



Human Rights Foundation

Case of Miguel Ángel Hernández Souquett

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The Human Rights Foundation (HRF) is a nonprofit nonpartisan organization that promotes and protects human rights globally, with an expertise in the Americas. HRF unites people in the common cause of defending human rights and promoting liberal democracy. Our mission is to ensure that freedom is both preserved and promoted around the world.

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Table of Contents

A. Background	1
a. Who is Miguel Ángel Hernández Souquett?	1
b. The state of freedom of expression in Venezuela.....	1
B. Chronology of events	4
a. Arrest.....	4
b. Transfer to the National Directorate of Intelligence and Prevention Services (DISIP).....	5
c. Legal proceedings	6
C. Standard for protection of freedom of expression according to international human rights law	8
a. Freedom to express opinions and ideas freely, even if these opinions “offend, shock or disturb”	9
b. Prohibition against the “criminalization of speech”	11
i. General prohibition against the criminalization of speech	11
ii. Special prohibition against the criminalization of speech directed at public officials	11
iii. Prohibition against the criminalization of “subjective opinions” or “value judgments”.....	13
iv. Only exception to the prohibition of the criminalization of speech: “Hate speech or incitement to violence” that has “gravely affected” the fundamental rights of other people.....	14
c. Prohibition against the application of <i>desacato</i> laws.....	15
d. Freedom to disseminate opinions or ideas freely, through any medium whatsoever, and to communicate them to the greatest possible number of people	17
i. U.S. standard in regard to freedom of expression: Case of <i>Cohen v. California</i>	18

D. Analysis of Venezuela's conduct in relation to the international standard for the protection of the right to freedom of expression	20
a. Violation of the right of Miguel Hernández to freely express opinions and ideas, even when they are “offensive, shocking, or disturbing”	20
b. Violation of the special prohibition against the criminalization of expressions directed at public officials.....	21
c. Violation of the prohibition against the criminalization of “subjective opinions” or “value judgments”	21
d. Violation of the prohibition against the application of <i>desacato</i> laws	21
e. Violation of Miguel Hernández’s right to freely disseminate his ideas or opinions through the means of dissemination of his choosing, in order to communicate them to the greatest possible number of people	22
E. Conclusion	22

A. Background

a. Who is Miguel Ángel Hernández Souquett?

Miguel Ángel Hernández Souquett (hereinafter “Hernández”) is a 51-year-old Venezuelan citizen who works as an auto mechanic.

On February 5, 2010, during a Caribbean Series baseball game which took place in the Mariño municipality, in the State of Nueva Sparta, Hernández was arrested by agents of the Bolivarian National Guard of Venezuela for the alleged crime of “offenses against the heads of government,” for wearing a short-sleeved yellow T-shirt with the phrase “Hugo, I shit on your revolution” printed in black capital letters, as well as a drawing of the cartoon character Bart Simpson, depicted with his pants down and exposing his buttocks.¹

In November 2010, Hernández stated to the press: “... I maintain my freedom of expression and if we live in a democratic country I have the right to state what I don’t like. I was not referring to Chávez, but to his revolution because I don’t want it and I will never want it.”²

b. The state of freedom of expression in Venezuela

In the past decade, Venezuela has restricted and systematically violated the right to freedom of expression in the country, through constant attacks, harassment, intimidation, criminalization, and censorship of the media,³ journalists,⁴ human rights activists,⁵ and Venezuelan citizens in general.⁶

¹ See 2010 Annual Report of the Inter-American Commission on Human Rights (IACHR), March 7, 2011, Chapter IV, ¶ 730. Available at:

<http://www.cidh.oas.org/pdf%20files/IACHR-ANNUAL-REPORT-2010.pdf>

Criminal Investigation Minutes No. 2010-023 of February 6, 2010, of the Bolivarian National Guard of Venezuela.

² See news report from the Venezuelan media outlet *Reportero 24*, from November 14, 2010, “Hugo, I shit on your revolution.” Available at: <http://www.reportero24.com/2010/11/hugo-i-shit-on-your-revolution/>

See news report from the Venezuelan newspaper *El Universal* from November 21, 2010, “I was not referring to Chávez, but to his revolution because I don’t want it and I will never want it.” Available in Spanish only at: http://www.eluniversal.com/2010/11/21/pol_art_no-me-referi-a-chav_2109905.shtml

³ Radio Caracas Televisión (RCTV), the oldest television station in Venezuela, faced criticism from President Hugo Chávez’s government for having an independent editorial line that denounced government corruption and inefficiency. On May 27, 2007, RCTV was shut down by Chávez’s government, which refused to renew the channel’s concession. On July 16, 2007, RCTV started broadcasting through cable and satellite service providers under the name of RCTV International (RCTV-I). On January 23, 2010, RCTV-I didn’t broadcast a speech of President Chávez; the same day, the government publicly announced the decision to remove RCTV-I from the air along with five other subscription-only channels. Cable and satellite providers carried out this order on January 24, under the threat of legal action against them. See a detailed analysis on the *freerctv.com* website. Available at:

http://www.freerctv.com/case_info.php

See news report from the Spanish newspaper *El País* from May 28, 2007, “Chávez closes the private channel RCTV amid violent protests.” Available in Spanish only at:

http://internacional.elpais.com/internacional/2007/05/28/actualidad/1180303206_850215.html

The alarming situation of freedom of expression in Venezuela—and human rights violations in general—has been documented through reports, press releases, and public statements issued by international organizations dedicated to human rights advocacy. Since 2008, both the Inter-American Commission on Human Rights (IACHR), and the Inter-American Court of Human Rights (IACourtHR) have condemned Venezuela for violating the American Convention on Human Rights (ACHR).⁷

See news report from the Venezuelan media outlet *Globovisión* from May 26, 2012, “Five years after RCTV’s shut down, controversy over freedom of press persists.” Available in Spanish only at:

<http://www.globovision.com/news.php?nid=232290>

See also the case of the weekly publication *6to Poder*. In August 2011, after it published a satirical article criticizing some high-ranking officials of the Chávez administration, the weekly publication was barred and two of its directors were charged with the crime of “incitement to hatred.”

See news report from the Venezuelan newspaper *El Universal* from August 24, 2011, “Journal Sexto Poder rejects court’s decision.” Available at:

<http://www.eluniversal.com/2011/08/24/journal-sexto-poder-rejects-courts-decision.shtml>

See news report from the U.S. media outlet *The Huffington Post* from August 29, 2011, “Venezuela: Court Lifts 6to Poder Newspaper Publishing Bar.” Available at:

http://www.huffingtonpost.com/2011/08/29/venezuela-6to-poder_n_940700.html

See news report from the BBC from August 23, 2011, “What does an arrest say about justice and the media in Venezuela?” Available in Spanish only at:

http://www.bbc.co.uk/mundo/noticias/2011/08/110823_venezuela_sexto_poder_libertad_expresion_jp.shtml

⁴ See HRF’s legal reports on the cases of journalists Gustavo Azócar Alcalá and Marta Colomina, as well as other emblematic cases of political persecution in Venezuela. Available at: <http://www.caracasnine.com/cgi-local/blog.cgi?l=eng>

⁵ See press release from the IACHR from September 22, 2008, “IACHR Condemns the Expelling of Human Rights Defenders by the Government of Venezuela.” Available at:

<http://www.cidh.org/Comunicados/English/2008/42.08eng.htm>. The press release makes reference to the expulsion from Venezuela of two directors of the non-governmental human rights organization Human Rights Watch—including its executive director for Latin America, Chilean national José Miguel Vivanco—after they presented a report critical of Chávez’s government.

