

INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF GRANIER *ET AL.* (*RADIO CARACAS TELEVISIÓN*) V. VENEZUELA
JUDGMENT OF JUNE 22, 2015
(Preliminary objections, merits, reparations and costs)

In the case of *Granier et al. (Radio Caracas Televisión)*,

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), composed of the following judges:

Humberto Antonio Sierra Porto, President
Roberto F. Caldas, Vice President
Manuel E. Ventura Robles, Judge
Diego García-Sayán, Judge
Alberto Pérez Pérez, Judge
Eduardo Vio Grossi, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and Articles 31, 32, 42, 65 and 67 of the Court’s Rules of Procedure (hereinafter “the Rules of Procedure” or “the Court’s Rules of Procedure”), delivers this judgment, structured as follows:

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I

INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On February 28, 2013, in accordance with the provisions of Articles 51 and 61 of the American Convention and Article 35 of the Court's Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted the case of *Granier et al. (Radio Caracas Televisión) versus the Bolivarian Republic of Venezuela* (hereinafter "the State," "the Venezuelan State" or "Venezuela") to the jurisdiction of the Inter-American Court. This case relates to the alleged violation of the "freedom of expression of [the] shareholders, executives and journalists" of "Radio Caracas Televisión" (hereinafter "RCTV"), owing to "the State's decision not to renew [...] the concession." Based on this, the Commission concluded that "the State [...] had] failed to abide by its substantive and procedural obligations where the allocation and renewal of broadcast licenses was concerned[; and] that the dispute concerning the non-renewal of RCTV's license occurred in a context of legal uncertainty for the network, [owing to the lack of] clarity as to the legal framework applicable to the license." It also indicated that the State's decision "was based on the network's editorial line[, constituting] a clear act of misuse of power and an indirect restriction incompatible with Article 13(1) and 13(3) of the Convention." Furthermore, it indicated that the State had "committed a violation of the right to equality and freedom from discrimination." Lastly, it alleged presumed violations of due process and judicial protection in the context of the administrative and judicial proceedings held before and after the channel's closure.

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

- a) *Petition.* The initial petition was lodged before the Commission on February 18, 2010, by Carlos Ayala Corao and Pedro Nikken.
- b) *Admissibility Report.* On July 22, 2011, the Commission adopted Admissibility Report No. 114/11.¹
- c) *Merits Report.* On November 9, 2012, the Commission adopted Merits Report No. 112/12,² under Article 50 of the Convention (hereinafter also "the Merits Report"), in which it reached a series of conclusions and made several recommendations to the State:

Conclusions. The Commission concluded that the State was responsible for the violation of Articles 13 and 24 of the American Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Eladio Lárez, Odila Rubin, Oswaldo Quintana, Eduardo Sapene, Daniela Bergami, Isabel Valero, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño, as well as of the rights recognized in Articles 8(1) and 25 of the Convention, in relation to Article 1(1), to the detriment of the persons indicated above and also Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar and Francisco J. Nestares.

Recommendations. Consequently, the Commission made a series of recommendations

¹ In this report, the Commission decided that the petition lodged by Carlos Ayala Corao and Pedro Nikken was admissible in relation to the presumed violations of "Articles 8, 13, 21, 24 and 25 of the American Convention, in relation to Articles 1(1) and 2 of this instrument." Admissibility Report No. 27/08, Case of Marcel Granier *et al.* v. Venezuela of July 22, 2011 (evidence file, folios 781 to 793).

² Cf. Merits Report No. 112/12, Case of Marcel Granier *et al.* v. Venezuela, November 9, 2012 (merits file, folios 9 to 86).

to the State, as follows:

- i. Initiate proceedings to allocate a free-to-air nationwide television frequency in which RCTV is able to participate, at a minimum, under conditions of equality. The process should be open, independent and transparent, apply clear, objective and reasonable criteria, and avoid any political consideration that discriminates on the basis of a media outlet's editorial stance, in keeping with the standards set forth in [the] report;
 - ii. Make reparation to the victims for the damage they sustained as a direct result of the due process violations, and
 - iii. Adopt the measures necessary to guarantee that the process whereby radio and television frequencies are granted and renewed is compatible with the Venezuelan State's international obligations vis-à-vis freedom of expression, as established in th[e] report.
- d) *Notification to the State.* The Merits Report was notified to the State on November 28, 2012, granting it two months to report on compliance with the recommendations. On January 18, 2013, the State presented a brief in which it indicated that "its Constitution prevented it from complying with the three recommendations" made by the Commission.
- e) *Submission to the Court.* On February 28, 2013, the Commission submitted this case to the Court "in light of the need to obtain justice for the [presumed] victims given the failure to comply with the recommendations." The Commission designated Commissioner Felipe González, the Special Rapporteur for Freedom of Expression, Catalina Botero, and Executive Secretary Emilio Álvarez Icaza as its delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, Executive Secretariat lawyer as legal advisers.

II PROCEEDINGS BEFORE THE COURT

3. *Notification to the State and the representatives.* The submission of the case was notified to the State and to the representatives of the presumed victims (hereinafter also "the representatives") on June 10, 2013.

4. *Brief with motions, pleadings and evidence.* On August 12, 2013, the representatives presented their brief with motions, pleadings and evidence (hereinafter "the motions and pleadings brief"), pursuant to Articles 25 and 40 of the Court's Rules of Procedure. In this brief, they agreed with the Commission's allegations and added arguments on the presumed violation of Article 21 of the American Convention.

5. *Answering brief.* On December 10, 2013, the State presented its brief with preliminary objections, answering the submission of the case by the Commission and with observations on the motions and pleadings brief (hereinafter "the answering brief"). In this brief, the State filed three preliminary objections, one of which referred to the presumed "lack of impartiality" of certain judges of the Court and its Secretary. The State appointed Germán Saltrón Negretti, State Agent for Human Rights before the Inter-American and International Systems, as its Agent in this case, and the lawyers, María Alejandra Díaz Marín and Luis Britto García, as deputy agents.

6. On February 6, 2014, the Court issued an order³ in which, *inter alia*, it decided, with regard to the so-called "preliminary objection" filed by the State concerning the recusal of two of the judges and of the Court's Secretary, that "the allegations of lack of impartiality in the functions performed by some of the judges of the Court presented as a preliminary objection, did not meet

³ Cf. *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*. Order of the Inter-American Court of Human Rights of February 6, 2014. Available at: http://www.corteidh.or.cr/docs/asuntos/brewer_29_11_12.pdf

the requirements for an objection of this type.” In addition, the Court considered “unfounded the allegation of lack of impartiality made [...] in relation to Judge Diego García-Sayán and Judge Manuel Ventura Robles, who have not [incurred] in any of the statutory causes for disqualification or executed any act that would allow their impartiality to be questioned,” and declared “inadmissible and unfounded the allegations [...] relating to the supposed lack of impartiality of Pablo Saavedra Alessandri, Secretary of the Court.”

7. *Observations on the preliminary objections.* On March 4 and 7, 2014, the representatives and the Inter-American Commission, respectively, presented their observations on the preliminary objections filed by the State.

8. *Public hearing.* On April 14, 2014, the President issued an order,⁴ in which he called the Inter-American Commission, the representatives, and the State to a public hearing, to receive the final oral arguments of the representatives and of the State, and the final oral observations of the Commission on the preliminary objections and possible merits, reparations and costs. In addition, in this order, he required that affidavits be received from six presumed victims, seven witnesses, four expert witnesses, and one deponent for information purposes, which were submitted by the parties and the Commission on April 28 and 29 and May 7 and 9, 2014. The representatives and the State were given the opportunity to pose questions and make observations on the statements offered by the other party. In addition, in the said order, one presumed victim, one witness and four expert witnesses were called to appear to provide their testimony at the public hearing. The said hearing took place on May 29 and 30, 2014, during the 103rd regular session of the Court held at its seat.⁵ During the hearing, the parties submitted certain documentation and the Court’s judges asked for certain information, explanations and helpful evidence.

9. In addition, the Court received five *amicus curiae* briefs presented by: (1) Elizabeth Ballantine, on behalf of the Inter American Press Association; (2) Nani Jansen, on behalf of the Legal Media Defence Initiative (MLDI); (3) Héctor Oscar Amengual and Alexandre K. Jobim, on behalf of the Association for International Broadcasting; (4) Carlos Correa, Marco Ruiz and Tinedo Guía, on behalf of the Venezuelan *Colegio Nacional de Periodistas* and *Sindicato Nacional de Trabajadores de la Prensa*, and (5) Javier El-Hague, on behalf of the Human Rights Foundation.

10. *Final written arguments and observations.* On July 1, 2014 the parties forwarded their final written arguments and the Commission presented its final written observations. The representatives and the State presented some of the information, explanations and helpful evidence requested by the Court’s judges with their final written arguments (*supra* para. 8).

11. On July 3, 2014, the Court’s Secretariat, on the instructions of the President of the Court, granted until July 15, 2014, for the representatives, the State and the Commission to forward any observations they deemed pertinent, exclusively on the briefs and annexes presented by the State and the representatives on July 1, 2014.

12. *Observations of the representatives, the State, and the Commission.* The Commission and the parties did not submit observations in this regard.

⁴ Cf. *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*. Order of the acting President of the Court of April 14, 2014. Available at: http://www.corteidh.or.cr/docs/asuntos/granier_14_04_14.pdf

⁵ At this hearing, there appeared: (a) for the Inter-American Commission: Commissioner Felipe González, Delegate; Catalina Botero, Special Rapporteur for Freedom of Expression; Ona Flores and Jorge Meza, advisers; (b) for the presumed victims: the representatives Pedro Nikken, Carlos Ayala, Oswaldo Quintana, Gustavo Reyna, José Valentín González, Jesús Loreto, Claudia Nikken Garvía and Bernardo Pulido, and (c) for the State: Germán Saltrón Negretti, State Agent for Human Rights; Luis Britto García, adviser to the State Human Rights Agency; Manuel Galindo, Attorney General of the Bolivarian Republic of Venezuela; María Alejandra Díaz, lawyer; Manuel García Andueza, lawyer; Carlos Márquez, university graduate, and Beatriz Rodríguez, lawyer.

13. *Deliberation of the case.* The Court deliberated this judgment during its 106th, 107th, 108th and 109th regular sessions.

III JURISDICTION

14. Venezuela has been a State Party to the American Convention since August 9, 1977, and accepted the contentious jurisdiction of the Court on June 24, 1981. On September 10, 2012, Venezuela denounced the American Convention, and this decision entered into effect on September 10, 2013. According to Article 78(2) of the Convention, the Court has jurisdiction to hear this case, taking into account that the facts analyzed occurred prior to the entry into force of Venezuela's denouncement of the Convention.

IV PRELIMINARY OBJECTIONS

15. In its answering brief, the State presented the following arguments as "preliminary objections": (i) a recusal of judges and the Secretary of the Court, which was resolved in the order of February 6, 2014 (*supra* para. 6); (ii) the Court's presumed lack of jurisdiction to protect legal entities, and (iii) the presumed failure to exhaust domestic remedies.

A) The objection of the Court's lack of jurisdiction to protect legal entities

A.1. Arguments of the Commission and of the parties

16. The **State** filed an objection concerning the Court's lack of jurisdiction to protect legal entities. In this regard, it argued that both the Preamble to the American Convention and Article 1(2) "establish that, for the purposes of the Convention, 'person means every human being.'" Consequently, it asserted that the Convention "is not applicable to legal entities and that, therefore, the shareholders who represent the commercial enterprise RCTV are not protected by Article 1(2) [of this instrument]." The State also indicated that it did "not accept the criteria" applied by the Court in the case of *Cantos v. Argentina*, since it involved an "arbitrary interpretation" of the Convention in order to "provide protection for corporate interests under a human rights protection system created exclusively for human beings." Furthermore, it argued that, in the said case, the Court "made an inappropriate interpretation of Protocol No. 1 to the European Convention on Human Rights when it stated that, in certain circumstances, individuals may have recourse to the [inter-American] system to assert their rights, even though they are covered by a legal concept" and that the States had not agreed to this when they ratified the Convention. Venezuela "endorsed and alleged the first preliminary objection filed by the Argentine State in the case of *Cantos v. Argentina*" that "legal entities are not included in the American Convention and, therefore, its provisions cannot be applied to legal entities, because they do not have human rights." On this basis, the State asked the Court to "rectify its case law in this regard."

17. The **Commission** indicated that the State had "recognize[d] that, according to the [Court's] case law, the fact that a natural person exercises one or several of the rights established in the Convention through his connection to a legal entity, does not exclude his possibility of lodging an individual petition before the Commission, or the exercise of the jurisdiction of the Inter-American Court to eventually hear the matter." Consequently, it asked the Court to "maintain its consistent case law" on "the possibility of hearing cases in which natural persons consider that their rights have been violated by acts or omission of the State

related to a legal entity,” and that “it reject the [...] preliminary objection [...] filed [...] by the Venezuelan State.”

18. The **representatives** argued that the objection “has no basis [...] because no legal entity is, or claims to be, a procedural subject,” and the presumed victims in this case are “natural persons, fully identified as such, who are employees, journalists, executives and shareholders of RCTV.” Regarding Article 1(2) of the Convention, they indicated that the fact that “it does not recognize rights to legal entities” cannot mean that shareholders, “as natural persons, [...] may be deprived of the human rights inherent in their essential dignity.” According to the representatives, “a distinction should be made between the entitlement to and the exercise of human rights, [because, at times,] owing to the law or the circumstances, the human being entitled to the right is in the situation that the exercise of the right must be implemented through the intermediation of a legal entity.” Thus, they indicated that “[w]hen a legal entity is prejudiced by a violation of the Convention, the substantial element is to determine whether the rights of ‘every human being’ are also violated [...] rather than, exclusively, interests that merely relate to the corporate entity.” In addition, they indicated that in the case of *Cantos v. Argentina*, “the [Inter-American] Court did not interpret Protocol No. 1 to the European Convention, but rather the American Convention,” and asked the Court to reject “the request to amend its case law.”

A.2. Considerations of the Court

19. Article 1(2) of the Convention establishes that the rights recognized in this instrument correspond to persons; that is, human beings.⁶ Thus, in order to decide which situations may be analyzed within the framework of the American Convention, the Court has examined the presumed violation of rights of individuals in their capacity as shareholders,⁷ and employees,⁸ in the understanding that the said presumed violations fell within its jurisdiction.

⁶ Article 1(2) of the American Convention establishes that “[f]or the purposes of this Convention, ‘person’ means every human being.” *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2009. Series C No. 207, para. 45.

⁷ *Case of Ivcher Bronstein v. Peru. Merits, reparations and costs.* Judgment of February 6, 2001. Series C No. 74, paras. 123, 125, 138 and 156, and *Case of Perozo et al. v. Venezuela. Preliminary objections, merits, reparations and costs* Judgment of January 28, 2009. Series C No 195 para. 400.

⁸ *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No.72, para. 109, 110, 125 and 130, and *Case of Abrill Alosilla et al. v. Peru. Merits, reparations and costs.* Judgment of March 4, 2011. Series C No. 223, paras. 81 to 84.

20. In both their initial petition and their brief with motions, pleadings and evidence, the representatives identified individuals who were executives,⁹ shareholders,¹⁰ journalists¹¹ and employees of RCTV¹² as presumed victims.

21. Meanwhile, the Commission asked the Court to declare the violation of the rights established in Articles 13 and 24 of the American Convention to the detriment of some of the employees of RCTV¹³ and of the shareholders and executives, Marcel Granier, Peter Bottome and Jaime Nestares, as well as the violation of the rights established in Articles 8(1) and 25 of this instrument to the detriment of the shareholders, executives and certain employees.¹⁴

22. Based on the foregoing, the Court observes that the presumed violations of the rights recognized in the Convention are alleged with regard to their effects on the shareholders and

⁹ Marcel Granier, Edgardo Mosca, Anani Hernández, Inés Balcao, José Escalona, Isabel Valero, Rogelio Jaua, Julián Isaac, Odila Rubín, Francisca Casto, Pablo Mendoza, Daniela Bergami, Oswaldo Quintana and Eduardo Sapene. See, the petition of the victims' legal representatives of March 1, 2007 (evidence file, folio 28).

¹⁰ Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar and Francisco J. Nestares. See, brief with motions, pleadings and evidence of the victims' legal representatives of August 12, 2013 (merits file, folios 313 and 314).

¹¹ Magdi Gutiérrez, Miguel Ángel Rodríguez, Iván Pérez, Rita Núñez, Álvaro Algarra, Lolymar Viloria, Pedro Guerrero, María Castillo, Teo Castro, Luis Gómez, Isnardo Bravo, Erika Corrales, Berenice Gómez, Mercedes París, Tinedo Guía, Jennifer de Santana, Alejandro Silva, Jonnathan Quintero, Manuel Gago, León Hernández, David de Matteis, Alexys Palmera, Jhenny Chirinos, Trina Ballesteros, David Pérez, Junior Acosta, Ana Virginia Escobar, Javier García, Iris García, Violeta Rosas, Deilui Pernalet, Jofrana González, Isabel Mavarez, Ronald Rojas, Soraya Castellano, Randy Carrero, María Arriaga, Yuly Belle Youseff, Adriana Terán, Elizabeth Pérez, Elaine Marrero, Melanny Hernández, Vanesa Vásquez, Tamara Slusnys, Adriana Carrillo, Nayeli Villarreal, Jessica Flores, Jossybell Ávila, Morella Colina, Dioneila Abreu, Maryalejandra Pastrán, Marcialy Carreño, Jemmy García, Marielysa Castellano, Yamel Rincón, Pedro Beomón, Adriana Mussett, Adriana Toledo, Mirna Abreu, Eduardo Rivas, Larissa Patiño, Dayana Vásquez, Esther Gómez, Andrés Mendoza, Morella Giordana, Sasha Escalante, Irene Contreras, Yamileth Angarita, Mariemma Ramos, Norbis Guerra, María Baleato, Jenny Do Nascimento, Lourdes Mata, Laura Castellanos, Carla Betancourt, Verónica Hernández, María González and Francia Sánchez. See, petition of the victims' legal representatives of March 1, 2007 (evidence file, folio 27 and 28).

¹² In the initial petition, the following employees in the RCTV area of information and opinion were identified as presumed victims: Solisbella Sánchez, Andreina Rodríguez, Eduardo Torres, Luis Galaviz, Jorge Ramírez, Juan Ramírez, Manuel Yépez, Buenaventura Briceño, Joffry Castillo, José López, Jonathan Aular, Yomel Rondón, César Sánchez, Juan Rojas, Ramón Moreno, Maikel Rísquez, Dhennys Arenas, Lae-Ros Escobar, César Díaz, Deyvis Espinoza, Carolina Guidón, Miguel González, Luciana Peña, Lucymar Valladares, Jesús Ramírez, Juan Duarte, Franklin Luna, Simón Martínez, Francisco Maldonado, Jóvito Villalba, Ana Primera, Eva Espinoza, Arturo Valbuena, Aura Meza, Oscar Becerra, Jenny de Araujo, Cristina Valladares, Félix Vivas, María Sojo, Jonathan Acevedo, Alex González, José González, Wilmer Martus, Leonardo Romero, Lennis Terán, María Arteaga, Luis Mota, Marco Camargo, Ángel Cedeño, Reinaldo Trujillo, Andrea Quiroga, Adalaj Salas, Leonardo Moscato, José Luna, Desirae Segovia, Yaris Prato, Luis Carrion, William Sosa, José Grau, María Sánchez, Guillermo Pinite, Evolis Flores, Leonay Corso, Ileana Torrealba, Osman Mendoza, Ismelix Millán, Simón Rodríguez, Luis Martínez, Armando Zambrano, Douglas Márquez, Jesús Zepa, Giovanni Mejías, Giovanni Campos, Raúl Medina, Winston Gutiérrez, Luis Hernández, Jorge Díaz, Ismael García, Wildejhon Aguaje, José Rengel, Ronald Pérez, Oswaldo García, Marlene Betancourt, María Jacinto, Miguel Guzmán, Ingrid Hernández, Ximena Planchart, Lía Lezama and Héctor Duran. See, petition of the victims' legal representatives of March 1, 2007 (evidence file, volume I, folios 29 and 30).

In the brief with motions, pleadings and evidence, the following employees (or former employees) were identified as presumed victims: Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Eladio Lárez, Odila Rubín, Oswaldo Quintana, Eduardo Sapene, Daniela Bergami, Isabel Valero, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño. See, brief with motions, pleadings and evidence of the victims' legal representatives of August 12, 2013 (merits file, volume I, folios 313 and 314).

¹³ Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Odila Rubín, Oswaldo Quintana, Eduardo Sapene, Eladio Lárez, Daniela Bergami, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño. See letter of the Inter-American Commission on Human Rights of February 28, 2013, submitting the case (merits file, folios 4 and 5).

¹⁴ Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar, Francisco J. Nestares, Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Eladio Lárez, Odila Rubín, Oswaldo Quintana, Eduardo Sapene, Daniela Bergami, Isabel Valero, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño. See letter of the Inter-American Commission on Human Rights of February 28, 2013, submitting the case (merits file, folios 4 and 5).

employees as natural persons, so that it finds the preliminary objection of lack of jurisdiction filed by the State inadmissible. However, the Court considers it necessary to underscore that the fact that a legal entity is involved in the facts of the case does not signify, *prima facie*, that the preliminary objection is admissible, because the exercise of the right by a natural person or its presumed violation must be analyzed when examining the merits of the case. Therefore, the other arguments of the Commission and the parties concerning how natural persons would exercise rights presumably violated through a legal entity will be analyzed in detail in the chapter corresponding to each right.

B) Objection of failure to exhaust domestic remedies

B.1. Arguments of the Commission and of the parties

23. The **State** filed an objection of failure to exhaust domestic remedies. It argued that "the Commission did not take into consideration the failure to exhaust [the said] remedies [...], included in the briefs presented by the State on December 4, 2011, and November 9, 2012." The State argued that "the delay in a specific judicial proceeding cannot be measured only by the time that has passed since the remedy was filed; rather, its complexity, the procedural activity of the parties, the conduct of the judicial authorities and the effects produced on the legal situation of those involved should also be analyzed." In this regard, the State indicated that the Supreme Court of Justice processed "thousands of cases" so that it cannot be concluded that "there is, *prima facie*, an unjustified procedural delay in this case." In addition, it indicated that its "laws establish a wide range of remedies and actions that may be used by the defense of [the presumed victims], to substantiate their rights and interests."

24. The **Commission** argued that the objection of failure to exhaust domestic remedies was "inadmissible because it was time-barred." In this regard, it indicated that the procedural opportunity to file this objection was "during the admissibility procedure before the Commission" and that "owing to the lack of a response [by Venezuela at that stage], the mechanism of a tacit waiver by the State comes into operation." It also argued that the State's briefs of December 4, 2011, and November 9, 2012, "were subsequent to the adoption of the Admissibility Report by the Commission."

25. In addition, the Commission indicated that "[f]urthermore, there was an unjustified delay at the admissibility stage." It argued that when "analyzing the requirement of exhaustion of domestic remedies, it took note of the two remedies that were pending a decision." In this regard, it indicated that "the appeal for nullification was at the initial stage and [that] the appeal against the interim measures had not elicited any response from the Supreme Court of Justice, even though four years had elapsed." Consequently, the Commission concluded that "the exception to the exhaustion of domestic remedies established in Article 46(2)(c) [of the Convention] had been activated" and asked the Court to "reject the [...] preliminary objection filed [...] by the Venezuelan State."

26. The **representatives** indicated that the "objection should be rejected as time-barred, unfounded and inadmissible because this case has met the requirement of exhaustion of domestic remedies pursuant to Article 46(1)(a) of the Convention [...]." They argued that "the State, by failing to respond to the petition [...] before the Commission before the latter took a decision on its admissibility, tacitly waived filing the [said] objection." Likewise, they argued that since, at the admissibility stage, the State had failed to contest the "information on the unjustified delay in the processing of the matter in the domestic jurisdiction and the legal consequences derived from this delay, [...] it was also prevented from contesting these facts for the first time before the Court." In addition, they indicated that Venezuela had "merely

stated that the remedies had not been exhausted, and then tried to justify the delay in the remedies filed, which [...] had exceeded a reasonable time.”

B.2. Considerations of the Court

27. Article 46(1)(a) of the American Convention establishes that “[a]dmission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to [...] the remedies under domestic law hav[ing] been pursued and exhausted in accordance with generally recognized principles of international law.”¹⁵ This supposes not only that such remedies should formally exist, but also that they should be adequate and effective, as a result of the exceptions established in Article 46(2) of the Convention.¹⁶

28. In this regard the Court has indicated in its consistent case law that an objection to the exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies must be presented at the proper procedural moment;¹⁷ that is, during the admissibility procedure before the Commission.¹⁸ This interpretation that the Court has made of Article 46(1)(a) of the Convention for more than two decades is in accordance with international law,¹⁹ and signifies that following this procedural opportunity, the principle of estoppel operates.

29. The rule of prior exhaustion of domestic remedies is conceived in the interest of the State, because it seeks to exempt the State from responding before an international organ for acts attributed to it, before it has had the opportunity to remedy them by its own means.²⁰ However, for a preliminary objection of failure to exhaust domestic remedies to be admissible, the State filing this objection must specify the domestic remedies that have not been exhausted and demonstrate that they were available and adequate, appropriate and effective.²¹ Accordingly, it is not the task of the Court or the Commission to identify *ex officio* the domestic remedies that remain to be exhausted. The Court emphasizes that it is not incumbent on the international organs to rectify a lack of precision in the State’s arguments.²²

30. In this case, the initial petition was lodged before the Commission on February 18, 2010, and forwarded to the State on March 11, 2011,²³ at which time the Inter-American Commission granted it two months to forward its observations corresponding to the admissibility stage of the petition. However, the State did not send the observations requested, and did not comment on the petition’s admissibility. Therefore, the Admissibility Report was adopted on July 22, 2011. Then, on December 4, 2011, the State presented its “observations on the merits” and referred to the failure to exhaust domestic remedies, stating that “although the Venezuelan State did not

¹⁵ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 85, and *Case of Cruz Sánchez v. Peru. Preliminary objections, merits, reparations and costs* Judgment of April 17, 2015. Series C No. 292 para. 48.

¹⁶ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 63, and *Case of Cruz Sánchez v. Peru*, para. 48.

¹⁷ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, para. 88, and *Case of Cruz Sánchez v. Peru*, para. 49.

¹⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, paras. 88 and 89, and *Case of Cruz Sánchez v. Peru*, para. 49.

¹⁹ Cf. *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197, para. 22, and *Case of the Human Rights Defender et al. v. Guatemala. Preliminary objections, merits, reparations and costs* Judgment of August 28, 2014. Series C No. 283, para. 20.

²⁰ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 61, and *Case of Cruz Sánchez v. Peru*, para. 48.

²¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, paras. 88 and 91, and *Case of Cruz Sánchez v. Peru*, para. 49.

²² Cf. *Case of Reverón Trujillo v. Venezuela*, para. 23, and *Case of Cruz Sánchez v. Peru*, para. 49.

²³ Cf. Communication of the Inter-American Commission of July 26, 2006 (evidence file, folio 1945).

present information on the petition by the date indicated by the Commission, the rule of the exhaustion of domestic remedies corresponds not only to the State, but also the Commission has the responsibility to verify whether the domestic remedies have been filed and exhausted; thus, it cannot immediately apply paragraph 3 of Article 31 [of the Commission's Rules of Procedure], transferring the burden of proof to the State."²⁴

31. The Court considers that the State failed to provide any observations on the requirements for the admissibility of the petition, and this was indicated in the Admissibility Report of July 22, 2011. Following the said report, the State presented two briefs (December 2011 and January 2013); however, the two briefs were sent after the Admissibility Report had been adopted. In this regard, the Court's consistent case law has established that the said objection must be filed during the admissibility stage before the Commission because, if it is not, it is considered that the State has tacitly waived its rights to file this objection.²⁵ Consequently, the Court notes that the objection of exhaustion of domestic remedies was presented after the Admissibility Report had been issued, so that it was time-barred. Therefore this objection is rejected.

V EVIDENCE

A) Documentary, testimonial and expert evidence

32. The Court received diverse documents presented as evidence by the Inter-American Commission, the representatives and the State, attached to their main briefs (*supra* paras. 3 to 5). In addition, the Court received the affidavits of: presumed victims Ananí Hernández, Jaime Nestares Phelps, María Isabel Arriaga, Larisa Patiño, Peter Bottome and Soraya Castellano; witnesses Tinedo Guía, Jhenny Eiselín Chirinos Contreras, Pedro Beomon Torres, León Hernández, Erika Corrales and Nelson Bustamente; the deponent for information purposes, Ana María Hernández Vallén, and the expert witnesses Alfredo Morles Hernández, Ángel Alayón, Francisco Rubio Llorente and André Ramos Tavares. Regarding the evidence provided during the public hearing, the Court received the statements of presumed victim Marcel Granier, witness José Leonardo Suárez, and expert witnesses Antonio Pasquali, Heli Rafael Romero Graterol, Domingo García Belaunde and Eduardo Cifuentes Muñoz.²⁶

B) Admission of the evidence

B.1 Admission of the documentary evidence

33. The Court admits those documents submitted at the proper procedural opportunity by the parties and the Commission, the admissibility of which was neither contested or challenged.²⁷

34. In the case of the newspaper articles presented by the parties and the Commission with their different briefs, this Court has considered that they may be assessed when they refer to well-known public facts or declarations of State officials, or when they corroborate aspects related to

²⁴ Cf. Communication of the State received on December 4, 2011, Annex 72 (evidence file, folios 3546 and 3547). As mentioned previously, both the State and the Commission referred to this brief of December 4, 2011, and to one supposedly presented by the State on November 9, 2012. However, the case file provided to this Court only contained the former.

²⁵ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, para. 88, and *Case of Brewer Carías v. Venezuela*. Judgment of May 26, 2014. Series C. No 278, para. 57.

²⁶ The purpose of these statement was established in the order of the President of the Court of April 14, 2014.

²⁷ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 140, and *Case of Cruz Sánchez v. Peru*, para. 102.

the case.²⁸ The Court decides to admit those documents that are complete or that, at least, permit their source and date of publication to be verified.

35. Likewise, regarding some documents indicated by the parties and the Commission by means of electronic links, the Court has established that, if a party provides at least the direct electronic link to the document cited as evidence and it can be accessed at the time the respective judgment is delivered, neither legal certainty nor procedural balance is affected, because it can be located immediately by the Court and the other parties.²⁹ In this case, neither the other parties nor the Commission opposed or made any observations on the content and authenticity of such documents.

36. In the case of the videos presented by the parties and the Commission, these were not contested and their authenticity was not questioned; the Court therefore admits them.³⁰

37. Regarding the representatives' request to incorporate into the case file the expert opinions of Toby Daniel Mendel and Eduardo Ulibarri Bilbao in the case of *Ríos et al. v. Venezuela*,³¹ the Court recalls that, as established in the order of April 14, 2014, the President found it appropriate "to incorporate into the body of evidence in this case, insofar as pertinent, the expert opinions provided [...] because they could be useful for deciding the instant case." Thus, and taking into consideration the objections raised by the State in exercise of its right of defense, the Court incorporates these documents into the case file to the extent that they may be useful for deciding the instant case.³²

38. During the public hearing (*supra* para. 8) the State, witness José Leonardo Suárez, and the representatives presented various documents,³³ copies of which were delivered to the parties and to the Commission, who were able to present their observations. Considering those documents useful for deciding this case, the Court admits the documents provided during the public hearing as evidence pursuant to Article 58 of the Rules of Procedure.

39. The State and the representatives submitted certain documentation with their final written arguments, in response to the requests for helpful information and evidence made by the Court's judges at the conclusion of the public hearing in this case (*supra* para. 10). The admissibility of the information and documentation requested was not contested, and its authenticity and veracity was not questioned. Consequently, under Article 58(b) of the Rules of Procedure, the Court finds it appropriate to admit the documents provided by the representatives and the State, which had been requested by the Court's judges or its President as helpful evidence.

²⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 146, and *Case of Cruz Sánchez v. Peru*, para. 104.

²⁹ Cf. *Case of Escué Zapata v. Colombia. Merits, reparations and costs. Judgment of July 4, 2007. Series C No. 165*, para. 26, and *Case of Cruz Sánchez v. Peru*, para. 103.

³⁰ Cf. *Case of Ríos et al. v. Venezuela. Preliminary objections, merits, reparations and costs. Judgment of January 28, 2009. Series C No. 194*, para. 93, and *Case of Cruz Sánchez v. Peru*, para. 123.

³¹ Toby Daniel Mendel submitted an opinion on freedom of expression as a human right and the permissible restrictions; freedom of expression in relation to public officials and matters of general interest; acts of intimidation, harassment, persecution and attacks against social communicators committed by State agents and/or private individuals, as well as on the positive obligation of the State to protect RCTV. Meanwhile, Eduardo Ulibarri Bilbao submitted an opinion on the relevant international standards for freedom of expression and the exercise of journalism. Cf. *Case of Ríos et al. v. Venezuela. Preliminary objections, merits, reparations and costs. Judgment of January 28, 2009. Series C No. 194*, para. 79.

³² Cf. *Case of the Pacheco Tineo family v. Bolivia. Preliminary objections, merits, reparations and costs. Judgment of November 25, 2013. Series C No. 272*, para. 47.

³³ Cf. Record of submission of documents. Public hearing of May 29 and 30, 2014 (merits file, folios 2022 to 2032).

40. In addition, the representatives argued that the criteria expressed in Judgment C-350/97³⁴ of the Colombian Constitutional Court of July 26, 1997, forwarded by the State, “was controversial and [...] had been surpassed by Colombian legislation and case law.” According to the representatives, “the laws of Colombia currently in force establish the ways in which broadcasting concessions are renewed, and although this is not automatic, [...] they also establish a procedure enabling concessionaires to obtain the renewal under reasonable and non-discriminatory conditions.” In this regard, the Court underscores that the representatives’ arguments relate to the importance that could be accorded to the judgment forwarded by the State and not to the admissibility of the documentary evidence. Therefore, pursuant to Article 58(b) of its Rules of Procedure, the Court finds it appropriate to admit this document.

B.2 Admission of the testimonial and expert evidence

41. The Court finds it pertinent to admit the statements and opinions provided during the public hearing and by affidavit, insofar as they are in keeping with the purpose defined by the President in the order requiring them (*supra* para. 6) and the purpose of this case.

42. Regarding the statement of witness José Leonardo Suárez, proposed by the State, the representatives stressed that he had “made it clear that he did not possess the technical knowledge to offer his views on the ‘sufficiency’ or the ‘quality’ of the frequencies.” In this regard, the Court emphasizes that, contrary to expert witnesses, witnesses do not provide technical opinions related to their special knowledge or expertise;³⁵ thus, the objections raised by the representatives are unrelated to the purpose of the statement of this witness. Consequently, his statement is admitted.

43. Also, regarding the statement of Ana María Hernández, the representatives argued that “she [did] not express herself objectively [and] could not be admitted as an expert.”³⁶ In this regard, the Court recalls that, in the order of the President of the Court of April 14, 2014, it was decided that Ms. Hernández would provide her statement for information purposes only and not as an expert witness as proposed by the State, because it was considered that she “might be in a subordinate relationship to the State entity that had a direct interest in the case, and thus the provisions of Article 48(1)(f) of the Court’s Rules of Procedure were applicable and it was not appropriate to summon her as an expert.”³⁷ Therefore, the Court understands that the representatives’ arguments do not contest the admissibility of the statement, but rather question its probative value. The Court will consider the content of this statement to the extent that it is in keeping with the purpose for which it was required (*supra* para. 6). On this basis, the Court admits the statement for information purposes.

C) Assessment of the evidence

44. Based on Articles 46, 47, 48, 50, 51, 57 and 58 of the Rules of Procedure, and on its consistent case law concerning evidence and its assessment,³⁸ the Court will examine and

³⁴ That judgment considered that a provision eliminating the possibility of “automatic” renewal at the conclusion of a concession that had been granted was in keeping with the Constitution and determined that this could not be understood as an acquired right because there was only an expectation. Constitutional Court of Colombia. Judgment C-350 of 1997 (evidence file, folio 3407).

³⁵ Cf. *Case of Atala Riffo and daughters v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2012. Series C No. 254, para. 27.

³⁶ In particular, the representatives referred to the phrase: “[m]ost of these private sector communication enterprises were and are connected to *Acción Democrática* and COPEI, as well as to other commercial political predators who have lived off the economic structure of the Venezuelan State.”

³⁷ Cf. *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*. Order of the acting President of the Court of April 14, 2014, para. 29.

³⁸ Cf. *Case of Loayza Tamayo v. Peru. Reparations and costs*. Judgment of November 27, 1998. Series C No. 42,

assess the documentary probative elements remitted by the parties at the proper procedural moments, the statements and testimony provided by affidavit and during the public hearing, and also the helpful evidence requested by the Court and, subsequently, it will assess this when establishing the proven facts and ruling on the merits, taking into account the whole body of evidence and the observations of the parties.³⁹ To this end, it will abide by the principle of sound judicial criteria, within the corresponding legal framework.⁴⁰ In addition, the statements made by the presumed victims will be assessed in the context of all the evidence in the proceedings, insofar as they can provide further information on the presumed violations and their consequences.⁴¹ Regarding newspaper articles or texts which refer to facts related to this case, their assessment is not subject to the formalities required by testimonial evidence. However, their probative value will depend on whether they corroborate or refer to aspects related to this specific case.⁴²

VI FACTS

A) Background and context

45. The Court recalls that the factual framework of the proceedings before it are constituted by the facts contained in the Merits Report submitted to the Court's consideration.⁴³ Consequently, it is not admissible for the parties to allege new facts that differ from those contained in the said report, without prejudice to describing those that explain, clarify or reject the facts mentioned in the report and that have been submitted to the Court's consideration.⁴⁴ The exception to this principle are facts that are classified as supervening, provided that they are related to the facts of the proceedings. Accordingly, in this chapter, the Court will only take into account the facts included in the Merits Report.⁴⁵

A.1. Determination of the context of the facts of the case

46. The **representatives** argued that this case was based on two contexts. The first context was related to "a particular institutional situation created by the political climate established following the presidential re-election in December 2006, characterized by the extreme radicalization of the government's polarizing discourse and the increasing concentration of power in the hands of the President of the Republic." As part of the alleged context, they mentioned the "political climate" surrounding the proposed constitutional reform of 2007, the 2007 referendum, and the "Enabling Law" of that year. The representatives referred to the second context as the "constitutional hegemony of the government as the original goal and

para. 38 and *Case of Cruz Sánchez v. Peru*, para. 125.

³⁹ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 146, and *Case of Cruz Sánchez v. Peru*, para. 104.

⁴⁰ Cf. *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*, para. 52, and *Case of Cruz Sánchez v. Peru*, para. 129.

⁴¹ Cf. *Case of Loayza Tamayo v. Peru. Merits*, para. 43, and *Case of Cruz Sánchez v. Peru*, para. 131.

⁴² Cf. *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs. Judgment of November 23, 2009. Series C No. 209*, para. 72, and *Case of the Massacres of El Mozote and nearby places v. El Salvador. Merits, reparations and costs. Judgment of August 19, 2013. Series C No. 264*, para. 37.

⁴³ Cf. *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs. Judgment of February 28, 2003. Series C No. 98*, para. 153, and *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs. Judgment of November 20, 2014. Series C No. 289*, para. 35.

⁴⁴ Cf. *Case of "Five Pensioners" v. Peru*, para. 153, and *Case of Espinoza Gonzáles v. Peru*, para. 35.

⁴⁵ In particular, the facts presented by the representatives that will not be taken into account are: (i) "the closure and threat of closure of other audiovisual and radio media services," especially Globovisión; (ii) the presumed "exclusion of RCTV International from the program content of subscription services," and (iii) the facts related to the loss of work of the employees as a result of RCTV's closure.

also the result of the process described," which involved the creation of "an institutional and legal structure, a State policy, and an operational apparatus that has established the bases for the dissemination of a single message, which is the new ethical, moral and spiritual hegemony of the political project known as Twentieth Century Socialism." On this point, the representatives referred, *inter alia*, to: (i) the "general outline of the 2007-2013 Economic and Social Development Plan of the Nation"; (ii) "the so-called *Plan Patria*"; (iii) the "RESORTE Law" (Law on Social Responsibility in Radio and Television); (iv) the number of radio stations and television channels that exist in the country, as well as their possible editorial line; (v) the use of the "*cadenas nacionales*" [simultaneous broadcasts on all State radio and television frequencies], and (vi) the 2012 Annual Report of PROVEA (Venezuelan Program of Human Rights Education and Action).

47. The **Commission** placed the presumed violations of rights that occurred in this case in three contexts: (i) "'a progressive deterioration of the exercise of freedom of expression in Venezuela,' caused, *inter alia*, by 'an environment of intimidation' fostered by statements of senior State officials against independent media outlets, as well as 'the official discourse of government officials discrediting journalists and the launch of administrative proceedings that could result in the suspension or revocation of concessions for providing radio and television services.'"; (ii) "a context of retaliation against officials who made decisions contrary to the interests of the government," and (iii) another context characterized by the "lack of judicial independence and autonomy vis-à-vis the political power" as "one of the weakest points of Venezuelan democracy."

48. The Court will take into account the facts indicated by the Commission and the parties, as well as the evidence in the case file in order to establish the specific context of this case.

a) ***Social mobilization and the April 2002 coup***

49. First, the Court underlines that, between December 2001 and April 2002, a process of social mobilization took place among certain sectors of the population against various policies of the Venezuelan Government.⁴⁶ The national strike that began on December 10, 2001,⁴⁷ originated in the labor conflict in the company, *Petróleos de Venezuela* (PDVSA) and, subsequently, other manufacturing and business sectors joined the strike.⁴⁸

50. The public protest gradually increased during the first quarter of 2002. In particular on April 11, 2002:⁴⁹

A mass march [was] called by an umbrella organization of the opposition forces, which would later come to be known as the Democratic Coordination, [which] proceeded from the Parque del Este towards Chuao. The demonstrators soon continued on to Miraflores to demand the President's resignation. There they encountered pro-government groups that had been camped near the Palace for three consecutive days.

[...]

The result of the encounter was a confrontation in the city center involving clashes between the Metropolitan Police, the National Guard and demonstrators in favor of and opposed to the government.

[...] The day produced tragic results. Information received on this matter indicates almost 19 deaths and a large number of wounded.

⁴⁶ Cf. *Case of Brewer Carías v. Venezuela. Preliminary objections*. Judgment of May 26, 2014. Series C No. 278, para. 36. Similarly, IACHR. Report on the situation of human rights in Venezuela 2003, OEA/Ser.L/V/II.118. Doc. 4 rev.1, October 24, 2003, paras. 76 and 77. Available at: <http://www.cidh.org/countryrep/Venezuela2003eng/toc.htm>

⁴⁷ IACHR. Report on the situation of human rights in Venezuela 2003, OEA/Ser.L/V/II.118. Doc. 4 rev.1, October 24, 2003, para. 76.

⁴⁸ IACHR. Report on the situation of human rights in Venezuela 2003, OEA/Ser.L/V/II.118. Doc. 4 rev.1, October 24, 2003, paras. 76 to 79.

⁴⁹ IACHR. Report on the situation of human rights in Venezuela 2003, OEA/Ser.L/V/II.118. Doc. 4 rev.1, October 24, 2003, paras. 80 to 83.

51. That same day, the commanders of the Armed Forces declared that they repudiated the authority of the President of the Republic, Hugo Chávez Frías (hereinafter "President Chávez") and, the following day, General Lucas Rincón advised the population that "the President of the Republic has been asked to resign from office, and he has accepted this."⁵⁰ The sector of the Army that had spoken out against the President of the Republic, together with a group of civilians, constituted the group calling itself the "Government of Democratic Transition and National Unity."⁵¹

52. In the early morning hours of April 12, 2002, Mr. Carmona Estanga "announced the dissolution of the public powers and the establishment of a 'government of democratic transition,' among other measures,"⁵² reading the so-called "Carmona Decree." This decree established the following, among other matters:

1. A government of democratic transition and national unity is constituted. Pedro Carmona Estanga [...] is appointed President of the Republic of Venezuela, and, in this act and immediately, he becomes the Head of State [...]. The President of the Republic with the Council of Ministers is authorized to issue the acts with general effects that may be necessary to ensure execution of this decree [...].
2. The name of the Republic of Venezuela is re-established [...].
3. The members of the National Assembly and their substitutes are suspended from their duties [...].
7. The President of the Republic with the Council of Minister may remove and provisionally appoint the heads of the organs of the municipal, state and national public powers to ensure the democratic institutional framework [...].
8. The reorganization of the public Powers is decreed, [...] and, to this end, the president and the other justices of the Supreme Court of Justice, the Prosecutor General of the Republic, the Comptroller General of the Republic, the Ombudsman, and the members of the National Electoral Council are dismissed from the posts they have held illegally. [...]

53. On April 14, 2002, "Hugo Chávez was reinstated as President of the Republic."⁵³ The events that took place on April 12 and 13, 2002, were considered by the Permanent Council and the General Assembly of the Organization of American States as an "abrupt interruption of the democratic and constitutional order [in Venezuela]."⁵⁴ As soon as the coup d'état occurred, the Group of Rio⁵⁵ "condemned the alteration of the constitutional order in Venezuela, [... arising from an] excessive polarization," and, therefore, requested that a special session of the OAS Permanent Council be convened pursuant to Article 20 of the Democratic Charter.⁵⁶ Subsequently, in Resolution 811 (1315/02) the OAS Permanent Council, in application of Article 20 of the Democratic Charter, condemned the alteration of the constitutional order in Venezuela and decided to send a fact-finding mission headed by the Secretary General to investigate the

⁵⁰ Cf. *Case of Brewer Carías v. Venezuela*, para. 37 and IACHR. Report on the situation of human rights in Venezuela 2003, OEA/Ser.L/V/II.118. Doc. 4 rev.1, October 24, 2003, para. 85.

⁵¹ IACHR. Report on the situation of human rights in Venezuela 2003, OEA/Ser.L/V/II.118. Doc. 4 rev.1, October 24, 2003, para. 86.

⁵² Cf. *Case of Brewer Carías v. Venezuela*, para. 39. IACHR. Report on the situation of human rights in Venezuela 2003, OEA/Ser.L/V/II.118. Doc. 4 rev.1, October 24, 2003, para. 86.

⁵³ Cf. *Case of Brewer Carías v. Venezuela*, para. 40 and IACHR. Report on the situation of human rights in Venezuela 2003, OEA/Ser.L/V/II.118. Doc. 4 rev.1, October 24, 2003, para. 87.

⁵⁴ OEA. Report of the Permanent Mission of Venezuela to the Permanent Council, The Current Situation in Venezuela, OEA/SerP. CP/doc.3616/02. May 28, 2002 Available at: http://www.oas.org/xxxiiga/english/docs_en/docs_items/cpdoc3616_02.htm.

⁵⁵ The "Rio Group" was a permanent political consultation and concertation mechanism created in 1986 by most of the States of Latin America and the Caribbean.

⁵⁶ Report of the OAS Secretary General pursuant to Resolution CP/RES.811 (1315/02). Situation in Venezuela. http://www.oas.org/XXXIIGA/english/docs_en/report_venezuela.htm.

events that occurred on April 11 and 12 and to undertake the necessary diplomatic negotiations to promote the prompt normalization of the democratic institutional framework.⁵⁷

54. In compliance with the above, the Secretary General prepared a report on the situation in Venezuela, in which he recommended, *inter alia*, that the OAS should be at the disposal of the government and people of Venezuela to ensure that those events were never repeated.⁵⁸ In his report, the OAS Secretary General considered it opportune to examine aspects of the institutional framework of Venezuela in light of the provisions of the Democratic Charter. For example, he asserted that whatever agreement was reached between the different sectors of Venezuelan society should, as that Charter indicates, fully respect freedom of expression and therefore of the press. Also, that, as established in Article 4 of that international instrument, it was essential to re-establish complete confidence in the rule of law.

b) Conduct of the media

55. RCTV has been named by senior Venezuelan officials as one of the private television stations that were active political participants in the events surrounding the coup d'état of April 2002.⁵⁹ In particular, RCTV has been accused of openly supporting the strike that took place at the end of 2001 and the beginning of 2002 by presenting propaganda in favor of the resignation of President Chávez during its paid publicity spots.⁶⁰ Also, RCTV and other domestic television channels were accused of giving extensive coverage to the opposition marches and the swearing in of Pedro Carmona on April 11 and 12, 2002, and of failing to transmit the marches and protests in favor of the President and the reinstatement in the presidency of Hugo Chávez on April 13 and 14, 2002.⁶¹ In this regard, the Inter-American Commission indicated that it:⁶²

"notes the bias found in some Venezuelan media outlets, which reflects the extreme polarization that characterizes the country. As one example of this, at the end of its visit, the Commission stated that: 'The IACHR has been concerned by the scant information, or at times total lack of information, available to Venezuelan society during the days of the institutional crisis of April. Although there may be any number of justifications to explain this lack of information, to the extent that the suppression of information resulted from politically-motivated editorial decisions, this should be the subject of an essential process of reflection by the Venezuelan media about their role at that moment.'"

56. Similarly, the Human Rights Center of the Universidad Católica Andrés Bello indicated in its report entitled "*Entre el estruendo y el silencio. La crisis de abril y el derecho a la libertad de expresión e información*" that, during the coup d'état of April 2002 "the main private

⁵⁷ CP/RES. 811 (1315/02). "Situation in Venezuela." http://www.oas.org/XXXIIGA/english/docs_en/resolucion_venezuela.htm.

⁵⁸ Report of the OAS Secretary General pursuant to Resolution CP/RES.811 (1315/02). Situation in Venezuela. http://www.oas.org/XXXIIGA/english/docs_en/report_venezuela.htm.

⁵⁹ Cf. IACHR. Report on the situation of human rights in Venezuela 2003, OEA/Ser.L/V/II.118. Doc. 4 rev.1, October 24, 2003, paras. 79, 81, 372 and 373.

⁶⁰ Cf. Council on Hemispheric Affairs (COHA). "Reunión de alto nivel en Venezuela concluye con magros resultados," [High-level meeting in Venezuela concludes with meagre results] Washington, DC, March 10, 2003; cited in the RCTV *White Paper*. Venezuela: March 2007, 1st edition (evidence file, folios 3314, 3315 and 3319). Also, during the general strike between December 2002 and February 2003, "the private television networks [including RCTV] bombarded viewers with coverage of the marches and carried opposition political messages free of charge in place of commercial advertising." Cf. Human Rights Watch "Caught in the crossfire. Freedom of expression in Venezuela," May 2003. Available at: <https://www.hrw.org/report/2003/05/20/caught-crossfire/freedom-expression-venezuela>.

⁶¹ Cf. IACHR, Democracy and Human Rights in Venezuela, 2009, Available at: <http://www.cidh.org/countryrep/Venezuela2009eng/VE09.TOC.eng.htm>. It has also been recognized that "the Venezuelan population was kept with a total lack of information from hours before the coup d'état, and this continued, in practice, until the Monday [when Hugo Chávez was reinstated in the Presidency]." Cf. Equipo Nizkor – Derechos Human Rights "El fallido golpe de estado en Venezuela sirve para dejar en evidencia a la "diplomacia del estado de excepción,"" p. 4 Available at: <http://www.derechos.org/nizkor/venezuela/doc/nizkorven1.html>

⁶² IACHR, Informe Democracy and Human Rights in Venezuela, 2009, para. 358.

television networks provide scant coverage of the demonstrations in favor of Chávez” and, once former President Chávez had been reinstated, “the television networks began to transmit films, comic strips, soap operas and sports. The programs transmitted by the television networks at the time did not reflect the events that were taking place in the street, and appeared to be trying to deny that reality.”⁶³

57. The report cited above also indicated that:

Additionally, among the few activities that he carried out as Head of State during his brief government, [Pedro Carmona Estanga], the former President of Fedecámaras, held a meeting with the owners of the main media. Versions in the foreign press, cited by the Committee to Protect Journalists, indicate that the owners and executives of the country’s television networks and media met with Carmona on the Saturday morning. Subsequently, José Gregorio Vásquez, who had been appointed deputy minister of the Secretariat, in a public letter, confirmed that the owners of the media had been invited to a meeting with President Carmona, which was attended by the editor of the newspaper *El Universal*, Andrés Mata, the director general of Globovisión, Alberto Federico Ravell, the owners of Venevisión, Gustavo and Ricardo Cisneros, the editor of the newspaper *El Nacional*, Miguel Henríquez Otero, the director of Radio Caracas Televisión, Marcel Granier, the president of the Bloque de Armas, Andrés de Armas, and also Orlando Urdaneta, of Globovisión, and Patricia Poleo, of *El Nuevo País*. According to Vásquez, during the meeting a discussion was held on the errors that the new government had committed and the search for solutions, and the media representatives had agreed to cooperate with the communications policy of the *de facto* government. This account of the meeting has not been denied, and serves to assert that, although there are no indications that the media were involved in the coup d’état, as President Chávez has insistently indicated, the almost unanimous reaction of the press, radio and television had some common features: zero questioning of the new government and the way in which it took power, omission of information questioning the version that Chávez had resigned, which implied censorship, and a large dose of partiality reflected in a media discourse on April 12, on the radio and television and on April 13 in the newspapers, directed at giving legitimacy to the actions signifying that President Chávez had been deposed. This combination of factors infringed the people’s right to receive information.”⁶⁴

c) Tension between the State and the media

58. To illustrate the situation that existed when the facts occurred, the Court finds it necessary to refer to the case of *Ríos et al. v. Venezuela*, because the factual presumptions analyzed in that case allow the context of this case to be understood. Thus, those facts referred to acts and omissions of public officials and private individuals between 2001 and 2004 that constituted restrictions to the task of seeking, receiving and imparting information of 20 individuals who had been employed by RCTV as journalists and social communication employees. In that case, the Court indicated that:

The speeches and declarations mentioned, of an essentially political nature, refer to the private social communication media in Venezuela, in general, and to RCTV, its owners and directors, particularly, even though they do not indicate any specific journalists. The evidence provided allows for verification that those statements [by State officials] include the expressions that have been emphasized by the Commission and the representatives in their arguments. Thus, the social communication company RCTV, and in some cases its owners and directors, are referred to as “fascists,” who “are committed” to destabilizing action against the government of Venezuela, against its people, against its laws, against the Republic.” Additionally, that company or its owners are identified, expressly or implicitly, as participants in the *coup d’état* of 2002; RCTV is included as one of the four private media companies referred to as “the four horsemen of the Apocalypse;” and references are made to RCTV as “an enemy of the people of Venezuela” and of responding to a “terrorist plan.” Similarly, the veracity of the information transmitted by RCTV is questioned, and in some declarations reference is made to the concession to operate the media and to the possibility of canceling it.”⁶⁵

⁶³ Cf. Human Rights Center, Universidad Católica Andrés Bello “*Entre el estruendo y el silencio. La crisis de abril y el derecho a la libertad de expresión e información*,” 2002 Available at: http://w2.ucab.edu.ve/tl_files/CDH/recursos/entreelstruendoyelsilencio.pdf

⁶⁴ Cf. Human Rights Center, Universidad Católica Andrés Bello “*Entre el estruendo y el silencio. La crisis de abril y el derecho a la libertad de expresión e información*,” 2002.

⁶⁵ Cf. *Case of Ríos et al. v. Venezuela*, para. 127.

59. Added to this, the Court takes into account the information presented in the expert opinions provided in the case of *Ríos et al.* on this issue, which have been added to the file in the instant case. Thus, expert witness Eduardo Ulibarri Bilbao referred to the existence of “threats, harassment and attacks against the journalists of RCTV and other media considered ‘enemies.’”⁶⁶ While expert witness Toby Mendel indicated that “President [Chávez] made several declarations that were very hostile towards the private media, linked to implicit and explicit threats of revoking their licenses. Among other matters, these declarations accused the private media of ‘poisoning’ the minds of the people, transmitting terrorist propaganda, and inventing lies to promote panic and fear.”⁶⁷ The Court also highlights the evidence provided to this case with regard to the declarations made by various officials and government publications concerning the editorial content of RCTV and the actions and opinions of its shareholders, executives and employees (*infra* paras. 75 to 86).

d) Conclusion

60. The Court emphasizes the seriousness of the events that occurred between April 11 and 14, 2002, which resulted in the *coup d’état* in Venezuela. The Court also stresses that the facts related to the coup d’état and the conduct of the media during those days led to a radicalization of the statements made by government officials against the media.

61. The Court concludes that it has sufficient evidence to determine that the facts of this case took place in a tense situation following the *coup d’état*, during which a political polarization occurred that was revealed by a noticeable trend towards radicalization of the positions of the sectors involved. Consequently, there is evidence to consider proven the existence of a context marked by the insistent discourse of the Venezuelan Government accusing the private media, including RCTV, of “being enemies of the government,” “perpetrators of the coup,” and “fascists” and of causing “very serious psychological harm to the people of Venezuela,” among other matters. As will be referred to below (*infra* para. 75 to 86), the different statements of the officials also mentioned the possibility of not renewing the concessions of the media whose position was contrary to the government. Thus, in the instant case, the Court considers proved, “the ‘environment of intimidation’ fostered by statements of senior State officials against independent media outlets” and “an official discourse discrediting the professionalism of journalists.”

A.2. Radio Caracas Televisión RCTV, C.A., its shareholders, executives and journalists

62. Radio Caracas Televisión RCTV, C.A. (hereinafter “RCTV”) had operated as a VHF (very high frequency) free-to-air television station with national coverage in Venezuela since 1953 when it was granted the respective concession.⁶⁸ The television network transmitted entertainment, information and opinion programs and, according to its executives, its editorial line was critical of the government of then President Chávez⁶⁹ beginning with the start of his

⁶⁶ Expert opinion provided by Eduardo Ulibarri Bilbao dated June 30, 2008 (merits file, folio 1341).

⁶⁷ Expert opinion provided by Toby Mendel dated July 21, 2008 (merits file, folio 1356).

⁶⁸ Cf. License authorizing RCTV to operate as a VHF free-to-air television station issued by the Telecommunications Directorate of the Ministry of Communications on July 31, 1953 (evidence file, folio 2479).

⁶⁹ In this regard, expert witness Antonio Pasquali indicated that “Radio Caracas Televisión renounced decorum and I and many others recognized this because it decided to be an outspoken spokesman of the dissent and, so it was until it was silenced.” Opinion provided by expert witness Pasquali during the public hearing in this case. Meanwhile, presumed victim Marcel Granier stated that he “would define [the editorial line of RCTV] as constitutional; it was a line that supported the preservation of democracy in Venezuela, which was always under threat.” Statement of presumed victim Marcel Granier during the public hearing in this case. Jaime Nestares Phelps, RCTV board member and shareholder indicated in his sworn statement that, “from the start, the critical spirit of RCTV [...] annoyed [the] government [of President Hugo Chávez Frías].” Sworn statement of Jaime Nestares Phelps (merits file, folio 1424). Meanwhile, Soraya Castellano, Information Manager of the RCTV Vice Presidency for Information, mentioned in her

mandate in 1999. Before it left the airwaves, it was the nationwide television network with the largest audience among all sectors of the Venezuelan population, based on its audience share⁷⁰ in the country at that time.⁷¹

63. The primary objective of the company, RCTV, is "executing commercial activities related to the radio and television industry."⁷² Its main body is the shareholders' General Assembly, which has broad authority to manage and administer the company's business.⁷³

64. Regarding RCTV shareholders, both the representatives, as certified by Marcel Granier in his capacity as President of RCTV, and expert witness Ángel Alayón in his opinion, advised that the company's shares were distributed as follows:⁷⁴ (i) Peter Bottome held 48.62% of the shares; (ii) Marcel Granier, 18.25 %; (iii) Jaime Nestares, 16.57 %, and (iv) Francisco Nestares, Fernando Nestares, Jean Hope Nestares and Alicia Phelps de Tovar, 4.14% each. However, from the information provided by the representatives in the motions and pleadings brief and its annexes, it can be concluded that none of these presumed victims is a direct shareholder of RCTV. To the contrary, the above-mentioned partners hold shares in one or several separate legal entities which, in turn, are companies that own the RCTV shares. Nevertheless, and without this signifying a legal ruling in this regard, the Court will proceed hereafter in this judgement to refer to these individuals as "shareholders."

65. In this regard, it has been proved that the following persons, presumed victims in this case, are owners of the companies that, in turn, are owners of the shares of RCTV C.A. as follows:

- a) Marcel Granier⁷⁵ owns 100% of the shares of Guatí S.A. This company is a shareholder of RCTV C.A. in two ways: (i) directly, by owning 6.213% of its shares, and (ii) indirectly, by owning 13.74% of the shares of Alcatracia S.A, which owns 87.57% of the shares of RCTV C.A.
- b) Peter Bottome⁷⁶ is connected to RCTV in two ways, namely: (i) he is a shareholder of Bemana C.A. This company is, in turn, a direct shareholder of RCTV C.A. because it owns 6.213% of its shares, and (ii) it owns 100% of the shares of Yaví S.A. This

sworn statement that "since [she] began to work there in 1996, the RCTV editorial line was always critical of all the succeeding governments [and] for years was characterized by being a platform for criticism." Sworn statement by Soraya Castellano (merits file, folio 1554).

⁷⁰ *Porcentaje de participación de un medio de comunicación o un programa en el índice general de audiencia.* Diccionario Panhispánico de Dudas. Available at: <http://lema.rae.es/dpd/?key=share>

⁷¹ Rating indicators, reach, audience share and ATS (average time spent) for the period 2002-2006 in Venezuela, prepared by AGB Panamericana of Venezuela Medición, S.A. (evidence file, folios 27614 and 27615). See also information from AGB Nielsen on audience shares for 2006, establishing an audience share of 28% at the national level for RCTV and 27% for Venevisión. Available at: <http://www.agbnielsen.com.ve/libro2006/share/1.htm>.

⁷² Minutes of the Shareholders Special General Assembly of RCTV C.A. of August 4, 2006 (evidence file, folio 2486).

⁷³ Minutes of the Shareholders Special General Assembly of RCTV C.A. of August 4, 2006 (evidence file, folio 2489).

⁷⁴ Certification by Marcel Granier, in his capacity as President and Director General of RCTV C.A, dated July 7, 2011 and Annex with opinion of expert witness Ángel Alayón of May 7, 2014 (merits file, folios 1640 and 1641).

⁷⁵ Issue of share certificates 1 and 2 of "Guaiti, S.A," and Certificate of shares owned by Guaiti in Alcatracia and RCTV C.A., Shareholders Ledgers (evidence file, folios 3874, 3876, 4391 to 4396, 4411, 4442 and 4493 to 4530).

⁷⁶ Issue of certificates 1 and 2 for four hundred and ninety-nine shares; Issue of certificates 5 and 6 for four hundred and ninety-nine shares; Issue of certificate 7 for fifty thousand shares; Issue of certificate 8 for eighty-nine thousand and fifty-eight shares; Issue of certificate 9 for fifteen million, five hundred and twenty-four thousand eight hundred and twenty shares; Certification of shareholders of Yavi S.A.; Certification of shares owned by Yavi S.A in Alcatracia S.A.; Certification of shares owned by Bemana C.A in RCTV C.A., and Certification of shares owned by Alcatracia S.A. in RCTV C.A. (evidence file, folios 3880, 3884, 3886, 3887, 3888, 3892, 4406 to 4410, 4443 to 4492, 4493 to 4529 and 4530).

company is an indirect shareholder of RCTV C.A. because it owns 48.42% of the shares of Alcatracia S.A, which owns 87.57% of the shares of RCTV C.A.

- c) Jaime Nestares⁷⁷ is the beneficiary and trustor of the trust entitled "The Parapente 1. Settlement" and its trustee is ATC (Switzerland) SARL and owns 4140 shares in RCTV Holding S.A. He is also a beneficiary of "The Parapente 2 Trust" and its trustee is RCTV Holding S.A. and it was created with share capital from Inversiones Alje C.A. In its capacity as trustee of "The Parapente 2 Trust," RCTV Holding S.A. owns 14.28% of the shares of Inversiones Alje C.A. Inversiones Alje C.A. is an indirect shareholder of RCTV because it owns 33.10% of the shares of Alcatracia S.A., and the latter owns 87.57% of the shares of RCTV.
- d) Jean Nestares⁷⁸ is one of the beneficiaries of "The Milan 1 Trust" whose trustor is Jean Hope Nestares Phelps, and its trustee is ATC (Switzerland) SARL and it owns 4140 shares in RCTV Holding S.A. In addition, Jean Hope Nestares Phelps and Guido Van Hauwermeiren are the beneficiaries of "The Milan 2 Trust" and its trustee is RCTV Holding S.A. and it was created with share capital of Anastacia 2000 C.A. In its capacity as trustee of "The Milan 2 Trust," RCTV Holding S.A. owns 100% of the shares of Anastacia 2000 C.A. Anastacia 2000 C.A. is an indirect shareholder of RCTV because it owns 4.72% of the shares of Alcatracia S.A., and the latter owns 87.57% of the shares of RCTV.
- e) Fernando Nestares and Francisco J. Nestares⁷⁹ are the beneficiaries of "The Cine 1 Trust" whose trustor is Fernando Nestares Phelps, and its trustee is ATC (Switzerland) SARL and it owns 4140 shares in RCTV Holding S.A. In addition, Francisco Nestares Phelps and Fernando Nestares Phelps are the beneficiaries of "The Cine 2 Trust", and its trustee is RCTV Holding S.A. and it was created with share capital of Inversiones Alje C.A. In its capacity as trustee of "The Cine 2 Trust", RCTV Holding S.A. owns 14.28% of the shares of Inversiones Alje C.A. Francisco Nestares Phelps and Fernando Nestares Phelps are also the beneficiaries of "The Necala 1 Trust" whose trustor is Francisco Nestares Phelps, and its trustee is ATC (Switzerland) SARL and it owns 4140 shares in RCTV Holding S.A. Moreover, Francisco Nestares Phelps and Fernando Nestares Phelps are the beneficiaries of "The Necala 2 Trust," its trustee is RCTV Holding S.A. and it was created with share capital of Inversiones Alje C.A. In its capacity as trustee of "The Necala 2 Trust," RCTV Holding S.A. owns 14.28% of the shares of Inversiones Alje C.A. Inversiones Alje C.A. is an indirect shareholder of RCTV because it owns 33.10% of the shares of Alcatracia S.A., and the latter owns 87.57% of the shares of RCTV, and

⁷⁷ Certificate No. 2 of RCTV Holdings S.A; Shareholders Ledger of Alje C.A; Creation of Parapente 2 Trust; Creation of Parapente Trust; Certificate of shares owned by Alje C.A in Alcatracia S.A, and Certification of shares owned by Alcatracia S.A in RCTV C.A. (evidence file, folios 3893, 3896, 3899 to 3940, 3942 to 3999, 4397 to 4401, 4493 to 4529 and 4530).

⁷⁸ Sole certificate of the shares of RCTV Holdings S.A; Creation of The Milan 2 Trust; Creation of The Milan 1 Trust; Certification of shares owned by Anastacia 2000 C.A in Alcatracia S.A, and Certification of shares owned by Alcatracia S.A in RCTV C.A. (evidence file, folios 4000, 4006, 4011 to 4051, 4053 to 4096, 4402 to 4405, 4493 to 4529 and 4530).

⁷⁹ Certificate No. 3 of the shares of RCTV Holdings S.A; Creation of The Necala 2 Trust; Creation of The Necala 1 Trust; Share certificate No. 1 of the shares of RCTV Holdings S.A; Creation of The Cine 2 Trust; Creation of The Cine 1 Trust; Certification of shares owned by Alje C.A in Alcatracia S.A, and Certification of shares owned by Alcatracia S.A in RCTV C.A. (evidence file, folios 3898, 4097, 4103 to 4144, 4146 to 4189, 4298, 4304 to 4345, 4347 to 4390, 4397 to 4401, 4493 to 4529, 4530)

- f) Alicia Phelps de Tovar⁸⁰ and Alberto Tovar Phelps are the beneficiaries and trustors of "The Leucadendra 1 Settlement", and its trustee is ATC (Switzerland) SARL and it owns 16570 shares in RCTV Holding S.A.
 In addition, Alicia Phelps de Tovar is the beneficiary "The Leucadendra 2 Trust" and its trustee is RCTV Holding S.A. and it was created with share capital of Inversiones Alje C.A.
 In its capacity as trustee of "The Leucadendra 2 Trust," RCTV Holding S.A. owns 57.14% of the shares of Inversiones Alje C.A.
 Inversiones Alje C.A. is an indirect shareholder of RCTV because it owns 33.10% of the shares of Alcatracia S.A., and the latter owns 87.57% of the shares of RCTV.

66. In addition to the Shareholders General Assembly, RCTV has a Board of Directors appointed by the said Assembly. The Board of Directors is responsible for administering the company and, among other functions, establishes the communications policy for the media under its responsibility.⁸¹ Every year, the Shareholders General Assembly analyzes and, when appropriate, "adopts the Board of Directors' report on the company's activities during the last financial exercise."⁸² The Board of Directors at the time of the facts of this case included the shareholders Marcel Granier, President; Peter Bottome, Vice President, and Jaime Nestares, board member.⁸³ In their capacity as board members and shareholders, Marcel Granier, Peter Bottome and Jaime Nestares took part in the Shareholders General Assemblies held in 2000, 2001, 2002, 2003, 2004, 2006, 2007 and 2008.⁸⁴

67. Lastly, the following persons, presumed victims in this case, held the following positions in RCTV:

- a) Eladio Lárez, Executive President, who was responsible for executing the communications policy established by the Board of Directors, among other activities;⁸⁵
- b) Daniela Bergami, General Manager, who, among other functions, was in charge of determining the company's programming, subject to the approval of the Board of Directors;⁸⁶

⁸⁰ Share certificate No. 4 of the shares of RCTV Holdings S.A.; Creation of Leucadendra 2 Trust; Creation of Leucadendra 1 Settlement; Certificate of shares owned by Alje C.A in Alcatracia S.A, and Certification of shares owned by Alcatracia S.A in RCTV C.A. (evidence file, folios 3896, 4190, 4196 to 4237, 4239 to 4297, 4397 to 4401, 4493 to 4529, 4530)

⁸¹ Cf. Minutes of the Extraordinary Shareholders General Assembly of RCTV C.A., of August 4, 2006 (evidence file, folio 2494).

⁸² Cf. Minutes of the RCTV Shareholders General Assemblies of March 23, 1998, March 10, 1999, March 16, 2000, March 12, 2001, March 11, 2002, March 17, 2003, March 15, 2004, December 11, 2006, March 19, 2007, and March 10, 2008 (evidence file, folios 2508, 2513, 2519, 2525, 2532, 2539, 2546, 2551, 2556 and 2559).

⁸³ Cf. Minutes of the Shareholders Special General Assembly of RCTV C.A. of August 4, 2006 (evidence file, folio 2500).

