

**XV Inter-American Human Rights Moot Court Competition**  
Academy on Human Rights and Humanitarian Law  
Washington College of Law  
American University

**Bench Memorandum**  
**RADICAL RADIO v. CHIRILAGUA<sup>1</sup>**  
*(Confidential Document)*

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<sup>1</sup> Note: all of the references to doctrine and case law made in this memorandum are in the Reports of the Office of the Special Rapporteur for Freedom of Expression, from which the relevant sections have been selected and applied to the hypothetical case.

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## 1. SUMMARY OF THE CASE, ISSUES AND GENERAL OBJECTIVES

The facts of the case “Radical Radio *et al.* v. the Federal Republic of Chirilagua” concern issues relating to the exercise of the freedom to express ideas through the mass media. Some of these facts are related to standards already firmly established by the doctrine and case law of the system. Others deal with factual situations that the bodies of the system have not yet had the opportunity to litigate before the Court, even though they may fall within the framework of the general convention rules.

We authors expect that the argument of the case will focus on the role of the media in highly polarized political contexts, characterized by the attempts of the State to monopolize public speech and a trend toward the concentration of media ownership. In this respect, the case has elements relating to: the limits to freedom of expression in these contexts; the criteria for identifying the legitimacy of sanctions against the media and journalists; the limits of the State when regulating and administering the electromagnetic spectrum; and the diversity and plurality of the media.

To put these issues in context, the hypothetical State exhibits characteristics that play a fundamental role in the interpretation of the specific facts. First, Chirilagua is a democratic society that has a highly popular Executive. This has inspired the government’s political plan to keep the current president in power in spite of the fact that reelection is not constitutionally permissible. Nevertheless, the measures advanced by that political plan have not contravened the constitutional procedures established for democratic referendums and constitutional reforms. It is in this context that the work of the critical media gives rise to tensions between them and the government.

Second, although the government’s political plan has majority approval, certain sectors of society are opposed to the proposed constitutional changes. The description of the facts suggests a trend toward the concentration of power, but does not make certain that it exists and, above all, that it is promoted directly by the government. For example, the proposed referendum was not promoted directly by the president, but rather by citizens sympathetic to his policies. The opposition then has well-founded fears of concentration, but it is still debatable whether the measures taken by the State, and those promoted by the government, truly correspond to specific actions involving the concentration of power, or rather to issues open to democratic debate.

Nevertheless, there is a real controversy with regard to the opportunity for minorities to express their opinion on the possible reforms. While the public demonstration proposed by an opposition sector of society was not prohibited, it seems to have been limited or at least rejected by the government (with an excuse whose legitimacy should be debated by the competitors). In addition, the partisan political opposition also claims a lack of opportunities to express its opinions, due in part to the scant dissemination of its ideas by the commercial media. This situation is exacerbated by the alleged existence of a pro-government media monopoly. There is also an important indication that the administrative revocation of the license of one of the media outlets involved was in retaliation for the editorial line of the radio station and not related to compliance with legal or administrative requirements.

Third, the case is designed not only for the debate of the right to freedom of expression of commercial media; it also raises the issue of the recognition of community media and

their relationship to the exercise of democratic citizenship and the right to freedom of expression. Accordingly, the nature of the regulation of broadcasting and the general requirements for such regulation to be compatible with Article 13.2 of the American Convention with regard to limits to freedom of expression will be central to the argument of the case.

The specific issues that we expect to be debated among the competitors include the compatibility of Article 13 of the American Convention on Human Rights with the procedures for access to, renewal or revocation of licenses, the requirements for accessing them, the conditions of their use, the composition and powers of the regulatory authority. It is expected that the participants will identify the decisions of the system's human rights protection bodies with respect to these issues, and complement these decisions with a comprehensive interpretation of the scope of the right to freedom of expression contained in Article 13 of the American Convention.

The issue of community broadcasters and their ability to participate under equal conditions in gaining access to frequencies is of special interest. In that respect, the facts of the case are designed for the participants to debate the content of the state obligations on the regulation of broadcasting and the possible reservation of spectrum in order for the media system to represent the diversity and plurality of ideas and opinions. The discussion will move between the constitutional and legal recognition of community radio (a recognition that exists in the hypothetical country) and the real possibilities for exercising the right to establish such radio stations given the vagueness of the rules that could lead to arbitrary interpretations of the recognized right.

Fourth, the case seeks to generate debate on the relationship between new communications media, types of speech protected by freedom of expression, and the responsibilities of those who express themselves. Even though we know that the issue of the potential criminal liability of members of the media for activities related to their work has been addressed in other competitions, the issue continues to generate great practical and academic interest. Even though the inter-American case law has made progress in that area, there are still issues that remain unclear. In addition, in several countries of the hemisphere, there are often new cases involving criminal cases against members of the media that present challenges to the domestic legal systems as well as the regional system for the protection of human rights. The case ties these challenges to an issue that is new to the Inter-American Moot Court Competition: the relationship between the reporting of the traditional media and the expression that comes from what have been called "new media," which include information technology resources, social networks, and the use of new digital technologies for the dissemination of information.

Finally, we authors are interested in a discussion of the standing of the media to participate as victims in the inter-American case. For this we included three particular aspects in the case. First, we established that the constitutional case law of the country indicates that a petition for a constitutional remedy can be filed only by the legal entity, that is, by the communications medium. Second, the original petition was submitted only by one of the shareholders in the commercial radio station, and in its admissibility report the IACHR included the second shareholder. Third, in the community radio station it is not very clear who would assert this legal entitlement, as it also belongs to another legal entity, which is the Community Association.

In sum, the main issues that we expect to be addressed by the participants are the following:

- Role of the media in democratic debate
- Purpose and limits to the government regulation of broadcasting
- Legal recognition and effective exercise of freedom of expression through community broadcast media
- Pluralism, diversity and freedom of expression
- Speech protected and not protected by freedom of expression
- Indirect restrictions to freedom of expression
- Media as parties legally entitled to assert a claim before the inter-American system
- Reparations and public policies on the reservation of spectrum and equal conditions in the access to and use of licenses

To examine these issues, the facts of the case are framed principally by the alleged violations of Articles 8, 13 and 25 of the American Convention, all in relation to compliance with the obligations established in Article 1.1 and, possibly, Article 2 of the American Convention. Even though we expect that the debate will focus primarily on the discussion of the issues specified within this framework of standards, there are factual considerations that may give rise to arguments related to other rights established in Articles 7 (personal liberty), 21 (private property) and 24 (right to equal protection) of the American Convention.

This memorandum will review then, first of all, the general legal framework of the central issue: the scope of the obligations of States with respect to the right to freedom of expression. Second, we will go over in greater detail the inter-American standards to be discussed in relation to each issue, laying out the possible arguments of the students who assume the role of petitioners as well as those who assume the role of the State. Finally, following the structure outlined above, we will present some considerations relating to other Articles of the Convention.



**ARGUMENTS AND THEIR LOCATION IN THIS MEMORANDUM**

Arts.	Issue	Summary of arguments	Pages
13, 8, and 25	Granting and revocation of broadcasting licenses	<ul style="list-style-type: none"> <li>-- Laws are vague and imprecise, which gives rise to the possibility that the regulatory agency may abuse its authority</li> <li>-- There is no clarity regarding the requirements for ownership and the legal representation of parties that have been granted concessions</li> <li>-- The vagueness of the laws and the lack of independence of the regulatory body allowed for the arbitrary use of a procedural mechanism of control of the concessions to limit the expression of the media critical of the government</li> <li>-- The administrative proceedings did not respect due process</li> <li>-- The shareholders or representatives of Radical Radio were never called to present evidence in their defense or even informed of the proceedings against them</li> </ul>	<p>20-22</p> <p>22-23</p> <p>39-40</p>
		<ul style="list-style-type: none"> <li>-- The States have the authority to regulate broadcasting, which includes defining the manner in which concessions are granted as well as planning and implementing public policies on such activity</li> <li>-- The rules governing broadcasting are based on the Constitution itself, which guarantees the right to freedom of expression</li> <li>-- The requirements are not based on discriminatory or disproportionate criteria</li> <li>-- Ownership of a license may be substituted, but only through the submission of a prior application to the COFERETEL</li> </ul>	<p>20-22</p> <p>23- 25</p> <p>39-41</p>



13, 24, 8 and 25	Allocation of frequencies to community broadcasters	<p>-- It is practically impossible to establish and operate community media outlets due to the COFERETEL's refusal to grant operating licenses to those media</p> <p>-- In more than 30 years, there have been only 3 calls for bids for the issuance of community radio licenses</p> <p>-- In the first two calls for bids only 11 licenses were granted for community radios in the entire country, while 450 commercial broadcasting licenses were either awarded or renewed.</p> <p>-- The failure to recognize Radio Su-Versión is due to the nature of the association that promotes the community service: the "Landless"</p> <p>-- The suspension of Radio Su-Versión's broadcasts and the seizure of its equipment are a violation of the principle of legitimate expectations</p>	25- 26 26-28 44-46
		<p>-- The granting of licenses and the issuance of invitations to bid are complex administrative acts that respond not only to the applications submitted but also to political allocation criteria and technical requirements</p> <p>-- Given the State's obligations of pluralism and fairness, it is not possible for it to grant broadcasting licenses, whether commercial or community, to all those who claim they want one or who meet the requirements for one</p> <p>-- There is nothing in the standards or even in the case law of the inter-American system that refers to the claimed principle of legitimate expectations</p> <p>-- The principle of legitimate expectations does not allow the administrators to allege a state error to justify its failure to comply with public order provisions</p>	25- 26 28-30 44-46

13, 7, 8, 9 and 25		<p>-- The criminal sanctions are a violation of freedom of expression, as they penalize speech protected by the American Convention</p> <p>-- With the offenses of murder and instigation to commit a crime, the State is imposing sanctions against the members of the media for their opinion and not for their involvement in criminal acts</p> <p>-- Neither the acts nor the opinions of others can be imputed to those who provide information through the media</p> <p>-- The very formulation of the legal definitions of the crimes is a violation of freedom of expression to the extent that it amounts to an unlawful restriction of the right to express oneself</p> <p>-- The manner in which the legal definitions of the offenses of instigation to commit a crime and defamation are drafted violates the inter-American standards</p>	<p>30-31</p> <p>31-32</p> <p>41-43</p>
	Information broadcast by the media and the acts of violence	<p>-- The outcome of the events of March 3<sup>rd</sup> and March 20<sup>th</sup> was a direct result of the incitement to violence coming from the radio stations</p> <p>-- Facts cannot be taken in an isolated manner, as they are the culmination of a campaign of hatred and incitement to violence devised by these media</p> <p>-- On the day of the demonstration, journalist Garra carried the execution of the crime to its culmination, taking advantage of his platform to distort the facts and create confusion that would end in acts of violence</p> <p>-- There was no factual basis to think that the two marches would come together, let alone that the law enforcement officers in the area were intervening in them to favor a particular group over another</p>	<p>30-31</p> <p>32-33</p> <p>41-43</p>

<p>13, 7, 8, 9 and</p>	<p>Use of the radio spectrum and the imposition of criminal sanctions</p>	<p>-- The use of criminal sanctions is an excessive restriction that violates the right to freedom of expression, as the State can use sanctions that are less restrictive of this right, such as administrative sanctions.</p> <p>-- In this case there is no social imperative that justifies the criminal sanction, and that makes it disproportionate, which constitutes an indirect restriction to freedom of expression</p> <p>-- The legal definition of the crime was misapplied to the facts described, as they do not contain the objective elements required for the offense of theft</p> <p>-- The criminal sanction was imposed against individuals who for decades have sought to exercise a protected right and provide a community service, which they have not been able to do because of actions directly attributable to the State</p> <p>-- The interference that could have been caused to the radio spectrum as a result of its illegal use does not contain the objective elements of <i>use and displacement of property</i>, as it has been defined in the authorized criminal doctrine</p> <hr/> <p>-- In Chirilagua, as in the other countries of the region, the electromagnetic spectrum is an inalienable public good not subject to prescription, which is additionally characterized by being limited in nature</p> <p>-- The operation of a broadcasting station requires a license, which is the authority granted by the State to legal entities in order for them to operate an authorized broadcasting station</p> <p>-- When unauthorized broadcasts are made through furtively activated equipment, it amounts to taking possession of that intangible asset called electromagnetic spectrum, which is impossible to restore</p> <p>-- The State has not only the interest but also the obligation to protect public goods; in doing so, the public servant fulfills his duty and therefore his conduct is legitimate</p>	<p>33-34</p> <p>34-35</p> <p>41-43</p> <p>33-34</p> <p>35-36</p> <p>41-43</p>
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<p>13, 24 and 25</p>	<p>Monopolistic consequences of the decisions on regulation of the spectrum and the obstruction of democratic debate</p>	<p>-- The State has not taken measures to prevent information monopolies, as the monopoly has favored its political interests</p> <p>-- The State has directly favored the concentration of media through sanctions and shutdowns of community and commercial opposition media</p> <p>-- The most important media consortium of Chirilagua (the Fresa Alliance) owns the television channel with the largest national audience and “more than 50 radio stations located in several cities throughout the country”</p> <p>-- This consortium, in addition to directly supporting the election of the President of the Republic, has demonstrated a lack of impartiality in the information it broadcasts</p> <p>-- The Government measures taken as of March 5<sup>th</sup> through the COFERETEL did not affect any of the radio stations affiliated with the Fresa Alliance. On the contrary, it can be said that they benefited as their competition diminished with the closure of more than 40 stations</p> <hr/> <p>-- The state media policy establishes three distinct modes of access to the media, which are, in and of themselves, measures to prevent the concentration of media ownership</p> <p>-- There is empirical evidence that the media market has not been monopolized by the Fresa Alliance: the proportion of radio stations of the Fresa Alliance is only around 10% of the total</p> <p>-- This situation did not vary substantially with the measures taken as of March 5, 2008. According to the information of this case, by virtue of the administrative measures taken, [40 radio concessions were revoked].</p> <p>-- These measures did not hinder democratic and electoral debate; the administrative measures resulting in the revocation of the licenses were taken subsequent to the elections</p>	<p>36-38</p> <p>44-46</p> <p>36-38</p> <p>44-46</p>
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## **2. GENERAL LEGAL FRAMEWORK OF FREEDOM OF EXPRESSION IN THE INTER-AMERICAN SYSTEM**

This memorandum will begin with a summary of the general inter-American standards on freedom of expression that are related directly to the argument of the case. We will address the following issues specifically: (i) the importance and function of the right to freedom of expression; (ii) the main characteristics of the right to freedom of expression; (iii) the types of speech protected and not protected by the right to freedom of expression; (iv) the limits to the right to freedom of expression, and; (v) the relationship between the exercise of the right to freedom of expression and the media.

