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REPORT No. 4/17

CASE 12.663

MERITS

TULIO ALBERTO ÁLVAREZ

VENEZUELA

Approved by the Commission at its working meeting held on January 26, 2017

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I. SUMMARY

1. On April 25, 2006, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) received a petition from Tulio Álvarez¹ (hereinafter “the petitioner” or “the alleged victim”), alleging the international responsibility of the Bolivarian Republic of Venezuela (hereinafter “Venezuela,” “the State,” or “the Venezuelan State”) for the violation of his rights as a result of his prosecution for “ongoing aggravated defamation” in a case brought against him by a former congressman and president of the National Assembly of Venezuela. Álvarez was sentenced to two years and three months in prison, as well as the additional penalty of disqualification from holding public office. During the case, he was also subject to a precautionary measure barring him from traveling outside the country.

2. The petitioner asserted that his criminal prosecution and conviction stemmed from the publication of an article he wrote for his column in the newspaper *Así Es la Noticia*, reporting on the alleged misappropriation of funds from the Venezuelan Assembly’s Workers’ and Retirees’ Savings Bank managed by the congressman and then-president of the legislature, Willian Lara, and from his subsequent statements about these acts on different television stations, which were repeated in the national press. He maintained that his article was supported by a report by the Office of the Superintendent of Savings Banks of the Venezuelan Finance Ministry, and that this was not properly weighed by the courts. He alleged that, on the contrary, the actions of the courts were plagued by irregularities and violations of his rights. He maintained that, in addition to the violation of his right to freedom of thought and expression, the courts’ action also constitutes a violation of his rights to a fair trial and judicial protection, freedom of movement, and political rights.

3. For its part, the State argued that the alleged victim was prosecuted in accordance with Venezuelan law. It asserted that the limitation of the petitioner’s right to freedom of expression was legitimate, because the right to honor and reputation under Venezuelan law is an absolute, unlimited right that takes priority over any other right not considered equal in status. In addition, it reported that on December 20, 2007, the Ninth Trial Court for the Enforcement of Judgments of the Criminal Judicial Circuit for the Caracas Metropolitan Area granted the conditional suspension of the execution of the alleged victim’s sentence, for a period of one year, in view of the request filed by his defense attorney before the IACHR on his behalf.

4. On July 24, 2008, the Inter-American Commission adopted Admissibility Report No. 52/08, which concluded that the petition was admissible based on the alleged violation of the rights enshrined in Articles 13, 22, 23, 8, and 25 of the American Convention on Human Rights, in relation to the obligations established in Article 1.1 and 2 thereof, to the detriment of Tulio Alberto Álvarez.

5. After examining the positions of the parties, the IACHR concluded that Venezuela violated, to the detriment of Tulio Álvarez, the rights enshrined in Articles 8 (right to a fair trial), 9 (freedom from ex post facto laws), 13 (freedom of thought and expression), 22 (freedom of movement and residence), 23 (right to participate in government), and 25 (right to judicial protection) of the American Convention, in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof.

¹ In the court files, the names “Julio Alberto Álvarez” and “Tulio Alberto Álvarez” are used interchangeably; however, the Commission identifies the alleged victim as Tulio Álvarez, the name he calls himself.

II. PROCESSING BEFORE THE COMMISSION SUBSEQUENT TO THE ADMISSIBILITY REPORT

6. On July 24, 2008, the Inter-American Commission adopted Admissibility Report No. 52/08. The report was forwarded to the parties in a communication of July 29, 2008. The processing of the case up to that time is detailed in that report. In its communication, the IACHR requested that the petitioners present their additional observations on the merits, in accordance with Article 38.1 of its Rules of Procedure. Additionally, the Commission made itself available to the parties with a view to reaching a friendly settlement of the matter under Article 48(1)(f) of the American Convention.

7. In a communication dated August 15, 2008, the petitioner expressed his willingness to begin a friendly settlement process. The communication was forwarded to the Venezuelan State on August 28, 2008.

8. On October 2, 2008, the State presented its observations on the merits and dismissed the request for a friendly settlement. These observations were forwarded to the petitioner on October 15, 2008.

9. On October 7, 2008, the Commission received the petitioner's observations on the merits. They were forwarded to the State on October 15, 2008, and the IACHR asked the State to present the observations it deemed appropriate within 2 months.

10. On July 6, 2009, the petitioner submitted a communication reporting that on March 4, 2009, the Ninth Trial Court for the Enforcement of Judgments of the Criminal Judicial Circuit for the Caracas Metropolitan Area ordered his full release, given that he had fully complied with his sentence. This information was forwarded to the State on July 16, 2009, in order for it to present the observations it deemed pertinent. On July 22, 2009, the petitioner submitted additional comments about his situation. That same day, the communication was forwarded to the Venezuelan State. On August 14, 2009, the Venezuelan State asked the IACHR for an extension of the deadline to present its observations to the new information submitted by the petitioner. On August 28, 2009, the Commission granted the State a 30-day extension.

11. On April 19, 2010, the petitioner forwarded a document to the Commission specifying the harm he alleged to have suffered as a consequence of the Venezuelan State's actions, and attached additional documentation in support of his initial petition. This information was forwarded to the State on April 27, 2010; the attachments and an additional copy of the communication were forwarded on May 4, 2010.

12. On May 17, 2012 the Inter-American Commission asked the petitioner and the State to provide additional documentation. On June 18, 2012, the petitioner replied to the Commission's request and submitted the requested information. This communication was forwarded to the State on June 26, 2012. For its part, the Venezuelan State replied to the IACHR's request on June 26, 2012, and the petitioner was informed of the reply on July 2. On March 12, 2013, the petitioner submitted additional information about the attachments sent in the electronic version of June 18, 2012. On January 26, 2015, the information presented by the petitioner was forwarded to the State.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

13. The petitioner stated that, in the exercise of his right to freedom of expression, he wrote an opinion column in the newspaper *Así es la Noticia* for several years. On May 23, 2003, he published a piece in that paper which, he maintains, referred to a report from the Office of the Superintendent of Savings Banks. The column reportedly implicated William Lara, then-president of the Venezuelan National Assembly, in the misappropriation of Bs. 1,701,723,317.25 from the Assembly's Workers' and Retirees' Savings Bank. The petitioner explained that the publication of this article led to his criminal prosecution and that on February 28, 2005, the Seventh Trial Court for the Enforcement of Judgments of the Criminal Judicial Circuit found him guilty of ongoing aggravated defamation and sentenced him to two years and three months in prison, the

additional penalty of disqualification from holding public office, and other penalties. He stated that he tried unsuccessfully to appeal his conviction to the Court of Appeals of the Criminal Judicial Circuit for the Caracas Metropolitan Area, and also filed a petition for cassation with the Venezuelan Supreme Court. He further stated that from the beginning, and throughout the criminal proceedings, he was subject to a precautionary measure that barred him from leaving the country, and that this measure was extended during the period of probation that was imposed as a condition for the suspension of his sentence.

14. The petitioner asserted that these facts amount to a violation of his right to freedom of expression, recognized in Article 13 of the American Convention. The petitioner alleged, based on the case law of the Inter-American Human Rights System, that the trial court's judgment—which was later upheld by the court of appeals and the Court of Cassation—violated the right to freedom of thought and expression enshrined in Article 13 of the American Convention, in relation to Article 1.1 thereof. He indicated that the objective of the prosecution was to silence his newspaper and prevent the publication of his opinion columns. The petitioner maintained that the mission was accomplished, due to his resignation as a columnist from the newspaper *Así es la Noticia*, the departure of the paper's director, and the subsequent cessation of its activities. He asserted that, as evidenced by the psychological and social assessments performed, he does not wish to continue writing because of the risk it entails for him and his family. He added that the conviction also violated his civil rights. He explained that he was sentenced to the additional penalty of disqualification from holding public office during the period of his sentence. This additional penalty resulted, according to Article 24 of the Criminal Code of Venezuela, in his being barred from public or political office or employment and the inability, for the duration of the sentence, to obtain other employment and to enjoy the right to vote and to run for office. The petitioner further stated that the political disqualification made him like a foreigner in his own country, unable to exercise his citizenship, or any mechanism of political participation or representation.

15. The petitioner stated that his case was the first time a precautionary measure ordering the defendant not to leave the country was issued in a criminal defamation case in Venezuela. According to the petitioner, the law requires the court to examine and verify the defendant's risk of flight prior to issuing a substitute precautionary measure such as the prohibition of foreign travel. Under Venezuelan law, this flight risk can only be presumed in cases of crimes punishable by more than 10 years in prison. Therefore, the party requesting this type of measure bears the burden of proof, and according to the petitioner, the complainant limited himself to requesting the measure without stating the grounds for the request. The petitioner alleged that he requested permission to leave the country three times, that his first two requests were denied, and the third request went unanswered. He further indicated that even though he was granted a conditional suspension of the execution of his sentence on December 20, 2007, notice of that decision was not given to the immigration authorities. As a result, his name continued to appear in the police and national customs service registries at airports, and he had to continue to request prior authorization from the courts in order to travel. The petitioner alleged that the foreign travel ban had interfered with his professional and teaching activities, family life, and the exercise of his freedom of expression. He stated that his work entailed meetings abroad with clients and those potential professional and academic opportunities had been frustrated as a result of the ban. He also indicated that his wife and daughters had been subjected to interrogations and intimidating tactics every time they traveled outside Venezuela.

16. The petitioner also alleged the violation of his right to a fair trial and maintained that the judge who presided over the criminal complaint against him had no jurisdiction to adjudicate a case that can only be prosecuted at the victim's request [*juicio de acción privada*] and that, therefore, he should have transferred the complaint to a trial court. He also stated that the trial court judge decided to classify the complaint as a "private prosecution," in spite of the fact that it contained "every imaginable defect," and granted the complainant 5 days to cure those defects, in violation of the petitioner's right to a defense.

17. The petitioner stated that the criminal action against him was barred by the statute of limitations from the beginning, since one year had elapsed between the May 23, 2003 event that gave rise to the complaint and the June 11, 2004 summons to trial. He asserted that dismissed the allegation that the statute of limitations had expired without giving the petitioner an opportunity to prove it. He further stated that during the proceedings he was prevented from presenting evidence to oppose the numerous amendments to the complaint that the other party was allowed. According to the petitioner, this kept him from setting forth

his position under the same conditions as his adversary. For instance, he reported that he was unable to access the videos of the interviews he reportedly gave to media outlets, submitted by the prosecution in support of the accusations against him. He also stated that the court ruled inadmissible the evidence resulting from information provided by government agencies at the court's request for purposes of verifying the existence of the document referring to the irregularities of the National Assembly's Savings Bank.

18. The petitioner similarly asserted that while one of his witnesses—the President of the Retirees and Pensioners Association of the National Assembly—was testifying at the February 3, 2005 hearing, the opposing party requested the immediate arrest of the witness for perjury and the commission of a crime during a hearing. The petitioner explained that, in practice, this charge entails the advance impeachment of the witness, to the detriment of the defense. The petitioner indicated that the witness was indeed prosecuted, and it was not until months later that the Venezuelan courts found him innocent and dismissed the case. The petitioner stated that this witness had been testifying about how he obtained the report of the Office of the Superintendent of Savings Banks, which had been received by the Office of the President of the National Assembly and provided an account of the irregularities committed at the National Assembly's Workers' and Retirees' Savings Bank.

B. Position of the State

19. The Venezuelan State maintained that it had acted in accordance with the law in the case of Tulio Álvarez, and that there had been no violation of his human rights. It indicated that former Congressman Willian Lara brought a criminal defamation case pursuant to Article 444 of the Venezuelan Criminal Code, and that the constitutional right to one's honor and reputation is established in Article 60 of the Venezuelan Constitution. According to the State, the legal action was filed after the petitioner—an attorney and columnist for the newspaper *Así es la Noticia*—published a defamatory opinion piece against the congressman.

20. The State specified that the right to honor and reputation under Venezuelan law “is an absolute, unlimited right that takes priority over any other law any other right not considered equal in status.” In this regard, it stated that the right to freedom of opinion is also a right that has constitutional status but is not absolute; it is limited insofar as the person exercising the right assumes full responsibility for what is expressed.

21. The State indicated that the legal action filed by former Congressman Willian Lara on December 31, 2003 is a private action, in which the victim, rather than the Public Ministry, must pursue the criminal action. It stated that 6 months lapsed from the date the criminal complaint was filed and the defendant, Tulio Álvarez, received notice and named defense attorneys. It asserted that four months later, on October 26 and 29, the petitioner's lawyers went before the court to note their appearance as counsel. It also reported that the conciliation hearing was unsuccessful. The State indicated that on January 13, 2005, the public hearing was held at which the prosecution attorneys amended the complaint to allege that the crime was ongoing. According to the State, this was because on December 27, 2004, and January 9, 2005, the petitioner once again expressed “public contempt and public hatred” against Willian Lara. The State indicated that the petitioner was afforded the right to a defense and access to the evidence.

22. According to the State, the testimony of National Treasurer Carmen De Maniglia confirmed that there had been a delay in the employer contributions to the National Assembly's Workers' and Retirees' Savings Bank due to the 2002 coup d'état and the 2003 oil strike, which prevented the allocation of sufficient funds to the National Treasury to honor all of the State's commitments. Nevertheless, the State maintains that it was proved during the trial that payment orders were issued, and that the delay was not only at the Savings Bank but in all government banks. The State confirmed that, because of this, the petitioner was sentenced to two years and three months in jail, although he was never arrested due to his attorneys' request for the conditional suspension of the execution of the sentence, and the express request made by the Inter-American Commission to the State.

23. With regard to the measure prohibiting the petitioner from traveling outside the country, the State reported that the court authorities agreed to suspend the restriction for the duration of his probation. To that

end, official notice was reportedly sent to the competent authorities in order for the measure to be entered into the information system and take legal effect.

IV. ESTABLISHED FACTS

24. Pursuant to Article 43.1 of its Rules of Procedure (hereinafter the “Rules of Procedure of the IACHR”), the Commission will examine the arguments and evidence presented by the parties, and will take account of information that is a matter of public knowledge,² including its own reports on the general situation of human rights in Venezuela, publications of non-governmental organizations, laws, decrees, and other regulations in force when the facts at issue in this matter took place.

Background

25. The alleged victim Tulio Álvarez, a Venezuelan national, is a lawyer, writer, and university professor.³ At the time of the events, he regularly published opinion columns in the national press. He was also working as a constitutional lawyer. According to what the IACHR was able to verify, the petitioner filed criminal complaints seeking the prosecution of then-President Hugo Chávez Frías and other State authorities during the years prior to the events that gave rise to this case. For instance, in 2002, he filed a criminal complaint and a request for preliminary impeachment hearings against President Chávez for the alleged illegal financing of his election campaign and his political party, *Movimiento Quinta República*.⁴ That year, he also requested the nullification of the energy agreement for the supply of oil entered into by Venezuela and Cuba, and brought a criminal action against the former president of Venezuela for these acts.⁵ It has also been established that the alleged victim requested preliminary impeachment hearings against the Attorney General of the Republic, Julián Isafías Rodríguez Días, for the alleged denial of justice and procedural fraud in relation to the handling of the aforementioned complaints.⁶ All of these requests were ruled inadmissible by the Venezuelan Supreme Court, on grounds of implausibility.

