safe and enabling environment for civil society, whistleblowers, witnesses, activists, human rights defenders, journalists, prosecutors, lawyers, and judges, in order to protect these individuals from any threats arising from their activities to prevent and combat corruption".[315] An aspect of particular importance in this regard is freedom of expression, since it allows those actors to start and engage in a public debate about alleged corruption in the public administration. The Court held that "society has a legitimate interest in knowing about possible acts of corruption and, therefore, reporting acts of corruption constitutes specially protected speech under Article 13 of the Convention [freedom of thought and expression]".[316] Ultimately, the Court concluded that the sanctions imposed against the whistleblower in question breached his freedom of speech.

D. Findings

143. In light of the above, the Court could consider recognizing in the advisory opinion that:

- corruption is not only a governance or economic challenge, but it may also entail a direct threat to the stability of democracy as such. Specifically, corruption undermines democracy by eroding public trust in institutions and weakening the state's ability to fulfil human rights obligations. This latter aspect disproportionately affects marginalized groups, because their economic vulnerability means that they are more dependent on the state's provision of socio-economic rights.

- corruption also weakens democracy by destabilizing the rule of law and the equal application of the law across society. In this regard, judicial corruption is particularly hazardous, as it denies fair trials and equal enforcement.

- corruption also undermines democracy by preventing fair elections, since candidates benefiting from a corrupt electoral system receive unfair advantages.

- as part of their obligation under Article 1 of the ACHR to organize their governmental structure in such a way as to allow the full exercise of human rights, states have the obligation to establish a legal and institutional apparatus to combat corruption. If acts of corruption lead to human rights violations, such scenario may constitute in and of itself a breach of the obligation to guarantee human rights under Article 1 of the ACHR. In other words, the state's failure or negligence to prevent corruption violates Article 1 if it is determined that the corruption in question caused violations of human rights protected by the ACHR. To trigger a violation of Article 1 of the ACHR there must be a causal link between the acts of corruption and the concrete human rights violations *in casu*, with clearly identified or identifiable victims.

- states also have the obligation, under Article 1 of the ACHR, to ensure that their anti-corruption framework is established and implemented in full compliance with human rights and other

[314] *Viteri Ungaretti et al. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 27, 2023. Series C No. 510, para. 81.
[315] *Ibid.*, para. 85.
[316] *Ibid.*, para. 89.

democratic values. In specific terms, sufficient guarantees must be put in place to ensure that the anti-corruption state apparatus, especially the criminal justice system, is not instrumentalized for political aims, including for the purpose of silencing the opposition and the media or excluding potential candidates from the election process.

- freedom of expression is central to the fight against corruption, since it enables journalists, whistleblowers, human rights defenders, and civil society at large to expose abuses of power and acts of corruption, triggering public debate and potentially the punishment of those responsible. Thus, reporting on corruption constitutes speech of special public interest and democratic value that deserves heightened protection under the ACHR. States must, as far as reasonable, ensure adequate conditions for those publicly denouncing corruption, especially their safety and non-retribution.

VIII. YOUTH REPRESENTATION AND PARTICIPATION

A. The link between enhancing youth political engagement and furthering democracy

144. The active public engagement of the youth is important for a strong democratic society for at least three key reasons. *First*, as suggested by the European Youth Forum, youth organizations are usually the first to raise concerns about threats to democracy and the rule of law. This comes from the fact that the young generation is often the most sensitive to societal issues and the most forthcoming to speak out about them, demanding change.[317]

145. *Second*, there is evidence that intergenerational cleavages in politics have grown across different regions, particularly because young people tend to have more egalitarian and multicultural viewpoints than their adult counterparts.[318] This means that the exclusion of youth from public debate could entail the exclusion of important beliefs and their supporters, particularly with regards to issues that affect young citizens more acutely, such as rules on military conscription, education, and age limits for voting, holding elected office, drinking, and driving.

146. *Third*, the absence of youth in formal politics might lead to a vicious cycle of apathy and disengagement among the young generation: because they do not see themselves and their concerns represented in spaces of conventional politics, youth might become increasingly disengaged and disenfranchised, feeling less motivated to participate in the political process. As a result, formal politics may cater less and less to the young generation in terms of policies and political influence, restarting

[317] European Youth Forum, "Position Paper: Safeguarding civic space for young people in Europe" (12 April 2022), 3 <https://www.youthforum.org/files/220428-PP-civic-space.pdf>.
[318] Abramson and Inglehart, *Value Change in Global Perspective* (University of Michigan Press, 2009); Sloam and Henn, *Youthquake 2017: The Rise of Young Cosmopolitans in Britain* (Palgrave Macmillan, 2019).