This presentation summarizes the compilation of scholarly opinions and case law on the subject put together by the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights in Chapter III of its 2009 Annual Report. For a complete overview of the applicable standards on this subject, a comprehensive reading of that chapter is recommended.<sup>2</sup>

### **2.1 Importance and functions of the right to freedom of expression**

The legal framework of the Inter-American system for the protection of human rights is probably the international framework that provides the greatest scope and the broadest guarantees of protection to the right to freedom of thought and expression. Indeed, Article 13 of the American Convention on Human Rights,<sup>3</sup> Article IV of the American Declaration of the Rights and Duties of Man,<sup>4</sup> and Article 4 of the Inter-American Democratic Charter,<sup>5</sup> offer a number of reinforced guarantees that do not seem to be equaled in the universal system or in any other regional system of protection.

According to inter-American scholarship and case law, the importance of freedom of expression stems, among other things, from its triple function within democratic systems. First, it deals with one of the individual rights that most clearly makes possible

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<sup>2</sup> See: IACHR, *2009 Annual Report*, Volume III: “Annual Report of the Office of the Special Rapporteur for Freedom of Expression” (Chapters III & VI).

<sup>3</sup> American Convention on Human Rights. 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: (1) respect for the rights or reputations of others; or (2) 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. // 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence. // 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.”

<sup>4</sup> American Declaration of the Rights and Duties of Man, Article IV: “Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”

<sup>5</sup> Inter-American Democratic Charter, Article 4: “Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. // The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy.”

each person's designs as an individual subject as well as the realization of his or her life plan—personal autonomy.

Second, the Inter-American Commission and Court have underscored in their case law that the importance of freedom of expression also stems from its structural relationship to democracy.<sup>6</sup> The formation of an informed public opinion that is aware of its rights, citizen oversight over government affairs and the accountability of public officials would not be possible if this right were not guaranteed. In this same respect, the case law has emphasized that the democratic function of freedom of expression deems it a necessary condition to prevent the consolidation of authoritarian systems, to facilitate personal and collective self-determination<sup>7</sup> and to render citizen oversight and complaint mechanisms effective.<sup>8</sup>

Finally, Inter-American case law has explained that freedom of expression is a key instrument for the exercise of all other fundamental rights. It is an essential mechanism for the exercise of the rights to participation, religious freedom, education, ethnic or cultural identity and, needless to say, equality, understood not only as the right to be free from discrimination but also as the right to enjoy certain basic social rights.

## **2.2 Forms of expression specifically protected by the Inter-American instruments**

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have given a broad content to the right to freedom of expression enshrined in article 13 of the Convention, and have derived from its individual and collective aspects a series of rights protected by that article in relation to different forms of human expression.<sup>9</sup> The main specific types of expression that have been addressed in the decisions of the Inter-American Commission and the Inter-American Court are:

*The right to speak*, that is, to express one's thoughts, ideas, information or opinions orally. This is a basic right which, according to the Commission and the Court, is one of

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<sup>6</sup> I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985, Series A No. 5, para. 70; I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151, para. 85; I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004, Series C No. 107, para. 112; I/A Court H.R., *Case of Ricardo Canese v. Paraguay*, Judgment of August 31, 2004, Series C No. 111, para. 82; I/A Court H.R., *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 195, para. 116.

<sup>7</sup> I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985, Series A No. 5, para. 70; I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151, para. 85; I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004, Series C No. 107, para. 116; I/A Court H.R., *Case of Ricardo Canese v. Paraguay*, Judgment of August 31, 2004, Series C No. 111, para. 86; and I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo Bustos et al. v. Chile)*, Judgment of February 5, 2001. Series C No. 73. IACHR. Report No. 130/99. Case No. 11.740. *Víctor Manuel Oropeza*. Mexico. November 19, 1999, para. 46; I/A Court H.R., *Case of Ríos et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 194, para.105; I/A Court H.R., *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 195, para. 116.

<sup>8</sup> I/A Court H.R., *Case of Ríos et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 194, para.105; I/A Court H.R., *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 195, para. 116.

<sup>9</sup> I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151, para. 75.

the pillars of freedom of expression.<sup>10</sup> The right to speak necessarily entails people's right to use the language of their choice to express themselves.<sup>11</sup>

*The right to write*, that is, to express one's thoughts, ideas, information or opinions in written or printed form,<sup>12</sup> also in the language of one's choice. The Inter-American Commission and the Inter-American Court have protected various manifestations of the right to write, for example, in the case of those who write books,<sup>13</sup> news articles<sup>14</sup> and opinion pieces.<sup>15</sup>

*The right to disseminate* spoken or written expressions of thoughts, information, ideas or opinions, through the means of dissemination of one's choosing, in order to communicate them to the greatest possible number of people. On this point the Inter-American Court has stressed the following: (a) freedom of expression is not limited to the abstract right to speak or write; rather, it encompasses inseparably the right to disseminate the thought, information, ideas and opinions by any appropriate means chosen, in order to reach as many people as possible;<sup>16</sup> (b) to guarantee this freedom effectively, the State must not only protect the exercise of the right to speak or write ideas and information but it also has the duty to refrain from restricting their dissemination through the prohibition or disproportionate regulation of the means chosen for others to receive them;<sup>17</sup> and (c) in establishing that freedom of expression encompasses the right to impart information and ideas "by any (...) medium," the American Convention establishes that the expression and dissemination of thoughts and ideas are indivisible, and therefore any limitation to the means and possibilities for the dissemination of the expression is, directly and in the same measure, an infringement of freedom of expression,<sup>18</sup> which means, among other things, that restrictions on the communications media are also restrictions to freedom of expression.<sup>19</sup>

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<sup>10</sup> I/A Court H.R., *Case of López-Álvarez v. Honduras*. Merits, Reparations and Costs. Judgment of February 01, 2006. Series C No. 141, para. 164; I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004, Series C No. 107, para. 109; I/A Court H.R., *Case of Ricardo Canese v. Paraguay*, Judgment of August 31, 2004, Series C No. 111, para. 78; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment February 6, 2001. Series C No. 74, para. 147; I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo Bustos et al. v. Chile)*, Judgment of February 5, 2001. Series C No. 73, para. 65; I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)* Advisory Opinion OC-5/85 of November 13, 1985, para. 31.

<sup>11</sup> I/A Court H.R., *Case of López-Álvarez v. Honduras*. Merits, Reparations and Costs. Judgment of February 01, 2006. Series C No. 141, para. 164

<sup>12</sup> I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004, Series C No. 107, para. 109; I/A Court H.R., *Case of Ricardo Canese v. Paraguay*, Judgment of August 31, 2004, Series C No. 111, para. 78; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment February 6, 2001. Series C No. 74, para. 147; I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo Bustos et al. v. Chile)*, Judgment of February 5, 2001. Series C No. 73, para. 65.

<sup>13</sup> I/A Court H.R., *Case of Palamara-Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135 & I/A Court H.R., *Case of Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177.

<sup>14</sup> I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004, Series C No. 107.

<sup>15</sup> I/A Court H.R., *Case of Ricardo Canese v. Paraguay*, Judgment of August 31, 2004, Series C No. 111.

<sup>16</sup> I/A Court H.R., *Case of Palamara-Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 73; I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004, Series C No. 107, para. 109; I/A Court H.R., *Case of Ricardo Canese v. Paraguay*, Judgment of August 31, 2004, Series C No. 111, para. 78; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment February 6, 2001. Series C No. 74, para. 147; I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo Bustos et al. v. Chile)*, Judgment of February 5, 2001. Series C No. 73, para. 65; I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985, para. 31.

<sup>17</sup> *Idem*.

<sup>18</sup> I/A Court H.R., *Case of López-Álvarez v. Honduras*. Merits, Reparations and Costs. Judgment of February 01, 2006. Series C No. 141, para. 164; I/A Court H.R., *Case of Palamara-Iribarne v. Chile*. Merits, Reparations and

Furthermore, the Inter-American Commission and the Court have made reference to: (i) the right to artistic or symbolic expression, to the dissemination of artistic expression, and to access to art, in all its forms;<sup>20</sup> (ii) the right to seek, receive and have access to expressions, ideas, opinions and information of all kinds; (iii) the right of access to information about oneself contained in public or private databases or registries; and (iv) the right to possess information, whether written or in any other medium, to transport such information, and to distribute it.<sup>21</sup>

### 2.3 Types of speech protected according to content

In principle, all forms of speech are protected by the right to freedom of expression, independently of their content and degree of government and social acceptance. This general presumption of coverage of all expressive speech is explained by the State's primary duty of content-neutrality and, as a consequence, by the necessity to guarantee that, in principle, there are no persons, groups, ideas or means of expression excluded *a priori* from public debate.

Freedom of expression must be guaranteed not only with regard to the dissemination of ideas and information that are received favorably or considered inoffensive or indifferent but also in cases of speech that is offensive, shocking, unsettling, unpleasant or disturbing to the State or to any segment of the population.<sup>22</sup> This is required by the pluralism, tolerance and spirit of openness without which a democratic society cannot exist. In this respect, the Commission has pointed out the special importance of protecting freedom of expression "as regards minority views, including those that offend, shock or disturb the majority";<sup>23</sup> and it has emphasized that restrictions to freedom of expression "must not 'perpetuate prejudice or promote intolerance.'"<sup>24</sup> Likewise, it is clear that the duty to not interfere with the right of access to information of all kinds extends to the circulation of information, ideas and forms of expression that

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Costs. Judgment of November 22, 2005. Series C No. 135, para. 72; I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004, Series C No. 107, para. 109; I/A Court H.R., *Case of Ricardo Canese v. Paraguay*, Judgment of August 31, 2004, Series C No. 111, para. 78; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment February 6, 2001. Series C No. 74, para. 147; & I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo Bustos et al. v. Chile)*, Judgment of February 5, 2001. Series C No. 73, para. 36.

<sup>19</sup> I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985, para. 36.

<sup>20</sup> IACHR Arguments before the Inter-American Court of Human Rights in the *Case of "The Last Temptation of Christ" (Olmedo Bustos et al. v. Chile)*, in the Judgment of February 5, 2001. Series C No. 73, para. 61(b).

<sup>21</sup> IACHR, Report No. 3/98. Case No. 11.221. *Tarcisio Medina Charry. Colombia*. April 7, 1998, para. 77.

<sup>22</sup> I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*, Judgment of July 2, 2004, Series C No. 107, para. 113; I/A Court H.R., *Case of "The Last Temptation of Christ" (Olmedo Bustos et al. v. Chile)*, Judgment of February 5, 2001, Series C No. 73, para. 69; I/A Court H.R., *Case of Ríos et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 194, para. 105; I/A Court H.R., *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 195; para. 116; IACHR, 1994 Annual Report. Chapter V: *Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights*. Title III: The convention protects and promotes a broad concept of freedom of expression to preserve the existence of democratic societies in OAS member States. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995. 88th Session.

<sup>23</sup> IACHR, 1994 Annual Report. Chapter V: *Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights*. Title III: The convention protects and promotes a broad concept of freedom of expression to preserve the existence of democratic societies in OAS member States. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995. 88th Session.

<sup>24</sup> IACHR, 1994 Annual Report. Chapter V: *Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights*. Title III: The convention protects and promotes a broad concept of freedom of expression to preserve the existence of democratic societies in OAS member States. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995. 88th Session.



may or may not have the personal approval of those who represent State authority at a given time.<sup>25</sup>

While it is true that all forms of expression are protected in principle by the freedom enshrined in article 13 of the Convention, there are certain types of speech that receive special protection because of their importance to the exercise of other human rights, or to the consolidation, proper functioning and preservation of democracy. In the case law of the inter-American system, these types of specially protected speech are the following three: (a) political speech and speech involving matters of public interest; (b) speech regarding public officials in the exercise of their duties and candidates for public office; and (c) speech that is an element of the identity or personal dignity of the person expressing him or herself.

