



# ARTICLE 19

IN THE CONSTITUTIONAL COURT OF COLOMBIA

Case No. T7414038

Office: *Despacho Dr. Carlos Bernal Pulido*

María Camila Orozco Becerra, Juan Carlos Giraldo, César Melo,  
Florencio Sánchez, César Augusto Jiménez Flechas  
and Leónidas Medina Jiménez

Applicants

vs

Bogota Criminal Municipality Court no. 22 &  
Prosecutor Office no. 23 Specialised Division against Corruption

Respondents

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## EXPERT OPINION BY ARTICLE 19

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### I. Introduction

1. This expert opinion is submitted on behalf of ARTICLE 19, the Global Campaign for Free Expression (ARTICLE 19) pursuant to Article 13 of the Decree Law 2591 on the rules of the ‘action for protection’ (“acción de tutela”) of the Constitutional Court of Colombia. This expert

opinion is provided based on the request of Fundación por la Libertad de Prensa (FLIP) and the Center for Human Rights of the American Bar Association (ABA); we understand that it will be relied upon by the applicants in the case.

2. In the present case, the Constitutional Court of Colombia (the Court) is to determine whether restrictions on the access of the media and the public to trial in a high-profile corruption case were a permissible restriction on the right to freedom of expression. Namely, the Court will decide whether the restrictions met the necessity and proportionality test aimed to protect the interests of the victims, witnesses and their families, as well as the interests of proper administration of justice. ARTICLE 19 believes the Court's decision on these issues will have significance beyond this case, since a number of journalists and media have reported similar restrictions on access and reporting about criminal trials in Colombia in recent years.<sup>1</sup> Therefore, we find that this case gives the Court an opportunity to set guidance on open justice principles in the country more broadly.
3. In order to assist the Court in its deliberations in the case, in the expert opinion, ARTICLE 19 outlines:
  - (i) The international freedom of expression standards and the scope of permissible limitations of the right to freedom of expression;
  - (ii) the functional role of journalists and the media reporting public interest related matters in a democratic society;
  - (iii) international standards on the principle of publicity and open justice;
  - (iv) ARTICLE 19's observations on the case at hand in light of the above-mentioned standards.
4. This expert opinion is based on international and regional human rights law standards concerning the right to freedom of expression and information as well as comparative case law and open justice and its corresponding limitations. It is also based on the factual information about the case, provided by FLIP and the American Bar Association; ARTICLE 19 does not address the facts of the case.

## **II. Interest of ARTICLE 19**

5. ARTICLE 19 is an international human rights organisation that advocates for the development of progressive standards on freedom of expression and access to information at the international and regional levels, and the implementation of such standards in domestic legal systems. It has contributed to the elaboration and advocacy of international law and standards and has been engaged in litigation in national and international fora involving states' obligations arising from international law on freedom of expression and other human rights. It is well-known for its authoritative work in elaborating the implications of the guarantee of freedom of expression in different thematic areas.

6. Since 2000, ARTICLE 19's legal expertise has contributed to the development of progressive jurisprudence of regional and national courts in the area of freedom of expression and information, including at the Inter-American Court of Human Rights (the Inter-American Court), the European Court of Human Rights and the African Commission on Human and People's Rights. At the Inter-American Court, ARTICLE 19 intervened in, *inter alia*, the cases of *Luis Gonzalo 'Richard' Velez Restrepo v. Colombia*, *Marcel Claude Reyes and Others v. Chile*, *Ulloa and Rohrmoser v. Costa Rica*, *Gonzalez and Fries v. Chile*, *Jorge Fontevicchia and Héctor D'Amico v. Argentina* and *Tulia Alvarez v. Venezuela*. Additionally, for the last decade, ARTICLE 19's regional offices in Mexico and Brazil have contributed to progressive standards in national legislation and case law in a range of freedom of expression and information issues, including the protection of journalists.

