In the Constitutional Court of Colombia

WRITTEN COMMENTS SUBMITTED BY THE CENTRE FOR LAW AND DEMOCRACY

INTERVENTION AS AMICUS CURIAE IN PROCEEDING T-9.973.884 RELATING TO THE TUTELA ACTION BROUGHT BY JOSÉ MANUEL VEGA DE LA CRUZ AGAINST THE GOVERNMENT OF VALLEDUPAR

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Toby Mendel
Executive Director
Centre for Law and Democracy

39 Chartwell Lane
Halifax, N.S., B3M 3S7
Canada

Tel: +1 902 431-3686
email: toby@law-democracy.org

Laura Notess
Senior Legal Officer
Centre for Law and Democracy

Tel: +1 782 234-4471
email: laura@law-democracy.org

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Summary of the Argument

1. This brief argues that it would be exceptional for a block of a journalist by a government social media to be legitimate and that this standard was not present in Mr. Vega's case, based on the facts available to the Centre for Law and Democracy (CLD). The social media block in question was a blunt instrument which denied access to important government information and an opportunity for exchange with the government on a widely-used public forum (X). Several courts around the world have established very high standards for blocks by official accounts, which standards were not met here.

2. Under international human rights law, any official block must be justified by reference to the three-part test which governs any restriction on freedom of expression. It must be authorised by a law and regulated by a policy which establishes clearly when blocks may be imposed and imposes basic due process protections. Only a block which protects a specific legitimate interest which is recognised under international law could be legitimate. Limiting criticism of the government is not such a legitimate interest. Also, even if the block did seek to protect a legitimate interest, it would still need to be necessary and proportionate. Imposing a block in response to posts which commented critically on important public matters, such as government misconduct or corruption, could rarely if ever be justified. When assessing whether posts are illegal, government entities should err on the side of caution, given that they are poorly suited to making such an assessment.

Statement of CLD Interest and Expertise

3. CLD is a non-profit, human rights non-governmental organisation (NGO) which focuses on foundational rights for democracy. CLD believes in a world in which robust respect for human rights underpins strong participatory democracy at all levels of governance – local, national, regional and international – leading to social justice and equality. CLD works to promote, protect and develop those human rights which serve as the foundation for or underpin democracy, including the rights to freedom of expression, to vote and participate in governance, to access information and to freedom of assembly and association.

4. To achieve this mission, CLD undertakes research and educational outreach to advance the understanding of civil society and the wider public globally about those human rights which serve as a foundation for or underpin democracy. CLD builds the understanding of inter-governmental organisations and non-governmental organisations regarding human rights which underpin democracy, so that they can better realise their goals. CLD also engages in a range of law reform efforts, whether through analysing and advocating for reform of laws, advocating for the adoption of human rights protective laws or supporting strategic and constitutional litigation. Extensive research and policy work are also part of CLD's mandate, with a view to contributing to ensuring continuous relevance and development of the key human rights which fall within its mandate.

5. Based in Halifax, Canada, CLD is recognised as a global leader in international standard setting regarding freedom of expression. CLD has often engaged in constitutional litigation to promote

respect for freedom of expression, sometimes providing its own *amicus curiae* briefs before courts and sometimes providing support to local lawyers arguing these cases. For example, CLD has supported litigation before the Constitutional Court in Indonesia challenging the government's power to block websites, before the High Court of Islamabad on interpreting the common law doctrine of "contempt of court" and before the Supreme Court of Sri Lanka in a case challenging the failure of the State to regulate broadcasting in a manner which protects the right of the public to receive diverse information and ideas. In addition, on 15 June 2021, CLD's Executive Director, Toby Mendel, appeared before the Inter-American Court of Human Rights in Case No. 13.015, *Emilio Palacio Urrutia v. Ecuador* as an expert witness on behalf of the Inter-American Commission on Human Rights.

6. CLD is submitting this brief with a view to assisting the Constitutional Court in its task of interpreting international and constitutional guarantees of freedom of expression in Colombia. It is based on CLD's expertise in international and comparative law and is focused on international human rights standards, while not providing commentary on Colombia's domestic laws, an area in which CLD has limited expertise. The organisation has no direct interest in the outcome of this case, other than its human rights interest.

Statement of Facts

7. This case concerns the Government of Cesar Department (Gobernación del departamento del Cesar) blocking a journalist on X (formerly Twitter). On 16 August 2023, José Manuel Vega de la Cruz discovered that he had been blocked from access by the official X account of the Government of Cesar Department. The Government of Cesar Department uses its official X account to disseminate a range of public announcements such as in relation to use of public resources, contracts, progress on development plans, the implementation of public policies and so on.[1]

8. Mr. Vega sought the assistance of Fundación para la Libertad de Prensa (FLIP). FLIP sent a letter expressing concern with the block and also exercised the right to petition to obtain the reasons which motivated the decision. In response to the petition, the Cesar Government indicated that it was operating according to X's policies and defending against the journalist's "attacks" ("ataques") to protect the rights of privacy, honour, good name and presumption of innocence of the government and its officers.[2] The Cesar Government did not remove the block.

9. The first instance court rejected the petition on a procedural point related to whether the request sent by FLIP constituted a proper exhaustion of ordinary means to resolve the rights violation.[3] The court at the second instance focused its assessment on the proportionality of the block in light of alleged harms to the reputation of public officials in certain X posts by Mr. Vega. It highlighted in particular a post by Mr. Vega referring to the "band of delinquents" ("banda de delincuentes") which govern Cesar and another stating that Cesar government functionaries

[1] Sentencia de primera instancia, Juzgado Sexto de Pequeñas Causas de Valledupar, 3 de noviembre de 2023, p. 1.
[2] *Ibid.*, pp. 2-3.
[3] *Ibid.*

are afraid that processes which had been shelved by prepaid prosecutors ("fiscales prepagos") would be dusted off, i.e. resuscitated.[4] These posts appear to be posts on Mr. Vega's own account, rather than responses to or comments on posts made by Cesar Government on its own X account. It is not clear whether these two tweets in particular were the basis for the block by the Cesar Government or if they instead became a focus subsequently during the legal proceedings.

Freedom of Expression and Access to Information under International Law

10. The right to freedom of expression and to access information is protected by international human rights law, particularly by two treaties ratified by Colombia, namely in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR)[5] and Article 13 of the *American Convention on Human Rights* (ACHR).[6] This *amicus curiae* brief focuses on international standards derived from these treaties as well as from other relevant human rights treaties, such as the *European Convention on Human Rights*[7] and the *African Charter on Human and Peoples' Rights*.[8] In general, protection for freedom of expression is similar across these human rights systems, although the ACHR in particular has some stronger protective language, such as its explicit prohibition of prior censorship in Article 13(2).

11. The right to freedom of expression encompasses a right to express oneself as well as a right to seek and receive information.[9] Each right is summarised briefly, followed by some comments on the freedom of expression of journalists and freedom of expression online, in order to provide context for a more in-depth discussion of how international standards apply to social media blocks by government accounts later in this brief.

The right to freedom of expression

12. The right to freedom of expression extends to expression regardless of the medium of communications and subject matter. The right is formulated broadly, protecting the ability of individuals to develop ideas, express their creativity and engage in dialogue with others. In the words of the Inter-American Court of Human Rights (IACtHR), it is a "cornerstone" of democratic society without which "democracy is enervated, pluralism and tolerance start to deteriorate, the mechanisms for control and complaint by the individual become ineffectual and, above all, a fertile ground is created for authoritarian systems to take root in society."[10]

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[4] Sentencia de Segunda instancia, Juzgado Primero Civil del Circuito de Valledupar, 12 de deciembre de 2023, p. 7.
[5] UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 3 January 1976. Colombia ratified the ICCPR on 29 October 1969.
[6] 22 November 1969, in force 18 July 1978. Colombia ratified the ACHR on 28 May 1973.
[7] 4 November 1950, in force 3 September 1953.
[8] 27 June 1981, in force 21 October 1986.
[9] ACHR, Article 13(1); ICCPR, Article 19(2).
[10] *Herrera-Ulloa v. Costa Rica*, 2 July 2004, Ser. C. No. 107, paras. 112 and 116, https://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf (citing for the "cornerstone" metaphor *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85,13 November 1985, Ser. A No. 5, para. 70).

