

Inter-American Court of Human Rights
Case No. 12.441 “Luisiana Ríos”

LUISIANA RÍOS AND OTHERS

versus

THE REPUBLIC OF VENEZUELA

EXPERT STATEMENT BY TOBY MENDEL, SENIOR DIRECTOR FOR LAW,
ARTICLE 19, GLOBAL CAMPAIGN FOR FREE EXPRESSION

ATTACKS AGAINST MEDIA WORKERS

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EXPERT STATEMENT BY TOBY MENDEL, SENIOR DIRECTOR FOR LAW,
ARTICLE 19, GLOBAL CAMPAIGN FOR FREE EXPRESSION

ATTACKS AGAINST MEDIA WORKERS

Summary of Argument

- [1] Starting in December 2001, and continuing until at least 2004, RCTV and its staff were subject to a number of ongoing attacks of different sorts, including attacks perpetrated by officials. Their broadcasts were subject on certain occasions to direct government control, and they were the subject of formal letters of complaint from the broadcast regulator. In this context, the President of the Bolivarian Republic of Venezuela, Hugo Chávez Frías, made a number of hostile and threatening statements about private broadcasters, sometimes mentioning RCTV by name.
- [2] This Expert Statement, produced by Toby Mendel, Senior Director for Law of the international human rights NGO, ARTICLE 19, Global Campaign for Free Expression, sets out international and comparative national standards relevant to the issues raised in this case. It argues that the actions of the Venezuelan authorities breached the right to freedom of expression, guaranteed by Article 13 of the *American Convention on Human Rights*, in a number of important respects.
- [3] First, it is submitted that a number of actions by the authorities represented direct breaches of the freedom of expression of the victims. State officials were themselves involved in a number of attacks and incidents of harassment, which were aimed at exerting a chilling effect on the victims’ ability to freely disseminate information and ideas, including criticism of the government. It is clear that, under international law, the actions of these officials engaged Venezuela’s responsibility.
- [4] On a number of occasions, either RCTV’s broadcasts were interrupted entirely, or the station was required to broadcast official voices or the programmes of State broadcasters. Some of these direct controls over RCTV clearly cannot be justified, while others might be considered legitimate only if the facts – which are not fully accessible to the author – disclosed that these broadcasts posed a clear and imminent threat to public order.
- [5] Various official letters from the broadcast regulator, along with a number of public statements by Chávez, represent an attack on the victims’ right to freedom of expression. They are official threats to employ State power to take various actions against RCTV and its staff which cannot be justified by reference to the test for restrictions on freedom of expression. It is submitted that, taken together, Chávez’s statements constitute incitement to attack RCTV, which is itself a breach of the victims’ right to freedom of expression.
- [6] Finally, it is submitted that Venezuela signally failed to meet its international obligations to protect RCTV and its staff against attack, as well as to take

appropriate steps to investigate the attacks which did occur, and to bring those responsible to justice.

Statement of Expertise

- [7] The author of this Expert Statement, Toby Mendel, is recognised globally as a leading expert on international standards relating to freedom of expression. He is the Senior Director for Law at ARTICLE 19, Global Campaign for Free Expression, an international, non-profit human rights NGO, based in London, a position which he has held for 11 years. Taking its name from Article 19 of the *Universal Declaration of Human Rights*, ARTICLE 19 works globally to protect and promote the right to freedom of expression.
- [8] Toby Mendel's services as an expert have been sought out by a wide range of intergovernmental bodies, such as the World Bank, UNESCO, OSCE and the special mandates on freedom of expression, as well as numerous governments and NGOs in countries all over the world. He has undertaken a number of different activities with these various actors, including playing a leading role in drafting legislation, for example on the right to information or media regulation, providing advice, and publishing papers and books.
- [9] He is widely published on a range of freedom of expression issues. Just this year, UNESCO published his book, *Freedom of Information: A Comparative Legal Survey, 2nd Edition* (2008: Paris, UNESCO) and, working with the World Bank, he co-authored *Broadcasting, Voice, and Accountability, A Public Interest Approach to Policy, Law, and Regulation* (2008: Jackson, University of Michigan Press).
- [10] Toby Mendel has frequently engaged in litigation on freedom of expression issues before international courts and senior national courts, sometimes providing *amicus curiae* briefs, sometimes representing clients directly and sometimes working with local lawyers to prepare briefs. His work presents arguments based on relevant international and comparative standards with a view to assisting courts to elaborate on the specific meaning of the guarantee of freedom of expression in the context of the case being considered, in a manner which best protects this fundamental right.
- [11] Precedents and authoritative statements from other jurisdictions are not formally binding on the Inter-American Court of Human Rights. However, the guarantee of the right to freedom of expression in the *American Convention on Human Rights* (ACHR)¹ is worded broadly, so that there is wide scope for interpretation. Given the fundamental importance of this human right, it is of the utmost importance that this Court exercises the greatest care when elaborating its meaning in specific contexts.
- [12] Jurisprudence from international judicial bodies in other regions of the world and from national courts, as well as non-binding standard-setting documents, such as authoritative international declarations and statements, illustrate the manner in which leading judges and other experts have interpreted international and constitutional guarantees of freedom of expression. As such, they are good

¹ Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.

evidence of generally accepted understandings of the scope and nature of freedom of expression.² As a result, even though they are not formally binding, these documents provide valuable insight into possible interpretations of the scope of Article 13 of the ACHR.

[13] The purpose of submitting this Expert Statement to the Inter-American Court of Human Rights is to assist it in its assessment of whether or not Venezuela has, in the present case, acted in breach of the right to freedom of expression as guaranteed by Article 13 of the ACHR.

Brief Statement of Facts

[14] On 23 July 2002, Luisiana Ríos and a number of other media workers employed by the Radio Caracas Televisión network (RCTV) filed a petition with the Inter-American Commission on Human Rights in relation to a complex sequence of events which they claimed represented a breach by Venezuela of their human rights, including their right to freedom of expression as guaranteed by Article 13 of the ACHR. On 26 October 2006, the Commission adopted Report on Merits 119/06, pursuant to Article 50 of the ACHR, in which it held Venezuela to be in breach of its obligations under the ACHR, including to protect the petitioners' right to freedom of expression. Following on from a rejection of the Commission's Report by Venezuela, the case was submitted to the Inter-American Court of Human Rights on 8 April 2007.