### III. Applicable international and regional standards on freedom of expression

7. The right to freedom of expression is protected by international human rights standards, in particular Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR), as well as regional human rights treaties – Article 19 of the American Convention on Human Rights (American Convention), Article 10 of the European Convention on Human Rights (European Convention), and Article 9 of the African Charter on Human and Peoples' Rights (African Charter). These instruments protect the right to freedom of expression in broad terms: States are required to guarantee the right to freedom of expression, which includes the right to seek, receive and impart information and ideas of all kinds and regardless of frontiers.<sup>2</sup> Colombia has ratified the ICCPR and the American Convention; hence the national courts are required to take into account international and regional standards under the respective provisions.<sup>3</sup>
8. The right to freedom of expression is not absolute and may be restricted in certain limited circumstances. A three-part test sets out the conditions against which any proposed restriction must be scrutinised – the restriction must:
  - **Be provided by for law:** any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly; assurance of legality on limitations to freedom of expression should comprise the oversight of independent and impartial judicial authorities;
  - **Pursue a legitimate aim:** listed exhaustively as respect of the rights or reputations of others; or the protection of national security or of public order (*ordre public*), or of public health or morals;
  - **Be necessary and proportionate:** the restriction must be necessary in a democratic society, and in order to meet the proportionality requirement, it “must be the least intrusive measure to achieve the intended legitimate objective.<sup>4</sup> Proportionality must be respected not only in the law but also by the administrative and judicial authorities in applying the law.<sup>5</sup>

9. ARTICLE 19 notes that the Inter-American human rights system further elaborated in detail the types of protected speech under Article 13 of the American Convention. This includes:
- **Presumption of coverage:** All forms of speech are protected *ab initio* independently of their content and degree of acceptance. Persons, groups, ideas or means of expression cannot be excluded *a priori* from public debate;<sup>6</sup>
  - **Specially protected speech:** which includes *inter alia* speech involving matters of public interest and speech regarding public officials in the exercise of their duties.<sup>7</sup>
10. The special protection of speech involving matters of public interest is based on the rigorous scrutiny of and accountability for the acts and omissions of the State and the government. Both the press and public opinion are placed along with the authorities as the main controllers of the adequate functioning of democracy<sup>8</sup> and its institutions. For these reasons, the right to freedom of expression is considered as one of the most effective ways to denounce corruption.<sup>9</sup> Hence, in its jurisprudence, the Inter-American Court stated that States must:
- Refrain more rigorously from placing limitations on public interest forms of expression, and State entities and officials must have a higher threshold of tolerance in the face of criticism because of the public nature of their duties;<sup>10</sup> and
  - Ensure that the judiciary take into account the context involving matters of public interest and judges adequately assess the respect of the rights of others in relation to the benefits that open debate regarding matters of public interest or concern offer to a democratic society.<sup>11</sup>
11. In respect to the issues in the present case, ARTICLE 19 also highlights that the Inter-American Commission on Human Rights (the Inter-American Commission) and the Inter-American Court have also stressed the relationship between corruption and its impact on the enjoyment of human rights. In its Resolution 1/18, the Commission recognised that Article 13 of the Convention specially protects the dissemination and seeking of corruption-related information given its importance for the consolidation, functioning and preservation of the democratic systems in the region.<sup>12</sup> Further, the Inter-American Commission and the Special Rapporteur on Freedom of Expression of the Inter-American Commission (the Special Rapporteur) have consistently recognised that the jurisprudence of the Inter-American system provides high and special protection to corruption investigations, claims and accusations, considering that corruption-related disclosures and debate are matters of public interest.<sup>13</sup>
12. Protection of the rights of victims and witnesses in the trial may warrant restriction on the grounds of the rights of others. However, ARTICLE 19 submits that the trial concerning corruption in the present case and the State actions resulting from it are matters of high public interest with special protection under Article 13 of the American Convention and Article 19 of the ICCPR. Hence, the Court must balance the protection of the rights of the victims, witnesses and their families with the right to freedom of expression. Any restrictions imposed on the access to information about the trial and on circulation or reporting about the case affect both the journalists and the general public.