26. At the time of the events, the petitioner was also the attorney representing an employees’ union of the National Assembly of Venezuela and the Retirees and Pensioners Association of the National Assembly.⁷ In that capacity, on March 5, 2003, he filed a request before the Plenary of the Supreme Court for preliminary impeachment hearings against the president of the National Assembly, Congressman William Lara, for the alleged commission of “Aggravated Misappropriation of Public Funds, Intentional Embezzlement and Negligent Embezzlement,” provided for and punishable under Articles 60, 58, and 59 of the Organic Law to Safeguard Public Assets.⁸ That request alleged “the use of monies from the benefits fund to make payments and honor commitments totally unrelated to the employees’ rights. The latter allegation concerns payments

² Article 43.1 of the Rules of Procedure of the IACHR: The Commission shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge.

³ Annex 1. Tulio Álvarez’s *Curriculum Vitae* (CV), included in the enforcement Judgment No.1429-06, Case File No. 7, of July 3, 2006, of the Ninth Trial Court for the Enforcement of Judgments of the Criminal Judicial Circuit for the Caracas Metropolitan Area. Annex to the judgment, pp. 31-33. Communication from the petitioner received on April 12, 2007.

⁴ Annex 14. Supreme Court. Judgment of September 24, 2002. Available at: <http://www.tsj.gov.ve/decisiones/tplen/Septiembre/00-antejuicio-alvarez-vencida.htm>

⁵ Annex 15. Supreme Court. Judgment of August 24, 2004. Available at: <http://www.tsj.gov.ve/decisiones/scon/Agosto/1802-240804-02-0416.htm>; Supreme Court. Judgment of November 20, 2002. Available at: <http://www.tsj.gov.ve/decisiones/scon/Noviembre/2911-201102-02-0416%20.htm>

⁶ Annex 16. Supreme Court. Judgment of September 24, 2002. Available at: <http://historico.tsj.gob.ve/decisiones/tplen/febrero/ANTEJUICIO%20DE%20M%C3%89RITO%20N%C2%B0%20AA10-L-2002-000049.HTM>

⁷ In his observations on the merits, the petitioner stated that at that time he was the legal representative in 200 lawsuits filed by employees and retirees of the National Assembly. The State did not dispute that information.

⁸ Annex 17. Supreme Court. Judgment of April 24, 2003. Available at: <http://www.tsj.gov.ve/decisiones/tplen/Abril/AA10-L-2003-000028.htm>

for hired personnel, which tripled during the term of the accused, Congressman Willian Lara.” In particular, it was alleged that Congressman Willian Lara

used the Benefits Fund for a different purpose, intentionally breached contractual agreements, and resorted to subterfuge in order to conceal his misappropriation of funds. Specifically, he requested additional credits to replace the funds that he misappropriated, avoided the presentation of accounts during his term, and concealed his actions by closing the bank accounts that the National Assembly has at the Industrial Bank of Venezuela [*Banco Industrial*] every year during his term, and finally, to complete the commission of his crime, the accused allocated the 2003 budget in advance, adversely affecting the term of the National Assembly’s new board of directors.⁹

27. According to the information available, the complainants presented the following evidence in this case: i) a September 11, 2001 report on the economic outcome of the collective bargaining agreement that different trade union organizations sought to negotiate with the National Assembly, issued by Miguel Van Der Dijs, the then-Deputy Minister of Institutional Planning and Development; ii) copies of reports released by the Budget Subcommittee of the National Assembly’s Permanent Finance Committee with respect to requests for authorization to transfer budget credits to the National Assembly’s 2002 expenditure budget; iii) copies of the minutes of meetings held in the Office of the Deputy Minister of Labor, Edmeé Betancourt de García, on August 7 and 15, 2001; iv) copies of the minutes of a meeting held at the Ministry of Labor’s Office of the Labor Inspector in the Municipality of Libertador on November 8, 2001, reportedly with the objective of resolving the dispute between the employees and the National Assembly; v) copy of the report of the National Assembly’s Permanent Committee on Comprehensive Social Development, related to the case of the former employees of the defunct Congress of the Republic; vi) memorandum signed on August 17, 2001 from the Internal Comptroller of the National Assembly to the Internal Management Coordinator of the National Assembly, with the attachment “Report on the analysis of transfers and rendering of accounts of the Health Fund,” in which “it is established that the company that administers the health plans owes the National Assembly Bs. 2.6 billion, and that there were duplicate and improper payments totaling Bs. 196,611,808.82”; vii) official letter No. 01-00-001200 issued by the Comptroller General of the Republic, Clodosbaldo Russián; viii) official letter sent to Julián Isaías Rodríguez Díaz, Attorney General of the Republic, by the Internal Comptroller of the National Assembly, stating the need for an investigation to determine responsibilities with respect to the management of the funds related to contracts with the National Assembly’s health company.¹⁰

28. The Supreme Court ruled admissible the request for preliminary proceedings filed against Congressman Willian Lara, finding that in cases of crimes involving public property, the interest harmed is the wealth of the State; therefore, the Public Ministry is the only party that has plaintiff’s standing to file a request of this nature. It also found that “based on the supporting documents presented, it is implausible to assert that Willian Lara used the funds in question for any purpose other than meeting the supposed employment obligations with respect to the employees affiliated with the complaining trade union organizations, or the employees of the National Assembly.” First, it is not even credible to assert that the failure to pay the citizens these alleged amounts owed is the result of unlawful acts, when all of the supporting documents presented underscore a labor dispute in which the existence, amount, manner of payment, employee status, and numerous other situations were apparently under discussion. [...] In addition, with respect to the offenses allegedly committed by Representative Lara in the administration of the insurance funds, the Court observes that the record does not contain any evidence of responsibility for misappropriation, or intentional or negligent embezzlement on the part of the defendant. The plaintiffs’ arguments on this point would appear to be conjecture based on the potential existence of administrative irregularities and the resulting responsibility of some public servant of the National Assembly, which—according to the case file—have been examined by the Assembly’s Internal Comptroller. However, we cannot

⁹ Annex 17. Supreme Court. Judgment of April 24, 2003. Available at: <http://www.tsj.gov.ve/decisiones/tplen/Abril/AA10-L-2003-000028.htm>

¹⁰ Annex 17. Supreme Court. Judgment of April 24, 2003. Available at: <http://www.tsj.gov.ve/decisiones/tplen/Abril/AA10-L-2003-000028.htm>

assume, without additional evidence, that the responsibility lies with the President of the legislature's Board of Directors."¹¹

29. The Court nevertheless ordered that a copy of this case file be forwarded to the Attorney General of the Republic, for the purposes indicated in the legal reasoning of this judgment¹². According to the case file, the Public Ministry opened a criminal investigation into the alleged irregularities in the legislature's administration of the employees' funds¹³.

Criminal defamation case against Tulio Álvarez

30. On May 23, 2003 the newspaper *Así es la Noticia* published the following in "Black Files," an opinion piece by Tulio Álvarez:¹⁴

National Assembly's Savings Bank Looted

You are not going to believe it, but what is happening with the benefits and other rights of public sector employees is a crime of the largest magnitude. During the term of Congressman Willian Lara's—against whom a request for preliminary impeachment proceedings filed by employees and retirees of the institution is pending before the Plenary of the Supreme Court—two billion bolívares from the employees' Savings Bank was used to cover other National Assembly.

To date, only partial deposits have been made, and the debt has now reached Bs. 1,701,723,317.25. And I am not the one saying this—it was stated by Iván Rafael Delgado Abreu, Superintendent of Savings Banks of the Venezuelan Finance Ministry, in communication DDS-OAL-1841, received by the office of the current president of the National Assembly on April 28, 2003."

31. On this opinion piece, Tulio Alvarez referred to the official letter DS-OAL-1841 addressed by the Office of the Superintendent of Savings Banks of the Venezuelan Finance Ministry to the Office of the President of the National Assembly of Venezuela on April 28, 2003, requesting "your good offices for purposes of paying the SAVINGS AND BENEFITS BANK OF THE WORKERS, EMPLOYEES, RETIREES, AND PENSIONERS OF THE NATIONAL ASSEMBLY (CAPSEOJPAN) [...] for the debt incurred by this body for contributions and withholdings, which as of the month of February, 2003 was approximately ONE BILLION SEVEN HUNDRED ONE MILLION SEVEN HUNDRED TWENTY-THREE THOUSAND THREE HUNDRED SEVENTEEN BOLIVARES AND TWENTY-FIVE CENTIMOS (Bs. 1,701,723,317.25)" [emphasis in the original]. The Office of the Superintendent indicated that the debt had resulted in a decrease in the bank's assets that had "significantly affected its liquidity, preventing it from meeting the social objectives for which it was established, the commitments made to its members, and its principal mission which is to encourage savings

¹¹ Annex 17. Supreme Court. Judgment of April 24, 2003. Available at: <http://www.tsj.gov.ve/decisiones/tplen/Abril/AA10-L-2003-000028.htm>

¹² Annex 17. Supreme Court. Judgment of April 24, 2003. Available at: <http://www.tsj.gov.ve/decisiones/tplen/Abril/AA10-L-2003-000028.htm>.

¹³ Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006.

¹⁴ Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006; Annex 3. Third Division of the Court of Appeals of the Criminal Judicial Circuit of the Metropolitan District of Caracas. Appeal Judgment, case file No. 2367-05. September 29, 2005. Communication from the State dated June 26, 2012; and Communication from the petitioner dated March 12, 2013. In that communication, the petitioner reiterated the content of the article and reported that he does not have a copy of the publication. This information was not contested by the State.

and the household economy, protected by Articles 118 and 308 of the Constitution of the Bolivarian Republic of Venezuela.”¹⁵

32. On December 31, 2003, Congressman and National Assembly President Willian Lara filed a criminal complaint against Tulio Álvarez before the Thirty-Sixth Supervisory Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area, alleging the offense of aggravated defamation pursuant to Article 444 of the Criminal Code in force.¹⁶ On January 9, 2004, that court ruled that it did not have jurisdiction, and removed the case to a trial court.¹⁷ On January 13, 2004, the Seventh Trial Court of the same circuit heard the case¹⁸ and asked the complainant to satisfy the requirements for a private prosecution under Article 401 of the Venezuelan Criminal Code.¹⁹

33. On December 15, 2004, the Trial Court held a “conciliation hearing” with the parties. In view of their failure to reach an agreement, the Court ordered that the case be brought to trial. The following day, the court issued a precautionary measure²⁰ barring the alleged victim from leaving the country, under the following terms:

Having examined the arguments set forth by the judicial representative of the private prosecutor, the Court finds that in this case, the existence of a crime that carries a penalty of imprisonment, and which has clearly not been time-barred by the statute of limitations, has been proven, to wit: the crime of *defamation*, defined in and punishable under Article 444 of the Criminal Code with the aggravating factors established in clauses 5, 7, and 14 of Article

¹⁵ Annex 16. Ministry of Finance. Office of the Superintendent of Savings Banks. Official Letter DS-OAL-1841. April 28, 2003. Communication from the petitioner, received on September 7, 2006.

¹⁶ Annex 3. Third Division of the Court of Appeals of the Criminal Judicial Circuit of the Metropolitan District of Caracas. Appeal Judgment, case file No. 2367-05. September 29, 2005. Communication from the State dated June 26, 2012.

¹⁷ Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006.

¹⁸ Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006.

¹⁹ Article 401. Requirements. A private prosecution must be filed in writing directly with the trial court and must contain:

1. The full name, age, marital status, profession, domicile or residence, of the private prosecutor, his or her national ID card number, and his or her family relationship to the accused;

2. The full name, age, domicile or residence of the accused;

3. The crime alleged, and the date, place, and approximate time of its perpetration;

4. A detailed account of all of the essential circumstances of the act;

5. Evidence supporting the allegation of the accused’s participation in the crime;

6. Substantiation of victim status;

7. The signature of the accuser or his or her attorney-in-fact;

If the accuser is unable to sign his or her name, he or she will appear personally before the Judge and provide a fingerprint in the Judge’s presence to ratify the accusation.

The Clerk of the Court will place this proceeding on record. No more than one private prosecution will be admitted in a single proceeding, but should various individuals intend to bring a criminal action for a single crime, they may do so jointly or through a single legal representative. *Cfr.* Organic Code of Criminal Procedure and the amendments thereto. National Assembly of the Bolivarian Republic of Venezuela. Book Three. Special Proceedings. Title VII. Procedure for Crimes Requiring a Request for Prosecution from the Victim. Art. 401. October 2, 2001.

²⁰ Article 412. Decision of the court. If the conciliation is unsuccessful, the Judge will render a prompt decision on motions, precautionary measures, and the admissibility of evidence presented. If there is a procedural defect in the private prosecution, the accuser may cure it promptly, if possible. A decision dismissing a motion or finding evidence inadmissible may only be appealed together with the final judgment. If a motion is granted or a precautionary measure has been ordered, the accuser or the accused, as applicable, may appeal within the next five days. When a precautionary measure is ordered, the appeal will not stay the proceeding. *Cfr.* Organic Code of Criminal Procedure and the amendments thereto. National Assembly of the Bolivarian Republic of Venezuela. Book Three. Special Proceedings. Title VII. Procedure for Crimes Requiring a Request for Prosecution from the Victim. Art. 401. October 2, 2001.

77 *ejusdem*, which is the basis for this private prosecution. The Court finds that there is sufficient evidence to conclude that the defendant was the alleged perpetrator or participant in the commission of said crime, given the evidence presented by the complainant. The Court additionally finds a reasonable presumption that the defendant is a flight risk, based on the assessment of the circumstances of this particular case, and given his ability to leave the country permanently. These findings are based on the arguments set forth, and on Article 13 of the Organic Code of Criminal Procedure, which aims to establish the truth of the facts through legal channels and justice in the application of the law [...] in accordance with Article 256(4) of the Organic Code of Criminal Procedure.²¹

34. Trial hearings were subsequently held on January 13 and 18, 2005. The trial was then continued due to the amendment of the plaintiff's complaint,²² which alleged that the victim had continued to defame Congressman Lara in interviews disseminated on Venezuelan social media before the trial began.²³

35. The trial resumed on January 25, 2005, and then was once again continued, due to the alleged victim's health,²⁴ to February 3, 9, and 10, 2005.²⁵ During those hearings, the defense filed several motions and requested the nullification of the proceedings because of procedural error and the expiration of the statute of limitations. During the trial on February 3, 2005, defense witness José Rafael García, President of the Retirees and Pensioners Association of the National Assembly, was detained for the alleged *in flagrante* commission of perjury and the commission of a crime during a hearing. He was transferred to a detention center at the request of the prosecuting party.²⁶

36. On February 10, 2005, the Trial Court handed down its judgment of conviction, sentencing the accused to 2 years and 3 months in prison. It also found that the motions were untimely filed and therefore inadmissible. In view of this decision, the petitioner filed a petition for a constitutional remedy [*amparo*] before the Court of Appeals of the Criminal Judicial Circuit of the Caracas Metropolitan Area, requesting the absolute nullity of the hearings held.²⁷ In its judgment of February 11, 2005, the Second Division of the Court of Appeals ruled the *amparo* action inadmissible, on grounds that "It follows from a reading of the petition for a constitutional remedy that the petitioner could avail himself of the ordinary courts, as, according to his brief, [his case] is at the trial phase and a judgment has not been issued by the trial court. Accordingly, he can file an ordinary motion for appeal if his arguments are not heard, and it is through an ordinary appeal that the

²¹ Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006.

²² Article 351. Amendment of the complaint. During oral argument, and prior to the closing arguments of the parties, the Public Ministry or the complainant may amend the complaint through the inclusion of a new fact or circumstance that has not been mentioned and that changes the legal classification of or penalty for the act at issue in the oral argument. The complainant may join the Prosecutor's amendment to the complaint, and the Prosecutor may include the new evidence in the amendment of his or her complaint. In such case, a new statement will be taken from the defendant in relation to the new facts or circumstances alleged in the amended complaint, and all of the parties will be informed. The parties will have the right to request a stay of the trial proceedings in order to offer new evidence or prepare their defense. When this right is asserted, the court will suspend oral argument for a reasonable period of time, according to the nature of the facts and the needs of the defense. The new facts or circumstances addressed in the amendment will be included in the order to stand trial. *Cfr.* Organic Code of Criminal Procedure and the amendments thereto. National Assembly the Bolivarian Republic of Venezuela. Title II. Trial. Chapter II. Trial Proceedings. Section One. Preparation of Oral Argument. Art. 351. October 2, 2001.