⁸⁴ Cf. Minutes of the RCTV Shareholders General Assemblies of March 23, 1998, March 10, 1999, March 16, 2000, March 12, 2001, March 11, 2002, March 17, 2003, March 15, 2004, December 11, 2006, March 19, 2007, and March 10, 2008 (evidence file, folios 2507, 2512, 2518, 2524, 2531, 2538, 2545, 2550, 2555, 2558).

⁸⁵ Cf. Minutes of the Extraordinary Shareholders General Assembly of RCTV C.A. of August 4, 2006 (evidence file, folio 2494). Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2789).

⁸⁶ Cf. Activities record of RCTV Executives dated February 27, 2007 (evidence file, folio 2894). Minutes of the Extraordinary Shareholders General Assembly of RCTV C.A. of August 4, 2006 (evidence file, folios 2494 and 2495). Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2789).

- c) Isabel Valero, Executive Secretary, who advised the shareholders and the Board of Directors, and maintained and updated the organization's legal and historical files;⁸⁷
- d) Edgardo Mosca, Vice President, Engineering, responsible for designing, planning and executing the activities inherent in recording and broadcasting programs; designing and providing production, manufacture and support services, and planning and executing civil engineering works and building maintenance;⁸⁸
- e) Anani Hernández, Vice President, Human Resources, responsible for the organizational structure required for the channel's productions, by the selection of human talent for the screen and for the production and services areas;⁸⁹
- f) Inés Bacalao, Vice President, Programming, whose main task was to manage the channel's programming schedule;⁹⁰
- g) José Simón Escalona, Vice President, Dramatic, Humorous and Light Entertainment Programs, in charge of planning, coordinating, controlling and supervising all the administrative and logistical processes in order to produce content in these areas;⁹¹
- h) Odila Rubin, Vice President, Information Technology, responsible for technological infrastructure and information technology solutions that supported the production of the content shown by RCTV;⁹²
- i) Oswaldo Quintana, Vice President, Legal Affairs, in charge of legal matters related to program production and transmission;⁹³
- j) Eduardo Sapene, Vice President, Information and Opinion, responsible for directing the planning and execution of projects in these two areas;⁹⁴
- k) Miguel Ángel Rodríguez, International Affairs Manager, and presenter of the talk show "*La Entrevista*";⁹⁵
- l) María Arriaga, Manager of the Information Division, who defined strategies and guidelines for the production of information-based programs, newscasts, special reports, and mini-documentaries, among others;⁹⁶

⁸⁷ Cf. Activities record of RCTV Executives dated February 27, 2007 (evidence file, folio 2894). Minutes of the Extraordinary Shareholders General Assembly of RCTV C.A. of August 4, 2006 (evidence file, folios 2495 and 2501). Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2790).

⁸⁸ Cf. Activities record of RCTV Executives dated February 27, 2007 (evidence file, folio 2894). Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2789).

⁸⁹ Cf. Activities record of RCTV Executives dated February 27, 2007 (evidence file, folio 2894). Sworn statement by Anani Hernández (merits file folios 1392 and 1393). Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2789).

⁹⁰ Cf. Activities record of RCTV Executives dated February 27, 2007 (evidence file, folio 2894). Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2790).

⁹¹ Cf. Activities record of RCTV Executives dated February 27, 2007 (evidence file, folio 2894). Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2790).

⁹² Cf. Activities record of RCTV Executives dated February 27, 2007 (evidence file, folio 2894). Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2790).

⁹³ Cf. Activities record of RCTV Executives dated February 27, 2007 (evidence file, folio 2894). Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folios 2790 and 2791).

⁹⁴ Cf. Activities record of RCTV Executives dated February 27, 2007 (evidence file, folio 2894). Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2791).

⁹⁵ Cf. Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2791) and in the application for amparo filed with the Constitutional Chamber of the Supreme Court of Justice on February 9, 2007 (evidence file, folio 25121). Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2791).

⁹⁶ Cf. Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2792) and in the application for amparo filed with the Constitutional Chamber of the Supreme Court of Justice on February 9, 2007 (evidence file, folio 25121). Sworn statement by María Isabel Arriaga (merits file, volume III, folios 1487 and 1488). Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2792).

- m) Soraya Castellano, Information Manager, who defined strategies and guidelines for the production of information-based programs, newscasts, special reports, and mini-documentaries, among others,⁹⁷ and
- n) Larissa Patiño, Manager for Opinion and Morning Programs, who managed the production and transmission of the program "*La Entrevista*."⁹⁸

A.3. *The concession granted to RCTV and the legal framework*

68. As already indicated, RCTV was granted its first concession in 1953,⁹⁹ under the Telecommunications Law of August 1, 1940, in force at the time. On September 10, 1953, the Telecommunications Directorate granted Radio Caracas the operating license corresponding to "Radio Caracas TV," together with a provisional permit to commence its transmission on Channel 7.¹⁰⁰ Later, at the request of RCTV, the Telecommunications Directorate granted it permission to use television Channel 2 for an experimental trial period of six months,¹⁰¹ which was extended in 1954 when the Telecommunications Directorate advised that Channel 2 would substitute Channel 7.¹⁰²

69. Subsequently, Decree No. 1,577 of May 27, 1987, established the Regulations for Television and Radio Station Concessions. Article 1 of Decree No. 1,577 stipulated that "[c]oncessions for the establishment and exploitation of television and radio stations shall be granted for twenty (20) years."¹⁰³ And, article 4 of the Decree indicated that "[c]oncessions granted prior to the date that this Decree enters into force, shall be considered valid for the period established in article 1."¹⁰⁴

70. Meanwhile, article 3 of the Decree established that:

When the concession terminates, concessionaires who, during the period indicated in article 1 have complied with the legal provisions established by the Telecommunications Law, the Radiocommunications Regulations and other legal provisions, **shall have preference for the extension of the concessions for another period of twenty (20) years** (bold added).

⁹⁷ Cf. Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folios 2791 and 2792) and in the application for amparo filed with the Constitutional Chamber of the Supreme Court of Justice on February 9, 2007 (evidence file, folio 25121). Sworn statement by Soraya Castellano (merits file, folios 1550 to 1553). Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folios 2791 and 2792).

⁹⁸ Cf. Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2792) and in the application for amparo filed with the Constitutional Chamber of the Supreme Court of Justice on February 9, 2007 (evidence file, folio 25121). Sworn statement by Larissa Patiño (merits file, folios 1455 and 1456). Certification of roles and activities approved by the RCTV Board of Directors dated July 29, 2011 (evidence file, folio 2792).

⁹⁹ Cf. Authorization for RCTV to commence broadcasting on television channels 7 and 2 of September 10 and November 11, 1953 (evidence file, folios 2480 and 2481). The State granted this concession under the regime of the 1940 Telecommunications Law (evidence file, folios 4543 to 4548).

¹⁰⁰ Cf. Provisional permit granting RCTV an operating license to begin broadcasting, issued by the Telecommunications Directorate of the Ministry of Communications on September 10, 1953 (evidence file, folio 2480).

¹⁰¹ Cf. Permit granted to RCTV to use television Channel 2 for an experimental trial period issued by the Telecommunications Directorate of the Ministry of Communications on November 11, 1953 (evidence file, folio 2481).

¹⁰² Cf. Permit granted to RCTV to use television Channel 2 in substitution of Channel 7 issued by the Telecommunications Directorate of the Ministry of Communications on June 23, 1954 (evidence file, folio 2482).

¹⁰³ In addition, article 6 of Decree No. 1,577 established that "the Ministry of Transport and Communications [was] in charge of this Decree."

¹⁰⁴ Decree No. 1,577 of May 27, 1987, containing the Regulations for Television and Radio Station Concessions. (evidence file, folio 2955).

71. Based on articles 1 and 4 of Decree 1,577, the Venezuelan State renewed the RCTV concession to operate as a free-to-air television station and to use the corresponding electromagnetic spectrum for 20 years; in other words, until May 27, 2007.

72. On June 12, 2000, the State adopted the Telecommunications Organic Law (hereinafter "LOTEL"), which established, *inter alia*, the creation of the National Telecommunications Commission (hereinafter "CONATEL"). According to article 35 of the LOTEL, CONATEL is "an autonomous institute, with its own legal personality and capital, independent of the national treasury, with technical, financial, organizational and administrative autonomy." Its main functions include:¹⁰⁵ (i) "to ensure compliance with the provisions of this law and of the laws that relate to it, and with the regulations and other decisions issued by the Commission"; (ii) "to propose the national telecommunications plans to the Minister for Infrastructure," and (iii) "to grant, revoke and suspend administrative authorizations and concessions, unless this corresponds to the Minister for Infrastructure pursuant to this law." In addition, it was established that CONATEL would be administered by a Board of Directors composed of "the Director General of the Commission [...], who shall preside it, and four directors, who shall be appointed and removed by the President of the Republic."¹⁰⁶

73. In addition, the LOTEL included the transformation of the concessions and permits granted under the previous law into administrative authorizations, concessions or notification obligations or registrations established in the LOTEL. In this regard, article 210 of this Law establishes that:

ARTICLE 210. The National Telecommunications Commission shall establish, by a resolution, special timetables for the transformation of the actual concessions and permits granted under the previous law into the administrative authorizations, concessions or notification obligations or registrations established in this law. While this transformation is underway, all rights and obligations acquired under the previous law shall remain fully in force, with the same terms and conditions established in the respective concessions and permits.

The transformation of the legal instruments shall be executed within two years of the publication of the law in the Official Gazette; it shall be compulsory, and it will be implemented based on the following principles: [...]

2. The usage and exploitation rights given in concession for frequencies legally granted, shall remain fully in force. [...]

4. The purpose, coverage and life span of the concessions or permits in force at the time of the entry into force of this law shall be respected. Subsequent renovations of the administrative authorizations or concessions established in this law shall be ruled by the general rules contained herein. [...]

The transformation of the current legal instruments in no way supposes that the telecommunications operators that existed before the entry into force of this law are subject to the general procedure established for granting the administrative authorizations or to the extinction, revocation or suspension of the concessions or permits granted under the previous law to that end.¹⁰⁷

74. In addition, article 31 of the LOTEL established that "[i]f the National Telecommunications Commission does not rule on whether the request [for transformation] is admissible within the time frames established in this chapter, this silence shall be understood as a negative in relation to the request submitted."

B) The decision not to renew the RCTV concession and termination of the transmission

B.1 The declarations of State officials prior to the decision not to renew the RCTV concession

¹⁰⁵ Article 37 of the LOTEL (evidence file, folio 224).

¹⁰⁶ Article 40 of the LOTEL (evidence file, folio 227).

¹⁰⁷ Cf. Telecommunications Organic Law of June 12, 2000 (evidence file, folios 280 and 281).

75. Starting in 2002, officials of the Venezuelan State, including President Chávez, made different statements indicating that the concessions of some private social communication media in Venezuela would not be renewed. These statements included the following:

- a) Statement made by President Chávez of June 9, 2002, during his program "*Aló Presidente*," in which he stated: "Even when they are privately owned, television and radio stations are only operating under a concession; the State is the owner [...]. And the State authorizes a group of businessmen to use them as operators, so that they can project images over this devices; but the State reserves the right to grant that permission. It's as if someone wanted to use a State water pipeline to provide water to a village, and the State grants him permission. [...] However, let's suppose that [...] we give him permission to use the pipeline [and] he begins to poison the water. [...] immediately the permission would be revoked, and he would also be thrown in jail. He is poisoning the people. Exactly the same is happening, it's the same logic, the same explanation, with a television channel";¹⁰⁸
- b) Declaration of President Chávez of January 12, 2003, in his program "*Aló Presidente*," in which he stated: "The same goes for these television network and radio station owners; they, too, have a concession from the State, but they don't own the signal. The signal belongs to the State. I want to make that very clear; I want it clearly understood because if the owners of these television networks and radio stations continue their foolish efforts to destabilize our country, to give subversion a foothold, because it is subversion, let there be no doubt, [...] In this case it is fascist subversion, encouraged by the media, by those gentlemen I have mentioned and others I won't mention. So, I am warning Venezuela. I have ordered a review the whole legal procedure under which these gentlemen were granted a concession. We are reviewing them and if they do not return to normality in the use of the concession, if they continue using the concession to try and disrupt the country, or overthrow the government, then I would be compelled to revoke their concession to operate television networks";¹⁰⁹
- c) Declaration of President Chávez of November 9, 2003, in his program "*Aló Presidente*," in which he stated: "I'm not going to let you do this again, [...] you – Globovisión, Televén, Venevisión and RCTV – tomorrow or the day after tomorrow. [Minister] Jesse Chacón, I gave you an order; you must have a team of analysts and observers, 24 hours a day, watching all the channels simultaneously. And we must be very clear, I am very clear that there is a line they must not cross, and they should know, it is the limit established by law. The moment they cross the legal limit they will inevitably be closed down to keep peace in Venezuela, to preserve order in Venezuela,"¹¹⁰ and
- d) On May 9, 2004, President Chávez stated in his program "*Aló Presidente*": "those who are violating the right to information, the right to freedom of expression, are the owners of the private media, with some exceptions, but above all, the major television networks, Venevisión, Globovisión, RCTV [...]; the owners of these media are committed to subversion, terrorism, and destabilization, and, at this point in time, I have no doubt that – the owners of these media – we can well declare them enemies of the people of Venezuela."¹¹¹

¹⁰⁸ Transcript of the program "*Aló Presidente*" No. 107 of June 9, 2002, p. 19, Available at: http://www.aloPresidente.gob.ve/materia_alo/25/1663/?desc=alo_President_107_desde_el_chivo_zulia_venezuela.pdf

¹⁰⁹ Transcript of the program "*Aló Presidente*" No. 135 of January 12, 2003, Year 16 #008-23/04/07, Legal deposit PP-88-153, pp. 6 and 7.

¹¹⁰ Transcript of the program "*Aló Presidente*" No. 171 of November 9, 2003, p. 79, Available at: http://www.aloPresidente.gob.ve/materia_alo/25/1551/?desc=alo_President_171.pdf.

¹¹¹ *Case of Ríos et al. v. Venezuela Preliminary objections, merits, reparations and costs*, Judgment of January 28, 2009, Series C No. 194, paras. 127 and 128. Also, transcript of the program "*Aló Presidente*" of May 9, 2004.

76. Similarly, on June 14, 2006, President Chávez stated during an event at the Ministry of Defense:

I have ordered a review of the television network concessions. Some channels have shown signs of being prepared to change, and it appears that they intend to obey the Constitution and the law, Regarding those who backed the coup, which was everyone; at that time, we could have eliminated those concessions; however, we called for dialogue, reflection. Was it a mistake? I don't think so. I don't think so. Everything in its time. [...]

We're going to have to take a second look at the concessions granted to the television channels that are going to expire soon, they begin to expire in 2007. We can't be irresponsible and continue granting concessions to a handful of people who, availing themselves of the electromagnetic spectrum that belongs to the State – in other words, that belongs to the people – then use it against us, functioning like a fifth column right under our noses. I couldn't care less what the oligarchs of this world say. [...] Over and again, we have demonstrated that we are neither authoritarian nor arbitrary. We always prefer to call for unity, but there are some who will never heed this call. [...] We must act and ensure that the Constitution is respected [...] to protect our people, to protect national unity, because every day they issue messaged that incite hate, disrespect for our institutions, sowing doubt among the population, rumors, psychological warfare to divide the Nation, to weaken and to destroy it. [...] This is an imperialist plan. They are Trojan horses right under our noses.¹¹²

77. On the same day, June 14, 2006, the Minister of Communications and Information William Lara indicated in a press conference:

We can see, for example, there are television and radio stations that violate the users' rights; that fail to comply with their duties as service providers. Let us remember an emblematic day; the conduct of the television networks and radio stations on April 12, 2002. On that day, we saw, on the one hand, the failure of the operators of the communications services to fulfill their duties, and also the infringement or violation of the rights of the users. The Venezuelan State is obliged, by the Constitution, to guarantee that all Venezuelans receive equal treatment from service providers in relation to the use of the electromagnetic spectrum. Therefore, we are constantly making this evaluation and, as we know, next year, the concessions granted to some television channels expire. Our evaluation concludes at that time and the respective report will be made to the corresponding entities, including the Head of State. [...]

If we make a comparative analysis of the behavior of some television channels on April 11, 12 and 13 [2002], which were openly in support of the coup d'état, and we compare this to their conduct today, there have been qualitative changes in their programming, in the news line, in the editorial line, and also – I repeat – in their respect for the rights of the users of the service and their obligations as providers of a public service. However, there are other cases where no such change, correction, is in evidence; instead they have stubbornly clung to their conduct as it was on April 11, 12 and 13 in the country. [...] According to the law, the Venezuelan State – in this case through MINCI and CONATEL – has the authority not to renew a concession. Evidently, a Venezuelan citizen who feels that he has been affected by a decision of a public body can have recourse to the instance he considers pertinent. As for us, the officials responsible for taking decisions, we assume the defense of those decisions as required; just as, for example, we are defending the Radio and Television Social Responsibility Law before the Supreme Court of Justice from the attempt to eliminate it based on a request by a private group.¹¹³

¹¹² Speech by President Chávez on June 14, 2006 (evidence file, CD, Video minute 1:39; Newspaper articles in *"El Universal"* entitled *"Chávez anunció nuevas compras y cambios en concepción de equipos militares"* [Chávez announced new purchases and changes in military equipment planning], of June 14, 2006 (evidence file, folio 3109), *"Chávez: 'He ordenado la revisión de las concesiones de los canales de televisión'"* [Chávez: I've ordered a review of the television channels' concessions], of June 14, 2006, (evidence file, folios 3112 and 3113); Article in the newspaper *"El Mundo"* entitled *"Chávez ordena revisar las concesiones de televisión privada en Venezuela"* [Chávez orders review of private television concessions in Venezuela], of June 15, 2006 (evidence file, folio 3114).

¹¹³ Article in the newspaper *"El Nacional"* entitled *"Chávez amenazó con revocar concesiones a televisoras en 2007"* [Chávez threatens to revoke television concessions in 2007] of June 15, 2006 (evidence file, folios 3117 to 3119). Press release on the website *"Vive"* entitled *"Lara: Hay televisoras y emisoras de radio que violentan los derechos de los usuarios"* [Lara: there are television and radio stations that violate the rights of the audience] of June 14, 2006 (evidence file, folios 3121 and 3122). Press release on the website *"Radio Nacional of Venezuela"* entitled *"Hay televisoras y emisoras de radio que violentan derechos de usuarios"* [There are television and radio stations that violate users' rights] of June 14, 2006 (evidence file, folio 3124). Press release on the website *"Venezuela de Televisión"* entitled *"Lara: Hay televisoras y emisoras de radio que violentan los derechos de los usuarios"* [Lara: there are television and radio stations that violate users' rights] of June 13, 2006 (evidence file, folios 3120 to 3122).

78. These declarations were echoed by other State officials¹¹⁴ and reiterated by President Chávez on several occasions, including during the inauguration of an extension to the Caracas metro on November 3, 2006, during which he stated:

I just want to remind you, especially you the television channels, that next year your concession expires. On March 27, don't be surprised if I tell you "mmm, mmm" [shaking his finger in a gesture of denial] no more concessions for some television channels. No one should be surprised; no, no one should be surprised, because – owning a television channel – I know that tonight, tomorrow, they're going to accuse me "the tyrant" aahjj! - I couldn't care less what they say about me, I couldn't care less; I'm the Head of State and I always speak and act in keeping with the Constitution and the law.¹¹⁵

79. Subsequently, on December 1, 2006, in an interview with the journalist, Carlos Croes, President Chávez declared:

President Chávez: Of course, a channel [...] whose owners have declared themselves to be enemies of the government.

Carlos Croes: And, don't they have the right?

President Chávez: To declare themselves enemies of a government?

Carlos Croes: And, if they don't agree with it?

President Chávez: Ah, well, then the government has the right to decide whether or not to grant them the concession. It's a question of freedoms. As Head of State, I am not obliged to grant them a concession. [...] The government will evaluate the situation and make a decision when the time comes.¹¹⁶

80. In December 2006, State officials began to announce the official decision not to renew RCTV's concession, including in the following declarations:

- a) Declaration of President Chávez of December 28, 2006, on the occasion of his year-end address to the Armed Forces in which he stated: "There's someone out there, one of those representatives of the oligarchy, who wanted to be President of the oligarchy, and then those governments by the Adecons [Acción Democrática] and Copeyanos [COPEI] gave them concessions for television channels, and now he is saying that his concession is eternal; but it ends in March, the television concession, it ends in March. So, he better start packing his bags and thinking about what he's going to do after March. There'll be no new concession for that *coup*-supporting television channel that calls itself Radio Caracas Televisión; the concession's over; the decision is already being drafted. So, they better start getting ready, turning off the equipment, because we are not going to tolerate any media outlet that is at the service of the coup plotters, against the people, against the nations, against national independence, against the dignity of the Republic, Venezuela has self-respect. I am announcing this measure before the date arrives to that they do not

¹¹⁴ Newspaper articles in "El Universal" entitled "*Presidente de la AN apoya revisión de las concesiones a los medios*" [President of National Assembly in favor of review of media concessions], of June 15, 2006 (evidence file, folio 3127), "*William Lara: Se acabó la impunidad*" [William Lara: Impunity is finished], of June 16, 2006 (evidence file, folio 3129). Press release on the website "Aporrea" entitled "*Nicolás Maduro: 'En Venezuela el uso del espectro radioeléctrico es feudal'*" [Nicolás Maduro: In Venezuela, the use of the radio broadcast spectrum is feudal], of June 18, 2006 (evidence file, folio 3132), and Ministry of the People's Power for Communications and Information, press release entitled "*No renovar la concesión a RCTV, una decisión soberana*" [Not to renew RCTV's concession: a sovereign decision] of May 31, 2007 (evidence file, folio 3134).

¹¹⁵ Declaration of President Chávez of November 3, 2006 (evidence file, CD, Video minute 1:12). Press release on the website "Aporrea" entitled "*Serán revisadas concesiones a televisoras*" [Television concessions to be reviewed], of November 3, 2006, Available at: <http://www.aporrea.org/medios/n86035.html>.

¹¹⁶ Interview with President Chávez on December 1, 2006 (evidence file, CD, Video minute 1:39). Interview with President Chávez by the Ministry of Communications and Information of November 30, 2006. (evidence file, folio 3134).

- continue with their lies that this cannot be – that they have 20 more years. 20 more years, no way! 20 more years – that’s a joke! It’s over! It’s over!”;¹¹⁷
- b) Declaration of Minister William Lara of December 29, 2006, on the television program “*En Confianza*,” which was summarized by his office as follows: “The decision not to renew the [RCTV] concession is in keeping with the legal framework established by [the LOTEL],’ according to the Minister [Lara]. ‘The law is clear. The concession the State grants for the use of the electromagnetic spectrum is only for 20 years and RCTV’s concession expires on May 27, 2007.’ [...] Lara explained that, in addition to the legal and constitutional nature of the decision taken by the Head of State, it also addressed other equally important issues such as the relentless, uninterrupted campaign of destabilization waged by the editorial line of RCTV. ‘The decisive role of RCTV during the 2002 coup d’état should be recalled and the media manipulation it carried out at that time [...], because RCTV has not changed that irresponsible attitude; they have not mended their ways,’ stated Lara. He also indicated that a committee had determined that RCTV’s current programming was in constant violation of a number of provisions of the *Ley Resorte* (Radio and Television Social Responsibility Law)”;¹¹⁸
- c) Declaration of President Chávez during a telephone interview during the television program “*Contragolpe*” on January 3, 2007, in which he indicated: “Venezuela loses by having media like Radio Caracas Televisión. And not only Venezuela, good journalism suffers, freedom of expression suffers. [...] It has not passed the test to have its concession renewed by a State that is serious, a responsible State, and a State committed to its people and to respect for its people, the dignity of its people and the freedoms of its people. The decision is irrevocable”;¹¹⁹

¹¹⁷ Video published on the website “Aporrea” entitled “*Presidente Chávez: ‘a RCTV que vayan apagando los equipos’*” [President Chávez: ‘RCTV, start turning off the equipment], of December 28, 2006, Available at: <http://www.aporrea.org/medios/n88454.html> (evidence file, folio 3136). Article in the newspaper “Globovisión” entitled “*Presidente Chávez anuncia que no renovará concesión de RCTV*” [President Chávez announces that RCTV’s concession will not be renewed] of December 28, 2006 (evidence file, folio 3138). Article in the newspaper “El Mundo” entitled “*Chávez cancela la licencia a una televisión privada que tacha de ‘golpista’*” [Chávez cancels license of private television station he labels a ‘coup supporter’], of December 28, 2006, Available at: <http://www.elmundo.es/elmundo/2006/12/28/comunicacion/1167326997.html>. Article in the newspaper “El Universal” entitled “*Reporteros Sin Fronteras pide a Gobierno reconsiderar decisión de no renovar concesión a RCTV*” [Reporters Without Borders asks government to reconsider decision not to renew RCTV’s concession], of December 29, 2006, Available at: http://www.eluniversal.com/2006/12/29/pol_ava_29A819703.shtml.

¹¹⁸ Press release of “Agencia Bolivariana de Noticias” entitled “*William Lara: Decisión de no renovar concesión a RCTV es legal y constitucional*” [William Lara: Decision not to renew RCTV’s concession is legal and constitutional], of December 29, 2006 (evidence file, folio 3144). Press releases of “Radio Nacional of Venezuela” entitled “*Servicio Público de Televisión Nacional utilizará espectro que dejará RCTV*” [National Public Television Service will use frequency that RCTV will vacate], Available at: <http://www.rnv.gov.ve/noticias/index.php?act=ST&f=2&t=43149> and “*Estado actúa apegado al derecho en caso RCTV*” Available at: <http://www.rnv.gov.ve/noticias/?act=ST&f=&t=43138>, both of January 26, 2007 (evidence file, folios 3146 and 3148).

Regarding the declarations of Minister Chacón Escamillo, see also: “El Universal” entitled “*Gobierno considera entregar señal de RCTV al canal 8*” [Government considering turning over RCTV frequency to channel 8] of December 30, 2006, Available at: http://www.eluniversal.com/2006/12/30/pol_art_129283.shtml (evidence file, folios 3150 and 3151). MINCI, press release entitled “*Hasta el 27 de mayo operará señal abierta de RCTV*” [RCTV open-to-air frequency will operate until May 27], of December 29, 2006, Available at: <http://www.rnv.gov.ve/noticias/?act=ST&f=2&t=42181>; Press release on the website “Analítica” entitled “*William Lara precisa que la medida contra RCTV se aplicará en mayo*” [William Lara indicates that the measure against RCTV will be enforced in May], of December 29, 2006, Available at: <http://www.analitica.com/va/sintesis/nacionales/4704007.asp>. (evidence file, folio 3155).

¹¹⁹ MINCI press release entitled “*Presidente Chávez: decisión sobre RCTV es irrevocable*” [President Chávez: decision on RCTV irreversible], of January 4, 2007 (evidence file, folios 3157 and 3158). Press release of “Radio Nacional of Venezuela” entitled “*Presidente Chávez: decisión sobre RCTV es irrevocable*” of January 4, 2007 (evidence file, folio 3159); Article in the newspaper “Globovisión” entitled “*Presidente Chávez nombró a Jorge Rodríguez como Vicepresidente y a Pedro Carreño como Ministro de Interior y Justicia*” [President Chávez appointed Jorge Rodríguez as Vice President and Pedro Carreño as Minister of Interior and Justice], of March 1, 2007 (evidence file, folio 3160).

- d) On January 8, 2007, during the ceremony to appoint a new Cabinet, President Chávez spoke against about the RCTV concession indicating that: "Nothing and nobody will prevent us complying with the decision not to renew the concession of that television channel, and we all know which one. Nothing and nobody will prevent it,"¹²⁰ and
- e) Declaration of President Chávez during a speech to the National Assembly on January 13, 2007, in which he stated: "They just have January (a few days), February, March, April, May [2007]. They can yell and stamp their feet all they want, but the concession of that fascist channel, RCTV, is over."¹²¹

81. In February 2007, MINCI launched an official campaign to explain why RCTV's concession would not be renewed.¹²² In press releases, banners, posters in government offices, and painted on walls, messages were distributed with the RCTV logo and the following message:

Give the concession to the truth...RCTV ... [don't] renew [the license] for lying
 ¡The people have the power!
 Bolivarian Government of Venezuela. Ministry of the People's Power for Communications and Information.¹²³

82. Meanwhile, Minister William Lara justified the non-renewal by claiming that RCTV had supposedly violated the law, stating that, "Granier has systematically violated the Radio and Television Social Responsibility Law showing programs for adults at times when children are viewing."¹²⁴

83. Similarly, María Alejandra Díaz, Director General of Social Responsibility and Independent National Production of the MINCI, stated with regard to the non-renewal of the RCTV concession:

This is not a political problem, in my opinion. First, because if you analyze the RCTV file, it shows recalcitrant conduct regarding many other issues unrelated to politics. This a sovereign decision of the State. But, also, it is based on two articles of the Constitution – articles 108 and 113. Therefore, Venezuela has two obligations. One is the democratization of the use of the electromagnetic spectrum established in article 108, and the other is the deconcentration of the use and exploitation of the electromagnetic spectrum established in article 113.¹²⁵

¹²⁰ Press release of "Radio Nacional of Venezuela" entitled "*Nada ni nadie impedirá no renovación en concesión a RCTV*" [Nothing and nobody will prevent non-renewal of the RCTV concession], of January 8, 2007 (evidence file, folios 1573 and 1574).

¹²¹ Speech by President Chávez on January 13, 2007, note of "Agencia Bolivariana de Noticias" entitled "*Presentación del mensaje anual del Presidente de la República Bolivariana of Venezuela, Hugo Rafael Chávez Frías, ante la Asamblea Nacional, Palacio Federal Legislativo*" [President of the Bolivarian Republic of Venezuela, Hugo Rafael Chávez Frías, delivers his annual address to the National Assembly], of January 13, 2007 (evidence file, folio 3164).

¹²² MINCI press release entitled "*Ministro Willian Lara: ex trabajadores de RCTV tienen abiertas líneas de crédito para formar cooperativas*" [Minister William Lara: lines of credit opened to former RCTV employees to form cooperatives] (evidence file, folio 3167).

¹²³ Judicial inspection conducted on March 14, 2007, Ninth Municipal Court of the Judicial District of the Caracas Metropolitan Area, photos attached (evidence file, folios 3170 to 3188). Press release on the website "Aporrea" entitled "*Medios Alternativos debaten sobre nuevo modelo de comunicación*" [Alternative media debate new communications model], of February 10, 2007. Available at: <http://www.aporrea.org/medios/n90460.html> (evidence file, folios 3189 and 3190).

¹²⁴ Press release of "Agencia Bolivariana de Noticias" entitled "*Trabajadores de RCTV tiene garantizada estabilidad laboral*" [RCTV employees guaranteed job stability], of April 11, 2007 (evidence file, folio 3192). "*Los Trabajadores de RCTV tiene garantizada la estabilidad laboral*" of April 13, 2007, Available at: <http://www.voltairenet.org/Los-trabajadores-de-RCTV-tienen>.

¹²⁵ Statement by María Alejandra Díaz in the documentary: *Digan La Verdad* (made by the Ministry of the People's Power for Communications and Information based on the RCTV White Paper (CD, Video Documentary, *Digan La Verdad* minute 03:49).

84. In addition, on April 13, 2007, during a celebration of the people's victory of April 2002, President Chávez stated:

"However, we will do everything possible – and we must – to neutralize any attempt of magnicide. There are some people who continue to support this thesis; but there are others, perhaps more intelligent, guided by North American intelligence agencies, who are again planning, not a magnicide, because some of them are afraid of the people's response, to the army's response. Rather they are planning new acts of economic destabilization, political destabilization, social destabilization. And, they are trying to use the date of next May 28, when the concession ends to a television channel that has caused a lot of harm to Venezuelan society. The concession ends and the government that I head, using a legitimate right, has announced this decision, and I want to repeat this – however much they yell, however many insults they throw at us, even at me personally, I am not going to respond to their provocations; forget it! However much international pressure they elicit or try to elicit, the decision has been taken. That television channel's concession is not going to be renewed. They know it and therefore they are trying to set the stage to attack the people, attack the government, to cause acts of violence that justify any action that could bring down the Bolivarian Government. I recommend them, I recommend them to forget this. I politely recommend them to forget those plans because they have no probability of succeeding. Things will go badly for them if they try and do this. So, they have said that they are preparing a 'May 28' plan; well, we are preparing a May 29 plan. And I call on the whole country, I call on all the people to stay mobilized. From now on, every day in May, in June and always, but especially in this situation. Mobilized in Caracas, throughout the country – political leaders, governors, mayors, intelligence agencies of the Ministry of the People's Power for the Interior and Justice, the Ministry of the People's Power for Defense, civil intelligence agencies, military intelligence agencies; all of them mobilized and making plans to neutralize any attempt of internal or external aggression against Venezuela. And, don't forget, any aggression against us should be used by the revolution to increase the changes, to accelerate the changes. So – if they start an attack – welcome. We will know how to neutralize it and respond to it to continue the Bolivarian revolution, building Venezuelan socialism."¹²⁶

85. In addition to the declarations made by government officials and President Chávez, the State published and distributed the "RCTV White Paper."¹²⁷ This publication alleged that the decision not to renew the RCTV concession was driven by "the demands of Venezuelan civil society owing to serious breaches of social responsibility by RCTV,"¹²⁸ because the channel had "supplanted the political actors and fabricated its messages; it had violated freedom of information, incited civil war and the *coup d'état*, attempted to undermine the balance of powers and established economic cartels, among other conducts that did not conform to the social responsibility that the State and society require of it. These are entrepreneurs who are using a portion of the electromagnetic spectrum."¹²⁹ Furthermore, the decision was allegedly based on the strategy "to change the communications model in Venezuela, under which the owner of the media outlet is also the owner of all its messages."¹³⁰

86. The publication also indicated that, under article 108.5 of the LOTEL, concessions for use of the electromagnetic spectrum would not be granted when serious situations relating to State security arose that, in the opinion of the President of the Republic, made it inadvisable to grant them. Therefore, "it was 'inadvisable' for the Venezuelan State to renew the RCTV concession [based on its] actions during two episodes that endangered democracy and human rights in Venezuela, which were the coup d'état of April 2002 and the strike in the oil sector of December 2002 and January 2003."¹³¹

¹²⁶ Declaration of President Chávez during a celebration of the people's victory of April 2002, on April 13, 2007. Transmission of the Ministry of the People's Power for Communications and Information of the Bolivarian Republic of Venezuela and the National Radio and Television Network (CD, Video, Presidential network broadcast, minute 2:15:58)

¹²⁷ MINCI, RCTV White Paper, Venezuela: March 2007, 1st edition (evidence file, folios 3198 to 3381).

¹²⁸ MINCI, RCTV White Paper, Venezuela: March 2007, 1era (evidence file, folios 3246 and 3247).

¹²⁹ MINCI, RCTV White Paper, Venezuela: March 2007, 1st edition (evidence file, folios 3247 and 3248).

¹³⁰ MINCI, RCTV White Paper, Venezuela: March 2007, 1st edition (evidence file, folio 3269).

¹³¹ MINCI, RCTV White Paper, Venezuela: March 2007, 1st edition (evidence file, folio 3269). The White Paper also underlines that "RCTV has provided explicit evidence of its participation in the coup d'état, not only by the broadcasting images that revealed the presence of its director general, Marcel Granier, in the Palacio de Miraflores during the unconstitutional swearing-in of the businessman Pedro Carmona as illegitimate President of Venezuela, but also by its editorial position, the diffusion of false information, political propaganda, and applying censorship" (evidence file, folio 3270).

B.2 The decision not to renew the RCTV concession and the procedure

87. On June 5, 2002, based on the timetable established by CONATEL,¹³² RCTV formally requested that its concession titles be transformed into the new legal regime of the LOTEL.¹³³ However, CONATEL did not examine this request within the two-year time frame indicated in article 210 of the LOTEL;¹³⁴ rather, it responded to it in March 2007 (*infra* para. 93) without referring to article 31 of the said law.

88. On January 24, 2007, the representatives of RCTV wrote to CONATEL, requesting it to issue new concession titles to the network based on the following provisions:

- i) Article 210 of the LOTEL, for a period of 20 years starting on June 12, 2002, the date on which the said law entered into force;
- ii) alternatively, until June 27, 2027, pursuant to articles 1, 3 and 4 of Decree No. 1,577, or
- iii) also alternatively, that the procedure for transforming titles be completed and the RCTV titles be renewed for another 20 years.¹³⁵

89. With this request, RCTV presented transcripts of speeches made by State officials, among other evidence, to demonstrate that those officials had presumably abused their authority in reaction to RCTV's editorial line and the content shown by the channel. In addition, the television network requested production of the following evidence: (i) certified copy of all transformation applications and the respective free-to-air television and sound radio licenses granted under article 210 of the LOTEL indicating which stations were in operation on May 27, 1987, and (ii) the documents relating to all the penalties imposed on free-to-air television and radio stations for violations of the LOTEL and the RESORTE Law.¹³⁶ The documents were intended to show, among other matters, that: (i) RCTV had never been penalized; (ii) other operators in the same legal situation as RCTV had been subject to penalties, and (iii) those operators had been allowed to continue operating after May 27, 2007.¹³⁷

90. In response to RCTV's letter of January 24, 2007, Minister Jesse Chacón Escamillo, head of the Ministry of the People's Power for Telecommunications and Information Technology (MPPTI) and CONATEL issued Communication No. 0424 of March 28, 2007, announcing the decision not to renew the RCTV concession. In this document, Minister Chacón Escamillo noted that the decision was not a penalty, but a result of the legal effects established in article 1 of Decree No. 1,577; in other words, expiry of a concession. He claimed that, when the time granted by a concession expired, there was no need to open an administrative procedure and, consequently, due process had not been violated.

91. He also claimed that the only logical and reasonable interpretation, consistent with the consultations and discussions on the preliminary draft, draft and text of the LOTEL was that, under article 210 of the law, the only part of the concession to be respected, was whatever

¹³² Cf. Resolution No. 93 of CONATEL of December 4, 2001 (evidence file, folio 3060).

¹³³ Cf. Transformation request submitted by RCTV to CONATEL on June 5, 2002 (evidence file, folios 3053 to 3057).

¹³⁴ Cf. Request to CONATEL of January 24, 2007 (evidence file, folio 3063). Communication No. 0424 issued by the Ministry of the People's Power for Telecommunications and Information Technology on March 28, 2007 (evidence file, folio 3093).

¹³⁵ Cf. Request to CONATEL of January 24, 2007 (evidence file, folios 3063 and 3064).

¹³⁶ Cf. Request to CONATEL of January 24, 2007 (evidence file, folio 3089).

¹³⁷ Cf. *AGB Nielsen Media Research*, Average Audience Share 2006 (evidence file, folio 3395). Article in the newspaper "El Nacional" entitled "Gobierno no pagará por Cantv más de lo que ofreció Carlos Slim" of January 27, 2007 (evidence file, folios 3397 and 3398). Article in the newspaper "The New York Times" entitled "Media Mogul Learns to Live With Chávez" of July 5, 2007 (evidence file, folios 3400 to 3403). Press release in "Revista Producto" entitled "Jinetes sin Apocalipsis," No. 27, February 9, 2007 (evidence file, folios 3405 to 3407).

remained of the 20 years that began on the date that Decree No. 1,577 took effect; in other words, until May 27, 2007. Regarding the preferential right claimed by RCTV, Minister Chacón Escamillo stated that no such guarantee was established in either the Constitution of the Republic or the LOTEL and that, even in those areas in which a preferential right existed, it could not be exercised or opposed in relation to the owner of the asset to which the right attached – in this case, the electromagnetic spectrum belonged to the State of Venezuela, which had decided to use and exploit the portion once granted to RCTV after May 27, 2007. He also asserted that the transformation application submitted by RCTV in 2002 had become devoid of purpose following the State's sovereign decision, based on the National Telecommunications Plan to reserve to itself the use and exploitation of that portion of the electromagnetic spectrum.¹³⁸ According to Communication No. 0424, the purpose of the Venezuelan Government's decision was "to permit the democratization of the electromagnetic spectrum and make it available for a wide range of messages and content" by creating a free-to-air public television station.¹³⁹

92. Communication No. 0424 also indicated that RCTV did not have an acquired right to the automatic renewal of its concession, because: (i) this right was not established in the Constitution of the Republic; (ii) concessions were a privilege granted for a limited time; (iii) it was a general principle of law that privileges must be interpreted restrictively, and (iv) automatic renewal would be detrimental to the principle that the electromagnetic spectrum, as a public asset, should be open to as wide a cross-section of uses and users as possible.¹⁴⁰ The Communication explained that the State had "decided to reserve to itself the use and exploitation of that portion of the electromagnetic spectrum," "to permit the democratization of the electromagnetic spectrum and make it available to a wide range of messages and content," in compliance with the National Telecommunications Plan¹⁴¹ and article 108 of the Constitution.¹⁴² Lastly, regarding RCTV's request to produce evidence, Minister Chacón Escamillo considered it inadmissible, because: (i) the fact that RCTV's concession had not been transformed had not been contested, and (ii) the decision not to renew the RCTV concession was not a penalty, nor the result of any penalty imposed.¹⁴³

93. Subsequently, Minister Chacón Escamillo issued Resolution No. 002 of March 28, 2007, extinguishing the corresponding administrative procedure. Taking into account the arguments set out in Communication No. 0424, this resolution decided:

To declare terminated the administrative procedure opened following the request filed by Radio Caracas Televisión [...] concerning the transformation of the concession, owing to the extinguishment of the said

¹³⁸ Cf. Communication No. 0424 issued by the Ministry of the People's Power for Telecommunications and Information Technology of March 28, 2007 (evidence file, folio 3099).

¹³⁹ Cf. Communication No. 0424 issued by the Ministry of the People's Power for Telecommunications and Information Technology of March 28, 2007 (evidence file, folio 3103).

¹⁴⁰ Communication No. 0424 issued by the Ministry of the People's Power for Telecommunications and Information Technology of March 28, 2007 (evidence file, folio 3100).

¹⁴¹ See Ministry of the People's Power for Science, Technology and Intermediate Industries, National Telecommunications, Information Technology and Postal Services Plan (PNTI) and SP 2007-2013 (merits file, folios 845 to 866). The objectives of this plan included: "5.1.2 Promote the growth of public radio and television" and "5.1.3 Promote the deconcentration of media ownership."

¹⁴² Article 108 of the Constitution of the Bolivarian Republic of Venezuela establishes: "Public and private social communications media outlets shall contribute to civic education. The State shall guarantee public radio and television services as well as library and information technology networks to allow universal access to information. Educational establishments must incorporate the knowledge and application of the new technologies, and innovation, in keeping with the requirements established by law." Communication No. 0424 issued by the Ministry of the People's Power for Telecommunications and Information Technology on March 28, 2007 (evidence file, folios 3102 and 3103).

¹⁴³ Communication No. 0424 issued by the Ministry of the People's Power for Telecommunications and Information Technology on March 28, 2007 (evidence file, folio 3095).

request.¹⁴⁴

B.3 The decision of the Supreme Court of Justice to transfer the right of use of RCTV assets

94. On May 22, 2007, the representatives of the following audience groups: "José Leonardo Chirinos", "Satélite Popular", "27 de Febrero", "Fabricio Ojeda", "Josefa Camejo", "Observación", "Yaracoop", "Yurikli", "La Voz que se Ve", "Ojo Visor" and "AIPO", the CTI Casa de Alimentación and the San Bernardino Community Radio; in other words, parties unaffiliated with RCTV, filed an application for constitutional amparo before the Constitutional Chamber of the Supreme Court of Justice (hereinafter "SCJ"), together with a petition seeking unspecified interim measures against the MINCI, the MPPTI and the Venezuelan Public Television Foundation (*Fundación Televisora Venezolana Social*) (hereinafter "TVes"). The application was registered as Case No. 07-0720. Based on statements made by public officials, the applicants alleged that the new station, which would transmit programs on the frequency once assigned to RCTV, did not have the broadcasting and repeater infrastructure and equipment required to ensure nation-wide coverage of its transmissions. Consequently, they understood that "the National Executive ha[d] not taken all necessary measures [...] to ensure that all citizens, nationwide, would be able to enjoy the transmissions of the new public television station, after May 28, 2007, as had been repeatedly announced, creating a legitimate expectation of their entitlement to receive a quality public television service." The applicants thus sought to protect their basic rights to legitimate expectations, to non-discrimination and to obtain a quality public service. Accordingly, *inter alia*, they requested the Constitutional Chamber to order interim measures to give TVes temporary access, use and exploitation of the equipment used by RCTV for the use and exploitation of the portion of the electromagnetic spectrum, irrespective of who owned or possessed it.¹⁴⁵

95. On May 25, 2007 the Constitutional Chamber issued Decision No. 956, in which: (i) it admitted the application for amparo against the three defendants, referring to it as an application seeking protection of joint and separate interests, and (ii) ordered, by unspecified interim measures, the temporary transfer to CONATEL of the use of assets owned by RCTV, such as "high frequency waves, teleports, transmitters, auxiliary television equipment, auxiliary power and climate control equipment, towers, antennas, broadcasting booths, station booths, perimeter fencing, and electrical connections."¹⁴⁶ Pursuant to this decision, CONATEL would grant the use of these assets to TVes. The Chamber also ordered that interested parties be notified by an announcement in one of the national newspapers with the highest circulation, so that they were considered notified. In that regard, the decision emphasized that "because the purpose of the application is to protect diverse interests, interveners may only submit evidence pertaining to the allegations made by the parties for whom they intervene."¹⁴⁷

¹⁴⁴ Cf. Resolution No. 002 of the Ministry of the People's Power for Telecommunications and Information Technology of March 28, 2007 (evidence file, folios 3392 and 3393).

¹⁴⁵ Cf. Supreme Court of Justice, Constitutional Chamber, Case No. 07-0720, Decision No. 956 of May 25, 2007 (evidence file, folios 26321 to 26326).

¹⁴⁶ Supreme Court of Justice, Constitutional Chamber, Case No. 07-0720, Decision No. 956 of May 25, 2007 (evidence file, folios 26347).

¹⁴⁷ Supreme Court of Justice, Constitutional Chamber, Case No. 07-0720, Decision No. 956 of May 25, 2007 (evidence file, folio 3460). In a separate opinion, Justice Pedro Rafael Rondón Haaz expressed his disagreement with the interim measure ordered by the Constitutional Chamber, indicating, *inter alia*, that: (i) "the continuity of the [public television] service would have been guaranteed to much greater effect if the measure had permitted the current operator of the radio spectrum to remain in operation on a provisional basis, until the decision on this case is handed down"; (ii) the measure "means that one element of [RCTV's] right to property, (the use) of the assets affected is being taken away, without indicating the legal grounds for this measure, and (iii) although it is stated that the measure granted is temporary, its duration has not been specified. Dissenting opinion of Justice Pedro Rafael Rondón Haaz on Decision No. 956 of May 25, 2007 (evidence file, folios 26351 to 26355).

96. Similarly, on May 24, 2007, José Félix Guerrero Peralta, José Miguel Ferrer Pérez and Jorge Enrique Larrazábal Larrazábal, and the users “*Oyentes Interactivos de la Radio (OIR)*” filed an action for separate and joint interests before the Constitutional Chamber of the SCJ, together with an unspecified interim measure, against the President of the Republic and the MPPTI, who was also the Director of CONATEL. The action was registered as Case No. 07-0731. The plaintiffs alleged that the eventual closure of RCTV, which appeared imminent according to statements made by the respondents, would seriously and unlawfully restrict the public’s right to freedom of expression and information by depriving it one of the television options that the Venezuelan people had to receive their preferred opinion, entertainment and information programs. The plaintiffs argued that “the eventual closure of [RCTV] is unconstitutional because this order to close down the network [...] was a punishment imposed on that station for including in its broadcasts, messages that the government disagrees with.” Consequently, they asked the Constitutional Chamber to order the necessary measures to enable RCTV to remain on air, without interruption.¹⁴⁸

97. On May 25, 2007, the Constitutional Chamber issued Decision No. 957, in which it admitted the application only against the MPPTI and granted interim measures, *ex officio*.¹⁴⁹ In this regard, the Chamber noted that CONATEL was the competent body to rule on the legal situation of the RCTV concession and, therefore, the application was inadmissible against the President of the Republic. It also asserted that article 27 of the Constitution granted the constitutional judge the power to restore the legal situation violated or the closest possible equivalent immediately. It added that the State had the obligation to guarantee the universal telecommunications service by maintaining the system in sufficient or adequate operating conditions and, accordingly, the Administration could make temporary use of the assets needed to deliver that service in order to protect the users’ rights to a quality public service. The Chamber also affirmed that, in principle, the users’ right of access to and enjoyment of a universal public telecommunications service did not mean the continuation of a specific operator, but rather “the possibility that the said users may have effective access, under equal conditions, and provided that the corresponding service is maintained at a minimum standard of quality, irrespective of whether or not the specific private operation has a valid permission or concession.”¹⁵⁰

98. Considering that TVes might not have the infrastructure necessary to transmit nationwide, the Constitutional Chamber ordered interim measures similar to those ordered by Decision No. 956 delivered in Case No. 07-0720. Therefore, “as a temporary measure to ensure an uninterrupted universal public service,” the Chamber assigned to CONATEL the right to use the equipment necessary for the said operations, and entrusted CONATEL with assigning its use to the operator chosen in accordance with the provisions of the LOTEL. Lastly, the Constitutional Chamber ordered publication of a notice convening those interested in becoming intervening parties for one side or the other in the case, or representing their own rights and interests. However, it indicated that the intervening parties could only make arguments and introduce evidence in support of the party for which they intervened.¹⁵¹

99. The interim measures were executed on May 27 and 28, 2007, with the transfer to CONATEL of the use of the assets indicated in the corresponding decisions.¹⁵²

¹⁴⁸ Cf. Supreme Court of Justice, Constitutional Chamber, Files No. 07-0731, Decision No. 957 of May 25, 2007 (evidence file, folios 3464 a 3468).

¹⁴⁹ Cf. Supreme Court of Justice, Constitutional Chamber, Files No. 07-0731, Decision No. 957 of May 25, 2007 (evidence file, folio 3486).

¹⁵⁰ Cf. Decision of the Supreme Court of Justice, Constitutional Chamber, Files No. 07-0731, Decision No. 957 of May 25, 2007 (evidence file, folios 3476 to 3481 and 3484).

¹⁵¹ Cf. Decision of the Supreme Court of Justice, Constitutional Chamber, Files No. 07-0731, Decision No. 957 of May 25, 2007 (evidence file, folio 3485 and 3487).

¹⁵² Record of execution of the decision of the Supreme Court of Justice of May 27, 2007 (evidence file, folios 3494

100. Decision No. 957 of the Constitutional Chamber of the SCJ issued on May 25, 2007, established “the use of the frequency that has been assigned for open-to-air television on the television transmission and broadcasting network that includes, *inter alia*, high frequency waves, teleports, transmitters, auxiliary television equipment, auxiliary power and climate control equipment, towers, antennas, broadcasting booths, station booths, perimeter fencing, and electrical connections.”¹⁵³ The proceedings relating to the execution of the SCJ decision of May 27, 2007, include the inventory of the equipment and transmitters located in the Valencia Norte, Cerro Copey, relay station over which the right of use was granted to CONATEL and, in turn, to TVes.

101. Given the decision not to renew RCTV’s concession announced in Communication No. 0424 and in MPPT Resolution No. 002, its signal was cut off at 00:00 on May 28, 2007, and TVes began transmitting its programming on Channel 2 of the free-to-air television system.¹⁵⁴

102. On May 27, 2007, in addition to RCTV’s concession, those of four other television stations expired, and all four were renewed.¹⁵⁵ These stations included Venevisión, a private, free-to-air television station that operated in VHF, covered almost all national territory, and had an audience very similar to that of RCTV.¹⁵⁶

C) Remedies under domestic law filed before and after RCTV’s closure

C.1 Applications for constitutional amparo

103. On February 9, 2007, a group of executives, journalists and other RCTV employees¹⁵⁷ filed an application for amparo before the Constitutional Chamber of the SCJ against the President of the Republic and the MPPTI, owing to the alleged “imminent, immediate and possible threat” that their rights to freedom of expression, due process, and equality and non-discrimination would be violated. The application was registered as Case No. 07-0197. The applicants argued that, on the said date, the defendants had already taken the decision not to renew RCTV’s concession and, moreover, sought to justify their action by claiming supposed violations of the Criminal Code, the LOTEL and the RESORTE Law.¹⁵⁸ The applicants argued that, under article 242 of the Constitution and article 58 of the Organic Public Administration Law, the Ministries were directly answerable to the President of the Republic; thus, the decisions of the National Executive Branch were implemented through the legal measures taken by the Ministers. They also indicated that the National Executive had been unable to show that any final decision had imposed any type of penalty on RCTV for allegedly committing serious

a 3509, 3511 a 3522 and 3524 to 3531).

¹⁵³ Decision of the Supreme Court of Justice, Constitutional Chamber, Files No. 07-0731, Decision No. 957 of May 25, 2007 (evidence file, folio 3486).

¹⁵⁴ Cf. Record of inspection of free-to-air VHF Radio Caracas Televisión station, on May 27 and 28, 2007, Supreme Court of Justice, Constitutional Chamber, Files No. 07-0731, Decision No. 957 of May 25, 2007 (evidence file, folios 3533 to 3539).

¹⁵⁵ See, articles in the newspaper “*El Universal*” entitled “*Renovadas licencias a Venevisión, VTV y a tres emisoras AM*” [Licenses renewed for Venevisión, VTV and three AM stations] of May 27, 2007 (evidence file, folio 4721), and “*CONATEL emitió transformación de títulos y renovación de concesión a 4 televisoras*” [CONATEL issued transformation of titles and renewal of concession to 4 television stations] of May 26, 2007 (evidence file, folios 4723 and 4724).

¹⁵⁶ Rating, reach, audience share and ATS indicators for 2002-2006 in Venezuela, prepared by AGB Panamericana of Venezuela Medición, S.A. (evidence file, folios 27614 and 27615).

¹⁵⁷ Cf. Application for amparo filed with the Constitutional Chamber of the Supreme Court of Justice on February 9, 2007 (evidence file, folios 25120 and 25121). The following victims are among those who filed this application: Marcel Granier, Daniela Bergami, Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Isabel Valero, Odila Rubin, Oswaldo Quintana, Eduardo Sapene, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño.

¹⁵⁸ Cf. Application for amparo filed with the Constitutional Chamber of the Supreme Court of Justice on February 9, 2007 (evidence file, folios 25130 and 25131).

violations of those laws; that RCTV had never been subject to any criminal or administrative proceedings, and that the decision would be enforced by officials who had already made public statements about the case, including about the reasons for the decision.

104. The decision on the application for amparo was still pending on March 28, 2007, the date on which CONATEL issued Communication No. 0424 and Resolution No. 002. On April 2, 2007, the applicants reframed their original application to rebut the terms of the official decision not to renew RCTV's concession.¹⁵⁹

105. On May 17, 2007, the SCJ ruled on the amparo.¹⁶⁰ In its decision, the Constitutional Chamber declared that it was competent to hear the application. However, it found the application to be inadmissible with regard to the President of the Republic, because only CONATEL had the authority to take a decision on the legal status of the concession granted to RCTV. It also found that the application was inadmissible with regard to the MPPTI because, under article 6.1 of the Organic Law of Amparo for Protection of Fundamental Rights and Guarantees, for the said application to be admissible the harm denounced had to exist. In this regard, the Constitutional Chamber considered that, in this case, the complaint referred to a presumed omission by the MPPTI; "however, during the processing of the application for amparo, the presumed offender issued the omitted response, so that [...] the harm denounced had ceased."¹⁶¹ The Chamber also declared the application inadmissible under article 6.5 of the Amparo Law, which established that an application shall not be admitted "[w]hen the aggrieved party has chosen to have recourse to the ordinary court system or has made use of pre-existing judicial remedies." According to the Chamber, the aggrieved party had another suitable judicial remedy to contest the administrative acts in question, such as a remedy under administrative law seeking nullification, which could have been exercised in combination with a request for interim measures. The Chamber pointed out that RCTV had already filed such an action before the Political-Administrative Chamber of the SCJ on April 17, 2007, and noted that "there is no evidence in the case file to suggest that a *de facto* situation exists that would allow it to be asserted that the applicant would inevitably suffer harm or that the harm denounced might become irreparable if it was necessary to use and exhaust that judicial remedy first."¹⁶²

106. On May 10, 2007, RCTV filed an application for amparo, which was decided on May 24, that year.¹⁶³ In this application, which was processed as Case No. 07-0647, RCTV requested that implementation of the National Telecommunications, Information Technology and Postal Services Plan 2007-2013 be halted until the State had adopted it formally. The Constitutional Chamber declared this application inadmissible on the basis of article 6.5 of the said Amparo Law, because RCTV had filed an administrative remedy seeking nullification before the Political-Administrative Chamber on April 17, 2007.¹⁶⁴

¹⁵⁹ Cf. Amendment of the application for amparo filed with the Constitutional Chamber of the Supreme Court of Justice of April 2, 2007 (evidence file, folios 3579 to 3589).

¹⁶⁰ Supreme Court of Justice, Constitutional Chamber, Case No. 07-0197, Inadmissibility decision of May 17, 2007 (evidence file, folios 3622 and 3593 to 3630).

¹⁶¹ In this regard, in his concurring opinion Justice Pedro Rafael Rondón Haaz indicated, *inter alia*, that: "the complaint filed regarding the administrative proceeding that was underway when the application for amparo was filed related to a violation of the right to an ordinary judge as regards the aspect of impartiality – because, as revealed, the body in charge of processing and deciding the proceeding had already given an opinion in this regard – rather than to the lack of response by the administrative authority called on to decide. The threat that a decision would be taken by a biased body, which was the purpose of the complaint, materialized in the response of the Minister whose subjective competence was questioned." Supreme Court of Justice, Constitutional Chamber, Case No. 07-0197, Inadmissibility decision of May 17, 2007, Concurring opinion of Justice Pedro Rafael Rondón Haaz (evidence file, folios 3623 to 3630).

¹⁶² Supreme Court of Justice, Constitutional Chamber, Case No. 07-0197, Inadmissibility decision of May 17, 2007 (evidence file, folios 3617 to 3621).

¹⁶³ Supreme Court of Justice, Constitutional Chamber, Case No. 07-0647, Decision No. 951 of May 24, 2007. Available at: <http://www.tsj.gov.ve/decisiones/scon/Mayo/951-240507-07-0647.htm>

¹⁶⁴ Supreme Court of Justice, Constitutional Chamber, Case No. 07-0647, Decision No. 951 of May 24, 2007. Available at: <http://www.tsj.gov.ve/decisiones/scon/Mayo/951-240507-07-0647.htm>

C.2 Administrative remedy seeking nullification

107. On April 17, 2007, a group of RCTV executives, journalists and other employees filed a remedy under administrative law seeking nullification of the administrative decision delivered in Resolution No. 002 and Communication No. 0424.¹⁶⁵ The plaintiffs alleged that the decisions being challenged were unconstitutional, characterized by the presumed violation of the rights to freedom of thought and expression, to due process, to defense and to be heard by an impartial authority, to the guarantee of the non-retroactivity of the law, to equality, to economic freedom and to private property. They also considered that the administrative decisions were unlawful owing to: (i) violation of the principle of the hierarchy of laws and the singular non-derogability of regulations; (ii) violation of general principles of law; (iii) subjective lack of competence; (iv) unlawful purpose; (v) false premise; (vi) misuse of power; (vii) complete and absolute absence of procedure; (viii) violation of the legal obligation established in article 210 of the LOTEL to transform RCTV's licenses. In their brief, the plaintiffs also requested an injunction or, failing that, an unspecified protective measure. In particular, they asked the competent court to order the MPPTI: (i) to refrain from taking any decision that might prevent RCTV from transmitting its programming until such time as a final decision was taken on the merits, and (ii) to take the necessary measures to ensure that the station continued operating on the same frequencies nationwide until a final decision on the complaint had been taken.

108. On May 22, 2007, the Political-Administrative Chamber of the SCJ admitted the appeal for nullification, but declared the application for an injunction inadmissible and did not address the request for an unspecified protective measure. The decision to dismiss the application for an injunction considered that the right to freedom of thought and expression "is not absolute because it must be exercised within the boundaries of certain values and constitutional principles." It indicated that, in effect, "under Article 113 of the Constitution, in the case of the exploitation of natural resources which are the property of the State – as in the case of the radioelectric spectrum - [...] the State may grant concessions for a certain length of time, always ensuring the existence of service providers or counterparts that are in the public interest." In this regard, the Chamber indicated that, "in principle, "the plaintiffs may exercise their right to freedom of thought and expression using the radioelectric frequency assigned to RCTV only for as long as the concession is in effect [...], and this in no way implies a supposed violation of that right, because the plaintiffs are free to impart their ideas, opinions and information through the many other media outlets."

109. The Chamber also observed that: (i) to examine the alleged violations of the rights to due process, to defense, to the non-retroactivity of the law, to property and to economic freedom, the Chamber would have to conduct a detailed examination of the administrative procedures whose decisions were being challenged, and this would correspond to the merits stage of the appeal for nullification; (ii) the plaintiffs had failed to demonstrate the presumed violation of the principle of the presumption of innocence because the decisions they were challenging did not impose a penalty on RCTV, and (iii) regarding the alleged violation of the right to equality and non-discrimination, RCTV had failed to demonstrate that its circumstances were equal to those of the other operators.¹⁶⁶

110. On May 24, 2007, the plaintiffs submitted a brief to the Political-Administrative Chamber reiterating the urgency of the case and requesting a decision on their request for an

¹⁶⁵ Cf. Administrative remedy seeking nullification, filed with the Political-Administrative Chamber of the Supreme Court of Justice on April 17, 2007 (evidence file, folios 2794 to 2892).

¹⁶⁶ Cf. Supreme Court of Justice, Political-Administrative Chamber, Case No. 07-0411, Decision of May 22, 2007 (evidence file, folios 3632 to 3688).

unspecified interim measure.¹⁶⁷ The Chamber declared this inadmissible on July 31, 2007.¹⁶⁸ On November 29, 2007, May 27, 2008, and May 21, 2009, the plaintiffs filed new requests for an unspecified interim measure in which they argued new facts. The first two requests were declared inadmissible by the Political-Administrative Chamber in decisions of March 26, 2008, and July 30, 2008, respectively.¹⁶⁹ In the case of the third request, as of August 2011, no separate case file had been opened.

111. El October 9, 2007, in an order issued by the Trial Court of the Political-Administrative Chamber, the evidentiary stage of the proceedings was opened.¹⁷⁰ On March 6, 2008, that Court issued its decision on the admissibility of the evidence offered.¹⁷¹ On May 7 and June 10, 2008, the presumed victims and the State, respectively, filed appeals against that decision. On June 19, 2008, the Court admitted the appeals and referred the case files to the Political-Administrative Chamber. Between August 12, 2008, and October 22, 2009, the presumed victims filed eight request for the presiding justice to issue a decision on the appeals. In December 2011, when presenting observations on the merits, the State advised that the administrative remedy seeking nullification remained pending before the Political-Administrative Chamber of the Supreme Court of Justice.¹⁷² At the date of this judgment, the said administrative remedy had not been decided; the decision on the appeals had not been issued and the action continued at the evidentiary stage.¹⁷³

C.3 Objection to the interim measures issued during the processing of the action on joint and separate interests and the constitutional amparo

112. On May 31, 2007, the RCTV representatives filed an objection to Decision No. 957, issued by the Constitutional Chamber on May 25, 2007, in the action on joint and separate interests (Case No. 07-0731).¹⁷⁴ On June 13, 2007, the RCTV representatives filed a brief with evidence in the objection proceedings. To date the evidence has not been processed.

113. In addition, during the proceedings under Case No. 07-0731, on May 28, 2007, the plaintiffs filed a request before the Constitutional Chamber that the case be dismissed. On June 1, 2007, that court decided to refuse the dismissal and join cases Nos. 07-0720 and 07-0731.¹⁷⁵

C.4 Criminal complaints

¹⁶⁷ Cf. Affidavit attesting urgency of the administrative remedy seeking nullification, Case No. 07-0411), filed with the Political-Administrative Chamber of the Supreme Court of Justice on May 24, 2007 (evidence file, folio 3690).

¹⁶⁸ Cf. Decision of the Supreme Court of Justice, Political-Administrative Chamber, Case No. 07-0411, Decision No. 1,337 of July 31, 2007 (evidence file, folios 4625 to 4642).

¹⁶⁹ Cf. Decision of the Supreme Court of Justice, Political-Administrative Chamber, Case No. 07-0411, Decision No. 342 of March 26, 2008 (evidence file, folios 4549 to 4564). SCJ, Political-Administrative Chamber, Case No. 07-0411, Decision No. 883 of July 30, 2008 (evidence file, folios 4565 to 4580).

¹⁷⁰ Order of the Trial Court of the Political-Administrative Chamber of October 9, 2007 (evidence file, folio 28627).

¹⁷¹ Cf. Decision of the Supreme Court of Justice, Political-Administrative Chamber, Case No. 07-0411, Decision No. 107 of March 6, 2008 (evidence file, folios 29464 to 29530).

¹⁷² Cf. Observations of the State on the IACHR Admissibility Report of December 4, 2011 (evidence file, folio 3572).

¹⁷³ Cf. In its final arguments, the State indicated that "this appeal is pending in the Supreme Court of Justice and due to a backlog of cases, it has not been decided at this time."

¹⁷⁴ Cf. Contestation of the precautionary measure decreed by the Constitutional Chamber by Decision No. 957 issued on May 25, 2007, filed on May 31, 2007 (evidence file, folios 3716 to 3719).

¹⁷⁵ Cf. Decision of the Supreme Court of Justice, Constitutional Chamber, Case No. 07-0720/07-0731, Decision No. 1,075 of June 1, 2007 (evidence file, folios 4708 to 4714). There is a dissenting opinion of Justice José Leonardo Requena Cabello who considered that the purpose of the two cases and the constitutional rights cited were distinct (evidence file, folios 4715 to 4720).

114. On December 11, 2007, RCTV filed a criminal complaint with the Superior Prosecutor of the Judicial District of the Caracas Metropolitan Area, requesting that a criminal investigation be launched into offenses against property and other offenses established in the Anti-corruption Law.¹⁷⁶ In the complaint, RCTV alleged that, under the interim measures ordered in the actions on joint and separate interests (Cases Nos. 07-0720 and 07-0731), the Constitutional Chamber had deprived RCTV of its right to property and possession of assets. The station had been left completely defenseless because the court of last resort under the Venezuelan judicial system had indefinitely restricted its use, enjoyment and disposition of its own property, as a result of a major procedural fraud, which was a blatant violation of fundamental rights. In its complaint, RCTV argued that, by distorting the purposes of the interim measures requested by the aggrieved parties, the Constitutional Chamber had misapplied the law, with the result that RCTV's assets had been seized and handed over to the new operators of the free-to-air signal. In RCTV's view, the court had "committed an 'autonomous procedural fraud' detrimental to [its] rights and interests. This was an intentional fraud, inasmuch as the Constitutional Court's own case law on the subject of procedural fraud condemns the conduct of judges who, through procedure and other devices, inflict harm that always involves violations of fundamental rights." In its complaint, RCTV asked not only that an investigation be launched, but also that the condition of the physical installations, equipment and other assets assigned to the State be verified by judicial inspections.

115. On December 28, 2007, the 36th Prosecutor of the Public Prosecution Service with nationwide jurisdiction, in charge of the complaint, asked the court of oversight to order the case dismissed, alleging that the facts that prompted the filing of the complaint were not criminal offenses. On July 28, 2008, the 51st Criminal Trial Court of the Caracas Area admitted the request for dismissal filed by the Prosecutor, and decided to close the investigation.¹⁷⁷ On August 7, 2008, RCTV filed an appeal against this latest court ruling.¹⁷⁸

116. On October 10, 2008, the Fifth Chamber of the Appellate Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area ratified the reasons given by the Prosecutor in his request to have the case dismissed, and declared that the appeal filed by RCTV was inadmissible.¹⁷⁹ RCTV filed a remedy of cassation contesting that decision with the SCJ Criminal Cassation Chamber but, on May 7, 2009, this was dismissed also.¹⁸⁰

VII RIGHTS TO FREEDOM OF EXPRESSION AND TO EQUALITY

A) *Alleged violation of freedom of expression*

A.1. Arguments of the parties and of the Commission

117. The **Commission** argued that "[t]he allocation of radio and television licenses is a decision with a definite impact on the right to freedom of expression in both its dimensions: the right of everyone to express themselves freely and the right to receive a diversity of ideas

¹⁷⁶ Cf. Complaint alleging procedural fraud filed with the Superior Prosecutor of the Judicial District of the Caracas Metropolitan Area on December 11, 2007 (evidence file, folios 3721 to 3769).

¹⁷⁷ Cf. Decision of the 51st Criminal Trial Court of the Caracas Area in Case C-51-S-370-08 (evidence file, folios 25587 to 25603).

¹⁷⁸ Cf. Appeal filed with the 51st Criminal Trial Court of the Caracas Metropolitan Area, Case No. 370-08 of August 7, 2008 (evidence file, folios 3771 to 3785).

¹⁷⁹ Cf. Decision No. 265-08 of October 10, 2008, of the 51st Criminal Trial Court of this Criminal Judicial District (evidence file, folios 25739 to 25792).

¹⁸⁰ Decision of the Supreme Court of Justice, Criminal Cassation Chamber, Case No. C09-005, Decision No. 195 of May 7, 2009 (evidence file, folios 26021 to 26037). Justice Blanca Rosa Mármol de León presented her dissenting opinion on that date (evidence file, folios 26039 TO 26045).

and opinions,” because “[b]oth the access of the media outlets owned by those requesting access to the frequencies and society’s right to receive a plurality of information pursuant to Article 13 of the American Convention depend on this decision.” It also indicated that “on allocating frequencies, the State decides which voice the public will be able to hear in the years to come.” Consequently, the Commission indicated that “the process of allocating and renewing concessions must be strictly regulated by law, characterized by transparency and guided by standards that are objective, impartial, clear, public, and compatible with a democratic society,” which would mean that “the procedure for awarding a license must be surrounded by sufficient guarantees against arbitrariness, including the obligation to provide justification for a decision granting or denying the request, as well as to provide adequate judicial oversight of the decision.”

118. The Commission also argued that, “these days, a significant amount of journalism is done via media outlets. These media outlets are, in effect, associations of persons who have come together to exercise their freedom of expression in a sustained manner.” Thus, the Commission considered that, “the role of the alleged victims within the media outlet must be analyzed in order to determine whether the State action that affected the media outlet as a legal person also, by extension, had a negative, certain, and substantial impact on the freedom of expression of natural persons.” In this case, the Commission indicated that the presumed victims were three shareholders and members of the Board of Directors of RCTV (Marcel Granier, Peter Bottome and Jaime Nestares), who exercised permanent and real control over RCTV, and also 14 professionals who were working for the channel, “all with significant levels of responsibility [and] who contributed directly to the communications mission of RCTV.”

