

**IN THE EUROPEAN COURT OF HUMAN RIGHTS  
First Section**

**Application no. 77419/16  
Case of Alessandro Biancardi v. Italy  
Communicated on 29 January 2020**

**INTERVENTION**

**Pursuant to Article 36(2) of the European Convention on Human Rights  
And Rule 44(3) of the Rules of Court**

**By Professor David Kaye,  
UN Special Rapporteur on the Promotion and Protection of the  
Right to Freedom of Opinion and Expression  
and**

**Mr. Edison Lanza,  
Special Rapporteur for Freedom of Expression of the  
Inter-American Commission on Human Rights**

**A. INTRODUCTION**

1. This is the intervention of the United Nations (“UN”) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (“**the UN Special Rapporteur**”) and the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (“**the IACHR Special Rapporteur**”) in connection with application no. 77419/16 made by Alessandro Biancardi against Italy. The intervention is submitted in accordance with Article 36 of the European Convention on Human Rights (“**ECHR**”) and Rule 44 of the Rules of Court. Leave to intervene was granted on 28 May 2020.
2. This intervention is submitted to the European Court of Human Rights (“**ECtHR**”) on a voluntary basis without prejudice to and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials, and experts on missions, including the individuals listed above, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views expressed by the UN Special Rapporteur, in full accordance with his independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies. Likewise, authorization for the positions and views to be expressed by the IACHR Special

Rapporteur, in full accordance with his independence, was neither sought nor given by the Inter-American Commission on Human Rights.

## **B. THE SPECIAL RAPPORTEURS**

3. The Special Rapporteurs examine, monitor, advise and report on issues pertaining to the freedom of expression. They each do this, independently, by gathering and receiving individual complaints, conducting country visits, issuing thematic reports and joint declarations, providing technical assistance to governments, and engaging in public outreach and promotional activities – with the goal of promoting and protecting freedom of expression.
4. The UN Special Rapporteur is an independent expert appointed by the UN Human Rights Council, the central human rights institution of the UN and a subsidiary organ of the UN General Assembly. Human Rights Council resolution 7/36 mandates the UN Special Rapporteur to, *inter alia*, gather all relevant information, wherever it may occur, relating to violations of the right to freedom of opinion and expression, discrimination against, threats or use of violence, harassment, persecution or intimidation directed at persons seeking to exercise or to promote the exercise of the right to freedom of opinion and expression, including, as a matter of high priority, against journalists or other professionals in the field of information.
5. The IACHR Special Rapporteur is appointed by the Inter-American Commission on Human Rights, a principal and autonomous organ of the Organization of American States (“OAS”). The Office of the Special Rapporteur for Freedom of Expression is mandated to “raise public awareness of the importance of freedom of expression throughout the hemisphere. This is being done in the conviction that this basic right plays a fundamental role in the development and consolidation of democracy and in the protection of all other human rights. The other purposes of the Office are: to make specific recommendations to Member States regarding freedom of expression so that they can better take measures to support it, to draft specific reports and studies, and to quickly respond to any petition or communication reporting violations of freedom of expression in an OAS Member State.”<sup>1</sup>

## **C. THE RIGHT TO BE FORGOTTEN AND MEDIA CENSORSHIP**

6. The concept of the “right to be forgotten” has generally referred to a remedy which in some circumstances enables individuals to request that search engines de-list or de-index certain name-based search results.<sup>2</sup> While ‘right to be forgotten’ claims have generally affected search engines, there have been requests and legal actions<sup>3</sup> brought against primary publishers of

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<sup>1</sup> IACHR. Directive 1/19: Guidelines on the Activities and Functions Provided for in the Mandates of The Special Rapporteurships of the IACHR. 30 September 2019.

