



A Decade Under Chávez
Political Intolerance and Lost Opportunities for
Advancing Human Rights in Venezuela

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Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela

I. Executive Summary	1
Political Discrimination	2
The Courts	3
The Media.....	4
Organized Labor	6
Civil Society.....	7
The Future of Venezuelan Democracy	8
II. Political Discrimination	10
Political Discrimination under International Law	12
Political Discrimination under Venezuelan Law.....	14
Political Patronage and Discrimination Before Chávez	14
Blacklisting: The “Tascón List” and “Maisanta Program”	15
Fund for the Guarantee of Deposits and Banking Protection	21
National Council of Frontiers (CNF).....	24
National Electoral Council (CNE)	25
Single Social Fund (FUS) and Fund for Microfinanced Development.....	27
Discrimination in PDVSA	28
Blacklisting Oil Strikers	29
A “Revolutionary” Workforce	30
Discrimination in Other Areas.....	33
The Media	33
Organized Labor.....	34
Civil Society	34
Recommendations	34

III. The Courts.....	36
International Norms on Judicial Independence	37
The OAS and the Inter-American Democratic Charter	37
International Human Rights Treaties	38
Background	40
The Pre-Chávez Judiciary.....	40
Reforming the Justice System	41
A Polarized Supreme Court	42
The 2004 Court-Packing Law	45
Power to Pack the Court.....	45
Power to Purge the Court	47
Implementation of the Court-Packing Law	49
A Compliant Court.....	54
The 2004 Court-Packing Law.....	55
The 2007 Constitutional Reform Process.....	56
Conflicts of Interest	58
Failure to Uphold Fundamental Rights	59
Recommendations	62
IV. The Media	64
Venezuela’s Polarized Media	68
Opposition Media	68
Government Media.....	69
Community Media	70
The “Media War”	71
Toughening Speech Offenses.....	75
International Norms	75
Insult Provisions	78
Defamation Provisions	80
Speech Offense Prosecutions.....	82
Regulating Media Content.....	92
International Norms	93
Incitement Provisions.....	94
Dangers of Broad and Imprecise Wording	96
Lack of an Independent Regulatory Body	97

Government Use of Incitement Provisions.....	98
Restricting Information.....	103
International Norms	103
Access to Information under Venezuelan Law	106
Failure to Respect the Right of Access to Information	107
Controlling the Airwaves	108
International Norms	108
Political Use of Discretionary Powers	110
Community Radio and Television	121
International Norms	121
Government Support.....	121
State-Sponsored Pluralism	123
Lack of Judicial Protection of Freedom of Expression.....	125
The Court’s Handling of the RCTV Case.....	126
Recommendations	132
V. Organized Labor.....	134
Freedom of Association under International Law.....	138
The Right to Freely Elect Representatives	139
The Right to Bargain Collectively.....	140
The Right to Join the Organization of Choice.....	141
The Right to Strike	142
Freedom of Association under Venezuelan Law	143
The Right to Freely Elect Representatives	144
The Right to Bargain Collectively.....	148
The Right to Strike	150
Organized Labor Before Chávez.....	150
Electoral Interference and the Denial of Collective Bargaining Rights	152
The Confederation of Venezuelan Workers (CTV)	153
Health Workers (SUNEP-SAS).....	160
Nutrition Workers (SUNEP-INN)	164
Doctors (FMV).....	165
Government Favoritism and the Denial of Collective Bargaining Rights.....	169
Public Sector Workers’ Federation (FEDEUNEP)	170
Airport Workers (SUNEP-Aeropuerto).....	172

Government Reprisals: The Oil Sector.....	174
The Oil Strike and Mass Firings of 2003	174
An Illegitimate Strike?	177
An Essential Service and a National Emergency?.....	179
An Adequate Remedy	180
Blacklisting	181
Threats against Political Opponents	182
Firing of a Dissident Labor Leader	183
New Workers' Associations: Risks to Freedom of Association.....	185
Proposed Legislation on Workers' Councils.....	185
Cooperatives	189
Lack of Judicial Protection of Freedom of Association.....	193
Recommendations	196
State interference in union elections	196
Collective bargaining.....	196
Right to strike.....	197
Alternative Labor Organizations.....	197
VI. Civil Society	198
International Norms on Civil Society.....	199
Deteriorated Relations with Civil Society	202
Two Divergent Approaches to Rights Advocates.....	204
Persecution of Prison Reform Advocates	204
An Alternative Approach: Police Reform	210
Prosecutorial Harassment	216
Carlos Ayala	216
Súmate	218
Public Condemnation.....	219
Attempts to Exclude NGOS from International Forums.....	221
Proposed Legal Restrictions	224
Judicial Rulings Affecting Civil Society	226
Recommendations	228
Acknowledgments.....	230

I. Executive Summary

It has been 10 years since Hugo Chávez was elected president of Venezuela and set out to overhaul the country's largely discredited political system. His first major achievement, the enactment of a new constitution in 1999, offered an extraordinary opportunity for the country to shore up the rule of law and strengthen the protection of human rights. The 1999 Constitution significantly expanded human rights guarantees by, among other things, granting Venezuela's international rights obligations precedence over domestic law. It also created a new Supreme Court and sought to provide this court with the institutional independence it would need to serve as the ultimate guarantor of these fundamental rights.

But this historic opportunity has since been largely squandered. The most dramatic setback came in April 2002 when a coup d'état temporarily removed Chávez from office and replaced him with an unelected president who, in his first official act, dissolved the country's democratic institutions, suspending the legislature and disbanding the Supreme Court. Within 40 hours, the coup unraveled, Chávez returned to office, and the constitutional order was restored. But while this derailment of Venezuelan democracy lasted less than two days, it has haunted Venezuelan politics ever since, providing a pretext for a wide range of government policies that have undercut the human rights protections established in the 1999 Constitution.

Discrimination on political grounds has been a defining feature of the Chávez presidency. At times, the president himself has openly endorsed acts of discrimination. More generally, he has encouraged his subordinates to engage in discrimination by routinely denouncing his critics as anti-democratic conspirators and coup-mongers—regardless of whether or not they had any connection to the 2002 coup.

Another defining feature of the Chávez presidency has been an open disregard for the principle of separation of powers enshrined in the 1999 Constitution—and, specifically, the notion that an independent judiciary is indispensable for protecting

fundamental rights. After the 2002 coup, the most damaging blow to the rule of law in Venezuela was the political takeover of the Supreme Court by Chávez and his supporters in 2004.

In the absence of credible judicial oversight, the Chávez government has engaged in often discriminatory policies that have undercut journalists' freedom of expression, workers' freedom of association, and civil society's ability to promote human rights in Venezuela.

This book examines the current state of Venezuelan democracy from a human rights perspective. It does not address all the pressing human rights issues facing the country today, many of which pre-date the Chávez presidency. Rather, it focuses on the impact that the Chávez government's policies have had on institutions that play key roles in ensuring that human rights are respected: the courts, the media, organized labor, and civil society.

The book's findings are based primarily on research that Human Rights Watch conducted during multiple visits to Venezuela between December 2006 and July 2008. It also draws on research carried out during previous visits dating back to 2002. While in Venezuela, Human Rights Watch conducted extensive interviews with government officials, judicial authorities, jurists, academics, human rights advocates, trade unionists, and journalists.

Political Discrimination

The Venezuelan government under President Chávez has tolerated, encouraged, and engaged in wide-ranging acts of discrimination against political opponents and critics. Chapter 2 documents how the government has:

- Fired and blacklisted political opponents from some state agencies and from the national oil company;
- Denied some citizens access to social programs based on their political opinions; and
- Discriminated against media outlets, labor unions, and civil society in response to legitimate criticism or political activity.

Chávez assumed the presidency in part on the promise to free Venezuela from its entrenched patterns of political exclusion. However, while his government has uprooted established networks of political patronage, it has replaced them with new forms of discrimination against its own critics and opponents.

While Chávez himself has at times recognized that discrimination is a problem and spoken out against it, his routine expressions of political intolerance have served to undergird the discriminatory actions of his supporters. On occasion, Chávez has openly advocated political discrimination against opponents, as when he publicly supported declarations by his energy minister that the state oil company would remove employees who did not support the president.

Human Rights Watch recommends that the Venezuelan government take concrete steps to end political discrimination. In particular, the president and other top officials should refrain from public statements that appear to endorse discrimination. The government should give clear instructions to all government officials explicitly prohibiting political discrimination in the hiring and firing of employees and in the access to government programs. It should also carry out prompt and thorough investigations into all credible allegations of politically motivated discrimination and sanction officials found to be responsible.

The Courts

The government under President Chávez has effectively neutralized the judiciary as an independent branch of government. Chapter 3 documents how the president and his supporters carried out a political takeover of the Supreme Court in 2004, and how the court has since largely abdicated its role as a check on arbitrary state action and a guarantor of fundamental rights.

When Chávez first assumed the presidency, there was broad public support for his calls to clean up a judiciary that was dysfunctional and profoundly discredited. The 1999 Constitution created a new Supreme Court and sought to guarantee its integrity and independence. But in 2004 Chávez signed legislation that made it possible for his supporters in the National Assembly to both pack and purge the Supreme Court. The governing coalition implemented this court-packing legislation by filling the 12

new seats (in what had been a 20-member court) with political allies. This packed Supreme Court subsequently fired hundreds of lower court judges and appointed hundreds more.

Since this takeover occurred, the court's response to government measures that threaten fundamental rights has typically been one of passivity and acquiescence. It has failed, in particular, to counter assaults on the separation of powers, such as the 2004 court-packing law and, more recently, a 2007 constitutional reform package. It has also failed to safeguard fundamental rights in prominent cases involving the media and organized labor.

Human Rights Watch recommends that steps be taken to reverse the damage done by the 2004 court-packing law. After the next legislative elections in 2010, the new National Assembly should implement a one-time ratification process to legitimize the composition of the Court by, for example, requiring a two-thirds majority affirmation vote for each Supreme Court justice who has been appointed since the passage of the 2004 Supreme Court law. Measures should then be taken to permit the lawful removal of any justice who does not receive a two-thirds majority vote during this process. Any resulting vacancies should be filled through a selection process that is open, transparent, and ensures broadest possible political consensus. The legislature should also immediately repeal the 2004 provisions that allow justices to be removed by a simple majority vote.

The Media

The Venezuelan government under President Chávez has undermined freedom of expression through a variety of measures aimed at reshaping media content and control. Chapter 4 documents how the government has:

- Expanded the scope of insult laws, which punish disrespectful expression toward government officials, and toughened penalties for criminal defamation and libel;
- Expanded and toughened the penalties of vaguely defined “incitement” provisions that allow for the arbitrary suspension of TV and radio channels;
- Restricted public access to official information; and

- Abused the state's control of broadcasting frequencies to threaten and discriminate against stations with overtly critical programming.

Venezuela still enjoys a vibrant public debate, in which anti-government and pro-government media are equally vocal in their criticism and defense of Chávez. However, whereas Chávez faced an almost entirely hostile private media at the time of the 2002 coup, he has since significantly shifted the balance of the mass media in the government's favor. This shift has been accomplished, not by promoting more plural media, but by stacking the deck against critical opposition outlets while advancing state-funded media that represent the views only of Chávez's supporters.

By expanding and toughening the penalties for speech and broadcasting offenses, Chávez and his legislative supporters have strengthened the state's capacity to limit free speech and created powerful incentives for critics to engage in self-censorship. Journalists working for opposition media have borne the brunt of prosecutions under these laws in recent years, generating pressure on these media to tone down criticism. Should the government choose to utilize the expanded speech and broadcasting offenses more aggressively, the space for political debate in Venezuela could be severely curtailed.

One area where the government's media policy has produced positive results is broadcasting at the community level. The government has actively supported the creation of community radio and TV stations, whose broadcasting contribute to media pluralism and diversity in Venezuela.

Human Rights Watch recommends that the National Assembly repeal all existing legislation that contravenes international norms on freedom of expression, including insult laws, laws criminalizing defamation of public officials and institutions, and the overly broad incitement provisions of its broadcasting law. It should also pass legislation to implement the constitutional right of access to information held by public entities in an effective and non-discriminatory manner. In addition, after the next legislative elections in 2010, the National Assembly should establish a new state agency to administer broadcasting frequencies and enforce broadcasting laws.

Steps should be taken to ensure that this new agency possesses the institutional autonomy that CONATEL is formally granted by law but lacks in practice.

Organized Labor

The Venezuelan government under President Chávez has sought to remake the country's labor movement in ways that violate basic principles of freedom of association. Chapter 5 documents how the government has:

- Undermined workers' right to elect their representatives by requiring state oversight and certification of union elections;
- Denied the right to bargain collectively to unions which do not receive state approval of election results;
- Undermined workers' right to freely join the labor organization of their choosing by engaging in favoritism toward pro-government unions; and
- Undermined workers' right to strike by banning legitimate strike activity and engaging in mass reprisals against striking oil workers.

President Chávez and his allies have tried to justify these actions as part of a broader effort to “democratize” the labor movement by safeguarding workers' rights against allegedly corrupt and co-opted union leaders. However, firing workers who exercise their right to strike, denying workers their right to bargain collectively, and discriminating against workers because of their political beliefs does not promote union democracy.

Moreover, it is a central principle of the international law protecting workers' rights that states should not interfere in the internal affairs of unions, including their leadership elections. This prohibition—enshrined in the conventions of the International Labour Organization (ILO) to which Venezuela is a party—exists to prevent the political manipulation and state control that can often result from state interference in union affairs.

Through its systematic violation of workers' right to organize, the Chávez government has undercut established unions and favored new, parallel unions that support its political agenda. For example, it has denied established unions the right to bargain collectively until they hold state-certified elections—which have been delayed and

even blocked by electoral authorities—while negotiating with new pro-Chávez unions exempt from electoral requirements. It has fired and blacklisted thousands of workers in the state oil company who engaged in legitimate strike activity, and later threatened to remove all remaining workers who did not support Chávez. And it has promoted the formation of alternative workers' organizations that could be used to suppress legitimate worker organizing, undermine existing unions, and circumvent the country's labor laws.

Human Rights Watch recommends that the government cease intervening in union affairs and engaging in political discrimination against workers. Specifically, the government should promote legislation to make state oversight and certification of union elections strictly optional (in the absence of a court order) and to eliminate political discretion in the choice of collective bargaining partners. It should also refrain from reprisals against workers engaged in legitimate strike activity and permit strikes grounded in economic and social policy demands, as required by international law. And it should amend existing and proposed legislation on alternative workers' associations to ensure that they are not used to subject organized labor to state control, block legitimate worker organizing, or evade national labor legislation.

Civil Society

The Venezuelan government under President Chávez has undermined its own ability to address the country's long-standing human rights problems through its aggressively adversarial approach to local rights advocates and civil society organizations. Chapter 6 documents how the government has:

- Subjected rights advocates to criminal investigations on groundless or grossly exaggerated charges;
- Sought to discredit and undermine rights organizations through unfounded allegations of complicity in subversion;
- Sought to exclude organizations receiving foreign funding from participation in international forums; and
- Promoted legislation that would allow arbitrary state interference in rights organizations' fundraising and operations.

President Chávez and his supporters have tried to justify these measures by arguing that rights advocates and civil society organizations were pursuing a partisan political agenda aimed at destabilizing the country and toppling President Chávez. Yet, while it is reasonable for a government to investigate and prosecute credible allegations of criminal activity, as well as to regulate foreign funding of civil society groups to promote greater transparency, these measures have gone beyond these legitimate forms of accountability and regulation.

Given the gravity of the human rights problems facing Venezuela, the government could greatly benefit from the expertise and input of the country's human rights advocates and organizations in developing and implementing needed reforms. Instead authorities have harassed and intimidated leading human rights advocates, marginalizing them from policy discussions. In one notable exception, the government incorporated civil society experts in a commission set up to analyze and make proposals to reform Venezuela's police forces. Unfortunately, however, the commission on police reform is merely the exception that proves the rule regarding the cost of the government's adversarial approach to Venezuelan civil society.

The Chávez government should abandon its aggressively adversarial posture toward local human rights defenders and civil society organizations. As the experience with police reform demonstrates, even in the midst of a polarized political situation, constructive engagement is possible and can contribute to finding solutions to the country's chronic human rights problems.

The Future of Venezuelan Democracy

The recommendations outlined in this book are fully consistent with the broader goal enshrined in the 1999 Constitution—and publicly espoused by the Chávez government—of promoting a more inclusive democracy in Venezuela. Indeed, Human Rights Watch believes that the recommended steps are prerequisites for any serious effort to pursue this vital and ambitious aim.

A country's citizens cannot participate fully and equally in its politics when their rights to freedom of expression and association are at risk. Ensuring these essential rights requires more than constitutional guarantees and political rhetoric. It requires

institutions that are capable of countering and curbing abusive state practices. Above all, it requires a judiciary that is independent, competent, and credible. It is also critical that non-state institutions—such as the media, organized labor, and civil society—are free from government reprisals and political discrimination.

President Chávez has actively sought to project himself as a champion of democracy, not only in Venezuela, but throughout Latin America. Yet his professed commitment to this cause is belied by his government's willful disregard for the institutional guarantees and fundamental rights that make democratic participation possible. Venezuela will not achieve real and sustained progress toward strengthening its democracy—nor will it serve as a useful model for other countries in the region—so long as its government continues to flout the human rights principles enshrined in its own constitution.

II. Political Discrimination

Political discrimination has long plagued Venezuela. For decades, government patronage and spoils were divided along party lines at the expense of large sectors of Venezuelan society. Chávez assumed the presidency in part on the promise to free Venezuela from its entrenched patterns of political exclusion. While his government managed to uproot the established system of political discrimination, it has replaced it with new forms of discrimination against real and perceived political opponents.

The Chávez government proclaims a commitment to political inclusion, but has openly discriminated against those who do not share its views. Government officials have removed scores of detractors from the career civil service, purged dissident employees from the national oil company, denied citizens access to social programs based on their political opinions, and denounced critics as subversives deserving of discriminatory treatment. The Chávez administration's exclusion and harassment of those who voice their dissent belie its banner of democratic pluralism.

Political discrimination under Chávez was most pronounced in the aftermath of the 2004 recall referendum on Chávez's presidency. Citizens who exercised their right to call for the referendum—invoking one of the new participatory mechanisms championed by Chávez during the drafting of the 1999 Constitution—were threatened with retaliation and blacklisted from some government jobs and services. After denouncing the referendum effort as an act “against the country”, Chávez requested that electoral authorities give legislator Luis Tascón a list of those who signed the referendum petition, which was made publicly available on the internet. The “Tascón list” and an even more detailed list of all Venezuelans' political affiliations—the “Maisanta program”—were then used by public authorities to target government opponents for political discrimination. (There were also reports that private sector employers utilized the lists to discriminate against Chávez supporters.)

In one prominent case from 2004, a government banking agency used the lists in compiling political profiles of its employees and then fired more than 80 employees deemed to be part of the political opposition. In a similar case shortly after the

referendum, government officials refused to renew a contract with a cooperative that made school uniforms on the grounds that cooperative members had appeared on the Tascón list and thus did not “deserve” the benefits of the program.

Political discrimination has been openly endorsed and practiced in the oil industry, which is one of the country’s largest sources of employment and the backbone of the national economy. After a two-month-long strike in December 2002, the government fired close to half of the workforce from the state oil company, *Petróleos de Venezuela, S.A. (PDVSA)*, and blacklisted them from future employment in the oil sector. A month before the 2006 presidential election, the energy minister (who also serves as PDVSA president) boasted that the company had “removed 19,500 enemies of the country from the [oil] business” and would continue to do so, telling PDVSA employees that anyone who disagreed with the government “should give up their post to a Bolivarian.” Although the minister issued a memo almost a year later proscribing political discrimination, there is credible evidence that the discriminatory mindset reflected in his initial remarks was also embodied in actual employment policies in some departments of PDVSA.

Political discrimination has been a recurring feature of the government’s policies and actions in a wide variety of areas. Subsequent chapters of this report show how political discrimination has affected the media, organized labor, and civil society. The government has threatened opposition journalists and media outlets with criminal prosecution and termination of broadcasting licenses. It has favored the formation of new pro-government unions, while refusing to bargain collectively with those associated with the opposition. And it has also harassed prominent human rights advocates and NGOs critical of the government.

Government officials have attempted to defend acts of political discrimination as a necessity, either to contain a political opposition allegedly intent on overthrowing the government or to establish a government capable of undertaking a “revolutionary” project. One government minister called the 2004 recall referendum effort an act of “terrorism” and urged the dismissal of those not “committed to the revolutionary process.” Other officials claimed that large groups of civil servants

were political appointees who merited dismissal for having signed petitions calling for the referendum.

Chávez himself has sent mixed messages regarding political discrimination. At times he has recognized that discrimination is a problem and spoken out against it. For example, he directed employers to “bury” the Tascón list due to reports he received of employment discrimination (although he waited a full year after the list’s implementation to do so). He also promoted a constitutional reform proposal to explicitly bar discrimination based on political orientation.

Yet Chávez has also at times openly advocated political discrimination against opponents of the “revolution.” For example, after his energy minister told PDVSA workers they should give up their jobs if they were not Chávez supporters, Chávez publicly defended this openly discriminatory message and called on all oil workers who were not committed to the “revolution” to abandon their jobs and “go to Miami.” Such expressions of political intolerance have served to undergird the discriminatory treatment applied by his supporters.

Political Discrimination under International Law

Discrimination against individuals for exercising democratic rights is proscribed under international law. Under Article 2 of the International Covenant on Civil and Political Rights (ICCPR), states must respect and ensure the rights recognized in the covenant “without distinction of any kind, such as race, color, sex, language, religion, *political or other opinion*, national or social origin, property, birth, or other status” (emphasis added).¹ Although race and gender discrimination have occupied the attention of the international community, the ICCPR makes no distinction, in terms of gravity, between these different manifestations of discrimination.

International law specifically bars discrimination in public sector employment. Article 25c of the ICCPR requires that “every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without

¹ International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171, December 16, 1966, art. 22(1), ratified by Venezuela on May 10, 1978.

unreasonable restrictions, to have access on general terms of equality to public service in his country.” In its general comment on this article, the Human Rights Committee noted that to ensure equal access, “the criteria and processes for appointment, promotion, suspension and dismissal in public service positions must be objective and reasonable.”² Governments that bar entry to their opponents or fire those already in government jobs solely because of their political opinions would be in violation of their obligations under Articles 2 and 25.

The Human Rights Committee has stressed that “the principle of access to public service on general terms of equality implies that the State has a duty to ensure that it does not discriminate against anyone. This principle is all the more applicable to persons employed in the public service and to those who have been dismissed.”³

International labor standards, specifically Convention 111 of the International Labour Organization (ILO), also prohibit discrimination on the basis of political opinion in access to jobs and in terms and conditions of employment.⁴

It is generally accepted that governments may apply political criteria in recruiting decision-makers at the top levels of public administration, and most governments do so. But these political appointments must be clearly defined and limited in nature so as to prevent abuse. It is a different matter when career civil servants are hired or dismissed in blanket fashion solely because of their presumed political views, whether such discrimination operates by law or occurs informally.

The Inter-American Commission on Human Rights has expressed concern about political discrimination in Venezuela. As it wrote in its 2005 report:

² Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para. 23.

³ Human Rights Committee, Communication No. 933/2000, “In the matter of *Adrien Mundy Busyo, Thomas Osthudi Wongodi, René Sibú Matubuka et al. v. Democratic Republic of the Congo*,” July 31, 2003, para. 5.2.

⁴ ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation, 1958, 362 U.N.T.S. 31, June 15, 1960, ratified by Venezuela on March 6, 1971.

The Commission finds that dismissing employees and obstructing access to social benefits, among other measures, to punish those persons who express their voice of dissent from the administration are violations of human rights and should be subject to generalized censure, and should be investigated.⁵

Political Discrimination under Venezuelan Law

Venezuela gives constitutional rank to international human rights treaties; as such, no domestic laws can violate the international proscription on political discrimination described above. In addition, the 1999 Constitution expressly prohibits “political discrimination” in employment.⁶ Finally, and more broadly, it bars “any discrimination with the intent or effect of nullifying or encroaching upon the recognition, enjoyment or exercise, on equal terms, of the rights and liberties of every individual.”⁷ Given that discriminatory actions based on political belief frequently result in a diminution of other rights, this broader prohibition can be read to provide general protections against political discrimination.⁸

Political Patronage and Discrimination Before Chávez

Political discrimination is not new to Venezuela. For at least 30 years before Chávez’s election, political allegiance was the passport to jobs in the public sector, as well as government contracts and services. Patronage—the provision of benefits, jobs, and services to those with party connections in exchange for political loyalty—was a pervasive feature of the power-sharing agreement between political parties known as the Punto Fijo pact.⁹

⁵ Inter-American Commission on Human Rights, Annual Report 2005, OEA/Ser.L/V/II.124, Doc. 5, February 27, 2006, Chapter IV: Venezuela, para. 331.

⁶ Constitution of the Bolivarian Republic of Venezuela, art. 89(5).

⁷ *Ibid.*, art. 21(1).

⁸ Though the constitution can be read to provide general protections against discrimination, many welcomed Chávez’s proposal to amend the constitution to explicitly prohibit discrimination based on political orientation in December 2007. Constitutional Reform Project presented by President Hugo Chávez [Proyecto de Reforma Constitucional presentado por el presidente de la República Hugo Chávez], 2007, http://www.cne.gov.ve/elecciones/referendo_constitucional2007/documentos/Proyecto_Reforma_final.pdf (accessed July 22, 2008), art. 18.

⁹ The Punto Fijo pact, signed in 1958, was a power-sharing agreement between the two dominant parties, Democratic Action (Acción Democrática, AD) and the Christian Democratic Party (Comité de Organización Política Electoral Independiente, COPEI).

The Punto Fijo pact was based on a system of political accommodation and a division of state jobs, contracts, and spoils between the two dominant political parties.¹⁰ As Human Rights Watch noted in a report published in 1993, “jobs in the public sector were allocated with calculated discrimination through the political parties, forming an important element in the stream of patronage descending from the top of each party to its bases throughout the nation.”¹¹

The main losers of the political arrangement were the millions of poor Venezuelans outside the public sector of the economy. Many of these voters supported Chávez in 1998, partially with the hope of bringing an end to the corruption and exclusion of the Punto Fijo era.¹²

The old system of patronage was largely uprooted with Chávez’s election, which ended the dominance of the two main political parties. Beginning in 2003, the Chávez government launched a series of “missions” that delivered social services directly to the poor, circumventing existing state institutions that had been criticized for distributing aid based on political criteria. Yet while the Chávez government replaced the old, discriminatory system for allocating public jobs and services, it has replaced it with new forms of exclusion based on political loyalty.

Blacklisting: The “Tascón List” and “Maisanta Program”

Two lists have been key instruments for giving effect to political discrimination under Chávez: the “Tascón list” and the “Maisanta program.” While ostensibly designed

The two-party system was credited with decades of democratic stability, but deprived many Venezuelans of effective political participation.

¹⁰ Terry Karl, “Petroleum and Political Pacts: the Transition to Democracy in Venezuela,” *Latin American Research Review*, January 1987, p. 83.

¹¹ Americas Watch (now Human Rights Watch/Americas), *Human Rights in Venezuela* (New York: Human Rights Watch, 1993), p. 3.

¹² Chávez, a former army lieutenant-colonel whose only political experience was a failed coup attempt against the government of Carlos Andrés Pérez, was elected president of Venezuela with 57 percent of the vote in 1998. His victory was attributed in part to widespread disillusionment with the traditional political parties, and his promises to transform the political system. José Vicente Carrasquero and Friedrich Welsch, “Opinión pública y cultura política en Venezuela: la consolidación del chavismo,” in Friedrich Welsch, (ed.), *Opinión pública y elecciones en América* (Caracas: International Political Association, 2000). Specifically, public opinion polls show that Chávez was able to win votes from Venezuelans who supported democracy but were highly dissatisfied with incumbent officials and practices. Damarys Canache, “From Bullets to Ballots: The Emergence of Popular Support for Hugo Chávez,” *Latin American Politics and Society*, Vol. 44, No. 1 (Spring 2002), pp. 69-90.

for legitimate electoral purposes, several high-ranking government officials encouraged or threatened to use the lists to retaliate against those identified as critical of the government. In the aftermath of a contentious 2004 referendum to recall Chávez from the presidency,¹³ some government officials blacklisted those who called for the removal of Chávez from government jobs, contracts, and services.¹⁴

Chávez encouraged holding those who signed the petition for a recall referendum on his mandate “accountable” for their decision, although he stopped short of endorsing political discrimination. In October 2003, Chávez insinuated that there might be future uses of the petition: “Those who sign against Chávez, in truth are not signing against Chávez. They will be signing against the country.... They will be recorded in history, because [the CNE] will have to register their name, their surname, their signature, their ID, and their fingerprints.”¹⁵

¹³ In 2002, the opposition began to organize a national referendum to allow Venezuelans to vote on whether Chávez should remain in office, invoking one of the new participatory mechanisms of the 1999 Constitution. The first signature drive was for a non-binding “consultative” referendum on whether Chávez should remain in office. A vote was scheduled for February 2003, but was indefinitely suspended by the Supreme Court. The opposition then organized a second signature drive, this time for a recall referendum that would force Chávez to resign. In September 2003, the CNE declared the petition inadmissible, arguing, among other technical objections, that the signatures were collected before Chávez completed half of his term in office. A third signature drive was organized, but the CNE declared in February 2004 that the number of valid signatures did not meet constitutional requirements and that the disputed signatures would have to be confirmed in another public event. The announcement was met with opposition protests that turned violent. A group of NGOs then appealed the CNE’s decision, and the Supreme Court’s Electoral Chamber held that the signatures were valid and the referendum should be carried out. The Supreme Court’s Constitutional Chamber overruled the decision, however, forcing the opposition to launch another petition drive to obtain the signatures necessary to hold a recall referendum. (The court decisions are discussed in further detail in chapter 3.) Finally, the required number of signatures was validated, and the referendum was held in August 2004. A large majority of Venezuelans voted in favor of the president’s continued tenure and the results were confirmed by electoral authorities and international observers.

¹⁴ In 2004, the public-sector workers’ union (Federación Unitaria Nacional de Empleados Públicos, FEDEUNEP) documented widespread allegations of politically motivated discrimination against public sector employees who appeared on the Tascón list, including 200 dismissals, 400 employees subjected to pressure tactics, and 180 transfers. Inter-American Commission on Human Rights, *Annual Report 2005*, OEA/Ser.L/V/II.124, Doc. 5, February 27, 2005, Chapter IV: Venezuela, para. 327; “Denuncian lista discriminatoria en organismos públicos”, *El Universal*, 8 de agosto de 2005; PROVEA, “Aumentan denuncias por despedidos en la administración pública por motivaciones políticas”, *Boletín Informativo* 142, 6-19 de agosto de 2004, http://www.derechos.org.ve/actualidad/coyuntura/2004/coyuntura_142.htm (consultado el 30 de junio de 2008); Ana Julia Jatar, *Apartheid del siglo XXI: La informática, al servicio de la discriminación política en Venezuela* (Caracas: Súmate, 2006).

¹⁵ Giuliana Chiappe, “42 organismos públicos incurrieron en discriminación”, *El Universal*, November 11, 2006, http://politica.eluniversal.com/2006/11/11/pol_art_65474.shtml (accessed June 28, 2008); Maria Lilibeth Da Corte, “La oposición tiene la derrota pintada en la frente”, *El Universal*, October 18, 2003, http://www.eluniversal.com/2003/10/18/pol_art_18106D.shtml (accessed June 13, 2008).

In January 2004, Chávez wrote to then-CNE president Francisco Carrasquero to inform him that he had authorized his campaign manager, Congressman Luis Tascón, to obtain copies of the forms with over three million signatures in support of the recall referendum from the CNE.¹⁶ Chávez announced on television that he intended to use the list to expose what he claimed were bogus signatures.¹⁷ Having obtained the election forms, Tascón posted the list of names on his website so that any individual was able to consult the “Tascón list,” ostensibly to verify their signature.¹⁸

The creation of a list of those who signed for the recall referendum was not objectionable in itself. By supporting the call for a referendum, citizens were not voting in an election or even expressing a political preference. The petition for a recall referendum was a matter of public record in which the publication of signatures could increase the transparency of the process. What was impermissible was the use of the list to discriminate against signers.

Several high-ranking government officials explicitly threatened retaliation against signers. In one prominent expression of support for political discrimination, then-Health Minister Roger Capella, told members of the press in March 2004 that health workers and doctors who had signed the recall referendum would be fired because to sign the petition was “an act of terrorism.”¹⁹ Capella added that “the only doctors who will work in the country’s hospitals will be comrade medics committed to the revolutionary process.”²⁰ On the following day, Capella rectified his comments, stating that they had a “personal connotation” and that discrimination on political

¹⁶ Letter from President Hugo Chávez Frías to Francisco Carrasquero, President of the CNE, January 30, 2004. Chávez then announced on television that he had requested the signatures. Transcript of “Aló Presidente,” No. 180, February 1, 2004, http://www.gobiernoenlinea.ve/misc-view/sharedfiles/Alo_Presidente_180.pdf (accessed June 23, 2008).

¹⁷ Hugo Chávez stated on a live broadcast on VTV on February 15, 2004, “There’s the list of all these things, above all the ID card numbers of those who supposedly signed. I call on the Venezuelan people to check so that the faces appear. There it is! www.luistascon.com. Check it out!” Video of VTV broadcast, Ciudadanía Activa, *La Lista: Un Pueblo Bajo Sospecha*, <http://video.google.com/videoplay?docid=-8187459075291793700> (accessed June 14, 2008).

¹⁸ Taynem Hernández, “MVR asegura que 72 dirigentes opositores no firmaron solicitud,” *El Universal*, January 15, 2003.

¹⁹ Yolanda Ojeda Reyes, “Firmar contra Chávez es un acto de terrorismo,” *El Universal*, March 21, 2004, http://www.eluniversal.com/2004/03/21/pol_art_21108A.shtml (accessed June 4, 2008).

²⁰ *Ibid.*

grounds is unconstitutional.²¹ Nonetheless, given that Capella made his initial statements in a public forum, speaking as a government official, they could not be easily retracted or lightly forgotten.²²

In another example of the political pressure placed on public sector employees, then-PDVSA President Alí Rodríguez warned of potential firings in the oil company for signing for the referendum, saying that “it wouldn’t surprise me” if workers who signed the referendum petition were fired from their jobs.²³ Some PDVSA employees later reported to the press that they had been fired and, when they asked for the reason, they were told it was because they had signed the referendum petition.²⁴

Over a year after ordering the creation of the Tascón list, Chávez himself acknowledged the discriminatory purposes for which the list had been used. In April 2005, having won the referendum, Chávez called on employers to archive and “bury” the list on public television:

It was a moment that we’ve put behind us. If one of us who has to take a personal decision about someone goes to consult the list, what they are doing is dragging past situations into the present, and helping to recreate them ... the famous list certainly fulfilled a useful role at a given moment, but that moment has passed.

²¹ “Ministro de Salud niega despidos por razones políticas,” *Radio Nacional de Venezuela/Venpress*, March 22, 2004, <http://www.aporrea.org/actualidad/n15077.html> (accessed June 4, 2008); Marielba Núñez y Leidys Asuaje, “Capella; fue un error decir que se despedirá a médicos por firmar,” *El Nacional*, March 23, 2004.

²² Capella’s words may not have been idle threats, as there were already reports of politically motivated firings of doctors and health workers emerging in the press. Eva Riera, “Médicos en Falcón denuncian represalias por participar en El Reafirmazo,” *El Nacional*, March 27, 2004; Nadia Pérez, “Podrían llegar a 35 los médicos despedidos del Pérez de León,” *El Nacional*, March 20, 2004.

²³ “Empleados de Pdvsa que firmaron referéndum revocatorio podrían ser despedidos: Alí Rodríguez admite que puede despedir a firmantes,” *El Nacional*, March 13, 2004; “Rodríguez Araque admite factibilidad de despedidos de firmantes,” *El Universal*, March 12, 2004.

²⁴ For example, Henry Omar Arteaga, a manager at Petroquímica de Venezuela (Pequiven) with more than 20 years of service, was fired in March 2004. He claimed he was told by a supervisor that the reason was his participation in the recall petition, and that the decision had come from the company directors and possibly its president. In March 2007 a labor court ordered Pequiven to pay compensation to Arteaga. The company did not contest that his dismissal was unjustified, though they did not say it was politically motivated. Ana Julia Jatar, *Apartheid del siglo XXI: La informática al servicio de la discriminación política en Venezuela*, (Caracas: Súmate, 2006), p. 59; Fifth Instance Court, Carobobo state, Zurima Escorihuela Paz, March 30, 2007, <http://carabobo.tsj.gov.ve/decisiones/2007/marzo/1574-30-GH21S2004000062-PJ0042007000018.html> (accessed June 12, 2008).

We're asking the whole country to build bridges. I say this because I've been receiving some letters—of all the papers I receive—that make me think that in some spaces they still have the Tascón list on the table to decide whether somebody is going to work or is not going to work. Bury the Tascón list!²⁵

Chávez almost certainly knew in 2004 of allegations that government departments were using the Tascón list to fire workers and block job applications. In fact, according to the state radio station, Tascón said in April 2004 that he had spoken to Chávez personally about cases of discrimination by both anti-Chávez private employers and pro-Chávez government institutions and urged Chávez to halt the continuing abuse of the list.²⁶ Nonetheless, it took Chávez over a year from his first order to compile the list—in which time, as noted above, several high-ranking government officials endorsed the use of political discrimination—to give clear instructions that the information should not be used for discriminatory purposes.

Following Chávez's statements, the Attorney General's Office opened an investigation in April 2005 to determine if private employers or public institutions used the Tascón list to discriminate against those who signed in favor of a recall referendum.²⁷ However, to our knowledge, no convictions resulted.

Moreover, Chávez's call to "bury" the Tascón list did not end political discrimination. While his announcement was welcome, some supporters responded by developing more sophisticated tools with which to discriminate. During the 2005 congressional elections, pro-Chávez campaigners designed a database known as the "Maisanta program".²⁸ Unlike the Tascón list, which contained only the names of those who had signed for the recall referendum, the Maisanta program contained detailed

²⁵ "Presidente Chávez ordena 'enterrar' lista de firmantes del revocatorio," *Radio Nacional de Venezuela*, April 16, 2005, <http://www.rnv.gov.ve/noticias/index.php?act=ST&f=2&t=16101> (accessed June 14, 2008); Maria Lilibeth da Corte, "Chávez exigió enterrar 'la famosa lista' del diputado Luis Tascón," *El Universal*, April 16, 2005, http://www.eluniversal.com/2005/04/16/pol_art_16186B2.shtml (accessed June 14, 2008).

²⁶ "Diputado Tascón: yo saqué la lista de mi pagina web desde 2004," *Radio Nacional de Venezuela/MINCI*, April 16, 2004, <http://rnv.gov.ve/noticias/?act=ST&f=2&t=16116> (accessed June 30, 2008).

²⁷ "Ministerio Público inició averiguación sobre uso de listados por solicitud de referendos en 2004," Attorney General's Office press release, April 27, 2005, <http://www.fiscalia.gov.ve/Prensa/A2005/prensa2704.htm> (accessed July 24, 2008).

²⁸ "Denuncian existencia de lista más sofisticada de oposición," *El Nacional*, August 24, 2005.

information on all registered voters, totaling over 12 million citizens. It informed the user if voters had signed the recall referendum against Chávez, abstained in earlier elections, participated in the government's missions, and signed the counter-petition for a recall referendum against opposition legislators.²⁹

The designers of the Maisanta program justified the program as an effort to democratize access to information.³⁰ The database could indeed prove useful for campaign purposes. However, like the Tascón list, the Maisanta software was used for more than just electoral ends.

Hundreds of allegations emerged starting in 2004 and 2005 that government officials in different branches of public administration were using the Tascón list, the Maisanta program, or both, to fire and screen applicants for government jobs and programs.³¹ Even Tascón acknowledged that there were cases of “people who were not given documents, who faced delays in completing paperwork, and who were denied the ability to work” because they signed for the referendum.³²

The vast majority of allegations of political discrimination were leveled by members of the opposition against government ministries and agencies, according to the nonpartisan Venezuelan human rights NGO, PROVEA.³³ However, there were also

²⁹ “The Maisanta Program,”

http://www.megaresistencia.com/portada/index.php?option=com_content&task=view&id=12&Itemid=1 (accessed June 30, 2008).

³⁰ Aleksander Boyd, “Lista de Tascón: Maisanta software explained,” post to *vcrisis.com*, September 15, 2005, <http://www.vcrisis.com/index.php?content=pr/200512061532> (accessed on June 16, 2008).

³¹ Inter-American Commission on Human Rights, *Annual Report 2005*, OEA/Ser.L/V/II.124, doc. 5, February 27, 2005, Chapter IV, Venezuela, para. 327; “Denuncian lista discriminatoria en organismos públicos,” *El Universal*, August 8, 2005; PROVEA, “Aumentan denuncias por despedidos en la administración pública por motivaciones políticas”; PROVEA, “La causa continúa vigente para personas despedidas por razones políticas”; Citizens Control for Security, Defense and the National Armed Forces (Control Ciudadano para la Seguridad, la Defensa y la Fuerza Armada Nacional), “Informe sobre la Discriminación Política en Venezuela (2003-2007), Estudio de Casos,” <http://www.controlciudadano.org/publicaciones/informe/> (accessed July 6, 2008); Jatar, *Apartheid del siglo XXI*.

³² PROVEA, “La causa continúa vigente para personas despedidas por razones políticas.”

³³ PROVEA, “Derechos laborales,” *Informe Anual 2004-2005*,

http://www.derechos.org.ve/publicaciones/inanual/2004_05/index.htm (accessed July 21, 2008), p. 13; Carlos Chirinos interview with Marino Alvarado, director of PROVEA, “Venezuela: Discriminación política,” *BBC Mundo*, May 22, 2004, http://news.bbc.co.uk/hi/spanish/latin_america/newsid_3737000/3737897.stm (accessed July 21, 2008).

reports of political discrimination against Chávez supporters in lower levels of public administration, state and municipal governments, and the private sector.³⁴

In most cases, it was not possible to prove political discrimination—with rare exceptions, citizens were given no grounds at all for the actions taken—yet many were told informally that they were losing their jobs, contracts, or services for having signed the referendum petition. For example, in one case reported to Human Rights Watch, a 98-year-old woman was denied medicines that she had long received from a state development agency because, as her family was told by the program secretary, she had signed the referendum petition.³⁵

Human Rights Watch documented several representative cases, detailed below, in which government officials employed the Tascón list or Maisanta program to target individuals for discriminatory actions.

Fund for the Guarantee of Deposits and Banking Protection

Among the cases of alleged politically motivated firings, one of the most prominent was the dismissal of more than 80 civil servants from a government banking agency, the Fund for the Guarantee of Deposits and Banking Protection (Fondo de Garantías de Depósitos y Protección Bancaria, FOGADE), in 2004.³⁶ All the fired employees reportedly had been named as members of the political opposition on a list, based in part on the Tascón list, circulated within the agency.³⁷ While the workers were fired without explanation, the president of the agency openly stated that the employees were being dismissed to make way for those “that adhered to the government project.”³⁸

³⁴ For example, the Ombudsman (Defensoría del Pueblo) received 57 allegations of political discrimination in 2004 of which 16 cases were known to be from the private sector and 15 from the public sector. *Ibid.*

³⁵ Human Rights Watch telephone interview with Pedro Elías Carrasco, nephew of Juana Bautista, Caracas, January 18, 2008.

³⁶ FOGADE is an institute attached to the Ministry of Finance which, among other functions, guarantees bank deposits held by the public. FOGADE, www.fogade.gov.ve/ (accessed June 27, 2008). Several press reports emerged about the firings: Miguel Ángel Santos, “FOGADE: Crónica de un colapso anunciado,” *El Universal*, June 21, 2004; Oscar Medina, “Purga Laboral,” *El Universal*, August 4, 2004.

³⁷ Medina, “Purga Laboral,” *El Universal*.

³⁸ “Despedidos ilegales impactan las cuentas de FOGADE,” *El Universal*, February 23, 2008, http://www.eluniversal.com/2008/02/23/eco_art_despidos-ilegales-im_726634.shtml (accessed May 26, 2008).

According to former employees, in May 2004 a group of FOGADE employees who belonged to a Bolivarian Circle—a type of grassroots political group supported and funded by the government—along with a senior official in the human resources department, created and circulated a list of the political affiliations of FOGADE’s more than five hundred employees.³⁹ Alongside each name was a handwritten number indicating the employee’s political profile based on perceived political inclinations—ranging from “1” for a hard-line Chavista to “6” for “radical political opposition”—and an initial noting whether the employee had signed the petition for the recall referendum based on the Tascón list.

The president of FOGADE, Jesús Caldera Infante, seemed to endorse the use of the list to purge the organization of government opponents, stating in a television interview that, “The revolution touched the soul and essence of FOGADE and ... we are going to carry out the necessary changes.”⁴⁰ In June 2004, Caldera Infante announced on television that numerous employees, “many of whom had held their positions for over 19 years,” had been dismissed because they “came from a culture that did not conform to the project envisioned by the Constitution for socioeconomic development” and that they would be substituted with officials “that adhered to the government project.”⁴¹ Eighty FOGADE staff members had lost their jobs by August 2004,⁴² and, according to former employees, they all had been ranked as government opponents on the list.⁴³

³⁹ “Situation of employees and workers at FOGADE as of March 30, 2004,” on file with Human Rights Watch; “FOGADE, otra lista para investigar: Aquí tienes pruebas, Isaías,” *Tal Cual*, May 2, 2005. Yadira Pérez, a secretary at FOGADE until she was fired in 2004, told Human Rights Watch that the list was created by a Bolivarian circle within the organization (Círculo Bolivariano José Félix Ribas), with the assistance of an official in the human resources department). Human Rights Watch interview with Yadira Pérez, FOGADE secretary (1993-2004), Caracas, September 22, 2007. Another employee, Glenda Fermín, similarly told the press that the list came from a Bolivarian circle with the assistance of the personnel department. Medina, “Purga laboral,” *El Universal*.

⁴⁰ “FOGADE transfiere 320 inmuebles a misión Vuelvan Caras,” *Radio Nacional de Venezuela*, May 17, 2004, <http://www.rnv.gov.ve/noticias/index.php?act=ST&f=2&t=5499> (accessed June 14, 2008). [“En Fogade operará un cambio y una transformación profunda... La revolución tocó el alma y la esencia de Fogade, y nosotros en el marco de la ley, en el marco de la Constitución, vamos a propiciar los cambios que sean necesarios.”]

⁴¹ “Despedidos ilegales impactan las cuentas de FOGADE,” *El Universal*.

⁴² Medina, “Purga Laboral,” *El Universal*; Human Rights Watch was also told that 140 FOGADE workers were fired by the end. Human Rights Watch interview with Antonio Suárez, president of FEDEUNEP, Caracas, September 13, 2007.

⁴³ Human Rights Watch interview with Yadira Pérez, FOGADE, September 22, 2007; Testimony of Glenda Fermín in Medina, “Purga laboral,” *El Universal*.

Among the dismissed employees was Yadira Pérez, a secretary who had worked for FOGADE for 11 years until she was fired in June 2004. Pérez had signed for the recall referendum. Pérez told Human Rights Watch that her dismissal notice stated that her job qualified as a political appointment, allowing FOGADE to fire her without cause.⁴⁴ However, Pérez was long considered a career civil servant and decided to fight her case in court.

FOGADE claimed that the firings were legally permissible because all the employees held political appointments from which they could be fired without explanation, and even for political reasons. An administrative decree from the president of FOGADE, shortly prior to the firings, established that all bank employees were political appointees because they handled sensitive information.⁴⁵ “They are ‘at will’ [*libre nombramiento y remoción*] employees so we fired them at will,” Caldera Infante explained.⁴⁶

The court would eventually determine that the FOGADE employees were civil servants, and that the administrative order violated constitutional provisions protecting civil servants against politically motivated or arbitrary dismissals. The court ordered Pérez and several other FOGADE employees reinstated.⁴⁷

⁴⁴ Human Rights Watch interview with Yadira Pérez, September 22, 2007.

⁴⁵ General Law of Banks and Other Financial Institutions [Ley General de Bancos y Otras Instituciones Financieras], *Official Extraordinary Gazette of the Bolivarian Republic of Venezuela (Gaceta Oficial Extraordinaria de la República Bolivariana de Venezuela)*, No. 5.555, November 13, 2001, <http://www.leyesvenezolanas.com/lgbif.htm> (accessed May 18, 2008), art. 298, establishes that FOGADE employees are civil servants. In a memo, Caldera Infante argued that since FOGADE was a guarantor of the stability and security of the financial system, all its work was confidential. Under an administrative decree amending the General Law of Banks and other Financial Institutions, Caldera Infante stated that staff could be hired and fired at the discretion of its president. This memo and administrative act was attached as a preamble to the firing letters received by staff in 2004. Providencia Administrativa No. 045, 2004.

⁴⁶ “Despedidos ilegales impactan las cuentas de FOGADE,” *El Universal*.

⁴⁷ As the court found in the case of one FOGADE employee, “To exclude all the positions of FOGADE from the administrative career broke with the general established constitutional and legal principle.” Second Administrative Court, Alejandro Soto Villasmil, Case No. AP42-R-2005-001719, May 2006, <http://bolivar.tsj.gov.ve/decisiones/2006/mayo/1478-24-AP42-R-2005-001719-2006-1531.html> (accessed June 13, 2008); First Administrative Court, Neguyen Torres López, Case No. AP42-R-2006-00180, June 2006, http://www.tsj.gov.ve/tsj_regiones/decisiones/2006/junio/1477-12-AP42-R-2006-000180-2006-1753.html (accessed June 13, 2008). Pérez was asked to accept financial compensation in exchange for signing a statement that she had voluntarily resigned. Human Rights Watch interview with Yadira Pérez, September 22, 2007. By that point, Caldera Infante had resigned in the midst of a corruption scandal. Victor Salmeron, “Caldera Infante, Gestión revolucionaria en FOGADE,” *El Universal*, August 6, 2005, http://www.eluniversal.com/2005/06/08/eco_art_09202F.shtml (accessed May 16, 2008).

National Council of Frontiers (CNF)

In another case that suggests politically motivated discrimination, an employee at the National Council of Frontiers (Consejo Nacional de Fronteras, CNF) was told by her boss that she and three other employees had been fired solely because they signed for the recall referendum.

Since 1996, Rocío San Miguel had worked as a contract employee and legal counsel to the CNF, a government agency attached to the office of the vice-president. Four of the council's 22 employees—Magally Chang, Jorge Guerra, Thais Peña Rocío, and San Miguel—were fired on March 22, 2004. The dismissal letters gave no reasons for their termination.⁴⁸

San Miguel discovered that of the CNF's 22 employees only she and the other three who were fired were listed as having signed the referendum petition. One of the employees, Guerra, was eventually allowed to keep his job, after he insisted his ID card had been fraudulently used and that he would withdraw his name from the petition.⁴⁹

After receiving her dismissal letter, San Miguel told Human Rights Watch that her supervisor explained to her in a telephone conversation that she was a political appointee and therefore was being dismissed for “showing disloyalty” by signing the petition for the recall referendum.⁵⁰ But San Miguel was in fact a contract employee, not a political appointee.⁵¹ While the council had the right not to renew her annual contract—though it had chosen to do so for eight years—her political beliefs should not have factored into any decision about her continued employment.

⁴⁸ Human Rights Watch interview with Rocío San Miguel, legal counsel to the CNF (1994-2004), Caracas, September 16, 2007.

⁴⁹ Ibid.; Rocío San Miguel, “Discriminación en el Palacio de Miraflores: Consejo Nacional de Fronteras,” in Jatar, *Apartheid del siglo XXI*, pp. 159-174.

⁵⁰ Human Rights Watch interview with Rocío San Miguel, September 16, 2007.

⁵¹ Article 146 of the Constitution establishes that contract employees are separate from political employees, and the Supreme Court confirmed that the dismissed CNF employees were contract employees. Supreme Court Constitutional Chamber, Marcos Tulio Dugarte Padrón, Case No. 04-2194, May 26, 2005, <http://www.tsj.gov.ve/decisiones/scon/Mayo/1024-260505-04-2194.htm> (accessed July 29, 2008).

National Electoral Council (CNE)

Political discrimination has also extended to unpaid public service positions. In the months prior to the recall referendum, the National Electoral Council (Consejo Nacional Electoral, CNE) dismissed volunteer members of municipal electoral councils, explicitly stating in dismissal letters that they were removed for having signed the recall referendum petition. The council members were citizens fulfilling their assigned civic duties, only to find their ability to render their services contingent on their political opinions.

Local electoral boards (*juntas municipales electorales*) are composed of unpaid citizens who are selected by public lottery to assist with elections as part of their duties as voting citizens.⁵²

Human Rights Watch interviewed one former member of these boards, Jorge Luis Suárez, who had served as president of the municipal electoral board of El Hatillo, a middle-class municipality of Caracas. Suárez, a lawyer, was selected by lottery to serve on the board to oversee the recall referendum in February 2004.⁵³ But just days prior to the referendum, on August 11, 2004, Suárez received a letter from the regional director of the CNE informing him that the CNE had decided to “replace as members of the municipal electoral boards all those who signed [petitions calling] for a referendum on the presidency [or for a referendum against opposition] deputies of the National Assembly; accordingly it has resolved to replace you in your capacity as principal member of said electoral board.” The letter cited a CNE resolution to this effect, dated July 30, 2004.⁵⁴

⁵² Organic Electoral Law [Ley Orgánica del Poder Electoral], *Official Gazette of the Bolivarian Republic of Venezuela (Gaceta Oficial de la República Bolivariana de Venezuela)*, No. 37.573, November 19, 2002, http://www.cne.gov.ve/documentos/ley_podeleo1.php (accessed March 23, 2008), arts. 54, 55.

⁵³ Letter from Francisco Carrasquero, President of the CNE, to Jorge Luis Suárez, February 10, 2004, reproduced in Jatar, *Aparteid del siglo XXI*, p. 132.

⁵⁴ Letter from Julio César Barroso, Director, Oficina Regional Electoral, Estado Miranda, to Jorge Luis Suárez, August 9, 2004, reproduced in Jatar, *Aparteid del siglo XXI*, p. 133.

Suárez told Human Rights Watch that four out of five members of the El Hatillo electoral board received similar discharge letters from the CNE. All four had signed for the referendum to recall President Chávez; the fifth member had not signed it.⁵⁵

According to Suárez, the municipal board members were replaced by government supporters handpicked by the CNE just days prior to the referendum, although Venezuelan law requires that municipal board members be selected by public lottery at least two months prior to a referendum.⁵⁶ Suárez said that when he went to retrieve his personal belongings from the municipal office, the new members—all dressed in red, the color of the government—would not let him in.⁵⁷

Suárez told Human Rights Watch that he had never received a copy of the CNE resolution referred to in his discharge letter, but he knew of municipal board members in other districts who were also dismissed for having signed for the recall referendum against President Chávez.⁵⁸ Suárez did not know of any cases of municipal board members dismissed for having signed a simultaneous counter-petition for recall referenda against legislators belonging to opposition parties.⁵⁹

Former vice-president of the CNE, Ezequiel Zamora, told Human Rights Watch that the resolution was applied nationwide, but that only those who signed the petition to recall President Chávez were dismissed.⁶⁰ Human Rights Watch was unable to find any cases of individuals suspended for signing for the referendum to recall opposition legislators.

⁵⁵ Human Rights Watch interview with Jorge Luis Suárez, lawyer and El Hatillo municipal board president (2004), Caracas, September 17, 2007, and telephone interview June 30, 2008.

⁵⁶ Organic Electoral Law, art. 55.

⁵⁷ *Ibid.*

⁵⁸ Human Rights Watch telephone interview with Jorge Luis Suárez, June 30, 2008. Human Rights Watch sought a copy of the resolution at the CNE offices in Caracas, but officials could not locate it in the files open to the public.

⁵⁹ Government supporters collected signatures to call referenda against nine opposition legislators in May 2004. “Sesenta por ciento de diputados opositores van a revocatorio,” *Radio Nacional de Venezuela*, May 25, 2004, <http://www.rnv.gov.ve/noticias/index.php?act=ST&f=2&t=5646> (accessed July 2, 2008).

⁶⁰ Human Rights Watch interview with Ezequiel Zamora, former CNE Vice-President, Caracas, September 22, 2007, and telephone interview June 30, 2008.

Even if the CNE resolution had been applied evenhandedly, it would have been improper: the exclusion of citizens from civic service because of their political beliefs violates the basic guarantees of equality and freedom of opinion essential to democratic government. Leaving aside the question of whether a signature in support of a recall referendum is a statement of political opinion, political belief should not be a disqualification for civic service.

Single Social Fund (FUS) and Fund for Microfinanced Development

The Tascón list was also applied to allocate government contracts. In one case from 2004, a cooperative lost an important government contract because, according to a letter from the government agency responsible for the contract, the cooperative's directors had signed the referendum petition and thus did not "deserve" the benefits of the contract.⁶¹

The Single Social Fund (Fondo Único Social, FUS), a government agency that administers social development projects, had bought school uniforms from Coprotene, a cooperative in the state of Nueva Esparta, since 2001. In 2004, FUS decided not to renew the annual contract. According to a letter from the president of the Nueva Esparta division of FUS, Coprotene was denied the contract to give an opportunity to cooperatives "truly committed to the revolutionary process and followers of our maximum leader President Hugo Rafael Chávez Frías."⁶²

The letter pointed out that FUS had checked the "signature status" of Coprotene's members and discovered "to its great surprise" that one of Coprotene's representatives, as well as her husband and the cooperative's treasurer, had all signed against Chávez. According to the FUS letter:

DUE [the school uniform program] depends strictly on the president of the republic and if they signed against the president, they cannot now

⁶¹ Letter No. DNE 2004-072 from Amelia García de Ordaz, president of CAPMI-NE, the association of artisans of small and medium-size enterprises in the state of Nueva Esparta, to Patricia Perazzo, director of FUS (Nueva Esparta), June 28, 2004; "FUS," *urru.org*, 2005, http://www.urru.org/papers/DDHH/PresosPoliticicos/2005_PP_varios/FUS.JPG (accessed May 22, 2008); "Todo aquel que no esté con el régimen... Caso FUS Margarita," *Tal Cual*, May 3, 2005.

⁶² *Ibid.*

claim to deserve the benefits of a program that they themselves wanted to eliminate through the signatures. As such, with a resounding “NO,” we said that Coprotene cannot participate in the DUE Program, nor can any other cooperatives or microenterprises that have shown their willingness to remove the top leader of the Bolivarian revolution, our President Hugo Rafael Chávez Frías.⁶³

The discriminatory use of the Tascón list appears to have been practiced by other state agencies as well. María Isabel Graciani, a former employee at the Fund for Microfinanced Development (Fondo del Desarrollo de la Microempresa, FONDEMI), a government development agency that provides small loans to cooperatives and social projects, told Human Rights Watch that she received orders from her superiors to use the Tascón list to weed out applications for loans, but that she refused to apply the list.⁶⁴

Discrimination in PDVSA

Political discrimination has been openly practiced in the state oil company, PDVSA. PDVSA fired more than 18,000 employees who participated in a two-month-long strike in 2002 in a mass reprisal for legitimate strike activity.⁶⁵ (The oil strike and mass firing are analyzed in detail in chapter 6.) In following years, the government used participation in the strike much like it used participation in the recall referendum effort: to identify targets for discriminatory treatment. PDVSA blacklisted the dismissed employees from future employment in the oil sector as well as in its subsidiaries and contractors. The energy minister and Chávez suggested that all of the company’s workers must support the government or leave. There is credible evidence that the discriminatory mindset reflected in these public statements also was embodied in actual employment policies in some departments of PDVSA.