119. The Commission argued that “once an interference with the right to freedom of expression has been established, it is the State that carries the burden of proving that this interference was permissible; that is, that the restriction on freedom of expression was established by law and necessary to ensure a legitimate purpose.” In this regard, it indicated that “the promotion of diversity and pluralism is a legitimate public interest which can justify decisions in the area of broadcasting.” It added that “the granting of radio and television broadcast frequencies with the objective of putting pressure on and punishing or rewarding and providing privileges to social communicators and media outlets because of the information they provide constitutes an indirect restriction of freedom of expression as prohibited by Article 13(3) of the American Convention[; this] also has the effect of silencing other media outlets, which severely impacts the social dimension of freedom of expression.”

120. Regarding the State’s alleged procedural obligations, the Commission argued that “the dispute over the non-renewal of RCTV’s concession took place in the context of legal uncertainty for the station as a result of the lack of clarity regarding the legal framework applicable to its concession.” This was due to the fact that “the State did not rule on the request [for transformation of its concession] within the two-year period established in the LOTEL, and the request was still unresolved when RCTV formally requested the renewal of its concession in January of 2007[;] while, CONATEL continually and quietly applied the new LOTEL legal regime to RCTV.” In this regard, the Commission considered that “that its task in this case [was] not to determine which domestic law should have been applied and what was the correct interpretation of it[, because it was] enough to observe that RCTV had, as a minimum, the right to a clear and objective proceeding strictly regulated by law.” And, it added that “[g]iven the State’s failure to comply with the legal mandate to transform RCTV’s concession, a situation of lack of legal certainty existed that was inconsistent with the Venezuelan State’s obligation to establish a procedure for renewing concessions that was strictly regulated by law.”

121. The Commission indicated that the decision not to renew the concession was taken based on the channel’s editorial line, in light of the statements made by senior officials,

including President Chávez, starting in 2003. It added that “no evidence had been provided establishing that the National Telecommunications Plan used by the State to justify the need to take back the frequency was adopted and published prior to the issue of Communication No. 0424,” announcing the decision not to renew the RCTV concession; to the contrary, “that Plan was presented by the President of the Republic four months after the decision not to renew the concession had been taken.” It also argued that, “faced with a situation of misuse of power or indirect abuse, it is essential to identify the motive for and purpose of the decision not to renew the concession. [In the instant case, this refers to] the non-renewal of the RCTV concession and the seizure of all its assets, which was due to the channel’s critical editorial line and the purpose was to punish it for this attitude.” Based on the foregoing, the Commission considered “proven [...] that the non-renewal of the concession was motivated [...] by the Venezuelan government’s disagreement with the station’s editorial stance; therefore it constituted a clearly act of misuse of power and a violation of Article 13(3) of the Convention

122. The **representatives** agreed with most of the Commission’s arguments. However, they added that, “[i]n Venezuela, the electromagnetic spectrum is a public asset owned by the State and it is administered by the Executive. Consequently, the concession for the use and exploitation of the electromagnetic spectrum is a concession in the public domain that grants the concessionaire exclusive use over the electromagnetic spectrum, because neither the grantor nor any other person may use that portion of this spectrum.” They argued that “the public statements of the President of the Republic and of other officials reveal that, in their opinion, the Venezuelan Government has arbitrary authority not to extend or renew, as it pleases, the licenses of a concessionaire of a free-to-air television outlet or radio station when they expire.”

123. The representatives argued that, according to the LOTEL and its regulations, “the only reason why the non-renewal of a concession would not be admissible [...] would be failure to comply with the law, its regulations, the general conditions established by [CONATEL] or the respective authorization.” They indicated that “it is not just any failure to comply that is sufficient to refuse the renewal,” because “[i]t must be [...] serious, proven and extremely strong non-compliance with the concessionaire’s essential obligations.” The representatives also argued that “the right of the concessionaires of free-to-air television to continue operating and to obtain the renewal of their licenses is a recognized standard and a general principle of administrative law on telecommunication concessions, based on recognition of all the work and investments made by the concessionaire, with the legitimate expectation that his right will be extended or renewed, unless there are clear, serious and justified legal reasons to end the legal relationship.” Accordingly, they indicated that “the Venezuelan Government did not and does not have discretionary or arbitrary powers to purely and simply deny the extension or renewal of the license of a free-to-air television station.

124. The representatives also argued that “the concessions regulated by Decree [No. 1577] include a clause that grants the concessionaire a right to the extension of the concession for a further 20 years.” They also argued that “RCTV had, at least, the right to a 20-year extension as of May 27, 2007, [...]. In fact, the Venezuelan government was legally obliged to extend or renew those licenses, pursuant to the LOTEL and applicable regulations, as it did for the other television stations whose concessions expired that same day (Venevisión and VTV).” They indicated that “RCTV had never been penalized for serious violations of the LOTEL, the Radio and Television Social Responsibility Law or any other applicable law,” so that there were no “legal grounds whatsoever to disregard RCTV’s right to the extension of its concession under the previous or the current legal regime.” In addition, the representatives argued that “RCTV ha[d] complied fully with its obligation to request the transformation of [the] licenses” in accordance with the provisions of article 210 of the LOTEL, but “the Ministry of Infrastructure

delayed more than four years and six months” and did not complete the process of transforming the licenses.

125. The representatives argued that the no-renewal of the concession constituted an “arbitrary action of the State with the deliberate intention of eliminating an independent media company, [...] based on political considerations, to penalize the diffusion of information and ideas by RCTV.” In particular, they argued that “the issue of the concession was addressed by the President of the Republic and other senior officials of the Venezuelan State and, in some case, by those who took decisions on the revocation of the concessions of private media companies, with an evident political motivation and with the unconcealed purpose of silencing the independent television companies that offered space to those who legitimately criticize, are adverse to or oppose the government.” They added that “[t]he Venezuelan Government cannot cite a supposed need to use the precise frequencies assigned to RCTV to try and justify the decision to prevent RCTV from continuing to operate as a free-to-air VHR television station.”

126. The representatives asserted that “the non-renewal of the RCTV concession and the State’s arbitrary seizure of its audiovisual broadcasting assets should be seen as a whole; in other words, as a unit that ended in the closure of RCTV. The judicial seizure of the RCTV equipment (broadcasting stations, antennas and repeaters) and their assignment to CONATEL around 56 hours before the announced end of the concession lends particular clarity to the violation of freedom of expression [...]. The abnormally rapid and unusual judicial intervention, *ex officio*, that placed in the hands of the National Executive the assets that the victims had been using to impart ideas and information, reveals that there must have been, at the very least, a coordinated strategy by the organs of the Venezuelan State to deprive RCTV of the possibility of continuing to be a medium at the service of freedom of expression.”

127. The **State** indicated that the argument that “the purpose of the Venezuelan State’s decision not to renew the RCTV concession to operate as a television station was to silence this media outlet because it distributed critical opinions and information contrary to the government” was disproved “because other Venezuela television stations that were as critical and against the government as RCTV had their concessions renewed; for example, Venevisión and Televén.” It added that the “companies [that own RCTV] have continued to operate and do business in Venezuelan territory without any restriction of their constitutional guarantees.”

128. The State indicated that “the administrative concession is a license granted by the State, through the competent body, for the establishment and operation of networks and the provision of telecommunication services, to those who have met the legal requirements and conditions and no right is ever transferred to public property (the electromagnetic spectrum), which always remains within the State’s domain.” It added that “[t]he establishment and operation of the telecommunication networks is an activity of general interest subject to strict legal control and supervision by the State, which also reserves to itself the exclusive operation of the radioelectric spectrum, as well as the power, through the corresponding body, the National Telecommunications Commission (CONATEL), to grant concessions in this area.”

129. The State also argued that “it [was] not true that, with the entry into effect of the [LOTEL] in 2000, the validity of the RCTV concession was extended for 20 years more, [...] by making a flexible interpretation of the text of article 210(4) of the said law, because the only logical, reasonable and legal interpretation was that the time remaining time in the concession was the time that should be respected”; namely, until May 27, 2007. Therefore, the State indicated that “the legal situation submitted in this case is the simple legal extinction of concession that the State decided not to renew, under its discretionary authority to administer public property such as, in this case, the electromagnetic spectrum.” It added that article 207

of the LOTEL “expressly derogated all existing legal and regulatory provisions regarding anything contrary to the provisions of that law.”

130. In addition, the State argued that “[t]he National Executive decided, through the Ministry of the People’s Power for Telecommunications, to assign the use of the Channel 2 signal to respond to the requirement under article 108 of the Constitution [...], which establishes the State’s duty to guarantee public television services in order to permit universal access to information in keeping with the National Telecommunications Plan.” It added that “the Venezuelan Social Television Foundation (TEVES), which now operates the RCTV frequency, was developed as an alternative medium that has been operating to carry out the proposals of the Strategic Plan and to continue the public service, but in an appropriate and constitutional way, meeting the main objectives which are to inform, entertain and provide a social and educational service at all levels, making the space previously occupied by RCTV C.A., a true window for the people’s democratic expression in which every voice and the opinions of every sector have a place, that makes no distinction between political ideas, and that constitutes not only a source of entertainment for the whole family, but also a reference point for true and objective information.”

131. Furthermore, the State argued that, “among the factors it took into consideration [...] when deciding not to renew the RCTV broadcasting license [was] the said television outlet’s failure to comply with Venezuelan laws and regulations, as well as basic ethical standards that should govern the function of social communicators.” It alleged that RCTV had abused “its right to freedom of expression because its programming revealed a constant misrepresentation of the facts, concealment of information and manipulation of the declarations made to the population,” thereby “limiting the right of the collectivity to be informed in a true, timely and balanced way.” It also argued that “the right of the journalists, executives and other employees to express themselves freely – within the limits established by law – through that television channel, using the concession granted, [was] restricted to the time the said concession was in force, following which [...] they needed to avail themselves of other media – operating legally – to exercise that right. And this situation has occurred, because the journalists and many of the RCTV employees are providing their professional services to other media in Venezuela and abroad.”

132. Additionally, during the public hearing, the State indicated that “in Venezuela, in addition to the dictatorial government issuing a decree to end the Constitution that had been voted for by an immense majority of Venezuelans, a communications shutdown began under which, for several days, nothing relating to “Chavism” and the people’s efforts to restore democratically-elected activities was shown on the screens,” because, “following the inauguration of the dictator Carmona, [...] the media, including RCTV, continued the communications shutdown for several days to conceal the efforts of the people to restore the legitimately elected authorities.”

A.2. Considerations of the Court

133. Taking into account the arguments presented by the parties and the Commission, the Court considers it necessary first, to establish the general standards for the exercise of the right to freedom of expression. Second, it will determine whether, in this case, a right to the automatic extension or renewal of the concession existed. And, then, the Court will determine whether there was an indirect restriction prohibited by Article 13(3) of the American Convention.

1. General standards concerning the right to freedom of expression

134. The Court will now proceed to: (i) refer to the general scope of the right to freedom of expression; (ii) present some considerations on the exercise of this right by natural persons through legal persons; (iii) present specific considerations on indirect restrictions of this right, and (iv) establish guidelines concerning broadcasting concessions or licenses.

1.1. General scope of the right to freedom of expression

135. The Court's case law has provided extensive content to the right to freedom of thought and expression recognized in Article 13¹⁸¹ of the Convention. The Court has indicated that this provision protects the right to seek, receive and impart ideas and information of all kinds, and also to receive and know the information and ideas imparted by others.¹⁸² The Court has indicated that freedom of expression has both an individual and a social dimension, and this give rise to a series of rights that are protected in the said article.¹⁸³ The Court has affirmed that the two dimensions are equally important and must be guaranteed fully and simultaneously in order to give full effect to the right to freedom of expression as provided for in Article 13 of the Convention.¹⁸⁴

136. The individual dimension of freedom of expression includes the right to use any appropriate means to disseminate opinions, ideas and information and allow it to reach the greatest number of persons. In this regard, expression and dissemination are indivisible, so that a restriction of the possibilities of dissemination represents directly, and to the same extent, a limit to the right to free expression.¹⁸⁵ Regarding the second dimension of the right to freedom of expression – that is, the social element – the Court has indicated that freedom of expression also involves the right of everyone to know the opinions, information and news of others. For the ordinary citizen, the knowledge of other people's opinions or information is as important as the right to impart their own.¹⁸⁶ Thus, in light of the two dimensions, freedom of expression requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts and therefore represents a right of each individual; but it also involves, on the other hand, a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.¹⁸⁷

137. The Court has established that violations of Article 13 of the Convention may occur in different situations.¹⁸⁸ The Court has indicated that when public authorities take measures or actions to prevent the free circulation of information, ideas, opinions or news, this produces

¹⁸¹ Similarly, Article 4 of the American Declaration of the Rights and Duties of Man establishes: Article IV. Right to freedom of investigation, opinion, expression and dissemination. Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

¹⁸² Cf. *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, and *Case of Norín Catrimán et al. v. Chile. Merits, reparations and costs*. Judgment of May 29, 2014. Series C No. 279, para. 371.

¹⁸³ Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, paras. 31 and 32, and *Case of Norín Catrimán et al. v. Chile*, para. 371.

¹⁸⁴ Cf. *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs*. Judgment of February 5, 2001. Series C No. 73, para. 67, and *Case of Norín Catrimán et al. v. Chile*, para. 371.

¹⁸⁵ Cf. *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, para. 65, and *Case of Norín Catrimán et al. v. Chile*, para. 372.

¹⁸⁶ Cf. *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, para. 66, and *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 22, 2013. Series C No. 265, para. 119.

¹⁸⁷ Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 30, and *Case of Mémoli v. Argentina*, para. 119.

¹⁸⁸ Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, paras. 53 and 54, and *Case of Vélez Restrepo and family members v. Colombia*, para. 139.

"an extreme violation of both the right of each individual to express himself, but also the right of everyone to be well informed; thus affecting one of the basic conditions for a democratic society."¹⁸⁹ This situation can be found when there is "prior censorship, the seizing or barring of publications and, in general, any procedure that subjects the expression or dissemination of information to State control."¹⁹⁰

138. The Inter-American Court has emphasized that "the profession of journalism [...] involves, precisely, the seeking, receiving and imparting of information. Consequently, the practice of journalism requires a person to engage in activities that are defined or encompassed by freedom of expression guaranteed in the Convention." Professional journalism "cannot be differentiated from freedom of expression; on the contrary, both are obviously intertwined, for the professional journalist is not, nor can he be, anything but someone who has decided to excise freedom of expression in a continuous, regular and paid manner."¹⁹¹

139. In addition, within the framework of freedom of information, the Court considers that the journalist has an obligation to verify, within reason although not necessarily exhaustively, the facts on which his information is based.¹⁹² In other words, it is valid to demand fairness and also diligence in comparing sources and seeking information. This involves the right not to receive a manipulated version of the facts. Consequently, journalists have an obligation to keep a critical distance from their sources and compare them with other relevant information.¹⁹³ Similarly, the European Court has indicated that freedom of expression does not guarantee that journalists have an unlimited protection, even in matters of public interest. "While enjoying the protection afforded by freedom of expression, journalists must, when exercising their duties, abide by the principles of responsible journalism; namely, to act in good faith, provide accurate and reliable information, objectively reflect the opinions of those involved in a public debate, and refrain from pure sensationalism."¹⁹⁴ The European Court has also indicated that the exercise of responsible and ethical journalism is particularly relevant in contemporary society where the media not only inform, but can also suggest by the way in which they present the information how it is to be assessed.¹⁹⁵

140. The Court has emphasized that freedom of expression, particularly in matters of public interest, "is a cornerstone in the very existence of a democratic society."¹⁹⁶ It should not only

¹⁸⁹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 54, and *Case of Vélez Restrepo and family members v. Colombia*, para. 139.

¹⁹⁰ *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 54, and *Case of Vélez Restrepo and family members v. Colombia*, para. 139.

¹⁹¹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, paras. 71 and 74, and *Case of Mémoli v. Argentina*, para. 120.

¹⁹² *Cf. Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 79, and *Case of Mémoli v. Argentina*, para. 122.

¹⁹³ *Cf. Case of Kimel v. Argentina*, para. 79, and *Case of Mémoli v. Argentina*, para. 122.

¹⁹⁴ *Cf. ECHR, Novaya Gazeta and Borodyanskiy v. Russia*, (No. 14087/08), Judgment of March 28, 2013, para. 37. In this judgment, the European Court indicated: "[i]n this respect the Court reiterates that Article 10 does not guarantee wholly unrestricted freedom of expression to the press, even with respect to coverage of matters of serious public concern." Similarly, see: ECHR, *Pedersen and Baadsgaard v. Denmark* [Grand Chamber], (No. 49017/99), Judgment of December 17, 2004, para. 78, and ECHR, *Stoll v. Switzerland* [Grand Chamber], (No. 69698/01), Judgment of December 10, 2007, para. 103. *Cf. Case of Mémoli v. Argentina*, para. 122.

¹⁹⁵ *Cf. ECHR, Stoll v. Switzerland* [Grand Chamber], (No. 69698/01), Judgment of December 10, 2007, para. 104, and ECHR, *Novaya Gazeta and Borodyanskiy v. Russia*, (No. 14087/08), Judgment of March 28, 2013, para. 42. In these judgments, the European Court indicated: "[t]hese considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance." *Cf. Case of Mémoli v. Argentina*, para. 122.

¹⁹⁶ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 70, and *Case*

be guaranteed as regards the dissemination of information or ideas that are received favorably or considered inoffensive or indifferent, but also as regards those that are disagreeable for the State or any sector of the population. Any condition, restriction or penalty in this regard must be proportionate to the legitimate purpose sought.¹⁹⁷ The democratic system is weakened and pluralism and tolerance suffer if freedom of expression is not guaranteed effectively; moreover, the population's complaint and control mechanisms may become inoperative and, finally, a fertile ground is created for authoritarian systems to take root.¹⁹⁸ Thus, Articles 3 and 4 of the Inter-American Democratic Charter stress the importance of freedom of expression in a democratic society, by establishing that "[e]ssential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government" and "[t]ransparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy."

141. From the outset, this Court has emphasized the importance of pluralism in the context of the right to freedom of expression, indicating that this signifies tolerance and a spirit of openness,¹⁹⁹ without which a democratic society does not exist. The relevance of pluralism has been stressed by the OAS General Assembly in different resolutions in which it has reaffirmed that: "free and independent media are fundamental for democracy, for the promotion of pluralism, tolerance, and freedom of thought and expression, and for the facilitation of dialogue and debate, free and open to all segments of society, without discrimination of any kind."²⁰⁰

142. In particular, the Court has indicated that the plurality of the media and news²⁰¹ constitutes an effective guarantee of freedom of expression,²⁰² and the State has a duty to protect and ensure this under Article 1(1) of the Convention, by minimizing restrictions to information and encouraging a balanced participation,²⁰³ and by allowing the media to be open to all without discrimination,²⁰⁴ because the idea is that "no individuals or groups are, *a priori*,

of Vélez Restrepo and family members v. Colombia, para. 141

¹⁹⁷ Cf. *Case of "The Last Temptation of Christ" (Olmedo Bustos v. Chile)*, para. 69; and *Case of Perozo et al. v. Venezuela*, para. 116.

¹⁹⁸ Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of July 2, 2004. Series C No. 107, para.116; and *Case of Vélez Restrepo and family members v. Colombia*, para. 141.

¹⁹⁹ Cf. *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, para. 69, and *Case of Perozo et al. v. Venezuela*, para. 116.

²⁰⁰ AG/RES. 2679 (XLI-O/11) Right to Freedom of Thought and Expression and the Importance of the Media (Adopted at the fourth plenary session, held on June 7, 2011), para. 5; AG/RES. 2523 (XXXIX-O/09) Right to Freedom of Thought and Expression and the Importance of the Media (Adopted at the fourth plenary session, held on June 4, 2009), para. 5; AG/RES. 2434 (XXXVIII-O/08) Right to Freedom of Thought and Expression and the Importance of the Media (Adopted at the fourth plenary session, held on June 3, 2008), para. 5; AG/RES. 2287 (XXXVII-O/07) Right to Freedom of Thought and Expression and the Importance of the Media (Adopted at the fourth plenary session, held on June 5, 2007), para. 5; AG/RES. 2237 (XXXVI-O/06) Right to Freedom of Thought and Expression and the Importance of the Media (Adopted at the fourth plenary session, held on June 6, 2006), para. 5; Cf. AG/RES. 2149 (XXXV-O/05) Right to Freedom of Thought and Expression and the Importance of the Media (Adopted at the fourth plenary session, held on June 7, 2005), para. 4.

²⁰¹ Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 34, and *Case of Perozo et al. v. Venezuela*, para. 117.

²⁰² Cf. *Case of Herrera Ulloa v. Costa Rica*, para. 116, and *Case of Vélez Restrepo and family members v. Colombia*, para. 141.

²⁰³ Cf. *Case of Kimel v. Argentina*, para. 57, and *Case of Perozo et al. v. Venezuela*, para. 117.

²⁰⁴ Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 34.

excluded.”²⁰⁵ The Court has also indicated that social communications media play an essential role as vehicles for the exercise of the social dimension of freedom of expression in a democratic society and must, therefore, reflect the most diverse information and opinions.²⁰⁶

143. In this regard, the Court has indicated that “freedom of expression may also be affected without direct State intervention. This may occur, for example, when, owing to the existence of monopolies or oligopolies in the ownership of the media, a practice is established of ‘mechanisms aimed at preventing the communication and circulation of ideas and opinions.’”²⁰⁷ On this point, article 12 of the Declaration of Principles on Freedom of Expression indicates that “[m]onopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people’s right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.”²⁰⁸

144. That said, freedom of expression is not an absolute right and may be subject to restrictions,²⁰⁹ particularly when it interferes with other rights guaranteed by the Convention.²¹⁰ Given the importance of freedom of expression in a democratic society and the responsibility that this entails for the social media and for the professionals who exercise this task, the State should minimize the restrictions to information and balance, insofar as possible, the participation of the different currents in the public debate, promoting the pluralism of information. This explains the protection of the human rights of those who are faced with the power of the media, which should exercise its social function responsibly,²¹¹ and the effort to ensure structural conditions that permit a balanced expression of ideas.²¹² The Court recalls that both freedom of expression and the right to honor established in the Convention, are extremely important,²¹³ and the exercise of both these rights must be guaranteed. Thus, the prevalence of one or the other in a specific case will depend on the weighing made based on an assessment of proportionality. Resolving the conflict between certain rights requires examining each case based on its characteristics and circumstances in order to ascertain the existence and intensity of the factors on which this assessment is based.

²⁰⁵ Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 34.

²⁰⁶ Cf. *Case of Ivcher Bronstein v. Peru. Merits*, para. 149, and *Case of Fontevecchia and D’Amico v. Argentina. Merits, reparations and costs*. Judgment of November 29, 2011. Series C. No 238, para. 44.

²⁰⁷ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 56.

²⁰⁸ Article 12 of the Declaration of Principles on Freedom of Expression. The Declaration of Principles on Freedom of Expression was adopted by the Inter-American Commission on Human Rights, to support the Special Rapporteurship on Freedom of Expression, during its 108th regular session in October 2000. Similarly, in its General Comment No. 34, the Human Rights Committee reiterated “its observation in General Comment No. 10 that ‘because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression.’ The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views,” General Comment No. 34, para. 40.

²⁰⁹ Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 36, and *Case of Perozo et al. v. Venezuela*, para. 117.

²¹⁰ Cf. *Case of Kimel v. Argentina*, para. 56, and *Case of Mémoli v. Argentina*, para. 123.

²¹¹ Cf. *Case of Herrera Ulloa v. Costa Rica*, para. 117, and *Case of Fontevecchia and D’Amico v. Argentina*, para. 45.

²¹² Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 34, and *Case of Fontevecchia and D’Amico v. Argentina*, para. 45.

²¹³ Cf. *Case of Kimel v. Argentina*, para. 51, and *Case of Mémoli v. Argentina*, para. 123.

145. Pursuant to the above, States have the international obligation to adopt the necessary measures “to give effect to” the rights and principles established in the Convention, as stipulated in Article 2 of this inter-American instrument, and to this end they must establish laws and public policies that guarantee the pluralism of information and news via the different media, such as the press, radio and television.²¹⁴

1.2. *Exercise of the right to freedom of expression through legal persons*

146. The Court has established that, even though the device of legal persons is not expressly recognized by the American Convention, as it is in Protocol No. 1 to the European Convention on Human Rights and Fundamental Freedoms, this does not restrict the possibility that, in certain circumstances, an individual may have recourse to the inter-American system for the protection of human rights to assert his fundamental rights, even when these are covered by a legal device or fiction created by the legal system itself.²¹⁵ Nevertheless, a distinction should be made in order to specify which situations can be examined by this Court under the American Convention.²¹⁶ In this regard, the Court has already examined the possible violation of the right to property of certain persons in their capacity as shareholders.²¹⁷ Thus, for example, in cases such as *Ivcher Bronstein v. Peru*, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador* and *Perozo et al. v. Venezuela*, the Court has analyzed acts that affected the legal persons of which they were shareholders.²¹⁸ In those cases, the Court differentiated the rights of a company’s shareholders from those of the legal person, indicating that domestic law grants shareholders certain direct rights, such as to receive the agreed dividends, to attend and vote in general assemblies, and to receive part of the company’s assets if it is liquidated.²¹⁹

147. In this case, the Court will analyze the exercise of the right to freedom of expression of natural persons through legal persons because, in addition to the violation of the right to property, the possible violation of this right as it applies to RCTV employees and shareholders has been alleged as a result of legal acts addressed, in principle, at the communications outlet.

148. In this regard, the Court has previously indicated that the media are true instruments of freedom of expression.²²⁰ Their function is to materialize this right²²¹ and they play an

²¹⁴ Similarly, in the case of *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, the European Court indicated that, “in addition to the negative duty of non-interference, the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism and diversity.” Also, when determining that the State had a positive obligation to ensure an appropriate legislative and administrative framework to guarantee effective pluralism, the Court referred to Recommendation CM/Rec(2007)2 of the Council of Ministers on media pluralism and diversity of media content, reaffirming that: “In order to protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, member States should adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed”. *Case of Centro Europa 7 S.R.L. and Di Stefano v. Italy* [Grand Chamber], (No.38433/09), Judgment of June 7, 2012, paras. 129 to 134.

²¹⁵ Cf. *Case of Cantos v. Argentina. Preliminary objections*. Judgment of September 7, 2001. Series C No. 85, para. 29, and *Case of Perozo et al. v. Venezuela*, para. 399.

²¹⁶ Cf. *Case of Cantos v. Argentina. Preliminary objections*, para. 29, and *Case of Perozo et al. v. Venezuela*, para. 400.

²¹⁷ Cf. *Case of Ivcher Bronstein v. Peru*, paras. 119 to 131, and *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, paras. 173 and 218, and *Case of Perozo et al. v. Venezuela*, paras. 396 and 403.

²¹⁸ Cf. *Case of Ivcher Bronstein v. Peru*, paras. 119 to 131, and *Case of Perozo et al. v. Venezuela*, paras. 396 to 403.

²¹⁹ Cf. *Case of Ivcher Bronstein v. Peru*, para. 127 and *Case of Perozo et al. v. Venezuela*, para. 400. See also, *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, p. 36, para. 47.

²²⁰ Cf. *Case of Ivcher Bronstein v. Peru*, para. 149, and *Case of Fontevecchia and D’Amico v. Argentina*, para. 44.

²²¹ Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 34

essential role as vehicles for the exercise of the social dimension of this freedom in a democratic society; thus, it is essential that they reflect the most diverse information and opinions.²²² The Court agrees with the Commission that, in general, the media are organisations of people who have assembled to exercise their freedom of expression in a sustained manner, so that, nowadays, it is unusual that a media outlet is not registered as a legal person, because the production and distribution of information requires an organizational and financial structure that responds to the requirements of the demand for information.²²³ Similarly, just as labor unions are instruments for the exercise of the right to freedom of association of workers, and political parties are vehicles for citizens to exercise their political rights, the media are mechanisms for the exercise of the right to freedom of expression of those who use them as a means of imparting their ideas and information.

149. Several international courts and bodies have ruled similarly. Indeed, the Human Rights Committee, in the case of *Singer v. Canada* in which it examined the presumed violation of the right to equality of the owner of an English-language printing business who had been restricted from placing commercial advertisements in English outside his store in Québec based on the argument that the victim was claiming rights that belonged to his company, the Committee considered the following:

The Covenant rights which are at issue in the present communication, and in particular the right of freedom of expression, are by their nature inalienably linked to the person. The author has the freedom to impart information concerning his business in the language of his choice. The Committee therefore considers that the author himself, and not only his company, has been personally affected by the contested provisions.²²⁴

150. Also, in the case of *Groppera Radio AG and Others v. Switzerland*, the European Court of Human Rights, when examining who could argue violations owing to the interruption of the transmission of the media outlet, considered that the shareholder of a radio station, its employees in the exercise of their work as journalists, and its audience all had a direct interest in the continued transmission of the programs, and could claim to be presumed victims.²²⁵

151. Consequently, the Inter-American Court considers that restrictions to freedom of expression frequently occur due to actions of States or individuals that affect, not only the legal person that constitutes a media outlet, but also all the natural persons, such as its shareholders or the journalists who work there, who communicate through it, and whose rights may also be violated. The Court also stresses, as affirmed by the Commission, that to determine whether a State action that affects the media outlet as a legal person also, by extension, had a real and substantial negative impact on the freedom of expression of natural persons, it is necessary to examine the role of the presumed victims within the respective media outlet and, in particular,

²²² Cf. *Case of Ivcher Bronstein v. Peru*, para. 149, and *Case of Fontevecchia and D'Amico v. Argentina*, para. 44.

²²³ Likewise, expert witness Morles Hernández indicated that "even if corporate organization in the field of telecommunications was merely discretionary, the general rule provided by national and international practice is that, in order to exercise the right to freedom of expression, those involved organize themselves in the form of a company." Opinion of expert witness Morles Hernández date May 5, 2014 (merits file, folio 1607). See also: Constitutional Court of Colombia. Judgment T-611 of 1992. M.P. Alejandro Martínez Caballero, Fabio Morón Díaz.

²²⁴ Human Rights Committee. *Case of Singer v. Canada*. January 30, 1991, para. 11.2. Similarly, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has also referred to the connection between the ownership of a media outlet and its editorial content or publications, when stating that: "States should ensure that, in addition to promoting diversity of media ownership and making financing and influence structures transparent, they educate the public about the importance of understanding how media outlets are financed, and encourage critical thinking about how editorial content is developed and how it might reflect the persuasions or biases of media owners." See, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. July 2, 2014. UN Doc. A/HRC/26/30, para. 68.

²²⁵ ECHR, *Case of Groppera Radio AG et al. v. Switzerland*, (No. 10890/84), Judgment of March 28, 1990, paras.49, 50 and 51; ECHR, *Case of Glas Nadezhda Eood and Anatoliy Elenkov v. Bulgaria*, (No. 14134/02), Judgment of October 11, 2007, para. 40.

the way in which they contributed to the communications mission of the channel. Consequently, the Court finds it relevant to state that, when reference is made to "RCTV" in this chapter on freedom of expression and in the chapter on discrimination, it should be understood as the medium by which the presumed victims exercised their right to freedom of expression and not as an explicit reference to the legal person known as "RCTV C.A."

152. In this regard, it should be noted that, at the present time, most journalism is exercised through legal persons and the Court reiterates that it is essential that the journalists who work in the media enjoy the necessary independence and protection to fulfill their functions properly because it is they who keep society informed, an essential requirement for society to enjoy complete freedom.²²⁶ In particular, bearing in mind that their activity is the principle expression of freedom of thought and expression and is specifically guaranteed by the American Convention.²²⁷

153. In this case, both journalists, and shareholders who are members of the Board of Directors of RCTV C.A, proved the connection between their respective tasks and the generation of content on the media outlet. In this regard, the Court emphasizes that the initial petition lodged before the Inter-American Commission contained a greater number of possible presumed victims, because it included more of the company's employees. In this regard, the Commission analyzed which employees had a real impact on the company's communications mission. Nevertheless, the Court considers that this relationship is directly proved in the following cases:

- a) Larissa Patiño, as Manager of Morning Information Programs, had every-day responsibility for deciding on the issues and who would be invited on the program "La Entrevista"; took part in meetings to rank the news and select topics that were relevant to what was happening in the country for the news program "El Observador" and to discuss the issues to be dealt with in the program "Alerta";²²⁸
- b) Soraya Castellano, Information Manager, attached to the RCTV Vice President for Information, stated that she had always handled everything related to the news content and ranking for the RCTV news and information programs, as well as special reports;²²⁹
- c) María Arriaga, in her capacity as Information Manager, stated that she was "responsible for the content of the three emissions of "El Observador" and supported the other Managers [...] of Information and of Opinion";²³⁰
- d) Inés Bacalao, had the task of directing the strategic news program schedule using products created and implemented by RCTV;
- e) Eduardo Sapene, RCTV Vice President for Information and Opinion, was responsible for directing the planning and execution of RCTV information and opinion projects, producing programs that responded to audience needs;
- f) Eladio Lárez, RCTV Executive President, presided the work of creating, producing, integrating and monitoring the programming grid with news, opinion, drama, humor, educational and entertainment content;
- g) Daniela Bergami, RCTV General Manager, designed, supervised and supported all the processes related to the creation, diffusion and commercialization of news, opinion, drama, humor, educational and entertainment content, and

²²⁶ Cf. *Case of Ivcher Bronstein v. Peru*, para. 150, and *Case of Herrera Ulloa v. Costa Rica*, para. 119.

²²⁷ Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, paras. 71 and 72, and *Case of Fontevecchia and D'Amico v. Argentina*, para. 46.

²²⁸ Written statement of Larissa Patiño of May 5, 2014 (merits file, folio 1455).

²²⁹ Written statement of Soraya Castellano of April 20, 2014 (merits file, folios 1551 to 1553).

²³⁰ Written statement of María Arriaga of May 5, 2014 (merits file, folios 1487 and 1488).

- h) Miguel Ángel Rodríguez, International Affairs Manager and anchor of “*La Entrevista*”, was responsible for hosting this opinion program.²³¹

154. In this regard, the Court notes that the individuals mentioned above carried out essential tasks focused on the selection, ranking, management, direction and planning of the content of news programs and other dramatic, educational, humoristic, entertainment and opinion programs. The Court considers that these tasks made a direct contribution to RCTV’s communications mission, because they had an obvious impact on the definition of the programming transmitted by the channel.

155. Meanwhile, Jaime Nestares, as RCTV Board member and shareholder, stated that: “specifically, as a shareholder and members of the Board of Directors, [he] shared in the approval of the general programming policy and the orientation of the news and editorials, as well as the management plans that ensured RCTV’s financial self-sufficiency, economic independence, and profitability as a communications company.”²³² Similarly, Marcel Granier, also an RCTV shareholder and Board member, stated that, his functions included meeting with the General Manager to review daily operations, meeting with the Press Director to decide on the coverage of the most important news items, and to decide, with those in charge of the opinion programs, who would be interviewed and which issues were the most relevant.²³³

156. Regarding his contributions, Peter Bottome stated that, “[a]s a shareholder and Board members [he had] always considered that taking part in the ownership and direction of a company such as RCTV involved exercising [his] right to freedom of expression. [His] financial and personal contribution to the existence and operation of RCTV was part of [his] exercise of freedom of expression and the exercise of the right to information of society as a whole.”²³⁴

157. Based on the foregoing, the Court has verified that both the employees mentioned above (*supra* para. 153) and the three shareholders, members of the RCTV Board of Directors – that is, Marcel Granier, Peter Bottome and Jaime Nestares – exercised functions that made an essential contribution to RCTV’s communications mission, and they are, therefore, natural persons whose freedom of expression could be violated by State’s actions vis-à-vis the channel.

158. In addition, the Commission indicated other employees who carried out logistical, technical and administrative activities related to the production of content, such as:

- a) Edgardo Mosca, RCTV Vice President for Engineering, in charge of planning and executing the activities involved in the recording of programs and their transmission, as well as providing manufacturing services to support production;
- b) Anani Hernández, Vice President of Human Resources, whose role was to craft the organizational structure needed for the channel’s productions by selecting the human on-screen talent and the talent for the production areas;
- c) José Simón Escalona, Vice President of Drama, Comedy and Variety Shows, who controlled and supervised all the administrative and logistical processes necessary to produce content in these areas;
- d) Odila Rubin, Vice President of Information Technology, who provided the technological infrastructure ensuring the quality and efficiency required to produce content, and its maintenance and safety;

²³¹ Certification of positions and description of activities adopted by the RCTV Board of Directors on July 29, 2011 (evidence file, folios 2788 to 2791).

²³² Written statement of Jaime Nestares of May 7, 2014 (merits file, folios 1421 and 1422).

²³³ Statement by Marcel Granier during the public hearing of this case.

²³⁴ Written statement of Peter Bottome of May 7, 2014 (merits file, folio 1540).

- e) Oswaldo Quintana, Vice President for Legal Affairs, who handled the legal issues involved in program production and transmission by providing legal, fiscal and financial advice, and
- f) Isabel Valero, Vice President of the Executive Secretariat, responsible for providing advice, keeping the legal record of the decisions taken by the shareholders and coordinating the company's historical archive.²³⁵

159. Regarding these individuals, the Court understands that their work was necessary to permit and facilitate the production and broadcasting of the information content by means of the channel's programming; however, it has not been proved that they had a real and direct impact on the company's communications mission.

160. Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar and Francisco J. Nestares had no specific function on the Board of Directors, so that there is no evidence proving their connection and contribution to the communications mission of the channel, that would establish that they exercised their freedom of expression through RCTV. Consequently, the Court will not consider them as presumed victims in the chapter on freedom of expression and equality.

1.3. *Indirect restrictions – scope of Article 13(3) of the Convention*

161. In this case it has been argued that there has been a possible indirect restriction on freedom of expression; therefore, the Court stresses that Article 13(3) of the Convention expressly refers to this situation when it indicates that: "[f]reedom 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." The Court considers that the scope of Article 13(3) of the Convention results from reading this paragraph together with Article 13(1) of the Convention, in the sense that a broad interpretation allows it to be considered that it specifically protects the communication, dissemination and circulation of ideas and opinions so that the use of "indirect methods or means" to restrict this are prohibited.²³⁶

162. In this regard, the Court indicates that the purpose of this paragraph is to provide examples of more subtle forms of restriction of the right to freedom of expression by State authorities or individuals. Indeed, in previous cases, this Court has had the opportunity to declare the indirect restriction produced, for example, by a decision that "annulled the citizenship" of the majority shareholder of a television channel,²³⁷ or by "criminal proceedings, the consequent sentence imposed [...] for more than eight years and the restrictions to leave the country for eight years" against a presidential candidate.²³⁸

²³⁵ Certification of positions and description of activities adopted by the RCTV Board of Directors on July 29, 2011 (evidence file, folios 2788 to 2791).

²³⁶ Similarly, Article 5 of the Declaration of Principles on Freedom of Expression establishes that "[p]rior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression."

²³⁷ Case of *Ivcher Bronstein v. Peru*, para. 162. This case related to the arbitrary deprivation of Ivcher Bronstein's citizenship by the Peruvian State, in order to deprive him of the editorial control of the television channel he administered because the laws of Peru in force in 1997 established that it was necessary to be a Peruvian national in order to own companies that had television channel concessions in Peru.

²³⁸ Case of *Ricardo Canese v. Paraguay. Merits, reparations and costs*. Judgment of August 31, 2004. Series C No. 111, para. 107. The facts of this case related to the conviction and the restrictions to leaving the country imposed on Ricardo Canese as a result of statements made while he was a presidential candidate. As a result of criminal proceedings against him, Mr. Canese was subjected to a permanent restriction to leave the country, which did not respect the

163. Furthermore, the description of restrictive measures in Article 13(3) is neither exhaustive nor prevents considering “any other indirect methods” or means derived from new technologies.²³⁹ Thus, Article 13 of the Declaration of Principles on Freedom of Expression gives other examples of indirect methods or means when it indicates that “[t]he exercise of power and the use of public funds by the state, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans; the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law. The means of communication have the right to carry out their role in an independent manner. Direct or indirect pressures exerted upon journalists or other social communicators to stifle the dissemination of information are incompatible with freedom of expression.”²⁴⁰ Likewise, during the public hearing, expert witness García Belaunde referred to other possible means of indirect restriction related to: (i) publicity, [because] States are important publicity agents and [...] giving a great deal of publicity or taking it away may be important and, in the latter case, can stifle the media which basically lives from publicity,” or (ii) “taxes [in] cases in which heavy taxes have been levied on companies” in order to burden them or to send message to media outlets.

164. The Court also recalls that, to result in a violation of Article 13(3) of the Convention, the means or method must effectively indirectly restrict the communication and circulation of ideas and opinions.²⁴¹ In addition, the Court reiterates that Article 13(3) of the Convention imposes obligations of guarantee on the State, even as regards relations between private individuals, because it not only covers indirect government restrictions, but also private controls that produce the same result.²⁴² In this regard, the Court underlines that indirect restriction may have a dissuasive, frightening and inhibiting effect on all those who exercise the right to freedom of expression, which, in turn, prevents public debate on issues of interest to society.²⁴³

1.4. *Broadcasting standards*

165. As mentioned, Article 13(3) of the Convention notes that one of the examples of indirect restrict relates to “abuse of government or private controls over [...] radio broadcasting frequencies.” It should be underscored that the Court recognizes the States’ authority and need to regulate broadcasting activities,²⁴⁴ and this covers not only the possibility of defining the way in which license concessions, renewals or revocations are handled, but also the possibility of planning and implementing the relevant public policies, provided that the standards imposed by the right to freedom of expression are respected. This is because the granting or renewal of a broadcasting concession cannot be compared to that of other public services, because the scope of the right to freedom of expression must permeate the respective regulation. In this regard, expert witness Cifuentes Muñoz stated during the public hearing in this case that:

The rule for concessions [...] and licenses must be clearly established by law. However, this law, insofar as

requirements of legality, necessity and proportionality necessary in a democratic society.

²³⁹ Cf. *Case of Ríos et al. v. Venezuela*, para. 340, and *Case of Perozo et al. v. Venezuela*, para. 367.

²⁴⁰ Article 13 of the Declaration of Principles on Freedom of Expression.

²⁴¹ Cf. *Case of Ríos et al. v. Venezuela*, para. 340, and *Case of Perozo et al. v. Venezuela*, para. 367.

²⁴² Cf. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 48, and *Case of Perozo et al. v. Venezuela*, para. 367.

²⁴³ *Mutatis mutandis*, *Case of Herrera Ulloa v. Costa Rica*, para. 133, and *Norín Catrimán et al. v. Chile*, para. 376.

²⁴⁴ In this regard, expert witness García Belaunde indicated that “the State is [...] the administrator of these spaces or these spectrums for obvious reasons, and especially in the past when the space was limited; today, it has increased considerably.” Opinion of expert witness García Belaunde during the public hearing in this case.

it supposes a restriction, must necessarily be subjected to the principles and requirements of freedom of expression. I have already indicated that freedom of expression exercises a dominant permeating effect on the scope of such functions.²⁴⁵

166. On this issue, the European Court has indicated in its case law that States are permitted to control broadcasting in their territories, and particularly the technical aspects, by a licensing system.²⁴⁶ Additionally, since the case of *Informationsverein Lentia and Others v. Austria*, the European Court reiterated that, in addition to the importance of the technical aspects, “the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.”²⁴⁷

167. Furthermore, in its General Comment No. 34, the United Nations Human Rights Committee referred to the need for the general safeguards or guarantees in the processes for the concession and renewal of licenses. In particular, the Committee indicated that:²⁴⁸

States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations.²⁴⁹ The criteria for the application of such conditions and licence fees should be reasonable and objective,²⁵⁰ clear,²⁵¹ transparent,²⁵² non-discriminatory and otherwise in compliance with the Covenant.²⁵³ Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters. It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses.²⁵⁴

168. Similarly, the European Court has attempted to reiterate and include the recommendations of the Committee of Ministers of the Council of Europe in the cases of *Glas Nadezhda Eood and Elenkov v. Bulgaria* and *Meltex Ltd and Mesrop Movsesyan v. Armenia*, when indicating that “[t]he guidelines adopted by the Committee of Ministers of the Council of Europe in the broadcasting regulation domain call for open and transparent application of the regulations governing the licensing procedure and specifically recommend that ‘all decisions taken [...] by the regulatory authorities [...] be [...] duly reasoned [and] open to review by the competent jurisdictions.’”²⁵⁵

²⁴⁵ Opinion of expert witness Cifuentes Muñoz during the public hearing in this case.

²⁴⁶ See, for example, ECHR, *Case of Groppera Radio AG et al. v. Switzerland* [Grand Chamber], (No. 10890/84), Judgment of March 28, 1990, para. 61; ECHR, *Case of Informationsverein Lentia et al. v. Austria*, (No. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90), Judgment of November 24, 1993, para.32; ECHR, *Case of Glas Nadezhda Eood and Anatoliy Elenkov v. Bulgaria*, (No. 14134/02), Judgment of October 11, 2007, para. 44. In the latter case, the European Court indicated that “States are permitted to regulate by means of a licensing system the way in which broadcasting is organized in their territories, particularly in its technical aspects.”

²⁴⁷ Cf. ECHR, *Case of Informationsverein Lentia et al. v. Austria*, (No. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90), Judgment of November 24, 1993, para.32; ECHR, *Case of ABC v. Austria*, (No.109/1996/728/925), Judgment of October 20, 1997, para. 33, and ECHR, *Case of Centro Europa 7 S.R.L. and Di Stefano v. Italy*, (No. 38433/09), Judgment of June 7, 2012, para.139.

²⁴⁸ General Comment No. 34, para. 39

²⁴⁹ Concluding observations on Gambia (CCPR/CO/75/GMB).

²⁵⁰ Concluding observations on Lebanon (CCPR/CO/79/Add.78), para. 25.

²⁵¹ Concluding observations on Kuwait (CCPR/CO/69/KWT), and Concluding observations on Ukraine (CCPR/CO/73/UKR).

²⁵² Concluding observations on Kyrgyzstan (CCPR/CO/69/KGZ).

²⁵³ Concluding observations on Ukraine (CCPR/CO/73/UKR).

²⁵⁴ Concluding observations on Lebanon (CCPR/CO/79/Add.78).

²⁵⁵ ECHR, *Case of Glas Nadezhda Eood and Anatoliy Elenkov v. Bulgaria*, (No. 14134/02), Judgment of October 11, 2007, para. 51, and ECHR, *Case of Meltex Ltd and Mesrop Movsesyan v. Armenia*, (No. 32283/04), Judgment of June 17, 2008, para. 83.

169. Meanwhile, expert witness Romero Graterol referred to the recommendations established by the International Telecommunications Union (ITU)²⁵⁶ regarding the minimum content of regulations related to the concession or renewal of licenses, stating that:

The ITU recommendation has established a simple procedure so that there are only a few formal requirements, such as indicating the type of procedure to be used, the time frames, information needed for the concession and the basic documentation, also establishing the amounts and types of guarantee to cover both the service offered and obligations resulting from the granting of the license.²⁵⁷

170. In this regard, and in relation to the pluralism of the media, the Court recalls that the citizens of a country have the right to access information and ideas representing a diversity of positions, which must be guaranteed at different levels,²⁵⁸ such as the types of media, the sources and the content. The Court considers that, since the radioelectric spectrum is a limited resource with a specific number of frequencies, this restricts the number of media that have access to it so that it is necessary to ensure that this media represents a diversity of news and opinion viewpoints or positions. The Court emphasizes that the pluralism of ideas in the media cannot be measured based on the number of media; rather the ideas and information broadcast must truly be diverse and approached from different perspectives, without just one viewpoint or position existing. The foregoing should be taken into account in the procedures for the granting and renewal of broadcasting concessions or licenses. The Court considers that any limits or restrictions arising from broadcasting laws and regulations should take into account the guarantee of the pluralism of the media, given its importance for the functioning of a democratic society.²⁵⁹

171. Based on the above, the Court underlines the need for States to regulate, clearly and precisely, the procedures for the granting and renewal of broadcasting concessions and licenses, using objective criteria that avoid arbitrariness. Specifically, each State must establish the general safeguards or guarantees of due process²⁶⁰ that it determines are required in these

²⁵⁶ The International Telecommunications Union is a specialized body of the United Nations for information technologies and information. The ITU has 193 member countries, including Venezuela, which has been a member since 1920. In this regard see: <http://www.itu.int/>.

²⁵⁷ Opinion of expert witness Romero Graterol during the public hearing in this case. Similarly, see: "Legal and Institutional Framework, Approaches for Policymakers, Regulators, and Practitioners," <http://www.ictregulationtoolkit.org/6>.

²⁵⁸ Similarly, in the Joint Declaration on Diversity in Broadcasting indicated, *inter alia*, that: (i) "[s]ufficient 'space' should be allocated to broadcasting uses on different communications platforms to ensure that, as a whole, the public is able to receive a range of diverse broadcasting services." Regarding the plurality of sources, the Declaration reiterated that "special measures, including anti-monopoly rules, should be put in place to prevent undue concentration of media or cross-media ownership, both horizontal and vertical." Lastly, regarding the diversity of content, it indicated that "[p]olicy tools could be used, where this is consistent with international guarantees of freedom of expression, to promote content diversity among and within media outlets." Declaration adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information.

²⁵⁹ In this regard, the European Court in the case of *United Christian Broadcasters Ltd v. The United Kingdom* – in which a broadcasting license was refused because the company only had religious programming – established that the aim of protecting the rights of others was associated with the protection of diversity and pluralism, because the State sought to "ensure that the limited spectrum available for national radio broadcasting [was] distributed in such a way as to satisfy as may radio listeners as possible [and] ensure that any one [religious] viewpoint is not allowed to dominate to the disadvantage of others." On that occasion, the European Court stressed that the said argument was applicable to both religious organization and organizations of a political nature. ECHR, *Case of United Christian Broadcasters Ltd v. The United Kingdom*, Decision on admissibility (No. 44802/98), Judgment of November 7, 2000.

²⁶⁰ Regarding development in comparative law concerning the possible basic guarantees in procedures to grant or to renew a telecommunications concession, the Court asked the parties and the Inter-American Commission to provide examples of domestic laws that would enable it to make an analysis in this regard. However, the information provided by the parties and the Commission did not allow the Court to identify general characteristics or criteria throughout the region, because very few countries were referred to expressly. Reference was made to: Australia, Canada, Colombia,

procedures in light of the American Convention in order to avoid abuse by official controls and the generation of possible indirect restrictions.

2. Alleged right to automatic extension or renewal of the concession

172. In the instant case, the representatives have argued that the violation of the right to freedom of expression occurred owing to failure to comply with domestic and international laws, from which a right to the renewal of the concession can be deduced. In this regard, the Court points out that the representatives presented contradictory concepts, using them indistinctly, because they have argued that RCTV had a preferential right, a right to extension of the concession, and a reasonable expectation of renewal or an automatic renewal. To the contrary, the State has asserted that such a right to the renewal of the concession granted to RCTV cannot be deduced from domestic law and, therefore, the closure arose exclusively from verification that the period for which the concession had originally been granted had expired. Consequently, the Court finds it necessary to analyze the following disputed aspects to determine whether the facts of this case constituted a restriction of the right to freedom of expression: (i) the law applicable to the concession granted to RCTV; (ii) whether Decree No. 1,577 of May 27, 1987, established a right to renewal of the concession or a preferential right; (iii) whether the entry into force of the LOTEL granted an automatic extension to the concession, and (iv) whether any obligation to renew broadcasting concessions exists in comparative law or in international law.

173. Regarding the applicable law, the Court underlines that RCTV's first concession was granted in 1953. This concession was regulated, first, by the Telecommunications Law of August 1, 1940,²⁶¹ in force at the time, which was replaced by Decree No. 1,577 of May 27, 1987, establishing the Regulations for Television and Radio Station Concessions. Then, in 2000, the State enacted the LOTEL.

174. The dispute between the parties as to which of the two norms, Decree No. 1,577 or the LOTEL, would be applicable arises owing to the entry into force of the LOTEL in 2000 and, especially, due to the request to transform the licenses made by RCTV on June 5, 2002, which was not answered until 2007. On this point, the Court agrees with the Inter-American Commission that it is not competent to establish which norm is applicable, particularly when there is disagreement on the interpretation of this matter, because the Court is not a tribunal of fourth instance.²⁶² However, the Court considers it necessary to point out that neither of the two possible interpretations of application of the norms results in a right to renewal or automatic extension.

175. Based on Article 3 of Decree No. 1,577, the representatives have argued that "the concessions governed by [this] Decree include a clause that grants the concessionaires a right to the extension of the concessions for 20 more years." In this regard, the Court observes that this article establishes that:

At the end of the concession, the concessionaires who, during the period indicated in article 1 have complied with the legal provisions established by the Telecommunications Law, the Radiocommunications Regulations, and other legal provisions, **shall have preference for the**

France, Germany, Mexico, South Africa, Spain, the United Kingdom, the United States of America and Uruguay.

²⁶¹ Cf. Telecommunications Law of the Republic of Venezuela published on August 1, 1940 (evidence file, folio 4543).

²⁶² Similarly, see: *Case of Atala Riffo and daughters v. Chile*, para. 188: "Lastly, the Court has indicated that it is not a fourth instance that can make an assessment of the evidence regarding which of the parents of the three girls offers a better home for them. Likewise, the Court is not a fourth instance that can rule on the dispute between different sectors of internal legal doctrine on the scope of domestic law concerning the requirements for the admissibility of the remedy of complaint."

extension of the concession for another 20-year period (bold added).

176. From reading the article it can be inferred that it is referring to a “preference” for the extension of concessions that have complied with the pertinent legal provisions. And, it should be noted that the nature of a preferential right is totally different from a right to renewal, because the preferential right is merely a special consideration or a certain advantage that may or may not be granted depending on the provisions of the applicable norm. On this point, expert witness Morles Hernández stated that “[t]he concessionaire [...] cannot invoke a preferential right, but does have the right to be considered a candidate or applicant in the renewal process.”²⁶³ Similarly, expert witness García Belaunde stated that:

Normally, the holder [of the concession] has a preferential right or an option; he does not have a guaranteed right; that is, he does not have a right to be given the frequency. I am referring to a preferential right. And, if there are other holders [of concessions] who are in competition, he merely competes. But, the person who is the holder [of the concession] has an advantage to be awarded it.

177. Regarding the alleged extension or automatic renewal deduced from article 210 of the LOTEL, the representatives have argued that “RCTV had, at the very least, the right to an extension of 20 years from May 27, 2007, [because] the Venezuelan Government was legally obliged to extend or renew those licenses, as established in the LOTEL.” Article 210 is a transitory provision of the LOTEL which establishes:

ARTICLE 210. The National Telecommunications Commission shall establish, by a resolution, special timetables for the transformation of the current concessions and permits granted under the previous law into the administrative authorizations, concessions or notification obligations, or registrations established in this law. While this adaptation is taking place, all the rights and obligations acquired under the previous law shall remain in full effect, under the same terms and conditions established in the respective concessions and permits.

The transformation of the legal titles shall be carried out within the two years following the publication of this law in the official gazette, shall be compulsory and shall be executed based on the following principles: [...]

2. The right to use and exploitation given in concession over legally granted frequencies shall remain in full effect. [...]

4. The purpose, coverage and remaining period of the concessions or permits in force when this law enters into effect shall be respected. Subsequent renewals of the administrative authorizations or concessions established in this law shall follow the general rules contained herein. [...]

8. The transformation of the current titles in no way supposes that the telecommunication operators who existed before the entry into force of this law are subject to the general procedure established for the award of administrative authorizations or to the extinction, revocation or suspension of the concessions or permits granted under the previous laws to this end.²⁶⁴

178. As can be seen, this article makes no mention whatsoever that the State was obliged to grant the renewal, nor does it establish an automatic extension to those who requested the transformation of titles. Furthermore, it should be underlined that expert witness Morles Hernández stated that:

Under Venezuelan law there is no explicit legal formula that indicates that the holder of a concession has a right to the renewal of the administrative contract.²⁶⁵

179. In addition, regarding whether, under international law, there was an obligation to renew the broadcasting concessions, the Court concludes that this obligation is not established in international law. Also, regarding whether a right to the renewal of broadcasting frequency concessions may be deduced from comparative law, the Court has no evidence and no arguments were presented that could support this assertion. The representatives referred to

²⁶³ Opinion of expert witness Morles Hernández of May 5, 2014 (merits file, folios 1592 and 1593).

²⁶⁴ Article 210, Telecommunications Organic Law of June 12, 2000 (evidence file folio 2957).

²⁶⁵ Opinion of expert witness Morles Hernández of May 5, 2014 (merits file, folio 1591).

the fact that, in France and in Spain, the domestic laws establish an automatic renewal of concessions, but these examples are not sufficient to conclude a general rule.²⁶⁶ In this regard, expert witness Cifuentes Muñoz indicated that:

In the law, we find [...] models which indicate precise terminations, they also include possibilities for renewals and, in some case, these may be automatic; in other case, when concessions or licenses end their conditions are amended. [Regarding the preferential right,] I don't believe that it should always exist; it will necessarily depend on domestic law.

180. Based on the foregoing, it may be concluded that the alleged restriction in this case did not derive from the fact that RCTV's concession was not renewed automatically, because from the preceding analysis it cannot be inferred that the State was obliged to do this. Nevertheless, the Court notes that, on two occasions, on May 6, 2002, and January 24, 2007, the petitioners asked CONATEL, respectively, to transform their titles and to follow the procedure for the renewal of the concession.²⁶⁷ The procedures corresponding to these requests were not executed because, according to the State, "when the validity of a concession expires [...] there are no grounds for initiating an administrative procedure." In this regard, Minister Chacón Escamillo issued Resolution No. 002 of March 28, 2007, in which he terminated the administrative procedure corresponding to the request to transform the titles.²⁶⁸ In this resolution, based on the arguments set out in Communication No. 0424, it was decided:

To declare that the administrative procedure initiated based on the request made by Radio Caracas Televisión [...] concerning the transformation of the concession had terminated, because the request had expired.

181. Although the effects of this decision not to continue the procedure will be examined more thoroughly in the chapter on the presumed violation of Article 8 of the Convention (*infra* para. 243), the Court will now analyze the State's actions that resulted in the non-renewal of the concession to determine whether the right to freedom of expression was violated in this case. To this end, the Court considers it fundamental to establish whether the said actions constituted an indirect restriction prohibited by Article 13(3) of the Convention.

3. Alleged indirect restriction of freedom of expression established in Article 13(3) of the American Convention

182. The Court notes that the Venezuelan State presented various arguments concerning the reasons behind its actions in this regard. Therefore, the Court will now determine: (i) the reasons related to the supposed sanctions applied to the television channel; (ii) the purpose declared in Communication No. 0424 and Resolution No. 002, and (iii) the alleged undeclared purpose related to RCTV's editorial line.

183. The Court notes that the State argued that one of the reasons not to renew the RCTV concession was based on the alleged sanctions imposed on the channel for its actions during the 2002 coup as well as other actions. The State outlined the following sanctions in its arguments: (i) the National Integrated Customs and Tax Administration Service had imposed a fine on RCTV, in the form of a donation, for broadcasting political propaganda of groups opposed to Chávez. The payment, amounting to 1,041,660 bolivars, consisted of the taxes waived owing to the transmission of messages by the opposition that, it affirmed, were broadcast as donations during the industrial strike between December 2002 and January 2003; (ii) the Superintendence for the Protection and Promotion of Free Competition had decided that

²⁶⁶ Law 7/2010 of March 31, 2010, General Law on Audiovisual Communication (B.O.E. 2010, 5292) (Spain), art. 28.2.

²⁶⁷ Cf. Request to CONATEL of January 24, 2007 (evidence file, folios 3063 and 3064).

²⁶⁸ Cf. Resolution No. 002 del Ministry of the People's Power for Telecommunications and Information Technology of March 28, 2007 (evidence file, folios 3392 and 3393).

there was sufficient evidence to determine that RCTV had executed acts contrary to free competition contained in paragraphs 1 and 3 of article 10 of the Pro-Competition Law, and therefore, on February 25, 2005, following due process, had imposed a fine of 21,360,723,955.13 bolivars. This action was justified under article 113 of the Constitution which establishes that "Monopolies shall not be permitted [...]. The State shall adopt the necessary measures to avoid the harmful and restrictive effects of a monopoly [...]," and (iii) on May 11, 2006, the Constitutional Chamber of the SCJ had issued an interim measure to protect joint and separate interests against publicity with sexually-charged images offering a telephone service, transmitted by RCTV every day starting at 1 a.m., called "*Llamadas Calientes*." The Chamber ordered the prohibition of the emission because it considered that the repeated dissemination of these advertisements had a degenerating and disturbing effect on the population. In addition to these procedures alleged by the State, it presented evidence of the following proceedings: (i) administrative proceeding against RCTV instituted by the Ministry of Infrastructure on January 17, 2003. According to the court records, CONATEL assessed the channel's programming between October 9, 2002, and January 5, 2003, and recommended the Ministry "to open an administrative proceeding to determine presumed non-compliance" with various rules contained in the Radiocommunications Regulations and in the Partial Regulation on Television Transmissions, and that "if appropriate, it apply the pertinent sanctions pursuant to" these instruments;²⁶⁹ (ii) in 2002, judicial proceedings were instituted by the National Council for the Rights of Children and Adolescents, by protection actions aimed at compliance with the Organic Law for the Protection of Children and Adolescent (LOPNA),²⁷⁰ and (iii) suspension of the program del "*Una Rosa para un Cadáver*" [A rose for a corpse].²⁷¹

184. On this point, the Court notes that the proceedings and sanctions presented by the State are not directly related to the coup events and, in addition, it did not prove whether or not they involved the non-renewal of the concession. Moreover, it should be pointed out that this argument was only presented before the Court, because Communication No. 0424 expressly indicates that:

"Regarding the inexistence of a sanction or accusation against RCTV
Why has no sanction been imposed on RCTV as a result of an alleged complaint?
The expiry of a time limit is not a sanction. Indeed, **the expiry of the time for which the concession was granted to RCTV for the use and exploitation of a portion of the electromagnetic spectrum is not the result of a sanction**, as the RCTV representatives are trying to claim [...], but rather the effect of a natural and inexorable fact which is the passage of time, which produces the legal effects associated with that fact" (bold added).

²⁶⁹ Court record of the opening of the administrative proceeding against RCTV on January 17, 2003 (evidence file, folios 23759 to 23775); Video "*RCTV Informe de infracciones edición*" (evidence file, minutes 1:24 to 1:48) in which it indicates that, "in 2003, during the transmission of the films "Gaspar" [or] "Gasparín" and "*Juego de Gemelas*", whose target audience, it is worth insisting, [are] children and adolescents, the television station inserted subliminal messages with a political content subsequently verified by a judicial inspection."

²⁷⁰ Management Report, 2001-2006, of the National Council for the Rights of Children and Adolescents of August 2006 (evidence file, folio 26199); CONATEL "Report on the program '*Justicia para todos*' transmitted by Radio Caracas Televisión, Channel 2" of June 2000 (evidence file, folios 12413 to 12435); Video "*RCTV Informe de infracciones edición*" (evidence file, minutes 1:49 to 3:45) which indicates that "the regular programming of RCTV, precisely the programs '*La Entrevista*', '*Loco Video Loco*', '*El Observador*', '*Ají Picante*' (now renamed *Ají Dulce*) and '*Radio Rochela*' resulted in the institution of a protection action also by the [National Council for the Rights of Children and Adolescents and that,] according to the complainants, these programs violated articles 68, 75 and 79 the LOPNA"; Management Report, 2001-2006, of the National Council for the Rights of Children and Adolescents of August 2006 (evidence file, folios 26202 to 26204); Communication No. 001501 from CONATEL to RCTV dated April 5, 2006 (evidence file, folios 26187-26188); Communication No. 001504 from CONATEL to RCTV dated April 6, 2006 (evidence file, folios 26185 and 26186); Complaint of Joselín Dugarte filed with the National Council for the Rights of Children and Adolescents of September 1, 2005 (evidence file, folio 26195); Communication No. 13-097-2005 of the National Council for the Rights of Children and Adolescents to RCTV dated September 16, 2005 (evidence file, folio 26193); Communication No. 13-117-2005 of the National Council for the Rights of Children and Adolescents to CONATEL dated September 29, 2005 (evidence file, folio 26192), and Video "*RCTV Informe de infracciones edición*" (evidence file, minutes 1:14 to 1:23).

²⁷¹ Letter from CONATEL to RCTV of June 11, 2001 (evidence file, folios 14005-14007).

185. Meanwhile, Resolution No. 002 declared that the decision to reserve the concession assigned to RCTV and to terminate the administrative procedure was taken “to permit universal access to information [...], to promote a new free-to-air television management model that would co-exist with the others that existed in the country, under the model of television as a public service, seeking to promote the democratization of the use of the broadcasting media and the plurality of messages and contents.” The Court notes that Communication No. 0424 repeated this same justification.

186. Additionally, during the public hearing, in answer to the question of its reason for deciding to reserve to itself the use of the spectrum granted to RCTV in concession, the State indicated that:

This was merely [for] technical reasons. Remember that the frequencies have transmission channels; frequency 2 and 3 which is the one that RCTV has is the one closest to the earth, and it therefore has greater scope, it reaches further and needs much cheaper equipment. [...] There’s no other reason. There’s no political reason; that is untrue, totally untrue.

187. Consequently, the Court notes that the arguments explicitly used as justification for the decisions taken in Communication No. 0424 and Resolution No. 002, were “the democratization of the use of the broadcasting media and the plurality of messages and contents.” Therefore, the Court will now determine whether this purpose can be considered legitimate.

188. Regarding the legitimacy of this purpose, the Court recalls what it has established previously with regard to the importance of pluralism in a democratic society (*supra* paras. 144 and 145); thus, it considers that the protection of pluralism is not only a legitimate objective, but also a necessary one. Accordingly, the Court concludes that the purpose declared by the State in Communication No. 0424 and Resolution No. 002 was legitimate.

189. Nevertheless, both the Inter-American Commission and the representatives have affirmed that this was not the real objective, because there was evidence that proved that the intention was to punish RCTV for its editorial line that was critical of the government. In this regard, in the instant case, the Court finds it necessary to take into account that the motive or purpose of a specific act of the State authorities is relevant for the legal analysis of a case,²⁷² because a motivation or purpose that differs from that of the norm that grants the state authority the power to act may show whether the action may be considered an arbitrary act,²⁷³

²⁷² *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2013. Series C No. 266, para. 173, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2013. Series C No. 268, para. 210.

²⁷³ *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador.* In this regard, the European Court has taken into account the purpose or motivation that the State authorities revealed when exercising their functions to determine whether the European Convention on Human Rights had been violated. For example in the *Case of Gusinskiy v. Russia*, the European Court considered that the restriction of the victim’s right to liberty, authorized by Article 5(1)(c) of the European Convention, was not only “for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence,” but also with the purpose of obliging him to sell his company to the State. In the *Case of Cebotari v. Moldova*, it declared that Article 18 of the European Convention had been violated because “the government had failed to satisfy the Court that there was a reasonable suspicion that the applicant had committed an offence” and concluded “that the real aim of the criminal proceedings and of the applicant’s arrest and detention was to put pressure on him with a view to hindering *Oferta Plus* from pursuing its application before the Court.” Lastly, in the *Case of Lutsenko v. Ukraine*, the European Court determined “that the restriction of the applicant’s liberty, [authorized by Article 5(1)(c),] was applied not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons” related to the “prosecuting authorities’ [...] attempt to punish the applicant for publicly disagreeing with accusations against him.” Cf. ECHR, *Case of Gusinskiy v. Russia*, (No. 70276/01), Judgment of May 19, 2004, paras. 71 to 78; *Case of Cebotari v. Moldova*, (No. 35615/06), Judgment of November 13, 2007, paras. 46 to 53, and *Case of Lutsenko v. Ukraine*, (No. 6492/11), Judgment of July 3, 2012, paras. 100 to 110.

or a misuse of power. The Court bases its analysis on the presumption that the actions of the State authorities are in keeping with the law.²⁷⁴ And, therefore, an irregular action by the State authorities has to be substantiated in order to disprove this good faith presumption.²⁷⁵ Accordingly, the Court will proceed: (a) to review the evidence in the case file on the alleged undeclared purpose, and (b) examine this evidence.

a) Review of statements and documents on the alleged undeclared purpose

190. When making its decision, the Court takes into account its extensive review of public statements made by officials of the Venezuelan State since 2002 indicating that the concessions of some private social communications outlets in Venezuela would not be renewed (*supra* paras. 75 to 86). Among the different statements previously described, the following are reiterated:

- a) November 9, 2003, declaration by President Chávez in his program “*Aló Presidente*” in which he stated: “I’m not going to let you do this again, [...] you – Globovisión, Televén, Venevisión and RCTV – tomorrow or the day after tomorrow. [Minister] Jesse Chacón, I gave you an order; you must have a team of analysts and observers, 24 hours a day, watching all the channels simultaneously. And we must be very clear, I am very clear that there is a line they must not cross, and they should know, it is the limit established by law. The moment they cross the legal limit they will inevitably be closed down to keep peace in Venezuela, to preserve order in Venezuela.”²⁷⁶

191. In December 2006, State officials began to announce the official decision not to renew the RCTV concession. The following are some of the statements they made:

- b) declaration of President Chávez of December 28, 2006, on the occasion of his year-end address to the Armed Forces in which he stated: “There’s someone out there, one of those representatives of the oligarchy, who wanted to be President of the oligarchy, and that, then those governments by the Adecos [Acción Democrático] and Copeyanos [COPEI] gave them concessions for television channels, and now he is saying that his concession is eternal; but it ends in March, the television concession, it ends in March. So, he better start packing his bags and thinking about what he’s going to do after March. There’ll be no new concession for that *coup*-supporting television channel that calls itself Radio Caracas Televisión; the concession’s over; the decision is already being drafted. So, they better start getting ready, turning off the equipment, because we are not going to tolerate any media outlet that is at the service of the coup plotters, against the people, against the nations, against national independence, against the dignity of the Republic, Venezuela has self-respect. I am announcing this measure before the date arrives to that they do not continue with their lies that this cannot be – that they have 20 more years. 20 more years, no way! 20 more years – that’s a joke! It’s over! It’s over!”;²⁷⁷

²⁷⁴ *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 173, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, para. 210.

²⁷⁵ *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 173, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, para. 210. The Inter-American Court has indicated that “direct evidence, either testimonial or documentary, is not the only evidence that can legitimately be considered to substantiate the judgment. Circumstantial evidence, indications and presumptions may be used, provided that conclusions that are consistent with the facts can be inferred from them.” *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 130.