the cycle.[319] Another aspect to stress in the context of apathy and underrepresentation is that some studies indicate that young people are more inclined to vote for younger candidates.[320]

147. Accordingly, ensuring sufficient civic space for young people and youth organizations to operate effectively and free from any interference and retribution is critical to uphold the healthy functioning of democratic societies.[321] In recognizing and protecting youth agency, it must be acknowledged that their engagement is multifaceted and takes various forms: besides voting and being voted for in formal elections, alternative forms of participation should also be promoted, especially participation in policy-making and governance processes which concern young people.[322]

148. At the same time, individual young activists and youth organizations face serious challenges, especially their vulnerability to governmental suppression and retribution. On the individual level, young activists often lack an established support system, career stability, and financial opportunities. On the institutional level, youth organizations are often more vulnerable than other civil society organizations given their dependence on volunteer work and the lack of proper and stable funding. On the systematic level, the youth face unique hurdles, such as: (i) age-based discrimination or stigmatization; (ii) the lack of proper training and competence by public officials on how to properly engage the youth and how to foster meaningful youth participation; and (iii) the lack of sensitivity by public officials about the importance and the realities of young people.[323] Also, the young generation has been disproportionately affected in the long-term by the Covid-19 pandemic, particularly by mental health issues, such as depression and anxiety; loss of work and income; and significant loss of learning and poor quality remote education.[324]

B. European developments

149. Youth representation and participation have been recognized as a key component of a democratic society in Europe. The 2023 Reykjavík Principles for Democracy indicate that states should give priority "to supporting the participation of young persons in democratic life and decision-making processes".[325] The CoE Secretary General also acknowledged the potential of young people

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[319] Henn and Foard. "Young People, Political Participation, and Trust in Britain", (2012) 65(1) *Parliamentary Affairs* 47-67; Sloam, "New Voice, Less Equal: The Civic and Political Engagement of Young People in the United States and Europe", (2014) 47(5) *Comparative Political Studies* 663-688.

[320] Pomante and Schraufnagel, "Candidate Age and Youth Voter Turnout", (2015) 43(3) *American Politics Research* 479-503.

[321] European Youth Forum, "Position Paper: Safeguarding civic space for young people in Europe" (12 April 2022), 3 <https://www.youthforum.org/files/220428-PP-civic-space.pdf>.

[322] CoE Secretary General, "State of democracy, human rights and the rule of law" (2023), 147-148 <https://rm.coe.int/secretary-general-report-2023/1680ab2226>; European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, "Young people's participation in European democratic processes How to improve and facilitate youth involvement" (2023), 21-22 <https://www.europarl.europa.eu/RegData/etudes/STUD/2023/745820/IPOL_STU(2023)745820_EN.pdf>.

[323] European Youth Forum, "Position Paper: Safeguarding civic space for young people in Europe" (12 April 2022), 3 <https://www.youthforum.org/files/220428-PP-civic-space.pdf>.

[324] European Youth Forum, "Beyond Lockdown: the 'pandemic scar' on young people" (2021) <https://www.youthforum.org/policy-library/beyond-lockdown-the-pandemic-scar-on-young-people>.

[325] CoE, "Reykjavík Principles for Democracy" (2023) <https://www.coe.int/en/web/steering-committee-on-democracy/10-principles-for-democracy>.

to actively uphold, defend and promote democratic values across Europe.[326] The CoE Committee of Ministers[327] and the European Youth Forum[328] encouraged states to adopt measures to identify and address threats to youth civil society and to ensure that all young people and youth organizations can participate meaningfully in political processes. In fact, individual states have also adopted measures at their domestic level to further youth political engagement, such as lowering the voting age to 16 years old.[329]

C. Relevance in the American context

150. The significance for democracy of the participation of children and adolescents in public spaces of deliberation and decision-making has also been recognized in the Latin American context. The OAS General Assembly Resolution AG/RES. 2905 ("Strengthening Democracy")[330] acknowledged the need to increase "the participation of children and adolescents and the exercise of their right to seek, receive, and disseminate information and ideas". The Resolution also "encourage[d] authorities, political actors, and adults in general, to listen to and respect the opinions and proposals of children and adolescents." Importantly, it stressed the necessity of "promot[ing] intergenerational dialogue through coexistence based on democratic values that respect different opinions, while encouraging gender equality, equity, and nonviolence".