[15] The facts of the case are, as noted, complex. A good summary of these facts is found in the Commission's Application to the Court in the case, dated 20 April 2007.³ A brief summary of the key facts is presented here with a view to assisting readers understand the legal arguments set out in this Expert Statement.

[16] An important background factor in this case was the political conflict taking place in Venezuela at the relevant time between supporters and opponents of Chávez, which became violent and which led to a number of deaths. This included clashes between demonstrators on 11 April which led to an estimated 20 deaths and a much larger number of casualties. Sometime later that day or early on 12 April, Chávez was briefly removed from power by the military and a businessman, Pedro Carmona, was installed as Interim President. By 13 April, however, the coup attempt was falling apart and Chávez's Vice President and loyalist, Diosdada Cabello, was back in power, with Chávez himself returning to the presidency the next day, 14 April.

[17] The most important facts of this case, from the perspective of the arguments made in this Expert Statement, are the numerous attacks and other incidents of harassment against the victims. These started in December 2001 and continued until at least 2004. They included a number of incidents at RCTV premises in April 2002, as well as a large number of incidents directed at the victims. The latter included (sometimes very strident) threats, damage to equipment and assaults, some quite severe and requiring hospitalisation or other medical treatment.

² See I. Brownlie, *Principles of Public International Law*, 5th Ed. (Oxford: Oxford University Press, 1998), p. 35, p. 12.

³ See, in particular, paras. 56-150.

- [18] The harassment and attacks referred to in the previous paragraph were perpetrated by a number of different actors. In some cases, the attacks were perpetrated by unidentified individuals. In other cases, government supporters and members of the governing party were involved. In yet other cases, officials – including members of the Highway Brigade of the Ministry of Infrastructure and army officials – were responsible.
- [19] There is no doubt that the harassment and attacks were motivated largely, if not entirely, by the reporting stance taken by RCTV and, in particular, its critical reporting on the government. This is clear from the fact that these acts were directed specifically at RCTV, in some cases from the statements that accompanied or constituted the acts, and from the political affiliation of the perpetrators, where this could be ascertained.
- [20] There is also no doubt that the attacks undermined the ability of the victims to carry out their jobs and to report the news. In some cases, they were physically prevented from accessing areas which they were entitled to access and which they needed to access for reporting purposes. In some cases, equipment necessary for reporting was damaged. More generally, the attacks created an environment which was intimidating and threatening for the victims, undermining their ability to carry out their professional duties.
- [21] No one has yet been prosecuted for any of these attacks. This is despite the fact that in a number of cases individuals responsible for them have been identified, including through video recordings, and that in other cases the police and/or other security forces were present during the attacks.
- [22] On a number of occasions during the events of April 2002, State authorities directly interfered with RCTV broadcasts. On 8-9 April, RCTV was required to broadcast messages from officials, such as the Mayor of the Capital District, the Minister of Labour, the Commander-in-Chief of the Armed Forces, the Minister of Defence, the Minister of Education and the President of Petróleos de Venezuela S.A. (PDVSA). On 11 April, their signal was shut down entirely. In the evening of 13 April, RCTV was forced by the Casa Militar (Presidential Guard), known to be loyal to the President, to carry the State television broadcasts instead of their own. It is assumed, for purposes of this Expert Statement, that these interferences affected programmes produced by the victims.
- [23] In January and February 2002, CONATEL, the broadcast regulator, sent three official letters to RCTV, questioning the appropriateness of the program “La entrevista en el observador”, which was critical of the government. At least some of the victims worked on this programme. In May 2007, CONATEL refused to renew RCTV’s licence (concession) for broadcasting via terrestrial (open channel) means, although it was still permitted to broadcast via cable.
- [24] During the period in which the attacks noted above were taking place, the President made a number of statements which were very hostile to the private media, linked to threats, both implicit and explicit, to revoke their licences. These statements, among other things, accused the private media of ‘poisoning’ people’s minds, of broadcasting terrorist propaganda and of inventing lies to promote panic and fear. They also made it clear that this was not considered to be an acceptable use of the licence concession and

that the latter could, as a result, be withdrawn. Although many of these statements were directed against the private media in general, RCTV was mentioned specifically on some occasions.

[25] Venezuela ratified the *American Convention on Human Rights* on 9 August 1977 and accepted the contentious jurisdiction of the Court on 24 June 1981.

[26] Article 13 of the ACHR states, in relevant part:

Article 13: Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - (a) respect for the rights or reputations of others; or
 - (b) the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

Freedom of Expression

[27] Article 19 of the *Universal Declaration of Human Rights*,⁴ binding on all States as a matter of customary international law, proclaims the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek to receive and impart information and ideas through any media regardless of frontiers.

[28] Venezuela's international legal obligations to respect freedom of expression are also spelt out in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),⁵ which it ratified on 10 May 1978. Article 19 of the ICCPR states:

- (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

⁴ UN General Assembly Resolution 217A(III), 10 December 1948.

⁵ Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

[29] As noted, Venezuela is also a party to the *American Convention on Human Rights*.

The Fundamental Nature of Freedom of Expression

[30] The overriding importance of freedom of expression – including the right to information – as a human right has been widely recognised, both for its own sake and as an essential underpinning of democracy and means of safeguarding other human rights. At its very first session in 1946 the United Nations General Assembly declared:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.⁶

[31] These views have been reiterated by all three regional judicial bodies dealing with human rights.

[32] This Court has stated:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.⁷

[33] The African Commission on Human and Peoples' Rights has noted, in respect of Article 9 of the African Convention:

This Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of the public affairs of his country.⁸

[34] The European Court of Human Rights (ECHR) has also recognised the key role of freedom of expression:

[F]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to "information" or "ideas" that are favourably received ... but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".⁹

[35] These views have been reiterated by numerous national courts around the world.

[36] The author does not consider it necessary to elaborate on the importance of freedom of expression before this Court, given the recognition which this Court has already given to this fundamental human right.

[37] It may, however, be noted that this Court has recognised that the right to freedom of expression has two dimensions: an individual dimension and a social dimension. Regarding the latter, this Court has stated:

⁶ Resolution 59(1), 14 December 1946.

⁷ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, 13 November 1985, Series A, No. 5, para. 70.

⁸ *Media Rights Agenda and Others v. Nigeria*, 31 October 1998, Communication Nos. 105/93, 130/94, 128/94 and 152/96, para. 52.

⁹ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49.