Also, see IACHR brief on the granting of precautionary measures in favor of the Venezuelan human rights activist and director of Venezuelan NGO Control Ciudadano, Rocío San Miguel, and for her daughter, to guarantee the life and physical integrity of both. In recent years, San Miguel and her family have been victims of harassment and threats, including death threats, supposedly because of her criticism and denunciation of irregularities in Hugo Chávez’s government. Available at:

<http://www.oas.org/en/iachr/decisions/precautionary.asp>

⁶ See HRF’s legal report on the case of Oswaldo Álvarez Paz, a Venezuelan citizen accused, detained, and incarcerated for expressing opinions critical of President Chávez and his administration. Available at:

http://thehrf.org/HRF_Report_OswaldoAlvarezPaz.pdf

See also HRF’s legal report on the case of Francisco Usón, a Venezuelan citizen indicted by a military court for the alleged crime of slandering the armed forces of Venezuela. Available at:

<http://thehrf.org/reports/UsonFullReport.pdf>

⁷ On January 24, 2010, the Commissioner for Venezuelan Affairs of the IACHR, Paulo Sérgio Pinheiro, and the Special Rapporteur for Freedom of Expression, Catalina Botero, express their categorical rejection of the closure of cable television stations in Venezuela and requested the restoration of the guarantees of freedom of expression and due process. See joint press release from January 24, 2010, on the OAS’s website, “Commissioner for Venezuelan Affairs and IACHR’s Special Rapporteur for Freedom of Expression Reject the Closing of Cable Television Channels in Venezuela.” Available at:

<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=781&lID=1>

Venezuela has repeatedly ignored these pronouncements. In 2008, the Venezuelan Supreme Court ruled that a judgment by the IACourtHR was “unenforceable” and “requested the executive to denounce” the ACHR “given the evident usurpation of powers by the Inter-American Court.”⁸

On November 20, 2009, the IACourtHR pronounced a final judgment on the case of *Usón Ramírez v. Venezuela* and concluded that Venezuela had violated, among others, the right to freedom of expression of Usón. See IACourtHR, Case of *Usón Ramírez v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, ¶ 199(2). Available at:

http://www.corteidh.or.cr/docs/casos/articulos/seriec_207_ing.pdf

On August 5, 2009, the Commissioner for Venezuelan Affairs of IACHR, Paulo Sergio Pinheiro, and the IACHR’s Special Rapporteur for Freedom of Expression, Catalina Botero, sent a communication to the Minister of Foreign Affairs of the Bolivarian Republic of Venezuela, Nicolás Maduro, in order to express their deep concern about the deterioration of the situation of freedom of expression, to request information on recent events in that country, and to submit observations with respect to the Special Legislative Bill on Media-Related Crimes proposed by the Attorney General’s Office. Pinheiro and Botero stated that, “If this bill is passed, no person in the Bolivarian Republic of Venezuela will be able to feel free to express his critical or dissident thoughts without fear of being the target of distressing criminal persecution.” See press release from August 5, 2009, on the OAS’s website, “IACHR and Office of the Special Rapporteur Send Communication to the Venezuelan State Expressing Deep Concern About the Situation of Freedom of Expression.” Available at:

<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=759&IID=1>

On August 3, 2009, the IACHR expressed its deep concern about the deterioration of the situation of freedom of expression in Venezuela. The IACHR stated that since 2000, it has observed a gradual deterioration and restriction on the exercise of this right in Venezuela, as well as a rising intolerance of critical expression. It also stated that through information received by the Office of the Special Rapporteur for Freedom of Expression, over the past few days the IACHR has obtained new facts that demonstrate the situation is growing more serious, such as the closure of 34 radio stations, the armed attack on the *Globovisión* channel headquarters, and the presentation of a bill that seeks to impose new restrictions on the freedom of expression. See press release from August 3, 2009, on the OAS’s website, “IACHR Expresses Concern About the Deterioration of the Situation of Freedom of Expression in Venezuela.” Available at:

<http://www.cidh.org/Comunicados/English/2009/55-09eng.htm>

On May 22, 2009, the United Nations (UN) Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, and the IACHR’s Special Rapporteur for Freedom of Expression, Catalina Botero, expressed concern over comments by Venezuelan government officials against *Globovisión* and other private television stations. See press release from May 22, 2009, on the OAS’s website, “UN and OAS Rapporteurs for Freedom of Expression Express Concern over Comments by Venezuelan Government Officials against Private Television Stations.” Available at:

<http://www.cidh.org/Comunicados/English/2009/comunicados2009eng.htm>

In the conclusions of its 2009 report “Democracy and Human Rights in Venezuela,” the IACHR stated:

“1143. As to freedom of expression, the IACHR reiterates the conclusions reached in previous reports regarding the absence of a climate of national tolerance to foster active participation and the exchange of ideas among diverse sectors of society. In particular, the IACHR anxiously observes how, in recent years, major overhauls of the legal framework have tended to shut down rather than to promote public debate. The protection of values such as pluralism and diversity, integral parts of democratic models, requires shaping institutions that develop public deliberation, not inhibit or muzzle it. Yet numerous acts of violence and intimidation perpetrated by private violent groups against journalists and the media; disqualifying statements by highly placed civil servants; the systematic filing of administrative proceedings predicated on vague legal norms that allow for great margins of discretion when implemented, coupled with disproportional sanctions, all serve to create a restrictive scenario that also dampens the full observance of freedom of expression as a condition of democracy rooted in pluralism and public debate.”

Available at: <http://www.cidh.oas.org/pdf%20files/VENEZUELA%202009%20ENG.pdf>

⁸ Supreme Court of the Bolivarian Republic of Venezuela, Constitutional Court, File No. 08-1572. Judgment of December 18, 2008. Available in Spanish only at:

Later, on September 10, 2012, the Venezuelan government denounced the ACHR. On this date, the Venezuelan government filed a notice of denunciation⁹ with the Secretary General of the Organization of American States (OAS). The denunciation will be effective one year after this notification.¹⁰

B. Chronology of events

a. Arrest

On February 5, 2010, Miguel Hernández was at the Nueva Esparta Stadium, located in the Guatamare section of the Mariño municipality in the State of Nueva Esparta, attending a Caribbean Series baseball game between Venezuela and Mexico. Hernández was wearing a short-sleeved yellow T-shirt¹¹ with the phrase “Hugo, I shit on your revolution” printed in black capital letters¹² along with an image of cartoon character Bart Simpson, depicted with his pants down and exposing his buttocks.¹³

The T-shirt caught the attention of members of the Bolivarian National Guard of Venezuela (National Guard) who were in charge of the security of the event; they attempted to apprehend Hernández while he was watching the game in the stands. However, they backed down due to

<http://www.tsj.gov.ve/decisiones/scon/diciembre/1939-181208-2008-08-1572.html>

⁹ See press release from the IACHR from September 12 2012, “IACHR Regrets Decision of Venezuela to Denounce the American Convention on Human Rights.” Available at:

http://www.oas.org/en/iachr/media_center/PReleases/2012/117.asp

¹⁰ On September 10, 2012, Venezuela notified the Secretary General of the Organization of American States (OAS) with a note of denunciation of the ACHR—to be effective one year from the date of this notification. Article 78 of the ACHR states:

“1. The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties.