On the other hand, there are certain kinds of speech that, by virtue of express prohibitions set forth in international human rights law, are excluded from the scope of coverage of this freedom. There are essentially three types of speech that do not enjoy protection under Article 13 of the Convention, pursuant to the international treaties in force: (a) war propaganda and hate speech that amount to the incitement of violence; (b) the direct and public incitement of genocide; and (c) child pornography.

#### **2.4 Limits to freedom of expression**

Freedom of expression is not an absolute right.<sup>26</sup> Article 13 of the American Convention provides expressly—in paragraphs 2, 4 and 5—that it can be subject to certain limitations, and establishes the general framework of the conditions required for such limitations to be legitimate.<sup>27</sup> Standards for the admissibility of restrictions are applied to all of the constituent elements of freedom of expression in its diverse manifestations.<sup>28</sup>

As it has been interpreted in the case law of the inter-American system, Article 13(2) of the Convention requires that the following three conditions be met in order for a limitation to freedom of expression to be admissible: (1) the limitation must have been defined by law, substantively and procedurally, in a precise and clear manner; (2) the

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<sup>25</sup> IACHR Arguments before the Inter-American Court of Human Rights in the *Case of “The Last Temptation of Christ” (Olmedo Bustos et al. v. Chile)*, in the Judgment of February 5, 2001. Series C No. 73, para. 61(c).

<sup>26</sup> I/A Court H.R., *Case of Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 54; I/A Court H.R., *Case of Palamara-Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 79; I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*, Judgment of July 2, 2004, Series C No. 107, para. 120; I/A Court H.R., *Case of Tristán-Donoso v. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, para. 110; I/A Court H.R., *Case of Ríos et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 194, para.106; I/A Court H.R., *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 195, para. 117; IACHR, 1994 Annual Report. Chapter V: *Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights*. Title III: The convention protects and promotes a broad concept of freedom of expression to preserve the existence of democratic societies in OAS member States. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995. 88th Session.

<sup>27</sup> I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*, Judgment of July 2, 2004, Series C No. 107, para. 120; I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985, para. 35; IACHR Report No. 11/96, Case No. 11.230. *Francisco Martorell*. Chile. May 3, 1996, para. 55; IACHR Arguments before the Inter-American Court of Human Rights in the *Case of Ricardo Canese v. Paraguay*, in the Judgment of August 31, 2004, Series C No. 111, para. 72(a).

<sup>28</sup> I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985, para. 36.

limitation must serve compelling objectives authorized by the Convention; and (3) the limitation must be necessary in a democratic society to serve the compelling objectives pursued, strictly proportionate to the objective pursued, and appropriate to serve said compelling objective.

The conditions that must be met in order for restrictions to freedom of expression to be legitimate are applied to the laws that establish them as such, as well as to the administrative, judicial, police or other decisions that bring them into being—that is, to every manifestation of State authority that affects the full exercise of freedom of expression.<sup>29</sup> The types of State acts constituting limitations to freedom of expression addressed in the case law of the inter-American system include: the decisions of prosecutors and judges of the military criminal justice system in cases they are prosecuting,<sup>30</sup> orders given by members of the Armed Forces to their subordinates,<sup>31</sup> orders given by prison wardens regarding the conduct of inmates,<sup>32</sup> the decisions of criminal court judges,<sup>33</sup> administrative acts of the executive Branch,<sup>34</sup> and even legal and constitutional provisions,<sup>35</sup> among others.

In addition, certain types of limitations are contrary to the American Convention. Limitations imposed upon freedom of expression may not be tantamount to censorship, and therefore they must be established through the imposition of subsequent liability for the exercise of this right; they may not be discriminatory or produce discriminatory effects; they may not be imposed through indirect mechanisms such as those proscribed by Article 13(3) of the Convention, and they must be exceptional.

The case law of the inter-American system has also addressed indirect measures limiting freedom of expression. Thus, for example, it has condemned a legal requirement of compulsory membership in associations for the practice of journalism,<sup>36</sup> the arbitrary use of the State's regulatory powers when they have been used to initiate acts of intimidation against the directorship of a communications medium, or to revoke the nationality of the director of a medium as the result of the editorial line of the programs it broadcasts.<sup>37</sup> Another form of indirect restriction is that arising from the statements of public servants when, given the context, they may amount to “forms of direct or indirect interference or harmful pressure on the rights of those who seek to

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<sup>29</sup> I/A Court H.R., *Case of López-Álvarez v. Honduras*. Merits, Reparations and Costs. Judgment of February 01, 2006. Series C No. 141, para. 165.

<sup>30</sup> I/A Court H.R., *Case of Palamara-Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135.

<sup>31</sup> I/A Court H.R., *Case of Palamara-Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135.

<sup>32</sup> I/A Court H.R., *Case of López-Álvarez v. Honduras*. Merits, Reparations and Costs. Judgment of February 01, 2006. Series C No. 141.

<sup>33</sup> I/A Court H.R., *Case of Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177; I/A Court H.R., *Case of Tristán-Donoso v. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193.

<sup>34</sup> I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment February 6, 2001. Series C No. 74.

<sup>35</sup> and I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo Bustos et al. v. Chile)*, Judgment of February 5, 2001. Series C No. 73.

<sup>36</sup> I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985, para. 76.

<sup>37</sup> I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment February 6, 2001. Series C No. 74, paras. 158-163.

contribute [to] public deliberation through the expression and [dissemination] of their thoughts.”<sup>38</sup>

## 2.5 Journalists and the communications media

The Inter-American Court has stated that the media play an essential role as vehicles or instruments for the exercise of freedom of expression and information—in its individual and collective aspects—in a democratic society.<sup>39</sup> Indeed, it is the job of the media to transmit all kinds of information and ideas on matters of public interest that the public has the right to receive and evaluate independently.<sup>40</sup> In this respect, the regional case law and scholarly writings have reiterated that the existence of free, independent, robust, pluralistic and diverse media is essential for the proper functioning of a democratic society.<sup>41</sup>

Throughout their jurisprudence, the Inter-American Commission and the Court have recognized that freedom of expression grants directors of the media, as well as the journalists who work for those media, the right to investigate and disseminate events of public interest;<sup>42</sup> and that in a democratic society, the press has the right to report freely on the activities of the State and to criticize the government, since the public has a corresponding right to be informed of what goes on in the community.<sup>43</sup> It has also been recognized that journalists have the right to impart information on matters of legitimate public interest that are available in the foreign press.<sup>44</sup> It has likewise been established that the restriction of the right of journalists and the communications media to circulate news, ideas and opinions also affects the public’s right to receive information, limiting its freedom to exercise political options and to engage fully in a democratic society;<sup>45</sup> and that the punishment of a journalist for aiding in the dissemination of statements made by another or available in the foreign press is a serious threat to the contribution of the press to the discussion of matters of public interest.<sup>46</sup>

## 3. PRELIMINARY PROCEDURAL ISSUE: CONTROVERSY REGARDING THE RIGHT OF ACTION BEFORE THE INTER-AMERICAN SYSTEM

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<sup>38</sup> I/A Court H.R., *Case of Ríos et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 194, para. 139; I/A Court H.R., *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 195, para. 151.

<sup>39</sup> I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*, Judgment of July 2, 2004, Series C No. 107, para. 117; I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment February 6, 2001. Series C No. 74, para. 149.

<sup>40</sup> I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment February 6, 2001. Series C No. 74, para. 153.

<sup>41</sup> See: IACHR, *2008 Annual Report*, Volume III: “Annual Report of the Office of the Special Rapporteur for Freedom of Expression” (Chapter IV), paras. 216-230.

<sup>42</sup> I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment February 6, 2001. Series C No. 74, para. 157.

<sup>43</sup> IACHR. Arguments before the Inter-American Court of Human Rights in the *Case of Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment February 6, 2001. Series C No. 74, para. 143(g).

<sup>44</sup> IACHR. Arguments before the Inter-American Court of Human Rights, in I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*, Judgment of July 2, 2004, Series C No. 107, para. 101(5).

<sup>45</sup> I/A Court H.R., *Case of Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment February 6, 2001. Series C No. 74, para. 163.

<sup>46</sup> I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*, Judgment of July 2, 2004, Series C No. 107, para. 134, citing ECtHR, *Case of Thoma v. Luxemburg*, Judgment of March 29, 2001, para. 62.

The issue expected to be discussed on this point is the standing of the media to take part in the inter-American proceedings as victims. Thus, although the position of not admitting legal entities as alleged victims (except in very exceptional cases) has remained the majority position in the system, it is also true that it has become more flexible. This is based on the jurisprudence of the Commission and the Court in which the shareholders of legal entities have been considered victims, or collective victims (beyond the individual persons comprising them) have been admitted, as in the case of labor unions or indigenous peoples and other political groups representing ethnic minorities.

In addition, it is not unusual today in the national courts for constitutional appeals for the protection of fundamental rights to be admitted not on behalf of shareholders, but rather on behalf of the media themselves, and for them to be the ones called upon to bring actions in defense of their interests. In several States of the hemisphere, for example, a petition for a constitutional remedy for specific legal entities can and should be exercised in the case of violations of rights such as freedom of the press and expression. There are several reasons for the legitimacy of these petitions: the idea of protecting the medium and not the free enterprise of an individual, the idea of the two-way street of information and its public repercussions, and so on. These cases give rise to an important dilemma with regard to inter-American litigation: if the litigant at the national level was a communications medium, why must it be an individual person at the international level? Have remedies been exhausted when the case was conducted at the national level by a legal entity? If it is truly believed that the right to the free market of ideas and opinions protects more than just the person imparting the opinion, should that not have consequences on the standing of those who consider their rights to have been violated? Does the plaintiffs' standing in this case protect only the owners of the medium, or the entire "community" of journalists and media workers?

These are precisely the questions we expect the students to develop. As such, we have included three particular aspects in the case. First, we established that the constitutional case law of the country indicates that the petition for a constitutional remedy must be filed by the legal entity, that is, by the communications medium. Second, the original petition was submitted only by one of the shareholders in the commercial radio station and in its admissibility report the IACHR included the second shareholder. Third, it is not very clear who in the community radio station would exercise this right of action, as it also belongs to another legal entity, which is the Community Association. All of these elements could generate an interesting debate on the legal entitlement to fundamental rights and the possibility that legal entities can go before the system in exceptional cases.

We likewise believe that both parties have relevant arguments. Both must identify the three aforementioned issues in the case and address them. Whoever maintains the position consolidated herein (of including the shareholders as victims) will be questioned with regard to the exhaustion of remedies and the legal personality of the association. In addition, the State may object to jurisdiction, but there are also arguments to defend it, based on the currently prevailing position.

## 4. SPECIFIC ARGUMENTS REGARDING FREEDOM OF EXPRESSION

The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights has recently undertaken the compilation and systematization of the standards applicable to the right to freedom of expression and broadcasting. Based on this work, the Office of the Special Rapporteur finds that the main rules applicable to the case are the following:

### 4.1 Facts relative to the granting and revocation of broadcasting licenses

#### 4.1.1 Applicable standards<sup>47</sup>

**Broadcasting regulations must be established through a law that is drafted clearly and precisely.** The regulation of broadcasting can involve limits to the exercise of the right to freedom of expression. As such, it must be established by law, in advance, in an express, limited, precise and clear manner, in both substantive and procedural respects.<sup>48</sup> It is essential that the regulatory framework provide legal certainty to the public and that it define, in the clearest and most precise terms possible, the conditions for the exercise of the right and the limits to which broadcasting activity is subject. Thus, for example, by regulating the composition of the regulatory enforcement authorities, or the procedures for accessing or revoking licenses, or the powers of the government authorities, the regulations must be drafted so as to prevent vagueness or ambiguity conducive to potential arbitrary acts or discrimination against a person, group or sector in broadcasting. It is therefore necessary that the law itself establish the substantive aspects of the regulation; that is, it must not delegate the determination of policies central to broadcasting activities to the regulatory agency. In any case, such agency will only be able to fill in gaps or specify the substantive aspects defined previously and clearly in the law.<sup>49</sup>

**The regulation of broadcasting, when it may affect the right to freedom of expression, is legitimate only if it pursues an aim consistent with the American Convention.** The defense of public order is a legitimate aim, but the States must demonstrate that it in fact is meant to protect a democratic idea of “public order.” In other words, broadcasting regulations cannot establish limits to the circulation of news, ideas or opinions that are merely critical, unpleasant or shocking in the name of defending “public order,” because the very “concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to

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<sup>47</sup> This section is intrinsically related to section 4.1 *Right to a fair trial and effective recourse (Articles 8 and 25 of the ACHR)*, and therefore must be read parallel to it.

<sup>48</sup> I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985, para. 39.

