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5 REPARATIONS MEASURES

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

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

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, 24, 8 and 25	Allocation of frequencies to community broadcasters	<ul style="list-style-type: none"> -- It is practically impossible to establish and operate community media outlets due to the COFERETEL's refusal to grant operating licenses to those media -- In more than 30 years, there have been only 3 calls for bids for the issuance of community radio licenses -- 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. -- The failure to recognize Radio Su-Versión is due to the nature of the association that promotes the community service: the Landless -- The suspension of Radio Su-Versión's broadcasts and the seizure of its equipment are a violation of the principle of legitimate expectations 	25- 26 26-28 44-46
		<ul style="list-style-type: none"> -- 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 -- 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 -- 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 -- 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 	25- 26 28-30 44-46

13, 7, 8, 9
and 25

-- The criminal sanctions are a violation of freedom of expression, as they penalize speech protected by the American Convention

-- 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

-- Neither the acts nor the opinions of others can be imputed to those who provide information through the media

-- The very formulation

Information broadcast by the media
and the acts of violence

13, 7, 8, 9
and

<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 5th 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> <p>--</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.²

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,³ Article IV of the American Declaration of the Rights and Duties of Man,⁴ and Article 4 of the Inter-American Democratic Charter,⁵ 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

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

³ 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.

⁴ 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.

⁵ 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

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;²⁰ (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.²¹

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.²² 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;²³ and it has emphasized that restrictions to freedom of expression must not perpetuate prejudice or promote intolerance.²⁴ 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

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.

¹⁹ 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.

²⁰ 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).

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

²² 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.

²³ 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.

²⁴ 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.²⁵

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 Article 13 of the Convention, pursuant to the international treaties force: (a) war propaganda and hate speech that amount to the ent 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.²⁶ 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 legitimat0 1 85.08 442.64 Tm[(pro)] TJETBT1 0 0 1 101.1 442.64 Tm[(vide)-o086 539.2

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.²⁹ 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,³⁰ orders given by members of the Armed Forces to their subordinates,³¹ orders given by prison wardens regarding the conduct of inmates,³² the decisions of criminal court judges,³³ administrative acts of the executive Branch,³⁴ and even legal and constitutional provisions,³⁵ 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,

contribute [to] public deliberation through the expression and [dissemination] of their thoughts.³⁸

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.

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

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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 standards⁴⁷

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.⁴⁸ 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,

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. ⁵⁰

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,

democratic criteria.⁵⁶ In this same respect, the licensing procedures must be accompanied by sufficient guarantees against arbitrariness, including the obligation to state the reasons

This vagueness in the law, added to the lack of independence on the part of the regulatory body

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

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.⁶⁴

It is equally important that the regulations on broadcasting

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

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-Verisión. 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

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

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.⁶⁹

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

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

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 sanctions⁷⁰

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 licenses⁷¹ 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.⁷²

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

⁷⁰ 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)*.

⁷¹ 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.

⁷² 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.⁷³ It is thus necessary to use strict and unequivocal terms, clearly restricting any punishable behaviors,⁷⁴ 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.⁷⁵

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.

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

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.⁷⁷ 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.⁷⁸ 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 exam

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 5th 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

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

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

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.⁸¹ 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,

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

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 base⁸⁵ of the human rights protection system established by the OAS.⁸⁶ 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;⁸⁷ and has added that [it] is fundamental for the safeguard of human rights.⁸⁸

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.⁸⁹ 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.⁹⁰ 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.⁹¹

Aguados to establish communications media constitutes discrimination, and that the State has not taken measures to ensure real equality. In addition, the petitioners could

The competitors will then be able to make arguments regarding the components of what the Court has called comprehensive reparation, which includes: restitution,⁹² indemnification or compensation,⁹³ rehabilitation,⁹⁴ measures of satisfaction⁹⁵ and guarantees of non-repetition.⁹⁶ 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 nullin tu1 0 0 1 127.5o 1 173.9 401.2