In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.¹⁰

[38] Almost of necessity, most contentious cases involving the right to freedom of expression are brought by individuals or legal entities who claim that their own right to freedom of expression has been violated. However, many such cases, particularly where they involve the media, also involve an important social dimension of freedom of expression. It is submitted that the social dimension in this case is of at least equal importance to the individual dimension.

[39] Closely linked to the social dimension of the guarantee of freedom of expression is the importance of diversity in the media. Pluralism has received extremely broad endorsement as a key aspect of the right to freedom of expression. Jurisprudentially, it derives from the multi-dimensional nature of the right, which, as noted, protects not only the right of the speaker (to 'impart' information and ideas) but also the right of the listener (to 'seek and receive' information and ideas).¹¹

[40] This aspect of the right rules out arbitrary interferences by the State that prevent individuals from receiving information that others wish to impart to them.¹² However, the rights of the listener also place a positive obligation on the State to take measures to promote an environment in which a diversity of information and ideas are available to the public. International law recognises generally that States must take positive measures to ensure rights. Article 2 of the ICCPR, for example, places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant".¹³

[41] The specific need for positive measures to ensure respect for freedom of expression has been widely recognised.¹⁴ The *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and Peoples' Rights, for example, states:

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.¹⁵

¹⁰ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 7, para. 32.

¹¹ See, in addition to *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 7, this Court's decision in *Baruch Ivcher Bronstein v. Peru*, 6 February 2001, Series C, No. 74, para. 146.

¹² See, for example, *Leander v. Sweden*, 26 March 1987, Application No. 9248/81 (European Court of Human Rights), para. 74.

¹³ See also Articles 1 and 2 of the ACHR.

¹⁴ See, for example, *Vgt Verein gegen Tierfabriken v. Switzerland*, 28 June 2001, Application No. 24699/94 (European Court of Human Rights), para. 45. See also *Miranda v. Mexico*, 13 April 1999, Report No. 5/99, Case No. 11.739 (Inter-American Commission on Human Rights).

¹⁵ Adopted at the 32nd Session of the African Commission, 17-23 October 2002, Principle III.

[42] Within the European context, the issue of media diversity as an aspect of the right to freedom of expression has attracted considerable attention and the Council of Europe has adopted a specific document on the issue, Recommendation 2007(2) on Media Pluralism and Diversity of Media Content.¹⁶ The whole Recommendation is devoted to the question of the importance of pluralism in the media and measures to promote it. This is supported by the jurisprudence of the European Court of Human Rights, which has frequently noted: “[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism.”¹⁷

[43] The special international mandates for promoting freedom of expression – the UN Special Rapporteur, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression and Access to Information – have met each year since 1999 and each year they issue a joint Declaration addressing various freedom of expression issues.¹⁸ In their 2007 Joint Declaration, they stressed,

the fundamental importance of diversity in the media to the free flow of information and ideas in society, in terms both of giving voice to and satisfying the information needs and other interests of all, as protected by international guarantees of the right to freedom of expression.¹⁹

Restrictions on Freedom of Expression

[44] The right to freedom of expression is not absolute. Every system of international and domestic rights recognises carefully drawn and limited restrictions on freedom of expression in order to take into account the values of individual dignity and democracy. Under international human rights law, national laws which restrict freedom of expression must comply with the provisions of Article 19(3) of the ICCPR and Article 13(2) of the ACHR, quoted above, which are substantially similar in nature.

[45] Restrictions must meet a strict three-part test.²⁰ First, the restriction must be provided by law. Second, the restriction must pursue one of the legitimate aims listed in Article 13(2); this list is exclusive. Third, the restriction must be necessary to secure that aim.

¹⁶ Recommendation No. R (2007)2, adopted by the Committee of Ministers on 31 January 2007. This updates Recommendation No. R(1999)1 in Measures to Promote Media Pluralism, adopted by the Committee of Ministers on 19 January 1999.

¹⁷ See, for example, *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 38.

¹⁸ The earlier Joint Declarations were only signed by the UN, OAS and OSCE mandates, because the African Commission mandate was created only at the end of 2004.

¹⁹ Adopted on 12 December 2007.

²⁰ This test has been affirmed by the UN Human Rights Committee. See, *Mukong v. Cameroon*, views adopted 21 July 1994, Communication No. 458/1991, para. 9.7. It has also been confirmed by this Court, which has held that the test for restrictions under Article 13(2) of the ACHR is substantially similar to that applied under the ICCPR and the ECHR. See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 7, paras. 38-46. For an elaboration of the test under the ECHR see *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, 2 EHRR 245, para. 45.

Provided by Law

[46] International law and most constitutions only permit restrictions on the right to freedom of expression that are set out in law. This implies not only that the restriction is based in law, but also that the relevant law meets certain standards of clarity and accessibility, sometimes referred to as the “void for vagueness” doctrine. The European Court of Human Rights has elaborated on the requirement of “prescribed by law” under the ECHR:

[A] norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.²¹

[47] Vague provisions are susceptible of wide interpretation by both authorities and those subject to the law. As a result, they are an invitation to abuse and authorities may seek to apply them in situations that bear no relationship to the original purpose of the law or to the legitimate aim sought to be achieved. Vague provisions also fail to provide sufficient notice of exactly what conduct is prohibited or prescribed. As a result, they exert an unacceptable “chilling effect” on freedom of expression as individuals stay well clear of the potential zone of application in order to avoid censure.

[48] Courts in many jurisdictions have emphasised the chilling effects that vague and overbroad provisions have on freedom of expression. The US Supreme Court, for example, has cautioned:

The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within “narrowly limited classes of speech.” ... [Statutes] must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.²²

[49] The requirement of “provided by law” also prohibits laws that grant authorities excessively broad discretionary powers to limit expression. In *Re Ontario Film and Video Appreciation Society v. Ontario Board of Censors*, the Ontario High Court considered a law granting the Board of Censors the power to censor any film it did not approve of. In striking down the law, the Court noted that the evils of vagueness extend to situations in which unfettered discretion is granted to public authorities responsible for enforcing the law:

It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.²³

[50] The UN Human Rights Committee, the body of independent experts appointed under the ICCPR to monitor compliance with that treaty, has also expressed concern about excessive discretion, specifically in the context of broadcast

²¹ *The Sunday Times v. United Kingdom*, note 20, para.49.

²² *Gooding v. Wilson*, 405 U.S. 518 (1972), p. 522.