⁶³ Ibid.

⁶⁴ Human Rights Watch interview with María Isabel Graciani, FONDEMI administrative assistant (2002-2004), Caracas, March 17, 2007, and telephone interview July 28, 2008. FONDEMI provides small loans at low-interest rates to cooperatives and social production projects through Venezuela’s communal banks. FONDEMI, www.fondemi.gob.ve/ (accessed May 22, 2008).

⁶⁵ In December 2002, PDVSA’s managers and workers called a work stoppage that shut down the state-owned oil company for two months. The strike organizers were angered by Chávez’s management changes and increasing control of PDVSA, and joined with business and labor leaders in a general strike to regain control of the company and demand Chávez’s resignation. The strike almost halted oil exports and temporarily crippled the economy, causing billions of dollars in damages.

Blacklisting Oil Strikers

In the aftermath of the oil strike, PDVSA purged its ranks of thousands of workers who participated in the strike. The government justified the mass firings by arguing that the workers' sole objective was "to overthrow the President."⁶⁶ When the ILO reviewed the case, however, it determined that reasons for the work stoppage included worker demands relating to government economic policies and it therefore fell within the scope of legitimate trade union activity.⁶⁷ The ILO concluded that the mass dismissal of thousands of workers and refusal to rehire them constituted reprisals in violation of international law.⁶⁸

For several years after the strike, the government blacklisted the fired workers from employment in the oil sector. PDVSA wrote a letter to its subsidiaries and contractors, warning them not to hire the dismissed workers.⁶⁹ In one letter sent in May 2005 to senior officials of contracting companies operating in the Orinoco Belt, the PDVSA official responsible for hiring workers in allied companies pointed out that PDVSA maintained a policy "of not contracting people responsible for conduct against the interests of the company during the events of December 2002 [the oil strike]."⁷⁰ Another contractor, the Cypriot Hanseatic Shipping Company, allegedly received a similar letter from PDVSA in 2003 specifically mentioning that 168 employees had participated in the oil strike and could no longer be employed by the shipping company.⁷¹

⁶⁶ ILO, "Complaint against the Government of Venezuela presented by the National Union of Oil, Gas, Petrochemical and Refinery Workers (UNAPETROL) and the National Single Federation of Public Employees (FEDEUNEP)," Case No. 2249, Report 333, Vol. LXXXVIII, 2004, Series B, No. 1, para. 1059.

⁶⁷ ILO, "Complaint against the Government of Venezuela presented by the National Union of Oil, Gas, Petrochemical and Refinery Workers (UNAPETROL) and the National Single Federation of Public Employees (FEDEUNEP)," Case No. 2249, Report 337, Vol. LXXXVIII, 2005, Series B, No. 2, para. 1478.

⁶⁸ *Ibid.*, para. 1478. The ILO has held that the refusal to rehire workers for their organizing-related activities "implies a serious risk of abuse and constitutes a violation of freedom of association." "Sanctions (Right to strike)," ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 666.

⁶⁹ Many press reports emerged that PDVSA blacklisted former employees from oil sector companies. Nathalie Malinarich, "Venezuela's middle class feels the squeeze," *BBC.com*, November 29, 2006, <http://news.bbc.co.uk/1/hi/world/americas/6186990.stm> (accessed June 29, 2008); Human Rights Watch met with Trina Zavarse, associate director of Gente de Petróleo, an NGO of former oil workers, who said that both private and public oil companies blacklisted the former workers. Human Rights Watch interview with Trina Zavarse, Caracas, September 13, 2007.

⁷⁰ Letter from Freddy Caraballo, managing director, business with third parties, PDVSA, to the presidents of Ameriven, Cerro Negro, Petrozuata and Sincor, May 9, 2005, reproduced in Jatar, *Apartheid del siglo XXI*, p. 63.

⁷¹ ILO, Case 2249, Report 333, para. 1050.

PDVSA's hiring guidelines from July 2007 (which are still in force, to the best of our knowledge) stipulated that an applicant who is in the company's database as "the author of an action under investigation—the oil stoppage" is "unsuitable" for hiring.⁷² PDVSA also reportedly circulated lists of names of dismissed employees that should not be rehired.⁷³

Some officials suggested that blacklisting striking workers was appropriate as a way of promoting accountability for crimes. As Labor Minister Roberto Hernández later explained, the government fired and refused to rehire thousands of oil workers because "those were 23,000 criminals."⁷⁴ Such an approach might have been reasonable had it been limited to specific individuals facing well-substantiated charges of criminal activity who were then investigated and prosecuted with appropriate due process guarantees. Instead, the company applied the policy to exclude any employee who participated in the strike and therefore presumably opposed the government. Chávez himself publicly denounced these workers as "traitors" and declared that Venezuela could "not afford the luxury of having such people in PDVSA."⁷⁵

A "Revolutionary" Workforce

The allegedly subversive actions of the striking oil workers were used to encourage political discrimination within PDVSA. Both the energy minister and Chávez himself made clear that workers at PDVSA must support the "Bolivarian process," and employment policies in some departments of the company appeared to follow these government statements.

One month before the December 2006 presidential election, Energy Minister and president of PDVSA Rafael Ramírez gave a speech to PDVSA employees, which was

⁷² "General Guidelines for the Hiring of Staff and Providers, Criteria to Verify," memo from Rafael Ramírez to senior PDVSA executives, July 31, 2007; Patricia Clarembaux, "Discriminación a Medias," *Tal Cual*, September 24, 2007.

⁷³ Allegedly, the loss prevention and control department of PDVSA, along with the NGO Association of Oil Workers (Asociación Nacional Petroleros por Venezuela, Asopetroleros), circulated a blacklist of former PDVSA employees who participated in the oil stoppage. ILO, Case 2249, Report 337, para. 1453.

⁷⁴ "No nacionalizarán Coca-Cola Femsá," *Últimas Noticias*, June 19, 2008.

⁷⁵ "Chávez: 'Pdvsá es el corazón económico de la patria y no pueden haber traidores,'" *Venpress*, February 16, 2003, <http://www.aporrea.org/actualidad/n5127.html> (accessed June 15, 2008).

clandestinely filmed and later broadcast on television, in which he told workers that those who did not support Chávez should leave the company:

PDVSA is red, red, from top to bottom.... Let no one be left with even a grain of doubt that the new PDVSA is with President Chávez.... it is a crime, a counter-revolutionary act for anyone here from management to try to suppress or cool the political expression of our workers in support of President Chávez. We are going to do everything necessary to support our president. Whoever feels uncomfortable with this [word indistinct] should give up their post to a Bolivarian.”⁷⁶

In the speech, Ramírez made clear to workers that this was not merely an idle threat. Referring to the mass dismissals that followed the oil strike, he told them: “Our pulse won’t falter. We removed 19,500 enemies of the country from this business and we are ready to go on doing it.”⁷⁷

For his part, President Chávez, rather than refute the overtly discriminatory message, publicly endorsed it on national TV, calling on his energy minister to repeat it “100 times,” and declaring that “PDVSA workers are part of this revolution, and whoever is not should go somewhere else, go to Miami.”⁷⁸

The statements of Rodríguez and Chávez were applied in at least some divisions of the company. In one case, the electric distribution division of PDVSA established a strategy to force political opponents out of PDVSA, according to internal company documents provided to Human Rights Watch by former employees. In a meeting on October 16, 2006, division managers agreed to drive out critics of the Chávez government. The minutes of the meeting describe the agreement: “All individuals (from leaders down) that are not identified with the process will be assigned to

⁷⁶ Video of speech by Rafael Ramírez to PDVSA employees, posted to YouTube, November 3, 2006, <http://youtube.com/watch?v=dmXpbT7Fhiw> (accessed June 23, 2008); “Chávez al ministro Ramírez: ‘Vaya y repítale a Pdvsa cien veces lo que usted ha dicho,’” *aporrea.org*, November 3, 2006, <http://www.aporrea.org/oposicion/n86027.html> (accessed June 23, 2008); “Detalles del mensaje,” *El Universal*, November 3, 2006, http://www.eluniversal.com/2006/11/03/pol_apo_56270.shtml (accessed July 3, 2008).

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

irrelevant activities, overtime will be eliminated for them and they will be taken out of activities on Saturday and Sunday. Those who are not with Chávez must not be in PDVSA.”⁷⁹

One PDVSA subsidiary, Sincor, reportedly maintained a list of employees divided into “suitable” and “unsuitable” categories based on their political views.⁸⁰ The newspaper *Tal Cual* reported that Sincor fired four young contract workers in 2007 because they were considered politically “unsuitable.”⁸¹ The press office of Total, the French multinational that partially owns Sincor, seemed to acknowledge there were problems, stating in response to *Tal Cual*’s inquiry about the company’s employment policies and the dismissal of the four contract workers: “[A]s [Sincor’s] procedures could create operating risks, we are working with PDVSA to limit the consequences of this internal process and we hope that it will cease and that the people will be reincorporated.”⁸²

Official encouragement of political discrimination also has led companies that work with PDVSA and need to gain government contracts to engage in political discrimination. In a job announcement in October 2007, Trical de Venezuela, C.A.,⁸³ a private company that manufactures industrial products and sells materials to PDVSA and other state companies, did so explicitly. Trical specified the political orientation it was looking for in prospective hires as follows: “Preferably not identified as from the opposition. Not present on public lists at odds with the Government. Preferably sympathetic to the Bolivarian Government.”⁸⁴

⁷⁹ Meeting minutes recorded by Alexis Brancho Bozo, PDVSA, Distribución Eléctrica, Reunión de Equipo, October 18, 2006, 10:30 AM, on file with Human Rights Watch. [“Toda persona (de líderes para abajo) que no esté identificada con el proceso será ubicada en actividades irrelevantes, se le eliminará el sobretiempo y serán sacados de actividades los días sábados y domingo. El que no esté con Chávez no deberá estar en PDVSA.”]

⁸⁰ Patricia Clarembaux, “Despedidos políticos en Sincor,” *Tal Cual*, July 18, 2007; Patricia Clarembaux, “Pdvsa ‘nacionaliza’ la discriminación,” *Tal Cual*, July 19, 2007, <http://venezuelareal.zoomblog.com/archivo/2007/07/19/pdvsa-nacionaliza-la-discriminacion.html> (accessed June 18, 2008).

⁸¹ Patricia Clarembaux, “¿Puedo llamar a un amigo?,” *Tal Cual*, July 25, 2007, <http://venezuelareal.zoomblog.com/archivo/2007/07/25/puedo-llamar-a-un-amigo.html> (accessed June 18, 2008).

⁸² Patricia Clarembaux, “Se oficializó la lista Tascón,” *Tal Cual*, July 26, 2007, <http://venezuelareal.zoomblog.com/archivo/2007/07/26/se-oficializo-la-Lista-Tascon.html> (accessed June 18, 2008).

⁸³ TRICAL, <http://www.trical.net/> (accessed May 29, 2008).

⁸⁴ “Mercado Laboral: Trical de Venezuela, C.A. solicita Comisionista con contactos gubernamentales,” October 3, 2007, on file with Human Rights Watch.

A year after Ramírez’s remarks that PDVSA must be “red, red,”—perhaps under pressure from Total and other companies to reinstate meritocratic hiring practices⁸⁵—Ramírez appeared to acknowledge that discriminatory employment practices were being used in PDVSA and called for them to end. Ramírez sent a memo to PDVSA managers on July 31, 2007, expressly prohibiting the use of discriminatory “lists”:

In no case may general lists be applied which have no relevance to the hiring in progress and which do not justify the exclusion and/or disqualification of the applicant or provider.... The present resolution revokes any internal norm, resolution or decision that contradicts it and will be applied preferentially in all cases.⁸⁶

While the affirmation of non-discrimination in employment represented a positive step forward for PDVSA, the specific mention of the need for current norms to supersede past practices also appears to confirm that the lists had indeed been in circulation and applied to hiring policies in some branches of the company.

Discrimination in Other Areas

Political discrimination has underpinned and tarnished the government’s actions in a wide variety of areas. As subsequent chapters of this report document, political discrimination has affected government decisions with respect to the media, organized labor, and civil society. Legitimate criticism has been used by some government officials as the basis for excluding dissident voices from the airwaves, collective contract negotiations, and civil society meetings.

The Media

The Chávez government has punished media outlets for their criticism of the government. As we document in chapter 5, the government has also threatened legal action or administrative sanctions against opposition stations, and blocked

⁸⁵ Industry experts also complained that a blacklist not to hire PDVSA managers and technicians resulted in substantial drops in oil production. U.S. Government Accountability Office, “Issues Related to Potential Reductions in Venezuelan Oil Production,” June 2006, <http://www.gao.gov/new.items/do6668.pdf> (accessed June 29, 2008), p. 20.

⁸⁶ Memo from Rafael Ramírez to senior PDVSA executives, “Lineamientos Generales para la Contratación de Personal o Proveedores,” July 31, 2007.

applications by a station critical of the government for frequencies to extend its coverage.

In the most notorious case, the government refused to renew the license of the opposition television station RCTV in May 2007 because of its obstinate refusal to soften its editorial line. While the decision was nominally justified by the need to use the RCTV frequency to set up a new public channel, the government had other frequencies at its disposal and at the time had renewed the licenses of channels that supported the government or had moderated their criticism.

Organized Labor

Labor unions which fall into disfavor with the government have faced obstacles to collective bargaining. As we document in chapter 6, contrary to international law on the right to association in particular as it relates to trade unions, the government has denied established unions the right to bargain collectively until they hold state-supervised leadership elections. At the same time, the government has negotiated with new, pro-government unions, which are exempt from electoral requirements when first formed.

Civil Society

Government officials have also made unfounded accusations against civil society organizations and harassed human rights defenders because of their real or alleged political positions. As we document in chapter 7, during the Chávez presidency rights advocates have faced prosecutorial harassment, public denunciations, discriminatory efforts to exclude them from international forums, and efforts to restrict their access to international funding.

Recommendations

The Venezuelan government should take active steps to prevent political discrimination. In particular, the executive branch should implement a “zero tolerance” policy with regard to politically based discrimination. Specifically, it should:

- Issue clear and unequivocal directives to all government agencies prohibiting all forms of political discrimination in the hiring and firing of employees and in the provision of public services;
- Ensure that effective mechanisms and procedures exist to receive and respond to complaints of political discrimination; and
- Conduct rigorous investigations into all credible allegations of political discrimination and, when appropriate, sanction those responsible in a timely fashion.

In view of the government's past support for political discrimination in the hiring and firing of PDVSA employees, it is particularly important that this "zero tolerance" policy be implemented immediately by the Ministry of Energy. In addition, the PDVSA should:

- Allow former employees dismissed for their participation in the strike of 2002, who were not convicted of criminal behavior during the strike, to compete for job opportunities in PDVSA and its subsidiaries.

III. The Courts

If there was a single point on which most Venezuelans were in full agreement when Chávez first took office, it was the need to overhaul the country's judiciary. Decades of rampant corruption and political meddling had left Venezuela's justice system dysfunctional and profoundly discredited. As a result, Chávez's call for drastic measures to clean up the courts enjoyed support from even his most ardent critics.

The enactment of the 1999 Constitution provided an opportunity for Venezuela to salvage its judicial branch. The constitution created a new Supreme Court and established essential protections for judicial independence, such as the requirement of a two-thirds majority vote of the National Assembly to impeach a justice. It thus laid the groundwork for the judiciary to fulfill its essential role as guarantor of the rule of law and protector of basic rights.

Unfortunately, however, the Chávez government has since abandoned this commitment to judicial independence. In 2004, displeased with a series of controversial judicial rulings, the president and his supporters in the National Assembly launched a political takeover of the Supreme Court. They enacted a new law expanding the court from 20 to 32 members. Since the law allowed the legislature to select new members by simple majority vote, this meant the governing coalition was able to use its then slim majority in the National Assembly to obtain an overwhelming majority of seats on the court. (At the time the court was believed to be evenly divided between Chávez allies and critics.) The law also gave the National Assembly the power to remove justices from the bench with a simple majority vote rather than the two-thirds majority required by the 1999 Constitution. The law, in short, made it possible for the governing coalition to both pack and purge the country's highest court.

Chávez supporters attempted to justify the law as a response to efforts by some government opponents to subvert the rule of law. They claimed, in particular, that Supreme Court justices who opposed Chávez had been disregarding the dictates of the law and deciding cases to advance the opposition's political agenda.

It is certainly true that some members of the opposition had subverted the rule of law during the 2002 coup. It might also be true that some judges had allowed their political convictions to unduly influence their application of the law. But if so, the appropriate response would have been to pursue measures aimed at limiting such political interference and promoting judicial independence. Instead, Chávez and his allies chose to rig the system to favor their own interests.

Within weeks of the law's enactment, the three Supreme Court justices responsible for the rulings that had most angered the Chávez camp were gone from the bench. In December 2004 the governing coalition in the National Assembly filled their vacancies, as well as the 12 new seats, with political allies. Over the next few years, this packed Supreme Court fired hundreds of lower court judges and appointed hundreds more to permanent judgeships.

The political takeover of the Supreme Court effectively neutralized the judiciary as an independent branch of government. The packed court has largely abdicated its role as a check on arbitrary state action. When the Chávez government has pursued measures that undermine human rights protections, the court's response has typically been one of passivity and acquiescence. It has failed, in particular, to counter assaults on the separation of powers, such as the 2004 court-packing law and, more recently, a 2007 constitutional reform package. It has also failed to safeguard fundamental rights in prominent cases involving the media and organized labor.⁸⁷

International Norms on Judicial Independence

The OAS and the Inter-American Democratic Charter

Democracy is indispensable for human rights, and an independent judiciary is indispensable for democracy. The 34 foreign ministers of the Organization of

⁸⁷ Portions of this chapter were originally published in Human Rights Watch, *Rigging the Rule of Law: Judicial Independence Under Siege in Venezuela*, vol. 16, No. 3(B), June 2004, <http://www.hrw.org/reports/2004/venezuelao604/> (accessed August 18, 2008). At that time, Human Rights Watch conducted extensive interviews with four Supreme Court justices (and one former justice), including then-Supreme Court President Iván Rincón Urdaneta. In researching this chapter, Human Rights Watch requested interviews with multiple Supreme Court justices, but despite repeated requests, with two exceptions (Justice Blanca Rosa Mármol de León and Justice Fernando Ramón Vegas Torrealba), these interviews were not granted. For both reports, Human Rights Watch also conducted extensive interviews with Venezuelan legal scholars and jurists.

American States (OAS) recognized these propositions when they adopted the Inter-American Democratic Charter in 2001.⁸⁸ The Charter defines the “[e]ssential elements of representative democracy” to include “access to and the exercise of power in accordance with the rule of law” and “the separation of powers and independence of the branches of government.”⁸⁹

The Inter-American Commission on Human Rights emphasized this link between judicial independence and democratic rule of law in its 2003 report on Venezuela:

The observance of rights and freedoms in a democracy requires a legal and institutional order in which the laws prevail over the will of the rulers, and in which there is judicial review of the constitutionality and legality of the acts of public power, i.e., it presupposes respect for the rule of law. Judiciaries are established to ensure compliance with laws; they are clearly the fundamental organs for preventing the abuse of power and protecting human rights. To fulfill this function, they must be independent and impartial.⁹⁰

International Human Rights Treaties

In addition to its commitment to democracy under the Inter-American Charter, Venezuela is party to human rights treaties—including the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights—that require it to safeguard the independence and impartiality of its judiciary.⁹¹ The

⁸⁸ Inter-American Democratic Charter, Organization of American States, adopted September 11, 2001, AG/doc.8 (XXVIII-E/01), art. 7: “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.”

⁸⁹ Inter-American Democratic Charter, art. 3: “*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*” (emphasis added).

⁹⁰ Inter-American Commission on Human Rights, “Report on the Situation of Human Rights in Venezuela,” OEA/Ser.L/V/II.118, December 29, 2003, <http://www.cidh.org/countryrep/venezuela2003eng/toc.htm> (accessed July 3, 2008), paras. 150-1.

⁹¹ The American Convention on Human Rights provides that: “Every person has the right to a hearing, with due guarantees and within a reasonable time, *by a competent, independent, and impartial tribunal*, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of (. . .) any other nature” (emphasis added). American Convention on Human Rights (“Pact of San José, Costa Rica”), adopted

United Nations Human Rights Committee, that monitors the implementation of the ICCPR by states party, has ruled that for a tribunal to be “independent and impartial,”⁹² the executive must not be able to control or direct the judiciary,⁹³ judges “must not harbor preconceptions about the matter put before them, and ... must not act in ways that promote the interests of one of the parties.”⁹⁴

The practical safeguards that this obligation entails are set forth in a series of “basic principles” on the independence of the judiciary endorsed by the United Nations General Assembly.⁹⁵ These principles include:

- The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any reason.⁹⁶
- Any method of judicial selection shall safeguard against judicial appointments for improper motives.⁹⁷
- The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions, and the age of retirement shall be adequately secured by law.⁹⁸
- Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the conclusion of their term of office, where such exists.⁹⁹

November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, ratified by Venezuela on June 23, 1977, art. 8(1). The International Covenant on Civil and Political Rights (ICCPR) also imposes an obligation to guarantee the independence of the judiciary in Article 14 (1): “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, *everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...*” (emphasis added). International Covenant on Civil and Political Rights, adopted December 16, 1966, General Assembly Resolution 2200 A (XXI), entered into force March 23, 1976, ratified by Venezuela on August 10, 1978.

⁹² ICCPR, art. 14 (1).

⁹³ *Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, October 20, 1993, CCPR/C/49/D/468/1991, para. 9.4.

⁹⁴ *Karttunen v. Finland*, Communication No. 387/1989, October 23, 1992, CCPR/C/46/D/387/1989, para. 7.2.

⁹⁵ Basic Principles on the Independence of the Judiciary, adopted September 6, 1985, endorsed by United Nations General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 ST/HR/1/Rev. 6(Vol. 1/Part1).

⁹⁶ *Ibid.*, art. 2.

⁹⁷ *Ibid.*, art. 10.

⁹⁸ *Ibid.*, art. 11.

⁹⁹ *Ibid.*, art. 12.

- A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing....¹⁰⁰
- Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.¹⁰¹
- All disciplinary, suspension, or removal proceedings shall be determined in accordance with established standards of judicial conduct.¹⁰²

As this chapter shows, in the past several years, Venezuela has flouted *all* of these principles. In doing so, it has undermined its rule of law and degraded its democracy.

Background

The Pre-Chávez Judiciary

When Chávez became president in 1999, he inherited a judiciary that had been plagued for years by influence-peddling, political interference, and, above all, corruption. In interviews with Human Rights Watch, lawyers from across the political spectrum described a system in which justice had often been for sale to the highest bidder. Former Attorney General Isaías Rodríguez recalled how the country's top administrative court in the past actually established set fees for resolving different kinds of cases.¹⁰³

A 1996 report on the Venezuelan justice system by the Lawyer's Committee for Human Rights painted a grim portrait of the judiciary:

Rather than serving the constitutional role of defender of the rule of law and protector of the human rights of Venezuelan citizens against the government, the courts had often become highly politicized adjuncts of the parties. They were manipulated by groups of lawyers, judges, political and business actors for private economic gain. And

¹⁰⁰ *Ibid.*, art. 17.

¹⁰¹ *Ibid.*, art. 18.

¹⁰² *Ibid.*, art. 19.

¹⁰³ Human Rights Watch interview with Isaías Rodríguez, then-Attorney General, Caracas, Venezuela, May 14, 2004.

court procedures had become so slow, cumbersome and unreliable that disputants avoided them at all costs.¹⁰⁴

In terms of public credibility, the system was bankrupt. A 1998 survey by the United Nations Development Program found that only 0.8 percent of the population had confidence in the judiciary.¹⁰⁵ That distrust translated into public outrage, and in the presidential election of that year, candidates across the political spectrum—including Hugo Chávez Frías—promised to clean up the system.

Reforming the Justice System

Once in office, President Chávez launched an ambitious effort to reform the Venezuelan state that included holding a referendum to convene a National Constituent Assembly, which then drafted a new constitution that went into effect in December 1999.¹⁰⁶

One of the first acts of the National Constituent Assembly was to declare, in August 1999, that the judiciary was in a state of emergency. It suspended the tenure of judges and created an emergency commission which it empowered to suspend judges who showed signs of wealth incommensurate with their salaried income, and to remove judges who, for example, had adopted decisions “manifestly disregarding

¹⁰⁴ The Lawyers Committee for Human Rights and The Venezuelan Program for Human Right Education and Action, “Halfway to Reform: The World Bank and the Venezuelan Justice System,” August 1996, <http://humanrightsfirst.org/pubs/descriptions/halfway.htm> (accessed July 8, 2008).

¹⁰⁵ United Nations Development Program, *Justice and Governability. Venezuela: judicial reform in progress [Justicia y gobernabilidad. Venezuela: una reforma judicial en marcha]*, (Caracas: Editorial New Society [Editorial Nueva Sociedad], 1998), p. 143. Supreme Court of Justice, Executive Directorate of Magistracy, Coordinating Unit of the Project to Modernize the Judiciary, “Project to Improve the Administration of Justice in the Context of Conflict Resolution in Venezuela”, (Proyecto para la Mejora de la Administración de Justicia en el Contexto de la Resolución de Conflictos en Venezuela), p. 8.

¹⁰⁶ The 1999 Constitution combines novel ideas of popular participation with a clear commitment to human rights, the separation of powers, pluralism, and the rule of law. Among other things, it gives constitutional rank to human rights treaties and limits the rights that could be suspended in states of emergencies. It establishes several forms of direct citizen participation, including recall referenda by which voters could revoke the mandate of all elected officials, including the president. Venezuelans voted by a wide margin (72 percent) to enact the new constitution in December 1999. National Electoral Council [Consejo Nacional Electoral, CNE], “Resultados Electorales,” <http://www.cne.gov.ve/estadisticas/eo12.pdf> (accessed July 22, 2008).

the law.”¹⁰⁷ In the following months, the emergency commission removed hundreds of judges from their posts.¹⁰⁸

The 1999 Constitution created a new Supreme Court, with twenty seats, and established protections for judicial independence, such as the requirement of a two-thirds majority vote of the National Assembly to impeach a sitting justice. In March 2000, the Constituent Assembly selected 20 justices, with a nearly unanimous vote, to sit on the new court.

The new constitution also established that international human rights treaties ratified by Venezuela have precedence over domestic laws.¹⁰⁹ Consequently, the new Supreme Court would have the authority as well as the responsibility to ensure that the government “immediately and directly applied” the rights set forth in those treaties.

Due to the overwhelming public consensus that judicial reform was needed, these measures to overhaul and strengthen the courts had broad support from across the political spectrum.

A Polarized Supreme Court

The consensus around the need to strengthen the judiciary largely dissolved as the country, including its Supreme Court, grew increasingly polarized during President Chávez’s first term in office. This polarization intensified as a divided court delivered controversial rulings on issues that were central to the political struggle between the Chávez government and its opponents, including the 2002 coup and the 2004 recall referendum.

¹⁰⁷ Decree “Reorganization of the Judiciary and the Penitentiary System”, (“Reorganización del Poder Judicial y el Sistema Penitenciario”), *Official Gazette*, No. 36805, 1999, http://www.oas.org/juridico/spanish/ven_res51.pdf (accessed July 14, 2008)

¹⁰⁸ Tribunal Supremo de Justicia, Dirección Ejecutiva de la Magistratura, Unidad Coordinadora del Proyecto de Modernización del Poder Judicial, “Proyecto para la Mejora de la Administración de Justicia en el Contexto de la Resolución de Conflictos en Venezuela,” p. 23.

¹⁰⁹ Constitution of the Bolivarian Republic of Venezuela, art. 23. “The treaties, pacts and conventions relating human rights which have been executed and ratified by Venezuela have a constitutional rank, and prevail over internal legislation, insofar as they contain provisions concerning the enjoyment and exercise of such rights that are more favorable than those established by this Constitution and the laws of the Republic, and shall be immediately and directly applied by the courts and other organs of the Public Power.”

By early 2004, it was common wisdom within Venezuela's legal community that the 20-member Supreme Court was evenly divided between opponents and allies of President Chávez. Each camp controlled some of the court's six chambers. The opposition camp was said to have a majority of seats in the electoral chamber, while the pro-Chávez camp had a majority in the constitutional chamber, as well as on the six-member Judicial Commission that handles many of the court's administrative affairs. The court's president at the time, Iván Rincón Urdaneta, was considered to be an ally of President Chávez.

The first of the controversial rulings came in August 2002, four months after the attempted April 11 coup d'état against President Chávez.¹¹⁰ A slim Supreme Court majority held that it did not have enough evidence to initiate a criminal investigation of four generals accused of participating in the coup.¹¹¹ The ruling was adopted after the court had recused two pro-Chávez justices and appointed substitute justices to the panel hearing the case.¹¹² The ruling immediately provoked expressions of

¹¹⁰ Opposition to the Chávez government intensified in November 2001 after Chávez passed 49 economic laws by presidential decree, including land reforms and measures to tighten state control of the oil industry. Following labor disputes at the national oil company, the main labor confederation and business chamber called a general strike on April 9, 2002. On April 11, members of the political opposition and civil society joined the labor and business organizations in a massive protest to demand Chávez's resignation. The protest march of some half a million people changed its planned route and headed to the presidential palace, where Chávez supporters had gathered. The protesters and Chávez supporters clashed violently near the palace, leaving 19 people dead and more than 150 injured, including both government supporters and members of the opposition. A group of military officials forced Chávez from office in the wake of the violence. The president of the business chamber Fedecámaras, Pedro Carmona Estanga, declared himself president and proceeded to dissolve the National Assembly, dismiss the magistrates of the Supreme Court, and call for new presidential elections after a year. Street protests by Chávez supporters continued and more than 40 people were killed during the second eruption of violence. The short-lived Carmona government soon collapsed under military and popular pressure, as well as international repudiation, and Chávez returned to power on April 14. Human Rights Watch, "Venezuela," *World Report 2003* (New York: Human Rights Watch, 2004), <http://hrw.org/wr2k3/americas10.html>.

¹¹¹ On May 24, 2002, Attorney General Isaías Rodríguez requested the Supreme Court to investigate four generals—Efraín Vásquez Velazco, Pedro Pereira Olivares, Héctor Ramírez Pérez and Daniel Lino José Comisso Urdaneta—for their participation in the events of April 11, 12, and 13 of 2002. The Supreme Court concluded that the Attorney General's Office had not presented sufficient evidence to warrant the investigation. First, the court concluded that the crime for which they were accused did not carry with it a clearly stipulated punishment, in which case investigating it would violate the principle of legality. Secondly, the Court concluded that there was not sufficient evidence to prove the acts that the Attorney General had ascribed to the generals, and that the events that took place in April did not occur in the manner in which the Attorney General had presented them. Supreme Court Full Accidental Chamber, Franklin Arrieché Gutiérrez, Case No. AA10-L-2002-000029, August 14, 2002, <http://www.tsj.gov.ve/decisiones/tplen/Septiembre/SENTENCIA%20DE%20LOS%20MILITARES.htm> (accessed July 8, 2008).

¹¹² The decision was adopted by Justice Antonio García García, who noted that both justices had described the events of April as a coup d'état. Supreme Court, Antonio J. García García, Case No. 02-00029-3, July 2, 2002, <http://www.tsj.gov.ve/decisiones/tplen/Julio/Perdomo%20fondo.htm> (accessed July 28, 2008); Supreme Court, Antonio J.

outrage from Chávez and his supporters.¹¹³ And the following day, the Chavista majority in the National Assembly created a “Special Commission to Investigate the Crisis in the Judicial Branch regarding alleged irregularities committed by Supreme Court Justices”, which a few months later recommended removing one justice, on grounds unrelated to the decision (see discussion below), and investigating another who participated in this decision.¹¹⁴

The second explosive issue—the recall referendum to remove Chávez from office—produced an open confrontation within the Supreme Court. In March 2004, the National Electoral Council (Consejo Nacional Electoral, CNE) invalidated 876,017 of the 2,708,510 signatures that the opposition had obtained in favor of holding a recall referendum, leaving the opposition short of the number of signatures required to compel such a referendum.¹¹⁵ After a group of NGOs presented a constitutional challenge against CNE’s decision, the Supreme Court’s electoral chamber—with a majority of opposition judges—held that the signatures were valid and the

García García, Case No. 02-00029-5, July 2, 2002, <http://www.tsj.gov.ve/decisiones/tplen/Julio/Mora%20fondo.htm> (accessed July 28, 2008).

In an interview given at the beginning of 2005, Omar Mora Díaz, one of the recused justices, stated that it was predictable that the Supreme Court would be divided “in two” in the decision it issued on August 14, 2002. Mora said: “... it was evident, from the Supreme Court meeting that took place on April 12, 2002, that a significant number of judges understood that a power vacuum had occurred, and the second group of us was convinced otherwise: what had taken place was a coup d’état. It is clear that the conspiracy extended all the way to the Supreme Court.” *Política Urgente*, “Omar Mora, Presidente del TSJ, promoverá sanción a los magistrados golpistas y revolución judicial,” February 7, 2005, <http://www.aporrea.org/actualidad/n55923.html> (accessed July 8, 2008).

When the Supreme Court annulled its decision on the April 11 coup with a ruling issued in March 2005, it held that Justice Antonio García García did not have the power to recuse Justices Perdomo and Mora, and therefore the Supreme Court was not properly established when it decided the case. Supreme Court Constitutional Chamber, Francisco Antonio Carrasquero López, Case No. AA50-T-2004-003227, March 11, 2005, <http://www.tsj.gov.ve/decisiones/scon/Marzo/233-110305-04-3227.htm> (accessed July 7, 2008).

¹¹³ Chávez stated that “what they have written was a mess.” “Chávez – Tribunal puso la plasta,” posted to YouTube, April 15, 2007, <http://uk.youtube.com/watch?v=Wd4E-Af82Uc&mode=related&search=> (accessed July 16, 2008); “Dura reacción en Caracas por no juzgar a los golpistas,” *Gaceta de los Negocios*, August 16, 2002; “Advertencias de Chávez no impiden fallo favorable del Supremo,” Agencia EFE, August 15, 2002; “Venezuela—El Supremo absuelve a los cuatro militares acusados de participar en la intentona,” Europa Press, August 14, 2002.

¹¹⁴ *Official Gazette*, No. 37584, December 4, 2002, <http://www.tsj.gov.ve/gaceta/diciembre/041202/041202-37584-01.html> (accessed July 8, 2008); Supreme Court Constitutional Chamber, José Manuel Delgado Ocando, Case No. 02-3053, June 22, 2004, <http://www.tsj.gov.ve/decisiones/scon/Junio/1205-220604-02-3053.htm> (accessed July 8, 2008).

In March 2005, the Supreme Court revoked the August 2002 decision. Supreme Court Constitutional Chamber, Francisco Antonio Carrasquero López, Case No. AA50-T-2004-003227, March 11, 2005, <http://www.tsj.gov.ve/decisiones/scon/Marzo/233-110305-04-3227.htm> (accessed July 8, 2008)

¹¹⁵ Resolution No. 040302-131, *Official Gazette*, No. 181, 2004, <http://web.sumate.org/democracia-retroceso/attachments-spanish/T2%20ST03b%20N5%20Resoluci%C3%B3n%20del%20CNE%20sobre%20las%20firmas%20recogidas.pdf> (accessed July 8, 2008).

referendum should be carried out.¹¹⁶ A week later, the constitutional chamber, composed of a pro-Chávez majority, decided that it had jurisdiction to review the electoral chamber's decision and overruled it.¹¹⁷ As a result, the opposition launched a new petition drive to obtain the number of signatures necessary to carry out the recall referendum.

The 2004 Court-Packing Law

In May 2004, President Chávez signed a law that severely undermined the independence of the country's judicial branch, just a day after the National Assembly had passed it. The new Organic Law of the Supreme Court (Ley Orgánica del Tribunal Supremo de Justicia, LOTSJ) fundamentally altered the composition of the country's highest court, as well as its relationship to the other branches of government.¹¹⁸

Power to Pack the Court

The new court-packing law increased the Supreme Court from 20 to 32 justices, adding two justices to each of the court's six chambers.¹¹⁹ The new justices could be selected with a simple majority vote of the National Assembly: a nominee who failed to receive a two-thirds majority in the first three votes could be selected by a simple

¹¹⁶ On March 15, 2004, the electoral chamber of the Supreme Court, presided over by the Justice Alberto Martini Urdaneta, decided on a challenge presented by members of the Coordinadora Democrática, who were linked to the opposition. These included Julio Borges (national coordinator of Primero Justicia), César Pérez Vivas (secretary general of COPEI), Henry Ramos Allup (secretary general of Acción Democrática), Jorge Sucre Castillo (president of Proyecto Venezuela), and Ramon José Medina and Gerardo Blyde (representatives in the National Assembly). The court stated that the creation of new criteria for validating signatures could hinder efforts to reach the number necessary to convoke a recall referendum on the presidency, and that this generated a possible violation of the constitution. The court also held that it was necessary to solve the problem quickly, since prolonging it would pose risks to the recall process. Consequently, the electoral chamber ordered, as a precautionary measure, that the effects of the CNE's decision be suspended, and mandated that the 876,017 signatures be added to those that had been validated by the CNE, bringing the total number of signatures to 2,708,510. Supreme Court Electoral Chamber, Rafael Martini Urdaneta, Case No. AA70-E-2004-000021, March 15, 2004, <http://www.tsj.gov.ve/decisiones/selec/marzo/24-150304-x00006.htm> (accessed July 14, 2008).

¹¹⁷ Supreme Court Constitutional Chamber, José Manuel Delgado Ocando, Case No. 04-0620, March 23, 2004, <http://www.tsj.gov.ve/decisiones/scon/Marzo/442-230304-04-0620.htm> (accessed July 8, 2008).

¹¹⁸ Organic Law of the Supreme Court [Ley Orgánica del Tribunal Supremo de Justicia de la República Bolivariana de Venezuela], *Official Gazette*, No. 37.942, 2004, <http://www.tsj.gov.ve/legislacion/nuevaleysj.htm>.

Organic laws are laws that govern the structure and operation of government institutions. The LOTSJ replaced the previous Organic Law of the Supreme Court (Ley Orgánica de la Corte Suprema de Justicia) of July 1976.

¹¹⁹ *Ibid.*, art. 2

majority on the fourth vote.¹²⁰ In contrast, the 20 existing justices of the Supreme Court had all received at least a two-thirds majority confirmation vote.¹²¹

Some proponents of the law justified this increase as a measure for alleviating the justices' workload.¹²² This justification is dubious, at best. Four justices who were in office in 2004, as well as one ex-justice at the time, told Human Rights Watch that only two of the six chambers had any difficulty keeping up with their caseloads (the constitutional chamber and the "political administrative" chamber).¹²³ According to Iván Rincón Urdaneta, who was then the court's president and considered a Chávez ally, the only justification for increasing the number of justices in the other chambers was to help them handle administrative tasks.¹²⁴ However, it is not difficult to imagine other means to alleviate the administrative responsibilities of the justices, such as by having them delegate the work to their staff. Nor, for that matter, is it difficult to imagine ways to alleviate the caseload of those chambers with more cases, such as by assigning them more clerks or creating adjunct tribunals to handle cases in which the jurisprudence is already clearly established.

Whatever the justification, however, the impact of the increase in judges on the judiciary's independence was unmistakable. It allowed the governing coalition in the National Assembly, which at the time enjoyed a slim majority of seats, to radically alter the balance of power in the country's highest court, ensuring that each of its chambers was controlled by justices sympathetic to the government's political agenda.

¹²⁰ *Ibid.*, art. 8.

¹²¹ While there is disagreement among Venezuelan jurists as to whether this two-thirds majority was or is actually required by the former or current constitution, most agree that Supreme Court nominees generally did receive such a vote prior to the 1999 Constitution. Human Rights Watch interviews with various jurists, Caracas, May 2004.

¹²² Human Rights Watch interviews with Calixto Ortega, then National Assembly member, Caracas, Venezuela, May 6, 2004, and Iván Rincón Urdaneta, then-Supreme Court president, Venezuela, May 13, 2004.

¹²³ Human Rights Watch interviews with Iván Rincón Urdaneta, then-Supreme Court president, May 13, 2004, Juan Rafael Perdomo, then-Supreme Court justice, May 13, 2004, Blanca Rosa Mármol de León, Supreme Court justice, May 13, 2004, Carlos Martini, then former Supreme Court justice, May 14, 2004, and Carlos Escarra, then former Supreme Court justice, May 16, 2004.

¹²⁴ Human Rights Watch interview with Iván Rincón Urdaneta, May 13, 2004.

Power to Purge the Court

Venezuela's 1999 Constitution seeks to guarantee the independence of justices by granting them a single 12-year term and establishing an impeachment process that requires a two-thirds majority vote by the National Assembly, after the "citizen branch"—which consists of the "Moral Council," composed of the attorney general, the ombudsman, and the comptroller—has determined that the justice has committed a "serious offense" (*falta grave*).¹²⁵

The 2004 law eliminated this guarantee. While the impeachment of justices still requires a two-thirds majority vote, the law creates two new mechanisms for removing justices, short of impeachment and without the need for a two-thirds majority. One entails suspending justices pending an impeachment vote, the other entails nullifying their appointments.

The first mechanism is found in a new provision which establishes that when the "citizen branch" determines that a justice has committed a serious offense, and unanimously recommends the justice's dismissal, then the justice will be automatically suspended pending an impeachment vote by the National Assembly.¹²⁶ The law requires that the president of the assembly call for a hearing and an impeachment vote within 10 days. However, such deadlines are habitually disregarded by the assembly, and there is no effective mechanism for enforcing them. Consequently, if the president of the assembly chooses not to bring the issue to a vote, the justice could remain suspended indefinitely.

¹²⁵ Constitution of the Bolivarian Republic of Venezuela, arts. 264 and 265. Article 265 states: "Supreme Court Justices will be subject to removal by the National Assembly by a super-majority of two-thirds of its members, after a hearing is granted the affected party, in cases of serious offenses found by the Citizen Branch, in accordance with the law."

¹²⁶ Organic Law of the Supreme Court, art. 23 (3): "Supreme Court Justices will be subject to suspension or removal from their responsibilities, in cases of serious offenses, by the National Assembly, following the petition and determination of offenses by the Citizen Branch. In case of removal, the [decision] must be approved by a super-majority of two-thirds of the members of the National Assembly, following a hearing for the Justice. At the moment that the Citizen Branch determines that an offense is serious and unanimously seeks removal, the Justice will be suspended from his or her post, until the definitive decision of the National Assembly. Likewise, [the Justice] will be suspended if the Supreme Court declares that there are grounds to prosecute him or her; in which case, this measure is different from the suspension sanction established by the Organic Law of the Citizen Branch."

The definition of “serious offense” is broad and includes highly subjective categories such as “threaten or damage public ethics or administrative morale” and “made decisions that threaten or damage the interests of the Nation.”¹²⁷

The National Assembly has also bestowed upon itself the power to “nullify” justices’ appointments by a simple majority vote in one of three circumstances: the justice provided false information at the time of his or her selection to the court; the justice’s “public attitude ... undermines the majesty or prestige of the Supreme Court” or of any of its members; or the justice “undermines the functioning” of the judiciary.¹²⁸

This provision is a clear ploy to circumvent the constitutional requirement that justices must be removed with a two-thirds majority vote of the National Assembly. Calling this action the “nullification of appointment” cannot disguise the fact that it entails firing the justice.

What makes the provision particularly dangerous is the fact that two of the three criteria for “nullification” are entirely subjective and, therefore, allow the assembly’s majority to target justices identified with the political opposition. In fact, at the time, a leading member of the National Assembly’s pro-government coalition, Iris Varela, explicitly acknowledged this as the law’s intent, saying “the 10 coup-backing justices (*magistrados golpistas*) who supported the de facto government of Pedro Carmona Estanga should be off the Supreme Court, and the new law passed in the National Assembly will achieve this goal.”¹²⁹

¹²⁷ Article 11 of the Organic Law of the Citizen Branch states: “The following are considered a serious offense on the part of Supreme Court Justices: 1. When they attempt to harm, threaten, or damage the public ethics and the administrative morale established in the present Law.... 4. When they adopt decisions that attempt to harm or damage the interests of the Nation.” Organic Law of the Citizen Branch [Ley Orgánica del Poder Ciudadano], *Official Gazette*, No. 37.310, 2004, <http://www.tsj.gov.ve/legislacion/nuevaleytsj.htm>, art. 11.

¹²⁸ Organic Law of the Supreme Court, art. 23 (4): “The National Assembly, by a simple majority, will be able to annul the administrative act by which a Justice is appointed, principal or temporary, when this person has supplied false information at the time and for the purposes of his or her nomination, which prevented or distorted the fulfillment of the requirements established in this Law and in the Constitution of the Bolivarian Republic of Venezuela; *or when the public attitude of these [sic.], aims to harm the majesty or prestige of the Supreme Court, of any one of its Chambers, of the Justices of Judicial Branch [sic.]; or when it aims to harm the functioning of the Supreme Court, one of its Chambers, or the Judicial Branch*” (emphasis added.)

¹²⁹ Xavier de la Rosa, “Dip. Iris Varela: Magistrados que apoyaron gobierno de facto de Carmona deben quedar fuera del TSJ,” *Venpres*, May 3, 2004, <http://www.aporrea.org/actualidad/n16224.html> (accessed July 7, 2008).

Implementation of the Court-Packing Law

The new law provided the basis for a political takeover of the Supreme Court. Within weeks of its passage, the three justices responsible for the rulings most criticized by the Chávez camp were off the court. And, by the end of the year, pro-government members of the National Assembly had filled their seats, as well as the 12 new seats created by the law, with people known to be political allies.

The impact of this political takeover soon extended to the entire judiciary. The packed Supreme Court, in charge of appointing and removing lower court judges, significantly altered the composition of the judiciary.

Removal of Arrieche

Less than a month after the court-packing law was passed, the pro-government majority in the National Assembly used it to remove Franklin Arrieche Gutiérrez, the justice who had penned the Supreme Court's ruling on the 2002 coup. Instead of following the constitutional procedure to impeach the justice, which would have required a two-thirds majority, the National Assembly used the court-packing law, which allowed it to annul his designation with a simple majority vote.

The effort to remove Arrieche had begun the day after the court delivered the controversial ruling in August 2002. Outraged by the ruling, Chávez supporters in the National Assembly created a "Special Commission to Investigate the Crisis in the Judicial Branch regarding alleged Irregularities Committed by Supreme Court Justices." Four months later, the assembly voted to approve the commission's recommendation to annul Arrieche's appointment as Supreme Court justice.

The grounds for removal had nothing to do with the ruling on the coup. Instead, the commission based its recommendation on a finding that Arrieche had provided false information to the National Constituent Assembly when it appointed him to the court

two years earlier.¹³⁰ Specifically, while Arrieche claims he met the constitutional requirements to become a justice, the commission ruled that he did not.¹³¹

Arrieche successfully appealed to the Supreme Court to block his removal, arguing that he had never been granted an opportunity to refute the allegations before the commission, and that the removal violated the constitutional requirement of a two-thirds majority vote. The court issued a temporary injunction, blocking Arrieche's removal, while it decided his constitutional challenge.¹³² Two years later, the injunction remained in place—preserving Arrieche's position as a justice—as the court had yet to rule on the merits of the case.

In June 2004, a month after the National Assembly passed the court-packing law, the pro-government coalition used it to do what it had been unable to do two years earlier: remove Arrieche without a two-thirds majority vote. The coalition applied the provision of the new law that allows for the annulment of judicial appointments with a simple majority vote.¹³³

Arrieche again appealed to the Supreme Court. This time, however, the constitutional chamber rejected his petition, arguing that the National Assembly was merely

¹³⁰ *Official Gazette*, No. 37.584, December 4, 2002, <http://www.tsj.gov.ve/gaceta/diciembre/041202/041202-37584-01.html> (accessed July 7, 2008), p. 2.

¹³¹ Arrieche told Human Rights Watch that the charges against him were inaccurate. First, according to Arrieche, the National Assembly's decision to annul his appointment had not taken into account the Supreme Court's interpretation of what requirements should be met by magistrates who were appointed by the Constituent Assembly and subsequently ratified by the National Assembly. According to the Supreme Court, when the National Assembly ratified these magistrates' appointments, it should only analyze their performance, and not other constitutional requirements. (Supreme Court Constitutional Chamber, Iván Rincón Urdaneta, Case N°: 00-3035, December 12, 2002, <http://www.tsj.gov.ve/decisiones/scon/Diciembre/1562-121200-00-3035%20.htm> (accessed July 16, 2008)).

Secondly, Arrieche argued that even if other constitutional requirements were applicable, he fulfilled them. The Venezuelan constitution requires that to be a Supreme Court magistrate, the person must have been a lawyer for 15 years and have a post graduate degree, must have been a law professor for at least 15 years, or must have been a judge for at least 15 years in the specific area of law that he or she will cover in the court. Constitution of the Bolivarian Republic of Venezuela, art. 263 (3). Arrieche told Human Rights Watch that he has over 15 years of teaching experience. The Special Commission's report recognizes that Arrieche has taught in the Universidad Católica Andrés Bello since 1987, but argued that five of these years did not count because Arrieche had been on "paid leave."

Human Rights Watch telephone interview with Franklin Arrieche Gutiérrez, former Supreme Court justice, Caracas, April 30, 2008; email communication from Franklin Arrieche Gutiérrez to Human Rights Watch, June 12, 2008.

¹³² Supreme Court Accidental Chamber [Sala Accidental], José Manuel Delgado Ocando, Case No. 02-3053, December 10, 2002, <http://www.tsj.gov.ve/decisiones/scon/Diciembre/3168-101202-02-3053.htm> (accessed July 7, 2008).

¹³³ *Official Gazette*, No. 37.962, June 17, 2004, <http://www.tsj.gov.ve/gaceta/junio/170604/170604-37962-01.html> (accessed July 7, 2008).

applying the new law. The chamber inexplicably disregarded the fact that the removal of a justice without a two-thirds majority vote violates the 1999 Constitution¹³⁴ and failed to consider that Arrieche's removal was incompatible with Venezuela's international human rights obligation to guarantee the independence of the judiciary.¹³⁵

A few months after Arrieche's removal, the constitutional chamber revoked the Supreme Court's decision on the April 11 coup that the justice had drafted in 2002.¹³⁶

Retirement of Martini and Hernández

In July 2004, a month after Arrieche's removal, two justices responsible for another Supreme Court ruling that had outraged the Chávez government left the court. Facing the risk of being indefinitely suspended as a consequence of the new law, Alberto Martini Urdaneta and Rafael Hernández Uzcátegui resigned from the court.

Martini had written and Hernández had signed the March 2004 electoral chamber ruling that overturned the National Electoral Council's invalidation of thousands of signatures calling for a recall referendum.¹³⁷ (The third justice who signed the decision was a substitute justice filling in on that particular case.)

The ruling had generated a strong reaction from the government, including statements by then-Vice-President José Vicente Rangel, who held it was a "mafia-type and immoral" ruling issued by "perpetrators of a coup."¹³⁸ Two days later, the "Moral Council" announced that it would investigate the justices' performance in

¹³⁴ Supreme Court Constitutional Chamber, José Manuel Delgado Ocando, Case No. 02-3053, June 22, 2004, <http://www.tsj.gov.ve/decisiones/scon/Junio/1205-220604-02-3053.htm> (accessed July 7, 2008).

¹³⁵ In *Pastukhov v Belarus* (Communication No. 814 /1998, August 5, 2003 CCPR/C/78/D/814/1998), the removal of a constitutional court judge by presidential decree was deemed to be an attack on the independence of the judiciary in violation of Article 14(1) of the ICCPR, to which Venezuela is also a party. The judge had been elected for a period of 11 years but was removed from office after three years on the grounds that his term of office had expired following the entry into force of a new constitution.

¹³⁶ Supreme Court Constitutional Chamber, Francisco Antonio Carrasquero López, Case No. AA50-T-2004-003227, March 11, 2005, <http://www.tsj.gov.ve/decisiones/scon/Marzo/233-110305-04-3227.htm> (accessed July 7, 2008).

¹³⁷ Supreme Court Electoral Chamber, Alberto Martini Urdaneta, Case No. AA70-E-2004-000021, March 15, 2004, <http://www.tsj.gov.ve/decisiones/selec/Marzo/24-150304-X00006.htm> (accessed July 7, 2008).

¹³⁸ Eugenia Ramiro, "El *Reafirmazo* contra Chávez divide al Tribunal Supremo," *América Económica*, vol. 257, March 18, 2004, <http://www.americaeconomica.com/numeros4/257/reportajes/mariaeugenia257.htm> (accessed July 7, 2008).

this case.¹³⁹ And, in June 2004, it decided that the justices had committed a “serious offense” and sent the cases to the National Assembly for it to decide whether or not to vote the justices off the court.¹⁴⁰

Facing the threat of an indefinite suspension as a consequence of the court-packing law, the two justices opted for retirement. Under the new law, justices accused by the “citizen branch” of committing a “serious offense” are indefinitely suspended from their positions until the National Assembly votes on whether or not to remove them from the court.¹⁴¹ According to Radio Nacional de Venezuela, an official radio station, the two judges requested their retirement in order to avoid the consequences of the sanction that the Moral Council would impose due to their participation in the ruling on the 2004 referendum.¹⁴² Two sources very close to the case confirmed this explanation to Human Rights Watch.¹⁴³

Packing the Court

In December 2004, the pro-Chávez majority in the National Assembly filled the 12 new seats created by the court-packing law, as well as five vacancies (which included the seats previously occupied by Arrieché, Martini, and Hernández). The assembly also appointed 32 substitute justices—who temporarily fill in for justices who are on leave or recused in a specific case—bringing the total to 49 appointees in one day.¹⁴⁴

Leaders of the congressional majority made it clear they were only appointing individuals who would not rule against the government. “This time we will not score

¹³⁹ “Consejo Moral inició procedimiento a Magistrados de la Sala Electoral”, *Radio Nacional de Venezuela*, March 17, 2004, transcribed by the Ministry of Communication and Information, <http://rnv.gov.ve/noticias/?act=ST&f=2&t=4251> (accessed July 7, 2008).

¹⁴⁰ The decision of the Moral Council was adopted on June 18, 2004. *Official Extraordinary Gazette*, No. 5712, Caracas, June 22, 2004, http://www.tsj.gov.ve/gaceta_ext/junio/220604/220604-5712-01.html (accessed July 7, 2008).

¹⁴¹ Organic Law of the Supreme Court, art. 23 (3).

¹⁴² “Designada nueva directiva del TSJ, aprobadas jubilaciones”, *Radio Nacional de Venezuela*, July 8, 2004, transcribed by the Ministry of Communication and Information, <http://rnv.gov.ve/noticias/?act=ST&f=2&t=6576> (accessed July 7, 2008).

“Cambios en TSJ por jubilaciones favorecerán a el oficialismo”, *La Voz*, July 7, 2004, <http://www.la-voz.net/seccion.asp?pid=18&sid=1755¬id=89706&fecha=07/07/2004> (accessed July 7, 2008).

¹⁴³ Human Rights Watch interview (name withheld), April 30, 2008; Human Rights Watch interview (name withheld), May 23, 2008.

¹⁴⁴ Ministry of Communication and Information, “Designados 49 Magistrados del Máximo Tribunal Venezolano,” December 14, 2004, http://www.mci.gob.ve/noticias/1/2011/designados_49_magistrados.html (accessed July 7, 2008).

own goals,” declared Pedro Carreño, a pro-government congressman, immediately before the list of appointments was made public. “[I]n the list of potential candidates there is no one who will act against us.”¹⁴⁵

Impact on Lower Court Judges

The impact of the court-packing law extended to the entire judiciary. Over the next several years, the newly packed Supreme Court would fire hundreds of judges and appoint hundreds more. This massive turnover of judges only compounded the damage already done to the credibility of Venezuela’s judiciary.

Under Venezuelan law, the Supreme Court is responsible for the appointment and removal of all the country’s lower court judges through a “Judicial Commission” made up of six justices. After the court-packing law was passed in May 2004, one of the law’s principal sponsors, the prominent Chavista legislator Luis Velázquez Alvaray, was appointed by his colleagues in the National Assembly to fill one of the new seats on the Supreme Court. He was then appointed by his colleagues in the packed court to serve as president of the Judicial Commission.

From that position, Velázquez Alvaray presided over the removal of 400 lower court judges from their posts.¹⁴⁶ At the time, 80 percent of Venezuela’s judges held provisional or temporary posts and therefore, under Venezuelan law, could be summarily fired.¹⁴⁷ In addition, the Judicial Commission under Velázquez Alvaray appointed hundreds of permanent lower court judges.

¹⁴⁵ Javier Pereira, “Chavismo designa hoy 49 nuevos magistrados,” *El Nacional*, December 13, 2004, <http://infovenezuela.org/T1STo2P7V1.HTM> (accessed July 7, 2008). “Nosotros no nos vamos a meter autogoles... En el grupo de postulados no hay nadie que vaya actuar contra nosotros.”

¹⁴⁶ “TSJ determinó sobreprecio en terrenos adquiridos por Velázquez Alvaray,” Radio Nacional de Venezuela, July 3, 2006, transcribed by the Ministry of Communication and Information, <http://www.rnv.gov.ve/noticias/index.php?act=ST&f=27&t=35177&hl=alvaray&s=1331d552c16ca9881690d7a027899398> (accessed July 7, 2008).

¹⁴⁷ The Supreme Court justified giving the Judicial Commission such broad discretion by pointing out that provisional judges have not taken part in the public competitions required to enter the judiciary, and by stating that temporary appointments are necessary to keep the judiciary functional while it undergoes the structural reorganization process prompted by the LOTSJ. For example, in the case of Yolanda del Carmen Vivas Guerrero, whose appointment as “provisional” judge in the state of Mérida was revoked in June 2005, the court held that while tenured judges can only be removed or sanctioned after receiving an oral public hearing with full due process guarantees, provisional judges can be summarily fired at the discretion of the Judicial Commission. Supreme Court Constitutional Chamber, Carmen Zuleta de Merchán, Case No. 07-1417, December 20, 2007, <http://www.tsj.gov.ve/decisiones/scon/Diciembre/2414-201207-07-1417.htm> (accessed July 7, 2008).

In theory, one positive effect of the overhaul of the judiciary has been reducing the number of provisional and temporary judges. In 2004 only 20 percent of the country's 1732 judges held permanent appointments and enjoyed the rights established in the constitution.¹⁴⁸ According to information provided by the Venezuelan government to the Inter-American Commission on Human Rights, as of December 2007 almost 1000 judges (or 54 percent) were tenured.¹⁴⁹

Unfortunately, however, the value of this development, in terms of strengthening the independence and credibility of the judiciary, is overshadowed by the fact that it was carried out by the Judicial Commission of a Supreme Court that was itself subject to a political takeover.