13. Based on the foregoing, the Court must undertake an exhaustive examination of whether the restrictions on the access and reporting on the corruption trial, imposed by the Criminal Judge No. 22 and the Special Prosecutor No. 23, meet the conditions of the three-part test. In ARTICLE 19's view, this examination should include whether:
- the restrictions meet the criterion on legality, including examination of relevant domestic legislation (namely Article 28 of the Transparency Law and Articles 149-152 of the Decree Law 906-2004 Criminal Procedural Code);
  - the restrictions meet the conditions of necessity and proportionality. In particular, the Court must examine whether less restrictive measures were available in applicable domestic law under review in this case (i.e. Law 906-2004 Criminal Procedural Code, Articles 149 - 152). This would also include the assessment of whether the Special Prosecutor No. 23 provided any reliable and sufficient evidence to support its request to classify the trial as confidential, including any measures adopted to investigate and protect from the alleged risks to victims, witnesses and families as well as the integrity of the investigation in order to mitigate any actual impact before, during and after the trial;
14. Above all, it is crucial that this assessment take account of the role of the State as the main guarantor of the protection of the rights and physical integrity of persons deprived of liberty. In ARTICLE 19's view, the Constitutional Court should also place attention on the primary duty and power of the State to adopt special protection measures ensuring that, before, during and after trials of high public interest, the right to life and physical integrity are guaranteed for the victims, witnesses and their families.<sup>14</sup>

#### **IV. The role of the media and journalists in matters of public interest**

15. International and regional human rights standards highlight the role that journalists and media play in a democratic society and the functions they serve for the exercise of freedom of expression and information, particularly in relation to matters of public interest.
16. As the UN Human Rights Committee (HR Committee), the body tasked with interpreting the ICCPR stated:
- 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 [rights guaranteed by the ICCPR]. It constitutes one of the cornerstones of a democratic society. The [ICCPR] embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output.<sup>15</sup>
17. In addition, the Inter-American human rights system has consistently held that journalism is one of the most important manifestations of freedom of expression and information, as well as an essential instrument thereof.<sup>16</sup> This recognition is based on the principle whereby expression and dissemination are indivisible concepts<sup>17</sup> and, in virtue of which, any limitation

to freedom of expression, including in its means and form as media and individual journalists, impacts on both the individual and collective dimensions of the right.<sup>18</sup> The Inter-American Court has repeatedly stressed that it is vital that the media and journalists are able to gather the most diverse information and opinions.<sup>19</sup> In particular, under the American Convention, media workers should be allowed to investigate and disseminate matters of public interest,<sup>20</sup> to inform freely about the State's activities and to criticise the government.<sup>21</sup> This is in order to fulfill their two-fold task in relation to freedom of expression; first to transmit information and ideas of public interest that affect society, and second, to serve as a means of disseminating matters of interest to the public, who have the right to receive them.<sup>22</sup>

18. The Inter-American Court has also highlighted the important oversight role that journalists and the media play in investigating and reporting corruption-related matters.<sup>23</sup> It underlined the importance of disseminating information and opinions of this type to facilitate the exchange of social dissatisfaction and to highlight that corruption has a disproportionately negative effect on groups in situations of vulnerability, including persons deprived of liberty, migrants, land defenders, among others, whose rights are some of the most seriously impacted by corruption.<sup>24</sup> For these reasons, any restriction on corruption-related matters must be cautiously examined.<sup>25</sup>
19. In light of the foregoing, ARTICLE 19 considers that this case requires an evaluation of whether the role of the media and journalism was adequately weighed when the Criminal Judge No. 22 imposed a confidentiality restriction and denied access to the criminal trial of 'Carcel La Modelo.' This is especially important in light of the widespread problem of corruption in prisons throughout the country.<sup>26</sup> The Court should also consider the connection between the applicants' right to cover and disseminate information on the matters of public interest, the benefits of their reporting on corruption-related trials, including the potential to obtain additional information on or strengthen the prosecution of corruption-related investigations.