151. Empirical data confirms the need for measures to improve the youth footprint among elected officials in the Americas: the Inter-Parliamentary Union indicated that, as of August 2024, on average only 3.43% of the region's parliamentarians are under 30 years old, with subregions performing differently (4.71% in the Caribbean, 5.84% in Central America, 1.16% in North America, 3.58% in South America).[331] Yet, two caveats are warranted here. First, although the overall regional average is low in absolute terms, a comparison with other regions across the world reveal that the Americas rank second worldwide, preceded by Europe (with 3.51%) and followed by Sub-Saharan Africa (with 2.29%), Asia (with 2.08%), Middle East and North Africa (with 2.07%), and the Pacific (with 1.79%).[332] Second, it must be recognized that some individual American states rank well worldwide: as of 2023, the best ranking state from the region was Suriname, with the fifth highest percentage of parliamentarians under 30 years old worldwide (9.8%), followed by Cuba (7th place, with 7.9%), Costa Rica (13th place, 7.0%), Guatemala (14th place, 6.9%), Colombia (15th place, 6.7%), Bolivia (18th place,

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326 CoE Secretary General, "State of democracy, human rights and the rule of law" (2023), 147-152 <https://rm.coe.int/secretary-general-report-2023/1680ab2226>.

327 CoE Committee of Ministers, "Recommendation CM/Rec(2022)6 to member States on protecting youth civil society and young people, and supporting their participation in democratic processes" (2022); CoE Committee of Ministers, "Recommendation CM/Rec(2017)4 to member States on youth work" (2017).

328 European Youth Forum, "Position Paper: Safeguarding civic space for young people in Europe" (12 April 2022), 3 <https://www.youthforum.org/files/220428-PP-civic-space.pdf>.

329 Austria, Bundes-Verfassungsgesetz (1920, as emended in 2025), arts. 23a.(1), 26(1); Malta, Constitution (1964, as emended in 2018), art. 57(b); Belgium, Loi modifiant la loi du 23 mars 1989 relative à l'élection du Parlement européen en vue d'offrir aux citoyens la faculté de voter dès l'âge de 16 ans (2022); Germany, European Elections Act (1994, as amended in 2023), section 6.

330 OAS General Assembly, "Resolution AG/RES. 2905 ("Strengthening Democracy") (2017) <https://www.oas.org/en/sla/dil/docs/AG-RES_2905_XLVII-O-17_ENG.pdf>.

331 See <https://data.ipu.org/age-brackets-aggregate/?region=americas&structure=&date_month=8&date_year=2024>.

332 See <https://data.ipu.org/age-brackets-aggregate/?region=pacific&structure=&date_month=8&date_year=2024>.

6.2%), and Chile (20th place, 5.8%).[333] If one considers the percentage of parliamentarians under 40 years old worldwide, some individual states perform even better: Bolivia (4th place, 42.3%), Colombia (5th place, 41.6%), Saint Kitts and Nevis (9th place, 38.5%), Suriname (11th place, 37.3%), and Cuba (16th place, 35.5%).[334]

152. In its Strategic Plan 2023-2027, the IACHR committed itself to work towards a greater engagement by children and adolescents, in line with the rights to participation, freedom of expression and access to information.[335] This commitment led to the adoption of Resolution 5/23 on December 30, 2023, titled "Participation of children within the mandates of the IACHR". The document recognized that "citizen participation in decisions regarding their own development is a fundamental human right [that] extends to children"[336] and "children are full rights holders, and their active participation is crucial for their integral development"[337].

153. Although Resolution 5/23 focused on youth participation in IACHR's procedures specifically, it contains important guidelines of general application: (i) documents and other sources of information on issues that concern children must be adapted to be accessible and understandable by them, while avoiding infantilizing language and designs; (ii) youth participation should be voluntary and informed; (iii) inclusive participation should be promoted through the elimination of structural barriers based on disability, gender, ethnicity, or socioeconomic status as well as the development of specific strategies to involve children in vulnerable or marginalized situations; (iv) adults and institutions must be trained and sensitized to facilitate respectful and effective child participation; (v) protective measures, including the confidentiality of personal and sensitive information of children, must be put in place, but these measures should not become a barrier to a protagonist participation, particularly for the children who publicly act as human rights defenders; (vi) active efforts shall be made to prevent the re-victimization of children during and after their participation, ensuring that no harm or retaliation results from the children's involvement; and (vii) active efforts shall be carried out to ensure that children's participation takes place in a safe and respectful environment, always preserving their dignity and well-being.