²³ (1983) 31 O.R. (2d) 583 (Ont. H.C.), p. 592.

licensing:

21. The Committee expresses its concern ... about the functions of the National Communications Agency, which is attached to the Ministry of Justice and has wholly discretionary power to grant or deny licences to radio and television broadcasters.²⁴

Legitimate Aim

[51] The ACHR provides a full list of the aims that may justify a restriction on freedom of expression. It is quite clear from both the wording of Article 13(2) of the ACHR and the views of this Court that restrictions on freedom of expression that do not serve one of the legitimate aims listed in Article 13(2) are not valid.²⁵ This is also the position under the ICCPR and ECHR.²⁶

[52] It is not sufficient, to satisfy this second part of the test for restrictions on freedom of expression, that the restriction in question has a merely incidental effect on the legitimate aim. The restriction must be primarily directed at that aim, as the Indian Supreme Court has noted:

So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.²⁷

[53] In assessing the legitimate aim, courts go beyond the general aim the law serves and look at its specific objectives. As the Canadian Supreme Court has noted:

Justification under s.1 requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing and substantial as to be capable of overriding the Charter's guarantees.²⁸

[54] In assessing whether a restriction on freedom of expression addresses a legitimate aim, regard must be had to both its purpose and its effect. Where the original purpose was to achieve an aim other than one of those listed, the restriction cannot be upheld:

[B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.²⁹

Necessary in a Democratic Society

[55] Different constitutions and treaties use different terms to describe the third part of the test for restrictions on freedom of expression; treaties normally permit only restrictions which are 'necessary' while national constitutions use a range of terms including 'reasonably justifiable in a democratic society', 'reasonably required in a democratic society' and various other related combinations.

²⁴ Concluding Observations on Kyrgyzstan's Initial Report, 24 July 2000, CCPR/CO/69/KGZ, para. 21.

²⁵ See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 7, para. 40.

²⁶ See, for example, *Mukong v. Cameroon*, note 20, para. 9.7. The African Charter takes a different approach, simply protecting freedom of expression, "within the law."

²⁷ *Thappar v. State of Madras*, (1950) SCR 594, p.603.

²⁸ *R. v. Zundel*, (1992) 2 SCR 731, p.733.

²⁹ *R. v. Big M Drug Mart Ltd.*, (1985) 1 SCR 295, p.331 (Supreme Court of Canada).

[56] Regardless of the precise phrase used, this part of the test presents a high standard to be overcome by the State seeking to justify the restriction, apparent from the following quotation, cited repeatedly by the European Court:

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.³⁰

[57] The European Court has noted that necessity involves an analysis of whether:

[There is a] “pressing social need” ... [whether] the interference at issue was “proportionate to the legitimate aim pursued” and whether the reasons adduced...to justify it are “relevant and sufficient.”³¹

[58] Courts around the world have elaborated on the specific requirements of the necessity part of the test for restrictions on freedom of expression. The Canadian Supreme Court, for example, has held that it includes the following three-part inquiry:

[T]he party invoking [the limitation] must show that the means chosen are reasonable and demonstrably justified. This involves “a form of proportionality test”: *R. v. Big M Drug Mart Ltd.*, *supra*, at p.352...There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p.352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance.”³²

[59] This Court has recognised similar factors in elaborating the test under Article 13(2) of the ACHR:

[I]f there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.³³

[60] The first factor noted by the Canadian Supreme Court means that while States may,

³⁰ See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63.

³¹ See *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, EHRR 407, paras. 39-40.

³² *R. v. Oakes* (1986), 1 SCR 103, pp.138-139. *R. v. Big M Drug Mart Ltd.*, note 29.

³³ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 7, para. 46.

perhaps even should, protect various public and private interests, in doing so they must carefully design their measures so that they focus specifically on the objective. This is uncontroversial. It is a very serious matter to restrict a fundamental right and, when considering imposing such a measure, States are bound to reflect carefully on the various options open to them.

[61] The second factor is also uncontroversial. Any restriction which does not impair the right as little as possible clearly goes beyond what is necessary to achieve its objectives. In applying this factor, courts have recognised that there may be practical limits on how finely honed and precise a legal measure may be. But subject only to such practical limits, restrictions must not be overbroad.

[62] Other courts have also stressed the importance of restrictions not being overbroad. For example, the US Supreme Court has noted:

Even though the Government's purpose be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved.³⁴

[63] Finally, the impact of restrictions must be proportionate in the sense that the harm to freedom of expression must not outweigh the benefits in terms of the protected interest. A restriction which provided limited protection to reputation but which seriously undermined freedom of expression would, for example, not pass muster. This again is uncontroversial. A democratic society depends on the free flow of information and ideas and it is only when the overall public interest is served by limiting that flow that such a limitation can be justified. This implies that the benefits of any restriction must outweigh the costs for it to be justified.

Public Officials and Matters of Public Concern

[64] It has been widely recognised that public officials must tolerate a greater degree of criticism than ordinary citizens. In its very first defamation case, the European Court of Human Rights emphasised:

The limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.³⁵

The Court has affirmed this principle in several cases and it has become a fundamental tenet of its jurisprudence.³⁶

[65] The principle is not limited to criticism of politicians acting in their public capacity. Matters relating to private or business interests can also be subject to this higher standard of tolerance. For example, the "fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even

³⁴ *Shelton v. Tucker*, 364 US 479 (1960), p. 488.

³⁵ *Lingens v. Austria*, note 31, para. 42.

³⁶ See, for example, *Oberschlick v. Austria*, 23 May 1991, Application No. 11662/85, para. 59; *Wabl v. Austria*, 21 March 2000, Application No. 24773/94, para. 42; and *Lopes Gomez da Silva v. Portugal*, 28 September 2000, Application No. 37698/97, para. 30.

where, strictly speaking, no problem of incompatibility of office under domestic law arises.”³⁷

[66] The higher standard of protection has been applied broadly to all matters of public interest by the European Court of Human Rights as well as other authoritative bodies. ARTICLE 19’s key standard setting publication on defamation, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation (Defining Defamation)*,³⁸ defines the scope of this notion as follows:

As used in these Principles, the term ‘matters of public concern’ is defined expansively to include all matters of legitimate public interest. This includes, but is not limited to, all three branches of government – and, in particular, matters relating to public figures and public officials – politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic issues, the exercise of power, and art and culture. However, it does not, for example, include purely private matters in which the interest of members of the public, if any, is merely salacious or sensational.³⁹

[67] There are a number of reasons for this higher standard of tolerance, particularly in relation to public officials. First, and most importantly, democracy depends on the possibility of open public debate about matters of public interest. Without this, democracy is a formality rather than a reality. This is the underpinning for the frequent references to the press as ‘watchdog’ of government.⁴⁰ As the Judicial Committee of the Privy Council so aptly put it:

In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.⁴¹

[68] Second, as the European Court of Human Rights has noted, a public official, “inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.”⁴²

[69] Third, public officials normally have greater access to the means of communication and hence can respond publicly to any allegations whereas this may not be easy for ordinary citizens.