²³ Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006.

²⁴ Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006.

²⁵ Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006.

²⁶ Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006.

²⁷ Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006.

violations alleged by the petitioner should be addressed.”²⁸ The petitioner appealed this decision to the Constitutional Chamber of the Supreme Court, which rendered a decision on April 14, 2005. According to the judgment, the composition of the Court was reconstituted and a new Board of Directors was elected that declared the appeal inadmissible and upheld the decision of February 11, 2005. The petitioner therefore “decided to use the regular and suitable judicial means to oppose the allegedly unconstitutional proceedings [...] held by the Seventh Trial Court of the Judicial District of the Caracas Metropolitan Area.”²⁹

37. On February 28, 2005, the Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area published the text of the judgment in its entirety, in which it decided: 1) to convict Tulio Álvarez and sentence him to two years and three months in prison for the offense of ongoing aggravated defamation in accordance with Article 444 of the Venezuelan Criminal Code, in conjunction with Article 99 thereof; 2) to order his compliance with the penalties imposed in addition to the prison sentence, disqualification from political office for the duration of the sentence, and supervision by the authorities for one-fifth the duration of the sentence, as well as the payment of court costs; 3) to keep in place the measure barring him from leaving the country, which was imposed by the same Court on December 15, 2004; 4) to reject the defense asserted by Tulio Álvarez’s defense attorney referred to as “*exceptio veritatis*”; 5) to order the publication of the judgment in its entirety, one time only, in two nationally circulated newspapers; 6) to rule the motions filed by the petitioner’s defense attorney untimely and therefore inadmissible; and 7) to rule inadmissible the requests for nullity filed by the petitioner’s defense attorney.³⁰

38. In its judgment, the Court found that it had been fully proven that the article “*National Assembly’s Savings Bank Looted*” was written by the alleged victim and that, although he did not participate in the design of the publication, “He personally provided the information to the newspaper for purposes of publication.” The Court also found that it had been proven that the alleged victim gave interviews on television programs aired on the channels Globovisión and Televen prior to oral argument at trial, in which he “attributed [...] specific acts to Willian Lara, asserting that he had diverted funds from the Savings Bank of the National Assembly.” It similarly found that those statements were picked up by other television channels and by the print media in Venezuela, and “disseminated to the public.”

39. In addition, the Court found that after the publication of the article in the newspaper *Así es la Noticia*, the National Treasury issued a statement “admitting that the Ministry of Finance was responsible for the delays in the payment of employer contributions to the National Assembly’s Workers’ and Retirees’ Savings Bank, since it had not received sufficient income because of the coup and the oil strike.” It similarly found, through the testimony of Iván Rafael Delgado Abreu, the Superintendent of Savings Banks, that a report was prepared on the Savings Bank of the National Assembly affirming that all of the banks experienced administrative problems. Nevertheless, it found that the witness “never said that Willian Lara, as president of the National Assembly, had misappropriated the employer contribution funds.”

40. Therefore, the Court stated that, “by continuing to attribute the misappropriation of funds and corrupt acts [to Congressman Lara] through the media [...] in spite of the fact that he was already aware that the National Treasury had issued a statement [denying these acts] demonstrates, in this Court’s opinion, that [Tulio Álvarez’s] intent was to defame, which demonstrates criminal intent, that is, the conscious intent to cause harm.” The Court similarly found, based on his statements to the press at the beginning of the trial, that “The defendant continued to repeat the accusations against [Lara], once again exposing him to public scorn and ridicule [...] thus carrying out an ongoing criminal offense.” Finally, it concluded that “There is no doubt that the defendant [...] exercised no moderation in the accusation and/or publication he made in his column [...], as well as in the interviews disseminated prior to the oral argument phase of the public trial [...] even

²⁸ Annex 4. Constitutional Chamber of the Supreme Court. Judgment on writ of amparo No. 05-0361. April 14, 2005. Available at: <http://www.tsj.gov.ve/decisiones/scon/abril/475-140405-05-0361.htm>

²⁹ Annex 4. Constitutional Chamber of the Supreme Court. Judgment on writ of amparo No. 05-0361. April 14, 2005. Available at: <http://www.tsj.gov.ve/decisiones/scon/abril/475-140405-05-0361.htm>

³⁰ Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006.

though he knew, because of his access to the record of the proceedings, that what he was saying was not true.”

41. With respect to the petitioner’s assertion of truth as a defense, the judge stated that it was admissible under Article 445 of the Venezuelan Criminal Code³¹ because it pertained to conduct attributed to a member of the National Assembly, in relation to his duties as president of the National Assembly. Nevertheless, he ruled that “Every piece of evidence offered, admitted, and examined led to the conclusion that, at least the specific act that he attributed to the [congressman], [...] [was] not proven to be true.” In this regard, the defense was rejected.

42. The petitioner appealed the conviction to the Court of Appeals of the Criminal Judicial Circuit of the Caracas Metropolitan Area. On May 5, 2005, the Third Division of the court ruled the appeal admissible. On September 29, 2005, by majority vote, the Court of Appeals ruled to dismiss the appeal, finding that “There is no evidence that the lower court’s decision entailed any violation of or failure to observe the law and fundamental rights [...] that would warrant the absolute nullity of the trial.”³² Judge Judith Brazon Solano dissented, stating that, “This was an appeal of a final judgment, which allows us to examine not only the intrinsic defects of the judgment but also any procedural errors in the rendering of the judgment.”³³

43. The petitioner filed a petition for cassation with the Criminal Chamber of the Supreme Court, which dismissed it on grounds of inadmissibility on February 7, 2006.³⁴ The Court found that the judgment of the Third Division of the Court of Appeals was not subject to cassation, as it does not fall within the category of appealable decisions set forth in Article 459 of the Organic Code of Criminal Procedure. That article establishes that, “A petition for cassation may be filed only against judgments of the courts of appeals that decide the appeal, without ordering a new trial, when the Public Ministry has requested in its indictment, or the victim has requested in his or her private prosecution, the imposition of a prison sentence exceeding four years; or the judgment of conviction imposes a sentence exceeding that limit, when the Public Ministry or private prosecutor has requested the imposition of a lower sentence.”

44. On July 3, 2006 the Ninth Trial Court for the Enforcement of Judgments of the Criminal Judicial Circuit of the Caracas Metropolitan Area ordered the immediate enforcement of the conviction, finding that the petitioner did not qualify for the benefit of conditional suspension of the execution of the sentence.³⁵ The Court ordered that notice of its decision be provided to the National Electoral Council, the Office of Identification and Alien Affairs, and the Criminal Records Division of the Ministry of the Interior and Justice for its enforcement. From that time forward, and as a result of the political disqualification ordered by the court, the petitioner was excluded from the National Electoral Registry and the electoral registry of the Professors’ Association of the Central University of Venezuela. Furthermore, the Court ordered Tulio Álvarez to submit to psychological exams and other procedures in order to be able to obtain the conditional

³¹ Article 445.- A person charged with the crime of defamation shall not be allowed to argue in his defense the truthfulness or notoriety of the defamatory statement, except in the following instances: 1) When the victim is a public servant and provided that the accusation is related to the performance of his official duties; except as provided in Articles 223 and 227. 2) When legal proceedings have begun or are pending against the defamed person in connection with the allegations. 3) When the complainant formally requests that the judgment also rule on the truthfulness or falsehood of the defamatory statement. If the truth of the allegation is proven, or if the defamed person is convicted for the content of the defamatory charge, then the perpetrator of the defamation shall be exempt from penalties, except in those instances in which the means used in and of themselves constitute the crime described in the article below. *Cfr.* Venezuela. Criminal Code and the amendments thereto. National Legislative Committee of the National Assembly. Chapter VII. Art. 445. October 20, 2000.

³² Annex 3. Third Division of the Court of Appeals of the Criminal Judicial Circuit of the Metropolitan District of Caracas. Appeal Judgment, case file No. 2367-05. September 29, 2005. Communication from the State dated June 26, 2012.

³³ Annex 3. Third Division of the Court of Appeals of the Criminal Judicial Circuit of the Metropolitan District of Caracas. Appeal Judgment, case file No. 2367-05. September 29, 2005. Communication from the State dated June 26, 2012.

³⁴ Annex 5. Criminal Cassation Chamber of the Supreme Court. Cassation Judgment, case file No. AA30-P-2005-00534. February 7, 2006. Communication from the petitioner dated June 18, 2012.

³⁵ Annex 6. Ninth Trial Court for the Enforcement of Judgments of the Criminal Judicial Circuit for the Caracas Metropolitan Area. Enforcement Judgment No.1429-06, Case File No. 7. July 3, 2006. Communication from the petitioner received on April 12, 2007.

suspension of his sentence.³⁶ In spite of his immediate compliance with these measures and his repeated requests, there is no evidence of the court having ordered the conditional suspension of the sentence imposed; nor is there any information to indicate that the alleged victim was in fact incarcerated.

45. On September 28, 2006, in view of the petitioner's request, the IACHR asked the Venezuelan State to take, without delay, the necessary measures to set aside the enforcement of the July 3, 2006 decision of the Ninth Trial Court for the Enforcement of Judgments until a final decision could be rendered in the case by the bodies of the Inter-American System of Human Rights.³⁷ Informed of this request in pleadings filed by the petitioner on October 13, 2006 and February 15, 2007, the Ninth Trial Court for the Enforcement of Judgments ruled on March 26, 2007 rejected the request for the conditional suspension and indicated that it would only comply with the request of the Inter-American Commission if required to do so by order of the Superior and/or Supreme Court.³⁸

46. Finally, on December 20, 2007, pursuant to Article 494 of the Organic Code of Criminal Procedure in force,³⁹ the Ninth Trial Court for the Enforcement of Judgments ordered the *conditional suspension of the execution of the sentence* for twelve months, during which the alleged victim was on probation subject to the following conditions: a) not to change his residence without the authorization of the Court; b) report in person to his probation officer whenever instructed; c) report in person to the Court every three months; d) comply with any other condition imposed by the probation officer; and e) refrain from visiting persons involved in the act of which he was accused. The judge also ordered the suspension of the *measure barring him from leaving the country*; however, he specified that "If the defendant needs or intends to leave Venezuelan territory, he must inform the Court and duly provide the necessary documentation to support his departure, in order to verify where he will stay, the duly specified reasons for his departure, and the duration of his stay abroad."⁴⁰ According to the information provided by the alleged victim, his assigned probation officer subjected him to additional reporting each week, accompanied by his relatives, and prohibited him from making public statements, on pain of revocation of the benefit of liberty.⁴¹

³⁶ Annex 7. Ninth Trial Court for the Enforcement of Judgments of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Official Letters No. 1319-06 and 1321-06. July 17, 2006.

³⁷ Annex 13. Communication of the IACHR to the Venezuelan State, September 25, 2006. Communication forwarded to the petitioner on September 28, 2006.

³⁸ Annex 8. Ninth Trial Court for the Enforcement of Judgments of the Criminal Judicial Circuit for the Caracas Metropolitan Area. Judgment conditionally suspending the sentence in Case No. 142906. December 20, 2007. Communication from the petitioner received on February 22, 2008.

³⁹ Article 494. Conditional suspension of execution of sentence. In order for the enforcement court to order the conditional suspension of execution of a sentence, it must request a psycho-social report on the defendant from the Ministry of the Interior and Justice, and will require:

1. That the defendant not commit any other crimes, as certified by the Ministry of the Interior and Justice;
2. That the sentence imposed not exceed five years;
3. That the defendant agrees to comply with the conditions imposed upon him or her by the court or the probation officer;
4. That the defendant present an offer of employment; and

5. That the defendant has not been charged with the commission of a new crime, or had any previously granted alternative sentence revoked. If the defendant has been convicted through a plea bargain, and the sentence imposed exceeds three years, he or she may not be granted the conditional suspension of execution of sentence. *Cfr.* Organic Code of Criminal Procedure and the amendments thereto. National Assembly the Bolivarian Republic of Venezuela. Book Three. Special Proceedings. Book Five. Enforcement of Sentence. Chapter III. Conditional Suspension of Execution of Sentence, Alternative Sentencing Formulas, and Judicial Reduction of Sentence for Work or Education. Art. 494. October 2, 2001.

⁴⁰ Annex 8. Ninth Trial Court for the Enforcement of Judgments of the Criminal Judicial Circuit for the Caracas Metropolitan Area. Judgment conditionally suspending the sentence in Case No. 142906. December 20, 2007. Communication from the petitioner received on February 22, 2008.

⁴¹ Communication of the petitioner dated february 19, 2007 and annexes.

47. On January 18, 2008, the Fourteenth Assistant Prosecutor of the Public Ministry with National Jurisdiction over the Enforcement of Sentences appealed the decision to conditionally suspend the sentence. In a May 27, 2008 decision, the Ninth Division of the Court of Appeals of the Criminal Judicial Circuit of the Caracas Metropolitan Area ruled the appeal inadmissible, finding that the Public Ministry lacked standing.⁴²

48. On March 4, 2009 the Ninth Trial Court for the Enforcement of Judgments of the Criminal Judicial Circuit for the Caracas Metropolitan Area ordered the *full release* of the petitioner. This decision was based on his compliance with the term of probation and all of the obligations imposed.⁴³

49. On October 7, 2009, the alleged victim filed a petition for a constitutional remedy [writ of *amparo*] alleging that, in spite of having completed his sentence, the Electoral Commission of the Professors' Association of the Central University of Venezuela had politically disqualified him for an indefinite period of time, in violation of his constitutional rights⁴⁴. On November 25, 2009, the Electoral Chamber of the Supreme Court granted the *amparo* action,⁴⁵ finding that the association had failed to include the petitioner in its electoral registry, even though there was a judgment granting him full release for having completed his sentence. It also found that, in any case, the political disqualification established in Article 65 of the Constitution⁴⁶ is not applicable to the elections of that professional association. In that regard, it stated that, "The situations presented amount to a violation of the plaintiff's constitutional rights to political participation and voting, as he is being deprived of his right to participate in the electoral processes of the professors' association to which he belongs, even though there is no legal impediment to his doing so."

50. On March 16, 2010, the Office of the Comptroller General of the Republic requested the constitutional review of the judgment. On November 3, 2010, the Constitutional Chamber of the Supreme Court granted the request for review and overturned the decision of the Electoral Chamber, remanding the case to the Electoral Chamber for a new decision.⁴⁷ The Constitutional Chamber found that the Electoral Chamber's judgment failed to take account of binding criteria and interpretations of the relevant constitutional standards and principles. In particular, it held that, "Article 65 of the Constitution of the Bolivarian Republic of Venezuela does not preclude the possibility that such disqualification may be established by an administrative body *stricto sensu* or by a functionally autonomous body, or the authority of the legislature to establish, within the limits of the Constitution, the scope of the political disqualification as a sanction or penalty, which Articles 64 and 65 of the Constitution do not limit to positions of public office."⁴⁸

Criminal defamation and its application to speech on matters of public interest and about public servants in Venezuela

51. As the IACHR and its Office of the Special Rapporteur for Freedom of Expression have stated in their reports on Venezuela, the criminal prosecution of alleged criminal defamation offenses against public

⁴² Annex 9. Court of Appeals of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment in Case No. 2261-08. May 27, 2008. Communication from the State dated October 2, 2008.