2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.”

Venezuela’s denunciation will be effective on September 10, 2013. From this date, the IACourtHR will not be able to sit on cases involving Venezuela. However, the State will continue to be subject to the IACHR’s jurisdiction and be bound by the obligations established in the OAS Charter and the American Declaration, to which Venezuela has been a State Party since 1948. The IACHR will still be able to process petitions and requests for precautionary measures regarding Venezuela, as well as supervise the human rights situation in the country, based on Article 106 of the OAS Charter and the American Declaration. Although the American Declaration is not a treaty, the OAS General Assembly, the IACHR, and the IACourtHR have repeatedly recognized that it is a source of international obligations for the member states of the OAS.

See IACourtHR, Advisory Opinion OC-10/89, July 14, 1989. Available at:

http://www.corteidh.or.cr/docs/opiniones/seriea_10_ing1.pdf

¹¹ See Merriam-Webster Dictionary (“T-shirt: a collarless short-sleeved or sleeveless usually cotton undershirt; also: an outer shirt of similar design.”)

¹² See supra note 2.

¹³ See supra note 1.

resistance from the crowd.¹⁴ Shortly after, Hernández was arrested at the stadium gates as he was leaving the facilities.¹⁵

Hernández was immediately taken to the offices of the National Guard. The police report that describes the details of his arrest, states, among other things:

On February 5, 2010, at approximately 10:30 in the evening, while we were commissioned with the security of Guatamare de Porlamar Stadium, Mariño municipality in the State of Nueva Esparta, in the framework of the Caribbean Series security operation, we caught sight of a citizen in the main stand who was wearing a yellow T-shirt that had a “Bart Simpson” drawing and the words “Hugo, I shit on your revolution” printed on it, which is the reason why he was preventively arrested and was identified by his identification card as Miguel Ángel Hernández Souquett...¹⁶

b. Transfer to the National Directorate of Intelligence and Prevention Services (DISIP)

In the early morning of February 6, 2010, the National Guard took Hernández by car to the local office of the National Directorate of Intelligence and Prevention Services (DISIP), today SEBIN.¹⁷ According to the police report on the case prepared by DISIP:

“...[i]t was agreed upon instructions from the Minister of Popular Power for Internal Relations and Justice, Tarek El Aissami, [that] any individual or group of individuals that violates article 147 of the Criminal Code,¹⁸ shall be arrested and taken to the facilities of this institution [DISIP] and the Attorney General’s office be informed of the situation...”¹⁹

Afterward, DISIP reached the second public prosecutor Cruz Herminia Pulido, who instructed, among other things, that Hernández be “brought before the respective Control Court at 9:00 on the morning of Sunday, February 07, of the current year...”²⁰

¹⁴ See news report from *Medios24* from November 12, 2012, “To court over a T-shirt.” Available in Spanish only at: <http://www.medios24.com/a-juicio-por-una-franela.html>

¹⁵ See news report from *El Universal* from November 13, 2010, “Man who was wearing a T-shirt against the revolution taken to court.” Available in Spanish only at: http://www.eluniversal.com/2010/11/13/pol_art_a-juicio-hombre-que_2104445.shtml

¹⁶ See supra note 1.

¹⁷ Currently, Bolivarian National Intelligence Service (SEBIN). On August 11, 2009, through Decree N° 6.685, the Venezuelan government ordered the restructuring of the National Directorate of Intelligence and Prevention Services (in Spanish: Dirección Nacional de los Servicios de Inteligencia y Prevención “DISIP”). On June 2, 2010, according to the provisions of the Official Gazette N° 376.851, SEBIN was established.

¹⁸ See Criminal Code, article 147 (Anyone who offends the President of the Republic, or whoever is serving this role, verbally or in writing, or in any other form, shall be penalized with time in prison from six to thirty months if the offense was serious, and half the time if it was minor. The penalty shall be increased in one third if the offense was made in public.)

¹⁹ DISIP’s report from February 6, 2010.

²⁰ Ibid.

c. Legal proceedings

i. Arraignment

On February 7, 2010, the First Criminal Circuit Court of the State of Nueva Esparta, under Judge Alejandro Chirimelli, held an arraignment hearing for Hernández. In the hearing, the second public prosecutor, Ermillo Dellán, claimed Hernández's conduct constituted the crime of "offending the heads of government"²¹ as provided by article 147 of the Venezuelan Criminal Code, punishable with 6 to 30 months in prison (up to two and a half years). The public prosecutor requested the adoption of measures alternative to pre-trial detention, and that the commission of the crime be declared *in flagrante* so that Hernández could be tried summarily.²²

Judge Chirimelli granted the public prosecutor's request and imposed measures alternative to pre-trial detention against Hernández—disregarding the dismissal request by defense attorney Alí Romero Farías—which included the obligation to appear in court every thirty days. Hernández's lack of prior criminal record was taken into account in the ruling.²³ Likewise, the judge declared that the crime was to be considered *in flagrante* and, therefore, that Hernández could be prosecuted in a summary trial.²⁴

ii. Trial

The draw of the case was carried out on February 24, 2010.²⁵ After the draw, the case was assigned to Judge No. 2 of the Criminal Court of the Judicial District of the State of Nueva Esparta, Jessybel Bello Boada.²⁶

The trial against Hernández was scheduled for March 18, 2010.²⁷ However, the trial did not take place on the specified date because, according to the trial deferral minutes "...neither the accused in question, Miguel Ángel Hernández, nor the private criminal defense attorney, Alí Romero Farías, appeared before court."²⁸ Judge Bello deferred the trial to December 1, 2010—approximately nine months after the date originally set for the trial.²⁹

On November 3, 2010, Judge No. 2, Emilia Valle Ortiz, took over the case and confirmed the date of trial for December 1, 2010.³⁰

²¹ See supra note 18.

²² Arraignment minutes of February 7, 2010.

²³ Notification No. 9700-103-184 of February 6, 2010, issued by the bailiff José González, chief of the sub-station of Porlamar.

²⁴ Court ruling of February 7, 2010, issued by Judge Alejandro Chirimelli.

²⁵ List of the distribution of the case registered in the case file.

²⁶ Writ of entry of February 26, 2010, issued by Judge Jessybel Bello Boada.

²⁷ Writ of March 9, 2010, issued by Judge Jessybel Bello Boada, through which the date for the trial was set.

²⁸ According to the swearing-in of the private criminal defense minutes of November 24, 2010, attorneys Alberto José Rausseo González and Juan Bautista Mata Prado joined Miguel Hernández defense at a later date.

²⁹ Deferral minutes of March 18, 2010, signed by Judge Jessybel Bello Boada and the court's registrar, Luiggy Díaz Naranjo.

³⁰ Change of venue order of November 3, 2010, issued by Judge Emilia Valle Ortiz.