<sup>2</sup> European Court of Justice, *Google Spain v. Agencia Española de Protección de Datos and Mario Costeja González*, [C-131/12](#), 13 May 2014; Article 19. The “Right to be Forgotten”: Remembering Freedom of Expression, 2016. [https://www.article19.org/data/files/The\\_right\\_to\\_be\\_forgotten\\_A5\\_EHH\\_HYPERLINKS.pdf](https://www.article19.org/data/files/The_right_to_be_forgotten_A5_EHH_HYPERLINKS.pdf)

<sup>3</sup> See, Belgium Court of Cassation, *Olivier G v. Le Soir*, Judgement of 29 April 2016, no. C.15.0052.F; Spanish Supreme Court, Civil Chamber, Judgment of 15 October 2015, ECLI:ES:TS:2015:4132; Spanish Constitutional Court, Judgment of 4 June 2018 ECLI:ES:TC:2018:58; Colombian Constitutional Court, T-277/15, Judgement of 12 May 2015, <https://www.corteconstitucional.gov.co/relatoria/2015/t-277-15.htm>

information, including media outlets.<sup>4</sup> However, any application of the “right to be forgotten”, especially to journalistic content, requires extremely careful consideration of the freedom of expression interests involved, and the assessment of the interests and rights in those situations should be different than when referring to processing by a search engine. Even in the landmark case, *Google Spain v. Agencia Española de Protección de Datos, Mario Costeja* (“Costeja Case”), the European Court of Justice (“EJC”) stated that the “the processing by the publisher of a web page consisting in the publication of information relating to an individual may, in some circumstances, be carried out ‘solely for journalistic purposes’ and thus benefit [...] from derogations from the requirements laid down by the directive, whereas that does not appear to be so in the case of the processing carried out by the operator of a search engine.”<sup>5</sup> In this regard, the ECtHR in the case *M.L. and W.W. v Germany*, stated that the balancing of the interests at stake may have different outcomes depending on whether the request for deletion was directed to the primary publisher of the information or to a search engine.<sup>6</sup>

7. There is a significant distinction between de-listing and content erasure under international freedom of expression standards. While the ease of accessibility to personal information on the internet might raise right to privacy concerns, there should be as little restriction as possible to the flow of information via the Internet.<sup>7</sup> Treating the removal of a news article (as opposed to its de-linking) as an application of the “right to be forgotten” would inappropriately muddle ECJ and ECtHR standards when a traditional evaluation of the right to freedom of expression should be applied. A conclusion that the “right to be forgotten” entails a right to news content erasure would almost certainly lead to censorship worldwide, and the “right to be forgotten” would be inappropriately expanded to a point of severely jeopardizing press freedom.
8. The overbroad application of the “right to be forgotten” also presents negative implications on the public’s right to access information, a right codified by Article 19 of the International Convention on Civil and Political Rights (“ICCPR”), Article 13 of the American Convention on Human Rights (“ACHR”) and Article 10 of the ECHR.

#### **D. APPLICATION OF THE RIGHT TO BE FORGOTTEN TO MEDIA OUTLETS WOULD LEAD TO SIGNIFICANT INTERFERENCE WITH THE RIGHT TO FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION**

9. The ECtHR has repeatedly emphasized the pre-eminent role of the press in a state governed by the rule of law, and it has observed that “freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders.”<sup>8</sup> In *Barthold v Germany*, the Court described the role of the press as the “purveyor of

<sup>4</sup> Miquel Peguera, ‘The Right to Be Forgotten in the European Union,’ in *Oxford Handbook of Online Intermediary Liability*, May 2020, DOI: 10.1093/oxfordhb/9780198837138.013.25.

<sup>5</sup> European Court of Justice, *Google Spain v. Agencia Española de Protección de Datos and Mario Costeja González*, [C-131/12](#), ¶ 85, 13 May 2014; ECtHR, *M.L. and W.W. v Germany*, Applications Nos. [60798/10 and 65599/10](#), ¶ 97, 28 June 2018.

<sup>6</sup> ECtHR, *M.L. and W.W. v Germany*, Applications Nos. [60798/10 and 65599/10](#), ¶ 97, 28 June 2018.

<sup>7</sup> Human Rights Council, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,’ UN doc. [A/HRC/17/27](#), 16 May 2011, ¶ 68.