<sup>49</sup> In this respect, the European Court of Human Rights has recognized that laws assigning absolutely discretionary powers in the regulation of broadcasting are incompatible with the European Convention. It thus held that: “Domestic law must also afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise [...]. It must furthermore provide adequate and effective safeguards against abuse, which may in certain cases include procedures for effective scrutiny by the courts *Case of Glas Nadezhda Eood and Elenkov v. Bulgaria*, No. 14134/02, § 46, ECtHR (11/10/2007).”

information by society as a whole. Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard. (...) It is also in the interest of the democratic public order inherent in the American Convention that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected.”<sup>50</sup>

***The regulatory authority must be an autonomous body independent of political and economic powers.*** The broadcasting regulatory authority must be independent of the influence of government as well as private groups connected to public, private/commercial or community broadcasting.<sup>51</sup> It must be a collective body that ensures plurality in its composition, subject to clear procedures that are entirely public, transparent and subject strictly to the imperatives of due process and strict judicial oversight.<sup>52</sup> Its decisions must be public, consistent with existing legal standards and must state the reasons on which they are based.<sup>53</sup> Finally, it must be a responsible body that is publicly accountable for its administration. With regard to enforcement authority, the Inter-American Commission has held that “it is fundamental that the bodies with oversight or regulatory authority over the communications media be independent of the executive branch, be fully subject to due process and have strict judicial oversight.”<sup>54</sup>

***Allocation and renewal of frequencies.*** This process must be regulated strictly by law, be characterized by transparency<sup>55</sup> and be guided by objective, clear, public and

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<sup>50</sup> I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of November 13, 1985, para. 68. In this same respect the Inter-American Commission has explained that a properly functioning democracy is the greatest guarantee of public order, and that the existence of a democratic society rests on the cornerstone of the right to freedom of expression. IACHR, 1994 Annual Report. Chapter V: *Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights*. Title IV: “Desacato laws are incompatible with Article 13 of the American Convention on Human Rights because they suppress the freedom of expression necessary for the proper functioning of a democratic society.” Section A. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995. 88th Session.

<sup>51</sup> In this respect, Recommendation Rec(2000)23, of the Committee of Ministers of the Council of Europe, cited by the European Court of Human Rights, stated that “The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.” Council of Europe. Committee of Ministers. *Appendix to Recommendation Rec(2000)23 of the Committee of Ministers to member states*. Guideline 3. December 20, 2000.

<sup>52</sup> The European Court of Human Rights has ruled on the characteristics that the communications regulatory authority should have, in the same terms indicated herein. Thus, for example, in the *Case of Glas Nadezhda Eood and Elenkov v. Bulgaria*, the Court noted that Recommendation Rec(2000)23, of the Committee of Ministers of the Council of Europe established the regulatory duties and independence of broadcasting authorities, recommending that the Member States, *inter alia*, “include provisions in their legislation and measures in their policies entrusting the regulatory authorities for the broadcasting sector with powers which enable them to fulfill their missions, as prescribed by national law, in an effective, independent and transparent manner, in accordance with the guidelines set out in the appendix to this recommendation.” (*Glas Nadezhda Eood and Elenkov v. Bulgaria*, No. 14134/02, § 33, ECtHR (11/10/2007).

<sup>53</sup> In this respect, Recommendation Rec(2000)23, of the Committee of Ministers of the Council of Europe stated that: “27. All decisions taken and regulations adopted by the regulatory authorities should be: duly reasoned, in accordance with national law; open to review by the competent jurisdictions according to national law; made available to the public.” Council of Europe. Committee of Ministers. *Appendix to Recommendation Rec(2000)23 of the Committee of Ministers to member states*. Guideline 27. December 20, 2000.

<sup>54</sup> IACHR, 2008 Annual Report, Volume III: “Annual Report of the Office of the Special Rapporteur for Freedom of Expression” (Chapter IV), para. 82.

<sup>55</sup> UN, OAS, OSCE and ACHPR Rapporteurs on Freedom of Expression, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007. In this same respect, the Committee of Ministers of the Council of Europe has stated: “13. One of the essential tasks of regulatory authorities in the broadcasting sector is normally the granting of broadcasting licenses. The basic conditions and criteria governing the granting and renewal of broadcasting licenses should be clearly defined in the law.” It went on to state: “14. The regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner. The

democratic criteria.<sup>56</sup> In this same respect, the licensing procedures must be accompanied by sufficient guarantees against arbitrariness, including the obligation to state the reasons for decisions to grant or deny licensing applications and proper judicial oversight of such decisions.<sup>57</sup>

The Inter-American Commission has also already recognized that States have the authority to administer the spectrum and, specifically, to set pre-established terms for the duration of concessions and to decide on their renewal at the end of the respective time periods.<sup>58</sup> In the case that regulations provide the opportunity to renew or extend licenses, as with allocation procedures, the renewal or extension procedures must be regulated by law; they must be transparent, guided by objective, clear and democratic criteria, and they must ensure due process.<sup>59</sup>

#### 4.1.2 Arguments of the petitioners

The petitioners will argue, principally, that the law is vague and imprecise, which raises the possibility that the regulatory body may abuse its authority and impose sanctions against the editorial line of a medium, as occurred in this specific case to Radical Radio. This situation is aggravated by the fact that the regulatory agency—the COFERETEL—is not an independent body, as it reports directly to the Ministry of the Interior of the State, that is, to the Executive Branch.

Thus, there is no clarity in the requirements regarding ownership and the legal representation of parties that have been granted concessions. The Telecommunications Act establishes that a legal entity may be granted access to the spectrum, and once it does so, it is considered to be the owner of that concession. Nevertheless, the rules are unclear with respect to the relationship between legal representation and ownership. In the specific case of Radical Radio, although initial ownership of the concession was granted to the legal entity Radio Cadena Básica, it is possible to argue that the State granted its approval for the assignment of this concession to the new legal entity called Radical Radio, pursuant to Article 92 of the Telecommunications Act. Another related argument is that there was in fact no assignment of the ownership of the concession, but rather a change in the legal representation of the legal entity that was the beneficiary of that concession. That is, Ms. Pereira Peroni as the new director and shareholder assumed the legal representation of the radio station, but there was no change in the legal entity that gained access to the concession, even though in practice there was a change in shareholders as a result of succession due to death.

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decisions made by the regulatory authorities in this context should be subject to adequate publicity.” Council of Europe. Committee of Ministers. *Appendix to Recommendation Rec(2000)23 of the Committee of Ministers to member states*. Guidelines 13 & 14. December 20, 2000.

<sup>56</sup> In this respect, the Committee of Ministers of the Council of Europe has recommended that “The regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner. The decisions made by the regulatory authorities in this context should be subject to adequate publicity.” *Recommendation Rec(2000)23, Committee of Ministers of the Council of Europe*, December 20, 2000, para. 14.

<sup>57</sup> Along these lines, the European Court of Human Rights has understood that: “As regards licensing procedures in particular, the Court reiterates that the manner in which the licensing criteria are applied in the licensing process must provide sufficient guarantees against arbitrariness, including the proper reasoning by the licensing authority of its decisions denying a broadcasting license.” ECtHR, *Meltex Ltd. & Mesrop Movsesyan v. Armenia* (Judgment of June 17, 2008), para. 81 *in fine*.

<sup>58</sup> IACHR, Press Release No. 29/07, “Inter-American Commission on Human Rights expresses its concern for the situation of freedom of expression in Venezuela,” May 25, 2007.

<sup>59</sup> UN, OAS, OSCE and ACHPR Rapporteurs on Freedom of Expression, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

This vagueness in the law, added to the lack of independence on the part of the regulatory body, allowed a procedural mechanism for the control of concessions to be used arbitrarily to limit the expression of the media critical of the government, such as Radical Radio and radio Su-Versión. The facts of the case demonstrate that this administrative review of the concessions was politically motivated, given that: (a) it was ordered directly by the President of the Republic; and (b) it resulted in the revocation of 40 radio stations' licenses, none of which belonged to stations that formed part of the pro-government media conglomerate (the Fresa Alliance).

Third, the administrative proceedings failed to respect due process. The defects in this proceedings began with the absence of a response to the requests of the new legal representative who, given the vagueness of the law, formally requested that the government clarify the legal status of the radio station's representation and ownership. The regulatory agency (COFERETEL) did not respond to its request. Nevertheless, the government's receipt of tax payments and sending of official correspondence in Ms. Pereira Peroni's name, among other things, were acts indicative of its acceptance of her as the legal representative. All of this demonstrates an administrative practice that must be recognized in good faith by the State, and gives rise to legitimate expectations that cannot be simply betrayed by the government.

Administrative due process was also violated during the untimely review of the requirements for the concessions. As such, the shareholders or representatives of Radical Radio were never called to present evidence in their defense or even informed of the proceedings against them. Although the Executive issued a public statement asserting that it was going to begin a review of the concessions, there was no personal communication to give notice to the petitioners that such review would be done with respect to the concession it had held for over 40 years. In addition, those shareholders never had the opportunity to present evidence in their defense or to contest the evidentiary or legal assessments that gave rise to the proceedings and resulted in the decision to revoke the license. And as if that were not enough, the decision revoking that license failed to state the reasons on which it was based, as required.

#### *4.1.3 Arguments of the State*

The State's defense will be based principally on the authority of States to regulate broadcasting, on the fact that Chirilagua has laws establishing a regulatory framework that is respectful of the inter-American standards, and on the argument that the law was not used arbitrarily in this specific case.

The Inter-American Commission on Human Rights has acknowledged the authority of States to regulate broadcasting activity. This authority encompasses not only the power to define the manner in which licenses shall be granted, renewed or revoked but also the power to devise and implement public policies on such activity, provided that the standards imposed by the right to freedom of expression are respected.<sup>60</sup>

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<sup>60</sup> "The Commission recognizes the State's prerogative to administer the wave bands, to previously establish the duration of concessions and to decide on their renewal at the end of those periods." (IACHR, Press Release No. 29/07, "Inter-American Commission on Human Rights expresses its concern for the situation of freedom of expression in Venezuela," May 25, 2007).



In Chirilagua, as in most countries in the region, the broadcasting regulations give the government authority the power to enforce the respective provisions in its performance of two essential functions: the development and implementation of communications policies (enforcement) and control of the previously issued regulations (oversight). The bodies of the inter-American system have recognized that the regulatory agency can be authorized to specify the circumstances in which the substantive aspects of the broadcasting policies—defined clearly in a pre-established law—shall be enforced.<sup>61</sup>

In observance of this inter-American standard, the broadcasting provisions are based on the Constitution itself, which guarantees the right to freedom of expression “under the terms of Article 13 of the American Convention.” Likewise, the Constitution establishes that “all persons are free to establish mass communications media,” and it grants the State the responsibility to “administer the radio spectrum taking into account criteria of equity and bearing in mind the principle of equal opportunity and media pluralism.” In the development of this provision, the Telecommunications Act regulates commercial, government and community broadcasting, respecting the inter-American standards set forth in Article 13 of the Convention. Thus, under the freedom of state regulation, the Act establishes the conditions for gaining access to a concession of the public good of the electromagnetic spectrum as well as the conditions for renewing such concessions.

These requirements are not based on discriminatory or disproportionate criteria. For example, in compliance with the standards, the concessions are granted for a long period of time (30 years), and in the case of commercial media they are based on objective technical and financial requirements. All of these requirements are well-known, and have been since 1976, when the corresponding regulations were established. On this point, it should be noted that this regulation was established through the legislative body of the federation, in compliance with the inter-American case law.

In Chirilagua, as in the other American States, the electromagnetic spectrum is an inalienable public good not subject to prescription, subject to the management and control of the State. Furthermore, it is a valuable public good that must be regulated in order to guarantee fundamental objectives for society as a whole. Therefore, it is not only reasonable but it is also a priority for the State to perform regulatory functions with respect to it. An essential guarantee for maintaining control over the regulation of this public good is for licenses to be granted solely by the State to legal entities that it can oversee on relevant issues such as the origin of their funding, among other things. It is for this reason that in Chirilagua the rights to the use and exploitation of the electromagnetic spectrum derived from a concession cannot be transferred or assigned. The irresponsible or unsupervised transfer of such rights could result, for example, in radio frequencies being captured by media operating with illegal assets, or in monopolies or oligopolies not subject to the control of the State.

In any case, the laws of Chirilagua recognize that ownership of a concession can be substituted, but only through the submission of a prior application to the Federal Telecommunications Regulatory Commission (COFERETEL), and only if that agency finds that the new licensee meets the legally established conditions and principles. As it

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<sup>61</sup> See: I/A Court H.R., *The Word “Laws” in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 36. See also: European Court of Human Rights, *Case of Glas Nadezhda Eood and Elenkov v. Bulgaria*, No. 14134/02, § 45, ECTHR (11/10/2007).

can be seen, these requirements are proportionate and appropriate for the fair management of a public good with the characteristics of the radio spectrum.

In the instant case, the licensee whose license was revoked failed to comply with these rules, which resulted in the adoption of corrective measures by the competent authority. The verification of those irregularities followed a comprehensive, preventive control or review proceeding conducted by the agency, which disproves any allegation of political or ideological persecution. Furthermore, the COFERETEL gave public notice of the proceeding to Chirilaguan society, which included the hundreds of recognized radio licensees.

Thus, in the enforcement of the regulations in force, the competent agency conducted a verification (the failure to meet the legal requirements) and consequently issued an appropriate corrective decision (the revocation of the license). Chirilagua recognizes the right to due process and, therefore, in compliance with the inter-American standards, administrative acts are subject to judicial review. The petitioners in this case were able to avail themselves of that judicial review before the constitutional court (which found their claim to be unfounded) and before the court with jurisdiction to review administrative acts (a decision in that case is currently pending).