13. Expression is protected within the scope of the right even when it is offensive, shocking or erroneous, reflecting the importance of tolerating open debate and dissenting views. Prior conditioning of expression, such as that it be truthful or impartial, is accordingly not legitimate.[11] In contrast, States have a responsibility to ensure that there are "no persons, groups, ideas or means of expression excluded *a priori* from public debate".[12]

14. The right is not absolute, but any restriction on freedom of expression must meet certain minimum standards specified in Article 19(3) of the ICCPR and Article 13(2) of the ACHR. This is assessed via a three-part test which requires any restriction to 1) be provided by law; 2) have a legitimate aim, namely the protection of the rights or reputations of others, the protection of national security, public order or public health or morals; and 3) be necessary to meet the identified aim.

15. Additional human rights standards provide key guidance for interpreting this three-part test. For example, the "provided by law" requirement requires laws to be sufficiently clear and precise. The necessity part requires restrictions to be narrowly tailored and not overbroad. It also incorporates a proportionality assessment, meaning that the benefits to the protected interest must outweigh the harms caused to freedom of expression. Specific attributes of the three-part test are discussed further below, in the context of applying the test to the question of government social media blocks.

16. Freedom of expression, like other human rights, applies universally to everyone. It must therefore be guaranteed in a non-discriminatory manner, including not only on the basis of traits such as race or sex but also any discrimination on grounds of "political or other opinions".[13]

17. Although the right protects all kinds of speech, when applying the three-part test some kinds of speech receive special protection. This includes political debate and discussion of government policies, reporting on government activities and corruption, and expressions of opinion and dissent.[14] Discussion of matters of public interest, as well as speech regarding public officials as it relates to the exercise of their duties, is specially protected because of the importance of "democratic oversight of government" and because public officials "have exposed themselves voluntarily to heightened scrutiny" and "have an enormous capacity to call information into question through their power to appeal to the public."[15] Accordingly, the

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[11] Inter-American Commission on Human Rights, *Declaration of Principles on Freedom of Expression*, 19 October 2000, Principle 7, http://www.iachr.org/declaration.htm.

[12] Report of the Office of the OAS Special Rapporteur for Freedom of Expression, Annual Report of the Inter-American Commission on Human Rights 2008 Vol. II, OEA/Ser.L/V/II.134, 25 February 2009, Ch. 3 para. 30, https://cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf. See also OAS Special Rapporteur for Freedom of Expression, Background and Interpretation of the Declaration of Principles, para. 32, https://www.oas.org/en/iachr/expression/showarticle.asp?artID=132.

[13] Inter-American Commission on Human Rights, *Declaration of Principles on Freedom of Expression*, note 11, Principle 2.

[14] Human Rights Council, Resolution 12/16, Freedom of Opinion and Expression, 12 October 2009, undocs.org/A/HRC/RES/12/16, para. 3(p)(i).

[15] Report of the Office of the OAS Special Rapporteur for Freedom of Expression, Annual Report of the Inter-American Commission on Human Rights 2008, note 12, Ch. 3, paras. 38-39 (citing a number of IACtHR cases).

application of the three-part test should take into account the special protections for speech which expresses critical opinions about public authorities.

The right to access information

18. The right to freedom of expression includes a right to "seek" and "receive" information. This gives rise to a right to access information, which reflects the dual individual and social dimension of the right to freedom of expression.[16] Individuals who seek and obtain information can circulate it to others, enhancing overall access to information throughout society, particularly when the individuals in questions are journalists or others who monitor and comment on public affairs.

19. The right to access information includes a specific right to access information held by public authorities. The Inter-American Court of Human Rights recognised this right in the landmark 2006 *Claude Reyes v. Chile* case, noting: "Democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities. Hence, for the individual to be able to exercise democratic control, the State must guarantee access to the information of public interest that it holds."[17]

20. Governments should accordingly undertake "all necessary efforts to ensure easy, prompt, effective and practical access to government information of public interest, including online."[18] To guarantee the right, government procedures should be "governed by the principles of good faith and maximum disclosure, in a way that all information in State power is presumed public and accessible, subject to a limited regime of exceptions."[19]

21. In order to ensure public access to official information, States should establish access to information systems. Such systems should have both a proactive a reactive component, meaning the State has a responsibility to proactively release information to the public as well as to respond to specific requests for information. Proactively released information should be available in a range of accessible formats. For example, the *Declaration on Principles of Freedom of Expression in Africa* notes: "Information required to be proactively disclosed shall be disseminated through all available mediums, including digital technologies."[20]

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[16] Human Rights Committee, *Toktakunov v. Kyrgyzstan*, 28 March 2011, Communication No. 1470/2006, para. 7.4, undocs.org/CCPR/C/101/D/1470/2006; IACtHR, *Claude Reyes and Others v. Chile*, 19 September 2006, Series C, No. 151, para. 77, https://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf; and IACtHR, *Flores Bedregal y Otras v. Bolivia*, 17 October 2022, para. 32, https://www.corteidh.or.cr/docs/casos/articulos/seriec_467_esp.pdf.
[17] IACtHR, *Claude Reyes and Others v. Chile*, note 16, para. 87.
[18] Human Rights Council, Resolution 44/12, 16 July 2020, https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2FRES%2F44%2F12&Language=E&DeviceType=Desktop.
[19] IACtHR, *Gomes Lund v. Brazil*, 24 November 2010, Series C, No. 219, para. 229, https://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf.
[20] African Commission on Human and Peoples' Rights, adopted at the 32nd Ordinary Session, 17-23 October 2002, Principle 29(3), https://achpr.au.int/en/node/902.

22. Such right to information systems are distinct from government press or communications offices, such as those which frequently operate government social media accounts. This is because it is important to have independent procedures for managing and releasing all government documents, whereas government press offices often seek to communicate only certain messages via their platforms. However, government communications through such channels also constitute a means of providing information to the public. Indeed, active official social media accounts are often a crucial information channel, for example during emergencies, because of their reach and speed.[21] When communicating through social media accounts, governments should therefore also meet their obligation to protect and promote the right to access information, and be governed by principles of openness and accessibility, including though ensuring easy access to information via digital channels.

23. Any government action to restrict access to information should always comply with the same three-part test which applies to restrictions on freedom of expression. Decisions to limit a specific individual's access to information are clearly a restriction on his or her right and must be justified under the three-part test.[22] Similarly, like other human rights, the right to access information should not be denied on a discriminatory basis.

Journalists

24. The right to freedom of expression and to access information extends to everyone, but it is of particular importance vis-à-vis journalists. A "free, independent and diverse media fulfils society's right to know, as well as journalists' right to seek, receive and impart information."[23]

25. By virtue of their profession, journalists circulate information to the wider public and enhance the flow of information to the public. The Human Rights Committee has consistently affirmed that "the right of access to information includes a right of the media to have access to information on public affairs".[24] Similarly, the European Court of Human Rights' (ECtHR) Grand Chamber has said that the gathering of information is an "inherent, protected part of press freedom."[25] And the Human Rights Council has affirmed that access to information, "both online and offline", is necessary for journalists to "conduct their work effectively and meaningfully".[26]

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[21] OAS Special Rapporteur on Freedom of Expression, Building a Proactive Transparency Index for Use During Health Emergencies, 2023, p. 42, https://www.oas.org/en/iachr/expression/reports/transparency%20ENG.pdf (proposing indicators related to the availability of official social media accounts and whether they are active).
[22] See, for example, ECtHR, *Kalda v. Estonia*, 19 January 2016, Application No. 17429/10, https://hudoc.echr.coe.int/fre?i=001-160270; and IACtHR, *Gomes Lund v. Brazil*, 24 November 2010, Series C, No. 219, para. 229, https://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf.
[23] UN Special Rapporteur for freedom of expression, Reinforcing Media Freedom and the Safety of Journalists in the Digital Age, 20 April 2022, para. 11, undocs.org/A/HRC/50/29.
[24] Human Rights Committee, *Toktakunov v. Kyrgyzstan*, note 15, para. 6.3.
[25] ECtHR (Grand Chamber), *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, 27 June 2017, Application No. 931/13, para 128, https://hudoc.echr.coe.int/fre?i=001-175121.
[26] Human Rights Council, Resolution 44/12, 16 July 2020, https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2FRES%2F44%2F1.
2&Language=E&DeviceType=Desktop.