<sup>8</sup> ECtHR, *Castells v Spain*, Application No. [11798/95](#), ¶ 43, 23 April 1992; ECtHR, *Lingens v Austria*, Application No. [9815/82](#), ¶ 42, 8 July 1986.

information and public watchdog.”<sup>9</sup> Simply put, it is the role and duty of the press to gather information and report on matters of public interest and to provide analysis to give context to the reporting. This is a protected part of a journalist's or a newspaper's right to freedom of expression even if the opinion advanced is not positively received. Critically, the law has protected the press not merely so that specific journalists may conduct their work; it has protected the press in order to guarantee the public's right of access to information in the public interest.<sup>10</sup> The Court has set out these important propositions in a number of its judgments.<sup>11</sup> It has consistently stressed the essential role played by the press in a democratic society,<sup>12</sup> including through its websites and the maintaining digital archives, which significantly contribute to enhancing the public's access to information and its dissemination.<sup>13</sup>

10. The prominent place afforded to the right of freedom of expression, and in particular the special recognition of the press as a public watchdog, reflects universal values recognized in the ICCPR and the ACHR. For example, the Human Rights Committee in its General Comment 34 states that a “free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.” It continued, “This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.”<sup>14</sup>
11. The Office of the Special Rapporteur of the IACHR has also emphasized that journalism, in the context of a democratic society, is one of the most important manifestations of freedom of expression and information. It has highlighted that a free press is fundamental for the functioning of democracies, as journalists keep society informed of events and their varied interpretations—a necessary condition for public debate to be robust, informed and vigorous. It has also stressed that an independent and critical press is a fundamental element for the effectiveness of other freedoms in a democratic system.<sup>15</sup> The Inter-American Court of Human Rights (IACtHR) in its landmark Advisory Opinion OC-05/85 stated 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.” And within this context it stressed that “journalism is the primary and principal manifestation of freedom of expression of thought.”<sup>16</sup>
12. The importance of the press and journalists may be explained in part by “the indivisibility of the expression and dissemination of thoughts and information, and by the fact that a restriction to the possibilities for dissemination is, directly and to the same extent, a limit to freedom of

<sup>9</sup> ECtHR, *Barthold v. Germany*, Application No. [8734/79](#), ¶ 58, 25 March 1985.

<sup>10</sup> See the Special Rapporteur's Report to the General Assembly, A/70/361, paragraphs 4-7: <https://freedex.org/resources/sources-and-whistleblowers/>.

<sup>11</sup> ECtHR, *The Sunday Times v. United Kingdom*, Application No. [6538/74](#), ¶ 65, 26 April 1979; ECtHR, *Handyside v. the United Kingdom*, Application No. [5493/72](#), ¶ 49, 7 December 1976.

<sup>12</sup> ECtHR, *The Sunday Times v. United Kingdom*, Application No. [6538/74](#), ¶ 65, 26 April 1979.

<sup>13</sup> ECtHR, *Times Newspapers Ltd v. the United Kingdom* (nos. 1 and 2), Applications nos. [3002/03 and 23676/03](#), 10 March 2009; ECtHR, *M.L. and W.W. v Germany*, Applications Nos. [60798/10 and 65599/10](#), ¶ 90, 28 June 2018.

<sup>14</sup> See also §§ 3-4, 9, 11, 15, 20, 23, 28, 38 and 42.

<sup>15</sup> IACmHR, *Report of the Special Rapporteur on Freedom of Expression, Catalina Botero. Inter-American Legal Framework regarding the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. 30 December 2009, ¶ 165

<sup>16</sup> IACtHR, Advisory Opinion [OC-5/85](#), 13 November 1985, ¶ 69-71.

expression in both its individual and collective aspects.”<sup>17</sup> Therefore, government restrictions on the circulation of information should be minimized, taking into account the importance of freedom of expression in a democratic society and the responsibility that such importance places upon journalists and media workers.<sup>18</sup>

13. Both Article 19(2) of the ICCPR and Article 13(1) of the ACHR provide a robust right to freedom of expression, emphasizing that “everyone shall have the right . . . to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media.” While the right to freedom of expression may be restricted in exceptional circumstances, restrictions are only permissible if a state’s action meets the three-part test provided in Article 19(3) of the ICCPR and Article 13(2) of the ACHR, which requires that (i) is provided by law; (ii) serves a legitimate purpose; and (iii) is necessary and proportionate to meet the ends it seeks to serve. The UN General Assembly, the Human Rights Council, and the IACHR have also recognized that the “same rights that individuals exercise offline must also be protected online.” Thus, any restrictions on the operation of any “internet-based, electronic or other such information dissemination system” are only permissible to the extent that they are compatible with [Article 19(3) of the ICCPR].”<sup>19</sup>