²⁷⁶ Transcript of the program “*Aló Presidente*”, No. 171, of November 9, 2003, p. 69, Available at: http://www.aloPresidente.gob.ve/materia_alo/25/1551/?desc=alo_President_171.pdf.

²⁷⁷ Video published on the website of “Aporrea” entitled “President Chávez: ‘a RCTV que vayan apagando los

- c) declaration of President Chávez during a telephone interview during the television program "Contragolpe" on January 3, 2007, in which he indicated: "Venezuela loses by having media like Radio Caracas Televisión. And not only Venezuela, good journalism suffers, freedom of expression suffers. [...] It has not passed the test to have its concession renewed by a State that is serious, a responsible State, and a State committed to its people and to respect for its people, the dignity of its people and the freedoms of its people. The decision is irrevocable";²⁷⁸
- d) On January 8, 2007, during the ceremony to appoint a new Cabinet, President Chávez spoke against about the RCTV concession indicating that: "Nothing and nobody will prevent us complying with the decision not to renew the concession of that television channel, and we all know which one. Nothing and nobody will prevent it,"²⁷⁹ and
- e) declaration of President Chávez during a speech to the National Assembly on January 13, 2007, in which he stated: "They just have January (a few days), February, March, April, May [2007]. They can yell and stamp their feet all they want, but the concession of that fascist channel, RCTV, is over."²⁸⁰

b) Analysis of the evidence related to the undeclared purpose

192. To begin with, the Court recalls that these statements by public officials were made in the context of a situation of political polarization (*supra* paras. 60 and 61). In this regard, and however reprehensible the conduct of the media at that time may have been,²⁸¹ the Court recalls, as it has in other cases that occurred in this same context,²⁸² that in the instant case, in exercise of its contentious jurisdiction as an international human rights court, its function is to determine the responsibility of the State under the American Convention for the alleged violations, and not the responsibility of RCTV or other media, or that of their executives, shareholders or employees, in relation to specific facts or historical events in Venezuela, or their role or performance as a social communication medium. The Court takes no decision on the right of RCTV, as a company, corporation or legal person. Even if it were true that RCTV or

equipos" of December 28, 2006 (evidence file, folio 3136); Article in the newspaper "Globovisión" entitled "Presidente Chávez anuncia que no renovará concesión de RCTV" of December 28, 2006, (evidence file, folio 3138); Article in the newspaper "El Mundo" entitled "Chávez cancela la licencia a una televisión privada que tacha de 'golpista'" of December 28, 2006, Available at: <http://www.elmundo.es/elmundo/2006/12/28/comunicacion/1167326997.html>, and Article in the newspaper "El Universal" entitled "Reporteros Sin Fronteras pide a Gobierno reconsiderar decisión de no renovar concesión a RCTV" of December 29, 2006, Available at: http://www.eluniversal.com/2006/12/29/pol_ava_29A819703.shtml.

²⁷⁸ Press release of the Ministry of the People's Power for Communications and Information entitled "Presidente Chávez: decisión sobre RCTV es irrevocable" of January 4, 2007 (evidence file, folio 3157); Press release of "Radio Nacional de Venezuela" entitled "Presidente Chávez: decisión sobre RCTV es irrevocable" of January 4, 2007 (evidence file, folio 3159), and Article in the newspaper "Globovisión" entitled "President Chávez nombró a Jorge Rodríguez como Vice President y a Pedro Carreño como Ministro de Interior and Justicia" of January 3, 2007 (evidence file, folio 3160).

²⁷⁹ Press release of "Radio Nacional de Venezuela" entitled "Nada ni nadie impedirá no renovación en concesión a RCTV" of January 8, 2007 (evidence file, folios 1573 and 1574).

²⁸⁰ Speech by President Chávez on January 13, 2007, note of "Agencia Bolivariana de Noticias" entitled "Presentación del Mensaje anual del Presidente de la República Bolivariana of Venezuela, Hugo Rafael Chávez Frías, ante la Asamblea Nacional, Palacio Federal Legislativo" of January 13, 2007 (evidence file, folio 3164).

²⁸¹ In this regard, expert witness Pasquali indicated that "up until 2002, Radio Caracas and almost all the other media committed abuses based on their dominant position; that is, [...] from merely providing information they tried to become protagonists of the country's history; but, neither in Venezuela, nor, I believe, in any other country of Latin America, has any ethically fair democracy considered issuing a list of obligations so that the population knows what to expect. In other words, I think that, finally, RCTV and the others went too far in 2002; it was a morally reprehensible, but could not be dealt with legally because nothing was violated, there were no laws that prohibited them from doing what they did, and the government, I believe, knew this and did not take legal steps against that television station." Opinion of expert witness Pasquali during the public hearing in this case.

²⁸² *Case of Ríos et al. v. Venezuela*, para. 105, and *Case of Perozo et al. v. Venezuela*, para. 74.

its employees committed the acts that the State attributes to it, this would not justify the State's failure to comply with its obligations to respect and ensure human rights.²⁸³

193. That said, in order to analyze the statements mentioned above, it is essential to examine the statements and accusations together because, in isolation, they could not autonomously constitute acts that violate the American Convention. This is because the fact that several officials have made statements of a similar tenor over the same time period reveals that they were not isolated statements. Bearing this in mind, the Court will proceed to assess the content of those statements to determine whether reasons or motives existed as to why the said decision was reached that differed from the declared purpose because, as already indicated, for the legal analysis of the case it is relevant to take into account the motive or intention, especially when seeking to determine whether an arbitrary action or a misuse of power has been constituted (*supra* para. 189). First, the Court underlines that, starting in 2002, indications were given that television channels that did not modify their editorial line would not have their concessions renewed (*supra* para. 75) and that statements of this type increased as the date on which the concessions expired grew nearer (*supra* paras. 76 to 78). In 2006, in several statements made prior to Communication No. 0424 and Resolution No. 002, it was announced that the decision not to renew the RCTV concession had already been taken and would not be re-evaluated or amended (*supra* para. 79 to 86). Furthermore, it is worth emphasizing that, not only were statements made by State officials in diverse media, but also in national newspapers and even in a book in order to announce and justify the decision not to renew the RCTV concession. Consequently, the Court is able to conclude, first, that the decision was taken a long time before the concession expired and that the order was given to CONATEL and the Ministry of Telecommunications by the Executive.

194. Regarding the real reasons behind the decision, according to the statements and the publications made by different members of the Venezuelan Government, these were: (i) that RCTV had not modified its editorial line following the 2002 coup despite the warnings issued since then, and (ii) the alleged improper actions of RCTV, which had resulted in sanctions. In the case of the first reason, the Court finds it essential to state that it is not possible to restrict the right to freedom of expression based on the government's political disagreement with a certain editorial line. As indicated previously, the right to freedom of expression must not only be guaranteed with regard to the dissemination of information and ideas that are received favorably or considered inoffensive or indifferent, but rather and particularly, as regards those that are disagreeable for the State or any sector of the population (*supra* para. 140). In the case of RCTV's improper actions that had resulted in sanctions, the Court stresses that it is contradictory that comments and accusations were made in relation to the alleged sanctions and that Communication No. 0424 indicated expressly that these were not the justification for the decision. In particular, the Court underscores that, despite the seriousness of the events related to the *coup d'état*, it has not been proved before this Court that, at the domestic level, proceedings were undertaken to sanction the said improper actions. Accordingly, it is not possible to use what happened during the coup as an argument to substantiate the decision, when those actions were not penalized at the time.

195. On this point, the Court considers it necessary to reiterate the precedent established in another case concerning this same media outlet, according to which in a democratic society it is not only legitimate but also, at times, constitutes a duty of the State authorities, to rule on matters of public interest. However, by doing so, they are subject to certain limitations because they must verify reasonably, although not necessarily exhaustively, the facts on which they

²⁸³ Cf. *Case of Perozo et al. v. Venezuela*, para. 74; *Mutatis mutandis*, ECHR, *Özgür Gündem v. Turkey*, (No. 23144/93), Judgment of March 16, 2000, para. 45.

base their opinions,²⁸⁴ and they must do this with even greater diligence to that used by private individuals, owing to their high office, and the extensive scope and eventual effects that their statements may have on certain sectors of the population, and to avoid the citizens and other interested parties receiving a manipulated version of certain facts.²⁸⁵ In addition, they should take into account that, as public officials, they have a duty to guarantee the fundamental human rights and, therefore, their statements cannot disregard such rights²⁸⁶ or constitute forms of direct or indirect interference or harmful pressure on the rights of those who are trying to contribute to the public debate by expressing and imparting their thoughts. This duty of special care is particularly heightened in situations of increased social conflict, alterations of public order and social or political polarization, due precisely to the series of risks entailed for certain individuals or groups at a given time.

196. Furthermore, the Court notes that, of the statements provided in this case, only one mentioned the purpose declared in Communication No. 0424 and Resolution No. 002; namely, the protection of media plurality, while most of the others coincided in citing the other purposes. This allows the Court to conclude that the declared purpose was not the real one and that it was only offered to give an appearance of legality to the decisions.

4. Conclusion concerning the right to freedom of expression

197. Therefore, the Court concludes, as it has in other cases,²⁸⁷ that the facts of the instant case involved a misuse of power because the State used its lawful authority to try and align the communications outlet's editorial line with the government. This assertion is derived from two main conclusions that this Court was able to reach based on the above information; namely, that the decision had been taken previously and that it was based on the displeasure caused by RCTV's editorial line, added to the context of the "deterioration in the protection of freedom of expression" that has been proved in this case (*supra* para. 61).

198. Furthermore, this Court considers it necessary to emphasize that the misuse of power declared herein had an impact on the exercise of freedom of expression, not only of the executives and employees of RCTV, but also on the social dimension of this right (*supra* para. 136); that is, on the population that was deprived of access to the editorial line that RCTV represented. Indeed, the real purpose sought was to silence voices that were critical of the government, which constitute, together with pluralism, tolerance and the spirit of openness, the requirements for a democratic debate, which is exactly what the right to freedom of expression seeks to protect.

199. Consequently, the Court finds it proved that, in this case, there was an indirect restriction of the exercise of the right to freedom of expression by measures aimed at preventing the communication and circulation of ideas and opinions, when the State decided that it would reserve to itself the portion of the spectrum and, therefore, prevent the participation in the administrative procedures for the adjudication of the titles or the renewal of the concession of a media outlet that expressed opinions that were critical of the government. On this basis, the Court declares the violation of Article 13(1) and 13(3) in relation to Article 1(1) of the American Convention to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Inés Bacalao, Eladio Lárez, Eduardo Sapene, Daniela Bergami, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño.

²⁸⁴ Cf. *Case of Ríos et al. v. Venezuela*, para. 139.

²⁸⁵ Cf. *Case of Ríos et al. v. Venezuela*, para. 139.

²⁸⁶ Cf. *Case of Ríos et al. v. Venezuela*, para. 139.

²⁸⁷ *Case of Camba Campos et al. v. Ecuador*, para. 219.

B) Alleged discrimination against RCTV

B.1. Arguments of the Commission and of the parties

200. The **Commission** considered that “regulation of the electromagnetic spectrum should ensure, simultaneously, the freedom of expression of the greatest number of people and viewpoints, equal opportunities for access to the media, and the right to pluralist and diverse information for contemporary societies.” In this regard, it argued the violation of both Articles 1(1) and 24 of the Convention, stressing that “while the general obligation under Article 1(1) refers to the duty of the State to respect and ensure ‘without discrimination’ the rights set forth in the American Convention, Article 24 protects the right to ‘equal protection of the law.’” The Commission underlined that “Article 24 of the American Convention prohibits discrimination, *de jure* or *de facto*, in respect not only of the rights enshrined in that instrument but in all laws enacted by the State and their application.”

201. Regarding the presumed violation of the right to equality, the Commission divided its analysis into different aspects of this right including, in particular: the existence of a “differential treatment,” and the determination of “whether there were sufficient [objective] reasons to justify and continue that treatment.” Regarding the existence of a differential treatment, it asserted that “[i]n this case, the Commission has considered proved the existence of a difference in treatment given to two television stations whose technical and legal conditions were identical, because one of them had its license to exploit the electromagnetic spectrum renewed, while renewal of RCTV’s license was refused.”

202. Regarding the existence of sufficient objective reasons to justify or continue this treatment, the Commission had recourse to the assessment of the appropriate balance of interests which, in its interpretation, “makes it necessary to determine, first, whether the differential treatment seeks a legitimate purpose and whether it is useful, necessary and strictly proportionate to achieve this purpose.”

203. The Commission argued that “[i]n evidentiary terms, it should be recalled that, having demonstrated a reasonable indication of the existence of a distinction based on a suspect category – political opinions – the burden of proof falls on the State.” Similarly, the Commission stated that “[e]ven in the presence of suspect categories prohibited by Article 1(1) of the Convention, the organs responsible for ensuring that this international instrument is applied, must ensure that the measure is indispensable to achieve the essential purpose and that its implementation is substantially more advantageous than the cost that those who do not benefit from it must support,” because, according to the Commission, “the objective pursued by way of the differential treatment should be a particularly important purpose or a pressing social need.”

204. Bearing in mind this evidentiary standard, the Commission concluded that the purpose was not legitimate because it “found that the said decision was taken in order to penalize the channel for its critical political opinions and to send a message to the other Venezuelan media concerning the consequences of not following the news and editorial line indicated by the government.” The Commission concluded that “the State has not presented any arguments or evidence demonstrating a relationship between the legitimate purpose of promoting pluralism and the State’s conduct in not renewing the RCTV concession based on the channel’s political opinion.”

205. Regarding the applicable international law, the **representatives** established the grounds for the presumed violation of Article 24 of the Convention by stating that the “Court had interpreted that any distinction that lacked an objective and reasonable justification was

discriminatory; thus, 'discrimination was evident if a difference in treatment did not have a legitimate reason; in other words, if it led to situations that were contrary to justice, reason or the nature of things'; and the Court had stressed that the States must refrain from executing actions that, in any way, are addressed, directly or indirectly, at creating situations of discrimination *de jure* or *de facto*."

206. Second, regarding the factual and legal similarity with Venevisión, the representatives argued that "[i]n this case, the RCTV and Venevisión television stations not only had a similar coverage in geographical terms, but their audience share was almost the same, and they had an identical legal situation as regards the period for which their concessions were in effect." Regarding this similarity with Venevisión, they asserted that "among the stations with national coverage, it was always evident that the leadership was disputed by two television stations: RCTV and Venevisión. Thus, for example, in 2006 (the year before the closure of RCTV), the distribution of the audience share was as follows: (i) RCTV 28%; (ii) Venevisión 27%; (iii) Televen 12%; (iv) VTV 8%; (iv) Globovisión 4%, and (v) Meridiano TV 3%."

207. They also argued the existence of the following common characteristics: "(i) they were both private free-to-air television stations; (ii) they operated on VHF; (iii) they covered almost all national territory; (iv) they were leaders in audience share, and their share percentages had been almost identical during the previous year, and (v) their concessions – according to the State – expired on May 27, 2007. Consequently, it is absurd to think that the decision to renew the Venevisión concession and not to renew RCTV's concession was based on technical reasons such as the possibility of a supposed better coverage by the frequencies corresponding to RCTV. This possibility not only was never included in the State's administrative acts and thus is a supervening motive and, therefore, legally inadmissible; but also it was never proved under domestic law or in the procedure before the IACHR or before this Court."

208. Likewise, the representatives argued that "the only difference between these two media outlets was Venevisión's change in its editorial line, leaving RCTV as the only dissenting voice"; hence they considered it "evident that RCTV's concession was not renewed in reprisal for its editorial line and the content of its news and opinion programs."

209. The representatives also indicated that "not only were other frequencies free and available on the radioelectric spectrum, but also the frequencies of another television station in the same legal, technical and commercial conditions as RCTV, so that there was no reason that justified why it had to be precisely the RCTV frequencies that had to be used to permit the alleged democratization of the media." They concluded that, "[i]n this case, it is clear that, although they were legally in the same situation, the Venezuelan Government gave a different treatment to the request for renewal or extension of the RCTV concession than it gave to the request for renewal or extension of the Venevisión concession. That said, given that the reason for this differential treatment has no objective and reasonable justification (in any case, it was an illegitimate reprisal for the critical editorial line of RCTV), it is obvious that the said treatment was discriminatory and, consequently, violated the obligations imposed on the Venezuelan State by Article 24 of the American Convention."

210. The **State** argued that Article 24 of the Convention had not been violated because "all the companies in which Marcel Granier, Peter Bottome and Jaime Nestares are still shareholders, and which the State has specifically indicated, continue operating imparting their points of view and commercializing their products in Venezuelan territory with no restriction."

211. The State considered that what had happened was "the simple termination of a concession that the State decided not to renew under its discretionary powers for the administration of public property, as is the case of the electromagnetic spectrum." It asserted

that, in light of the discretionary powers of the State, “the refusal to renew the concession is not conditional on any prior procedure; it is not conditional on the quantity, quality or variety of the programming.” Despite this, the State also argued that the “power exercised by the media, through radio, television and the press, [had] tried to destroy Venezuelan democracy since President Chávez came to power.”

212. Regarding the reasons to assign “the RCTV signal rather than that of another television station,” it stated that, “of the VHF signals that exist, that of Channel 2 is the one that has the greatest reach owing to its location on the electromagnetic spectrum band; technically speaking, this signal is the one that is the most advantageous; it is the first signal on the dial on the electromagnetic spectrum band; it has the greatest reach, even more than a State signal, such as Venezolana de Televisión, and therefore requires less investment to distribute it.” It added that “[t]here are considerable savings in technical and infrastructure costs and the signal has significant reach nationwide; in addition, the antennas, the towers, their location – the attributes of the concession, as this is defined in article 110 of the Telecommunications Organic Law – are specific for each signal; in other words, the RCTV infrastructure, specifically its transmitters, is only suitable for use with that particular signal.” The State also indicated “that the activity of exploitation of the electromagnetic spectrum is a public service; [consequently, it] considered that the collective interest had priority over the private interest of a communications company that has operated that frequency for 53 years based on respect for the constitutional rights of companies.”

213. The State reiterated that the selection of the RCTV chain was due “merely to technical reasons,” because “the frequencies have viewing channels,” so that “the frequencies 2 and 3, which [were] those that RCTV [had, are those that are] closest to the earth; therefore, they have a greater reach, they extend further and require less expensive equipment.” It added that “it was the only channel [...] that had nationwide coverage.” It emphasized that, it was “a technical necessity; that is the reason for choosing one or another; there is no other reason, there is no political reason. That is false, totally false.”

B.2. Considerations of the Court

214. In its case law, the Court has established that Article 1(1) of the Convention is a general provision the content of which extends to all the provisions of this treaty because it establishes the obligation of the States Parties to respect and ensure the free and full exercise of the rights and freedoms recognized therein “without any discrimination.” In other words, whatever the origin or the form it assumes, any treatment that may be considered discriminatory in relation to the exercise of any of the rights recognized in the Convention is *per se* incompatible with it.²⁸⁸ The State’s failure to comply, by any discriminatory treatment, with the general obligation to respect and ensure human rights, gives rise to its international responsibility.²⁸⁹ Accordingly, there is an indissoluble link between the obligation to respect and ensure human rights and the principle of equality and non-discrimination.²⁹⁰

215. Furthermore, the Court has reiterated that the equal and effective protection of the law and of non-discrimination constitutes an outstanding principle in the system for the protection

²⁸⁸ Cf. *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 53, and *Case of the Afro-descendant Communities displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia*. Preliminary objections, merits, reparations and costs. Judgment of November 20, 2013. Series C No. 270, para. 332.

²⁸⁹ Cf. *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 85, and *Case of Espinoza González v. Peru*, para. 218.

²⁹⁰ Cf. *Juridical Condition and Rights of Undocumented Migrants*, para. 53, and *Case of Espinoza González v. Peru*, para. 218.

of human rights embodied in numerous international instruments and developed by legal doctrine and case law.²⁹¹ At the current stage of evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*; the whole legal structure of national and international public order rests on it and it permeates the whole legal system.²⁹²

216. In the instant case, the Commission concluded that the differential treatment suffered by the RCTV executives and employees was discriminatory and arbitrary in violation of Articles 1(1) and 24 of the Convention. Meanwhile, the representatives argued that the decision not to renew the RCTV concession constituted a serious violation of the obligations imposed on the Venezuelan State by Article 24 of the American Convention.

217. With regard to Articles 1(1) and 24 of the Convention, the Court has indicated that "[t]he difference between the two articles lies in that the general obligation contained in Article 1(1) refers to the State's duty to respect and guarantee "non-discrimination" in the enjoyment of the rights enshrined in the American Convention, while Article 24 protects the right to equal treatment by the law. In other words, if the State discriminates with regard to the guarantee of a Convention right, it would violate Article 1(1) and the substantial right in question. If, on the contrary, the discrimination refers to an unequal protection by domestic law or its application, the fact should be examined in light of Article 24."²⁹³

218. The Court notes that the facts of this case do not relate to unequal protection derived from a domestic law or its application; thus, it is not appropriate to examine the presumed violation of the right to equal protection of the law contained in Article 24 of the Convention. Consequently, the Court will only examine the alleged violation of the obligation to respect and to ensure, without discrimination, the rights contained in the American Convention established in Article 1(1) of the Convention, in relation to the presumed victims' right to freedom of expression.

219. To determine whether there has been a violation of the obligation to respect and to ensure rights without discrimination in this case, the Court will analyze: (i) whether RCTV was in equal conditions to other television channels; (ii) whether it received unequal treatment based on the use of any of the prohibited categories of discrimination established in Article 1(1) of the Convention, and (iii) whether the State presented evidence that the differential treatment conformed to the American Convention.

1. Conditions of equality between RCTV and other television channels

220. The Court underlines that the concession granted to RCTV under Decree No. 1,577 was never transformed pursuant to the provisions of the LOTEL even though, as indicated, RCTV requested this transformation in June 2002 (*supra* para. 87). In the absence of this transformation, the RCTV concession expired on May 27, 2007, at the end of its 20-year term.

221. The Court notes that, on the date the RCTV concession expired, there were other television stations that shared some similar characteristics with RCTV and whose concession also expired on May 27, 2007. These television channels were VTV, Venevisión, Televisora

²⁹¹ Cf. *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of August 4, 2010. Series C No. 214, para. 269, and *Case of Veliz Franco et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 19, 2014. Series C No. 277, para. 205.

²⁹² Cf. *Juridical Condition and Rights of Undocumented Migrants*, para. 101, and *Case of Espinoza Gonzáles v. Peru. Preliminary objections*, para. 216.

²⁹³ *Case of Apitz Barbera et al. v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of Veliz Franco et al. v. Guatemala*, para. 214.

Andina de Mérida and Amavisión. The Court considers that, although some of these television stations shared common characteristics with RCTV, they were also different as regards audience, type of frequencies, and other distinguishing characteristics. Therefore, the Court does not find that this case meets the requirements to make a determination on equality as proposed by the Commission and the representatives. Nevertheless, the Court notes that the licenses of all these channels, with the exception of RCTV, were renewed and will therefore examine whether the State's decision to reserve to itself the use of the spectrum initially assigned to RCTV rather than that of another channel may have resulted in discriminatory treatment in the exercise of RCTV's right to freedom of expression.

2. Application of a type of discrimination prohibited by Article 1(1) of the Convention

2.1. RCTV's editorial line as an expression of the "political opinions" of its executives and employees

222. The Court will now assess the reason for the possible differential treatment and the alleged application of a type of discrimination prohibited by Article 1(1) of the Convention. In this regard, it takes note of the Commission's argument in relation to the existence of a reasonable indication that the differential treatment towards RCTV was based on a prohibited type of discrimination contained in Article 1(1); namely, the political opinions expressed by RCTV executives and employees.

223. In this regard, the Court recalls that Article 1(1) of the Convention establishes that "[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." Consequently, the Court will analyze whether the editorial line of a television channel falls within the category of "political opinion" set forth in Article 1(1) of the Convention. Subsequently, it will assess whether there is evidence that would allow it to be considered that the application of this prohibited type of discrimination was the reason for the differential treatment.

224. First, the Court underscores that, in the case of *Ríos et al. v. Venezuela*, it established that "it [was] possible that individuals linked to RCTV could be included in the category of "political opinion" included in Article 1(1) of the Convention and be discriminated against in certain situations. Therefore, the alleged discriminations *de facto* must be analyzed under the general obligation of non-discrimination included in Article 1(1) of the Convention, in relation to Article 13(1) thereof."²⁹⁴ Accordingly, the Court considers that the editorial line of a television channel may be considered a reflection of the political opinions of its executives and employees insofar as they are involved in and determine the content of the information transmitted. Thus, it can be understood that the critical stance taken by a channel is a reflection of the critical position of its executives and employees involved in deciding the type of information transmitted. This is because, as already indicated (*supra* para. 148), the media are frequently the mechanisms by which individuals exercise their right to freedom of expression, which may involve the expression of contents such as political opinions or positions.

225. In particular, the Court notes that the editorial line and content of a television channel is not created accidentally, but is the result of decisions and actions taken by specific individuals linked to the definition of this editorial line. It is reasonable to assume that these individuals, who have a direct relationship to the definition of the channel's editorial line, reflect their

²⁹⁴ Case of *Ríos et al. v. Venezuela*, para. 349.

political opinions in this and, based on those opinions, define the content of its programming. In this regard, the Court emphasizes the statement made by Soraya Castellano, Information Manager of the RCTV Vice-Presidency for Information, that “[the] tone or ranking [of the news] was submitted to discussion and approval by the Department for the Production of Newscasts, the Information Directorate, and the Vice-Presidency for Information [...]. [This] working group approved the guidelines for the leading program ‘*El Observador*.’”²⁹⁵

226. On this point, the Court emphasizes the need to protect the expression of political opinions in a democratic society and recalls that it has previously established that “[d]emocratic control exercised by society through political opinion encourages the transparency of State activities and promotes the accountability of public officials in public administration.”²⁹⁶ Thus, this Court reaffirms the importance of the prohibition of discrimination based on the political opinions of an individual or a group of individuals, and the consequent obligation of the States to respect and ensure the rights contained in the American Convention without any type of discrimination.

227. Based on the above, the Court concludes that it may be affirmed that the editorial line of a television channel is the reflection of the ideas of those involved in the design of this line; therefore, they may be subject to discriminatory treatment based on their political opinions. Having established this, the Court will now examine the inversion of the burden of proof derived from the presumption of the existence of discriminatory treatment based on a prohibited type of discrimination established in Article 1(1) of the Convention, in this case, the political opinions of the RCTV executives and employees.

2.2. Inversion of the burden of proof and evidence presented by the State concerning the differential treatment

228. The Court stresses that, regarding the prohibition of discrimination based on one of the protected categories established in Article 1(1) of the Convention, the possible restriction of a right requires a rigorous and substantial justification and also the burden of proof is inverted, which means that it is for the authority to prove that its decision did not have a discriminatory purpose or effect.²⁹⁷ In this case, having verified that the differential treatment towards RCTV was based on one of the prohibited categories, the State had the obligation to prove that the decision to reserve the spectrum to itself did not have a discriminatory purpose or effect.

229. The Court has verified that, in Communication No. 0424, Minister Chacón Escamillo merely indicated that the decision not to renew the concession was not a sanction but rather the legal effect established in article 1 of Decree 1,577; namely, the expiry of a time frame (*supra*, para. 90) and that the State “had decided to reserve to itself the use and exploitation of that portion of the electromagnetic spectrum.” The Court notes that the State did not give the reasons for its decision or indicate, in either Communication No. 0424 or Resolution No. 002, why it reserved to itself the use of the electromagnetic spectrum assigned to RCTV and not the portion of the spectrum used by other channels.

230. Meanwhile, the State has argued in this case that the decision to reserve to itself the portion of the spectrum assigned to RCTV and not that used by another channel was because RCTV had specific technical characteristics that would reduce costs and expand the transmission range. However, the Court notes that this explanation was not indicated in either

²⁹⁵ Affidavit of Soraya Castellano (merits file, folio 1554).

²⁹⁶ *Case of Herrera Ulloa v. Costa Rica*, para. 127, and *Case of Vélez Restrepo and family members v. Colombia*, para. 145.

²⁹⁷ *Cf. Mutatis mutandis, Case of Atala Riffo and daughters v. Chile*, para. 124.

Communication No. 0424 or Resolution No. 002, and has not been substantiated by technical reports proving what the State has indicated. Therefore, the Court has no evidence to allow it to conclude that RCTV did indeed have specific technical characteristics that other television channels did not have and that justified the difference in treatment. The Court stresses that, in the instant case, based on the inversion of the burden of proof as a result of the application of a prohibited type of discrimination contained in Article 1(1) of the Convention, it would have been particularly important for the State to substantiate the differential treatment to the detriment of RCTV with technical evidence, expert reports and opinions, in order to disprove that presumption.

231. However, the Court has already considered proved that the editorial line and the political position transmitted by RCTV were among the main reasons behind the decisions taken in Communication No. 0424 and Resolution No. 002 (*supra* para. 197). This has been revealed by the numerous statements by different State officials cited previously, in which they spoke out about the content of the RCTV transmissions (*supra* para. 75 to 86).

232. Having established the government's position towards the critical editorial line of RCTV, the Court underscores the allegations that RCTV had not changed its conduct:

If we make a comparative analysis of the behavior of some television channels on April 11, 12 and 13 [2002], which were openly in support of the coup d'état, and we compare this to their conduct today, there have been qualitative changes in their programming, in the news line, in the editorial line. [...] However, there are other cases where no such change, correction, is in evidence; instead they have stubbornly clung to their conduct as in was on April 11, 12 and 13 in the country²⁹⁸ (underlining added).

233. Furthermore, the Court recalls the words of President Chávez during an event at the Ministry of Defense on June 14, 2006:

I have ordered a review of the television network concessions. Some channels have shown signs of being prepared to change, and it appears that they intend to obey the Constitution and the law. Regarding those who backed the coup, which was everyone; at that time, we could have eliminated those concessions; however, we called for dialogue, reflection. Was it a mistake? I don't think so. I don't think so. Everything in its time.²⁹⁹

234. In this regard, the Court emphasizes that if a government applies differential treatment based on its satisfaction or dissatisfaction with a channel's editorial line, this has a dissuasive, intimidating and inhibiting effect on those who exercise their right to freedom of expression (*supra* para. 164), because it sends a threatening message to the other media of what could happen to them if they followed an editorial line similar to that of RCTV. As mentioned previously, the failure to allow the exercise of the right to freedom of expression in equal conditions prevents the public debate on issues of interest to society that is essential for the protection of democracy and the pluralism of the media.

235. Based on the above, the Court concludes that, in this case, there is evidence to determine that the State's decision to reserve to itself the portion of the spectrum assigned to

²⁹⁸ Press release on the website "Vive" entitled "*Lara: Hay televisoras y emisoras de radio que violentan los derechos de los usuarios*" of June 14, 2006, (evidence file, folios 3121 and 3122); Article in the newspaper "El Nacional" entitled "*Chávez amenazó con revocar concesiones a televisoras en 2007*" of June 15, 2006 (evidence file, folios 3117 to 3119), and Press release on the website "Radio Nacional de Venezuela" entitled "*Hay televisoras y emisoras de radio que violentan derechos de usuarios*" of June 14, 2006 (evidence file, folio 3124).

²⁹⁹ Speech by President Chávez on June 14, 2006 (evidence file, CD, Video minute 1:39; Article in the newspaper "El Universal" entitled "*Chávez anunció nuevas compras y cambios en concepción de equipos militares*" of June 14, 2006 (evidence file, folios 3109 to 3111); Press release "Chávez: 'He ordenado la revisión de las concesiones de los canales de televisión'" of June 14, 2006, (evidence file, folios 3112 and 3113), and Article in the newspaper "El Mundo" entitled "*Chávez ordena revisar las concesiones de televisión privada en Venezuela*" of June 15, 2006 (evidence file, folio 3114).

RCTV involved discriminatory treatment in the exercise of the right to freedom of expression based on the application of one of the types of discrimination prohibited by Article 1(1) of the American Convention. Consequently, the Court finds that the State is responsible for the violation of the right to freedom of expression established in Article 13 in relation to the obligation of non-discrimination contained in Article 1(1) of the American Convention, to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Inés Bacalao, Eladio Lárez, Eduardo Sapene, Daniela Bergami, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño.

VIII JUDICIAL GUARANTEES AND JUDICIAL PROTECTION

236. In this chapter, the Court will examine the arguments presented by the parties and the Commission and develop the pertinent points of law relating to the alleged violations of judicial guarantees and judicial protection in the following order: (i) proceedings in which the violation of Article 8 of the Convention has been alleged, and (ii) proceedings in which Article 25 of the Convention has been alleged.

A) Alleged violations of Article 8 of the Convention – judicial guarantees

A.1. Administrative procedures for transformation of the titles and renewal of the concession

A.1.1. Arguments of the Commission and of the parties

237. The **Commission** argued that the procedure for the assignation and renewal of “concessions must be strictly regulated by law, characterized by transparency, and guided by criteria that are objective, impartial, clear, public and compatible with a democratic society. [Also,] a party seeking a decision of this kind must have the right to be heard and to offer evidence before a decision is taken; also to be guaranteed the right to a reasoned decision within a reasonable time, and to subsequent judicial review.”

238. The Commission also related Article 13 to Article 8 of the Convention because it considered that “[t]he procedural obligations that follow from Article 13 are dictated by the administrative due process obligations that are enshrined in Article 8.” In this regard, the Commission argued that “the State also violated Article 8 of the Convention by conducting an administrative process that had a definitive impact on the right to freedom of expression, without observing due process of law.” Specifically, it argued “that this process was conducted in secret, outside the boundaries of the clear legal framework, and RCTV’s right to be heard and to offer evidence was never respected.”

239. Meanwhile, the **representatives** argued that “[t]he process to assign and renew concessions should have been strictly regulated by law, characterized by transparency, and guided by criteria that were objective, clear, public, non-discriminatory and in keeping with the values of a democratic society.” They also emphasized that “[a]ny act that led to terminating [the RCTV] concession should have been preceded by a procedure in which the concessionaire and other directly interested parties had the right to intervene and to submit their arguments concerning the continuation of the concession.” They argued that there had been a lack of due process, adding that “[n]ot even the government’s argument concerning the discretionary nature of the renewal or the concession [...] exonerated it from applying the guarantees of Article 8.”

240. The representatives also alleged the violation of Article 8 because, in their opinion, “the Venezuelan State should have guaranteed RCTV a right that the decision on the renewal of its

concession would be taken by an independent and impartial body[; and the Minister of the People's Power for Telecommunications and Information Technology,] the body that took the decision, did not offer the guarantee of independence and impartiality in this particular matter required by Article 8 of the Convention." According to the representatives, the Minister had "expressed his opinion previously on the merits of RCTV's request [...] in relation to the duration and extension of its concession." They also argued that the Minister was a "direct organ for the execution of the decisions of the President of the Republic" who, they indicated, "had publicly and repeatedly announced his decision not to renew the RCTV concession and [...] openly confessed his enmity towards the said media outlet, as a result of the conflict between its critical editorial line and the interests of his political project." They also argued that in his Communication No.0424, the Minister had "refused to admit and examine the evidence submitted by RCTV," violating the rights to defense and to due process.

241. The representatives argued that Communication No. 0424 and Resolution No.002, were not duly reasoned because they "did not analyze basic and fundamental aspects, such as the content of and the effects on the right to freedom of expression; the reason why the option of creating a new public television station in substitution for RCTV was essential, [and] they also failed to analyze other possible frequencies available to the government, among other aspects that should have been evaluated to avoid arbitrariness." They also argued that "the RCTV representatives were not allowed to access the file of the administrative case in the procedure prior to the adoption of the decisions contained in Resolution No. 002 and Communication No. 0424" and therefore argued that the public nature of due process and the right of defense was violated by preventing the presumed victims from verifying and monitoring their content; denying them the possibility of "providing additional evidence in their defense in relation to the new supervening arguments set out by the Minister."

242. The **State** argued that Articles 8(1) and 25 of the Convention had not been violated. In addition, it indicated that the decision not to renew the RCTV concession was neither arbitrary nor discriminatory. According to the State, "it is [its] prerogative [...] to renew or use [the administration of the electromagnetic spectrum], and the undisputed holder of this right does not have to open any new procedure in order to exercise it. Therefore, it decreed the extinction of the concession request made by RCTV."

A.1.2. Considerations of the Court

243. The Court recalls that Article 8(1) of the Convention guarantees that decisions determining the rights of the individual must be adopted by the competent authorities established by domestic law,³⁰⁰ and using the procedure established to that end. In this case, the decision to reserve to the State the use of the spectrum initially assigned to RCTV meant that the administrative procedures for transformation of the titles and renewal of the concession were not implemented, and this had an impact on the determination of the rights of the executives and employees of RCTV, because the result of this decision was the non-renewal of RCTV's concession to operate as a free-to-air television station, and this had an impact on the exercise of their right to freedom of expression (*supra* para. 199). Consequently, in this case, the judicial guarantees established in Article 8(1) of the American Convention are applicable.

244. In this regard, this Court has already indicated that the procedures related to the renewal or granting of licenses or concessions must comply with certain general safeguards or guarantees to avoid an abuse of official controls or the generation of indirect restrictions (*supra* para. 171). In this context, the Court finds it pertinent to indicate that the European Court,

³⁰⁰ Cf. *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 158, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, para. 171.

also, has understood that “[a]s regards licensing procedures in particular, the Court reiterates that the manner in which the licensing criteria are applied in the licensing process must provide sufficient guarantees against arbitrariness, including the proper reasoning by the licensing authority of its decisions denying a broadcasting licence.”³⁰¹ The European Court has also indicated “that a licensing procedure whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression.”³⁰²

245. In this case, both the Commission and the representatives argued that the legal framework of the procedure for the renewal of the concession was not established clearly in domestic law. In addition, they presented arguments concerning the presumed failure to comply with other judicial guarantees, such as the right to a hearing and the right to a reasoned decision. However, throughout these contentious proceedings, Venezuela has argued that the law did establish specific procedures for both the transformation of the titles and the renewal of the concession, but the State had chosen not to use them because it took the decision to reserve to itself the use of the spectrum when the initial concession expired. Based on the foregoing, and in order to determine whether Article 8(1) of the Convention was violated, the Court will examine, first, the legal framework in order to determine whether or not legal procedures existed. If they did exist, the Court will then evaluate the reasons given by the State to justify why those procedures were not applied.

246. Regarding the transformation of the titles, the Court underlines that article 210 of the LOTEL (*supra* para. 73) established the procedure to be followed by determining that it was necessary to prepare “special timetables for the transformation of the current concessions and permissions granted under the previous laws, into the administrative authorizations, concessions or notification obligations or registrations established in [the said] law.” This article also stipulated the procedural terms and conditions for requesting the transformation of titles and the general approval procedure. Thus, the purpose of the request presented by RCTV on June 5, 2002 (*supra* para. 87) was “the transformation of the titles granted to RCTV prior to the entry into force of the [LOTEL, and it therefore asked to be granted the] administrative authorization for a for-profit free-to-air television station and the concession for the use and exploitation of the electromagnetic spectrum.”³⁰³

247. The Court also notes that the LOTEL established general provisions for the concession renewal procedure. These provisions refer to the duration of concessions and to the possibility that they may be renewed for equal periods of time “provided that the holder of the concession has complied with the provisions established in [the said] law, its regulations, the General Conditions established by the National Telecommunications Commission and in the respective authorization.”³⁰⁴ In addition, it established that, by “concession” was understood the use of the electromagnetic spectrum, indicating that this “is a unilateral administrative act by which [...] (CONATEL) grants or renews, for a limited time, to a natural or legal person, the condition of concessionaire for the use and exploitation of a specific portion of the electromagnetic spectrum, following fulfillment of the legally established requirements.”³⁰⁵ It also stipulated that renewals of the concessions “would following the general rules contained in [the LOTEL].”³⁰⁶

³⁰¹ ECHR, *Meltex Ltd. & Mesrop Movsesyan v. Armenia* (No. 32283/04), Judgment of June 17, 2008, para. 81.

³⁰² ECHR, *Meltex Ltd. & Mesrop Movsesyan v. Armenia* (No. 32283/04), Judgment of June 17, 2008, para. 83.

³⁰³ Transformation request submitted to CONATEL by RCTV on June 5, 2002. The request was signed by Oswaldo José Quintana Cardona, in his capacity as “legal representative of the commercial company RCTV” (evidence file, folios 3053 a 3057).

³⁰⁴ Telecommunications Organic Law of June 12, 2000, article 21 (evidence file, folio 219).

³⁰⁵ Telecommunications Organic Law of June 12, 2000, article 73 (evidence file, folio 239).

³⁰⁶ Telecommunications Organic Law of June 12, 2000, article 210(4) (evidence file, folio 280).

248. The Court underlines that the specific provisions relating to concession renewals are to be found in the Regulations of the Telecommunications Organic Law on administrative authorizations and concessions for the use and exploitation of the electromagnetic spectrum, which indicate that “[t]he concessions for the use and exploitation of the electromagnetic spectrum granted by the Minister for Infrastructure of the National Telecommunications Commission, may be renewed, as appropriate, by a request submitted by the titleholder at least 90 calendar days before the date of its expiry, failing which he may be required to initiate the procedure to obtain a new concession for the use and exploitation of the electromagnetic spectrum. For the purposes of the renewal, full compliance with the obligations derived from the respective concession will be taken into account.”³⁰⁷ In this regard, the administrative Decree on General Conditions for Sound Radio and Free-to-air Television Authorizations added that “[t]he competent body shall take the applicable decision within ninety (90) calendar days of the submission of the request.”³⁰⁸

249. Consequently, the Court recalls the statement made by witness José Leonardo Suárez that “when RCTV submitted its request for renewal, according to the instruments of the Telecommunications Organic Law and its Regulation, it should have done so at least 90 days before its administrative title expired, in this case the concession. It was then incumbent on CONATEL to review the request at a substantiation stage because [...] the authority to grant or renew a radio or television concession corresponds only and exclusively to the representative of the State which, in this case [...], was the Ministry of Telecommunications and Information Technology, which is one of the bodies that has authority to do this, and not CONATEL, which is responsible for receiving information and verifying it.”³⁰⁹

250. On January 24, 2007, RCTV’s legal representatives submitted a new request to CONATEL in which they requested this organ to issue new concession titles to the station based on the following norms: (i) according to the provisions of article 210 of the LOTEL, for the 20-year period starting on June 12, 2002, because “the process of transformation of the previous concessions into the new titles should have been completed [on the said date and] at that time, the 20-year extension established in article 3 of Decree No. 1577 should have begun”; (ii) alternatively, based on article 3 of Decree No. 1577, until May 27, 2027, because, if May 27, 2007, was considered the date of expiry of the concession, they asked that “the new titles be issued to RCTV [recognizing] the acquired right to the additional 20-year extension established therein,” or (iii) also alternatively, that the procedure for the transformation of the titles be completed and they be renewed “pursuant to the provisions of article 80(2) of the Regulations for Administrative Authorizations and Concessions for the Use and Exploitation of the Electromagnetic Spectrum [...] and article 9 of the Decree on General Conditions for Sound Radio and Free-to-air Television Authorizations.”³¹⁰

251. Accordingly, the Court concludes that a procedure did exist for the transformation of the titles and for the renewal of concessions in the laws of Venezuela and that the RCTV legal representatives initiated this procedure by submitting the said requests. However, it notes that the State took the decision not to apply the procedure. Consequently, the Court will now assess the reasons given by the State for why it did not follow the said procedure.

³⁰⁷ Regulations for the Telecommunications Organic Law on Administrative Authorizations and Concessions for the Use and exploitation of the Radio Spectrum, 2000, article 80(2) (evidence file, folio 2132).

³⁰⁸ Decree on General Conditions for Sound Radio and Free-to-air Television Authorizations, article 9 (evidence file, folio 28260).

³⁰⁹ Statement by witness José Leonardo Suárez during the public hearing in this case.

³¹⁰ Cf. Request presented to CONATEL on January 24, 2007, by Gustavo J. Reyna, Pedro Perera Riera, José Valentín González, José Humberto Frías and Alvaro Guerrero Hardy, as “legal representatives of the commercial company Radio Caracas Televisión RCTV” (evidence file, folios 3063 to 3091).

252. In this regard, the Court recalls that, in this judgment, it has declared that the purpose of the termination of the administrative procedures for the transformation of the titles and the renewal of the concession was to silence the media outlet (*supra* paras. 198 and 199) and that this purpose violates the guarantees established in Article 8 of the Convention because the administrative procedures should have continued in order to define whether or not the transformation or renewal of the concession was accepted. The Court emphasizes that, if this procedure had continued in keeping with domestic law and respecting the basic safeguards established by those provisions, the arbitrariness of the decision would have been avoided. Consequently, the Court considers that the existence of the said procedure and the fact that the State decided not to apply it is precisely one more element of the real and illegitimate purpose that has already been declared in this judgment (*supra* paras. 198 and 199).

253. Based on the above, the Court concludes that domestic law established an appropriate procedure for the transformation of the titles and for the renewal of the concession and the State deliberately omitted to follow this, thus violating the judicial guarantees established in Article 8(1) in relation to Article 1(1) of the American Convention to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar and Francisco J. Nestares. Considering that the State did not following the procedures established by law, the Court does not find it necessary to make a special ruling in this case on the other alleged violations related to the right to a hearing and to present evidence, access to the administrative case file and the independence of the entity responsible for awarding or renewing the concession.

A.2. Administrative remedy seeking nullification with applications for an injunction and unspecified interim measure

254. As previously indicated, on April 17, 2007, a group of executives, journalists and employees of RCTV³¹¹ filed an administrative remedy seeking nullification of the administrative decision derived from Resolution No. 002 and Communication No. 0424. The applicants also requested an injunction and, failing this, unspecified interim protection measures. The Political-Administrative Chamber of the SCJ admitted the appeal for nullification, but declared inadmissible the injunction and the unspecified interim measure. The appeal for nullification has been halted at the evidentiary stage since June 2008 (*supra* para. 111). The Court will now analyze the proceedings on the appeal for nullification, the injunction and the unspecified interim measure that were filed together.

A.2.1. Appeal for nullification

i) Reasonable time

255. In order to analyze whether Article 8(1) of the Convention was violated by the presumed failure to comply with the right to a reasonable time in relation to the appeal for nullification, the Court will examine the four criteria established in its case law in this regard: (a) the complexity of the matter; (b) the procedural activity of the interested party; (c) the conduct of the judicial authorities, and (d) the effects produced on the legal situation of the persons involved in the proceedings.³¹² The Court recalls that it is for the State to justify, based on

³¹¹ Cf. Those who filed this remedy included RCTV on behalf of its shareholders and the following presumed victims: Marcel Granier, Eladio Lárez, Daniela Bergami, Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Isabel Valero, Odila Rubin, Oswaldo Quintana, Eduardo Sapene, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño (evidence file, folio 2794).

³¹² Cf. *Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 192, para. 155, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia*.

these criteria, why it has required the time that has passed to deal with the case and, if it does not do so, the Court has broad attributes to draw its own conclusions in this regard.³¹³

256. In this case, the appeal for nullification was filed on April 17, 2007 (*supra* para. 107) and is halted at the evidentiary stage since June 2008 (*supra* para. 111) so that more than seven years have passed since the start of the proceedings. Consequently, the Court will determine whether the time that has elapsed is reasonable based on the criteria established in its case law.

a) The complexity of the matter

Arguments of the Commission and of the parties

257. Regarding the complexity of the case, the **Commission** indicated that the numerous allegations filed in the appeal for nullification "involved a certain degree of complexity when the time came to decide the case, although none of the points raised by RCTV would appear to require an especially demanding examination of the evidence, with the possible exception of the arguments concerning the availability of frequencies other than RCTV's to accomplish the objectives of the National Telecommunications Plan."

258. The **representatives** argued that "to date, no particularly complex incident or circumstance had arisen in the proceedings that would excuse the prolonged delay and require the proceedings to be held up; moreover, the judicial authorities are not observed to be acting diligently; rather, to the contrary, their conduct is marked by passivity and inaction."

259. The **State** presented no specific arguments on this point.

Considerations of the Court

260. This Court has taken diverse criteria into account to determine the complexity of a case. They include the complexity of the evidence, the plurality of procedural subjects or the number of victims, the time that has passed since the violation, the characteristics of the remedy established in domestic law, and the context in which the violation occurred.³¹⁴

261. The Court considers that, in this case, there is no record of the existence of elements that represent a level of complexity that would justify the delay of more than seven years to decide the administrative remedy seeking nullification. Even though numerous arguments were presented, the Court stresses that the proceedings are halted at the evidentiary stage since 2008, without the State submitting arguments concerning the existence of any element that signifies a particular complexity.

b) The procedural activity of the interested party

Arguments of the Commission and of the parties

Preliminary objections, merits, reparations and costs. Judgment of November 14, 2014. Series C No. 287, para. 506.

³¹³ Cf. *Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009. Series C No. 202, para. 156 and *Case of López Mendoza v. Venezuela. Merits, reparations and costs.* Judgment of September 1, 2011. Series C No. 233, para. 162.

³¹⁴ Cf. *inter alia*, *Case of Genie Lacayo v. Nicaragua. Preliminary objections.* Judgment of January 27, 1995. Series C No. 21, para. 78, and *Case of Argüelles et al. v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2014. Series C No. 288, para. 190.

262. The **Commission** indicated that “the available information does not suggest that the litigants engaged in any activity that would have caused an unwarranted delay in processing the petition. Their interventions in the proceedings included the offer of evidence, an appeal against the ruling declaring certain evidence inadmissible, and the filing of three more petitions seeking unspecified interim measures, which indicates an active participation, with nothing to suggest that it was frivolous.”

263. The **representatives** argued that “[the procedural activity] of the interested party [...] has only been addressed at trying to obtain a rapid processing and settlement of the matter, as proved by the insistent requests to the Chamber for a decision on the appeals concerning the evidence filed by both parties.”

264. The **State** presented no specific arguments on this point.

Considerations of the Court

265. The Court underscores that it has received no specific information or arguments regarding any activities of the representatives or the presumed victims that might have hindered the proceedings. To the contrary, the Court finds that the presumed victims instigated measures to try and advance the proceedings. For example, the Court recalls that between August 12, 2008, and October 22, 2009, the presumed victims filed eight petitions before the presiding judge requesting that she adjudicate the appeals filed at the evidentiary stage, without obtaining any response. Nevertheless, the Court reiterates that the State, in exercise of its judicial functions, has inherent legal obligations; hence the conduct of the judicial authorities does not depend exclusively on the procedural initiative of the petitioner in the proceedings.³¹⁵

c) The conduct of the judicial authorities

Arguments of the Commission and of the parties

266. The **Commission** “observe[d] the long delays in settling procedural issues necessary for the case to move forward,” and indicated that “[t]he court took from October 23, 2007, to March 6, 2008, to deliver its ruling on the admissibility of the evidence offered by the parties. Both parties appealed this ruling; a decision on those appeals has been pending since June 26, 2008; in the meantime, the proceedings have been suspended.” The Commission also indicated that there had been a “lack of any explanation from the State for the more than four years’ delay in arriving at a decision on this matter,” and concluded that the appeal for nullification “ha[d] not been decided within a reasonable time.”

267. The **representatives** argued that the Political-Administrative Chamber “ha[d] incurred in [...] unjustified delay, inactivity and lack of procedural integrity”; in particular, they indicated that the delay occurred “specifically at the evidentiary stage of the proceedings, which began on October 9, 2007, and, to date, has not concluded as a result of the lack of the necessary procedural activity of the presiding judge and despite the constant insistence and failed attempts by RCTV to advance the proceedings.” Lastly, the representatives indicated that “although [six] years have passed since the appeals were filed, no decision has been issued on the merits and the proceedings are halted with no justification.”

³¹⁵ Cf. *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and Merits*. Judgment of May 6, 2008. Series C No. 179, para. 83, and *Case of Espinoza Gonzáles v. Peru*, para. 238.

268. The **State** argued, in general, that “all the constitutional courts in the world have a backlog of cases and priority must be given to the cases that are most delayed based on the principle that everyone is equal before the law.” The State also argued that an unjustified delay did not exist because, “taking into consideration the thousands of cases processed by the Supreme Court of Justice, it cannot be suggested that there has been an unjustified judicial delay in this case.”

Considerations of the Court

269. The Court notes that the appeal for nullification was filed with the Political-Administrative Chamber of the Superior Court of Justice on April 17, 2007. Subsequently, on October 9, 2007, the evidentiary stage was initiated and the Political-Administrative Chamber delayed from October 23, 2007, until March 6, 2008, to issue a ruling on the admission of the evidence provided by the parties. On March 6, 2008, the Trial Court of the Political-Administrative Chamber issued the decision on the admission of the evidence provided; both the presumed victims and the State appealed this decision. On June 19, 2008, the Court admitted the appeals and forwarded the proceedings to the Political-Administrative Chamber. The decision on the appeals is pending since June 26, 2008, and, therefore, the proceedings are halted at the evidentiary stage (*supra* para. 111).

270. The Court finds that excessive delays have occurred at different stages of the proceedings – especially at the evidentiary stage and despite numerous requests by the presumed victims – and they are halted since 2008. The Court considers that the State has not proved that the prolonged delay of more than seven years cannot be attributed to the conduct of its authorities, and therefore concludes that the judicial authority did not ensure, diligently, that a reasonable time was respected in this case. Lastly, the Court reiterates that the large number of cases pending before a court does not, in itself, justify violating the right of the individual to obtain a decision in a reasonable time.³¹⁶

d) Effects on the legal situation of the person involved in the proceedings

Arguments of the Commission and of the parties

271. The **Commission** indicated that “the situation of those involved has been continuously affected because, since May 28, 2007, they have been unable to express themselves through the free-to-air RCTV television channel.”

272. The **representatives** argued that the facts described “clearly characterize the violation of the procedural guarantee of a trial without undue delays, as well as a violation of the human right of access to effective and expedite justice established in Articles 8 and 25 of the American Convention.”

273. The **State** presented no specific arguments on this point.

Considerations of the Court

274. The Court reiterates that, to determine whether the time is reasonable, it is necessary to take into account the effects of the duration of the proceedings on the legal situation of the person involved in them, considering, among other aspects, the matter that is the purpose of the dispute.³¹⁷ In this regard, the Court has established that if the passage of time has a

³¹⁶ Cf. *Case of Apitz Barbera et al. (“First Contentious Administrative Court”) v. Venezuela*, para. 180.

³¹⁷ Cf. *Case of Valle Jaramillo et al. v. Colombia*, and *Case of Argüelles et al. v. Argentina*, para. 196.

relevant impact on the legal situation of the individual, the proceedings must advance with greater diligence in order to decide the case as soon as possible.³¹⁸

275. In this case, the Court finds that neither the Commission nor the representatives presented evidence that would allow it to conclude whether relevant effects had been produced on the legal situation of those involved or reasons that would signify that special speed should have been given to these proceedings, so that it does not find that such effects have been proved.

e) Conclusion regarding the reasonable time

276. Having analyzed the four elements to determine whether the time was reasonable and bearing in mind that a decision on the appeal for nullification remains pending at the present time without the State having been able to justify this delay, the Court concludes that Venezuela violated the right to a reasonable time established in Article 8(1) in relation to Article 1(1) of the American Convention to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar, Francisco J. Nestares, Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Eladio Lárez, Odila Rubin, Oswaldo Quintana, Eduardo Sapene, Daniela Bergami, Isabel Valero, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño.

ii) Other guarantees alleged in relation to the appeal for nullification

Arguments of the representatives

277. The **representatives** argued the “lack of independence and impartiality of the authority called on to decide the administrative appeal for nullification” and referred to the existence of a “general context of Judiciary’s lack of independence in Venezuela [and to the issue of] decisions and [...] specific statements by the [SCJ’s Political-Administrative] Chamber concerning the termination of the RCTV concession.”

Considerations of the Court

278. Regarding the alleged “lack of independence and impartiality of the authority called on to decide the administrative appeal for nullification,” the Court considers that this context was not duly alleged and presented, because no evidence was provided that would allow it to conclude that it existed in the instant case. In addition, it is not sufficient to make a general mention of an alleged context for the Court to be able to conclude that there has been a violation; rather, it is necessary to present specific arguments on the possible effect on the proceedings that could be derived from the lack of independence and impartiality. Therefore, in the terms in which it was presented by the representatives, the Court is unable to conclude that there was an alleged violation of independence and impartiality in the said contentious proceedings.

A.2.2. Request for an unspecified interim measure

Arguments of the Commission and of the parties

279. The **Commission** argued the violation of Article 25(1) of the Convention owing to the delay in the decision. In this regard, it indicated that “the more than three months’ delay in ruling on the petition seeking an unspecified interim measure deprived the request of any

³¹⁸ Cf. *Case of Valle Jaramillo et al. v. Colombia*, para. 155, and *Case of Argüelles et al. v. Argentina*, para. 196.

chance of efficacy since, by July 31, 2007, the government decision not to extend RCTV's concession had already been implemented and RCTV had been forced off the airwaves." The Commission concluded that "the failure to issue a prompt and immediate ruling on the request for an unspecified interim measure that was filed in conjunction with the administrative remedy seeking nullification violated Article 25(1) of the Convention, to the detriment of RCTV's shareholders, executives and employees who are [presumed] victims in this case."

280. Regarding the unspecified interim measure, the **representatives** argued "that it had been requested as an alternative measure in case the amparo was denied; there was a delay of more than three [...] months in the decision, and then it was denied." They also indicated that, when ruling on the interim measure, the Court should only have referred to "whether or not a fact existed that could constitute possible irreparable harm to a fundamental right"; however, but that by "anticipating an opinion on the merits of the matter" it had infringed the guarantee of an impartial judge. The representatives also argued that the interim measure was processed "negligently and with a notable delay, even though, due to its nature, it required an urgent ruling, [and] that this delay and this paralysis patently violated the right to judicial protection and to due process."

281. The **State** presented no specific arguments on this point.

Considerations of the Court

282. The Court reiterates that the amparo should be a "simple and prompt" remedy pursuant to Article 25(1) of the Convention,³¹⁹ and indicates that other remedies should be decided within a "reasonable time" pursuant to Article 8(1) of the Convention. In this case, the unspecified interim measure was filed together with the appeal for nullification and the injunction; however, the Court has no evidence to allow it to conclude that the interim measure is similar in nature to the injunction. Indeed, the Court notes that Venezuelan laws establish the admissibility of the application for amparo against any administrative act that violates or threatens to violate a constitutional right or guarantee; the application for amparo may be presented together with the appeal for nullification, in which case the judge "if he considers it appropriate to protect the constitutional guarantee, shall suspend the effects of the appealed act as a guarantee of the violated constitutional right, for the duration of the trial."³²⁰ Meanwhile, the adoption of an interim measure seeks "to safeguard [the] legal right cited and to guarantee the results of the trial"³²¹ and, in this case, it is not necessary for a fundamental right to have been violated or under threat of violation.

283. The Court notes that although both the injunction and the interim measure may obtain the same result, such as the suspension of the effects of the administrative act whose nullification has been requested,³²² "[t]he difference between the amparo and other interim measures is that the amparo relates exclusively to the violation of constitutional rights and guarantees."³²³

³¹⁹ Cf. *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 107, and *Case of the Las Dos Erres Massacre v. Guatemala*, para. 107.

³²⁰ Organic Law on Amparo of Constitutional Rights and Guarantees of December 18, 1988, article 5. Available at: <http://www.tsj.gov.ve/legislacion/loadgc.html>.

³²¹ Organic Law of the Supreme Court of Justice of the Bolivarian Republic of Venezuela of May 20, 2004, article 19. Law in force at the time of the facts (evidence file, folios 25755 and 25756).

³²² Organic Law on Amparo of Constitutional Rights and Guarantees of December 18, 1988, article 5. Available at: <http://www.tsj.gov.ve/legislacion/loadgc.html>.

³²³ Cf. *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 168.

284. The Court recalls that in the case of *Apitz Barbera et al. v. Venezuela*, it considered that, under the laws of Venezuela, the precautionary nature of the amparo exercised together with the appeal for nullification requires provisional, but immediate, protection in view of the nature of the harm. This permits the legal situation infringed by the State to be restored to its condition before the supposed violation occurred while a final decision is taken in the main proceedings.³²⁴ On that occasion, the Court established that it had to make an analysis that differentiated the duration of the decision on the amparo from the duration of the decision on the appeal for nullification; and even though they were filed together they have different purposes. Thus, the Court considers that the alleged unjustified delay in an application for amparo should be analyzed in light of Article 25 of the Convention, while the other remedies should be examined under the "reasonable time" that derives from Article 8(1) of the Convention.

285. Consequently, the Court will analyze the unspecified interim measure, in relation to the violation of the right to a hearing within a reasonable time established in Article 8(1) of the American Convention.

286. When analyzing whether the interim measure was decided within a reasonable time, the Court notes, based on the criteria established in its case law (*supra* para. 255), that: (i) the interim measure was not sufficiently complex to justify the delay in issuing a decision because, basically, it reiterated the arguments presented with regard to the injunction and asked that the situation of RCTV at that time be maintained while the proceedings on the appeal for nullification continued;³²⁵ (ii) the conduct of the presumed victims did not affect the progress of the proceedings and, in fact, the RCTV representatives tried to further them by reiterating to the Superior Court the urgency of ruling on the requested interim measure;³²⁶ (iii) the authorities took more than three months to decide the measure without the State providing any explanation about the reason for this delay, and (iv) the interim measure was decided more than two months after the date on which RCTV ceased transmitting, making it impossible for this measure to be effective, since it was decided a considerable time after the act that it sought to avoid had occurred. Therefore, the Court considers that, in this case, the delay did result in relevant harm to the legal situation of those involved. Consequently, the Court notes that the period of more than three months to decide the interim measure violated the right to a reasonable time.

287. The Court concludes that, when processing the unspecified interim measure, the Venezuelan State violated the right to a reasonable time established in Article 8(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar, Francisco J. Nestares, Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Eladio Lárez, Odila Rubin, Oswaldo Quintana, Eduardo Sapene, Daniela Bergami, Isabel Valero, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño.

A.3. Criminal proceedings

A.3.1. Arguments of the Commission and of the parties

288. The **Commission** considered that Articles 8 and 25 of the Convention had not been violated with regard to the criminal complaint filed by RCTV and the treatment it received in

³²⁴ Cf. *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 169.

³²⁵ Cf. Administrative appeal for nullification with a request for an injunction filed with the Political-Administrative Chamber of the Supreme Court of Justice of Venezuela on April 17, 2007 (Evidence file, folios 28365 to 28495).

³²⁶ Cf. Sworn statement on the urgency of the administrative appeal for nullification with a request for an injunction filed with the Political-Administrative Chamber of the Supreme Court of Justice of Venezuela on May 24, 2007. Case No. 07-0411 (evidence file, folio 3690).

the three domestic courts that heard the case, because “[t]he information provided showed that the prosecutor examined the criminal complaint filed by RCTV almost immediately and that RCTV was able to appeal the prosecutor’s decision to seek dismissal of the complaint and even filed a remedy of cassation with the Supreme Court, all within the space of five months.”

289. The **representatives** argued that the “fact that the prosecutor had examined the case and the same day requested the presiding judge to dismiss the complaint is sufficient to demonstrate that he did not conduct any kind of investigation into the complaint filed.” The representatives also argued that “[e]very investigation must be exhaustive, sufficient and pertinent, as required by domestic and international law; [in this case,] it is highly unlikely, if not impossible, that it was carried out on the same day; this constitutes a denial of justice and results in the ineffectiveness of the judicial remedy that was filed because, even though it was established by law, it did not constitute a guarantee of a hearing when seeking judicial protection.” The representatives also indicated that “[t]he facts reported merited an exhaustive criminal investigation because they could constitute the offenses of procedural fraud or deception, which would also involve the perpetration of the offense of generic abuse of authority.”

290. Lastly, the representatives concluded that “[t]he prosecutor of the Public Prosecution Service failed to conduct an investigation and the only actions taken by the State had the sole purpose of dismissing the complaint. In this case, the competent authorities failed to comply with their obligation to investigate acts of which they were aware that violated the right to property, and that are defined as actionable offenses.”

291. The **State** argued that “the presiding judge [...] decided, based on the opinion of the Public Prosecution Service and after examining the facts presented, that they were not criminal in nature. Therefore, pursuant to article 301 of the Organic Code of Criminal Procedure, she declared that the complaint was dismissed.”

A.3.2. Considerations of the Court

292. The Court recalls que RCTV³²⁷ filed a criminal complaint requesting the opening of an investigation into offenses against its property and other offenses established in the Anti-Corruption Law (*supra* para. 114). The prosecutor in charge of the complaint requested the dismissal of the case and the court that heard the case declared the request admissible and decided to close the investigation.

293. The Court notes that the criminal complaint was dismissed by the 51st Court of the Caracas District at the prosecutor’s request. RCTV filed an appeal with the Appellate Court, which ratified the dismissal and rejected the appeal. RCTV therefore filed a remedy of cassation before the SCJ Criminal Cassation Chamber and this was also dismissed (*supra* para. 116). The Cassation Chamber agreed with the opinion of the court that had heard the case previously and found that “when the courts exercise their function to hear cases submitted to their consideration [...], they do not commit a fraudulent action, [so that] the presumed perpetration of the wrongful act of procedural fraud has not been constituted” and that “when examining a conduct that does not reveal the perpetration of an act of a criminal nature, the legally established action is not to open or continue an investigation.”³²⁸ The Court notes that the

³²⁷ The complaint was filed by Oswaldo José Quintana Cardona in his capacity as “legal representative” of RCTV (evidence file, folio 3721).

³²⁸ Criminal Cassation Chamber of the Supreme Court of Justice. Case No. C09-005. Decision No. 195 of May 7, 2009 (evidence file, volume XXIV, folio 26025).

whole process took less than two years and that the domestic authorities determined that the facts contained in the criminal complaint did not constitute offenses under Venezuelan law.

294. The Court considers that, from the information provided, it can be concluded that the complaint filed by RCTV was analyzed by various domestic courts and that RCTV was able to present remedies of appeal and cassation against the decisions that dismissed its claims. The Court notes that it has no evidence to determine whether the actions of the different courts that intervened in the criminal proceedings were contrary to the obligation to investigate. In addition, the Court stresses that the nature of the international jurisdiction is complementary and supportive and, thus, it does not perform the functions of a court of "fourth instance."³²⁹ This means that the Court is not a higher court or an appellate court to resolve disagreements between the parties relating to the assessment of evidence or the application of domestic law with regard to aspects that are not directly related to compliance with international human rights obligations.³³⁰

295. Based on the foregoing, the Court concludes that the State did not violate Article 8 of the Convention in the processing of the criminal complaint.

A.4. Judicial proceedings on the seizure of assets

A.4.1 Arguments of the Commission and of the parties

296. The **Commission** alleged the violation of both Article 8 and Article 25 of the Convention based on the judicial proceedings on the seizure of assets. In its analysis, the Commission considered three points raised by the representatives: the presumed victims' right of defense, the alleged delay in deciding the objection to the injunction, and the alleged lack of impartiality of the SCJ.

297. Regarding the presumed victims' right of defense, the Commission argued that Article 8 of the Convention had been violated because "before ordering the transfer of RCTV's assets to the State – or, in any case, after having done so – the Constitutional Chamber should have taken measures to ensure that the owners of the property in question were able to exercise their right of defense." The Commission also argued that "[i]t was a violation of due process for a court to order seizure of the property essential for a media outlet to operate without even notifying that media outlet beforehand of the existence of the proceeding. Lastly, the Commission indicated that it "fail[ed] to understand how the media outlet could be regarded as nothing more than an interested third party vis-à-vis a court order to seize its property, and was not given the right to make arguments and offer evidence in defense and support of its own interests."

298. Regarding the alleged delay in deciding the objection to the interim measures, the Commission stressed that "the proceedings that resulted in the interim measures issued by the Constitutional Chamber were decided within the space of one and three days, respectively, in stark contrast to the more than five years that have passed without the Constitutional Chamber issuing its ruling on the objection to those measures." The Commission also asserted that

³²⁹ The Preamble to the American Convention states that international protection should be seen as "reinforcing or complementing the protection provided by the domestic law of the American States." See also, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75). Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 31, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia*, para. 81.

³³⁰ Cf. *Case of Nogueira de Carvalho et al. v. Brazil. Preliminary objections and merits*. Judgment of November 20, 2006. Series C No. 161, para. 80, and *Case of the Afro-descendant Communities displaced from the Rio Cacarica Basin (Operation Genesis) v. Colombia*, para. 225.

"Venezuelan law requires that objections to interim measures be decided "promptly," and [...] considered that this must be a 'simple and prompt remedy,' in keeping with Article 25(1) of the Convention. Specifically, with regard to the instant case, the Commission argued that Article 25 of the Convention had been violated because it did "not find any explanation for the long delay in issuing a ruling on the objection to the interim measures that resulted in the seizure of RCTV's assets, measures that have remained in place the entire time that the decision on the objection to them has been pending."

299. Lastly, regarding the SCJ's lack of impartiality, the Commission mentioned "some context [presented in] its special report on *Democracy and Human Rights in Venezuela*, published in 2009, [in which the Inter-America Commission] characterized the 'lack of judicial independence and autonomy vis-à-vis the political power' [as] one of the weakest points in Venezuelan democracy." In addition, the Commission argued that "in the instant case, the highest ranking authorities in the executive branch of the Venezuelan government stated repeatedly, and in no uncertain terms, their opinions about RCTV and their opposition to renewal of its concession." Lastly, the Commission argued that the actions of the SCJ, "when analyzed as a whole and in the context described earlier, reveal that the SCJ was using proceedings that were lawful from a purely procedural standpoint to accomplish objectives of the executive branch."

300. The **representatives** alleged, with regard to the right of defense of the presumed victims, that "the Constitutional Chamber never summoned RCTV, its executives, shareholders, journalists or employees to appear at the proceedings in question, not even to contest the interim measures, thus openly and arbitrarily violating the law and the rights relating to defense, due process and judicial guarantees." The representatives also referred to the delay in the actions of the SCJ, emphasizing that "[i]t was surprising and extremely revealing to note the procedural speed and agility with which the courts acted on some occasions to adopt some decisions – all in favor of the government's interests – such as the one that deprived RCTV of the possession and effective ownership of its assets. This contrasted with the slowness, inactivity and procedural delay that occurred, and that can be attributed to the organ of the State, when RCTV requested a measure or action in the proceedings aimed at protecting its fundamental rights and the guarantees of due process."

301. Regarding the SCJ's alleged lack of impartiality, the representatives argued that "[t]his case [...] reveals a true instrumentalization of justice to benefit the interests of the Executive branch of government. The facts of the case represent a clear example of the lack of procedural integrity of the actions of the Chambers of the Supreme Court of Justice and reveal a total lack of independence of the highest judicial organ." The representatives concluded that "[a]ll these irregular and arbitrary procedural acts, which contravened the adjectival law, and which are not admissible in the normal practice of an impartial organ for the administration of justice, have constituted and characterized an additional violation of the rights of RCTV, its shareholders, executives and journalists established in Articles 8 and 25 of the American Convention to have access to effective, opportune and expedite justice."