## **4.2 Facts relative to the allocation of frequencies to community broadcasters**

### *4.2.1 Applicable standards*

The inter-American case law has emphasized that in relation to the protection, guarantee and promotion of human rights, the States must refrain from “engaging in actions or favoring practices that may in any way be aimed, directly or indirectly, at creating situations in which certain groups or persons are discriminated against or arbitrarily excluded, *de jure* or *de facto*, from enjoying or exercising the right to freedom of expression.” Furthermore, the States are required to take “affirmative measures (legislative, administrative, or any other kind) to reverse or change existing discriminatory situations that may jeopardize certain groups’ effective enjoyment and exercise of the right to freedom of expression under conditions of equality and non-discrimination.”<sup>62</sup> Thus, for example, they must remove the obstacles that prevent certain sectors of society from accessing the media; at the same time, they actively must promote the inclusion of disadvantaged or currently marginalized groups in the media.

In this respect, the Inter-American Commission and the Office of the Special Rapporteur for Freedom of Expression have recognized that community media perform a basic function in our region for different sectors of society to exercise their freedom of expression and gain access to information.<sup>63</sup> Those decisions have held that it is necessary for the States to recognize them legally and consider the reservation of

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<sup>62</sup> IACHR, *2008 Annual Report*, Volume III: “Annual Report of the Office of the Special Rapporteur for Freedom of Expression” (Chapter V), para. 230.

<sup>63</sup> See, e.g.: IACHR, *Justice and Social Inclusion: The Challenges Facing Democracy in Guatemala* (Chapter VII: “The status of freedom of expression in Guatemala,” December 29, 2003, para. 414; IACHR, *2002 Annual Report*, Volume III: “Report of the Office of the Special Rapporteur for Freedom of Expression” (Chapter IV: Freedom of Expression and Poverty), para. 41.

spectrum for this type of media, as well as to foster conditions of equal access to licenses that distinguish the status of the various media.<sup>64</sup>

It is equally important that the regulations on broadcasting recognize expressly the right of non-profit organizations to own media. As the OAS Office of the Special Rapporteur for Freedom of Expression has stated, “these cases deal with a regulatory framework to promote the vitality of democracy if we bear in mind that the communicative process must satisfy not only the consumer needs of society’s inhabitants (legitimate entertainment needs, for example) but also their information needs.”<sup>65</sup>

Along the same lines, in their Joint Declaration on Diversity in Broadcasting, the UN, OAS, European and African Rapporteurs on Freedom of Expression underscored that “Community broadcasting should be explicitly recognized in law as a distinct form of broadcasting.” They likewise indicated that “different types of broadcasters—commercial, public service and community—should be able to operate on, and have equitable access to, all available distribution platforms,” including the new “digital dividend.”<sup>66</sup>

#### 4.2.2 *Arguments of the petitioners*

The petitioners will argue that it is practically impossible in Chirilagua to establish and operate community media due to the COFERETEL’s refusal to grant operating licenses to such media. This situation is evident based on the experience of Radio Su-Versión, which has attempted to gain access to a license for more than 30 years.

In over 30 years, there have been only three calls for bids for community broadcast licenses in Chirilagua: two between 1976 and the date of the facts of the case, and one subsequent to the submission of the case to the inter-American system that was issued under the new broadcasting law. In the first two calls for bids only 11 licenses for community broadcasters were granted in the entire country, while 450 commercial broadcasting licenses were either awarded or renewed. This striking imbalance not only violates international standards but also contravenes the national law itself (Article 70 of the Telecommunications Act), which establishes that community broadcasting shall have the right to a proportionate percentage of the radio frequencies.

Specifically, in the case of Radio Su-Versión, in addition to participating in the only two calls for bids issued, it formally requested on 14 occasions over the years that the COFERETEL issue new calls for bids. In more than 30 years of seeking recognition, Radio Su-Versión was unable to get a call for bids issued and to have a license granted to it. This was in spite of the fact that, according to the facts of the case, neither of the two invitations to bid resulted in the awarding of a license to operate in the city of San Pedro de los Aguados, and in the year 2000 it was the only radio station that operated locally in San Pedro. These facts demonstrate an effective limit to the right to freedom of expression on the part of the State.

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<sup>64</sup> IACHR, *2007 Annual Report*, Volume III: “Report of the Office of the Special Rapporteur for Freedom of Expression” (Chapter III: Conclusions and Recommendations), para. 5.

<sup>65</sup> IACHR, *2008 Annual Report*, Volume III: “Annual Report of the Office of the Special Rapporteur for Freedom of Expression” (Chapter IV), para. 107.

<sup>66</sup> UN, OAS, OSCE and ACHPR Rapporteurs on Freedom of Expression, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

In addition, there is sufficient evidence to think that the failure to recognize Radio Su-Versión is due to the nature of the association that promotes the community service. It is, precisely, an organization that brings together members of a community historically discriminated against in the country—the Landless—and who, furthermore, challenge not only the dominant economic power of the landholders but also their political power. The fact that the Landless community is silenced through limits to the radio spectrum directly favors the economic interests of the largest landowner of the State of Gorgia: the President of the Republic.

Furthermore, the measures that involved the suspension of Radio Su-Versión's broadcasts and the seizure of its equipment are an additional limit to the exercise of freedom of expression through the media. With these acts, the Federal State abruptly ignored a situation of *de facto* recognition that had been developed over the years by the local government of San Pedro. Accordingly, the radio station had not only formed alliances with the local government but also was broadcasting from public facilities and with public equipment.

The facts thus constitute a violation of the principle of legitimate expectations that the community associated through Radio Su-Versión had placed in the State. This principle of the protection of legitimate expectations was developed in German case law, and has been recognized by the European Court of Justice (Judgment of July 13, 1965) and in the legal systems of several countries in the hemisphere. The principle of legitimate expectations is a representation of the good faith that should govern the relationship between the authorities and private citizens, based on the people's need to be protected from arbitrary, sudden, impromptu or similar acts of the State. Likewise, this principle tends to protect private citizens from the violation of the legitimate expectations formed on the basis of the acts or omissions of the State over time, and which the government has consented to expressly or tacitly, whether dealing with active or passive conduct, legal regulation or regulatory interpretation.

#### 4.2.3 *Arguments of the State*

In its defense, the State will try to demonstrate that the granting of licenses and the issuance of invitations to bid are complex administrative acts that respond not only to the applications submitted but also to political allocation criteria and technical requirements. In addition, the State will seek to disprove the existence and admissibility of the principle of legitimate expectations. Another strategy that the State might use is to debate the community nature of Radio Su-Versión.

Although Chirilagua recognizes the right to freedom of expression through the media, this recognition is regulated and democratic criteria of access have been established for its exercise. Given the State's obligations of pluralism and fairness, it is not possible for it to grant broadcasting licenses—whether commercial or community—to everyone who claims to want one or meets the requirements for one.

Like most fundamental rights, the right to establish mass media is not absolute; rather, it can be limited by the rights of others, by the guarantee of health, morals and public order, national security, and in certain cases, by the particular characteristics of the technical support and materials used for its exercise. This occurs especially with media that require the use of the electromagnetic spectrum for their operation.

The technical specificities involved in the use of the electromagnetic spectrum make State regulation appropriate, but regulation is also essential, above all, because the frequencies and space on that public good are limited and therefore cannot be used by all citizens. As such, equal opportunity of access to the spectrum and the pluralism of the content issued by those who do gain access become the basic principles to be safeguarded by the State whenever it intervenes in the matter.

Consequently, and bearing in mind the needs of public activity, the broadcasting authorities of Chirilagua enjoy discretion in determining when, where and under what conditions a public invitation to bid should be issued for the concession of the public service of community sound broadcasting. This legal authority is completely legitimate, appropriate and reasonable, as it arises from the particular characteristics of the electromagnetic spectrum and the technical requirements of the allocation of its frequencies, as well as from the principle of opportunity that must govern administrative activities.

Second, there is nothing in the standards or even in the case law of the inter-American system that refers to the claimed principle of legitimate expectations. However, even if it were to be recognized as such, its application to the specific case is dubious as a mechanism to justify the unlawful use of the public good of the radio spectrum.

The prevailing jurisprudence and scholarly writings on the subject establish that the interpretation of the precept of legitimate expectations must be done with the understanding that it does not apply to vested rights, but rather to legal situations that are subject to modification. Furthermore, it has been recognized that this principle is not absolute, and must be weighed against the safeguarding of the general interest, the principles of good faith, proportionality, the democratic principle, the principles of legal certainty and estoppel, among others.

In other words, the principle of legitimate expectations does not function as a silver bullet that enables administrators to allege an error of the state in order to justify noncompliance with provisions of public order. On this matter, several constitutional courts of countries in the Americas have defined this principle and established precise rules of application. One well-known constitutional court among them has established the following sub-rules: the principle of legitimate expectations *(i) does not release the government from the duty to correct its irregular acts or omissions, but rather imposes upon it the obligation to do so in such a manner that the fundamental rights of the people are not violated, for which it shall be necessary to examine carefully the impact of its course of action and to design solution strategies; (ii) it is not an absolute right and therefore must be weighed pursuant to the criterion of proportionality; (iii) it cannot be focused on obtaining the payment of compensation, recovery of damages, reparations, donations or other similar payments, and (iv) it does not apply to vested rights, but rather to anomalous legal situations subject to modification.*

In the case at hand, the State finds that even if it were to admit the existence of the principle of legitimate expectations created by the acts of the local authority, this principle in and of itself does not lead to the granting of an unlimited right to Radio Su- Versión. Without the proper balancing, this type of recognition would end up fostering a culture of illegality in which *de facto* acts and acts of bad faith (like the so-called

“political actions” taken by ACOSINTI) would end up being compensated for by the State to the detriment of society in general.

This bad faith is also evident in the fact that the petitioners argue that the State must, based on the principle of legitimate expectations, respect their right to operate a community radio station when, in practice, they carry out commercial radio activities. In this respect, it follows from the facts of the case that the Radio Su-Versión radio station has formed an alliance with a commercial radio station whereby it aims to benefit from both modes of broadcasting.

Finally, the State can attack this specific charge by arguing that the legal entitlement to this right is vague in the claim before the Inter-American Court. In the case that the Court were to find fault with the public policy of Chirilagua on the issue, who would be the victim of the violation of this right? Would it be Francis Hoffman, the legal entity Radio Su-Versión, the legal entity ACOSINTI, or Chirilaguan society as a whole? The State can argue that this vagueness of the claim arises precisely because the petitioners failed to exhaust any domestic remedy of a judicial nature in order to litigate their claim; they limited themselves to submitting requests for information and filing the constitutional claim (mentioned in the facts) seeking a response to their requests, but no legal action was initiated to address the issue on its merits.

### **4.3 Facts relative to the information broadcast by the media and the acts of violence<sup>67</sup>**

#### *4.3.1 Applicable standards*

The inter-American case law has established, without prejudice to the presumption of coverage *ab initio* of all forms of human expression by freedom of expression, that there are certain types of speech that are excluded from the scope of coverage of this freedom by virtue of express prohibitions set forth in international human rights law. Precisely one such type of speech that does not enjoy protection under Article 13 of the Convention is war propaganda and hate speech that is an incitement to violence.

Article 13(5) of the Convention provides expressly that “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.”

The IACHR, following the consistent international jurisprudence and scholarly opinions on the subject, has held that the imposition of sanctions for the abuse of freedom of expression under the charge of incitement to violence (understood as the incitement to commit crimes, disturb the public order or threaten national security) must be based on current, certain, objective and compelling evidence that the person was not simply expressing an opinion (no matter how harsh, unfair or disturbing it may be), but rather

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<sup>67</sup>Additional arguments can be found in section 4.2, *Right to a fair trial, Personal liberty and Freedom from ex post facto laws* (ACHR Articles 7, 8 and 9).

that he had the clear intention to commit a crime and the current, real and effective possibility to achieve his objectives.<sup>68</sup>

Otherwise, it would be possible penalize opinions, and all of the States would be authorized to suppress any critical thought or expression that questions even the very existence of the institutions in power, such as anarchism or opinions that are radically contrary to the established order. In a democracy, the legitimacy and strength of institutions is rooted in and strengthened by the vitality of public debate on their performance—not its suppression. Likewise, the inter-American case law has indicated clearly that, in order for any sanction to be imposed in the name of public order (understood as public morals, safety or health), it is necessary to demonstrate that the concept of “order” that is being defended is not an authoritarian or autarchic but rather a democratic order understood as the existence of the structural conditions for all people, without discrimination, to be able to exercise their rights freely, robustly and without fear of being penalized for it.

Indeed, in the opinion of the Inter-American Court, in general terms, “public order” cannot be invoked to suppress a right guaranteed by the American Convention, distort it or deprive it of real content. If this concept is invoked as grounds for limits to human rights, it must be interpreted in a manner strictly tailored to the just requirements of a democratic society, which takes into account the balance between the different interests at stake, and the need to preserve the object and purpose of the American Convention.<sup>69</sup>

The conditions required by the Court in order for a limit to free expression to be legitimate must also be taken into account (see *supra*).

#### 4.3.2 Arguments of the petitioners

The argument of the petitioners will try to demonstrate that (i) the criminal sanctions are a violation of freedom of expression, as they penalize speech protected by the American Convention; (ii) that neither the acts nor the opinions of others can be imputed to those who provide information through the media; and (iii) the very wording of the legal definitions of the crimes is a violation of freedom of expression to the extent that it amounts to an unlawful restriction of the right to express oneself.

According to the facts of the case, the State brought criminal actions against three individuals (two media directors and a journalist) alleging the commission of three criminal offenses: instigation to commit a crime, defamation and murder. However, all of the facts that could constitute elements of the offense involve situations in which freedom of expression was exercised legitimately.