154. American states have also shown a strong commitment to ensuring greater youth engagement in their national public space. States adopted a diverse array of strategies. Brazil,[338] Argentina,[339]

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333 Inter-Parliamentary Union, "Youth participation in national parliaments: 2023", 17 <https://www.ipu.org/resources/publications/reports/2023-10/youth-participation-in-national-parliaments-2023>.
334 *Ibid.*
335 IACHR, "Strategic Plan 2023-2027", OEA/Ser.L/V/II.185 Doc. 310 (2022), 33 <https://www.oas.org/en/iachr/mandate/strategicplan/2023/StrategicPlan2023-2027.pdf>.
336 IACHR, "Resolution 5/23 - Participation of children within the mandates of the IACHR" (2023), preambule <https://www.oas.org/en/iachr/decisions/2023/Res-5-23-EN.pdf>.
337 *Ibid.*
338 Brazil, Constituição da República Federativa do Brasil (1988), art. 14(1)(II)(c).
339 Argentina, Ley nº 26.774, de Ciudadanía Argentina (2012), art. 3.

Ecuador,[340] Nicaragua,[341] and Cuba[342] turned to the reduction of the voting age, by introducing the right to vote for 16-year-olds. All other American states maintain the minimal voting age of 18 years old.[343] In fact, it has been reported that a lower voting age might lead to an increased youth turnout in elections as well as long-term democratic habits among the population.[344]

155. Colombia adopted important legislative measures to enhance political youth agency. Art. 45 of the 1991 National Constitution determines that "[t]he State and the society must guarantee the active participation of young people in public and private organizations responsible for the protection, education, and advancement of youth".[345] In 2013, Colombia adopted its *Estatuto de Ciudadanía Juvenil* (Juvenile Citizenship Statute), whose key pillar is to recognize, organize, and strengthen youth engagement in the public sphere, including through direct youth participation bodies.[346]

156. In Brazil, the national electoral institutions have been particularly active towards increasing youth vote, including via the implementation of countrywide campaigns aimed at young people[347] and allowing 15-year-olds to obtain their electoral ID.[348] These policies led to an increase of 51.13% in the number of 16- and 17-year old voters in Brazil between 2018 and 2022.[349] Also, the Chamber of Deputies of the Brazilian National Congress has the Secretariat for Early Childhood, Childhood, Adolescence and Youth, whose statutory mandate includes the promotion of studies to better engage with children and adolescents and reduce the deficit in their representation and participation in the political sphere.[350]

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340 Ecuador, Ley Orgánica Electoral, Código de la Democracia (2009), art. 11; Ecuador, Constitución de la República del Ecuador (2008), art. 62.

341 Nicaragua, Constitución Política de la República de Nicaragua (1987, as amended in 2025), art. 43.

342 Cuba, Constitución Política (2019), art. 205.

343 See <https://worldpopulationreview.com/country-rankings/voting-age-by-country>.

344 European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, "Young people's participation in European democratic processes How to improve and facilitate youth involvement" (2023), 61 <https://www.europarl.europa.eu/RegData/etudes/STUD/2023/745820/IPOL_STU(2023)745820_EN.pdf>.

345 Colombia, Constitución Política de Colombia (1991), art. 45 <http://www.secretariasenado.gov.co/senado/basedoc/constitucion_politica_1991.html>.

346 Colombia, Estatuto de Ciudadanía Juvenil: Ley Estatutaria 1622 de 2013 modificada por la Ley Estatutaria 1885 de 2018 (2018) <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=85540>. See also Fundación Foro Nacional por Colombia, "¿Qué ha pasado con la participación ciudadana juvenil en Colombia? 2018 – 2022" (2023) <https://foro.org.co/wp-content/uploads/2024/02/Informe-participacion-Juvenil_Digital-1.pdf>.

347 Brazilian Superior Electoral Court, "Campanhas da Justiça Eleitoral contribuem para crescimento do voto jovem" (2023) <https://www.tse.jus.br/comunicacao/noticias/2023/Julho/campanhas-da-justica-eleitoral-contribuem-para-crescimento-do-voto-jovem>.

348 Brazilian Superior Electoral Court, "Jovens que completaram 15 anos já podem tirar o título de eleitor" (2025) <https://www.tse.jus.br/comunicacao/noticias/2023/Maio/jovens-que-completaram-15-anos-ja-podem-tirar-o-titulo-de-eleitor>

349 Brazilian Superior Electoral Court, "Campanhas da Justiça Eleitoral contribuem para crescimento do voto jovem" (2023) <https://www.tse.jus.br/comunicacao/noticias/2023/Julho/campanhas-da-justica-eleitoral-contribuem-para-crescimento-do-voto-jovem>.