A Compliant Court

Since the political takeover of 2004, the Supreme Court has repeatedly failed to fulfill its role as a guarantor of the rule of law in the face of arbitrary state action. When President Chávez and his supporters in the National Assembly have pursued measures that undermine the protection of human rights, the Supreme Court's response has typically been one of passivity and acquiescence. The court has failed, in particular, to respond to assaults on the separation of powers, such as the 2004 court-packing law and the 2007 constitutional reform package.

On occasion, the court has issued rulings upholding human rights in discrete cases, but it has repeatedly failed to do so in the most prominent and politically sensitive cases of arbitrary state action by the Chávez government.

This decision was later cited as supporting precedent when the Supreme Court decided to deny Rafaela de Morales's appeal to be reinstated as temporary judge. Supreme Court Political-Administrative Chamber, Levis Ignacio Zerpa, Case No. 00517, April 30, 2008, <http://www.tsj.gov.ve/decisiones/spa/Abril/00517-30408-2008-2005-5065.html> (accessed July 7, 2008).

¹⁴⁸ The remaining 80 percent held positions were "provisional" judges (52 percent), "temporary" judges (26 percent), or other non-permanent postings (2 percent). The provisional judges held their posts until a public competition was held to select the judges who will fill them on a permanent basis. Temporary judges were appointed to fill temporary openings, such as those created when a sitting judge takes a parental or sick leave. Human Rights Watch e-mail correspondence with Ricardo Jiménez Dan, then-executive director of the Magistracy, Supreme Court, May 20, 2004.

¹⁴⁹ According to the IACHR, the Venezuelan government reported that "as of December 31, 2007, judges nationwide totaled 1,840, of whom 443 (24%) were provisional, 108 (5.87%) were special alternates, 303 (16.47%) were temporary, and 986 (53.59%) were tenured." Inter-American Commission on Human Rights, "Annual Report of the IACHR 2007," ch. IV (Venezuela), <http://www.cidh.org/annualrep/2007eng/Chap.4g.htm> (accessed July 24, 2008), para. 280.

The 2004 Court-Packing Law

Shortly after Chávez signed the court-packing law, several prominent Venezuelan jurists filed petitions with the Supreme Court challenging its constitutionality. Among other issues, their petitions challenged new provisions for removing justices on the grounds that such measures did away with the constitutional requirement of a two-thirds majority vote.

Despite the urgent nature of these appeals, it took the court three years to rule on the petitions, at which time it dismissed them on procedural grounds without ever addressing the merits.¹⁵⁰

The court attempted to justify this evasion by claiming, inaccurately, the petitioners were no longer “interested” in the matter.¹⁵¹ The evidence the court provided for this inaccurate claim was the fact that there had been “no procedural activity” by the petitioners for over a year.¹⁵² Yet it was the court, not the petitioners, that was responsible for the inactivity. As one justice (who disagreed with the court’s handling of these cases) explained to Human Rights Watch, the petitioners had already completed their submissions and were waiting for the court to respond.¹⁵³ In one case, for example, what was pending was a determination by the court as to whether it would handle the case as a “purely legal matter” (*cuestion de mero derecho*), requiring only “a final report” from the petitioners, or as a case in which petitioners would need to provide empirical evidence to substantiate their claims.¹⁵⁴

¹⁵⁰ Supreme Court Constitutional Chamber, Jesús Eduardo Cabrera Romero, Case No. 04-1385, June 27, 2007, <http://www.tsj.gov.ve/decisiones/scon/Junio/1325-270607-04-1385.htm> (accessed July 7, 2008).

¹⁵¹ *Ibid.*, section IV.

¹⁵² The Supreme Court used this argument to close seven cases. It closed the eighth case arguing that the petitioner had requested the court to refrain from deciding his case, but avoided explaining that he did so because the court had failed to address his claim. Tulio Álvarez, the petitioner, told Human Rights Watch that when he challenged the constitutionality of the court-packing law, he also requested the court to grant him precautionary measures while it decided on the merits of his case, to stop the appointment of 12 new justices provided for in the law. Álvarez argued that a packed court would not be able to adequately and independently analyze his case. The Supreme Court never decided on his request. So, after the National Assembly packed the court, Álvarez asked the court not to rule on his case, arguing that the appointment of new judges was equivalent to a denial of justice. Human Rights Watch telephone interview with Tulio Álvarez, Caracas, May 13, 2008. Vanessa Gomez Quiroz, “Álvarez desistió de recursos contra Ley del TSJ,” *El Nacional*, December 15, 2004.

¹⁵³ Human Rights Watch telephone interview with Blanca Rosa Mármol de León, Supreme Court justice, Caracas, April 24, 2008.

¹⁵⁴ Human Rights Watch telephone interview with Rafael Chavero, lawyer and petitioner in the case, Caracas, May 13, 2008.

Moreover, even if there had been omissions on the part of the petitioners, the Supreme Court could still have addressed the merits of the case. Indeed, the 2004 Supreme Court law expressly establishes that the court can “supplement, *de oficio*, the deficiencies of petitioners” in cases involving constitutional challenges like these.¹⁵⁵ Moreover, the court itself has ruled that it can address a constitutional violation, *de oficio*, even when the petitioners have not themselves identified that particular violation, or when their petition is somehow “deficient,”¹⁵⁶ or even when the court considers the petitioners’ claim inadmissible.¹⁵⁷

The 2007 Constitutional Reform Process

The Supreme Court similarly avoided addressing challenges to efforts by Chávez and his congressional supporters to enact sweeping reforms of the constitution in 2007. The reforms included measures that would have dramatically expanded the powers of the executive branch by, among other things, authorizing the president to suspend fundamental rights indefinitely during states of emergency without any Supreme Court oversight.¹⁵⁸

¹⁵⁵ Organic Law of the Supreme Court, art. 5.

¹⁵⁶ Supreme Court Constitutional Chamber, Jesús Eduardo Cabrera Romero, Case No. 01-2862, February 27, 2007, <http://www.tsj.gov.ve/decisiones/scon/Febrero/301-270207-01-2862.htm> (accessed July 7, 2008). “This chamber... is authorized to analyze, *de oficio*, violations of the Constitution, even if the petitioner has not noticed such violations or if his/her recourse technique is deficient” (“Este máximo exponente de la Jurisdicción Constitucional está autorizado para apreciar, *de oficio*, la violación de la Norma Fundamental, no obstante que la parte impugnante no haya advertido tales infracciones, o su técnica recursiva haya sido deficiente”).

The court had ruled back in 2000 that the general principle under Venezuelan law that requires petitioners to proactively advance cases before the court (called “*principio dispositivo*”) is not applicable to constitutional challenges. Supreme Court Constitutional Chamber, Jesús Eduardo Cabrera Romero, Case No. 00-0010, February 2, 2000.

¹⁵⁷ Supreme Court Constitutional Chamber, Jesús Eduardo Cabrera Romero, Case No. 01-2862, February 27, 2007, <http://www.tsj.gov.ve/decisiones/scon/Febrero/301-270207-01-2862.htm> (accessed July 7, 2008). “This Chamber’s powers, which result from its constitutional function... do not end when it declares that a particular case is inadmissible... given that to protect the public order, the case remains open, and must be pushed forward *de oficio*, particularly when the Chamber is going to interpret that a law is constitutional” (“Esta potestad de la Sala, que emerge de su función constitucional, y que en otras oportunidades ha efectuado no decae porque se declare inadmisibile la acción del particular y no sin lugar la solicitud, ya que por protección al orden público, la acción queda viva, impulsada *de oficio*, máxime cuando lo que la Sala va a efectuar es una interpretación en beneficio de la constitucionalidad de una norma”).

¹⁵⁸ “Venezuela: Proposed Amendments Threaten Basic Rights,” Human Rights Watch news release, November 29, 2007, <http://hrw.org/english/docs/2007/11/29/venezu17447.htm>.

The reform package also included several positive human rights measures, including a prohibition against discrimination on the basis of political orientation and a provision making state oversight of labor union elections strictly optional. “Proyecto de Reforma Constitucional,”

http://www.cne.gov.ve/elecciones/referendo_constitucional2007/documentos/Proyecto_Reforma_final.pdf (accessed July 22, 2008), arts. 18, 293.

Specifically, the proposed changes would have eliminated the constitutional prohibition on suspending due process guarantees during states of emergency—including the presumption of innocence, the right against self-incrimination, and other guarantees of a fair trial—in violation of international law. The reform would also have made it possible for a wide range of other fundamental rights to be suspended indefinitely, including the guarantee of equality and non-discrimination, and the freedom of thought, conscience, and religion, all of which are considered so fundamental that countries are not permitted to derogate from their obligations to respect them even in a state of emergency. In addition, the reform would have eliminated specific time limits on states of emergency and it also would have lifted the requirement that the Supreme Court review the constitutionality of any emergency decree that suspended rights.

Petitioners questioned before the Supreme Court both the content of the reforms and the process through which Chávez and his supporters were seeking to enact them. In terms of process, petitioners objected to Chávez and his congressional supporters seeking to enact a major reform package, with 69 amendments, through a single yes-or-no vote in a national referendum. They argued that this procedure violated the constitutional provision that requires that a constituent assembly be convoked to enact any reforms that modify the “fundamental principles and structure” of the document.¹⁵⁹

The Supreme Court declined to address any of these challenges. It argued that it could not review them until after the referendum had been held. According to the court, given that the constitutional reform process is “complex” and composed of various steps, the process could not result in any effects (*gravamen*) on individuals until it concluded. (In a dissenting opinion, Justice Pedro Rafael Rondón Haaz held that the court could review the procedure that was being implemented to

¹⁵⁹ According to the constitution, if the proposed modifications would “transform the State, create a new legal system and draft a new Constitution” the Venezuelan people, who hold the “original constituent power,” can convoke a constituent assembly. Constitution of the Bolivarian Republic of Venezuela, art. 347.

The “constitutional reform process,” which includes presenting a constitutional reform proposal, its approval by the National Assembly, and a referendum, is only applicable if it would lead to a “partial revision” of the constitutional text. *Ibid.*, arts. 342-346.

reform the 1999 Constitution, and that the proposed reform would in fact modify the constitution's structure and fundamental principles.)¹⁶⁰

Conflicts of Interest

The credibility of the rulings in both the court-packing and constitutional reform cases was further marred by the Supreme Court's unwillingness to recognize and address the blatant conflicts of interest of certain justices in each case, thus compromising their impartiality.

In the case of the court-packing law, the Supreme Court rejected a request to recuse three justices who had been appointed to fill the new seats created by the law, including Justice Luis Velázquez Alvaray, who had been a principal sponsor of the law as a member of the National Assembly. Clearly, the three justices had a direct interest in the final decision of the case, given that if the law were annulled, their appointments would no longer be valid. Yet the court argued, inexplicably, that there was not even "a possibility" that this could influence their decision. Disregarding the evident conflict of interest that was the basis of the recusal request, it claimed that these arguments did not overturn the presumption that justices are supposed to be honorable. According to the court, their honorability "cannot be doubted given that they must decide on the validity of a law that could affect them indirectly."¹⁶¹

¹⁶⁰ The Supreme Court used these arguments to resolve a petition brought before it on October 23, 2007, after President Chávez had presented his constitutional reform proposal. Supreme Court Constitutional Chamber, Carmen Zuleta de Merchán, Case No. 07-1476, November 13, 2007, <http://www.tsj.gov.ve/decisiones/scon/Noviembre/2147-131107-07-1476.htm> (accessed July 7, 2008).

The Supreme Court used similar arguments to decide cases brought before it after the National Assembly passed the reform. Supreme Court Constitutional Chamber, Arcadio Delgado Rosales, Case No. 07-1596, November 22, 2007, <http://www.tsj.gov.ve/decisiones/scon/Noviembre/2189-221107-07-1596.htm> (accessed July 7, 2008); Supreme Court, Marcos Tulio Dugarte Padrón, Case No. 07-1605, November 22, 2007, <http://www.tsj.gov.ve/decisiones/scon/Noviembre/2191-221107-07-1605.htm> (accessed July 7, 2008); Supreme Court Constitutional Chamber, Carmen Zuleta de Merchán, Case No. 07-1641, November 22, 2007, <http://www.tsj.gov.ve/decisiones/scon/Noviembre/2193-221107-07-1641.htm> (accessed July 7, 2008); Supreme Court Constitutional Chamber, Arcadio Delgado Rosales, Case No. 07-1624, November 29, 2007, <http://www.tsj.gov.ve/decisiones/scon/Noviembre/2210-291107-07-1624.htm> (accessed July 7, 2008); Supreme Court Constitutional Chamber, Arcadio Delgado Rosales, Case No. 07-1617, November 29, 2007, <http://www.tsj.gov.ve/decisiones/scon/Noviembre/2211-291107-07-1617.htm> (accessed July 7, 2008).

¹⁶¹ Supreme Court Full Court, Case No. 04-1385, April 28, 2005, <http://www.tsj.gov.ve/decisiones/scon/Abril/656-280405-04-1385.htm> (accessed July 7, 2008).

In the case of the constitutional referendum, the court rejected a request to recuse Justice Luisa Estella Morales Lamuño, who had participated in the drafting of the reform proposal that the petitioners were challenging. Morales, then-president of the Supreme Court, had been appointed by Chávez himself in January 2007 to serve as the executive secretary of the presidential commission that drafted the original version of the reforms. According to the rules governing the presidential commission, it had to “permanently inform the president” about its work, which would be carried out “in conformity with guidelines established by the head of state in strict confidentiality.”¹⁶²

The court simply argued that there was no evidence that Morales’s participation in such a commission would undermine her independence when deciding the case.¹⁶³ Yet, while serving as executive secretary of the presidential commission that drafted the reform, she had publicly argued that it was unnecessary to carry out a constituent assembly to modify the constitution, which was one of the key questions the court was being asked to rule on.¹⁶⁴

Failure to Uphold Fundamental Rights

The packed Supreme Court’s pattern of passivity and acquiescence has been evident as well in critical cases involving government infringement on fundamental rights.

On occasion, the court has issued rulings protecting basic human rights. For example, in October 2005, it protected the right to freedom of expression when it ruled that the attorney general could not sue the newspaper *El Universal* for an editorial criticizing his office and the judiciary, given that the article was an expression of opinion and did not amount to an institutional insult.¹⁶⁵ In April 2006, it upheld Ibéyise Pacheco Martini’s right to due process, finding that the prosecutor

¹⁶² Decree No. 5138, *Official Gazette*, No. 38.606, January 17, 2007, <http://www.tsj.gov.ve/gaceta/enero/170107/170107-38606-03.html> (accessed July 7, 2008).

¹⁶³ The Supreme Court held that Morales, as executive secretary, merely conducted “administrative functions,” that her participation in the commission did not mean she supported the reform proposal, and that she had not prejudged the issue when she stated publicly that “now we must wait and see what happens without hurrying up.” Supreme Court Constitutional Chamber, Jesús Eduardo Cabrera Romero, Case No. 07-1597, November 22, 2007, <http://www.tsj.gov.ve/decisiones/scon/Noviembre/2188-221107-07-1597.htm> (accessed July 7, 2008).

¹⁶⁴ “Morales: No es necesaria una constituyente” *El Nacional*, 15 de febrero de 2007.

¹⁶⁵ “Improcedente solicitud del Fiscal General contra editorial de ‘El Universal’,” Supreme Court press release, October 5, 2005.

who accused her of perjury had failed to ensure that Pacheco was legally represented at the hearing at which she was charged, and had denied her the right to be heard.¹⁶⁶

However, the court has failed to uphold basic rights in several of the most prominent and politically sensitive cases.

Freedom of Expression

The Supreme Court failed to protect the right to freedom of expression and the right to due process and the rule of law in the high profile case of Radio Caracas Television (RCTV). As we document more fully in chapter 4, the court, by failing to resolve key rights issues, allowed the government to use its regulatory power in a discriminatory and punitive manner against a channel because of its critical coverage of Chávez and his government.

In December 2006, Chávez announced his decision not to renew RCTV's broadcasting license, which was due to expire the following May, explaining that Venezuela would not tolerate a channel that was "at the service of coup-plotting" and "against the dignity of the Republic." Chávez had repeatedly threatened such non-renewal in response to critical media coverage, accusing RCTV of involvement in the 2002 coup. Three months later, his communication and information minister formally adopted a decision to refuse to renew RCTV's license, without giving RCTV an opportunity to respond to the public accusation of criminal actions and broadcasting infractions cited by government authorities as grounds for the decision not to renew its concession. The government did, however, renew the license of Venevisión, a rival channel that Chávez had also repeatedly accused of involvement in the coup but that had since cut its overtly anti-Chávez programming.

RCTV and some of its supporters turned to the Supreme Court for relief, submitting appeals aimed at blocking the implementation of the president's decision. RCTV journalists and owners requested the court to protect their rights to freedom of expression, due process, and equal treatment.

¹⁶⁶ Supreme Court Criminal Cassation Chamber, Eladio Ramon Aponte Aponte, Case No. 05-000354, April 4, 2006, <http://www.tsj.gov.ve/decisiones/scp/Abril/A05-0354-124.htm> (accessed July 18, 2008).

The Supreme Court, however, failed to protect these fundamental rights. Instead, the court put off making a final judgment on the claims and refused to issue a temporary injunction to protect the petitioners while they awaited that judgment. In decisions by two separate chambers, the court, in questionable maneuvers—including disregarding key facts—evaded addressing the petitioners’ claims. At this writing, more than a year after RCTV’s license expired and it was taken off the public airwaves, the court still had not issued a final judgment on the legality of the government’s actions.

In stark contrast with its handling of the RCTV petitions, the Supreme Court responded immediately to a petition by opponents of RCTV, issuing an injunction that allowed a newly created state channel to take control of RCTV’s transmitters so that it could broadcast across the country.

Freedom of Association

The Supreme Court similarly failed to uphold the freedom of association of Venezuelan workers when it dismissed a petition to clarify the proper role of the state in union leadership elections. As we document in chapter 5, state interference in union elections, in direct violation of international standards on labor law practice, has been a widespread problem in Venezuela throughout Chávez’s presidency. The court’s failure to issue a clear ruling has effectively allowed the government to continue to violate workers’ basic right to freely elect their representatives.

The Chávez government has interpreted the 1999 Constitution to require that all union elections be supervised and certified by a state institution, the National Electoral Council, and has exploited this requirement in ways that have undermined public sector unions identified with the political opposition. At the same time, when questioned by the International Labor Organization (ILO) about this practice, which is inconsistent with international law, the government has claimed that state certification of union elections is not in fact mandatory.

In May 2006, the National Press Workers’ Union asked the Supreme Court to resolve this ambiguity and bar mandatory government involvement in union elections. The

union argued that such mandatory state organization of elections violates international law and thus contravenes the Venezuelan constitution.

Rather than affirm workers' right to freely elect their representatives, the Supreme Court skirted the issue. The court dismissed the request for legal interpretation on the grounds that there was no contradiction between Venezuelan and international law. Yet it failed to indicate which of the two contradictory interpretations of the law—the one that the government presented before the ILO or the one that it applied in practice in Venezuela—was the correct one. As such, the Supreme Court left the ability of workers to freely organize their elections in limbo.

Recommendations

At this point, there is no easy way to reverse the damage done to the independence of the Venezuelan judiciary by the 2004 court-packing law, especially given the fact that the credibility of the National Assembly, which is responsible for judicial appointments, was itself damaged by the opposition's boycott of the 2005 legislative elections.

Under these circumstances, Human Rights Watch recommends as an extraordinary measure that, *after the 2010 legislative elections*, the new National Assembly implement a one-time ratification process to legitimize the composition of the Court, for example, by requiring a two-thirds majority affirmation vote for each Supreme Court justice whose appointment occurred after the passage of the 2004 Supreme Court law. Measures should then be taken to permit the lawful removal of any justice who does not receive a two-thirds majority vote during this process. Any resulting vacancies should be filled through a selection process that is open, transparent, and ensures broadest possible political consensus.

More immediately, the current National Assembly should:

- Repeal the provisions of the Supreme Court law that undermine the court's independence by allowing justices to be removed by a simple majority vote.

Once the National Assembly has completed the ratification process, the new Supreme Court should seek to reassume its role as an independent guarantor of fundamental rights. Specifically it should:

- Resolve quickly and impartially appeals involving allegations of infringements of fundamental rights, particularly if the court's delay would result in an irreparable harm; and
- Recuse justices who face clear conflicts of interests to ensure that all decisions are adopted impartially, and that the court is seen to be impartial, as well as acting impartially.

IV. The Media

President Chávez and his supporters in the Venezuelan Congress have undermined freedom of expression through a variety of measures aimed at influencing the control and content of the country's mass media. They have extended and toughened penalties for speech offenses; implemented a broadcasting law that allows for the arbitrary suspension of channels for a vaguely defined offense of "incitement"; limited public access to official information; and abused the government's control of broadcasting frequencies to punish stations with overtly critical programming.

After nine years during which the country has been polarized between Chávez's supporters and detractors, Venezuela still enjoys a vibrant public debate in which anti-government and pro-government media are equally vocal in their criticism and defense of Chávez. However, in its efforts to gain ground in this "media war," the government has engaged in discriminatory actions against media airing opposition viewpoints, strengthened the state's capacity to limit free speech, and created powerful incentives for government critics to engage in self-censorship. Should the government choose to utilize the expanded speech offenses and incitement provisions more aggressively to sanction public expression, the existing political debate could be severely curtailed.

Chávez and his supporters have attempted to justify media restrictions as a response to what they consider to be irresponsible reporting and excessively partisan coverage by journalists and broadcasters. They accuse opposition media of conspiring to remove Chávez from office, and even participating directly in the 2002 short-lived anti-Chávez coup. They also justify the measures as being part of a broader effort to "democratize" the media so that it reflects viewpoints that were largely excluded from the commercial media in the past.

States have a right to sanction media that incite violence, the commission of crimes, or breaches of public order. However, under international norms on freedom of expression, broadcasting regulations must be precisely defined in order to avoid overbroad or arbitrary interpretation by officials that constrain free expression and

the public's access to information and opinion. Permissible restrictions on speech do not include sanctions for expressing critical opinions of government officials, however offensive they may be. Governments are also fully justified in seeking to regulate the concentration of media ownership and in backing public service and community outlets in order to promote a more diverse and plural public debate. However, governments may not abuse their control of broadcasting frequencies to discriminate against outlets whose editorial line is not to their liking.

The Venezuelan government's "media democratization" efforts have produced positive results in at least one area. By licensing and giving financial support to hundreds of start-up community broadcasting ventures, the Venezuelan government has taken a leading role in the region in promoting local radio and TV stations.

However, the government's legitimate efforts to promote alternative media at the local level have been overshadowed by its efforts to restrain critical opinion. Chávez and his supporters in the National Assembly have resorted to actions and measures, aimed at influencing large-scale print and broadcast media, that run counter to international norms and threaten freedom of expression. Specifically, they have:

- **Expanded the scope of insult laws (desacato), which punish disrespectful expression toward government officials, and toughened penalties for criminal defamation and libel.**

Chávez and his supporters in the National Assembly have expanded the scope of laws punishing expression deemed to insult public officials and established draconian penalties for defamation, including increased prison sentences and onerous fines. Under reforms to the criminal code enacted in 2005 they increased the number of public officials benefiting from the protection of insult laws and greatly increased penalties, including prison terms, for criminal defamation. These measures are inconsistent with Venezuela's obligations under international legal norms of press freedom.

Journalists working for opposition media have borne the brunt of prosecutions under these laws in recent years, generating pressure on these media to tone down

criticism. Were the government to aggressively pursue prosecutions under the new provisions, it would dramatically shrink the space for free expression in Venezuela.

- **Expanded and toughened the penalties of vaguely defined “incitement” provisions that allow for the arbitrary suspension of TV and radio channels.**

The 2004 Law on Social Responsibility in Radio and Television (hereinafter Social Responsibility Law), which replaced broadcasting regulations enacted in 1984, expanded the scope of an already broad prohibition on incitement and established severe penalties for broadcasters that violated it. Under the 2004 law, broadcast media can face suspension and ultimately revocation of their licenses for broadcasting material deemed to “promote, justify, or incite” war, breaches of public order, or crime. The transmission of such material can also be banned under this law. The broad and imprecise wording of the incitement provisions, the severity of the penalties, and the fact that the law is enforced by an executive branch agency all increase the broadcasts media’s vulnerability to arbitrary interference and pressure to engage in self-censorship.

On several occasions officials have warned channels covering protests or showing repeated images of violence in demonstrations that they could be sanctioned under the incitement provisions. Given that government officials often claim there are subversive intentions behind critical news coverage, journalists and broadcasters have good reason to fear that these loosely-worded provisions could be used to sanction them for legitimate news coverage.

- **Restricted the public’s access to information held by public officials.**

Government officials routinely deny or fail to respond to requests for information by the press and the public. This lack of transparency contravenes Venezuela’s obligation under international law to guarantee the right to “seek, receive, and impart” information—which includes a positive obligation to provide access to official information in a timely and complete manner. Access to official information is crucial to ensure democratic control and transparency, and to promote accountability within the government.

While the right to official information is recognized in Venezuela's 1999 Constitution, the government has failed to promote legislation to define the grounds under which information may legitimately be denied. It has also failed to provide a mechanism to hold accountable those officials who arbitrarily reject or ignore requests for information.

- **Abused state control of broadcasting frequencies by threatening or punishing channels for critical programming while favoring state-owned and commercial channels that refrain from strong criticism of the government.**

On numerous occasions since the 2002 coup, Chávez has personally threatened channels sympathetic to the opposition with revocation of their broadcasting licenses. Such threats appear to have led to editorial changes by some broadcasters, creating a media landscape more favorable to Chávez. In procedures lacking transparency, the national broadcasting authority blocked applications for frequencies by Globovisión, a news channel that refused to yield to such pressures, while granting them rapidly to newly created state channels.

The most flagrant example of this discriminatory policy was the government's treatment of Radio Caracas Television (RCTV), Venezuela's oldest television channel and a constant critic of Chávez. On his orders, the government singled out RCTV—one of the four channels Chávez had accused of involvement in the coup—by refusing to renew its broadcasting license. At the same time, it renewed that of Venevisión, a rival channel that he had also repeatedly accused of involvement in the coup but had since cut its overtly anti-Chávez programming.

Whereas Chávez faced an almost entirely hostile broadcast media early in his presidency, he has since significantly shifted the balance of media forces in the government's favor. This shift has been accomplished by stacking the deck against critical opposition outlets while advancing state-funded media that are heavily slanted in favor of the government. For example, TVES—the state-funded channel created to occupy the frequencies vacated by RCTV—has proven to be no less partial in its pro-Chávez coverage than other state channels, despite much fanfare that it would be Venezuela's first genuine public service channel.

Instead of exercising its crucial role as guarantor of freedom of expression, the Supreme Court has effectively backed the government in these policies. It has declared insult laws to be constitutional and declared that the findings of the Inter-American Commission of Human Rights are not binding on Venezuela if they conflict with the Constitution. Most notably, the court failed to protect the right to freedom of expression and respect for due process in the RCTV case. The court requisitioned RCTV's transmitters—without a time-limit or compensation—for use by a newly created state channel, and yet failed to address the central human rights issues of freedom of expression, due process, and discrimination affecting RCTV's journalists and owners.

Venezuela's Polarized Media

The print and broadcast media have been the site of intense political struggle throughout the Chávez presidency. Both the government and its critics have used the media at their disposal as tools to attack each other and to mobilize their own supporters. Media coverage has tended to be extremely partisan on both sides.

Opposition Media

During the early years of Chávez's government, four private television channels—Radio Caracas Television (RCTV), Venevisión, Televen, and Globovisión—dominated the public airwaves. Until 2004, all four stations sided openly with the opposition, providing uniformly partisan and anti-Chávez news coverage and commentary.

This partisanship was most evident during the short-lived 2002 coup. All four channels gave extensive coverage to the opposition march on April 11, but on April 12 and 13, 2002—after Chávez had been taken by the military to an unknown destination and his supporters were filling the streets demanding his return—they substituted cartoons and old movies for news coverage.¹⁶⁷

¹⁶⁷ Andrés Izarra, a former journalist for RCTV who later became Chávez's communications and information minister, resigned from RCTV because, as he alleged, it had imposed on its journalists a policy of "zero Chavismo" during the April 2002 events. Human Rights Watch interview with Andrés Izarra, Caracas, February 6, 2003. RCTV officials have denied the allegation, stating that the absence of their mobile units on the streets on April 12 and 13 was due to a security policy to protect their staff from violence that dated from the 1989 riots in Caracas known as the "Caracazo." Human Rights Watch interview with Eduardo Sapene, Vice-President of RCTV, Caracas, February 7, 2003.

The news blackout of Chávez's return to power was followed by highly partisan coverage of the oil strike and opposition marches in December 2002 and January 2003, when opposition stations replaced commercial advertising with donated opposition political spots calling on people to join the protests. Apart from slanted news coverage, the private stations had interview programs dedicated to discrediting Chávez's policies, in which pro-government experts were rarely invited to participate.

The print media was also predominantly in the opposition camp. Two long-established daily newspapers—*El Universal* and *El Nacional*—were persistent critics, and another critical paper, *Tal Cual*, although with a much smaller circulation, also had considerable influence.

Government Media

During the early years of his government, Chávez's administration had only one national television channel at its disposal (Venezolana de Televisión, VTV-Channel 8). Although VTV is a state channel with a mandate to be non-partisan, under Chávez it has been as partisan and biased as its private counterparts.¹⁶⁸

The government has accused RCTV and Venevisión of more serious actions such as manipulating video footage of Chávez supporters firing pistols to make it appear that they were shooting at peaceful marchers. These serious allegations have never been examined in court, however. Kim Bartley and Donacha O'Briain, *The Revolution Will Not be Televised*, documentary, 2006, <http://video.google.com/videoplay?docid=5832390545689805144> (accessed August 1, 2008). Bartley and O'Briain have been accused of omissions and distortion in another documentary. Thaelman Urgelles and Wolfgang Schalk, *X-Ray of a Lie*, documentary, 2006, <http://video.google.com/videoplay?docid=-3378761249364089950> (accessed August 1, 2008).

¹⁶⁸ According to a recent study based on four days' programming in 2006, more than half of VTV's output was devoted to pro-government news and opinion programs heavily biased against the opposition and in favor of the government view. Marcelino Bisbal and Rafael Quiñones, "¿Instrumento de gobierno o institución estatal?", *Comunicación*, vol. 139 (2007), p. 64. Another investigation carried out during the 2006 presidential elections by a media monitoring group sympathetic to Chávez found VTV to be the most partisan of the six channels studied. Global Observatory of Communication Mediums of Venezuela (Observatorio Global de Medios de Venezuela), "Los contenidos de opinión e información electoral en medios de comunicación social nacionales y regionales: elecciones presidenciales Venezuela 2006," Final Report, 2007, http://www.observatoriodemedios.org.ve/docs/informe_electoral.pdf (accessed August 1, 2008), p. 54. A study of television coverage of the December 2007 constitutional reform referendum funded by the Norwegian Ministry of Foreign Affairs and the Swedish Institute also found VTV to be the worst performer on impartiality, followed by RCTV International. Monitoring Group of Communication Mediums (Grupo Monitoreo de Medios), "Información equilibrada en tres de siete canales de televisión," *Comunicación*, vol. 141 (2008), http://www.gumilla.org.ve/publicaciones/publicaciones_revista_comunicacion.php (accessed August 1, 2008). Some VTV interview program hosts, however, have invited opposition spokesman onto their programs. Ernesto Villegas, who hosts VTV's morning show "In Confidence," told Human Rights Watch he interviewed one of the leaders of the oil strike as well as supporters of the coup on his program and received complaints from audience members as a result. Human Rights Watch interview with Ernesto Villegas, Caracas, February 10, 2003.

Chávez ran and continues to run his own television and radio show on VTV and National Radio, “Hello President,” as a vehicle to communicate directly with his supporters. “Hello President” became his preferred venue for announcing new policy initiatives and he often uses it to challenge his media critics and political enemies.

One state television program openly attacks the opposition and the government’s press critics. A nightly show on VTV, *La Hojilla* (The Razorblade), has used secretly recorded conversations, private documents, and similar material to expose or ridicule media critics. Chávez often talks live on the phone to its host, Mario Silva, adding his own observations to Silva’s attacks.

Chávez also made up his media deficit by using presidential authority to order all stations—including private television and radio stations—to interrupt programming without prior warning and broadcast his speeches and other government events live, often for hours on end, at peak viewing hours.¹⁶⁹ In the nine years of his government, the president has ordered 1,710 such mandatory broadcasts, totaling 1,048 hours or 43 days of uninterrupted transmission, according to a recent study.¹⁷⁰

In the print media, two privately owned newspapers, Venezuela’s largest selling daily, *Últimas Noticias*, and the Zulia-based newspaper *Panorama*, have been largely sympathetic to Chávez and his government.

Community Media

In addition to the opposition and government media, a vibrant community media sector has emerged since the events of April 2002. After decades of being shut out by the mainstream media, a network of community activists seized upon Chávez’s 1998 triumph to push for state support for community radio initiatives. They worked

¹⁶⁹ Under article 192 of the Organic Law on Telecommunications promulgated in 2000, Chávez, the vice-president, and government ministers are authorized to order private channels to transmit speeches without time limits. Organic Law on Telecommunications (Ley Orgánico de Telecomunicaciones, “LOTEL”), *Official Gazette*, No. 36.970, 2000, <http://www.tsj.gov.ve/gaceta/junio/120600/120600-36970-15.html> (accessed August 1, 2008), art. 192.

The Social Responsibility Law prohibits adulteration or editing of the speeches. Law on Social Responsibility in Radio and Television (Ley de Responsabilidad Social en Radio y Televisión), *Official Gazette*, No. 38.081, 2004, <http://www.tsj.gov.ve/gaceta/diciembre/071204/071204-38081-01.html> (accessed August 1, 2008).

¹⁷⁰ Francisco Olivares, “TV sin público,” *El Universal*, June 1, 2008, http://archivo.eluniversal.com/2008/06/01/pol_art_tv-sin-publico_880350.shtml (accessed August 1, 2008), citing data from AGB Nielsen Media Research.

with Chavista lawmakers to draft legislation on alternative media that is among the most advanced in the hemisphere.

The Venezuelan law establishes a duty on the government to support community radio stations by granting licenses and providing seed capital, infrastructure grants, and training. Although the government was slow to implement the law, the licenses and financing began to flow after community radios proved their political value during the 2002 coup by breaking a news blackout by the private media and summoning Chávez supporters to the demonstrations that helped return him to power. By August 2007, 266 community radio stations and more than 30 community television outlets were licensed and operating, according to the National Telecommunications Commission (CONATEL).¹⁷¹

The “Media War”

After the 2002 coup was overturned, Chávez and his supporters adopted an increasingly adversarial approach to the private media. They accused the United States of leading the international media and their Venezuelan counterparts in a “media war” to smear and destroy his government.¹⁷²

Government officials vigorously engaged the media “enemy.” The communication and information minister said in an interview that the government was waging “a battle for the hearts and minds of the population,” with the aim of gaining “state hegemony in communication and information.”¹⁷³ The minister described VTV’s

¹⁷¹ These figures are from the CONATEL website, August 2007. National Commission of Telecommunications of the Bolivarian Republic of Venezuela (Comisión Nacional de Telecomunicaciones República Bolivariana de Venezuela, CONATEL), <http://www.conatel.gob.ve> (accessed August 1, 2008); Cristóbal Alva, “Redes de Comunicación Popular,” National Seminar: Social Policy: A New Paradigm? (Seminario Nacional: Política Social: Una Nueva Paradigma), Caracas, May 11-13, 2004, http://www.gerenciasocial.org.ve/bsocial/bs_03/bs_03_pdf_doc/jueves/panel_cristobal_alva.pdf (accessed August 1, 2008).

¹⁷² In April 2008 Chávez suggested setting up a 24-hour media monitoring center led by the government and the ruling socialist party to counteract media distortions: “a well equipped national brain, where there are people dedicated 24 hours a day to the media war.” Bolivarian News Agency (Agencia Bolivariana de Noticias), “Psuv dirigirá Centro Nacional de Mensajes para enfrentar guerra mediática,” April 26, 2008, http://www.abn.info.ve/go_news5.php?articulo=130516 (Accessed August 1, 2008); Pedro Peñaloza, “Crearán centro nacional de mensajes para guerra mediática,” *El Universal*, April 26, 2008, http://www.eluniversal.com/2008/04/27/pol_art_crearan-centro-nacio_838363.shtml (accessed August 1, 2008).

¹⁷³ “Para el nuevo panorama estratégico que se plantea, la lucha que cae en el campo ideológico tiene que ver con una batalla de ideas por el corazón y la mente de la gente. Hay que elaborar un nuevo plan, y el que nosotros proponemos es que sea hacia la hegemonía comunicacional e informativa del Estado.” Laura Weffer, “Entrevista: Andrés Izarra piensa que deben evaluarse todos los operadores de TV,” *El Nacional*, January 8, 2007,

program *La Hojilla* as “a tool for the media war, whose purpose is to dismantle the false opinions created by the private media which hope to fool the people and destabilize the revolutionary process.”¹⁷⁴ In his speeches Chávez demonized his media critics as “fascists,” “terrorists,” “enemies of the people,” “liars,” “coup-mongers,” “immoral,” “trash,” and “laboratories of psychological warfare,” among other things.¹⁷⁵

These tirades, often delivered in speeches all media were obliged to transmit, fueled street violence between Chavez’s supporters and opponents. In the months following the reversal of the coup, Chávez followers physically attacked and threatened scores of journalists and cameramen working for opposition outlets.¹⁷⁶

Although the number of such incidents declined after 2004, journalists working for media identified with the opposition have remained vulnerable to physical attack and threats of violence. The freedom of expression NGO Espacio Público reported 20 cases of aggression and intimidation of journalists during 2007, including three cases in which journalists’ cars were reportedly set on fire while parked outside their homes.¹⁷⁷ In July 2008, as the campaign for the November 2008 regional elections

<http://venezuelareal.zoomblog.com/archivo/2007/01/08/entrevista-Andres-Izarra-considera-que.html> (accessed August 1, 2008).

¹⁷⁴ Ministry of Communication and Information (Ministerio del Poder Popular para la Comunicación y la Información), “Ministro Izarra: Programa La Hojilla es herramienta para la guerra mediática,” March 24, 2008, http://www.mci.gob.ve/noticias-nacionales/1/175847/programa_la_hojilla.html (accessed August 1, 2008).

¹⁷⁵ Alfredo Rojas, “Chávez llamó “basura” a los medios en una escuela,” *El Universal*, September 19, 2002, http://www.eluniversal.com/2002/09/19/pol_art_19108AA.shtml, (accessed August 1, 2008); Rodolfo Carrera, “Chávez acusa a televisoras,” *El Universal*, December 9, 2002, http://www.eluniversal.com/2002/12/09/pol_art_09105AA.shtml (accessed August 1, 2008); “Chávez invocó carta democrática para televisoras,” *El Universal*, December 16, 2002 http://www.eluniversal.com/2002/12/16/pol_art_16104BB.shtml (accessed August 1, 2008); “Se adiestran para el magnicidio,” *El Universal*, May 10, 2004, http://www.eluniversal.com/2004/05/10/pol_art_10104A.shtml (accessed August 1, 2008).

¹⁷⁶ For more on these attacks and their effects on freedom of expression, see Human Rights Watch, *Caught in the Crossfire: Freedom of Expression in Venezuela*, vol. 15, no. 3(B), May, 2003 <http://www.hrw.org/reports/2003/venezuela/>. In May 2008, a former policeman was sentenced to fifteen years in prison for the murder of press photographer Jorge Aguirre, who was shot in the street in April 2006 by an off-duty policeman while covering protests against violent crime. Clodovaldo Hernández, “Condenado a 15 años un asesino que fue fotografiado por su víctima,” *El País* (Spain), May 21, 2008.

¹⁷⁷ *Venezuela: Situación del derecho a la libertad de expresión e información, 2007* (Caracas: Espacio Público, 2008), <http://www.espaciopublico.info/index.php> (accessed July 29, 2007), pp. 15, 122, 132, 180.

gathered steam, press monitoring groups reported several new cases.¹⁷⁸ Such attacks are encouraged by the fact that those responsible for previous incidents have rarely, if ever, been identified and prosecuted. The Inter-American Court of Human Rights is currently considering the cases of 44 journalists and workers at Globovisión and of 20 journalists and workers at RCTV who allege they were victims of physical attacks or threats, among other violations of free expression.¹⁷⁹

Alongside its verbal onslaught against the private media, the government expanded the number of outlets under its control. In addition to VTV it now also controls or owns three recently created channels: Vive TV, a cultural and educational channel founded in 2003; Telesur, an international cable channel which transmits nationally on public airwaves using the frequency once occupied by the private Canal Metropolitano de Televisión (CMT);¹⁸⁰ and Venezuelan Social Television (Televisora Venezolana Social, TVES), set up in May 2007 to occupy RCTV's nation-wide frequencies. In addition, the National Assembly, now composed exclusively of pro-Chávez legislators, has its own cable television channel, Asamblea Nacional Televisión (ANTV), which transmits on public airwaves in Caracas.¹⁸¹ The more recently created public stations rarely transmit programs challenging the government view.¹⁸²

¹⁷⁸ Javier Moreno Sucre, "Colegio nacional de periodistas exige investigar agresiones," *El Universal*, July 29, 2008, http://www.eluniversal.com/2008/07/29/pol_art_colegio-nacional-de_967925.shtml (accessed August 4, 2008).

¹⁷⁹ Inter-American Court of Human Rights, Gabriela Peroza y otros v. Venezuela, Judgment of February 27, 2004, Inter-Am.Ct.H.R., (Ser. L) No. 122 (2004); Inter-American Court, Luisiana Ríos y otros v. Venezuela, June 11, 2008, Order of the President of the Inter-American Court, <http://www.corteidh.or.cr/docs/asuntos/luisiana.pdf> (accessed August 1, 2008).

¹⁸⁰ The Venezuelan government has the majority shareholding in Telesur, which is jointly owned by the governments of Venezuela, Argentina, Cuba, and Uruguay. Telesur bought CMT in 2006. "Telesur compra televisora venezolana CMT," *apoorrea.org*, December 13, 2006, <http://www.apoorrea.org/medios/n87857.html> (accessed August 5, 2008).

¹⁸¹ Although state media have proliferated in recent years, their audience figures remain consistently low in comparison with the commercial channels. Between 2002 and 2006, all the state channels put together were being watched by less than 6 percent of the television audience, whereas RCTV alone had an average audience share of more than 30 percent. The migration of RCTV to cable following the non-renewal of its broadcasting license has scarcely altered this picture. In March 2008, VTV's audience share was less than 4 percent, whereas RCTV's was above 13 percent despite the fact that only about a quarter of Venezuelan households have access to cable. Víctor Suárez, "Un rating inusitado," *El Universal*, April 20, 2008, http://www.eluniversal.com/2008/04/20/eco_art_inside-telecom_825589.shtml (accessed August 1, 2008). The figures cited are from AGB Panamericana de Venezuela Medición S.A., a branch of Nielsen Media Research.

¹⁸² During a four-day period in July 2006, 76 percent of Vive's broadcasting consisted of news slanted toward the government and pro-government propaganda. Marcelino Bisbal and Rafael Quiñones, "¿Instrumento de gobierno o institución estatal?", pp. 65-66. Although TVES was ostensibly set up as a plural public service broadcaster, a recent study shows that 8 percent of its programming consisted of government messages promoting Chávez's Bolivarian socialism. Gustavo Hernández, "Gubernamental TVES," in "Medios de Servicio Público," *Comunicación*, vol. 139, (2008), p. 28.

In addition to creating new state-financed channels, Chávez and his supporters have taken steps to limit broadcasting they deem unacceptable. The Social Responsibility Law introduced wide-ranging restrictions on the content of radio and television broadcasting. As this chapter details below, these legal constraints gave the state tools with which to interfere in free expression and intimidate media critics.

In 2005 two of the stations that had previously given full support to opposition campaigns, Venevisión and Televen, pulled controversial opinion shows and ceased to engage in overtly anti-Chávez commentary. Only RCTV and Globovisión retained their clearly critical editorial line.

Despite his repeated threats, Chávez refrained for years from closing down any media outlet. Indeed, prior to 2007, the only interruptions of broadcasting came during the short-lived coup of 2002, when coup supporters backed by police shut down VTV and National Radio and the police raided three community television and radio stations.¹⁸³

However, in December 2006, Chávez abruptly announced that he would not renew RCTV's 20-year broadcasting license when it expired the following year. Despite a national and international outcry, RCTV—the only remaining channel left on nationwide public airwaves with an overtly critical line— was taken off the air on May 27, 2007. Its frequencies and national network of transmitters were taken over by a new government-funded channel, TVES, which has failed to deliver the plural and balanced public service broadcasting the government promised it would. RCTV was obliged to convert to cable in order to continue broadcasting.

Although the government has significantly shifted the constellation of broadcast media forces in its favor, political opponents continue to have access to critical outlets, albeit fewer in number. They include the cable channel RCTV International (the subscription channel through which RCTV reinstated its transmissions), Globovisión, Unión Radio, and several major national newspapers.¹⁸⁴

¹⁸³ José Ignacio López Vigil, *Golpe de radio: los tres días que transmitimos peligrosamente*, (Caracas: Aler, 2007), pp. 52, 61.

¹⁸⁴ Except for the creation in 2003 of a pro-Chávez tabloid, *Vea*, the balance of forces in the print media has not changed significantly.

Nevertheless, as the rest of this chapter shows, the government now has an array of legal weapons with which it can clamp down on government critics at any moment. By promoting self-censorship, these laws constrain the expression of critical opinion, even when they are not rigorously enforced. The government's discriminatory use of its control of the airwaves and its repeated threats to use this control against critical channels also represent significant threats to freedom of expression.

Toughening Speech Offenses

In March 2005, Chávez and his supporters in the National Assembly expanded existing speech offense laws and established draconian penalties, including increased prison sentences and onerous fines for expression deemed to “offend” government officials.

These measures are inconsistent with international legal principles on press freedom. International human rights bodies have long called on governments around the world to decriminalize speech that may displease public officials so as to allow the press to effectively monitor government actions. But Venezuela has gone in the opposite direction. It has reaffirmed and extended insult laws (*desacato*)—which directly violate international freedom of expression norms—and introduced prison sentences of up to four years for defamation.

International Norms

Insult laws (known in Spanish as *leyes de desacato*), which criminalize expressions deemed to offend the honor of public officials and institutions, directly contravene international human rights norms.¹⁸⁵

The Inter-American and European systems on human rights both consider insult laws incompatible with the free debate essential to democratic society. In a landmark

¹⁸⁵ Insult laws are “a class of legislation that criminalizes expression which offends, insults, or threatens a public functionary in the performance of his or her official duties.” Inter-American Commission on Human Rights, “Report on the Compatibility of Desacato Laws with the American Convention on Human Rights,” Annual Report of the Inter-American Commission on Human Rights 1994, OEA/Ser/.L/V/11.88, 1995, <http://www.cidh.org/annualrep/94eng/chap.5.htm> (accessed August 1, 2008). The offense does not necessarily involve a false assertion; for this reason proving its truth is generally no defense. Moreover, it is usually classified not only as a detriment to the honor of the public official in question but also to his or her office. By extension it is often considered an offense against public order.

1995 report, the Inter-American Commission on Human Rights (IACHR) concluded that these laws are incompatible with Article 13 of the American Convention on Human Rights, which protects the right to freedom of thought and expression. The commission wrote, “[t]he special protection *desacato* laws afford public functionaries from insulting or offensive language is not congruent with the objective of a democratic society to foster public debate.” It also noted that in democratic societies, political and public figures must be more, not less, open to public scrutiny and criticism. “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.” The commission also noted that insult laws have a chilling effect, since “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.”¹⁸⁶

More recently, in *Palamara Iribarne v. Chile* (2005), the Inter-American Court of Human Rights held that “in the case of public officials, individuals who perform public services, politicians, and government institutions a different threshold of protection should be applied, which is not based on the specific individual, but on the fact that the activities or conduct of a certain individual is of public interest.”¹⁸⁷

The European Court of Human Rights has stressed that the protection of freedom of expression must extend not only to information or ideas that are widely accepted, but also to those that “offend, shock or disturb.”¹⁸⁸ As the European Court noted in a case involving a politician accused of insulting the government of Spain, “Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.”¹⁸⁹

In a joint declaration, the Special Rapporteurs on Freedom of Expression of the United Nations, the Organization for Security and Cooperation in Europe, and the Organization of American States recommended in 2000 that “laws which provide special protection

¹⁸⁶ *Ibid.*

¹⁸⁷ Inter-American Court, *Palamara Iribarne v. Chile*, Judgment of November 22, 2005, (Series C), No. 35 (2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.pdf (accessed August 1, 2008), para 88.

¹⁸⁸ European Court of Human Rights, *Castells v. Spain*, Judgment of 23 April, 1992, Series A. no. 236, p. 22, para. 42.

¹⁸⁹ *Ibid.*

for public figures, such as *desacato* laws, should be repealed.” The experts also recommended that “the State, objects such as flags or symbols, government bodies, and public authorities of all kinds should be prevented from bringing defamation actions.”¹⁹⁰

International rights bodies also hold that defamation involving public officials should be decriminalized in the interest of promoting the vibrant public debate necessary to a democracy.¹⁹¹ The Principles on Freedom of Expression adopted by the Inter-American Commission on Human Rights in 2000 assert that protection of the reputation of public officials should be guaranteed only by civil sanctions.¹⁹² In other words, no one should go to prison for criticizing or offending a public servant. The Inter-American Court of Human Rights has held recently that the use of criminal proceedings for defamation must be limited to cases of “extreme gravity,” as a “truly exceptional measure” where its “absolute necessity” has been demonstrated, and that in any such case the burden of proof must rest with the accuser.¹⁹³

The Inter-American Commission on Human Rights’ Declaration of Principles on Freedom of Expression also holds that for a court to establish defamation it must be proven that “in disseminating the news, the social communicator had the specific

¹⁹⁰ Joint declaration issued by Abid Hussain, U.N. Special Rapporteur on Freedom of Opinion and Expression; Freimut Duve, OSCE Representative on Freedom of the Media; and Santiago Cantón, OAS Special Rapporteur on Freedom of Expression, UN Press Release, December 1, 2000, <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/EF58839B169CC09C12569AB002D02Co?opendocument> (accessed on August 1, 2008).

¹⁹¹ Defamation can be defined as a communication that “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” Robert D. Sack, *Sack on Defamation: Libel, Slander and Related Problems* 2–9 (1999), cited in Bonnie Docherty, “Defamation Law: Positive Jurisprudence,” *Harvard Human Rights Journal*, Vol. 13 (2000), <http://www.law.harvard.edu/students/orgs/hrj/iss13/docherty.shtml#fn7> (accessed August 1, 2008).

¹⁹² Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights in its 108th session, 2000, <http://www.iachr.org/declaration.htm> (accessed August 1, 2008). Principle 10 of the Declaration of Principles states: “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.” Inter-American Commission on Human Rights, Annual Report of the Rapporteur on Freedom of Expression (2002), Chap. 5 (18, 19), pp. 149-154, <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=159&lID=2> (accessed August 5, 2008).

¹⁹³ Inter-American Court, Eduardo Kimel v. Argentina, Judgment of May 2, 2008, Inter-Am. Ct. H. R. (Series C) No. 177 (2008), para. 78, http://www.corteidh.or.cr/pais.cfm?id_Pais=2 (accessed August 5, 2008).

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.”¹⁹⁴

Even while decriminalizing defamation is the more urgent task, excessive civil damages can also close down freedom of expression and should be prohibited. As the joint declaration of the UN, OSCE, and OAS experts stated, “civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritize the use of a range of non-pecuniary remedies.”¹⁹⁵

In his report covering the Americas for 2006, the Special Rapporteur on Freedom of Expression of the OAS concluded that “the continuous use of criminal trial proceedings against journalists for *desacato* and defamation demonstrates, in the great majority of cases, both State intolerance of criticism and the use of these to frustrate investigations of acts of corruption.”¹⁹⁶

Insult Provisions

Under Chávez, Venezuela has bucked the international trend to eliminate insult laws. Ever since its ground breaking report on insult laws was published in 1995, the Inter-American Commission on Human Rights has urged OAS member states to repeal these provisions from their criminal codes. Ten member states of the OAS, including Argentina, Chile, Peru, Paraguay, and Panama have now done so.¹⁹⁷

¹⁹⁴ Inter-American Declaration of Principles on Freedom of Expression, Principle 10. These standards are similar to the “actual malice” doctrine, which originated in the United States in the landmark *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁹⁵ Joint declaration issued by Abid Hussain, U.N. Special Rapporteur on Freedom of Opinion and Expression; Freimut Duve, OSCE Representative on Freedom of the Media; and Santiago Canton, OAS Special Rapporteur on Freedom of Expression, December 1, 2000.

¹⁹⁶ Report of the Office of the Special Rapporteur on Freedom of Expression, Annual Report of the Inter-American Commission on Human Rights, 2006. OEA/Ser.L/V/II.127 Doc 4. Rev. 1, March 3, 2007, <http://www.cidh.oas.org/annualrep/2006eng/Rapporteurship%20for%20Freedom%20of%20Expression.pdf> (accessed July 8, 2007). The report mentions five countries in the region in which defamation or insult prosecutions were underway in 2006: Honduras, Mexico, Paraguay, Peru, Uruguay, and Venezuela.

¹⁹⁷ Report of the Office of Special Rapporteur on Freedom of Expression, Annual Report of the Inter-American Commission on Human Rights, 2007, December 29, 2007, OEA/Ser.L/V/II.130, Doc. 22, rev. 1, para. 137.

Venezuela's Supreme Court, however has adopted a position contrary to this trend that openly defies international norms. In 2003, in response to an appeal against speech offense provisions of the criminal code filed by a human rights lawyer, its constitutional chamber ruled unanimously that Venezuela's insult provisions were constitutional. In refusing to align Venezuelan constitutional protection of freedom of expression with international standards it noted that the IACHR's recommendations were not binding on the state, and expressed the opinion that applying the norms set out by the IACHR could even endanger it and threaten its independence if implemented.¹⁹⁸

Rather than eliminate Venezuela's insult laws, Chávez and his supporters enacted legislation in 2005 that increases the range of public officials who may resort to insult prosecutions when faced with unfavorable press. Before the legislature enacted reforms in March 2005, only the president, the vice-president, government ministers, state governors, mayors, and justices of the Supreme Court could initiate prosecutions for an insult. The reformed code added to the list members of the National Assembly, electoral council officials, the attorney general, the public prosecutor, the human rights ombudsman, the treasury inspector, and members of the military high command.¹⁹⁹ In fact, all top Venezuelan officials now enjoy enhanced legal protection against media criticism.

Because the crime of insult does not require that the speaker or writer accuse an official of specific actions but merely that he or she use language that subjectively "offends" or "disrespects" a public official, defendants in insult prosecutions cannot escape conviction by proving the truth of what they assert. Whether the assertion amounts to an insult and how serious it is are matters left entirely to the opinion of the court. The wording of the law ("offends by word or deed, or shows lack of respect in any other way")²⁰⁰ is vague, broad, and subjective, making legal defense against a charge of this nature difficult. Journalists must choose their language carefully and conservatively to avoid offending the officials they write about.

¹⁹⁸ Supreme Court Constitutional Chamber, Jesús Eduardo Cabrera Romero, Case No. 01-0415, July 15, 2003, <http://www.tsj.gov.ve/decisiones/scon/Julio/1942-150703-01-0415.htm> (accessed August 1, 2008).

¹⁹⁹ Criminal Code of Venezuela [Código Penal de Venezuela], *Official Gazette*, No. 5.494, 2000, <http://www.mintra.gov.ve/legal/codigos/penaldevenezuela.html> (accessed August 1, 2008), art. 148.

²⁰⁰ *Ibid.*, art. 147.

The March 2005 reforms left unchanged a separate insult provision that penalizes insults directed not at officials but at institutions of state (an offense known as denigration [*vilipendio*] in Venezuela). Under this article, people held to have insulted the legislature, the Supreme Court, the cabinet, state legislative councils, or the higher courts can go to prison for up to 15 months.²⁰¹ The notion that a state institution can bring insult actions resulting in prison sentences is a dangerous interference with freedom of expression that could seriously hamper the press from serving its role as watchdog in a free society.²⁰²

All insult crimes in Venezuela carry prison sentences, and the higher the office, the greater the penalty. This reverses the democratic principle that public officials with greater public roles and responsibilities must be open and liable to greater degrees of criticism than ordinary citizens. Penalties range from a maximum sentence of 20 months in the case of justices of the Supreme Court, legislators, and the government officials listed above except for mayors, to 40 months in the case of the most serious offense against the president.

Defamation Provisions

Venezuelan law also contradicts international norms by establishing that prison sentences can be imposed on anyone who “imputes to somebody a specific act that may expose them to public disdain or hatred, or harm their honor or reputation.”²⁰³ Rather than eliminate these penalties, Chávez and his supporters in the legislature have increased them significantly.

While some governments in the region are considering legislation to decriminalize defamation in the case of public officials or persons in the public eye, Venezuela has once again moved in the opposite direction.²⁰⁴ Amendments enacted in March 2005

²⁰¹ *Ibid.*, art. 149.

²⁰² Joint declaration issued by Abid Hussain, U.N. Special Rapporteur on Freedom of Opinion and Expression; Freimut Duve, OSCE Representative on Freedom of the Media; and Santiago Canton, OAS Special Rapporteur on Freedom of Expression, December 1, 2000.

²⁰³ Criminal Code of Venezuela, art. 442.

Elaborating on this point of the law, the Supreme Court has ruled on two occasions that to escape conviction journalists are not necessarily bound to prove the truth of an accusation, provided that they can show they took reasonable steps to confirm information that turned out to be false. Supreme Court Constitutional Chamber, Jesús Eduardo Cabrera, Case No. 00-2760,

increased the minimum penalty for defamation from three months of imprisonment to one year. The maximum was increased from thirty months to four years if the offense is committed “in a public document, in writing or drawings distributed or exposed to the public, or through other forms of publicity.” In addition, the new article prescribes substantial fines not present in the previous law, ranging from 100 tax units to 2,000 tax units (US\$2,145 to US\$42,898, at current rates).²⁰⁵

It is also a form of defamation, *injuria* (roughly translated as “libel”), to “offend the honor, reputation and decorum of someone” without attributing to them a specific act.²⁰⁶ Under the new legislation the minimum prison sentence for this offense rose from three days to six months, the maximum from three months to two years. Fines, which were previously insignificant, were increased from a minimum of 50 tax units to a maximum of 500 tax units (US\$1,071 to US\$10,710 at current rates).²⁰⁷

In addition, the reforms to the criminal code provide that the statute of limitations of one year that applies to defamation cases, and of six months in cases of *injuria*, may now be interrupted by “any action” of the plaintiff.²⁰⁸ This makes it easier for the litigant to extend the period of investigation. A notable feature of defamation prosecutions in Venezuela is that many stay open in the courts without progress or

June 12, 2001, <http://www.tsj.gov.ve/decisiones/scon/Junio/1013-120601-00-2760%20.htm> (accessed August 1, 2008); Supreme Court Constitutional Chamber, Jesús Eduardo Cabrera, Case No. 01-0415, July 15, 2003, <http://www.tsj.gov.ve/decisiones/scon/Julio/1942-150703-01-0415.htm> (accessed August 1, 2008). The principle followed by the Supreme Court is consistent with rulings of the Inter-American Court of Human Rights, which has argued that the requirement to prove the truth of an assertion to escape liability on a defamation charge is an “excessive limitation on freedom of expression,” as it produces a “dissuasive, intimidating and inhibiting” effect on journalists. Inter-American Court, Herrera Ulloa v. Costa Rica, Judgment of July 2, 2004, Inter-Am. Ct. H.M. (Ser. C) No. 107 (2004), <http://www1.umn.edu/humanrts/iachr/C/107-esp.html> (accessed August 1, 2008), paras. 132, 133.