26. Non-discriminatory access is particularly important for journalists. In contexts where only a limited number of journalists can access a particular forum, such as a press conference, accreditation systems for allocating access should be "independent and non-discriminatory in nature, including on the basis of political opinion."[27] For example, during the COVID-19 pandemic the UN Special Rapporteur for freedom of expression decried interferences with media access to public information resources, such as at press briefings, noting that they risk "closing off access to reliable information, disabling independent journalists from addressing questions to officials… and limit the ability to hold officials accountable for decisions".[28]

27. As noted above, public officials and speech regarding public affairs receive special protection in international human rights law. This is particularly true when journalists report or comment on public matters. Public officials "should demonstrate high levels of tolerance towards critical journalistic reporting bearing in mind that critical scrutiny of those in positions of power is a legitimate function of the media in democracy."[29] The Human Rights Committee has specifically said that penalising a journalist "solely for being critical of the government or the political social system espoused by the government" can never be a necessary restriction on freedom of expression.[30]

The rights to freedom of expression and access to information online

28. Human rights authorities have consistently affirmed that the same principles which govern offline speech protect online speech.[31] The right exists "regardless of frontiers" and through any medium of one's choice.[32]

29. While the principles remain the same, the digital era has introduced novel challenges related to new means of communication. One of these is the precise issue raised in this case: the responsibilities of government entities when operating social media accounts and the circumstances under which governments may block individual users. So far, international human rights authorities have not commented on the specific issue of social media blocks by official government accounts, but they have commented extensively on the importance of access to the Internet and to social media sites.

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[27] Special International Mandates on Freedom of Expression, 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression, 20 October 2021, https://www.ohchr.org/sites/default/files/2022-04/Joint-Declaration-2021-Politicians_EN.pdf.
[28] UN Special Rapporteur for freedom of expression, Disease Pandemics and the Freedom of Opinion and Expression, 23 April 2020, para. 22, undocs.org/A/HRC/44/49.
[29] Special International Mandates on Freedom of Expression, 2023 Joint Declaration on Media Freedom and Democracy, 2 May 2023, https://www.ohchr.org/sites/default/files/documents/issues/expression/activities/2023-JD-Media-Freedom-and-Democracy.pdf.
[30] UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, para. 42, https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf.
[31] Human Rights Council, Resolution 47/16, para. 1, undocs.org/A/HRC/RES/47/16.
[32] Article 13(1) of the ACHR and Article 19(2) of the ICCPR.

30. Given the central role of the Internet in modern communications, access to the Internet is vital to the exercise of freedom of expression.[33] Accordingly, any interference with Internet access is a serious restriction on freedom of expression. Interference with access to major social media platforms also raises concerns, because these platforms now constitute important public fora for the exchange of information. In a range of recent cases finding that States improperly blocked access to social media sites, human rights courts have emphasised the importance of social media sites to the realisation of freedom of expression in the modern world.

31. For example, the ECtHR found a violation where a Turkish court had ordered the blocking of YouTube because it contained videos insulting the memory of Atatürk. The Court noted: "YouTube is a unique platform on account of its characteristics, its accessibility and above all its potential impact". It also noted that "political content ignored by the traditional media is often shared via YouTube, thus fostering the emergence of citizen journalism."[34]

32. Similarly, the Community Court of Justice of the Economic Community of West African States, holding that Nigeria's temporary ban on Twitter constituted a violation of freedom of expression, suggested that access to Twitter, as a "social media of choice to receive, disseminate and impart information" is a "derivative right" which is complementary to the right to freedom of expression.[35] It stressed that Twitter has become "one of the most usable or user-friendly platforms" for the dissemination and reception of ideas.[36]

33. Many major cases relating to restrictions on access to the Internet focus on blocks imposed on an entire population or community, but denying a particular individual access to certain sites also triggers access to information concerns. For example, in *Kalda v. Estonia,* the ECtHR addressed the case of a prisoner who was denied access to specific government websites and the website of an international institution.[37] The Court acknowledged that imprisonment "inevitably" involves restrictions on prisoners' communication rights, and a denial of access to some sites could be justified on security grounds. However, in finding a violation of the prisoner's access rights, it considered factors such as that access to government websites "promotes public awareness and respect for human rights", and the increasing importance of the Internet for accessing official information.[38]

34. While extensive attention has been paid to the question of freedom of expression when governments regulate private intermediaries, the responsibilities of governments themselves when operating on online platforms has received far less attention. Government officials have responsibilities to avoid certain speech which harms the rights of others, especially hate speech,

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[33] Special International Mandates on Freedom of Expression, Joint Declaration on Freedom of Expression and the Internet, 1 June 2011, para. 6(a), https://www.law-democracy.org/live/joint-declaration-on-access-to-the-internet/; and African Commission on Human and Peoples' Rights, *Declaration of Principles on the Freedom of Expression in Africa*, note 20, Principle 37(2).
[34] ECtHR, *Cenzig and others v Turkey*, 1 December 2015, Application Nos. 48226/10 and 14027/11, para. 52, https://hudoc.echr.coe.int/eng?i=001-159188.
[35] *SERAP and Ors v. Nigeria*, 14 July 2022, Judgment No. ECW/CCJ/JUD/40/22, para. 68, https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2022/08/twitter-final.pdf.
[36] *Ibid.*, para. 70.
[37] ECtHR, *Kalda v. Estonia*, note 22.
[38] *Ibid.*, paras. 50 and 52.

including via online platforms.[39] However, if governments remove or limit the speech of others, such as people commenting on their platforms, this raises direct freedom of expression concerns which are subject to the three-part test. The following section of this brief examines this in greater depth.

Approaches to Social Media Blocks by Official Accounts, Politicians or Public Officials in National Courts

35. International human rights authorities have not yet addressed the precise issue raised by this case, although a clear conclusion can be derived from existing international standards, discussed further below. However, several national courts have now ruled on social media blocks by accounts run by government, government officials or politicians. Some of these cases focus on whether and if so when "private" accounts, such as personal accounts of politicians, should be treated as public in nature. These cases do, however, demonstrate that social media blocks by official government accounts are not appropriate, even if this is not stated directly (for example because it was held that the account was private).[40] This section provides a short summary of some key cases from around the globe, to provide a comparative perspective from other courts.

36. In the United States (U.S), there have been numerous lawsuits about politicians or public officials who have blocked individuals on social media. These date back to a 2012 case where a Hawaiian police department blocked followers on Facebook, which was settled after the police department agreed to develop a policy governing public posting on its Facebook page.[41]

37. U.S. Circuit Courts, which are the appellate courts one level below the Supreme Court, have affirmed that government social media sites are "public forums", and that blocking or otherwise denying access to individual social media users interferes with their freedom of speech rights under the First Amendment to the U.S. Constitution. Under U.S. First Amendment jurisprudence, when the government opens a "public forum" for debate, it cannot exclude some voices from that forum on the basis of viewpoint discrimination.[42]

38. For example, *Robinson v. Hunt* involved a Facebook page run by local law enforcement (the county sheriff's office). Following the death of a police officer, a message was posted on the

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[39] Special International Mandates on Freedom of Expression, 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression, note 27, para. 3(iii).

[40] See, for example, U.S. Supreme Court, *Lindke v. Freed*, 601 U.S. 187 (2024), 15 March 2024, https://www.supremecourt.gov/opinions/23pdf/22-611_ap6c.pdf.

[41] U.S. District Court for the District of Hawaii, *Hawaii Defense Foundation et al. v. City and County of Honolulu et al.*, Order Adopting in Part and Modifying in Part Findings and Recommendation to Grant in Part and Deny in Part Plaintiffs' Motion for Attorneys' Fees, Doc. No. 64, 19 June 2014, https://www.hawaiifreepress.com/Portals/0/Article%20Attachments/Judge%20Seabright%20Attorney%20Fee%20Order.pdf.