On November 16, 2010, the second public prosecutor, Herminia Pulido, and the second assistant prosecutor, Esther Alfonzo Rivera, filed a bill of indictment against Hernández. The accusation was filed for the alleged commission of the crime of “offending the heads of government.” The attorney general’s office requested “the measures alternative to pre-trial detention to remain in place, as issued by the First Criminal Circuit Court of the State of Nueva Esparta on February 07, 2010, when the crime was declared *in flagrante* and to be processed in a summary trial.”³¹

On November 25, 2010, the defense attorney, Juan Bautista Mata Prado, requested the nullity of the bill of indictment and the dismissal of the criminal case.³²

On December 1, 2010, Judge Valle Ortiz deferred the trial hearing to February 7, 2011, given the absence of the second public prosecutor, Herminia Pulido.³³

On February 7, 2011, Judge Valle Ortiz deferred the trial hearing once again to May 5, 2011, given the absence of the second public prosecutor, Herminia Pulido.³⁴

On May 5, 2011, Judge Valle Ortiz deferred the trial hearing to September 9, 2011, this time due to the absence of the defense attorneys.³⁵ On the same day, the defense attorney, Alberto José Rausseo González, presented a brief in which he pointed out, among other things, “... the urgent need to expressly state that [...] I was in fact [...] inside courtroom [No.] 02 of the Criminal Circuit Court [...] along with my client, having noticed that who was in fact not in the room was the public prosecutor...”³⁶

On December 1, 2011, seven months after the last deferral, Judge Valle Ortiz set the date for the trial hearing to January 16, 2012.³⁷

On January 16, 2012, Judge Valle Ortiz deferred the trial hearing “to a new date to be set on a separate writ,” due to the absence of the second public prosecutor, Heminia Pulido.³⁸

³¹ Bill of indictment of November 13, 2010, signed by the second public prosecutor, Cruz Herminia Pulido, and the assistant prosecutor, Esther Alfonzo Rivera.

³² Brief presented by the defense on November 25, 2010.

³³ Deferral minutes of the trial hearing of December 1, 2010, signed by Judge Emilia Valle Ortiz, the court’s registrar Juan Carlos Rodríguez F., the accused Miguel Hernández, and the defense attorneys Alí Romero, Juan Bautista Mata, and Alberto Rausseo.

³⁴ Deferral minutes of the trial hearing of February 7, 2011, signed by Judge Emilia Valle Ortiz, the court’s registrar Juan Carlos Rodríguez F., the accused Miguel Hernández and the defense attorneys Alí Romero, Juan Bautista Mata, and Alberto Rausseo.

³⁵ Deferral minute of the trial hearing of May 5, 2011, signed by Judge Emilia Valle Ortiz, the court’s registrar Juan Carlos Rodríguez F., the accused Miguel Hernández, and the second public prosecutor Cruz Herminia Pulido.

³⁶ Brief filed by the defense on May 5, 2011.

³⁷ Writ of December 1, 2011, issued by Judge Jessybel Bello Boada, through which the date of the trial hearing was set.

³⁸ Deferral minutes of the trial hearing of January 16, 2012, signed by Judge Emilia Valle Ortiz, the court’s registrar María Teresa García, the accused Miguel Hernández, and the defense attorney Juan Bautista Mata.

In phone conversations with HRF, Miguel Hernández reported that throughout 2012, and until the date of publication of this report, the trial has been deferred at least six times. All deferrals occurred as a result of the absence of the prosecution. The next trial hearing has been scheduled for June 7, 2013.

C. Standard for protection of freedom of expression according to international human rights law

The Inter-American legal framework regarding the right to freedom of expression consists of³⁹ article 13 of the ACHR,⁴⁰ article 4 of the American Declaration of Rights and Duties of Man (ADRDM),⁴¹ and article 4 of the Inter-American Democratic Charter (IADC).⁴²

The primary, specific types of expression that have been addressed by both the IACHR and the IACourtHR are the following: the right to speak, in other words, to express one's thoughts, ideas, information or opinions orally, and to do so in any desired language;⁴³ the right to write, to express

³⁹ See Special Rapporteur for Freedom of Expression, "The Inter-American Legal Framework Regarding the Right to Freedom of Expression," December 30, 2009, ¶ 3. Available at: <http://www.oas.org/en/iachr/expression/docs/publications/INTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf>

⁴⁰ See ACHR, article 13 (Article 13 of the American Convention establishes that: "(1) Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. (2) The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals. (3) The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. (4) Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence. (5) Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.")

⁴¹ See American Declaration of the Rights and Duties of Man, article 4 (Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever).

⁴² See Inter-American Democratic Charter, article 4 (Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy.)

⁴³ IACourtHR, Case of *López-Álvarez v. Honduras*. Merits, Reparations and Costs. Judgment of February 1, 2006. Series C No. 141. ¶ 164; IACourtHR, Case of *Herrera-Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. ¶ 109; IACourtHR, Case of *Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111. ¶ 78; IACourtHR, Case of *Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74. ¶ 147; IACourtHR, 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. ¶ 65; IACourtHR, Compulsory Membership in an

thoughts, ideas, information, or opinions in writing or in print, also in any desired language;⁴⁴ the right to disseminate spoken or written expressions of thoughts, information, ideas, or opinions, through the means of dissemination of one's choosing in order to communicate them to the greatest possible number of people;⁴⁵ the right to artistic and symbolic expression, to the dissemination of artistic expression, and to access to art in all its forms;⁴⁶ among others.

a. Freedom to express opinions and ideas freely, even if these opinions “offend, shock or disturb”

International human rights law⁴⁷ establishes that “no one shall be disquieted on the account of his opinions,” and that “everyone has the right to freedom of expression.” Freedom of expression “comprises the freedom to seek, receive and impart information and ideas, regardless of borders, whether it is orally, in writing or any printed or artistic form.” This right comprises the right of individuals to “receive” and “impart” all sorts of opinions and information through the press. This right does not only apply to favorable information or ideas, “but also to those that offend, shock or

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. ¶ 31.

⁴⁴ IACourTHR, Case of *Herrera-Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. ¶ 109; IACourTHR, Case of *Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111. ¶ 78; IACourTHR, Case of *Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74. ¶ 147; IACourTHR, 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. ¶ 65; IACourTHR, Case of *Palamara-Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135; IACourTHR, Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 3, 2008. Series C No. 177.

⁴⁵ IACourTHR, Case of *Palamara-Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135. ¶ 73; IACourTHR, Case of *Herrera-Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. ¶ 109; IACourTHR, Case of *Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111. ¶ 78; IACourTHR, Case of *Ivcher-Bronstein v. Peru*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74. ¶ 147; IACourTHR, 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. ¶ 65; IACourTHR, 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. ¶ 31.

⁴⁶ IACHR, Arguments before the IACourTHR in the Case of “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) *v. Chile*, cited in IACourTHR, 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. ¶ 61.b).