302. The **State** argued that the "Constitutional Chamber of the Supreme Court issued interim measures which sought to safeguard the joint and separate interests of the users of the television service, guaranteeing their constitutional and legal rights to receive objective, opportune and true information through the media. Therefore, part of the RCTV assets are under special judicial protection, guaranteeing collective interests and the general interest of the Venezuelan population." Lastly, the State argued during the public hearing in this case that "the interim measures have an instrumental purpose to preserve the results of the proceedings," adding that the "judge must decide the interim measures immediately even [...] without notification, to avoid the person against whom they are addressed fraudulently

preventing their execution, and [in the instant case], this is how it proceeded, pursuant to the laws in force in Venezuela and in most legal systems.”

A.4.2 Considerations of the Court

303. The Court recalls that one of the main purposes of the separation of public powers is the guarantee of the independence of the judges and to avoid the judicial system and its members being subjected to undue restrictions in the exercise of their functions by organs outside the Judiciary, or even by those justices who exercise functions of review and appeal.³³¹ In addition, the guarantee of judicial independence encompasses the guarantee against external pressure,³³² so that the State must refrain from unduly interfering in the Judiciary or with its members – in other words, with the specific judge – and must prevent such interferences, and investigate and punish those who commit them.³³³

304. The Court reiterates that the right to a hearing by an impartial judge or court is a fundamental guarantee of due process, and it must be ensured that the judge or court, in the exercise of their functions to adjudicate, demonstrate the greatest objectivity in the proceedings.³³⁴ This Court has established that impartiality requires that the judge who intervenes in a dispute approach the facts of the case without any subjective prejudice and, also, offering sufficient guarantees of an objective nature to inspire the necessary confidence in the parties to the case, as well as in the citizens in a democratic society.³³⁵ The impartiality of the court implies that its members do not have a direct interest, a preconceived opinion, or a preference for one of the parties, and that they are not involved in the dispute.³³⁶

305. Regarding the arguments of the Commission and the representatives concerning the alleged existence in Venezuela of a context marked by the “lack of independence and autonomy of the Judiciary vis-à-vis the political power,” the Court has already determined that it has no evidence to find that the existence of this context has been proved in the instant case (*supra* para. 278). The Court also considers that the specific allegations that the decision to seize the RCTV assets could be related to a lack of independence and impartiality of the SCJ have not been substantiated in this case. Accordingly, the Court finds that, in this case, the allegations concerning the presumed violation of judicial independence and impartiality have not been proved.

306. Furthermore, regarding the presumed victims’ right of defense, the Court notes that the RCTV representatives were unable to intervene directly in the judicial proceeding in which the seizure of the assets owned by RCTV was decided, because it was only notified of the proceeding as possible interested parties by decree, without being able to present arguments

³³¹ Cf. *Case of Apitz Barbera et al. (“First Contentious Administrative Court”) v. Venezuela*, para. 55, and *Case of Argüelles et al. v. Argentina*, para. 147.

³³² Cf. *Case of the Constitutional Court v. Peru*, para. 75, and *Case of Argüelles et al. v. Argentina*, para. 147. See also: ECHR, *Campbell and Fell v. The United Kingdom*, (No. 7819/77; 7878/77), Judgment of June 28, 1984, para. 78, and ECHR, *Langborger v. Sweden* (No. 11179/84), Judgment of June 22, 1989, para. 32. See also: the United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of the Offenders, held in Milan from August 26 to September 6, 1985, and confirmed by the General Assembly in its Resolutions 40/32 of November 29, 1985, and 40/146 of December 13, 1985, Principles 2, 3 and 4.

³³³ Cf. *Case of Reverón Trujillo v. Venezuela*, para. 146, and *Case of Atala Riffo and daughters v. Chile*, para. 186.

³³⁴ Cf. *Case of Herrera Ulloa v. Costa Rica*, para. 171, and *Case of Usón Ramírez v. Venezuela*, para. 117.

³³⁵ Cf. *Case of Herrera Ulloa v. Costa Rica*, para. 171, and *Case of Argüelles et al. v. Argentina*, para. 168.

³³⁶ Cf. *Case of Palamara Iribarne v. Chile. Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 135, para. 146, and *Case of Usón Ramírez v. Venezuela*, para. 117.

or evidence.³³⁷ The fact that they were unable to intervene in a proceeding that clearly had an impact on the property rights of RCTV was an evident violation of the right of defense.

307. Lastly, the Court recalls that, in May 2007, the representatives of RCTV³³⁸ filed an appeal against the interim measures issued by the Constitutional Chamber in the context of the action on joint and separate interests that assigned the use of property owned by RCTV to CONATEL. The Court underscores that the interim measures issued in 2007 remain in force to date and that the State continues using RCTV's property to transmit the signal of the State channel TVes (*supra* para. 112). In this regard, Court reiterates that it must examine the facts relating to the appeal against the interim measures under the right to a reasonable time contained in Article 8(1) of the Convention. Thus, the Court notes that, since June 2007, no action has been taken in the proceedings to decide this appeal (*supra* para. 112). The Court also underlines that the State has not justified the existence of this delay and lack of activity. Consequently, the Court finds that the reasonable time has been violated in these proceedings.

308. Based on the above, the Court declares that Venezuela has violated the right to a hearing and a reasonable time established in Article 8(1), in relation to Article 1(1) of the American Convention, to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar and Francisco J. Nestares.

B) Alleged violation of Article 25 of the Convention – judicial protection

B.1. Application for constitutional amparo

B.1.1. Arguments of the Commission and of the parties

309. The **Commission** argued that Article 25 had been violated owing to an unjustified delay in deciding the application for constitutional amparo. The Commission referred to both the presumed violation of Article 25 of the Convention and to the presumed failure to comply with the respective deadlines established in the domestic law of Venezuela. Specifically, the Commission argued that “[i]n this case, it is clear that the formalities prescribed by Venezuelan law for applications for amparo were not observed. Also, it is not possible to claim that the decision delivered more than three months after the application was filed, was the prompt recourse required under Article 25(1) of the Convention.” In addition, the Commission argued that “the delay in deciding the application for amparo violated the right to a ‘simple and prompt recourse’ [...] for protection against acts that violate fundamental rights,’ as established by Article 25(1) of the Convention, to the detriment of the shareholders, executives and employees who jointly filed the application for amparo.”

310. The Commission argued that “the failure to observe the deadline prescribed by law had a real and serious effect, since while the decision on the application for amparo was still pending, in violation of Venezuelan law, on March 29, 2007, the MPPTI issued Communication No. 0424 in which it announced that RCTV's concession would not be renewed.” The Commission concluded that “the delay in deciding the application for amparo was not only a violation of Venezuelan law, but also had the effect of enabling the consummation of the very violations that the application for amparo was intended to prevent.”

³³⁷ Cf. Constitutional Chamber of the Supreme Court of Justice of Venezuela. Decision No. 957 of May 25, 2007. Case No. 07-0731 (evidence file, folio 3486).

³³⁸ The brief was presented by Gustavo J. Reyna, Pedro Perera Riera, José Valentín González P., José Humberto Frías and Alvaro Guerrero Hardy in their capacity as “legal representatives” of RCTV (evidence file, folios 3716 to 3719).

311. The **representatives** argued both the violation of Article 8 owing to “a violation of the judicial guarantee to be heard with no undue delay,” and the violation of Article 25 of the Convention owing to “a violation of the human right to effective judicial protection.” They argued that “it took 90 days – that is, three months – for the application for amparo to receive only the initial ruling on its admissibility and, as if this delay was not enough, the presiding judge declared that the application was inadmissible.” They added that “[t]he Constitutional Chamber merely had to verify the presence of a series of simple and formal requirements in order to process the application for amparo, a matter that, according to the law, should not take more than three days.”

312. The representatives also argued that the delay had an impact on the violation of the rights of the presumed victims because “during this 90-day delay, the violation against which the protection had been requested was consummated by the issue of the order to close down RCTV by the Minister of the People’s Power for Telecommunications and Information Technology.” They also argued that “[t]he judge of the Constitutional Chamber merely waited until the violation had been committed and until RCTV had filed a request for ordinary protection before another Chamber of the same Court before responding that the amparo was inadmissible because the unlawful administrative act had been contested using the ordinary remedy of the appeal for nullification.

313. The **State** reiterated its argument that “all the constitutional courts in the world have a backlog of cases and priority must be given to the cases that are most delayed based on the principle that everyone is equal before the law. In addition, in the case of RCTV, the Venezuelan constitutional principle prevailed which establishes that the “collective interest has preference over the individual interest.”

B.1.2. Considerations of the Court

314. The Inter-American Court has indicated that Article 25(1) of the Convention establishes the obligation of the States Parties to ensure to everyone subject to their jurisdiction an effective remedy against acts that violate their fundamental rights.³³⁹ This effectiveness also means that, in addition to the formal existence of such remedies, they must provide results or solutions to any violation of the rights established in the Convention, the Constitution or the law.³⁴⁰ In addition, the Court has established that, for a remedy to be effective, it is not sufficient that it is established in the Constitution or by law, or that it is formally admissible; rather, it must be truly appropriate to establish whether a human rights violation has occurred and to provide whatever is necessary to redress this. Those remedies that are illusory, owing to the general situation in the country or even the particular circumstances of the case, cannot be considered effective.³⁴¹ Consequently, the State has the responsibility not only to elaborate an effective remedy and enact it into law, but also to ensure the proper application of this remedy by its judicial authorities.³⁴²

³³⁹ Cf. *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2007. Series C No. 172, para. 177, and *Case of Argüelles et al. v. Argentina*, para. 145.

³⁴⁰ Cf. *Case of Mejía Idrovo v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of July 5, 2011. Series C No. 288, para. 95, and *Case of Argüelles et al. v. Argentina*, para. 145.

³⁴¹ Cf. *Case of Ivcher Bronstein v. Peru*, para. 137, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, para. 228.

³⁴² Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 237, and *Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of January 30, 2014. Series C No. 276, para. 116.

315. In this case, the application for constitutional amparo was filed on February 9, 2007, by a group of executives, journalists and other employees of RCTV³⁴³ against the President of the Republic and the Minister of the People's Power for Telecommunications and Information Technology based on "an imminent, immediate and possible threat" of violations of several rights including "the right to due process, expressed in the right to the presumption of innocence, the right of defense, and the right to a hearing by an impartial authority."³⁴⁴ The amparo remained pending a decision on March 28, 2007, the date on which CONATEL issued Communication No. 0424 and Resolution No. 002. On April 2, 2007, the applicants amended their initial application for amparo to refute the terms of the official decision not to renew the RCTV concession.³⁴⁵

316. According to the proven facts in this case, on May 17, 2007, the Supreme Court of Justice ruled on the application for amparo and declared it inadmissible. Among the reasons given, the SCJ referred to the Amparo Law pointing out that its article 6(5) indicated that "[w]hen the aggrieved party has chosen to have recourse to ordinary judicial proceedings or used pre-existing judicial procedures"³⁴⁶ the application will be inadmissible. In addition, it indicated that "since an ordinary procedure exists under adjectival administrative law that permits obtaining the same objective as would be obtained by filing the application for amparo, this is the procedure that should be used first by the person who considers that his constitutional rights have been violated."³⁴⁷

³⁴³ Cf. The application for constitutional amparo before the Constitutional Chamber of the Supreme Court of Justice of February 9, 2007, was filed by Gustavo J. Reyna and Pedro Alberto Perera Riera in their capacity as legal representatives of shareholder Marcel Granier, and also jointly by Gustavo J. Reyna, Pedro Alberto Perera Riera, José Valentín González P., and José Humberto Frías, in their capacity as legal representatives of (a) the RCTV company; (b) its executives: Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Isabel Valero, Rogelio Jaua, Julian Isaac, Odila Rubin, Francisca Castro, Pablo Mendoza, Daniela Bergami, Oswaldo Quintana and Eduardo Sapene; (c) the journalists: Magdi Gutiérrez, Miguel Ángel Rodríguez, Iván Pérez, Rita Núñez, Álvaro Algarra, Lolymer Viloria, Pedro Guerrero, María Castillo, Teo Castro, Luis Gómez, Isnardo Bravo, Erika Corrales, Berenice Gómez, Mercedes París, Tinedo Guía, Jennifer de Santana, Alejandro Silva, Jonnathan Quintero, Manuel Gago, León Hernández, David de Matteis, Alexys Palmera, Jhenny Chirinos, Trina Ballesteros, David Pérez, Junior Acosta, Ana Virginia Escobar, Javier García, Iris García, Violeta Rosas, Deilui Pernalet, Jofrana González, Isabel Mavarez, Ronald Rojas, Soraya Castellano, Randy Carrero, María Arriaga, Yuly Belle Youseff, Adriana Terán, Elizabeth Pérez, Elaine Marrero, Melanny Hernández, Vanesa Vásquez, Tamara Slusnys, Adriana Carrillo, Nayeli Villarreal, Jessica Flores, Jossybell Ávila, Morella Colina, Dioneila Abreu, Maryalejandra Pastrán, Marcialy Carreño, Jemmy García, Marielysa Castellano, Yamel Rincón, Pedro Beomón, Adriana Mussett, Adriana Toledo, Mirna Abreu, Eduardo Rivas, Larissa Patiño, Dayana Vásquez, Esther Gómez, Andrés Mendoza, Morella Giordana, Sasha Escalante, Irene Contreras, Yamileth Angarita, Mariemma Ramos, Norbis Guerra, María Baleato, Jenny Do Nascimento, Lourdes Mata, Laura Castellanos, Carla Betancourt, Verónica Hernández, María González and Francia Sánchez, (d) and also the employees attached to the Vice Presidency for Information and Opinion: Solisbella Sánchez, Andreina Rodríguez, Eduardo Torres, Luis Galaviz, Jorge Ramírez, Juan Ramírez, Manuel Yépez, Buenaventura Briceño, Joffry Castillo, José López, Jonathan Aular, Yomel Rondón, César Sánchez, Juan Rojas, Ramón Moreno, Maikel Rísquez, Dhennys Arenas, Lae-Ros Escobar, César Díaz, Deyvis Espinoza, Carolina Guidón, Miguel González, Luciana Peña, Lucymar Valladares, Jesús Ramírez, Juan Duarte, Franklin Luna, Simón Martínez, Francisco Maldonado, Jovito Villalba, Ana Primera, Eva Espinoza, Arturo Valbuena, Aura Meza, Oscar Becerra, Jenny de Araujo, Cristina Valladares, Félix Vivas, María Sojo, Jonathan Acevedo, Alex González, José González, Wilmer Martus, Leonardo Romero, Lennis Terán, María Arteaga, Luis Mota, Marco Camargo, Angel Cedeño, Reinaldo Trujillo, Andrea Quiroga, Adiala Salas, Leonardo Moscoso, José Luna, Desireé Segovia, Ayaris Prato, Luis Carreño, William Sosa, José Grau, María Sánchez, Guillermo Piñate, Evelyns Flores, Leonay Corso, Ileana Torrealba, Osman Mendoza, Ismelix Millán, Simón Rodríguez, Luis Martínez, Armando Zambrano, Douglas Márquez, Jesús Zerpa, Giovanni Mejías, Giovanni Campos, Raúl Medina, Winston Gutiérrez, Luis Hernández, Jorge Díaz, Ismael García, Wildejhon Agnaje, José Rengel, Ronald Pérez, Oswaldo García, Marlene Betancourt, María Jaeinto, Miguel Guzmán, Ingrid Hernández, Ximena Planchart, Lia Lezama and Héctor Duran. Cf. Application for constitutional amparo filed with the Constitutional Chamber of the Supreme Court of Justice of Venezuela on February 9, 2007 (evidence file, folios 25120 to 25123).

³⁴⁴ Cf. Application for constitutional amparo filed with the Constitutional Chamber of the Supreme Court of Justice of Venezuela on February 9, 2007 (evidence file, folio 25125).

³⁴⁵ Cf. Ratification of the application for amparo filed with the Constitutional Chamber of the Supreme Court of Justice of Venezuela on April 2, 2007 (evidence file, folios 3579 to 3589).

³⁴⁶ Constitutional Chamber of the Supreme Court of Justice of Venezuela. Case No. 07-0197. Inadmissibility decision of May 17, 2007 (evidence file, folio 3614).

³⁴⁷ Constitutional Chamber of the Supreme Court of Justice of Venezuela. Case No. 07-0197. Inadmissibility decision of May 17, 2007 (evidence file, folio 3619).

317. The Court notes that, when declaring the application inadmissible, the Supreme Court of Justice based its decision on the fact that domestic law establishes that, as the applicants could avail themselves of the ordinary procedure by using the administrative remedy seeking nullification against the administrative acts, it was not admissible to use the constitutional remedy of amparo. In this regard, the Court points out that the applicants filed the said appeal for nullification together with the application for amparo, and this was decided before the closure of RCTV took place (*supra* para. 105). Furthermore, the Court notes that the applicants amended their original application for amparo and included new requests (*supra* para. 104). Bearing in mind these three factors, the Court considers that, although the Supreme Court of Justice delayed slightly more than three months to rule on the application for constitutional amparo, this period was not excessive for deciding the application, and did not influence its effectiveness, particularly since its inadmissibility was based on the requirement that the appropriate remedy should be used against the administrative decisions contained in Communication No. 0424 and Resolution No. 002 prior to making an application for amparo. In addition, it cannot be considered that the ruling on this application for amparo permitted the consummation of the violation, because it was not the appropriate remedy to file against the said administrative decisions, since the appeal for nullification together with a request for protection had been filed on April 17, 2007, and the request was decided before the closure.

318. Consequently, the Court concludes that the decision on the application for constitutional amparo did not violate the right to a simple and prompt recourse of the RCTV shareholders, executives and employees, presumed victims in this case, established in Article 25(1), in relation to Article 1(1) of the American Convention.

B.2. Injunction request

B.2.1. Arguments of the Commission and of the parties

319. The **Commission** indicated that it had not found a lack of impartiality of the Political-Administrative Chamber of the Supreme Court of Justice in the decision to reject this request. The Commission indicated that although that Chamber had declared that "non-renewal of the frequency in no way implies a supposed violation of that right [to freedom of expression], since the provisional protection of freedom of expression was requested, [...] it was inevitable – or at least predictable – that the court would take a position on a matter related to the merits of the appeal for nullification." The Commission also argued that "notwithstanding the importance of meeting the legally-prescribed deadlines, the delay of more than one month in deciding the injunction request did not prejudice the [presumed] victims' access to justice, given that it was decided before the event it was meant to prevent, that is RCTV being removed from the air."

320. The **representatives** indicated that the requests for an injunction and for unspecified interim measure were processed "negligently and with a notorious delay, even though, due to their nature, they required an urgent ruling; [and] this delay and this paralysis evidently violated the right to judicial protection and due process." Specifically, with regard to the injunction, the representatives argued that "the Political-Administrative Chamber "had three working days [to decide the injunction request]; however, the Chamber issued its decision on May 23, 2007, one month after the protection had been requested, [...] and this [...] was inadmissible."" They argued that "the unjustified delays by the Judiciary" entailed "the consummation of irreparable harm to [the presumed victims]." They indicated that the right to an effective recourse contained in Article 25 of the Convention had been violated, because the arguments presented by RCTV had been ignored arbitrarily and as part of the State policy [...] to punish RCTV and prevent it from imparting information."

321. The **State** presented no specific arguments on this point.

B.2.2. Considerations of the Court

322. As already indicated, the Court has considered that, in the terms of Article 25(1) of the Convention, the amparo should be a “simple and prompt” recourse, while nullification should be decided within a “reasonable time” pursuant to Article 8(1) of this instrument. In this case, the Court recalls that the injunction request³⁴⁸ was filed at the same time as the appeal for nullification and the request for an unspecified interim measure (*supra* para. 107). In this regard, the Court notes that the Political-Administrative Chamber took from April 17 to May 22, 2007, to decide on the injunction, despite the 3-day time limit to do so. Despite this, the Court notes that the injunction was decided before the date on which RCTV was closed down. In this regard, it recalls that the injunction request asked that: (i) [the State] refrain from taking any decision that could prevent RCTV from transmitting its programming until a final judgment had been delivered on the merits of the case, and (ii) that the necessary measures be taken to ensure that the station could continue operating with the same frequencies and throughout national territory, until the final ruling on the action.

323. In the Court’s opinion, in this case, the time that elapsed between the presentation of the injunction request and the respective decision did not have an adverse effect on the judicial protection of the presumed victims, because the injunction was decided before the closure of RCTV. Consequently, the Court finds that, in the case of this injunction, the State did not violate the right to judicial protection, established in Article 25(1), in relation to Article 1(1) of the Convention.

IX RIGHT TO PROPERTY

Arguments of the parties and of the Commission

324. The **Commission** found that Venezuela had not violated the right to property established in Article 21 of the Convention. Regarding the deprivation of assets, the Commission explained that, for the deprivation of a person’s assets to be compatible with the right to property established in the Convention it must be based on reasons of public utility or social interest, subject to payment of just compensation, and restricted to the cases and according to the forms established by law. It added that, in order to find a violation of the right to property, the effect on the personal property of the presumed victims must be clearly established. In this way, it is possible to distinguish between State actions that affect the rights of a legal person and those that affect the rights of a natural person. On this basis, the Commission declared that the presumed victims had not presented sufficient evidence of the direct effect on the personal property of the shareholders presented as victims as a result of the State’s seizure of RCTV’s tangible assets.

325. Regarding the non-renewal of the RCTV concession, the Commission considered that given the uncertainty with regard to the applicable legal framework and its proper interpretation under Venezuelan domestic law, under these procedures it cannot be concluded that RCTV had an acquired right to the automatic renewal of its concession. It added that, RCTV was entitled

³⁴⁸ Article 5 of the Organic Law on Protection of Constitutional Rights and Guarantees, in force at the time of the facts, established that: “[w]hen an application for amparo is made against administrative acts at the same time as the contentious administrative recourse based on the violation of a constitutional right, the exercise of the recourse shall be admissible at any time, even after the time limits established in the Law, and it shall not be necessary to exhaust the administrative channel previously.” Organic Law on Amparo of Constitutional Rights and Guarantees of December 18, 1988, article 5. Available at: <http://www.tsj.gov.ve/legislacion/loadqc.html>.

to participate, in equal conditions, in an open and transparent renewal process with clear, objective and non-discriminatory criteria. The Commission concluded that even if the non-renewal of the RCTV concession had an effect on the property of the television station's shareholders, it had not been proved that the concession itself formed part of the shareholders' property.

326. The **representatives** argued that, in this case, the broad concept of the right to property protected by the Convention and that of its purpose was applicable because various property rights were involved: the shares, the RCTV concession, and the seizure of the RCTV assets. They explained that, for the effects of this case, the diverse nature of this property required establishing the scope of the protection of property provided by the Convention, in light of the purpose of the right to property. They argued that, just as the protection offered to the owner is broad, so is the range of property involved, as regards the tangible and intangible items that may be subject to ownership, and ownership of which may be understood as the right to property.

327. Additionally, the representatives argued that property is not only a human right in itself, but can have numerous functions linked to the exercise of other human rights, and the protection provided against violations of the right to property is frequently related to the violation of other human rights and their international protection. The representatives linked the right to property to freedom of expression when arguing that, by creating, acquiring or operating a media outlet, its owner becomes involved, through the right to property, in the activity protected by Article 13 of the Convention. They added that private ownership of a media outlet is the legal structure that guarantees the independence and plurality of the media. They argued that the type of limits or interferences that the law may impose on property should be adapted to the requirements of freedom of expression when the property is the vehicle for its exercise, because violation of the property of a media outlet may involve an illegitimate (direct or indirect) restriction of freedom of expression. In the case of RCTV, the representatives argued that the television channel was not an ordinary company, and the interests at stake were not limited to preserving a commercial establishment, but stemmed from the fact that it was a media outlet through which freedom of expression was exercised including, at times, commentaries that were critical to the government's administration.

328. The representatives argued that the RCTV concession, as protected property, whose ownership for the exclusive use of a television frequency involved an economically useful and productive asset, in other words a capital asset that, due to its nature, could be used and enjoyed, fell within the sphere of protection guaranteed by Article 21 of the Convention. They underscored that the concession was a property right that could be expropriated and that this did not only include expropriation in the sense legitimately conceived under domestic law and international law, but was also subject to illegitimate forms of "deprivation" prohibited by Article 21(2) of the Convention, according to which "[n]o one shall be deprived of his property," except for expropriations carried out in accordance with the law. The representatives argued that the limitations to property must be clearly established by a formal law that is sufficiently clear so that such limitations are predictable and respect the essential content of the right to property. They argued that the maximum limitation that may be imposed on the right to property is expropriation, which is understood to be the effective elimination of the right to property, whether or not a judicial expropriation procedure has been filed and whether or not the owner has been deprived of formal ownership of the right or whether this has been transferred to the expropriator or a third party. They added that the relevant point was the illegitimate elimination of the right to property, and not that the property had been transferred to the State or to another person or entity.

329. The representatives argued that the State had also violated the right to property guaranteed by Article 21 of the Convention when it decided to seize RCTV's tangible assets in

an arbitrary procedure. They also argued that the elimination of the right to property, even for reasons of public utility or social interest, when just compensation is not paid, is an unlawful deprivation of property that violates Article 21 of the Convention. The representatives argued that the seizure of the equipment was carried out without previously declaring that it was of public utility, without respecting the expropriation procedure established by the laws of Venezuela, and without paying compensation. They added that the arbitrary seizure by the Supreme Court of Justice was a confiscation under the appearance of an interim measure, an appearance that was irrelevant to change the confiscatory nature of the act, and RCTV was deprived of those assets in open violation of Article 21(2) of the Convention.

330. The representatives indicated that a broad application of the right to property would result in an interpretation that it included the shareholder's legal title to assets. They added that Article 1(2) of the Convention established that, for the purpose of the protection system established by the Convention, "person" means every human being." However, they argued that Article 1(2) only excluded legal persons from the sphere of the Convention. They alleged that companies were excluded, but not the partners and that this distinction was of crucial importance because a legal person also served as a vehicle to implement activities that were the exercise of human rights guaranteed by the Convention. Additionally, the representatives argued that the shares in a commercial company are property and enjoy the protection of Article 21 of the Convention. The representatives explained that when they cited Article 21 of the Convention to denounce its violation, they were not referring to the rights of the shareholder who plays an active role in the activities of the company, but rather they were referring to the harm suffered by shareholders' property, particularly the value of the shares, owing to "the arbitrary actions taken by the State in order to close down RCTV, including the arbitrary non-renewal, and the asset seizure, which resulted in the destruction of the economic value of their property." The foregoing was because the elimination of the company's assets resulted in the destruction of the shares as titles that represented a specific value.

331. The representatives also emphasized that RCTV was a closed family company and that the shareholders represented all the partners, who together represented the whole ownership of the media outlet, so that the non-pecuniary interests and the pecuniary interests of the partners merged with the non-pecuniary interests and the pecuniary interests of the legal person of the media outlet.

332. The **State** shared the Inter-American Commission's opinion when it concluded that "the petitioners ha[d] not provided sufficient evidence of the direct effect on the personal property of the shareholders presented as victims as a result of the State's seizure of RCTV's tangible assets." Consequently, the State concluded that it was excused from providing compensation for harm to the patrimony of the RCTV shareholders and that it owed nothing in relation to the interim measures that awarded the property that belonged to RCTV.

333. The State indicated that the Commission had concluded that it was not possible to determine that RCTV had an acquired right to the automatic renewal of its concession. It argued that the Venezuelan State was responsible for the administration of the electromagnetic spectrum and that it was its prerogative to renew the concession or to use it itself because, since it owned the right, it was not obliged to open a new procedure

Considerations of the Court

334. The Court takes note that the Commission did not find any violation of the right to property established Article 21 of the Convention, while the representatives argued that this right had been violated. The Court reiterates that "the presumed victims or their representatives may invoke rights other than those cited by the Commission, based on the

facts that the Commission describes,"³⁴⁹ so that it is in order to examine the alleged violation of Article 21 of the Convention.

335. In this regard, the Court has understood in its case law that property is a broad concept that encompasses, among other matters, the use and enjoyment of property, defined as appropriable material possessions, as well as any right that may form part of a person's assets. This concept includes all movable and immovable property, tangible and intangible elements, and any other immaterial object that may have a value.³⁵⁰ In addition, the Court has considered that acquired rights, understood as rights that have been incorporated into a person's assets, are protected.³⁵¹

336. In addition, it should be reiterated that the right to property is not absolute and, in this sense, it may be subject to restrictions and limitations, provided these are implemented using the appropriate legal means and in keeping with the standards established in Article 21.³⁵² The first paragraph of this article recognizes the right to property and indicates that everyone has the right to the use and enjoyment of this property; it also includes a limitation of this right based on the interest of society.³⁵³ The second paragraph refers to the expropriation of property and the requirements to ensure that this action by the State may be considered justified. In this regard, the Court has established that it should not restrict itself to examining whether a formal expropriation or dispossession has occurred, but should also look beyond the appearance and verify the real circumstances behind the situation that has been denounced.³⁵⁴

337. As mentioned previously, when analyzing violations of the right to freedom of expression in previous cases, the Court has considered that although the device of "legal person" has not been expressly recognized by the American Convention, this does not limit the possibility that, in certain circumstances, an individual may have recourse to the inter-American system to assert his rights, even when they are covered by a legal fiction created by the legal system itself and it has therefore examined the possible violation of the property rights of certain individuals in their capacity of shareholders.³⁵⁵

338. In such cases, the Court has made a distinction between the rights of the shareholders of a company and those of the company itself, indicating that domestic law grants shareholders certain direct rights such as to receive the agreed dividends, to attend and vote in the general assemblies, and to receive part of the company's assets if it is liquidated.³⁵⁶ Thus, in order to determine whether a right to property of the shareholders has been violated, the harm caused to their rights must be clearly proved.³⁵⁷

339. To determine whether these direct rights of the RCTV shareholders have been harmed, as distinct from the alleged harm to the assets of the company, the Court will analyze in greater detail whether there was a violation of property rights, based on the arguments of the parties

³⁴⁹ Cf. *Case of the "Five Pensioners" v. Peru*, para. 155, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia*, para. 47.

³⁵⁰ Cf. *Case of Ivcher Bronstein v. Peru*, para. 122, and *Case of Mémoli v. Argentina*, para.170.

³⁵¹ Cf. *Case of the "Five Pensioners" v. Peru*, para. 102, and *Case of Abrill Alosilla et al. v. Peru*, para. 82.

³⁵² Cf. *Case of Acevedo Buendía et al. ("Dismissed and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009 Series C No. 198, para. 84, and *Case of Mémoli v. Argentina*, para.170.

³⁵³ Cf. *Case of Salvador Chiriboga v. Ecuador*, para. 55.

³⁵⁴ Cf. *Case of Ivcher Bronstein v. Peru*, para. 124, and *Case of Mémoli v. Argentina*, para. 170.

³⁵⁵ Cf. *Case of Cantos v. Argentina. Preliminary objections*, para. 29, and *Case of Perozo et al. v. Venezuela*, paras. 399 and 400.

³⁵⁶ Cf. *Case of Ivcher Bronstein v. Peru*, para. 127, and *Case of Perozo et al. v. Venezuela*, para. 400.

³⁵⁷ *Mutatis mutandis*, *Case of Perozo et al. v. Venezuela*, para. 402.

concerning: (i) the non-renewal of the RCTV concession for the use of the electromagnetic spectrum; (ii) the interim measures imposed by the Constitutional Chamber of the Supreme Court of Justice on RCTV's assets, and (iii) the possible effects on the value of the shares owned by the RCTV partners.

1. The non-renewal of the RCTV concession for the use of the electromagnetic spectrum

340. When examining the violation of the right to freedom of expression, the Court established that States have the authority to regulate broadcasting activities, including by defining the way in which concessions are granted or renewed (*supra* para. 165). Furthermore, regarding Venezuela's domestic laws, the Court notes that the Constitution of the Bolivarian Republic of Venezuela establishes that "the full sovereignty of the Republic is exercised on the continental and insular spaces, over lakes and rivers, inland seas, historic, vital and inland marine areas and those lying within such straight baselines as have been adopted or may come to be adopted by the Republic; the soil and subsoil of these areas; the continental, insular and maritime airspace, and the resources located within the aforementioned spaces, including genetic resources, migratory species, derived products and intangible components that may be present within the aforementioned spaces due to natural causes."³⁵⁸ Thus, to the extent that the electromagnetic spectrum is part of the airspace resources, the State also exercises full sovereignty over this.³⁵⁹

341. Similarly, the Organic Communications Law establishes that this resource is a public commodity that is the property of the Republic, and its use and exploitation require the respective legal concession.³⁶⁰ In this regard, witness Suárez stated that "owing to the legal nature of the electromagnetic spectrum as a public commodity, [...] it cannot be transferred, is inalienable, and cannot be divested. It could not be established or considered that there is an automatic renewal of this type of commodity."³⁶¹ Additionally, expert witness Romero Graterol explained that "it has been recognized that the radioelectric spectrum [...] is a scarce and limited resource because it is essential for the operations of networks [...], especially broadcasting services."³⁶²

342. Bearing this in mind, the Court notes that the electromagnetic spectrum is a public commodity within the State's domain and, therefore, its ownership cannot be claimed by private individuals. Consequently, it is not possible to affirm that RCTV and, in particular, its shareholders had acquired a right to, or ownership of, the spectrum.

³⁵⁸ Constitution of the Bolivarian Republic of Venezuela, article 11.

³⁵⁹ Article 11 of the Constitution of the Bolivarian Republic of Venezuela establishes that the full sovereignty of the Republic is also exercised over the continental, insular and maritime airspace and the resources within this, such as the electromagnetic spectrum. In this regard, expert witness Alfredo Morles Hernández explained that "the radio spectrum, as part of the terrestrial and extraterrestrial atmosphere in which the waves that produce sounds and images circulate is physically intangible as a whole; however, the airspace may be occupied partially and, by employing technology, the radio spectrum may be used." Opinion of expert witness Alfredo Morles Hernández of May 5, 2014 (merits file, volume III, folio 1593).

³⁶⁰ Telecommunications Organic Law of Venezuela. March 28, 2000, articles 5 and 7 (merits file, volume IV, annex 21, folios 2956 to 3051). This ownership was also recognized in the previous Telecommunications Organic Law, which assigned the establishment and exploitation of the whole communications system and procedures for the transmission of electric or visual signals exclusively to the State. In this regard, see Telecommunications Organic Law of Venezuela. August 1, 1940, article 1, complete text consulted at: http://www.procuraduriacarabobo.gob.ve/site/images/stories/pdf_descargas/leyes/derogadas/Ley%20de%20Telecomunicaciones%201940.pdf

³⁶¹ Opinion of expert witness José Leonardo Suárez during the public hearing in this case.

³⁶² Opinion of expert witness Heli Rafael Romero during the public hearing in this case.

343. Having determined this, the Court will now examine the representatives' argument that the non-renewal of the concession was comparable to an illegitimate elimination of the presumed victims' right to property with regard to the concession, in the understanding that this was an asset protected under the American Convention. On this point, the Court has already concluded that no right existed to the renewal or automatic extension of the concession (*supra* para. 180), so that, in this case, there are no arguments or regulations that would allow the Court to interpret that Venezuela's laws created a right to the extension of concessions that benefited the company. Accordingly, the possibility that the State would renew RCTV's concession for the use of the electromagnetic spectrum in 2007 cannot be considered an acquired right to an asset already incorporated into the company's property. This possibility was a mere expectation of renewal that was conditional on the State's authority to establish controls over a resource that it owned. Consequently, the financial benefits that the shareholders might have received as a result of the renewal of the concession cannot be considered acquired rights or assets that were part of the direct property of the shareholders and that could be protected by Article 21 of the American Convention.

344. The Court also notes that RCTV did own a property right as a result of the 20-year concession granted based on Decree No. 1577, for which the State had granted a license. However, it finds that the State did not prevent RCTV's use of the electromagnetic spectrum or arbitrarily interfere in the exercise of the rights derived from the concession contract while it was in effect, acts that could truly have violated the right to property of the presumed victims.

2. The interim measures imposed by the Constitutional Chamber

345. The Court has established that the adoption of an interim measure in the domestic jurisdiction does not constitute *per se* a violation of the right to property. Even though it does constitute a limitation of this right, insofar as it affects the ability of the individual to freely dispose of his possessions, it does not signify a transfer of the ownership of the property rights.³⁶³ Nevertheless, the Court considers that the adoption of actual interim measures must be justified previously by the inexistence of any other type of measure that is less restrictive of the right to property. Also, the disposal of the property cannot be definitive and must be restricted exclusively to its administration and conservation.³⁶⁴

346. Additionally, judicial authorities should adopt and supervise such measures, taking into account that if the reasons that justified the interim measure disappear, the judge must assess the pertinence of continuing the restriction.³⁶⁵ The said judicial authorities must also consider the possibility of moderating the impact of the duration of the civil proceedings on the ability of the presumed victims to dispose of their possessions, so that it does not affect their right to property disproportionately.³⁶⁶

347. In this case, on May 25, 2007, the Constitutional Chamber of the SCJ issued ruling No. 956, in which it admitted the application for amparo against the MINCI, the MPPTI and the Venezuelan Public Television Foundation and ordered, by means of unspecified interim measures, the provisional transfer to CONATEL of the use of the assets owned by RCTV,³⁶⁷ so that CONATEL could arrange the use of these assets by TVes, because the latter did not have the necessary infrastructure to transmit nationwide (*supra* para. 95). Also, to protect the

³⁶³ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 187, and *Case of Mémoli v. Argentina*, para. 178.

³⁶⁴ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, paras. 187 and 188.

³⁶⁵ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 188.

³⁶⁶ Cf. *Case of Mémoli v. Argentina*, paras. 180 and 183.

³⁶⁷ Supreme Court of Justice, Constitutional Chamber, Case No. 07-0720, Decision No. 956 of May 25, 2007 (evidence file, volume VII, annex 64, folio 3461).

continuity of the provision of a universal public service, in ruling No. 957 the Constitutional Chamber assigned to CONATEL the right to use the necessary equipment for television operations so that it could transfer its use to the operator established to this end pursuant to the provisions of the LOTEL.³⁶⁸ Both measures were executed on May 27 and 28 that year and both measures were executed with regard to the property owned by the company.

348. The Court recalls, as it has indicated in other cases, that it does not have jurisdiction to examine the presumed violations of the Convention to the detriment of legal entities.³⁶⁹ Therefore, it is unable to analyze the consequences arising from the interim measures imposed on the property that formed part of RCTV's assets³⁷⁰ or to determine whether those consequences have violated the company's right to property.

349. One of the expert witnesses proposed by the representatives indicated that the strict separation between the assets of the shareholders and those of the legal entity should not be applied in this case. Regarding the effects that directly limit the rights of the shareholders, expert witness Alfredo Morles Hernández indicated that "the general rule of the separation of assets, characteristic of limited liability companies in general, should be substituted by the rule of the merging of assets, for the simple reason that the corporate guise of the communications business is a fiction [...]. This reality is a well-known, public fact. It does not have to be proved."³⁷¹ Similarly, the expert witness argued that "in [a] closed corporation, a company with a limited number of shareholders, frequently a family company, which is not subject to any kind of third party protection, [...] a phenomenon can be observed of a lack of differentiation in the shareholders' administration of the company's assets, with the result that the company's assets and the shareholders' assets merge into one."³⁷²

350. Regarding the argument that the general rule of the separation of assets should not be applied, the Court has established that the legal entity of RCTV was a vehicle for the freedom of expression of its employees and executives (*supra* para. 148). Nevertheless, it does not find that this provides sufficient legal grounds to assert that this instrumental function signifies that the separation of the assets of the legal person and its shareholders has disappeared. The Court reiterates that the rights of a company's shareholders differ from the rights of the legal person;³⁷³ thus, in order to overlook the legal personality of the limited liability company and attribute legitimacy for the shareholders to claim the harm resulting from acts addressed at the company, it is necessary to have sufficient evidence to prove that relationship.

351. No evidence was presented to substantiate the assertion made by expert witness Morles concerning the merging of the assets owing to administration by the family. Without

³⁶⁸ Cf. Decision of the Supreme Court of Justice, Constitutional Chamber, Files No. 07-0731, Decision No. 957 of May 25, 2007 (evidence file, volume VII, annex 65, folio 3486).

³⁶⁹ Cf. *Case of Cantos v. Argentina. Preliminary objections*, para. 29, and *Case of Perozo et al. v. Venezuela*, paras. 399 and 402.

³⁷⁰ Even though the Court's case file does not contain any official ownership record or document proving that RCTV C.A. owns the assets subject to the interim measures, the Court notes that, both the judgment of the Supreme Court of Justice ordering the measure and the records of the execution of the measure expressly refer to RCTV's ownership of the said assets. In this regard, see Decision No. 957 of the Supreme Court of Justice, Constitutional Chamber, Case No. 07-0731, of May 25, 2007 (evidence file, folios 3486 and 3487), and Record of the execution of the judgment of the Supreme Court of Justice of May 27, 2007 (evidence file folios 3494 to 3509, 3511 to 3522 and 3524 to 3531).

³⁷¹ Opinion of expert witness Alfredo Morles Hernández of May 5, 2014 (merits file, folio 1609).

³⁷² Opinion of expert witness Alfredo Morles Hernández of May 5, 2014 (merits file, folio 1611).

³⁷³ Cf. *Case of Cantos v. Argentina. Preliminary objections*, para. 26. This division has also been recognized repeatedly in international law. In this regard, see also *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, p. 36, para. 47. similarly, the International Court of Justice in the case of Ahmadou Sadio Diallo, recognized that "international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders." *Republic of Guinea v. Democratic Republic of the Congo*, Judgment I.C.J. November 30, 2010, para.155

intending to provide a detailed definition of this mechanism, the Court understands that family businesses are, by definition, those in which several members of a family group retain control of a company, but the administration, the assets, and the family remain as three distinct areas of the family business. Consequently, there is no basis for understanding that whenever there is a family business, a possible merging of assets occurs; especially when, as has been proved in this case, the share composition is complex (*supra* para. 65) because the direct shareholders of RCTV are other companies.

352. Based on the above, the Court will not analyze the possible violation of the right to property of RCTV owing to the seizure of its assets, since RCTV is a legal person. Consequently, this Court will merely examine the presumed effect that the interim measures could have had directly on the assets of the shareholders; in other words, on the shares they own. Nevertheless, the Court considers it necessary to emphasize that the decision it takes should have no impact on the damage that may be declared in the domestic sphere owing to the seizure of the assets owned by RCTV, or on the impact on the possible reparations that could be awarded directly to the legal person on that basis.

3. The possible harm to the value of the shares owned by the RCTV partners

353. The Court has already indicated that domestic laws grant shareholders specific direct rights such as to receive the agreed dividends, to attend and vote during general assemblies and to receive part of the company's assets when it is liquidated.³⁷⁴

354. In this case, the file before the Court does not show that there was any limitation to the management rights of the shareholders, such as those relating to their participation in the shareholders general assemblies. However, the possible violation of the right to property of the presumed victims has been alleged as a result of the loss of value of their shares owing to the non-renewal of the concession for the use of the electromagnetic spectrum and the interim measures imposed on RCTV's assets.

355. In this regard, in the case of *Chaparro v. Ecuador*, the Court considered that, since Mr. Chaparro held 50% of the shares of the company and was its manager, it was "clear that a value could be placed on this participation in the company's shares, which formed part of its owner's property from the moment it was acquired. As such, this participation constituted an asset to which Mr. Chaparro had the right to use and enjoyment."³⁷⁵ The Court recalls that, in the instant case, the relationship between the presumed victims of this harm and the company affected is not direct (*supra* para. 65), which makes it difficult to make an assumption about the possible harm to the shares. Indeed, the Court reiterates that, in this case, it has found proved that the presumed victims are shareholders of legal entities or separate autonomous assets (*supra* para. 65) that, in turn, are shareholders or owners of a chain with between one and five other legal entities until it reaches the company, RCTV C.A. Consequently, the Court considers that this complex shareholding, resulting from a wide-ranging structure of legal entities with separate assets, makes it even more difficult to be able to establish a direct and clear relationship between the alleged loss of share value and the harm to the patrimony of the legal entity, RCTV.

356. Furthermore, in the case of *Perozo et al. v. Venezuela*,³⁷⁶ the Court indicated that it was necessary to prove how the harm to the assets owned by "Globovisión" resulted in harm to the rights of the company's shareholders and, since it did not find that this harm had been

³⁷⁴ Cf. *Case of Ivcher Bronstein v. Peru*, para. 127, and *Case of Perozo et al. v. Venezuela*, para. 400.

³⁷⁵ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 182.

³⁷⁶ Cf. *Case of Perozo et al. v. Venezuela*, para. 402.

proved, it concluded that the shareholders' right to property had not been violated in that case. Bearing this in mind, the Court will now analyze whether, in the instant case, the harm to the shares owned by the presumed victims has been proved.

357. That said, the Court underscores that the representatives provided evidence aimed at proving, quantitatively, the harm to the property of the presumed victims. This evidence included a financial report on the results of the closure of RCTV,³⁷⁷ an executive report on the financial model to evaluate the effect of the elimination of the concession,³⁷⁸ technical reports on the valuation of RCTV C.A.³⁷⁹ and the company's financial statements.³⁸⁰ Similarly, the Court's case file contains the expert opinion of Ángel Alayón concerning the calculation of the damage to the personal assets of the RCTV shareholders.³⁸¹ These documents refer specifically to the pecuniary damage resulting from the alleged "unlawful and arbitrary elimination" of the concession on the company's value and on the value of its shares; therefore, they will not be taken into account in order to determine the effective violation of the property of the RCTV shareholders. This is because, the Court recalls, the renewal of the concession was not an acquired right already incorporated into the company's assets (*supra* para. 180); therefore, the financial effects that this may have had on the share value cannot be claimed as the property of the shareholders in this case.

358. Nevertheless, the proven facts in this case have established that the interim measures involved the transfer of the company's assets, such as "high frequency waves, teleports, transmitters, auxiliary television equipment, auxiliary power and climate control equipment, towers, antennas, broadcasting booths, station booths, perimeter fencing, and electrical connections" to the State for assignment of their use and enjoyment to other operators of the television signal. The representatives presented photographs, physical inventories and reports with certifications of the replacement value of the assets that were the subject of this measure.³⁸² However, the harm caused to the right to property of the presumed victims has not been proved because, in order to establish the harm, first it was necessary to prove harm to the companies of which they are direct shareholders and the way in which this could have had repercussions on each of the legal entities that, in turn, formed part of the widespread company structure, until reaching the shares or trust of which the presumed victims are direct owners. Therefore, the Court has no evidence that would prove the alleged harm to the assets of Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar and Francisco J. Nestares.

4. Conclusion on the right to property

359. Based on paragraphs 343, 344, 352 and 358 and taking into account that the potential financial benefits resulting from the possible renewal of the concession were not acquired rights and that the harm that the interim measures could have had on the value of the shares of the

³⁷⁷ Financial report on the results of the closure of RCTV dated March 22, 2010 (merits file, folio 3540 to 3544).

³⁷⁸ Executive report on the financial model to evaluate the effect of the elimination of the concession dated August 2013 (evidence file, folio 4769).

³⁷⁹ Technical report: Valuation of Radio Caracas Televisión RCTV C.A. to 2007 (evidence file, folios 819 to 821).

³⁸⁰ Consolidated financial statements from January 1, 1999, to December 31, 2007 (evidence file, folio 4775).

³⁸¹ Opinion of expert witness Ángel Alayón of May 7, 2014 (merits file, folio 1636 to 1666).

³⁸² Inventory of the assets confiscated from RCTV, without valuation, and Reports on Jeremba I and II, Agualinda, Begote, Bejuma, Picacho Nirgua, Pico Alvarado, Pico Galicia, Paramo Zumador, Punta Mulatos, Paramo San Telmo, Pto. Ordaz, Puerto Cabello, Vidoño, Tucupita, Tucusito, Valle de la Pascua, Sabana Larga, San Fernando, Tereperina, Topo Gallinero, Palma Real, Guanare, Higuero, La Aguada, La Arenosa, Laguneta, Maracaibo, Maturin I and II, Mecedores, El Tigre, Ciudad Bolívar, Cerro Copey, Cerro la Cruz, Cerro Plantillón, Cerro Vichú, Charallave I and II, Curimagua I and II, Caricua, Acarigua, Altamira, Auyatiro, Barinas Carabella and Puerto Concha (evidence file, folios 31091 to 32230).

RCTV partners has not been clearly proved, the Court finds that, in this case, it has not been proved that the State has violated the right to property of the presumed victims pursuant to Article 21 of the Convention.

X REPARATIONS (*Application of Article 63(1) of the American Convention*)

360. Based on the provisions of Article 63(1) of the American Convention,³⁸³ the Court has indicated that any violation of an international obligation that has caused harm entails the obligation to repair this adequately,³⁸⁴ and that this provision reflects a customary rule that constitutes one of the fundamental principles of contemporary international law on State responsibility.³⁸⁵

361. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. If this is not feasible, as in most cases of human rights violations, the Court will determine measures to ensure the rights that have been violated and to redress the consequences of the harm that the violations have caused.³⁸⁶

362. This Court has established that reparations must have a causal nexus with the facts of the case, the violations that have been declared, the harm that has been proved and the measures requested to redress the respective harm. Therefore, the Court must observe this concurrence to rule appropriately and pursuant to the law.³⁸⁷

363. The Court has found it necessary to grant diverse measures of reparation in order to redress the harm integrally, so that in addition to pecuniary compensation, measures of satisfaction, restitution and rehabilitation as well as guarantees of non-repetition have special relevance owing to the adverse effects and harm caused.³⁸⁸

364. Based on the violations of the American Convention declared in Chapters VII and VIII, the Court will now examine the arguments and recommendations submitted by the Commission and the claims of the representatives, as well as the arguments of the State, in light of the criteria established in the Court's case law concerning the nature and scope of the obligation to make reparation,³⁸⁹ in order to establish measures aimed at redressing the harm caused to the victims.

A) Injured party

³⁸³ Article 63(1) of the Convention establishes that "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

³⁸⁴ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Cruz Sánchez et al. v. Peru*, para. 451.

³⁸⁵ Cf. *Case of Castillo Páez v. Peru. Reparations and costs*. Judgment of November 27, 1998. Series C No. 43, para. 50, and *Case of Cruz Sánchez et al. v. Peru*, para. 451.

³⁸⁶ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 26, and *Case of Cruz Sánchez et al. v. Peru*, para. 452.

³⁸⁷ Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Cruz Sánchez et al. v. Peru*, para. 453.

³⁸⁸ Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, paras. 79 to 81, and *Case of Cruz Sánchez et al. v. Peru*, para. 452.

³⁸⁹ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, paras. 25 to 27, and *Case of Cruz Sánchez et al. v. Peru*, para. 454.

365. The Court reiterates that, pursuant to Article 63(1) of the Convention, it considers that anyone who has been declared a victim of the violation of any right recognized in this instrument is an "injured party." Therefore the Court considers that the following are the "injured party": Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Francisco J. Nestares, Alicia Phelps de Tovar, Fernando Nestares, Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Eladio Lárez, Odila Rubin, Oswaldo Quintana, Eduardo Sapene, Daniela Bergami, Isabel Valero, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño. Consequently, as victims of the violations declared in Chapters VII and VIII, they will be considered the beneficiaries of the reparations ordered by the Court.

B) Obligation to investigate the facts and identify, prosecute and punish, as appropriate, those responsible

366. The **Commission** did not submit any specific arguments on this request by the representatives.

367. The **representatives** asked the Court to require "a complete investigation into the human rights violations that could be attributed to the Venezuelan State [...] to determine all possible responsibilities under the laws of Venezuela."

368. Regarding the obligation to investigate the human rights violations, the **State** argued that it "had informed the Court [...] how it was ensuring all the human rights of the RCTV employees, responding to the matters submitted to the courts, and the only issues pending related to the nullification of the decision on the non-renewal of the concession, and the merits of the interim measure to protect joint and separate interests."

Considerations of the Court

369. The Court considers that the delivery of this judgment and the reparations required in this chapter are sufficient and adequate to remedy the violations declared and does not find it appropriate to order the measure requested. In addition, it considers that the main facts of this case have been proved and that the different participants in the facts of this case have been identified in this judgment.

C) Measures of restitution and satisfaction and guarantees of non-repetition

370. The Court will determine other measures that seek to repair the non-pecuniary damage and that are not of a pecuniary nature, and will establish measures of a public scope or repercussion.³⁹⁰

371. International case law, and in particular that of the Court, has established repeatedly that the judgment constitutes, *per se*, a form of reparation.³⁹¹ Nevertheless, bearing in mind the circumstances of the case *sub judice*, the harm that the violations committed caused to the victims, and also the consequences of a non-pecuniary nature that they endured as a result of the violations of Articles 8 and 13 of the American Convention, declared to the detriment of the victims, the Court finds it pertinent to establish the following measures of satisfaction and guarantees of non-repetition.

³⁹⁰ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Tarazona Arrieta et al. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of October 15, 2014. Series C No. 286, para. 177.

³⁹¹ Cf. *Case of El Amparo v. Venezuela. Reparations and costs*. Judgment of September 14, 1996. Series C No. 28, para. 35, and *Case of Cruz Sánchez et al. v. Peru*, para. 482.

C.1. Restitution

C.1.1. Reinstatement of the concession, a new concessions process, and return of property and assets

372. The **Commission** did not submit any specific arguments on the representatives' request concerning the reinstatement of the concession or the return of the property and assets. However, it asked that the State "[i]nitiate a procedure to allocate a free-to-air nationwide television frequency in which RCTV is able to participate, at a minimum, under equal conditions." It added that "[t]he procedure should be open, independent and transparent, apply clear, objective and reasonable criteria, and avoid any political consideration that discriminates on the basis of a media outlet's editorial stance."

373. The **representatives** considered "that the recommendations made by the Commission were insufficient to redress the violations of the right to freedom of expression" and indicated "that the full reparation that the State was obliged to make entailed *restitutio in integrum*, which signified that it should re-establish the original legal situation of the victims prior to the violation." They added that "[t]he Commission's recommendation did not fully repair the harm caused or return the victims to their original legal situation prior to the violation." The representatives argued that full redress meant that "the State must re-establish the rights of the victims, through RCTV, as holder of the administrative concession to operate the television station that corresponds to it, under the same conditions as the other media outlets [...] whose concessions were renewed [...] for 10 years." They argued that "none of the television stations that were in the same circumstances as RCTV were subject to a procedure such as the one suggested by the Commission to obtain the renewal of their concession; hence, there was no reason whatsoever to add a new situation that discriminated against RCTV."

374. The representatives underscored that "on February 19, 2013, national Executive Decree No. 9,389 was issued which initiated a procedure of migration from analogue television to free-to-air digital television in Venezuela, which will be a public service." Therefore, they asked that "as a measure of restitution, [...] RCTV be permitted, under conditions of equality, without any discrimination and pursuant to the laws in force, if applicable to migrate from analogue TV to digital TV in the same conditions as the other concessionaires of nationwide analogue TV in Venezuela." They added that "in this regard, [...] it is possible that RCTV would hold, simultaneously, a concession for nationwide analogue TV, such as the one it enjoyed until 2007, and also the corresponding digital TV concession, so that the request for full access to digital TV in no way signifies an alternative request to the recovery of the concession to transmit in analogue free-to-air TV, but is accumulated to this."

375. Furthermore, the representatives requested "the return of all the property that was unlawfully seized under the decisions on interim measures arbitrarily issued [...] by the Constitutional Chamber of the SCJ, and that have been and are currently being used by the State in TVES without any compensation."

376. The **State** argued that "[concessions are granted by] sovereign States for assets that are part of the public domain, [and] all these concessions, by their nature, have [a limited] duration and purpose pursuant to domestic law; in other words, the person who becomes a concessionaire by receiving from the State the right to exploit a specific asset, in this case the electromagnetic spectrum, is previously aware of the duration of this concession and knows that he is subject to the State's authority as regards the concession, which the State can revoke at any time based on the collective or social interest, or even decide not to renew." The State added that "the term for granting a radio or television concession is not pre-established, but is

set by the authority that administers the electromagnetic spectrum in Venezuela.” In addition, the State rejected the Commission’s argument that the decision not to renew the RCTV concession was arbitrary and discriminatory because this argument “sidelined the sovereign right of Venezuela to use an asset that belongs to it, such as the electromagnetic spectrum.” Lastly, the State argued that “[i]t was illogical [...] to open a public procedure to allocate the signal held by RCTV until 2007, when the owner of the asset has decided to reserve the right of use and exploitation.”

377. Regarding the equipment that was the subject of the interim measure issued by the Supreme Court of Justice, the State argued that “these assets were allocated temporarily to *Televisora Venezolana Social*, which uses them for the transmission of its free-to-air signal [...] nationwide.” The State added that “[r]egarding the value of the assets subject to the interim measure, if the Supreme Court decides that payment should be made for their value, this will be done according to the fair value established by experts who will present their report to the courts.”

378. The State also emphasized “that the RCTV transmission equipment was developed to work with a specific frequency, so that even if it was returned immediately it could not be used in national territory by any other company. Regarding the intangible value of the assets, the State argued that this has not been proved and rejected any claim for compensation in this regard.

Considerations of the Court

379. In paragraphs 199, 235, 253, 276, 287 and 308 of this judgment, the Court declared the violation by the Venezuelan State of the rights to freedom of expression, to its exercise without discrimination, and to judicial guarantees. The violation of the right to freedom of expression declared in this case signified that not only were the victims prevented from exercising it fully, but the social dimension of the right was also violated (*supra* para. 198), because Venezuelan society was unable to receive the information and opinions that RCTV broadcast. Added to this, the Court verified that the main purpose of the decision not to renew the channel’s concession was to silence its criticisms (*supra* para. 198). Consequently, a reparation is required that restores the plurality of the media that was affected by the indirect restriction declared in this case.

380. Therefore, owing to the nature of these violations and without this signifying recognition of RCTV’s ownership of the concession, as a necessary measure to ensure the enjoyment and exercise of the rights violated in this case pursuant to Article 63(1) of the American Convention, the Court orders that the concession of the frequency of the electromagnetic spectrum corresponding to television Channel 2 be re-established, until it is granted definitively as a result of the process established in paragraph 382 of this judgment. This measure does not involve the protection of, or reparation for the legal person (RCTV C.A), but constitutes an appropriate measure to redress the rights that have been declared violated of the shareholders and employees, even if, at the present time, they are not part of or do not work for the company.

381. To ensure that this measure is not illusory and without this signifying a ruling on the right to property, the Court orders the return of the assets subject to interim measures, because they are essential for the effective operation of the concession. In addition, this measure repairs the violations declared in relation to the judicial guarantees of the right to be heard and of a reasonable time in the judicial proceedings relating to the action on joint and separate interests (*supra* para. 308).

382. When the RCTV concession has been returned, the State must, within a reasonable time, order the opening of an open, independent and transparent procedure to allocate the frequency of the electromagnetic spectrum corresponding to television channel 2; to this end, following the procedure established in the LOTEL or the relevant domestic law.³⁹² This procedure must be executed guaranteeing that no discriminatory criteria will be applied that condition the award of the concession, and must be aimed at truly strengthening democratic pluralism and respect for judicial guarantees. Consequently, the State must: (i) take appropriate steps to implement an open, independent and transparent procedure to allocate the frequency, and (ii) give the victims in this case the opportunity to participate in this procedure through RCTV, or another company, or in their own names, at a minimum under equal conditions. The State must provide information on the measures taken in this regard within one year.

C.2. Satisfaction

C.2.1. Publication of the judgment

383. The **Commission** did not present any specific arguments on this point.

384. The **representatives** asked the Court to order the State to “publicly acknowledge its international responsibility by publishing the main paragraphs of the judgment on merits delivered in this case in a national newspaper.”

385. The **State** rejected the measures of satisfaction requested and argued “that all the appropriate guarantees for the exercise of freedom of expression through the media exist in Venezuela.”

Considerations of the Court

386. The Court orders, as it has in other cases,³⁹³ that the State must publish, within six months of notification of this judgment: (a) the official summary of this judgment prepared by the Court, once, in the official Gazette; (b) the official summary of this judgment prepared by the Court, once, in a national newspaper with widespread circulation, and (c) this judgment in its entirety, available for one year, on the official website of CONATEL and similar entities, taking into consideration the characteristics of the publication ordered.

C.3. Guarantees of non-repetition

C.3.1. Measures to adapt domestic law to Convention standards

387. The **Commission** did not present any specific arguments on this point. The **representatives** asked “that, in order to ensure legal certainty, the regime for the granting and renewal of administrative broadcasting concessions be established in conformity with the standards of freedom of expression and the pluralism of information.”

388. The **State** argued that “all the information on the processing of telecommunications concessions can be found publicly and accessibly on the website of the agency responsible for this area.” Lastly, the State added that “through its different organs, in particular the Supreme Court of Justice, through its Constitutional Chamber, and considering the principle of the separation of powers and the sovereignty of the State, it has indicated that the rulings of the

³⁹² LOTEL. Title VI On limited resources, Chapter II. On the procedure for the concession of use and exploitation of the radio spectrum (evidence file, folios 241 to 250).

³⁹³ Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*, para. 79, and *Case of Cruz Sánchez et al. v. Peru*, para. 466.

Court [...] on the amendment of legal regimes should be revised constitutionally by the Constitutional Chamber, and it is the internal jurisdiction of Venezuela that determines the constitutionality of the said norms.”

Considerations of the Court

389. The Court recalls that the State should prevent the recurrence of human rights violations such as those that occurred and, to this end, take all the legal, administrative and any other measure necessary to avoid similar facts from occurring in the future in compliance with its obligations of prevention and to ensure the fundamental rights recognized in the American Convention.³⁹⁴ In particular, and pursuant to Article 2 of the Convention, the State has the obligation to adopt the necessary measures to ensure that the exercise of the rights and freedoms recognized in the Convention is effective.³⁹⁵

390. In this case, the Court restricted itself to examining the differential treatment suffered by RCTV, based on one of the prohibited categories of discrimination contained in Article 1(1) of the Convention (*supra* para. 235). The Court did not examine the compatibility of a specific law with the American Convention, nor was this the purpose of this case. Moreover, the representatives did not provide sufficient evidence to allow the Court to infer that the violations arose from a problem in the laws themselves. Therefore, the Court considers that, in the circumstances of this case, it is not pertinent to order the adoption, amendment or adaptation of specific provisions of domestic law.

C.3.2. Measures to guarantee the implementation of procedures to allocate and renew radio and television frequencies that reinforce democratic pluralism

391. The **Commission** asked that the State adopt the measures of non-repetition necessary “to guarantee that the process to allocate and renew radio and television frequencies are compatible with the Venezuelan State’s international obligations with regard to freedom of expression.”

392. The **representatives** asked the Court to order the State “to provide transparent procedures for the allocation of concessions for the use of the electromagnetic spectrum for broadcasting.”

393. The **State** rejected the requests of the Commission and the representatives, and argued that, “all the appropriate guarantees for the exercise of freedom of expression through the media exist in Venezuela [and] that it is false that a transparent process does not exist for the award of concessions.” The State also emphasized that “since the government of President Hugo Chávez, a process of the de-monopolization and democratization of the radio spectrum has been undertaken making way for the creation of hundreds of community radio and television stations.”

Considerations of the Court

394. The Court establishes that the State should take the necessary measures to ensure that all the future processes held to allocate and renew radio and television frequencies be carried

³⁹⁴ Cf. *Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, para. 106, and *Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs*. Judgment of October 14, 2014. Series C No. 285, para. 179.

³⁹⁵ Cf. *Case of Las Dos Erres Massacres v. Guatemala*, para. 240, and *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2012. Series C No. 257, para. 335.

out in an open, independent and transparent manner. All these processes must be implemented without discriminatory criteria that seek to limit the granting of concessions, and must be designed to reinforce the pluralism of information and respect for judicial guarantees.

D) Compensation for pecuniary and non-pecuniary damage

395. The Court recalls the compensatory nature of this reparation;³⁹⁶ the type and amount depend on the characteristics of the violation and the pecuniary and non-pecuniary harm caused. It should not make the victim or his heirs either richer or poorer, and should relate to the violations declared in the judgment.³⁹⁷ One or more measures may repair a specific harm without this being considered a double reparation.³⁹⁸

396. The Court also reiterates that, even though a judgment constitutes, *per se*, a form of reparation,³⁹⁹ considering the circumstances of the case *sub judice* and the consequences of the violations committed for the victims on a personal and professional level, the Court also finds it pertinent to examine the payment of compensation, established in fairness, for pecuniary and non-pecuniary damage.⁴⁰⁰

Arguments of the Commission and of the parties

397. Regarding the request for compensation for pecuniary damage, the **Commission** asked that adequate reparation be ordered in favor of the injured parties for the violation of due process. Regarding the request for non-pecuniary reparation, it did not present specific arguments.

398. Regarding the request for compensation for pecuniary damage, the **representatives** submitted the following arguments:

- a) They requested reparation "for the economic prejudice that the devaluation of [RCTV] caused" to the shareholders. They indicated that "the harm caused owing to the closure of RCTV, calculated [from May 2007] to May 2014 amounts to a total of US\$384,458,356 or its equivalent in current bolivars: Bs. 19,194,044,977.46." The representatives divided up that amount based on the "percentage of shares held by each shareholder" and indicated the amounts requested for each of them.
- b) They also requested "the sum of US\$33,166,954 [for] transmission equipment made abroad, the general transmission network, sites for placement of transmitters and other equipment, as well as reports on strategic signal coverage in the territory of Venezuela" and indicated that each shareholder should be reimbursed "in proportion to his/her share percentage." They added that "additional damages and costs could exist that it has not been possible to evaluate because RCTV has not been allowed" to verify the condition and the safety of the seized assets.

³⁹⁶ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 47, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 266.

³⁹⁷ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*, para. 43, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 266.

³⁹⁸ Cf. *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 450.

³⁹⁹ Cf. *Case of El Amparo v. Venezuela. Reparations and costs*, para. 35, and *Case of Cruz Sánchez et al. v. Peru*, para. 482.

⁴⁰⁰ Cf. *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 437.

- c) They requested full reparation of the "right to property of the RCTV employees who are victims in this case owing to the pecuniary damage caused as a result of losing their employment" owing to the non-renewal of the RCTV concession. They indicated the amount for each person and indicated that this "should be adjusted to the date on which payment is made."

399. In the case of the request for compensation for non-pecuniary damage, the representatives indicated that "the closure of RCTV owing to non-renewal [...] of the concession by the State [...] caused the victims a series of adverse psychological effects, anguish, suffering and other non-pecuniary harm." They asked the Court to grant the sum of US\$25,000 to each victim in this case for non-pecuniary damage.

400. Regarding the request for compensation for pecuniary damage, the **State** submitted the following arguments:

- a) It underscored that, "in its Merits Report, the Commission established that the property of the shareholders had not been harmed" and, therefore, it agreed with the Commission and would not submit other arguments on the presumed damage to property.
- b) It rejected "the protection of interests of legal persons [in] this jurisdiction" in "relation to the petitioners' request for reparations for pecuniary damage." Regarding the concessions, the State argued that they are granted by "sovereign States for those assets that are in the public domain, [and] the purpose and length of all of them are [limited] pursuant to domestic law; in other words, anyone who becomes a concessionaire by receiving from the State the right to exploit a specific asset, in this case the radioelectric spectrum, has prior knowledge of the duration of this concession and knows that he is subject to the State's authority with regard to the concession, and that the State can revoke it at any time based on social or collective interest, or even decide not to renew it." Consequently, it argued that "the State's actions cannot be penalized, by making pecuniary claims against it, when it is exercising its sovereign right to organize the radioelectric spectrum in accordance with the National Telecommunications Plan." The State affirmed that "it is a blatant abuse to ask the Inter-American Court [...] to require reparation for the RCTV shareholders based on a percentage of their shares for the financial prejudice caused by the devaluation of the company." Furthermore, it asked the Court to recall that "the RCTV shareholders have radio concessions in Venezuela and RCTV had been making a profit in the country from 1953 to 2007, that is for 54 years."
- c) It shared the opinion of the Commission when it concluded that "the petitioners have not presented sufficient evidence of a direct effect on the personal property of the shareholders presented as victims as a result of the State's seizure of RCTV's tangible assets." Consequently, the State concluded that it was exempt from providing compensation for damage to the property of the RCTV shareholders and that it owed nothing in relation to the interim measure granting it the RCTV assets.
- d) In addition, it affirmed that "the employment situation of the personnel who worked for [RCTV] cannot be attributed to the State, because the employment relationship is established between the employer and the employee and is governed by the Organic Labor Law."

401. In relation to the request for compensation for non-pecuniary damage, the State argued that “regarding the allegations that RCTV employees were subjected to physical attacks, nothing had been [...] proved about these presumed attacks.”

Considerations of the Court

402. In its case law, the Court has developed the concept of pecuniary damage and has established that this supposes “the loss or detriment to the income of the victims, the expenditure made owing to the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case.”⁴⁰¹ The Court has also developed the concept of non-pecuniary damage and has established that this “may include the suffering and afflictions caused to the direct victim and his family, the impairment of values of great significance for the individual, and the changes of a non-pecuniary nature in the living conditions of the victim or his family.”⁴⁰²

403. Although the Court does not have sufficient evidence to determine precisely the pecuniary and non-pecuniary damage caused in this case, based on the criteria established in its consistent case law, the circumstances of the case, the nature and severity of the violations committed, and the suffering caused to the victims,⁴⁰³ the Court finds it pertinent to establish, in equity, the sum of US\$10,000 (ten thousand United States dollars) as compensation for pecuniary and non-pecuniary damage, in favor of the shareholders Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar and Francisco J. Nestares. This is based on the fact that this judgment has ordered the return to them of the concession of the channel, and also the annulment of the interim measures covering the RCTV assets.

404. In addition, the Court find it pertinent to establish, in equity, the sum of US\$50,000 (fifty thousand United States dollars) as compensation for pecuniary and non-pecuniary damage, in favor of the employees, Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Eladio Lárez, Odila Rubin, Oswaldo Quintana, Eduardo Sapene, Daniela Bergami, Isabel Valero, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño.

E) Costs and expenses

405. The ***Commission*** did not present specific arguments on this request.

406. The ***representatives*** argued that the victims “have had to incur substantial expenses to protest the arbitrary non-renewal of the concession at the domestic and international level, mainly related to professional fees.” They indicated that, at the domestic level, they incurred additional expenditure, such as “public announcements, certified copies, notification expenses, express mailings, international telephone calls, mobile phone use, etc.” They also indicated that they would submit, “later, the evidence in order to calculate the procedural costs.” Lastly, they asked the Court to recognize, in equity, the expenses arising from the domestic and international litigations.