[42] U.S. constitutional law distinguishes between different kinds of public forums (i.e., "traditional" and "limited" or "designated" public forums), but since viewpoint discrimination is prohibited in any public forums, the distinction was not highly relevant to the cases described in this brief, which focused on viewpoint discrimination. For an explanation of this distinction see *Davison v. Randall,* 912 F.3d 666, 7 January 2019, p. 21, https://cases.justia.com/federal/appellate-courts/ca4/17-2002/17-2002-2019-01-07.pdf?ts=1546889434.

account stating that people were trying to "degrade or insult police officers" on the page and that posts with "foul language, hate speech of all types and comments that are considered inappropriate" would be removed and the user banned.[43] The Circuit Court held that removing comments which were deemed inappropriate by the sheriff was an impermissible official policy of viewpoint discrimination.

39. In *Davison v. Randall*, the chair of a local government board banned a user from her Facebook page after he posted a comment alleging corruption on the school board, which she deemed to be slanderous. The Court found that the interactive component of the Chair's Facebook Page constituted a "public forum". The Court held the Chair's block to be an attempt to suppress the user's opinion and therefore a form of unconstitutional viewpoint discrimination.[44]

40. Similar reasoning was applied in *Knight v. Trump*,[45] in which then-President Trump conceded that he blocked users because their tweets were critical of him or his policies. The Court held that he used his account in an official government capacity and then found a clear case of unconstitutional viewpoint discrimination. It also stressed that the interactive component of Twitter was a "public forum" where blocking users restricts their rights. The Court rejected Mr. Trump's argument that the ban was not a meaningful restriction because "workarounds" existed for accessing his tweets or expressing oneself on the platform, holding that burdening speech can violate the constitution just as banning speech can.[46]

41. Israel's Supreme Court recently decided a case in which a mayor blocked an activist who tweeted that without a change in transportation policy, there would continue to be dead and wounded (implied to mean pedestrians).[47] A major question in the case was whether the mayor's account was personal or public. Once the Court determined that the account was public, it held that the block was a disproportionate administrative act which harmed the activist's right to freedom of expression and to access information.

42. The Court stressed the harm to freedom of expression and to the right to information, the severity of which was heightened because the block applied not only to the one post but prevented future interactions with the mayor's account. It also suggested that the case involved potential discrimination concerns, although the parties had not raised that issue.[48] The fact that the activist had access to alternative avenues for public discourse, like other social media sites, was not enough to mitigate the harm to the activist since these alternatives did not give the

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[43] U.S. Court of Appeals for the Fifth Circuit, *Robinson v. Hunt*, 921 F.3d 440, 15 April 2019, p. 2, https://cases.justia.com/federal/appellate-courts/ca5/18-10238/18-10238-2019-04-15.pdf?ts=1555371011.
[44] U.S. Court of Appeals for the Fourth Circuit, *Davison v. Randall,* note 43, pp. 33-34.
[45] U.S. Court of Appeals for the Second Circuit, *Knight v. Trump*, 928 F.3d 226, 9 July 2019, https://law.justia.com/cases/federal/appellate-courts/ca2/18-1691/18-1691-2019-07-09.html (the case was subsequently vacated by the Supreme Court as moot because Mr. Trump was no longer president).
[46] *Ibid.*, p. 11.
[47] Israel Supreme Court, *Rubinstein v. Kunik et al.,* SAA 7659/22, 17 April 2023. This description is based on the unofficial English translation available here: https://en.isoc.org.il/wp-content/uploads/2024/03/Supreme-Court-Decision-76659-22-English.pdf. The original Hebrew text is available here: https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/22/590/076/g09&fileName=22076590.G09&type=4.
[48] *Ibid.*, para. 36.

activist access to the same forum as the mayor used, or as rapid and efficient a response from the mayor. And allowing the block would create a situation where "the level of service given to residents" by the municipality was "conditioned on the resident not criticizing the Municipality".[49]

43. The mayor's claim that he was defending his good name also could not justify the restriction on freedom of expression because an "ordinary person" would understand the tweet to express an opinion regarding city policy. In any case, even if the block was to protect the mayor's reputation, rather than out of anger or to silence public criticism, less harmful measures were available to the mayor, such as removing his tag from the tweet, or giving a warning of a block or a temporary block.[50] As a final note, the Court also stressed the complexity of the issue and indicated that clearer rules on the topic should be developed by the legislature.

44. There have also been some cases addressing social media blocks by public officials in Europe. In a case from France, the Director General of the French immigration office had blocked the personal account of the coordinator of an immigration rights organisation.[51] The Court held that when a public entity decides to participate in public debate on social media, it cannot restrict the freedom of expression and right to information of others except through necessary and proportionate measures with the object of maintaining public order or the reputation of others. The Court stressed that the immigration office publishes information more frequently on social media than on its website and that the nature of engagement and discourse on social media is substantially different from distribution of information to the public via a website. The block had notable impacts on the NGO coordinator's ability to participate in this discourse and, even if he could have used a pseudonym or found another means to post information on the account, he was deprived of expressing himself in his own name, thus restricting his right to free expression and right to information. The Court then considered the statements in question, noting that they could not be considered to be defamatory, even if they were polemical. It therefore found the action to block the account to be disproportionate.[52]

45. Within Latin America, several courts have addressed social media blocks by public accounts or public figures. An early example is from Costa Rica in 2012, where the Costa Rican president's official Twitter account blocked a follower for several months without explanation (the follower was then unblocked). The Constitutional Chamber of the Supreme Court found

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[49] *Ibid.*, para. 37.
[50] *Ibid.*, para. 39.
[51] Cour administrative d'appel de Paris (1ère Chambre) (Paris Court of Administrative Appeal, First Chamber), N° 21PA00815, 27 March 2023, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000047357595?init=true&page=1&query=21pa00815&searchField=ALL&tab_selection=al.
[52] Some German jurisprudence also supports a right to non-discriminatory access to social media accounts run by public authorities. Based on the English summary available at Library of Congress, Germany: District Court Holds Federal Minister May Block Users from Personal Social Media Accounts, https://www.loc.gov/item/global-legal-monitor/2023-12-13/germany-district-court-holds-federal-minister-may-block-users-from-personal-social-media-accounts/, and a machine translation from the German of the referenced case, which suggest that while in this opinion federal ministers may block users on their personal accounts, official social media accounts are "public institutions" to which citizens have a right of non-discriminatory access.

that the block violated the user's right to freedom of expression.[53] It held that social networks can make it easier to expand digital services and divulge information to the public, and stressed that the right to freedom of expression extends to the online space. Public actors cannot discriminate in providing users access to their social networks. The Constitutional Chamber did not find a violation of the right to information, however, given evidence that all of the information was accessible despite the block.

46. In subsequent cases, Costa Rica's Constitutional Chamber has further elaborated on the subject. In a 2015 case, the Costa Rican Social Security Fund had warned a Facebook user that she had violated the anti-spam policy on its institutional Facebook page.[54] The Fund blocked the user after she continued to post repetitive messages. Although the Fund provided a mechanism for users to request unblocking of their accounts, the user had not used this procedure. The Constitutional Chamber found that blocking the account in these circumstances did not violate her right to freedom of expression, noting that a block can be permissible where the actions of a user harm the rights of others. However, a second account by the same user was blocked, and no reason for this block was given to the Court. Emphasising that official accounts cannot block users without a reason, the Chamber ordered the Fund to allow access by the second account.