²⁰⁴ Mexico approved a federal statute decriminalizing defamation and libel in the case of public officials in 2007. Other countries, such as Argentina and Uruguay, have bills in the legislature. Alejandro Torres, “Senado despenaliza delito de difamación,” *El Universal* (Mexico), March 7, 2007, <http://www.el-universal.com.mx/nacion/149031.html> (accessed August 5, 2008); Asociación Mundial de Radios Comunitarios (AMARC, Uruguay), “Gobierno impulsa proyecto de ley para despenalizar delitos de desacato y difamación e injurias,” <http://politicas.infoycom.org.uy/?q=node/2184> (accessed August 5, 2007).

²⁰⁵ Criminal Code of Venezuela, art. 442.

²⁰⁶ *Ibid.*, art. 444. This law is similar to an “insult law” in that it criminalizes the expression of insulting language, rather than specific factual allegations. It is not, however, limited to protecting government officials.

²⁰⁷ *Ibid.*

²⁰⁸ Criminal Code of Venezuela, art. 450.

conclusion for years on end. These lengthy proceedings can take a heavy toll on the professional and personal lives of journalists.²⁰⁹

Speech Offense Prosecutions

While these speech laws have not been enforced systematically, they are more than just a latent threat. As the following cases demonstrate, speech offense laws have been employed against journalists in a wide array of cases.

Napoleón Bravo

The prosecution of Napoleón Bravo for offending the honor of the Supreme Court exemplifies an insult prosecution that violates article 13 of the American Convention on Human Rights. In February 2006, at the request of the Supreme Court, the state prosecutor opened legal proceedings against José Ovidio Rodríguez Cuesta (a television celebrity known in Venezuela as Napoleón Bravo) for insulting the court.

The alleged offense occurred in September 2004 when Bravo's political program, "24 Hours," was covering the hunger strike of a sex abuse victim who was protesting the court's long delay in resolving her case. While the camera showed images of the protester, Bravo suggested, apparently with ironic intent, that the court served no purpose and should be made into a brothel. The then-chief justice asked the attorney general to open proceedings against Bravo. The prosecutor formally accused him of insulting the court's honor.²¹⁰

Bravo was subjected to a two-year investigation followed by two years of proceedings in the Venezuelan courts. The case against him remains open today.²¹¹

²⁰⁹ Human Rights Watch interviews with Julio Balza and Marianella Salazar, Caracas, March 8 and March 15, 2007. Out of 63 court cases against journalists opened since 2002, 26 were still unresolved in 2007. Carlos Correa and Débora Calderón, *El Peso de las Palabras*, (Caracas: Espacio Público, 2007), pp. 53-60.

²¹⁰ Prosecutor's written statement of charges (Fiscal Sexta a Nivel Nacional con Competencia Plena), Acusación, February 8, 2006.

²¹¹ Human Rights Watch telephone interview with Alberto Arteaga, Bravo's defense lawyer, Caracas, April 9, 2008. Juan Francisco Alonso, "Ordenan reiniciar proceso contra Napoleón Bravo," *El Universal*, March 13, 2007. The Supreme Court ruled in support of freedom of expression in a July 2005 case in which the attorney general sought to prosecute a news source for an editorial. The attorney general ordered an investigation to determine whether the newspaper *El Universal* had insulted his office and the country's judiciary by publishing an editorial entitled "Justice on its Knees." The investigation revealed that the attorney general's office could not prosecute the paper for insulting the public ministry since it was not among the institutions

Tulio Álvarez

A constitutional lawyer and academic, Tulio Álvarez was convicted of criminal defamation for publishing an article in which he cited an official report that he claimed implicated a congressman in financial mismanagement. He was convicted in February 2005 and given a suspended sentence of two years and three months imprisonment. (Under Venezuelan law, those sentenced to not more than five years in prison for a first offense may apply to a court for their prison sentence to be conditionally suspended.²¹²)

Álvarez's article, published in a May 2003 edition of the newspaper *Así es la Noticia*, suggested that a prominent congressman had used funds from the savings of National Assembly employees and former employees for other congressional purposes, leaving an unpaid debt to the employees' savings fund of 1,707,723,317 Bolívares (about US\$792,000). Álvarez was representing the National Assembly employees' union in a legal case against the congressman, and had access to a report on the case issued by the superintendency of savings banks, a body attached to the Ministry of Finance.

In December 2003, the congressman filed a complaint against Álvarez for defamation. A year later, the court barred Álvarez from leaving the country as a "precautionary measure" to prevent him escaping justice. In February 2005, the court convicted Álvarez and sentenced him to two years and three months in prison, suspended.²¹³ The court found that Álvarez had defamed the congressman by insinuating his guilt because the report he cited only established that the money owed to the savings bank had not been paid, and not that the congressman was guilty of malfeasance.²¹⁴

authorized to do so under the Criminal Code, nor could it sue for defamation or disrespect as the editorial had not targeted any individual in particular. The attorney general instead presented the case to the Supreme Court and requested that it rule on whether the article offended its institutional honor. In a sound decision, the court concluded unanimously that the article was an expression of opinion and did not amount to an institutional insult. "Improcedente solicitud del Fiscal General contra editorial de 'El Universal'," Supreme Court of Venezuela, Press Release, October 5, 2005.

²¹² Organic Code of Procedure [Código Orgánico Procesal Penal], *Official Gazette*, No. 5,558, November 14, 2001, http://www.tsj.gov.ve/legislacion/reforma_copp2001.asp (accessed August 1, 2008), arts. 478,494.

²¹³ Supreme Court Criminal Chamber, Eladio Ramón Aponte Aponte, Case No. AA30-P-2005-00534, February 7, 2006, <http://www.tsj.gov.ve/decisiones/scp/Febrero/RC05-0534-2.htm> (accessed August 1, 2008).

²¹⁴ *Ibid.*

Julio Balza

Julio Balza, a veteran journalist who writes a weekly column for the opposition newspaper *El Nuevo País*, has faced four defamation prosecutions since 2004 for his criticism of public officials.

In July 2006 Balza was given a suspended prison sentence of two years and eleven months and fined about US\$12,500 for calling a government minister “imprudent, mendacious, negligent and incompetent” after the viaduct linking Caracas’s Maiquetía airport with the capital was taken out of service in March 2006 due to risk of its collapse.²¹⁵ The minister had headed long and unsuccessful efforts to reinforce the structure, which Balza had criticized in the paper. The Caracas Appeals Court confirmed the sentence in December 2006, and in April 2007 the Supreme Court declared a final appeal inadmissible.²¹⁶ In this case the three impugned articles made no specific accusations but simply expressed a strongly worded opinion about the minister’s competence.

In previous years, Julio Balza had been accused three times of defamation by officials of the Maiquetía airport authority for accusing them of corruption. Two of the cases were settled out of court. In one case, Balza agreed to publish three successive articles apologizing for the harm caused to the institution, and to write to its director promising not to attack the airport’s honor and reputation in the future.²¹⁷

Henry Crespo and Miguel Salazar

In May 2006, a Caracas court sentenced journalist Henry Crespo, a columnist for *Las Verdades de Miguel*—a periodical with a long record of investigating corruption cases and political intrigue—to an 18-month suspended jail term for defaming the governor of Guárico state.

Las Verdades de Miguel had run a series of reports on a congressional investigation into financial irregularities involving four projects undertaken by the Guárico state

²¹⁵ Supreme Court Criminal Chamber, Hector Manuel Coronado Flores, Case No. 07-102, April 12, 2007, <http://www.tsj.gov.ve/decisiones/scp/Abril/148-12407-2007-Co7-0102.html> (accessed August 1, 2008).

²¹⁶ Ibid.

²¹⁷ Human Rights Watch interview with Julio Balza, journalist for *El Nuevo País*, Caracas, March 8, 2007.

government.²¹⁸ The court considered that a comment cited by Crespo that the governor's actions were a "compendium of the criminal code" was defamatory, as were other articles Crespo wrote in *Las Verdades de Miguel* denouncing corruption in government projects.²¹⁹

The governor and two close political associates also filed a defamation action against the magazine's editor, Miguel Salazar, for publishing articles about alleged corruption and accusing the governor of hiring someone to kill him. Salazar's trial began in April 2007 and continued as of this writing.

Francisco Usón

The only person convicted of a speech offense in recent years who has served prison time was not a journalist but rather a retired military officer who was prosecuted under the military criminal code for a comment he made on a television talk show. Gen. (Rtd.) Francisco Usón, an outspoken critic of the Chávez government, was sentenced by a military court in November 2004 to five years and six months in prison for "insulting the armed forces."²²⁰

Usón was convicted for comments he made in April 2004 as a guest on Televen's television show "La Entrevista" ("The Interview"), hosted by opposition journalist Marta Colomina.

Part of the interview concerned events in the Mara Fort (Fuerte Mara) in February 2004, when eight soldiers being held in a punishment cell were severely burned. Two of them later died of their injuries. The soldiers' deaths caused an outcry in the opposition press. A day before the program was aired, a prominent critic of the government, Patricia Poleo, had published an article alleging that the fire had been

²¹⁸ Carlos Correa and Débora Calderón, *El Peso de las Palabras*, pp. 78-79.

²¹⁹ Accidental Court of Appeals of the Criminal Judicial Circuit of Caracas, Jesús Orangel García, Case No. 2968-06, July 12, 2006, <http://bolivar.tsj.gov.ve/decisiones/2006/julio/1728-12-57-2968-06-.html> (accessed August 1, 2008).

²²⁰ Having previously occupied senior army posts, Usón served briefly as Chávez's finance minister in 2002. He resigned this cabinet post during the April 2002 coup in protest against the government's handling of the opposition protests. After returning to his military duties, in letters to the defense minister, Usón denounced what he claimed were politically motivated promotions in the army and the use of excessive force against protesters. In May 2003 the ministry issued an order forcing him into retirement. Usón continued to participate actively in opposition activities until he was arrested in May 2004 while collecting signatures for the recall referendum.

caused by a flamethrower. Interviewing Poleo and Usón, the program's host, Marta Colomina, asked Usón for a technical opinion on the use of a flamethrower. He said that to use it a mixture of gasoline and napalm had to be prepared beforehand, implying that if a flamethrower had been used such an action would have been premeditated. "If that turns out to be true, it would be very, very serious," he said.²²¹

Although he had retired from the army a year before the interview, Usón was charged under an article of the military criminal code that punishes anyone who "insults, offends or disparages the armed forces."²²² In November 2004 a military court convicted Usón in a rapid trial that was closed to the public. Over the next few months, both a Martial Court and the Supreme Court rejected Usón's appeals against the sentence.²²³ Usón was released on parole in December 2007.

Marianella Salazar

In some cases, prosecutors investigating alleged abuses or cases of corruption reported by journalists subsequently level charges at the journalists, even though the officials accused in their articles did not sue for defamation.

Such was the case with Marianella Salazar, who faces criminal charges of maliciously accusing a public official (slander, *calumnia*) more than four years after the publication of the article in dispute. In Venezuela, to engage in malicious accusation (*calumnia*) is to accuse someone of a crime *in the presence of a judicial authority* knowing the accusation to be false.²²⁴

The article, published in the newspaper *El Nacional* in June 2003, was about an allegation that two government ministers were involved in a plan to acquire

²²¹ Official transcription by the criminal investigations police (Cuerpo de Investigaciones Científicas, Penales y Criminalísticas, CICPC), October 4, 2004, available at <http://www.humanrightsfoundation.org/reports/uson/2.pdf> (accessed July 20, 2008).

²²² Article 505 of the Organic Code of Military Justice, for example, prescribes a prison sentence of between three and eight years for anyone who "insults, offends and disparages in any way the armed forces or one of their units." Organic Code of Military Justice [Código Orgánico de Justicia Militar], *Official Gazette*, No. 5,263, September 17, 1998, art. 505. A prison sentence of between three and eight years is prescribed for this offense.

²²³ Supreme Court Criminal Chamber, Deyanira Nieves Bastidas, Case No.05-125, June 2, 2005, <http://www.tsj.gov.ve/decisiones/scp/junio/rc05-0125.htm> (accessed August 1, 2008).

²²⁴ Criminal Code of Venezuela, art. 241.

electronic spying equipment from a European defense agency. The article described an alleged dispute between them over lucrative commissions expected from the deal.²²⁵ In accordance with a procedure laid down in the law, the two ministers asked the public prosecutor to investigate the allegations made by Salazar in order to clear their names, but did not sue her for defamation.²²⁶ After interrogating Salazar and two men named in the article, the prosecutor concluded that the author had been unable to supply proof and that her allegations were unfounded.

Subsequently, the prosecutor accused Salazar of *calumnia* because she had shown him, in the course of his investigation, an article by a third party that had corroborated her story.²²⁷ The case brought by the prosecutor against Salazar was still open at this writing, although the prosecutor's accusation presents no evidence to support the notion that Salazar knew the information to be untrue.²²⁸

Ibéyise Pacheco

In October 2004 another prosecutor opened criminal proceedings against an investigative journalist after examining allegations she made against several government officials and finding them to be without substance. The prosecution again originated in an investigation requested by government ministers in reaction to allegations, in this case published by opposition columnist Ibéyise Pacheco in the newspaper *El Nacional*.²²⁹

²²⁵ Marianella Salazar, "Guerra Electrónica," *El Nacional*, June 11, 2003.

²²⁶ Under Venezuela's laws of criminal procedure, a person who has been publicly accused of a crime may request the Attorney General's Office to conduct an inquiry into the allegations. If they are proven to be unfounded, the accuser must pay the costs of the investigation. Organic Law of Criminal Procedure [Ley Orgánica Procesal Penal], *Official Gazette*, No. 5. 208, 1998, <http://www.tsj.gov.ve/legislacion/copp.html> (accessed August 1, 2008), art. 290. ,

²²⁷ Prosecutor's written statement of charges (Fiscalía Quincuagésima Sexta, Área Metropolitana de Caracas), Case No. F-01-56-460-03, undated.

²²⁸ Salazar appealed the first court decision on the case—which admitted the accusation against her—on the grounds that the judge had not evaluated the evidence properly. A Caracas appeals court accepted the appeal and ordered a new hearing. Court of Appeals of the Criminal Judicial Circuit of the Metropolitan Area of Caracas (Corte de Apelaciones del Circuito Judicial Penal del Area Metropolitana de Caracas), Chamber 9, Case No. 1934-06, October 26, 2006.

²²⁹ Ibéyise Pacheco, "Entre Delincuentes," *El Nacional*, May 9, 2003.

Like Salazar, Pacheco was prosecuted not for these allegations but for evidence she submitted to the prosecutor in the course of his investigation, in her case for perjury. The investigation was eventually annulled on due process grounds.²³⁰

In a May 2003 article entitled “Between Delinquents,” featured in *El Nacional*, Pacheco published an alleged conversation between Hugo Chávez, Vice-President José Vicente Rangel, other officials, pro-government legislators, and military officers that supposedly took place in Miraflores (the presidential palace) the previous February, two months before the short-lived coup. Among the plans allegedly approved was one to kidnap union leader Carlos Ortega and blame the crime on an extreme left-wing Chavista group, another to intimidate the press, and another to organize fake terrorist attacks and assassinate opposition figures.²³¹

After interviewing all the alleged participants in the conversation, the prosecutor concluded that it was fictitious, and closed the investigation. The prosecutor then concluded that Pacheco had lied during the investigation about the transcription of an alleged tape recording on which the article was based.²³² Based on a discrepancy between her version and the evidence of a fellow journalist, the prosecutor opened proceedings against Pacheco for perjury that lasted for two-and-a-half years.²³³

Her lawyers filed an appeal to the Supreme Court alleging that Pacheco’s rights to due process had been violated. They argued that she had been charged without having legal representation and being given an opportunity to defend herself, in violation of Venezuelan law.²³⁴

²³⁰ Ibeyise Pacheco has faced ten prosecutions for defamation, treason, and perjury since 2002. At present, all but one or two have been settled by agreement or have been annulled. Nevertheless, in March 2006, Pacheco was held under house arrest after being sentenced to nine months in prison for defaming an army colonel whom she had accused of faking his academic credentials. She admitted making a mistake, and the colonel pardoned her. Carlos Correa and Débora Calderón, *El Peso de las Palabras*, pp. 75-76.

²³¹ Pacheco, “Entre Delincuentes,” *El Nacional*.

²³² Prosecutor’s written statement of charges (Fiscal Quincuagésimasexta del Area Metropolitana de Caracas), Acusación, undated.

²³³ David González, “Imputaron a Ibeyise Pacheco en expediente abierto por petición del vicepresidente,” *El Nacional*, October 29, 2004.

²³⁴ Defense petition to the Supreme Court (Asunto: Petición de Avocamiento), July 26, 2005.

Finally, in April 2006, the Supreme Court's Cassation Chamber granted the appeal and annulled the trial, finding that the prosecutor had failed to ensure that Pacheco was legally represented at the hearing at which she was charged, and moreover had denied her the right to be heard.²³⁵

Luz Mely Reyes

Most of the journalists who have faced legal action for their reporting have been outspoken Chávez opponents, or have worked for strongly antigovernment media. However, investigative reporters working for pro-government media have not been immune from legal intimidation by government officials. In March 2007, Luz Mely Reyes, an investigative reporter for the generally pro-government tabloid *Últimas Noticias*, received a letter from a cabinet minister threatening to have her prosecuted for conspiracy for a series of reports alleging irregularities in a major government development project.

On March 11, 2007, Reyes published the first of a series of weekly articles in the newspaper describing how contracts for government development projects had been traded in exchange for million-dollar commissions, with an estimated loss to the state of about US\$117 million.²³⁶ The projects were part of a joint development plan with Iran to install corn and milk production facilities in different parts of Venezuela. Execution of the plan was entrusted in March 2006 to the Ministry of Communal Economy, and was supposed to take six months. However, by the time the articles appeared none of the projects were operational and widespread management irregularities had been detected. At the center of the controversy were various successive communal economy ministers.

On March 18 during a "Hello President" transmission from the state of Barinas, Chávez complained about a reference to Iran in the title of one of the articles,

²³⁵ Supreme Court Criminal Chamber, Eladio Ramón Aponte Aponte, Case No. 05-000354, April 4, 2006, <http://www.tsj.gov.ve/decisiones/scp/Abril/A05-0354-124.htm> (accessed August 4, 2008).

²³⁶ Luz Mely Reyes, "Se buscan recompensa," *Últimas Noticias*, March 11, 2007; Eliezer Díaz Rangel, "Precisiones," *Últimas Noticias*, March 19, 2007.

accusing the paper of being manipulated by powerful groups in the country, which he did not identify.²³⁷

Reyes and the paper's director, Eleazar Díaz Rangel, later received a letter from the communal economy minister, threatening both of them with prosecution for criminal conspiracy under a provision of the criminal code that punishes those who "conspire or rebel in order to violently change the Constitution of the Bolivarian Republic of Venezuela."²³⁸ This grave political crime carries a prison sentence of up to 24 years. The minister expressed concern that the article could be part of a "campaign destined to encourage disloyal competition or simply cause economic damage to people, enterprises and institutions."²³⁹

Although the Attorney General's Office never took up the case, the minister's threatening letter was itself problematic, since threats by officials of legal action in response to publications can lead to media self-censorship and hence indirectly limit freedom of expression.

Laureano Márquez and Teodoro Petkoff

In February 2007, a court specializing in child welfare cases fined author Laureano Márquez for publishing a letter to Chávez's nine-year-old daughter Rosinés, satirizing Chávez's authoritarian style of government, which appeared on the cover of the newspaper *Tal Cual* on November 25, 2005. The newspaper's director, Teodoro Petkoff, was also fined. The fines totaled nearly US\$50,000.

The imaginary letter asked Chávez's daughter to persuade her father to soften his attacks on his political opponents.²⁴⁰ A child welfare judge ruled that it violated the

²³⁷ César Concepción Salza, "Chávez: No es justo meter a Irán en supuesta corrupción," *Últimas Noticias*, March 19, 2007.

²³⁸ Criminal Code of Venezuela, art. 144.

²³⁹ Luz Mely Reyes, "La bonita libertad," *Últimas Noticias*, March 25, 2007. The letter said: "we are concerned that what is expressed in the publications I refer to may form part of a national or international conspiracy, classified as a crime under article 144 of the Criminal Code; or, it may form part of a campaign destined to encourage disloyal competition or simply cause economic damage to people, enterprises and institutions." ("Es de nuestra preocupación que lo expresado en las referidas publicaciones pueda formar parte de una conspiración nacional o internacional, tipificada como delito en el artículo 144 del Código Penal; o puede ser parte de una campaña destinada a fomentar la competencia desleal o simplemente causar daños económicos a personas, empresas o instituciones.")

²⁴⁰ Laureano Márquez, "Querida Rosinés," *Tal Cual*, November 25, 2005.

child's right to honor, reputation, and privacy, which are protected under the Organic Law for the Protection of Children and Adolescents (LOPNA) as well as Venezuela's law approving the United Nations Convention on the Rights of the Child.²⁴¹

But more was at stake than the child's privacy. The court found that the article "incited disrespect for symbols of the nation and for her father, since, regardless of the office he holds, he deserves his children's respect, and a medium of communication should not encourage a young girl to despise her father, or involve a girl in political argument concerning the post that he holds, nor does the girl need to have direct knowledge of the political objections of the citizens..."²⁴² The judge concluded that the child's rights to honor, peer-group relations, family life, and social development had been gravely affected.

In the newspaper's defense Petkoff claimed that it was Chávez himself who had made his daughter into a public figure by mentioning her repeatedly in his speeches. A few days before the article appeared, Chávez had suggested in his "Hello President" broadcast that the national coat of arms should be changed because his daughter had pointed out that the white horse on the emblem was looking the wrong way, an event which in fact came to pass.²⁴³

Article 65 of the LOPNA protects children's "right to honor, reputation, self image, private life, and family privacy, which may not be subject to arbitrary and illegal interference."²⁴⁴ While the judge found that the article had "seriously compromised"

²⁴¹ Organic Law for the Protection of Boys, Girls, and Adolescents [Ley Orgánica para la Protección de Niños, Niñas y Adolescentes], *Official Gazette*, No. 5,859, 2007, http://www.tecnoiuris.com/derecho/LOPNA_2007.php (accessed August 4, 2008). Article 65 prohibits the publication of images of children without their consent, as well as of information that could affect their honor or privacy, especially that of victims or alleged perpetrators of crimes.

²⁴² Tribunal de Protección del Niño y Adolescente de la Circunscripción Judicial del Estado Lara, Case No. KP02-V-2006-00226, February 8, 2007.

²⁴³ Transcript of "Aló Presidente," No. 240, November 20, 2005, http://www.alopresidente.gob.ve/component/option,com_docman/Itemid,54/task,doc_view/gid,78/ (accessed May 8, 2008). In fact, the coat-of-arms was officially changed on March 9, 2006. The horse now looks to the left.

²⁴⁴ "All children and adolescents have the right to honor, reputation, and good image. In this way they have the right to a private life and to an intimate family life. These rights cannot be the object of arbitrary or illegal injuries." ("Todos los niños y adolescentes tienen derecho al honor, reputación y propia imagen. Asimismo tienen derecho a la vida privada e intimidad de la vida familiar. Estos derechos no pueden ser objeto de injerencias arbitrarias o ilegales.") Organic Law for the Protection of Boys, Girls, and Adolescents, art. 65.

these rights, she did not explain how she reached this conclusion. According to her finding, “there is no report to determine how her rights were damaged, what were the disturbances in her family life, what was the harm caused, but we know that it is so, since we have all been children....” The judge added, “it is also evident, and follows from the [president’s] speeches on ‘Hello President’ that neither the father, nor the child herself, agrees with the publication.”²⁴⁵

The judge was referring to remarks by Chávez in his weekly broadcast two days after the publication of the *Tal Cual* article. Chávez had criticized the writer’s reference to his daughter, describing her reaction to the article with pride: “She said to me: ‘Papi, it’s a lack of respect for the coat-of-arms.’ She didn’t complain about herself, but about the coat-of-arms, you see? How fantastic children are! How fantastic children are to teach a lesson to those animals infesting the sewers!”²⁴⁶ The prosecution of *Tal Cual* seemed to follow the cue of the president’s objections.

Regulating Media Content

In December 2004, the Law on Social Responsibility in Radio and Television (“Social Responsibility Law”), a comprehensive statute that regulates television and radio content, came into force. The new law, which replaced broadcasting regulations enacted in 1984, contained detailed regulations to protect minors from exposure to unsuitable content, established programming obligations in order to promote Venezuelan music and national producers, and allowed audience groups to participate in broadcasting regulation. The law also expanded the scope of an already broad prohibition on incitement and established severe penalties for broadcasters that violated it.

²⁴⁵ Tribunal de Protección del Niño y Adolescente de la Circunscripción Judicial del Estado Lara, Case No. KP02-V-2006-00226, February 8, 2007.

²⁴⁶ Transcript of “Aló Presidente,” No. 24, November 27, 2005, http://www.alopresidente.gob.ve/component/option,com_docman/Itemid,54/task,doc_view/gid,79/ (accessed August 5, 2008). “Entonces ella me llamó anoche y me dijo: ‘Papá’. Ella no reclamó por ella ¿saben? Fue lo más grande, que me llenó de orgullo. Ella me dijo: ‘Papi, es un irrespeto al Escudo’, pero no reclamó por ella, sino que reclama por el Escudo, ¿ves? Entonces ¡qué grandes son los niños! ¡Qué grandes son las niñas para darle lección a las bestias que pululan por ahí entre los albañales!”

The broad and imprecise wording of the new incitement provisions, the severity of the penalties, and the fact that the law is enforced by a body dependent on the executive branch all increase the broadcast media's vulnerability to arbitrary interference and pressure to engage in self-censorship.²⁴⁷

International Norms

It is generally recognized that incitement to violence may legitimately be subject to legal sanctions on public order grounds. But the power to prohibit such speech is not unlimited. Because of the importance of allowing a full and free public debate, the government must only impose restrictions on grounds of incitement where there is a direct relation between the speech in question and a specific criminal act.

The International Criminal Tribunal for Rwanda, for example, held that the "direct" element of incitement implies that the incitement "assume a direct form and specifically provoke another to engage in a criminal act," and that "more than mere vague or indirect suggestion goes to constitute direct incitement....The prosecution must prove a definite causation between the act characterized as incitement ... and a specific offense."²⁴⁸

In *Incal v. Turkey*, the European Court of Human Rights ruled that Turkey had violated the European Convention on Human Rights by sentencing a Turkish national to prison because he had written a propaganda leaflet that, according to the government, incited hatred and hostility through racist words and advocated illegal forms of protest. The court agreed that the leaflet included a number of "virulent" criticisms of the government's policies towards the Kurdish minority, and called on Kurdish citizens to "oppose" these policies by forming "neighborhood committees." The court concluded, however, that these appeals could not be taken as incitement

²⁴⁷ The law also contains detailed provisions on scheduling and content restrictions on language, drugs, alcohol, gambling, sex, and violence. It prescribes fines of up to two percent of a TV channel or radio station's income for serious infractions. Law on Social Responsibility in Radio and Television, art. 28.

²⁴⁸ The International Criminal Tribunal for Rwanda, Decision of September 2, 1998, *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, 6.6.3: 557. The tribunal was applying Article 2(3)(c) of the Convention on the Prevention and Punishment of the Crime of Genocide, which prohibits "direct and public incitement to commit genocide."

All translations by Human Rights Watch except for text from international instruments, the Venezuelan Constitution, the Social Responsibility Law, and the Regulations on Community Broadcasting.

to the use of violence, hostility, or hatred between citizens. It also considered that a prison sentence was "disproportionate to the aim pursued and therefore unnecessary in a democratic society."²⁴⁹

As these judgments illustrate, governments are required to tread with care to avoid endangering freedom of expression in efforts to prevent violence or the disruption of public order. Moreover, because the crucial link between speech and action must be demonstrated by interpretation and argument, it is essential that the procedures under which cases are examined are transparent and impartial.

Incitement Provisions

The Social Responsibility Law, which applies to all television and radio broadcasters except international cable channels, contains broad and imprecise provisions on incitement whose infringement can lead to a channel having its broadcasting license suspended or revoked.

According to article 29 of the law, stations which transmit messages that “promote, defend or incite war,... disturbance of public order,... crime..., or are a threat to national security” may have their license suspended for 72 hours or revoked for up to five years on a second offense.²⁵⁰ In addition, once an investigation under article 29 is underway, the law permits the government telecommunications commission,

²⁴⁹ European Court of Human Rights, *Incal v. Turkey*, judgment of June 9, 1998, (41/1997/825/1031), available at <http://www.legislationline.org/legislation.php?tid=112&lid=4884>, paras. 50, 59.

²⁵⁰ Art. 29 states: “Radio and televisions service providers shall be sanctioned with:

1. Suspension for up to seventy-two consecutive hours, whenever the messages broadcast: promote, defend or incite war; promote, defend or incite disturbance of public order; promote, defend or incite crime; are discriminatory; promote religious intolerance; are a threat to national security; are anonymous; or whenever the providers of radio, television or subscription broadcasting service have been punished on two occasions within a period of three years following the date on which the first sanction was imposed.
2. Revocation of the authorization for up to five years and revocation of the concession, whenever the sanction mentioned in section 1 of this article, is repeated within a period of five years following the occurrence of the first sanction. The sanctions foreseen in Section 1 shall be imposed by the Social Responsibility Directorate in accordance with the procedures established by this law. The sanction foreseen in Section 2, whenever it involves a revocation of the authorization or concession, shall be applied by the governing organ in matters of telecommunications. In both cases, the ruling shall be pronounced within thirty working days following reception of the case documents by said competent organ.

Law on Social Responsibility (official translation issued by CONATEL), art. 29.

CONATEL, to censor the broadcaster's messages if they are considered to violate the article's provisions.²⁵¹

The Social Responsibility Law was intended to modernize broadcasting regulations which date from 1984, but the overly vague incitement provisions of those regulations were retained and expanded.²⁵² Whereas the 1984 regulations referred only to "incitement,"²⁵³ article 29 of the new law also makes it an offense to "promote" (*promover*) or "defend" (*hacer apologia*) disturbances, crimes, or threats to national security. Under the new law, broadcasters can be sanctioned for commentary that appears to justify actions that already occurred.

The lack of clear language limiting the application of these terms increases the possibility of arbitrary application, and also offends the principle that laws must be of sufficient certainty and legal precision that people are able to regulate their conduct to avoid infringement. This principle of legality is infringed where it would be particularly difficult to distinguish between the circumstances in which a message would be considered as public "promotion" or "defense" of an act of public disorder and those in which it would represent the legitimate exercise of the right to express an opinion.²⁵⁴

²⁵¹ Law on Social Responsibility, art. 33. Stations are allowed to appeal and present evidence before CONATEL reaches a final decision.

²⁵² Reglamentos de Radiocomunicaciones, Decreto No.2,427, February 1, 1984.

²⁵³ *Ibid.*, art. 53(c). The Broadcasting Regulations of 1984 prohibited the transmission of "messages, speeches, sermons, or lectures that incite rebellion or lack of respect for the legitimate institutions and authorities." This article prohibited not only the incitement of criminal breaches of public order, but also expressions found to show lack of respect to authorities, an example of an "insult" provision. It is to the credit of the government and its supporters that this insult provision was dropped during debate of the Social Responsibility Law.

²⁵⁴ In many cases in which governments have sought to limit language that does not directly advocate violence, the European Court of Human Rights has found the government has gone too far and violated the protection of free speech. For example, in a series of cases, the court has held that speech criticizing democracy and calling for the imposition of Sharia law cannot legitimately be subject to restriction provided that it does not incite violence. European Court of Human Rights, *Gunduz v. Turkey*, (no. 35071/97), judgment of December 4, 2003, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699399&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. The court has held similarly in the case of separatist propaganda. European Court of Human Rights, *Association Ekin v. France*, (no. 39288/98), judgment of July 17, 2001, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=697480&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; *Okçuoğlu v. Turkey [GC]*, (no. 24246/94), judgment of July 8, 1999, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696154&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

The Social Responsibility Law also greatly increased penalties for infractions. Under the 1984 broadcasting regulations fines had become trifling, not exceeding 4,000 Bolívares (a little over US\$2.00 in 2004).²⁵⁵ Channels or stations that violate the regulations to protect children now face fines of up to 2 percent of their income in the previous tax year. Whereas in the 1984 broadcasting regulations, incitement of rebellion was subject to a fine or suspension, in the Social Responsibility Law, incitement is punishable by suspension on a first offense.

Dangers of Broad and Imprecise Wording

This latitude in the current provisions is particularly troubling given the penchant of Chávez and government officials to categorize dissent as subversion, treason, or incitement of violence. They often describe protests as a cover for destabilizing action and as being manipulated by the “oligarchy,” “fascists,” or the “imperial power.” Chávez, for example, referred to the largely peaceful student protests against the non-renewal of RCTV’s broadcasting license in 2007 as a “soft coup” (*golpe blando*).²⁵⁶

Similarly, the current communication and information minister referred to the boycott of the 2005 congressional elections as “a new coup d’état” and as being “contrary to democracy.”²⁵⁷ While electoral abstention may be harmful if its effect is to weaken democratic checks and balances, it is also an exercise of the right to engage in peaceful protest. To describe it as tantamount to a coup is at best misleading and inaccurate and worst another threat against non-violent expression, especially given that neither participation in elections nor voting are obligatory in Venezuela. Vice-President José Vicente Rangel even described opposition candidate Manuel Rosales’s suggestion that the election be postponed as being “in the same line as the April 12 coup.”²⁵⁸

²⁵⁵ Broadcasting Regulation, art. 199.

²⁵⁶ “Chávez alertó sobre nuevo plan conspirativo contra Venezuela,” Agencia Bolivariana de Noticias, June 17, 2007, http://www.abn.info.ve/go_news5.php?articulo=95289 (accessed May 23, 2008).

²⁵⁷ “Consejo de Responsabilidad Social insta a los medios a cumplir Ley Resorte,” *El Universal*, December 2, 2005, http://www.eluniversal.com/2005/12/02/pol_ava_02A639131.shtml (accessed May 23, 2008).

²⁵⁸ Jose Luis Carrillo, “Opositores perdieron el chivo y el mecate: Rangel,” *Últimas Noticias*, December 2, 2005.

Following the government's logic, any radio or TV broadcasts deemed to have incited, promoted, or merely defended participation in the protests, the electoral abstention, or the postponement of elections could be accused of violating the Social Responsibility Law, and the broadcaster would be liable to suspension or ultimately revocation of its license for five years.

Lack of an Independent Regulatory Body

The bodies responsible for investigating and sanctioning infractions under the Social Responsibility Law do not enjoy sufficient guarantees of independence to protect them from political interference. The decision to open an investigation and the application of sanctions for infractions of broadcasting laws are the responsibility of the National Telecommunications Commission (CONATEL), a body attached to the Ministry of Communication and Information. CONATEL also decides on the application of preventive measures, which as noted can include prohibiting transmissions.²⁵⁹ While defined in law as an autonomous body, CONATEL's four-person board of directors and its director general are all appointed by the president of Venezuela and can be dismissed at his discretion.²⁶⁰

The government also has a majority on the Directorate of Social Responsibility, the body created under the Social Responsibility Law to analyze infractions and impose sanctions. The directorate is headed by CONATEL's director general, and includes six officials selected by ministries and state institutions, two representatives of audience groups organized by CONATEL, a university representative, and a church representative.²⁶¹

The danger of overbroad interpretation of the vague incitement provisions could be limited if the enforcement body were independent from the executive branch and

²⁵⁹ Law on Social Responsibility, arts. 19 (11), (13).

²⁶⁰ Organic Law on Telecommunications [Ley Orgánica de Telecomunicaciones], *Official Gazette*, No.36,970, 2000, http://www.tsj.gov.ve/legislacion/LT_ley.htm (accessed August 4, 2008), arts. 35 and 40. When the commission was incorporated into the Ministry of Communication and Information following the December 2006 elections the then-minister of telecommunications assumed the position of director general.

²⁶¹ Law on Social Responsibility, art 20. CONATEL has organized and maintains a register of over 1,078 audience committees, which are often the source of the complaints it investigates. Ministerio del Poder Popular para la Comunicación y la Información, "Libertad de expresión: política y estrategia del Estado Venezolano," 2007.

staffed by professionals who have suitable qualifications, serve fixed terms of office, and enjoy security of tenure while in office. While the directorate includes members from different sectors of society, the law does not state the criteria required for appointment to the directorate or the period of office of its members, and it does not protect them from arbitrary or politically motivated dismissal.

Government Use of Incitement Provisions

To Human Rights Watch's knowledge, CONATEL has not at this writing imposed any sanction under article 29 of the Social Responsibility Law.²⁶² Yet officials have repeatedly invoked these provisions in warnings issued to television stations at moments of political tension, and in circumstances in which their application would have been unjustified and hence an arbitrary interference in freedom of expression.

Coverage of Anti-Crime Protests

In April 2006, for example, CONATEL's director general invoked the incitement provision of the Social Responsibility Law in response to private stations' coverage of street protests sparked by a violent crime. In letters to the directors of Globovisión and RCTV, the official warned them against inciting breaches of public security and crime and reminding them that the station could be punished for failing to comply. The provisions of article 29 of the Social Responsibility Law were underscored in the letters.²⁶³ Globovisión and RCTV had been covering the discovery of the bodies of three teenage brothers and their driver who had been kidnapped for ransom and

²⁶² Between December 2004, when the Social Responsibility Law entered force, and July 2007 no television station has been punished for incitement, or for any other offense related to coverage of political events or the expression of political views. The sanctions applied against radio stations have been for transmitting race-track advertisements (five cases); failure to broadcast the mandatory number of hours of Latin American and Caribbean music (one case); and breach of the rules on language and sex aimed at protecting children (one case). All of the other offenses were for failure to comply with the stations' obligation under the law to present CONATEL with a monthly report on their music programming. "CONATEL: Cuadro de Procedimientos Administrativos de la Ley de Responsabilidad Social en Radio y Televisión", (undated), document provided to Human Rights Watch by Franco Silva, CONATEL, March 15, 2007. This information was published in February 2006. In July 2007, a CONATEL official told Human Rights Watch that no other radio or TV stations have been sanctioned since then. Email communication from Aylema Rondón, Manager of Social Responsibility, CONATEL, to Human Rights Watch, July 6, 2007.

As noted previously, the Ministry of Infrastructure opened investigations against Venevisión, RCTV, Globovisión, and Televen in 2003 for alleged infractions of the Broadcasting Regulations during their coverage of the 2002/2003 oil strike. These investigations were never concluded. Human Rights Watch, *Caught in the Crossfire: Freedom of Expression in Venezuela*, vol. 15 no. 3(B), May 2003, <http://www.hrw.org/reports/2003/venezuela/venez0503-03.htm#TopOfPage> (accessed August 4, 2008).

²⁶³ Letter from Alvin Lezama, CONATEL director, to Guillermo Zuloaga, President of Globovisión, April 6, 2006.

ultimately executed. The shocking murders sparked street protests—extensively covered by the two channels—against the government’s failure to tackle the problem of rising violent crime.

These brutal murders and the protests they sparked were clearly matters of public interest, and therefore legitimately the subject of extensive coverage. The government was not justified in invoking the incitement provisions as a lever to persuade the channels to change their editorial decisions, whether or not they believed the channels had political motives in making such decisions.

Coverage of RCTV Case

Government officials also invoked the incitement provisions in response to media coverage of RCTV’s removal from the public airwaves after its license expired. When this event sparked large student demonstrations across Venezuela, the Directorate of Social Responsibility warned about transmitting messages that incite hatred and lawbreaking, and announced that it was, in permanent session, monitoring media coverage of the protests.²⁶⁴

The government objected specifically to the media’s presence at a press conference that the Inter American Press Association (IAPA) held in Caracas. The Ministry of Communication and Information’s delegate on the directorate claimed that an IAPA statement read at the conference invited Venezuelans not to recognize the government’s decision not to renew RCTV’s broadcasting concession.²⁶⁵ She said that the IAPA’s declarations violated the Social Responsibility Law and called on the channels not to broadcast them. The official warned the audiovisual media that they could face a 72-hour shutdown if they disseminated messages “promoting discrimination or inciting war.”²⁶⁶

²⁶⁴ “Directorio de Responsabilidad Social instala sesión permanente,” CONATEL press release, May 26, 2007, <http://www.conatel.gob.ve/> (accessed August 4, 2008).

²⁶⁵ “Consideran en Venezuela una ‘injerencia’ postura de la SIP,” *Telesur*, May 27, 2007, <http://www.telesurtv.net/secciones/noticias/nota/index.php?ckl=12240> (accessed August 4, 2008); “Declaraciones de SIP son un injerencia en Venezuela,” Bolivarian News Agency (Agencia Bolivariana de Noticias), May 27, 2002, http://www.abn.info.ve/go_news5.php?articulo=93196&lee=18 (accessed August 4, 2008).

²⁶⁶ “Directorio de Responsabilidad Social llamó a ejercer con ética el periodismo,” CONATEL press release, May 27, 2007, <http://www.conatel.gov.ve/noticia.asp?numn=1972> (accessed May 28, 2008).

The accusation that IAPA had incited disobedience of the law was unfounded. The IAPA press release described the RCTV decision as an “abuse of power” and called the Venezuelan government “undemocratic” for declining to renew RCTV’s license.²⁶⁷ While the press release might have encouraged some people to discuss the issue or express comparable views, it could not have “incited” illegal acts preventing the decision from taking effect because only the government or the courts could have prevented its implementation. In any case, the media had a right to report on what the press association said at its press conference, whether or not it was critical of the decision and the government.

Coverage of Electoral Boycott

In December 2005, CONATEL invoked the Social Responsibility Law’s incitement provisions in response to media coverage of the campaign leading up to the congressional elections of that month, during which the main opposition parties announced they were pulling out and called on voters to boycott the vote. The government was concerned that the private media were themselves encouraging the election boycott. Top government officials including Chávez and Vice-President José Vicente Rangel accused opposition parties advocating abstention of fomenting an “electoral coup”, instigated by the United States embassy.²⁶⁸ Chávez, on a national broadcast, warned RCTV and Globovisión that “the permissive Chávez was buried in 2002” and he would not allow further calls for “destabilization.”²⁶⁹

²⁶⁷ What IAPA President Rafael Molina said (as quoted in the IAPA press release) was: “This is a very easy thing to describe – it is nothing more or less than an act of abuse of power in which logic disappears,” and “we clearly see how a politically-motivated and undemocratic step has been taken to shut down a news outlet that had an independent editorial policy not to the government’s liking.” According to another IAPA official cited in the press release, “we are witnessing one further link in a global strategy that clearly demonstrates how the government is trying to control media and limit the Venezuelan people’s right to know . “IAPA calls Venezuelan government undemocratic for taking RCTV off the air,” Inter American Press Association press release, May 28, 2007, <http://www.sipiapa.com/pressreleases/srchcountrydetail.cfm?PressReleaseID=1925> (accessed August 4, 2008).

²⁶⁸ Vice-President José Vicente Rangel described the abstention campaign as a “subversive electoral strike on the same format as April 11, 2002” (“un paro electoral subversivo dentro del mismo formato del 11 de abril de 2002”). He accused the United States embassy of being behind the campaign. María Lilibeth Da Corte, “Planean paro electoral subversivo,” *El Universal*, December 1, 2005, http://www.eluniversal.com/2005/12/01/pol_art_01106AA.shtml (accessed August 4, 2008).

²⁶⁹ “The permissive Chávez was buried in 2002, the one who allowed them to call for destabilization: I’m not going to allow it, whatever the world says. I recommend that they consider their position carefully. I’m considering mine, as in any battle.” (“El Chávez permisivo quedó enterrado en el 2002, él que permitió que llamaran a la desestabilización. No lo voy a permitir. Diga lo que diga el mundo. Le recomiendo que se midan, los estoy midiendo como en cualquier batalla”). María Lilibeth Da Corte, “Chávez alerta sobre golpe electoral,” *El Universal*, December 2, 2005, http://politica.eluniversal.com/2005/12/02/pol_art_02106A.shtml (accessed August 4, 2008).

Within hours of Chávez's national address, CONATEL summoned media directors to a meeting to discuss coverage of the National Assembly elections after opposition candidates announced that they were withdrawing from the race in protest at alleged electoral irregularities. A CONATEL official who was present at the meeting told the press afterwards that he had merely "refreshed" the managers' memories about their legal responsibilities.²⁷⁰ But more specifically, according to Venevisión's vice-president, the directors were urged to make sure their coverage did not incite crime, attack national security, or call for war—the three offenses listed in article 29 of the Social Responsibility Law.²⁷¹

CONATEL official told Human Rights Watch there was no reason to be concerned about what took place. "The meeting was to evaluate with [the directors] how to interpret the norms in force and to request their cooperation. It was just a preventive measure, and there were no problems afterwards."²⁷² However, what was troubling about the meeting was that the central issue was the channels' coverage of abstention calls made by the opposition candidates. While the electoral boycott was controversial, opposition calls for abstention and opposition demonstrations challenging the electoral process were clearly matters of public interest. Covering the abstention campaign was a legitimate activity and cannot be said to have constituted incitement to crime or violence or a threat to national security.

Other Incidents of Threatened Action against Broadcasters

In addition to threatening sanctions under the Social Responsibility Law, the government has pressed for criminal investigations against Globovisión on highly dubious allegations.

In May 2007, at the request of the communication and information minister, the attorney general launched an investigation to establish whether Globovisión had transmitted messages inciting Venezuelans to assassinate Chávez. The minister said

²⁷⁰ "Solicitan a los medios propiciar la participación," *El Universal*, December 3, 2008, http://www.eluniversal.com/2005/12/03/pol_art_03106A.shtml (accessed August 4, 2008).

²⁷¹ "Consejo de Responsabilidad Social insta a los medios a cumplir Ley Resorte," *El Universal*, December 2, 2005, http://www.eluniversal.com/2005/12/02/pol_ava_02A639131.shtml (accessed on August 4, 2008).

²⁷² Human Rights Watch interview with Franco Silva, general manager of CONATEL, and Aylema Rondón, manager of Social Responsibility in Radio and Television, Caracas, March 15, 2007.

he believed the station had urged the president's assassination by transmitting a news archive clip of the gun attack on Pope John Paul II with an accompanying soundtrack of a song by salsa star Rubén Blades.²⁷³ The communication and information minister sent the complaint to the attorney general, insisting that communications experts who had analyzed the clip concluded that it contained a subliminal message inciting violence against the president.²⁷⁴

The clip in question was transmitted by Globovisión as part of the political comment program "Hello Citizen," during an interview with RCTV's president, after RCTV's license renewal had been refused. During commercial breaks the station was airing clips from RCTV's 53-year history covering world events, including the sequence of the gun attack on the pope. The soundtrack from the Blades song "Have Faith," contained the words "Have Faith, it's Not Over Yet!" (*Tengan fe, que esto no se acaba aquí*) and had already been transmitted several times that week on the program. There is nothing to suggest that the lyrics are about anything other than hope and perseverance, and Globovisión, in fact, claimed that its commentators had urged participants not to resort to violence.²⁷⁵ Although the attorney general began an investigation into the minister's complaints, and technicians who worked on "Hello Citizen" gave evidence as witnesses, nothing was heard of the investigation afterwards.²⁷⁶

In another case in October 2007, the interior and justice minister asked the attorney general to investigate an amateur video aired by Globovisión that showed a robbery in progress on a main road in Caracas.²⁷⁷ The minister accused the station of engaging in a psychological campaign to generate anxiety and fear in the population,

²⁷³ "Ministro Willian Lara formaliza denuncia contra Globovisión ante el Ministerio Público," Ministry of Communication and Information news release, May 28, 2007, http://www.minci.gob.ve/noticias/1/14030/ministro_willian_laraormaliza.html (accessed August 5, 2008).

²⁷⁴ Ibid. "Venezuela: Gobierno acusa a otro canal," *BBC Mundo*, May 29, 2007.

http://news.bbc.co.uk/1/hi/spanish/latin_america/newsid_6699000/6699765.stm (accessed August 4, 2008).

²⁷⁵ Diasdado Cabello, the prominent Chavista governor of Miranda state, acknowledged that Globovisión had called for calm, but considered it "suspicious" that it continued to transmit images of violence "as clear evidence of its inflammatory conduct." "Cabello advierte a los Guarimberos: no se metan ni con el pueblo ni con el presidente," *aporrea.org*, May 29, 2007, <http://www.aporrea.org/oposicion/n95754.html> (accessed May 28, 2008).

²⁷⁶ Human Rights Watch telephone interview with Ana Cristina Núñez, Globovisión's legal advisor, May 29, 2008.

²⁷⁷ "A tribunal canal de TV por difundir un video," *El Universal*, October 8, 2007; "Globovisión consignó en el CICPC video de asaltos en autopista," *El Universal*, October 10, 2007.

and said he suspected that the video has been “prepared” to attack the government’s anti-crime record. The beginning of the investigation was widely reported in the press, but it too was discontinued.²⁷⁸

Restricting Information

Chávez’s professed commitment to broadening popular participation in the political process has led neither to greater openness and transparency in government nor to easier public access to information held by government officials. Journalists and the public often experience difficulty in gaining access to what should be public information, and there is no legislation to provide effective redress in such circumstances.

International Norms

The right to “seek, receive, and impart” information is recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Convention on Human Rights.²⁷⁹

There is growing international recognition that the right to seek, receive, and impart information encompasses a positive obligation of states to provide access to official information in a timely and complete manner. Both regional and international organizations have held that the right of access to official information is a fundamental right of every individual.²⁸⁰ In the Americas, the Inter-American Court on

²⁷⁸ Human Rights Watch telephone interview with Ana Cristina Núñez, Globovisión’s legal advisor, May 29, 2008.

²⁷⁹ Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), art 19; International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 19(2); American Convention on Human Rights (“Pact of San José, Costa Rica”), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), art. 13(1). Human Rights Watch has always maintained that this right entails a general right of access to official information. Human Rights Watch, “Chile: Progress Stalled-Setbacks in Freedom of Expression Reform,” vol. 13, no. 1(B), March 2001.

²⁸⁰ Joint declaration by Ambeyi Ligabo, U.N. Special Rapporteur on Freedom of Opinion and Expression; Miklos Haraszti, OSCE Representative on Freedom of the Media; and Eduardo Bertoni, OAS Special Rapporteur for Freedom of Expression, December 6, 2004, <http://www.cidh.org/Relatoria/showarticle.asp?artID=319&lID=1> (accessed August 4, 2008). Principle 4 of the Declaration of Principles on Freedom of Expression, approved by the IACHR at its 108th regular sessions in October 2000, <http://www.cidh.org/Relatoria/showarticle.asp?artID=26&lID=1> (accessed August 4, 2008); United Nations Economic and Social Council, Commission on Human Rights, *Civil and Political Rights, Including the Question of Freedom of Expression: The*

Human Rights has held that article 13 of the ACHR (on the right to freedom of expression) entails the right to receive information held by government offices, as well as these offices' obligation to provide it.²⁸¹ Moreover, it is internationally recognized that this right is crucial to ensure democratic control of public entities and to promote accountability within the government.²⁸²

Right to Freedom of Opinion and Expression, Report of the Special Rapporteur, Ambeyi Ligabo, submitted in accordance with Commission resolution 2003/42, (New York: United Nations, 2003).

²⁸¹ Inter-American Court of Human Rights, *Claude Reyes Case*, Judgment of September 19, 2006, Inter-Am.Ct.H.R., (Series C), No. 151, paras. 76 and 77. Paragraph 76 states: "In this regard, the Court has established that, according to the protection granted by the American Convention, the right to freedom of thought and expression includes 'not only the right and freedom to express one's own thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds.' In the same way as the American Convention, other international human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, establish a positive right to seek and receive information." Paragraph 77 states: "In relation to the facts of the instant case, the Court finds that, by expressly stipulating the right to 'seek' and 'receive' 'information,' Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State."

Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS/Ser.L./V/II 116, Doc. 5 rev. 1 corr. 22, October 2002, para. 281. "As stated earlier, the right to freedom of expression includes both the right to disseminate and the right to seek and receive ideas and information. Based on this principle, access to information held by the State is a fundamental right of individuals and States have the obligation to guarantee it. In terms of the specific objective of this right, it is understood that individuals have a right to request documentation and information held in public archives or processed by the State, in other words, information considered to be from a public source or official government documentation."

²⁸² This right has been recognized in Europe since the early 1980s. Toby Mendel, "Libertad de Información: derecho humano protegido internacionalmente," *Comparative Law of Information (Derecho Comparado de la Información)*, January-June 2003, pp. 13-19, <http://www.juridicas.unam.mx/publica/librev/rev/decoinc/cont/1/cnt/cnt3.pdf> (accessed August 4, 2008).

The Inter-American Court of Human Rights held in 1985 that effective citizen participation and democratic control, as well as a true debate in a democratic society, cannot be based on incomplete information. Understanding freedom of expression as both the right to express oneself, and the right to obtain information, the Inter-American Court of Human Rights held that "freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable in the formation of public opinion.... 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."

Inter-American Court of Human Rights, "Compulsory Membership in an Association prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights)," *Advisory Opinion OC-5*, November 13, 1985, para. 70.

The OAS General Assembly has held in 2003, 2004, 2005, 2006, and 2007 that access to public information is an indispensable requirement for a democracy to work properly, and that states have an obligation to ensure it. *Access to Public Information: Strengthening Democracy*, adopted June 10, 2003, OAS General Assembly Resolution, AG/Res. 1932 (XXXIII-O/03), adopted June 10, 2003; *Access to Public Information: Strengthening Democracy*, adopted June 8, 2004, OAS General Assembly Resolution, AG/Res. 2057 (XXXIV-O/04); *Access to Public Information: Strengthening Democracy*, adopted May 26,

The right of access to information is governed by the “principle of maximum disclosure,” meaning the government is presumed to be under an obligation to disclose information.²⁸³ This presumption can only be overridden under circumstances clearly defined by law in which the release of information could undermine the rights of others or the protection of national security, public order, or public health or morals.²⁸⁴

2005, OAS General Assembly Resolution, AG/Res. 2121 (XXXV-O/05); Access to Public Information: Strengthening Democracy, adopted June 6, 2006, OAS General Assembly Resolution, AG/Res. 2252 (XXXVI-O/06); Access to Public Information: Strengthening Democracy, adopted June 5, 2007, OAS General Assembly Resolution, AG/Res. 2288 (XXXVII-O/07); <http://www.oas.org/juridico/English/regeneas.html>.

The Chapultepec Declaration, signed by most heads of state in the hemisphere, and the Lima Principles, endorsed by the OAS and U.N. Special Rapporteurs on Freedom of Expression and Opinion, also recognize this consensus. The Chapultepec Declaration determines in its second principle that every person has the right to seek and receive information, and in its third principle that “authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector.” The declaration was adopted on March 11, 1994, by the Hemisphere Conference on Free Speech held in Mexico City. Experts and 32 government representatives, including former Mexican President Carlos Salinas de Gortari, endorsed it. Chapultepec Declaration, adopted by the Hemisphere Conference on Free Speech, Mexico City, Mexico, March 11, 1994, http://www.declaraciondechapultepec.org/english/declaration_chapultepec.htm (accessed August 4, 2008). Principle 1 of the Lima Principles establishes access to information as an individual right and as a necessary component for a democratic society. Principle 2 establishes that states must make information available in a timely and complete manner. Lima Principles, adopted by experts on freedom of expression and by the U.N. and OAS Special Rapporteurs on Freedom of Opinion and Expression, November 16, 2000, <http://www.cidh.org/Relatoria/showarticle.asp?artID=158&lID=1> (accessed August 4, 2008), principles 1 and 2.

²⁸³ Principle 1 of The Public’s Right to Know—Principles on Freedom of Information Legislation holds that “[t]he principle that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances.” The Public’s Right to Know: Principles on Freedom of Information Legislation, adopted by Article XIX, an NGO working on freedom of expression and access to information, June 1999, <http://www.article19.org/pdfs/standards/righttoknow.pdf> (accessed August 4, 2008). It was later endorsed by the U.N. and Inter-American systems on human rights. Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OAS/Ser.L/V/II 116, Doc. 5 rev. 1 corr. 22, October 2002, para. 284; IACHR Annual Report 1999, Vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression, chapter II, OEA/Ser.L/V/II.111, Doc. 3 rev., Vol. III; UN Commission on Human Rights, “Resolution 1999/36,” E/CN.4/2000/63 (January 18, 2000), para. 43.

²⁸⁴ Article 19(3) of the ICCPR and Article 13(2) of the American Convention on Human Rights. The Inter-American Commission’s Declaration of Principles on Freedom of Expression states that the right may only be limited exceptionally and such limitations must “be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.” Inter-American Commission on Human Rights, Declaration of Principles on Freedom of Expression, approved at 108th regular session, October 2000, <http://www.cidh.org/Relatoria/showarticle.asp?artID=26&lID=1> (accessed August 4, 2008), principle 4.

Finally, the Johannesburg Principles hold that restrictions must be “necessary in a democratic society to protect a legitimate national security interest.” Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted by Article XIX, November 1996, <http://www.article19.org/pdfs/standards/joburgprinciples.pdf> (accessed August 4, 2008), principles 1 (d) and 11. The Johannesburg Principles were adopted on October 1995 by experts in international law, national security, and human rights, and were later recognized by the U.N. Special Rapporteur on Freedom of Opinion and Expression and the OAS Special Rapporteur for Freedom of Expression. UN Commission on Human Rights, “Report of the Special Rapporteur Mr. Abid Hussain,” UNCHR resolution 1993/45, E/CN.4/1996/39, March 22, 1996, para. 154; and Inter-

Access to Information under Venezuelan Law

Venezuela's 1999 Constitution guarantees the right of access to government files and records, "without prejudice to the limits acceptable in a democratic society concerning interior and external security, criminal investigation, and the intimacy of private life, in accordance with the law regulating the classification of documents whose contents are confidential or secret."²⁸⁵ The constitution also guarantees the right to "timely and truthful" information about official procedures affecting individuals directly, and access to any official resolutions adopted. And it establishes that "no censorship by public officials affecting the provision of information on matters under their responsibility will be permitted."²⁸⁶

In furtherance of the right to information, the 2001 Organic Law of Public Administration establishes that anyone can submit a written request to a state entity for a specified document and has a right to receive a copy at his or her own expense.²⁸⁷ By default, all requests or petitions directed to an administrative authority, whatever their nature, must receive a reply within 20 days.²⁸⁸ Officials who do not reply face a possible fine of between 5 and 50 percent of their monthly salary.²⁸⁹

Even though the obligation to provide information exists in law, there is no law that specifies the circumstances in which access to public documents may be denied. Nor is there any enforcement mechanism to address situations where officials fail to respond satisfactorily to requests for information. Officials at the Ministry of Communication and Information told Human Rights Watch that Andrés Izarra, during his first term as minister, presented a draft bill to the National Assembly to strengthen access to information that was discussed in the Assembly's sub-

American Commission on Human Rights, IACHR Annual Report 2003, Vol. III, Report of the Special Rapporteur for Freedom of Expression, chapter IV, OEA/Ser.L/V/II.118 Doc. 70 rev. 2.