⁴⁷ See ACHR. Art. 13 (1) (“Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.”). The Republic of Venezuela ratified the ACHR on August 9, 1977. See International Covenant on Civil and Political Rights. Art 19 (2) (“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”). The Republic of Venezuela ratified the International Covenant on Civil and Political Rights and its Optional Protocol on May 10, 1978.

disturb the State,”⁴⁸ because “such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”⁴⁹

The preamble and first principle of the Declaration of Principles on Freedom of Expression of the IACHR establish that “freedom of expression is not a concession by the States but a fundamental right;” that “consolidation and development of democracy depends upon the existence of freedom of expression;” that “freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals;” and that “[freedom of expression] is an indispensable requirement for the very existence of a democratic society.”⁵⁰

The IACourtHR has set a legal precedent, explaining the underlying reasons for the need of this exchange of ideas:

In the domain of political debate on issues of great public interest, not only is the expression of statements which are well seen by the public opinion and those which are deemed to be harmless protected, but also the expression of statements which shock, irritate or disturb public officials or any sector of society.⁵¹

Democratic checks and balances, exercised by society through public opinion, encourage transparency in State activities and promote accountability of public officials for their administration. This is why there should be more tolerance and openness to criticism, in the face of statements and opinions advanced by individuals in the exercise of said democratic mechanism. [...] Moreover, said democratic mechanism of checks and balances promotes greater participation among people in matters of social interest.⁵²

⁴⁸ European Court of Human Rights (ECHR). Case of *Handyside v. Reino Unido*. Judgement of December 7, 1976, ¶ 49.

⁴⁹ IACourtHR, Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 3, 2008. Series C No. 177, ¶ 87 and 88.

In its comments on the Declaration of Principles on Freedom of Expression, the IACHR, referencing the case *Castells v. Spain*, (ECHR, Judgment of April 23, 1992, Series A, N1 236, ¶ 42) stated: “The Inter-American Court, citing a decision of the European Court, has declared that protection of freedom of expression must encompass not only favorable information or ideas, but also those that ‘offend, shock or disturb’ because ‘such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society’.” Available at:

<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=132&lID=1>

⁵⁰ Declaration of Principles on Freedom of Expression of the Inter-American Commission on Human Rights. Available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26&lID=1>

⁵¹ See supra note 49, ¶ 88.

⁵² IACourtHR. Case of *Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C. No. 135, ¶ 83.

b. Prohibition against the “criminalization of speech”

i. General prohibition against the criminalization of speech

Article 13 of the ACHR, in accordance with principle 10 of the Declaration of Principles on Freedom of Expression⁵³ of the IACHR,⁵⁴ establishes that:

Principle 10

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

ii. Special prohibition against the criminalization of speech directed at public officials

In its comments on the Principles of Freedom of Expression, the IACHR explained that the prohibition against the criminalization of speech applies, in particular, in the case of speech directed toward public officials:

43. The Inter-American Commission has stated that the criminalization of speech directed toward public officials or private individuals voluntarily engaged in matters of public interest is a disproportionate punishment compared to the important role that freedom of expression and information plays in a democratic system. “Such sanctions clearly cannot be justified, particularly in light of the adequacy of non-criminal sanctions in redressing any harm to individuals’ reputations.” In a representative democracy, public officials, or anyone involved in matters of public interest, must be held accountable to the men and women they represent. The individuals who make up a democratic society confer upon their representatives the task of managing matters of interest to society as a whole. However, society retains ownership of these matters and must enjoy a broad right, with the fewest restrictions possible, to exercise control over the management of public affairs by their representatives. In this regard, the IACHR stated that: “A law that targets speech that is considered critical of public administration by virtue of the individual who is the object of the expression, strikes at the very essence and content of freedom of expression.”

44. Thorough and effective oversight of public management as a tool to guarantee the existence of a democratic society requires a different type of protection for those responsible

⁵³ See Declaration of Principles of Freedom of Expression. Available at:

<http://www.iachr.org/declaration.htm>

⁵⁴ See the 2002 Annual Report of the Office of the Special Rapporteur for Freedom of Expression of the IACHR, Chapter V, ¶ 10 (“The Declaration is meant to be a definitive interpretation of Article 13 of the Convention.”).

for public affairs than that accorded an individual not involved in matters of public interest. In this regard, the Inter-American Commission has stated that the application of laws protecting the honor of public officials acting in an official capacity unjustifiably grants them a right to protection that other members of society lack. This distinction indirectly inverts the fundamental principle of a democratic system in which the government is subject to controls, including public scrutiny, to prevent or check abuses of its coercive power.

Moreover, the fact that public officials and public figures generally have easy access to the mass media allowing them to respond to attacks on their honor and personal reputation is also a reason to provide for a lower level of legal protection of their honor.

45. The State fulfills its obligation to protect the rights of others by establishing statutory protection against intentional attacks on honor and reputation through civil procedures, and by enacting legislation to ensure the right to rectification or reply. In this way, the State safeguards the private life of all individuals, without exercising its coercive power abusively to repress the individual freedom to form and express an opinion.

In this respect, the IACHR has upheld that the use of criminal laws to sanction expressions directed toward public officials violates article 13 of the ACHR:

[...] there is no imperative social interest that justifies the punitive measure, or because the restriction is disproportionate or constitutes an indirect restriction. It should be established that statements made in the context of matters of public interest, such as an electoral campaign, are not punishable.⁵⁵

[...][the State's] use of its coercive powers to restrict speech lends itself to abuse as a means to silence unpopular ideas and opinions, thereby repressing the debate that is critical to the effective functioning of democratic institutions. Laws that criminalize speech which does not incite lawless violence are incompatible with freedom of expression and thought guaranteed in Article 13, and with the fundamental purpose of the American Convention of allowing and protecting the pluralistic, democratic way of life.⁵⁶

According to the IACHR:

... society [...] must enjoy a broad right, with the fewest restrictions possible, to exercise control over the management of public affairs by their representatives. [...] Thorough and effective oversight of public management as a tool to guarantee the existence of a democratic society requires a different type of protection for those responsible for public affairs than that accorded an individual not involved in matters of public interest.

[...]

⁵⁵ IACHR. Arguments before the IACourtHR in the case of *Ricardo Canese v. Paraguay*. Included in the Sentence of August 31, 2004, Series C No. 111, ¶ 72.

⁵⁶ IACHR. 2004 Annual Report. February 17, 1995. Chapter V, Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights. Available at: <http://www.cidh.oas.org/annualrep/94eng/chap.5.htm>

The fact that public officials and public figures generally have easy access to the mass media allowing them to respond to attacks on their honor and personal reputation is also a reason to provide for a lower level of legal protection of their honor.

Regarding this subject, the UN Human Rights Committee has stated that:

Freedoms of information and of expression are cornerstones in any free and democratic society. It is in the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties [...], and that they may criticize or openly and publicly evaluate their Governments without fear of interference or punishment.⁵⁷

Similarly, the European Court of Human Rights (ECHR) has stated that:

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.⁵⁸

The Office of the Special Rapporteur for Freedom of Expression of the IACHR has emphasized the fact that the highest public officials are not only obligated to be more tolerant of criticism, but that they also have alternative, enormously effective means to express their opinions about information or ideas that they consider unjust or offensive.⁵⁹

iii. Prohibition against the criminalization of “subjective opinions” or “value judgments”

In the Background and Interpretation of the Declaration of Principles of Freedom of Expression, the IACHR states that:

47. There should be no liability when the information-giving rise to a lawsuit is a value judgment rather than a factual assertion. A prerequisite for establishing liability is the ability to demonstrate that the information was false or to prove that the respondent knowingly published a statement that was false or very likely false. If the information is a value judgment, it is impossible to prove its truth or falsity, since it represents a totally subjective opinion that cannot be proved.