The charge of defamation was brought as a result of the broadcasting of the radio program hosted by the journalist William Garra, in which the President of the Republic

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<sup>68</sup> See the following cases of the European Court of Human Rights: *Karatas v. Turkey* [GC], No. 23168/94, ECtHR 1999-IV; *Gerger v. Turkey* [GC], No. 24919/94, July 8, 1999; *Okçuoglu v. Turkey* [GC], no. 24246/94, July 8, 1999; *Arslan v. Turkey* [GC], No. 23462/94, July 8, 1999, *Erdogdu v. Turkey*, No. 25723/94, § 69, ECtHR 2000 – VI. See also: I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985, para. 77.

<sup>69</sup> I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985 para. 67.

was parodied. In this respect, the State of Chirilagua is penalizing the exercise of a type of speech “specially protected” by Article 13 of the American Convention. In this case, the petitioners will argue that the application of the inter-American rules on the resolution of conflicts between the honor of public servants and the right to freedom of expression demonstrates that the State of Chirilagua violated the consistent case law of the Inter-American Court with regard to the priority of freedom of expression and the exceptional nature of criminal action as a mechanism for the subsequent imposition of liability against the person expressing him or herself.

Second, as far as the offenses of murder and instigation to commit a crime, the State is imposing sanctions against the members of the media for their opinion and not because of their involvement in criminal acts. At no time did the opinion or information broadcast by the media use language that encouraged anyone to commit crimes. On the contrary, Garra’s statements were calling for the protection of rights and of the democratic system. It follows that responsibility cannot be extended to the acts of violence, as there is no element of certainty. In addition, the chain of attribution of responsibility for the events that took place in the streets of San Pedro even extends to the directors of the media, but there is no current and compelling evidence that they would have even agreed with such acts of violence.

Third, the manner in which the criminal offenses of instigation to commit a crime and defamation are defined under the law violates the inter-American standards. The Inter-American Court has held that the subsequent imposition of liability must be provided for clearly and precisely. It must be established in laws drafted in unequivocal terms, which define the unlawful acts clearly, establish their elements precisely and allow for their distinction from conduct that is not unlawful. In the opinion of the Court, provisions that limit freedom of expression must be drafted with such clarity that any effort at interpretation is unnecessary. That is not the case here.

#### *4.3.3 Arguments of the State*

The strategy of the State on this point will be to focus on the acts of violence that did in fact occur—especially the deaths—and their relationship to the broadcasts on the day of the march and on election day, as well as to the prior broadcasts related to the social networking groups that promoted violence against the president. The State will seek to link the different events to demonstrate that the role of the members of the media was decisive in triggering the acts of violence, the disturbance of public order and the violations to the rights to life and safety of the protesters and police officers.

The unfortunate outcome of the events of the 3<sup>rd</sup> and the 20<sup>th</sup> of March, 2008, was a direct result of the incitement to violence coming from the radio stations with which the convicted individuals were affiliated. These facts cannot be considered in isolation, as they were the culmination of a hate-producing, violence-inciting campaign devised by these media. As such, the variety program on the radio initiated a campaign to stir up class hatred that ended up being crucial to the outbreak of violence. Furthermore, Radical Radio’s invitation to participate in the march (which aired during commercial breaks and opinion programs) also promoted a public perception of hatred and violence—in the context of what claimed to be a peaceful demonstration—through the exaltation of groups created on the social networking sites with violent, offensive and



defamatory content. These groups were exalted with the aim of increasing social polarization and rivalry, as well as to promote the messages of hatred and violence.

Finally, on the day of the demonstration, journalist Garra carried the execution of the crime to its culmination, taking advantage of his platform to distort the facts and create confusion that would end in acts of violence. This is evidenced by several facts. It is clear from the facts that there was no basis to think that the two marches would come together, let alone that the law enforcement officers in the area were intervening in them to favor a particular group over another. William Garra, who was not at the scene of the crime—not even in the city in which the crimes occurred—distorted the information so that the opposition protesters would confront the pro-government marchers. In fact, it was solely through Garra’s instructions that the two marches ran into each other. And, the violence was caused precisely by Garra’s incendiary language, which also distorted the information on the political processes underway, creating a false sense of democratic instability and the violation of citizen rights; in the end, this is what led to the inflamed mood and the acts of violence.

#### **4.4 Facts relative to the use of the radio spectrum and the imposition of criminal sanctions<sup>70</sup>**

##### *4.4.1 Applicable standards*

The Inter-American Commission on Human Rights has acknowledged the authority of the States to regulate broadcasting activity. This authority encompasses not only the power to define the manner in which licenses<sup>71</sup> shall be granted, renewed or revoked but also the power to devise and implement public policies on such activity, provided that the standards imposed by the right to freedom of expression are respected.<sup>72</sup>

One of these standards imposed by the right to freedom of expression is that the limitations must be established through laws that are drafted clearly and precisely. Vague, ambiguous, overly-broad or open-ended laws, by their very existence, deter people from imparting information and opinions out of fear of sanctions, and can lead to overly-broad judicial interpretations that unduly restrict freedom of expression. Accordingly, the State must specify the conduct that can give rise to subsequent liability, thus preventing infringement of the free expression of discontent and protest against the conduct of the authorities.

For its part, in addressing limits to freedom of expression imposed by criminal provisions, the Inter-American Court has stated that the requirements of the principle of strict legality must additionally be met: “If such restriction or limitations are under criminal law, it is important to observe the strict requirements characteristic of the

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<sup>70</sup> Complementary arguments are provided in section 4.2, *Right to a fair trial, Personal liberty, Freedom from ex post facto laws (ACHR Articles 7, 8 and 9)*.

<sup>71</sup> The terms “concessions,” “licenses,” “authorizations” or “permits” are used interchangeably in this report, although it is acknowledged that each one may have different scopes of meaning in the different countries of the region.

<sup>72</sup> “The Commission recognizes the State’s prerogative to administer the wave bands, to previously establish the duration of concessions and to decide on their renewal at the end of those periods” (IACHR, Press Release No. 29/07, “Inter-American Commission on Human Rights expresses its concern for the situation of freedom of expression in Venezuela,” May 25, 2007).

criminal codification to satisfy the principle of legality.”<sup>73</sup> It is thus necessary to “use strict and unequivocal terms, clearly restricting any punishable behaviors,”<sup>74</sup> which involves “a clear definition of the incriminatory behavior, setting its elements, and defining the behaviors that are not punishable or the illicit behaviors that can be punishable with non-criminal measures.”<sup>75</sup>

In addition, the inter-American case law has established that in order not to inhibit expression, the absolute necessity of the imposition of liabilities must be proven; and, in any case, the State must choose the means least onerous to freedom of expression in order to redress the harm. Only in the case that such means are insufficient to redress the harm caused can the State turn to the imposition of legal liabilities more onerous to the person who abused his or her right to freedom of expression and thereby caused certain and serious harm to the rights of other persons or legal interests specially protected by the Convention.

On this point, the Inter-American Commission has stated that “Considering the consequences of criminal sanctions and the inevitable chilling effect they have on freedom of expression, criminalization of speech can only apply in those exceptional circumstances when there is an obvious and direct threat of lawless violence. (...) The State's use of its coercive powers to restrict speech lends itself to abuse as a means to silence unpopular ideas and opinions, thereby repressing the debate that is critical to the effective functioning of democratic institutions. Laws that criminalize speech which does not incite lawless violence are incompatible with freedom of expression and thought guaranteed in Article 13, and with the fundamental purpose of the American Convention of allowing and protecting the pluralistic, democratic way of life.”<sup>76</sup>

#### 4.4.2 *Arguments of the petitioners*

The petitioners will argue, mainly, in two respects. First, the petitioners will allege that the use of criminal sanctions is an excessive restriction that violates the right to freedom of expression, as the State can use sanctions that are less restrictive of this right, such as administrative sanctions. Furthermore, the petitioners will criticize the application of the definition of the offense, on the basis that the facts in question do not contain the objective elements required for the offense of theft.

In the instant case there is no social imperative that justifies the criminal sanction. Therefore, it is disproportionate, and is an indirect restriction to freedom of expression, given that the criminal convictions have a chilling effect on all speech involving public figures and concerning matters of public interest. First of all, the criminal sanction is imposed against individuals who for decades have sought to exercise a protected right and provide a community service, which they have not been able to do because of actions directly attributable to the State. Furthermore, the State itself, through its local

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<sup>73</sup> I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207, para. 55.

<sup>74</sup> I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207, para. 55.

<sup>75</sup> I/A Court H.R., *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207, para. 55.

<sup>76</sup> IACHR, 1994 Annual Report. Chapter V: *Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights*. Title IV: Conclusion. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995. 88th Session.

authorities and the inaction of its federal authorities, consented to and supported the acts that later gave rise to criminal sanctions. Finally, the criminal action was used arbitrarily insofar as it was brought exclusively to restrict public debate, especially information that was inconvenient to the leader in power. These three situations demonstrate that, in this specific case, the criminal sanction is disproportionate—especially if it is taken into account that the State, through its broadcasting regulations, could have used other sanctions of an administrative nature that would be less harmful to the right to freedom of expression in general.

Second, the criminal sanction imposed against Ms. Pereira Peroni and Mr. Hoffman violates the right to freedom of expression insofar as it is an unlawful restriction to its exercise. In order for such a restriction to be admissible, the definition of the criminal offense must satisfy the principle of strict legality. However, in this case, the conduct prosecuted is inconsistent with the offense charged (theft). The interference that could have been caused to the radio spectrum as a result of its illegal use does not contain the objective elements of *use and displacement of property*, as it has been defined in the authoritative criminal doctrine.

#### 4.4.3 *Arguments of the State*

The electromagnetic spectrum is a natural resource, made up of a band of space surrounding the earth, which humankind, through the development of technology, discovered could be used to send and receive messages through radio waves that carry long and short distance audio or visual messages.

Therefore, in Chirilagua, as in the other countries of the region, the electromagnetic spectrum is an inalienable public good not subject to prescription, which is additionally characterized by being limited in nature. For this reason, the media that use it—such as sound broadcasting and television—are subject to a special set of legal rules.

In the development of this principle, the operation of a broadcasting station requires a license, which is the authority granted by the State to legal entities in order for them to operate an authorized broadcasting station. At the same time, a permit is required for the installation of equipment to be used for a radio broadcasting station. The permit is the authorization that the State grants individuals or legal entities to install broadcasting equipment in a specific place.

Under such circumstances, when unauthorized broadcasts are made through furtively activated equipment, it amounts to taking possession of that intangible asset called the electromagnetic spectrum, which is impossible to restore. In Chirilagua—as in other legal systems—electrical energy, the radio spectrum and other types of waves or energy in the telephone, television and computer facsimile systems, or any other that has economic value, is therefore considered to be personal property. Consequently, the State has established that the unlawful use of that public good constitutes the punishable offense of theft of State property.

The State has not only the interest but also the obligation to protect public goods; in doing so, the public servant fulfills his duty and therefore his conduct is legitimate. Accordingly, the sanction imposed against persons who used the electromagnetic

spectrum unlawfully in order to broadcast on behalf of Radio Su-Versión is in fact consistent with the correct application of the law.

The criminal sanction for the commission of these acts is likewise justified and necessary. First of all, it is justified and necessary to prevent anarchy in a context that has a special set of legal rules and requires strict regulation and monitoring by the State. Further, the unlawful and abusive use of the spectrum can lead to direct risks to the exercise of citizens' rights. For example, it has been demonstrated that clandestine broadcasting operations can cause interference in the contiguous frequency bands in which radio air navigation systems operate, thus affecting the proper functioning of those systems and posing a serious risk to safety and to life. This justifies the State's choice of criminal sanction as a necessary measure for the prevention of conduct that that could seriously affect others, or society as a whole.

#### **4.5 Monopolistic consequences of the decisions on regulation of the spectrum and the obstruction of democratic debate**

##### *4.5.1 Applicable standards*

Monopolies or oligopolies in the media violate the freedom of expression enshrined in Article 13 of the American Convention, in that they hinder the diversity and plurality of voices necessary in a democratic society.<sup>77</sup> Accordingly, both the Commission and the Inter-American Court have asserted the importance of state intervention to ensure competition and promote pluralism and diversity. The effective measures that the States must take include antitrust laws that limit the concentration of ownership and control of the broadcast media.

The concentration of ownership of the media leads to the uniformity of content that they produce or disseminate. Therefore, over 20 years ago, the Inter-American Court held that all monopolies on the ownership or administration of the media, whatever form they may take, are prohibited.<sup>78</sup> It also recognized that the States must intervene actively to prevent monopolies in the media sector. The Inter-American Court has also held that "[...] given the broad scope of the language of the Convention, freedom of expression can also be affected without the direct intervention of the State. This might be the case, for example, when due to the existence of monopolies or oligopolies in the ownership of communications media, there are established in practice 'means tending to impede the communication and circulation of ideas and opinions.'"<sup>79</sup>

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<sup>77</sup> IACHR, *Declaration of Principles on Freedom of Expression*, October 2000, Principle No. 12: "Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information."

<sup>78</sup> "It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, *inter alia*, a plurality of means of communication, *the barring of all monopolies thereof, in whatever form*, and guarantees for the protection of the freedom and independence of journalists [...]" (para. 34); and "[...]It is equally true that the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view" (para. 33) (I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985).