#### ***Provided by law***

14. For any restriction to satisfy the legality requirement, “the law must be made accessible to the public” and “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.”<sup>20</sup> Furthermore, “a law may not confer unfettered discretion of the restriction of freedom of expression on those charged with its execution” and must provide “sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.”<sup>21</sup> In sum, the law must be sufficiently specific to provide notice to the public of what conduct is prohibited, and the law must be sufficiently narrow to prevent arbitrary enforcement.
15. In the 2018 Joint Declaration on Media Independence and Diversity in the Digital Age, signed by both Special Rapporteurs, it was emphasized that States should ensure any removal of online content is “provided for by law in clear, specific terms, are applicable only where the petitioner demonstrates substantive harm to his or her privacy which overrides any freedom of expression interest involved, are subject to appropriate due process guarantees and are otherwise conducted in a manner which, both procedurally and substantively, fully respects the right to freedom of expression.”<sup>22</sup>

<sup>17</sup> IACmHR, *Report of the Special Rapporteur on Freedom of Expression, Catalina Botero. Inter-American Legal Framework regarding the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09, 30 December 2009, ¶ 167; See also IACtHR, Advisory Opinion [OC-5/85](#), 13 November 1985, ¶ 131-32, and *Case of Álvarez Ramos v. Venezuela*. Preliminary Exception, Merits, Reparations and Costs. Judgment of August 30, 2019. Series C No. 380, ¶ 96.

<sup>18</sup> IACtHR, *Case Kimel v. Argentina*. Judgment of May 2, 2008. Series C No. 177, ¶ 57.

<sup>19</sup> General Comment No. 34, ¶ 43. See also, IACmHR, *Report of the Special Rapporteur on Freedom of Expression, Edison Lanza. Standards for a Free, Open and Inclusive Internet*. [OEA/Ser.L/V/II CIDH/RELE/INF. 17/17](#), 15 March 2017, ¶ 135.

<sup>20</sup> General Comment 34, ¶ 25. See also, IACtHR, *Case Kimel v. Argentina*. Judgment of May 2, 2008. Series C No. 177, ¶ 63.

<sup>21</sup> *Id.*

<sup>22</sup> Joint Declaration on Media Independence and Diversity in the Digital Age. 2 May 2018. [https://www.ohchr.org/Documents/Issues/Opinion/JointDeclaration2May2018\\_EN.pdf](https://www.ohchr.org/Documents/Issues/Opinion/JointDeclaration2May2018_EN.pdf).

16. Applying the “right to be forgotten” to media reporting would be inappropriate on legality grounds. Most importantly, it would confer a vague standard to which publishers and editors would be unlikely to identify when an individual’s rights to delete a report outweigh the media’s role in gathering and reporting information – and the public’s right to access it. It would leave broad discretion for the restriction of freedom of expression by creating a right for any individual who is mentioned in the news—including public servants and other public figures<sup>23</sup>—to seek the removal of news articles. Imposing an obligation of this sort would compel media outlets to periodically examine the lawfulness of a report at a later stage following a request from the person concerned. While individuals who are subject to reporting or other sharing of information available on the Internet enjoy a panoply of rights, including to privacy and reputation, these must also be balanced against society’s right to access information and the journalists right to expression. The “right to be forgotten”, as conceived today, would not enable an appropriate assessment of the respective rights. Instead, it would risk media outlets taking action to avoid claims by refraining from maintaining online archives, or taking excessive caution to avoid individualized elements in their reports to prevent such requests. This could severely restrict press freedom as “the inclusion in a report of individualised information such as the full name of the person concerned is an important aspect of the press’s work.”<sup>24</sup>
17. Additionally, a system of this sort may force media outlets to delete their content when overwhelmed by the requests, effectively interfering with the right to freedom of expression, in both its individual and social dimensions, as well as the right of access to information by the people.<sup>25</sup> Moreover, because the right to be forgotten as applied to news content is insufficiently specified, a media outlet’s determination not to grant a removal request is likely to be subject to costly litigation. The cost of litigating the removal of news content may also have a chilling effect on the media and even cause media outlets to go bankrupt.