48. The Commission has stated that this is particularly the case in the public arena where criticism is often based on value judgments rather than purely fact-based statements. Since value judgments cannot be proven, it may be impossible to demonstrate the veracity of such declarations. Thus, a rule that compels someone who criticizes public officials to guarantee the

⁵⁷ *Aduayom v. Togo*, Views of the Human Rights Committee, Nos.422/1990, ¶ 7.4, UN Doc. CCPR/C/51/D/422/1990 (1996).

⁵⁸ ECHR. *Lingens v. Austria*. Judgment of July 8, 1991. Application No. 9815/82, ¶ 42; ECHR. *Oberschlick Vs. Austria*. Judgment of May 23, 1991. Application No. 11662/85, ¶ 59. ECHR. *Wabl Vs. Austria*. Judgment of March 21, 2000. Application No. 24773/94, ¶ 42; ECHR. *Lopes Gómez da Silva v. Portugal*. Judgment of September 28, 2000. Application No. 37698/97, ¶ 30.

⁵⁹ Complete text available at: <http://www.cidh.org/relatoria/showarticle.asp?artID=857&IID=1>

veracity of the assertions has a chilling effect on criticism of government conduct. Such rules raise the specter that someone who criticizes the government in good faith may be penalized for his or her criticism.

The IACourtHR, citing the ECHR,⁶⁰ has stated that:

(...) an opinion cannot be subjected to sanctions, even more so where it is a value judgment on the actions of a public official in the performance of his duties. In principle, truthfulness or falseness may only be established in respect of facts. Hence, the evidence regarding value judgments may not be examined according to truthfulness requirements.⁶¹

According to U.S. law, it is possible to determine whether an expression is subjective⁶² or a value judgment when factors such as the specificity of the terms used by the author, their objective verifiability, and linguistic and social contexts are taken into account.⁶³

iv. Only exception to the prohibition against the criminalization of speech: “Hate speech or incitement to violence” that has “gravely affected” the fundamental rights of other people

In the case of *Kimel v. Argentina* in 2008, the IACourtHR ruled that:

...(the) possibility (that a criminal sanction regarding the right to inform or give one’s opinion being contrary to the Convention) should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception. At all stages the burden of proof must fall on the party who brings the criminal proceedings.⁶⁴

As examples of what could justify the “possibility of a criminal sanction” against the expression of opinions or information, the IACourtHR referred to only “exceptional circumstances” as a result of which other fundamental rights have been “seriously impaired,” such as “hate speech or incitement to violence.”

⁶⁰ ECHR. Case of *Lingens v. Austria*. Judgment of July 8, 1986, ¶ 46.

⁶¹ See supra note 49, ¶ 93.

⁶² See Merriam-Webster Dictionary (“Subjective: 1. of, relating to, or constituting a subject. 2. of or relating to the essential being of that which has substance, qualities, attributes, or relations. 3. characteristic of or belonging to reality as perceived rather than as independent of mind.”)

⁶³ Doctrine originated from the United States Court of Appeals, District of Columbia, Case of *Ollman v. Evans* (1985)

⁶⁴ See supra note 49, ¶ 78.

c. Prohibition against the application of *desacato* laws

According to the definition provided by the IACHR, *desacato* laws (or contempt) laws “are a form of legislation that criminalizes expression which offends, insults or threatens a public official in the performance of his or her official duties.”⁶⁵

Article 13 of the ACHR, in accordance with principle 11 of the Declaration of the Principles of Freedom of Expression of the IACHR,⁶⁶ establishes that:

Principle 11

Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as “*desacato* laws,” restrict freedom of expression and the right to information.

In its comments on the Declaration of Principles on Freedom of Expression,⁶⁷ the IACHR stated that:

50. [...] the full enjoyment of freedom of expression is one of the principal mechanisms available to society to exercise democratic oversight of those responsible for matters of public interest. The IACHR clearly pronounced on the incompatibility of *desacato* laws with the American Convention:

The use of *desacato* laws to protect the honor of public functionaries acting in their official capacities unjustifiably grants a right to protection to public officials that is not available to other members of society. This distinction inverts the fundamental principle in a democratic system that holds the Government subject to controls, such as public scrutiny, in order to preclude or control abuse of its coercive powers. If we consider that public functionaries acting in their official capacity are the Government for all

⁶⁵ See *supra* note 56.

⁶⁶ Concerning IACourtHR’s interpretative role, article 62.3 of the ACHR states that the IACourtHR “[...] shall comprise all cases concerning the interpretation and application of the provisions of this Convention...” Also, article 1 of the Statute of the IACourtHR states that “[t]he Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights.” As per IACHR’s consultative status, article 106 of the OAS Charter states that the “[...] Inter-American Commission on Human Rights [...] shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.” Article 1 of the Statute of the IACHR reaffirms its consultative status by stating that “[t]he Inter-American Commission on Human Rights is an organ [...] created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.” In accordance with these articles, the IACourtHR would be the only body with the authority to interpret the ACHR, with binding effects for all State Parties. However, interpretations of the ACHR—and other Inter-American instruments—by the IACHR, have similar standing to the ones by the IACourtHR, given that the IACHR’s interpretations, in an exercise of the body’s consultative role, represent an expert opinion that guides the actions of OAS bodies. Nonetheless, interpretations made by the IACHR that contradict the ones by the IACourtHR are not legally binding.

⁶⁷ See IACHR comments on the Declaration of Principles on Freedom of Expression. Available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=132&lID=1>

intents and purposes, then it must be the individual and the public's right to criticize and scrutinize the officials' actions and attitudes in so far as they relate to public office.

Desacato laws restrict freedom of expression because they carry with them the threat of imprisonment and/or fines for those who insult or offend a public official. [...] The fear of criminal sanctions necessarily discourages people from voicing their opinions on issues of public concern particularly when the legislation fails to distinguish between facts and value judgments. Political criticism often involves value judgments.

Moreover, the Commission notes that, contrary to the rationale underlying desacato laws, in democratic societies political and public figures must be more, not less, open to public scrutiny and criticism. The open and wide-ranging public debate, which is at the core of democratic society, necessarily involves those persons who are involved in devising and implementing public policy. Since these persons are at the center of public debate, they knowingly expose themselves to public scrutiny and thus must display a greater degree of tolerance for criticism.

51. The Inter-American Commission has stated that "the open and wide-ranging public debate, which is at the core of democratic society, necessarily involves those persons who are involved in devising and implementing public policy..." and added that "since these persons are at the center of public debate, they knowingly expose themselves to public scrutiny and thus must display a greater degree of tolerance for criticism."

52. In this context, a crucial distinction must be made between private persons and public persons. The protection accorded public officials under these desacato laws directly contravenes these principles. Such laws completely invert the parameters of a democratic society in which public officials must be subject to greater scrutiny by society. To safeguard democratic principles, these laws must be repealed in countries where they still exist. Because of the way in which they are structured and used, these laws constitute bastions of authoritarianism left over from past eras and must be done away with.