⁴³ Annex 10. Ninth Trial Court for the Enforcement of Judgments of the Criminal Judicial Circuit for the Caracas Metropolitan Area. Judgment in Case No. 9E-1429-06. March 4, 2009. Communication from the petitioner received on July 7, 2009.

⁴⁴ Annex 11. Electoral Chamber of the Supreme Court of Justice. Judgment No. 151. November 25, 2009. Communication from petitioner received on April 20, 2010.

⁴⁵ Annex 11. Electoral Chamber of the Supreme Court of Justice. Judgment No. 151. November 25, 2009. Communication from petitioner received on April 20, 2010.

⁴⁶ Article 65. Persons who have been convicted of crimes committed while holding office or other offenses against public property, shall be ineligible to run for any office filled by popular vote, for such period as may be prescribed by law after serving their sentences, depending on the seriousness of the offense. Constitution the Bolivarian Republic of Venezuela. National Constituent Convention. With Amendment No. 1. Art. 65. February 15, 2009.

⁴⁷ Annex 12. Constitutional Chamber of the Supreme Court. Judgment No. 1.063. November 3, 2010. Communication from the petitioner dated June 19, 2012.

⁴⁸ Annex 12. Constitutional Chamber of the Supreme Court. Judgment No. 1.063. November 3, 2010. Communication from the petitioner dated June 19, 2012.

servants and about matters of public interest has been a worrisome trend in Venezuela since the time of the events in this case.⁴⁹ These cases often remain open in the courts for many years, resulting in intimidation and self-censorship that disproportionately affects the right to freedom of expression, as recognized by the Court and the Commission in the case of *Néstor José and Luis Uzcátegui et al. v. Venezuela*.⁵⁰

52. The IACHR and its Office of the Special Rapporteur indicated in its 2011 Annual Report that the criminal laws in Venezuela contain provisions that are incompatible with Article 13 of the American Convention and emphasized the need to revise the legal framework governing crimes against honor and criminal defamation⁵¹ that were still in force in Venezuela.

53. The State of Venezuela has not adopted measures to implement these recommendations and, on the contrary, has widened the scope of desacato laws and criminal defamation provisions. In March 2005, the Criminal Code was amended to broaden the scope of the provisions protecting the honor and reputation of government employees from critical speech that may be considered offensive. Prior to the 2005 reform, the President of the Republic, the Vice President, government ministers, governors, the Mayor of the Metropolitan District of Caracas, the Supreme Court justices, the presidents of the Legislative Councils, and high court judges could press charges for the offense of criminal defamation. The legislative amendment expanded this list to include members of the National Assembly, the members of the National Electoral Council, the Attorney General, the Prosecutor General, the Ombudsperson of the People, the Inspector General, and members of the Military High Command.⁵² The 2005 reform preserved the offense known as “insult” [*vilipendio*] in Article 149, which is a type of criminal defamation against the institutions of the State, as well as the crime of “denigration of a public official” [*ultraje contra la autoridad*], contained in Article 222.⁵³ The reform also preserved the offense of defamation [*difamación*] and included the penalties of steep fines, in addition to imprisonment.⁵⁴

V. LEGAL ANALYSIS

54. The Commission will examine whether Articles 13, 22, 23, 8, and 25, all in relation to Articles 1.1 and 2 of the American Convention on Human Rights, have been violated in this case as the petitioner alleges.

A. Freedom of thought and expression (Article 13) in relation to Articles 1.1 and 2 of the American Convention

55. Article 13 of the American Convention provides, in pertinent part:

⁴⁹ Annex 19. IACHR Democracy and Human Rights in Venezuela. OEA/Ser.L/V/II. 3 Doc. 54. December 30, 2009. Paras. 381-402; IACHR. 2001 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II. Doc. 69. December 30, 2011. Para. 510-520. IACHR. 2013 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 876-897; IACHR. 2014 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere) OEA/Ser.L/V/II. Doc. 13. March 9, 2015. Para.114-1119.

⁵⁰ IACHR. Report No. 88/10. Case 12.661. Merits. Néstor José and Luis Uzcátegui et al. Venezuela. July 14, 2010. Available in Spanish at: <http://www.cidh.org/demandas/12.661esp.pdf>; 1/A Court H.R., *Case of Uzcátegui et al. v. Venezuela*. Merits and reparations. Judgment of September 3, 2012. Series C No. 249.

⁵¹ IACHR. 2010 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II. Doc. 5. March 7, 2011. Para. 412 a 524.

⁵² Criminal Code of Venezuela. 2005 Amendments. Official Gazette 5768E of April 13, 2005. Available at: <http://www.ministeriopublico.gob.ve/web/guest/codigo-penal>

⁵³ Criminal Code of Venezuela. 2005 Amendments. Official Gazette 5768E of April 13, 2005. Available at: <http://www.ministeriopublico.gob.ve/web/guest/codigo-penal>

⁵⁴ Criminal Code of Venezuela. 2005 Amendments. Official Gazette 5768E of April 13, 2005. Available at: <http://www.ministeriopublico.gob.ve/web/guest/codigo-penal>

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

[...]

56. The right to freedom of thought and expression, according to the protection granted under Article 13 of the American Convention, includes the right of individuals to express their own thoughts, as well as the right to seek, receive, and disseminate information and ideas of all kinds.⁵⁵ This right is critically important for the personal development of every individual, for the exercise of his or her autonomy and other fundamental rights and, finally, for the consolidation of a democratic society.⁵⁶

57. In this regard, the Inter-American Commission and the Inter-American Court have maintained that freedom of expression has two dimensions: an individual dimension and a social dimension. The individual dimension of freedom of expression consists of the right of every person to express his or her own thoughts, ideas, and information, and is not limited to the theoretical recognition of the right to speak or write; rather, it includes, inseparably, the right to use any appropriate means to disseminate thought and enable it to reach the greatest number of recipients.⁵⁷ The second dimension of the right to freedom of expression, the collective or social dimension, consists of society's right to seek and receive any information, to learn about the thoughts, ideas, and information of others, and to be well-informed.⁵⁸ In this regard, the Court has held that freedom of expression is a means for the exchange of ideas and information among individuals; it

⁵⁵ IACHR, Report No. 82/10, Case 12.524, Merits, Jorge Fontevecchia and Hector d'Amico, Argentina, July 13, 2010, para. 86. Available in Spanish at: <http://www.cidh.oas.org/demandas/12.524Esp.pdf>.

⁵⁶ IACHR, Report No. 82/10, Case 12.524, Merits, Jorge Fontevecchia and Hector d'Amico, Argentina, July 13, 2010, para. 85. Available in Spanish at: <http://www.cidh.oas.org/demandas/12.524Esp.pdf>.

⁵⁷ 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. 31, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf.

⁵⁸ I/A Court H.R., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 53; I/A Court H.R., Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 75; I/A Court H.R., Case of López Álvarez v. Honduras. Merits, Reparations and Costs. Judgment of February 1, 2006. Series C No. 141, para. 163; IACHR. Arguments before the Inter-American Court in the Case of Herrera Ulloa v. Costa Rica. Reprinted in: I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Judgment of July 2, 2004. Series C No. 107, para. 101.1 a); I/A Court H.R., Case of Herrera Ulloa. Judgment of July 2, 2004. Series C No. 107, para. 108; I/A Court H.R., Case of Ivcher Bronstein v. Peru. Judgment of February 6, 2001. Series C No. 74; I/A Court H.R., Case of Ricardo Canese v. Paraguay. Judgment of August 31, 2004. Series C No. 111, para. 77; 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. 64; 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. 30, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf; IACHR. 1994 Annual Report. Chapter V: Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights. Title III. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995; IACHR. Report No. 130/99. Case No. 11.740. Víctor Manuel Oropeza. Mexico. November 19, 1999, para. 51; IACHR. Report No. 11/96, Case No. 11.230. Francisco Martorell. Chile. May 3, 1996. Para. 53.

includes their right to try to convey their views to others, but it also entails the right of all persons to freely learn about opinions, accounts, and news of all kinds.⁵⁹

58. The right to freedom of expression is an essential cornerstone of democratic societies, given its indispensable structural relationship to democracy.⁶⁰ The objective of Article 13 of the American Convention is to strengthen the workings of deliberative and pluralistic democratic systems through the protection and promotion of the free circulation of information, ideas, and expressions of all kinds.⁶¹ The overarching importance of freedom of expression in a democratic society has also been recognized in the same terms by the European Court of Human Rights,⁶² the United Nations Human Rights Committee⁶³ and the African Commission on Human and Peoples' Rights.⁶⁴ Article 4 of the Inter-American Democratic Charter characterizes freedom of expression and the press as "essential components of the exercise of democracy."⁶⁵ Similarly, the 1999 Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression recalls that, "Freedom of expression is a fundamental international human right and a basic component of a civil society based on democratic principles." For the same reasons, it has been said that the States must promote, rather than constrain, the vigorous, plural, and uninhibited deliberation of all public affairs.

59. Notwithstanding its fundamental significance, freedom of expression is not an absolute right. Article 13.2 of the American Convention, which prohibits prior censorship, also allows for restrictions to freedom of expression through the imposition of subsequent liability for the abuse of this right. Nevertheless, these restrictions are exceptional and must meet the conditions set forth in the Convention; that is, they must be established by law, have a legitimate aim, and be necessary and proportionate to the accomplishment of that

⁵⁹ I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 110. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf; I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 79. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf; 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. 66. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf

⁶⁰ 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; 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, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf.

⁶¹ IACHR. Arguments before the Inter-American Court in the Case of Ivcher Bronstein v. Peru. Reprinted in: I/A Court H.R., Case of Ivcher Bronstein v. Peru. Judgment of February 6, 2001. Series C No. 74, para. 143. d); IACHR. Arguments before the Inter-American Court in the Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Reprinted in: 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. 61. b).

⁶² I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 83; I/A Court H.R., Case of Herrera Ulloa. Judgment of July 2, 2004. Series C No. 107, para. 113; I/A Court H.R., Case of Ivcher Bronstein v. Peru. Judgment of February 6, 2001. Series C No. 74, para. 152; Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.). Judgment of February 5, 2001. Series C No. 73, para. 69; Scharsach and News Verlagsgesellschaft v. Austria, no. 39394/98, § 29, ECHR 2003-XI; Perna v. Italy [GC], no.48898/98, § 39, ECHR 2003-V; Dichand and others v. Austria, no. 29271/95, § 37, ECHR 26 February 2002; Eur. Court H.R., Case of Lehideux and Isorni v. France, Judgment of 23 September, 1998, para. 55; Eur. Court H.R., Case of Otto-Preminger-Institut v. Austria, Judgment of 20 September, 1994, Series A no. 295-A, para. 49; Eur. Court H.R. Case of Castells v. Spain, Judgment of 23 April, 1992, Series A. No. 236, para. 42; Eur. Court H.R. Case of Oberschlick v. Austria, Judgment of 25 April, 1991, para. 57; Eur. Court H.R., Case of Müller and Others v. Switzerland, Judgment of 24 May, 1988, Series A no. 133, para. 33; Eur. Court H.R., Case of Lingens v. Austria, Judgment of 8 July, 1986, Series A no. 103, para. 41; Eur. Court H.R., Case of Barthold v. Germany, Judgment of 25 March, 1985, Series A no. 90, para. 58; Eur. Court H.R., Case of The Sunday Times v. United Kingdom, Judgment of 29 March, 1979, Series A no. 30, para. 65; Eur. Court H.R., Case of Handyside v. United Kingdom, Judgment of 7 December, 1976, Series A No. 24, para. 49.

⁶³ U.N. Human Rights Committee, Aduayom et al. v. Togo (422/1990, 423/1990 & 424/1990), Decision of 12 July, 1996, para. 7.4, and U.N. Human Rights Committee. General Comment N° 34: Article 19 Freedoms of opinion and expression. September 12, 2011.

⁶⁴ African Commission on Human and Peoples' Rights, Media Rights Agenda and Constitutional Rights Project v. Nigeria, Communications No. 105/93, 128/94, 130/94 and 152/96, Decision of 31 October, 1998, para. 54; African Commission on Human and Peoples' Rights. Declaration of Principles on Freedom of Expression in Africa. 17 - 23 October, 2002; African Court on Human Rights and Peoples' Rights. In the Matter of Lohé Issa Konaté v. Burkina Faso. Application No. 004/2013. Judgment of December 5, 2014.

⁶⁵ Art. 4, Inter-American Democratic Charter, adopted on September 11, 2001. Available at: http://www.oas.org/charter/docs/resolution1_en_p4.htm.

aim in a democratic society.⁶⁶ The failure to meet any one of these requirements means that the measure imposed is contrary to the American Convention.

60. The IACHR and the Inter-American Court have consistently stated that the States have less room to impose restrictions on freedom of expression “whenever dealing with expressions concerning the State, matters of public interest, public officials in the performance of their duties, candidates for public office, private citizens involved voluntarily in public affairs, or political speech and debate.”⁶⁷

61. Along these same lines, the Commission has held that the analysis of the proportionality of the restrictive measures must take account of: “(1) the greater degree of protection accorded to speech concerning the suitability of public officials and their performance, or of those who aspire to hold public office; (2) speech concerning political debate or debate on matters of public interest—due to the need for a broader degree of openness for the wide-ranging debate required in a democratic system and the citizen oversight inherent in it—and (3) the correspondingly heightened threshold of tolerance for criticism that State institutions and officials must demonstrate when confronted by the statements and opinions of persons exercising such oversight. In such cases, the demands of the protection of these individuals’ right to their honor and reputation must be balanced against the interests of an open debate on public affairs [...] On the point, for example, the Inter-American Court in the case of *Tristán Donoso v. Panama*, recalled that “any expression regarding the suitability of an individual for holding public office or regarding the acts performed by public officials in the course of their duties enjoy greater protection, thus fostering democratic debate.”⁶⁸

62. Indeed, democratic debate means allowing for the free circulation of ideas and information on the activities of public servants by the media, representatives and their political parties, and any person who wishes to express his or her opinion or provide information. It is especially important for everyone to be able to report and corroborate, through debate and the exchange of information and ideas, alleged acts of corruption attributable to State entities and employees.⁶⁹

63. In this case, it is not disputed that the most restrictive or severe instrument available to the State—the criminal law—was applied, or that the alleged victim was sentenced to a term of imprisonment and the limitation of his political rights as a consequence of the exercise of his right to freedom of expression. Nor is it in question that the statements made by Tulio Alberto Álvarez concern a matter of public interest and the conduct of a public official, specifically, the reported misappropriation of funds from the Venezuelan National Assembly’s Workers’ and Retirees’ Savings Bank during the term of the then-president of the legislature; or that the contributions and withholdings owed to the Savings Bank when the petitioner’s column was published had reached a considerably high sum.

⁶⁶ I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 120; I/A Court H.R., Case of Ricardo Canese v. Paraguay. Judgment of August 31, 2004. Series C No. 111, para. 95; 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, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.pdf; Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 54. See also: Annual Report of the Inter-American Commission on Human Rights, Annual Report 2009 of the Office of the Special Rapporteur for Freedom of Expression, p. 258, paras. 68-69, available at: <http://www.oas.org/en/iachr/expression/docs/reports/annual/Informe%20Anual%202009%202%20ENG.pdf>.

⁶⁷ IACHR. Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Inter-American Framework on Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 100; I/A Court H.R., Case of Ivcher Bronstein v. Peru. Judgment of February 6, 2001. Series C No. 74; I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Judgment of July 2, 2004. Series C No. 107; I/A Court H.R., Case of Ricardo Canese v. Paraguay. Judgment of August 31, 2004. Series C No. 111; I/A Court H.R., Case of Palamara Iribarne v. Chile. Judgment of November 22, 2005. Series C No. 135; I/A Court H.R., Case of Kimel v. Argentina. Judgment of May 2, 2008 Series C No. 177; IACHR. 1994 Annual Report. Chapter V: Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995.