## V. International standards on the principle of publicity and open justice

20. The principle of publicity is an essential part of the right to a fair trial enshrined in a range of international and regional instruments and constitutional laws around the world, including the Constitution of Colombia (Article 29). It is guaranteed, most notably, by Article 10 of the UDHR, Article 14 of the ICCPR, Article 8 of the American Convention, as well as Article 6 of the European Convention on Human Rights. This principle includes *inter alia* the obligation of the State to provide open and public administration of justice; as the transparency of any trial proceeding provides safeguards for the interest of the individual and of society at large.<sup>27</sup> It has also been interpreted as an aspect of the right to freedom of expression (e.g. under Article 10 of the European Convention of Human Rights).
21. The Inter-American Court and the European Court have consistently held that secret administration of justice is prohibited, subjecting it to the scrutiny of the parties and of the public, including reporters and the press, in response to the need for transparency, impartial judicial decisions and the maintenance of confidence in the courts.<sup>28</sup> As highlighted above, the press plays an oversight role that significantly serves the underlying purpose of the principle of publicity and must be taken into account when considering restrictions thereof.

22. The public nature of criminal proceedings may exceptionally be limited under specific circumstances outlined in Article 8 (5) of the American Convention. This includes, *inter alia*, to preserve the interests of justice, and to subject State's to the burden to prove the need and proportionality of such a restriction.<sup>29</sup>
23. Similarly, under both Article 6 (1) of the European Convention and the 14 (1) of the ICCPR, the press and the public may be excluded from all or part of the trial *inter alia* to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. In very limited circumstances States have been allowed to hold in camera proceedings, for instance, under national security grounds where States must comply with additional requirements to safeguard the purposes of the principle of publicity. Such measures, however, should be accompanied with adequate mechanisms for observation or review that guarantee the fairness of the hearing.<sup>30</sup> They should also be limited to those portions of the hearing in which there is a necessary and proportional need to exclude the press and the public.<sup>31</sup>
24. Hence, international and regional standards provide for the public nature of trials as a rule.<sup>32</sup> Closed hearings may be in breach of the principle of judicial publicity if they fail to meet a threshold involving a legitimate ground under international human rights law and the necessity and proportionality test outlined below.
25. From a comparative perspective, ARTICLE 19 wishes to highlight the following examples:
  - Under the jurisprudence of the **UK Supreme Court**, the purpose of the common law principle of open justice “is to enable the public to understand and scrutinise the justice system of which the courts are administrators.”<sup>33</sup> The operation of this principle heavily weighs the role of the media as essential for the purposes of open administration of justice. The UK Supreme Court also held that “the principle of open justice is inextricably linked to the freedom of the media to report court proceedings”<sup>34</sup> considering that they “serve as the eyes and ears of a wider public” who, entitled to attend but unable to, rely upon the press to inform them about court proceedings.<sup>35</sup>

Departing from the open justice principle is an exception applicable in unusual and extraordinary circumstances strictly construed under “clear and cogent” evidence which judges must assess<sup>36</sup> to determine whether a hearing in camera is strictly necessary and whether justice can only be served through the exclusion of the public from the hearings.<sup>37</sup>

The UK Supreme Court also held that restrictions to the principle of open justice on the grounds of protection of administration of justice as well as anonymity and privacy of the parties and witnesses are justifiable but exclusive to the foregoing test satisfaction, assessed against the public interest in each case.<sup>38</sup> Thus, judges are required to treat these cases as a matter of principle, turning on necessity rather than convenience.<sup>39</sup> In practice, judges must take account of the following elements when examining if the threshold is met:  
a) There is a presumption of parties' identification;<sup>40</sup>