²⁸⁵ Constitution of Venezuela, art. 143.

²⁸⁶ *Ibid.*

²⁸⁷ Organic Law of the Public Administration [Ley Orgánica de la Administración Pública], *Official Gazette*, No. 37-305, October 17, 2001, <http://www.finanzas.usb.ve/loap.pdf> (accessed August 4, 2008), arts. 138, 155-157.

²⁸⁸ *Ibid.*, Organic Law of Administrative Procedures [Ley Orgánica de Procedimientos Administrativos], *Official Gazette*, No. 2.818, July 1, 1981, <http://www.tsj.gov.ve/legislacion/lopa.html> (accessed August 4, 2008), art. 5.

²⁸⁹ *Ibid.*, art. 100.

committee on media.²⁹⁰ Human Rights Watch was unable to confirm this information, but to our knowledge no such bill has been discussed on the floor of the National Assembly.

The Venezuelan section of Transparency International presented its own bill in 2007 to the president of the National Assembly's sub-committee on media. As of July 2007 the organization had been unable to get the endorsement of three legislators, the minimum required for introducing a draft law for consideration.²⁹¹ In June 2008 the president of the sub-committee said that the sub-committee had "other priorities" and claimed that progress on the law had been held up by the attempts of some journalists to politicize the issue.²⁹²

Failure to Respect the Right of Access to Information

Government officials routinely deny or fail to respond to requests for information by journalists. According to an investigation by *Últimas Noticias*, a generally pro-government newspaper, journalists have encountered obstacles in obtaining information from the police on crime statistics, judges and court officials, hospitals, state enterprises such as PDVSA, the comptroller general's office, and various ministries.²⁹³

According to a log publicized by the newspaper *El Mundo*, only 37.5 percent of the officials responded to requests for official information made by its investigative reporters in 2007. The average wait for a reply was 38 days, almost twice the legal maximum. For example, a reporter approached the Ministry of Planning and Development to get information about the salaries of public employees. It took seven months, three letters, and a change of vice-minister before a reply was received.²⁹⁴ Similarly, it proved impossible to obtain information from the civil

²⁹⁰ Human Rights Watch interview with Carlos Aguilar, María Alejandra Díaz, and Lidice Altuve, Ministry of Communication and Information, Caracas, March 15, 2007.

²⁹¹ Human Rights Watch telephone interview with Mercedes de Freitas, board member, Transparencia Venezuela, July 30, 2007.

²⁹² Doris Villaroel, "Reforma a ley de periodismo incluirá acceso a la información," *El Mundo*, June 26, 2008.

²⁹³ Jorge Chávez and Tamoá Calzadilla, "27 de Junio, Día del Periodista: 'Una ley debe penalizar al funcionario que niegue la información,'" *Últimas Noticias*, June 26, 2005.

²⁹⁴ Human Rights Watch interview with Tamoá Calzadilla, Caracas, September 20, 2007; Tamoá Calzadilla, "En Venezuela los sueldos públicos son secreto del Estado", *El Mundo*, February 6, 2006, on the difficulty of obtaining information on government salaries.

register (ONIDEX) on the number of Venezuelans who had left the country since 1997.²⁹⁵

For NGOs, obtaining official information can be even more difficult. In a study conducted by the human rights NGO Espacio Público, 46 requests for information were made to the same number of government ministries and departments in 2007. The requests were for information about salaries, advertising expenditure, and a copy of the bill on access to information supposedly in the National Assembly. Only 4 percent of the requests received a positive reply. Eight-seven percent were rejected or not answered.²⁹⁶

In the absence of an enforcement mechanism, neither journalists nor NGO representatives have any means of compelling officials to disclose the information that is withheld.

Controlling the Airwaves

The government has misused its control of broadcasting frequencies to discriminate against channels that are political opponents. In the most prominent and egregious case, Chávez gave orders not to renew the concession of Venezuela's oldest television channel, Radio Caracas Television (RCTV), because it refused to tone down its hostile editorial stance.

International Norms

Evolving norms in international law have strengthened the obligation of governments to promote pluralism in broadcasting. In 2001, in a joint declaration, the special rapporteurs on freedom of expression for the United Nations, the OAS, and the OSCE, determined that:

Promoting diversity should be a primary goal of broadcast regulation; diversity implies gender equity within broadcasting, as well as equal opportunity for all sections of society to access the airwaves;

²⁹⁵ Emilia Díaz and Andrea Daza, "Casi dos meses le toma un funcionario contestar una carta," *El Mundo*, December 26, 2007.

²⁹⁶ "Informe Final: Estudio sobre Acceso a la Información Pública en Venezuela," Public Space (Espacio Público): 2007.

broadcast regulators and governing bodies should be so constituted as to protect them against political and commercial interference.²⁹⁷

The special rapporteurs issued a further declaration in 2007 stressing that media regulation to promote diversity must be protected from political interference:

Regulation of the media to promote diversity, including governance of public media, is legitimate only if it is undertaken by a body which is protected against political or other forms of unwarranted interference, in accordance with international human rights standards.²⁹⁸

Moreover, regional human rights norms on free expression do not allow states to use their control of radio-electrical frequencies to “impede the communication and circulation of ideas and opinions.”²⁹⁹ Nor may they use such control to “put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express.”³⁰⁰

To safeguard against bias, political favoritism, and corruption, the procedures for granting or refusing broadcasting licenses should be open, impartial, and transparent. As the Inter-American Commission on Human Rights pointed out in a press release on the RCTV case:

[I]n competitions for or in the awarding of licenses for the use of wave bands, in accordance with the principle of equality of opportunity, states must promote open, independent and transparent procedures

²⁹⁷ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression, “Challenges to Freedom of Expression in the New Century,” November, 2001, http://www1.osce.org/documents/rfm/2001/11/193_en.pdf (accessed August 4, 2008).

²⁹⁸ Joint Declaration 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 African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information, “Joint Declaration on Diversity in Broadcasting,” December 8, 2007, http://www1.osce.org/documents/rfm/2001/11/193_en.pdf (accessed August 4, 2008).

²⁹⁹ American Convention on Human Rights, art. 13 (3).

³⁰⁰ Inter-American Commission on Human Rights, “Declaration of Principles on Freedom of Expression,” approved at 108th session, 2000, principle 13.

with clear, objective and reasonable criteria that avoid any political discrimination on the basis of the editorial line of a media outlet.³⁰¹

Political Use of Discretionary Powers

Venezuelan law bestows the power to award radio and television concessions on the communication and information minister following prior technical evaluations carried out by CONATEL.³⁰² Although CONATEL is technically an autonomous agency, its four directors, like the communication and information minister, are all appointed by the president of the republic and can be dismissed at his discretion. There are no institutional controls to ensure that such decisions are based on an impartial consideration of the public interest rather than the government's political objectives.

In the case of free-to-air radio and television, concessions are decided on an individual basis, rather than through a competitive bidding process or lottery, as is the practice for other users of the airwaves. This means that the minister—and, by extension, the president—has full discretion to accept or reject applications. The absence of clear criteria for awarding concessions and the lack of impartial regulation of the process open the door to politically motivated and discriminatory decisions.

RCTV

In December 2006, Chávez announced on a nationwide broadcast that he would not renew the broadcasting license of RCTV, Venezuela's oldest and one of its most popular television stations. Filmed standing on a military parade ground, he said that Venezuela would no longer tolerate private media "at the service of coup-planning, against the people, against the nation, against the independence of the nation, and against the dignity of the Republic!"³⁰³

³⁰¹ "IAHCR concerned about freedom of expression in Venezuela," Inter-American Commission on Human Rights press release, No. 29/07, May 25, 2007, <http://www.cidh.oas.org/Comunicados/English/2007/29.07eng.htm> (accessed August 5, 2008).

³⁰² Under Article 40 of the Organic Law on Telecommunications, CONATEL's governing council is presided by its director general and consists of four directors appointed by the president. During 2007 Jesse Chacón, the communication and information minister, also held the post of director general of CONATEL.

³⁰³ María Lilibeth Da Corte, "No habrá nueva concesión para ese canal golpista RCTV," *El Universal*, December 29, 2006; "No Renovarán la concesión al canal golpista RCTV," posted to YouTube, <http://www.youtube.com/watch?v=AujQgo6u4xl> (accessed August 4, 2008).

Chávez had repeatedly threatened not to renew the broadcasting concessions of the country's main private television channels in response to critical coverage of his government. While he pointed to the channels' role in the 2002 coup as a justification, he also made clear that the threatened action would be in response to the continuously critical coverage of some of the channels.³⁰⁴

In March 2007, three months after Chávez announced his decision, the Ministry of Communication and Information published *The White Book of RCTV (El libro blanco sobre RCTV)*, a compendium of the government's accusations against the channel. During the same month RCTV received a resolution and cover letter from the communication and information minister—the official responsible for television concessions—formalizing Chávez's decision. Yet neither the official resolution nor the letter mentioned any of the accusations publicly leveled by Chávez against the channel as grounds for the decision not to renew the license. After the Supreme Court rejected RCTV's legal appeals for an injunction, the channel stopped broadcasting on public airwaves on May 27, 2007.

While the Chávez government was under no obligation to renew RCTV's concession, it improperly used its regulatory power to punish anti-Chávez programming, discriminating against RCTV on political grounds and disregarding due process considerations.

A Discriminatory Decision

As noted, one of the principle justifications that Chávez and his supporters offered for denying RCTV a concession renewal was its role during the 2002 coup. Ever since the events of April 2002—which he accused the media of fomenting—Chávez had threatened the four largest private channels (RCTV, Venevisión, Televen, and Globovisión) with revocation of their broadcasting licenses. From June 2002 until he made the announcement in December 2006, Chávez had made such threats on at

³⁰⁴ Chávez accused these channels, which he did not identify, of “dividing Venezuelans” in a speech given six months before he announced the decision not to renew RCTV's license. Elizabeth Núñez, “Chávez amenaza con revocar concesiones a televisoras en 2007,” *El Nacional*, June 15, 2006, nacional.com/ediciones/archive/default.asp?d=15&m=06&a=2006&archivo=n1_2n1.asp&searchstring= (accessed May 29, 2008).

least eight occasions in public broadcasts or interviews.³⁰⁵ On the last of these occasions, in November 2006, Chávez warned that some of the licenses were due to expire the following year. “No one should be surprised if on March 27 [sic] I tell them their license is up.”³⁰⁶

Two private stations’ licenses were in fact due to expire on May 27, 2007—RCTV’s and Venevisión’s. But in his December 2006 speech Chávez made no mention of Venevisión—a channel he had accused with equal vehemence for its conduct during the coup—and its license was duly renewed for five years on its expiry.

If the non-renewal of RCTV’s license was indeed a belated sanction for the channel’s conduct during the coup, Venevisión should have received the same treatment. But after Chávez’s victory in the recall referendum in August 2004, Venevisión (along with Televen) pulled its adversarial political opinion shows and drastically reduced its coverage of opposition news.³⁰⁷ In contrast, RCTV (along with Globovisión)

³⁰⁵ Inter-American Commission on Human Rights, *Luisiana Ríos and others v. Venezuela*, Case No. 12,441, April 20, 2007, paras. 72-83.

³⁰⁶ Asencion Reyes, “Vaya y repítelo todos los días 100 veces más,” *El Nacional*, November 4, 2006, <http://web.sumate.org/democracia-retroceso/attachments-spanish/Rafael%20Ramirez.htm> (accessed on August 4, 2008).

³⁰⁷ Programs cut by Venevisión included Napoleón Bravo’s show “24 Horas.” Televen pulled Marta Colomina’s interview program—“The Interview”—in March 2005 and César Miguel Rondón’s opinion program—“30 Minutes”—the following month. Blanca Santos, “Soy una víctima de la Ley Mordaza y del régimen,” *El Universal*, March 5, 2005, http://www.eud.com/2005/03/05/ti_art_05250A.shtml (accessed August 4, 2008); Hugo Prieto, “Mucho gusto y muchas gracias,” (interview with César Miguel Rondón), *Tal Cual*, April 28, 2004. Both Colomina and Rondón now broadcast on the opposition radio station Unión Radio.

In a special broadcast in July 2007, Venevisión’s president, Gustavo Cisneros, defended the station’s change of editorial policy, saying that Venevisión had erred by adopting an openly partisan position in Venezuela’s political conflict. Whether or not the change was a response to government pressure (as Cisneros seemed to imply in an interview published during the same month in the *New York Times*) Chávez publicly acknowledged the change in editorial policy (without referring to Venevisión by name). “Video: Autopromocion de Venevisión,” posted to YouTube June 21, 2007, <http://eriksez.wordpress.com/category/venevision/page/2/> (accessed August 4, 2008); Simon Romero, “Media Mogul Learns to Live with Chávez,” *New York Times*, July 5, 2007.

Venevisión also claimed that its broadcasting concession was renewed because, unlike RCTV, it had carefully followed the legal procedures for renewal. The official resolution denying RCTV its license renewal, however, did not mention any alleged failure of RCTV to comply with the formal procedures. “Porqué Venevisión Sí?”, Venevisión press release from Venevisión’s vice-president, Carlos Baldosano, to Human Rights Watch, June 25, 2007.

continued to cover protests extensively and broadcast comment that was uniformly critical of the government.³⁰⁸

RCTV was singled out evidently because of its refusal to tone down this criticism. In fact, in June 2006, six months before Chávez announced his decision, he himself pointedly compared the conduct of some stations, in an apparent reference to RCTV and Venevisión. At a televised ceremony handing over Russian rifles to the army, Chávez ordered his ministers and CONATEL's director general to review private television concessions, placing a question mark over their renewal the following year. After complaining that some channels still acted like "fifth columns," he noted that other channels that he accused of supporting the coup had "given signs of wanting to change, and look like they intend to respect the Constitution and the law."³⁰⁹ The communication and information minister went further:

If we analyze the conduct of some channels that were openly in the coup and we compare it with today, there are qualitative changes: in programming, in reporting, in editorial line, in respecting the rights of users and fulfilling the obligations of public service providers. In other cases, there is no sign of any rectification and they stubbornly stick to their old ways.³¹⁰

Neither Chávez nor the minister mentioned the channels they were referring to, but it was widely understood that the government's sights were on RCTV.

The discriminatory use of the government's regulatory authority was also made clear by the fact that Chávez had issued his threats of non-renewal in response to critical coverage of his government. For example, the last such threat he made before announcing his decision on RCTV was during a televised address just weeks before

³⁰⁸ In contrast to the drastic measures taken by Venevisión and Televen, RCTV retained Miguel Angel Rodríguez's morning show "La Entrevista" ("The Interview") until the station was closed on May 27, 2007. Globovisión still runs Leopoldo Castillo's call-in program "Aló Ciudadano" ("Hello Citizen"). Globovisión's license is not due for renewal until 2015.

³⁰⁹ Elizabeth Núñez, "Chávez amenaza con revocar concesiones a televisoras en 2007," *El Nacional*, June 15, 2006, nacional.com/ediciones/archive/default.asp?d=15&m=06&a=2006&archivo=n1_2n1.asp&searchstring= (accessed May 29, 2008).

³¹⁰ *Ibid.*

the 2006 presidential election in which he denounced private stations for broadcasting a clandestine video of his energy minister calling on employees in the state oil company to abandon their jobs if they did not support Chávez.

Lack of Due Process

As already noted, in March 2007, at the height of the controversy over RCTV, the Ministry of Communication and Information published the *White Book on RCTV*, a 360-page compendium of alleged malfeasance by the station. The document cited several actions of RCTV as evidence of its involvement in the coup: its coverage of the street demonstrations which precipitated the coup; its splitting its screen during a presidential broadcast in order to continue showing scenes of the protests; repeated transmissions of speeches and comments by opposition leaders blaming the government for the violence; its refusal to transmit news of Chávez's illegal arrest by the coup plotters; and its blacking out coverage of pro-Chávez demonstrations as the coup unraveled.³¹¹ Yet none of these actions were formally investigated in an administrative or judicial hearing, and RCTV was not given an opportunity to defend its record.

The *White Book* also charged RCTV with monopolistic practices, incitement to violence, non-compliance with standards protecting children, and tax evasion. Yet the book did not show that any of these allegations had been proven, either in court or in an administrative investigation by the broadcasting authorities.³¹²

TVES: Democratization or Damage Control?

In March 2007, after an international outcry about Chávez's announcement, Communication and Information Minister Jesse Chacón, sought to recast Chávez's decision. In a resolution notifying the station of the expiry of its concession, Chacón presented the matter as a purely technical issue without any reference to the accusations. The government, Chacón stated, had "a peremptory need for...an open access television network with national range, like that which will become available

³¹¹ Ministry of Communication and Information, *Libro Blanco sobre RCTV* (Caracas: MCI, 2007), pp.55-64.

³¹² *Ibid.*

when RCTV's concession expires."³¹³ In a cover letter to the station's legal representatives, Chacón insisted that "the expiry of a term is not a punishment," and that due process guarantees were not applicable to the case.³¹⁴

If the government's reason for not renewing RCTV's license had been, as Chacón claimed, to free up the frequency for a use that was in the public interest, the non-renewal would seem to be far more justifiable. However, the government appears to have had no such plans when Chávez announced his decision in December 2006.³¹⁵ For several months after his announcement the actual proposals for RCTV's replacement were extremely vague, even though the law requires that the potential grantee of a concession provide CONATEL with detailed proposals and technical plans, and even though their evaluation is normally a lengthy process. Not until mid-May 2007—two weeks before the new station was due to go on air for the first time—was the creation of the station, Venezuelan Social Television (Televisora Venezolana Social, TVES) officially announced.

Moreover, the government never explained satisfactorily why it did not use frequencies that were already at its disposal to create a new station. Chacón claimed that the VHF frequency used by RCTV was the best available for the purpose of

³¹³ Resolution No. 002 of the Ministry of Communication and Information, Jesse Chacón, addressed by letter to RCTV legal representatives, March 28, 2007. In a letter to United States Senate Foreign Affairs Committee Chairman Sen. Richard Dodd, dated May 22, 2007, Venezuelan Ambassador to the United States Bernardo Álvarez repeated the same argument: "Since RCTV was created in 1953, it has occupied the highest quality segment in Venezuela's limited broadcast spectrum. Since its most recent broadcast license (granted in 1987 for twenty years) was up for renewal this year, the Venezuelan government legally decided to reclaim the access to the spectrum for the purposes of creating the country's first public service television station." Letter from Bernardo Álvarez, Venezuelan Ambassador to the U.S., to Senator Richard Dodd, Foreign Affairs Committee Chairman, May 22, 2007.

³¹⁴ Letter from Jesse Chacón, N^o.0424, to RCTV lawyers, March 28, 2007.

³¹⁵ Communication and Information Minister William Lara proposed various alternatives: that the workers of RCTV form cooperatives and apply for a new license, that a mixed public-private company take charge of the frequency, or that the state launch an entertainment channel. As the website *Venezuelanalysis* reported on January 24, "William Lara, Minister of Communication and Information, also made a statement regarding the channel's signal yesterday, saying that RCTV would be a 'creation of the Venezuelan people.' Speaking at a forum organized by Aproni (Association of Independent National Producers) entitled 'Towards the Television We Want,' Lara stated that the forum 'must produce results, a concrete proposal as to what should be done with Channel 2 [RCTV], as well as opening the discussion about the democratization of the airwaves. He also added that the proposals for the future of the signal, which are currently being evaluated, included the possibility of giving the license to a cooperative that specializes in the field, or to workers in the television industry. He reiterated that the infrastructure belongs to Channel 2 and that it is only the channel's signal that is being recovered." Liza Figueroa-Clark, "Venezuelan television workers to propose management plan for RCTV's airwaves," *Venezuelanalysis.com*, January 24, 2007, <http://www.venezuelanalysis.com/news/2191> (accessed August 4, 2008).

creating a national network, and that other VHF frequencies were not practicable.³¹⁶ However, at the time the government had 26 unused VHF frequencies that could have provided coverage similar to the RCTV concession.³¹⁷ Failing that, the government could have used UHF as an alternative, as it did successfully when it launched Vive TV in 2003.³¹⁸

The government's improvised response to the future vacancy of the RCTV frequency was also apparent in its lack of technical preparation. CONATEL had not secured the technological capacity to transmit TVES's signal throughout Venezuela's territory before the expiry of RCTV's concession. According to Jesse Chacón, at the time of the hand-over TVES only had three transmitters functioning, two in Caracas and one in Maracaibo.³¹⁹ The government had stressed that it had no plans to expropriate RCTV's transmitters.³²⁰

As the crucial date neared, the audience groups registered with CONATEL provided a way out for the government. Eleven of them requested the Supreme Court to deliver an injunction obliging CONATEL to provide all Venezuelans with access to the station about to air for the first time. With unusual speed (the court had delayed for months before rejecting an appeal for an injunction filed by RCTV to keep it on the air), it granted the audience groups' appeal, and ordered the military to secure RCTV's transmitters across the country so that CONATEL could use them to transmit the TVES signal.³²¹

³¹⁶ Carlos Croes interview with Jesse Chacón, "Diálogo con Carlos Croes," *Televen*, May 27, 2007.

³¹⁷ As noted below, in 2006 CONATEL had reclaimed 26 VHF frequencies previously assigned to Vale TV, a church-owned station, on the grounds that they had not been used. "Le quitaron 26 frecuencias a Vale TV," *Quinto Día*, April 28, 2006, <http://www.sntp.org.ve/mayo613.htm> (accessed August 4, 2008).

³¹⁸ VHF (Very High Frequency) occupies a lower frequency wave band than UHF (Ultra High Frequency). Both types of radio frequency are in use in Venezuela, and both are used by state channels: VTV occupies VHF frequencies, while Vive TV uses UHF frequencies.

³¹⁹ Carlos Croes interview with Jesse Chacón, "Diálogo con Carlos Croes," *Televen*, May 27, 2007.

³²⁰ For example, the communication and information minister defended Chávez's decision stressing that "no government spokesman has said that Radio Caracas Television's installations will be expropriated." "Hasta el 27 de mayo operará señal abierta de RCTV," Ministry of Communication and Information (Ministerio de Comunicación e Información) press release, December 29, 2006, <http://www.rnv.gov.ve/noticias/index.php?act=ST&f=2&t=42181> (accessed August 4, 2008).

³²¹ "Sala Constitucional acordó medida cautelar que garantiza la continuidad de la señal televisa a nivel nacional," Supreme Court press release, May 25, 2007, <http://www.tsj.gov.ve/informacion/notasdeprensa/notasdeprensa.asp?codigo=4808> (accessed August 4, 2008).

Chacón argued that the RCTV decision meant Venezuela’s first public service outlet would contribute to the democratization of the media. After a year in operation, TVES has shown no signs of genuine independence of the government or editorial pluralism. The channel is funded by the government, its director and five of its seven governors are government appointees, and there are no safeguards to ensure representation of different sectors of opinion.³²² An analysis of 42 hours of programming in June 2007 revealed that 8 percent consisted of repetitive government messaging, more than the 6 percent dedicated to news. The news coverage itself consisted largely of government information, and downplayed opposition opinion or stories that reflected badly on government authorities.³²³ A study of media coverage of the December 2007 referendum campaign revealed that TVES had coverage no less biased toward the Yes vote than the state channel VTV.³²⁴

With RCTV’s removal from the public airwaves, only Globovisión, whose 20-year license is due to expire in 2015, remains as a station with an unequivocal opposition editorial line. But Globovisión transmits a free-to-air signal only in Caracas and Valencia, enjoying only a fraction of RCTV’s reach.

Globovisión

Globovisión has also been under pressure from the government for years because of its political line. It has received warning letters from CONATEL because of the political tone of its reporting, it has been frequently refused entry to government press conferences, and its reporters and cameramen have been physically attacked and threatened by Chávez supporters.

Although government officials have recognized its broadcasting concession as legal, Globovisión, founded in 1994, still has not received a reply to an application for the

³²² Constitutive Statutory Act of the Venezuelan Social Television Foundation (Acta Constitutiva Estatutaria de la Fundación Televisora Venezolana Social), *Official Gazette*, No. 38.682, May 14, 2007, <http://www.tsj.gov.ve/gaceta/mayo/140507/140507-38682-01.html> (accessed August 4, 2008).

³²³ Gustavo Hernández Díaz, “Gubernamental TVES,” Centro Gumilla, *Comunicación*, vol. 139, 2007, pp. 26-30.

³²⁴ According to this study, the coverage of RCTV International and Globovisión was equally biased in favor of the NO vote. The three stations with the most balanced coverage were Venevisión, Televen, and Channel 1. Tomás Andersson, “Referendum constitucional: información equilibrada en tres de los siete canales de televisión,” Centro Gumilla, *Comunicación*, vol. 140, 2008.

validation of its license, a mandatory procedure for broadcasters whose license predated the Organic Law of Communications of 2000. Under this law, CONATEL was obligated to complete the validation process by June 2002, but it still had not done so at this writing.³²⁵

Globovisión executives complain that its many submissions to CONATEL for extended coverage have been denied or more often ignored.³²⁶ In 1998, in the final year of the Caldera administration, CONATEL assigned Globovisión two extra frequencies in the states of Vargas and Monagas, with a one-year deadline to install its transmitters. According to Globovisión, it filed a request in May 1999 to CONATEL for an extension of the deadline. Having received no reply, it submitted further applications for the frequencies in August 1999, January 2002, April 2002, June 2002, and February 2005, all without result.³²⁷

On top of failing to respond to Globovisión's requests, the government decided to free the frequencies that the company had been trying to secure for years. In September 2005 CONATEL began an administrative investigation against Globovisión for its *failure to occupy* these frequencies.³²⁸ Globovisión protested that it had not received legal authorization to use them after it missed the initial deadline, and that to do so without authorization would be illegal. Three months later, the Ministry of Infrastructure decided Globovisión was not at fault and ordered CONATEL to investigate the legal status of the frequencies. In April 2006 despite Globovisión's numerous applications for the frequencies over several years, CONATEL published a resolution freeing them for use by other service providers, without explaining to Globovisión the outcome of its long-delayed applications.

The Supreme Court supported the government's refusal to address Globovisión's claims. Globovisión had filed a writ in the Supreme Court to annul CONATEL's April

³²⁵ Organic Law on Telecommunications, art. 210. Human Rights Watch interview with Ana Cristina Núñez, then Globovisión's legal advisor, Caracas, December 19, 2006.

³²⁶ Human Rights Watch telephone interview with Ana Cristina Núñez, Globovisión executive, February 6, 2007.

³²⁷ Globovisión's submission to the Supreme Court, summarizing the steps taken to obtain authorization to use the frequencies, p.4. Supreme Court Administrative Policy Chamber, Levis Ignacio Zerpa, Case No.2006-0907, November 15, 2006, <http://www.tsj.gov.ve/decisiones/spa/Noviembre/02554-151106-2006-0907.htm> (accessed August 4, 2008).

³²⁸ Not to put frequencies allocated by CONATEL to use is punishable by law. Organic Law on Telecommunications, art. 171(3).

2006 resolution, alleging it had been denied a fair hearing. It also requested the court to issue a temporary injunction to suspend the effects of that resolution until the court had ruled on its legality. In November 2006, the Supreme Court's Political Administrative Chamber rejected Globovisión's request for an injunction, arguing that CONATEL's lack of response should be interpreted as a denial of Globovisión's requests.³²⁹ Two years later, the court has yet to rule on the legality of CONATEL's resolution.³³⁰

In stark contrast to the bureaucratic obstacles faced by Globovisión in its efforts to reach a wider public, state-owned Vive TV, a cultural channel founded by the government in 2003 (nine years after Globovisión's inception), is currently transmitting on public airwaves to Caracas and all 23 of Venezuela's states.³³¹ As we have seen, the government's most recently created channel, TVES, obtained in a matter of days nationwide frequencies and a network of national transmitters which RCTV was obliged to surrender indefinitely without a judicial hearing.

Vale TV (Channel 5)

CONATEL's treatment of Vale TV is another example of the lack of transparency and apparent arbitrariness of the government's administration of broadcasting frequencies. In this case, the reason for discrimination was less political (Vale TV's programming was politically innocuous), but appeared to be based on the government's conviction that the station's frequencies legitimately belonged to the state.

During the 1990s Channel 5 (then TVN-5), Venezuela's oldest state channel, was virtually defunct, only retransmitting sports programs from the main state channel (VTV) for a few hours a day. In 1998 the Archbishop of Caracas proposed to then-President Rafael Caldera to replace it with a new public service non-profit educational and cultural channel, with commercial and technical backing from

³²⁹ The court argued that CONATEL's failure to reply to Globovisión's repeated requests, what the court referred to as its "administrative silence," must be interpreted as a rejection. Supreme Court Policy Chamber, Levis Igancio Zerpa, Case No. 2006-0907, November 15, 2006, <http://www.tsj.gov.ve/decisiones/spa/Noviembre/02554-151106-2006-0907.htm> (accessed August 13, 2008).

³³⁰ Email communication from Nelly Herrera, lawyer for Globovisión, to Human Rights Watch, June 25, 2008.

³³¹ Vive TV, <http://www.vive.gob.ve/cobertura.php> (accessed July 29, 2008).

Venevisión, RCTV, and Televen. In December 1998 CONATEL reserved Channel 5's 27 frequencies across the nation for use by Vale TV and authorized it to begin transmissions.³³²

The transfer of Channel 5 to the private sector attracted widespread criticism at the time, mainly because it was seen by media commentators on the left as a covert privatization. Upon assuming office, the Chávez government began proceedings to recover the frequencies.

On December 14, 2005, CONATEL annulled the concession approved under the Caldera government, arguing that it had been assigned illegally, and took back the 26 frequencies outside Caracas that it had conceded to Vale TV in 1998. Vale TV was told to submit a new application for the Caracas frequency, and was given temporary authorization to transmit in Caracas while the application was being processed. Vale TV asked CONATEL to reconsider, but received no reply.

In April 2006, without any further consultation with Vale TV, CONATEL announced that the 26 frequencies had now passed to the state, and were now free for assignation to other users.³³³ In March 2007 Vale TV submitted to CONATEL the required application for its Caracas frequency and also for four of those it had originally possessed in other states (Lara, Bolívar, Anzoátegui, and Carabobo). At this writing, CONATEL had ratified only the Caracas frequency, thus by default restricting Vale TV's coverage to the capital.³³⁴ To our knowledge, the 26 frequencies the state reclaimed from Vale TV have still not been assigned to other users.

³³² Unlike the other four large commercial stations, Vale TV does not have a political profile. It mainly retransmits from respected sources like the BBC, National Geographic, and Discovery Channel. It was set up to make educational cable programming available to the mass of people without access to cable, and most of its viewers are from poorer sectors of the community. Human Rights Watch interview with María Eugenia Mosquera, President of Vale TV, Caracas, September 13, 2007.

³³³ "Le quitaron 26 frecuencias a Vale TV," *Quinto Día*, April 28, 2006, <http://www.sntp.org.ve/mayo613.htm> (accessed on August 4, 2008).

³³⁴ Human Rights Watch telephone interview with María Eugenia Mosquera, April 10, 2008; Norma García, "Vale TV teme que su frecuencia sea entregada al Estado," *El Mundo*, May 29, 2007, <http://venezuelareal.zoomblog.com/archivo/2007/05/29/vale-Tv-teme-que-su-frecuencia-sea-ent.html> (accessed August 4, 2008).

Community Radio and Television

At the same time as the Venezuelan government has engaged in political discrimination in the distribution and administration of radio-electrical frequencies, it has also gone further than many Latin American countries in opening opportunities for broadcast media at the community level. The government's support for these media has contributed to a dramatic increase in the number of licensed community radio and television outlets in recent years, which has given new opportunities for public expression to residents of many poor communities in Venezuela.

International Norms

The United Nations has recognized the role of community media in fostering sustainable development objectives for more than a decade.³³⁵ International bodies like UNESCO and the Inter-American Commission on Human Rights have stressed the importance of non-profit community media for the poorest sectors of the population who normally have very restricted access to the conventional media. In his 2002 report, the Special Rapporteur on Freedom of Expression of the OAS, Eduardo Bertoni, recognized their role in expanding the scope of free expression in societies with significant levels of poverty.³³⁶

Government Support

Since the 2002 coup, CONATEL has provided millions of dollars to support incipient community media across the country.

³³⁵ In 1996, the UN General Assembly adopted Resolution A/C. 2/51/L.45, stressing "the need to support two-way communication systems that enable dialogue and that allow communities to speak out, express their aspirations and concerns and participate in the decisions that relate to their development." United Nations General Assembly, "Sustainable Development and International Economic Cooperation," Resolution A/C.2/51/L.45, A/51/604/Add.8., December 5, 1996. According to UNESCO, which supports community media initiatives in many parts of the world, "community-based media ensure media pluralism, diversity of content, and the representation of a society's different groups and interests. Community media encourage open dialogue and transparency of administration at local level and offer a voice to the voiceless. They are established on the concepts of public access, sharing experiences and information." UNESCO, International Programme for the Development of Communication, http://portal.unesco.org/ci/en/ev.php-URL_ID=14620&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed August 4, 2008).

³³⁶ The Rapporteur stressed that states were bound not to discriminate against them in the award of broadcasting frequencies, intimidate them, or arbitrarily close them down: "Given the potential importance of these community channels for freedom of expression, the establishment of discriminatory legal frameworks that hinder the allocation of frequencies to community radio stations is unacceptable. Equally worrisome are those practices that, even when the legal framework is being respected, pose unjustified threats of closure or arbitrary seizures of equipment." United Nations Commission on Human Rights, Report of the Special Rapporteur on Freedom of Expression, Chapter IV., 2002, para. 47.

Government support was in part given in recognition of the role community radio played during the news blackout during the coup. While the mainstream commercial media were reporting that Chávez had resigned, and with VTV and National Radio out of action, only a few community radio frequencies reported that he had in fact been arrested, calling Chávez supporters' from the barrios onto the streets to protest the coup and demand his return. Some paid an immediate price for their reporting: two community outlets, Radio Perola and Catia TV, were raided by police after Carmona's illegal swearing in.³³⁷

Long before the coup, however, the Chávez government had committed itself to supporting alternative community-based media. After more than two decades of neglect and marginalization, community media were formally included for the first time in the telecommunications sector in the Organic Law of Telecommunications, enacted in 2000. The promotion of community media “for the exercise of the right to free and plural communication” is named second in a list of the law's objectives.³³⁸

The Regulations for Non-Profit Public Service Community Radio Broadcasting and Open Community Television (hereinafter “the Regulations”), which came into force in November 2001, encourage community broadcasting. They allow anyone with appropriate skills to obtain a license to operate a community radio or TV station after a feasibility evaluation by CONATEL, and provided that conditions on financial independence and diversity are met.³³⁹ CONATEL provided technical support to start-up community media for a year after the Regulations came into force, including non-reimbursable grants for infrastructure, as well as training.³⁴⁰

In October 2003, Chávez announced that five billion Bolívares (approx. \$2,300,000, at current rates) would be donated to a fund to be administered by a cooperative of

³³⁷ José Ignacio López Vigil, *Golpe de Radio: Los 3 Días que Transmitimos Peligrosamente* (Caracas: Asociación Latinoamericana de Educación Radiofónica [ALER], October 2006) p. 61. In June 2002, Fe y Alegría, the Jesuit community radio network, was awarded the national prize for journalism and Radio Perola and Catia TV gained honorable mentions.

³³⁸ Organic Law on Telecommunications, art. 2.1.

³³⁹ Regulations for Non-Profit Public Service Community Radio Broadcasting and Open Community Television (Reglamento de Radiodifusión Sonora y Televisión Abierta Comunitaria de Servicio Público Sin Fines de Lucro), *Official Gazette*, No. 37,359, January 8, 2002, <http://www.tsj.gov.ve/gaceta/enero/080102/080102-37359-01.html> (accessed August 4, 2008), arts. 3, 4, 5, 17.

³⁴⁰ *Ibid.*, third transitory article.

community media operators to finance seed capital, infrastructure, and training.³⁴¹ By 2006, some 3,994,008,000 Bolívares (about \$1,860,000, at current rates) of the money had been spent, benefiting 109 community radio and television stations. By August 2007, 266 community radio stations and more than 30 community television outlets were licensed and operating, according to CONATEL.³⁴²

During visits to Venezuela in 2007, Human Rights Watch interviewed staff at five community radio stations in Caracas and Maracaibo. Four had received money from CONATEL for equipment such as computers, sound equipment, or aerials, and some were operating from premises loaned by the municipal government or other government bodies. Radio Voces Libertarias, which houses a school that trains young people in radio and computing skills, had five unpaid permanent volunteers, and a transmitter and computers lent by the municipality, which also owns the building from which it operates. CONATEL was hiring more experienced workers at the station to organize training workshops in other parts of the country.³⁴³ Radio Nuevo Día in the low income neighborhood of Catia also received government support. “Everything you can see here we got with CONATEL’s help,” its director told Human Rights Watch.³⁴⁴ Some community radios also receive income from government advertising.

State-Sponsored Pluralism

The legal regime governing community broadcasting contains norms to protect stations from government or other external interference. Under the Regulations, discrimination in access to the services provided is proscribed; stations are protected from being taken over by any particular political or religious group; state

³⁴¹ The Fund for the Development of Open Public Service Non-Profit Community Radio and Television Broadcasters (Fondo para el Desarrollo de las Emisoras de Radiodifusión Sonora y Televisión Abierta Comunitaria de Servicio Público sin fines de lucro). “Erogación de recursos del Fondo de Desarrollo para las Emisoras de Radiodifusión Sonora y Televisión Abierta Comunitarias, de Servicio Público sin fines de lucro,” CONATEL, May 13, 2005, http://www.conatel.gov.ve/downloads/comunitarias/Recursos_erogados_13-05-05.pdf (accessed August 4, 2008);

“Erogación de recursos del Fondo de Desarrollo para las Emisoras de Radiodifusión Sonora y Televisión Abierta Comunitarias, de Servicio Público sin fines de lucro, 2004-2006,” CONATEL, www.conatel.gov.ve (accessed May 22, 2008).

³⁴² These figures are posted on the CONATEL website, August 2007, <http://www.conatel.gov.ve> (accessed August 4, 2008). “Redes de Comunicación Popular,” Seminario Nacional, “Política Social: Una Nueva Paradigma,” May 11-13, 2004.

³⁴³ Human Rights Watch Interview with Elida Polanco, San Martín, Caracas, March 13, 2007.

³⁴⁴ Human Rights Watch interview with Luis Peña, Radio Nuevo Día, Catia, Caracas, September 21, 2007.

aid may not be made conditional on the donor's influence over program content or other controls; programming cannot be monopolized by an individual or a single group; and the re-transmission of government broadcasts is only acceptable within certain time limits.³⁴⁵

The Regulations also establish that the "foundations" set up to start a community radio project must be run on democratic, participatory, and plural lines, with a governing council which is elected every three years, if not earlier.³⁴⁶ Certain people may not hold official positions on community radio foundations, such as public officials, members of the military, leaders of political parties at any level, leaders or representatives of labor unions, or business associations.³⁴⁷ As well as these controls, there is an express provision in the law that prohibits discrimination in accessing community media. Foundations must provide "equal access of all the members of a community to the services they provide," and may not "do anything by action or omission to discriminate and prevent access to the medium of some individual or group."³⁴⁸ Operators must provide airtime so that members of the community can participate in programs directly. Discrimination on the basis of "political beliefs, age, race, sex, creed, social condition, or any other condition" is not allowed. Operators must abstain from transmitting party or propaganda messages of any kind.³⁴⁹

A large majority of community radio stations are supportive of the Chávez government. However, they are not politically homogeneous, and by no means uncritical. Most are associated with the National Association of Free and Alternative Community Media (Asociación Nacional de Medios Comunitarios Libres y Alternativos, ANMCLA), which was formed after a split in the Venezuelan Network of Community Media (Red Venezolana de Medios Comunitarios, RVMC), which helped

³⁴⁵ Regulations for Non-Profit Public Service Community Radio Broadcasting and Open Community Television, arts. 22, 23, 26, 32. Community radio activists participated in the drafting of the regulations.

³⁴⁶ *Ibid.* art. 21.

³⁴⁷ *Ibid.*, art. 22.

³⁴⁸ *Ibid.*, art. 23.

³⁴⁹ *Ibid.*, art. 26.

the government draft the community radio regulations. The RVMC now has about 70 radio stations compared to ANMCLA's 130.³⁵⁰

Not all community-run outlets are pro-Chávez, and even those that are frequently criticize corruption, mismanagement, or malfeasance by local officials. Among non-profit radios that have maintained an independent journalistic line is the Jesuit network *Fe y Alegría*, which has been involved for decades in popular education in some of the poorest parts of Venezuela, and has won awards from the government as well as from the opposition. There are several stations licensed by CONATEL that are overtly critical of Chávez, such as Radio Tropical Stereo in Venezuela's second largest city, Maracaibo.³⁵¹ Radio Tropical Stereo's director told Human Rights Watch that CONATEL imposed no political conditions when its license application was under consideration in 2003.³⁵²

Although Human Rights Watch has not documented any cases of government discrimination against community broadcasters, the dependence of most community stations on the state for funding and broadcasting licenses makes them vulnerable to potential political interference in the future, particularly in light of the concerns noted above about the independence of CONATEL.

Lack of Judicial Protection of Freedom of Expression

The Supreme Court has not fulfilled its role as a defender of the fundamental right to freedom of expression from threats by the executive branch or the legislature. As noted earlier in this chapter, it upheld the constitutionality of insult laws that are

³⁵⁰ Interview with Elizabeth Flores of Radio Perola and member of ANMCLA. "No solo somos medios, somos un completo, parte de una comunidad," *Prensa de Frente*, November 6, 2006, <http://www.prensadefrente.org/pdfb2/index.php/a/2006/11/06/p2278?printme=1&skin=print> (accessed August 4, 2008). Human Rights Watch interview with Luis Peña, Radio Nuevo Día, Catia, Caracas, September 21, 2007.

³⁵¹ The governor of Zulia state, Manuel Rosales, stood unsuccessfully against Chávez in the December 2006 elections. Zulia is one of only two states in Venezuela with opposition governors.

³⁵² When Radio Tropical Stereo's license was issued, CONATEL was criticized by the National Association of Free, Alternative, and Community Media (ANMCLA). In the Chavista group's opinion, CONATEL was "inexplicably" granting licenses to opposition stations like Tropical and La Voz del Pescador, both of which, it said, had openly supported the 2002 coup, while loyal pro-government stations were experiencing bureaucratic obstacles. "(Audio) Denuncia: Radio 'Carmonitaria' del Zulia habilitada por CONATEL había apoyado golpe fascista de Abril de 2002," *Apporea.org*, February 11, 2004, <http://www.aporeea.org/actualidad/n13830.html> (accessed August 4, 2008).

contrary to freedom of expression norms binding on Venezuela, and invoked these laws itself against a media critic. In its handling of the RCTV case in 2007, the Supreme Court failed to ensure that decisions on the allocation and renewal of broadcasting frequencies are made transparently, without discrimination, and with respect for due process.

The Court's Handling of the RCTV Case

As we saw earlier in this chapter, the Chávez government refused to renew RCTV's license, abusing its regulatory power to punish anti-Chávez programming and showing utter disregard for due process considerations. At the time, RCTV and some of its supporters turned to the Supreme Court for relief, submitting appeals aimed at blocking implementation of the president's decision to deny RCTV a renewal of its license.

The Supreme Court, rather than addressing issues of protection of free speech and due process, engaged in a variety of dubious measures—including delaying urgent rulings, failing to address central issues, disregarding key facts, and miscasting the claims of the petitioners—before deciding in favor of the government.

Detrimental Delays

The RCTV lawyers submitted their first appeal on February 9, 2007, six weeks after Chávez announced the decision to deny the company a concession renewal. The appeal was directed to the Supreme Court's Constitutional Chamber, seeking protection of the rights of RCTV journalists and owners to free expression, due process, and equal treatment. Specifically, the station sought an injunction (*amparo constitucional*) against Chávez and Communication and Information Minister Jesse Chacón, to prevent them from taking measures to force the station to stop transmitting when its license expired.³⁵³

³⁵³ In their appeal, RCTV's lawyers contended that the president's words of December 2006 constituted an imminent threat. It was clear, they argued, that Chávez's decision was motivated by the fact that "the executive does not like" the station's "ideas, opinions, information, entertainment, publicity, and propaganda," and that the president had the power to enforce it, since Chacón, the minister in charge of adopting the decision regarding RCTV's license, was his hierarchical subordinate. Supreme Court Constitutional Chamber, Luisa Estella Morales Lamuño, Case No. 07-0197, May 17, 2007, <http://www.tsj.gov.ve/decisiones/scon/Mayo/920-170507-07-0197.htm> (accessed August 4, 2008).

Under Venezuelan law, the court is required to expedite the resolution of such constitutional appeals but instead, for three months, the Constitutional Chamber remained silent on the matter.³⁵⁴ Only after the government had formally adopted the president's decision not to renew the license, and ten days before the license was to expire, did the constitutional chamber finally issue a ruling.³⁵⁵ The chamber denied the petitioners' request, rejecting some of their claims and deferring others to another chamber of the court, the Political Administrative Chamber (Sala Político Administrativa, SPA).

The SPA was, at that point, already reviewing a separate and similar appeal that RCTV lawyers had filed in April, after more than two months of waiting in vain for a ruling by the Constitutional Chamber. In this second appeal, the petitioners argued that the government's resolution formalizing the president's decision was unconstitutional, and requested a temporary injunction (*medidas cautelares*) to prevent its execution until the court reached a final decision on the case.

The SPA issued its own ruling five days after the Constitutional Chamber did,³⁵⁶ declaring that the majority of claims were too complex to be resolved at that point and would instead be addressed in a final judgment on the merits of the case in the indefinite future.³⁵⁷ It also refused to grant RCTV a temporary injunction while it considered the merits of the case, thereby allowing the government's decision to go forward and RCTV to lose its concession notwithstanding the potential illegality of the decision and the inevitable and perhaps irreparable damage that RCTV would

³⁵⁴ According to the Venezuelan constitution, the procedure during which a court analyzes a constitutional injunction should be "brief," the competent judicial authority will have the power to "immediately restore the legal situation that was affected, or the situation that is most similar to that one," and the court will prioritize these appeals over any other issue. Constitution of Venezuela, art. 27; Law Protecting Constitutional Rights and Guarantees (Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales), *Official Gazette*, No. 34,060, September 27, 1988, <http://www.tsj.gov.ve/legislacion/loadgc.html> (accessed August 4, 2008), arts. 13, 16, 17, 23, 26.

³⁵⁵ Supreme Court Constitutional Chamber, Luisa Estella Morales Lamuño, Case No. 07-0197, May 17, 2007, <http://www.tsj.gov.ve/decisiones/scon/Mayo/920-170507-07-0197.htm> (accessed August 4, 2008).

³⁵⁶ Supreme Court Administrative Policy Chamber, Evelyn Marrero Ortíz, Case No. 2007-0411, May 24, 2007, <http://www.tsj.gov.ve/decisiones/spa/Mayo/00763-23507-2007-2007-0411.html> (accessed August 4, 2008).

³⁵⁷ This completely disregarded the fact that the standard required to grant temporary injunctions is different than the one used to decide on the merits of a case. When adopting temporary injunctions, a court is not required to analyze all the facts of a case, but rather to determine that there is a "serious presumption" that there would be a "violation or threat of a violation of the constitutional rights invoked by the petitioners" and that there would be a risk in delaying the decision, "which is determined by the mere fact that the previous requirement is met." *Ibid.*, section IV.

suffer as a result.³⁵⁸ At this writing, more than a year after RCTV's license expired, the court still had not issued a final judgment.³⁵⁹

Questionable Arguments

In addition to putting off making a final judgment, both chambers of the Supreme Court made use of highly questionable arguments as they sought to justify their refusal to address RCTV's claims.

For example, the Constitutional Chamber rejected the appeal against Chávez's decision on the grounds that the president was not legally responsible for the decision to deny RCTV the concession renewal.³⁶⁰ The court argued that the administration of broadcasting frequencies was exclusively the responsibility of CONATEL.³⁶¹ While this is correct in general terms, the court appeared to ignore that Venezuelan law expressly provides that free-to-air television and radio concessions are adjudicated directly, not by CONATEL, but by the Ministry of Infrastructure (now the Ministry of Communication and Information), an official who is directly subordinate to the president.³⁶² Chávez was therefore perfectly within his powers to order the minister to rescind the decision not to renew RCTV's license, as the petitioners had requested, whether he had taken it personally or his minister had. In fact, Chávez himself had made it emphatically clear in public statements that he had personally taken the decision, a fact that the court disregarded completely.³⁶³

³⁵⁸ Since then, the Supreme Court has repeatedly rejected new requests for temporary injunctions by RCTV's legal representatives. Supreme Court Administrative Policy Chamber, Evelyn Marrero Ortíz, Case No. AA40-X-2008-000070, July 30, 2008, <http://www.tsj.gov.ve/decisiones/spa/Julio/00883-30708-2008-2007-0411.html> (accessed August 4, 2008).

³⁵⁹ Human Rights Watch telephone interview with Moirah Sánchez, RCTV's lawyer, Caracas, June 23, 2008.

³⁶⁰ Supreme Court Constitutional Chamber, Luisa Estella Morales Lamuño, Case No. 07-0197, May 17, 2007, <http://www.tsj.gov.ve/decisiones/scon/Mayo/920-170507-07-0197.htm> (accessed August 13, 2008).

³⁶¹ *Ibid.*

³⁶² Organic Law on Telecommunications, art. 104. The Ministry of Infrastructure was abolished in 2006 and its functions taken over by the newly created Ministry of Communication and Information, then headed by Jesse Chacón.

³⁶³ Chávez took full responsibility for the decision on "Hello President": "Anyway, some governments of the right (others are respectful because they understand reality) have a world campaign against Venezuela today, against the Venezuelan government *for the sole reason that I took the decision and I assume responsibility for it before the entire world*, that this bourgeoisie is not going to have its concession renewed" (emphasis added). ["En fin, algunos gobiernos de la derecha (otros son respetuosos porque entienden la realidad, o la conocen), tienen una campaña mundial contra Venezuela ahora, contra el Gobierno venezolano por el solo hecho de que yo tomé la decisión y asumo ante el mundo entero la responsabilidad, no se le va a renovar la concesión a esta burguesía."] "Hello President," No. 284, Unidad Educativa Bolivariana Negra Hipólita, Barloventa, Estado Miranda, April 24, 2007. He reiterated this point in a public address days after the court judgment. "As head of state I took a decision several months after reviewing the files, the resúmenes of each of those enterprises and I made it

The SPA, meanwhile, dismissed the request for a temporary injunction claiming that the government's action did not pose a threat to freedom of expression. According to the court, RCTV would be able to continue broadcasting its views as a cable channel, and the station's large national audience would still be able to view "many other private channels." Absent from the SPA's reasoning was any consideration of the fact that RCTV was the only remaining channel on public airwaves with national coverage that was openly critical of the government, as well as the fact that large segments of RCTV's national audience had no access to cable. The SPA also failed to consider the broader impact that the president's openly political and discriminatory handling of the case could have on freedom of expression in Venezuela.

Similarly, when analyzing the temporary injunction request, the court dismissed RCTV's claim that its right to due process had been violated. RCTV argued that it had no opportunity to respond to the public accusation of criminal actions and broadcasting infractions cited by government authorities as grounds for the decision not to renew its concession. However the court based its ruling solely on an analysis of the resolution and letter issued by the communication and information minister in March 2007—two documents which carefully avoided any punitive language.³⁶⁴ It avoided mention of Chávez's public justifications for his decision, as well as the White Book that detailed RCTV's alleged transgressions to justify the non-renewal of the concession. Based on this highly selective analysis, the court found that RCTV's assertion regarding its right to due process was misplaced.

Supporting the New State Channel

The Supreme Court's response to petitions by opponents of RCTV was dramatically different. Five days before RCTV's concession expired, the Constitutional Chamber received a petition from 11 pro-Chávez audience groups seeking an injunction to guarantee viewer access to TVES, the state channel that was to replace RCTV after its

public. On Sunday (tomorrow) the concession will end and won't be renewed." "Durante la exhibición de los Sukhoi el presidente Hugo Chávez negó atentado contra la libertad de expresión," *El Nacional*, May 26, 2007.

³⁶⁴ In a letter to the RCTV's legal representatives, Chacón insisted that that "the expiry of a term is not a punishment." On this reasoning, he argued, due process was irrelevant since it was unnecessary and superfluous to open an investigation to determine the expiry of a time-period. Letter from Jesse Chacón to RCTV lawyers, N^o.0424, March 28, 2007 (see "Controlling the Airwaves" above).

license expired.³⁶⁵ It took the court only three days to admit the case and grant the petitioners a temporary injunction.

As noted earlier in this chapter, TVES was set up only two weeks before RCTV's frequency became available. As the date for TVES's launch neared, ministers recognized that the government had few transmitters of its own to broadcast its signal throughout the country.

The 11 audience groups argued in their appeal that if TVES's broadcasting range did not cover the entire country, it would violate their right not to be discriminated against, as well as their right "to obtain a quality public television service." The charge of discrimination was based on statements made by TVES executives that for the time being the TVES signal would be limited to the cities of Caracas and Maracaibo and would only be available by cable to viewers living outside these cities.

The constitutional chamber immediately admitted the petition and issued a temporary injunction assigning RCTV's transmitters and broadcasting equipment to CONATEL for use by TVES. The court also ordered the defense minister to secure and protect the broadcasting installations.

In order to justify this measure, the Constitutional Chamber held that the temporary injunction would not affect RCTV's property rights, despite the fact that it was assigning control over them to the state. However, the court did not fix a time-limit by which CONATEL would have to return the facilities to their owner or initiate proceedings to expropriate them. As of July 2008, more than a year after the court decision, TVES continues to use the transmitters.

The court used a petition seeking precisely the opposite outcome—blocking removal of RCTV from the public airwaves—to reiterate its decision that RCTV's equipment should be assigned for use by TVES. The Interactive Radio Listeners (Oyentes Interactivos de Radio, OIR), an audience group opposed to Chávez, requested an injunction to prevent Chávez and Chacón from taking steps to have RCTV removed

³⁶⁵ Supreme Court Constitutional Chamber, Luisa Estella Morales Lamuño, Case No. 07-0720, May 25, 2007, <http://www.tsj.gov.ve/decisiones/scon/Mayo/956-250507-07-0720..htm> (accessed August 4, 2008).

from the air, arguing they had a right to continue watching RCTV. The court argued that their “right” was met by having access to a television service of quality, not by access to any particular broadcaster, and that the injunction enabling TVES to broadcast from RCTV’s old transmitters satisfied any claims they might have.³⁶⁶

In both rulings, the court stated in no uncertain terms that petitions for injunctive relief required immediate resolution by the court:

[O]n some occasions the object of judicial protection requires expedited protection, which in turn responds to the need to ensure the effectiveness of the court’s future pronouncement, and to avoid the risk that a possible finding in favor of the claim is rendered ineffective by the irreversible consolidation of situations contrary to law or to the interest recognized by the court at the time.³⁶⁷

This is exactly what the court failed to do when responding to the petitions by the RCTV journalists and owners.³⁶⁸

³⁶⁶ “Although this court recognizes that all users have the right to access and enjoy a universal public television service, the content of the aforementioned right in Article 108 and 117 of the Constitution consists in principle not of the continuity of a particular VHF sound or television broadcaster but the possibility that users may effectively access the service in question on equal terms, and with the maintenance of a minimum standard of quality, irrespectively of the validity or otherwise of the license or concession of a specific private operator.” Supreme Court Constitutional Chamber, Luisa Estella Morales Lamuño, Case No. 07-0731, May 25, 2007, <http://www.tsj.gov.ve/decisiones/scon/Mayo/957-250507-07-0731.htm> (accessed August 4, 2008).

³⁶⁷ *Ibid.*, section IV. [“Se observa que en determinadas ocasiones el objeto de la tutela constitucional requiere de una protección expedita, lo cual responde, a su vez, a la necesidad de asegurar, en su caso, la efectividad del pronunciamiento futuro del órgano jurisdiccional evitando que un posible fallo a favor de la pretensión quede desprovisto de la eficacia por la conservación o consolidación irreversible de situaciones contrarias a derecho o interés reconocido por el órgano jurisdiccional en su momento”]. Supreme Court Constitutional Chamber, Luisa Estella Morales Lamuño, Case No. 07-0720, May 25, 2007, <http://www.tsj.gov.ve/decisiones/scon/Mayo/956-250507-07-0720..htm> (accessed August 4, 2008).

³⁶⁸ In July 2007, shortly after RCTV started to broadcast again in Venezuela as a cable channel (RCTV Internacional), the communication and information minister claimed that the channel must register as a “national producer,” thereby making it subject by law to the provisions of the Social Responsibility Law, including an obligation to broadcast compulsory presidential addresses. The minister ordered the body responsible for cable operators in Venezuela (the Cámara Venezolana de la Televisión por Suscripción, CAVETESU) to remove RCTV and other national producers from its grid if they failed to register by a tight deadline. CAVETESU appealed to the Supreme Court for an injunction against the minister, claiming difficulty in enforcing the measure since CONATEL had not defined clearly what a national producer was. Its president pointed out that the appeal was not motivated solely by the RCTV case, but by uncertainties about how the measure would affect another 40 cable operators. “Gobierno y Cavetesu alcanzan acuerdo,” *Últimas Noticias*, August 4, 2007, <http://www.aporrea.org/medios/n99019.html> (accessed August 4, 2008).

Recommendations

To prevent future acts of violence and intimidation against journalists, the government should:

- Ensure that all attacks on journalists are investigated promptly and thoroughly; and
- Avoid inflammatory public statements that could be construed as condoning such attacks.

The National Assembly should repeal all legal provisions which contravene international norms on freedom of expression and generate undue pressure for self-censorship. Specifically, it should:

- Repeal all insult laws (*desacato*);
- Repeal all laws that criminalize defamation of public officials and institutions;
- Ensure that civil damages for defamation are limited so as to avoid a chilling effect on free expression; and
- Amend the language of article 29(1) of the Social Responsibility Law to ensure that the offense of incitement is clearly defined and restricted to situations in which broadcasters directly and explicitly incite the commission of crimes.

The government should ensure the impartiality and due process in the procedures by which broadcasting laws are enforced. Specifically, it should:

- Ensure that investigation and sanctioning of alleged infractions of broadcast laws are carried out by an impartial and independent body protected from political interference; and
- Ensure that alleged violators of broadcast regulations are guaranteed the right to contest the charges against them.

The Supreme Court's constitutional chamber promptly granted the injunction and stayed the ministerial order, "Tribunal Supremo de Justicia admite recurso interpuesto por Cavetesu," Bolivarian News Agency (Agencia Bolivariana de Noticias), August 1, 2007, http://www.abn.info.ve/go_news5.php?articulo=99175 (accessed August 4, 2008).

As of this writing, CONATEL had still not issued a definitive resolution defining a national producer, and RCTV International continued to broadcast as an international cable channel.

To safeguard the right of access to information and increase the transparency of government and the accountability of government officials, the government should:

- Introduce legislation to implement effectively and without discrimination the constitutional right of access to information held by public entities.

To ensure the impartiality in the criteria used for the granting and renewal of broadcasting decision, the government should:

- Give applicants for concessions and frequencies opportunities to present their cases and be heard in a manner that follows appropriate due process, and includes safeguards against political interference.