<sup>79</sup> I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985, para. 56. See also: IACHR, *2004 Annual Report*, Volume III: "Report of the Office of the Special Rapporteur for Freedom

#### 4.5.2 *Arguments of the petitioners*

The petitioners will argue that in Chirilagua the State has not taken measures to prevent information monopolies, as the monopoly has favored its political interests. Indeed, the state actions recounted in the facts of the case demonstrate that the State has directly favored the concentration of media through sanctions and shutdowns of community and commercial opposition media. With these shutdowns, the monopoly has increased and the potential to engage in free debate in a plural and diverse environment has been restricted notably.

According to the facts of the case, the most important media consortium of Chirilagua (the Fresa Alliance) owns the television channel with the largest national audience and “more than 50 radio stations located in several cities throughout the country.” This consortium, in addition to directly supporting the election of the President of the Republic, has demonstrated a lack of impartiality in the information it broadcasts. For example, the Fresa Alliance’s radio stations and television channel reported very little information on the announcement of the national march of March 3, 2008, and when they did so, they referred to it in an adverse and distorted manner by categorizing it as “criminal disturbances that aim to prevent popular participation and to destabilize the democratic institutions that have been so difficult to build.” Furthermore, these media failed to inform the citizens fairly of government programs and the candidates in the 2008 parliamentary elections, as demonstrated in the investigation conducted by Radical Radio.

Subsequent to these acts, the radio stations of that conglomerate sent the message to the public that the country was at risk of being taken over by “terrorist vandals and therefore the entire population should go to the polls to ensure the continuity of the government.” In exchange for this proselytizing support, the Government measures taken as of March 5<sup>th</sup> through the COFERETEL did not affect any of the radio stations affiliated with the Fresa Alliance. On the contrary, it can be said that they benefited as their competition diminished with the closure of more than 40 stations. Its monopoly grew accordingly, as did its corresponding media, political and economic influence, to the detriment of possibilities for the plurality and diversity of information established by the inter-American standards.

#### 4.5.3 *Arguments of the State*

The State will try to disprove the existence of monopolies and, above all, that the alleged concentration of media was a result of its policies. The debate could focus then on evaluating the data available to establish whether there is, in fact, a monopoly or oligopoly.

To deny this, the State will first argue that its media policy establishes three distinct modes of access to the media, which are, in and of themselves, measures to prevent the concentration of media ownership. Second, the State will maintain that there is empirical evidence that the media market has not been monopolized by the Fresa Alliance. Indeed, the facts of the case demonstrate that the Fresa Alliance has around 50 radio stations. Nevertheless, it is indicated later that in the two calls for bids issued by

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of Expression” (Chapter V: Indirect violations of freedom of expression: the impact of the concentration of media ownership).

the COFERETEL, 450 commercial broadcasting licenses and 11 community broadcasting licenses were either awarded or extended. In this respect, even if it were understood that this is the total number of legal radio stations (which is unclear from the facts of the case, as other radio stations had been licensed prior to those two calls for bids, such as Radical Radio—formerly Radio Cadena Nacional), the proportion of radio stations of the Fresa Alliance would be close to 10% of the total. Third, this situation did not vary substantially with the measures taken as of March 5, 2008. According to the information in this case, by virtue of the administrative measures taken, 40 radio concessions (it is not specified whether they were all commercial or whether they include community radio stations) were revoked.

The State will further argue that it is not true that these measures have prevented democratic and electoral debate, or that this was done to benefit the pro-government party. The facts of the case show that the administrative measures taken resulted in the revocation of the licenses on April 6, 2008, and the parliamentary elections as well as the popular referendum were held in the month of March, 2008. Therefore, the measures did not did not cause any interference in the democratic elections.

## **5. ARGUMENTS RELATED TO OTHER RIGHTS IN THE AMERICAN CONVENTION**

As we indicated in the introduction, the case specifies that the IACHR classified the facts as violations of the rights contained in Articles 13, 8 and 25 of the Convention. Nevertheless, the victims' representatives have alleged that the facts constitute violations, in addition to the Articles specified, of the rights recognized in Articles 7, 9, 21 and 24 of the American Convention. In large part, the positions and arguments indicated in the previous section will be used to support the violations of those Articles. For example, the arguments on the violation of the principle of strict legality could be used in relation to alleged violations of the right to a fair trial or of the right to freedom from ex post facto laws (ACHR Art. 9). Without prejudice to the potential for such connections to be made, we will address some considerations below in relation to the inter-American standards with respect to the rights to due process and effective recourse, equal protection, personal liberty and the principle of freedom from ex post facto laws. These arguments complement some of those set forth in greater detail in the previous section.

### **5.1 Right to a fair trial and effective recourse (Articles 8 and 25 of the ACHR)**

The case was designed to focus the discussion concerning the right to a fair trial and effective recourse on two main issues: the rules of administrative due process in the cases involving the granting and revocation of radio licenses, and the legality of the criminal cases against journalists, media directors and owners. Although many other issues will come up in the debate, the judges should direct their questions primarily toward those two issues.

The general framework of the facts demonstrates that when faced with the adverse administrative decisions, the radio stations had the opportunity to file legal actions for the judicial review of administrative acts and to file constitutional appeals (petitions for a constitutional remedy). In addition, the structure of criminal procedure in Chirilagua basically establishes an Office of the Public Prosecutor that is responsible for investigating and bringing charges before the judges, who then decide the criminal case in a public hearing. The decisions may be appealed before a Court of Appeals. There are no indications in the facts that point to any violations of due process—in the criminal, administrative or constitutional forums—in terms of procedural irregularities, court delays, and so on.

#### *5.1.1 Applicable standards*<sup>80</sup>

The standards and case law of the inter-American system recognize the application of the guarantees of due process of law in administrative contexts. The system has thus established the obligation of the States to have clear rules for the conduct of their agents, in order to prevent inappropriate margins of discretion in the administrative sphere that could encourage arbitrary or discriminatory practices. At the same time, the

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<sup>80</sup> For purposes of summarizing this memorandum, this section will present the standards and arguments relating to administrative due process, and the following section will do the same with regard to the standards on legality and the right to a fair trial.

system has made progress in the identification of certain standards of due process of law that must govern administrative proceedings. These standards include reasonable time periods, the right to the judicial review of administrative decisions, the right to have an attorney, the requirement that the reasons for the decision be clearly stated, the public nature of administrative proceedings, and others.

The bodies of the inter-American system have underscored the need to regulate and restrict the discretion of the State.<sup>81</sup> The Court and the IACHR have established that the work of the government has specific limits, and that they include, *inter alia*, respect for human rights. As for cases involving especially vulnerable sectors, the Inter-American Court has identified the need to map out the links between the scope of administrative due process of law and the effective validity of the prohibition against discrimination.

The inter-American case law and scholarly opinions have also identified some elements that make up the guarantee of due process in an administrative forum. In this respect, the Inter-American Commission has considered that the elements of administrative due process of law include the right to a hearing for the determination of the rights at stake. According to the IACHR, such guarantee includes the right to legal assistance, the right to assert a defense and be afforded a reasonable period of time to prepare and present arguments, as well as the right to offer and produce the appropriate evidence. The Commission has also considered prior notice of the existence of a case to be a basic component of the guarantee.

The Inter-American Commission and Court have also specified as elements of due process of law the right to have a well-founded decision on the merits of the case and the need to guarantee the public nature of the administrative proceeding. Furthermore, they have underscored the existence of a right to have the administrative proceeding conducted within a reasonable period of time. The Inter-American Court has held that a prolonged delay in an administrative proceedings amounts, in principle, to a violation of Article 8 of the Convention, and that to prove otherwise the State must demonstrate that the delay in the case was due to the complexity of the case or the conduct of the parties.

### 5.1.2 *Arguments of the petitioners*

On this issue we refer to the matters addressed previously in section 3.1 of this memorandum with respect to the facts concerning the granting and revocation of broadcasting licenses. In sum, the petitioners will allege (i) problems with the law, which is vague and imprecise, and allows the regulatory agency to abuse its authority and impose sanctions against a medium's editorial line; (ii) the regulatory authority is not independent, as it reports directly to the executive branch, and it did not act impartially in this case; (iii) due process was not respected in the administrative proceedings, as the shareholders or representatives of Radical Radio were never called to present evidence in their defense or even informed of the proceedings against them; (iv) the shareholders also did not have the opportunity to present evidence in their defense or contest the legal assessments that gave rise to the proceedings and resulted in the decision to revoke its license; and (v) the decision revoking that license failed to state the reasons on which it was based, as required.

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<sup>81</sup> I/A Court H.R., *Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, paras. 240 & 242).



### 5.1.3 Arguments of the State

The detailed description of the arguments of the State can be seen in section 3.1 of this memorandum, relative to the facts concerning the granting and revocation of broadcasting licenses. In sum, the State will assert on its behalf its power to regulate broadcasting, the fact that Chirilagua has laws establishing a regulatory framework observant of the inter-American standards, and that in the specific case there was no arbitrary use of the law.

## 5.2 Right to a fair trial, personal liberty, and freedom from ex post facto laws (ACHR Articles 7, 8 and 9)

### 5.2.1 Applicable standards

Article 9 of the American Convention states that “No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.”

With respect to the principle of legality in the criminal context, the Inter-American Court has held that the drafting of criminal statutes must involve a clear definition of the criminal conduct, which sets forth its elements and distinguishes it from lawful conduct or unlawful conduct that is punishable by non-criminal sanctions.<sup>82</sup>

According to the Inter-American Court, under the rule of law, the principles of legality and non-retroactivity govern the actions of all the State’s bodies in their respective fields, particularly when the exercise of its punitive power is at issue.<sup>83</sup> Likewise, in a democratic system it is necessary to maximize precautions in order for such measures to be taken with absolute respect for the basic rights of individuals, and subject to a careful verification of the actual existence of the unlawful conduct.<sup>84</sup>

In this respect, it is incumbent upon the criminal judge, at the time of applying the criminal law, to abide strictly by its provisions and to observe the greatest possible rigor in applying the definition of the criminal offense to the conduct of the defendant, so as not to penalize acts that are not punishable under the law. The principle of legality is developed specifically in the statutory description of the defense, which guarantees individual freedom and security by pre-establishing the punishable conduct clearly and unequivocally, and which also protects legal certainty.

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<sup>82</sup> I/A Court H.R., *Case of De la Cruz-Flores v. Peru*. Merits, Reparations and Costs. Judgment of November 18, 2004. Series C No. 115, paras. 77 et seq.; *Case of Ricardo Canese*. Judgment of August 31, 2004. Series C No. 111, para. 174; I/A Court H.R., *Case of Cantoral-Benavides v. Peru*. Merits. Judgment of August 18, 2000. Series C No. 69, para. 157.

<sup>83</sup> I/A Court H.R., *Case of Ricardo Canese*. Judgment of August 31, 2004. Series C No. 111, para. 177; & I/A Court H.R., *Case of Baena-Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, para. 107.

<sup>84</sup> I/A Court H.R., *Case of Baena-Ricardo et al.* Judgment of February 2, 2001. Series C No. 72, para. 106; & *inter alia*, ECtHR, *Ezelin* Judgment of April 26, 1991, Series A No. 202, para. 45; and ECtHR, *Müller and Others* Judgment of May 24, 1988, Series A No. 133, para. 29.

In the *Case of De La Cruz Flores*, the Inter-American Court found that [the judgment convicting the victim] had been “imposed [against her] in violation of the principle of legality” and, consequently, found that “none of the acts carried out within the proceedings that led to the delivery of this criminal conviction can be considered compatible with the provisions of the American Convention; accordingly, in the instant case, they entail the violation of other provisions of this international treaty.” Thus, the violation of Article 9 led also to an inevitable violation of the right to a fair trial contained in Article 8 of the Convention.

Along the same lines, the Court found that the arrest of Ms. María Teresa De La Cruz Flores, arising from a case that resulted in a conviction that violated the principle of legality, was unlawful and arbitrary, and the respective proceedings were contrary to the right to a fair trial.” Accordingly, the Court held that the State violated the rights to personal liberty and the fair trial rights enshrined in Articles 7 and 8, respectively, of the American Convention, in relation to Articles 9 and 1.1.

### 5.2.2 *Arguments of the petitioners*

The petitioners will allege the violation of the principle of legality with respect to the definitions of three criminal offenses: (i) defamation, (ii) instigation of violence, and (iii) theft of State property. They will further allege that in the charge of murder brought against journalist William Garra, the facts of the underlying conduct do not satisfy the elements of the offense.

First, the petitioners might attack the charge of defamation based on the test established by the Inter-American Court for the determination of the imposition of subsequent liability meant to protect the rights of others to their honor, good name and reputation. According to this test, first of all, it must be demonstrated that there is a clear harm or threat of harm to the rights of others; the rights meant to be protected must be clearly violated or threatened. On this point, the petitioners will argue that the State has not demonstrated that there has been a real and certain threat to someone’s rights (presumably President Escalante’s).

Second, there must be clear and precise legal provisions establishing the subsequent liabilities, drafted in unequivocal terms that define unlawful conduct clearly, set forth the elements of such conduct with specificity and enable it to be differentiated from lawful conduct. The petitioners will argue with respect to this issue that the formulation of the law is very vague, making it unclear what the punishable conduct actually entails. Third, the petitioners will argue that the criminal sanction was not used as a last resort, and that the State failed to consider less restrictive measures, bearing in mind that the matters in question were of public interest.