⁶⁸ IACHR. Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Inter-American Framework on Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 101.

⁶⁹ IACHR. Arguments before the Inter-American Court in the Case of Herrera Ulloa v. Costa Rica. Reprinted in: I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Judgment of July 2, 2004. Series C No. 107, para. 101.2 h).

64. In these types of cases, it is incumbent upon the Commission to examine, under a strict criterion of necessity, whether the measure imposed is authorized in light of Article 13.2 of the American Convention, that is, whether: (a) it is established beforehand in a law, and set forth expressly, exhaustively, precisely, and clearly, both substantively and procedurally;⁷⁰ (b) it pursues compelling objectives authorized by the Convention;⁷¹ and (c) is absolutely necessary in a democratic society to accomplish those objectives⁷² and is strictly proportional to the aim pursued (three-part test).⁷³

a) Strict formulation of the provision establishing the limitation or restriction (legal provision)

65. With respect to the first requirement of *three-part test* and the clear and precise legal provision of the restriction, the IACHR and the Inter-American Court have both held that restrictions to freedom of expression must be established by law,⁷⁴ in both substantive and procedural terms. Should the limitation or restriction be based on criminal law, the strict requirements for the statutory definition of a crime must be observed in order to satisfy the principle of legality, using strict and unequivocal terms that clearly delimit the punishable conduct.⁷⁵ Therefore, according to the inter-American case law and doctrine, the statutory description of speech-related offenses must be stated “expressly, accurately, [exhaustively] and previously, even more so

⁷⁰ 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. 59, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf; Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177. para. 63; Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151. para. 89; Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. para. 121; See also, IACHR. 1994 Annual Report. Chapter V: Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995. Available at: <http://www.cidh.org/annualrep/94eng/chap.5.htm>; IACHR. Report No. 11/96. Case 11.230. Merits. Francisco Martorell. Chile. May 3, 1996.

⁷¹ 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. 85; Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. paras. 121 & 123; 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. 43, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf.

⁷² I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. paras. 121 & 123; 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. 46, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf; Corte I.D.H., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177. para. 83; 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. 85.

⁷³ I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. paras. 121 & 123; 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. 46, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf; Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177. para. 83; Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135. para. 85. See also, IACHR. 1994 Annual Report. Chapter V: Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995. Available at: <http://www.cidh.oas.org/annualrep/94span/cap.V.htm#CAPITULO%20V>.

⁷⁴ 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; 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. 40, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf. See also, Case of Tristán Donoso v. Panama. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, para. 77; I/A Court H.R., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 63; Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 89.

⁷⁵ 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; I/A Court H.R., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 63.

[because] criminal law is the most restrictive and severe means to establish liabilities for illicit behavior, taking into account that the legal framework [should] provide [legal] certainty to its citizens.”⁷⁶

66. The IACHR has emphasized that provisions curtailing freedom of expression must be drafted clearly, leaving no room for interpretation. It stated that, “even if there are specific judicial interpretations of such provisions, that is not a sufficient reason for them to be overly broad. Judicial interpretations may change, or not be followed strictly, and are not general in nature.”⁷⁷

67. In the case of *Kimel v. Argentina*, the Inter-American Court found that the statutory definition of the criminal defamation offenses of *calumnia* and *injuria* violated Articles 13 and 9 the American Convention, in relation to Articles 1.1 and 2,⁷⁸ because they were overly broad and ambiguous. Later, at the supervisory stage, the Court found that the State had complied with the judgment when it amended the statutory definitions of the offenses, specifying the element of intent and defining the scope of application of the criminal provision with the aim of protecting speech concerning matters of public interest, among others.⁷⁹ In addition, in the case of *Usón Ramírez v. Venezuela*, the Inter-American Court found that a statutory definition of the offense of “slander, offense, or disparagement of the National Armed Forces,” which failed to clearly establish the elements of the crime and did not specify the criminal intent required of the perpetrator, violated Articles 9 and 13 of the American Convention, in relation to Articles 1.1 and 2,⁸⁰ because the definition of the offense was vague, ambiguous, and imprecise.⁸¹

⁷⁶ 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. Cfr. I/A Court H.R., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 63; 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, paras. 39-40, available at: http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf; Corte I.D.H., Case of Palamara Iribarne v. Chile. 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. 117; IACHR. 1994 Annual Report. Chapter V: Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights. Title IV. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995; IACHR. Report No. 11/96. Case No. 11.230. Francisco Martorell. Chile. May 3, 1996, para. 55; IACHR. Arguments before the Inter-American Court in the Case of Ricardo Canese v. Paraguay. Reprinted in: I/A Court H.R., Case of Ricardo Canese v. Paraguay. Judgment of August 31, 2004. Series C No. 111, para. 72. a).

⁷⁷ IACHR. Arguments before the Inter-American Court in the Case of Ricardo Canese v. Paraguay. Reprinted in: I/A Court H.R., Case of Ricardo Canese v. Paraguay. Judgment of August 31, 2004. Series C No. 111, paras. 72. s) - 72.u).

⁷⁸ The Inter-American Court examined the drafting of Article 109, which provided that “Defamation or the false imputation of a publicly actionable crime shall be punished with imprisonment from one to three years,” and Article 110, which stated that “Any person who harms another person’s honor or reputation shall be punished with a fine from 1,500.00 to 90,000.00 pesos or imprisonment from one month to one year,” and found that, “The lack of sufficient accuracy in the criminal legislation punishing defamation” was a violation of Articles 9 and 13.1 of the American Convention. I/A Court H.R., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, paras. 64-67.

⁷⁹ I/A Court H.R., Case of Kimel v. Argentina. I/A Court H.R., Case of Kimel v. Argentina. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of May 18, 2010, paras. 30-35, available at: http://www.corteidh.or.cr/docs/supervisiones/kimel_18_05_10_ing.pdf; Cfr. Law 26.551, enacted on November 26, 2009, available at: <http://infoleg.gov.ar/infolegInternet/anexos/160000-164999/160774/norma.htm>. Pursuant to this reform, the respective articles of the Argentine Criminal Code provide:

Article 109: Defamation or the false imputation to a specific person of a publicly actionable crime shall be punished with a fine of three thousand (3,000) to thirty thousand pesos (30,000). In no case will speech referring to matters of public interest or matters that are not affirmative be considered a defamation crime.

Article 110: Any person who intentionally harms another person’s honor or reputation shall be punished with a fine of one thousand five hundred (1,500) to twenty thousand (20,000) pesos. In no case will speech referring to matters of public interest or matters that are not affirmative be considered a defamation crime. Nor will speech that harms another person’s honor be considered a defamation crime when it is related to a matter of public interest.

⁸⁰ Article 505 of the Organic Code of Military Justice in force at that time provided that: “whoever slanders, offends, or disparages the National Armed Forces or any of its units shall be subject to three to eight years in prison.” Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, paras. 56-57.

⁸¹ 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, paras. 56-57.

68. On February 28, 2005, pursuant to a complaint filed by the then-President of the National Assembly, Willian Lara, petitioner Tulio Alberto Álvarez was convicted of the criminal offense of ongoing aggravated defamation, provided for and punishable under the sole paragraph of Article 444 of the Criminal Code currently in force, in relation to Article 99 thereof.⁸² Article 444 states:

Article 444.- Defamation: A person who, in communication with several others, either together or separately, accuses an individual of a given act that could expose him to public scorn or hatred, or that is offensive to his honor or reputation, shall receive a punishment of between three and eighteen months in prison. Should the crime be committed in a public document or in writings or drawings displayed or exposed to the public, or through other public means, the punishment shall be a prison term of between six and thirty months.⁸³

69. In its report on the Case of *Néstor José and Luís Uzcátegui, et al.*, the IACHR had occasion to examine the compatibility of this type of criminal offense with the requirements of Articles 13 and 9 of the Convention, in relation to Articles 1.1 and 2 thereof. The IACHR found that, as noted in *Kimel*,⁸⁴ cited in the Cases of *Tristán Donoso*⁸⁵ and *Usón Ramírez*,⁸⁶ the verb used to define the *actus reus* in the definition of the crime is so ambiguous that it is impossible to have certainty and foreseeability with regard to conduct that is prohibited versus conduct that is protected by the right to freedom of expression. In this regard, it found that the ambiguity and breadth of the provision allows for any complaint, criticism, or objection to the actions of government authorities to give rise to lengthy criminal proceedings—such as the one against Luis Uzcátegui—that are in and of themselves a psychological, social, and economic burden that the person should not have to bear given the ambiguous nature of the underlying provision.⁸⁷ Consequently, the IACHR reiterated that, “Should the State decide to keep laws that penalize defamation, it must draft them specifically enough that they do not affect free expression about the actions of government entities and their members.”⁸⁸

70. To use the expression of the Inter-American Court from a case in which the principle of strict legality was also applied, these types of provisions should establish “a clear definition of the incriminatory behavior, setting its elements, and defining the behaviors that are not punishable (...).”⁸⁹

71. The IACHR reiterates the opinion expressed in the Case of *Néstor José and Luís Uzcátegui et al.*, and underscores that Article 444 of the Criminal Code is incompatible with the principle of strict legality and the right to freedom of expression because it fails to establish clear parameters to anticipate prohibited conduct and its elements. The provision in question conditions the definition of the unlawful conduct on the verification of hypothetical damages (“that could expose him”) and on the determination of subjective criteria

⁸² Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006. Article 99 refers to continuity as an aggravating factor. Article 99.- Several violations of the same legal provision are considered a single punishable act even if they were committed on different dates, provided that they were carried out through acts stemming from a single decision; but the penalty shall increase by one-sixth to one-half.

⁸³ Criminal Code of Venezuela. Published in Official Gazette No. 36.920 of March 28, 2000. Available in Spanish at: http://www.oas.org/juridico/spanish/mesicic3_ven_anexo6.pdf

⁸⁴ I/A Court H.R., Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177.

⁸⁵ 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.

⁸⁶ 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.

⁸⁷ IACHR, Report No. 88/10, Case 12.661, Merits, *Néstor José and Luís Uzcátegui et al.*, Venezuela, July 14, 2010, para. 279.

⁸⁸ Arguments of the Inter-American Commission in the Case of *Kimel v. Argentina*, I/A Court H.R., Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177. para. 29.

⁸⁹ 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; Cfr. 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, paras. 105-107.

like “public scorn or hatred.” In other words, it refers to elements that can only be defined by the judge *ex post facto*. To this extent, Article 444 of the Venezuelan Criminal Code cannot provide reliable guidance to individuals in their conduct, given the serious consequence of the deprivation of personal liberty and the revocation of political rights. It does not establish a bright line to identify when it is legal or illegal to publicly denounce criminal acts or express a critical opinion about a government authority. On the contrary, the vagueness of the provision opens the door to the use of the criminal law for the creation of an intimidating environment that inhibits speech on matters of public interest.⁹⁰

72. Bearing in mind the ambiguity and imprecision of these statutory definitions, and pursuant to the recommendations of the IACHR and the Inter-American Court, several countries in the region have introduced legislative reforms to either repeal crimes against honor or better define their scope.

73. In Mexico, for instance, the Federal Criminal Code provisions on crimes against honor were repealed in their entirety in 2007.⁹¹ Later, in 2011, the National Congress deleted Articles 1 and 31 of the Law on Press Crimes. Those articles referred to “attacks on privacy” and the penalties applicable to those infractions, respectively.⁹²

74. The Supreme Court of Mexico has similarly ruled that state criminal laws that protect the honor and privacy of public servants are incompatible with the Mexican Constitution and Mexico’s international obligations on the issue. In a June 17, 2009 judgment, the same Mexican Supreme Court that ruled Article 1 of the Press Law of the State de Guanajuato unconstitutional⁹³ held that when provisions establishing subsequent liability “are criminal in nature, and allow for the deprivation of a person’s assets and core rights—including, on occasion, his or her liberty—the requirements on [the strict formulation of the law] are even more stringent.” Examining the facts of the specific case, the Court concluded that the provision on which the appealed conviction was based⁹⁴ did not “meet the requirement of exhaustiveness contained within the general principle of criminal legality, or the requirement—functionally equivalent in this case—that every restriction of freedom of expression must be provided for in advance in a clearly and precisely drafted law.” The Supreme Court explained that, first, there is “a patent lack of clarity [...] resulting from the defective structuring of something that in our legal system [...] is subject to strict requirements: the statutory definition of a criminal offense.” Second, it found that parts of this provision were vague and overly broad because they referred to merely hypothetical damages, and covered both direct harm to a person’s reputation and the simple “discrediting” of it, and the potential effects “on the interests” of individuals. In the Court’s opinion, “The inclusion of the latter irremediably obscures the interest or right that the legislature supposedly aims to protect from the abusive exercise of freedom of expression and leaves the definition of the offense completely open.”⁹⁵

75. In 2013, Jamaica passed the Defamation Act,⁹⁶ which completely eliminates the use of the criminal law in defamation cases. The law amended the defamation laws in force at the time, which had been enacted

⁹⁰ IACHR, Report No. 88/10, Case 12.661, Merits, Néstor José y Luís Uzcátegui et al., Venezuela, July 14, 2010, para. 279.

⁹¹ DOF. April 13, 2007. Decreto por el que se derogan diversas disposiciones del Código Penal Federal y se adicionan diversas disposiciones al Código Civil Federal. See also, House of Representatives. May 2012. Criminal defamation and defamatory libel [*Calumnias, difamación e injurias*]. Estudio Teórico Conceptual, de antecedentes, de las reformas al Código Penal Federal, iniciativas presentadas, y de Derecho Comparado.

⁹² Mexico. Law on Press Crimes. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/40.pdf>

⁹³ Supreme Court of Mexico. Direct Amparo 2044-2008, June 17, 2009. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/08020440.010.doc>.

⁹⁴ Art. 1 of the Guanajuato Press Law. Available at: <http://docs.mexico.justia.com/estatales/guanajuato/ley-de-imprenta-del-estado-de-guanajuato.pdf>

⁹⁵ Supreme Court of Mexico. Direct Amparo 2044-2008, June 17, 2009. Available at: <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/08020440.010.doc>.

⁹⁶ On November 28, Sir Patrick Linton Allen, Governor General of Jamaica, assented the Defamation Act. Jamaican Parliament. Defamation Act, 2013. Act No. 31.

in 1851 and 1961.⁹⁷ The reform decriminalized the offense of criminal libel and established advanced criteria for the resolution of civil cases in accordance with the highest principles of international law on the subject.⁹⁸ That same year, the National Assembly of Ecuador passed the new Comprehensive Organic Criminal Code⁹⁹ that repealed the criminal defamation offense known as *desacato*,¹⁰⁰ and decriminalized the offense of defamatory libel [*injuria no calumniosa*].

76. For its part, Argentina decriminalized the criticism of matters of public interest in a criminal reform adopted in November 2009¹⁰¹ to comply with the judgment of the Inter-American Court in the Case of *Kimel v. Argentina*. This reform eliminated penalties for the dissemination of opinions or information about public servants or matters of public interest. The legislative reform contains some important points: i) it eliminates the penalty of imprisonment for the commission of criminal defamation offenses [*injuria* and *calumnia*], replacing it with a monetary fine; ii) it establishes that speech “referring to matters of public interest or matters that are not affirmative” will in no case be considered criminal defamation; iii) provides that “speech that harms another person’s honor” will not be considered criminal defamation “when it relates to a matter of public interest”; and iv) it establishes that a person who, by any means, publishes or reproduces defamatory statements made by another cannot be penalized as the author of the defamatory statements, unless the content was not accurately attributed to the pertinent source.

