# Content Moderation and private censorship: standards drawn from the jurisprudence of the Inter-American Human Rights system

Submission to the United Nations Special Rapporteur on the Protection and Promotion of Freedom of Opinion and Expression, David Kaye, by the Center for Studies on Freedom of Expression and Access to Information (CELE)[1]

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## Introduction

The Center for Studies on Freedom of Expression and Access to Information (CELE) is a research Center hosted at Universidad de Palermo law school in Buenos Aires, Argentina. The Center devotes its work to promoting and enhancing the protection of freedom of speech and expression through cutting-edge research capable of shaping and changing public debate on key policy issues, and capacity building. The Center's work is regional in scope and has a special interest in Inter-American law and standards that it seeks to promote and enhance region-wide.

This submission seeks to bring some of the standards that could be drawn from the Inter-American Human Rights System to the questions posed by the Rapporteur in his call for submissions on Private content regulation in the digital age.

In the words of the Rapporteur, "Private companies facilitate an unprecedented global sharing of information and ideas. Social and search platforms in particular have become primary sources of news and information (and disinformation) for hundreds of millions of people. With that role they have also become gatekeepers of expression that may excite passions and knowledge – or incite hatred, discrimination, violence, harassment, and abuse." It specifically asks "What steps should platforms, government actors, and others take to ensure that these processes establish adequate safeguards for freedom of expression?" This is the question we seek to address and try to establish whether the Inter-American system for the protection of human rights offers any guidance, either for companies and/or for States, to address content regulation in the digital age, and if so, what those standards look like. This submission concludes that the Inter-American System does provide some standards that could serve as a baseline for private actors, and offers

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concrete recommendations for States (at least in the Americas) and private companies to further enhance the protection of freedom of expression in the digital age.

**Expression, dissemination and censorship**

The protection of Freedom of expression is widely recognized thought the different international human rights instruments across regions as well as the Universal Declaration and the international Covenant on Civil and Political Rights.

There seems to be a common understanding among all free speech advocates and experts that expression and dissemination go hand in hand and one cannot exist without the other. As stated by the Inter-American Court 30 years ago, "[f]reedom of expression goes further than the theoretical recognition of the right to speak or to write. It also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible. (…) [r]estrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely."[2]

This very same notion that dissemination and expression are indivisible and contemplate any medium underlies several joint declarations by the Special Rapporteurs on Freedom of Expression at the Organization of American States, United Nations, Organization for Security and Co-operation in Europe, and the African Commission on Human and Peoples' Rights,[3] particularly when they stated that the right to freedom of expression applies fully to the internet, and online limitations are only acceptable if they comply with international standards.

While there is wide agreement as to the indissoluble nature of expression and dissemination, there is also wide agreement that free speech is not an absolute right and that certain contents constitute abuses. Still, there is no universal agreement as to what "abuses" mean, or even as to the means to address such abuses. What may be deemed abusive in one country, may not be so in another. And what could be understood as a legal means to deal with such abuse in one region, may not be in another.

Private companies mediating content and expression across borders have an enormous (and ever increasing) power to affect public discourse, impact free speech and access to information. They are also undergoing increasing State and civil society pressure to exercise their powers to mediate content, while establishing terms of services (ToS) that prohibit certain types of content deemed abusive. Some of those abusive contents may be illegal. Some may be short of illegal but problematic. Some others may be illegal in some countries but not in others. An example of each may help illustrate: a) child pornography is illegal everywhere; b) aggressive or disrespectful language short of harassment, although unwanted, not illegal; c) blasphemy may be an offense punishable by law in some countries, and not be considered abusive at all in another.

On the means to address "abusive" content, legally tolerated means also vary from one region to another. Prior censorship, for example, understood as a preventative measure to impede the

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[2]OAS, Inter-American Court of Human Rights, *Advisory Opinion OC-5/85*, November 13, 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights), par. 31.

[3] See, for example, UN, OSCE, OAS, and ACHPR, "Joint Declaration on Freedom of Expression and the Internet," June 1, 2011. Available at: http://bit.ly/1wnId8U, and "Joint Declaration on Freedom of Expression and Responses to Conflict Situations," May 4, 2015. Available at: http://bit.ly/2yYwRhE

dissemination of information or ideas, may be understood as a legitimate means to redress abusive content in some regions (e.g. Europe) and not in others (e.g. the Americas).