407. The ***State*** “reject[ed] any claim for procedural costs in the domestic sphere, because the available domestic remedies are still active and, to date, RCTV has not be found liable to pay the costs of these proceedings.”

⁴⁰¹ *Case of Bámaca Velásquez v. Guatemala. Reparations and costs.* Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Argüelles et al. v. Argentina*, para. 286.

⁴⁰² *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*, para. 56, and *Case of Cruz Sánchez et al. v. Peru*, para. 482.

⁴⁰³ *Mutatis mutandis, Case of Ticona Estrada et al. v. Bolivia*, para. 109, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia*, para. 603.

Considerations of the Court

408. The Court reiterates that, based on its case law,⁴⁰⁴ costs and expenses form part of the concept of reparation established in Article 63(1) of the American Convention, because the actions taken by the victims in order to obtain justice, at both the domestic and the international level, entail disbursements that must be compensated when the international responsibility of the State has been declared in a judgment.

409. The Court has indicated that the claims of the victims or their representatives for costs and expenses, and the supporting evidence must be submitted to the Court at the first procedural moment granted them; that is, in the motions and pleadings brief, without prejudice to these claims being updated subsequently, based on the new costs and expenses incurred as a result of the proceedings before this Court.⁴⁰⁵ In addition, the Court recalls that it is not sufficient merely to forward the probative documents; rather, the parties are required to include arguments that relate the evidence to the fact it is considered to represent and that, in the case of alleged financial disbursements, the items and their justification are clearly established.⁴⁰⁶

410. In this case, the file does not contain any precise evidence supporting the costs and expenses incurred by the victims' representatives. Nevertheless, the Court can infer that the representatives did incur expenses in the exercise of their legal representation during the proceedings before this Court. Also, it is reasonable to suppose that, during the years that this case was processed before the Commission, the victims and the representatives made financial disbursements. Taking this into account, the Court establishes, in equity, the sum of US\$10,000 (ten thousand United States dollars) that must be delivered to the representatives for the costs and expenses arising from the processing of the case before the inter-American human rights system. At the stage of monitoring compliance with this judgment, the Court may require the State to reimburse the victims or their representatives for any subsequent, reasonable and duly authenticated expenses.⁴⁰⁷

F) Method of compliance with the payments ordered

411. The State shall make the payment of compensation for pecuniary and non-pecuniary damage directly to the beneficiaries, and the payment for costs and expenses directly to the representatives, within one year of notification of this judgment, in accordance with the following paragraphs.

412. If any beneficiary should die before receiving the respective compensation, this shall be delivered directly to his or her heirs, pursuant to the applicable domestic law.

413. The State shall comply with its obligations by payment in United States dollars or the equivalent amount in Venezuelan currency, using the exchange rate between the two currencies in force on the New York Stock Exchange (United States of America), the day before the payment to make the respective calculation.

⁴⁰⁴ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*, para. 79, and *Case of Cruz Sánchez et al. v. Peru*, para. 488.

⁴⁰⁵ *Case of Garrido and Baigorria v. Argentina. Reparations and costs*, para. 79, and *Case of Cruz Sánchez et al. v. Peru*, para. 489.

⁴⁰⁶ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 277, and *Case of Cruz Sánchez et al. v. Peru*, para. 489.

⁴⁰⁷ Cf. *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs*. Judgment of September 1, 2010 Series C No. 217, para. 291, and *Cruz Sánchez et al. v. Peru*, para. 492.

414. If, for causes that can be attributed to the beneficiaries of the compensation or their heirs it is not possible that they receive this within the period indicated, the State shall deposit the said amounts in their favor in a deposit account or certificate in a financial institution in United States dollars in the most favorable financial conditions allowed by banking law and practice. If, after 10 years, the compensation has not been claimed, the amounts shall revert to the State with the interest accrued.

415. The amounts established in this judgment as compensation and to reimburse costs and expenses shall be delivered to the persons indicated in full, as established in this judgment, without any deductions arising from possible taxes and charges.

416. If the State incurs in delay, it shall pay interest on the amount owed corresponding to bank interest on arrears in Venezuela.

417. Pursuant to its consistent practice, the Court reserves the right inherent in its attributes and also derived from Article 65 of the American Convention to monitor full compliance with this judgment. The case will be closed when the State has complied fully with all the provisions of this judgment.

418. Within one year of notification of this judgment, the State shall provide the Court with a report on the measures adopted to comply with it.

XI OPERATIVE PARAGRAPHS

419. Therefore,

THE COURT

DECIDES,

By six votes to one:

1. To reject the preliminary objection of the Court's alleged lack of jurisdiction to protect legal persons, pursuant to paragraphs 19 and 22 of this judgment.

Unanimously,

2. To reject the preliminary objection of failure to exhaust domestic remedies, pursuant to paragraphs 27 and 31 of this judgment.

DECLARES,

By six votes to one, that:

3. The State violated Article 13(1) and 13(3) in relation to Article 1(1) of the American Convention owing to an indirect restriction of the exercise of the right to freedom of expression, to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Inés Bacalao, Eladio Lárez, Eduardo Sapene, Daniela Bergami, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño, pursuant to paragraphs 197 to 199 of this judgment.

By six votes to one, that:

4. The State violated Article 13 in relation to the obligation of non-discrimination contained in Article 1(1) of the American Convention, to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Inés Bacalao, Eladio Lárez, Eduardo Sapene, Daniela Bergami, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño, pursuant to paragraph 235 of this judgment.

Unanimously, that

5. The State violated the right to due process established in Article 8(1) in relation to Article 1(1) of the American Convention, in the procedures for transformation of the titles and renewal of the concession, to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar and Francisco J. Nestares, pursuant to paragraph 253 of this judgment.

Unanimously, that

6. The State violated the right to a reasonable time, established in Article 8(1) in relation to Article 1(1) of the American Convention, in the context of the administrative appeal for nullification, to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar, Francisco J. Nestares, Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Eladio Lárez, Odila Rubin, Oswaldo Quintana, Eduardo Sapene, Daniela Bergami, Isabel Valero, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño, pursuant to paragraph 276 of this judgment.

Unanimously, that

7. The State violated the right to a reasonable time, established in Article 8(1) in relation to Article 1(1) of the American Convention, in the processing of the unspecified interim measure in the context of the administrative appeal for nullification, to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar, Francisco J. Nestares, Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Eladio Lárez, Odila Rubin, Oswaldo Quintana, Eduardo Sapene, Daniela Bergami, Isabel Valero, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño, pursuant to paragraph 287 of this judgment.

Unanimously, that

8. The State violated the rights to a hearing and a reasonable time established in Article 8(1) in relation to Article 1(1) of the American Convention when processing the action on joint and separate interests to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar, Francisco J. Nestares, pursuant to paragraph 308 of this judgment.

Unanimously, that

9. The State did not violate Article 8 in relation to Article 1(1) of the American Convention, in the context of the processing of the criminal complaint, pursuant to paragraph 295 of this judgment.

Unanimously, that

10. The State did not violate the right to a simple and prompt remedy established in Article 25(1) in relation to Article 1(1) of the American Convention, in the context of the constitutional

amparo proceeding and the request for an injunction, pursuant to paragraphs 318 and 323 of this judgment.

By five votes to two, that:

11. It has not been proved that the State violated the guarantees of independence and impartiality established in Article 8(1) in relation to Article 1(1) of the American Convention, in the context of the administrative appeal for nullification, pursuant to paragraph 278 of this judgment.

By five votes to two, that:

12. It has not been proved that the State violated the guarantees of independence and impartiality established in Article 8(1) in relation to Article 1(1) of the American Convention, when processing the action on joint and separate interests, pursuant to paragraph 305 of this judgment.

By five votes to two, that:

13. It has not been proved that the State violated the right to property established in Article 21 in relation to Article 1(1) of the American Convention, pursuant to paragraph 359 of this judgment.

AND ESTABLISHES,

Unanimously, that:

14. This judgment constitutes, *per se*, a form of reparation.

By five votes to two, that:

15. The State shall re-establish the concession of the frequency on the electromagnetic spectrum corresponding to television channel 2 in accordance with paragraph 380 of this judgment and shall return the property that is the subject of the interim measure, pursuant to paragraph 381 of this judgment.

By five votes to two, that:

16. When the RCTV concession has been re-established, the State shall, within a reasonable time, order the opening of an open, independent and transparent process to grant the frequency on the electromagnetic spectrum corresponding to television channel 2 and, to this end, shall following the procedure established in the LOTEL or the relevant domestic law in force, pursuant to paragraph 382 of this judgment.

Unanimously, that:

17. The State shall, with six months of notification of this judgment, make the publications indicated in paragraph 386 of the judgment, as indicated therein.

Unanimously, that:

18. The State shall take the necessary measures to ensure that all future processes to assign and renew radio and television frequencies are conducted in an open, independent and transparent manner, pursuant to paragraph 394 of this judgment.

Unanimously, that:

19. The State shall pay, within one year of notification of this judgment, the amounts established in paragraphs 403 and 404 herein as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses, pursuant to paragraph 410 of this judgment.

Unanimously, that:

20. The State shall provide this Court with a report, within one year of notification of this judgment, on the measures taken to comply with its provisions.

Unanimously, that:

21. The Court will monitor full compliance with the judgment, in exercise of its attributes and in fulfillment of its duties under the American Convention on Human Rights, and will consider this case concluded when the State has complied fully with its provisions.

DONE, at San José, Costa Rica, on June 22, 2015, in the Spanish language.

Judge Roberto F. Caldas advised the Court of his Concurring Opinion, which accompanies this judgment.

Judge Manuel Ventura Robles advised the Court of his Dissenting Opinion, which accompanies this judgment.

Judge Diego García Sayán advised the Court of his Concurring Opinion, which accompanies this judgment.

Judge Alberto Pérez Pérez advised the Court of his Partially Dissenting Opinion, which accompanies this judgment.

Judge Eduardo Vio Grossi advised the Court of his Concurring Opinion, which accompanies this judgment.

Judge Eduardo Ferrer Mac-Gregor Poisot advised the Court of his Partially Dissenting Opinion, which accompanies this judgment.

Humberto Antonio Sierra Porto
President

Roberto F. Caldas

Manuel E. Ventura Robles

Diego García-Sayán

Alberto Pérez Pérez

Eduardo Vio Grossi

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Humberto Antonio Sierra Porto
President

Pablo Saavedra Alessandri
Secretary

PARTIALLY DISSENTING OPINION OF JUDGE ROBERTO DE FIGUEIREDO CALDAS
INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF GRANIER *ET AL.* (RADIO CARACAS TELEVISIÓN) V. VENEZUELA
JUDGMENT OF JUNE 22, 2015
(Preliminary objections, merits, reparations and costs)

I. Introduction

1. The purpose of this opinion, which partially dissents from some of the specific grounds and conclusions indicated in this judgment by the majority of the judges of this Inter-American Court, is to clarify and emphasize aspects which I consider extremely important, not only for the understanding of this case, but also for the historic development of the Court's case law on freedom of thought and expression and of the press, and the necessary respect for the democratic rule of law, especially in extreme situations as in this case, when there has been a coup d'état. In the instant case, it is important to analyze the consequences and the appropriate legal evaluation that the Court can and should give to this serious political phenomenon of an attack on representative democracy.

2. First, it is important to stress that I have added my vote to the majority, or to the unanimous vote depending on the specific point, to find the Venezuelan State responsible for the violation of the freedom of expression of those victims who were recognized as such (paragraphs 197 to 199), and also for the violation of freedom of expression in its collective dimension of the social right to receive information; for violation of due process of law (paragraph 253), and for disregarding for its own domestic laws in relation to the procedure for the transformation of titles and for the renewal of the concession; for violation of a reasonable time in numerous aspects of the administrative and judicial proceedings, and for violation of the right to a simple and prompt remedy. The grounds for these aspects have already been described appropriately in the judgment that I helped draft.

3. Although it refers to two common general concepts that are substantive in the judgment, the purpose of this opinion is more exactly to provide the grounds for the parts with which I dissent. Initially, I will describe my partial dissent with regard to the differentiation of the petitioners in relation to the request to re-establish the concession of the electromagnetic spectrum to RCTV, which led me to admit the first objection of this Court's lack of jurisdiction to protect legal persons. Then, I will elaborate on the interrelationship between freedom of the press and freedom of expression and the role of the State in guaranteeing the satisfactory exercise of these freedoms. In sum, I will present these and other aspects that I consider relevant in the decision on the return of the RCTV concession.

II. Admission of the preliminary objection of lack of jurisdiction of the Inter-American Court to protect legal persons

4. First, it is necessary to differentiate between the rights of physical persons and company rights – rights of legal persons – understanding that the judgment could not provide direct protection to the rights of a third party; that is, of RCTV in its capacity as a legal person, and not a petitioner in this case. Also, although agreeing with the possible protection of the human rights of a physical person violated by harm to a legal person to which he is connected, this is not the case of some of the claims made, such as the restoration of the RCTV concession and the return of its assets for the use of the electromagnetic spectrum.

5. In this regard, it is relevant to underline the impossibility of legal persons lodging direct petitions with the inter-American system of human rights (IASHR), Article 1(2) of the American Convention establishes that, for the effects of this treaty, "person" is every human being. In addition, legally recognized, non-governmental organizations in one or more OAS Member States may lodge petitions before the IASHR under Article 44 of the Convention. However, since the focus of the IASHR is the protection of individuals and communities, these legal persons have competence to lodge petitions in their capacity as representatives of physical persons, and are not protected by the rights recognized in the Convention. In other words, the Convention allows special types of legal person to litigate on the rights of physical persons, individually or collectively.

6. In this case, it is exactly the contrary: physical persons requiring possible rights for a legal person, which would undoubtedly be inadmissible in light of the Convention.

7. If the IACHR could admit a petition with regard to a legal person by a physical person, from the legal point of view the latter could only petition if he was legally representing the former. That is, the individuals must be shareholders with a power of attorney from the company, but in this case they did not have this.

8. Moreover, the petitioners were not even RCTV shareholders! They were only shareholders in companies that, in turn were shareholders in RCTV, according to paragraph 65 of the judgment.

9. Based on the documents submitted, it has been concluded that only three of the said indirect shareholders had, at the time of the facts, a direct connection to the communication activities of RCTV. However, even though the Court did not recognize that the indirect investors who did not perform activities related to the company's mission were holders of the rights relating to freedom of expression (para. 60), the judgment granted protection to all of them with regard to the alleged violations of judicial guarantees.

10. It is worth pointing out that, in these proceedings, the use of the word "shareholders" is questionable because, in fact, no RCTV shareholder is named in the petition. On this point also, I dissent from the majority opinion in the judgment, which repeats the word numerous times even while agreeing that they are not shareholders in RCTV, pursuant to paragraphs 64 and 65.

11. Since they are not directly connected to RCTV, we should not refer to the violation of the human rights of these individuals; rather the consequence was necessarily an effect on the property of the legal persons that owned all the shares in RCTV, and that are not protected by the Convention. In other words, the closure of this television station did not necessarily mean that the physical persons were unable to continue to exercise their activities in their capacity as indirect investors who were not connected to the company, but only the impossibility to maintain the connection between legal persons, which could result in financial prejudices for the companies who owned shares in RCTV. However, as already emphasized, the American Convention does not protect the rights of these entities, as the Court recognized in its judgment by denying the violation of the right to property.

12. Hence, it is necessary to make a distinction between the individuals who worked for RCTV, recognized as victims in this case, and those who were merely connected to the company by indirect patrimonial links. It is the RCTV employees, on whom the daily operations of the television station depended and who effectively implemented its communication mission, who could be considered victims by the Court. After all, as the American Convention establishes,

only physical persons are holders of the rights that it protects. Therefore, these are the individuals identified in paragraphs 66 and 67 of the judgment.

13. I find it evident that the indirect investors were not connected to the information function of RCTV, they merely had a financial interest in resolving the matter, and are absolutely excluded from the case owing to its central issue, which is the alleged violation of the right to freedom of expression in the context of the facts. In this way, I find that it is only the direct employees of RCTV whose rights were violated.

14. The just compensation for the violation of the rights of the physical persons who are victims in this case (Art. 63 of the American Convention) could be provided in the direct and traditional way, by establishing payments to the victims. Not as the judgment decided by restoring the rights not exactly of the victims, but of the legal persons who are unable to lodge petitions before the IACHR.

15. In this way the case ended up involving corporate rights, and the judgment itself refers to it as the Case of "Radio Caracas Televisión" (RCTV)!

16. Based on the above, I accept the State's preliminary objection concerning the Inter-American Court's lack of jurisdiction to protect legal persons so that it would continue to examine the case excluding the possibility of analyzing the dispute on the restoration of the radioelectric spectrum, the renewal of the concession or the return of RCTV's assets.

III. Freedom of expression and democracy: discrepancy in relation to the restoration of the concession and return of the assets to RCTV

17. I will now analyze the merits of this issue, since the preliminary objection was not admitted by the majority opinion. The judgment, as a whole, was unanimously found to be based on the guiding principles of freedom of expression. However, the analysis of the grounds for the case and the petition with regard to the concession of the radioelectric spectrum, requires making a distinction between freedom of expression and freedom of the press. Once the distance between these two concepts has been clearly delimited, it is clear that the petition finally admitted relates to the right to freedom of the press of RCTV, a legal person that does not meet the requirement of a petitioner.

18. For the reasons that I will now explain, I understand that the investors requested a company right disguised as an individual right to freedom of expression, and this is why the attribution of just compensation should have been determined in favor of the victims and not in favor of a legal person.

3.1 The distinction between freedom of expression and freedom of the press

19. Freedom of expression is a right of every person, under equal conditions and without discrimination of any kind.¹ Consequently, as indicated by inter-American jurisprudence, the entitlement to the right to freedom of expression cannot be restricted to a profession or group of individuals, nor applied solely to freedom of the press.² This means that freedom of expression is an essential element of freedom of the press, although they are not synonymous

¹ Special Rapporteurship for freedom of expression (Inter-American Commission for Human Rights). Inter-American Legal Framework regarding the right to freedom of expression, OEA/Ser.L/V/II CIDH/RELE/INF.2/09, Washington D.C., 2009, para. 11.

² I/A Court HR., Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs. Judgment of January 27, 2009. Series C No. 193, para. 114.

and the exercise of the former does not condition exercise of the latter.³ Whereas freedom of expression is an individual, basic and fundamental right, freedom of the press is an accessory right of the media companies and a way of implementing freedom of expression. This distinction reveals the fact that freedom of the press does not include the right to communicate by any means, which is a right of everyone, individually.

20. The right to freedom of expression tends not only towards the personal fulfillment of those who expresses themselves, but also towards the consolidation of truly democratic societies. Thus, the public debate must satisfy the legitimate needs of everyone, not just as consumers of certain information, but also as citizens. In other words, freedom of the press must exist in order to comply with the basic pillars of freedom of expression, and the State must guarantee this reality.⁴

21. Freedom of expression has a triple function in a democracy.⁵ First, it is an individual right that guarantees one of the most important human freedoms which is the right to think for oneself and to share these thought with others. Thus, it consists in one of the individual rights that most clearly reflects the virtue that marks – and characterizes – human beings: the capacity to think about the world from our own perspective and communicate with one another in order to construct, through a deliberative process, not only the model of life that each person has the right to adopt, but the model of society in which we want to live.⁶

22. Second, both the Inter-American Commission on Human Rights, (IACHR) and this Court have expressed similar consistent legal opinions that stress the structural relationship between freedom of expression and democracy. According to the IACHR, the purpose of Article 13 of the American Convention is to strengthen the operation of deliberative and pluralistic democratic systems through the protection and promotion of the free circulation of information, ideas and expressions of all kinds.⁷ Article 4 of the Inter-American Democratic Charter, in turn, characterizes freedom of expression and freedom of the press as “*essential components of the exercise of democracy*.” Similarly, the freedom of expression rapporteurs of the United Nations (UN), the Organization for the Security and Cooperation in Europe (OSCE), and the Organization of American States (OAS) recalled in their first Joint Declaration of 1999 that “*freedom of expression is a fundamental international human right and a basic component of civil society based on democratic principles*.”⁸

23. In its third function in the democratic system, “freedom of expression is a key instrument for the exercise of all other fundamental rights. Indeed, it is an essential mechanism for the exercise of the rights to participation, religious freedom, education, ethnic or cultural identity

³ Special Rapporteurship for freedom of expression (Inter-American Commission for Human Rights). Inter-American Legal Framework regarding the right to freedom of expression, OEA/Ser.L/V/II CIDH/RELE/INF.2/09, Washington D.C., 2009, para. 12.

⁴ Special Rapporteurship for freedom of expression (Inter-American Commission for Human Rights). Inter-American Legal Framework regarding the right to freedom of expression, OEA/Ser.L/V/II CIDH/RELE/INF.2/09, Washington D.C., 2009, para. 8.

⁵ Special Rapporteurship for freedom of expression (Inter-American Commission for Human Rights). Inter-American Legal Framework regarding the right to freedom of expression, OEA/Ser.L/V/II CIDH/RELE/INF.2/09, Washington D.C., 2009, para. 6.

⁶ Special Rapporteurship for freedom of expression (Inter-American Commission for Human Rights). Inter-American Legal Framework regarding the right to freedom of expression, OEA/Ser.L/V/II CIDH/RELE/INF.2/09, Washington D.C., 2009, para. 7.

⁷ Special Rapporteurship for freedom of expression (Inter-American Commission for Human Rights). Inter-American Legal Framework regarding the right to freedom of expression, OEA/Ser.L/V/II CIDH/RELE/INF.2/09, Washington D.C., 2009, para. 8.

⁸ The complete text of the joint declaration can be found at: <http://www.oas.org/es/IACHR/expresion/showarticle.asp?artID=141&ID=2>, consulted on 03/09/2015.

and, needless to say, equality, understood not only as the right to be free from discrimination, but as the right to enjoy certain basic social rights.”⁹ Furthermore, free access to information is essential for the satisfactory exercise of political rights.¹⁰

24. Meanwhile, freedom of the press is one of the ways of implementing the triple functions of freedom of expression, insofar as it guarantees one of the spaces in which it is possible to exercise it. Moreover, it makes it possible to exercise freedom of expression by allowing the dissemination of ideas, news and information in vehicles with widespread coverage. However, as can be seen, despite its ability to reinforce freedom of expression, freedom of the press is not the only or the fundamental means of exercising it.

25. From this differentiation, it is evident that the re-establishment of the concession obtained by means of the judgment is related legally to the freedom of the press of RCTV, even though it may affect the freedom of expression of the petitioners. Thus, despite understanding the relevance of the freedom of the press being guaranteed under the democratic rule of law, the renewal of the concession in this case, as a corporate right of a legal person, should not have been granted by this Court because, substantively, the Convention only allows physical persons to have access to the inter-American system of petitions.

3.2. *Freedom of expression and freedom of the press in the context of the 2002 coup d'état: application of Article 13 of the American Convention*

26. In light of the content of the right to freedom of expression and its realization in contemporary societies, mainly through the media, it can be affirmed that the media play a lead role in this deliberation, as they allow individuals to access both the relevant information and a variety of perspectives that are necessary for reaching reasonable and informed conclusions on public matters.¹¹

27. The scenario of the April 2002 coup d'état, as the Inter-American Commission verified *in situ* was characterized by the fact that the Venezuelan media did not always act responsibly or ethically. RCTV took part in and contributed to the so-called communications blackout that occurred at the time, which hindered Venezuelan society's access to vital information on the institutional crisis experienced at the time, a conduct that seriously undermined freedom of expression and the democratic rule of law.¹² Thus, any person could have lodged a petition with the IACHR against the State owing to the actions of RCTV and other companies, which is not what is being analyzed in this case. However, when evidence or proof in this regard is found in the analysis of a case, it should be taken into account when establishing and quantifying responsibilities.

28. As we have seen, the media allow members of society to exercise their right to seek and to impart information. Therefore, the media owes its primary duty of responsibility to the public, rather than to the government. The main purpose of the media, and freedom of expression

⁹ Special Rapporteurship for freedom of expression (Inter-American Commission for Human Rights). Inter-American Legal Framework regarding the right to freedom of expression, OEA/Ser.L/V/II CIDH/RELE/INF.2/09, Washington D.C., 2009, para. 9.

¹⁰ Special Rapporteurship for freedom of expression (Inter-American Commission for Human Rights). Inter-American Legal Framework regarding the right to freedom of expression, OEA/Ser.L/V/II IACHR/RELE/INF.1/09, Washington D.C., 2009, para. 5.

¹¹ Special Rapporteurship for freedom of expression (Inter-American Commission for Human Rights). Freedom of Expression Standards for Free and Inclusive Broadcasting. OEA/Ser.L/V/II IACHR/RELE/INF.3/09, Washington D.C., 2009, para. 5.

¹² Report of the Inter-American Commission on Human Rights on the situation of human rights in Venezuela (2003): <http://www.cidh.org/countryrep/Venezuela2003eng/toc.htm>, consulted September 3, 2015.

generally, is to inform the public about the actions of the government.¹³ By isolating society from the important political events and social movements that were occurring at that time, RCTV itself violated the terms of freedom of expression.

29. It is important to stress that RCTV inserted itself into the context of destabilization of democracy created by the coup d'état. According to the Inter-American Commission's "Report on the situation of human rights in Venezuela" published in 2003, thus immediately after the coup d'état, it was possible to verify the tendentious nature of some media. Thus:

The IACHR has been concerned by the scant information, or at times total lack of information, available to Venezuelan society during the days of the institutional crisis of April. Although there may be any number of justifications to explain this lack of information, to the extent that the suppression of information resulted from politically-motivated editorial decisions, this should be the subject of an essential process of reflection by the Venezuelan media about their role at that moment.¹⁴

30. In this regard, the Special Rapporteurship for Freedom of Expression even expressed concern "regarding the possibility that the Venezuelan media did not always act responsibly or ethically," having "noted the actions by the media that had hindered Venezuelan society's access to vital information during the tragic events of April 2002 that led to a coup d'état and subsequent restoration of democracy in Venezuela."¹⁵

31. According to a report of the Human Rights Center of the Universidad Católica Andrés Bello, consulted by the Court when deliberating on its judgment, and included in paragraph 56 of the judgment which it is worth repeating here:

56. Similarly, the Human Rights Center of the Universidad Católica Andrés Bello indicated in its report entitled "*Entre el estruendo y el silencio. La crisis de abril y el derecho a la libertad de expresión e información*" that during the coup d'état of April 2002 "the main private television networks provide scant coverage of the demonstrations in favor of Chávez" and, once President Chávez had been reinstated, "the television networks began to transmit films, comic strips, soap operas and sports. The programs transmitted by the television networks at the time did not reflect the events that were taking place in the street, and appeared to be trying to deny that reality."

32. This is supplemented by another citation from the said report:

*Meanwhile, the private media also restricted access to information, insofar as several channels transmitted the same information, without providing space to a diversity of news, including with regard to the same incident; while, on the political level in that context, they failed to reflect the political plurality that existed in the country and openly privileged the opposition sectors.*¹⁶

33. In addition, the report included an illuminating description of individual participations:

"Additionally, among the few activities that he carried out as Head of State during his brief government, [Pedro Carmona Estanga], the former President of Fedecámaras, held a meeting with the owners of the main media. Versions in the foreign press, cited by the Committee to Protect Journalists, indicate that the owners and executives of the country's television networks and media met with Carmona on the Saturday morning. Subsequently, José Gregorio Vázquez, who had been appointed deputy minister of the Secretariat, in a public letter, confirmed that the owners of the media had been invited to a meeting with President Carmona, which was attended by the editor of the newspaper El Universal, Andrés Mata, the director general of Globovisión, Alberto Federico Ravell, the owners of Venevisión, Gustavo and Ricardo Cisneros, the editor of the newspaper El Nacional, Miguel Henrique Otero, **the director of**

¹³ Special Rapporteurship for freedom of expression (Inter-American Commission for Human Rights). Freedom of Expression and Media Responsibility, Chapter V. Media Ethics, para. 2.

¹⁴ IACHR. Report on the situation of human rights in Venezuela (2003), para. 373.

¹⁵ IACHR. Report on the situation of human rights in Venezuela (2003), para. 471.

¹⁶ See, Human Rights Center of the Universidad Católica Andrés Bello, "*Entre el estruendo y el silencio. La crisis de abril y el derecho a la libertad de expresión e información*", 2002. Available at: http://w2.ucab.edu.ve/tl_files/CDH/recursos/entreelstruendoyelsilencio.pdf

Radio Caracas Televisión, Marcel Granier, the President of the Bloque de Armas, Andrés de Armas, and also Orlando Urdaneta, of Globovisión, and Patricia Poleo, of El Nuevo País. According to the account given by Vásquez, during the meeting a discussion was held on the errors that the new government had committed and the search for solutions, and the media representatives had agreed to cooperate with the communications policy of the *de facto* government. This account of the meeting has not been denied, and serves to assert that, although there are no indications that the media were involved in the coup d'état, as President Chávez has insistently indicated, the almost unanimous reaction of the press, radio and television had some common features: zero questioning of the new government and the way in which it took power, omission of information that questioned the version that Chávez had resigned, which implied censorship, and a large dose of partiality reflected in a media discourse on April 12, on the radio and television and on April 13 in the newspapers, directed at giving legitimacy to the actions signifying that President Chávez had been deposed. This combination of factors infringed the people's right to receive information"¹⁷ (bold added).

34. It should be noted that the first victim in this case was cited by name, proof that is coherent with other evidence that stands out in this case, in addition to the responsibility of RCTV as a media outlet. This can be seen from the opinion of the expert witness proposed by the victims, Antonio Pasquali, for example, that RCTV took part in an operation that was morally wrong.

35. It is essential to underscore that the way in which press coverage was conducted during the coup d'état was detrimental not only for the effectiveness of the right to freedom of thought and expression, but also for the consolidation of democracy in Venezuela. In this regard, it is worth citing the following extract from the Inter-American Commission's report:

473. However, the best way to foster a broader debate on ideas in Venezuela, in light of the political crisis conditions it is currently facing, is through those actions that guarantee the editorial independence of the media and enable journalists to perform, with the utmost care, their task of informing the public. This is the challenge facing the media in Venezuela because their chief responsibility lies with the public and not with the government. The process of reflection that the IACHR called for at the end of its visit to Venezuela is still necessary.¹⁸

36. The conduct of the media in that context – in which RCTV participated – prevented Venezuelans from exercising their right established in Article 13 of the American Convention. In this situation, it is important to verify the dual dimension of the parameters established for the exercise of the rights and obligations of freedom of expression in its essential function for democracy, as an individual guarantee that cannot be separated from the collective guarantee.

37. The basic pillars for the interpretation of this article were developed in Advisory Opinion OC-5/85. The first pillar proposed by the Court establishes that freedom of expression is a value that, if it is not respected, endangers the exercise of the essential principles for the existence of a democratic society. In the words of the Court:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. [...] It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.¹⁹

38. The content of freedom of expression is linked not only to the individual aspect of the right, but also to its collective dimension. In this regard, the text of OC-5/85 clarifies that these dimensions are necessarily intertwined and must be guaranteed simultaneously. This is because

¹⁷ Cf. Human Rights Center of the Universidad Católica Andrés Bello, "*Entre el estruendo y el silencio. La crisis de abril y el derecho a la libertad de expresión e información*," 2002. Available at: http://w2.ucab.edu.ve/tl_files/CDH/recursos/entreelestruendoyelsilencio.pdf.

¹⁸ IACHR. Report on the situation of human rights in Venezuela (2003). Available at: <http://www.cidh.org/countryrep/Venezuela2003eng/toc.htm>, consulted September 3, 2015.

¹⁹ I/A Court HR. Advisory Opinion OC-5/85 of November 13, 1985. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), para. 70.

we who are protected by this article will only realize our individual right to express our ideas if they reach the other citizens, who have to the right to receive them:

Article 13 indicates that freedom of thought and expression "includes freedom to seek, receive, and impart information and ideas of all kinds...." This language establishes that those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. Hence, when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.²⁰

39. In its social dimension, which should always be considered, freedom of expression allows for exchanges among citizens, creating progress and democracy by the sharing of opinions and news. It is as or more important to know about recent relevant events and to be able to know the opinion of others, as to be able to impart one's own ideas, which is an unproductive exercise when others do not have freedom of access to those ideas.

40. On this point, it is important to highlight Principle 9 of the Declaration of Chapultepec adopted by the 1994 Hemisphere Conference on Free Speech, according to which: "[t]he credibility of the press is linked to its commitment to truth, to the pursuit of accuracy, fairness and objectivity and to the clear distinction between news and advertising." Likewise, the Preamble to the 2002 Declaration of Principles on Freedom of Expression in Africa: "Considering the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy".

41. This Court, in the exercise of its mission, must be very aware of what is occurring within the States, analyzing the whole social and political context that surrounds the cases submitted to it. In this regard, it is not possible to disregard the fact that the RCTV executives and the television station itself, who are presented as direct and indirect victims in these proceedings, even though their human rights were violated, were tacitly – and could be formally – accused before the IACHR of violating human rights themselves by denying access to impartial and well-founded information to Venezuelan society, thereby infringing the legal and ethical commitment that should guide all aspects of the company's work. Even though the Court is unable to find the international responsibility of private entities, because its jurisdiction is restricted to the States Parties, it should have considered this aspect when taking its decision because it is necessary to consider the protection and promotion of human rights in the region in a broad sense so that its judgments do not encourage future violations thereby undermining the American Convention and the Inter-American Democratic Charter.

42. I repeat that I am not disregarding the responsibility of the Venezuelan State for the human rights violations evidenced in the judgment, but merely noting that this should have been analyzed within the broad context of political tensions, with excesses being committed on both sides - even the serious action of supporting or endorsing a coup d'état, which is the most severe political action against a representative democracy, an aspect that, with the approval of the majority of the Court, was not given due consideration when establishing the State's responsibility and determining the extent of this. Paradoxically, the judgment convicting the State in this case, which was decided in favor of RCTV, could be the one that awards the highest financial compensation in the Court's history.

²⁰ I/A Court HR. Advisory Opinion OC-5/85 of November 13, 1985. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), para. 30.

IV. Regarding the concession procedure as a way of guaranteeing the plurality of the media

43. The right of access to information, one of the elements of the right to freedom of expression, results in rights for society and obligations for all public authorities and for all those who occupy public office, provide public services or manage public funds in the name of the State.²¹

44. Thus, considering that the media operate on the basis of public concessions, providing a privately-administered public service of informing the population, based on authorizations granted by the State, it can properly be affirmed that the media have obligations they must comply with, and one of these is the obligation to inform the public.

45. In the case of *Ivcher Bronstein v. Peru* (2011), the Court determined that “the media have the task of transmitting information and ideas on matters of public interest, [and] the public has the right to receive them”²² as an input for their personal development and for a proper understanding of matters relating to democracy.

46. The exercise of freedom of expression entails duties and responsibilities for those who express themselves. The basic obligation derived from this, is the duty not to violate the rights of others while exercising this fundamental freedom. To verify the complementarity and harmonization between the rights and duties resulting from freedom of expression, it is necessary to take into account the specific situation in which the right is exercised, and the technical method used to express and impart the ideas and opinions.²³

4.1 The prohibition of monopolies and oligopolies in communication vehicles as a support for the principles of democracy

47. It is precisely for this reason, that application of Article 13 of the American Convention recommends the firm action of the State against the establishment of monopolies and oligopolies in the media. Advisory Opinion OC-5/85²⁴ refer to the need for plurality of such vehicles in order to respect effective freedom of expression. Similarly, in the case of *Kimel v. Argentina*, the need for the pluralism of information was reinforced, attributing the State with the obligation to guarantee this: “the State must not only minimize restrictions to the circulation of information, but must also, insofar as possible, balance the participation of different opinions in the public debate, promoting the pluralism of information.”²⁵

48. The free circulation of ideas and opinions also means that there cannot be either public or private monopolies, as the Court emphasized in Advisory Opinion OC-5/85 on “Compulsory

²¹ Special Rapporteurship for freedom of expression (Inter-American Commission for Human Rights). The Inter-American Legal Framework regarding the Right of Access to Information. OEA/Ser.L/V/II IACHR/RELE/INF.1/09, Washington D.C., 2009, para. 19.

²² I/A Court HR. *Case of Ivcher Bronstein v. Peru. Reparations and costs*. Judgment of February 6, 2001. Series C No. 74, para. 153.

²³ Special Rapporteurship for freedom of expression (Inter-American Commission for Human Rights). Inter-American Legal Framework regarding the right to freedom of expression, OEA/Ser.L/V/II CIDH/RELE/INF.2/09, Washington D.C., 2009, para. 18.

²⁴ I/A Court HR. Advisory Opinion OC-5/85 of November 13, 1985. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), para. 34.

²⁵ I/A Court HR. *Case of Kimel v. Argentina. Merits, reparations and costs*. Judgment of May 2, 2008 Series C No. 177, para. 57.

Membership in an Association Prescribed by Law for the Practice of Journalism.”²⁶ On that occasion, the Court indicated that:

[G]iven the broad scope of the language of the Convention, freedom of expression can also be affected without the direct intervention of the State. This might be the case, for example, when due to the existence of monopolies or oligopolies in the ownership of communications media, there are established in practice “means tending to impede the communication and circulation of ideas and opinions.”²⁷

49. Therefore, the existence of monopolies or oligopolies constitutes a disruptive element, contrary to freedom of expression, which should be addressed by the State.

50. Even supposing that clarity was lacking in the amendment of the regulatory framework, and even in view of the public statements made by senior government authorities before the conclusion of the appropriate administrative procedure for the review of the concessions, which allegedly led to the adoption of inappropriate measures, there is no way to avoid the undisputed fact that RCTV dominated a significant segment of Venezuelan television communication, and for this reason the action of the State would be relevant in the sense that it limited its power. If the State did this in an inappropriate way, without complying with its own laws, that is another issue (moreover, duly considered in the judgment).

51. In a context in which the State has the obligation to guarantee plurality, preventing the formation of undesirable oligopolies – always in order to promote the full exercise of the right to freedom of expression in its two dimensions, and in light of the internal norms governing the matter – it is apparent that RCTV did not have a right to continue benefiting from a State concession, and that the claim seeking to force the State’s hand was futile.

4.2. The role of regulation of the media to protect access to information

52. Bearing in mind that this case relates to the freedom of expression and of the press of executives, investors and employees of an important media outlet against the State, I consider it important to underscore the power that the press has achieved over the years.

53. Even though freedom of the press was born and developed as a right vis-a-vis the State – a constitutional guarantee of protection of the spheres of individual and social freedom against the political establishment – today, in many countries, the press represents a social power that is as significant as that of the political establishment itself. In this regard, Ossenbühl has stated that “today, it is not so much the ‘media’ that have to defend their position against the State, but rather, inversely, it is the State that has to protect itself so that it is not besieged, that is, manipulated by the ‘media.’”²⁸

54. Similarly, Vital Moreira has considered:

Initially, freedom of the press was a manifestation of individual freedom of expression and opinion. It involved ensuring the freedom of the press vis-à-vis the State. According to the classic liberal understanding, the freedom to establish newspapers and the competition between them ensured the truth and the pluralism of information, and provided vehicles for the expression of all the different currents and points of view in the press.

But soon it became evident that the press was also a social power that could affect the rights of the individual, as regards his good name, reputation, image, etc. Second, freedom of the press became

²⁶ I/A Court HR. Advisory Opinion OC-5/85 of November 13, 1985. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), para. 33.

²⁷ I/A Court HR. Advisory Opinion OC-5/85 of November 13, 1985. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), para. 56.

²⁸ Apud, Andrade, Manuel da Costa, *Liberdade de Imprensa e inviolabilidade pessoal: uma perspectiva jurídico-criminal*, Coimbra, Coimbra Editora, 1996, p. 63.

increasingly less an individual function for all, turning increasingly into a function of the few. Today, the mass media are no longer an expression of the individual freedom and autonomy of the citizens, rather they privilege the commercial or ideological interests of large corporations, institutions or interest groups.

Now, it has become necessary to defend not only the freedom of the press, but also freedom vis-à-vis the press.²⁹

55. In these circumstances, it is urgent to protect freedom of expression and of the press from the press itself. However, the content of the American Convention not only guarantees the press a broad area of freedom of action; it also protects the individual from the social power of the press. When this is used abusively there is a violation of the same right that it is supposed to protect and violations due to the abuse of the power of the press are usually devastating and difficult to fully reinstate or repair.

56. Another aspect of the media organs (television and radio stations, newspapers, magazines, or websites) which becomes important to verify is whether, despite acting in the public sphere providing information, they are private for-profit companies and they act in keeping with the private interests and opinions of the groups they represent.³⁰

57. The question here is, what are the terms of this relationship between private agents and the public sphere. As holders of power, these entities need to be monitored and held to account. As actors in the public sphere, working with fundamental rights, they possess public obligations. In this context, the mere application of private rules does not encompass the true breadth of the reality created in the sphere of the media.

58. It should also be considered that there is a growing debate on the responsibility of private entities for the violation of human rights, in the sense that they must respond for their acts at both the national and the international level. In 2011, the UN Human Rights Council adopted the Guiding Principles on Business and Human Rights, which emphasize the following:

Principle 11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

Principle 12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

Principle 13. The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

Principle 14. The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.

59. Regardless of the branch to which they belong, companies must respect the internationally recognized human rights, and may be held responsible for the reparation of possible violations that occur in the exercise of their functions. Specifically, with regard to the media, it is important to remember their relevance for the consolidation of active citizenship, which entails a press whose credibility before society stems from its independence and its

²⁹ Moreira, Vital. *O direito de resposta na Comunicação Social*. Coimbra: Coimbra Editora; 1994, p. 9

³⁰ Fonseca, Francisco. Mídia, poder e democracia: teoria e prática dos meios de comunicação. *Rev. Bras. Ciênc. Polít.*, Brasília, December 6, 2011. Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0103-33522011000200003&lng=en&nrm=iso.

ethical commitment to quality information, and its essential role in the promotion of human rights and in the denouncement of violations of these rights.

60. Currently, there is a great deal of discussion about the regulatory framework of communication or of the media, between those who defend its need and those who reject this with the justification of cherishing a communication free of any and every type of State interference or censure.

61. However, various countries have already enacted laws designed to regulate the exercise of mass communication, although it is necessary to consider that this regulation could be used for different purposes, which include in particular: (i) the promotion of democracy in the area of communications to prevent certain groups from controlling the production of information in the country; (ii) the defense of free competition with regard to communication companies; (iii) the defense of the rights of journalists and others responsible for obtaining and distributing news; (iv) the delimitation of the right to freedom of expression, in order to avoid abuses that violate the rights of others. Evidently, the regulations could also be used in order to exercise control over the content produced, censoring the media, and this is precisely the argument most used by those who oppose regulation.

62. The countries that possess regulations include: Argentina, the United Kingdom, the United States and Uruguay (the most recent). In Argentina, the media has been regulated since 2009 when the "Media Law" was enacted. The law defined the rules for television and radio stations, regulating the communication services, aimed at developing mechanisms for the "promotion, deconcentration and encouragement of competition in order to lower the cost of, democratize and universalize" communication.

63. In the United Kingdom, the regulation relates to the conduct of journalists as regards the limits to be observed in the exercise of the profession so as not to violation the rights of others, such as the right to privacy. It emerged in response to public demand as a result of the scandal that, in October 2013, exposed the invasion of privacy of many citizens by the British tabloids who had used illegal listening devices and hacked private telephones and social network accounts.

64. In the United States, the regulation has a much more limited purpose than the defense of democracy or of individual rights to privacy, and is designed to ensure freedom of competition in the sector, guaranteeing that no company can control a certain market, monopolizing the production or distribution of information.

65. In 2014, the UNESCO Communication and Information Sector published a report on: "World trends in freedom of expression and media development: regional overview of Latin America and the Caribbean,"³¹ in which it analyzed issues such as the freedom, pluralism, independence and safety of the media in the countries of the region.

66. One of the aspects addressed was the regulatory framework. In this regard, the report noted that there was a growing tendency to regulation communication; however, in each country this regulation had a different goal. The report underscored the adoption of new laws in order to revise the media laws left over from military dictatorships that no longer corresponded to the reality in the countries, either through the implementation of public policies aimed at broadening access to information or through the emergence of "alternative" sources

³¹ UNESCO. World trends in freedom of expression and media development: regional overview of Latin America and the Caribbean, 2014.

of information that brought different perspectives; in other words, a new approach to the production of news.

67. Based on the above, it appears extremely important that each State make an appropriate analysis of its internal communication regulations so that freedom of expression can be guaranteed and realized in a democratic manner. Accordingly, I will now analyze this objective in view of the decision to re-establish the RCTV radioelectric spectrum concession.

4.3 The absence of legal grounds to re-establish the RCTV radioelectric spectrum concession

68. As identified in paragraph 72 of the judgment, the Venezuelan State has a domestic law that guarantees a proper administrative procedure. In this way, the function of the Court in this situation was to ensure that the State implemented its laws effectively, without interfering arbitrarily in the merits of the concession procedure for its radioelectric spectrum.

69. Similarly, the re-establishment of the concession, and the return of RCTV's property and assets relates, above all, to a right to property that the judgment did not recognize.³² Thus, the restoration of the concession to RCTV entailed the use of contradictory mechanisms to re-establish democratic normality in the media in Venezuela. In addition, the fact that the Court understood, in paragraph 174 of the judgment, that the automatic renewal of the RCTV concession for the use of the radioelectric spectrum in 2007 could not be considered an acquired right under the laws of Venezuela, is contrary to that this decision Thus:

The dispute between the parties as to which of the two norms, Decree No. 1,577 or the LOTEL, would be applicable arises owing to the entry into force of the LOTEL in 2000 and, especially, due to the request to transform the licenses made by RCTV on June, 5, 2002, which was not answered until 2007. On this point, the Court agrees with the Inter-American Commission that it is not competent to establish which norm is applicable, particularly when there is disagreement on the interpretation of this matter, because the Court is not a tribunal of fourth instance. However, the Court considers it necessary to point out that neither of the two possible interpretations of application of the norms results in a right to renewal or automatic extension.³³

70. Having excluded the possibility of talking about an acquired right to automatic renewal of the concession, it is evident that the proper step to restore the right of the RCTV employees to the exercise of freedom of the press and of expression could be, for example, by opening a new concession procedure that guaranteed participation by RCTV and the other candidates in equal conditions and without discrimination, respecting the provisions of the domestic law in force.

71. It would only be reasonable to understand the inverse if it had been possible to prove that the Venezuelan State had not presented a clear and public intention to cancel the renewal of RCTV; then RCTV would certainly have obtained a renewal for another term. Since this was not so, I understand that the measure adopted in the judgment was not supported by the legal framework of the American Convention and resulted in a situation of inequality in relation to the other communication companies that wanted a concession on the radioelectric spectrum in Venezuela. Consequently, there was an unjustified interference that could, in apparent contradiction, violate the principle of plurality of the press necessary for the democratic system and firmly defended by this Court's case law.

72. Furthermore, the decision to re-establish the concession and the assets to RCTV, as shown above, does not affect the rights of any of the physical persons who are plaintiffs in this

³² *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 359.

³³ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 174.

case, but only of the company. In reality, what was requested was the right of the company to continue working. However, the Inter-American Court of Human Rights is unable to grant this type of restitution because it exceeds what it is supposed to protect. Consequently, I understand that this measure goes against the Court's case law and contradicts the defense of democratization and pluralism of the press, so dear to the values protected by the American Convention.

V. Final considerations

73. Despite my position which, to a great extent, concurs with the provisions of judgment, and my personal conviction that, when possible, discrepancies should be avoided on points that are merely conceptual, the rationale presented here is essential for the case law of this Court. In its mission to protect the human rights contained in the American Convention, the Court should always decide carefully and with view to the future in light of the possible consequences of its decisions. Even though these decisions are intended to establish the international responsibility of the States Parties, it is necessary to consider the broader context in which violations take place; not to attenuate or deny the role of the State, but rather to determine the real dimension of the significance of its actions. The violation of a human right of a defenseless individual is different from the violation of a human right of another that has extensive mechanisms for defense and, at times, the abuse of power.

74. There are many elements involved in the rights to freedom of the press and freedom of expression that are crucial for the consolidation of democracy in our hemisphere. The States, not only of this region but of the whole world are increasingly concerned about the regulation of the media as a fundamental aspect for the exercise of these rights. This does not mean that we should accept censure, but rather permit a plurality of quality information and in a more democratic way.

75. The *Case of Granier et al. v. Venezuela* is an example of how a monopoly in the media, either of the State or of private entities, can be harmful for society and can violate the collective aspect of the right to freedom of thought and expression. In a context of political tensions such as that experienced by Venezuela, it is unacceptable that either party ceases to comply with its institutional role and, above all, to act in a way that reinforces efforts that harm the democratic rule of law. Even political opposites must conduct themselves within a democratic framework.

76. As previously mentioned, the media operate under a public concession. This involves not only an ethical commitment, that should be fulfilled in all areas, but also the observance of certain rights and obligations. Even though, it is not pertinent to consider that RCTV violated the American Convention directly, this does not mean that RCTV does not have obligations and limitations resulting from domestic law and other international documents.

77. I am not ignoring the responsibility of the Venezuelan State for the human rights violations found in this judgment, but merely consider that they should have been analyzed within a broad context of the political tensions, with excesses committed on both sides, including even the serious action taken by the company by supporting and endorsing a coup d'état, which is the most serious political action against a representative democracy, an aspect that, with the approval of the majority of the Court, was not given due consideration when establishing the State's responsibility and determining the extent of this.

78. Freedom of thought and expression is not just about freedom of the press. To the contrary, it may conflict with this in case of abuse. It is necessary to give increasing attention to the collective dimension of human rights, in this case of freedom of expression, and the Inter-American Court is the necessary agent in this regard.

Roberto F. Caldas
Judge

Pablo Saavedra Alessandri
Secretary

DISSENTING OPINION OF JUDGE MANUEL E. VENTURA ROBLES
CASE OF GRANIER ET AL. (RADIO CARACAS TELEVISIÓN) V. VENEZUELA
JUDGMENT OF JUNE 22, 2015
(Preliminary objections, merits, reparations and costs)

1. I have dissented from the majority opinion in operative paragraphs 11, 12 and 13 of the judgment in the case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, because, if I had not done so, it would not be possible to rectify the contradiction between this case and others heard by this Court against the State of Venezuela with regard to two essential points which are those that refer to the guarantee of judicial independence and impartiality, and the right to property.

2. The case of *Granier et al. v. Venezuela* is, without any doubt, the most important judgment that the Inter-American Court of Human Rights has handed down in the area of freedom of expression (Article 13 of the American Convention on Human Rights) and the consequent reparations (Article 63 of the Convention). Throughout the judgment, the Court's desire to avoid violations of freedom of expression in our hemisphere, to reverse the case law in the case of *Mémoli v. Argentina*, and to convince the State of the gravity of the violation through the reparation ordered of returning the assets in question is unmistakable.

3. A crucial point to understand this judgment is the lack of independence and impartiality of the Judiciary in Venezuela, reiterated by the Court in the judgments delivered in the cases of *Apitz Barbera et al.*,¹ *Reverón Trujillo*² and *Chocrón Chocrón*,³ and to understand the consequences of this in the instant case: the violation of the right to property.

4. One of the main purposes of the separation of the public powers is to guarantee the independence of judges to avoid the judicial system and its components being subjected to undue constraints in the exercise of their function by entities that are not part of the Judiciary or, even, by those justices who exercise functions of review or appeal.⁴ In addition, the guarantee of judicial independence includes the guarantee against external pressure;⁵ thus,

¹ *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 148. In that case, the Court declared that: "the State violated the right of Messrs. Apitz, Rocha and Ruggeri to be tried by a court with sufficient guarantees of independence." See also, paras. 109 to 148.

² *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 127. The Court indicated that "owing to the specific consequences they had in this particular case, some of the norms and practices associated with the judicial restructuring process underway in Venezuela greatly affect judicial independence." See also, paras. 67 to 70, 77 to 79, 81, 114, 121 and 122.

³ *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011. Series C No. 227, para. 142. According to the Court: "owing to their specific consequences in this particular case, the inexistence of clear norms and practices on the full effectiveness of judicial guarantees in the removal of provisional and temporary judges resulted in a violation of the obligation to adopt appropriate and effective measures to ensure judicial independence." See also paras. 97 to 110.

⁴ *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 55, and *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 67.

⁵ *Cf. Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 75, and *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 80. See also ECHR, *Case of Campbell and Fell v. The United Kingdom*, (No. 7819/77; 7878/77), Judgment of June 28, 1984, para. 78, and *Case of Langborger v. Sweden* [Grand Chamber], (No. 11179/84), Judgment of June 22, 1989, para. 32. See also Principles 2, 3 and 4 of the United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on

the State must refrain from any undue interference in the Judiciary or its components; that is, with regard to the person of the specific judge, and must prevent such interferences and investigate and punish those who commit them.⁶

5. The right to be tried by an impartial judge or court is a fundamental guarantee of due process and it must be ensured that the judge and court, in the exercise of their functions, have the greatest possible objectivity when hearing a case.⁷ The Inter-American Court has established that impartiality requires that the judge who intervenes in a dispute must approach the facts of the case subjectively eliminating any prejudice and, thus, offering sufficient guarantees of an objective nature to inspire the necessary confidence in the parties to the case, as well as in the citizens in a democratic society.⁸ The court's impartiality signifies that its members do not have a direct interest, a preconceived position or a preference for one of the parties, and are not involved in the dispute.⁹

6. In the case of *Granier et al. v. Venezuela*, with regard to the representatives' argument concerning the "lack of procedural probity of the actions of the Chambers of the Supreme Court of Justice, thus revealing a total lack of independence of this highest judicial organ [as well as] an evident misuse of public power," the following points should be emphasized: (i) the decision to seize RCTV's assets was taken during proceedings on the application for constitutional amparo and the action for joint and separate interest in which interim measures had been requested. In one of those proceedings, the Supreme Court took, *ex officio*, and without being asked, the decision to assign the use of the property owned by RCTV to TVes, so that the latter could transmit throughout national territory; (ii) when the interim measure was issued granting the use of the assets to CONATEL, TVes had only recently been created and did not have the necessary infrastructure to transmit nationwide; thus, the Supreme Court granted it, *ex officio*, the use of the assets owned by RCTV; (iii) the representatives of RCTV were unable to take part in the proceedings directly because, even though the interim measure took a decision on the use of the assets owned by RCTV, they were not summoned to appear or served notice directly, and were only able to take part in the proceedings as interveners, and (iv) seven years later, the interim measure continues in force, allowing the State to use the assets owned by RCTV, without the Supreme Court taking any action to decide on the objection to this interim measure.

7. The action of the Supreme Court of Justice contributed to the decisions taken by organs of the Executive in relation to reserving the right to use the spectrum initially assigned to RCTV and the creation of a State-owned television channel, because the unspecific interim measure was ordered by the Supreme Court in order to grant the recently created State channel the assets it needed to operate.

the Prevention of Crime and Treatment of the Offenders, held in Milan from August 26 to September 6, 1985, and confirmed by the General Assembly in its Resolutions 40/32 of November 29, 1985, and 40/146 of December 13, 1985.

⁶ Cf. *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197, para. 146.

⁷ Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of July 2, 2004. Series C No. 107, para. 171, and *Case of Palamara Iribarne v. Chile. Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 135, para. 145.

⁸ Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of July 2, 2004. Series C No. 107, para. 171; *Case of Barreto Leiva v. Venezuela. Merits, reparations and costs*. Judgment of November 17, 2009. Series C No. 206, para. 98.

⁹ Cf. *Case of Palamara Iribarne v. Chile. Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 135, para. 146, and *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 207, para. 117.

8. The action of the Supreme Court contributed to the misuse of power, using a legitimate power with the illegitimate purpose of cooperating with the decisions taken by organs of the Executive. The Supreme Court of Justice acted with a lack of independence when deciding the unspecific interim measure regarding the use of RCTV's property.

9. The Constitutional Chamber of the Supreme Court of Justice decided to assign the use of the assets owned by RCTV to TVes by granting interim measures in two proceedings, in one of which this was disputed. Indeed, even though the action on joint and separate interests requested the Supreme Court to allow RCTV to continue transmitting, that court decided, *ex officio*, to assign the use of RCTV's property to TVes. The Supreme Court intervened in the decision on interim measures with a preconceived position, which collaborated with the decisions of the organs of the Executive, protecting the interests of TVes and granting it the assets it required to begin to operate. This reveals a lack of impartiality in the actions of the Constitutional Chamber when deciding the interim measure. Therefore, the Supreme Court of Justice failed to comply with the guarantee of impartiality in its ruling deciding on the use of RCTV's assets, and the State violated the right to property because the Supreme Court showed no independence whatsoever following the line taken by the Executive, which arbitrarily deprived RCTV of its assets.

10. In conclusion, it should be mentioned that the fact that the Court failed to declare a violation of the guarantees of judicial independence and impartiality and the right to property left a void in the judgment's content that resulted in its losing cohesion and harmony.

Manuel E. Ventura Robles
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE EDUARDO VIO GROSSI
CASE OF GRANIER ET AL. (RADIO CARACAS TELEVISIÓN) V. VENEZUELA
JUDGMENT OF JUNE 22, 2015
(Preliminary objections, merits, reparations and costs)

INTRODUCTION

This concurring opinion¹ is issued in relation to the judgment indicated above,² to emphasize some aspects of it related to the Inter-American Democratic Charter and, in this regard, to judicial independence and, above all, freedom of thought and expression.

A. THE INTER-AMERICAN DEMOCRATIC CHARTER

The allusion made in the judgment to the Inter-American Democratic Charter³ has special significance because, of its legal nature, the obligation it establishes, and the role that corresponds to the Court in this regard.

a. Legal nature

1. The Inter-American Democratic Charter is both a “declarative legal resolution of an international organization”⁴ and also an “authentic interpretation” of the treaties it refers to. The former, because it is a resolution adopted by the Special General Assembly⁵ of the Organization of American States.⁶ The latter, because it expresses the interpretation made by the Member States of that international organization, including the States Parties to the American Convention on Human Rights,⁷ of the provisions of its

¹ Art. 66(2) of the American Convention on Human Rights: “If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.”

Art. 24(3) of the Court’s Statute: “the decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges’ individual votes and opinions and with such other data or background information that the Court may deem appropriate”; and

Art. 65(2) of the Court’s Rules of Procedure: “Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the President so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment.”

² Hereinafter, “the judgment.”

³ Paras. 53, 54 and 140 of the judgment.

⁴ Another category of resolutions of international organizations includes those that are binding for their member States, because their constituent treaties explicitly establish this. In this case, the sources of law are the said treaties. It is worth added that all resolutions of international organizations are evidently compulsory for their organs.

⁵ Twenty-eighth special period of sessions held in Lima, Peru, September 11, 2001.

⁶ Hereinafter, “the OAS”.

⁷ Hereinafter, “the Convention.”

Charter⁸ and of the Convention,⁹ both as regards democracy. Hence, it could also be classified as an agreement between the States Parties to these two treaties concerning the application and interpretation of these instruments.¹⁰

2. In this regard, the Inter-American Democratic Charter was established because it was considered necessary. *A contrario sensu*, it is not a theoretical or a merely political text, without a specific legal purpose, but rather a legal instrument and, more specifically, it is an auxiliary source of international law, of even greater relevance than the Court's case law, because it is the States Parties themselves that have determined the Convention rules on the matter in question.¹¹ Its legal effects are, consequently, evident.

b. Democracy, an inter-American legal obligation

1. And this is because, in particular, it clearly establishes that the effective exercise of democracy in the States of the Americas constitutes an international legal obligation

⁸ Hereinafter the OAS Charter. Art. 2(b): "The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes: (b) To promote and consolidate representative democracy, with due respect for the principle of nonintervention."

Art. 3(d): "The American States reaffirm the following principles: (d) The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy," and "(l) The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex," and

Art. 9: "A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established."

(a) The power to suspend shall be exercised only when such diplomatic initiatives undertaken by the Organization for the purpose of promoting the restoration of representative democracy in the affected Member State have been unsuccessful.

(b) The decision to suspend shall be adopted at a special session of the General Assembly by an affirmative vote of two-thirds of the Member States;

(c) The suspension shall take effect immediately following its approval by the General Assembly;

(d) The suspension notwithstanding, the Organization shall endeavor to undertake additional diplomatic initiatives to contribute to the re-establishment of representative democracy in the affected Member State;

(e) The Member which has been subject to suspension shall continue to fulfill its obligations to the Organization;

(f) The General Assembly may lift the suspension by a decision adopted with the approval of two-thirds of the Member States;

(g) The powers referred to in this article shall be exercised in accordance with this Charter."

⁹ Paras. 2 and 4 of the Preamble to the Convention: "Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope; [...]", and

Art. 29(c): "No provision of this Convention shall be interpreted as: precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government."

¹⁰ Art. 31(3)(a) of the Vienna Convention on the Law of Treaties: "There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."

¹¹ Art. 38(1)(d) of the Statute of the International Court of Justice: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

and that, therefore, they have sovereignly agreed that this exercise is no longer only a matter of their exclusive internal, domestic jurisdiction. Thus, it can be affirmed that the Inter-American Democratic Charter was adopted in order to both safeguard duly and opportunely the full exercise of democracy and also, in the event that democracy was interrupted in a State of the Americas, ensure that this was promptly re-established.

2. That practical effect of the Inter-American Democratic Charter and, in particular, its Article 21,¹² is founded, above all, on the provisions of Article 9(d) and (f), of the OAS Charter.¹³ In other words, this supposes that the States of the Americas are democratic; in actual fact, at the time of its adoption they were and, consequently, its provisions indicate the situations in which, in one way or another, they violate their obligation to exercise democracy and indicate that this should be restored as soon as possible.

3. In summary, the Inter-American Democratic Charter was signed to be applied; that is, to have practical effects and to be valid for all OAS Member States and for all the organs of the inter-American system, including, consequently, the Court.

4. It is in this perspective that the allusion made in the judgment to the coup d'état that occurred in Venezuela should be understood¹⁴ and, accordingly, it is appropriate to reiterate that the re-establishment of the rule of law following a coup d'état¹⁵ does not, under any circumstance or pretext, authorize the legitimate authorities who have been reinstated in their positions to violate the human rights of those who presumably took part in that internationally wrongful act and, especially, to do this years after the coup and without have taken any legal action against such individuals on those grounds.

c. The Court and the Inter-American Democratic Charter.

1. Regarding the authority of the Court to consider, in the cases submitted to it and that it hears, the conformity or disconformity of the State's conduct with the Inter-American Democratic Charter, it should be recalled that in the event of a violation of the obligation to exercise representative democracy, the latter establishes the participation of both the OAS political organs and the organs established in the Convention.

2. In the case of the political organs, they can adopt measures that may consist in granting the assistance requested by the State concerned, organizing visits to it, executing diplomatic procedures or suspending its participation in the OAS. In other words, these organs adopt decisions of a political nature if an OAS Member State violates the inter-American legal obligation to exercise democracy effectively.

3. Regarding the Convention, Article 8 of the Inter-American Democratic Charter, included in the chapter entitled "Democracy and Human Rights," establishes that "[a]ny

¹² "When the special session of the General Assembly determines that there has been an unconstitutional interruption of the democratic order of a member state, and that diplomatic initiatives have failed, the special session shall take the decision to suspend said member state from the exercise of its right to participate in the OAS by an affirmative vote of two thirds of the member states in accordance with the Charter of the OAS. The suspension shall take effect immediately.

The suspended member state shall continue to fulfill its obligations to the Organization, in particular its human rights obligations.

Notwithstanding the suspension of the member state, the Organization will maintain diplomatic initiatives to restore democracy in that state."

¹³ Footnote No. 8.

¹⁴ Paras. 51, 52 and 60 of the judgment.

¹⁵ Para. 53 of the judgment.

person or group of persons who consider that their human rights have been violated may present claims or petitions to the inter-American system for the promotion and protection of human rights in accordance with its established procedures.”

4. Considering that this provision reiterates the provisions of the Convention,¹⁶ it may be concluded that, if it has been included in the Inter-American Democratic Charter it is, doubtless, to stress that the total or partial absence of democracy in a State involves, *per se*, violations of human rights. This means, consequently, that even though it would not be incumbent on the Court to condemn a State party to the Convention for violating the said Charter, at the very least it should consider that phenomenon in the context, not only of the specific facts that violate human rights in the case submitted to its consideration and decision, but also in the terms of the Convention, interpreted by that Charter.¹⁷ If this were not so, the inclusion of human rights in the latter would make no sense.

5. In addition, it is worth noting that, although the Court’s indications in this regard in a concrete or specific contentious case are not compulsory or binding for the OAS organs, such indications can constitute an element to be considered within the framework of the interrelationship between the different instances and organs of the inter-American system, if it should issue a ruling under the provisions of the Inter-American Democratic Charter. Consequently, a ruling by the Court in this regard would make a relevant contribution to one of the main purposes of the OAS¹⁸ and principles of the States of the Americas,¹⁹ particularly when the first paragraph of the Preamble to the Convention reaffirms “their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.”

B. JUDICIAL INDEPENDENCE

1. An issue with major impact on the effective exercise of democracy and, consequently, freedom of thought and expression, is that of the separation of powers and, more specifically, that of the independence of the Judiciary.²⁰ It should be recalled, in this regard, that Article 3 of the Inter-American Democratic Charter establishes as an essential element of representative democracy “the separation of powers and independence of the branches of government.”²¹ Plainly, this separation must not only be formal, but real and effective; consequently, if this is not so, the logical consequence

¹⁶ Art. 44 of the Convention: “Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.”

¹⁷ Footnote No. 10.

¹⁸ Article 2(b) of the OAS Charter: Any person or group of persons who consider that their human rights have been violated may present claims or petitions to the inter-American system for the promotion and protection of human rights in accordance with its established procedures.”(b) To promote and consolidate representative democracy, with due respect for the principle of nonintervention.”

¹⁹ Article 3(d) of the OAS Charter: “The American States reaffirm the following principles: (d) The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.”

²⁰ Judgment, Chapter VI “Facts”: (A) “Background and context”; A.1. “Determination of the context of the facts of the case”.

²¹ “Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.”

would be that this absence of separation and/or independence of the branches of government, signifies that the State concerned is not, strictly speaking, fully democratic; in other words, that it is violating the Inter-American Democratic Charter and the treaties it interprets.

2. Regarding the independence of the Judiciary in the State, it should be recalled that the Court referred to this recently in the case of *Chocrón Chocrón v. Venezuela*, in which it indicated: "in 2010, 56% of the Judiciary's judges were provisional and temporary according to a statement by the SCJ President and, at the time of the facts of this case, this figure was 80%. In addition to creating impediments to judicial independence, this is particularly relevant because Venezuela does not offer such judges the guarantee of tenure required by the principle of judicial independence. In addition, the Court observes that provisional and temporary judges are appointed discretionally by the State; in other words, without competitive examinations, and many of them have been made permanent through the "Special Program to Regularize Permanence (PET)." This means that the respective posts have been filled without allowing individuals who are not part of the Judiciary to compete with the provisional judges to accede to these posts. As indicated in the Reverón Trujillo case, even though evaluations of suitability have been made under the PET, this procedure grants job security to those who were initially appointed on an entirely discretionary basis."²²

3. Thus, the short time that passed between the date on which the facts of that case occurred and those of the instant case and, hence, little change in the context in which they took place, allow us to consider that the lack of independence of the Judiciary in Venezuela that was verified at that time is a well-known public fact. Accordingly, it should perhaps have been developed in the petition and other submissions by the petitioners and, in consequence, allowed the judgment to do so also.²³

C. Freedom of thought and expression.

1. Evidently, the *litis* in the instant case related fundamentally, although not exclusively, to whether the decision of the Bolivarian Republic of Venezuela²⁴ not to renew the license of Radio Caracas Televisión violated the provisions of the Convention with regard to freedom of thought and expression. Even more specifically, the dispute revolved around determining whether the non-renewal of the said license constituted an indirect means of restricting or rendering illusory the right to freedom of expression of the victims in this case.²⁵

2. And, it is precisely because the dispute relates to freedom of thought and expression and considering the provisions of Article 63(1) of the Convention²⁶ that, having verified that this right had been violated, it was appropriate in order to re-

²² *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011. Series C No. 227, para. 110.

²³ Para. 305 of the judgment.

²⁴ Hereinafter, "the State."

²⁵ Art. 13(3) of the Convention: "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." Paras. 161 to 164 of the judgment.

²⁶ "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party".

establish the enjoyment of that right that the Court order that the situation be returned to its condition prior to the violation; in other words, before the end of the concession held by Radio Caracas Televisión, making it unnecessary to determine the possible autonomous violation of the right to private property alleged in this case.²⁷

3. Second, since this matter relates to freedom of thought and expression, it was considered that, although the Convention only refers, in its Article 1(2), to the rights of human beings²⁸ – that is, natural persons, excluding legal persons from its scope – it is no less certain that, since legal persons are an instrument for natural persons to be able to achieve certain social objectives and therefore execute certain activities to that end,²⁹ the existence of these legal persons cannot constitute, in the practice or effectively, a pretext for preventing the natural persons who compose them from exercising their human rights established in the Convention.

4. In this regard, it should not be overlooked that some of the rights established in the Convention presume that their exercise may be carried out precisely through legal persons, non-profit or profit-making, companies or foundations and corporations, political parties or trade unions, etc. The stipulations with regard to the right of assembly,³⁰ freedom of association,³¹ and political rights³² should also be recalled in this regard.

5. Third, for the same reason, considering that the object and purpose of the Convention is that the States respect the rights and freedoms recognized therein and ensure their free and full exercise to all persons subject to their jurisdiction, without any discrimination,³³ in the interpretation and application of the Convention in this case, the Court took into account the *pro personae* principle that inspires the Convention;³⁴ namely, that it is not permitted, whatsoever the manner or instrument used, “to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein.”

²⁷ Paras. 379 to 382 of the judgment.

²⁸ “For the purposes of this Convention, “person” means every human being.”

²⁹ Paras. 22 and 146 a 152 of the judgment.

³⁰ Art. 15 of the Convention: “Right of Assembly. The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.”

³¹ Art. 16(1) of the Convention: “Freedom of Association Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.”

³² Article 23.1.a) of the Convention: “Right to Participate in Government. Every citizen shall enjoy the following rights and opportunities: to take part in the conduct of public affairs, directly or through freely chosen representatives.”

³³ Article 1(1) of the Convention: “Obligation to Respect Rights. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

³⁴ Article 29 of the Convention: “Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; (b).restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”

6. Hence, in the instant case, the purpose of the application of the *pro personae* principle in the interpretation of Article 13 of the Convention is precisely to avoid the freedom of thought and expression recognized in that provisions being illusory or subject to a normative pretext that voids it of content or practical effect.