47. In 2018, the Constitutional Court addressed the expulsion of a journalist from a WhatsApp group maintained by the press office of the Minister of Public Security.[55] The press office had established certain formal rules for the group after challenges with irrelevant content and "spam" caused some journalists to leave the group. The Court indicated that such rules could be acceptable but that they must comply with certain standards:

> Primeramente, se debe aclarar que esta Sala no objeta que existan reglas de cordialidad que los participantes del grupo deban respetar. Por otra parte, tampoco desaprueba que se puedan imponer límites, incluso la separación temporal del grupo, a quienes irrespeten las reglas preestablecidas, siempre y cuando tales límites sean razonables, las regla, fijadas previamente, sean suficientemente claras y se refieran a conductas que generen algún perjuicio a otros participantes. Es decir, debe existir una necesaria relación de proporcionalidad entre la conducta censurable y la consecuencia y esa relación debe estar clara desde el momento en que se establecen las reglas.[56]

48. The requirement of proportionality was not met in this case. The journalist had been excluded from the group indefinitely instead of for a set time period, which was not reasonable. The consequences for violating the group's rules were not clear and the rules did not provide for graduated measures. In addition, the journalist had only made a single intervention which did not harm the other participants and was not offensive or propagandistic, so the exclusion was "totally disproportionate" ("totalmente desproporcionada"). The Court stressed that an official

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[53] Sala Constitucional de la Corte Supreme de Justicia, Sentencia Nº 16882, 4 de Diciembre de 2012, https://vlex.co.cr/vid/-499776530.
[54] Sala Constitucional de la Corte Supreme de Justicia, Sentencia Nº 01988, 13 de febrero del 2015, https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-635435.
[55] Sala Constitucional de la Corte Supreme de Justicia, Sentencia Nº 17051, 12 de octubre del 2018, https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-857431.
[56] *Ibid.*, at V.

channel must abide by constitutional principles and that the expulsion deprived the journalist of a fluid form ("forma fluida") of receiving information.

49. In Mexico, the core case on this subject is Amparo en Revisión 1005/2018, which dealt with a regional attorney-general who blocked a journalist on his personal Twitter account. The attorney-general justified the block on the basis that giving the journalist access to his private account violated his right to privacy rather than on any specific speech by the journalist. The case thus centred on whether the account was public or private but the Mexican Supreme Court ultimately found that, because the account was also used to share public information, the journalist's right to information prevailed over the claimed privacy rights.[57]

50. In El Salvador, an administrative court addressed a situation where a social media account associated with the Human Rights Ombudsman (Procuradora para la Defensa de los Derechos Humanos) blocked a user because the user had shared posts on Twitter which attacked institutional work and decisions. No administrative procedures were in place to govern when the Attorney General could block users. The Court determined that, despite this, before blocking a user due process should have been followed including in terms of giving notice, an opportunity to present arguments in response and a reasoned decision. Lacking this, the user's rights to freedom of expression and to information had been breached.[58]

International Standards: Applying the Three-Part Test to Social Media Blocks

51. When a government social media account blocks an individual user, this represents a restriction on the user's right to freedom of expression and to information. Because the blocked user is unable to comment on or otherwise interact with the government account, it restricts the user's freedom of expression. Since the user will also be unable to view posts on the government account, it is also a restriction on the user's access to information, including government information.[59] Where the account is an official government account, there is no question about government responsibility for the act.

52. Any government action to restrict expression and access to information must pass the three-part test to be valid. This section of the brief analyses the application of the three-part test to social media blocks by governments, outlining the circumstances in which such a block would and would not pass the three part-test.

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[57] Segunda Sala de la Suprema Corte de Justicia de la Nación, Amparo en Revisión 1005/2018, para. 271, https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-01/AR1005-2018.pdf.

[58] Cámara de lo Contencioso Administrativo, Santa Tecla, departamnto de La Libertad, 22 July 2019, Resolution 00089-18-ST-COPC-CAM, p. 25-26, https://web.archive.org/web/20221005205633/https:/www.jurisprudencia.gob.sv/DocumentosBoveda/D/1/2010-2019/2019/07/DF34F.PDF.

[59] If an account on X is public, users can see tweets even without following the account, such as by accessing the account on a search engine when not logged into one's own account. However, X has now made this more difficult, only offering limited views of an account or tweet before requiring the user to sign in. In any case, such access would mean tweets are no longer conveniently available in the user's feed. Such a burden on accessibility represents a restriction on access to information.

Social media blocks by government accounts should be "provided by law"

53. Restrictions on freedom of expression and access to information must be "provided by law". This includes the idea that these rights "cannot be restricted at the sole discretion of governmental authorities"[60] and that a law cannot "confer unfettered discretion for the restriction of freedom of expression to those charged with its execution."[61] It is very simple, at a technical level, for government entities which operate social media accounts to block users at will. Absent a clear set of rules governing such actions, they will not meet the provided by law part of the test. Many government entities around the world, both national and subnational, have adopted policies describing when they will remove user comments on their social media accounts and sometimes also when certain users may be blocked entirely, especially in the case of repeated policy violations.[62]

54. Most of these policies govern the moderation of comments made on government social media accounts. However, in this case, the second instance court referred to tweets by Mr. Vega made on his own X account, rather than on the Cesar Government's account. As such, these represent direct measures against Mr. Vega in retaliation for the exercise of his own freedom of expression, rather than an instance of applying rules about managing an official account. As such, these measures could only be legitimate if there was a specific law or legal order authorising them. For example, if a court found statements by Mr. Vega to be defamation, it might order the social media platform to take them down or for compensation to be paid to the party to whom the statements related. It would only be legitimate for the government to engage in secondary measures such as blocking Mr. Vega from its own social media platforms if the court specifically authorised that as part of the remedies ordered, which seems extremely unlikely and hard to justify. A social media policy could not serve as the basis to justify any block imposed as retaliation for views expressed by a journalist outside of the context of managing a government social media account.

55. If the block by the Cesar Government was instead in response to comments on or interactions with the Government's own account, the Government would need to show that the block was based on some kind of pre-existing social media policy and that the policy met certain minimum standards so that it qualified as meeting the "provided by law" standard. Although major international human rights authorities have not focused much so far on this precise issue, clear basic requirements for such a policy can be established based on existing international standards regarding the "provided by law" part of the test.

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[60] Advisory Opinion OC-6/86, *The Word "Laws" in Article 30 of the American Convention on Human Rights*, 9 May 1986, para. 27, https://www.corteidh.or.cr/docs/opiniones/seriea_06_ing.pdf.
[61] UN Human Rights Committee, General Comment No. 34, note 30, para. 25.
[62] For some examples, see Gobierno de Chile, Lineamiento comunicacional de redes sociales para cuentas gubernamentales, V. 1.0 Octubre 2022, p. 6, https://kitdigital.gob.cl/archivos/redes-sociales/Lineamientos-redes-sociales.pdf (establishing a rule against blocking users), European Commission Social Media Moderation Policy, https://commission.europa.eu/about-european-commission/get-involved/social-media-connect-european-commission_en; Ministry of Foreign Affairs of Denmark, Code of Conduct Social Media, https://um.dk/en/about-us/organisation/mfa-on-social-media/social-media-guide; and New Zealand Ministry for the Environment, Social Media Community Guidelines, https://environment.govt.nz/about-us/social-media-community-guidelines/. These are listed solely as examples without comment on their alignment with international human rights standards.

56. First, such a social media policy must be "made accessible to the public."[63] An internal policy is therefore not sufficient. Rather, the policy should be clearly visible on the relevant social media website.

57. Second, the policy must be sufficiently clear and precise, or "be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly".[64] Vague or general language which does not indicate clearly what kind of comments would violate the policy, or which give the government authority excessive discretion to block a user on improper grounds, are not legitimate.

58. Third, any policy rules governing the blocking of social media users by government entities should ultimately have a clear basis in national law. In its Advisory Opinion on the Word "Laws" in Article 30 of the American Convention on Human Rights, the IACtHR clarified that human rights may only be restricted according to a legal norm "passed by the legislature and promulgated by the executive branch". Delegations of the authority to restrict fundamental rights are possible "provided that such delegations are authorized by the Constitution, are exercised within the limits imposed by the Constitution and the delegating law, and that the exercise of the power delegated is subject to effective controls, so that it does not impair nor can it be used to impair the fundamental nature of the rights and freedoms protected by the Convention."[65]

59. Practically speaking, because social media policies may need to be revised somewhat regularly, the authority to draft and amend them would need to be delegated. But the legal basis for the policies should be clearly articulated in the existing legal system. And the policies should also be informed by a country's wider legal and constitutional framework, such as privacy and data protection laws, laws addressing hate speech or spam, and cybersecurity rules.