While governments and laws vary from one State to another, some companies, particularly big social media companies, are a single unit and need common norms to function across borders through the different legal regimes. In doing so, however, they must not only bear in mind the substantive differences between the legal systems but also the different approaches that they can legitimately take or enforce globally as potential means for redress.

**Article 13 of the American Convention: How does it differ from other frameworks for the protection of freedom of expression worldwide**

Article 13 of the American Convention on Human Rights (ACHR), although apparently similar to the ICCPR's[4] Article 19, sets standards that differ slightly from it and bring about certain specificities that could be particularly relevant to the study that is being conducted. As established in Advisory Opinion 5/85, "The form in which the American Convention is drafted differs very significantly from Article 10 of the European Convention, which is formulated in very general terms. (…) The Covenant, in turn, is more restrictive than the American Convention, if only because it does not expressly prohibits prior censorship."[5]

Article 13 in its relevant parts states that:

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

*a. respect for the rights or reputation of others; and*

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

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

The text of the ACHR expressly prohibits prior censorship and addresses not only government indirect restrictions on freedom of expression, but also **private restrictions of these rights where those restrictions could lead to similar results as government controls**. As expressed by the Inter-American Court, "Neither the European Convention nor the Covenant contains a

[4] International Covenant on Civil and Political Rights.

[5] OAS, Inter-American Court of Human Rights, *Advisory Opinion OC-5/85*, November 13, 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights), par

comparable clause" to Article 13 (3). Guarantees in the ACHR "(...) were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas."[6]

The prohibition of prior censorship is wide and broad. The only exception is that established in article 13 (4), which allows for prior censorship of public entertainments with the sole purpose of regulating children's access to them.[7] The Court had multiple opportunities to address prior censorship through its jurisprudence and it consistently confirmed the understanding that censorship, whether prohibiting expression or its dissemination, constituted an unacceptable state measure in all cases safe for Article 13(4).[8]

There are different views as to what constitutes prior censorship and how it applies *vis a vis* States/non-state actors.[9] The Inter-American Rapporteur for Freedom of Expression has asserted that government filtering and blocking prior to judicial review of its legality constitutes prior censorship. And following this line, Professor Nunziato argues that this will be so regardless of whether the content be removed before it is made publicly available or after being published but before judicial determination of illegality, and cites to the U.S. Supreme Court and the ACHR in reaching this conclusion.[10]

The other main difference between the ACHR and other instruments is an express prohibition of indirect restrictions including those generated by abusive government or **private controls** (Article 13(3)). These indirect restrictions may adopt different and multiple forms and Article 13(3) is open ended as to the examples it cites to. The Inter-American system has applied this clause to different cases as free speech restrictions in the region moved from direct and manifest towards more subtle and indirect in nature (eg. license renewals, nationality processes, State publicity assignments, etc.). Under the same logic, the Special Rapporteurs' Office with the Inter-American Commission on Human Rights has repeatedly asserted that establishing intermediary liability for third party posted content would infringe upon this particular norm, and constitutes an indirect restriction per the ACHR.[11]

Additionally, and following the above conceptualization of prior censorship, private content removals per terms of service **could** also be considered prior censorship under the American Convention since per art. 13(3) this kind of private action **could** have a similar effect on the circulation of speech. As Bertoni puts it, **States could be held internationally liable for leaving with private entities the ability to censor content, since those private entities would in fact be infringing upon the freedom of expression of their users.**[12]

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[6] OAS, Inter-American Court of Human Rights, *Advisory Opinion OC-5/85*, November 13, 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights), par. 50.

[7] ACHR, Art. 13(4):4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

[8] IACtHR, case of The Last Temptation of Christ (Chile), 2001. And Palamara Iribarne vs. Chile, 2006?

[9] Nunziato, Dawn C., Preservar la libertad de expresion en America Latina, CELE, Towards an internet free of censorship, 2012. pag. 29-30.

[10] Nunziato, Dawn C., Preservar la libertad de expresion en America Latina, CELE, Towards an internet free of censorship, 2012. pag. 33 citing Bantam Books vs. Sullivan, 372 US 58 (1963).