7. Thus, it is within this general framework, that the allusion made in the Inter-American Democratic Charter to freedom of thought and expression acquires special significance.³⁵ Moreover, it refers to this freedom three times, twice indirectly and once directly. The first indirect reference is in its Article 3, which indicates that one of the essential elements of democracy is "respect for human rights and fundamental freedoms."³⁶ The second is in its Article 7, which establishes that "[d]emocracy is indispensable for the effective exercise of fundamental freedoms and human rights."³⁷ Obviously, the freedom of thought and expression established in Article 13(1) and (3) of the Convention and in Article IV of the American Declaration of the Rights and Duties of Man,³⁸ should be understood within the concept of "fundamental freedoms."

8. Then, there is a direct reference in Article 4 of the Inter-American Democratic Charter which indicates that an essential component of democracy is "freedom of expression and of the press."³⁹

9. It is on this basis that the Court has indicated that "[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion."⁴⁰ This position was reiterated in greater detail when the Court asserted that: "[t]hus the different regional systems for the protection of human rights and the universal system agree on the essential role played by freedom of expression in the consolidation and dynamics of a democratic society"; and added that "[w]ithout effective freedom of expression, exercised in all its forms, democracy is enervated, pluralism and tolerance start to deteriorate, the mechanisms for control and complaint by the individual become ineffectual and, above all, a fertile ground is created for authoritarian systems to take root in society."⁴¹

³⁵ Para. 140 of the judgment.

³⁶ "Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government."

³⁷ "Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments."

³⁸ "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever".

³⁹ "Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. [...]"

⁴⁰ *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs.* Judgment of February 5, 2001. Series C No. 73, para.68.

⁴¹ This thesis is reiterated in: *Cf. 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; *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para.116; *Case of Ricardo Canese v. Paraguay. Merits, reparations and costs.* Judgment of August 31, 2004. Series C No. 111, para. 86; *Case of Ríos et al. v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of January 28,2009. Series C No. 194, para. 105; *Case of Perozo et al. v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of January 28,2009. Series C No. 195, para. 116, and *Case of Vélez Restrepo and family members v. Colombia.* Judgment of September 3, 2012. Series C No. 248, para. 141.

10. These references signify, therefore, that if the right to freedom of expression and of the press is violated, the right of the people concerned to democracy is also violated. Ultimately, the close relationship between human rights and representative democracy is expressed by full respect for the former leading to the effective exercise of the latter and that the latter guarantees this full respect for the former.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE DIEGO GARCIA-SAYÁN
JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF GRANIER ET AL. (RADIO CARACAS TELEVISIÓN) V. VENEZUELA
JUDGMENT OF JUNE 22, 2015
(Preliminary objections, merits, reparations and costs)

1. In this judgment, the Court reaffirms and develops fundamental principles regarding freedom of expression in its relationship with democratic pluralism and the corresponding obligation of the States to ensure rights in different areas, including the issue of media concentration.

Freedom of expression and the obligation to ensure this

2. In concepts developed in its consistent case law that it reiterates in this judgment, the Court has established that "freedom of expression, particularly in matters of public interest, 'is a cornerstone in the very existence of a democratic society'"¹ Consequently, the State must not only respect freedom of expression, but also ensure it, including not only "the dissemination of information or ideas that are received favorably or considered inoffensive or indifferent, but also as regards those that are disagreeable for the State or any sector of the population."²

3. By emphasizing the pivotal nature of the protection of freedom of expression as a "cornerstone" of democratic society, the Court reiterates three fundamental principles that it has identified invariably and consistently directly related to freedom of expression: the exercise of freedom of expression in harmony with other rights;³ the obligations of journalists and the media,⁴ and the plurality of the media and news.⁵

4. From the perspective of the weighing of rights, which this Court must take into consideration in its decisions, in this judgment, the Court has reaffirmed the principle that freedom of expression is not an absolute right and must be exercised and ensured in harmony with the exercise and protection of other rights.

5. Consequently, in certain circumstances, it may be subject to restrictions as the Court had already established in its Advisory Opinion OC-5/85 of November 13, 1985, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, and in the *Case of Perozo et al. v. Venezuela* of January 28, 2009, among other rulings. In addition, the Court reaffirmed that the right to freedom of expression should be exercised and protected in harmony with the other rights, which must be protected and ensured simultaneously and in a coordinated manner. Thus, the Court reiterated in this judgment, "that both freedom of expression and the right to honor, established in the Convention, are extremely important," so that "the exercise of both these rights must be guaranteed."⁶ Hence, it affirmed that "the prevalence of one or the other in a specific case will depend on the weighing made based on proportionality."⁷

¹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of June 22, 2015. Series C No. 293, para. 140.

² *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 140.

³ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 144.

⁴ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 139 and 144.

⁵ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, paras. 142 and 143.

⁶ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 144.

⁷ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 144.

6. Assuming its jurisdictional function to safeguard the full and comprehensive exercise of all the rights established in the Convention, the Court assigns a central role in the exercise of the right to freedom of expression to journalists and the media. In this regard, the reaffirmation of the close relationship between this right and the professional exercise of journalism is significant, in the sense that the professional journalist is not, nor can he be, anything but someone who has decided to exercise freedom of expression in a continuous, regular and paid manner.”⁸

7. At the same time, the Court reiterates and specifies the responsibilities that a journalist has, for the benefit of society as a whole. Among these, it stresses the “obligation to verify, within reason although not necessarily exhaustively, the facts on which his information is based. In other words, it is valid to demand fairness and diligence in comparing sources and seeking information. This involves the right not to receive a manipulated version of the facts. Consequently, journalists have an obligation to keep a critical distance from their sources and compare them with other relevant information. Similarly, the European Court has indicated that freedom of expression does not guarantee that journalists have an unlimited protection, even in matters of public interest. “While enjoying the protection afforded by freedom of expression, journalists must, when exercising their duties, abide by the principles of responsible journalism; namely, to act in good faith, provide accurate and reliable information, objectively reflect the opinions of those involved in a public debate, and refrain from pure sensationalism.”⁹

Plurality of the media: obligation to ensure rights

8. The Court, in this judgment, reaffirms and develops fundamental criteria contained in its consistent case law with regard to the plurality of the media. One of the issues in dispute in this case was, precisely, that of the alleged purpose of the control by the State, for political reasons, of the frequency of which RCTV had been a concessionaire. The Court determined that, as inferred from the proven facts, the measures adopted by the State authorities in this case affected pluralism. Hence, it concluded that this action resulted in a restriction of the right to freedom of expression and violated the prohibition of using “indirect methods or means” to restrict the communication, dissemination and circulation of ideas and opinions, which includes the parallel obligation of the States to fully guarantee these rights.

9. The conceptual development of the Court’s criteria on the crucial issue of pluralism as an essential component of freedom of expression – in particular and, in general, for a democratic society – is central in this judgment. Indeed, the judgment stresses “the importance of pluralism in the context of the right to freedom of expression, indicating that this signifies tolerance and a spirit of openness without which a democratic society does not exist.”¹⁰ The Court defines the general concept of “pluralism” for the purposes of freedom of expression, among other aspects, by the binding interpretive standard of the “plurality of the media or news.” In this regard, the pluralism of the media “constitutes an effective guarantee of freedom of expression¹¹ and the State has a duty to protect and ensure this [...] by minimizing restrictions to information and encouraging a balanced participation and by allowing the media to be open to all without discrimination, because the idea is that “no individuals or groups are, *a priori*, excluded.”¹²

⁸ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, paras. 71 and 74, and *Case of Mémoli v. Argentina*, para. 120.

⁹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 139.

¹⁰ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 141.

¹¹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 142.

¹² *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 142.

10. The plurality of the media may be impaired by a direct action or intervention of the State, as indicated by the facts of this case. However, the Court clarified that violations may also occur without direct State intervention, as this judgment clearly reveals.¹³ In this regard, the Court emphasized criteria established in its consistent case law, indicating that "[t]his may occur, for example, when, owing to the existence of monopolies or oligopolies in the ownership of the media, a practice is established of 'mechanisms aimed at preventing the communication and circulation of ideas and opinions.'"¹⁴ Thus, the Court endorsed the criteria contained in the Declaration of Principles on freedom of expression and incorporated this, establishing as an interpretive standard of international law that "[m]onopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information."¹⁵

11. In keeping with the right to plurality of the media and news, the Court recalled the positive obligations of the States derived from this right and that other international courts have already determined with precision. This was clearly established by the European Court of Human Rights "in the case of *Centro Europa 7 S.R.L. and Di Stefano v. Italy* (2012), [in which it] indicated that, in addition to the negative duty of non-interference, the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism and diversity. Also, when determining that the State had a positive obligation to ensure an appropriate legislative and administrative framework to guarantee effective pluralism, the Court referred to Recommendation CM/Rec(2007)2 of the Council of Ministers on media pluralism and diversity of media content, reaffirming that: "In order to protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, member States should adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed."¹⁶

12. In the context of this standard of analysis, and reiterating what it had already established in its consistent case law, the Inter-American Court strongly emphasized the positive obligation; in other words, the obligation of the States to guarantee the pluralism of the media: "the States have the international obligation to adopt the measures necessary 'to give effect to' the rights and principles established in the Convention, as stipulated in Article 2 of this inter-American instrument, and to this end they must establish laws and public policies that guarantee the pluralism of information and news on the different media, such as the press, radio and television."¹⁷

13. Consequently, as a result of the international obligation of the States to guarantee the plurality of the media, they must adopt "the necessary measures," which include "laws and public policies" that guarantee "the pluralism of information and news on the different media, such as the press, radio and television." Thus, the enumeration of the possible ways to comply with this international obligation includes a key guiding concept which is that of "the necessary measures," and the mention of "laws and public policies" should be understood as one of several ways available to comply with this general obligation. As in the case of the different international

¹³ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 143.

¹⁴ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 143.

¹⁵ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 143.

¹⁶ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 145, footnote 214.

¹⁷ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 145.

obligations of the States, it should be understood that the one mentioned here includes all the institutional spheres of the power of the State, so that the Executive, the Legislature, the Judiciary and all the other areas of the State, within their terms of reference, are also subject to them.

Radio frequencies and rights of private individuals

14. The legal conditions for the use of radio frequencies has been one of the important aspects disputed in this case. As described in the judgment, during the proceedings the representatives of the victims argued that an alleged right to "automatic renewal" of the right to the use of the frequency allocated to RCTV had been violated, while the State affirmed that the right to automatic renewal did not exist under Venezuelan law.

15. In this regard, the Court was clear in establishing, first, the power of the States "to regulate broadcasting activities, and this covers not only the possibility of defining the way in which concessions, renewals or revocations of licenses are handled, but also the possibility of planning and implementing the relevant public policies."¹⁸ However, at the same time, the Court clarified that this is so, "provided that the standards imposed by the right to freedom of expression are respected. This is because the granting or renewal of a broadcasting concession cannot be compared to that of other public services because the scope of the right to freedom of expression must permeate the respective regulation."¹⁹

16. By the same token, the State's ability to regulate this area must not only respect and ensure the right to freedom of expression in general but, in particular, must seek to ensure pluralism taking into account that the radioelectric spectrum is a limited resource, which restricts the number of media that have access to it. Therefore, the Court established that "it is necessary to ensure that this media represents a diversity of news and opinion viewpoints or positions. [...] The foregoing should be taken into account in the procedures for the granting and renewal of broadcasting concessions or licenses."²⁰ Based on considerations such as this, the Court was emphatic in establishing that "any limits or restrictions arising from broadcasting laws and regulations should take into account the guarantee of the pluralism of the media, given its importance for the functioning of a democratic society."²¹

17. Applying this reasoning to the instant case, taking into consideration the elements of law and the proven facts, the Court concluded that this guarantee of pluralism had been impaired by the actions of the State. This was not because RCTV had been denied an alleged right to "automatic renewal," which the Court noted that the State was not obliged to grant under either domestic law or international law,²² but owing to the lack of objective criteria used by the authority in the case of RCTV and the serious violation of the guarantees of due process that prevented the executives of this company from negotiating the renewal of the license that expired on May 27, 2007.

18. As the Court established in this judgment, "starting in 2002, indications were given that the television channels that did not modify their editorial line would not have their concessions renewed."²³ The real reasons for the decision in the case of

¹⁸ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 165.

¹⁹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 165.

²⁰ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 170.

²¹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 170.

²² *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, paras. 178 to 180.

²³ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 193.

RCTV were “that RCTV had not modified its editorial line following the 2002 coup” and “the alleged improper actions of RCTV”; however, these reasons were not even mentioned at the time by the authorities as justification for the decision. It should be noted that the Court established that “it [was] contradictory that comments and accusations were made in relation to the alleged sanctions and that Communication No. 0424 indicated expressly that these were not the justification for the decision.”²⁴

19. In this context, the Court established that the violation of Article 13 “involved a misuse of power because the State used its lawful authority in order to try and align the communications outlet’s editorial line with the government,”²⁵ which constituted the Court’s core conclusion in this case: that it was “an indirect restriction of the exercise of the right to freedom of expression by measures aimed at preventing the communication and circulation of ideas and opinions, when the State decided that it would reserve to itself the portion of the spectrum and, therefore, prevent the participation in the administrative procedures for the adjudication of the titles or the renewal of the concession of a media outlet that expressed opinions that were critical of the government.”²⁶

20. Considerations such as this led the Court to conclude that, in this case there had been a violation of “Article 13(1) and 13(3) in relation to Article 1(1) of the American Convention to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Inés Bacalao, Eladio Lárez, Eduardo Sapene, Daniela Bergami, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño.”²⁷

Guarantees and due process

21. To decide this case, the Court made a rigorous and impartial examination based on the factual and legal arguments submitted by the parties and the Commission, and the evidence in the case file. Regarding the specific aspect of judicial guarantees and judicial protection, this called for a detailed examination of the information obtained on each of the domestic proceedings to determine whether there had been violations of Article 8 of the Convention and of judicial protection in order to arrive at the conclusions reached in this case.

22. The legal considerations in this judgment regarding judicial guarantees and due process are conclusive in finding the violations that occurred in this case to several of the rights that are in dispute.

23. As in other cases decided by this Court, violations of the procedural guarantees have a direct impact on other substantive rights – in this case freedom of expression. Owing to the nature of this case, the fact that the administrative procedures for the transformation of the titles and renewal of the RCTV concession were not executed was a determinant factor in its non-renewal. As the Court established, “a procedure did exist for the transformation of the titles and for the renewal of concessions in the laws of Venezuela and [...] the RCTV legal representatives initiated this procedure by submitting the said requests. However, [...] the State took the decision not to apply the procedure,”²⁸ “thus violating the judicial guarantees established in Article 8(1) in relation to Article 1(1) of the American Convention to the detriment of Marcel Granier, Peter Bottome, Jaime

²⁴ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 194.

²⁵ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 197.

²⁶ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 199.

²⁷ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 199.

²⁸ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 251.

Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar and Francisco J. Nestares.”²⁹

24. In addition, during its examination of the domestic proceedings, the Court verified that, during the processing of the “administrative remedy seeking nullification with a request for an injunction and, failing this unspecified interim measures of protection against the administrative decision derived from Resolution No. 002 and Communication No. 0424,” the guarantees of those concerned were violated. Indeed, the Court determined that “the judicial authority did not ensure, diligently, that a reasonable time was respected in this case,”³⁰ and that there had been excessive delays in these proceedings which were at a halt since 2008. In this regard, the Court concluded that “Venezuela violated the right to a reasonable time established in Article 8(1) in relation to Article 1(1) of the American Convention to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar, Francisco J. Nestares, Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Eladio Lárez, Odila Rubin, Oswaldo Quintana, Eduardo Sapene, Daniela Bergami, Isabel Valero, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño,”³¹

25. Furthermore, regarding the processing of the unspecified interim measure, the Court reiterated the principle that “the amparo should be a ‘simple and prompt’ remedy pursuant to Article 25(1) of the Convention, and [...] that other remedies should be decided within a ‘reasonable time’ pursuant to Article 8(1) of the Convention.”³² Therefore, since this was an interim measure and since more than three months were taken to decide it, the State “violated the right to a reasonable time established in Article 8(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar, Francisco J. Nestares, Edgardo Mosca, Anani Hernández, Inés Bacalao, José Simón Escalona, Eladio Lárez, Odila Rubin, Oswaldo Quintana, Eduardo Sapene, Daniela Bergami, Isabel Valero, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño.”³³

26. Regarding the criminal proceedings in this case, the Court determined that the State did not violate Article 8 of the Convention when processing the criminal complaint filed by RCTV “requesting the opening of an investigation into offenses against property and other offenses established in the Anti-Corruption Law.”³⁴ However, in the judicial proceedings related to the alleged seizure of assets, the Court noted that, in May 2007, the RCTV representatives filed “an appeal against the interim measure issued by the Constitutional Chamber in the context of the action on joint and separate interests that assigned the use of RCTV’s assets to CONATEL.”³⁵ Despite the time that has passed, “the interim measures issued in 2007 remain in force to date and the State continues using RCTV’s property to transmit the signal of the State channel TVes,”³⁶ thus constituting a violation of the “right to a hearing and a reasonable time established in Article 8(1), in relation to Article 1(1) of the American Convention to the detriment of Marcel Granier, Peter Bottome, Jaime

²⁹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 253.

³⁰ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 270.

³¹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 276.

³² *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 282.

³³ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 287.

³⁴ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, paras. 114, 292.

³⁵ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 307.

³⁶ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 307.

Nestares, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar, Francisco J. Nestares"³⁷.

27. Regarding the alleged violation of Article 25 of the Convention on judicial protection, the Court examined the processing of the application for constitutional amparo and concluded that "although the Supreme Court of Justice delayed slightly more than three months to rule on the application for constitutional amparo, this period was not excessive for deciding the application, and did not influence its effectiveness, particularly since its inadmissibility was based on the requirement that the appropriate remedy should be used against the administrative decisions contained in Communication No. 0424 and Resolution No. 002 prior to making an application for amparo."³⁸ The Court also examined the processing of the injunction request and concluded that although the Political-Administrative Chamber took more than the three working days established for this purpose, it did so before the date on which RCTV was closed down.³⁹ In this understanding, the Court concluded that "the State did not violate the right to judicial protection established in Article 25(1), in relation to Article 1(1) of the Convention."⁴⁰

Reparations and re-establishment of violated rights

28. The violations of Articles 8 and 13 of the Convention verified by the Court could, in theory, be redressed legally by the simple declaration in the judgment that the violation occurred and, in this regard, by determining that the judgment, *per se*, constituted the reparation. However, in its case law, the Court has usually established the pertinence of diverse measures of reparation addressed at repairing the harm, restoring the violated rights, and determining measures of non-repetition in each case.

29. This is what the Court has decided to do in this case. Hence, considering, in particular, "the circumstances of the case *sub judice*, the harm that the violations committed caused to the victims, and also the consequences of a non-pecuniary nature that they endured as a result of the violations of Articles 8 and 13 of the American Convention, declared to the detriment of the victims, *the Court finds it pertinent to establish the following measures of satisfaction and guarantees of non-repetition*" (Para. 371).

30. The judgment found concurrent violations of the rights to freedom of expression, of its exercise without discrimination, and of judicial guarantees, concluding, based on the proven facts, that the decision not to renew the RCTV concession was not based on a valid technical or legal reason, but rather to weaken the plurality represented by critical voices.

31. Consequently, although the Court has not determined that the alleged right to property in relation to the concession granted to RCTV has been violated in this case, owing to the verified violations of several provisions of Articles 8 and 13 of the Convention in relation to Article 1(1) of this instrument, the judgment required the re-establishment of the concession of the frequency of the electromagnetic spectrum corresponding to television's channel 2. To this end, and to ensure that this measure is not illusory, the Court ordered "the return of the assets subject to interim measures, because they are essential for the effective operation of the concession."⁴¹

³⁷ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 308.

³⁸ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 317.

³⁹ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 322.

⁴⁰ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 323.

⁴¹ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 381.

32. However, this measure of reparation did not require the re-establishment of the concession to be final, but rather an immediate action, taken in the context of a procedure, and “until it is granted definitively”⁴² as a result of “an open, independent and transparent procedure to allocate the frequency of the electromagnetic spectrum corresponding to television channel 2; to this end, following the procedure established in the LOTEL or the relevant domestic law.”⁴³

33. Lastly, in order to reinforce democratic pluralism and as a guarantee of non-repetition, the Court required that the State “take the necessary measures to ensure that all the future processes held to allocate and renew radio and television frequencies, be carried out in an open, independent and transparent manner. All these processes must be implemented without discriminatory criteria that seek to limit the granting of concessions, and must be designed to reinforce the pluralism of information and respect for judicial guarantees.”⁴⁴

Diego García-Sayán
Judge

Pablo Saavedra Alessandri
Secretary

⁴² *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 381.

⁴³ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 382.

⁴⁴ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 394.

PARTIALLY DISSENTING OPINION OF JUDGE ALBERTO PÉREZ PÉREZ
CASE OF GRANIER ET AL. (RADIO CARACAS TELEVISIÓN) V. VENEZUELA

JUDGMENT OF JUNE 22, 2015
(Preliminary objections, merits, reparations and costs)

1. I have voted against declarative paragraphs 3 and 4, and operative paragraphs 15 and 16, for the following reasons.

I. Freedom of enterprise and not freedom of expression

2. The central point of my dissent stems from the third operative paragraph which declares a violation of "Article 13(1) and 13(3) in relation to Article 1(1) of the American Convention owing to an indirect restriction of the exercise of the right to freedom of expression to the detriment of Marcel Granier, Peter Bottome, Jaime Nestares, Inés Bacalao, Eladio Lárez, Eduardo Sapene, Daniela Bergami, Miguel Ángel Rodríguez, Soraya Castellano, María Arriaga and Larissa Patiño." In my opinion, the rights defended by the presumed victims are not related to freedom of expression, but rather to the financial interests of those who, through a complicated network of legal entities,¹ are the real owners of RCTV C.A, as indirect shareholders. (In the interests of brevity, although with less precision, we will refer to them as "shareholders.")

Subjective aspect

3. Initially, in the original petition lodged before the Inter-American Commission on Human Rights ("the Commission"), the representatives identified as presumed victims physical persons who, according to their description, "were RCTV shareholders, journalists or employees."² They identified the 78 persons who appear in footnote 11 of the judgment as "journalists," the 89 persons who appear in footnote 12 as "employees," the 14 personas who appear in footnote 9 as "executives," and the seven persons who appear in footnote 10 as "shareholders." This gives a total of 187 persons, because Marcel Granier appears on the last two lists, as a Board member and shareholder.³ In the brief with motions, pleadings and evidence the "executives" became "employees" and four members of the Board who had not appeared in any of the original lists were added⁴ (footnote 12, second paragraph)

4. That list was drastically reduced to only 21 (including 7 shareholders) in the Commission's Merits Report⁵ and, in relation to violation of Article 13(1) and 13(3), and reduced even further, to 11 (including 3 shareholders), in the judgment.⁶ In reality, according

¹ Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, para. 65.

² Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, para. 20.

³ Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, para. 20.

⁴ Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, para. 20, footnote 12.

⁵ Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, para. 21.

⁶ Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, operative paras. 3 and 4.

to the Court, the criteria for inclusion on the list of victims of the indirect restriction of the right to freedom of expression was the “*real impact on the communications mission of the company.*”⁷ Based on the total number of violations declared by the Court, the list of victims is variable: the 7 indirect shareholders in relation to the right to due process in the proceedings on the transformation of the titles and renewal of the concession⁸ and the right to a hearing and a reasonable time in the processing of the action on joint and separate interests;⁹ 11 in relation to the indirect restriction of the exercise of the right to freedom of expression¹⁰ and the obligation of non-discrimination,¹¹ and 19 with regard to the right to a reasonable time in the administrative proceedings for annulment¹² and the right to a reasonable time in the processing of the unspecified interim measure in the context of the administrative proceedings for annulment.¹³

5. Also, the fifteenth and sixteenth operative paragraphs bear no relationship to any of the paragraphs declaring violations, and consider that the legal person, RCTV, is a victim, and substantially, its seven indirect shareholders.

6. Thus, from a subjective perspective, 168 journalists, employees and executives who were included in the original petition have been omitted from the protection of the judgment, and 176 of these from the protection of freedom of expression. The beneficiaries of the findings and reparations in relation to the most important aspects are the seven shareholders. The other individuals who have been considered victims on some points, citing their supposed capacity as employees, in reality were part of another category because they were senior executive personnel.

Objective aspect

7. The reduction of the number of people involved in the proceedings before to Court to seven individuals – the shareholders – also explains why, from an objective point of view, the claims that were asserted and the results finally obtained were related not to the individual and social values associated with freedom of expression, but rather to the RCTV company and its owners. Several points illustrate this assertion.

8. First, the shareholders did not assign priority to the possible concession of another channel that would have allowed them to continue operating. Indeed, paragraph 209 notes that the representatives indicated that “there were other free and available frequencies on the radioelectric spectrum.” Their arguments reveal that they were more interested in underlining that there were also “the frequencies of another television station in the same legal, technical and commercial conditions as RCTV, so that there was no reason that justified why it had to be precisely the RCTV frequencies that had to be used to permit the alleged democratization of the media.” But, if there were other “free and available” frequencies, and if they wanted to defend freedom of expression, the most logical and natural reasoning would be that RCTV should have requested one of these frequencies.

9. The judgment also refers to the State’s assertion (which was not contradicted by the

⁷ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, paras. 153 and 158 to 160.

⁸ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, operative para. 5.

⁹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, operative para. 8.

¹⁰ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, operative para. 3.

¹¹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, operative para. 4.

¹² *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, operative para. 6.

¹³ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, operative para. 7.

representatives) that “[r]egarding the reasons to assign ‘the RCTV signal rather than that of another television station,’ it stated that, ‘of the VHF signals that exist, that of Channel 2 is the one that has the greatest reach owing to its location on the electromagnetic spectrum band; technically speaking, this signal is the one that is the most advantageous; it is the first signal on the dial on the electromagnetic spectrum band; it has the greatest reach, even more than a State signal, such as Venezolana de Televisión, and therefore requires less investment to distribute it.’”¹⁴ It added that “[t]here are considerable savings in technical and infrastructure costs and the signal has significant reach nationwide; in addition, the antennas, the towers, their location – the attributes of the concession, as this is defined in article 110 of the Telecommunications Organic Law – are specific for each signal; in other words, the RCTV infrastructure, specifically its transmitters, is only suitable for use with that particular signal.”¹⁴ The State also indicated “that the selection of the RCTV chain was due ‘merely to technical reasons,’ because ‘the frequencies have viewing channels,’ so that ‘the frequencies 2 and 3, which [were] those that RCTV [had, are those that are] closest to the earth; therefore, they have a greater reach, they extend further and require less expensive equipment.’” It added that “it was the only channel [...] that had nationwide coverage” and emphasized that, it was “a technical necessity.”¹⁵

10. This assertion appears to corroborate the following information that can be found by a simple search on the Internet.¹⁶ In 1953, “two private commercial television stations were inaugurated, Televisa (unrelated to the actual Mexican chain) and Channel 4 on the VHF band, on June 1, and *Radio Caracas Televisión (RCTV) on 174-180 MHz on November 15. Subsequently, the latter company asked to change Channel 7 for Channel 2 on the VHF band to improve its coverage in Caracas*” (italics added). The representatives’ failure to refute this point means that the argument in the judgment that cites extensively “the inversion of the burden of proof as a result of from the application of a prohibited type of discrimination contained in Article 1(1) of the Convention”¹⁷ is unconvincing.

11. The predominance given by the representatives to the material and financial interests is expressed also in the exorbitant request for compensation. Indeed, they ask for 384,458,356 dollars for “the financial prejudice that the devaluation of [RCTV] caused the shareholders” [and] “33,166,954 dollars for transmission equipment made abroad, the general transmission network, sites for placement of transmitters and other equipment, as well as reports on strategic signal coverage in the territory of Venezuela,”¹⁸ for a total of 417,625,310 dollars.

II. Inadmissibility of the restoration of the concession

12. The fifteenth and sixteenth operative paragraphs are absolutely contradictory to the general reasoning of the judgment, in which it is clearly stated that RCTV did not have a right to the renewal and that there was no automatic renewal either.

Inexistence of the right to renewal of the concession of a television channel or to automatic renewal

13. The restoration of the concession would only have been justified if the judgment had

¹⁴ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 212.

¹⁵ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 213.

¹⁶ “*Televisión en Venezuela*”.

¹⁷ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 230.

¹⁸ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 398.

admitted the argument of the company that, in the words of the Court, using “contradictory concepts, using them indistinctly, [...] had argued that RCTV had a preferential right, a right to extension of the concession, and a reasonable expectation of renewal or of an automatic renewal”¹⁹.

14. Far from this being the case, the Court rejected – and quite rightly – each and every one of these argument.

a. “[T]he Court notes that the electromagnetic spectrum is a public commodity within the State’s domain and, therefore, its ownership cannot be claimed by private individuals. Consequently, it is not possible to affirm that RCTV and, in particular, its shareholders had acquired a right to, or ownership of, the spectrum.”²⁰

b. “[T]he possibility that the State would renew RCTV’s concession for the use of the electromagnetic spectrum in 2007 cannot be considered an acquired right to an asset already incorporated into the company’s property. This possibility was a mere expectation of renewal that was conditional on the State’s authority to establish controls over a resource that it owned. Consequently, the financial benefits that the shareholders might have received as a result of the renewal of the concession cannot be considered acquired rights or assets that were part of the direct property of the shareholders and that could be protected by Article 21 of the American Convention.”²¹

c. The law in force in Venezuela “makes no mention whatsoever that the State was obliged to grant the renewal, nor does it establish an automatic extension to those who requested the transformation of titles. Furthermore, it should be underlined that expert witness Morles Hernández stated that:

Under Venezuelan law there is no explicit legal formula that indicates that the holder of a concession has a right to the renewal of the administrative contract.”²²

d. “In addition, regarding whether, under international law, there was an obligation to renew broadcasting concessions, the Court concludes that this obligation is not established in international law. Also, regarding whether a right to the renewal of broadcasting frequency concessions may be deduced from comparative law, the Court has no evidence and no arguments were presented that could support this assertion.”²³

e. Based on the above, it may be concluded that the alleged restriction in this case is not derived from the fact that the concession held by RCTV was not renewed automatically, because it cannot be deduced from the preceding analysis that the State was obliged to do this.

Lack of congruence between the legal grounds accepted by the Court and the final decision to require the re-establishment of the concession

15. Consequently, the final decision to require the re-establishment of the concession of the television channel to RCTV is contrary to the legal reasoning presented by the Court. In

¹⁹ Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, para. 172.

²⁰ Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, para. 342.

²¹ Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, para. 343.

²² Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, para. 178.

²³ Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, para. 179.

other words, it is totally unfounded.

Alberto Pérez Pérez
Judge

Pablo Saavedra Alessandri
Secretary

**PARTIALLY DISSENTING OPINION
OF JUDGE EDUARDO FERRER MAC-GREGOR POISOT**

CASE OF GRANIER ET AL. (RADIO CARACAS TELEVISIÓN) V. VENEZUELA

JUDGMENT OF JUNE 22, 2015

(Preliminary objections, merits, reparations and costs)

INTRODUCTION

1. This case emphasizes the importance of freedom of thought and expression in a democratic society, which was underscored by the Inter-American Court of Human Rights (hereinafter “the Court” or “the Inter-American Court”) in its Advisory Opinion OC-5/85 on *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*¹ 30 years ago. Since then, the Inter-American Court has been providing wide-ranging content to Article 13 of the American Convention, particularly in contentious cases and cases involving public interest such as this one, guaranteeing simultaneously both the individual dimension and the social dimension of this right.

2. The judgment reiterates the importance of the media as vehicles for the exercise of the social dimension of freedom of expression in a society that is authentically democratic, so that it is essential that the most diverse information and opinions are obtained.² Thus, the need to adequately guarantee not only the dissemination of information and ideas in general, but also those that are disagreeable or critical of the State or any sector of the population. Thus, “[a]ny condition, restriction or penalty in this regard must be proportionate to the legitimate purpose sought.”³

3. The social media are generally “organisations of people who have assembled to exercise their freedom of expression in a sustained manner, so that nowadays, it is unusual that a media outlet is not registered as a legal person, because the production and distribution of information requires an organizational and financial structure that responds to the requirements of the demand for information.”⁴ “Similarly, just as labor unions are instruments for the exercise of the right to freedom of association of workers, and political parties are vehicles for citizens to exercise their political rights, the media are mechanisms for the exercise of the right to freedom of expression of those who use them as a means of imparting their ideas and information.”⁵

¹ *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, especially para. 70.

² Cf. *Case of Ivcher Bronstein v. Peru. Merits, reparations and costs*. Judgment of February 6, 2001. Series C No. 74, para. 149; and *Case of Fontevecchia and D’Amico v. Argentina. Merits, reparations and costs*. Judgment of November 29, 2011. Series C. No 238, para. 44.

³ Cf. *Case of “The Last Temptation of Christ” (Olmedo Bustos. v. Chile. Merits, reparations and costs*. Judgment of February 5, 2001. Series C No. 73, para. 69; and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of June 22, 2015. Series C No. 293, para. 140.

⁴ Similarly, expert witness Alfredo Morles Hernández indicated that “even if corporate organization in the field of telecommunications was merely discretionary, the general rule provided by national and international practice is that, in order to exercise the right to freedom of expression, those involved organize themselves in the form of a company.” Opinion of expert witness Morles Hernández dated May 5, 2014 (merits file, folio 1607). Also, see: Constitution Court of Colombia. Judgment T-611 of 1992. M.P Alejandro Martínez Caballero, Fabio Morón Díaz.

⁵ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 148.

4. In this case, the Inter-American Court has confirmed its case law that, although the category of legal persons has not been explicitly recognized by the American Convention (as in the European system),⁶ this does not restrict the possibility that, in certain circumstances, the physical person, as an individual, may resort to the inter-American system for the protection of human rights to assert his fundamental rights, even when they are covered by a legal device or fiction created by the legal system itself.⁷

5. In this way, “restrictions to freedom of expression frequently occur due to actions of States or individuals that affect, not only the legal person that constitutes a media outlet, but also all the natural persons, such as its shareholders or the journalists who work there, who communicate through it, and whose rights may also be violated.”⁸ And this occurred in this specific case, in which the victims are physical persons who, in their capacity as shareholders, executives, journalists or employees of “Radio Caracas Televisión” (RCTV), had recourse to the inter-American system alleging, in their individual capacity, the violation of different rights established in Articles 8 (judicial guarantees), 13 (freedom of thought and expression), 21 (property), 24 (equality before the law) and 25 (judicial protection), in relation to Articles 1(1) (respect and guarantee of rights) and 2 (domestic legal provisions) of the Pact of San José, as a result of the closure of the company owing to the State’s decision not to renew the concession and to reserve to itself the portion of the electromagnetic spectrum allocated to RCTV. Thus, RCTV, as a means of social communication constituted the vehicle through which the victims exercised fully their right to freedom of expression.

6. The key aspect of the judgment is the violation of Article 13(3) of the American Convention,⁹ based on evidence of an indirect restriction of the exercise of the right to freedom of expression. Indeed, this case arises in a scenario in which the Inter-American Court has found, and considered proved, that the facts involved a “misuse of power” — a concept used by the Court in other cases¹⁰ — because the State used a permitted power in order to conceal actions taken in the domestic sphere. The judgment declared that this had been proved owing, essentially, to the statements made by the President of the Republic at the time and different authorities, as well as to diverse official documents which alluded to the fact that the decision not to renew the RCTV concession had been taken previously and that it was related to the displeasure caused by the RCTV editorial line that was critical of the government.

7. This “misuse of power” had an impact on RCTV, not only in the individual dimension by preventing the full exercise of the right to freedom of expression of the victims who exercised this through the said media outlet, but particularly in the “social dimension” of this right, because it was the Venezuelan people who were deprived of access to the editorial line that RCTV represented. The real and undeclared purpose that the government sought was that of silencing the voices that criticized it. In this way, “there was an indirect restriction of

⁶ Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (known as Protocol No. 1), adopted on March 20, 1952, and entered into force on May 18, 1954.

⁷ Cf. *Case of Cantos v. Argentina. Preliminary objections*. Judgment of September 7, 2001. Series C No. 85, para. 29. and *Case of Perozo et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 195, para. 399.

⁸ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 151.

⁹ “Art. 13(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 (underlining added).”

¹⁰ On the concept and scope of the concept of “misuse of power,” see Partially dissenting opinion of Judge Eduardo Ferrer Mac-Gregor Poisot in the *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador (Preliminary objections, merits, reparations and costs)*. Judgment of August 28, 2013, especially paras. 120 to 137.

the exercise of the right to freedom of expression by measures aimed at preventing the communication and circulation of ideas [...], when the State decided that it would reserve to itself the portion of the [radioelectric] spectrum and, therefore, prevent the participation in the administrative procedures for the adjudication of titles or the renewal of the concession.”¹¹ And, one more effect of this real and unlawful objective was the violation of “due process” established in Article 8 of the American Convention, because “the purpose of the termination of the administrative procedures for the transformation of the titles and the renewal was to silence the media outlet”;¹² hence, it would have been necessary that the said administrative procedures continued in order to decide on the transformation or renewal of the concession.

8. Closely connected to the above violation of freedom of expression, the Court also declared the violation of the right to “equality before the law” established in Article 24 of the Pact of San José, because the State’s decision to reserve for itself the portion of the spectrum allocated to RCTV constituted “discriminatory treatment” in the exercise of the right to freedom of expression of the victims.¹³ Indeed, the judgment found proved that the State had applied “differential treatment based on its satisfaction or dissatisfaction with a channel’s editorial line,” which also had “a dissuasive, intimidating and inhibiting effect” on the media, journalists and public in general who exercised their right to freedom of expression, by sending a “threatening message to the other media of what could happen to them if they followed an editorial line similar to that of RCTV.”¹⁴ Consequently, “the failure to allow the exercise of the right to freedom of expression in equal conditions prevents the public debate on issues of interest to society that is essential for the protection of democracy and the pluralism of the media.”¹⁵

9. In light of these violations, I find it particularly relevant to highlight some of the measures of reparation adopted in the judgement; in particular, that the State must “re-establish the concession of the frequency of the electromagnetic spectrum corresponding to television’s channel 2.” In this regard, the State must return to RCTV the assets subject to the “unspecified interim measures” ordered, *ex officio*, by the Constitutional Chamber of the Supreme Court of Justice;¹⁶ and when the RCTV concession has been re-established, “the State must, within a reasonable time, order the opening of an open, independent and transparent process to grant the frequency of the electromagnetic spectrum corresponding to television channel 2,” pursuant to the relevant domestic law.

10. These “measures of restitution” adopted by the Inter-American Court are in keeping with the provisions of Article 63(1) of the American Convention,¹⁷ because “[t]he reparation

¹¹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 199.

¹² *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 252.

¹³ On May 27, 2007, in addition to the RCTV concession, the concessions of four other television outlets terminated; however, those concessions were renewed and they included that of Venevisión, a private free-to-air television station that operated on the VHF band, covered almost all national territory, and had an audience very similar to that of RCTV. See *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 102.

¹⁴ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 234.

¹⁵ *Idem*.

¹⁶ The Constitutional Chamber of the Supreme Court of Justice ordered, *ex officio*, by means of unspecified interim measures, the temporary transfer to CONATEL of the use of the assets owned by RCTV so that they could be used by TVes, because that station did not have the necessary infrastructure to transmit nationwide. Similarly, by Decision No. 957, the Constitutional Chamber assigned to CONATEL the right of use of the equipment required for the television operations, so that it could grant the use to the operator selected in accordance with the provisions of the LOTEL, in order to guarantee the continuity of the provision of a universal public service. Both measures were executed on May 27 and 28, that year and both measures involved RCTV’s assets.

¹⁷ Article 63(1) of the Convention stipulates that “[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that

of the harm caused by the violation of an international obligations requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation.”¹⁸ In this case, not only is it possible to re-establish the situation prior to the violation of the Convention rights, but it also constitutes a suitable means of making adequate reparation for the rights that the Court declared had been violated of the shareholders, executives and employees even if, at the present time, they are no longer part of, or work for, the company. Furthermore, it is also an appropriate means of redressing the social dimension of the right to freedom of expression that was violated because the Inter-American Court “verified that the main purpose of the decision not to renew the channel’s concession was to silence its criticisms. Consequently, a reparation is required that restores the plurality of the media that was affected by the indirect restriction declared in this case.”¹⁹

11. Accordingly, I fully concur with the decision taken in the judgment to declare the violation of the rights to freedom of expression (Art. 13(1) and 13(3) of the Convention) and to its exercise without discrimination (Art. 24 in relation to Art. 13 of the Convention) and also the violation of certain judicial guarantees (the right to a hearing and to a reasonable time, Art. 8 of the Convention) by the Venezuelan State.

12. My dissent focuses exclusively on three aspects that are closely related to the violation of freedom of expression that has been declared and is based on the “misuse of power” unanimously considered proved in the judgment, the content of which was deliberated at length during four regular sessions of the Inter-American Court.²⁰

13. First, I differ from the majority opinion that excluded the shareholders Jean Nestares, Fernando Nestares, Alicia Phelps Tovar and Francisco J. Nestares as victims of the right to freedom of expression because, since they were not on the RCTV Board of Directors, there was no evidence of their connection to the channel’s communication mission and, therefore, that they exercised their freedom of expression through this communications outlet. As I will explain below, I consider that this distinction between shareholders who are directors and those who are not – made for the first time in its case law by the Inter-American Court – creates a *de facto* two-tier category without considering that, in this case, each and every shareholder formed part of a family that shared a common personal and political project, which was materialized in the content transmitted by RCTV, and that all of them – without any exception – had recourse to the inter-American system owing to the violation of various Convention rights. Moreover, it was the individual dimension of the full exercise of the right to freedom of expression of each and every one of them that was violated by the mere fact of being shareholders (irrespective of whether they on the Board of Directors), because it is evident that, using the communications outlet they had established, they exercised this right and also because there are several factors that reveal their connection and their contribution to the channel’s communications mission.

14. Second, I differ from the majority opinion that the right to property established in Article 21, in relation to Article 1(1) of the Convention, was not violated (thirteenth operative paragraph of the judgment). The judgment examines the alleged violation of the right to property in isolation rather than in relation to the right to freedom of expression — as it does in the case of the right to equality before the law that was declared violated. I consider that the right to property should have been analyzed in light of the right to freedom of expression

constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”

¹⁸ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 361.

¹⁹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 379.

²⁰ The Court deliberated on the draft judgment during its 106th, 107th, 108th and 109th regular sessions. See *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 13.

because there is evidently a patrimonial content in the right this article protects.

15. In point of fact, Article 13(3) of the Convention textually grants protection to the assets that are, in certain circumstances, essential for materializing freedom of expression; among such assets, the article indicates the "radio broadcasting frequencies, or equipment used in the dissemination of information," as are the assets used by a media outlet such as those of RCTV in this specific case. The purpose of this Convention provision is to safeguard the ownership of such fixtures and equipment and to protect them from arbitrary interference. In addition, the ownership of such assets cannot be exercised absolutely, but must be guided by the standards imposed by Article 21 of the American Convention.

16. Hence, in this specific case, the Constitutional Chamber of the Supreme Court of Justice deprived RCTV of the "use and enjoyment" of a large part of its assets²¹ by "unspecified interim measures" with no time limit;²² which, *de facto*, resulted in a seizure of property without compensation and in an indirect restriction of the exercise of freedom of expression that the victims executed through the media outlet. It is evident that the loss of the company's property, which enabled the victims in this case to carry out their communication task, was a fact that was in addition to the arbitrary non-renewal of the concession. This unlawful act was used to justify the adoption of the interim measures that resulted in the said property being transferred to the new concessionaire, so that the new company could begin operating because "it did not have the infrastructure required to transmit nationwide." In addition, the harm to the value of the shares – which are owned by the shareholders, victims in this case – is evident, owing to the closure of RCTV; the determination of the *quantum* of the share depreciation is a different matter.

17. Third, I differ from the majority opinion that the violation of the guarantees of independence and impartiality contained in Article 8(1) in relation to Article 1(1) of the Convention (eleventh and twelfth operative paragraphs of the judgment) was not proved. I consider that, having declared and proved in this case the existence of a "misuse of power," because the State used a power permitted to it in order to "align" the media outlet's editorial line with the government, the logical and coherent consequence would have been to also declare that the judicial guarantees of independence and impartiality established in Article 8(1) of the American Convention had been violated. This is because the undeclared purpose of the decisions taken in the administrative proceedings and, particularly, by the Constitutional Chamber of the Supreme Court of Justice, when deciding, *ex officio*, the "unspecified interim measures," denotes, when taken as a whole, that they contributed to real intention and undeclared purpose consisting in silencing the voices that were critical of the government by closing down RCTV. In addition, this analysis should necessarily have been linked to the "context" proved by the Inter-American Court; that is, because, "in the instant case, the Court considered proved, 'the 'environment of intimidation' fostered by statements of senior State officials against independent media outlets and 'an official discourse discrediting the professionalism of journalists.'"²³

18. Based on the foregoing, this opinion is divided into the following sections: I. The importance of audiovisual media in democratic societies (*paras. 19-31*). II. The decision that the right to freedom of expression of some victims (shareholders) was not violated (*paras. 32-62*). III. The violation of the right to property in relation to freedom of expression (*paras. 63-125*); IV. The violation of the guarantees of independence and impartiality (*paras. 126-*

²¹ High frequency waves, teleports, transmitters, auxiliary television equipment, auxiliary power and climate control equipment, towers, antennas, broadcasting booths, station booths, perimeter fencing, and electrical connections.

²² Regarding these "unspecified interim measures," see *supra* footnote 16 of this opinion.

²³ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 61.

137); and V. Conclusion (*paras. 138-142*).

I. THE IMPORTANCE OF AUDIOVISUAL MEDIA IN DEMOCRATIC SOCIETIES

19. As emphasized at the beginning of this opinion, starting with Advisory Opinion OC-5 on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism and up until this case against Venezuela, the Inter-American Court had been consistent in granting a broad content to the right to freedom of thought and expression recognized in Article 13 of the Convention.²⁴ The Inter-American Court has indicated that this article protects the right to seek, receive and impart ideas and information of all kinds, as well as to receive and know the information and ideas imparted by others. In addition, it has indicated that freedom of expression has an individual dimension and a social dimension, which should be guaranteed fully and simultaneously to provide total effectiveness to the right to freedom of expression.²⁵

20. The individual dimension of freedom of expression includes the right to use any appropriate means to impart opinions, ideas and information and to ensure that it reaches the largest possible audience. In this regard, expression and dissemination are indivisible, so that a restriction of the possibilities of dissemination represents directly, and to the same extent, a limit to the right to express oneself freely.²⁶

21. In addition, regarding the second dimension of the right to freedom of expression – the social dimension – it is necessary to point out that freedom of expression is a means of sharing ideas and information between individuals; it includes the right to try and communicate one's point of view to others, but it also signifies the right of everyone to know the opinions, information and news imparted by others.²⁷ For the ordinary individual it is as important to know the opinion of others or the information that they have, as the right to impart his or her own. Thus, in light of both dimensions, freedom of expression requires, on the one hand, that no one should be arbitrarily impaired or prevented from expressing his or her own thoughts and represents, therefore, a right of each individual; but, on the other hand,

²⁴ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*; *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*; *Case of Ivcher Bronstein v. Peru*; *Case of Herrera Ulloa v. Costa Rica*. Preliminary objections, merits, reparations and costs. Judgment of July 2, 2004. Series C No. 107; *Case of Ricardo Canese v. Paraguay*. Merits, reparations and costs. Judgment of August 31, 2004. Series C No. 111; *Case of Palamara Iribarne v. Chile*. Merits, reparations and costs. Judgment of November 22, 2005. Series C No. 135; *Case of Claude Reyes et al. v. Chile*. Merits, reparations and costs. Judgment of September 19, 2006. Series C No. 151; *Case of Kimel v. Argentina*. Merits, reparations and costs. Judgment of May 2, 2008. Series C No. 177; *Case of Tristán Donoso v. Panama*. Preliminary objection, merits, reparations and costs. Judgment of January 27, 2009. Series C No. 193; *Case of Ríos et al. v. Venezuela*. Preliminary objections, merits, reparations and costs. Judgment of January 28, 2009. Series C No. 194; *Case of Perozo et al. v. Venezuela*. Preliminary objections, merits, reparations and costs. Judgment of January 28, 2009. Series C No. 195; *Case of Usón Ramírez v. Venezuela*. Preliminary objection, merits, reparations and costs. Judgment of November 20, 2009. Series C No. 207; *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*. Preliminary objections, merits, reparations and costs. Judgment of November 24, 2010. Series C No. 219; *Case of Fontevecchia and D'Amico v. Argentina*. Merits, reparations and costs. Judgment of November 29, 2011. Series C No. 238; *Case of Mémoli v. Argentina*. Preliminary objections, merits, reparations and costs. Judgment of August 22, 2013. Series C No. 265; *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*. Merits, reparations and costs. Judgment of May 29, 2014. Series C No. 279; and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*.

²⁵ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, para. 53, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 371

²⁶ Cf. *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, para. 65, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 372.

²⁷ *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, para. 66, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 375.

it involves a collective right to receive any information and to hear the opinions of others.²⁸

22. In its Advisory Opinion OC-5/85, the Inter-American Court referred to the close relationship that exists between democracy and freedom of expression, when establishing that:

[...] freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition *sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public.²⁹

23. The different regional systems for the protection of human rights and the universal system agree on the essential role played by freedom of expression in the consolidation and dynamics of a democratic society. Without effective freedom of expression, exercised in all its forms, democracy is enervated, pluralism and tolerance start to deteriorate, the mechanisms for oversight and complaint by the individual become ineffectual and, ultimately, a fertile ground is created for authoritarian systems to take root in society.³⁰

24. Regarding the importance of the media, in the said Advisory Opinion OC-5/85, the Inter-American Court referred to the social media when stating that:

[...] if freedom of expression requires, in principle, that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media, it must be recognized also that such media should, in practice, be true instruments of that freedom and not vehicles for its restriction. It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, *inter alia*, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.³¹

25. Similarly, the European Court has considered that "democracy thrives on freedom of expression" and that "it is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself."³² It has also underscored "that to ensure true pluralism in the audio-visual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audio-visual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes

²⁸ Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs. Judgment of February 5, 2001 Series C No. 73, para. 64, and Case of Mémoli v. Argentina, para. 119.

²⁹ Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), para. 70.

³⁰ Case of Herrera Ulloa v. Costa Rica, para. 116, *Mutatis mutandis*, Case of The Sunday Times v. The United Kingdom, April 26, 1979, Series A No. 30, para. 65; and Case of Handyside v. The United Kingdom, December 7, 1976, Series A No. 24, para. 49; Cf. African Commission on Human and Peoples' Rights, Media Rights Agenda and Constitutional Rights Project v. Nigeria, Communications Nos 105/93, 128/94, 130/94 and 152/96, Decision of October 31, 1998, para. 54; and Cf. UN., Human Rights Committee, Aduayom et al. v. Togo (422/1990, 423/1990 and 424/1990), decision of July 12, 1996, para. 7.4.

³¹ Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), para. 34.

³² Case of Manole and Others v. Moldavia, No. 13936/02, September 17, 2009, para. 95; and Case of Socialist Party and Others v. Turkey, May 25, 1998, paras. 41 and 45 to 47.

are aimed.”³³

26. From this perspective, the European Court “recall[ed] that freedom of expression, as secured in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress.”³⁴ Hence, the dissemination of information, through the press or any other means of communication, “affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.”³⁵

27. With regard to the audio-visual media, such as radio and television, the European Court has established that they “have a particularly important role to ensure the right to freedom of expression. Because of their power to convey messages through sound and images, such media have more immediate and powerful effects than print.”³⁶ “The function of television and radio as familiar sources of entertainment in the intimacy of the listener’s or viewer’s home further reinforces their impact.”³⁷ Also, that Court has been very emphatic in considering “that in such a sensitive sector as the audio-visual media, in addition to its negative duty of non-interference, the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism.”³⁸

28. As the European Court of Human Rights, the Inter-American Court has indicated that freedom of expression should not only be guaranteed as regards the dissemination of “information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also as regards those that offend, shock or disturb the State or any sector of the population.”³⁹ In the opinion of the Inter-American Court, this has particular importance when it applies to social communication media, because it not only means that the media have the task of transmitting information and ideas on matters of public interest, but also that the public has the right to receive them.⁴⁰

29. In the cases of *Ríos et al.* and *Perozo et al.*, both against Venezuela, the Inter-American Court indicated that freedom of expression, especially in matters of public interest, is a cornerstone in the very existence of a democratic society. In these case, the Inter-American Court reiterated the need to guarantee the dissemination of information or ideas that are received favorably or that are considered as inoffensive or indifferent, but also those that result unpleasant for the State. These are the demands of pluralism that entail tolerance and a spirit of openness, without which there cannot be a democratic society.⁴¹

³³ *Case of Centro Europa 7 S.r.l. and Di Stefano v. Italy*, Application No. 38433/09, June 7, 2012, para. 130.

³⁴ *Case of Lingens v. Austria*, Series A No. 103, July 8, 1986, para. 41, and *Case of Centro Europa 7 S.r.l. and Di Stefano v. Italy*, para. 131.

³⁵ *Case of Handyside v. The United Kingdom*, para. 49, and *Case of Lingens v. Austria*, paras. 41 and 42.

³⁶ See, *Case of Jersild v. Denmark*, Series A No. 298, September 23, 1994, para. 31, and *Case of Pedersen and Baadsgaard v. Denmark* [GC], No. 49017/99, December 17, 2004, para.79, ECHR 2004-XI.

³⁷ *Case of Murphy v. Ireland*, No. 44179/98, July 10, 2003, para. 74, ECHR 2003-IX, and *Case of Centro Europa 7 S.R.L. and Di Stefano v. Italy*, para. 132.

³⁸ *Case of Centro Europa 7 S.R.L. and Di Stefano v. Italy*, para. 134.

³⁹ *Case of “The Last Temptation of Christ” (Olmedo Bustos) v. Chile*, para. 69; *Case of Ivcher Bronstein v. Peru*, para. 152; *Case of Herrera Ulloa v. Costa Rica*, para. 113; *Case of Ricardo Canese v. Paraguay*, para. 83, *mutatis mutandi*; *Case of Handyside v. The United Kingdom*, para. 49; *Case of The Sunday Times v. The United Kingdom*, paras. 59 and 65; *Case of Barthold v. Germany*, Application No. 8734/79, March 25, 1985, para. 55; *Case of Lingens v. Austria*, para. 41; *Case of Müller v. Switzerland*, Application No. 10737/84, May 24, 1988, para. 33; and *Case of Otto-Preminger-Institut v. Austria*, Application No. 13470/87, September 20, 1994, para. 49.

⁴⁰ *Case of Ivcher Bronstein v. Peru*, para. 153, and *Case of The Sunday Times v. The United Kingdom*, para. 65.

⁴¹ *Case of Ríos et al. v. Venezuela*, para. 105.

30. The Inter-American Court has indicated the importance of the State minimizing restrictions to information as much as possible, in order to guarantee the different currents in the political debate, promoting informative pluralism. Thus, it has understood that

"Given the importance of freedom of expression in a democratic society and the responsibility it implies for social communication media outlets and for those who exercise these tasks professionally, the State must minimize the restrictions to information and balance, as much as possible, the participation of the different currents present in the public debate, promoting informative pluralism. This explains the protection of the human rights of whoever faces the power of the media, and who must exercise his social function with responsibility and an effort to ensure structural conditions that allow an equitable expression of ideas."⁴²

31. Ultimately, freedom of expression is a condition for the community, when exercising its options, to be sufficiently informed. Consequently, it can be asserted that a society that is not well-informed is not fully free.⁴³

II. DETERMINATION OF NON-VIOLATION OF THE RIGHT TO FREEDOM OF EXPRESSION OF SOME VICTIMS (SHAREHOLDERS)

A) Company shareholders as victims, individually, in the case law of the European Court of Human Rights

32. Under the inter-American system, the *ius standi* of legal persons has been reduced to certain rights held by individuals who form part of the company or undertaking. Thus, in the *Case of Cantos v. Argentina*, the Inter-American Court, following in the steps of the well-known case of *Barcelona Traction, Light and Power Company* of the International Court of Justice, affirmed the principle of distinguishing between the rights of natural persons who formed part of legal persons and the rights of legal persons.⁴⁴ In this way, the Inter-American Court determined that the rights of company shareholders refer, for example, to receiving dividends, participating in the administration of the company through its administrative bodies, and receiving a part of what remains of the company's assets following its liquidation, among other benefits,⁴⁵ so that they could possibly be declared victims in the respective cases.

33. The European Court has considered that the word "victim" used in Article 34 of the European Convention denotes the person directly affected by the act or omission in question.⁴⁶ In the case of the European human rights system, with the adoption of the Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms (Protocol No. 1) on March 20, 1952, and its entry into force on May 18, 1954, it was expressly recognized that legal persons or entities could have *ius standi* before the extinct European Commission of Human Rights and the European Court of Human Rights, by the inclusion in its Article 1 that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions"⁴⁷ (underlining added).

⁴² *Case of Ríos et al. v. Venezuela*, para. 106.

⁴³ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, para. 70.

⁴⁴ Cf. *Case of Cantos v. Argentina*, para. 26. Citing the *Case of Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 36, para. 47.

⁴⁵ *Case of Cantos v. Argentina*, para. 26.

⁴⁶ The word "victim" in the context of Article 25 denotes the person directly affected by the act or omission in question, the existence of a possible violation, even in the absence of harm. See, *inter alia*, *Vatan v. Russia*, No. 47978/99, October 7, 2004, para. 48, and *Eckle v. Germany*, July 15, 1982, Series A No. 51, p. 30, para. 66.

⁴⁷ Additional Protocol to the European Convention on Human Rights, Article 1.

34. Even though the European system provides protection to legal persons, the case law of the European Court has also developed a series of exceptions that provide protection to the individuals who form part of the legal persons as presumed victims; for example, in their capacity as company shareholders or partners. However, this relates to an exceptional situation, insofar as the legal persons are protected by the European Convention in light of Protocol No. 1. Among these exceptions, the European Court has not taken into account the legal personality of the company, but has focused its analysis, when declaring possible violations of shareholders' rights, on the companies being *vehicles* to execute the purpose of the company or undertaking.⁴⁸

35. In the cases of *Agrotexim and Others v. Greece*,⁴⁹ *AD Capital Bank v. Bulgaria*⁵⁰ and *Camberrow MM5 AD v. Bulgaria*,⁵¹ the European Court defined the first exception for the protection of the shareholders who form part of a company. It considered that when shareholders suffer unlawful interference or violation of their right to property, it was possible to apply to the system for the protection of human rights without taking into account the legal personality of the company; and that this exception was justifiable when, owing to the circumstances of the case, it was clearly established that it was impossible for the company to lodge a petition to the institutions of the Convention through the organs created in the corporate charter, in the case of liquidation by its liquidators, or by the trustees in the case of bankruptcy.⁵²

36. A second scenario identified by the Strasbourg Court arose in the cases of *Groppera*

⁴⁸ *Case of Piney Valley Developments Ltd. and Others v. Ireland*, No. 12742, November 29, 1991, para.42 and *Case of Eugenia Michaelidou Developments LTD and Michael Tymios v. Turkey*, No. 16163/90, July 31, 2003, para. 21.

⁴⁹ In August 1982, the National Bank of Greece ceased financing Fix Brewery. As the company's business continued to decline, the shareholders' general meeting decided on 30 August 1983 to wind up the company and appointed two liquidators. The companies Agrotexim, Viotex, Hymofix, Kykladiki and Texem were shareholders in Fix Brewery. In the first place, when the applicant companies lodged their application with the Commission in 1988, Fix Brewery, although in the process of liquidation, had not ceased to exist as a legal person. The Court considered that it was at that time represented by its two liquidators, who had legal capacity to defend its rights. There is no evidence to suggest that at the material time it would have been impossible as a matter of fact or of law for the liquidators to do so. The Court noted further that there was no reason to suppose that the liquidators failed to perform their duties satisfactorily. On the contrary, there was sufficient evidence to show that they took all the measures that they considered to be in the interests of the insolvent company's assets. In sum it was not clearly established that at the time when the application was lodged with the Commission it was not possible for Fix Brewery to apply through its liquidators to the Convention institutions in respect of the alleged violation of Article 1 of Protocol No. 1 which was the basis of the applicant companies' complaint. It followed that the latter companies could not be regarded as being entitled to apply to the Convention institutions, as shareholder companies composed of individuals. *Case of Agrotexim and Others v. Greece*, No. 15/1994/462/543, October 24, 1995.

⁵⁰ In this case, in contrast to the situation in *Agrotexim and Others*, the European Court considered that the application did not concern a matter in respect of which the trustees could be expected to act in protection of the bank's interests. Therefore, it concluded that there was a clear conflict of interest between the bank and the trustees, who had been appointed in view of the bank's liquidation, making it unfeasible for the bank to apply to the Court through them. Consequently, the Court concluded that to hold that the trustees alone were authorized to represent the bank in lodging an application with the Court would be to render the right of individual petition conferred by Article 34 (individual applications) theoretical and illusory. *Case of AD Capital Bank v. Bulgaria*, No. 49429/99, First Section- Admissibility, September 9, 2004.

⁵¹ The Court considered that because of the conflict of interests between the company and its special administrators and trustees it was not possible for the bank itself to bring the case before the European Court. Moreover, the Court recalled that the applicant held a substantial shareholding of 98% in the bank. It was in effect carrying out part of its business through the bank and had, therefore, a direct personal interest in the subject-matter of the application. Therefore, the Court found that in the special circumstances of that case the applicant could claim to be a victim of the alleged violations of the Convention affecting the rights of the bank. *Case of Camberrow MM5 AD v. Bulgaria*, No. 50357/94, Decision of Admissibility, April 4, 2004.

⁵² *Case of Agrotexim and Others v. Greece*, para. 63-71; *Case of AD Capital Bank v. Bulgaria*, and *Case of Camberrow MM5 AD v. Bulgaria*, para. 1.

Radio A.G. and Others v. Switzerland,⁵³ *Glas Nadezhda EOOD and Elenkov v. Bulgaria*,⁵⁴ *Ankarcrona v. Sweden*⁵⁵ and *Eugenia Michaelidou Developments LTD and Michael Tymios v. Turkey*,⁵⁶ when a company has a single shareholder or when just one shareholder holds all the share capital. Thus, the European Court has considered it admissible that a company's sole shareholder may apply individually to the organs of the European system to claim the violation of the rights of the company or enterprise because, in the opinion of the Court, in that situation there is no risk of differences of opinion among shareholders or between shareholders and a board of directors.⁵⁷

37. In the case of *Khamidov v. Russia*,⁵⁸ the European Court established a third exception to be able to apply, subsidiarily, to the system for the protection of human rights; thus, it considered that if one shareholder decided to apply to the organs of the Convention but not the other/others or the company, the individual who chose to apply to the Court would be considered a victim.⁵⁹

38. To the contrary, in the cases of *F Santos LDA and Fachadas v. Portugal*,⁶⁰ *Nosov v.*

⁵³ *Case of Groppera Radio A.G. and Others v. Switzerland*, No. 10890/84, March 28, 1990, paras. 46 to 51.

⁵⁴ The Court noted at the outset that it was only the applicant company, Glas Nadezhda EOOD, that had been established as a victim, because it had applied for and was denied a license. The issue thus arose of whether the second applicant, Mr. Elenkov, who was its sole member and manager, could himself claim to be a victim within the meaning of Article 34 of the Convention. The Court noted that in the case of *Groppera Radio AG et al. v. Switzerland* it had found that the sole shareholder and statutory representative of a company could also be considered as a victim as regards a ban on broadcasting. Since the case in hand was indistinguishable in that regard, the Court considered that Mr. Elenkov could also claim to be a victim of a violation. *Case of Glas Nadezhda EOOD and Elenkov v. Bulgaria*, No. 14134/02, October 11, 2007.

⁵⁵ Following the criteria developed in the case of *Groppera Radio AG*, once again in this case, the European Court considered admissible that a sole shareholder of a company apply individually to the organs of the European human rights system to claim the violation of the company's rights and, also, considered that there was *no risk of differences of opinion among the shareholders or between shareholders and a board of directors*. *Case of Ankarcrona v. Sweden*, No. 35178/97, October 26, 2000.

⁵⁶ The European Court reached the conclusion that a sole shareholder who held almost all the share capital, with the exception of a small percentage belonging to his wife, had the condition of victim of violations of the European Convention that directly prejudiced the company, because this should be considered a mere vehicle for his business projects. Specifically, between July and November 1986, the applicant had held all of the shares apart from forty shares, which were in his wife's name; from November 19, 1986, onwards, he held all the shares, apart from one, which was owned by his wife, and after April 3, 1996, the ownership of the property was assigned to him. In the opinion of the European Court, both applicants (the company and the applicant) were so closely identified with each other that it would be artificial to regard each as an applicant in its/his own right. In reality, the first applicant (the company) is the second applicant's company and the vehicle for his business projects. *Case of Eugenia Michaelidou Developments LTD and Michael Tymios v. Turkey*, No. 16163/90, July 31, 2003

⁵⁷ *Case of Glas Nadezhda EOOD and Elenkov v. Bulgaria*, paras. 40 and 41; *Case of Ankarcrona v. Sweden*, para. 24 and *Case of Eugenia Michaelidou Developments LTD and Michael Tymios v. Turkey*, para. 21.

⁵⁸ The applicant, a Chechen, was the co-owner of a company. The European Court considered that the applicant could claim to be a victim as he held a 50% share in a limited liability company together with his brother who held the other 50%. They had constituted the company based on real estate that was the family patrimony, and that had been occupied by Russian counterterrorism forces in the Chechen Republic. Only one of the brothers applied to the European Court (but not the other brother or the company). The European Court found the application admissible owing to the close relationship between the two brothers who had always run the family business together through the company. The applicant's brother had entrusted the applicant with representation of his interests in the domestic proceedings and clearly supported the application given that he had issued the applicant with a general power of attorney confirming the applicant's right to represent him should it be necessary. In the circumstances, in the reparations, the European Court merely decided on 50% of the patrimony affected. *Case of Khamidov v. Russia*, No. 72118/01, November 15, 2007.

⁵⁹ *Case of Khamidov v. Russia*, para. 125.

⁶⁰ On April 5, 1990, the company filed an application for compensation with the Santiago District Court against one of its shareholders who presumably had received a certain sum of money on behalf of the company, but had not turned it over to the company. Meanwhile, Ms. Fachadas also, in the procedure before the European Court, alleged that she was a victim. The Court observed as a preliminary point that the second applicant was not a party to the proceedings in question, which only concerned the first applicant; that is, the company. Therefore, taking into account

*Russia*⁶¹ and *Roseltrans, Finlease and Myshkin v. Russia*,⁶² the Strasbourg Court considered that a person cannot be considered a victim in the context of proceedings in which he is not a party under the human rights protection system despite being a shareholder or director of the company that is a party to the proceedings.⁶³

39. Moreover, in the case of *Meltex LTD and Mesrop Movsesyan v. Armenia*,⁶⁴ it considered that it was not possible to apply to the human rights protection system if the applicant was not a shareholder or legal representative of the company.⁶⁵ Added to this, in the case of *Amat-G LTD and Mebaghishvli v. Georgia*⁶⁶ it reached the conclusion that it was not possible to be

the provisions of Article 34 of the Convention, according to which the Court could receive applications “from any person ... claiming to be the victim of a violation ... of the rights set forth in the Convention ...,” in this case it was the company to which the sums provided to the company had not been paid. Therefore, the second applicant could not complain about the length of proceedings to which she was not a party, despite the fact that she was one of the shareholders of the company. *Case of F Santos LDA and Fachadas v. Portugal*, No. 49020/99, September 19, 2000, Admissibility.

⁶¹ The Court indicated that, in this case, the applicant had complained of the re-opening of proceedings and the annulment of a final judgment. The Court took note of the difference of opinions regarding who was the real owner of the companies, Kompanyony and Pamir-99. While on the application form of August 28, 2001, the second applicant alleged that he had been “co-owner” of one of the two companies, in his observations on admissibility and merits of August 13, 2004, he affirmed that he had been a director but not the owner of either of the companies. In its oral report during the hearing, the government referred consistently to both companies as belonging to the applicant. However, neither of the parties provided any document proving ownership of the shares of either of the companies. In these circumstances, the identity of the shareholders of the two companies could not be established with sufficient clarity; therefore, the Court was unable to identify the applicant with the company. In addition, the Court noted that the second applicant was not a party to the proceedings in which a final ruling had been issued in favor of the company, Kompanyony, which had subsequently been annulled. Furthermore, there was no evidence in the case file to suggest that the applicant had tried to intervene in the proceedings on an individual basis. *Case of Nosov v. Russia*, No. 30877/02, October 20, 2005.

⁶² The European Court noted the government’s observation concerning the authority of Mr. Myshkin to represent Roseltrans. The Court notes further that the application of Roseltrans was signed by Mr. Myshkin as director general of Roseltrans. Similarly, Roseltrans was represented by the same person in the domestic proceedings which ended with the decision of the Lyublinskiy District Court of May 17, 2000, the quashing of which is the subject of the present complaint. The Court noted that Mr. Myshkin was one of plaintiffs in the proceedings in question concerning the decision to liquidate Roseltrans; however, the Court found that such link between the decision to liquidate the company and Mr. Myshkin’s interests was not direct enough to conclude that the proceedings in question affected him personally. The mere fact that the domestic courts considered Mr. Myshkin as a legitimate plaintiff did not endow him with victim status under the Convention. *Case of Roseltrans, Finlease and Myshkin v. Russia*, No. 60974/00, May 27, 2004.

⁶³ *Case of F Santos LDA and Fachadas v. Portugal*, , para. 1; *Case of Nosov v. Russia*, para. 2, and *Case of Roseltrans, Finlease and Myshkin v. Russia*, para. 2; *mutatis mutandis*, Application No. 436/58, Commission Decision *Case of Pires da Silva et al. v. Portugal*, No. 19157/91, Decision of the Commission of July 5, 1993.

⁶⁴ The case originated in an application lodged by a limited liability company, Melmex Ltd and Mr. Mesrop Movseyan. In 1995, the second applicant established and registered the applicant company, which was set up as an independent broadcasting company outside State control. Later, the second applicant created the A1+ television company within the structure of the applicant company; however, it was not a shareholder of the applicant company. In this case, the second applicant did not produce any evidence to show that he was indeed a shareholder of the applicant company, let alone its sole owner. To the contrary, it was the applicant company alone, as a legal entity, which applied for and was denied a license, and was later a party to the relevant court proceedings. In addition, all the decisions of the domestic courts were delivered in respect of the applicant company and not the second applicant, who did not even represent the applicant company in the domestic proceedings. That being so, the Court considered that the application, in so far as it concerned the second applicant, was incompatible *ratione personae* with the provisions of the Convention. It therefore limited its examination of the complaints raised in the application to those which concern the applicant company. *Case of Meltex LTD and Mesrop Movsesyan v. Armenia*, No. 32283/04, June 17, 2008.

⁶⁵ *Case Meltex LTD and Mesrop Movsesyan v. Armenia*, No. 32283/04, June 17, 2008, para. 67.