Issues Addressed

[70] It is submitted that the actions and omissions of the Venezuelan authorities, as set out above, represent an important breach of the right to freedom of expression of the victims. This Expert Statement assesses those actions in light of relevant international and comparative constitutional law.

³⁷ *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 51 (European Court of Human Rights).

³⁸ (London: July 2000).

³⁹ *Ibid.*

⁴⁰ *Lingens v. Austria*, note 31, para. 44.

⁴¹ *Hector v. Attorney-General of Antigua and Barbuda*, [1990] 2 AC 312 (PC), p. 318.

⁴² *Lingens v. Austria*, note 31, para. 42.

[71] Specifically, this Expert Statement addresses two separate sets of issues. First, it argues that Venezuela is in breach of its obligation to respect freedom of expression in respect of certain actions taken by Venezuelan officials. These include direct acts of harassment by officials against the victims, the direct control exercised over RCTV during the events of April 2002, the attempts by CONATEL to control the content of RCTV broadcasts, and the statements by the President which, it is argued, in the circumstances constitute instigation to attack, and threats against, RCTV, and also breach the principle of independent regulation of broadcasting.

[72] Second, this Expert Statement argues that the Venezuelan authorities have breached their positive obligation to provide protection to RCTV against attacks by private individuals.

Direct Responsibility

Attacks Perpetrated by ‘Agents’ of Venezuela

[73] Attacks against and harassment of the media and media workers by the State clearly represent a breach of the right to freedom of expression. This flows directly from the State’s obligation to promote and protect freedom of expression. It is explicit in the Americas by virtue of Article 13(3) of the ACHR, which provides that the “right of expression may not be restricted by indirect methods or means ... or by any other means tending to impede the communication and circulation of ideas and opinions.” The acts in question – which included making threats and even beatings – clearly tend to impede the communication of ideas and hence represent a breach of the right to freedom of expression.

[74] It may be noted that harassment and attacks of this sort can never be justified as a restriction on freedom of expression. Formally, they are not prescribed by law, they do not serve any legitimate aim and they do not meet the standards of necessity. In other words, these sorts of actions can never be legitimate, regardless the behaviour of a media outlet. Where that behaviour warrants some State response, this should be pursuant to formal legal channels, not random official acts.

[75] It is also clear that these acts are attributable to the State. The International Law Commission’s *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*⁴³ are the most authoritative statement of principles of international law in this area. They make it quite clear that the State is responsible for the acts of officials, even where they “acted in excess of authority or contrary to instructions. ... This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence.”⁴⁴ The reason for this is fairly obvious; if this were not the case, the State could always hide behind a claim of non-authorisation, which would be almost impossible to disprove.

[76] This Court has confirmed the same principle in relation to human rights obligations in the case of *Velásquez Rodríguez v. Honduras*, where it stated:

⁴³ Adopted by the International Law Commission at its fifty-third session, in 2001, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two.

⁴⁴ See the commentary to Article 7.

This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.⁴⁵

[77] There is no question that the individuals in question here were, for purposes of State responsibility, agents of the State. As the Iran-United States Claims Tribunal has put it, the question is whether the acts have been “carried out by persons cloaked with governmental authority”.⁴⁶ Officials in uniform are, quite literally, ‘cloaked with governmental authority’.

Direct Control over RCTV Broadcasting

[78] The incidents of direct control over RCTV are more complicated. They occurred during a time of serious unrest, which led to an estimated 20 deaths on 11 April in clashes between pro- and anti-Chávez demonstrators, as well as the brief removal of Chávez from power in a coup attempt shortly thereafter.

[79] The author is of the view that requiring broadcasters to carry political messages can never be legitimate. ARTICLE 19’s key publication on broadcast regulation, based on international standards and comparative national practice, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*,⁴⁷ states, at Principle 2.3:

Broadcasters should never, subject to Principle 31 (Direct Access Political Broadcasts) [election broadcasts], be required to carry specific broadcasts on behalf of, or to allocate broadcasting time to, the government.

[80] In their 2003 Joint Declaration, the special mandates on freedom of expression stated:

Media outlets should not be required by law to carry messages from specified political figures, such as the president.⁴⁸

[81] It may be noted that, in many countries, broadcasters are required to be balanced in their treatment of matters of public controversy, including in their news and current affairs programming. For State broadcasters, this obligation flows as a matter of course from their public nature and, where this is not currently the case in practice, these broadcasters should be transformed into public service broadcasters. The author also views it as legitimate to impose such an obligation of balance on private broadcasters, as long as it is implemented by a broadcast regulator that is independent of government and commercial influences. This is supported by a UNESCO publication, *Media Development Indicators: A Framework for Assessing Media Development*, adopted in March 2008 by UNESCO’s International

⁴⁵ 29 July 1988, Series C, No. 4, para. 170.

⁴⁶ *Petrolane, Inc. v. The Government of the Islamic Republic of Iran* (1991), 27 Iran-U.S. C.T.R. 64, p. 92.

⁴⁷ (London: ARTICLE 19, 2002). Available at: <http://www.article19.org/pdfs/standards/accessairwaves.pdf>.

⁴⁸ Adopted on 18 December 2003. Available at: <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2003.pdf>.

Programme for the Development of Communications (IPDC).⁴⁹ The section on Requirements for Fairness and Impartiality calls for the adoption of broadcasting codes imposing obligations of fairness and impartiality on both public and private broadcasters.

[82] Presently in Venezuela neither these rules nor the appropriate institutional framework for them exist. The State broadcasting network is government controlled, the broadcast regulator is not independent of government and there is no rule imposing a regime of impartiality on broadcasters.