- b) Restrictions on the basis of the interests of the parties may be considered as necessary but must be read in accordance with the open justice principles set out above;<sup>41</sup>
- c) Protection of witnesses' interests against threats to life or safety may yield the press right to freedom of expression and be subject to anonymity measures.<sup>42</sup> The court must be satisfied that a *real and immediate risk* to life will arise or will materially increase in the absence of any such restriction to open justice in order to grant anonymity orders on the basis of threats to life or safety of witnesses. This threshold has been qualified upon a scale that courts must adopt to assess any restriction: stringent, high, very high and not readily satisfied.<sup>43</sup>

Importantly, the courts in England and Wales also held that the openness of a trial can act as a safeguard against impropriety on the part of witnesses, by discouraging perjury and other misconduct. They explicitly noted the advantages of taking evidence in public, including that “witnesses are less likely to exaggerate or attempt to pass on responsibility” when they are subject to public scrutiny.”<sup>44</sup> Taking witness testimony in public can also encourage other witnesses to come forward and can lead to other evidence becoming available, which ultimately benefits the proper administration of justice.<sup>45</sup>

- In **Canada**, the Supreme Court has articulated a strong commitment to the principle that any decision to limit public access to courts should not be taken lightly. It also stressed the special role of the media in informing citizens who are unable to attend court about what has transpired there. The Court has consistently reinforced the starting presumption of openness and emphasised that exclusion should constitute the exception. It developed the so-called “Dagenais/Mentuck test”<sup>46</sup> to determine whether open access should be limited in a given case. Under the test discretionary action to limit freedom of expression in relation to judicial proceedings should only be ordered when:
  - a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk. This risk must be real, substantial, and well-grounded in the evidence: “it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained;”<sup>47</sup> and
  - b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.<sup>48</sup>
- In **Australia**, the common law also establishes presumption of open justice, permitting limits on open justice where “necessary for the administration of justice”<sup>49</sup> or “in the interests of justice.”<sup>50</sup> For example, the New South Wales Court of Appeal, in a case considering whether the Police Tribunal could issue an order suppressing the name of a witness, held that open justice requires that proceedings be heard in open court, and that departure from this rule is only permitted where “its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified” the rule. The principle includes the rule that “nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom.”<sup>51</sup> The



judge in this case held that the capacity to publish reports of a proceeding was a “common law right” that is vital to “the proper working of an open and democratic society and to the maintenance of public confidence in the administration of justice.”<sup>52</sup>

In another case, the Full Federal Court highlighted the role of journalists in the court proceedings; stating that “whatever their motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the courts of the land are open to the public. This principle arises out of the belief that exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend courts in person, in a practical sense this principle demands that the media be free to report what goes on in them.”<sup>53</sup>

Further, in a number of cases, judges have relied upon the principle of open justice to grant media access to documents that have been used in open court; reasoning that this will help reporters to cover court proceedings fairly and accurately.<sup>54</sup>

- In the **USA**, the Supreme Court consistently held that the denial of the media’s access to judicial proceedings would inevitably dilute the media’s right to provide information on those proceedings. It emphasised that “[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could... be foreclosed arbitrarily... [W]ithout the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and “of the press could be eviscerated.”<sup>55</sup>

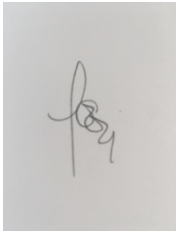
## VI. ARTICLE 19’s observations

26. The principles outlined above apply to in the present case. Accordingly, ARTICLE 19 submits the following observations in the present case.
27. First, it is not clear whether the Criminal Judge No. 22 fully considered a presumption of openness in relation to court hearings and a negative obligation on States not to prevent the media from attending and reporting from such hearings.
28. Second, international and regional freedom of expression standards stipulate that measures restricting the media’s right to freedom of expression must be proportionate to the “legitimate aim” that is being pursued. In order for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned. The complete exclusion of the media from attending a corruption trial will rarely (if ever) be a proportionate measure because of its particularly drastic nature.
29. Third, the Criminal Judge No. 22 did not consider a variety of alternative measures that could be adopted in order to achieve the “legitimate aims” of protecting the proper administration of justice and protection of witness in such a way that would be less restrictive on the right to freedom of expression. For example, an undertaking from the media not to publish certain