V. Organized Labor

The Venezuelan government under President Chávez has sought to remake the country's labor movement in ways that violate basic principles of freedom of association. The government has systematically flouted its obligations under the conventions of the International Labour Organization (ILO) by promoting state interference in union elections, refusing to bargain collectively with established unions, and engaging in favoritism toward pro-government unions. It has also punished workers with job dismissals and blacklisting for legitimate strike activity. And it has supported the creation of alternative labor organizations that undercut the country's labor laws, risk undermining established unions, and leave workers particularly vulnerable to political discrimination.

President Chávez and his allies have attempted to justify these violations as part of a broader effort to “democratize” the labor movement by safeguarding workers' rights against allegedly corrupt and co-opted union leaders. In particular, the government has argued that trade unions have failed to hold regular elections, thereby allowing union leaders to monopolize power and sacrifice workers' interests to their own political agendas.

Yet there is nothing “democratic” about firing workers who exercise their right to strike, or denying workers their right to bargain collectively, or discriminating against workers because of their political beliefs.

Moreover, for unions to be truly democratic, workers must also be free to elect their leaders and organize their affairs without being subject to unsolicited state interference and control. In fact, it is a central tenet of the international law protecting workers' rights that states should not interfere in the internal affairs of unions. This prohibition, established in ILO Convention No. 87 and repeatedly reaffirmed by the ILO, reflects the recognition that state interference in union affairs allows for political manipulation and control of organized labor in ways that severely impede workers' freedom of association.

There are many ways in which the Chávez government could address the alleged problems of the country's unions without violating this fundamental prohibition on state interference in union affairs. For example, if there were serious grounds for believing that the alleged corruption of individual union leaders rose to the level of criminal activity, the government could conduct investigations and press criminal charges. If there were concerns about possible financial mismanagement, it could require unions to regularly submit financial reports. If there were credible evidence that union actions contravened their internal rules, an independent body could provide limited supervision to promote compliance with these rules. And if unions were failing to hold periodic and fair elections, the government could require that elections be held at specified intervals (provided it left the exact election procedures up to workers) and strengthen the appeal process to make it easier for workers to challenge alleged fraud in the courts.

But the Chávez government has gone much further, routinely violating workers' rights, openly rejecting the notion that unions should be free from state interference, and intervening in union affairs in ways that favor its own political agenda. Chávez has gone so far as to publicly rail against "the venom of union autonomy" and called for organized labor to serve as "the industrial arm" of his political project. And his government has promoted laws and measures that have allowed for significant state control over union affairs, enabling the government to weaken unions linked to the political opposition, and to foster the formation of parallel unions sympathetic to the government. Specifically, the Chávez government has:

- **Undermined workers' right to elect their representatives by mandating the organization and certification of union elections by a state institution;**

The government has promoted state interference in union elections by requiring that all union elections be organized and certified by the National Electoral Council (Consejo Nacional Electoral, CNE), a public authority. This mandatory oversight of union elections violates international standards, which guarantee workers the right to elect their representatives in full freedom and according to the conditions they determine.

- **Denied unions which do not receive state approval of election results the right to bargain collectively;**

The government has refused to bargain collectively with established unions on the grounds that they failed to hold state-certified elections. While in practice, there is a clear need for union elections to be held, such refusals by the government to bargain collectively pending state approval of elections violate the right of workers' organizations to bargain collectively to defend the interests of their members.

In the public sector alone, more than 250 collective bargaining agreements are reported to have expired while unions were waiting for the CNE to approve their requests to hold elections and certify their election results. The number of collective bargaining agreements plummeted in past years—from 854 in 2004 to 538 in 2006—in part because the Ministry of Labor blocked collective bargaining projects of established unions that had not held CNE-certified elections.

- **Undermined workers' right to freely join the labor organization of their choosing by discriminating against established unions linked to the political opposition;**

The government has exploited the requirement that existing unions must hold routine elections to discriminate against public sector unions identified with the political opposition. Bypassing established unions on the grounds that they have failed to hold state-certified elections, the government has promoted and negotiated with new, pro-government unions that are exempt from electoral restrictions when first formed. This has created strong incentives for workers to switch labor organizations and join the new organizations preferred by the government.

In one prominent case in 2004, the CNE ordered the largest public health workers' union to stop its elections the night before the vote. The union proceeded to hold the election without incident, but the CNE did not recognize the results for 17 months. While waiting for CNE approval, the Ministry of Health signed a collective bargaining contract with a newly formed, pro-government, minority health federation that had never held elections.

- **Undercut the right to strike by banning legitimate strike activity and engaging in mass reprisals against striking oil workers;**

In response to the oil strike of December 2002, the government declared the actions of thousands of striking oil workers illegal, fired close to half of the workforce, and ordered private oil companies not to hire the dismissed workers, although the ILO, the highest international authority on labor rights, found that the workers had engaged in legitimate strike activity.

The Chávez government has further threatened workers' rights by supporting the creation of alternative labor organizations. One of the central initiatives of the Chávez presidency has been the proposed creation of local-level councils, including workers' councils. Workers' councils potentially offer possibilities for greater workplace self-management, but as currently proposed, they would be granted ambiguous powers to prevent "destabilizing" labor activity—possibly including legitimate strikes—and would potentially be allowed to negotiate directly with employers on labor issues, undermining the right of established workers' organizations to bargain collectively.

The Chávez government has also strongly endorsed labor cooperatives, which can help informal workers form associations to improve their economic well-being. But cooperative workers are exempt from national labor laws. As a result, the government's support for cooperatives without the extension of protections for their workers has contributed to the expansion of a class of vulnerable workers whose rights to organize and bargain collectively are left unprotected.

Workers' rights have been further jeopardized by the lack of effective judicial protection against government violations of workers' right to organize. Venezuelan law grants international human rights treaties and conventions constitutional status and precedence over domestic norms, but the Supreme Court has repeatedly failed to uphold international standards on freedom of association. Instead, the court has permitted the government to control union elections, block legitimate labor organizing, and retaliate against workers for their labor activities.

After supporting grave violations of workers' right to organize and after backing unprecedented state interventions in union affairs, the Chávez government has promised to take steps that could begin to restore workers' right to freedom of association. In 2007, Chávez actively campaigned for a failed constitutional reform package that would have permitted state authorities to assist in union elections only at the request of the union or a court. Likewise, the government has promised for several years to reform the relevant labor and electoral laws to restrict state interference in union elections. Yet at the time of this writing, these proposals remain under discussion by the National Assembly and CNE. Until these and other necessary reforms—discussed below—are instituted, routine violations of workers' freedom of association will continue and labor rights will not be secure.

Freedom of Association under International Law

The right of workers to organize is clearly established under international human rights law. The International Covenant on Civil and Political Rights (ICCPR) states that “everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”³⁶⁹ Likewise, the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the “right of everyone to form and join the trade union of his choice.”³⁷⁰ The American Convention on Human Rights also provides for the right to associate freely for labor purposes.³⁷¹

These instruments, to which Venezuela is party, clearly establish the right to freedom of association within the context of internationally protected labor rights. As the Inter-American Court has held, “in labour union matters, freedom of association consists basically of the ability to constitute labour union organisations, and to set into motion their internal structure, activities and action programme, without any intervention by the public authorities that could limit or impair the exercise of the

³⁶⁹ International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171, December 16, 1966, art. 22(1), ratified by Venezuela on May 10, 1978.

³⁷⁰ International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316, 993 U.N.T.S. 171, December 16, 1966, art. 8(1), ratified by Venezuela on May 10, 1978.

³⁷¹ American Convention on Human Rights, OAS Treaty Series No. 36, 1144 U.N.T.S. 123, November 22, 1969, art. 16(1), ratified by Venezuela on June 23, 1977; Venezuela has signed, but not ratified, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador.”

respective right.... in trade union matters, freedom of association is of the utmost importance for the defence of the legitimate interests of the workers, and falls under the corpus juris of human rights.”³⁷² The conventions, recommendations, and jurisprudence of the ILO flesh out this right.

The ILO Declaration on Fundamental Principles and Rights at Work recognizes freedom of association as one of the “fundamental rights” that all ILO members are obligated “to respect, to promote and to realize.”³⁷³ Venezuela has ratified both of the ILO’s core conventions on freedom of association—ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise and ILO Convention No. 98 concerning the Right to Organise and to Bargain Collectively—which set forth the key elements of this fundamental right.³⁷⁴

The Right to Freely Elect Representatives

The right of workers to freely elect their representatives is a central component of freedom of association. Article 3 of ILO Convention No. 87 states, “Workers’ and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.”³⁷⁵

The prohibition on state intervention in union elections exists to guarantee the impartiality and objectivity of electoral procedures. As the ILO has cautioned, “Any intervention by the public authorities in trade union elections runs the risk of appearing to be arbitrary and thus constituting interference in the functioning of workers’ organisations, which is incompatible with their right to elect their

³⁷² *Baena Ricardo et al. v Panama*, Inter-American Court of Human Rights, Series C No. 72, February 2, 2001, paras. 156 and 158.

³⁷³ International Labour Conference, “ILO Declaration on Fundamental Principles and Rights at Work,” 86th Session, Geneva, June 18, 1998.

³⁷⁴ ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise, 1948, 68 U.N.T.S. 17, July 4, 1950, ratified by Venezuela on September 20, 1982. ILO Convention No. 98 concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, July 18, 1951, ratified by Venezuela on December 19, 1968.

³⁷⁵ ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise, art. 3,1.

representatives in full freedom.”³⁷⁶ It is therefore “the prerogative of workers’ ... organizations to determine the conditions for electing their leaders.”³⁷⁷ States can play only highly circumscribed roles in union elections. For example, if an internal union dispute ensues between rival groups of union leaders, “competent judicial authorities” can supervise a trade union’s elections.³⁷⁸ A trade union registrar, independent of state authorities and subject to appeal, can also catalog election results.³⁷⁹ However, the ILO makes clear that “[t]he situation is different ... when the elections can be valid only after being approved by the administrative authorities,” finding that, “the requirement of approval by the authorities of the results of trade union elections is not compatible with the principle of freedom of election.”³⁸⁰ Similarly, the ILO has held that the “determination of conditions of eligibility for union membership or union office is a matter that should be left to the discretion of union by-laws”³⁸¹ and that, therefore, legislation that limits the maximum tenure of trade union officers and re-election runs contrary to ILO Convention 87.³⁸²

The Right to Bargain Collectively

The right to bargain collectively with employers is an essential component of freedom of association.³⁸³ ILO Convention No. 98 establishes that governments have a responsibility to promote and encourage collective bargaining.³⁸⁴ Given the centrality of collective bargaining to the ability of workers to defend their interests in

³⁷⁶ “Intervention by the authorities in trade union elections (Right of organizations to elect their representatives in full freedom),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 455.

³⁷⁷ “General Principles (Right of organizations to elect their representatives in full freedom),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 390.

³⁷⁸ *Ibid.*, para. 431.

³⁷⁹ *Ibid.*, para. 439.

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*, para. 405.

³⁸² “Eligibility conditions (Right of organizations to elect their representatives in full freedom),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 426.

³⁸³ “The right to bargain collectively – General principles (Collective bargaining),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 881.

³⁸⁴ ILO Convention No. 98 concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, art. 4.

the workplace, the ILO has found that “public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.”³⁸⁵

Collective bargaining takes a wide variety of forms across countries. The basic international standard establishes that if a union represents the absolute majority of workers in a workplace, it is incumbent on the government authorities to ensure “the employer’s recognition of that union for collective bargaining purposes.”³⁸⁶ In the case that no union commands the majority, “collective bargaining rights should be granted” to minority unions, at least on behalf of their members.³⁸⁷ And according to the ILO, even in cases in which majority organizations enjoy exclusive bargaining rights, minority unions should “at least ... have the right to speak on behalf of their members and to represent them.”³⁸⁸ Venezuelan law, as discussed below, requires that a union enjoy majority support before gaining collective bargaining rights.

However, the ILO does not establish a specific method most appropriate for determining the most representative labor organization in a workplace. Instead, the ILO sets forth criteria for making such a determination, stating that it must be based on “objective and pre-established criteria so as to avoid any opportunity for partiality or abuse” that could arise from governmental discretion.³⁸⁹

The Right to Join the Organization of Choice

Freedom of association requires that workers have the right to join the labor organizations of their choice.³⁹⁰ They have the right to form multiple trade union organizations within a given workplace or to choose to unite to form a single

³⁸⁵ “The right to bargain collectively – General principles (Collective bargaining),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 881.

³⁸⁶ “Determination of the trade union(s) entitled to negotiate (Collective bargaining),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 959.

³⁸⁷ “Rights of minority unions (Collective bargaining),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 977.

³⁸⁸ *Ibid.*, para. 975.

³⁸⁹ “Admissible privileges for most representative unions (Right of workers and employers to establish and join organizations of their own choosing),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 347.

³⁹⁰ ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise, art. 2.

organization.³⁹¹ The ILO has observed that in order to protect these rights, governments must treat labor organizations with complete impartiality so as not to influence the choice of workers.³⁹² The government should play no role either to support or obstruct the formation of new organizations or otherwise interfere in the union formation process.³⁹³ Explicit state support of or preferential treatment for a particular organization risks influencing workers to select or form the organization favored by the government, rather than the one best suited to defend their occupational interests.³⁹⁴

The Right to Strike

International law protects the right to strike. The ICESCR requires parties to the covenant to ensure “the right to strike.”³⁹⁵ The ILO further explains that the “right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87.”³⁹⁶

The ILO has held that governments can ban strikes in only very limited circumstances, such as for a limited time for “an acute national emergency”³⁹⁷ and in “essential public services”—defined as a service whose stoppage poses “a clear and imminent threat to the life, personal safety or health of the whole or part of the population.”³⁹⁸

³⁹¹ “Trade union unity and pluralism (Right of workers and employers to establish and join organizations of their own choosing),” ILO Committee on Freedom of Association Digest of Decisions, 2006, paras. 315, 322.

³⁹² “Favouritism or discrimination in respect of particular organizations (Right of workers and employers to establish and join organizations of their own choosing),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 340.

³⁹³ “Trade union unity and pluralism (Right of workers and employers to establish and join organizations of their own choosing),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 322.

³⁹⁴ “Favouritism or discrimination in respect of particular organizations (Right of workers and employers to establish and join organizations of their own choosing),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 339.

³⁹⁵ ICESCR, art. 8(1)(d).

³⁹⁶ International Labour Conference, 1994, “Freedom of association and collective bargaining: The right to strike, Report of the Committee of Experts on the Application of Conventions and Recommendations,” 81st Session, Geneva, 1994, Report III (Part 4B), para. 151.

³⁹⁷ “Cases in which strikes may be restricted or even prohibited, and compensatory guarantees (Right to strike),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 570.

³⁹⁸ *Ibid.*, para. 576

These exceptions, however, are narrowly defined so as to prevent overly broad restrictions on the right to strike.³⁹⁹

To guarantee the right to strike, workers must be protected against reprisals. In particular, the ILO has noted, “The dismissal of workers because of a strike constitutes serious discrimination in employment on grounds of legitimate trade union activities and is contrary to Convention No. 98.”⁴⁰⁰ Dismissals of strikers on a large scale, therefore, per se “involve a serious risk of abuse and place freedom of association in grave jeopardy.”⁴⁰¹ Likewise, refusing to reemploy workers as a result of their strike participation also violates their right to freedom of association.⁴⁰² The ILO has noted that hiring discrimination—“blacklisting”—because of protected strike activity constitutes “a serious threat to the free exercise of trade union rights and, in general, governments should take stringent measure to combat such practices.”⁴⁰³

Freedom of Association under Venezuelan Law

The Venezuelan constitution guarantees freedom of association for workers.⁴⁰⁴ Venezuela also gives constitutional rank to international law; as such, no domestic laws can violate ILO conventions and jurisprudence.⁴⁰⁵

Nonetheless, Venezuelan labor law falls short of international standards, and the 1999 Constitution further restricted the right to freedom of association by mandating that state electoral authorities intervene in internal union elections, prohibiting the reelection of union leaders, and imposing term limits for union leaders. Venezuelan law makes the right to bargain collectively contingent on periodic union elections

³⁹⁹ *Ibid.*, para. 583. “The principle regarding the prohibition of strikes in essential services might lose its meaning if a strike were declared illegal in one or more undertakings which were not performing an ‘essential service’ in the strict sense of the term, i.e. services whose interruption would endanger the life, personal safety or health of the whole or part of the population.”

⁴⁰⁰ “Sanctions (Right to strike),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 661.

⁴⁰¹ *Ibid.*, para. 674.

⁴⁰² *Ibid.*, para. 666.

⁴⁰³ “Acts of discrimination (Protection against anti-union discrimination),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 709.

⁴⁰⁴ Constitution of the Bolivarian Republic of Venezuela, art. 95.

⁴⁰⁵ *Ibid.*, art. 23.

held according to state-specified rules, allows only majority unions to bargain collectively, grants government authorities broad discretion to select collective bargaining partners, and does not allow for strikes grounded in demands concerning the government's social or economic policy.

The Right to Freely Elect Representatives

Venezuelan law assigns the National Electoral Council (Consejo Nacional Electoral, CNE), an administrative body, a central role in internal union elections, including the certification of election results. Although ostensibly intended to guarantee the transparency of union elections, the required intervention of the CNE denies workers one of the most basic safeguards of union autonomy: the right to elect their representatives in full freedom.

The 1999 Constitution mandated the alternation of union leaders at least every three years.⁴⁰⁶ The government argued that the provision was necessary to ensure that union leadership elections were held in practice and that union leaders did not monopolize power. However, the ILO has noted that decisions as to the alternation of trade union leadership must lie exclusively with workers' organizations and their members and that "provisions restricting or prohibiting the re-election of trade union officers are a serious obstacle to the right of organizations to elect their representatives in full freedom."⁴⁰⁷

To oversee union elections, the constitution assigned the CNE the responsibility to "organize union elections under the terms established by law."⁴⁰⁸ The constitution granted the CNE control over the elections of all trade unions and professional organizations, regardless of whether the organization asked for state assistance.⁴⁰⁹

⁴⁰⁶ *Ibid.*, art 95.

⁴⁰⁷ ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Venezuela (ratification: 1982), 2002; ILO General Survey, 1994, Freedom of association and collective bargaining: Rights of workers' and employers' organizations to draw up their constitutions and rules, to elect their representatives in full freedom and organize their administration and activities, Report III Part 4B, Session of the Conference 81, para. 121.

⁴⁰⁸ Constitution of the Bolivarian Republic of Venezuela, art. 293(6).

⁴⁰⁹ In the case of civil society organizations, the constitution clearly specifies that the CNE can only organize elections when requested by the organization or by the Supreme Court. However, the constitution establishes no similar limitations on the CNE's powers over the elections of unions and professional associations.

The precise role of the CNE in the organization of union elections is established in the Statute on the Election of Union Leadership of 2004.⁴¹⁰ The CNE is assigned detailed functions to regulate electoral processes from beginning to end. For instance, it authorizes the convocation of elections, dictates measures to guarantee impartiality, suspends elections when irregularities are suspected, and certifies election results.⁴¹¹ The ILO has clearly stated that the 2004 statute adopted by the CNE “constitutes a serious breach of Article 3 of Convention No. 87 and should be promptly amended so as to bring it into full conformity with Convention No. 87.”⁴¹²

The mere existence of a government body that is required to administer and certify the validity of all union elections violates workers’ right to hold elections in full freedom and without state interference. The detailed and binding rules for the intervention of the CNE at all stages of union elections undermine workers’ prerogative to determine the conditions for electing their leaders, and constrain their right to organize the internal administration of their organizations. Moreover, although unions can appeal administrative decisions of the CNE to electoral and constitutional courts, the appeal process can drag on indefinitely. During this time, the validity of the unions’ electoral processes is in doubt and, as a result, unions are barred from exercising their collective bargaining rights, in violation of international standards.

The government has provided three contradictory defenses of the role assigned to the CNE. First, the Venezuelan government has argued to the ILO that the CNE’s responsibility to oversee union elections is consistent with international law because the CNE ensures the impartiality, reliability, and transparency of elections.⁴¹³ The government defends state oversight as a needed antidote to an

⁴¹⁰ National Electoral Council (Consejo Nacional Electoral, CNE), Statute on the Election of Union Leadership [Normas para la elección de las autoridades de las organizaciones sindicales], Resolution No. 041220-1710, December 20, 2004, http://www.cne.gov.ve/documentos/pdf/2008/NORMAS_PARA_LA_ELECCION_DE_LAS AUTORIDADES_DE_LAS_ORGANIZACIONES_SINDICALES.pdf (accessed May 1, 2008).

⁴¹¹ *Ibid.*, art 12.

⁴¹² ILO, “Complaint against the Government of the Bolivarian Republic of Venezuela presented by the Venezuelan Workers’ Confederation (CTV),” Report 340, Case No. 2411, Vol. LXXXIX, 2006, Series B, No. 1, para. 1400(a).

⁴¹³ ILO, “Complaint against the Government of Venezuela presented by the International Confederation of Free Trade Unions (ICFTU), the Venezuelan Workers’ Confederation (CTV) and the Latin American Central of Workers (CLAT),” Report 326, Case(s) No(s). 2067, Vol. LXXXIV, 2001, Series B, No. 3, para. 502.

entrenched and monopolistic union leadership, which would not hold free and fair elections on its own accord. As the former CNE Director of Union Affairs Aníbal Galindo told Human Rights Watch, “Venezuela is the only country in the world where we had to create rules to protect freedom of association not from the state but from the union leadership itself.”⁴¹⁴

Despite the government’s stated aim of improving union democracy, under international law the organization of union elections must be exclusively a matter for the unions concerned. Moreover, the optional participation of the CNE in union elections could achieve similar ends: if workers had concerns about upcoming electoral processes or suspected wrongdoings, they could request CNE assistance or appeal to a judicial authority.

Second, the Venezuelan government has argued that the role assigned to the CNE is compatible with international law because the CNE “functions as an electoral tribunal.”⁴¹⁵ The government has posited that the CNE enjoys full independence from executive power, given that it is part of a separate branch of government (the electoral branch).⁴¹⁶ Moreover, the directors of the CNE are appointed by the legislature, as are Supreme Court judges, and the decisions of the CNE can be appealed in a court of law.⁴¹⁷

The ILO recognizes a role for the judiciary in union elections only in the event that elections results are challenged or otherwise disputed, not in the everyday oversight and certification of all elections. According to the ILO, the intervention of an independent judiciary is necessary in such cases to ensure “impartial and objective procedures.” Furthermore, the ILO has determined that the CNE is not an independent judicial body.⁴¹⁸ The CNE does not function like a judicial tribunal, with

⁴¹⁴ Human Rights Watch interview with Aníbal Galindo, former CNE director of union affairs, May 7, 2008.

⁴¹⁵ ILO, “Complaint against the Government of the Bolivarian Republic of Venezuela presented by the Venezuelan Workers’ Confederation (CTV),” para. 1381.

⁴¹⁶ Venezuela has five theoretically independent branches of government: legislative, executive, judicial, electoral, and citizen.

⁴¹⁷ Constitution of the Bolivarian Republic of Venezuela, art. 293.

⁴¹⁸ ILO, Report 340, Case No. 2411, para. 1396; ILO, “The Single National Union of Public, Professional, Technical and Administrative Employees of the Ministry of Health and Social Development (SUNEP-SAS), supported by Public Services International (PSI),” Report No. 342, Case(s) No(s). 2422, Vol. LXXXVIX, 2006, Series B, No. 2, para. 864.

the full guarantees of defense and due process necessary to adjudicate disputes. Its members are not judges, although constitutionally they are supposed to be appointed through similar proceedings. In 2003 the government disregarded the nominating procedures established in the constitution and allowed the Supreme Court to designate the directors of the CNE, raising additional doubts about the CNE's autonomy.⁴¹⁹

Finally, the government has defended the faculties assigned to the CNE on the false premise that CNE participation in union elections is optional. Relying on an opinion from the Ministry of Labor Legal Advisor's Office from 2003, the government told the ILO that "trade union organizations are independent and free to organize and carry out their electoral processes and that the participation of the National Electoral Council is optional, i.e. it only acts at the express request of the trade union organizations."⁴²⁰ Likewise, Labor Minister Roberto Hernández stated in June 2008 that the CNE had dictated new norms to bar state interference in union elections,⁴²¹ however at this writing, the CNE had not published a new statute and the ILO continued to criticize that the government "had not taken steps to eliminate the interference of the National Electoral Board in trade union elections."⁴²²

In practice, government authorities, including the CNE and the Ministry of Labor, have treated CNE certification of elections as mandatory and binding. Aníbal Galindo told Human Rights Watch, "Article 293, Numeral 6 reads that the CNE will organize the elections of unions, professional organizations, and political organizations under

⁴¹⁹ After the National Assembly failed to elect new directors of the CNE in August 2003, the Constitutional Chamber of the Supreme Court appointed the five-member board of the CNE (which included two members and a president generally known to be pro-government). Supreme Court Constitutional Chamber, "Designación del CNE," Jesús Eduardo Cabrera Romero, Case No. 03-1254, August 25, 2003, <http://infovenezuela.org/attachments-spanish/T3%20ST01%20N2b%20Primera%20Designacion%20del%20CNE.pdf> (accessed May 13, 2008).

⁴²⁰ ILO, Report 340, Case No. 2411, para. 1384, citing the Ministry of Labor, Legal Advisor's Office, Opinion No. 13, May 30, 2003, <http://www.mintra.gov.ve/consultoria/dictamenes/dictamen13.html> (accessed March 10, 2008).

⁴²¹ Kiraz Janicke, "Venezuela Removed from ILO List of Labor Union Freedom Violators," *Venezuelanalysis.com*, June 20, 2008, <http://www.venezuelanalysis.com/news/3574> (accessed July 28, 2008).

⁴²² International Labour Conference, Report of the Committee on the Application of Standards, 97th Session, Geneva, PR No. 19, Part 1, June 11, 2008, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_094073.pdf (accessed July 28, 2008), para. 15. The National Assembly is reportedly working on reforms to the Organic Labor Law, but they had not passed at this writing. Ana Díaz, "Inician consultas de nueva Ley del Trabajo," *El Nacional*, July 31, 2008.

the terms established by the law. Period. Only in the case of clubs, such as private clubs, is it the case that the organization requests CNE assistance.... The Constitution clearly states the [CNE's] faculty to organize all union elections."⁴²³ The ILO has repeatedly requested that the Venezuelan government amend the relevant laws to expressly establish that CNE intervention is optional.⁴²⁴

The Right to Bargain Collectively

Venezuelan law commits the state to promote collective bargaining and to establish the necessary conditions to favor collective bargaining,⁴²⁵ yet the law, both on paper and in its application, falls far short of international standards and fails to provide an adequate legal framework for collective bargaining.

Labor laws bar unions from contract negotiations if elections are not held at least every three years and, as discussed, require such elections to be both CNE organized and certified.⁴²⁶ Only unions representing the absolute majority of workers are granted bargaining rights.⁴²⁷ And government authorities enjoy virtually unfettered discretion in resolving disputes over a union's majority status.

If CNE-organized and certified union elections are not held within statutory limits, union leaders are not allowed to exercise functions beyond simple administration. That includes not being allowed to represent workers in negotiations. This condition, referred to as "electoral default" (*mora electora*), amounts to a suspension of a union's collective bargaining activities.⁴²⁸ Given administrative delays in election organization and certification by the CNE, the effect has been to prevent legitimate

⁴²³ Human Rights Watch interview with Anibal Galindo, May 7, 2008.

⁴²⁴ ILO CEACR, Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise Convention, 1948 Venezuela (ratification: 1982), 2003-2008.

⁴²⁵ Constitution of the Bolivarian Republic of Venezuela of 1999, art. 96; Organic Labor Law, art. 296.

⁴²⁶ Organic Labor Law Reforms [Reglamento de la Ley Orgánica de Trabajo], *Official Gazette*, No. 38.426, April 28, 2006, <http://www.gobiernoenlinea.ve/docMgr/sharedfiles/reglamentoleyorgtrabajo.pdf> (accessed March 8, 2008), art. 128; Ministry of Labor, Legal Advisor's Office, Opinion No. 07 [Ministerio de Trabajo a través de la Consultoría Jurídica, Dictamen No. 07], June 18, 2004; Supreme Court Electoral Chamber [TSJ Sala Electoral], Case N° 2003-000069, October 20, 2003, <http://www.tsj.gov.ve/decisiones/selec/Octubre/175-201003-000069.htm> (accessed May 8, 2008).

⁴²⁷ Organic Labor Law, art. 514.

⁴²⁸ Organic Labor Law Reforms, 2006, art. 128; Ministry of Labor, Legal Advisor's Office, Opinion No. 07; Supreme Court Electoral Chamber, Case N° 2003-000069.

unions from exercising their right to collective bargaining for extended periods of time.

The paralysis of collective bargaining with established unions, pending CNE organization or certification of elections, can also create strong incentives for workers to transfer their membership to alternative unions. The ILO has found that the refusal to recognize the leaders of certain organizations in the performance of legitimate activities “may be an informal way of influencing the trade union membership of workers.... [A]ny discrimination of this kind jeopardizes the rights of workers set out in Convention No. 87, Article 2.”⁴²⁹ As the cases presented below illustrate, the Venezuelan government’s actions seem to have contributed to shifts in worker affiliation.

Venezuelan labor law further violates international standards by failing to provide collective bargaining rights for the most representative union, where no majority union exists, and by allowing the government wide discretion in resolving which union holds majority status.⁴³⁰ The ILO has urged the Venezuelan government to amend its labor law to comply with international standards in this area.⁴³¹

The broad discretion allowed Venezuelan authorities in determining which union represents a majority of workers is facilitated by ambiguous procedures provided in Venezuelan law. When a ministry grants the request of workers’ organizations to convene a sector-wide meeting to negotiate employment terms and conditions for the sector, the relevant minister must simply verify, “in the judgment of the Minister,” the majority of the unionized workers in the branch of activity at issue.⁴³² The opinion of the minister is hardly an impartial standard. And until 2006, the government had no rules for determining which union enjoyed majority status for the purposes of lower-level collective bargaining; the law was simply silent.⁴³³

⁴²⁹ “Favouritism or discrimination in respect of particular organizations (Right of workers and employers to establish and join organizations of their own choosing),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 302.

⁴³⁰ Organic Labor Law, art. 514.

⁴³¹ ILO CEACR, Observation concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Venezuela (ratification: 1968), 2003, 2004.

⁴³² Organic Labor Law, art. 530.

⁴³³ *Ibid.*, art. 514.

Revisions to the labor law from 2006 provided little improvement. They established that the labor inspector must hold a referendum with relevant workers to determine the majority union entitled to bargain collectively, when there is a dispute. However, there is a serious loophole in the law. When “it is not possible or proves inconvenient” to hold a referendum, the inspector can use “any other verification mechanism as long as it guarantees impartiality and confidentiality.”⁴³⁴

In practice, referenda are often costly and rarely conducted and, as a result, no consistent criteria exist to determine the majority union or to guarantee impartiality in the determination. As a result, the government exercises wide discretion both in selecting unions to participate in sector-wide standard setting and in conferring a union majority status for collective bargaining. Its decisions have thus appeared, at best, arbitrary and, at worst, discriminatory on political grounds.

The Right to Strike

Venezuelan law, while guaranteeing the right to strike, does not allow for a critical type of strike: strikes grounded in demands concerning government social and economic policies.⁴³⁵ This limitation removes an important way for workers to seek changes to broad conditions that affect their rights and livelihoods. The ILO has recognized that workers must be able to use strike action not only to promote positions related to better working conditions or collective occupational claims, but also in efforts to seek changes to economic and social policy questions that concern workers.⁴³⁶

Organized Labor Before Chávez

For decades prior to Chávez’s accession to power, Venezuelan labor leaders portrayed the workers’ movement as a model of “responsible” trade unionism.⁴³⁷ The main workers’ confederation, the Confederation of Venezuelan Workers

⁴³⁴ Organic Labor Law Reforms, 2006, art. 115.

⁴³⁵ Constitution of the Bolivarian Republic of Venezuela of 1999, art. 97; Organic Labor Law, art. 497.

⁴³⁶ “Objective of the strike (strikes on economic and social issues, political strikes, solidarity strikes, etc.),” ILO Committee on Freedom of Association Digest of Decisions, 2006, paras. 526, 527, 529, 531.

⁴³⁷ Steve Ellner and Miguel Tinker-Salas, *Venezuela: Hugo Chávez and the Decline of Exceptional Democracy* (Lanham, MD: Rowman & Littlefield, 2006), p. 77.

(Confederación de Trabajadores de Venezuela, CTV), worked closely with the dominant Democratic Action party (Acción Democrática, AD) to moderate labor conflict and contribute to the nation's political and social stability.

Yet, while limiting labor conflicts, the labor movement was accused by critics of political cooptation, corruption, and fraudulent leadership elections. In particular, they pointed to the CTV's support of "neoliberal" labor legislation and privatizations in the 1990s as evidence of the subordination of workers' interests to business and political demands.⁴³⁸

Observers also questioned the procedures used by the CTV, and many other unions, to select their representatives.⁴³⁹ The CTV granted seats on its executive committee to labor and political party leaders in proportion to the strength of their respective parties. Confederation and party leaders agreed on a unified slate of candidates, which was then ratified every five years through an up-or-down vote at the CTV's national congress.⁴⁴⁰ Likewise, some base unions, federations, and confederations failed to hold regular leadership elections or used internal procedures that gave workers little voice in the electoral process.⁴⁴¹

Close coordination between the main political parties and the CTV was largely thought to have limited labor conflict prior to the Chávez presidency.⁴⁴² Moreover, though the right to strike was guaranteed by Venezuelan law, the state repeatedly

⁴³⁸ Diana Barahona, "Venezuela's National Workers' Union," *Venezuelanalysis.com*, October 24, 2005, <http://www.venezuelanalysis.com/analysis/1428> (accessed July 10, 2008); M. Victoria Murillo, "From Populism to Neoliberalism: Labor Unions and Market Reforms in Latin America," *World Politics* 52, January 2000, pp. 135-174.

⁴³⁹ Steve Ellner, *Organized Labor in Venezuela, 1958-1991* (Wilmington, DE: Scholarly Resources, 1993).

⁴⁴⁰ Ellner and Tinker-Salas, *Venezuela*, p. 77.

⁴⁴¹ Jorge Joquera, *Venezuela: The Revolution Unfolding in Latin America* (Broadway, Australia: Resistance Books, 2003), p. 7. These criticisms led the political party Causa Radical to propose a bill in 1996, which strongly resembled measures later implemented by the Chávez government (discussed in this chapter) to promote elections and democratic procedures within trade unions, which were not consistently holding elections. The ILO recommended that the government withdraw the bill because it violated the right of workers to freely elect their representatives and the government complied. Causa Radical, "Proyecto de Ley de los Derechos Democráticos de los Trabajadores en sus Sindicatos, Federaciones y Confederaciones," 1996; PROVEA, "Derechos de los Trabajadores," *Informe Anual 1996-1997*, http://www.derechos.org.ve/publicaciones/infanual/1996_97/derecho_trabajadores.htm (accessed July 5, 2008); ILO, Complaint against the Government of Venezuela presented by the International Confederation of Free Trade Unions (ICFTU) Report No. 297, Case(s) No(s). 1797, Vol. LXXVIII, 1995, Series B, No. 1.

⁴⁴² Ellner and Tinker-Salas, *Venezuela*.

violated this right by taking measures to limit legitimate strike activity in the 1990s that frequently contravened both domestic and international law, such as the use of return to work orders, the deployment of the military in labor conflicts, and the reliance on decrees to declare strike activity illegal.⁴⁴³

Labor legislation predating the Chávez government created additional obstacles to worker organizing. As described above, strikes based on discontent over government social and economic policies were not permitted by Venezuelan law. Likewise, rules on collective bargaining passed in 1997 introduced the requirement that a trade union represent an absolute majority of workers to negotiate a collective agreement and granted the government sweeping discretion to determine which union held such status. These rules denied collective bargaining rights to the many workers whose unions fell short of representing a majority and facilitated government favoritism in designating the union with bargaining privileges.⁴⁴⁴ Despite two major reforms to the labor law during his time in office, the Chávez government has not altered these restrictions on the right to strike and collective bargaining and has imposed further limitations on workers' right to organize.

Electoral Interference and the Denial of Collective Bargaining Rights

Mandatory state organization of union elections, as described above, has resulted in the routine violation of the rights of workers to freely elect their representatives and to bargain collectively. The state has regularly suspended, delayed, and failed to certify union elections. As a result, more than half of unions in Venezuela are currently in electoral default and thus barred from bargaining collectively.⁴⁴⁵

⁴⁴³ PROVEA, "Derechos de los Trabajadores," *Informe Anual 1996-1997, and Informe Anual 1997-1998*, http://www.derechos.org.ve/publicaciones/infanual/1996_97/derecho_trabajadores.htm (accessed July 5, 2008). In particular, the ILO also found that authorities adopted excessive measures to limit strike activity in the national airports and that authorities engaged in anti-union reprisals by dismissing 300 workers for trade union activities in textile enterprises in the state of Miranda. ILO, Complaint against the Government of Venezuela presented by the Federation of Aeronautical Trade Unions of Venezuela (FGAV), Report No. 304, Case(s) No(s). 1827, Vol. LXXIX, 1996, Series B, No. 2; Complaint against the Government of Venezuela presented by the Union of Workers in the Textile, Clothing and Allied Industries of the Federal District and the State of Miranda (UTIT) Report No. 297, Case(s) No(s). 1685, Vol. LXXVIII, 1995, Series B, No. 1.

⁴⁴⁴ Organic Labor Law [Ley Orgánica de Trabajo], *Official Gazette*, No. 5.292, January 25, 1999, <http://www.tsj.gov.ve/legislacion/lot.html> (accessed May 3, 2008), para. 473(2).

⁴⁴⁵ Human Rights Watch interview with Aníbal Galindo, May 7, 2008.

The resulting paralysis—in addition to constituting a suspension of union activities in violation of workers’ right to freedom of association—opens the door to government favoritism and manipulation contrary to international law. In a common pattern, while established unions are deemed to be in electoral default and blocked from collective bargaining, the government has promoted and opened negotiations with new, pro-government unions. These new unions benefit from a grace period when they can bargain collectively without having held leadership elections.⁴⁴⁶ In this way, the government creates strong incentives for workers to join these alternative, pro-government unions.

The Confederation of Venezuelan Workers (CTV)

The CNE’s delay in ruling on the validity of the CTV’s elections—taking four years to declare the elections void—undermined the ability of the confederation to represent workers in national and international labor discussions during that time. Meanwhile, the government signaled its support for the formation of a new pro-government confederation, motivating workers and unions to rethink their choice of organization and abandon the established CTV.

Founded in 1936, the CTV has long been the largest confederation of workers in Venezuela. As of 2001, it represented over 65 percent of unions.⁴⁴⁷

In December 2000 the National Assembly convened a national referendum to determine whether workers’ federations and confederations should be required to renew their executive committees.⁴⁴⁸ All citizens voted on whether to remove existing

⁴⁴⁶ Organic Labor Law, art. 422(e). To register a new union, the union must present a list of the provisional directors. There are no specific term limits for provisional directors, thus they can presumably complete a full mandate of three years, unless internal union statutes establish different regulations.

⁴⁴⁷ ILO, Report 340, Case No. 2411, para. 1398.

⁴⁴⁸ Workers’ federations and confederations are also known as second- and third-tier workers’ organizations because they unite first-tier or base unions. The ILO has clearly stated that federations and confederations “enjoy the various rights accorded to first-level organizations, in particular as regards their freedom of operation, activities and programmes.” “Rights of federations and confederations (Right of employers’ and workers’ organizations to establish federations and confederations and to affiliate with international organizations of employers and workers),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 730.

trade union leaders from office and whether to require workers to “totally replace the union leadership within the next 180 days” in elections supervised by the CNE.⁴⁴⁹

The government stated that the purpose of the referendum was to ensure that the provisions of ILO Convention No. 87 were “complied with in practice.” According to the government, a popular referendum was necessary because “the traditional union leadership has embedded and strengthened itself in a way that prevents its removal through normal means by the exercise of the rights of the respective workers.”⁴⁵⁰

While all confederations would be required to hold new elections if the referendum passed, Chávez made it clear that the referendum was an attack on the CTV in particular: “We are going to demolish the CTV.... And what is the next step? The referendum.”⁴⁵¹ Such threats were not isolated incidents and, as the ILO noted, “Since it came to power, the government has pursued a policy of denigrating and slandering the Venezuelan Workers’ Confederation and its leaders.”⁴⁵²

The referendum was a clear attempt by the government to intervene in union affairs. The proposed indiscriminate suspension of union leaders, their replacement through elections supervised and certified by an electoral council set up by the government, and the principle of alternation imposed so that union leaders would not be reelected restricted the right of workers to freely elect their representatives and to have the conditions of such elections determined through union bylaws.⁴⁵³ The ILO noted that the union referendum constituted “a dangerous precedent with respect to a policy of state intervention” and ILO Secretary General Juan Somavía wrote to the

⁴⁴⁹ The referendum asked, “¿Está usted de acuerdo con la renovación total de la dirigencia sindical, en un lapso de 180 días, bajo estatuto Especial elaborado por el Poder Electoral...y que se suspendan en sus atribuciones en un lapso de 180 días a los directivos de las Centrales, Federaciones y Confederaciones sindicales establecidas en el país?” CNE, General Sectoral Office of Electoral Information, Office of Political Analysis, “Resultados del Referendo Sindical del 3 de diciembre de 2000.”

⁴⁵⁰ Government response to the ILO, “Queja contra el Gobierno de Venezuela presentada por La Confederación Internacional de Organizaciones Sindicales Libres (CIOSL) et al.,” Report 324, Case No. 2067, Vol LXXXIV, 2001, Serie B, No. 2, para. 961.

⁴⁵¹ Gregorio Salazar, “Libertades sindicales en Venezuela en los comienzos de la V República,” in Enrique de la Garza Toledo, ed., *Los sindicatos frente a los procesos de transición política* (Buenos Aires: CLACSO, 2001).

⁴⁵² “Venezuela: Convention No. 87. Concerning Freedom of Association and Protection of the Right to Organise, 1948,” ILO fact sheet, undated, <http://www.ilo.org/public/english/dialogue/actrav/new/ilco3/file4.pdf> (accessed May 12, 2008).

⁴⁵³ “Rights of federations and confederations (Right of employers’ and workers’ organizations to establish federations and confederations and to affiliate with international organizations of employers and workers),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 731.

CNE asking that the referendum be cancelled.⁴⁵⁴ Even so, in November 2000, the Supreme Court rejected an appeal by trade union representatives and civil society organizations to cancel the referendum.⁴⁵⁵

On December 3, 2000, the union referendum was held and passed, though turnout was just 23 percent.⁴⁵⁶ In light of the referendum result, all confederations in Venezuela were required to hold new elections. The CNE issued a special statute, which detailed an expansive and mandatory role for the CNE in the organization of the new elections⁴⁵⁷ (precursor of the Statute on the Election of Union Leadership of 2004, described above).

On October 25, 2001, the CTV participated in the state-supervised election process. The CTV's internal electoral commission ratified that Carlos Ortega was selected as president.⁴⁵⁸ However, workers and other candidates who participated in the elections alleged electoral fraud.⁴⁵⁹

The workers alleging fraud appealed to the Supreme Court, demanding new elections.⁴⁶⁰ The court declared their request inadmissible because an electoral appeal before the CNE was underway and, only after an examination of the voting by

⁴⁵⁴ "Venezuela: Convention No. 87," ILO fact sheet.

⁴⁵⁵ The Constitutional Chamber of the Supreme Court ruled that the referendum was consistent with international law and was not an intervention in union affairs, but rather, served to "create favorable conditions in practice for the participation of workers in union affairs." "Improcedente amparo constitucional contra referéndum sindical," Supreme Court Constitutional Chamber press release, November 28, 2000, <http://www.tsj.gov.ve/informacion/notasprensa/2000/281100-2.htm> (accessed May 12, 2008).

⁴⁵⁶ Of the 23 percent of the registered electorate that voted, 62 percent voted in favor of the referendum and 27.3 percent voted against it. CNE, "Referendos Nacionales Efectuados en Venezuela (1999-2000)," <http://www.cne.gov.ve/estadisticas/eo10.pdf> (accessed May 8, 2008).

⁴⁵⁷ CNE, Special Statute for the Renovation of Union Leadership [Estatuto Especial para la Renovación de la Dirigencia Sindical], Resolution No. 010418-113, April 18, 2001, http://www.cne.gov.ve/documentos/elecc_esta.php (accessed May 15, 2008).

⁴⁵⁸ "Comisión electoral de la CTV reinició el proceso de escrutinio," *El Nacional*, October 28, 2001.

⁴⁵⁹ "TSJ declare inadmissible amparo interpuesto por Aristóbulo Isturiz sobre elecciones de la CTV," Supreme Court Constitutional Chamber press release, December 4, 2001, <http://www.tsj.gov.ve/informacion/notasprensa/2001/041201-3.htm> (accessed June 18, 2008); "Diferencias por ilícitos impiden acuerdo para salvar elecciones de la CTV," *El Nacional*, November 3, 2001; "Candidatos piden decretar nulidad de las elecciones," *El Nacional*, October 31, 2001.

⁴⁶⁰ *Ibid.*

the CNE could new elections be called. As such, the court urged the CNE to complete its examination of the validity of the CTV elections.⁴⁶¹

The CNE declined to rule on the results of the CTV elections, however, alleging that the CTV withheld election materials necessary for it to certify the results.⁴⁶² Finally, in January 2005, the CNE declared the elections null and void, never having received the electoral documents it claimed it needed to assess the allegations of fraud.⁴⁶³

With the election results uncertified, the government refused to recognize the CTV executive committee, arguing, “The State has no legal grounds for recognizing an executive committee of the CTV which has not been able to demonstrate to the public registrar of trade unions the number of votes obtained by each of the alleged members of the above board.”⁴⁶⁴ On this basis, in 2002, the government violated Venezuelan law by refusing to call national tripartite discussions with the CTV—which was the most representative labor organization, according to CNE statistics—to review government-proposed minimum wage increases.⁴⁶⁵ The Ministry of Labor, instead, decreed a minimum wage increase in April 2002 without consulting with the CTV or any other labor representatives.⁴⁶⁶

⁴⁶¹ “TSJ declare inadmissible amparo interpuesto por Aristóbulo Isturiz sobre elecciones de la CTV,” Supreme Court Constitutional Chamber press release.

⁴⁶² “CNE exhorta a iniciar proceso de totalización,” *El Nacional*, October 31, 2001; “Exigen ante el TSJ pronunciamiento del Consejo Nacional Electoral: Sindicato del Metro de Caracas solicita medida cautelar de enajenar o gravar bienes de la CTV,” Supreme Court press release, March 25, 2002, <http://www.tsj.gov.ve/informacion/notasprensa/2002/250302-2.htm> (accessed June 18, 2008); ILO, “Complaint against the Government of the Bolivarian Republic of Venezuela presented by the Venezuelan Workers’ Confederation (CTV);” ILO CEACR, Individual Observation concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Venezuela (ratification: 1968), 2004.

⁴⁶³ “Poder Electoral Venezolano invalida elecciones de la CTV,” Ministry of Communication and Information (*Ministerio del Poder Popular para la Comunicación y la Información*), January 12, 2005, http://mci.gov.ve/pagina/1/2470/poder_electoral_venezolano.prnt (accessed May 7, 2008).

⁴⁶⁴ ILO CEACR, Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise Convention, 1948, Venezuela (ratification: 1982), 2005.

⁴⁶⁵ Venezuelan law requires tripartite discussion between the most representative workers’ organization, the most representative employers’ organization, and the national executive to revise minimum wage legislation at least once every three years. *Ley Orgánica de Trabajo*, arts. 167, 168. The CTV was registered as the most representative workers’ organization. CNE, Union Commission (Comisión Sindical Gremial), “Estructura Sindical Venezolana,” August 21, 2001.

⁴⁶⁶ PROVEA, *Informe Anual 2001-2002*, “Derechos laborales, Derecho a la libertad sindical,” http://www.derechos.org.ve/publicaciones/inanual/2001_02/derecho_laboral.htm#04 (accessed June 17, 2008); “Negaron a convocar la Comisión Tripartita,” *El Universal*, March 8, 2002; “CTV: Asamblea Nacional no pueda engavetar decreto de aumento salarial,” *El Nacional*, July 22, 2001.

Commenting specifically on Venezuela, the ILO, however, stressed that the most representative labor confederation, which was the CTV in 2002, “should be consulted at length by the authorities on matters of mutual interest, including everything relating to the preparation and application of legislation concerning matters relating to them and to the fixing of minimum wages.” It asked the government “to duly respect and consult it on all draft bills relating to labor issues and abide by [the CTV’s] status as the most representative trade union confederation.”⁴⁶⁷

Even accepting that there were genuine concerns about the results of the CTV elections, including by members of CTV affiliated unions, the ILO pointed out that the activities and recognition of the confederation—particularly its right to participate in tripartite discussions as the most representative worker association—should not have been suspended pending the outcome of judicial proceedings.⁴⁶⁸ By denying the confederation the right to engage in union-related activities, including tripartite discussions, and by failing to recognize the CTV executive committee for over four years, the government created strong incentives for workers and affiliated unions to desert the CTV for a confederation recognized by the government.

Politics most likely influenced the government’s decision not to recognize the CTV’s executive committee. For example, Chávez made clear that if a pro-government candidate had won the CTV elections, the treatment of the confederation would have been different. Chávez had publicly promised the pro-government candidate, Aristóbulo Istúriz, “a seat at Miraflores [the presidential palace]” if he were to have won the election.⁴⁶⁹

Government antipathy toward the CTV intensified following the involvement of some CTV members (including CTV president Carlos Ortega) in the coup attempt

⁴⁶⁷ ILO 330th Report of the Committee on Freedom of Association, FB.286/11(Part 1), 286th Session, Case No. 2067 (Venezuela), paras. 174, 175.

⁴⁶⁸ ILO CEACR, Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Venezuela (ratification: 1982), published 2005.

⁴⁶⁹ Ellner and Tinker-Salas, *Venezuela*, p. 89.

of April 2002 and the oil strike that nearly crippled the economy in December 2002 (see below).⁴⁷⁰

At the same time, the government vocally supported the creation of a pro-government confederation called the National Union of Workers (Unión Nacional de Trabajadores, UNT). As Chávez said at the one-year anniversary of the UNT in 2004:

This is much more important [than the Constituent Assembly] because it was not a group of 135 people in an Assembly, but rather the workers' movement, confronting coup-makers, fascists, businessmen, anti-nationals and apartheidists, that achieved as a result a demolished CTV and a UNT each day stronger and each day freer.⁴⁷¹

While the government denounced the CTV executive committee, the UNT immediately received favorable treatment.⁴⁷² Breaking from tradition, the government refused to appoint the CTV secretary general as labor's representative at meetings of the ILO beginning in 2002 on the grounds that its executive committee was illegitimate.⁴⁷³ In May 2003 the government accredited the two-month-old UNT to

⁴⁷⁰ Carlos Ortega, the president of CTV and fierce opponent of President Chávez, was convicted for participation in the attempted coup of April 2002 and sentenced in 2005 to 16 years in prison for plotting against the government. On December 2, 2002, a national strike was called by the Democratic Coordination in which the CTV and Fedecámaras participated. Inter-American Commission Report on the Situation of Human Rights in Venezuela 2003, OEA/Ser.L/V/II.118 doc. 4 rev. 2. December 29, 2003, para. 115; "Carlos Ortega irá a juicio," *El Nacional*, May 7, 2005.

⁴⁷¹ "Presidente Chávez: Movimiento obrero ha demolido a la CTV," *RNV*, April 18, 2004, <http://rnv.gov.ve/noticias/?act=ST&f=10&t=4937> (accessed May 11, 2008). Chávez had made similar statements at the UNT's founding, saying that "the CTV must disappear from the Venezuelan scene and a workers' movement ... a Venezuelan labor confederation must be born because these gangsters [referring to the CTV leadership] should be imprisoned as saboteurs, fascists, irresponsible people and delinquents." ILO, "Complaints against the Government of Venezuela presented by the Venezuelan Workers' Confederation (CTV), the International Confederation of Free Trade Unions (ICFTU), the National Union of Oil, Gas, Petrochemical and Refinery Workers (UNAPETROL) and the National Single Federation of Public Employees (FEDEUNEP)," Report 333, Case(s) No(s). 2249, Vol. LXXXVII, 2004, Series B, No. 1, para. 1040.

⁴⁷² ILO CEACR, Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Venezuela (ratification: 1982), 2005.

⁴⁷³ In March and May 2002, Carlos Ortega requested that the labor minister accredit him as the labor delegate at the ILO annual meeting. On May 22 the minister replied, refusing to recognize Ortega as president of the CTV because the election results were disputed, and therefore denying Ortega official credentials to attend the ILO conference. Nonetheless, the Supreme Court held that Carlos Ortega should be appointed to represent labor at the ILO meeting, given that the CTV was the most representative worker confederation and Ortega appeared to be president of the confederation. The decision, however, came after the conference had already begun. Ministry of Labor, Oficio No. 677, May 22, 2002; "Auto de la Sala Electoral del Tribunal Supremo de Justicia: Carlos Ortega debe acreditarse como delegado por el Ministerio del Trabajo ante la 90

represent Venezuela at the ILO's annual meeting. The CTV contested the appointment to the ILO Credentials Verification Commission, claiming that it was the country's most representative labor organization and therefore should represent labor. The ILO questioned the criteria put forward by the government to determine the most representative labor confederation—which considered the number of collective bargaining agreements signed by the confederations with the government, rather than the number of members or unions affiliated—and found that “they lacked the objectivity necessary to be considered valid” and recommended that the government in the future use a predetermined method “which raises no doubts as to workers’ ability to act independently of the government.”⁴⁷⁴ Since 2005 the government has allowed the UNT and the CTV to jointly represent labor before the ILO.⁴⁷⁵

Many workers and unions did elect to voluntarily leave the CTV because of the role some members of the confederation played in the coup attempt of 2002, as well as its support for the oil strike of 2002-2003 along with the main business chamber.⁴⁷⁶ However, it was by no means clear that the UNT commanded a majority of support only months after its formation.

Government favoritism toward the UNT is also suggested by the shift in collective bargaining agreements signed by public sector unions with the government. According to the Ministry of Labor, three-quarters of all collective agreements signed in the public sector in 2003 were with unions affiliated with the UNT; under a quarter were with the CTV, representing a significant decline from the 70 percent signed with the CTV in 2002.⁴⁷⁷ In 2004, the number of unions in the public and private sector not

Conferencia de la OIT,” Supreme Court press release, May 30, 2002, <http://www.tsj.gov.ve/informacion/notasprensa/2002/300502-4.htm> (accessed June 19, 2008); ILO, “Curso Dado a las Recomendaciones del Comité y del Consejo de Administración,” Case No. 2067, para. 169.

⁴⁷⁴ International Labour Conference, “Reports of the Credentials Committee, Third report, Ninety-second Session, 2004,” <http://www-ilo-mirror.cornell.edu/public/english/standards/reln/ilc/ilc92/pdf/pr-6d.pdf> (accessed June 19, 2008), para. 36.

⁴⁷⁵ CTV Executive Committee, “Informe de la Comisión de Normas y de la Verificación de Poderes, de la Conferencia Internacional del Trabajo en su Nonagésima Sexta Reunión, celebrada en Ginebra, Suiza, en el 2007. Actas Provisionales, 22, Segunda Parte, República Bolivariana de Venezuela,” <http://www.ctv.org.ve/index.php> (accessed June 19, 2008), p. 54.

⁴⁷⁶ Ellner and Tinker-Salas, *Venezuela*, pp. 88-89.

⁴⁷⁷ “Según cifras del MT, la UNT encabeza la representatividad sindical en Venezuela,” Ministry of Labor press service, June 2, 2004, <http://www.aporrea.org/actualidad/n17158.html> (accessed May 8, 2008).

affiliated with a confederation reached one-third, while the UNT had 45 percent of affiliations and the CTV had 22 percent.⁴⁷⁸ As the ILO suggested, “one of the possible reasons for the drastic changes reported may be that CTV’s capacity for negotiation has been limited by the systematic attacks to this centre.”⁴⁷⁹ Union leaders from the CTV told Human Rights Watch that the government has regularly refused to re-negotiate expired collective agreements with unions affiliated with the CTV.⁴⁸⁰ As the following cases illustrate, the government often has cited delays in holding elections as justification for excluding established unions from collective bargaining agreement negotiations, while opening negotiations with new, pro-government unions exempt from electoral requirements when first formed.

Health Workers (SUNEP-SAS)

Public health workers belonging to the oldest and largest public sector health union in Venezuela were denied the right to bargain collectively in 2004 due to the CNE’s 17-month delay in certifying the union’s election results. While the union was waiting to receive CNE certification, the government negotiated a collective agreement with a newly formed, pro-government federation that had never held leadership elections and banned the more representative union from participating in the negotiation.

Founded in 1971, the Single National Union of Public, Professional, Technical and Administrative Employees of the Ministry of Health and Social Development (Sindicato Único Nacional de Empleados Públicos, Profesionales, Técnicos, Administrativos del Ministerio de Salud y Desarrollo Social, SUNEP-SAS) represents over 30,000 workers across the country and is a CTV affiliate.⁴⁸¹ SUNEP-SAS has historically administered the collective bargaining contract for the public health sector.⁴⁸²

⁴⁷⁸ ILO CEACR, Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Venezuela (ratification: 1982), 2006.

⁴⁷⁹ International Labour Conference, “Reports of the Credentials Committee, Third report, Ninety-second Session, 2004,” para. 36.

⁴⁸⁰ Human Rights Watch interviews with Antonio Suárez, president of FEDEUNEP, Caracas, September 18, 2007, and Linerby Sánchez, SUNEP-SAS, Caracas, September 18, 2007.

⁴⁸¹ Human Rights Watch interview with Linerby Sánchez and Candida Inés, SUNEP-SAS, Caracas, September 18, 2007.

⁴⁸² SUNEP-SAS negotiated the four previous collective health sector contracts. ILO, “Complaint against the Government of the Bolivarian Republic of Venezuela presented by the Single National Union of Public, Professional, Technical, and

In 2004 SUNEP-SAS planned to hold elections to renew its leadership, which had last been elected in 2001.⁴⁸³ The CNE approved the electoral project, and the elections were scheduled for November 30, 2004.⁴⁸⁴

At 7:40 p.m. on November 29, 2004, the leaders of SUNEP-SAS received an administrative order from the CNE to suspend the elections scheduled for the next day.⁴⁸⁵ According to the CNE, a group of SUNEP-SAS workers had filed a complaint to the CNE about irregularities in the electoral process, so the CNE issued an injunction to postpone the elections until the dispute was resolved.⁴⁸⁶

SUNEP-SAS decided to proceed with the elections because the union had already expended considerable energy and resources to install voting equipment in the union's 26 chapters across the country. The elections occurred without incident or further challenge.⁴⁸⁷ Nonetheless, the CNE did not certify the results and did not respond to SUNEP-SAS's appeal requesting reversal of the election suspension order and recognition of the election results.⁴⁸⁸ SUNEP-SAS's appeal to the Venezuelan courts was also unsuccessful, being ultimately dismissed by the Supreme Court on the basis of alleged procedural irregularities.⁴⁸⁹

Meanwhile, SUNEP-SAS was denied the right to bargain collectively. In July 2005 the Ministry of Labor rejected a previous request dating from 2002 from SUNEP-SAS to

Administrative Employees of the Ministry of Health and Social Development (SUNEP-SAS), supported by the Public Services International (PSI)," Case 2422/Venezuela, Report 342, Vol. XC, 2007, Series B, No. 3, para. 1025.