⁶⁶ In this case Amat-G, a limited liability company, acted through the second applicant, its general manager, who represented the company in its relations with third parties and before the domestic courts. The judgment of December 6, 1999, was in favor of the applicant company, not of the second applicant. Consequently, the failure to execute the judgment of December 6, 1999, only had direct effects on the interests of the applicant company. Also, the second applicant did not complain of a violation of his rights as general manager of the applicant company. His complaint was based exclusively on the non-execution of the judgment delivered in favor of “his” company.

considered a victim when, even while holding a management position as general manager, an individual was not a shareholder.⁶⁷

40. Regarding activities performed within an audiovisual media outlet that were directly related to communications activities, the European Court has only taken these activities into account when giving victim status to physical persons who are not shareholders, but who play an important role in the editorial line of the media outlet.⁶⁸ Thus, in the case of *Groppera Radio A.G. and Others v. Switzerland*, in addition to considering that the sole shareholder of the company was a victim, the European Court included in this category Mr. Marquard, Mr. Fröhlich and Mr. Caluzzi, who worked for the company as journalists. To reach this conclusion, the European Court considered that despite obvious dissimilarities of status and role, there were no grounds for distinguishing between the different applicants, because they all had a direct interest in the continued transmission of the sound radio's programs by cable; for the sole shareholder it was essential to keep the station's audience and therefore to maintain its financing from advertising revenue; for the employees, it was a matter of their job security as journalists. In summary, the Strasbourg Court concluded that the three applicants could claim to be victims of the alleged violation.

41. It is worth mentioning that, in the case relating to the audiovisual media and in which, in addition, the shareholders have been admitted as victims on an individual basis, the European Court has not made a distinction between the activities they performed within the company; to the contrary, it has taken into account their ability, as shareholders, to provide assets or social capital to execute the dissemination or communication activities and to guarantee the plurality of opinions, on the grounds that, when a company suffers interference by the State, there is a connection between the violations suffered by the company and the violations suffered by the partners or shareholders.

42. In the above circumstances, the European Court considers as victims all the shareholders who: (1) owing to restrictions established by the company itself are unable to apply to the system; (2) are sole shareholders of the company; (3) despite not being sole shareholders, have the consent of those who do not apply to the protection system, and (4) form part of the proceedings before the system to protect their rights as shareholders.

43. These practical solutions for the consideration of the shareholders of companies or undertakings as victims of human rights violations owing to State acts that are contrary to the European Convention, but which are addressed against the company or undertaking, are the answer that the European Court has provided to a situation that, *prima facie*, should not have arisen under the European system since legal persons enjoy *ius standi* before that Court.

44. Under the inter-American system, the preceding exceptions adopted by the European Court could result in giving victim status to all those shareholders of a company who have recourse to the inter-American system to seek protection for their rights, merely because they are shareholders and also when there is no risk of disagreements or claims among them or between them and the board of directors. This is crucially important for the inter-American system where, contrary to the European Court, the general rule of protecting companies does not exist. Consequently, the only remedy the shareholders have is to resort, on an individual

Furthermore, there was nothing in the case file to suggest that the second applicant could presume to be an indirect victim, in his individual capacity, of the presumed violation of the Convention that affected the rights of the limited liability company. *Case of Amat-G LTD and Mebaghishvili v. Georgia*, No. 2507/03, September 27, 2005.

⁶⁷ *Case of Amat-G LTD and Mebaghishvili v. Georgia*, paras. 32 to 34.

⁶⁸ *Case of Groppera Radio A.G. et al. v. Switzerland*, paras. 46 to 51.

basis, to the organs for the protection of human rights of the inter-American system

B) The exclusion of Jean Nestares, Fernando Nestares, Alicia Phelps Tovar and Francisco J. Nestares as victims of the violation of the right to freedom of expression and equality (as they were not members of the RCTV Board of Directors)

B.1. Opinion of the Court

45. In the judgment (as in the Merits Report of the Inter-American Commission), Jean Nestares, Fernando Nestares, Alicia Phelps Tovar and Francisco J. Nestares are not taken into consideration as victims of the right to freedom of expression and equality because, at the time of the facts, they “had no specific function on the Board of Directors, so that there [was] no evidence proving their connection and contribution to the communications mission of the channel and that would establish that they exercised their freedom of expression through RCTV,”⁶⁹ unlike Marcel Granier, Peter Bottome and Jaime Nestares who, in addition to being shareholders who regularly took part in the Shareholders General Assembly of the company, were members of the RCTV Board of Directors at the time of the facts and, consequently, “exercised functions that made an essential contribution to RCTV’s communications mission.”⁷⁰

B.2. Dissent

46. Contrary to the majority opinion, I consider that the shareholders who were not members of the RCTV Board of Directors (Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar and Francisco J. Nestares) should be considered “victims” of the rights to freedom of expression and equality, even though they were not members of the Board of Directors. In fact, I consider that several aspects reveal their connection and contribution to the channel’s communications mission and establish that they exercised their freedom of expression through RCTV.

B.2.a) Shared family and political project

47. First, it should be pointed out that all the RCTV shareholders are members of the same family and share a personal and political project that was materialized in the content transmitted by RCTV. In this case, Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar and Francisco J. Nestares were not just capitalist shareholders who were seeking to obtain a financial benefit through the company; rather, as part of a family, they knowingly contributed to the existence, independence and functioning of RCTV by their participation in the share capital. In this regard, Jaime Nestares stated:

“I am a shareholder of RCTV, the same as my brothers Fernando, Francisco Javier and Jean Hope [...] We inherited not just the shares and participation in the company, but we also inherited the principles and values that have inspired the operations, activities and administration of the company and the legal structures and capital to carry out these activities. Similarly, Alicia Phelps de Tovar, my aunt, inherited from her father Alberto Phelps, and my grandfather Alberto, and he from his father William H. Phelps. [...] In addition, the legal and administrative structure has preserved the principles and values that inspired the founding of RCTV over time.”⁷¹

⁶⁹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 160.

⁷⁰ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 157.

⁷¹ Written statement of witness Jaime Nestares of May 7, 2014 (merits file, folios 1421 and 1422)

48. In this regard, it should not be forgotten that Article 13 of the Convention establishes that the right to freedom of expression establishes the freedom to seek, receive and impart information and ideas of all kinds either orally, in writing, in print or artistically or by any other procedure of one's choice;⁷² consequently, such procedures include the financial participation by which a physical person is able to create or sustain a media outlet, in this way materializing the exercise of his or her freedom of expression.

49. The patrimonial participation of all the RCTV shareholders permitted the development of a family project that was able to maintain independence with regard to the decisions on the content of the programming transmitted by the channel. This participation in the social capital was part of the structure required for the independent development of the RCTV communications mission and it was shared by all its shareholders.

50. The independence of the RCTV communications project was defended by all its shareholders. This was revealed by the unanimous refusal of the State's offer to buy RCTV, In this regard, Marcel Granier stressed that, in response to the purchase offer, all the shareholders decided to conserve their ownership of the media outlet, in part to avoid it being used for the government's political propaganda.⁷³

B.2.b) All the shareholders (majority and minority) agreed to have recourse to the inter-American system

51. In addition, bearing in mind the exceptions developed by the European Court in its case law (see *supra* paras. 32 to 44 of this opinion), all those shareholders who form part of a legal person have the right to be given the status of "victim," especially if, in the case of private media outlets, their assets are devoted to consolidating the plurality of information in a society.

52. In this regard, expert witness Rubio Llorente stated that freedom of expression in the private media protects not only the contents of their programs, but also their specific commercial activities, which is vital for their subsistence in the market. The freedom and independence of the editorial line of the private television media is due, above all, to the fact that their financing does not come from public funds. He added that whatever the personal reasons of the shareholders of the communication company, or their level of involvement in its management, or the significance of the profit motive that inspires their activity, both the shareholders and the company are protected by freedom of expression. Regarding the degree of harm caused, the expert witness pointed out that, although there may be differences in the degree of harm, these may be taken into consideration to weigh the severity of the harm caused by the refusal to renew the concession because this decision impaired the freedom of expression of the media outlet and, consequently, of each of the shareholders.⁷⁴

53. In this case, there was no dispute or discrepancy among the shareholders of RCTV, either majority or minority, in the decision to have recourse to the inter-American system for the protection of human rights, because each and every one of them has requested the protection of his or her rights before the organs of the system and, thus, they are victims/plaintiffs in the case *sub judice*. It is all the shareholders of RCTV who, together, represent the total ownership of the media outlet; so that there was no risk of discrepancies between them when they decided to have recourse to inter-American protection. In addition, all of them approved the RCTV editorial line and information and, despite the threats of closure

⁷² American Convention on Human Rights, Article 13.

⁷³ Cf. Statement of witness Marcel Granier during the public hearing in this case.

⁷⁴ Opinion of expert witness Francisco Rubio Llorente (merits file, folio 1678).

by the President of the Republic at the time and his Ministers, they decided to retain the same critical position towards the government.

B.3. Conclusion

54. In the case of *Cantos v. Argentina*, the Inter-American Court determined what the inter-American system should understand as “victim” when the rights of natural persons and the rights of legal persons are in dispute. In the *Cantos* case, the Inter-American Court considered that:

[I]n general, the rights and obligations attributed to legal persons are decided in rights and obligations of the physical persons that constitute them or who act on their behalf or representing them. In addition, it pointed out that “although the device of legal persons has not been expressly recognized in the American Convention, as it has in Protocol No. 1 to the European Convention on Human Rights, this does not restrict the possibility that, in certain circumstances, an individual may have recourse to the inter-American system for the protection of human rights to assert his fundamental rights, even when these are covered by a legal fiction or device created by the legal system itself”⁷⁵ (bold added).

55. In this case, the possibility of shareholders to have recourse to the inter-American system when their rights are affected is not in dispute, because the Inter-American Court has recognized that shareholders have rights that may be protected by the Pact of San José. The considerations in the case of *Cantos v. Argentina* reveal that the rights that are being exercised by the legal persons are merely the rights of the natural persons who compose them. In other words, all those shareholders who consider that their rights have been violated may have recourse to the inter-American system to realize their rights that are protected by the American Convention. Thus, the Inter-American Court considered that:

The law offers the individual a wide range of alternative to regulate his relations with other individuals and to limit his responsibility. Thus, there are partnership companies, limited liability companies, joint-stock companies, limited partnerships, etc. **At any event, this organized association permits the coordination of individual forces to achieve a higher common purpose**⁷⁶ (bold added).

56. In the instant case, this “higher common purpose,” which includes all the shareholders, results in the capacity of the media outlet to provide information to Venezuelan society. Refusing to recognize the right of some shareholders as victims means that this common purpose is fragmented because it leads to an illogical conclusion regarding which shareholders to protect and which not to protect. In the case of legal persons, it is each and every one of the individual strengths that create an organized and coordinated aggregation to carry out a common purpose, which is the communications activity of RCTV.

57. Rather than asserting the status of victims of the shareholders in its case law in the context of the right to freedom of expression, what the majority opinion does is create two distinct categories of shareholders: those who participate in the decision-making mechanisms of a media outlet and those who do not. This categorization of what should be understood by “victims” in the television and radio media evidently has an impact on the violation of the right to freedom of expression, because it results in those shareholders who voluntarily provided their own assets and resources and form part of a media company, sharing and defending its communications project, but who are not part of the board of directors of the

⁷⁵ *Case of Cantos v. Argentina*, paras. 27 and 29.

⁷⁶ *Case of Cantos v. Argentina*, para. 26.

company, not being protected by the inter-American system.

58. In this regard, in his opinion, expert witness Alfredo Morales Hernández considered that it was difficult to understand differentiating with respect to those who should be considered victims with regard to the right to freedom of expression. He also considered that “the government’s actions [that were] reported which violated the right to freedom of expression were addressed at the media outlet and at all the individuals who had associated to exercise the right to freedom of expression, without [any] distinction. [Thus,] the Commission [should not have] made a distinction between the victims and provided protection to some and not to others, basing the differentiation on participation in activities that influenced the editorial line or the control of the media outlet.”⁷⁷

57. Ultimately, I consider that placing *de facto* limitations to classify a shareholder as a victim – in this and future cases – nuances, to some extent, the considerations of the Inter-American Court in the Cantos case, by subordinating the rights (in this specific case the right to freedom of expression of a media outlet) to whether the possible victims have the capacity to take decision on the editorial line that the media outlet should follow or offer; excluding the contribution of finance and assets made by a person committed to the mission of the media outlet and without which, very possibly, the company would not have been established.

59. In addition, it should be considered that the boards of directors of media outlets are temporary in nature, because they are constantly being renewed. Moreover, in the instant case it is especially relevant that the “main body” of RCTV was the Shareholders General Assembly, “which had the broadest possible authority to direct and administer the company business,”⁷⁸ as it was the General Assembly that appointed the “Board of Directors”⁷⁹ and, evidently, that Board – which was composed of several shareholders – shared the project of all the shareholders who, in the case of RCTV, were all members of the same family.

60. If all the shareholders have claimed the protection of the Inter-American Court vis-a-vis the closure of RCTV, it is precisely because they do not hold conflicting positions and, in particular, opposing opinions with regard to this case against the Venezuelan State. From this perspective, if the Court had following the findings of the European Court, since there was no discrepancy among the shareholders and they all formed part of the proceedings being processed before the inter-American system, there would have been no reason to exclude Jean Nestares, Fernando Nestares, Alicia Phelps Tovar and Francisco J. Nestares as victims of the right to freedom of expression.

61. In the same way as the shareholders who form part of the decision-making bodies, the shareholders who do not form part of these bodies are key elements to consolidate rights such as freedom of expression by means of a television channel such as RCTV because they chose to contribute their assets to a media outlet whose objective was to seek, receive and impart ideas, which is protected, not only by Article 13 of the Convention, but also by Article 21 of this international instrument – which I will analyze in the following section.

62. Based on the foregoing, I consider that the Inter-American Court should have considered as “victims” all the shareholders, including Jean Nestares, Fernando Nestares, Alicia Phelps de Tovar and Francisco J. Nestares, who, as part of the same family, shared the personal and political project and all of them took steps that made an essential contribution to the RCTV communication mission. These shareholders are natural persons whose freedom

⁷⁷ Opinion of expert witness Alfredo Morales Hernández (merits file, folio 1627), para. 45.

⁷⁸ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 63.

⁷⁹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 66.

of expression was violated by the State's actions against RCTV, as was proved and declared with regard to the other shareholders who sit on the Board of Directors.

III. VIOLATION OF THE RIGHT TO PROPERTY (ART. 21) IN RELATION TO THE RIGHT TO FREEDOM OF EXPRESSION (ART. 13)

63. In the judgment, the majority opinion was that the violation of the right to property had not been proved pursuant to Article 21 of the American Convention, essentially because "the potential financial benefits resulting from the possible renewal of the concession were not acquired rights and that the harm that the interim measure [issued, *ex officio*, by the Constitutional Chamber of the Supreme Court of Justice in favor of TVes] could have had on the value of the shares of the RCTV partners has not been clearly proved."⁸⁰

64. I dissent from this opinion on the basis of the considerations that I will present in this section. In principle, it should not be overlooked that, in the instant case, a situation exists in which the Inter-American Court found and considered proved that the facts involved a "misuse of power" because the State took advantage of a power that it was authorized to use in order to conceal the internal actions. This is evident owing to the statements made by the President of the Republic at the time and various authorities, in which they indicated that the decision not to renew the RCTV concession had been taken previously and that it was based on the displeasure caused by RCTV's editorial line.⁸¹

65. This "misuse of power" had an impact on RCTV, not only on the individual dimension of the right to freedom of expression but also on the social dimension of this right because "the population [...] was deprived of access to the editorial line that RCTV represented."⁸² The objective ought by the government was to silence voices that were critical of the State, "which constitute, together with pluralism, tolerance and the spirit of openness, the requirements for a democratic debate, which is exactly what the right to freedom of expression seeks to protect."⁸³ Hence, there was an indirect restriction of the exercise of the right to freedom of expression as a result of measures aimed at preventing the communication and circulation of ideas, "when the State decided that it would reserve to itself the portion of the spectrum and, therefore, prevent participation in the administrative procedures for the adjudication of the titles or the renewal of the concession."⁸⁴

66. In this understanding, I do not agree with the separate analysis made of the content of Article 21 of the Convention (right to property), taking into account the circumstances in which the violations were committed because each and every one of them was related to a context of violation of freedom of expression. The majority opinion decided to address separately two rights that were closely related arriving at contradictory conclusions in relation to Article 13 and Article 21 of the Convention because it is clear that, with the violation of freedom of expression, two facts merged coherently with the content of Article 13(1) and 13(3): (A) the loss of value of the shares, and (b) the seizure of RCTV's assets.

The electromagnetic spectrum is a public commodity

67. Before addressing those two points, it is very important to make the following clarification: there is no dispute between the parties that, in Venezuela, the electromagnetic

⁸⁰ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 359, operative para. 13.

⁸¹ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 197.

⁸² Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 198.

⁸³ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 198.

⁸⁴ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 198.

spectrum is a public commodity, so that it is owned by the Venezuelan State, and this ownership cannot be claimed by private individuals. Thus, it is not possible, nor would it be appropriate, to affirm that a concession confers a right to, or ownership of, the spectrum.⁸⁵

68. That said, the concession is the means by which the State decides to grant a portion of the electromagnetic spectrum so that a media outlet, constituted by its shareholders, can exercise a right protected by the Convention. As the judgment explains, “preventing participation in the administrative procedures for the adjudication of the titles or the renewal of the concession” constitutes a violation of the right to freedom of expression. However, what the majority opinion overlooked was the effects on the right to property of the indirect restrictions to freedom of expression.

69. In the case of *Centro Europa 7 S.R.L. Di Stefano v. Italy*, for example, the European Court noted that, as of July 28, 1999, the applicant company held a license that allowed it to install and exploit television terrestrial broadcasting activities, that would cover 80% of national territory. However, this license did not grant the concession to use the electromagnetic spectrum. The laws of Italy established a special procedure to adjudicate this spectrum and, according to the law, this adjudication should be made within the 24 months following the award of the license. In the opinion of the Strasbourg Court, in the area of radio and television broadcasting, freedom to provide services requires not only the grant of broadcasting authorizations, but also the grant of broadcasting radio frequencies, because an operator cannot exercise effectively the rights of access to the television-broadcasting market without broadcasting radio frequencies.”⁸⁶

70. The applicant company submitted that it had been “deprived of its possessions” in the sense of Article 1 of Protocol 1, because not only had the State, without justification, abstained from granting it a broadcasting license, but it had also refused to ensure that the license granted was effective. However, the European Court did not agree with this argument because “there had been no State interference or expropriation of the applicant company’s substantive interest in operating an analogue television network, as shown by the fact that it was now able to broadcast television programmes with the allocation of a frequency on the electromagnetic spectrum.” “Nevertheless, the possibility of engaging in the activity corresponding to the license was affected by several measures which, in essence, were aimed at delaying the start-up date; this, in the Court’s view, represents a means of controlling the use of property.”⁸⁷

71. In the opinion of the European Court, “Article 1 of Protocol 1 protected interests related to the exploitation of the license, which constitute property interests protected by the right to property, because the applicant company had a *legitimate expectation* which was linked to property interests such as the operation of an analogue television network by virtue of the license, which had a sufficient basis to constitute a substantive interest that could be protected as a “possession” within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1.”⁸⁸

72. First, in the case of *Centro Europa 7*, the European Court reached the conclusion on the violation a freedom of expression because the State had not allowed the applicant company to exercise its information activities owing to the absence of the concession of a

⁸⁵ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 342.

⁸⁶ ECHR, *Case of del Centro Europa 7 S.R.L. and Di Stefano v. Italy*, Application No. 38433/09, June 7, 2012, para. 175.

⁸⁷ ECHR, *Case of del Centro Europa 7 S.R.L. and Di Stefano v. Italy*, para. 186.

⁸⁸ ECHR, *Case of del Centro Europa 7 S.R.L. and Di Stefano v. Italy*, para. 179.

frequency on the electromagnetic spectrum. In the case *sub judice*, the concession granted by the Venezuelan State encompassed both the license to transmit television programs and the allocation of a portion of the electromagnetic spectrum; therefore, it was not possible to consider that the concession was the property of the shareholders. Also, in the case of RCTV, the misuse of power used by the Venezuelan government resulted in the non-renewal of the RCTV concession, leading to a deprivation of its function as a means of communication.

73. Second, regarding the assets, as the European Court emphasized, what the article protects is the interests and rights derived from the exploitation of the license and, in that case in particular, this included the allocation of a concession over the spectrum. In the case of RCTV, the concession was not a property right of the shareholders; to the contrary, it was the means that allowed them to take advantage of interests derived from the concession, such as the share value resulting from the exercise of a communication function protected by Article 21(1) of the Convention.

74. Added to this, the European Court did not find that the failure to grant the concession resulted in an expropriation, because Centro Europa 7 had the infrastructure to be able to transmit as soon as it received a concession for the spectrum. However, regarding the assets to be able to implement the communication function, the situation in the case of RCTV was very different, because the Venezuelan State executed a *de facto* seizure of the assets used by RCTV to transmit its programs, which, according to the provisions of Article 21(2) of the Convention, involved arbitrary interference by the government.

75. Thus, in the context of violation of the freedom of expression of the shareholders of a media outlet, what the Convention protects under Article 21, related to Article 13 (first and third paragraphs), are the economic interests relating to the exploitation of the concession, such as the shares and the assets that were necessary to ensure the dissemination of the information. Having made this clarification, I will now analyze the two above-mentioned aspects of the right to property in light of freedom of expression.

III.A. Loss of value of RCTV shares

76. Article 21(1) of the American Convention establishes that “[e]veryone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.” The wording of this paragraph responded to an issue that was the subject of discussion in Europe on the extension of the protection offered, because it refers explicitly to the “right to the use and enjoyment” and, thus, offers a broader protection than the European protection. According to the American Convention, an unlawful restriction of either of these two attributes (even if it does not affect them both at the same time) violates the protected rights. In other words, the breadth of the provisions of Article 21 of the Convention guarantee the protection of both the “use” and the “enjoyment” of the said property, and the two together, against any unlawful restrictions or deprivation.

77. In its case law, the Inter-American Court has developed a wide-ranging concept of property that includes, among other matters, the use and enjoyment of property, defined as appropriable material possessions, as well as any right that may form part of a person’s property. This concept includes all the movable and immovable property, tangible and intangible elements, and any other immaterial object that may have a value.⁸⁹

⁸⁹ *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 170; *Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of August 19, 2013. Series C No. 259, para. 269; *Case of the Massacres of El Mozote and nearby places v. El Salvador. Merits, reparations and costs.* Judgment of October 25, 2012. Series C No. 252, para. 179; *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment

78. The European Court has adopted a similar concept when interpreting Article 1 of Protocol No. 1 to the European Convention when considering that:

"[A]s well as physical goods, certain rights and interests constituting assets may also be regarded as "property rights", and thus as "possessions" for the purposes of this provision [...]. The concept of "possessions" is not limited to "existing possessions" but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and "legitimate expectation" of obtaining effective enjoyment of a property right."⁹⁰

79. The Inter-American Court has considered that acquired rights are protected. Thus, for example, in the case of the *Five Pensions v. Peru*, it determined that Article 21 also protected the acquired rights derived from a pension. In this way, the Inter-American Court has understood as "*acquired right*," a right that has been incorporated into a person's property.⁹¹

80. Following this same reasoning, in the case of *Chaparro Álvarez and Lapo Iñiguez*, the Inter-American Court determined that, in the case of Mr. Chaparro, neither of the parties made "a distinction between the property of the Fábrica Plumavit and the property of Mr. Chaparro."⁹² However, the Inter-American Court considered that the evidence submitted revealed that "Mr. Chaparro's shares in Plumavit amounted to 50% of its capital."⁹³ In the opinion of the Inter-American Court, this participation in the share capital "could be measured and formed part of its owner's property from the moment of its acquisition."⁹⁴ The Inter-American Court affirmed that this "participation constituted property over which Mr. Chaparro had a right to the use and enjoyment."⁹⁵

81. Regarding the loss in value of the shares, the Inter-American Court considered that

of August 31, 2012. Series C No. 246, para. 220; *Case of the Barrios family v. Venezuela. Merits, reparations and costs*. Judgment of November 24, 2011. Series C No. 237, para. 148; *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs*. Judgment of October 13, 2011. Series C No. 234, para. 237; *Case of Abrill Alosilla et al. v. Peru. Merits, reparations and costs*. Judgment of March 4, 2011 Series C No. 223, para. 82; *Case of Acevedo Buendía et al. ("Dismissed and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009 Series C No. 198, para. 84; *Case of Perozo et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 195, para. 399; *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits*. Judgment of May 6, 2008. Series C No. 179, para. 55; *Case of Chaparro Álvarez and Lapo Iñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 174; *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006 Series C No. 148, para. 174; *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of March 29, 2006. Series C No. 146, para. 121; *Case of Palamara Iribarne v. Chile*, para. 102; *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of June 17, 2005. Series C No. 125, para. 137; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs*. Judgment of August 31, 2001. Series C No. 79, para. 144, and *Case of Ivcher Bronstein v. Peru. Merits, reparations and costs*. Judgment of February 6, 2001. Series C No. 74, para. 122.

⁹⁰ ECHR, *Case of Öneriyildiz v. Turkey*, Application No. 48939/99, November 30, 2004, para. 124.

⁹¹ *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C No. 98, para. 102. This same concept of "acquired rights" has been reiterated in this Court's case law: *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 220; *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs*. Judgment of October 13, 2011. Series C No. 234, para. 237; *Case of Abrill Alosilla et al. v. Peru. Merits, reparations and costs*. Judgment of March 4, 2011 Series C No. 223, para. 82; *Case of Acevedo Buendía et al. ("Dismissed and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009 Series C No. 198, para. 84; and *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and Merits*, para. 55.

⁹² *Case of Chaparro Álvarez and Lapo Iñiguez. v. Ecuador*, para. 181.

⁹³ *Case of Chaparro Álvarez and Lapo Iñiguez. v. Ecuador*, para. 182.

⁹⁴ *Case of Chaparro Álvarez and Lapo Iñiguez. v. Ecuador*, para. 182.

⁹⁵ *Case of Chaparro Álvarez and Lapo Iñiguez. v. Ecuador*, para. 182.

the failure to return the property to the company and the harm to the property in the custody of the State had an impact on the value and productivity of the shares and this, in turn, prejudiced the shareholders, so that this prejudice should be understood as an arbitrary interference in the “enjoyment” of the property. In other words, a violation of Article 21(1) of the Convention. This is how the Inter-American Court protected the share capital of Mr. Chaparro Álvarez considering it an acquired right that was also protected by Article 21(1) of the Convention.⁹⁶

82. The case of Mr. Chaparro established an important precedent because it considered that “shares” are acquired rights that become part of the property of the shareholder when he acquires the title to them and, therefore, they will be subject to the protection of Article 21 of the Convention insofar as their loss can be measured.

83. Meanwhile, the European Court has considered that the ownership of a share in a company should be taken into account as a right to property protected under Article 1 of Protocol No. 1 to the European Convention, understanding that “a company share is a complex thing. It certifies that the holder possesses a share in the company together with the corresponding rights. This is not only an indirect claim on company assets but other rights, especially voting rights and the right to influence the company, may follow the share.”⁹⁷

84. In the instant case, with regard to the possible effects on the value of the shares owned by the RCTV shareholders, the majority opinion reached the conclusion that, in this regard, there had not been a violation of the right to property of RCTV for two reasons: (i) regarding the shareholders’ rights that were not intervened by the State, and (ii) the impossibility of establishing a violation owing to the “complex shareholding structure” of the RCTV shareholders.

(i) Regarding the shareholders’ rights that were not intervened by the State

85. First, the majority opinion, reiterating the cases of *Ivcher Bronstein*, *Cantos*, and *Chaparro Álvarez and Lapo Iñiguez*, took into consideration the decision of the International Court of Justice in the case of *Barcelona Traction, Light and Power Company, Limited* and indicated that “domestic law grants shareholders certain direct rights, such as to receive the agreed dividends, to attend and vote in general assemblies, and to receive part of the company’s assets if it is liquidated.”⁹⁸ Consequently, the majority of the Inter-American Court considered that the case file did “not show that there was any limitation to the *management rights* of the shareholders, such as those relating to their participation in the shareholders general assemblies”⁹⁹ (italics added).

86. On this point, it is very important to clarify the scope of the *Barcelona Traction* case in relation to shareholders’ rights. In the *Barcelona Traction* case, Belgium sued Spain owing to the protection that it had decided to extend to Belgian legal persons who were shareholders in a Canadian company, claiming the damage caused by acts that could be attributed to Spain in relation to that company and that it claimed were unlawful. Canada had previously granted its diplomatic protection to Barcelona Traction as a Canadian legal person, but then Canada ceased to act on behalf of that company for reasons which have not been fully revealed. On this point, the reasoning following by the International Court of Justice in this case is interesting because it made a distinction between *rights and interests*. Thus, only legal

⁹⁶ *Case of Chaparro Álvarez and Lapo Iñiguez. v. Ecuador*, paras. 174 to 182 and 210 to 214.

⁹⁷ ECHR, *Case of Sovtransavtov Holding v. Ukraine*, Application No. 48553/99, June 25, 2002, para. 92.

⁹⁸ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 146.

⁹⁹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 354.

persons have rights to claim for unlawful acts that cause them harm resulting in losses; while it is only the interests of the shareholders that are affected. In other words, the shareholders would not have any right to make a direct claim and the only way to protect their interests would be through the whole of the company, so that the latter would assert their rights.¹⁰⁰

87. However, I consider that this precision is inappropriate in systems for the protection of human rights because, above all, international human rights instruments protect the rights of the person based on the mere fact of being a natural person. In addition, if the principle of distinguishing between the rights of companies or enterprises and the interests of natural persons is applied literally, this would leave a large number of natural persons who seek to associate in order to comply with a legitimate purpose in a democratic society without protection before the organs of the system, if we take into account that, under the inter-American system, neither the Inter-American Commission nor the Inter-American Court have recognized *ius standi* to legal persons, pursuant to Article 1(2) of the Convention.

88. Thus, when the International Court of Justice referred to shareholders' rights, it referred to company rights, considering that a deprivation of those rights is something that only an individual in his capacity as a shareholder can suffer. However, the *Barcelona Traction* case made no mention whatsoever of the fact that the shareholder, to have this status, has an ownership title to his shares. Thus, the share is the subject of the right to property. On the one hand, the share represents the documentary expression of the condition of shareholder – in other words, it is a corporate certificate – and, on the other hand, it has a value as property and, thus, it is an ownership title and, as such, a title to property. Thus, all shareholders' rights are internationally protected, as human rights, by the right to property established in Article 21 of the American Convention.

89. From this perspective, the share is a title denoting participation in the company in two ways: (a) *administrative* (participation in assemblies, voting and contesting majority decisions), and (b) *economic* (perception of dividends).

90. The concept of the share as a property title protected by Article 21 was reinforced in the cases of *Ivcher Bronstein* and *Chaparro Álvarez and Lapo Iñiguez*, insofar as the victims in these cases were deprived of their ownership of their shares, with the result that they could not exercise their rights as shareholders. Thus, the participation in the company's shares, or the ownership of shares in a company, has a value and forms part of the property of the holder from the moment of its acquisition, and this results in the right to use and enjoyment of property.

91. In this case, the non-renewal of the concession had the result that the shares, as the title of ownership, lost almost all the nominal value that the RCTV shareholders owned. Although the assets of a company are not the direct property of its shareholders, if they are harmed, this affects the property of the said shareholders, to the extent that the value of their shares (property titles), as well as the distribution of dividends and the allocation of assets in the case of liquidation are affected. What is at issue here is not the rights exercised by the shareholders in their capacity as partners, but the destruction of the share, as a means of exercising those rights; a standard that, implicitly, the Inter-American Court has already pointed out in the cases involving shareholders. It is evident that, to be able to exercise shareholders' rights, first it is necessary to have this status – in other words, own a share – which, in this case, should be protected by Article 21(1) of the Convention.

¹⁰⁰ International Court of Justice, *Barcelona Traction, Light and Power Company, Limited*, ICJ Reports (1970), para. 77.

(ii) The impossibility of establishing a violation owing to the "complex shareholdings" of the RCTV shareholders

92. Second, the majority opinion held that it had been proved that the presumed victims were shareholders of legal persons or separate autonomous properties that, in turn, were shareholders or owners of a chain with between one and up to five separate autonomous properties or legal persons leading to the company RCTV C.A.¹⁰¹ On this basis, the majority opinion concluded that this shareholding was "complex," as a result of a broad company structure of legal persons with separate patrimonies, which ma[de] it even more difficult to be able to establish a direct and clear relationship between the alleged loss of share value and the harm to the patrimony of the legal entity, RCTV.¹⁰² In addition, it considered that, in keeping with the case of *Perozo et al. v. Venezuela*, "it was necessary to prove how the harm to the assets owned by "Globovisión" resulted in harm to the rights of the company's shareholders and, since it did not find that this harm had been proved, it concluded that the shareholders' right to property had not been violated in that case."¹⁰³

93. Regarding this second aspect, it is very important to clarify that it is neither complex nor difficult to establish a direct and evident relationship between the loss of value of the shares and the adverse effects on the property of the RCTV shareholders. This is because, as in the case of *Perozo et al. v. Venezuela*,¹⁰⁴ there is no dispute between the parties and it has even been considered a proven fact of the case that Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Francisco Nestares and Alicia Phelps de Tovar are shareholders and owners of the company RCTV through separate autonomous companies and patrimonies.¹⁰⁵ The complexity of the RCTV shareholding structure could, in any case, make it difficult to determine the exact quantum of the deterioration in the value of the company's shares, but does not constitute an element to conclude that, all in all, there were no adverse effects on the value of the shares owned by Marcel Granier, Peter Bottome, Jaime Nestares, Jean Nestares, Fernando Nestares, Francisco Nestares and Alicia Phelps de Tovar.

94. In the case of *Perozo*, the Inter-American Court considered that "Alberto Federico Ravell and Guillermo Zuloaga [were] shareholders of the company UNITEL de Venezuela C.A., which [was], in turn, owner of the television station Globovisión and the evidence submitted showed that they were shareholders [...], in part, of the television station Globovisión at the time of the alleged facts."¹⁰⁶ In this regard, "[t]he representatives presented the articles of incorporation and the minutes of the shareholders' meetings of UNITEL de Venezuela C.A., Corpomedios GV Inversiones, C.A. and Globovisión Tele, C.A., in order to prove that Mr. Ravell and Mr. Zuloaga were shareholders of Globovisión [...]. The documents furnished show that the Corpomedios GV Inversiones C.A. holds 100% of the shares of the company Globovisión Tele C.A. [...]. In turn, the company Corpomedios GV holds 60% of the shares in UNITEL de Venezuela C.A., Half of 40% of the remaining shares belong to Sociedad Mercantil Sindicato Avila, C.A. [20%] and the other half to Sociedad Mercantil DNS Inversiones 2000, C.A. [20%]. Meanwhile, at May 15, 2000, UNITEL de Venezuela C.A. was constituted by the shareholders Guillermo Antonio Zuloaga Núñez, who holds 66% of the shares, and Alberto Federico Ravell, who holds 17% of the shares, while Montferrat S.A. holds the remaining 17% of the shares [...]. On January 3, 2005, the share capital of UNITEL de Venezuela, C.A. was increased but

¹⁰¹ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 355.

¹⁰² Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 355.

¹⁰³ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 356.

¹⁰⁴ Case of *Perozo et al. v. Venezuela*, para. 401.

¹⁰⁵ Regarding the percentage of shares of each shareholder, see, para. 65 of the judgment.

¹⁰⁶ Case of *Perozo et al. v. Venezuela*, para. 401.

this did not affect the shareholding percentages.”¹⁰⁷

95. In other words, Guillermo Zuloaga owned 39.6% of Corpomedios (through UNITEL) and Alberto Federico Ravell owned 10.2% of Corpomedios (through UNITEL) and, in this way, Corpomedios owned 100 % of Sociedad Mercantil Globovisión Tele, C.A., so that Mr. Zuloaga owned 39.6% and Mr. Ravell 10.2% of Sociedad Mercantil Globovisión Tele, C.A. This reveals that the submission of the victims in the instant case affirming the shareholding percentages in which their rights in relation to RCTV were affected was not unreasonable. In the *Perozo* case, the Inter-American Court did not determine the non-violation of the right to property based on the “difficulty” of establishing to what extent Mr. Zuloaga and Mr. Ravell were shareholders of Globovisión; to the contrary, it affirmed that they were partial shareholders of this media outlet.

96. Furthermore, in the instant judgment, citing the *Perozo* case, the majority opinion considered that, in order to declare that the right to property had been violated, it was necessary to prove how the harm or damage to the assets owned by the communication channel resulted in a violation of the rights of the shareholders of the company and, since it found that this had not been proved, it was concluded that, in this case, the shareholders’ right to property had not been violated.¹⁰⁸ Nevertheless, there are evident differences between the case of Globovisión and that of RCTV.

97. In the *Perozo* case, the Inter-American Court concluded that it had not been proved that the shareholders’ property had been affected because, to a large extent, the adverse effects could be attributed to unidentified individuals. To the contrary, in the case *sub judice*, the Inter-American Court has found that a misuse of power has been proved, manifested by the non-renewal of the concession, as a result of which the company shares lost their value, which had a direct impact on the shareholders’ property.

98. In this specific case, there are various probative elements in the case file, such as the expert opinion of Ángel Alayón in the “Report on the calculation of damage to the personal property of the RCTV shareholders,”¹⁰⁹ in which this expert witness assessed the value of the company on the closure of RCTV in order to assess the “damage caused to the property of 100% of the RCTV shareholders at the date of closure.”¹¹⁰ I consider that the Inter-American Court could have analyzed this expert opinion – among other evidence submitted¹¹¹ – in order to be able to determine the real violation of the property of the RCTV shareholders, precisely owing to the harm caused to the value of their shares. The foregoing in the understanding that when the corporate veil has been lifted from a company it eventually reveals the existence of shareholders who are natural persons and who form part of the company on an individual basis or through other companies that they own.

99. In summary, neither the argument concerning the non-interference of the State in the rights of the shareholders, ignoring the holding of shares as a means of exercising these

¹⁰⁷ Case of *Perozo et al. v. Venezuela*, footnote 357.

¹⁰⁸ Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, paras. 356 to 359.

¹⁰⁹ Opinion of expert witness Ángel Alayón of May 7, 2014 (merits file, folios 1636 to 1666).

¹¹⁰ Opinion of expert witness Ángel Alayón of May 7, 2014 (merits file, folio 1639).

¹¹¹ For example, a financial report at the closure of RCTV of March 22, 2010 (merits file, folios 3540 to 3544); a report on the financial model for the appraisal of the effect of the elimination of the concession (Executive report on the financial model for the appraisal of the effect of the elimination of the concession of August 2013 (evidence file, folio 4769)); technical reports on the valuation of RCTV C.A. (Technical report: Valuation of Radio Caracas Televisión RCTV C.A. to 2007 (evidence file, folios 819 to 821)), and the company’s financial statements (Consolidated financial statements from January 1, 1999, to December 31, 2007 (evidence file, folio 4775)). See, Case of *Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 357.

rights, nor the difficulty to determine the effects owing to the complexity of the RCTV shareholding structure are sufficient to deny the protection of the right to property owing to the loss in value of the shares in this case.

III.B. Interim measure imposed by the Constitutional Chamber of the Superior Court of Justice to seize the RCTV assets and the consequent violation of the right to property of its shareholders

100. Article 21(2) stipulates that “[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.” Hence, “[t]he right to private property should be understood in the context of a democratic society where in order for the public welfare and the collective rights to prevail there must be proportional measures that guarantee individual rights.”¹¹²

101. “The social role of property is a fundamental element for its functioning and for this reason, the State, in order to guarantee other fundamental rights of vital relevance in a specific society, may limit or restrict the right to property, always respecting the criteria contained in Article 21 of the Convention and the general principles of international law.”¹¹³

102. The Inter-American Court has considered that the adoption of interim or precautionary measures in the domestic jurisdiction does not constitute, *per se*, a violation of the right to property; even though it constitutes a limitation of this right, insofar as it affects the ability of the individual to freely dispose of his property, it does not signify a transfer of the ownership of this property. In addition, “the disposal of property cannot be definitive and [must be] restricted exclusively to its administration and conservation.”¹¹⁴ In other words, in any other eventuality, there would be a violation of the right to property.

103. In keeping with the foregoing, “provided that it is proved that there is due justification to adopt such measures, the corresponding effects on the ability to dispose of property does not, in itself, constitute a violation of the right to property. Thus, the Inter-American Court has considered that the purpose of these measures is in accordance with the American Convention and their existence is not contrary to the provisions of Article 21 in relation to Article 2 of this instrument.”¹¹⁵

104. “[T]he right to property is not an absolute right because Article 21(2) of the Convention states that, for the deprivation of a person’s property to be in keeping with the right to property, such deprivation must be based on reasons of public utility or social interest, subject to payment of a just compensation and in the cases and according to the forms established by law and in accordance with the Convention.”¹¹⁶ However, regarding the limitations to the right to property permitted by the Convention, the Inter-American Court has indicated that “the restriction of the rights established in the Convention must be proportionate to the interest of justice and be closely adapted to the achievement of this objective, while interfering in the effective exercise of [a] right as little as possible [...]”¹¹⁷

¹¹² *Case of Salvador Chiriboga v. Ecuador*, para. 60.

¹¹³ *Case of Salvador Chiriboga v. Ecuador*, para. 60.

¹¹⁴ *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 187.

¹¹⁵ *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 189.

¹¹⁶ *Case of Salvador Chiriboga v. Ecuador*, para. 61, and *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 174.

¹¹⁷ *Case of Salvador Chiriboga v. Ecuador*, para. 62.

105. The Inter-American Court has stated that “for the State to legally satisfy a social interest and find a just balance with the interest of an individual, it must use proportionate measures in order to cause the least harm to the right to property of the person subject to the restriction. Thus, the Court considers that, in the context of a deprivation of the right to property, in particular in the case of an expropriation, this restriction calls for compliance with and exercise of the requirements contained in Article 21(2) of the Convention.”¹¹⁸

106. “The reasons of public utility and social interest to which the Convention refers comprise all that legally protected property that, owing to the use assigned to them, permit the best possible development of democratic society. To this end, the States must use all possible means to affect other rights as little as possible and therefore, assume the relevant obligations pursuant to the Convention.”¹¹⁹

107. “In the same way as in the case of social interest, the Court has interpreted the scope of the reasons of general interest included in Article 30 of the American Convention (Scope of Restrictions), by pointing out that the requirement that laws be enacted for reasons of general interest means they must have been adopted for the “general welfare” (Art. 32(2)), a concept that must be interpreted as a constituent element of public order in a democratic State, the main purpose of which is “the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness.”¹²⁰

108. “Furthermore, the [Inter-American] Court has pointed out that the concepts of ‘public order’ or ‘general welfare’ derived from the general interest, when cited as grounds for limiting human rights, must be subject to an interpretation strictly limited to the ‘just demands’ of ‘a democratic society’ that take into account the need to balance the different interests involved and the need to preserve the object and purpose of the Convention.”¹²¹

109. Thus “Article 21(2) of the American Convention expressly indicates, as a requirement to be able to deprive someone of their property, the payment of just compensation. [...] In this regard, the [Inter-American] Court has considered that, in cases of expropriation, the payment of compensation constitutes a general principle of international law, which is derived from the need to seek a balance between the general interest and that of the owner. This principle is reflected in Article 21 of the American Convention when referring to the payment of ‘just compensation.’ The Court has considered that, to ensure payment of just compensation, this must be adequate, prompt and effective.”¹²²

110. “In this regard, the European Court of Human Rights has interpreted the rule contained in Article 1 of Protocol I, considering that there is an intrinsic right to receive compensation

¹¹⁸ *Case of Salvador Chiriboga v. Ecuador*, para. 63.

¹¹⁹ *Case of Salvador Chiriboga v. Ecuador*, para. 73. Cf. *The Word “Laws” in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 30.

¹²⁰ *Case of Salvador Chiriboga v. Ecuador*, para. 74. Cf. Advisory Opinion OC-6/86 of May 9, 1986, para. 29.

¹²¹ *Case of Salvador Chiriboga v. Ecuador*, para. 75. Cf. Advisory Opinion OC-5/85, paras. 66 and 67, and *Advisory Opinion OC-6/86*, para. 31.

¹²² *Case of Salvador Chiriboga v. Ecuador*, *supra*, para. 95 and 96. Cf. *INA Corporation v. The Islamic Republic of Iran*, 8 Iran US CTR, p.373; 75 ILR, p. 595; and Principles 15 and 18 of the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” General Assembly Resolution 60/147, Preamble, UN.Doc. A/RES/60/147 (Dec. 16, 2006). Cf. also: the WB, Guidelines of the Treatment of Foreign Direct Investment; 1962. *Texaco* case 17 ILM, 1978, pp. 3, 29; 53 ILR, pp. 389, 489; *Aminoil* case 21 ILM, 1982, p. 1032; 66 ILR, p. 601; Permanent Sovereignty Resolution, and 1974 Charter of Economic Rights Direct and Duties of States.

for the deprivation of property. Furthermore, the United Nations General Assembly, in Resolution No. 1803, indicated that, in the context of State sovereignty, that expropriation for reasons of public utility entailed the obligation to pay the owner appropriate compensation. Furthermore, the principle that compensation may be claimed in cases of expropriation has been reaffirmed by international jurisprudence.”¹²³

111. In addition, the Inter-American Court has established that “it is not enough to merely examine whether a dispossession or a formal expropriation has occurred; rather it is necessary [...] to verify, beyond the outward appearance, the real situation behind the situation that has been denounced.”¹²⁴

112. In the instant case, “[o]n May 22, 2007, the representatives of the following audience groups: “José Leonardo Chirinos”, “Satélite Popular”, “27 de Febrero”, “Fabricio Ojeda”, “Josefa Camejo”, “Observación”, “Yaracoop”, “Yurikli”, “La Voz que se Ve”, “Ojo Visor” and “AIPO”, the CTI Casa de Alimentación and the San Bernardino Community Radio [...] filed an application for constitutional amparo before the Constitutional Chamber of the Supreme Court of Justice [...] together with a petition seeking unspecified interim measures against the MINCI, the MPPTI and the Venezuelan Public Television Foundation (“TVes”). [...] The applicants alleged that the new station [TVes], which would transmit programs on the frequency once assigned to RCTV, did not have the broadcasting and repeater infrastructure and equipment required to ensure nation-wide coverage of its transmissions. Accordingly, they requested the Constitutional Chamber to order interim measures to give TVes temporary access, use and exploitation of the equipment used by RCTV, irrespective of who owned or possessed it.”¹²⁵

113. “On May 25, the Constitutional Chamber issued Decision No. 956, in which [...] it ordered, by [the requested] unspecified interim measures, the temporary transfer to CONATEL of the use of assets owned by RCTV, such as “high frequency waves, teleports, transmitters, auxiliary television equipment, auxiliary power and climate control equipment, towers, antennas, broadcasting booths, station booths, perimeter fencing, and electrical connections”;¹²⁶ in other words, the tangible property. “The interim measures were executed on May 27 and 28, 2007, with the transfer to CONATEL of the use of the assets indicated in the corresponding decisions and other objects that were not mentioned therein.”¹²⁷

114. “On May 31, 2007, the representatives of RCTV filed an objection to Decision No. 957 issued by the Constitutional Chamber on May 25, 2007, in the action on joint and separate interests”¹²⁸ in which the Constitutional Chamber had “affirmed that, in principle, the users’ right of access to and enjoyment of a universal public telecommunications service did not mean the continuation of a specific operator, but rather “the possibility that the said users may have effective access, under equal conditions and provided the corresponding service is maintained at a minimum standard of quality, irrespective of whether or not the specific private operation has a valid permission or concession.”¹²⁹ However, the Constitutional Chamber also affirmed that the intervening parties could only make arguments and introduce

¹²³ *Case of Salvador Chiriboga v. Ecuador*, *supra*, para. 97. Cf. General Assembly Resolution 1803 (XVII) of December 14, 1962, entitled “Permanent Sovereignty over Natural Resources” (1962).

¹²⁴ *Case of Ivcher Bronstein v. Peru*. *Merits, reparations and costs*. Judgment of February 6, 2001. Series C No. 74, para. 124. Cf. ECHR, *Case of Belvedere Alberghiera S.R.L. v. Italy*, Judgment of May 30, 2000, para. 53.

¹²⁵ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 94.

¹²⁶ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 95.

¹²⁷ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 99.

¹²⁸ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 112.

¹²⁹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 97.

evidence in support of the party for which they intervened. "On June 13, 2007, the representatives of RCTV filed a brief with evidence in the objection proceedings. To date the evidence has not been processed."¹³⁰

115. Although in the instant case, and contrary to the case of *Ivcher Bronstein*, the State argued that the purpose of the unspecified interim measure issued by the Constitutional Chamber was for reasons of public interest, such as providing a public communications service, it is very important to note the context in which this measure was adopted; moreover, this specific fact should have been analyzed in light of Article 13(3) of the Convention. Thus, in the section of the judgment on the violation a freedom of expression, the Inter-American Court made a distinction between the purpose declared by the State and the real purpose (the undeclared purpose) and concluded that:

"of the statements provided in this case, only one mentioned the purpose declared in Communication No. 0424 and Resolution No. 002; namely, the protection of the plurality of the media[. And, added to the statements relating to other possible justifications, t]his allows the Court to conclude, second, that the declared purpose was not the real one and that it was only offered to give an appearance of legality to the decisions"¹³¹ (italics and underlining added).

116. This reasoning shows that the decisions previously taken with regard to RCTV were based, rather than on a public interest, on the displeasure generated by RCTV's editorial line that was critical of the government. In this regard, the case file reveals that the Minister of the People's Power for Telecommunications and Director of CONATEL at the time, Jesse Chacón, had stated that "I hope we can reach an agreement with the owners of [the channel]; otherwise the law clearly gives us the mechanisms for a declaration of public interest, expropriation and negotiation of value."¹³²

117. In this regard, the victims' representatives, in their final written observations, indicated that, on February 17, 2007, Minister Chacón "recognized [...] that all the assets used for the functioning of RCTV, as a free-to-air television channel was private property and that, if the State chose to appropriate them, it would be obliged to follow the expropriation procedures and pay the corresponding compensation."¹³³

118. Thus, the victims' argument that the arbitrary seizure by the Constitutional Chamber of the Supreme Court of Justice is an act of confiscation shielded by the appearance of an interim measure should not be considered surprising or irrelevant. Calling the seizure of RCTV's property an "interim measure" does not change the nature of the act as confiscation. In this understanding, in relation to the violation of the right to property, the Inter-American Court should have looked beyond the appearance and analyzed what was the real situation behind the action denounced; particularly in a context in which it had been proved that the objectives declared by the State were not the real reasons (constituting a "misuse of power") and merely sought to endow the State's actions with legality.

119. In this regard, first, the Inter-American Court has noted that, by an interim measure, "the disposal of the property cannot be definitive and must be restricted exclusively to its administration and conservation."¹³⁴ However, it should have pointed out the following: an

¹³⁰ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 112.

¹³¹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 196.

¹³² *El Tiempo* newspaper, "Jesse Chacón amenaza con expropiar transmisores of RCTV" [Jesse Chacón threatens to expropriate RCTV's transmission equipment] February 27, 2007 (evidence file, folio 466).

¹³³ Merits file, folio 3204.

¹³⁴ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 345.

interim measure of this nature cannot be open-ended."

120. In this case, at the date of the judgment the evidence submitted by the representatives on June 13, 2007, in the domestic sphere had still not been processed. Also, the State has not presented any justification for the delay in this process. In addition, the transfer of the RCTV property to TVEs, ordered by the Constitutional Chamber, was not limited to the "administration and conservation" of the RCTV property. To the contrary, the Constitutional Chamber ordered "the temporary transfer to the CONATEL of the use of the RCTV property." Consequently, it is patent that this was not an interim measure; to the contrary, given the context of the facts, the interim measure was in reality a deprivation of property.

121. Thus, as revealed when it alleged that the main reason for the interim measure was to guarantee a quality television service for the entire population of Venezuela, what the State should have guaranteed was a declaration of public interest, an expropriation procedure and the payment of just compensation. However, far from considering and ensuring the provisions of Article 21(2) of the Convention, and based on the mechanism of an interim measure, the State ordered the seizure of property without a prior declaration of public interest, without abiding by the expropriation procedure and, above all, without paying just compensation. And, analyzing this in the context of the repression of freedom of expression (which was declared proven in the judgment),¹³⁵ violated the provisions of Article 21(2) of the Pact of San José. In this way, an interim measure issued by a judge was able to violate the victim's use and enjoyment of his holding in a television station, because the State did not envisage any kind of expropriation or compensation measures.¹³⁶

122. In order to understand this context of repression of freedom of expression and of threats and harassment towards the media and journalists, the findings of the Court in the case of *Ríos et al. v. Venezuela* – which was incorporated into the body of evidence in this case – should not be overlooked. The said findings related to the restrictions to the work of seeking, receiving and imparting information of 20 individuals who had been employed by RCTV as journalists and social communicators:¹³⁷

"In its annual reports and reports on the human rights situation in Venezuela, issued between 2003 and 2006, the Commission verified the existence of a climate of harassment and threat against the freedom of expression and, especially, against the personal integrity of journalists, cameramen, photographers, and other employees of social communication companies. When identifying areas meriting special attention in this matter, the Commission observed the existence of "threats, attacks, and acts of harassment, against social communicators, especially those whose work takes them out of the office, as well as a lack of investigation regarding those threats and attacks." It also referred to the lack of investigation of those acts and it pointed out that on several occasions it had asked the State to adopt precautionary measures to protect the life, personal integrity and freedom of expression of the journalists, cameramen and photographers who had been attacked. Among the recommendations made by the Commission in its reports, it emphasized that "the most senior government officials should proclaim the public condemnation of the attacks against social communicators, in order to prevent acts that lead to" the deprivation of life, or attacks, threats, and acts of intimidation against them. The Commission also

¹³⁵ When analyzing the context of the case, "the Court considers proved, "the 'environment of intimidation' fostered by statements of senior State officials against independent media outlets" and "an official discourse discrediting the professionalism of journalists"; see *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 61.

¹³⁶ *Case of Ivcher Bronstein v. Peru*, paras. 128 and 129.

¹³⁷ Order of the President of the Court of April 14, 2014. See, *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 37.

received information on attacks to both the media and communicators outside the context of the political and social conflict, an increase in criminal proceedings against social communicators, and acts that could be considered forms of indirect restriction to the exercise of freedom of expression. The Commission indicated its concern because these facts could obstruct the free exercise of journalism by both the media perceived as the opposition, and by the official media.”¹³⁸

“The Inter-American Commission’s Special Rapporteurship for Freedom of Expression, [...] ha[d] included different comments on the situation in Venezuela and ha[d] referred to statements made by senior officials ‘that could be considered intimidating for the media and journalists.’ Similarly, [the Special Rapporteurship had] mentioned that these statements ‘could contribute to creating an environment of intimidation toward the press that does not facilitate public debate and the exchange of opinions and ideas that are necessary for coexistence in a democracy.’”¹³⁹

Several situations caused reactions from the OAS political bodies. For example, the OAS Permanent Council in Resolution 833 of December 16, 2002, decided:¹⁴⁰

To urge the government of Venezuela to ensure full enjoyment of freedom of expression and of the press and to exhort all sectors of Venezuelan society to contribute to promoting peace and tolerance among all Venezuelans and all social actors to refrain from encouraging political confrontation and violence.

It should be recalled that, when the facts of this case occurred, the Court issued several orders requiring Venezuela to adopt provisional measures of protection in favor of individuals linked to social media.¹⁴¹ At that time, on several occasions, the Court verified failure to comply with the orders for provisional measures.¹⁴²

123. Furthermore, regarding the interim measure adopted by the Constitutional Chamber, the majority opinion also indicates that the Court does not have competence to analyze the presumed violations of the Convention that may have occurred with regard to legal persons; so that it could not examine the consequences of the imposing of the interim measure on the assets that formed part of the property of RCTV, or determine whether this had violated the property of the legal person.¹⁴³

124. In this regard, it should be taken into account that the shareholders of a company

¹³⁸ Cf. *Case of Ríos et al. v. Venezuela*, para. 122; IACHR. Report on the situation of human rights in Venezuela, OEA/Ser.L/V/II.118doc.4 rev.2, December 29, 2003, para. 367; Annual Report of the Inter-American Commission on Human Rights 2005, Chapter IV, “Development of Human Rights in the Region,” OEA/Ser.L/V/II.124, Doc.7, February 27, 2006, and Annual Report of the Inter-American Commission on Human Rights 2006, Chapter IV, “Development of Human Rights in the Region,” OEA/Ser.L/V/II.127, Doc. 4 rev.1, March 3, 2007.

¹³⁹ Cf. *Case of Ríos et al. v. Venezuela*, para. 123

¹⁴⁰ Cf. Organization of American States, “Support for the Democratic Institutional Structure in Venezuela and the Facilitation Efforts of the OAS Secretary General”, OEA/Ser.G. CP/RES. 833 (1348/02), December 16, 2002.

¹⁴¹ Cf. *Case of Luisiana Ríos et al. with regard to Venezuela. Provisional measures*. Order of the Inter-American Court of Human Rights of November 27, 2002; *Matter of Marta Colomina and Liliana Velásquez with regard to Venezuela. Provisional measures*. Order of the Inter-American Court of Human Rights of September 8, 2003; *Matter of the Newspapers “El Nacional” and “Así es la Noticia” with regard to Venezuela. Provisional measures*. Order of the Inter-American Court of Human Rights of July 6, 2004; and *Case of the “Globovisión” Television Station with regard to Venezuela. Provisional measures*. Order of the Inter-American Court of Human Rights of September 4, 2004.

¹⁴² Cf. *Case of Luisiana Ríos et al. with regard to Venezuela. Provisional measures*. Orders of the Inter-American Court of Human Rights of February 20, 2003, November 21, 2003, December 2, 2003, September 8, 2004 and September 12, 2005; *Matter of Marta Colomina and Liliana Velásquez with regard to Venezuela. Provisional measures*. Orders of the Inter-American Court of Human Rights of September 8, 2003, December 2, 2003, and July 4, 2006; and Joint order of the Inter-American Court of Human Rights concerning several matters (Liliana Ortega *et al.*; Luisiana Ríos *et al.*; Luis Uzcátegui; Marta Colomina and Liliana Velásquez) with regard to Venezuela of May 4, 2004.

¹⁴³ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 352.

devote part of its income to acquiring the goods and equipment that are essential for its main activity. When the company is deprived of these goods and equipment, the shareholders themselves are deprived of their property, because the company can no longer fulfill the purpose for which it was created, with the corresponding and logical adverse effects on the value of their shares, as previously mentioned (see *supra* para. 91 of this opinion). Even though the American Convention denies *ius standi* to legal persons before the organs of the system, it does not deny the rights of the shareholders of these legal persons who do not lose their individual status by incorporating a legal person. The shareholders of a legal person are human beings and, as such, may have recourse, on an individual basis, to the international organs when their rights are violated.

125. In this understanding, in light of the fact that, in reality, what occurred was a seizure of property, the State had the obligation to guarantee just compensation to the RCTV shareholders for the equipment that was seized. In other words, the compensation was not going to be paid to the legal person constituted as RCTV, but to the shareholders, who would have benefited from this compensation in proportion to their shareholding in RCTV. This would be clear if, in the absence of the seizure of RCTV's assets, the company had been liquidated or dissolved before May 27, 2007 (the date on which the RCTV concession ended), or following this, and they had continued to own its assets. Thus, the shareholders would have shared out some specific assets or the equivalent of their value, in proportion to their shareholding in the company. The same logic would have applied to the compensation if there had been a declaration of public interest and an expropriation process.

IV. VIOLATION OF THE GUARANTEES OF INDEPENDENCE AND IMPARTIALITY (ART. 8(1) IN RELATION TO ART. 1(1) OF THE AMERICAN CONVENTION)

126. Both the Inter-American Commission,¹⁴⁴ and the representatives¹⁴⁵ expressly alleged the violation of the guarantees of independence and impartiality established in Article 8(1), in relation to Article 1(1) of the American Convention. In the judgment, the majority opinion considered that this violation had not been proved, either in the administrative contentious proceedings for nullification, or when processing the action on joint and separate interests before the Constitutional Chamber of the Supreme Court of Justice.¹⁴⁶

127. Contrary to this decision, I consider that, since it has been fully proved that there was

¹⁴⁴ Regarding the judicial proceedings in relation to the seizure of the assets, the Inter-American Commission argued, in relation to the lack of impartiality of the Supreme Court of Justice, "some context [presented in] its special report on *Democracy and Human Rights in Venezuela*, published in 2009, [in which the Inter-America Commission] characterized the 'lack of judicial independence and autonomy vis-à-vis the political power' [as] one of the weakest points in Venezuelan democracy." In addition, the Commission argued that "in the instant case, the highest ranking authorities in the executive branch of the Venezuelan government stated repeatedly, and in no uncertain terms, their opinions about RCTV and their opposition to renewal of its concession." Lastly, the Commission argued that the actions of the SCJ, "when analyzed as a whole and in the context described earlier, reveal that the SCJ was using proceedings that were lawful from a purely procedural standpoint to accomplish objectives of the Executive branch." *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 299.

¹⁴⁵ Regarding the judicial proceedings in relation to the seizure of the assets, the representatives argued that "[t]his case [...] reveals a true instrumentalization of justice to benefit the interests of the government in the Executive branch. The facts of the case represent a clear example of the lack of procedural integrity of the actions of the Chambers of the Supreme Court of Justice, revealing a total lack of independence of the highest judicial organ." The representatives concluded that "[a]ll these irregular and arbitrary procedural acts, which contravened the adjectival law, which are not admissible in the normal practice of an impartial organ for the administration of justice, have constituted and characterized an additional violation of the rights of RCTV, its shareholders, executives and journalists to have access to effective, opportune and expedite justice established in Articles 8 and 25 of the American Convention." *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 301.

¹⁴⁶ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, paras. 278 and 305, and Operative paras. 11 and 12.

a “misuse of power” in this case – decided unanimously in the judgment – owing to use of a power permitted to the State in order to “align the editorial content” of the media outlet with the government, the logical and natural consequence was not only to declare the violation of Article 13, but also of Article 8(1) of the American Convention in relation to the guarantees of independence and impartiality.

128. In fact, the Inter-American Court did declare that Article 13(1) and 13(3) of the Pact of San José had been violated, when considering that it had been proved that “there had been an indirect restriction of the exercise of the right to freedom of expression by measures aimed at preventing the communication and circulation of ideas and opinions, when the State decided that it would reserve to itself the portion of the spectrum and, therefore, prevent participation in the administrative procedures for the adjudication of title or the renewal of the concession of a media outlet that expressed opinions that were critical of the government.”¹⁴⁷

129. In the judgment, it was fully authenticated that the government’s decision not to renew the RCTV concession was taken prior to the administrative and judicial proceedings owing to displeasure with RCTV’s editorial line. Indeed, to reach this conclusion, the Inter-American Court considered particularly relevant the statements – taken as a whole rather than in isolation – of senior Venezuelan public servants starting in 2002 (especially of the President of the Republic at the time) that the concessions of some private social media companies, in particular RCTV, would not be renewed.¹⁴⁸

130. Furthermore, relevance was accorded to publications “in national newspapers and even in a book in order to announce and justify the decision not to renew the RCTV concession. Consequently, the [Inter-American] Court [...] conclude[d], first, that the decision was taken considerably before the concession expired and that it was the Executive that gave the order to CONATEL and the Ministry of Telecommunications.”¹⁴⁹

131. Hence, the Inter-American Court declared, unanimously, the existence of a “misuse of power” because the declared objective in the official decisions¹⁵⁰ was not the real one, and was only provided in order to give an appearance of legality to the decisions, as established in the judgment.¹⁵¹

132. Based on the existence of the “misuse of power,” the Inter-American Court should have considered that there was sufficient evidence to affirm that the actions of the Supreme Court of Justice were aimed at collaborating with a decision taken previously by organs of the Executive to reserve to the State the use of the frequency on the spectrum initially allocated to RCTV and to create a television channel owned by the State. This action of the Supreme Court contributed to the undeclared and unlawful purpose because the State used a permitted power in order to conceal an objective that was not lawful in light of the American Convention. Consequently, the Inter-American Court should have considered that the Supreme Court of Justice acted with a lack of independence when taking the decision to seize RCTV’s assets.

¹⁴⁷ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 199

¹⁴⁸ Several of these statements were transcribed in the judgment, see *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, paras. 75 to 86, 190 and 191.

¹⁴⁹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 193.

¹⁵⁰ Communication No 0424 issued by the Ministry of the People’s Power for Telecommunications and Information Technology of March 28, 2007 (evidence file, folio 3093-3105), and Resolution No 002 of the Ministry of the People’s Power for Telecommunications and Information Technology of March 28, 2007 (evidence file, folios 3392 and 3393).

¹⁵¹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 196.

133. The same can be said of the administrative remedy seeking nullification, because it clearly collaborated with the previously adopted decision not to renew the concession. This is so evident that the Inter-American Court itself underlined that another effect of the real and unlawful purpose was the violation of Article 8 of the American Convention, because “the purpose of the termination of the administrative procedures for the transformation of the titles and the renewal was to silence the media outlet”;¹⁵² hence, it would have been necessary that the said administrative procedures continued in order to decide on the transformation or renewal of the concession.

134. The Inter-American Court’s case law on the right to a hearing by an impartial judge or court should be recalled, considering that this is a fundamental guarantee of due process; moreover, it should be guaranteed that the judge or court presiding over the case bring to it the utmost objectivity.¹⁵³ The Inter-American Court has established that impartiality requires the judge who intervenes in a specific litigation to approach the facts of the case without any subjective bias, thus providing sufficient guarantees of an objective nature to inspire the necessary trust and confidence in the parties to the case and in the citizens of a democratic society.¹⁵⁴ The impartiality of the court means that its members do not have a direct interest, a pre-established position, or a preference for either of the parties, and that they are not involved in the dispute.¹⁵⁵

135. In this specific case, the Constitutional Chamber of the Supreme Court of Justice decided to allocate the use of the assets owned by RCTV to TVes by granting interim measures in two proceedings in which it received conflicting requests. Indeed, even though in the action on joint and separate interests the Supreme Court was asked to allow RCTV to continue its transmissions, the Supreme Court of Justice decided, ex officio, to allocate the use of the RCTV assets to TVes. This decision of the Supreme Court of Justice reflects the fact that its analysis of the facts described in the appeal was made based on a previously-taken decision to grant TVes the platform and the assets it needed to be able to transmit nationwide. In my opinion, this reveals a clear lack of impartiality in the action of the Constitutional Chamber when deciding the interim measures filed together with the action on joint and separate interests, and corroborates the fact that the Supreme Court contributed to the undeclared and unlawful objective (misuse of power).

136. Having declared the violation of Article 8(1) of the American Convention (with regard to the lack of independence and impartiality), it would have strengthened the congruence of the Inter-American Court’s decision reflected in the fifteenth and sixteenth operative paragraphs of the judgment – which I fully share – that the State “shall re-establish the concession of the frequency on the electromagnetic spectrum corresponding to television channel 2,” ordering, to this end, “the return of the assets subject to interim measures, because they are essential for the effective operation of the concession. In addition, this measure redresses the violations declared in relation to the judicial guarantees of the right to a hearing and to a reasonable time in the judicial proceedings concerning the processing of the action on joint and separate interests.”¹⁵⁶

137. In sum, the Inter-American Court should have established that the Supreme Court of Justice failed to comply with the guarantees of independence and impartiality when taking

¹⁵² *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 252.

¹⁵³ *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 171; and *Case of Palamara Iribarne v. Chile*, para. 145.

¹⁵⁴ *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 171.

¹⁵⁵ *Cf. Case of Palamara Iribarne v. Chile*, para. 146; *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 207, para. 117.

¹⁵⁶ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, paras. 308 and 381.

the decision on the seizure of the RCTV assets, a situation that can also be noted with regard to the appeal for nullification, because all these decision, taken as a whole, collaborated with the prior decision taken by the authorities of the Executive not to renew the RCTV concession. Consequently, the Court should have declared the violation of Article 8(1) in relation to Article 1(1) of the American Convention, in relation to non-compliance with the guarantees of independence and impartiality, which would provide congruence to its previous decision that there had been a "misuse of power" in relation to the indirect restrictions to the exercise of freedom of expression (Art. 13 of the Convention) and to the measures of restitution ordered in the fifteenth and sixteenth operative paragraphs of the judgment.

V. CONCLUSION

138. RCTV was not just any private media outlet in Venezuela. It was a means of social communication that had been operating since 1953 and, at the time of its closure, of all the country's different television stations "it was the nationwide television network with the largest audience among all sectors of the Venezuelan population,"¹⁵⁷ and had an editorial line that was critical of the government.

139. The result of this critical editorial line was that the government used indirect ways and means to restrict the right to freedom of expression that the victims exercised through RCTV, owing to the "misuse of power" by the government, because the declared purpose of the official decision not to renew the concession was not real, but constituted a front to give an appearance of legality because, as the judgment indicates, "the real purpose sought to silence voices that were critical of the government, which constitute, together with pluralism, tolerance and the spirit of openness, the requirements for a democratic debate, which is exactly what the right to freedom of expression seeks to protect."¹⁵⁸

140. Without an effective guarantee of freedom of expression democracy is enervated and a fertile ground is created for authoritarian systems to take root in society, as the Court indicated in the judgment.¹⁵⁹ Hence, the importance also of the measure of reparation adopted to re-establish the concession of the frequency on the electromagnetic spectrum corresponding to television channel 2, to return the assets owned by RCTV and, within a reasonable time, to conduct an open, independent and transparent process to allocate the said frequency.

141. Over and above the discrepancies relating to the exclusion, as victims, of a group of shareholders because they did not sit on the Board of Directors and not considering that the violations of the rights to property and to independence and impartiality had been violated as I have tried to argue in this separate opinion, the judgment establishes standards of great relevance for the region that contribute to the progressive construction of a *ius constitutionale commune* based on the effectiveness of the human rights that are especially important for the due respect and guarantee of the Convention rights in the procedures for allocating or renewing telecommunication concessions.

142. In general, pursuant to Article 2 of the American Convention, these international standards are relevant to ensure that the States establish laws and public policies that truly guarantee the pluralism of the media and information in the different areas of communication (for example, the press, radio, television and the internet) as a necessary condition for the consolidation of a constitutional democracy founded on full respect for the fundamental rights,

¹⁵⁷ Cf. *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 62.

¹⁵⁸ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 198.

¹⁵⁹ *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 143

of which freedom of expression is an essential component, as noted in Articles 3 and 4 of the Inter-American Democratic Charter.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Secretary