[83] It is accepted that RCTV, along with the majority of private media outlets, sometimes presented a biased view of events to their listeners and viewers, including importantly during the events of April 2002, a view which was hostile to Chávez. At the same time, at the times during which direct control was exercised over RCTV – 8-11 April and again on the evening of 13 April – Chávez supporters retained effective control over the State broadcasters, Venezolana de Televisión and Radio Nacional de Venezuela. As a result, the Venezuelan listening and viewing public did have access to alternative perspectives on what was happening.

[84] The messages RCTV was required to carry on 8-9 April preceded the violence of 11 April and the subsequent dramatic coup attempt. It is extremely unlikely that anyone could have foreseen these events. Instead, the requirement to carry messages was fairly clearly an attempt to exert political control in a situation in which there were serious political challenges to the government. The particular context was attempts by the government to exert control over the State oil company, Petróleos de Venezuela (PDVSA), including the firing of key PDVSA staff, including seven top PDVSA executives, announced by Chávez on public television on 8 April, which generated a significant backlash.

[85] It is thus submitted that requiring RCTV to carry political messages on 8-9 April was not legitimate. This is without prejudice to the difficult question of whether or not it might be legitimate to require the broadcast of certain message in cases of imminent and serious threats to national security or violent threats to public order since, at that time, such threats did not exist.

[86] The situation was different on 11 and 13 April, when the coup events were still unfolding. In this highly volatile context, it might have been legitimate to stop RCTV broadcasting. Principle 6 of the ARTICLE 19 publication *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*,⁵⁰ which like *Access to the Airwaves* is based on international standards and comparative national practice, sets out the appropriate standards for restricting expression in the context of a threat to national security, which are also relevant to public order contexts:

a) the expression is intended to incite imminent violence;

⁴⁹ Adopted by IPDC at its 26th Session, 26-28 March 2008. Available at: http://portal.unesco.org/ci/en/files/26032/12109261673media_development_indicators_framework_ENG_FINAL.pdf/media_development_indicators_framework_ENG_FINAL.pdf.

⁵⁰ (London: ARTICLE 19, 1995). Available at: <http://www.article19.org/pdfs/standards/joburgprinciples.pdf>.

- b) it is likely to incite such violence; and
- c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

The author is unable to assess whether or not RCTV broadcasts at that time were captured by these standards, due to a lack of access to this material. Only in this case, however, would it have been legitimate to interrupt them on a temporary basis.

[87] Even if it had been legitimate to interrupt RCTV's broadcasts, however, a further question arises in relation to the evening of 13 April, when RCTV was required by Chávez supporters to carry the State television signal. In this context, it would not have been legitimate to require RCTV to carry messages of political support for Chávez, although messages aimed at calming and reassuring the public might have been legitimate. It is therefore submitted that the legitimacy of these actions depends on the content of the messages contained in the specific broadcasts in question, as well as the real intention of the authorities in requiring them to be broadcast. As with the issue of interrupting RCTV broadcasts, the author is unable to assess this due to a lack of access to the State messages broadcast.

Attempts by CONATEL to Control RCTV

[88] In almost every country, broadcasters are subject to regulation of some sort, including licensing procedures for permission to operate. In principle, this is legitimate, including because it is necessary to ensure order in the airwaves. However, not all forms of regulation are appropriate.⁵¹

[89] To be legitimate, broadcast regulation must be undertaken by a body that is independent of government. Otherwise, it allows for political control of the system, to the obvious detriment of freedom of expression.

[90] This basic principle has been endorsed by several international bodies. The *Declaration of Principles on Freedom of Expression in Africa* states very clearly, at Principle VII(1):

Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.⁵²

The special mandates on freedom of expression noted in their 2003 Joint Declaration:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.⁵³

Within Europe, an entire recommendation of the Committee of Ministers of the

⁵¹ See Access to the Airwaves, note 47, for a detailed description of what is and what is not legitimate under international law.

⁵² Note 15.

⁵³ Note 48.

Council of Europe is devoted to this matter, namely Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector (COE Recommendation).⁵⁴ The very first substantive clause of this Recommendation states:

Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

[91] Similarly, ARTICLE 19's Access to the Airwaves states clearly:

All public bodies which exercise powers in the areas of broadcast and/or telecommunications regulation, including bodies which receive complaints from the public, should be protected against interference, particularly of a political or commercial nature.⁵⁵

[92] This view has been upheld by international and national courts. The reasons for this were set out elegantly in a decision of the Supreme Court of Sri Lanka holding that a broadcasting bill which gave a government minister substantial power over appointments to the broadcast regulator was incompatible with the constitutional guarantee of freedom of expression. The Court noted: "[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought."⁵⁶

[93] In many countries, the regulatory system for broadcasters includes some form of regulation of content. However, such a system is legitimate only if it is based on a clear code of conduct, the substance of which is, in turn, based on objective, non-political considerations, such as protection of children and privacy. The code should be developed, preferably through a wide process of consultation involving all stakeholders, in advance of the application of any remedies for content issues. As Principle IX(1) of the African Declaration states in relation to any complaints system:

[C]omplaints shall be determined in accordance with established rules and codes of conduct agreed between all stakeholders.⁵⁷

Similarly, Principle 23.3 of ARTICLE 19's Access to the Airwaves states:

Any content rules should be developed in close consultation with broadcasters and other interested parties, and should be finalised only after public consultation. Agreed rules should be set out clearly and in detail in published form.⁵⁸

[94] The official letters from CONATEL to RCTV fail to conform to these established standards in a number of respects. First, CONATEL lacks the guarantees of

⁵⁴ Adopted by the Committee of Ministers on 20 December 2000.

⁵⁵ Note 47, Principle 10.

⁵⁶ *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.

⁵⁷ Note 15.

⁵⁸ Note 47.

independence required of a broadcast regulator under international law. Second, the specific complaints do not appear to be based on a clear, pre-established code of conduct. Third, importantly, the complaints appear to be motivated by political considerations rather than a desire to protect a legitimate interest. In its letters to RCTV, CONATEL referred to the need to protect children, along with the fact that the programme in question, “La Entrevista en el observador”, a current affairs programme, showed violent images, for example of attacks in the street. Although protection of children against excessive violence is potentially a legitimate basis for content regulation, it is difficult to imagine a current affairs programme breaching a rule along these lines while showing images of real events. In some countries, news programmes give a warning before showing graphic images, so that those who do not wish to view them might avoid this. On the other hand, it is clearly beyond coincidence that the programmes mentioned were all very critical of the government.