⁴⁸³ Letter from Elina Ramírez Reyes to the SUNEP-SAS Executive Committee, Document No. 2006-0932, September 26, 2006.

⁴⁸⁴ ILO, Report 342, Case No. 2242, para. 1022.

⁴⁸⁵ CNE, General Director of the Union and Professional Affairs (Coordinadora General de la Comisión de Asuntos Sindicales y Gremiales), Acto administrativo S/N, November 29, 2004, cited in Supreme Court Electoral Chamber, Luis Alfredo Sucre Cuba, Case No. AA70-E-2005-000004, May 11, 2005, <http://www.tsj.gov.ve/decisiones/selec/Mayo/42-110505-000004.htm> (accessed March 20, 2008).

⁴⁸⁶ Human Rights Watch interview with Aníbal Galindo, May 7, 2008.

⁴⁸⁷ Human Rights Watch interview with Linerby Sánchez and Candida Inés, SUNEP-SAS, Caracas, September 14 and September 18, 2007; ILO, Report 342, Case 2422, para. 1035.

⁴⁸⁸ SUNEP-SAS lodged an administrative complaint (recurso jerárquico) on November 30, 2004. The CNE, in practice, refused to rule on the appeal, and under Venezuelan law, administrative failure to respond to a claim within established time limits is considered a rejection of the claim. Ley del Estatuto de la Función Pública, *Official Gazette*, No. 37-522, September 6, 2002, art. 85.

⁴⁸⁹ Supreme Court Electoral Chamber, Case No. AA70-E-2005-000004.

convene contract negotiations.⁴⁹⁰ SUNEP-SAS was also denied its right under Venezuelan law to represent workers in August 2005 sector-wide contract discussions for public health workers, convened by the Ministry of Health. The ministry met instead with the newly formed National Federation of Regional, Sectoral and Allied Trade Unions of Health Workers (Federación Nacional de Sindicatos Regionales, Sectoriales y Conexos de Trabajadores de la Salud, FENASINTRASALUD), to discuss a draft labor agreement proposed by the latter.⁴⁹¹ FENASINTRASALUD had formed as a splinter group of SUNEP-SAS in 2004 and was affiliated with the UNT. It had never held leadership elections. In contrast, SUNEP-SAS claimed to represent the majority of workers—a matter not contested by the government—and had held elections in accordance with its internal statutes. Yet the ministry ignored the legal requirement to verify that the worker organizations with which it met for contract discussions represented the majority of unionized workers in the sector.⁴⁹² (The issue of majority versus minority representation in collective bargaining is discussed further below.)

Defending the denial of SUNEP-SAS participation, the Ministry of Labor wrote, “[T]he union file shows there have been no union elections since 2001, as a result of which elections are overdue, which is contrary to law and to genuine freedom of association.”⁴⁹³ The Ministry of Labor approved the health sector contract negotiated with FENASINTRASALUD on May 12, 2006.⁴⁹⁴

⁴⁹⁰ In December 2002 SUNEP-SAS introduced its fifth draft collective bargaining agreement for the health sector to the Ministry of Labor, but received no response until July 2005, when the Ministry of Labor rejected its request. Ministry of Labor, Resolution No. 3903, *Official Gazette*, No. 38.228, July 12, 2005; ILO Report 348, Case 2422, para. 1335.

⁴⁹¹ Ministry of Health (Ministerio del Poder Popular para la Salud), Resolution No. 3903, *Official Gazette*, No. 38.228, July 14, 2005, to convene a labor policy meeting (*reunión normativa laboral*) for the health sector.

⁴⁹² Organic Labor Law, art. 530.

⁴⁹³ ILO, Report 342, Case 2422, para. 1032; Ministry of Labor, Resolution 2005-0502, August 18, 2005; Ministry of Labor, Legal Advisor’s Office, Opinion No. 7, June 18, 2004.

⁴⁹⁴ Recognition agreement No. 2006-01015, May 12, 2006. ILO, “Complaint against the Government of the Bolivarian Republic of Venezuela presented by the Single National Union of Public, Professional, Technical and Administrative Employees of the Ministry of Health and Social Development (SUNEP-SAS), supported by Public Services International (PSI),” Report 348, Case 2422, para. 1336.

On May 11, 2006, the CNE finally certified the elections held by SUNEP-SAS in November 2004.⁴⁹⁵ However, by then, contract negotiations had already concluded for the health sector. SUNEP-SAS suffered significantly from the impact of its exclusion from these sector-wide discussions.

Under Venezuelan law, a workers' organization that has not participated in such sector-wide negotiations is prohibited from submitting complaints on behalf of the workers covered by the contract.⁴⁹⁶ As a result, even after SUNEP-SAS's elections were certified, the National Labor Inspectorate blocked SUNEP-SAS from presenting demands for health workers.⁴⁹⁷ The organization's ability to defend the rights of the workers it represents was thus severely limited, in violation of international standards that provide that presenting "a list of dispute grievances is a legitimate trade union activity" and that "[t]rade unions should be free to determine the procedure for submitting claims to the employer."⁴⁹⁸

The Ministry of Health also refused the request by the SUNEP-SAS leadership for trade union leave, noting that the union's collective workplace contract granting such leave was superseded by the sector-wide agreement to which the organization was not party.⁴⁹⁹ SUNEP-SAS officials were thus denied their right to leave, which reduced the time they could spend to organize union activities and violated their

⁴⁹⁵ CNE Resolución No. 060405-0215, *Electoral Gazette [Gaceta Electoral]*, No. 306, April 5, 2006, <http://www.cne.gov.ve/gacetas.php?gaceta=306> (accessed May 14, 2008). Aníbal Galindo, then-director of CNE Union Affairs Division, accepted that "[t]he delay may have been the fault of the CNE," but that it was purely a bureaucratic delay, as "the CNE simply processes complaints in the order they arise." Human Rights Watch interview with Aníbal Galindo, May 7, 2008.

⁴⁹⁶ Organic Labor Law, art. 545. Unions that have not been invited or have not adhered to a sector-wide agreement are limited to introducing conciliatory demands on behalf of workers (*pliegos de peticiones con carácter conciliatorio*) and only those in accordance with the contract signed for the sector.

⁴⁹⁷ The National Labor Inspectorate declared SUNEP-SAS's application to reopen discussion of its list of demands because the new collective agreement negotiated for the health sector had already entered into force. ILO, Report 342, Case 2422, paras. 1334, 1336; Letter from Elina Ramírez Reyes, director of the Labor Inspectorate, Collective Labor Affairs of the Public Sector, to SUNEP-SAS, September 26, 2006.

⁴⁹⁸ "Other activities of trade union organizations (protest activities, sit-ins, public demonstrations, etc.) (Right of organizations freely to organize their activities and to formulate their programmes)," ILO Committee on Freedom of Association Digest of Decisions, 2006, paras. 509, 510.

⁴⁹⁹ ILO, Report 348, Case 2422, paras. 1339, 1340.

right to “be afforded the necessary time off from work, without loss of pay or social and fringe benefits, for carrying out their representation functions.”⁵⁰⁰

As the ILO found, the decision to immediately negotiate with a pro-government federation and deny SUNEP-SAS collective bargaining rights, the right to present demands, and union leave for officials strongly suggested acts of favoritism on the part of the government.⁵⁰¹ The ILO urged the government “to put an end to the acts of discrimination against SUNEP-SAS and its officials, [and] to guarantee its rights to trade union leave and to collective bargaining.”⁵⁰²

Nutrition Workers (SUNEP-INN)

CNE delay in approving and certifying the elections for the public sector nutrition workers’ union similarly denied union representatives the right to represent their members in sector-wide collective bargaining agreement negotiations.

The Single National Union of Public Employees of the National Institute for Nutrition (Sindicato Único Nacional de Empleados del Instituto Nacional de Nutrición, SUNEP-INN) was founded in 1971 to represent nutrition workers in Venezuela; it is the only union in the sector.⁵⁰³ In December 2004 SUNEP-INN requested to hold elections, but it took almost two years, until November 2006, for the union to get its elections first approved and then certified by the CNE. SUNEP-INN blamed the CNE for the delay, while the CNE claimed that SUNEP-INN failed to submit the necessary documentation, specifically a list of members.⁵⁰⁴

⁵⁰⁰ “Free time accorded to workers’ representatives,” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 1110.

⁵⁰¹ *Ibid.*, para. 1345.

⁵⁰² *Ibid.*, para. 1348(a).

⁵⁰³ Human Rights Watch interview with Aurestela Vásquez, SUNEP-INN Executive Committee, Caracas, September 21, 2007.

⁵⁰⁴ SUNEP-INN first requested approval from the CNE on December 15, 2004, to hold elections in March 2005. Secretary General of SUNEP-INN Aurestela Vásquez told Human Rights Watch that the CNE asked the union to wait to hold elections until the CNE had finished drafting new norms for union elections. The CNE published the new norms in December 2004. SUNEP-INN wrote to the CNE in August 2005 with a second request to hold elections, this time in December 2005. In November 2005 SUNEP-INN finally received CNE authorization to hold elections, but the approval came too close to the planned election date, forcing the union to postpone elections until May 2006. It took the CNE until November 2006 to recognize the results of the elections. Letter from National Executive Committee, SUNEP-INN to the President of the CNE, December 15, 2004; Human Rights Watch interview with Aurestela Vásquez, September 21, 2007; Letter from the National Executive Committee, SUNEP-INN to the President of the CNE, August 30, 2005; Human Rights Watch interview with Aníbal Galindo, May 7, 2008; Letter

While stuck in exchanges with the CNE, in August 2005 SUNEP-INN officials requested to participate in the contract discussions for the health sector, convened by the Ministry of Health at the request of FENASINTRASALUD (see above).⁵⁰⁵ As with SUNEP-SAS, SUNEP-INN's request to participate in the discussions was denied. The Ministry of Labor found that SUNEP-INN had not held elections and thus "the leadership of the union, is only allowed to complete basic acts of administration.... [T]hey will not represent their members in negotiations and collective labor conflicts."⁵⁰⁶ As a result, the negotiations proceeded with no representation for nutrition workers.

Like SUNEP-SAS, SUNEP-INN suffered significant negative consequences from being barred from the sector-wide negotiations. For example, largely on the grounds that SUNEP-INN had not participated in the contract talks and was not a party to the agreement, the Ministry of Health denied SUNEP-INN representatives funds for union activities established under the public health sector contract, making it more difficult for SUNEP-INN to organize and defend the rights of its members.⁵⁰⁷

Doctors (FMV)

Since 2003 the Venezuelan government has denied the Venezuelan Medical Federation (Federación Médica Venezolana, FMV) the right to negotiate a new collective bargaining agreement for what appear to be political reasons. After the federation lodged a controversial challenge to the legality of the government's health missions, the government refused to negotiate collectively with the organization, citing various justifications. The government argued that because the legislation establishing the doctors' federation runs afoul of international law, the government would no longer bargain with the organization, breaking from past practice established over six decades prior. The government also pointed to the failure of the

from CNE Director General Anibal Galindo Salazar to SUNEP-INN, February 6, 2007, announcing that in its meeting on November 7, 2006, the CNE recognized the elections held by SUNEP-INN on May 18, 2006.

⁵⁰⁵ Letter from Auristela de Castillo, María de Benítez, Gisela Requiz, Carlos López, Lucinda Sanchez, and Gladys Manzano, executive committee members of SUNEP-INN, to the president of the Sector-Wide Standard Setting Meeting for Health Workers, No. 048, August 15, 2005.

⁵⁰⁶ Letter from Elina Ramírez Reyes and Adriana Caraballo, Ministry of Labor, General Labor Sector Director, No. 2005-0501, August 18, 2005.

⁵⁰⁷ Memo from the Ministry of Health to Personnel Office, "Prima substitutiva para Dirigente Sindical," December 8, 2006.

federation to elect new leaders as further grounds for refusing to bargain, despite attempts by the doctors to hold elections for roughly three years.

The FMV was established in 1942 as part of the Medical Practice Act (Ley del Ejercicio de la Medicina) and now represents over 60,000 doctors. The FMV has the responsibility by law to regulate the medical profession, and the exclusive power to negotiate collective agreements with public and private institutions on behalf of doctors.⁵⁰⁸

Nonetheless, in violation of international law, which requires that workers be allowed to freely choose their representative organization, the Medical Practice Act makes membership in the FMV mandatory for doctors practicing medicine in Venezuela and grants exclusive representation for collective bargaining in the medical sector to the FMV.⁵⁰⁹ Further, the ILO has found that “the legislation provides for a single mixed or puppet trade union made up simultaneously of workers and employers ... which ... raises issues of legitimacy of representation in the collective bargaining process due to a clear conflict of interests.”⁵¹⁰

For over six decades and 37 collective bargaining agreements, however, successive Venezuelan governments, including the Chávez government, ignored these international law violations and negotiated with the FMV.⁵¹¹ Problems in the long-standing relationship between the government and doctors erupted in 2003 when the FMV submitted to the labor inspectorate its draft proposal to replace the collective agreements with public health and social security authorities that had expired in 2002. The labor inspectorate accepted the draft collective agreements, but did not respond to the FMV’s repeated requests to begin discussions.⁵¹² The

⁵⁰⁸ Medical Practice Act [Ley de Ejercicio de Medicina], *Official Gazette*, No. 3002, August 23, 1982, arts. 4, 70(13), 72.

⁵⁰⁹ *Ibid.*

⁵¹⁰ ILO, “Complaint against the Government of the Bolivarian Republic of Venezuela presented by the Venezuelan Medical Federation (FMV),” Report No. 340, Case(s) No(s). 2428, Vol. LXXXIX, 2006, Series B, No. 1, para. 1437.

⁵¹¹ FMV, “Historia,” <http://www.federacionmedicavenezolana.org/> (accessed May 15, 2008).

⁵¹² The FMV submitted draft collective agreements, which were accepted by the National Labor Inspectorate on December 9, 2003. The FMV then made repeated requests to begin discussion of the collective agreements, but received no reply. Due to the administrative silence, the FMV filed a complaint with the Ombudsman’s Office in March 2005; again there was no response. In May 2005 the FMV also introduced to the Labor Inspectorate an application for conciliation proceedings. The inspectorate terminated the FMV petition in May 2005. ILO Report 340, Case 2428, paras. 1410-1419.

government defended the labor inspectorate's decision, citing the shortcomings in the Medical Practice Act.⁵¹³

According to the FMV, the sudden silence came after the FMV challenged the use of uncertified Cuban doctors in the government's *Barrio Adentro* healthcare program.⁵¹⁴ In 2003 the Supreme Court upheld the FMV's position that Cuban doctors who work in Venezuela must be certified by the FMV.⁵¹⁵

The Supreme Court decision unleashed numerous government insults on the FMV. For example, then-Labor Minister José Ramón Rivero called the doctors "coup-plotters, antidemocratic, counterrevolutionary, and at the service of the dark ends of North American imperialism."⁵¹⁶

Due to the government's simultaneous refusal to collectively bargain or to act to bring the problematic legislation into compliance with international law, doctors have been forced to spend several years without a new collective agreement to govern the conditions of their employment. According to the FMV, the delay in negotiations has also negatively affected salaries in real terms and stalled discussions about medical supply shortages, both of which should have been covered by a new collective bargaining agreement.⁵¹⁷

Commenting on the case, the ILO agreed that the Medical Practice Act fails to conform to international standards but also found that the government's failure to negotiate with the federation violated the doctors' right to collectively bargain. As a result, although the ILO requested that the government amend the offending

⁵¹³ ILO, Report 340, Case 2428, paras. 1424-25.

⁵¹⁴ Human Rights Watch interview with Douglas León Natera, president of the FMV, September 21, 2007.

⁵¹⁵ The Medical Practice Act establishes that all doctors—foreign and domestic—must meet certification criteria and register with the federation. The FMV won in both the lower administrative court and the Supreme Court. First Administrative Court (Corte Primera de lo Contencioso Administrativo), Ana María Ruggeri Cova, Case No. 03-2852; Supreme Court Constitutional Chamber, Iván Rincón Urdaneta, Case No. 03-2361, September 25, 2003, <http://www.tsj.gov.ve/decisiones/scon/Septiembre/2621-250903-03-2358-03-2361%20.htm> (accessed May 12, 2008).

⁵¹⁶ Vivian Castillo, "Salario de médicos en Venezuela es el tercero más bajo de Suramérica," *El Universal*, October 11, 2007.

⁵¹⁷ Natera told Human Rights Watch that the two main issues to be discussed in collective bargaining agreement negotiations were resources for public hospitals (including medical equipment and supplies, because public hospitals often had as little as 15 percent of required supplies available) and salaries for public sector doctors. Human Rights Watch interview with Douglas León Natera, September 21, 2007.

legislation, it also explicitly requested that, “in the meantime, until such time as it amends the [law at issue],” the government should “promote collective bargaining” with the doctors’ federation.⁵¹⁸ At this writing, the government continues to ignore both of the ILO’s recommendations.⁵¹⁹

In the wake of its challenge to the use of uncertified Cuban doctors in the *Barrio Adentro* healthcare program, the FMV also faced obstacles to holding leadership elections. The FMV claims that it attempted to convene elections seven times since 2004 and filed several appeals but never received approval from the CNE.⁵²⁰ The CNE alleges that the FMV failed to submit the proper documentation to convene elections.⁵²¹ Although the FMV’s May 2007 convention to elect a new internal electoral commission, ordered by the CNE, finally paved the way for leadership elections, due to factors unclear to Human Rights Watch, elections have yet to occur at this writing.⁵²²

Under international norms, a government can unilaterally impose salaries in the public sector in order to address budgetary constraints, though the ILO emphasizes that they “should be imposed as an exceptional measure and only to the extent necessary, without exceeding a reasonable period.”⁵²³ However, the ILO also adds that authorities “should give preference as far as possible to collective bargaining in

⁵¹⁸ ILO, “Complaint against the Government of the Bolivarian Republic of Venezuela presented by the Venezuelan Medical Federation (FMV),” Report No. 340, Case(s) No(s). 2428, para. 1441.

⁵¹⁹ Human Rights Watch interview with Douglas León Natera, September 21, 2007. In May 2008 the government did change the certification requirements for doctors as part of the Ley de Transporte Terrestre, such that the Ministry of Health, rather than the FMV, is in charge of doctor certification. However, it is unclear how this will affect membership requirements in the federation. Vivian Castillo, “Denuncian estrategia para eliminar a la Federación Médica,” *El Universal*, May 8, 2008, http://www.eluniversal.com/2008/05/08/pol_art_denuncian-estrategia_851053.shtml (accessed May 8, 2008).

⁵²⁰ Human Rights Watch interview with Douglas León Natera, September 21, 2007. The FMV introduced two electoral appeals (*recursos contencioso electoral*), but the first was rejected on technical grounds and the second went unanswered. The FMV then contested the CNE’s appointment of an ad hoc electoral commission. Supreme Court Electoral Chamber, Juan José Núñez Calderón, Case No. 2006-000088, December 19, 2006, <http://ve.vlex.com/vid/29522358> (accessed May 4, 2008).

⁵²¹ Human Rights Watch interview with Aníbal Galindo, May 7, 2008.

⁵²² “Federación Médica Venezolana: Convocatoria,” *El Universal*, March 30, April 20, April 27 and May 4, 2007; “Federación Médica Venezolana: Convocatoria,” *Últimas Noticias*, March 30, April 20, April 27 and May 4, 2007; Human Rights Watch interview with Douglas León Natera, September 21, 2007.

⁵²³ ILO, “General Survey 1994, Freedom of association and collective bargaining: Promotion of collective bargaining,” para. 265.

determining the conditions of employment of public servants.”⁵²⁴ Faced with strikes by doctors in public hospitals around the country in September and October 2007, Chávez announced a 60 percent salary increase effective November 1, 2007.⁵²⁵ Chávez did not justify the decree by citing budgetary constraints, however. Instead, referring to the FMV’s failure to convene elections since 2004, he stated the decree was necessary due to the “problems of legitimacy and quality of those who represent their respective collective bargaining agreement projects, given the expiration of their mandates and absence of previous elections.”⁵²⁶ Facing threats of further unrest by doctors, Chávez issued a second decree in July 2008 increasing salaries for state doctors by another 30 percent.⁵²⁷

The ILO has clearly noted that “[w]orkers’ organizations must themselves be able to choose which delegates will represent them in collective bargaining without the interference of the public authorities.”⁵²⁸ It is thus not the role of the government to evaluate the “legitimacy and quality” of those who represent workers in collective bargaining agreement projects. Chávez’s decision to continue to circumvent negotiations, this time citing problems of “legitimacy and quality” of union officials, yet again violates workers’ collective bargaining rights.

Government Favoritism and the Denial of Collective Bargaining Rights

In violation of international standards, Venezuelan law does not provide precise and objective criteria to determine the union that represents the majority of workers in the workplace for the purposes of collective bargaining, nor does it allow unions with minority support to engage in collective negotiations, even when no majority union exists. These shortcomings violate the rights of minority unions and afford the government wide discretion to collectively bargain with the union it prefers. As a

⁵²⁴ *Ibid.*, para. 264.

⁵²⁵ “Bajos sueldos acarrearán éxodo de nuevos médicos a clínicas privadas,” *Diario la Región*, March 12, 2008, <http://www.diariolaregion.net/seccion.asp?pid=29&sid=1567¬id=46433&fecha=03/12/2008> (accessed June 19, 2008); Decree No. 5.642, *Official Gazette* 38.798, October 29, 2007.

⁵²⁶ *Ibid.*

⁵²⁷ Fidel Eduardo Orozco, “Aumenta salarial de 30% para médicos al servicio del Estado,” *El Universal*, July 18, 2008.

⁵²⁸ “Representation of organizations in the collective bargaining process (Collective bargaining),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 984.

result, the choice of bargaining partners has often appeared arbitrary and discriminatory.

The cases below show that the Venezuelan government has at times granted exclusive representation to a single, pro-government, and questionably representative union. In doing so, the government has denied even majority organizations their right to collectively bargain and violated workers' right to freedom of association by favoring one union over others, thereby influencing workers to join the government-preferred organization.

Public Sector Workers' Federation (FEDEUNEP)

One of the most prominent examples of government favoritism in selecting a collective bargaining partner involves competing federations of public sector workers. Historically, the National Single Federation of Public Employees (Federación Nacional de Empleados Públicos, FEDEUNEP), which is affiliated with the CTV and unites a variety of public sector unions and federations, administered the collective bargaining contract for public sector workers. However, a schism in 2003 among FEDEUNEP executive committee members resulted in the formation of a parallel, pro-government federation. In violation of its legal obligations under Venezuelan law (and reminiscent of its approach towards the rival health sector unions SUNEP-SAS and FENASINTRASALUD, described above), the government negotiated with the new pro-government federation without first verifying that it represented the absolute majority of workers.

Represented by its president, Antonio Suárez, FEDEUNEP attempted to negotiate a new collective bargaining agreement in September 2002.⁵²⁹ The labor inspectorate rejected the draft agreement after FEDEUNEP failed to submit the amendments requested by the labor inspectorate.⁵³⁰

⁵²⁹ ILO Case 2249, Report 333, para. 1053. The draft collective agreement was submitted to the Ministry of Labor on September 17, 2002.

⁵³⁰ *Ibid.*, para. 855. FEDEUNEP contended that the set of demands exceeded those that the inspectorate was legally empowered to make. *Ibid.*, para. 1053.

In December 2002, the Ministry of Labor opened contract negotiations with a splinter group of FEDEUNEP leaders, led by Franklin Rondón, a candidate defeated in FEDEUNEP's November 2001 elections.⁵³¹ The group used the FEDEUNEP name and logo, though they were not elected FEDEUNEP officials.⁵³²

In March 2003, FEDEUNEP, led by Suárez, challenged in the administrative court the Ministry of Labor's decision to negotiate with Rondón. The court ruled in favor of Suárez and ordered the ministry to end negotiations with Rondón.⁵³³

Rondón reacted by forming a parallel federation, the National Federation of Public Sector Workers (Federación Nacional de Trabajadores del Sector Público, FENTRASEP). FENTRASEP gained government recognition within weeks, affiliated itself with the UNT, and resubmitted its 2002 contract proposal under its new name to the Ministry of Labor. The proposal was accepted and the government signed the collective agreement on August 25, 2003.⁵³⁴

Despite serious disagreement between FEDEUNEP and FENTRASEP about which federation was most representative,⁵³⁵ the Ministry of Labor failed to convene a referendum or compare membership lists to resolve the issue.

The Ministry of Labor defended its decision to negotiate with FENTRASEP citing FEDEUNEP's repeated failure to submit the amendments to its draft contracts requested by the labor inspectorate, first in late 2002 and again in 2003, and the

⁵³¹ *Ibid.*, para. 856. Rondón appealed the results without success. Supreme Court Electoral Chamber, Alberto Martín Urdaneta, Case No. AA70-E-2002-000019, May 21, 2002, <http://www.tsj.gov.ve/decisiones/selec/Mayo/99-210502-000019.htm> (accessed March 15, 2008).

⁵³² *Ibid.*, para. 858.

⁵³³ Supreme Court Political-Administrative Chamber, Evelyn Marrero Ortíz, Case No. 2006-1246, April 25, 2003, <http://www.tsj.gov.ve/decisiones/spa/Agosto/01959-02-08-06-2006-1246.htm>, (accessed March 18, 2008).

⁵³⁴ ILO Case 2249, Report 333, para. 862; Organic Labor Law, art. 530, b.

⁵³⁵ In an interview with Human Rights Watch, Rondón claimed that FENTRASEP had the most affiliated unions and majority support. Human Rights Watch interview with Franklin Rondón, president of FENTRASEP, September 17, 2008. FENTRASEP told the ILO that it submitted a contract with the signatures and support of many base unions that disaffiliated from FEDEUNEP (ILO Case 2249, Report 334, para. 862). Suárez contests this claim, maintaining that FENTRASEP was a splinter group of union leaders who lost elections shortly prior and therefore did not have worker support. Many of the unions affiliated with FENTRASEP were newly formed Bolivarian unions with few members, according to Suárez, such that FEDEUNEP continued to represent the majority of workers, even if not the majority of unions. Human Rights Watch interview with Antonio Suárez, September 18, 2007.

failure of FEDEUNEP to appeal the contract rejections.⁵³⁶ The government's failure to conclude a contract with FEDEUNEP, however, regardless of the reason, does not negate its responsibility under Venezuelan law to establish whether FENTRASEP is the most representative federation *before* beginning contract negotiations. The government's failure to make this determination and its immediate acceptance of the FENTRASEP contract suggests favoritism on the part of the Ministry of Labor, in violation of international standards.

Airport Workers (SUNEP-Aeropuerto)

In the case of two rival unions at the Simon Bolívar International Airport, the government again favored a pro-government union in the collective bargaining process. The labor inspectorate argued that the established union of airport workers was unable to negotiate due to electoral default, though the union had recently held elections certified by the CNE. Meanwhile, as in the case of FENTRASEP, the labor inspectorate opened negotiations with a newly formed, pro-government union without confirming that the new union represented the majority of workers.

The Single National Union of Public Employees of the Autonomous Institute of the Maiquetía International Airport (Sindicato Unitario Nacional de Empleados Públicos del Instituto Autónomo Aeropuerto Internacional de Maiquetía, SUNEP-Aeropuerto) was founded in 1975 to represent the employees of the Maiquetía International Airport (now the Simon Bolívar International Airport). Since its founding, SUNEP-Aeropuerto had negotiated three collective agreements, and presented its fourth collective bargaining agreement to the labor inspectorate in August 2004.⁵³⁷

In 2003, a parallel union formed at the airport, the Single Union of the Independent Workers of the Maiquetía International Airport (Sindicato Único de Trabajadores del Instituto Autónomo Aeropuerto Internacional de Maiquetía, SUTIAAIM), and affiliated

⁵³⁶ ILO Case No. 2249, Report No. 337, para. 861.

⁵³⁷ Fifth Superior Contentious Administrative Court of the Capital Region (Juzgado Superior Quinto de lo Contencioso Administrativo de la Región Capital), Teresa García de Cornet, Case No. 06-1254, January 29, 2008, <http://lara.tsj.gov.ve/decisiones/2008/enero/2110-29-05-1254-.html> (accessed June 20, 2008).

with the UNT.⁵³⁸ In November 2004 SUTIAAIM presented its first collective bargaining agreement proposal to the Ministry of Labor.⁵³⁹

Although SUNEP-Aeropuerto's draft contract was still pending, awaiting a response from the labor inspectorate,⁵⁴⁰ the labor inspectorate fixed a date in May 2005 to begin negotiations with SUTIAAIM, without determining whether the organization enjoyed majority status. SUNEP-Aeropuerto attended the first collective bargaining meeting as a third party, exercising its right under Venezuelan law to protest the contract negotiations.⁵⁴¹ At the meeting, SUNEP-Aeropuerto claimed that it was the most representative union and thus maintained the right to represent the airport workers in collective bargaining agreement negotiations. The labor inspectorate said it would determine which organization was the most representative within 20 days, but no announcement was ever made.⁵⁴²

In July 2005 an administrative court granted SUNEP-Aeropuerto's request for a temporary court injunction, ordering a halt to contract negotiations with SUTIAAIM until the labor inspectorate determined which organization represented the majority of workers, as required by Venezuelan law.⁵⁴³ Rather than determining majority representation, the labor inspectorate responded to the court order by declaring, falsely, that SUNEP-Aeropuerto was in electoral default and, therefore, without any right to bargain collectively or to object, on behalf of its members, to collective bargaining agreement negotiations with SUTIAAIM.⁵⁴⁴ On the basis of the

⁵³⁸ SUTIAAIM was founded with only 60 members but soon after claimed to represent the majority of the airport workers. "Dan visto bueno a sindicato en Aeropuerto Simón Bolívar, adscrito a la UNT," *Venpress*, June 22, 2004, <http://www.aporrea.org/actualidad/n17736.html> (accessed May 11, 2008).

⁵³⁹ The contract proposal was presented on November 12, 2004. Fourth Superior Civil and Contentious Court of the Capital Region (Juzgado Superior Cuarto en lo Civil y Contencioso de la Región Capital), Renee Villasana, Case No. 04992, August 2006, <http://aragua.tsj.gov.ve/decisiones/2006/agosto/2109-7-04992-.html> (accessed June 20, 2008).

⁵⁴⁰ SUNEP-Aeropuerto was in the process of appealing the labor inspectorate's failure to respond to its proposal for collective agreement negotiations. Supreme Court Constitutional Chamber, Luisa Estella Morales Lamuño, Case N° 06-1090, October 9, 2006, <http://www.tsj.gov.ve/decisiones/scon/Octubre/1733-091006-06-1090.htm> (accessed June 20, 2008).

⁵⁴¹ Organic Labor Law, art. 519.

⁵⁴² Fourth Superior Civil and Contentious Court of the Capital Region, Case No. 04992.

⁵⁴³ First Superior Court of the Civil and Contentious Administrative of the Capital Region (Juzgado Superior Primero en lo Civil y Contencioso Administrativo de la Región Capital). Acción de amparo constitucional conjuntamente con medida cautelar innominada, Case No. 036-0404-00017, July 22, 2005.

⁵⁴⁴ Labor Inspectorate in Vargas state, Case No. 036-04-04-0010, September 14, 2005.

inspectorate's incorrect declaration, the administrative court determined that SUNEP-Aeropuerto's constitutional right to collectively bargain was no longer being adversely affected, and lifted its injunction on September 22, 2005.⁵⁴⁵

Yet SUNEP-Aeropuerto had in fact held valid elections on April 28, 2005, which were certified by the CNE in May 2005.⁵⁴⁶ SUNEP-Aeropuerto appealed the administrative court's order. In August 2006 the administrative court reversed its decision and found that SUNEP-Aeropuerto had indeed held elections and that, as such, it had legal standing to submit objections to collective bargaining agreement negotiations. The court ordered the labor inspectorate to resolve the original issue at stake: the determination of which organization represented the majority of airport workers.⁵⁴⁷

However, by the time the court rendered its decision, SUTIAAIM and the labor inspectorate had signed the collective bargaining agreement. The labor inspectorate rejected SUNEP-Aeropuerto's proposal for collective negotiations, and flouted the court order by never determining which of the federations was most representative.⁵⁴⁸

Government Reprisals: The Oil Sector

The Venezuelan government has repeatedly violated the internationally protected labor rights of workers in the state-run oil company, *Petróleos de Venezuela, S.A.* (PDVSA), by engaging in reprisals in response to legitimate labor organizing, political beliefs, and defense of union autonomy.

The Oil Strike and Mass Firings of 2003

The most brazen of the labor rights violations in the oil sector was the firing of more than 18,000 workers from PDVSA following the oil strike of December 2002.

⁵⁴⁵ Fourth Superior Civil and Contentious Court of the Capital Region, Case No. 04992.

⁵⁴⁶ Secretario General del Consejo Nacional Electoral, Memorando No. SG/06676/05, May 31, 2004.

⁵⁴⁷ Fourth Superior Civil and Contentious Court of the Capital Region, Case No. 04992.

⁵⁴⁸ The collective bargaining agreement was signed on July 4, 2005. Fifth Superior Contentious Administrative Court of the Capital Region, Case No. 06-1254; Ley Orgánica de Trabajo, art. 514. The administrative court rejected SUNEP-Aeropuerto's multiple appeals on procedural grounds. *Ibid.*; Supreme Court Constitutional Chamber, Luisa Estella Morales Lamuñoc, Case No. 06-1090, October 9, 2006, <http://www.tsj.gov.ve/decisiones/scon/Octubre/1733-091006-06-1090.htm> (accessed June 20, 2008).

The strike was the culmination of a struggle for the control of PDVSA. In February 2002 Chávez had fired the PDVSA president and appointed a new board of directors with ties to his administration. Many PDVSA managers claimed the new company directors were inexperienced political appointees, and called a strike in early April to protest repeated government intervention in the management of PDVSA. In response, Chávez announced in a live television address that he was firing the top seven PDVSA managers and warned that he had “given clear instructions to the president of PDVSA that anyone who calls for a strike be fired immediately, without any discussion.”⁵⁴⁹

The failed April 11 coup brought an end to the strike, but the struggle between the Chávez administration and PDVSA employees continued through the year. In early December 2002 PDVSA workers and managers launched a second strike—this one part of a general strike called by labor and business leaders—and effectively shut down the country’s oil production and export.

Given the severe impact that the strike had on the Venezuelan economy (costing the oil industry alone an estimated US\$20 billion⁵⁵⁰), the government was justified in taking steps to limit this damage and ensure the safety of the general public—provided, however, that those steps were fully consistent with international labor rights protections. For example, under international law, “as a possible alternative in situations in which a ... total prohibition of strike action would not appear to be justified,” the government could have met with striking oil workers and agreed to a minimum level of service that workers would provide during the strike—“without calling into question the right to strike of the large majority of workers”—to ensure the continuation of those “operations which are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear” by the strike.⁵⁵¹ Venezuelan law explicitly provides for such a joint determination by unions and

⁵⁴⁹ “El Golpe de la Meritocracia,” *PDVSA Al Día*, February 18, 2003, http://www.pdvs.com.ve/new_site/pdf/aldia/pdvsafebrero.pdf (accessed March 5, 2008).

⁵⁵⁰ Vice President José Vicente Rangel said to the press that the strike had cost the oil industry \$20 billion. Juan Forero, “Venezuela Union Leader Guilty of Treason,” *New York Times*, December 15, 2005.

⁵⁵¹ “Situations and conditions under which a minimum operational service could be required (Right to strike).” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 607.

employers regarding the number of workers that must, even when on strike, continue to provide services indispensable for the “health of the population and the conservation and maintenance of machines.”⁵⁵² The government could also have pressed charges against individual workers suspected of engaging in criminal acts of sabotage.

Yet authorities did not take such steps at the time of the strike.⁵⁵³ Instead, on December 8, the Chávez government issued a total prohibition on the strike and ordered all striking workers back to work.⁵⁵⁴ Eleven days later, at PDVSA’s request, the Supreme Court issued a temporary injunction to halt the work stoppage and ordered all oil workers to obey the government’s strike ban and return to work.⁵⁵⁵ When the workers refused to return, the government proceeded to summarily fire them en masse.⁵⁵⁶

These mass firings constituted an egregious violation of international and Venezuelan law, which expressly proscribes the retaliatory dismissal of workers in response to legitimate strike activity.⁵⁵⁷

⁵⁵² Organic Labor Law, art. 498.

⁵⁵³ The government did eventually bring charges against some of those accused of sabotage during the 2002 strike, but with considerable delay. “Ministerio Público acusó a ex-ingeniero de PDVSA por sabotaje petrolero de 2002,” Attorney General’s Office press release, June 22, 2007, <http://www.fiscalia.gov.ve/Prensa/A2007/prensajunio2007.asp> (accessed July 22, 2008).

⁵⁵⁴ The Ministry of Labor announced that the ministry would publish a decree halting the strike, ordering the workers back, and authorizing managers not to pay the workers for the days missed in the strike. “Min-Trabajo decretó que las empresas tendrán que pagar días no laborados,” *El Nacional*, December 2, 2002. Chávez also published a presidential decree ordering the workers back to their posts. Presidential Decree No. 2.172, *Official Gazette*, No. 37.587, December 9, 2002. On December 9, 2002, PDVSA president Alí Rodríguez declared on television that the strike was illegal and ordered all the workers to return to their posts, threatening that workers who did not return would be fired. PDVSA, “Bitácora. Diciembre 2002-abril de 2003,” http://www.pdvsa.com/index.php?tpl=interface.sp/design/readmenuhist.tpl.html&newsid_obj_id=121&newsid_temas=13 (accessed June 23, 2008). The Ministry of Energy published a resolution backing Rodríguez’s statements. Resolution from the Ministry of Energy, *Official Gazette*, No. 5.612, December 8, 2002.

⁵⁵⁵ On December 19, 2002, the Constitutional Chamber of the Supreme Court issued a temporary injunction to halt the work stoppage at PDVSA. The court upheld the argument of PDVSA that the interruption of economic activity in an industry of “public utility and social interest” caused by the strike harmed the collective interests of the nation. The PDVSA employees would be considered in contempt of the court if they failed to comply. Supreme Court Constitutional Chamber, José Manuel Delgado Ocando, Case No. 02-3157, December 19, 2002, <http://www.tsj.gov.ve/decisiones/scon/Diciembre/3342-191202-02-3157%20.htm> (accessed May 11, 2008).

⁵⁵⁶ PDVSA justified the dismissals of the oil workers on the grounds of immoral conduct at work, unjustified absence, serious failure to discharge employment obligations, and dereliction of duty. ILO Case 2249, Report 333, para. 1110.

⁵⁵⁷ “Sanctions (Right to strike),” ILO Committee on Freedom of Association Digest of Decisions, 2006, paras. 661, 663, 674; Ley Orgánica de Trabajo, art. 506.

An Illegitimate Strike?

The Venezuelan government sought to justify the mass dismissal of PDVSA workers by arguing that the strike was “illegal” and that, consequently, the strikers were not covered by the prohibition on retaliatory firing. Specifically, the government claimed that the workers’ sole objective was “to overthrow the President”⁵⁵⁸ and that the work stoppage was thus not so much a strike as an “oil coup.”⁵⁵⁹

Government officials argued that the political nature of the strike relieved them of the obligation to follow the procedures established by Venezuelan law to prevent retaliation for legitimate union activity, including the requirements for dismissing workers engaged in labor conflicts and other union-related activities.⁵⁶⁰ Under such requirements, the employer must notify the labor inspectorate to seek authorization and present the causes for dismissals of workers who are engaged in union-related activities. Within two days, the dismissed workers must be given the chance to appear in front of the labor inspector to respond to the grounds cited for their dismissals.⁵⁶¹ The government insisted that the “exclusively political nature” of the PDVSA strike also justified workers’ immediate and mass dismissal,⁵⁶² thereby similarly relieving it of the obligation to follow the procedures established by Venezuelan law for cases of mass dismissals.⁵⁶³ In such cases, the labor inspectorate must summon the employer, who must present the grounds for dismissals. The labor minister must then review these grounds and, when appropriate “for reasons of social interest,” may suspend the dismissals.⁵⁶⁴

⁵⁵⁸ ILO Case 2249, Report 333, para. 1059.

⁵⁵⁹ “Ministra del Trabajo: En PDVSA no hubo despedido masivo,” Ministry of Communication and Information press release, September 2, 2004. http://minci.gob.ve/pagina/1/443/ministra_del_trabajoen.html (accessed May 12, 2008).

⁵⁶⁰ Organic Labor Law Reforms [Reglamento de la Ley Orgánica de Trabajo], *Official Gazette*, No. 5.295, January 25, 1999, <http://www.gobiernoenlinea.ve/docMgr/sharedfiles/reglamentoleyorgtrabajo.pdf> (accessed January 23, 2008), art. 63.

⁵⁶¹ *Ibid.*, art. 453.

⁵⁶² ILO Case 2249, Report 337, para. 1047. “It is a well-known fact, widely publicized by the mass media, that their conduct has contributed to the illegal paralysis of the economic activities of this enterprise since 2 December 2002 inasmuch as it has not been based on labor claims or rights but, on the contrary, has been of an exclusively political nature.... Such conduct, as well as other actions of which they have been guilty, clearly implies a serious and intentional violation of their employment obligations.”

⁵⁶³ Venezuelan law defines “mass dismissals” as dismissal that affects more than 10 percent of the workforce in companies with over a hundred employees fired. *Ley Orgánica de Trabajo*, art. 34.

⁵⁶⁴ *Ibid.*

The Chávez government disregarded these procedures. The ministry did not summon PDVSA managers or fired workers; it did not review the grounds for the firings; and it did not suspend the mass dismissals.⁵⁶⁵ Since 2003 the Venezuelan government has denied the Medical Federation (Federación Médica Venezolana, FMV) the right to negotiate a new collective bargaining agreement for what appear to be political reasons. According to the nascent National Union of Oil, Gas, Petrochemical, and Refinery Workers (Unión Nacional de Trabajadores Petroleros, Petroquímicos, de los Hidrocarburos y sus Derivados, UNAPETROL), PDVSA never notified the labor inspectorate of the dismissals of workers who had special organizing-related protections, and the labor inspectorate never allowed the workers to challenge the justifications for their being fired.⁵⁶⁶

Chávez made his support for the mass dismissals clear on national television: “See for yourselves the reasons that the Republic and PDVSA had to fire all the saboteurs, and there are already more than 10,000 because we do not have the luxury to have people like this in the industry.”⁵⁶⁷

It is true that, under international law, the prohibition on retaliatory dismissals does not cover strikes that have purely political aims. Such political strikes, according to the ILO, do not fall within the scope of the principles of freedom of association.⁵⁶⁸

Yet, when the ILO reviewed the PDVSA case, it determined that the oil stoppage, while motivated in large measure by political demands, also encompassed a set of demands about the government’s economic policies and management of the state

⁵⁶⁵ ILO Case 2249, Report 333, para. 1047. “These mass dismissals were also unjustified and were undertaken without any prior assessment by the labour inspector, in breach of the legislation and collective agreement in force. The employer failed to inform the Ministry of Labour and request due authorization from the latter, which also took no action to ensure that the rule of law was applied and thus suspend the dismissals, and did not put forward reasons of social interest to prevent them.”

⁵⁶⁶ ILO Case 2249, Report 337, para. 1047.

⁵⁶⁷ “Chávez: Pdvsa es el corazón económico de la patria y no pueden haber traidores,” *Venpress*, February 16, 2003. The labor minister went so far as to deny that the firings constituted a mass dismissal: “In PDVSA there were no mass dismissals” because “what occurred was an attempt at the margin of the state of law, at the margin of the Constitution and the laws, of an oil coup.” “Ministra del Trabajo: En PDVSA no hubo despedido masivo,” Ministry of Communications and Information press release, September 2, 2004, http://minci.gob.ve/pagina/1/443/ministra_del_trabajoen.html (accessed February 15, 2008).

⁵⁶⁸ “Objective of the strike (strikes on economic and social issues, political strikes, solidarity strikes, etc.) (Right to strike),” ILO Committee on Freedom of Association Digest of Decisions, 2006, paras. 528, 542.

oil company.⁵⁶⁹ It therefore did fall within the scope of legitimate trade union activity.⁵⁷⁰

As a result, the ILO also rejected the argument that workers' mass dismissal was justified by the strike's political nature and pointed out that in such cases of legitimate organizing activity, "[M]ass penalties for trade union actions are tantamount to abuses, and destroy labour relations."⁵⁷¹ Furthermore, the ILO noted that, "[T]he union officials who organized the work stoppage and the workers who took part in it should not be subjected to reprisals such as detention or dismissal, unless their direct individual involvement in the crimes referred to by the Government (sabotage of computer systems, damage to property, etc.), can be proved."⁵⁷²

An Essential Service and a National Emergency?

In addition to claiming that the aims of the oil strike were purely political, the government also sought to justify its response to the work stoppage by arguing that it had paralyzed an essential service and threatened to cause a national emergency. But while international norms permit governments to limit strike activity in essential services and in states of "acute national emergency," the ILO found that the oil strike qualified for neither of these exceptions.

The Venezuelan government argued that petroleum constituted an "essential service," in which a stoppage imperiled the life, health, and public security of the population so as to justify a ban on the strike, in accordance with international standards.⁵⁷³ The ILO rejected this argument, however, as well as the Venezuelan

⁵⁶⁹ ILO Case 2249, Report 337, para. 1478.

⁵⁷⁰ *Ibid.*

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.*

⁵⁷³ Venezuela's labor law, at the time, gave the president authority to decree an end to a work stoppage that "put in immediate danger the life or security of the population or part of the population." *Ley Orgánica de Trabajo*, art. 504. The Venezuelan Supreme Court states that the strike meets this standard and imperils constitutional rights including "the right to life, integral protection and personal security, family protection, health services, the right to work, to obtain a salary, to receive an education and to freely dedicate oneself to the preferred economic activity, to private property, and to have quality goods and services, protected by the Constitution." The Ministry of Labor also declared that the work stoppage "affected the continuous

government's assertions that the PDVSA strike caused such grave economic perils as to constitute an "acute national emergency." The ILO pointed out that the strike was largely peaceful.⁵⁷⁴ The ILO determined that the economic damage caused was not so severe as to endanger the population, and further noted that the government's claim to the contrary was belied by the fact that it had never declared a state of economic emergency, as allowed for under the constitution.⁵⁷⁵ (The ILO has specifically noted elsewhere that petroleum, as well as the production, transport, and distribution of fuel, are not essential public services "in the strict sense of the term" in which a blanket prohibition on strikes is justified.⁵⁷⁶)

Concluding, the ILO noted, "Measures taken to mobilize workers at the time of disputes in services of this kind are such as to restrict the workers' right to strike as a means of defending their occupational and economic interests."⁵⁷⁷

An Adequate Remedy

The lack of administrative review of the mass dismissals from PDVSA by the Ministry of Labor made it particularly critical that the PDVSA employees have the chance to appeal their dismissals in a court of law to ensure an adequate and expeditious remedy for dismissals that violated their fundamental right to freedom of association.

Many PDVSA workers submitted appeals. However, three years later, the courts still had not heard the vast majority of cases (80 percent). The government acknowledged that only 6,195 cases of dismissals had been resolved as of 2005 and the great majority of those "resolved" (6,048) were because the workers concerned had dropped their claims, which the ILO noted may have occurred "precisely

and uninterrupted provision of an essential public service, which means that the work stoppage was not only illegal but illicit." ILO Case 2249, Report 337, para. 1444.

⁵⁷⁴ *Ibid.*, para. 1478.

⁵⁷⁵ *Ibid.*, para. 1462.

⁵⁷⁶ "Cases in which strikes may be restricted or even prohibited, and compensatory guarantees (Right to strike)," ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 587. The ILO has also explained, however, that "[w]hat is meant by essential services in the strict sense of the term depends to a large extent on the particular circumstances prevailing in a country" and has further noted that "this concept is not absolute, in the sense that a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope." *Ibid.*, para. 582.

⁵⁷⁷ ILO Case 2249, Report 337, para. 1462.

because of the excessive delay.”⁵⁷⁸ The others were declared inadmissible or settled in favor of PDVSA. The extreme delay in resolving the appeals, as noted by the ILO, prevented workers from exercising their rights effectively.⁵⁷⁹

Protection of the right to freedom of association requires that workers who consider that they have been prejudiced against because of their trade union activities have access to redress that is expeditious, inexpensive, and fully impartial.⁵⁸⁰ Prohibitions on anti-union discrimination are insufficient if not accompanied by effective appeal procedures to ensure their application in practice.

Blacklisting

After the oil strike and subsequent mass dismissals, PDVSA blacklisted the fired oil workers from future employment with PDVSA and its subsidiaries, as we discuss in chapter 3. This blacklisting represented another serious violation of international legal prohibitions on reprisals for legitimate trade union activity.

Although the oil workers had been nominally dismissed for dereliction of duty, PDVSA made clear that they were suspected of far greater transgressions—including criminal acts such as sabotage, coup-plotting, and destruction of property—and therefore could not remain employed in the oil sector.⁵⁸¹ PDVSA’s own hiring guidelines from July 2007 (which are still in force, to the best of our knowledge) classified all job applicants listed in the company’s database as “the author of an

⁵⁷⁸ *Ibid.*, paras. 1047, 1481, and 1484.

⁵⁷⁹ The ILO condemned the situation, noting that “this state of affairs not only is liable to undermine seriously the trust of trade union organizations and their members in the justice system, but also prevents the organizations and their members from exercising their rights effectively.” *Ibid.*, para. 1472. Trina Zavarse, director of human rights at the NGO Gente de Petróleo, told Human Rights Watch that many of the appeals were then dismissed en masse in 2006, without even notifying the workers. Human Rights Watch interview with Trina Zavarse, Caracas, September 15, 2007.

⁵⁸⁰ “Need for rapid and effective protection,” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 820.

⁵⁸¹ “Luis Marín: Oil production cost down to \$2.30 per barrel,” Venezuelan Embassy News, <http://www.embavenez-us.org/news.english/Oilproduction.htm> (accessed May 16, 2008). PDVSA Director Luis Marín justified the order not to hire ex-workers or companies that had supported the oil strike as a matter of survival: “As an independent organization, we have the right to reserve to ourselves the power to undertake any sort of contract; all of this towards the end of preserving the interests of Petróleos de Venezuela.”

action under investigation—the oil stoppage” as “unsuitable” for hiring.⁵⁸² PDVSA also instructed its contractors not to employ the dismissed workers.⁵⁸³

Blacklisting workers based on legitimate labor organizing constitutes a serious violation of workers’ right to organize. The ILO has held that the refusal to rehire workers due to their organizing-related activities “implies a serious risk of abuse and constitutes a violation of freedom of association”;⁵⁸⁴ that “all practices involving the “blacklisting” of trade union officials constitute a serious threat to the free exercise of trade union rights; and that, in general, governments should take stringent measures to combat such practices.”⁵⁸⁵

Threats against Political Opponents

Over and above the firings and blacklisting of 2002 oil strike participants, both the president of PDVSA and Chávez himself have made clear that workers at PDVSA must support the “Bolivarian process,” and employment policies have seemed to conform to these government statements.⁵⁸⁶

As discussed in chapter 2, one month before the December 2006 presidential election, Energy Minister and PDVSA President Rafael Ramírez gave a speech to PDVSA employees in which he told workers that those who did not support Chávez should leave the company.⁵⁸⁷ Ramírez referred back to the mass dismissals that followed the oil strike to make clear that his words should not be taken lightly, stating that the company had “removed 19,500 enemies of the country from this

⁵⁸² “General Guidelines for the Hiring of Staff and Providers, Criteria to Verify,” memo from Rafael Ramírez to senior PDVSA executives, July 31, 2007. Patricia Clarembaux, “Discriminación a Medias,” *Tal Cual*, September 24, 2007.

⁵⁸³ Trina Zavarse told Human Rights Watch that hundreds of PDVSA employees reported being blacklisted from jobs with PDVSA subsidiaries, and that national and international contracting companies also refused to employ the dismissed employees for fear of losing contracts with PDVSA. Human Rights Watch interview with Trina Zavarse, September 15, 2007.

⁵⁸⁴ “Sanctions (Right to strike),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 666.

⁵⁸⁵ “Protection against anti-union discrimination (Article 1 of Convention No. 98),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 564.

⁵⁸⁶ “Chávez al ministro Ramírez: ‘Vaya y repítale a Pdvsa cien veces lo que usted ha dicho,’” *aporrea.org*, November 3, 2006, <http://www.aporrea.org/oposicion/n86027.html> (accessed June 23, 2008).

⁵⁸⁷ “Rafael Ramírez Parte 1,” posted to YouTube November 3, 2006, <http://youtube.com/watch?v=dmXpbT7Fhiw>, (accessed June 23, 2008); “Chávez: ‘Vaya y repítale a Pdvsa cien veces lo que usted ha dicho,’” *aporrea.org*; “Detalles del mensaje,” *El Universal*, November 3, 2006, http://www.eluniversal.com/2006/11/03/pol_apo_56270.shtml (accessed June 21, 2008).

business” and was “ready to go on doing it.”⁵⁸⁸ Rather than denounce his energy minister’s overtly discriminatory message, President Chávez publicly endorsed it, urging its repetition “100 times.” Chávez added that PDVSA workers were part of his political project, and those who were not “should go somewhere else, go to Miami.”⁵⁸⁹

International labor standards prohibit political discrimination in access to jobs, but as documented in chapter 2, the statements of Rodríguez and Chávez translated into PDVSA hiring guidelines contrary to international law.

Firing of a Dissident Labor Leader

The reprisals for union-related activity have not been limited to workers who participated in the oil workers’ strike or supported the political opposition. Prominent union leader Orlando Chirino was fired from PDVSA in December 2007, apparently because of his public criticisms of the government’s approach to organized labor. Chirino—a veteran labor organizer and outspoken leader of one of the main federations in the oil sector (Sinutrapetrol), as well as an executive committee member of the pro-government National Union of Workers (Unión Nacional de Trabajadores, UNT)—had openly criticized government policies and practices that undermined union autonomy.

Among other issues, Chirino had protested the government’s handling of collective bargaining agreement negotiations with the United National Union of Energy, Oil, and Gas Workers (Federación Unitaria de Trabajadores de la Energía, Petróleo, Gas, Similares y sus Derivados de Venezuela, FUTEV),⁵⁹⁰ stating that the negotiating committee was handpicked by the government, and led a chorus of workers who

⁵⁸⁸ Ibid.

⁵⁸⁹ Ibid.

⁵⁹⁰ Following the oil strike of 2003, the three main federations of PDVSA—the National Union of Oil, Gas, Petrochemical, and Refinery Workers (Federación de Trabajadores Petroleros, Químicos y sus Similares de Venezuela, Fedepetrol), the Venezuelan Federation of Workers of Hydrocarbons and their Derivatives (Federación de Trabajadores de la Industria de Hidrocarburos y sus Derivados de Venezuela, Fetrahidrocarburos), and the National Single Union of Oil Workers (Sindicato Unitario Nacional de Trabajadores del Petróleo, Sinutrapetrol)—signed a pact to unite into a single federation. Yet, despite the pact, no progress was made toward formal unification. The federations jointly presented a draft collective agreement in August 2006 in preparation for the expiration of the contract in January 2007, but they did not unify into a single organization until March 2007, when they merged into FUTEV.

demanded that they be allowed to elect their own bargaining representatives.⁵⁹¹ In another controversial position, Chirino advocated that workers abstain in the 2007 referendum on the constitution to protest a government proposal to form workers' councils that he believed would subordinate the labor movement to state control.⁵⁹² In more general terms, while being an outspoken advocate of many of the socialist objectives publicly embraced by Chávez, Chirino insisted that the transformation of the labor movement had to be driven by the workers themselves, rather than being imposed by the government.⁵⁹³

Chirino was fired from PDVSA without explanation in December 2007, shortly after the failed referendum on the constitution.⁵⁹⁴ Chirino said that in a meeting with the PDVSA directors he was told that his dismissal was due to his opposition to the constitutional reform and to his alleged attempts “to generate instability in the [oil] industry during the months of the collective bargaining agreement negotiations, because I opposed, along with thousands of workers, a negotiating team that no one selected, picked by hand by the Ministry of Labor and the directors of PDVSA.”⁵⁹⁵

⁵⁹¹ According to Fedepetrol Secretary General José Bodas, the leadership of FUTEV was appointed by José Ramón Rivero, who denied workers the right to choose their representatives. “Trabajadores exigen elecciones de la Futpv para primer trimestre de 2008,” *Nueva Prensa de Oriente* (Barcelona, Anzoátegui), January 3, 2008, <http://nuevaprensa.info/content/view/5360/2/> (accessed May 15, 2008). Fedepetrol said that the negotiating committee was comprised of “union bureaucrats” and that elections were needed to select a negotiating committee “truly representative of the base.” Kiraz Janicke, “Labor Disputes and Oil Shortage Cause Problems for Venezuela’s Oil Industry,” *Venezuelanalysis.com*, July 23, 2007, <http://www.venezuelanalysis.com/news/2514> (accessed on May 15, 2008).

⁵⁹² “Consensus allows progress in Oil Collective Contract talks,” PDVSA press release, http://www.pdvsacom/index.php?tpl=interface.en/design/readmenu.tpl.html&newsid_obj_id=4351&newsid_temas=1 (accessed May 12, 2008).

⁵⁹³ For example, Chirino objected to the government’s role in promoting the unification of the federations in the oil sector: “Neither PDVSA nor the Ministry of Labor should take part in this matter.” “Esta semana comenzarán las discusiones de la convención colectiva,” *Últimas Noticias*, April 9, 2007, <http://venezuelareal.zoomblog.com/archivo/2007/04/09/esta-Semana-Comenzaran-Las-Discusiones.html> (accessed April 15, 2008).

⁵⁹⁴ “La factura petrolera,” *Tal Cual*, January 2, 2008, <http://www.talcualdigital.com/Avances/Viewer.aspx?id=5097> (accessed May 13, 2008).

⁵⁹⁵ “Como ‘discriminación y persecución política,’ califica Orlando Chirino su despido de PDVSA,” interview with Chirino, *apoorrea.org*, January 28, 2008, <http://www.apoorrea.org/trabajadores/n108231.html> (accessed May 14, 2008). [“No está por demás señalar que se me acusa de generar inestabilidad en la industria durante los meses que duró la negociación del contrato petrolero, porque me opuse, junto con miles de trabajadores, a una comisión negociadora que no fue elegida nadie, designada a dedo por el Ministerio del Trabajo y los directivos de PDVSA, y porque denunciemos la pérdida de valiosas conquistas obtenidas por los trabajadores de la industria durante muchos años de lucha.”]