### *Legitimate purpose*

18. Any restriction to freedom of expression must be grounded in a legitimate objective. Article 19(3) of the ICCPR and Article 13(2) of the ACHR enumerate as legitimate the State’s responsibility to protect the rights and reputations of others, national security or public order (*ordre public*), or public health or morals. While States often seek to justify restrictions on the bases of the ‘rights of others’, in particular the right to privacy, “[s]uch restrictions must be construed with care.”<sup>26</sup>

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<sup>23</sup> For example, some Latin American countries have seen requests by public servants for content to be removed from the media under data protection laws. IACmHR. *Standards for a Free, Open, and Inclusive Internet. Report by Special Rapporteur for Freedom of Expression, Edison Lanza*. OEA/Ser.L/V/II CIDH/RELE/INF. 17/17. 15 March 2017, ¶ 130.

<sup>24</sup> ECtHR, *M.L. and W.W. v Germany*, Applications Nos. [60798/10](#) and [65599/10](#), ¶ 105, 28 June 2018.

<sup>25</sup> IACmHR. *Standards for a Free, Open, and Inclusive Internet. Report by Special Rapporteur for Freedom of Expression, Edison Lanza*. OEA/Ser.L/V/II CIDH/RELE/INF. 17/17. 15 March 2017, ¶ 133; IACHR. Complaint before the Inter-American Court of Human Rights against Costa Rica. Case No. 12.367, “la Nación” Mauricio Herrera Ulloa and Fernan Vargas Rohrmoser. 28 January 2002. ¶ 97.

<sup>26</sup> General Comment 34, ¶ 28.

19. The Inter-American system has emphasized that the exercise of human rights must be carried out with respect for other rights, and that in the process of harmonizing conflicting rights, the State plays a critical role by establishing the subsequent liability necessary to achieve such harmonization.<sup>27</sup> Specific emphasis has been placed throughout its case law on the guidelines that must govern this exercise of balancing and harmonization whenever the exercise of freedom of expression conflicts with the right of others to their honor and reputation. In addition, the Inter-American system has been clear in specifying that when limitations to freedom of expression are imposed for the protection of the rights of others, “it is necessary for those rights to be clearly harmed or threatened, and that it is the burden of the authority imposing the limitation to demonstrate this requirement; if there is no clear harm to another’s right, the subsequent imposition of liability is unnecessary.”<sup>28</sup>

### *Necessity and proportionality*

20. The requirement of necessity, under international human rights law, entails that restrictions “must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.”<sup>29</sup> The requirement of necessity also implies an assessment of the proportionality of the restrictions, with the aim of ensuring that restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons.”<sup>30</sup> Finally, the restrictions must be “the least intrusive instrument among those which might achieve the desired result.”<sup>31</sup> Otherwise, the restriction would imply abuse of power by the State.<sup>32</sup> In other words, among the various options available for reaching the same objective, the State should choose the one that least restricts freedom of expression.<sup>33</sup>

21. The Office of the Special Rapporteur of the IACmHR has stated that “when there is an actual abuse of freedom of expression that causes harm to the rights of others, the means least restrictive to freedom of expression must be used to repair that harm. The first means to be used is the right of correction or reply enshrined in Article 14 of the American Convention. If that is insufficient, and if it is shown that serious harm was caused intentionally or with obvious disregard for the truth, it is possible to resort to the imposition of civil liability.”<sup>34</sup> Also, it has stated that when “resorting to the imposition of liability for alleged abuses of freedom of expression, the standard of assessment of ‘actual malice’ must be applied; that is, it must be demonstrated that the person expressing the opinion did so with the intent to cause harm and the knowledge that she was disseminating false information, or that she did so with a reckless disregard for the truth of the facts.”<sup>35</sup> The Court has also established that when an statement

<sup>27</sup> IACtHR, *Case Kimel v. Argentina*. Judgment of May 2, 2008. Series C No. 177.

<sup>28</sup> IACmHR, *Report of the Special Rapporteur on Freedom of Expression, Catalina Botero. Inter-American Legal Framework regarding the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. 30 December 2009, ¶ 77.