350 Brazil, Regimento Interno da Câmara dos Deputados, art. 20-H(III) <https://www2.camara.leg.br/atividade-legislativa/legislacao/regimento-interno-da-camara-dos-deputados>.

157. In Peru, the Youth Nacional Policy (2019) has, as one of its six key priorities, the increase in civic participation by the young population.[351] Although youth quotas in political parties and elections remain rare in the region, Peru turned to this mechanism. In 2006, it adopted a law requiring that 20% of candidates in all local and regional elections be under the age of 29 (*Diezmo Juvenil*).[352] The quota achieved remarkable results towards having a greater number of youth candidates running for office and being elected: the percentage of youth candidates more than doubled after 2006, while the number of youth elected increased 60.5% and has remained steady at this higher rate.[353] Despite this success in Peru,[354] caution is warranted, since the practical impact of youth quotas remains understudied and is likely to be dependent on the adoption of a more holistic and structural strategy to support youth.[355]

D. Findings

158. In light of the above, the Court could consider recognizing in the advisory opinion:

- the importance of youth representation and participation for the perpetuation of democracy, particularly because young people have a key role in raising early warnings about threats to democracy and bringing egalitarian, multicultural, and human rights-centered viewpoints. In the long-term, greater youth engagement could later give rise to more politically engaged adults, enhancing democratic engagement in society as a whole. Also, the youth should be allowed significant participation in issues that particularly affect and interest them, including climate change.

- states should consider the adoption of strategies and measures to enhance youth representation and participation in civic life. Possible measures that states could entertain are reducing the legal voting age, publicity campaigns incentivizing young people to vote and run for elections, reserved seats in parliaments for the youth, legally determined quotas for young candidates, voluntary quotas for political parties, etc. The effectiveness of some of these measures is context-dependent and requires cautious assessment prior, during, and after their implementation.

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[351] Peru, Decreto Supremo nº 013-2019-MINEDU, Política Nacional de Juventud (2019), table 7. In concrete terms, the Peruvian government strives to achieve this goal through three strategies: (i) develop organizational and volunteer capacities among the youth population; increase youth participation mechanisms at the intersectoral and intergovernmental levels; and (iii) develop strategies for incorporating a youth-focused approach and participation at the intersectoral and intergovernmental levels.

[352] Peru, Law no. 28869 on promoting youth participation in municipal lists, (2006), art. 10; Peru, Law no. 29470 modifying various articles of Law no. 27683 on Regional Elections (2009), art. 12(2).

[353] Consortium for Elections and Political Process Strengthening (CEPPS), "Raising Their Voices: How effective are pro-youth laws and policies?" (2019) 67 <https://www.iri.org/wp-content/uploads/legacy/iri.org/iri_proyouth-report_.pdf>.

[354] There are some studies demonstrating that youth quotas in elections could directly affect the presence of young parliamentarians: Tremmel *et al*., *Youth Quotas and Other Efficient Forms of Youth Participation in Aging Societies* (Springer Verlag, 2015); Belschner and de Paredes, "Hierarchies of Representation: The Re-distributive Effects of Gender and Youth Quotas", (2021) 57(1) *Representation* 1-20.

[355] Consortium for Elections and Political Process Strengthening (CEPPS), "Raising Their Voices: How effective are pro-youth laws and policies?" (2019) 74 <https://www.iri.org/wp-content/uploads/legacy/iri.org/iri_proyouth-report_.pdf>. See also Stockemer and Sundström, "Age representation in parliaments: Can institutions pave the way for the young?", (2018) 10(3) *European Political Science Review* 467-490, 467 ("quota provisions for youths are currently too selectively applied to increase the percentage of young deputies in parliament"); Belschner and de Paredes, "Hierarchies of Representation: The Re-distributive Effects of Gender and Youth Quotas", (2021) 57(1) *Representation* 1-20.

- the complex and multifaceted nature of youth political participation indicates that, besides those specific institutional and normative measures, the states could also consider the implementation of structural measures to eliminate systemic barriers and stigmatization that hinder youth engagement, including age discrimination and lack of sensitivity and proper training among governmental officials on how to deal with young people effectively.

- despite their importance, youth organizations are particularly vulnerable, including to government suppression and lack of institutional stability. The youth has also been disproportionately affected long-term by the COVID-19 pandemic, giving rise to mental health, employment, and education setbacks. Thus, the states could take the necessary measures to ensure that youth organizations have the civic space, protection, and resources they need to function effectively in society.

Luxembourg, 17 November 2025

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(SIGNED ELECTRONICALLY)

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