sensitive information would be such a measure. It could have also considered anonymising witnesses or orders that witnesses may not be photographed or identified in any way.<sup>56</sup>

30. Fourth, although the protection of both the interests of justice and the rights of witnesses are justifiable grounds to impose access and reporting restrictions of criminal trials, the Criminal Judge No 22 did not provide any information of reliable, clear and convincing evidence supporting the request to impose such restrictions to protect witnesses. The Prosecutor Office no. 23 Specialised Division against Corruption had the burden to prove the real and imminent risk to the victims and witnesses and the interests of justice. However, it is not clear if there was any assessment of the factors that qualify the risks as real and imminent and how they would frustrate the purposes of administration of justice or protection of witnesses. It also did not adopt any measures to compensate the impacts on the press right to freedom of expression and the public to be informed about matters of public interest.
31. In light of these observations, jointly and critically, ARTICLE 19 submits that the exclusion of the press from the criminal proceedings against public officials of 'Cárcel La Modelo' imposed unnecessary and disproportionate reporting restrictions against the applicants' right to freedom of expression and the principle of publicity in a democratic society. The right to freedom of expression of both the applicants and the public was unduly restricted by the Criminal Judge No. 22 imposing a restriction of permanent confidentiality on the trial.

In London, 16 March 2020



Paulina Gutierrez  
Law & Policy Programme  
ARTICLE 19

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<sup>1</sup> FLIP reports at least 26 cases between 2017 and 2019 in which Criminal Judges instruct the press to abandon the room or impose reporting limitations due to confidentiality classification, victims' rights or interests of justice without a precise and written justification of the decision to impose such restriction. Fundación para la Libertad de Prensa, *Amici curiae* case T7414038 and answer to the Court's information request no. OPT-A-2202/ 2019, 4 September 2019, pages 3-14.

<sup>2</sup> See UN Human Right Committee (HR Committee), General Comment No. 34 on Article 19: on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 11. See also Inter-American Court of Human Rights (Inter-American Court), *Carvajal Carvajal et al., v. Colombia*, Merits, Reparations and Costs, 13 March 2018, para 171.

<sup>3</sup> General Comment 34, *op.cit.*, para 7.

<sup>4</sup> *Ibid*, paras 22 and 34.

<sup>5</sup> HR Committee, General Comment No 27, Freedom of Movement (Article 12), CCPR/C/GC/21/Rev.1/Add.1, 2 November 1999, paras 14 and 15. See also HR Committee, *Marques v Angola*, Comm. No 1128/2002, 29 March 2005; or *Coleman v Australia*, Comm. No 1157/2003, 17 July 2006.

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<sup>6</sup> Office of the Special Rapporteur for Freedom of Expression (OAS Special Rapporteur for Freedom of Expression), Inter-American Legal Framework Regarding The Right To Freedom Of Expression, Inter American Commission on Human Rights, 30 December 2009, paras 31-32.

<sup>7</sup> *Ibid.*, paras 32 -53.

<sup>8</sup> *Ibid.*, para 33. See also Inter-American Court, *Kimel v. Argentina*, Merits, Reparations and Costs, May 3, 2008, Series C No. 177, para 57 and 87; *Claude-Reyes et al. v. Chile*, Merits, Reparations and Costs, 19 September 2006, Series C No. 151. para 84, 86 and 87; *Palamara-Iribarne v. Chile*, Merits, Reparations and Costs, 22 November 2005, Series C No. 135. para 83; *Herrera-Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, 2 July 2004, Series C No. 107, para 127.