[95] As noted above, a rule of political impartiality, applied fairly and consistently by an independent regulator and based on a pre-established statement of standards, would be consistent with international guarantees of freedom of expression. On the other hand, random attempts to impose impartiality on critics of the government could never be legitimate. This is not relevant to the particular facts of this case, given the absence of such a rule, as well as the lack of an appropriate institutional framework for applying it.

[96] Although the letters from CONATEL did not impose specific regulatory sanctions on RCTV, their implication was clear: if RCTV did not ‘reform’ itself, its licence was at risk. The seriousness of this was subsequently made clear in the actual non-renewal of RCTV’s licence and there is little doubt that the implications of the earlier letters were clear to RCTV’s management.

Statements by the President

[97] Politicians, including presidents like Chávez, clearly have the right to respond to criticism in the media. This may include setting the record straight, providing alternative interpretations of events, and even counter-criticism against the media, for example for acting unprofessionally or in a biased manner. This is not only based on politicians’ own right to freedom of expression, but is also fundamental to the open exchange of views and ideas that underpins democracy.

[98] At the same time, very senior political figures like Chávez, by virtue of the enormous State power that they wield, have to respect certain boundaries in what they say, while also being bound by the rules that govern all citizens.

[99] Where there are ongoing attacks against certain media outlets and their staff, and the government is aware of those attacks, such as was the case in relation to RCTV, as has been described above, the State has certain obligations to provide protection to the media outlet (see below). Instead of bolstering such protection, however, the statements by Chávez actually promoted and encouraged the attacks. Indeed, in that particular context, where the attacks were being perpetrated mainly, if not exclusively, by Chávez supporters, it is submitted that the extreme statements made by Chávez amounted, taken collectively, to incitement to attack RCTV. Just as incitement to crime is universally recognised as a crime, so too is incitement to a human rights

breach itself a breach of the right. In a recent resolution on attacks on journalists in the context of armed conflict, the UN Security Council called for those who incite such attacks to be brought to justice.⁵⁹ Although restricted to armed conflicts, the same principles of responsibility apply to human rights breaches. Chávez's actions in this regard clearly engage the responsibility of the State, and, as a result, his statements inciting his supporters to attack RCTV represent an independent breach of the right to freedom of expression.

[100] Chávez's statements also breach the right to freedom of expression inasmuch as they contained threats against RCTV and its staff. Some of the statements contained threats of State action to terminate RCTV's licence, should it continue to engage in harsh criticism of the government. The statements were clearly politically motivated and, as such, they were analogous to CONATEL's letters. Although the formal power to impose the threatened measures lay with CONATEL, Chávez's effective power over the regulator made this a formality. In other words, the real implications of Chávez's statements would have been clear to RCTV management.

[101] Other statements contained implicit threats of violence against RCTV, as well as of legal measures to close it outside of the regulatory framework. Although couched in terms of maintaining respect for law, and in particular of enforcing rules against incitement to violence, it is clear from the statements themselves, as well as the wider context, that they were intended to intimidate RCTV, along with the other broadcasters to whom they referred, and, in particular, to make them more wary of criticising the government.

[102] It is not legitimate for senior officials to use threats of the application of State power against the media for political ends. This represents, of itself, an exercise of State authority to exert a chilling effect on freedom of expression and, as such, is clearly an interference with the right to freedom of expression. It is not authorised by law, it does not serve a legitimate aim and, even if it did, in this case the maintenance of security and protection of order, it could not be justified as necessary to this end.

[103] Finally, Chávez's statements also breach the State's obligation to provide for independent regulation of broadcasting, as outlined above. Although a number of structural measures can help promote independent broadcast regulation, an important aspect of this in practice is respect by senior political figures for that independence. Without this, functional independence is almost impossible to guarantee in practice, since there will inevitably be ways in which determined officials can interfere. These statements clearly demonstrated Chávez's view that it was a legitimate exercise of his power to control the regulator, for example by ordering it to monitor broadcasters or even to revoke their licences.

Positive Obligation to Protect RCTV

[104] It is now well-established that the right to freedom of expression includes a positive, as well as a negative, element, inasmuch as there are certain circumstances in which States are under an obligation to take positive measures to ensure respect for the right. One example of this is the right to information, which imposes a

⁵⁹ Resolution 1738, 23 December 2006, para. 4.

positive obligation on the State to adopt legislation ensuring that individuals can exercise their right to access information held by public bodies.⁶⁰

[105] It is also well-established that, as part of their positive obligations to respect freedom of expression, States are bound to take steps to prevent attacks which aim to limit freedom of expression and, when such attacks do occur, to take appropriate steps to ensure that those responsible are brought to justice. As the special mandates on freedom of expression stated in their 2006 Joint Declaration:

- Intimidation of journalists, particularly murder and physical attacks, limit the freedom of expression not only of journalists but of all citizens, because they produce a chilling effect on the free flow of information, due to the fear they create of reporting on abuses of power, illegal activities and other wrongs against society. States have an obligation to take effective measures to prevent such illegal attempts to limit the right to freedom of expression.
- States should, in particular, vigorously condemn such attempts when they do occur, investigate them promptly and effectively in order to duly sanction those responsible, and provide compensation to the victims where appropriate. They should also inform the public on a regular basis about these proceedings.⁶¹

[106] As noted above, the UN Security Council adopted Resolution 1738 condemning attacks against journalists in the context of armed conflict. Among other things, the Resolution,

Emphasizes the responsibility of States to comply with the relevant obligations under international law to end impunity and to prosecute those responsible for serious violations of international humanitarian law.⁶²

Although restricted to situations of armed conflict, the same principles apply to violations of human rights.

[107] In an analogous vein, Article 12(2) of the UN *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms* (Declaration on Human Rights Defenders)⁶³ provides:

The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.

For purposes of this Declaration, journalists are considered to be human rights defenders.

⁶⁰ See the leading decision in this area, adopted by this Court, namely *Claude Reyes and Others v. Chile*, 19 September 2006, Series C, No. 151.

⁶¹ Adopted on 19 December 2006. See also their Joint Declaration of 30 November 2000.

⁶² Note 59.

⁶³ United Nations General Assembly Resolution A/RES/53/144, 8 March 1999.