60. Fourth, the policy should reflect principles of due process. The presence of procedural safeguards is an important part of the "provided by law" requirement[66] as they can guard against arbitrariness and ensure that a government authority does not have "unfettered discretion" in implementing a social media policy. Here again, international human rights standards on the basic due process elements which are required can be derived from internationally recognised due process principles as well as standards applicable to content removal and moderation by online platforms.

61. The principles of due process are well recognised as a fundamental aspect of the rule of law and protection for human rights. Due process rights apply not only to judicial proceedings but also to administrative decisions which impact human rights. The IACtHR has noted that "the due process of the law guarantee must be observed in the administrative process and in any

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[63] UN Human Rights Committee, General Comment No. 34, note 30, para. 25.
[64] *Ibid.*, para. 25.
[65] Advisory Opinion OC-6/86, *The Word "Laws" in Article 30 of the American Convention on Human Rights*, note 60, para. 36.
[66] Report of the UN Special Rapporteur for freedom of expression, 9 October 2019, para. 6(a), undocs.org/A/74/486.

other procedure whose decisions may affect the rights of persons."[67] The European Union Charter explicitly includes a "right to good administration" which is defined as the right to have one's affairs handled "impartially, fairly and within a reasonable time" and includes the right to be heard before a measure is taken which affects him or her adversely and an obligation of the administration to give reasons for its decisions.[68]

62. In the landmark access to information case *Claude Reyes v. Chile*, the IACtHR found not only a violation of Article 13 of the ACHR but also the right to a fair trial found in Article 8(1). The Court noted that Article 8(1) applied where State entities adopt decisions which determine the rights of individuals. Because the denial of the request for information in the *Claude Reyes* case was not accompanied by a "duly justified written decision", it gave rise to a violation of Article 8(1).[69] Thus, restrictions on freedom of expression and access to information should be imposed only when certain minimal procedural guarantees, derived from Article 8(1), are present, as this can also be seen as part of Article 13's "provided by law" requirement. Article 8(1) standards suggest that government social media policies which authorise the blocking of users should require notice of the alleged policy violation, an opportunity for the user to respond, and a reasoned decision when a decision to block is taken.

63. Guidance on what minimum transparency and due process requirements should be contained in a government social media policy can also be found in emerging standards addressing how tech companies should guarantee human rights when removing content and blocking users. These principles are also derived from basic due process principles and, if anything, are likely to reflect a *lower* threshold compared to government obligations, given that private companies do not have the same direct human rights obligations as States.

64. For example, the various special international mandates on freedom of expression called, in a Joint Declaration, for social media companies to "[p]romote the maximum possible transparency in relation to their content moderation rules, systems and practices" and "ensure that their content moderation rules, systems and practices respect basic due process principles, including by providing independent dispute resolution options".[70] They also called for internal complaints systems and, in the case of larger platforms, a right to appeal to external oversight mechanisms, and for appeal options to be "clear, easy to find on company websites, and easy to use."[71]

65. Similarly, in a letter to TikTok addressing proposed content moderation reforms by the company, the U.N. Special Rapporteur on freedom of expression and the Working Group on business and human rights stated: "Robust due process and grievance mechanisms are essential in ensuring consistency of the decisions", specifically noting that users should receive notice

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[67] IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, 29 March 2006, Series C, No. 146, para. 82, https://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf. See also *Chocrón Chocrón v. Venezuela*, 1 July 2011, Series C, No. 227, para. 115, https://www.corteidh.or.cr/docs/casos/articulos/seriec_227_ing.pdf.
[68] Charter of Fundamental Rights of the European Union, Article 41, http://data.europa.eu/eli/treaty/char_2012/oj.
[69] IACtHR, *Claude Reyes and Others v. Chile*, note 16, para. 122.
[70] Special International Mandates on Freedom of Expression, 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression, note 27, para. 4(vi).
[71] Special International Mandates on Freedom of Expression, 2023 Joint Declaration on Media Freedom and Democracy, note 29.

and an explanation "before or coterminous" with content removal, including the specific rule which had been broken and the action to be taken, along with a channel to appeal and a guarantee of a "prompt and meaningful response".[72] Elsewhere the U.N. Special Rapporteur on freedom of expression has expressed concern over the vagueness of content rules and stressed the importance of notification, appeals and remedies in the context of content moderation.[73]

66. Another potential source of guidance is the Santa Clara Principles 2.0, a set of influential standards developed by organisations and experts after consultations and endorsed by many of the major social media platforms (including X).[74] They articulate a foundational principle of "human rights and due process" and specifically state that companies should provide adequate notice of actions such as content removal and account suspension and "a meaningful opportunity for timely appeal". The Principles elaborate on these principles, noting for example that the appeal should be reviewed by a someone who was not involved in the original decision and that the user should be given a reasoned decision of the results of any appeal.

67. Due process considerations require government social media policies to incorporate procedural protections such as notice of alleged offending content, an opportunity to reply, a reasoned decision for any removal or block and an opportunity to appeal against any measures taken. International standards make it clear that a policy which lacks minimum procedural protections raises legality concerns. In this relevant case, it does not appear that the Government of Cesar had any social media policy in place or at least not one which was publicly available. Even if such a policy existed, reviewing courts should consider whether it was sufficiently clear, had a proper legal basis and included adequate procedural safeguards against abuse.

Social media blocks by government accounts should have a legitimate aim

68. International law establishes an exclusive set of aims which are legitimate grounds for restricting freedom of expression and access to information, namely respect for the rights or reputations of others or to protect national security, public order, public health or public morals.

69. These categories are fairly broad, but governments must still demonstrate that their action sought to protect the identified aim. States should be able to "demonstrate in specific and individualized fashion the precise nature of the threat" to the protected aim they have identified. They should then be able to establish a "direct and immediate connection between the expression and the threat."[75] The threat cannot be vague or purely hypothetical. For example, a restriction cannot be simply based on a general allegation of reputational harm, but rather the speech in question should specifically threaten a particular person's reputation in a direct and immediate manner.

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[72] U.N. Special Rapporteur for freedom of expression and the Working Group on the issue of human rights and transnational corporations and other business enterprises, letter of 15 May 2020, p. 9, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25243.
[73] Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 6 April 2018, paras. 26, 37-38, undocs.org/A/HRC/38/35.
[74] Santa Clara Principles, https://santaclaraprinciples.org/.
[75] UN Human Rights Committee, General Comment No. 34, note 30.

70. Any decision to block someone on social media must have a legitimate aim and not be done for an illegitimate reason such as censoring public criticism. This is likely to be a highly fact-dependent assessment.

71. When considering evidence, courts should look specifically at whether the government sought to protect a legitimate aim *at the time of the block.* This is an additional reason why a reasoned explanation for a block should be given when the block occurs, as discussed above. Absent such a reasoned decision, it will be difficult for courts to assess whether the block was indeed imposed in pursuit of a legitimate aim. Subsequent explanations, such as those given in response to a challenge by the user, may represent an attempt to belatedly justify an action and should be viewed sceptically.

72. In this case, the letter from the Cesar Government indicated that it blocked Mr. Vega because it was operating according to X's policies and in order to protect the rights of privacy, honour, good name and presumption of innocence of the government and its officers. This explanation was only provided in response to an inquiry by Mr. Vega. However, the remainder of this brief assumes that this explanation does accurately reflect the purpose of the government's block.