77. In 2009, Uruguay introduced amendments to its Criminal Code to eliminate criminal penalties for the dissemination of opinions or information about public servants or matters of public interest. Although it is not a comprehensive reform, the provision enacted contains several important points: i) it exempts from liability persons who express any type of statement about matters of public interest, whether referring to public servants and persons who, because of their profession or occupation, have significant social exposure, or to any person who has voluntarily been involved in matters of public interest; ii) it protects accurate reporting by eliminating penalties against persons who make any type of statement on matters of public interest, when the author of those statements is identified; iii) it eliminates penalties against any person who makes or disseminates any type of humorous or artistic statement on matters of public interest; iv) it provides expressly that the provisions enshrined in the American Convention “are governing principles for the interpretation, application, and articulation of civil, procedural, and criminal provisions on expression, opinion, and dissemination, related to communication and information.” In this regard, it found that “the criteria contained in the judgments and advisory opinions of the Inter-American Court of Human Rights and in the decisions and reports of the Inter-American Commission on Human Rights will be taken into particular account.”¹⁰²

78. The IACHR has highlighted these reforms as evidence of regional progress.¹⁰³ Vague, ambiguous, overly broad, or open provisions, by their mere existence, discourage the dissemination of information and

⁹⁷ Ministry of Justice. The Defamation Act. Law 33 of 1961. Act 47 of 1963; Ministry of Justice of Jamaica. The Libel and Slander Act. 1851.

⁹⁸ Houses of Parliament. Defamation Act, 2013 Act No. 31. See also, Jamaica Information Service. November 5, 2013. Defamation Act Passed in the House of Representatives; IFEX/IPI. November 6, 2013. Jamaica decriminalises defamation; Jamaica Observer. November 6, 2013. House passes Defamation Act; Committee to Protect Journalists (CPJ). November 7, 2013. CPJ hails elimination of criminal defamation in Jamaica.

⁹⁹ El Ciudadano. December 17, 2013. El nuevo Código Penal mejorará la seguridad ciudadana; El Ciudadano. December 19, 2013. El Ejecutivo analizará minuciosamente el proyecto de Código Integral Penal (AUDIO).

¹⁰⁰ The criminal content of articles 230, 231, and 232 of the Criminal Code currently in force are not taken up again in Books I and II of the Comprehensive Organic Criminal Code enacted.

¹⁰¹ Argentina. Criminal Code. Law 26.551. Available at: <http://www.infoleg.gov.ar/infolegInternet/anexos/15000-19999/16546/texact.htm#16>

¹⁰² Uruguay. Law No. 18.515. Available at: <http://www.parlamento.gub.uy/leyes/ AccesoTextoLev.asp?Lev=18515&Anchor>

¹⁰³ IACHR. 2007 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter II (Situation of Freedom of Expression in the Region). OEA/Ser.L/V/II.131 Doc. 34 rev. 1. March 8, 2008, p. 109; IACHR. 2009 Annual Report. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 8; IACHR. 2009 Annual Report. Report of the Office of the Special

[continues ...]

opinions due to fear of punishment, and can lead to broad judicial interpretations that unduly restrict freedom of expression; therefore, the State must specify the conduct that may give rise to subsequent liability, in order to protect the free expression of disagreement and protest over the actions of the authorities.

79. In the instant case, the elements of the crime at issue do not include safeguards or exceptions that allow for the broadest possible debate about matters of public interest and about public servants and the exceptional use of the criminal law to establish subsequent liability for speech that is specially protected by the right to freedom of expression. On the contrary, the State has asserted to the Commission that the right to honor “is an absolute right” not subject to limitations under the Venezuelan Constitution and case law. Furthermore, it is clear that this offense has continued to be used in criminal cases against journalists who discuss matters of public interest or about public servants¹⁰⁴.

80. In view of the above, the Commission concludes that the ambiguity and breadth of Article 444 of the Criminal Code applied in this case results in a breach of the requirement of strict legality in the imposition of restrictions on the freedom of expression of Tulio Álvarez, thereby violating Articles 13.1 and 13.2 of the American Convention, in relation to Article 1.1 thereof. Similarly, because this violation stems from the application of a law that fails to meet the requirements of strict legality and, by virtue of the principle of *iura novit curia*, the State also violated Articles 9 and 2 of the Convention.

81. Notwithstanding the above, the Commission finds it proper to examine whether the restriction in this case sought to satisfy a legitimate and compelling objective of the State and whether it was strictly necessary for the accomplishment of this objective. The purpose of this is to systematically and thoroughly discuss the infringements of the right to freedom of expression presented in the instant case.

b) Legitimate aim of the restriction

82. The second element of the *criterion of necessity* refers to the identification of the aim of the restriction on freedom of expression. The limitations imposed on freedom of expression must pursue the accomplishment of some of the compelling objectives established exhaustively in the American Convention. According to Article 13.2 of the American Convention, the protection of the honor and reputation of others may be grounds for establishing subsequent liability for the abusive exercise of freedom of expression,¹⁰⁵ which means that persons who believes that they are victims of such abuse may avail themselves of the judicial remedies available for their protection.¹⁰⁶ In this matter, the IACHR observes that the alleged victim issued statements that could have offended and affected the reputation of the claimant, representative Willian Lara. The IACHR also observes the conviction of Tulio Alberto Álvarez for the offense of “ongoing aggravated defamation” sought to protect the reputation and honor of an individual.¹⁰⁷ The Commission thus finds that the second element of the test has been met.

c) Strict necessity and proportionality of the restriction

[... continuation]

Rapporteur for Freedom of Expression. Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 496.

¹⁰⁴ See for example, IACHR. Order 43/15. MC 179/15 – Miguel Henrique Otero et al, Venezuela. November 9, 2015.

¹⁰⁵ I/A Court H.R., Case of Kimel v. Argentina. Judgment of May 2, 2008 Series C No. 177, para.71; 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. 118.

¹⁰⁶ I/A Court H.R., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 55; Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111. para. 101.

¹⁰⁷ Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006.

83. In this case, the restriction on freedom of expression was applied through a criminal penalty. According to the consistent decisions of the Inter-American Commission and the Inter-American Court, the criminal law is the most restrictive and severe means of establishing liability for unlawful conduct, particularly when penalties of incarceration are imposed.¹⁰⁸ Therefore, the use of criminal proceedings must adhere to the principle of minimal intervention, given the *ultima ratio* nature of criminal law. In a democratic society, punitive power may be exercised only to the extent strictly necessary to protect fundamental legal interests from the most serious attacks that harm or jeopardize them. To do otherwise would lead to the abusive and unnecessary exercise of the punitive power of the State.¹⁰⁹ Accordingly, the Commission must use particular caution in examining the necessity of invoking the criminal law to impose subsequent liability for the exercise of the right to freedom of expression, taking account of “the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception.”¹¹⁰

84. As stated earlier, the Inter-American Commission and the Inter-American Court have consistently held that the test for the necessity of limitations to freedom of expression should be applied more strictly to political speech and speech concerning matters of public interest,¹¹¹ as well as to speech about public servants and candidates to public office.¹¹² Democratic oversight through public opinion encourages transparency in government activities and promotes the responsibility of public servants in the performance of their duties. As such, there should be less room for any restriction of political speech or speech concerning matters of public interest.¹¹³ There must be greater tolerance for statements and assessments made by citizens in the exercise of that democratic oversight.¹¹⁴ Persons who discharge such public duties in a democratic society must have a higher threshold of tolerance for criticism,¹¹⁵ since “they have exposed themselves voluntarily to heightened scrutiny, and because they have an enormous capacity to call

¹⁰⁸ IACHR, Report No. 82/10, Case 12.524, Merits, Jorge Fontevecchia and Hector d’Amico, Argentina, July 13, 2010, para. 99; Case of Ivcher Bronstein v. Peru. Judgment of February 6, 2001. Series C No. 74, para. 155; Case of Herrera Ulloa v. Costa Rica. Judgment of July 2, 2004, Series C No. 107, para. 127; 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. 73; I/A Court H.R., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 76; I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 104; 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.

¹⁰⁹ 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. 73.

¹¹⁰ I/A Court H.R., Case of Kimel v. Argentina. Judgment of May 2, 2008 Series C No. 177, para. 78.

¹¹¹ I/A Court H.R., Case of Kimel v. Argentina. Judgment of May 2, 2008 Series C No. 177, paras. 57 & 87; I/A Court H.R., Case of Claude Reyes et al. v. Chile. Judgment of September 19, 2006. Series C No. 151, paras. 84, 86 and 87; I/A Court H.R., Case of Palamara Iribarne v. Chile. Judgment of November 22, 2005. Series C No. 135, para. 83; I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Judgment of July 2, 2004. Series C No. 107, para. 127.

¹¹² I/A Court H.R., Case of Kimel v. Argentina. Judgment of May 2, 2008 Series C No. 177, para. 86; I/A Court H.R., Case of Palamara Iribarne v. Chile. Judgment of November 22, 2005. Series C No. 135, para. 82.

¹¹³ IACHR, Report No. 82/10, Case 12.524, Merits, Jorge Fontevecchia and Hector d’Amico, Argentina, July 13, 2010, para. 99; Cfr. Case of Ivcher Bronstein v. Peru. Judgment of February 6, 2001. Series C No. 74, para. 155; Case of Herrera Ulloa v. Costa Rica. Judgment of July 2, 2004, Series C No. 107, para. 127.

¹¹⁴ IACHR, Report No. 82/10, Case 12.524, Merits, Jorge Fontevecchia and Hector d’Amico, Argentina, July 13, 2010, para. 99; Cfr. Case of Ivcher Bronstein v. Peru. Judgment of February 6, 2001. Series C No. 74, para. 155; Case of Herrera Ulloa v. Costa Rica. Judgment of July 2, 2004, Series C No. 107, para. 127; Case of Palamara Iribarne v. Chile. Judgment of November 22, 2005. Series C No. 135, para. 83, and Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 87; Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 87.

¹¹⁵ I/A Court H.R., Case of Kimel v. Argentina. Judgment of May 2, 2008 Series C No. 177, paras. 86-88; I/A Court H.R., Case of Palamara Iribarne v. Chile. Judgment of November 22, 2005. Series C No. 135, paras. 83-84; 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 Ivcher Bronstein v. Peru. Judgment of February 6, 2001. Series C No. 74, paras. 152 & 155; I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 83; I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Judgment of July 2, 2004. Series C No. 107, paras. 125-129; I/A Court H.R., Case of Claude Reyes et al. v. Chile. Judgment of September 19, 2006. Series C No. 151, para. 87.

information into question through their power to appeal to the public.”¹¹⁶ The Commission has established that “The sort of political debate encouraged by the right to free expression will inevitably generate some speech that is critical of, and even offensive to those who hold public office or are intimately involved in the formation of public policy.”¹¹⁷ Because of that, the protection of honor or reputation must only be guaranteed through civil penalties in those cases in which the offended person is a public servant, public figure, or private citizen who has voluntarily become involved in matters of public interest,¹¹⁸ always bearing in mind the principles of democratic pluralism.¹¹⁹ In other words, the use of criminal mechanisms to punish speech on matters of public interest, and especially about public servants or politicians, violates Article 13 of the American Convention because there is no compelling social interest to justify it, it is unnecessary and disproportionate, and it may also constitute an indirect means of censorship given its intimidating and chilling effect on such speech.¹²⁰

85. In that regard, the Declaration of Principles on Freedom of Expression adopted by the IACHR in 2000 provides that, “Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person’s reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.”

86. The European Court of Human Rights, for its part, has found the imposition of criminal penalties for speech about matters of public interest to be unnecessary and/or disproportionate, and therefore incompatible with the right to freedom of expression enshrined in Article 10 of the European Convention. Criminal sanctions are a measure of last resort, when there is a serious threat to the exercise of other human rights¹²¹. In the past decade, in addition to finding that the use of the criminal law was unnecessary and disproportionate in specific cases, the European Court has developed a general rule about the exceptional nature that criminal penalties should have when it comes to speech about matters of public interest¹²². In the opinion of the Court, the use of the criminal law to punish speech about issues of public interest will only be admissible in absolutely exceptional cases, in particular, in response to the dissemination of hate speech or

¹¹⁶ I/A Court H.R., Case of *Kimel v. Argentina*. Judgment of May 2, 2008 Series C No. 177, paras. 86-88; I/A Court H.R., Case of *Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, para. 83; 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 *Ivcher Bronstein v. Peru*. Judgment of February 6, 2001. Series C No. 74, paras. 152 & 155; I/A Court H.R., Case of *Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 83; I/A Court H.R., Case of *Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, paras. 125-129; I/A Court H.R., Case of *Claude Reyes et al. v. Chile*. Judgment of September 19, 2006. Series C No. 151, para. 87; 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. 115.

¹¹⁷ IACHR. 1994 Annual Report. Chapter V: Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights. Title III Section B. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995.

¹¹⁸ IACHR, Declaration of Principles on Freedom of Expression, Principle 10, available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26&IID=1>.

¹¹⁹ I/A Court H.R., Case of *Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 128.

¹²⁰ IACHR. Arguments before the Inter-American Court in the Case of *Herrera Ulloa v. Costa Rica*. Reprinted in: I/A Court H.R., Case of *Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 101.2; IACHR. Arguments before the Inter-American Court in the Case of *Ricardo Canese v. Paraguay*. Reprinted in: I/A Court H.R., Case of *Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 72.h).

¹²¹ European Court of Human Rights, *Gavrilovici v. Moldova*, Application No. 25464/05 (2009), March 15, 2010, Para. 60.

¹²² See, e.g., European Court of Human Rights, *Castells v. Spain*. Application No. 11798/85. 23 April 1992; *Dalban v. Romania*. Application No. 28114/95. 28 September 1999; *Şener v. Turkey*. Application No. 26680/95. 18 July 2000; *Halis v. Turkey*. Application No. 30007/96. 11 January 2005; *Fatullayev v. Azerbaijan*. Application No. 40984/07. 22 April 2010; *Gutiérrez Suarez v. Spain*. Application No. 16023/07. 1 June 2010.

the incitement of violence.¹²³ In this regard, the Court has found the imposition of criminal penalties (even when they have not been enforced) as a consequence of clearly offensive or disturbing speech that may affect the personal rights of public servants to be disproportionate. This opinion is based not on the assertion that those rights should not be protected, but rather on the need to create appropriate and proportionate remedies that do not inhibit the robustness of debate surrounding issues of major public relevance and that cannot be used by States to silence criticism or dissent.