<sup>9</sup> OAS Special Rapporteur for Freedom of Expression, *op. cit.* para 34.

<sup>10</sup> See, e.g. *Palamara-Iribarne v. Chile*, *op.cit.*, para 83; *Herrera-Ulloa v. Costa Rica*, *op.cit.*, para 125.

<sup>11</sup> OAS Special Rapporteur for Freedom of Expression, *op. cit.*, para. 36; Inter-American Court, *Tristán Donoso v. Panama*, Preliminary Objection, Merits, Reparations and Costs, 27 January 2009, Series C No. 193. para 123.

<sup>12</sup> Inter-American Commission, Resolution 1/18 Corruption and Human Rights, 167 Period of Sessions, 2 March 2018, points 1. c.

<sup>13</sup> Inter-American Commission, Corruption and Human Rights, OAS/Ser.LN/II. Doc. 236, 6 December 2019, 2. paras 193-198.

<sup>14</sup> Inter-American Court, Jurisprudence Guidebook of the Inter-American Court of Human Rights No. 9: persons deprived of liberty, 2018, p. 3- 6.

<sup>15</sup> General Comment No. 34, *op. cit.*, para 13.

<sup>16</sup> *Herrera Ulloa v. Costa Rica*, *op. cit.*, paras 117 and 118;

<sup>17</sup> *Carvajal Carvajal et. al.*, *op. cit.*, para 172. See also, Inter-American Court, *Ivcher Bronstein v. Perú*, Merits, Reparations and Costs Judgment, 6 February 2001, series C No. 74, para 146; *López Lone et. al. V. Honduras*, Merits, Reparations and Costs Judgment, 5 October 2015, series C No. 302. para 235.

<sup>18</sup> OAS Special Rapporteur for Freedom of Expression, *op. cit.* para 167; *Kimel v. Argentina*, *op.cit.*, para 57.

<sup>19</sup> *Herera Ulloa*, *op. cit.*

<sup>20</sup> *Ivcher Bronstein v. Perú*, *op. cit.*, para 157.

<sup>21</sup> Inter-American Court, Arguments before the Inter-American Court of Human Rights in the case of *Ivcher Bronstein v. Peru*, *op. cit.*, para 143 g).

<sup>22</sup> *Ibid.*, para 153.

<sup>23</sup> Inter-American Commission, Resolution 1/18 Corruption and Human Rights, 167 Period of Sessions, 2 March 2018, points 1. c.

<sup>24</sup> *Ibid.*, points 2. a. b. and 3.b. and paras. 198-206.

<sup>25</sup> *Ibid.*, para 206.

<sup>26</sup> Office of the Ombudsman, Sixth Report about the situation of prison in Colombia, 2019.

<sup>27</sup> HR Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007.

<sup>28</sup> Inter-American Court, *J. v. Peru*, Preliminary objection, Merits, Reparations and Costs Judgment, 23 November 2013, series C No. 275, para 217; *Case Palamara Iribarne v. Chile*, Merits, Reparations and Costs Judgment, 22 November 2005, series C No. 135, para 135. See also the European Court, *Malhous v. Czech Republic*, App. No. 33071/96, 12 July 2001, para 55 GC; and *Barberà, Messegué and Jabardo v. Spain* A 146 (1998).

<sup>29</sup> *J. v. Peru*, *op.cit.*, para 220.

<sup>30</sup> UN Sub-commission on the promotion and protection of human rights, Report of the Sub-Commission Special Rapporteur on terrorism and human rights, An updated framework draft of principles and guidelines concerning human rights and terrorism, A/HRC/Sub.1/58/30, 3 August 2006, para 45; UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report to UNGA on Right to a fair trial in the fight against terrorism, A/63/223, 6 August 2008, para 30.