73. Compliance with the policies of a private company cannot be a legitimate aim justifying a restriction of a human right. Governments cannot abdicate their human rights responsibilities based on a policy adopted by a private company. This is clearly improper under international law but most countries would find it problematic under their own constitutional law as well. A U.S. court, in the *Robinson v. Hunt* case described above, corrected the reasoning of a lower court: "A private policy cannot authorize a state actor to engage in conduct that violates the Constitution."[76]

74. The three-part test allows restrictions which have the aim of protecting the rights or reputations of others. The Human Rights Committee has said that the term "others" "relates to other persons individually or as members of a community" and is defined with reference to international human rights law.[77] The restriction seeks to protect individuals or communities (such as individual members of a community defined by faith or ethnicity), not institutions or "the government" as an abstract entity, as government institutions do not have human rights *per se*.[78] For example, in the defamation context, it is very clear that freedom of expression should not be restricted to protect the reputation of government institutions or the "State itself".[79] Accordingly, to the extent that the Cesar Government argued that it sought to protect rights to privacy, reputation and the presumption of innocence, this aim was only legitimate to the extent it applied to individual government officers, and not to the Cesar Government as an institution. In addition, to engage these aims, the statement should have fairly clearly been defamatory, taking into account the high standards which apply to statements about officials,

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[76] U.S. Court of Appeals for the Fifth Circuit, *Robinson v. Hunt*, note 43, p. 14.
[77] UN Human Rights Committee, General Comment No. 34, note 30, para. 28.
[78] See UN Human Rights Committee, General Comment No. 34, note 30, para. 28.
[79] Special International Mandates on Freedom of Expression, Tenth Anniversary Joint Declaration, 3 February 2010, para. 2(c), https://www.law-democracy.org/wp-content/uploads/2010/07/10.02.Joint-Declaration.future-threats1.pdf; and UN Human Rights Committee, General Comment No. 34, note 30, para. 38.

represented an invasion of privacy, or undermined the presumption of innocence. It is not clear to us what ongoing legal case might have existed which could engage this last point.

Social media blocks by government accounts should be necessary and proportionate

75. Evaluating the necessity and proportionality of a restriction is often the most complex part of the three-part test. The necessity requirement evaluates whether the government restriction is logically connected to the legitimate aim and whether it is carefully tailored to protect that aim while minimising harm to freedom of expression. It also involves a proportionality assessment, which weighs the respective harms and benefits involved.

76. For restrictions to be necessary, they must be "appropriate to achieve their protective function" and not overbroad.[80] They should not therefore limit speech beyond that which poses a harm to protected interest, or restrict more information than is necessary. In other words, they should interfere "as little as possible with the effective exercise of the right."[81]

77. A restriction is only "necessary" if there are no less-restrictive alternative options to protect the aim. A restriction cannot merely be useful or desirable, but must serve a "compelling government interest" and, "if there are various options to achieve this objective, that which least restricts the right protected must be selected".[82] This involves an assessment of the alternatives and the degree to which they would be more or less injurious.[83]

78. Finally, the restriction should be proportionate, meaning the harm of the restriction should be weighed against its benefits. In the language of the IACtHR, the proportionality principle asks whether the "sacrifice inherent" in restricting freedom of expression "is not exaggerated or disproportionate in relation to the advantages obtained from the adoption of such limitation."[84] Proportionality should be determined with reference to contextual factors including the form and means of the communication in question. In particular, where the speech relates to public debate concerning figures in the public and political arena, the proportionality assessment should place particular value on the importance of uninhibited expression.[85]

79. Applying these principles to government social media blocks, some general observations can be made before examining when a block could be necessary in response to an alleged reputational or other harm.

80. Overall, a ban on a particular social media user will raise concerns of overbreadth and disproportionality. Such a block denies that user access to all information shared by the government account and otherwise prevents the user from interacting with the government via

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[80] UN Human Rights Committee, General Comment No. 34, note 30, para 34.
[81] IACtHR, *Claude Reyes and Others v. Chile*, note 16, para. 91.
[82] IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 10, para. 46 (referencing ECtHR, *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, https://hudoc.echr.coe.int/eng?i=001-57584).
[83] IACtHR, *Kimel v. Argentina*, 2 May 2008, Series C, No. 177, para. 74, https://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.
[84] IACtHR, *Kimel v. Argentina*, note 83, para. 83.
[85] UN Human Rights Committee, General Comment No. 34, note 30, para 34.

that particular social media account. The Human Rights Committee has said that when governments take action to restrict content online, such restrictions "should be content-specific" and "generic bans on the operation of certain sites and systems" are incompatible with the ICCPR's freedom of expression protections.[86] While individual social media accounts are narrower than an entire site, they are nonetheless important modern major communications vehicles and preventing a user entirely from engaging with a government actor on a prominent online platform is significant.

81. In most cases, less restrictive options than a block are available. Removing comments is not easily available on X, but since 2019 X has enabled users to "hide" replies on their posts, which makes them less visible.[87] Other alternative also exist, such as responding to the post and correcting any incorrect information, reporting abusive posts via the platform's own systems where the posts violate X's own policies, sending a warning to the user, issuing a temporary block or, depending on the context, removing mentions of one's account ("tags") made by the user.

82. Where a government blocks a user based on content on that user's own social media account, rather than on the government's account, this raises serious necessity concerns. This measure would not directly affect the content in question and thus be very unlikely to address any harm caused by the content. Indeed, cutting the user off from accessing (presumably accurate) government information might exacerbate the situation. Blocking the user would therefore not be an effective way to protect the aim.

83. Given these considerations, governments should have a default presumption against blocking users. However, governments may be justified in blocking some users in response to the posting of illegal speech on a repetitive basis. In the ECtHR case *Sanchez v. France*, the Court found that a politician could be held liable for failing to remove comments consisting of clearly unlawful hate speech from his public Facebook wall.[88] By logical extension, governments could have a similar obligation to address illegal hate speech, a kind of speech whose harmful nature is explicitly recognised in human rights law, and potentially other forms of illegal speech. If a user posted such content repetitively, a block may ultimately be a necessary step. However, this would only be legitimate where the speech in question was "clearly unlawful", as opposed to where there was a mere possibility that it was unlawful.

84. The primary responsibility of the government is to foster an environment for the exercise of freedom of expression, not to engage in censorship or limit critical views. Accordingly, if a government decides to moderate public engagement with its social media accounts, the aim of this moderation should be to address speech which harms engagement and free expression by other users (such as spam or hate speech). Moderation of this type will be more likely to be

[86] *Ibid.*, para 43.
[87] Emma Tucker, "Twitter Rolls Out Controversial 'Hide Replies' Feature", 21 November 2019, *The Daily Beast*, https://www.thedailybeast.com/twitter-rolls-out-controversial-hide-replies-feature.
[88] ECtHR, *Sanchez v. France*, 14 May 2023, Application No. 45581/15, https://hudoc.echr.coe.int/eng?i=001-224928. Note that this case was controversial in the digital rights community because of its potential implications for intermediary liability and the concern that it could cause over-censorship by high-profile figures who fear liability. See, for example, the criticisms here: https://www.mediadefence.org/news/sanchez-v-france-raises-serious-concerns-over-online-speech/.

acceptable under the three-part test. Blocks which are merely in response to critical commentary about the government are clearly not legitimate under international human rights law.

85. More precise necessity and proportionality assessments will vary depending on the aim the restriction seeks to protect. In Mr. Vega's case, it appears the Cesar Government is primarily concerned with reputational harm, so international standards relevant to reputation are discussed in detail below. However, the Cesar Government also referenced the right to privacy and presumption of innocence for public officials, warranting some brief comments.

86. Exercising one's freedom of expression may harm others' privacy rights if it involves making private information public. Public officials have a right to privacy, but the public also has a right to be informed about the conduct and actions of officials. In assessing proportionality in this context, courts have distinguished between information which relates to the conduct of officials in the course of their public duties, and purely private matters which are not relevant to matters of public debate. However, they have also stressed that public officials open themselves to scrutiny and therefore have a lower threshold of protection. If the information relates to matters of public interest, public access to it should generally be favoured over a public official's right to privacy.[89] Any government social media moderation to protect privacy should, therefore, distinguish between users who share information regarding the official conduct of officials and those who share private information which has no public interest value.