87. In the case of *Castells v. Spain*, the European Court ruled that the Spanish State violated Article 10 by imposing a prison sentence of one year and one day against a senator who accused the national government of being complicit in a number of murders in the Basque Country.¹²⁴ Similarly, in the case of *Fatullayev v. Azerbaijan*, the European Court found that the sentencing of a journalist to two years and six months in prison for criminal defamation because he questioned the official version of a massacre committed by the armed forces in Armenia was a violation of Article 10.¹²⁵ In the case of *Otegi Mondragon v. Spain*, the European Court found a violation of Article 10 based on the conviction for causing “serious insult to the King” of the spokesperson for a parliamentary group that attributed ultimate responsibility to the King of Spain for acts of torture and violence committed by the Spanish Army.¹²⁶ In the Case of *Cumpănă and Mazăre v. Romania* the European Court found the State responsible for the violation of Article 10 of the Convention after the journalists who published an article in a local newspaper under the headline “Former Deputy Mayor [D.M.] and serving judge [R.M.] responsible for series of offences in Vinalex scam” were convicted and sentenced to a term of imprisonment and disqualification from the exercise of their political rights.¹²⁷

88. Indeed, over the past decade, the European Court has developed a general rule about the exceptional nature of criminal penalties for speech about matters of public interest. The European Court has thus stated that, “the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.”¹²⁸ This jurisprudential rule was established by the Court in 2004 in the case of *Cumpănă and Mazăre v. Romania*, and later reiterated in the cases of *Fatullayev v. Azerbaijan* and *Otegi Mondragon v. Spain*, among others. With respect to the latter case, the Court examined the existence of a potential violation of the right to freedom of expression based on a politician’s criminal conviction for the offense of causing insult to the King. The Court found that the statements that led to the conviction—asserting that the King was the head of an army of torturers who had imposed his political regime through terror—were permitted, in the context of a public debate of general interest, even if they were bothersome, disturbing, or unfair. Therefore, the Court found that although the establishment of the penalties is in principle a prerogative of the national courts, the imposition of a prison sentence is incompatible with freedom of expression when used to punish statements made against public figures in the context of political debate, except in extreme cases, such as hate speech or the incitement of violence.¹²⁹ The European Court has

¹²³ European Court of Human Rights, *Cumpănă and Mazăre v. Romania*, Application No. 33348/96. 17 December 2004, para. 115; *Fatullayev v. Azerbaijan*. Application No. 40984/07. 22 April 2010, para. 103; *Otegi Mondragon v. Spain*. European Court of Human Rights. Application No. 2034/07. 15 March 2011, para. 59.

¹²⁴ European Court of Human Rights, *Castells v. Spain*. Application No. 11798/85. 23 April 1992.

¹²⁵ European Court of Human Rights, *Fatullayev v. Azerbaijan*. Application No. 40984/07. 22 April 2010.

¹²⁶ European Court of Human Rights, *Otegi Mondragon v. Spain*. European Court of Human Rights. Application No. 2034/07. 15 March 2011.

¹²⁷ European Court of Human Rights, *Cumpănă and Mazăre v. Romania*, Application No. 33348/96. 17 December 2004, para. 116

¹²⁸ European Court of Human Rights, *Cumpănă and Mazăre v. Romania*, Application No. 33348/96. 17 December 2004, para. 115; *Fatullayev v. Azerbaijan*. Application No. 40984/07. 22 April 2010, para. 103; *Otegi Mondragon v. Spain*. European Court of Human Rights. Application No. 2034/07. 15 March 2011, para. 59.

¹²⁹ European Court of Human Rights. *Otegi Mondragon v. Spain*. Application No. 2034/07. Strasbourg. 15 March 2011. Final 15/09/2011. Paras. 50 & 59. “The Court has previously held that, although sentencing is in principle a matter for the national courts, the imposition of a prison sentence for an offence in the area of political speech will be compatible with freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, [continues ...]

also underscored the fact that the existence of penalties of imprisonment in relation to freedom of expression has a “clear” and “inevitable” chilling effect on the exercise of that right, and discourages investigative journalists from reporting on general matters of public interest.¹³⁰

89. The African Court on Human and Peoples’ Rights, for its part, has affirmed that “freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures”. It has reiterated that “people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether”¹³¹. In its decision on the case *Lohé Issa Konaté v. Burkina Faso*, the African Court deemed contrary to requirements of article 9 of the Charter, the fact that a custodial sentence was imposed against the editor-in-chief of a weekly newspaper for writing and publishing an article exposing “the counterfeiting and laundering of fake bank notes” by authorities of the judiciary¹³². It affirmed that “apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences”.¹³³

90. In its General Comment 34 *Article 19: Freedoms of opinion and expression*, the UN Human Rights Committee asserted that “States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others”.¹³⁴

91. The case at hand concerns a prison sentence imposed in the context of political speech of clear public interest, specifically, about the way in which a public servant manages State funds and the public duties for which he is responsible. Moreover, as explained below, the State has failed to demonstrate that the requirements of necessity and strict proportionality have been met with respect to the measure imposed.

92. The IACHR notes that the statements made by the petitioner were both an opinion and an assertion of facts. In the article that he published, Tulio Álvarez first stated that the situation of the benefits and other rights of Venezuelan public sector employees was “a crime of the largest magnitude.” As the inter-American case law has held, opinions like these are not subject to veracity tests or penalties of any kind.¹³⁵

93. In addition, the IACHR observes that the alleged victim next asserted two facts as an example of the situation he reported that: a) during the term of Congressman Willian Laras’—against whom a request for preliminary impeachment proceedings filed by employees and retirees of the institution is pending before the Plenary of the Supreme Court—two billion bolívares from the employees’ Savings Bank was used to cover

[... continuation]

as, for example, in the case of hate speech or incitement to violence (see *Bingöl v. Turkey*, No. 36141/04, § 41, 22 June 2010, and, *mutatis mutandis*, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 115, ECHR 2004-XI).”

¹³⁰ European Court of Human Rights, *Cumpănă and Mazăre v. Romania*, Application No. 33348/96. 17 December 2004, paras. 113-114; *Fatullayev v. Azerbaijan*. Application No. 40984/07. 22 April 2010, para. 102.

¹³¹ African Court on Human Rights and Peoples’ Rights. In the Matter of Lohé Issa Konaté v. Burkina Faso. Application No. 004/2013. Judgment December 5, 2014. Para. 155.

¹³² African Court on Human Rights and Peoples’ Rights. In the Matter of Lohé Issa Konaté v. Burkina Faso. Application No. 004/2013. Judgment December 5, 2014. Para. 164.

¹³³ African Court on Human Rights and Peoples’ Rights. In the Matter of Lohé Issa Konaté v. Burkina Faso. Application No. 004/2013. Judgment December 5, 2014. Para. 165.

¹³⁴ United Nations. Human Rights Committee. General Comment N° 34: Article 19 Freedoms of opinion and expression. September 12, 2011. Para. 47.

¹³⁵ I/A Court H.R., Case of Kimel v. Argentina. Judgment of May 2, 2008 Series C No. 177, paras. 86-88.

other National Assembly, and b) “only partial deposits have been made, and the debt has now reached Bs. 1,701,723,317.25. according to Iván Rafael Delgado Abreu, Superintendent of Savings Banks of the Venezuelan Finance Ministry, in communication DDS-OAL-1841, received by the office of the current president of the National Assembly on April 28, 2003.” The petitioner reportedly repeated these statements later during the criminal proceedings against him.

94. It follows from the examination of the evidence presented by the parties that these statements were plausible and that they concern matters of clear public interest. In fact, the Office of the Superintendent stated that on the date of the events in question there was a pending debt owed to the Savings Bank of the National Assembly for contributions and withholdings. In the words of the Superintendent’s Office, “The debt incurred by [the legislature] for contributions and withholdings [reached] approximately ONE BILLION SEVEN HUNDRED ONE MILLION SEVEN HUNDRED TWENTY-THREE THOUSAND THREE HUNDRED SEVENTEEN BOLIVARES AND TWENTY-FIVE CENTIMOS (Bs. 1,701,723,317.25) in February [2003]” [emphasis in the original]. The Office of the Superintendent indicated that the debt had resulted in a decrease in the bank’s assets that had “significantly affected its liquidity, preventing it from meeting the social objectives for which it was established, the commitments made to its members, and its principal mission which is to encourage savings and the household economy, protected by Articles 118 and 308 of the Constitution of the Bolivarian Republic of Venezuela”.

95. The IACHR additionally observes that the petitioner asserted in his article that this debt was the result of the diversion of earmarked funds used “to cover other expenses of the legislature.” This assertion seems to correspond to the complaint filed by the employees of the Legislative Assembly on March 5, 2003, in which they requested preliminary impeachment proceedings against the President of the National Assembly, Representative Willian Lara, for the alleged commission of the crimes of “Aggravated Misappropriation of Public Funds, Intentional Embezzlement and Negligent Embezzlement,” provided for and punishable under Articles 60, 58, and 59 of the Organic Law to Safeguard Public Assets. In their complaint, the National Assembly employees alleged “the use of monies from the benefits fund to make payments and honor commitments totally unrelated to the employees’ rights. The latter allegation concerns payments for hired personnel, which tripled during the term of the accused, Congressman Willian Lara.” In particular, it was alleged that Congressman Willian Lara “used the Benefits Fund for a different purpose, intentionally breached contractual agreements, and resorted to subterfuge in order to conceal his misappropriation of funds. Specifically, he requested additional credits to replace the funds that he misappropriated, avoided the presentation of accounts during his term, and concealed his actions by closing the bank accounts that the National Assembly has at the Industrial Bank of Venezuela [*Banco Industrial*] every year during his term, and finally, to complete the commission of his crime, the accused allocated the 2003 budget in advance, adversely affecting the term of the National Assembly’s new board of directors.”

96. Naturally, the latter assertion could offend and affect the reputation of Representative Willian Lara. However, the IACHR notes that it was made within the context of the verification and condemnation of irregularities at the Savings Bank and an employment dispute between State workers and their employer. Once again, the statements of the petitioner—who was also the legal representative and defender of the National Assembly employees—concerned matters of public interest which, in any case, because they referred to the management of public funds, should be investigated, corrected, or clarified by the bodies in question.

97. The IACHR has consistently maintained that the State has other, less restrictive alternatives for the protection of privacy and reputation than the use of a criminal penalty. It can meet its obligation to protect the rights of others by establishing statutory protections against intentional attacks on honor and reputation through civil actions that respect international standards and by enacting laws that guarantee the right of correction and reply. In this way, the State guarantees the protection of the private life of all persons without abusing its coercive powers to repress the individual freedom to form and express opinions. Similarly, the Inter-American Court has consistently held in its case law that, “It is logical and appropriate that statements concerning public officials and other individuals who exercise functions of a public nature should be accorded, in the terms of Article 13(2) of the Convention, a certain latitude in the broad debate on matters of public interest that is essential for the functioning of a truly democratic system. The foregoing considerations

do not, by any means, signify that the honor of public officials or public figures should not be legally protected, but that it should be protected in accordance with the principles of democratic pluralism [...] A different threshold of protection should be applied, which is not based on the nature of the subject, but on the characteristic of public interest inherent in the activities or acts of a specific individual. Those individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate.”¹³⁶

98. The IACHR observes that affected public servant was elected to hold a senior position in government, namely Congressman and President of the Venezuelan National Assembly; as such, his ability to clarify the information contained in Tulio Álvarez’s statements, rather than being merely theoretical, could have been exercised through multiple channels available to public officials in his position.¹³⁷ To this extent, there were means other than the criminal law through which Representative Willian Lara could have defended his honor. Indeed, because the fact that money was missing became public knowledge, the National Treasury issued a statement “admitting that the Ministry of Finance was responsible for the delays in the payment of employer contributions to the National Assembly’s Workers’ and Retirees’ Savings Bank, since it had not received sufficient income because of the coup and the oil strike, [and acknowledging] the communication from the Office of the Superintendent of Savings Bank stating that it had not said that there was a misappropriation of funds attributable to the President of the National Assembly.”¹³⁸

99. In its judgment of conviction, the Seventh Trial Court called the petitioner’s statements excessive, false, and malicious, because he had repeated them in the media days prior to the oral argument phase of the public defamation trial, even though he knew, because of his access to the record of the proceedings, that “what he was saying was not true”.

100. Given the seriousness of the legal interests at stake in a criminal defamation case brought by a public servant against a private citizen, freedom of expression must protect the right of the parties to express the ideas and information that in their opinion are relevant to the adjudication of their case, as well as the right of society to be informed about it. In this regard, it is reasonable for the petitioner to find the explanation provided by the National Treasury and other prosecution evidence to be unsatisfactory, and for him to want to publicly maintain the veracity of his allegations during the criminal case against him. In fact, as seen in the decisions rendered, the petitioner reported the acts in question to the competent authorities and requested that preliminary impeachment hearings be held against the congressman. He also invoked the defense of *exceptio veritatis* and presented evidence to prove his assertions. This request was later rejected by the judge.

101. These types of statements must also be understood as part of a broader debate on the obstacles that prevent effective corruption investigations from being carried out and the implications of using the criminal law against those who publicly denounce it. The congressman continued to have access to different means of participating in this debate. To this extent, the use of the criminal law and the conviction handed down in this case are clearly unnecessary in a democratic society and openly discourage the exercise of the right to freedom of expression and speech on matters of public interest in general.

102. Furthermore, the IACHR has asserted that in cases where legal liability is imposed against a person who has abused his right to freedom of expression, the party alleging harm is the one that must bear the burden of proof in demonstrating that the pertinent statements were false, and that they effectively caused the harm that is being invoked. Even if the *exceptio veritatis* should be a defense against any type of liability, it cannot be the only such defense; as long as the expressions under consideration are reasonable

¹³⁶ I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Judgment of July 2, 2004. Series C No. 107, paras. 128-129

¹³⁷ 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. 122.

¹³⁸ Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006.

(*fair comment*), liability cannot be imposed for expressions on matters of current public interest¹³⁹. In the instant case, the IACHR observes that the *exceptio veritatis* was the only defense available and was later ruled unfounded without sufficient explanation. The judge based his decision on the fact that once the new Venezuelan Organic Code of Criminal Procedure took effect, the criminal justice system changed from an inquisitorial to an adversarial system, and stated that, “This judge cannot invade the sphere of action of another State body to rule on whether certain acts constitute a crime, knowing that the investigation lies with the Public Ministry. This follows from the judgment handed down by the Plenary of the Supreme Court, in which it ordered that a certified copy of the judgment be forwarded to the Public Ministry in order for it to investigate whether there were irregularities pertaining to the insurance policies covering the Assembly’s employees. Therefore, this court cannot issue any decision whatsoever on whether the acts constitute a crime, although this does not preclude it from observing that every piece of evidence offered, admitted, and examined led to the conclusion that the act attributed to the defendant [...] [was] not proven to be true.”¹⁴⁰

103. Finally, regarding the proportionality of the sanction imposed, the IACHR is of the opinion that the consequences of the criminal case—the precautionary measure barring the petitioner from leaving the country, the evidentiary system to which he was subjected, the latent risk of a potential loss of liberty and the suspended sentence of two years and three months in prison, the disqualification from exercising all political rights, the consequences of a criminal conviction on the petitioner’s professional life, and the stigmatizing effect of the criminal conviction—all demonstrate that the subsequent liability imposed against Tulio Álvarez for the exercise of freedom of expression were extremely severe in view of the fact that all of these consequences stem from the dissemination of information of public interest, related to the activity of an employee of the State.

104. The IACHR finds no justification for opening a criminal case, or for the resulting imposition of a prison sentence and other penalties in case such as this one, dealing with criticism of a high-ranking public official in the context of a legitimate debate on a matter of public interest. These types of matters in no way warrant the imposition of criminal responsibility that carries a prison sentence, the prohibition of foreign travel, and the disqualification from exercising political rights. These penalties, by their very nature, inevitably have an intimidating effect that is incompatible with Article 13 of the American Convention.

105. In weighing the satisfaction of the right to honor against the severity of the penalty imposed,¹⁴¹ the IACHR finds that the infringement of the petitioner’s freedom of expression through the use of the criminal law in this matter was also manifestly disproportionate because it was excessive.

106. In view of the above, the Inter-American Commission concludes that the State violated Articles 9 and 13 of the American Convention, in relation to the general obligations contained in Articles 1.1 and 2 of the Convention, to the detriment of Tulio Álvarez.