Further, the petitioners could argue that the Inter-American Commission as well as the Inter-American Court have found, in all of the specific cases they have examined and decided, that the protection of the honor or reputation of public servants or candidates for public office by means of the criminal prosecution or conviction of the person who expresses him or herself—through the use of criminal defamation offenses—was disproportionate and unnecessary in a democratic society.

With respect to the offense of instigation to commit a crime, the petitioners will argue that there was no clarity or certainty regarding the criminal scope of the conduct, as ultimately the accusation targets professional acts of journalism. Such circumstance violates and ignores Article 9 of the American Convention, because the State criminalized a lawful act—the journalistic activity performed by the victims. This would be in addition to the broad definition of the criminal offense of instigation to commit a crime, which allows for the possibility of an arbitrary interpretation giving rise to the criminalization of journalistic activity. Thus, Article 9 of the Convention is violated in that the elements of the crime were conceived of in an abstract and imprecise manner, which prevents exact knowledge of the specific conduct that amounts to the respective criminal offense.

As for the offenses of theft of State property, as stated previously, the petitioners will argue that the criminal sanction is an excessive restriction that violates the right to freedom of expression, as the State could apply sanctions less restrictive of this right, such as administrative sanctions. They will attack the classification of the underlying conduct as a crime, in that the facts described do not contain the objective elements required for the offense of theft.

### *5.2.3 Arguments of the State*

The State will try to demonstrate, first of all, that the criminal classifications at issue are consistent with the principle of legality, and that the acts prohibited therein are clear, precise and determinable. Second, the State will argue that the facts of the case are consistent with the elements of the offenses in question.

As discussed earlier in the section on freedom of expression, the State will seek to focus the debate on the acts of violence and their public repercussions (especially the deaths) as they relate to the prior activity of the media and the messages broadcast by Radical Radio and rebroadcast by Radio Su-Versión on the days of the march and the elections. The facts relating to the promotion of hatred (i) on William Garra's program; and (ii) on the program dedicated to the social networks and the groups that were stirring up hatred against President Escalante, will thus be linked to Radical Radio's official sponsorship of the march through its opinion programs and commercials. The State will also attempt to link what happened on the days of the march and the elections, Garra's statements and the violent results. Based on the connecting evidence, the argument of the State—with regard to instigation to commit a crime—will be that the directors of the media are criminally responsible in the same capacity as the journalist who issued the statements on the days of violence.

In addition, with regard to the charging of offenses involving the theft of State property, that State will use the same arguments discussed earlier with regard to the legitimacy of the classification of the criminal offense, its correspondence to the provisions of other national legal systems, and the proof of its violation in this specific case.

The State will argue that Radio Su-Versión was making unauthorized broadcasts through illegally activated equipment, whereby it took possession of an intangible public good. The State will further argue that these acts should be attributed to the director of the medium, who in this case is Mr. Francis Hoffman.

## 5.3 Right to equal protection (Article 24 of the ACHR)

### 5.3.1 Applicable standards

The Inter-American Commission has indicated that the principle of nondiscrimination is one of the pillars of any democratic system and a fundamental base<sup>85</sup> of the human rights protection system established by the OAS.<sup>86</sup> The Inter-American Court has held that “Non-discrimination, together with equality before the law and equal protection of the law, are elements of a general basic principle related to the protection of human rights;<sup>87</sup> and has added that “[it] is fundamental for the safeguard of human rights.”<sup>88</sup>

There is an indissoluble link between the obligation to respect and guarantee human rights and the principle of equality and nondiscrimination. The States are obligated to respect and guarantee the full and free exercise of rights and liberties without discrimination of any kind. The State’s breach, through any discriminatory treatment, of the general obligation to respect and guarantee human rights, gives rise to its international responsibility.

In examining the implications of different treatment under certain provisions, it is important to refer to the Inter-American Court’s statement that “not all differences in treatment are in themselves offensive to human dignity.”<sup>89</sup> In this same respect, the European Court of Human Rights, following “the principles which may be extracted from the legal practice of a large number of democratic States,” has held that a distinction is only discriminatory when it “has no objective and reasonable justification.”<sup>90</sup> Distinctions may be made, based on *de facto* differences, as an instrument for the protection of persons requiring protection, considering their situation of relative weakness or powerlessness.<sup>91</sup>

### 5.3.2 Arguments of the petitioners

The petitioners can allege the violation of this right based on two lines of argument. First, they can allege that the inability of the landless communities of San Pedro de los

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<sup>85</sup> IACHR, Case 11.625, Report No. 4/01, *María Eugenia Morales de Sierra*, Guatemala, January 19, 2001, published in OEA/Ser.L/V/II.111 Doc. 20 Rev., April 16, 2001, para. 36.

<sup>86</sup> IACHR, *Considerations regarding the compatibility of affirmative action measures designed to promote the political participation of women with the principles of equality and non-discrimination*, Section A, 1999 Annual Report, Chapter VI, published in OEA/Ser.L/V/II.106 Doc. 3, April 13, 2000.

<sup>87</sup> I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, para. 83.

<sup>88</sup> *Ibid.*, para. 88.

<sup>89</sup> I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 46; and I/A Court H.R., *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 56.

<sup>90</sup> See: ECtHR., *Case of Willis v. The United Kingdom*, Judgment of June 11, 2002, para. 39; ECtHR., *Case of Wessels-Bergervoet v. The Netherlands*, Judgment of June 4, 2002, para. 46; ECtHR., *Case of Petrovic v. Austria*, Judgment of March 27, 1998, Reports 1998-II, para. 30; ECtHR., *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, Judgment of July 23, 1968, Series A 1968, para. 10.

<sup>91</sup> On this matter, the Inter-American Court established that: “No discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic, or in conflict with the essential oneness and dignity of humankind” (I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17).

Aguados to establish communications media constitutes discrimination, and that the State has not taken measures to ensure real equality. In addition, the petitioners could argue that the refusal to accept requests for proposals in San Pedro de los Aguados in the State's calls for bids on community broadcasting concessions gives rise to an unacceptable disparity between the radio operators and their potential consumers and the inhabitants of other regions.

First, the petitioners will note that the inter-American case law has stressed that States must not only refrain from "engaging in actions or favoring practices that may in any way be aimed, directly or indirectly, at creating situations in which certain groups or persons are discriminated against or arbitrarily excluded, *de jure* or *de facto*, from enjoying or exercising the right [to freedom of expression]" but also are required to take "affirmative measures (legislative, administrative, or any other kind) to reverse or change existing discriminatory situations that may jeopardize certain groups' effective enjoyment and exercise of the right to freedom of expression under conditions of equality and non-discrimination."

In this respect, in order to promote equal opportunity of access to the media, the States must provide positive measures so that the three broadcasting sectors can access licenses under equitable conditions. They must provide democratic criteria and transparent procedures for the allocation of licenses, and establish reasonable and nondiscriminatory conditions for the use of licenses.

In the instant case, the State has not taken effective measures for a sector of the population traditionally discriminated against in Chirilagua to gain access to the media. The community of Gorgia in general, and the community of landless workers of San Pedro de los Aguados in particular, have been systematically excluded from the public debate. They have been prevented from accessing institutional or private channels to really exercise, in a robust and constant manner, their right to express publicly their ideas and opinions or to be informed of the issues that affect them. As the IACHR's Office of the Special Rapporteur has indicated, this exclusion has been similar to the effects of censorship: silence.

Second, the persistent decision to not grant broadcasting licenses in San Pedro de los Aguados for an indefinite period of time in itself has no legitimate justification and therefore discriminates against the community in that area. Thus, the *de facto* distinction made between the cities in which licenses have been granted and those in which such licenses have not been granted amounts to wholly unjustified discrimination. The State has not demonstrated that there is any legal, technical or economic impediment to the granting of licenses, which could be a justified reason for its denial. Consequently, as the State has not demonstrated an objective reason, it violates the aforementioned community's right to nondiscrimination.

In sum, it is necessary to conclude that the inequality of treatment described above has no adequate, sufficient or proportionate justification and, as such, violates the right of the shareholders to equal treatment.

### 5.3.3 Arguments of the State

The international norms establish that not all disparity in treatment is discrimination. Indeed, for treatment to be called discriminatory it must be proven that there is a similar factual situation in which someone is alleged to have accessed a benefit or has been exempted from an obligation owed to the government. Thus, even when there are clear differences between one case and another, there is no state imperative to treat both equally. This means that in order to allege the violation of the principle of equality it is necessary to establish that, in each specific case, the situation of one kind of person or group is comparable to another, as an assumption for the determination of whether the difference in treatment is discriminatory.

The petitioners in this case have not demonstrated such identity in the situation that they claim is discriminatory. The simple fact that the government has granted radio licenses to other legal entities or in other areas of the country does not in itself demonstrate discriminatory treatment on the part of the broadcasting entity. As explained previously, the state decision with respect to the granting and renewal of radio licenses is complex because different criteria of different types are involved.

The State also finds that there is no basis to support the alleged violation of the right to equality due to the exclusion from access to the media of the community that Radio Su- Versión claims to represent. The petitioners, like all citizens of Chirilagua, have domestic laws that reserve a slice of the radio spectrum for granting licenses to community broadcasters. This policy for the regulation of Chirilagua's radio spectrum has been developed precisely to favor true equality in the democratic debate and guarantee the plurality of media and opinions.

Likewise, the requirements for accessing such licenses have technical and financial requirements that are different from those required for commercial radio broadcasters, bearing in mind the specificities of community media. As such, it is demonstrated that the State does take internal measures aimed directly at providing for the greater involvement of communities and populations that might have been the victims of historic discrimination or exclusion. In this respect, the bodies of the inter-American system can evaluate the reasonableness of the public policy, which cannot be labeled unreasonable simply because a specific population has not accessed a public good. It does not seem reasonable to require that the State resolve simultaneously all of the injustices or absences of protection, especially when dealing with those that involve services and require planning and, in almost all cases, budget availability.

## **6. REPARATIONS MEASURES**

The participants must present their arguments and position on reparations in both their written briefs and their oral arguments. So as not to disclose the arguments in advance, the hypothetical case mentioned only generally that the IACHR had made recommendations to the State. As such, it is up to the petitioners to make their arguments with respect to their claims for comprehensive reparation. As such, they must take into account the components of such reparations and what they think would be an effective judicial remedy in the instant case.

The competitors will then be able to make arguments regarding the components of what the Court has called comprehensive reparation, which includes: restitution,<sup>92</sup> indemnification or compensation,<sup>93</sup> rehabilitation,<sup>94</sup> measures of satisfaction<sup>95</sup> and guarantees of non-repetition.<sup>96</sup> In this specific case, we are interested in a discussion of the measures of restitution of the rights infringed—especially the right to freedom of expression—and what the administrative or legislative measures seeking to ensure the non-repetition of similar acts would be.

The facts of the case establish that the State amended its media laws during the time the case was pending before the inter-American system. The model adopted by the State appears to be consistent with the inter-American standards with regard to the three-part system for the allocation of frequencies, with different financial and technical requirements for commercial and community radio stations. Furthermore, based on such reform, the State issued an invitation to bid for new radio licenses. The awards are currently pending in this bid process, but the radio stations named in the case before the Inter-American Court did not participate in it.

The competitors in the role of the State will most likely present these facts in their argument to disprove the alleged violations. For their part, the competitors in the role of petitioners might assert the doctrine of the perpetration of the international crime invoked by the Inter-American Court in the *Case of the Gómez-Paquiyaury Brothers v. Peru*. Beyond this discussion, this change in the country's reality raises doubts about the reparations measures that can be claimed and that the Court in turn can order.

The questions we expect to be discussed based on the facts include the following: Is the reform of the broadcasting system a sufficient measure of reparation? Could—and should—the Inter-American Court order the nullity of the revocation of the commercial radio station's license and order that it be allowed to operate halfway through a general licensing regulation process involving an open call for bids? What is the proper reparations measure for the alleged violation of the rights of the community radio? Does the ACOSINTI community have the right to have the Court order the granting of a license as a measure of reparation, or must the Court limit itself to ordering that they be taken into account under equal circumstances in a call for bids? In that case, should the Court order their inclusion in the current call for bids, but already in the selection process?

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<sup>92</sup> *Full restitution (or restitutio in integrum)* consists of reestablishing the previous situation, through measures that enable the restoration of the victim's rights, including, *inter alia*, citizenship, liberty, identity, the restitution of assets and property, the return to one's place of origin and the restoration of employment.

<sup>93</sup> *Indemnification or compensation* seeks to provide redress to the victims for physical and emotional pain and suffering, as well as for the loss of opportunities, pecuniary damages, lost wages, attacks on one's reputation and medical expenses.

<sup>94</sup> *Rehabilitation* aims to reduce the physical or psychological suffering of the victims, through measures designed to provide medical, psychological and psychiatric services, which enable the restoration of the dignity and reputation of the victims.

<sup>95</sup> *Measures of satisfaction* include measures to investigate and prosecute the perpetrators of human rights violations, to establish and disseminate the truth, to search for disappeared persons and to locate and turn over the mortal remains of deceased relatives. They also include the State's public acknowledgement of its responsibility, as well as the issuance of public apologies and official testimonies, the honoring and paying of tribute to the victims, the placement of commemorative plaques or monuments, and acts making amends to the memory of the victims.

<sup>96</sup> *Guarantees of non-repetition* refer to appropriate administrative, legislative or judicial means designed to ensure that the victims will never again be subject to violations of their dignity.