<sup>29</sup> General Comment 34, *supra* n. 5, at ¶ 22.

<sup>30</sup> Human Rights Council, ‘Report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye’, (May 22, 2015) UN Doc. A/HRC/29/32.

<sup>31</sup> Human Rights Committee, General Comment No. 27, UN Doc. CCPR/C/21/Rev.1/Add.9, at ¶ 14.

<sup>32</sup> IACtHR, *Case of Tristán Donoso Vs. Panama*. Judgment of January 27, 2009. Series C No. 193. ¶ 119.

<sup>33</sup> IACmHR, *Report of the Special Rapporteur on Freedom of Expression, Catalina Botero. Inter-American Legal Framework regarding the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. 30 December 2009, ¶ 86. IACtHR, *Case Kimel v. Argentina*. Judgment of May 2, 2008. Series C No. 177, ¶ 83, and *Case of Álvarez Ramos v. Venezuela*. Preliminary Exception, Merits, Reparations and Costs. Judgment of August 30, 2019. Series C No. 380, ¶ 108.

<sup>34</sup> *Id.*, ¶79.

<sup>35</sup> *Id.*, ¶109.

that may jeopardize the reputation of someone is conditioned upon the confirmation of a fact, the existence of the willful purpose of insulting, offending or disparaging must be ruled out.<sup>36</sup> Additionally, it has stated that the party alleging harm is the one that must bear the burden of proof in demonstrating that the statements were false, and that they effectively caused the harm that is being invoked.<sup>37</sup> Moreover, the Inter-American Court in the case of *Herrera Ulloa v. Costa Rica* held that requiring the person who expressed themselves to legally prove the veracity of the facts asserted in their statements, and failing to accept the *exceptio veritatis* on their behalf, “is an excessive limitation on freedom of expression that does not comport with Article 13.2 of the Convention.”<sup>38</sup>

22. With regards to the “right to be forgotten” the European Court of Justice has acknowledged that the processing by a publisher may be executed “solely for journalistic purposes” and thus in certain circumstances would allow a subject to exercise his or her rights “against [a search engine] operator but not against the publisher of the web page.”<sup>39</sup> Further, the weighing of competing interests—right to privacy and reputation and the right to freedom of expression—will differ according to whether the processor at issue is an operator of a search engine or the publisher of the website because “the legitimate interests justifying the processing may be different and [...] the consequences of the processing for the data subject, and in particular for his [or her] private life, are not necessarily the same.”<sup>40</sup>
23. The ECtHR in the case *M.L. and W.W. v Germany* stressed that the initial publisher’s activity “is generally at the heart of what freedom of expression is intended to protect”, while the main interest of search engines is not that of publishing the initial information about the person concerned, but facilitating the public to access information about that person and establishing a profile about him or her.<sup>41</sup> The Court recognized that, while the rights of a person who has been subject of content available online are important, “these rights must also be balanced against the public’s right to be informed about past events and contemporary history, in particular through the use of digital press archives.” The Court observed that in this regard “the most careful scrutiny under Article 10 is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern.”<sup>42</sup>
24. In light of these, the interests of a processor, and its capabilities to ascertain content removal claims, drastically differ when considering journalistic media. In its General Comment 25, the Human Rights Committee set out that “the free communication of information and ideas about public and political issues between citizens [...] is essential. This implies a free press and other

<sup>36</sup> Id. IACtHR, *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207. ¶ 86.

<sup>37</sup> IACtHR, *Case of Herrera-Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107. ¶ 132; IACmHR, Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, cited in IACtHR., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111. ¶ 72; IACtHR, *Case of Tristán Donoso Vs. Panama*. Judgment of January 27, 2009. Series C No. 193. ¶ 120.

<sup>38</sup> IACtHR, *Case of Herrera-Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107. ¶ 132.

<sup>39</sup> European Court of Justice, *Google Spain v. Agencia Española de Protección de Datos and Mario Costeja González*, [C-131/12](#), ¶ 85, 13 May 2014.

<sup>40</sup> European Court of Justice, *Google Spain v. Agencia Española de Protección de Datos and Mario Costeja González*, [C-131/12](#), ¶ 86, 13 May 2014.