B. Right to Participate in Government (Article 23 of the Convention) and Right to Judicial Protection (Article 25), in relation to Article 1.1 of the American Convention

107. The petitioner alleged that by imposing the penalty of political disqualification, his conviction also disproportionately affected the exercise of his political rights. The Commission has repeatedly referred to political rights as those that recognize and protect the right and the duty of all citizens to participate in their country’s political life. They are essentially rights that help strengthen democracy and political pluralism,¹⁴² and it is impossible to fully guarantee human rights without the effective and unrestricted recognition of political rights.

¹³⁹ IACHR, Annual Report 2009, Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III (Inter-American Framework on Freedom of Expression), OEA/Ser.L/V/II. Doc. 51, December 30, 2009, Para. 109.

¹⁴⁰ Annex 2, Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area, Judgment of Conviction in Case No.7-246-2004, Case File IV, February 28, 2005, Communication from the petitioner received on September 7, 2006.

¹⁴¹ I/A Court H.R., Case of Kimel v. Argentina, Judgment of May 2, 2008 Series C No. 177, paras. 85.

¹⁴² IACHR, Annual Report 2008, Chapter IV, Venezuela, para. 336.

108. Article 23.1 of the Convention establishes that Every citizen shall enjoy the following rights and opportunities, which must be guaranteed by the State under equal conditions: i) to take part in the conduct of public affairs, directly or through freely chosen representatives; ii) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and iii) to have access, under general conditions of equality, to the public service of his country. Article 23.2 of the Convention establishes that law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings. In this regard, political rights are not absolute and may be subject to regulation, provided that this regulation complies with “the principles of legality, necessity, and proportionality in a democratic society.”¹⁴³

109. The established grounds include “conviction, by a competent judge, in a criminal case.” In this case, the restriction in question was imposed through a criminal conviction, based on Article 16 of the Venezuelan Criminal Code, which states that, “Penalties additional to incarceration include: 1.- Disqualification from voting and from holding political office for the duration of the sentence [...]” Nevertheless, the IACHR has already noted that the effects of the case itself and the sentence imposed were particularly excessive in relation to the aim of protecting the public servant’s right to honor. This is certainly evident with respect to the restriction on the exercise of political rights, which was improperly extended beyond the duration of the sentence, and on the electoral rights inherent in the alleged victim’s activities as a teacher and active member of the professors’ association of a national public university (*supra* para. **). In this regard, although political disqualification pursuant to a criminal conviction is recognized in the American Convention, the IACHR finds that its use as an additional measure is not justified by the nature of the offense for which Tulio Álvarez was convicted, and considers that it was disproportionate in this case for the reasons stated in the section above.

110. In addition, by rejecting Tulio Álvarez’s petition for a constitutional remedy [*amparo*] seeking to allow him to participate in the elections of the professors’ association of the Central University of Venezuela—in spite of the existing judgment granting him full release due to the completion of his sentence (which had previously been conditionally suspended)—the State clearly violated his right to effective judicial protection, recognized in Article 25 of the Convention.¹⁴⁴

111. Consequently, the Inter-American Commission concludes that the State violated Articles 23 and 25 of the American Convention, in relation to the general obligations provided for in Article 1.1 of the Convention, to the detriment of Tulio Álvarez.

C. Right to a Fair Trial (Article 8) and Freedom of Movement and Residence (Article 22), in relation to Article 1.1 of the American Convention

112. Article 8 of the Convention stipulates, in pertinent part, that:

1. Every person has the right to a hearing [...] by a competent, independent, and impartial tribunal [...].
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

¹⁴³ I/A Court H.R., Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, para. 174.

¹⁴⁴ Article 25.1 of the Convention provides: “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”

[...]

b) prior notification in detail to the accused of the charges against him;

c) adequate time and means for the preparation of his defense;

[...]

f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

[...]

113. The petitioner alleged that, during the criminal proceedings that resulted in his conviction, he was denied several of the fair trial rights provided for in the Convention. The IACHR examines those allegations below.

a) Presumption of innocence and illegitimacy of the precautionary measure restricting foreign travel

114. The presumption of innocence is one of the main pillars of criminal procedure that underlies the purpose of fair trial rights. It means that a person cannot be convicted unless there is clear evidence of his criminal liability. If the evidence presented is incomplete or insufficient, he must be acquitted.¹⁴⁵ The relationship between the presumption of innocence and the precautionary measure of prohibiting the defendant from leaving the country was addressed specifically by the bodies of the Inter-American System in the Case of *Ricardo Canese v. Paraguay*. In that judgment, the Inter-American Court held that the restriction of foreign travel cannot be a substitute for the penalty or be used to meet its objectives. This can happen if the measure is used beyond what is strictly necessary to ensure the defendant's appearance at trial, in which case it becomes in practice a sort of advance sentence. In the Court's opinion, these measures are contrary to the presumption of innocence provided for in Article 8.2 of the Convention and the right to freedom of movement established in Article 22 thereof.¹⁴⁶

115. The right to freedom of movement, including the right to leave one's own country, may also be subject to restrictions. According to Articles 22.3 and 30 of the American Convention, any such restrictions must meet the following requirements: a) they must be expressly established by law; b) they must be designed to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others; and c) they must adhere to the principle of proportionality.

116. As noted earlier, on December 16, 2004, the Seventh Trial Court issued an order barring Tulio Álvarez from leaving the country, based on Article 256(4) of the Organic Code of Criminal Procedure, which establishes that:

"Provided that the grounds for pretrial detention can be reasonably satisfied through the use of another measure less burdensome to the defendant, the competent court, on its own motion or at the request of the Public Ministry or of the defendant, shall instead impose, through a well-reasoned decision, one of the following measures: [...] 4. The prohibition against unauthorized travel outside the country, the local district in which the defendant resides, or the geographical area identified by the court."

117. It is not sufficient, however, for the measure to be established in a law. Because they are precautionary rather than punitive measures, they must be applied on an exceptional basis, respecting the presumption of innocence and the principles of necessity and proportionality imperative in a democratic

¹⁴⁵ I/A Court H.R., Case of Cantoral Benavides v. Peru. Merits. Judgment of August 18, 2000, paras. 119-120; I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 153; Case of Cabrera García and Montiel-Flores v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 26, 2010, para. 183; Cfr. Case of Suárez Rosero v. Ecuador. Judgment of November 12, 1997. Series C No. 35, para. 77.

¹⁴⁶ I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 129.

society. The Inter-American Court has observed that national authorities are the ones responsible for assessing the relevance of maintaining the precautionary measures that are ordered in their legal systems. However, in carrying out this task, the authorities should offer sufficient reasons to allow for an understanding of why those measures are granted, so that their use is not distorted. International case law and comparative criminal law agree that precautionary measures in criminal proceedings must be aimed solely at ensuring that the detainee does not hinder effective investigations or evade justice.¹⁴⁷

118. In this case, the initial court decision restricting Tulio Álvarez's right to leave the country was handed down on December 15, 2004, and was in force for approximately one and a half years during the criminal proceedings until the final judgment of conviction. In support of its decision, the Seventh Trial Court stated that, "There is there is sufficient evidence to conclude that the defendant was the alleged perpetrator or participant in the commission of said crime, given the evidence presented by the complainant. The Court additionally finds a reasonable presumption that the defendant is a flight risk, based on the assessment of the circumstances of this particular case, and given his ability to leave the country permanently." The Circuit Court of Appeals echoed that decision and added that, since the trial against Tulio Álvarez had gone forward and was underway, his presence was required in order to guarantee the continuation and outcomes of the case.

119. It is impossible to verify from the above whether the authorities effectively weighed the reasons, necessity, and proportionality of the travel restriction ordered. On the contrary, there is a clear absence of reasoning set forth in the rulings issued to that end. The petitioner maintains, and the State does not dispute, that this measure unnecessarily infringed his rights in this case. Although the case file reflects that he was granted permission to travel abroad three times, with the condition that he report in person the Monday following his return,¹⁴⁸ he was subjected to lengthy procedures to request authorization to leave the country every time he needed to do so, which went beyond the trial to the sentencing enforcement system. In addition, according to the established facts of the case, the court of competent jurisdiction never adjudicated the petitioner's request to attend the Guadalajara Book Fair from September 20-28, 2005 in order to promote his books, and to attend a conference on November 27, 2005.

120. The IACHR therefore concludes that the State failed to demonstrate the necessity and proportionality of the foreign travel ban imposed against Tulio Álvarez for the duration of his trial, in violation of his rights to the presumption of innocence and to freedom of movement enshrined in Articles 8.2 and 22 of the American Convention.

b) Prior notification in detail to the accused of the charges against him (Article 8.2.b)

121. The Inter-American Court has held that in order to satisfy Article 8.2.b of the American Convention the State must inform the accused not only of the reason for the charges against him—that is, the acts or omissions attributed to him—but also the reasons leading the State to formulate the accusation, the evidentiary support for the charges, and the legal classification of the alleged acts. All of this information must be express, clear, comprehensive, and sufficiently detailed to allow the accused to fully exercise his right to a defense and present his version of the events to the judge. The Court has found that the timely observance of Article 8.2.b is essential for the effective exercise of the right to a defense.¹⁴⁹

¹⁴⁷ I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 129

¹⁴⁸ Annex 6. Ninth Trial Court for the Enforcement of Judgments of the Criminal Judicial Circuit for the Caracas Metropolitan Area. Enforcement Judgment No.1429-06, Case File No. 7. July 3, 2006. Communication from the petitioner received on April 12, 2007.

¹⁴⁹ I/A Court H.R., Case of López Álvarez v. Honduras. Merits, Reparations and Costs. Judgment of February 1, 2006. Series C No. 141, para. 149; Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 225; Case of Acosta Calderón v. Ecuador. Merits, Reparations and Costs. Judgment of June 24, 2005. Series C No. 129, para. 118; Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, para. 187.

122. Along these lines, Article 8.2.b also requires the States to satisfy the right to be informed of the accusation, as a prerequisite to the exercise of the right to a defense, in the case of crimes that can only be prosecuted at the victim's request. In such cases, the judge must guarantee that the aforementioned requirements are met. The IACHR notes that Article 401 of the Organic Code of Criminal Procedure establishes that "A private prosecution must be filed in writing directly with the trial court and must contain: 1. The full name, age, marital status, profession, domicile or residence, of the private prosecutor, his or her national ID card number, and his or her family relationship to the accused; 2. The full name, age, domicile or residence of the accused; 3. The crime alleged, and the date, place, and approximate time of its perpetration; 4. A detailed account of all of the essential circumstances of the act; 5. Evidence supporting the allegation of the accused's participation in the crime; 6. Substantiation of victim status; 7. The signature of the accuser or his or her attorney-in-fact."

123. With respect to the violation of this right, the alleged victim limited himself to stating that the criminal complaint filed against him failed to meet the requirements of Article 401 of the Organic Code of Criminal Procedure, and therefore should be ruled inadmissible by the competent supervisory judge. He did not cite any specific problems contained in the complaint. The IACHR observes that the Seventh Trial Court required the accusing party to satisfy the requirements of Article 401, and a reading of the relevant decisions indicates that this was in fact done. Given the imprecision on this point, the Commission is unable to conclude that the State violated Article 8.2.b of the Convention.

c) Adequate time and means for the preparation of a defense

124. The alleged victim stated that the criminal complaint against him was amended twice in order to add new charges, and that he did not have time to prepare his defense in view of the content of those amendments. He further stated that he did not have access to the evidence presented by the private prosecutor in support of the amendments.

125. With respect to time for the preparation of a defense subsequent to the amendment of the criminal complaint, the IACHR observes that the Seventh Trial Court ordered a stay of the trial proceedings for five days each time, which in principle does not appear to be inadequate for the preparation of a defense to these kinds of allegations. The petitioner has not provided any reasons to support the assertion that the 5-day period was insufficient to guarantee his right.

126. The Inter-American Commission and the Inter-American Court have acknowledged that fundamental due process rights include the right to have adequate means to prepare a defense, provided for in Article 8.2.c of the Convention, and that this requires the State to allow the accused to access the case file against him.¹⁵⁰ The principle of adversarial proceedings, which guarantees the defendant's participation in the examination of the evidence, must also be respected. There is nothing on record in this case to explain, nor has the State explained, the legal basis and well-founded reasons for which the alleged victim was reportedly denied access to videos and copies of the interviews conducted with the alleged victim before the trial, which were disseminated in the media, and which supported the amendment of the criminal complaint and subsequently the defendant's conviction. Therefore, the IACHR finds that the restriction violated Article 8.2.c of the Convention.

d) Right of the defense to examine and obtain the appearance of witnesses and experts (Article 8.2.f)

127. The IACHR considers it to have been proven that during the trial hearing of February 3, 2005, defense witness José Rafael García, President of the Retirees and Pensioners Association of the National Assembly, was detained for the alleged *in flagrante* commission of perjury and the commission of a crime during a hearing. He was transferred to a detention center at the request of the prosecuting party. The petitioner indicated that later, after having required him to comply with an in-person reporting system, the

¹⁵⁰ I/A Court H.R., Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs. Judgment of november 22, 2005. Para.170.

Venezuelan courts acquitted the witness and dismissed the case against him. The State did not dispute these facts.

128. The evidence indicates, as the petitioner alleges, that the witness was testifying about how he had obtained the report from Iván Rafael Delgado Abreu, the Superintendent of Savings Banks, which had been received in the Office of the President of the National Assembly, and about the irregularities committed at the National Assembly's Workers' and Retirees' Savings Bank, as he understood them.

129. In support of the arrest, the Seventh Trial Court maintained that Mr. García lied during oral argument "when he stated categorically that Willian Lara, in his capacity as President of the National Assembly, had failed to provide an accounting of his administration, and that a deposit was made to the account approved by the National Assembly. This allowed the judge, in keeping with the rules of reasoned judgment, to dismiss his testimony because a person who lies about something so important can even more easily lie about anything else."¹⁵¹ The investigation against the witness was reportedly never pursued, and was subsequently dismissed.

130. It is clear that arresting the defense witness while he was testifying meant that the alleged victim was unable to examine that witness or have his testimony admitted into evidence. The IACHR finds no justification based on protecting the administration of justice that would reasonably allow the State to take such a serious measure, which clearly intimidated the remaining witnesses to the detriment of the petitioner's right to a defense. The State has not provided evidence in the processing of this petition to reasonably support the notion that the measure was proportionate and necessary for the accomplishment of legitimate aims in a democratic society. Consequently, the IACHR concludes that the Venezuelan State violated Article 8.2.f of the Convention, to the detriment of Tulio Álvarez.

VI. CONCLUSIONS

131. Based on the considerations of fact and law contained in this report, the IACHR concludes that the State of Venezuela violated, to the detriment of Tulio Alberto Álvarez, Articles 8 (right to a fair trial), 9 (freedom from *ex post facto* laws), 13 (freedom of thought and expression), 22 (freedom of movement and residence), 23 (right to participate in government), and 25 (right to judicial protection) of the American Convention, in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof.

VII. RECOMMENDATIONS

132. Based on the analysis and conclusions of this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE STATE OF VENEZUELA:

1. Set aside the conviction of Tulio Alberto Álvarez and all of the consequences arising therefrom;
2. Guarantee the political rights of Tulio Alberto Álvarez that are still being violated, including the expungement of any records in his criminal history that disqualify him from continuing to exercise his rights as a citizen;
3. Compensate Tulio Alberto Álvarez for the pecuniary and non-pecuniary damages arising from the violations established herein;
4. Bring its domestic criminal laws on freedom of expression into line with its obligations under the American Convention on Human Rights and the contents of this report; and
5. Disseminate this report throughout the Venezuelan Judiciary.

¹⁵¹ Annex 2. Seventh Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area. Judgment of Conviction in Case No.7-246-2004, Case File IV. February 28, 2005. Communication from the petitioner received on September 7, 2006.