In its 2002 Annual Report, the Special Rapporteur for Freedom of Expression of the IACHR explained that:

Desacato laws ultimately deter critical speech because individuals will not want to subject themselves to imprisonment or monetary sanctions. Even those laws providing a defense if the accused can prove that the statements were true improperly restrict speech because they do not allow for the fact that much criticism is opinion and therefore not susceptible to proof. Desacato laws cannot be justified by saying that their purpose is to protect "public order" (a permissible purpose for

regulation of speech under Article 13), as this is in contravention of the principle that “a properly functioning democracy is indeed the greatest guarantee of public order.” Moreover, there are other, less-restrictive means besides criminal contempt laws by which governmental officials can defend their reputations from unwarranted attacks, such as replying through the media or bringing a civil action against individuals for libel or slander. For all of these reasons, the Commission concluded that desacato laws are incompatible with the Convention and called upon states to repeal these laws.

d. Freedom to disseminate opinions or ideas freely, through any medium whatsoever, and to communicate them to the greatest possible number of people

International human rights law determines that the right to freedom of expression—apart from comprising everyone’s freedom to “seek, receive and impart” their ideas and opinions freely, “regardless of borders, whether it is orally, in writing or any printed or artistic form”—comprises the freedom to impart these ideas or opinions “by any other appropriate means chosen.”⁶⁸

The IACourtHR has set extensive precedent in this regard.⁶⁹ In the case of *“The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile*, the IACourtHR stated that:

With regard to the content of the right to freedom of thought and expression, those who are protected by the Convention not only have the right and the freedom to express their own thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds. Consequently, freedom of expression has an individual and a social dimension:

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.

With regard to the first dimension of the right embodied in the said article, the individual one, freedom of expression is not exhausted in the theoretical

⁶⁸ See supra note 47.

⁶⁹ IACourtHR. Case of *López Alvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, ¶ 163 and 164; IACourtHR. Case of *Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, ¶ 72; IACourtHR. Case of *Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, ¶ 108, 109, 110 and 111; IACourtHR. Case of *Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, ¶ 77, 78, 79 and 80; IACourtHR. Case of *Ivcher Bronstein v. Perú*. Judgment of February 6, 2001. Series C No. 74, ¶ 146, 147, 148 and 149; IACourtHR, 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. ¶ 64, 65, 66, 67 and 68; IACourtHR, 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. ¶ 30, 31, 32 and 33.

recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate method to disseminate thought and allow it to reach the greatest number of persons. In this respect, the expression and dissemination of thought and information 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.

Regarding the second dimension of the right embodied in Article 13 of the Convention, the social element, it is necessary to indicate that freedom of expression is a way of exchanging ideas and information between persons; it includes the right to try and communicate one's point of view to others, but it also implies everyone's right to know opinions, reports and news. For the ordinary citizen, the knowledge of other people's opinions and information is as important as the right to impart their own.

The Court considers that both dimensions are of equal importance and should be guaranteed simultaneously in order to give total effect to the right to freedom of thought and expression in the terms of Article 13 of the Convention.

As the cornerstone of a democratic society, freedom of expression is an essential condition for society to be sufficiently informed.⁷⁰

As asserted by this Court, "the expression and the dissemination of ideas are indivisible;" therefore, in order to ensure the effective exercise of freedom of thought and expression, the State may not unduly restrict the right to disseminate ideas and opinions.⁷¹

Some specific means for the expression and dissemination of thoughts and ideas that the IACHR and the IACourtHR have ruled on favorably are books,⁷² news articles,⁷³ and films.⁷⁴

i. U.S. standard in regard to freedom of expression: Case of *Cohen v. California*

The case law of the U.S. Supreme Court⁷⁵ has served in the past as a subsidiary means for the interpretation of article 13 of the ACHR in the Inter-American system.⁷⁶ In the U.S., the rulings of

⁷⁰ IACourtHR. 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, ¶¶ 64, 65, 66, 67 and 68. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf

⁷¹ IACourtHR. Case of *Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C. No. 135, ¶ 72. Available at: http://corteidh.or.cr/docs/casos/articulos/seriec_135_ing.pdf

⁷² See IACourtHR. Case of *Kimel v. Argentina*. Judgment of May 2, 2008. Series C. No. 177. Available at: http://corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf

⁷³ See IACourtHR. Case of *Ulloa v Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf

⁷⁴ See supra note 70.

the Supreme Court have progressively determined the scope of speech protection under the First Amendment⁷⁷ to that country's constitution.

The case of *Cohen v. California* is a landmark case among the rulings on matters of freedom of expression.⁷⁸ In this case, the Supreme Court determined that “the simple public display” of a “four-letter expletive” on a garment, as a means of informing an eventual spectator about a particular idea or opinion, does not constitute “a criminal offense” and, on the contrary, it is considered “protected speech” under the First Amendment to the U.S. Constitution.⁷⁹

⁷⁵ International law stipulates that “judicial decisions and the teachings of the most highly qualified publicists of the various nations, [may be used] as subsidiary means for the determination of rules of law.” In fact, article 38-1 of the Statute of the International Court of Justice codifies the formal sources of international law. Article 38-1 establishes that:

“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; 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.”

⁷⁶ One example of this is the role of the “actual malice” standard established by the U.S. Supreme Court within the framework of the case of *New York Times v. Sullivan*, used by the IACHR in its arguments in the case of *Herrera Ulloa v. Costa Rica*. In the case of *Herrera Ulloa v. Costa Rica*, the IACHR stated that:

“[L]egal actions brought by public officials or private persons voluntarily involved in public affairs, claiming defamation, calumny and insult, should be matters for civil—not criminal—courts, applying the standard of actual malice, where it is the alleged aggrieved party who must bear the burden of proving that the social communicator intended to inflict harm or acted with full knowledge that he was spreading false information.”

⁷⁷ In the U.S., the right to freedom of expression is guaranteed by the First Amendment to the Constitution of that country, which states that:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

⁷⁸ See the decision of the U.S. Supreme Court on the case of *Cohen v. California* (1971). Excerpt available at: http://www.law.cornell.edu/supct/html/historics/USSC_CR_0403_0015_ZO.html

⁷⁹ Paul Robert Cohen was sentenced to prison by the Municipal Court of Los Angeles for wearing a jacket bearing the words “Fuck the Draft”—referencing the Vietnam War and the military draft resulting from it—in the corridor outside the Los Angeles Municipal Court, which, by said court's interpretation, violated section 415 of the California Penal Code which prohibited “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person [by] offensive conduct.” The Municipal Court defined the offensive conduct as behavior that has a tendency to provoke others to acts of violence or to disturb the peace. Cohen, on his part, expressed that the sentence violated his right to freedom of speech protected by the First Amendment to the U.S. Constitution. Cohen also declared that he used the jacket knowing what words were printed on it, in an effort to inform the public about the depth of his feelings towards the Vietnam War and the draft. In its decision, the U.S. Supreme Court determined that:

“The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only ‘conduct’ which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon ‘speech’ [...]”