<sup>31</sup> *Ibid.*, UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report on the Promotion and Protection of all human rights, Addendum Mission to South Africa, A/HRC/6/17/Add.2, 7 November 2007, para 32.

<sup>32</sup> Inter-American Court, Court's Digest, Article 8.5. The publicity of the criminal process, 3.4.1 and 3.4.2.

<sup>33</sup> UK Supreme Court, *Cape Intermediate Holdings LTD v. Doring*, [2019] UKSC 38, 29 July 2019, para 49. See also J. Nicholls, Public Law Project: Judicial Review Trends and Forecasts 2017, Session 5: Open justice in the law on anonymity, access to material on the court file and reporting restrictions, Doughty Street Chambers, paras 4-8, citing UK Supreme Court, *Scott v. Scott*, AC 417, 1913; *Khuja v. Times Newspapers Ltd* 3 WLR 35, 2017, paras 12 and 13.

<sup>34</sup> UK Supreme Court, *A v. British Broadcasting Corporation*, On appeal from [2013] JCSIH 43, 8 May 2014, para 26.

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- <sup>35</sup> *Khuja v. Times Newspapers Ltd*, *op.cit.*, para 16
- <sup>36</sup> Nicholls, *op. cit.*, paras 14 -18.
- <sup>37</sup> England and Wales Court of Appeal, *Guardian News and Media Ltd v Incedal*, Criminal Division EWCA, Case No: 2015/01756/B2, 09 February 2016, paras 49 and 50.
- <sup>38</sup> Nicholls, *op. cit.*, paras. 39-62.
- <sup>39</sup> UK Supreme Court, *Al Rawi and others v. The Secret Service and others*, [2011] UKSC 34, 13 July 2011, para 11.
- <sup>40</sup> *Ibid.*, para 51.
- <sup>41</sup> *Ibid.*, para 56-69. Protection of parties' interests has overridden open justice principles mainly in cases of children and mental patients under a very high threshold described in the case law in reference.
- <sup>42</sup> UK Supreme Court, *Guardian News and Media Limited, Her Majesty's Treasury v. Mohammed Jabar Ahmed and others*, 27 January 2010, paras 26 and 27.
- <sup>43</sup> UK House of Lords, *Van Colle v. Chief Constable of Hertfordshire*, [2008] UKHL 50, 30 July 2008, paras 30, 66, 69 and 116.
- <sup>44</sup> Divisional Court (UK), *R (Wagstaff) v. Secretary of State for Health*, [2001] 1 WLR 292, p. 319.
- <sup>45</sup> *Ibid.* See also, Court of Appeal of England and Wales, *R v. Legal Aid Board*, Ex p Kaim Todner, [1999] QB 966, para 4.
- <sup>46</sup> *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835; *R v Mentuck* [2001] 3 SCR 442
- <sup>47</sup> *R v Mentuck*, *op.cit.*, para 34.
- <sup>48</sup> *Ibid.*, para 32.
- <sup>49</sup> *R v Kwok* (2005) 64 NSWLR 335
- <sup>50</sup> *BUSB v The Queen* (2011) 80 NSWLR 17; see also *R v Macfarlane*, Ex parte O'Flanagan (1923) 32 CLR 518; *Hogan v Hinch* (2011) 243 CLR 506.
- <sup>51</sup> *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 50
- <sup>52</sup> *Ibid.*
- <sup>53</sup> *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 258–9 [35]; or (1995) 57 FCR 512, 514
- <sup>54</sup> *Tuqiri v Australian Rugby Union Ltd*, [2009] NSWSC 781; *Llewellyn v Nine Network Australia Pty Ltd* (2006) 154 FCR 293.
- <sup>55</sup> The US Supreme Court, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), p. 576 to 580
- <sup>56</sup> *C.f.* Supreme Court of Ireland, *Sunday Newspapers Limited & Others v. Gilchrist and Rogers*, [2017] IESC 18 (23 March 2017), para 44.