[11] Freedom of Expression on the internet, RELE,

[12] E. Bertoni, OC 5-85: Su vigencia en la era digital, en Libertad de Expresion a 30 anios de la Opinion Consultiva sobre la Colegiacion Obligatoria de Periodistas, CIDH RELE, 2017. He exemplifies with two cases: Costejas, where

**Duty to Respect and Ensure in the ACHR, the ICCPR and the European Convention**

When evaluating freedom of expression cases, the usual focus is on the obligations of States to respect free speech, understanding this as a negative obligation, to **refrain** or to **not** interfere illegitimately with freedom of expression, whether directly or indirectly. However, there are also positive obligations upon the States to guarantee the full exercise of this right for the people under their jurisdiction that are generally established both in the European Convention and the ICCPR as well as in the ACHR.

General Comment 34 of the Human Rights Committee sets from the outset in paragraph 7 that "The obligation [to respect and ensure] also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities."[13]

The European Convention has similar language although not as specific in article 1.[14] The European Court has said that "Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals […]".[15] Although the specifics of the positive obligations may be undefined, and the ECtHR endorses the principle of a wide margin of appreciation, authors sustain that under the positive obligation doctrine developed by the Court, States should, to "comply fully" with Article 10, ECHR, "ensure that they do not place intermediaries under such fear of liability claims that they come to impose on themselves filtering that is appropriate for making them immune to any subsequent accusation but is of a kind that threatens the freedom of expression of Internet users"." [16] of fundamental rights limitations for online enforcement through self- regulation conducted by the Institute for Information Law (IViR) Faculty of Law University of Amsterdam this has not

Article 1 of the ACHR, States have a duty to guarantee or "ensure" the full exercise of rights, understood as a duty to adapt their entire structure so that the people under their jurisdiction may fully enjoy and peacefully exercise their human rights.[17] Certain specific positive obligations

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the private censorship is being promoted by the State itself; and Delfi, where the private censorship draws from intermediary liability schemes.

[13] HRC, General comment No. 34: Article 19: Freedoms of opinion and expression, CCPR/C/GC/34,12 September 2011, available at http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf. This obligation drives from HRC General Comment No. 31 – "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant".

[14] ECHR, Article 1.

[15] Özgür Gündem v. Turkey, no. 23144/93, ECHR 2000-III, para. 43. via Study of fundamental rights limitations for online enforcement through self- regulation conducted by the Institute for Information Law (IViR) Faculty of Law University of Amsterdam, pag. 35.

[16] Study of fundamental rights limitations for online enforcement through self- regulation conducted by the Institute for Information Law (IViR) Faculty of Law University of Amsterdam, pag. 38 citing E. Montero and Q. Van Enis, "Enabling freedom of expression in light of filtering measures imposed on Internet intermediaries: Squaring the circle", Computer Law & Security Review 27 (2011) 21-35, at 34.

[17] IACtHR, Case Velasquez Rodriguez vs. Honduras, Series C, N. 4. 1989. par. available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf.166. "The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in

have been jurisprudentially developed within the right to freedom of expression. Standards towards guaranteeing pluralism and diversity in media can be set as examples of these positive obligations.

The Inter-American Court's Advisory Opinion 5/85 states that:

"48. Article 13(3) does not only deal with indirect governmental restrictions, it also expressly prohibits "private controls" producing the same result. This provision must be read together with the language of Article 1 of the Convention wherein the States Parties "undertake to respect the rights and freedoms recognized (in the Convention)... and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms...." Hence, a violation of the Convention in this area can be the product not only of State imposed restrictions that impede "the communication and circulation of ideas and opinions," but also from private controls. **States have an obligation to ensure that the violation does not result from the "private controls" referred to in clause 3 of Article 13.**[18]

The obligation to ensure implies a duty to act when States have knowledge of a human rights violation and a duty to take appropriate measures to prevent such violations from happening. In this sense, laws that condone human rights violations conducted by private actors are incompatible with the American Convention.

Unfortunately, there is still no jurisprudence on this issue in cases of internet and freedom of expression within the Inter-American system. However, the principles and standards that do exist suggest that current practices among internet companies could compromise the international responsibility of the State. As Bertoni pointed out, leaving private entities to censor may amount to a violation of the Inter-American system's standards. **We would contend that allowing intermediaries to establish, interpret and enforce ToS in an arbitrary, obscure or ambiguous way could also amount to a violation of States' duties to guarantee the right to freedom of expression, including preventing through reasonable means any violation of this right.**

The Inter-American Court framed the issue clearly regarding media: "If freedom of expression requires, in principle, that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media, it must be recognized also that such media should, in practice, be true instruments of that freedom and not vehicles for its restriction (…)"[19] and therefore "the conditions for its use must conform to the requirements of this freedom".