[108] Similarly, the 27th General Conference of UNESCO issued a resolution calling upon the Director General, among other things,

to urge that the competent authorities discharge their duty of preventing, investigating and punishing such crimes and remedying their consequences.⁶⁴

[109] These authoritative statements find strong support in the jurisprudence of international courts. The case of *Özgür Gündem v. Turkey*, involved an Istanbul-based daily, which had been harassed and attacked so persistently that it eventually had to close. Seven staff members, including journalists, were actually killed and the paper suffered numerous attacks – arson, bombs and even armed attacks – against newsagents, shops selling its paper and its offices. Several petitions by the newspapers to the authorities calling for assistance were met, for the most part, with no response. Finally some minor protective measures were put in place. At the same time, the authorities launched an official investigation of the newspaper, as well as several criminal prosecutions.

[110] The European Court of Human Rights held that Turkey had breached the newspaper's right to freedom of expression by failing to protect it against these attacks, stating:

The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals.⁶⁵

[111] The African Commission on Human and Peoples' Rights has also held in a number of cases that States are under a positive obligation to make efforts to investigate attacks against journalists, as well as to try to prevent them from occurring in the first place.⁶⁶ The Inter-American Commission on Human Rights has come to the same conclusion in a number of cases.⁶⁷

[112] An aspect of the *Gündem* case, which echoes the facts of the current case, is that Turkey argued that the newspaper was a front for terrorist propaganda. The European Court declined to rule on the substance of this claim, noting that regardless of its veracity, it did not relieve the State of its obligation to protect the newspaper. They might prosecute the newspaper for any illegal material it had disseminated, but they could not simply ignore the repeated attacks on it. Specifically, the Court stated:

The Court has noted the Government's submissions concerning its strongly held conviction that Özgür Gündem and its staff supported the PKK and acted as its propaganda tool. This does not, even if true, provide a justification for failing to take steps effectively to investigate and, where necessary, provide protection against unlawful acts involving violence. The Court concludes that the Government have failed, in the circumstances, to comply with their positive obligation to protect

⁶⁴ Resolution 29 of the 27th General Conference of UNESCO, 12 November 1997.

⁶⁵ 16 March 2000, Application No. 23144/93, para. 43.

⁶⁶ *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, October 1995, No. 74/92.

⁶⁷ See, for example, *Miranda v. Mexico*, note 14 and *Oropeza v. Mexico*, 19 November 1999, Report No. 130/99, Case No. 11.740.

[113] The precise extent of the positive obligation to prevent and investigate attacks remains unclear. This is in part because it is relatively dependent on the particular circumstances of each case, including the capacity of the State to undertake these functions. It is clear, however, that the obligation is significantly enhanced where the attacks are ongoing, where they are clearly motivated by a desire to silence the media or as retribution for the dissemination of critical output, and where the State is specifically aware of these facts.

[114] The facts of this case point very strongly to the failure of the authorities to protect the victims and to pursue those responsible for the attacks. All of the factors noted above as enhancing State responsibility – the persistency of the attacks, the motivation for the attacks and State awareness of these problems – are present in this case. Indeed, on a number of different occasions, RCTV formally requested official assistance from various Venezuelan State authorities. The State was also aware of the very serious nature of the situation as a result of the many orders relating to provisional measures in this case which were issued by this Court.

[115] The fact that not a single person has been prosecuted for any of the many attacks on RCTV and its staff, despite clear leads being available, is remarkable. On a number of occasions, RCTV staff requested official assistance which was refused or which was provided only after a significant delay. In some cases, instead of providing protection so that RCTV staff could discharge their journalistic responsibilities, the authorities chose the less onerous option of removing them from the scene of the problem. The protection provided to RCTV on 13 April was less than satisfactory, although in mitigation it may be noted that it was undoubtedly a very tumultuous day.

[116] In many of the cases noted above, the failure to take action was linked to at least suspicions, and sometimes actual findings, of State complicity in the attacks or at least a structural willingness to ignore the attacks, for example because they were directed against government critics. The same considerations are at play here. It has been argued that the State committed some of the attacks and it is obvious from the facts that they had a strong motivation to ignore them.

[117] It is submitted that, if the statements of the President are not deemed to constitute direct breaches of the right to freedom of expression of RCTV staff, then they at least demonstrate a distinct unwillingness to take the necessary measures to protect RCTV. As the special mandates on freedom of expression made clear in their 2006 Joint Declaration, States should condemn attacks on journalists when they occur; instead, Chávez's statements encouraged further attacks.

Conclusion

[118] It is submitted that the facts of this case, when assessed from the perspective of international standards, disclose a number of breaches of the freedom of expression rights of the victims. The most serious breach relates to the frequent and

⁶⁸ *Özgür Gündem v. Turkey*, note 65, paras. 45 and 46.

debilitating harassment of and attacks against the victims and their employer, RCTV, which undermined their ability to express themselves. International law not only prohibits States from engaging in such attacks but also places a positive obligation on States to take appropriate steps to protect those seeking to express themselves publicly, and in particular the media, from such attacks, as well as to bring the perpetrators to justice.

[119] It is submitted that the facts of this case reveal disturbing instances in which State officials engaged in direct harassment or attacks against the victims. Even more serious were a number of statements by President Chávez, which it is submitted, taken together, incited his followers and supporters to engage in the attacks.

[120] Even if Chávez's statements are not deemed to constitute incitement to the attacks, they surely represent a failure of the State to fulfil its obligation to protect those expressing themselves from attacks. Instead of condemning the attacks, Chávez's statements gave succour and support to those perpetrating them. Overall, Venezuela failed to provide sufficient protection to the victims of the attacks. And the fact that not a single person has been prosecuted for the attacks, despite good leads in some cases, speaks to its failure to bring those responsible to justice.

[121] Venezuela also breached the victims' right to freedom of expression by interrupting the broadcasts of their employer, RCTV. It is submitted that some of these interruptions were clearly unjustified, while others would only have been justified if the broadcasts in question represented a direct, serious and immediate threat to public order or national security.

[122] Finally, it is submitted that the official letters sent by CONATEL, the broadcast regulator, to RCTV, along with certain statements by Chávez, breached the victims' right to freedom of expression inasmuch as they represented official threats to employ State power to terminate RCTV's licence to operate as a broadcaster. These statements were not justified in the circumstances and they represented threats to employ regulatory powers by actors who were not independent of government, as required under international law.

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