The Supreme Court also stated that the State of California lacked power to punish Cohen for the underlying content of the message the inscription conveyed, since Cohen didn't show any intent to incite to acts of violence or to achieve the interruption of the draft:

“...so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected [...] Appellant's conviction, then, rests squarely

D. Analysis of Venezuela’s conduct in relation to the international standard for the protection of the right to freedom of expression

a. Violation of the right of Hernández to freely express opinions and ideas, even if they are “offensive, shocking, or disturbing.”

The opinion expressed by Miguel Hernández that could have “offended, disturbed, or shocked” Venezuelan President Hugo Chávez—and which was later criminalized and gave rise to the legal proceedings against him—was the phrase “Hugo, I shit on your revolution” (in Spanish, “*Hugo, me cago en tu revolución*”), branded on a T-shirt that Hernández wore to a massive, public event—a baseball game.

As stated in the previous section, international human rights law, through its international standard for the protection of freedom of expression, protects the freedom of the individual—in this case the freedom of Hernández—to freely express opinions and ideas, even when these are considered offensive, shocking, or disturbing.

The criminalization of Hernández’s expression by the Venezuelan authorities violated this standard. Therefore, Venezuela is internationally responsible for violating Hernández’s freedom to express opinions and ideas freely, even if they offended, or were found shocking or disturbing by the president of that country.

upon his exercise of the “freedom of speech” protected from arbitrary governmental interference by the Constitution [...]

The Supreme Court dismissed the idea that the conviction could find support on the fact that Cohen wore the jacket in a court of law:

“Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute [article 415 of the California Penal Code mentioned above] that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places [...] No fair reading of the phrase ‘offensive conduct’ can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.” The Supreme Court also dismissed the idea that the case involved “fighting words:”

“This Court has held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called ‘fighting words,’ those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not ‘directed to the person of the hearer.’ [...] No individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult. [...] Nor do we have here an instance of the exercise of the State’s police power to prevent a speaker from intentionally provoking a given group to hostile reaction. [...]”

The Court asserted that “the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense.” Therefore, it ruled in favor of Cohen, determining that the interpretation and application of article 425 of the California Penal Code by the Municipal Court of Los Angeles was unconstitutional.

b. Violation of the special prohibition against the criminalization of expressions directed at public officials.

As previously stated, the Inter-American standard regarding freedom of expression includes a special prohibition against the criminalization of expressions directed at public officials, since, among other things: 1) there are non-criminal sanctions to redress possible damages to reputation; 2) public officials may receive, unfairly, a right to protection that other members of society don't have, reversing the fundamental principle of a democratic system in which the government is subject to checks; 3) the criminalization of these expressions may produce an effect of self-censorship, due to its chilling and inhibiting effect on the debate of matters of public interest, a debate essential to the functioning of democratic institutions.

The opinion expressed by Hernández was directed at a public official, the president of Venezuela—although it was not directed at the president personally, it was directed to a matter that is linked to him⁸⁰—making the special prohibition applicable in this particular case. In spite of that, and according to the facts of this case, the Venezuelan government criminalized this expression by pressing charges against Hernández for the alleged crime of “offending the heads of government.” Therefore, Venezuela is internationally responsible for violating the special prohibition against the criminalization of expressions directed at public officials.

c. Violation of the prohibition against the criminalization of “subjective opinions” or “value judgments”

As previously stated, international human rights law establishes the prohibition of the criminalization of expressions in cases where these expressions are “subjective opinions” or “value judgments.” One of the most important reasons for this is that they do not meet one of the essential prerequisites for establishing a liability, which is that the information expressed is a statement of fact subject to an evaluation about its veracity or falsehood.

The opinion that led to the legal proceedings against Hernández for the alleged crime of “offending the heads of government,” constitutes a “subjective expression” or a “value judgment”—a personal point of view of a Venezuelan citizen regarding his country's government, and not, for instance, a statement of fact, which may be subject to corroboration. This expression is protected under international human rights law and should not have caused criminal prosecution against Hernández. Therefore, Venezuela is internationally responsible for violating the prohibition against the criminalization of the subjective opinions or value judgments of Hernández.

d. Violation of the prohibition against the application of *desacato* laws

As previously stated, in accordance with international human rights law, laws that criminalize offensive expressions directed at public officials—better known as *desacato* laws—are in direct violation of the right to freedom of expression.

⁸⁰ Hernández's expression was “Hugo, I shit on *your* revolution” (“Hugo, me cago en *tu* revolución”), and not “Hugo, I shit on *you*” (“Hugo, me cago en *tí*”). Hernández himself made reference to this, stating that “I was not referring to Chávez, but to his revolution because I don't want it and I will never want it.”

In spite of this, Hernández is being tried by criminal courts by virtue of a *desacato* law that criminalizes insults against the president of the country. Therefore, Venezuela is internationally responsible for violating the prohibition against the application of *desacato* laws.

e. Violation of Hernández’s right to freely disseminate his ideas or opinions through the means of dissemination of his choosing, in order to communicate them to the greatest possible number of people.

According to international human rights law, freedom of expression encompasses the right of individuals to disseminate their opinions and ideas through means of their choosing, in order to communicate them to the greatest possible number of people, with the understanding that the expression and the dissemination of thoughts are indivisible.

In this case—similar to the U.S. Supreme Court case of *Cohen v. California*, a domestic judicial decision that may serve as subsidiary means for the determination of rules of international law—Hernández chose to wear a T-shirt at a massive baseball game as a means to express and disseminate a subjective opinion: his disdain for the “revolution” promoted in his country by the president. In this regard, Hernández stated: “... I still have my freedom of expression and if we live in a democratic country, I have the right state what I don’t like.”

Hernández exercised his right to freedom of expression in accordance with international human rights law; however, Venezuelan authorities have prosecuted him for exercising this right. Therefore, Venezuela is internationally responsible for violating Hernández’s right to freely disseminate his opinions or ideas, through the means of his choosing, in order to communicate them to the greatest possible number of people.

E. Conclusion

Miguel Ángel Hernández Souquett was charged and is being prosecuted by Venezuelan authorities solely for legitimately exercising his right to freedom of expression by wearing a t-shirt at a baseball game with the slogan: “Hugo, I shit on your revolution.” For over three years, Hernández has been the defendant in criminal proceedings and still faces the possibility of a conviction and prison sentence of up to two and a half years.

With these actions, Venezuela violated (1) the right to freely express opinions and ideas, even when these are offensive, shocking, or disturbing; (2) the general prohibition against the criminalization of expressions, especially those directed at public officials; (3) the prohibition against the criminalization of subjective opinions or value judgments; (4) the prohibition against the application of *desacato* laws; and (5) Hernández’s right to freely disseminate his ideas or opinions through the means of dissemination of his choosing, in order to communicate them to the greatest possible number of people.

The authorities of Venezuela who made the accusation against Hernández possible, as well as those in charge of his trial and potential conviction, have violated the international standard for the protection of the right to freedom of expression, binding for Venezuela since August 9, 1977, when it ratified the American Convention on Human Rights.

In short, Venezuela is responsible for the violation of article 13 of the American Convention on Human Rights, and principles 1, 2, 6, 10 and 11 of the Declaration of Principles on Freedom of Expression of the Inter-American Commission on Human Rights, interpreted in accordance with the decisions of the Inter-American Court of Human Rights.