It is clear from the wording of the Court that the objective is to protect the main means for the exercise of free speech, which back in 1985 was mass media. Still, following the logic of the Court, in 2018, mass media is certainly one vehicle, but the internet has risen to be equally and

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general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."

[18] OAS, Inter-American Court of Human Rights, *Advisory Opinion OC-5/85*, November 13, 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights), par. 48.

[19] OAS, Inter-American Court of Human Rights, *Advisory Opinion OC-5/85*, November 13, 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights), par. 33

even more powerful a means or vehicle for regular people as well as journalists to exercise this important right. Following the Court's standard, conditions for the internet's use must also conform to the requirements of this freedom.

**Conclusions and Recommendations**

*1) Standards are similar yet not equal across different regions and vis a vis universal ones*

Although freedom of expression is recognized universally as a human right, linked directly to democratic governance and values, the definition and scope of the right vary if so slightly from one international instrument to another. Such differences generate different obligations for States across regions within the different frameworks.

As other instruments do, the American Convention states a duty among States to respect and guarantee the rights and duties contained in the ACHR. And it also states that when faced with different standards or obligations based on different instruments, States should enforce those most protective of the right in question. In the case of States within the Americas, the ACHR established the most protective standard on the right to freedom of expression and States should abide by those.

Therefore,

1) Companies must respect human rights in all the different jurisdictions where they operate and States must take all reasonable measures to guarantee compliance;

2) In determining global ToS, and verifying their compliance with human rights standards, companies should test against the most protective standards rather than the least protective ones and adjust regionally where the case rises. And

3) Companies should get better acquainted with universal and regional human rights standards and how they interact and dialogue amongst each other.

*2) Duties to respect free speech imply obligations not to run illegitimate interference, whether directly or indirectly*

States must not infringe upon free speech rights of people under their jurisdiction, neither directly, through government censorship, nor indirectly, through other regulations, including tax, nationality, monetary incentives like state publicity, **nor through impositions of undue regimes for internet intermediary liability.**

States must refrain from imposing direct or indirect restrictions on freedom of expression online and offline and must refrain from pressuring, suggesting, indirectly imposing restrictions and particularly censorship obligations upon internet intermediaries.

3) *Under Inter-American Standards, States could be liable for a company's abusive Terms of Service if they infringe illegitimately on freedom of expression*

Under the standards set forth in the ACHR as explained above, States have a duty not only to protect free speech from government abuse or controls, but also from private abuse and controls where they don't conform to the American Convention for allowable restrictions.

States must also guarantee freedom of expression for the people under their jurisdiction through positive measures including enacting legislation that protects freedom of expression and clearly establishes any allowable restriction, following the criteria set by regional and universal instruments. Finally, States must guarantee that private actors including internet companies do not infringe **arbitrarily** upon the freedom of expression of their users, including through moderation, filtering, blocking, suspending or canceling measures.

This conclusion has two main ramifications:

a. States must refrain from pressuring, proposing or regulating terms of service that would otherwise be deemed abusive or incompatible with freedom of expression standards within their own countries and under regional or global standards.

b. States must regulate so that companies functioning within their jurisdictions abide by freedom of expression standards and don't abusively control the circulation of opinions and ideas nor do they exclude specific groups or ideas from the debate while of course respecting the ability of companies to conduct business. This entails:

    a. States must ensure that ToS are clear and transparent;

    b. States must ensure that the application and enforcement of ToS are transparent and respectful of human rights, including freedom of expression, non-discrimination and due process.

c. The above mentioned should not be construed as a right to access a certain forum or determine specific terms of service for internet companies. While no one has a right to access gmail, Facebook or Twitter without agreeing to their terms of Service and complying with them, States cannot grant internet companies a right to arbitrarily and obscurely apply such ToS to the detriment of basic human rights such as those listed above.

*4) Companies need to abide by international human rights standards and be transparent about their ToS, rules and processes.*

Whether companies establish local, global or mixed ToS within different jurisdictions, they must make sure that ToSs respect human rights, not only in their theoretical notion but in their application, execution and enforcement.

*a.* Companies must abide by human rights standards in every jurisdiction where they operate.

*b.* Companies must clearly establish and publish their ToS unambiguously.

*d.* Interpretations and enforcement of ToS need to be transparent and subject to user's control and understanding. Arbitrary implementation or enforcement of ToS could amount to freedom of expression violations.