87. A criminal defendant has the right to be presumed innocent until proven guilty. In some circumstances, media coverage of a trial could impact ongoing criminal proceedings. However, public reporting on trials is important and, "[n]o restrictions on reporting on ongoing legal proceedings may be justified unless there is a substantial risk of serious prejudice to the fairness of those proceedings".[90] Such a risk would be more likely to arise if a major media outlet published extensive sensational or biased coverage of a trial, rather than from individual comments on social media. However, courts will have to evaluate on an individual basis the respective harms to the public's access to information about legal proceedings and to the defendant's right to be presumed innocent, considering factors such as the contribution of the speech to debate on public interest matters and the influence of the speech on the criminal proceedings.[91]

88. Harm to the presumption of innocence will only apply in limited instances related to specific criminal proceedings, and would not be triggered by general reporting or critical comments about misconduct by public officials. Even if a genuine risk of harm to fair trial rights exists, blocking a journalist on social media is unlikely to be an appropriate or effective response. Such a block limits the engagement of the journalist with the government entity via its social media account, but has limited impact on the journalist's engagement with the broader public

[89] See IACtHR, *Fontevecchia and D'Amico v. Argentina*, 29 November 2011, Series C, No. 238, http://www.corteidh.or.cr/docs/casos/articulos/seriec_238_ing.pdf; and ECtHR, *Von Hannover v. Germany (no. 2),* 7 February 2012, Applications No. 40660/08 and 60641/08, https://hudoc.echr.coe.int/fre?i=001-109029.
[90] Special International Mandates on Freedom of Expression, 2002 Joint Declaration, 10 December 2002, https://www.osce.org/files/f/documents/8/f/39838.pdf.
[91] ECtHR, *Bédat v. Switzerland*, 29 March 2016, Application No. 56925/08, https://hudoc.echr.coe.int/eng?i=001-161898.

and would not meaningfully protect the presumption of innocence. Should fair trial rights be threatened, a court injunction would be the appropriate response, not a block by a single government account which is not affiliated with the justice system. Additionally, any sanctions for reporting on legal proceedings should only be imposed by a "competent, independent and impartial tribunal".[92]

Freedom of expression and reputational harm in the context of social media blocks

89. International standards regarding defamation are well developed under international law, particularly in relation to criminal sanctions (which are always disproportionate) and civil lawsuits.[93]

90. Sanctions for defamation should only be available for false statements of fact which harm another's reputation, not on the expression of opinions or true information. Expressions of opinion are not by their nature defamatory, because opinions by their very nature cannot be subject to verification. In addition, freedom of expression strongly protects expressions of opinions, recognising that a government should not be the adjudicator of which opinions are valid and which are not. Similarly, no one should be penalised for truthful statements, even if they are negative. This is based on the importance of public access to truthful information, as well as the fact that no one has the right to defend a reputation they do not deserve (i.e. to try to prevent truths about them from being made public).[94]

91. In the context of speech about matters of public concern, international standards indicate that liability should not be imposed when it was reasonable to make the statement in the circumstances.[95] Such a qualification offers protection for journalists and others who make a statement based on reasonably available information, even if that statement is eventually proven to be inaccurate. A reasonableness defence protects a greater margin of error in public debate regarding important social and political issues.

92. When expression is alleged to harm the reputation of public officials, the proportionality analysis should strongly favour the right to freedom of expression. The Human Rights Committee has said that "in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high" and that although public officials also enjoy human rights

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[92] Special International Mandates on Freedom of Expression, 2002 Joint Declaration, note 90.
[93] CLD has discussed defamation standards in greater depth in a previous *amicus curiae* brief to this Court, available at: https://www.law-democracy.org/live/wp-content/uploads/2021/03/Colombia.Defamation-Brief.CLD_.final_.rev_.pdf.
[94] IACtHR, *Kimel v. Argentina*, note 83, para. 93; African Commission on Human and Peoples' Rights, *Declaration of Principles on the Freedom of Expression in Africa*, note 20, Principle 21(1)(a); and Special International Mandates on Freedom of Expression, 2000 Joint Declaration, 30 November 2000, https://www.osce.org/files/f/documents/c/b/40190.pdf.
[95] Special International Mandates on Freedom of Expression, 2000 Joint Declaration, note 94.

protection, "the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties".[96]

93. Given the importance of commentary on public officials, laws which specially protect their reputational rights (such as "descato" laws) are not legitimate. The *Inter-American Declaration of Principles on Freedom of Expression* instead indicates that a heightened standard should apply to civil defamation cases involving public figures, such that liability can only be imposed for reputational harm to a public official if the speaker had "the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news."[97]

94. Public officials and public figures also "generally have easy access to the mass media allowing them to respond to attacks on their honor and personal reputation", which is an additional reason "to provide for a lower level of legal protection of their honor." [98] This is certainly true when a public entity itself controls the forum, such as a social media account or page run by that public entity.

95. Defamation concerns only arise in relation to specific allegations which harm the reputation of a particular individual who could be identified from the post. As noted above, protecting the reputations of institutions does not serve a legitimate aim. Statements making general allegations about unnamed government officials would also not justify a restriction on freedom of expression.

96. In the context of a legal case, the complex legal standards relating to defamation can be tested properly as courts can evaluate the public interest in the speech, whether the statement is true, the extent to which it causes reputational harm and whether any defences are available. However, these protections are not available when a government entity acts to restrict content on the grounds that it is defamatory and experience in these contexts demonstrates clearly that, at least in borderline cases, government entities are likely to be biased in favour of their staff.

97. The fact that the statements in question are posted on a social media platform is also relevant, given that users post rapidly and frequently on such platforms without the kind of research and preparation which would precede the publication of a newspaper article, for example. The public is less likely to rely on a tweet as an authoritative source of information and the potential reputational harm will be similarly diminished, depending somewhat on the context.

98. Accordingly, CLD suggests that in the context of social media blocks, an institution should not itself determine whether criticism against its own staff is defamatory. Overall, it is better to err on the side of accepting criticism, given that the proportionality principle weighs heavily in favour of public debate regarding public officials and that it is very easy for a government social media account to overreach when policing critical statements. Should a statement

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[96] UN Human Rights Committee, General Comment No. 34, note 30, para 38.
[97] Inter-American Commission on Human Rights, *Declaration of Principles on Freedom of Expression*, note 11, Principle 10.
[98] OAS Special Rapporteur for Freedom of Expression, Background and Interpretation of the Declaration of Principles, para. 44, https://www.oas.org/en/iachr/expression/showarticle.asp?artID=132.

genuinely defame a particular official, that person has other remedies, such as civil litigation or potentially a right to reply (if the statement involves a journalist). We therefore recommend that claims of defamation not be included among the grounds for blocking users from government social media accounts.

99. If, however, an official account does authorise the blocking of individuals for defamatory posts, individual decisions should be based on the standards described above, which should be applied protectively, given that the officials applying the policy are unlikely to have legal training or understand the subtleties of defamation law well. Statements of opinion should not give rise to a block, even if strong language is used. Since it is not ease to assess the veracity of statements, only statements which are clearly and demonstrably false should attract sanctions. Statements about important public issues should be given the benefit of the doubt regarding their veracity. And the other protections for defamatory statements should also be applied.

Conclusion

100. Mr. Vega was blocked by the official account of the Cesar Government without a clear process, opportunity to defend himself or even an explanation of the reasons for the block until he submitted an inquiry. The block appeared to be based on posts which made general critical comments on important matters of public interest, including the conduct of public officials, without making any specific defamatory accusations against specific persons. It is the role of the Colombian courts to assess precisely the facts in light of Colombian law, but based on CLD's understanding, this set of facts indicates that the block imposed was not justified in accordance with the three-part test for restrictions on freedom of expression and information under international law.

101. Some of the leading reasons for this include that a social media block by a government account would only be legitimate if it were based on a clear pre-existing policy which was authorised by a Colombian law and which incorporated minimum due process guarantees. The block should have sought to protect a legitimate aim, and not to limit criticism of the government. The block should only have been in response to comments on the government's social media account rather than comments made elsewhere. If the block was based on expressions of opinion or commentary on public affairs, rather than specific false statements harming an individual's reputation, it would be disproportionate. The starting point for assessing the statements should be a presumption of veracity and reasonableness, given that government entities are poorly positioned to assess properly the complex legal factors which might determine that the statements were illegal. Finally, other less restrictive alternatives should have been explored before imposing the block.