<sup>41</sup> ECtHR, *M.L. and W.W. v Germany*, Applications Nos. [60798/10 and 65599/10](#), ¶ 97, 28 June 2018.

<sup>42</sup> ECtHR, *M.L. and W.W. v Germany*, Applications Nos. [60798/10 and 65599/10](#), ¶ 104, 28 June 2018.



media able to comment on public issues without censorship or restraint and to inform public opinion.”<sup>43</sup> In addition, Article 19 of the ICCPR embraces a right of access to information, including “a right whereby the media has access to information on public affairs and the right of the general public to receive media output.”<sup>44</sup>

25. The Inter-American Court has also established in its landmark case *Claude Reyes et. Al. v. Chile*, that article 13 of the ACHR, by expressly stipulating the rights to “seek” and “receive” “information”, protects the right of any person to access information, with the provisos permitted under the strict regime of restrictions established in said instrument.<sup>45</sup> It has also highlighted the dual dimension of freedom of expression — individual and social— as a means for the exchange of information and ideas among individuals and for mass communication among human beings; which involves not only the right to communicate to others one’s own point of view and the information or opinions of one’s choosing, but also the right of all people to receive and have knowledge of such points of view, information, opinions, reports and news, freely and without any interference that blocks or distorts them.<sup>46</sup> The Court has also indicated that social communications media play an essential role as vehicles for the exercise of the social dimension of freedom of expression in a democratic society and must, therefore, reflect the most diverse information and opinions.<sup>47</sup>
26. Finally and critically, considering that the necessity requirement mandates that the restriction on freedom of expression be the least intrusive instrument to achieve the desired purpose, the removal of news content is a severe restriction on freedom of expression. Any person with a complaint against a publisher may have a range of actions available, including corrections, a possibility of reply, even a civil legal action for compensation or reparation. The mechanism of deletion is extreme and extraordinary and should be considered inappropriate under the law governing freedom of expression. There are, in short, undoubtedly less-restrictive means of achieving the protection of the individual’s privacy and reputation other than full content removal.

## E. CONCLUSION

27. The decision of this Court could have significant effects on media freedom and the right to access information around the world, and it could help reinforce the pre-eminent role of the press in a democratic society to impart ideas and opinions on matters of public interest. This Court’s decision will have a significant impact on the media’s ability to report and rightfully disseminate public information. Particularly strong reasons must be provided for any measure

<sup>43</sup> Human Rights Committee, General Comment No. 25, UN Doc. [CCPR/C/21/Rev.1/Add.7](#), at ¶ 25.

<sup>44</sup> General Comment 34, *supra* n. 5, at ¶ 18.

<sup>45</sup> IACtHR, *Case of Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, ¶ 92.

<sup>46</sup> IACmHR, *Report of the Special Rapporteur on Freedom of Expression, Catalina Botero. Inter-American Legal Framework regarding the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. 30 December 2009, ¶ 14. IACtHR, *Case of Herrera-Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, ¶ 110; *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, ¶ 79; IACtHR, *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile*. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73, ¶ 66.

<sup>47</sup> IACtHR, *Case of Fontevecchia and D’Amico v. Argentina. Merits, reparations and costs*. Judgment of November 29, 2011. Series C. No 238, ¶ 44, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*. Preliminary objections, merits, reparations and costs. Judgment of June 22, 2015. Series C. No 293, ¶ 142.

affecting this role of the press and limiting access to information which the public has the right to receive.<sup>48</sup> The current case presents the Court with a valuable opportunity to address the ways in which “right to be forgotten” applies to online media outlets and how it should be weighed against the right to disseminate information. In so doing, we urge the Court to take into account the interests of the media and the public in publishing, archiving and accessing news content.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'D. Kaye', written in a cursive style.

David Kaye

UN Special Rapporteur on the promotion and protection of the right to  
Freedom of opinion and expression

A handwritten signature in black ink, appearing to read 'Edison Lanza', written in a cursive style.

Edison Lanza

Special Rapporteur for Freedom of Expression of the  
Inter-American Commission on Human Rights

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<sup>48</sup> ECtHR, *Case of Timpul Info-Magazin and Anghel v. Moldova*, Application no. 42864/05, 27 November 2007, ¶ 31.