The summary dismissal of Chirino appeared to violate both international and Venezuelan norms. The ILO has underscored that trade union officials must enjoy adequate protection against dismissal, “based on their status or activities as workers’ representatives” so as to ensure that they can perform their trade union duties.⁵⁹⁶ The firing of workers for reasons associated with their union membership or activities has also been condemned by the Inter-American Court on Human Rights as a measure which can seriously hinder the organization and activities of labor unions in violation of Article 16 of the American Convention on Human Rights.⁵⁹⁷ Under Venezuelan law, as noted above, these protections include a prohibition on firing union leaders without just cause and without previous approval by the local labor inspectorate.⁵⁹⁸ However, Chirino claims that he was given no legitimate justification for his firing and no chance to defend his dismissal before the labor inspectorate.⁵⁹⁹

New Workers’ Associations: Risks to Freedom of Association

Workers’ rights have also been put at risk by the government’s promotion of workers’ councils and cooperatives. These alternative labor associations could potentially complement and even reinforce efforts to organize. Nonetheless, as outlined below, in large part because of the legal framework through which the government has promoted them, they could also negatively impact the right to freedom of association by restricting and undermining worker organizing and undercutting collective bargaining.

Proposed Legislation on Workers’ Councils

A centerpiece of Chávez’s plans for “21st century socialism” is the institution of a variety of councils, including workers’ councils. The government first proposed workers’ councils in January 2007, stating that their purpose was to promote

⁵⁹⁶ “Trade union leaders and representatives (Protection against anti-union discrimination),” ILO Committee on Freedom of Association Digest of Decisions, 2006, paras. 799, 800. The ILO has also recommended in the Workers’ Representatives Recommendation (No. 143) that in the case of any alleged discriminatory dismissal, the burden of proving that the fact was justified should fall on the employer.

⁵⁹⁷ Baena Ricardo et al. v Panama, IACHR, para. 166.

⁵⁹⁸ Organic Labor Law, art. 449.

⁵⁹⁹ “Las clínicas no quieren atender a los petroleros,” *Versión Final* (Maracaibo), February 8, 2008, <http://www.versionfinal.com.ve/wp/2008/02/08/las-clnicas-no-quieren-atender-a-los-petroleros/> (accessed June 23, 2008).

workplace self-management. Then-Labor Minister José Ramón Rivero explained that the councils would organize workers “to participate in the planning, control, and evaluation of processes.”⁶⁰⁰ According to the government, the councils would encourage worker participation in decision making, worker consciousness, and ideological formation.⁶⁰¹

Chávez included the proposal for workers’ councils in his 2007 proposed constitutional amendments⁶⁰² and the Ministry of Labor also circulated a draft bill to create workers’ councils in July 2007.⁶⁰³ Despite the failure of the constitutional referendum in December 2007, the government continues to push its workers’ council proposal in the National Assembly.⁶⁰⁴ In addition, a pilot program to set up workers’ councils in over a thousand “social production enterprises,” based on the draft legislation, is underway, though its details are as yet unclear.⁶⁰⁵

The proposed legislation creating workers’ councils, as well as the pilot program based on the proposal, could significantly undermine the exercise of workers’ right to freedom of association. The draft law contemplates the creation of a “union committee” that would be authorized, among other things, “[t]o impede the stoppage or partial or total closure of work centers with clear speculative,

⁶⁰⁰ “Ernesto Tovar: Llamam a autoorganizarse para crear el control obrero,” *El Universal*, January 17, 2007.

⁶⁰¹ The government says that the councils will not supplant the function of unions, but supplement them. Vice-Minister of Labor Rafael Chacón has explicitly stated, “The figure of the workers’ councils will not affect the functions of unions.... In none of the drafts, neither the one proposed by the ministry nor the National Assembly, is there content that says that the councils replace unions,” and that they “have as an end to begin the formation of workers.” “Consejos de trabajadores no sustituirán a sindicatos,” *Radio Nacional de Venezuela/Agencia Bolivariana de Noticias*, May 14, 2007, <http://www.rnv.gov.ve/noticias/index.php?act=ST&f=2&t=46920> (accessed June 26, 2008).

⁶⁰² Proyecto de Reforma Constitucional presentado por la Presidente de la República Hugo Chávez Frías, August 16, 2007, art. 70.

⁶⁰³ Ministry of Labor, Proyecto de Ley de Especial de los Consejos de Trabajadores, July 11-14, 2007.

⁶⁰⁴ The Social Development Commission is currently reviewing the bill, according to legislators. “Iniciarán consultas de leyes laborales,” *Últimas Noticias*, January 24, 2008. Proposed reforms to the Organic Labor Law also reportedly include provisions that would give constitutional rank to workers’ councils and establish a statute to govern their formation. Beatriz Caripa, “Reforma de LOT llevarán a todo el país,” *Últimas Noticias*, July 31, 2008.

⁶⁰⁵ *Ibid.* For example, while the government will choose companies to participate in the project, it is unclear whether all workers in participating companies will be required to join the workers’ councils. “El programa Fábrica Adentro impulsará los consejos obreros,” *El Nacional*, February 5, 2008, <http://noticierodigital.com/forum/viewtopic.php?p=4451367&sid=ab8ce44375b379e31ad9269b76d434ff> (accessed May 12, 2008).

destabilizing or political ends.”⁶⁰⁶ The councils are assigned ambiguous disciplinary powers to sanction what they deem “destabilizing” activity.⁶⁰⁷ These provisions are particularly worrisome in light of the government’s record of equating legitimate labor organizing activity with destabilization, as seen in the oil sector. The broad and discretionary role of workers’ councils to prevent disturbances, work stoppages, or other potentially “destabilizing” activity could easily be abused, with the acquiescence of the government, to curtail legitimate union activities, including strikes or even contentious collective bargaining.

Workers’ councils could also be used to circumvent collective bargaining with freely elected unions. While the legislation does not grant workers’ councils the power to negotiate collective agreements, it appears to authorize many parallel functions that could potentially be used to replace collective bargaining between employers and trade unions. The law envisions committees within the workers’ councils responsible for basic labor issues: wages, social security, health, and workplace conditions.⁶⁰⁸ This would create a risk that employers would attempt to “collectively bargain” by reaching agreement on these matters between employers and committees of the workers’ councils, bypassing trade unions altogether.

Such direct settlements with workers’ councils on specific labor issues would violate workers’ right to organize and bargain collectively under international law. The ILO has observed that direct negotiations with workers should only occur in the absence of trade union organizations.⁶⁰⁹ In addition, the ILO has added that “[d]irect settlements signed between an employer and a group of non-unionized workers ... [do] not promote collective bargaining, ... which refers to the development of negotiations between employers or their organizations and workers’

⁶⁰⁶ Ministry of Labor, Proyecto de Ley de Especial de los Consejos de Trabajadores, arts. 8, 11(10).

⁶⁰⁷ *Ibid.*, art. 20.

⁶⁰⁸ *Ibid.*, art. 11.

⁶⁰⁹ ILO CEACR, Individual Observation concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Colombia, 2004, para. 2; “Collective bargaining with representatives of non-unionized workers (Collective bargaining),” ILO Committee on Freedom of Association Digest of Decisions 2006, paras. 944, 945. “Article 4 of the Convention [98] calls for the full development and utilization of machinery for voluntary negotiation with workers’ organizations with a view to the regulation of terms and conditions of employment by means of collective agreements, and that direct negotiations with workers should only be possible in the absence of trade union organizations.”

organizations.”⁶¹⁰ The ILO has also emphasized that direct negotiations with workers “must not prejudice or weaken the position of trade unions, nor weaken the impact of collective agreements that have been concluded.”⁶¹¹

While there are serious risks in Venezuela’s proposed legislation, there are also potential benefits in workers’ councils. For example, the ILO has recognized that work councils can be an important first step toward freely established workers’ and employers’ organizations.⁶¹²

Nonetheless, the Central American experience with solidarist associations underscores the risks in establishing alternative labor organizations, particularly when they lack “guarantees of independence in their composition and functioning.”⁶¹³ Solidarist associations are, at least in theory, set up for the mutual benefit of workers and employers and are dependent on financial contributions from employers.⁶¹⁴ Their close ties to employers, however, limit the ability of solidarist associations to organize in defense of workers’ interests. In a cautionary tale, union membership and the number of collective agreements signed in Costa Rica plummeted after the establishment of solidarist associations in the 1980s.⁶¹⁵ Since then, employers have regularly negotiated direct settlements with solidarist associations, bypassing collective bargaining processes with established workers’ organizations, and undermining workers’ right to organize and bargain collectively.⁶¹⁶

⁶¹⁰ “Solidarist or other associations (Protection against acts of interference,” ILO Committee on Freedom of Association Digest of Decisions, 2006, para 875.

⁶¹¹ ILO CEACR, Individual Observation concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Colombia, 2002.

⁶¹² “Electoral procedures (Right of organizations to elect their representatives in full freedom),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para 404.

⁶¹³ “Solidarist or other associations (Protection against acts of interference),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 878.

⁶¹⁴ *Ibid.*, para. 869.

⁶¹⁵ During the 1980s in Costa Rica, the solidarist associations succeeded in taking the place of unions in the industrial sector and on banana plantations, resulting in a considerable decline in collective bargaining. Union membership and the number of collective agreements signed dropped rapidly. Gilbert Brown Young, “Costa Rica,” in *Voices for Freedom of Association*, ILO Labour Education, 1998/3, No. 112, 31st session of the International Labour Conference, San Francisco, <http://www.psa.org.nz/library/other/ILO%20-%20International%20Labour%20Organisation/ILO%20-%20Voices%20for%20Freedom%20of%20Association%20-%201998.pdf> (accessed March 8, 2008), pp. 25-28.

⁶¹⁶ ILO CEACR, Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98) Costa Rica (ratification: 1960), 2008.

Cooperatives

Although there are many potential benefits of cooperatives for economic development, cooperatives also threaten to weaken existing unions and undermine workers' right to organize. Employers can deliberately use cooperatives to minimize the number of permanent, direct employees, and create a workforce increasingly dominated by vulnerable workers outside the protections of national labor law, which excludes cooperative workers from its protections.

Cooperatives are small groups of workers—in Venezuela the minimum membership is five—who form associations to share business costs and profits. More precisely, as defined by the ILO, a cooperative is “an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise.”⁶¹⁷

Cooperative workers are also not dependent or salaried workers. Instead, they are considered self-employed “associates,” rather than “workers,” and as such they are not covered by Venezuelan labor legislation applicable to direct “workers,” including legal protections for organizing and collective bargaining.⁶¹⁸

The ILO has generally encouraged the formation of cooperatives to promote sustainable development, generate employment, and improve social and economic well-being.⁶¹⁹ The ILO has emphasized, however, that while cooperatives can expand job opportunities and contribute to development, they are not “workers’ associations” within the meaning of international law, with the objective of promoting and defending workers’ interests.⁶²⁰

⁶¹⁷ ILO. R193 Promotion of Cooperatives Recommendation, 2002, June 3, 2002, art. 1(2).

⁶¹⁸ Special Law on Cooperative Associations [Ley Especial de Asociaciones Cooperativas], *Official Gazette*, No. 37.285, September 18, 2001, <http://www.leyesvenezolanas.com/leac.htm> (accessed January 23, 2008), art. 34.

⁶¹⁹ ILO. R193 Promotion of Cooperatives Recommendation, 2002, art. 4.

⁶²⁰ “Distinctions based on occupational category (Right of workers and employers, without distinction whatsoever, to establish and to join organizations),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 262.

Since Chávez took office, cooperatives have proliferated in Venezuela with the help of government training programs, logistical support, and credits.⁶²¹ The 1999 Constitution committed the government to “promote and protect cooperatives.”⁶²² According to the National Superintendence of Cooperatives (Superintendencia Nacional de Cooperativas, Sunacoop), there are now 215,000 cooperatives registered in Venezuela, though only 70,000 are thought to be active.⁶²³ Three-quarters of cooperatives are in the service sector, including commerce, public services, and construction, while less than a quarter are engaged in direct production, such as manufacturing and agriculture.⁶²⁴

Government proponents view cooperatives as part of a strategy of “economic democratization” and argue that among their benefits are improved worker well-being, greater integration of marginalized sectors into the formal economy, and in the long-term, a more just distribution of wealth.⁶²⁵ Chávez himself has acknowledged that cooperatives have not achieved all these goals, however, and he has called on the government “to discuss the model, because without realizing it, we are reproducing the [capitalist] model that we want to replace.”⁶²⁶

Likewise, many union leaders and labor experts expressed concern to Human Rights Watch that cooperatives are being used deliberately by some companies, particularly in the public sector, to weaken or even supplant existing unions by replacing permanent, direct employees with cooperative workers, thereby reducing the number of workers with associational and collective bargaining rights under

⁶²¹ State promotion of cooperatives occurs through Sunacoop, which supervises, registers, and supports cooperatives, and Mission Vuelvan Caras (now Mission Che Guevara), which helps train workers to establish and expand cooperatives.

⁶²² Constitution of the Bolivarian Republic of Venezuela of 1999, art. 308.

⁶²³ Sunacoop, “Cooperativas registradas en el SNC,” www.sunacoop.gob.ve (accessed June 23, 2008). These are registered cooperatives, though fewer than half are thought to be active. Some cooperatives have as few as five members and exist on paper to receive preferential loans. Gregory Wilpert, *Changing Venezuela by Taking Power*, (New York City: Verso, 2006), p. 78.

⁶²⁴ Instituto Nacional de Estadística, Census 2006, cited in “La industria socialista no impulsa la producción,” *El Universal*, January 29, 2008.

⁶²⁵ For example, the secretary of Sunacoop, Carlos Molina, explains, “Cooperatives are one of the tools employed by the state as part of its policy of inclusion [of marginalized sectors] and its aim to achieve a more just distribution of wealth.” Humberto Márquez, “Government distributes petrodollars through booming cooperative movement,” *InterPress Service*, July 27, 2006.

⁶²⁶ Elvia Gómez, “‘Si gana la oposición, los niños no tendrán futuro,’ dijo Chávez,” *El Universal*, July 21, 2008.

Venezuelan law.⁶²⁷ Cooperatives have been promoted in companies and industries, such as the state oil and electricity companies, that previously had strong unions and directly employed workers to provide services. For example, the energy minister announced that following the oil strike in PDVSA, “[c]ooperatives will assume all transport, service, maintenance, food, uniforms, tools, and small jobs.” PDVSA proceeded to invest heavily in the use of cooperatives.⁶²⁸

Similarly, when the mayor of Caracas, Juan Barreto, urged the formation of cooperatives and allowed them to compete for municipal contracts, Caracas street cleaners, who were formerly unionized, were forced to dissolve their existing union and fragment the workers into small cooperatives.⁶²⁹

Such large-scale replacement of stable, directly employed workers dilutes the strength of existing unions by diminishing membership and reducing the number of potential union affiliates. It also undermines the rights of new cooperative workers, who in many cases were previously employed as direct, permanent workers to perform the same jobs. These cooperative associates, though not explicitly banned from organizing and bargaining collectively under Venezuelan law, enjoy no legal protections against unjust dismissal or other retaliation for exercising these rights or the right to strike. As a result, companies can legally choose to fire or simply not rehire cooperatives if their workers exercise their right to agitate for better working conditions, including by forming labor organizations or engaging in work stoppages. In addition, cooperatives are typically retained only on short-term contracts, enjoying little job stability and no legal expectation of long-term employment. Therefore, they are particularly vulnerable to such retaliation if they are deemed “troublemakers” as

⁶²⁷ Human Rights Watch interviews with Orlando Chirino, September 11, León Arismendi, September 12, Froilán Barrios, September 13, 2007, and Marino Alvarado, January 25, 2008.

⁶²⁸ Cooperativas asumirán labores en PDVSA,” *El Universal*, April 20, 2003, http://buscador.eluniversal.com/2003/04/20/eco_art_20112CC.shtml (accessed May 15, 2008). PDVSA spent over half a billion dollars on start-up funds, training, and facilities for cooperatives just in the first two years of its efforts. “State-Financed Experiments in the Solidarity Economy,” *IPS News*, November 17, 2005, <http://ipsnews.net/news.asp?idnews=31071> (accessed May 15, 2008).

⁶²⁹ Barreto advocated cooperatives allegedly to help generate new jobs. The effect, however, was to reorganize existing rather than create new employment, to undermine the existing union of street cleaners, and to produce an increasingly unstable workforce unprotected by Venezuelan labor laws governing the right to organize, bargain collectively, and strike. “Barreto anunció que no dejará solo a Bernal para solucionar problema de la basura,” Metropolitan District Mayor’s Office press release, December 24, 2004, <http://alcaldiamayor.gob.ve/portala1/noticias/noticias.php?IdNoticia=1185> (accessed May 15, 2008).

a result of engaging in union activity or (as illustrated in chapter 2), for taking politically controversial stands.⁶³⁰

Even if cooperative workers' right to organize was explicitly protected under Venezuelan law and companies refrained from impeding its exercise, the prolific use of cooperatives could continue to violate workers' right to organize. Unless cooperative workers were also clearly granted the right to form organizations jointly with their directly employed counterparts and with workers laboring for other similarly situated cooperatives, established unions of direct workers could still be undermined by the reduced actual and potential membership spawned by cooperative use, and cooperative workers would likely still face obstacles to organizing far greater than those encountered by permanent, direct employees.

Each cooperative is generally small—over 80 percent have fewer than 10 workers—and operates at multiple companies within a relatively short period of time, due to the typically short-term contracts and lack of job stability.⁶³¹ This makes it exceedingly difficult for cooperative workers to form a labor association with a critical mass of workers able to articulate meaningful demands with respect to any one workplace. Moreover, Venezuelan law requires a minimum of 20 workers for the formation of an enterprise-level union, and unless this number was reduced, most cooperative workers would be legally barred from organizing themselves into a workplace union.⁶³²

In its recommendations, the ILO has highlighted that the concept of worker also includes independent or autonomous workers, such that “workers associated in cooperatives should have the right to establish and join organizations of their choosing.”⁶³³ The ILO also makes clear that governments must “ensure that cooperatives are not set up for, or used for, non-compliance with labour law or used

⁶³⁰ Coprotene, a cooperative that makes school uniforms, lost a government contract because its members had signed the recall referendum. They had no legal recourse to protest their exclusion on political grounds.

⁶³¹ SUNACOOP, “Porcentaje de cooperativas distribuido por estratos de tipos de empresas según su tamaño por número de asociados,” 2006.

⁶³² Organic Labor Law, art. 417.

⁶³³ “Distinctions based on occupational category (Right of workers and employers, without distinction whatsoever, to establish and to join organizations),” ILO Committee on Freedom of Association Digest of Decisions, 2006, para. 262.

to establish disguised employment relationships, and combat pseudo cooperatives violating workers' rights, by ensuring that labour legislation is applied in all enterprises."⁶³⁴ In Venezuela, however, evidence suggests that, in some cases, cooperatives are used precisely to undermine workers' right to organize and bargain collectively. This is particularly true when they are hired, as in the case of PDVSA, to perform jobs previously held by permanent, organized workers, seeming to create the very "disguised employment relationships" condemned by the ILO.

Lack of Judicial Protection of Freedom of Association

The Venezuelan judiciary has repeatedly failed to provide a check on state interference in union affairs. For instance, as we saw earlier, the Supreme Court allowed the 2000 referendum on union leadership to proceed, even though the referendum was a blatant act of state interference in union activity proscribed under international and Venezuelan law. It also failed to rule on the legality of the 2002 oil workers' strike, thus permitting the government to run afoul of international law by enforcing its ban on the strike and dismissing striking workers.

One of the most glaring failures of the Supreme Court to protect workers' right to freedom of association, however, was its handling of a 2006 petition that sought clarification on the role of the state in union leadership elections.

In December 2005, the National Press Workers' Union (Sindicato Nacional de Trabajadores de la Prensa, SNTP) submitted a new collective bargaining agreement with the newspaper *Últimas Noticias* to the local labor inspectorate for approval. The inspectorate rejected the contract because the union had not held elections approved by the CNE.⁶³⁵ Four months later, the SNTP disputed the constitutionality of required CNE participation in union elections.⁶³⁶

⁶³⁴ ILO. R193 Promotion of Cooperatives Recommendation, art. 8(b).

⁶³⁵ The union was granted 15 days to hold new elections and receive certification from the CNE. Because the union was unable to comply with the short timeframe, the labor inspectorate rejected the contract. SNTP, "Request for a constitutional injunction (amparo constitucional) to the Contentious Administrative Court," April 11, 2006, <http://www.sntp.org.ve/mayo636.htm> (accessed May 14, 2008).

⁶³⁶ SNTP, "Recurso de interpretación presentado por el SNTP ante la Sala Constitucional del Tribunal Supremo de Justicia (TSJ) el 18 de abril de 2006, sobre la aplicación de los artículos 293^o (numeral 6), 95^o y 23^o de la Constitución de la República Bolivariana de Venezuela, y los artículos 3^o y 8^o del Convenio 87 de la Organización Internacional de Trabajo (OIT) en relación

The SNTP asked the constitutional chamber of the Supreme Court to interpret the CNE's powers. The union argued that the interpretation favored by key government officials, which held that CNE organization of union elections is mandatory, contradicts the constitutional provision that gives international human rights treaties precedence over domestic law, requiring courts to apply them "immediately and directly."⁶³⁷ Accordingly, the SNTP asserted, the international prohibition on state interference in union elections should have the force of a constitutional guarantee.

The article of the constitution that addresses the CNE's role in union leadership elections is silent, however, on whether CNE's intervention is mandatory or limited to requests by the respective union.⁶³⁸ It merely establishes that the CNE has the power "to organize elections for labor unions, professional associations and organizations pursuing political purposes, in accordance with applicable provisions of law."

The government meanwhile (as discussed above) has presented divergent interpretations of the CNE's powers. Before the ILO, it has maintained that Venezuelan unions are free to hold elections without CNE interference and that Venezuelan law requires the government to respect international treaties, including ILO Convention 87's prohibition on state interference in union elections.⁶³⁹ Yet within Venezuela—as the SNTP case and previous cases in this chapter demonstrate—the Ministry of Labor has routinely insisted that, under Venezuelan law, CNE certification of elections is mandatory for collective bargaining purposes.

Rather than resolve this critical discrepancy and restore workers' right to elect their representatives in full freedom, according to their internal union statutes, the Supreme Court chose to evade it. It issued a ruling that dismissed the request for

con las facultades del Poder Electoral para organizar las elecciones de los sindicatos," <http://www.sntp.org.ve/mayo635.htm> (accessed May 12, 2008).

⁶³⁷ Constitution of the Bolivarian Republic of Venezuela of 1999, art. 23.

⁶³⁸ *Ibid.*, art. 293 (6).

⁶³⁹ ILO, "Complaint against the Government of the Bolivarian Republic of Venezuela presented by the Venezuelan Workers' Confederation (CTV)," Report No. 340, Case(s) No(s). 2411; ILO CEACR, Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise Convention, 1948 Venezuela (ratification: 1982), 2008. The Ministry of Labor, Legal Advisor's Office has also stated that unions are free to organize their internal elections. Ministry of Labor, Legal Advisors' Office, Opinion No. 13, May 30, 2003, <http://www.mintra.gov.ve/consultoria/dictamenes/dictamen13.html> (accessed March 10, 2008).

legal interpretation on the grounds that there is, in fact, no ambiguity in Venezuelan law regarding the CNE's role in union elections. What the court neglected to explain in its ruling, however, was which of the two contradictory interpretations of the law—the one that the government presented before the ILO or the one that it applied in practice in Venezuela—was the correct one.⁶⁴⁰

Concretely, the court claimed that there is no contradiction between Venezuelan law establishing CNE participation in union elections and international norms. However, it failed to indicate whether this is because CNE involvement is indeed optional or because mandatory involvement is consistent with international norms, a view the ILO has categorically rejected.⁶⁴¹

By failing to resolve the matter, the court effectively allowed Venezuelan officials to continue to interpret the CNE role in union elections as it saw fit. As a result, while the Ministry of Labor has told the ILO that some unions have now held valid elections without CNE participation,⁶⁴² the CNE has continued to view its organization and certification of union elections as mandatory, in flagrant violation of international law.⁶⁴³

⁶⁴⁰ Instead of resolving the issue in dispute, the Court limited its analysis to what the CNE should do if it participates in union elections. The court held that the CNE's intervention in these cases is permissible "as long as it does not constitute per se a limitation" of workers' rights, and it should be understood as the "participation of a specialized body that ... is called to collaborate [*llamado a coadyuvar*] in union elections, to ensure the transparency and impartiality that must exist in these types of processes." Supreme Court Constitutional Chamber, Arcadio Delgado Rosales, Case No. 06-0554, June 19, 2006, <http://www.tsj.gov.ve/decisiones/scon/Junio/1226-190606-06-0554.htm> (accessed May 12, 2008).

⁶⁴¹ ILO, "Complaint against the Government of Venezuela presented by the International Confederation of Free Trade Unions (ICFTU), the Venezuelan Workers' Confederation (CTV) and the Latin American Central of Workers (CLAT)," Report No. 326, Case(s) No(s). 2067, para. 502.

⁶⁴² ILO CEACR, Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise Convention, 1948 Venezuela (ratification: 1982), 2008.

⁶⁴³ Human Rights Watch interview with Anibal Galindo, May 7, 2008.

Recommendations

State interference in union elections

In order to guarantee workers' right to freely elect their representatives, the National Assembly should:

- Revise the Organic Labor Law and Organic Electoral Law to ensure that CNE participation in union elections occurs only at the request of the union or a court on appeal;
- Revise the Organic Labor Law so as to allow for the reelection of union leaders; and
- Alter or repeal the 2004 Statute for the Election of Union Leadership so that the power to certify and annul elections is only granted to a judicial body, with adequate guarantees of due process, right to defense, and impartiality, and only in the event that election results are challenged or disputed.

Collective bargaining

To ensure the protection of collective bargaining rights, the National Assembly should:

- Until the laws mandating state interference in union elections are changed, amend the Regulations of the Organic Labor Law from 2006 so that union leadership elections are not a prerequisite for collective bargaining; and
- Amend the labor law regulations to provide clear criteria to determine the most representative union for the purposes of collective bargaining, guarantees for the rights of minority unions when no union commands majority support, and an opportunity for minority unions to speak at least on behalf of their members in those cases where a majority union exists.

In addition, the government should:

- Ensure that it verifies which union represents the majority of workers through an objective process *prior* to collective bargaining until clear criteria to determine the most representative union are established.

Right to strike

To bring Venezuelan law into full compliance with international standards, the National Assembly should:

- Revise the Organic Labor Law to allow for strikes grounded in demands about government social and economic policies.

Furthermore, the Venezuelan government should:

- Refrain from retaliation against workers engaged in legitimate labor organizing, as well as from making threats of future retaliation or discrimination in employment.

Alternative Labor Organizations

As the National Assembly considers the proposed legislation on workers' councils, it should:

- Amend the legislation to explicitly bar labor negotiations between employers and workers' councils when trade unions exist in the workplace; and
- Clarify the power of workers' councils to impede worker actions "with speculative, destabilizing or political ends" to clearly exclude legitimate organizing activity.

To ensure that cooperatives are not used to restrict workers' rights, the National Assembly should:

- Amend the Organic Labor Law to include workers providing labor through cooperatives in the definition of "workers";
- Explicitly grant cooperative workers the right to form organizations jointly with their directly employed counterparts and with workers laboring for other similarly situated cooperatives so that cooperative workers enjoy the same protections and rights as workers in traditional labor arrangements;
- Revise the Law on Cooperatives to limit the use of cooperatives to only those associations that provide temporary or complimentary services and operate independently and autonomously, with their own capital and personnel; and
- Establish a limit on the percentage of cooperative workers in a workplace in the Law on Cooperatives sufficient to ensure that the use of cooperatives does not undermine workers' right to freedom of association.

VI. Civil Society

The Chávez government's ability to address Venezuela's long-standing and serious human rights problems has been undermined by its adversarial approach to civil society organizations. During the Chávez presidency, rights advocates have faced prosecutorial harassment, unsubstantiated allegations aimed at discrediting their work, and efforts to exclude them from international forums and restrict their access to international funding.

President Chávez and his supporters have sought to justify these measures by arguing that these civil society organizations, despite their professed commitment to human rights advocacy, are actually pursuing a partisan political agenda aimed at destabilizing the country and removing President Chávez from office. To back this charge, they have cited the fact that some civil society leaders have engaged in partisan activities, and some nongovernmental organizations have received funding from the United States.

It is perfectly reasonable for a government to investigate credible allegations that individuals or organizations have engaged in criminal activity, provided the investigations are conducted seriously and with appropriate due process guarantees. It is also reasonable for governments to regulate foreign funding of civil society groups in order to promote greater transparency, provided those regulations do not interfere with the groups' ability to exercise fundamental rights.

But the actions of Chávez and his supporters in the National Assembly and other branches of government have gone beyond these legitimate forms of accountability and regulation by:

- Subjecting rights advocates to criminal investigations on unsubstantiated and politically motivated charges;
- Seeking to discredit and undermine rights organizations through unfounded accusations of complicity in subversion;
- Seeking to exclude organizations receiving foreign funding from international forums;

- Pursuing legislation that would allow arbitrary governmental interference in the operations of rights organizations, including fundraising activities.

These actions compromise any professed government commitment or willingness to effectively address the country's longstanding human rights problems. For example, Venezuela faces one of the highest rates of prison violence in the continent, with hundreds of deaths in preventable violent incidents every year. But rather than engage constructively with NGOs that document abuses and advocate reforms to the prison system, the authorities have harassed, intimidated, and marginalized them from policy discussions.

In one notable exception, the government incorporated civil society experts in a commission set up to analyze and make proposals to reform Venezuela's police forces, which have long been accused of corruption and abuse. After an extensive process of consultation, the commission proposed reforms to overhaul the police system. For the first time—and largely due to the involvement of rights advocates with extensive experience in battling impunity for abuses—the government identified and prioritized accountability for police abuse as a major issue, though it did not ultimately adopt all of the commission's recommendations.

Unfortunately, the commission on police reform is the exception that proves the rule. The government most often has sought to discredit and sideline human rights advocates and organizations, including experienced groups that could contribute to governmental efforts to address a wide range of other human rights problems.

International Norms on Civil Society

As part of their duty to promote and protect human rights, governments must ensure that human rights defenders are allowed to pursue their activities without reprisals, threats, intimidation, harassment, discrimination, or unnecessary legal obstacles. Moreover, both the United Nations and the Organization of American States (OAS) have recognized the importance of the work of human rights defenders to the protection of human rights and the consolidation of democracy.

According to the United Nations Declaration on Human Rights Defenders, states must “take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of their legitimate exercise of the rights referred to in this Declaration”.⁶⁴⁴

In its report on the situation of Human Rights Defenders in the Americas, the Inter-American Commission on Human Rights stressed the importance of the defense of human rights to the consolidation of democracy. “Human rights defenders, from different sectors of civil society, and, in some cases, from state institutions, make fundamental contributions to the existence and strengthening of democratic societies. Accordingly, respect for human rights in a democratic state largely depends on the human rights defenders enjoying effective and adequate guarantees for freely carrying out their activities.”⁶⁴⁵

The Inter-American Court of Human Rights has embraced the same principle. “Respect for human rights in a democratic state depends largely on human rights defenders enjoying effective and adequate guarantees so as to freely go about their activities, and it is advisable to pay special attention to those actions that limit or hinder the work of human rights defenders.”⁶⁴⁶

Among government actions that limit or hinder the work of human rights defenders are criminal proceedings or legal action taken or threatened against them on unfounded charges, or intimidating accusations leveled at them by government officials. The Inter-American Commission on Human Rights has pointed out that:

⁶⁴⁴ United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, March 8, 1999, G.A. res.53/144, art.12(2).

⁶⁴⁵ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights Defenders in the Americas*, March 7, 2006. OEA/Ser. L/V/II.124, (B) 20, <http://www.cidh.oas.org/countryrep/Defenders/defenderschap1-4.htm#III> (accessed May 9, 2008).

⁶⁴⁶ *Lysias Fleury v. Haiti*, order of the Inter-American Court of Human Rights, June 7, 2003, http://www.corteidh.or.cr/docs/medidas/fleury_se_01_ing.pdf (accessed July 16, 2008), considering 5; *Nieto Palma v. Venezuela*, order of the Inter-American Court of Human Rights, July 9, 2004, http://www.corteidh.or.cr/docs/medidas/nieto_se_011.pdf (accessed July 16, 2008), considering 8.

... the punitive power of the state and its judicial apparatus should not be manipulated for the purpose of harassing those who are dedicated to legitimate activities such as the defense of human rights.... judicial proceedings brought by the state authorities should be conducted in such a way that—based on objective evidence that is legally produced— only those persons who can reasonably be presumed to have committed conduct deserving of a criminal sanction are investigated and submitted to judicial proceedings.⁶⁴⁷

Governments must not only protect human rights defenders but also ensure that they can engage in public debates through the issuing of findings and recommendations. Among the rights protected by the UN Declaration on Human Rights Defenders is the right:

individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.⁶⁴⁸

Although governments are under no obligation to heed the criticism or advice of human rights defenders, they are obliged to refrain from actions that undermine the defenders' ability to exercise this right, including unfounded public statements aimed at intimidating or discrediting them.

Finally, states may not impose arbitrary limitations on the right of organizations dedicated to human rights protection to solicit and receive funds for their activities. According to the UN Declaration:

Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of

⁶⁴⁷ *Report on the Situation of Human Rights Defenders in the Americas*, para. 114.

⁶⁴⁸ UN Declaration on the Right and Responsibility of Individuals, art. 8 (2).

promoting and protecting human rights and fundamental freedoms through peaceful means.⁶⁴⁹

The Inter-American Commission's view is that civil society organizations may legitimately receive money from foreign or international NGOs, or foreign governments, to promote human rights.⁶⁵⁰

Deteriorated Relations with Civil Society

At the outset of his presidency, Chávez's relations with human rights groups were better than they later became as opposition to his presidency gathered steam. Nongovernmental rights advocates participated actively in the debate over the new constitution in 1999 and had decisive influence on its human rights provisions. The Forum for Life, a consortium of nongovernmental human rights groups, submitted proposals to the constituent assembly responsible for drafting the new bill of rights. At its recommendation, many long-overdue reforms, such as limiting the number and types of rights that could be restricted in states of emergency and the use of military courts, were incorporated in the final text.⁶⁵¹

In December 1999, Chávez initially described reports of human rights abuses during floods and landslides in Vargas State as “superficial” and “suspicious,” but he later recognized their seriousness and promised action.⁶⁵² During the same year, Chávez described one of the organizations that documented these reports—the Venezuelan Program for Education-Action in Human Rights (El Programa Venezolano de Educación-Acción en Derechos Humanos, PROVEA)—as “an institution I know about,

⁶⁴⁹ *Ibid.*, art. 13.

⁶⁵⁰ *Report on the Situation of Human Rights Defenders in the Americas*, IV (40).

⁶⁵¹ About 65 percent of the proposals submitted by human rights groups like the Forum for Life, the Support Network for Justice and Peace, and PROVEA were accepted by the constituent assembly, 95 percent of whose members were Chávez supporters. Mariluz Guillén and María Pilar García-Guadilla, “Las organizaciones de derechos humanos y el proceso constituyente: alcances y limitaciones de la constitucionalización de la inclusión en Venezuela,” *Cuadernos del Cendes*, Año 23, No. 61, January- April, 2006, p.89; Gregory Wilpert, “Participatory Democracy or Government as Usual?” *Venezuelanalysis.com*, June 15, 2005, <http://www.venezuelanalysis.com/analysis/1192> (accessed June 10, 2008).

⁶⁵² Human Rights Watch, *World Report 2000*, <http://www.hrw.org/wrzk1/americas/venezuela.html>.

and with which we share its defense of human rights, they are in favor of our rights and those of our families.”⁶⁵³

Five years later, Chávez was to accuse the same organization of conspiring against his government. As detailed below, the government’s relations with civil society organizations more generally deteriorated over this period (1999-2004) as political divisions deepened over his presidency and some civil society organizations engaged in openly political advocacy. New organizations dedicated to the defense of democracy and the rule of law participated in broadly based opposition coalitions which engaged not only in litigation and political advocacy in defense of democratic rights, but also supported street protests and strike activity intended to force the president’s resignation.⁶⁵⁴ Some NGOs received funding from institutions in the United States, which the Venezuelan government accused of backing the April 2002 coup, heightening government suspicions about their ulterior motives.

The government publicly accused both institutions and individuals in civil society of supporting the coup, or of being paid by the “empire.” The attacks were directed at groups advocating peaceful and constitutional channels to change the government—in particular the 2004 recall referendum—or merely exercising their right to criticize government policies.⁶⁵⁵

⁶⁵³ “Opiniones sobre PROVEA,” <http://www.derechos.org/ve/nosotros/acercade/link5.htm> (accessed June 9, 2008). The Venezuelan Program for Education and Action in Human Rights (Programa de Educación-Acción en Derechos Humanos, PROVEA) is one of Venezuela’s oldest and most respected nongovernmental human rights organizations.

⁶⁵⁴ A heterogeneous umbrella group founded in January 2001 helped organize the street protests in 2002-2003. The Democratic Coordinating Group for Civic Action (Coordinadora Democrática de Acción Cívica) called itself “a democratic and pluralist movement aiming to channel the efforts of diverse groups and individuals in civil society, respecting the autonomy and independence of each, in order to defend the democratic system, the rule of law, individual freedoms and institutional stability.” María Pilar García-Guadilla, “Politicization and Polarization of Venezuelan Civil Society: Facing Democracy with Two Faces,” XXIV International Congress of the Latin American Studies Association, Dallas, Texas, March 27-29, 2003, p. 5.

⁶⁵⁵ According to a study of the treatment of human rights NGOs since 1997, the number of violent attacks, threats, and expressions of discredit directed at human rights activists or at their organizations (most attributed to government officials or police agents) increased from an average of four cases a year between 1999 and 2002 to more than 10 a year between 2003 and 2006 and seven cases just from January to May 2007. Police officials were responsible for some of the violence and threats. Two of the six killings of human rights defenders recorded since 1997 (of which the victims were people demanding court investigations into alleged extrajudicial executions of close relatives) have been attributed to police forces. Vicaría de Derechos Humanos de Caracas, *Informe sobre la Situación de Defensores y Defensoras de Derechos Humanos en Venezuela* (Caracas: Archdiocese of Caracas, 2007), <http://www.derechos.org/ve/Informe%20sobre%20defensores%20en%20Venezuela.pdf> (accessed June 15, 2008), pp.17, 32-33.

Activists belonging to high profile human rights groups in Caracas have been threatened and intimidated. They include Liliana Ortega, the director of the Committee of Relatives of Victims of the Events of February-March 1989 (Comité de Familiares de las Víctimas de los sucesos ocurridos entre el 27 de febrero y los primeros días de marzo de 1989, COFAVIC)—a long-established human rights group that works for victims of police violence—and other COFAVIC members; Carlos Nieto, director of Window to Freedom (Una Ventana a la Libertad, a prison reform group); and several relatives of victims of police killings who have sought justice in the courts.⁶⁵⁶ Ortega was one of several activists whose life and personal safety the Inter-American Commission and the Inter-American Court of Human Rights ordered the Venezuelan government to protect.⁶⁵⁷

Two Divergent Approaches to Rights Advocates

Venezuelan human rights NGOs, formed in the 1980s to defend victims of prison and police abuses, have decades of experience documenting, analyzing, and seeking solutions to these problems. Unfortunately, instead of collaborating constructively with these groups, the Chávez government has often treated them with hostility and suspicion and, in some cases, has actively sought to discredit and marginalize them.

In one notable instance, however, the government did actively collaborate with civil society groups to devise a major police reform, proving that even in the midst of political polarization such collaboration was possible, as well as productive.

Persecution of Prison Reform Advocates

The costs of sidelining human rights monitors can be clearly seen in the case of prison reform. Authorities have harassed and intimidated civil society groups that speak out about prison conditions rather than tap their commitment and expertise to find solutions to the systematic failings of Venezuelan prisons.

⁶⁵⁶ COFAVIC (the Committee of Relatives of Victims of the Events of February-March 1989) was formed to seek justice for the victims of “disappearances” and killings during the 1989 protests in Caracas known as the “Caracazo.”

⁶⁵⁷ *Matter of Liliana Ortega et al. regarding Venezuela*, order of the Inter-American Court of Human Rights, June 14, 2005, <http://www.corteidh.or.cr/medidas.cfm> (accessed June 15, 2008). The Court issued six such orders over a period of two-and-a-half years between November 2002 and June 2005.

Nine years into his presidency, Chávez has failed to address the chronic crisis in Venezuela's prisons, which remain among the most violent in the continent after decades of neglect by successive governments. Violence between inmates rages without check, causing hundreds of deaths every year.⁶⁵⁸ Inmates effectively control prisons, overwhelming the scant number of security guards.⁶⁵⁹ The system fails to provide minimum standards of hygiene, medical care, and internal order. Chávez himself has described the conditions as “infernal.”⁶⁶⁰

Venezuelan Prison Watch (Observatorio Venezolano de Prisiones, OVP), a nongovernmental organization whose stated mission is “to promote and monitor state protection of the human rights of persons deprived of their liberty,” has done much to bring the problem to public attention. OVP publishes annual reports on prison conditions and compiles statistics on violent prison deaths and injuries through an extensive network of contacts within the prison system.⁶⁶¹ Little official data is publicly available on Venezuela's prison population. The national press, civil society groups, and international organizations appear to rely on OVP for all but the

⁶⁵⁸ The government does not publish statistics on violent prison deaths, but numbers compiled by Venezuelan Prison Watch (Observatorio Venezolano de Prisiones, OVP), a nongovernmental organization, show the gravity of the problem. According to OVP, the number of prison deaths has averaged more than 300 per year for the past decade, reaching 498 violent prison deaths and 1,023 injuries in 2007. The government has not denied or questioned this data. Observatorio Venezolano de Prisiones, *Informe Situación Carcelaria en Venezuela, Año 2007*, http://www.ovprisiones.org/pdf/2007_Informe_Situación_Carcelaria_Venezuela.pdf (accessed May 10, 2008). OVP also reported that 120 prisoners died violently and 130 were injured in the first three months of 2008. “15 muertos y 30 heridos en cárceles del país este año,” *Últimas Noticias*, January 17, 2008; María Alejandra Monagas, “Han matado a 120 reclusos en lo que va de este año,” *Últimas Noticias*, March 27, 2008.

⁶⁵⁹ According to OVP a single guard often oversees a hundred inmates. For example, the fact that there were just five guards posted to guard over 700 prisoners in the Yare I Prison led the Inter-American Court to issue protective measures to safeguard the rights of inmates there. *Matter of Yare I and Yare Capital Region Penitentiary Center regarding Venezuela*, order of the Inter-American Court of Human Rights, November 30, 2007. Senator Wilmer Iglesias, the President of the National Assembly's Sub-Commission on Interior Policies, acknowledged that, “the experience that we have seen in visits to the prisons tells us that the State has lost control of the internal functioning of these and it is necessary to look for rapid solutions.” “Venezuela Moves to Humanize Prison System Amidst Hunger Strikes,” *Venezuelanalysis.com*, March 11, 2008, <http://www.venezuelanalysis.com/news/3260> (accessed May 7, 2008).

⁶⁶⁰ Chávez acknowledged: “we must humanize the prisons now. We can't let this problem continue, there are issues which we've left pending and in which we've failed, and this is one of them— the struggle against crime, the humanization of the prisons. The prisons can't go on being like an inferno.” “Chávez se reprobó en problemas que más aquejan al venezolano,” *El Universal*, January 28, 2008. [“Hay que humanizar las cárceles, ya, no podemos seguir con esos pendientes, hay materias que tenemos pendientes y en las que estamos raspaos, esa es una, la lucha contra la delincuencia, la humanización de las cárceles, las cárceles no pueden seguir siendo como un infierno.”]

⁶⁶¹ Human Rights Watch telephone interview with Humberto Prado, OVP director, Caracas, May 8, 2008.

most basic statistics.⁶⁶² OVP Director Humberto Prado is a prominent critic of government prison policy and appears regularly before the Inter-American Court and Commission to testify on conditions.⁶⁶³

In March 2008, hunger strikes broke out in 15 prisons in which thousands of prisoners across the country participated. The striking prisoners were pressing for the repeal of reforms to the criminal code dating from 2005 which exempted individuals convicted of violent crimes from sentencing benefits such as work outside the prison, probation, and conditional release.⁶⁶⁴

The government squarely blamed NGOs that work with prisoners for the unrest. For example, Interior and Justice Minister Ramón Rodríguez Chacín insinuated that unnamed human rights defenders who received their orders in the United States had incited the strike: “Coincidentally, when those individuals were in the United States, a prison strike began here in Venezuela to ask that an article of the Organic Penal

⁶⁶² The Ministry of Interior and Justice provides statistics on the overall size of the prison population, though such statistics are not readily available or published regularly. For example, no official data can be found online about the prison population, on the percentage of prisoners awaiting trial, on overcrowding, or on prison deaths. Carlos Nieto, director of the NGO Window to Freedom (*Ventana a la Libertad*), and Humberto Prado confirmed that the government does not publish official statistics on prison conditions. Human Rights Watch interview with Carlos Nieto, Caracas, September 18, 2007, and telephone interview with Humberto Prado, May 8, 2008. The Inter-American Commission on Human Rights appears to rely on statistics provided by OVP.

⁶⁶³ The Inter-American Court ordered the government to introduce special measures to protect the lives of inmates in three prisons: Yare I and II prisons (Centro Penitenciario Región Capital), the Uribana Prison (Centro Penitenciario de la Región Occidental), and the La Pica Prison (Internado Judicial de Monagas). Prado provided information to the Inter-American Commission on Human Rights in each of these cases. *Matter of Monagas Judicial Confinement Center (“La Pica”) regarding Venezuela*, Order of the Inter-American Court of Human Rights, January 9, 2006; *Matter of Yare I and Yare II Capital Region Penitentiary Center regarding Venezuela*, Order of the Inter-American Court of Human Rights, October 30, 2007; *Matter of the Penitentiary Center of the Central Occidental Region (Uribana Prison) regarding Venezuela*, Order of the Inter-American Court of Human Rights, February 2, 2007.

⁶⁶⁴ The prisoners protested reforms to Articles 458, 459, and 460 of the penal code, which exempt individuals convicted of armed robbery, assault, or other crimes involving violence from work outside the prison, conditional release, and probation. The strike ended in April when the Supreme Court issued a temporary injunction to suspend the application of the articles and admit the case. As of this writing, the Supreme Court has not issued a final decision on the case. Partial Penal Code Reform Law [Ley de Reforma Parcial del Código Penal], *Official Gazette*, No. 5.768, April 13, 2005; “Existe una total radicalización de los presos en cuanto al cumplimiento de sus demandas,” PROVEA, Boletín 196, February 28-March 14, 2008, http://www.derechos.org/ve/actualidad/coyuntura/2008/coyuntura_196.html#20 (accessed April 30, 2008); “TSJ suspende prohibición de beneficios a delitos más graves,” *Últimas Noticias*, April 22, 2008; “Venezuela: presos en huelga de hambre,” *BBC Mundo*, April 21, 2008, http://news.bbc.co.uk/hi/spanish/latin_america/newsid_7359000/7359901.stm (accessed April 30, 2008); “Prisoner Rights Restored After Venezuelan Supreme Court Decision,” *Venezuelanalysis.com*, April 23, 2008, <http://www.venezuelanalysis.com/news/3379> (accessed May 16, 2008).

Procedure Code not be applied.”⁶⁶⁵ Chacín called the prison groups “humanitarian organizations with political ends” and added that they had “dubious moral solvency” and “live off prison problems.”⁶⁶⁶

In April 2008, a newspaper article indicated that members of OVP were under investigation by the Ministry of Interior and Justice on charges of treason and inciting rebellion. The day after the charges appeared in the press, Prado presented himself before the public prosecutor, asking for an impartial investigation of the matter and signaling his willingness to cooperate to clear the name of the organization.⁶⁶⁷ No charges have been brought as of this writing.

On several prior occasions, government officials and pro-government legislators publicly accused Prado of starting prison riots to undermine the government. In January 2006, then-Interior and Justice Minister Jesse Chacón called Prado a “political spokesperson” with “false” accusations to “destabilize the country.”⁶⁶⁸ The president of the National Assembly Sub-Commission on Human Rights said that Prado “promoted prison riots.” “We all know who he is, he goes from prison to prison causing problems,” he added.⁶⁶⁹ In September 2007, Congressman Freddy Rojas announced on public television, “Each time Humberto Prado comes on

⁶⁶⁵ “Garantizan fin de crisis carcelaria,” *El Tiempo*, March 13, 2008, <http://www.eltiempo.com.ve/noticias/default.asp?id=143236> (accessed May 4, 2008).

⁶⁶⁶ “Individualidades venezolanas de derechos humanos reciben dirección en USA,” Ministry of Interior and Justice press release, March 12, 2008, <http://www.mpprij.gob.ve/spip.php?article43988> (accessed May 4, 2008). Congressman Antonio Barazarte similarly accused Prado of leading prison strikes around the country. Maritza Villaroel, “TSJ usurpa funciones a la AN al tomar atribuciones de legislar,” National Assembly press release, March 12, 2008, http://www.asambleanacional.gov.ve/publico/noticias/det_noticias.php?co=1272 (accessed May 4, 2008).

⁶⁶⁷ The alleged investigation was discussed in a column by Luis Felipe Colina in the newspaper *La Razón*. Human Rights Watch telephone interview with Humberto Prado, May 8, 2008; “Derechos humanos a juicio,” *Tal Cual*, April 29, 2008; “El Observatorio Venezolano de Prisiones colaborará con la investigación en su contra por los supuestos delitos de traición a la patria e incitación a la rebelión,” *El Carabobeño*, April 28, 2008, http://www.el-carabobeno.com/p_pag_not.aspx?art=a290408e01&id=t290408-e01 (accessed May 8, 2008); “Observatorio de Prisiones pide a Fiscalía investigue supuestas acusaciones en su contra,” OVP press release, April 28, 2008, <http://www.ovprisiones.org/> (accessed May 5, 2008).

⁶⁶⁸ “Foro por la Vida rechaza las reacciones de las autoridades públicas ante la solicitud de medidas de protección hecha por defensores de derechos humanos a la CORTE IDH,” PROVEA, Boletín Informativo 167, February 6-23, 2006, http://www.derechos.org.ve/actualidad/coyuntura/2006/coyuntura_167.htm (accessed May 4, 2008); “Ataques a defensores de derechos humanos,” COFAVIC, http://www.cofavic.org.ve/index.php?id=13&id_enti=1&casos=12 (accessed May 8, 2008).

⁶⁶⁹ “Diputado de la Asamblea Nacional señala a Humberto Prado como promotor de la ‘Guarimba carcelaria,’” PROVEA, Boletín Informativo 173, July 12-August 1, 2006, http://www.derechos.org.ve/actualidad/coyuntura/2006/coyuntura_173.htm#04 (accessed May 6, 2008).

television speaking about the prison situation, riots begins in the prisons ... I don't discount that this has to do with a destabilization plan."⁶⁷⁰

Harassment has often followed criticism of the Chávez government's record on prisons. For instance, just days after Prado briefed the Inter-American Commission on Human Rights about the prison situation in Venezuela in November 2005, Minister Chacón publicly questioned his moral integrity and motives.⁶⁷¹ Similarly, after testifying before the Inter-American Court in 2006, Director General of Prisoner Rehabilitation and Custody Erling Rojas said that Prado's statements about prison conditions "intended to destabilize the country when we are in an electoral year."⁶⁷² Prado reported receiving threatening phone calls in May 2007 after he described the appalling conditions in the Barinas prison to the newspaper *El Mundo*.⁶⁷³

Humberto Prado is not the only prison rights advocate who has suffered reprisals for his work. In 2004 the Inter-American Court ordered the government to take measures to protect Carlos Nieto, director of Window to Freedom (Una Ventana a la Libertad). The court acted after receiving reports that Nieto had received a house visit by government agents who issued veiled threats to his 9-month-old nephew, and that his neighbors had received pamphlets with death threats against Nieto.

The Court acted after Nieto's house was broken into several times, his nine-month-old niece was threatened, and death threats were sent to him and his neighbors.⁶⁷⁴

⁶⁷⁰ "Solicitan investigación por muerte de menores en La Planta," National Assembly press release, September 11, 2007, http://www.asambleanacional.gov.ve/publico/noticias/det_noticias.php?co=462 (accessed May 6, 2008). ["Cada vez que Humberto Prado sale en televisión declarando sobre la situación penitenciaria, comienzan a presentarse motines en los penales. No descarto que se trate de un plan desestabilizador."]

⁶⁷¹ According to press reports, Chacón said: "If [Humberto Prado] wants me to give him money not to speak about the Venezuelan prison system, he is very wrong and he should go on talking." ["Si él (Humberto Prado) pretende que le dé dinero para que no hable mal del sistema penitenciario venezolano está muy equivocado y que siga hablando."] "Ministro Chacón: Dos expedientes por violación de derechos humanos tiene Humberto Prado," *Agencia Bolivariana de Noticias (ABN)*, November 1, 2005.

⁶⁷² "Foro por la vida rechaza las reacciones de las autoridades públicas ante la solicitud de medidas de protección hecha por defensores de derechos humanos a la Corte IDH," Forum for Life press release, February 3, 2006, <http://www.analitica.com/va/sociedad/documentos/2558888.asp> (accessed May 6, 2008).

⁶⁷³ Prado filed a request for protective measures with the Inter-American Court of Human Rights on May 16, 2007. Inter-American Commission on Human Rights, *Annual Report 2007*, OEA/Ser.L/V/II.130, Doc. 22, rev. 1, December 29, 2007, Chapter IV, para. 234.

⁶⁷⁴ Human Rights Watch interview with Carlos Nieto Palma, Caracas, Sept 18, 2007; Inter-American Commission on Human Rights, *Annual Report 2004*, OEA/Ser.L/V/II.122 Doc. 5 rev. 1, February 23, 2005, Chap III, paras. 338-340,

The government's suspicion of human rights monitors and its refusal to treat them as valid interlocutors has direct practical consequences that limit the groups' effectiveness. Officials have ignored their requests to visit prisons, thereby hindering independent monitoring of prison conditions.⁶⁷⁵ Instead, OVP observers had to visit prisons in the company of family members of inmates.⁶⁷⁶

The government has also excluded prison groups from taking part in government-sponsored forums on the prison system. According to the government, two investigations against Prado for human rights violations during his tenure as the director of the Yare I Prison (1996-1997) are still underway. On these grounds, the government disqualified Prado from taking part in government discussions on its "humanization" plan in 2005.⁶⁷⁷ Prado said that he did not know of any investigations against him and that the accusations were baseless.⁶⁷⁸ More generally, Prado said that OVP has been eager to participate in government discussions on prison policy, but that the government has never invited NGOs.⁶⁷⁹

Government hostility also has broader ramifications for the public policy issues at stake. By publicly belittling the work done by prison groups, state officials attempt to discredit the complaints and evidence presented. The focus on the purported "destabilizing" intentions of prison groups has allowed the government to gloss over the institutional crisis in the prison system.

Although the government has announced a "humanization plan" to improve prison infrastructure through the construction of 15 new prisons between 2006 and 2012 and the expansion of recreational and occupational activities for prisoners, so far

<http://www.cidh.org/annualrep/2004eng/chap.3g.htm> (accessed May 4, 2008).

⁶⁷⁵ Both OVP and Window to Freedom said that they had not been able to obtain permission to enter the prisons from the interior and justice minister, despite repeated written requests. Human Rights Watch interview with Carlos Nieto, September 18, 2007, and telephone interview with Humberto Prado, May 8, 2008.

⁶⁷⁶ Human Rights Watch telephone interview with Humberto Prado, May 8, 2008.

⁶⁷⁷ "Ministro Chacón: dos expedientes por violación de derechos humanos tiene Humberto Prado," *Agencia Bolivariana de Noticias (ABN)*, November 1, 2005. Minister Chacón said that the investigations were underway, Cases Nos. 2795-97 and 2764-97.

⁶⁷⁸ Human Rights Watch telephone interview with Humberto Prado, May 8, 2008.

⁶⁷⁹ *Ibid.*

there have been few concrete advances.⁶⁸⁰ While OVP has commended the spirit of the government project, it has pressed the government to take further steps—often buttressed by the recommendations of the Inter-American Court—such as increases in the number and training of security guards, the separation of inmates awaiting sentencing from convicted prisoners, effective controls to prevent the entrance of weapons, hiring professional prison managers, and greater reliance on conditional liberty.⁶⁸¹ These proposals have been largely ignored.⁶⁸²

Although government officials have often sought to discredit Prado and OVP, Human Rights Watch is not aware of any examples of information published by the organization shown by authorities to be false or misleading.

Engaging civil society groups could help the government address the critical situation in Venezuelan prisons. By recognizing that the long-term goals of prison reform advocates—to construct a more humane prison system where basic rights are respected—align with those of the government, the authorities could stimulate productive discussions on how to address the inhumane conditions that have persisted for decades in Venezuelan prisons. However, such constructive dialogue will remain difficult so long as government officials continue publicly denouncing and undermining the credibility of prisoners’ rights advocates.

An Alternative Approach: Police Reform

In contrast to the government’s harassment of prison reform advocates and other human rights activists, recent experience with police reform provides a positive model for how the government can collaborate with civil society groups to address

⁶⁸⁰ Plans include the construction of new “penitentiary communities” in which inmates would be classified and provided with adequate food, health care, and opportunities for work and recreation. A “model” prison in Coro in Falcón State for 818 inmates was inaugurated in July 2008 and the government also announced that a new Rodeo prison will open in September 2008. Georgely Morín, “Presos sin derechos,” *Tal Cual*, July 14, 2008; “Cárcel El Rodeo III será estrenada en septiembre,” *Últimas Noticias*, May 8, 2008.

⁶⁸¹ OVP, “Plan para la disminución de la violencia carcelaria,” <http://www.ovprisiones.org/pdf/plandisminucionviolencia.pdf> (accessed May 5, 2008).

⁶⁸² The government has recently implemented some of the suggestions of OVP without its participation. For example, the government recently established human rights committees at the prison level and convened inter-institutional round-tables to discuss prison policy and define regional solutions to prison conditions. Human Rights Watch telephone interview with Humberto Prado, May 8, 2008.

pressing issues. Faced with rampant violent crime and a largely discredited police force, rather than attack and question human rights groups with experience in public security issues, the government has harnessed their knowledge to draft and pass legislation to overhaul the police and improve police accountability. While the ultimate effectiveness of these reforms will depend on whether the government is willing and able to implement them in a serious manner, the experience underscores the potential for productive collaboration between government and civil society. Instead of antagonizing expert NGOs and ignoring their critiques, the government has taken important steps toward addressing a critical human rights issue with their assistance.

Venezuela has long been notorious for its high rates of common crime and violence. Nonetheless, the security situation has deteriorated since Chávez took office. The investigative police (Cuerpo de Investigaciones Científicas, Penales y Criminalísticas, CICPC) registered over 13,000 homicides in a country of 27 million in 2007, up from just under 6,000 homicides in 1999.⁶⁸³ Citizens believe that the most serious problem confronting the country is violent crime.⁶⁸⁴ Not only have law enforcement efforts failed to reduce crime levels, but the police themselves have also been responsible for widespread abuses.

Police have been accused of thousands of violations of the right to life and personal integrity in past years, and impunity has allowed police abuse to persist. According to the Attorney General's Office, between 2000 and 2007, 6,300 law enforcement officials were investigated for alleged human rights violations. Authorities have

⁶⁸³ "Deadly message," *The Economist*, July 17, 2008; Mirelis Morales Tovar, "Venezuela es el Segundo país con la tasa de homicidios más alta," *El Universal*, July 18, 2008, http://politica.eluniversal.com/2008/07/18/sucgc_art_venezuela-es-el-segu_951296.shtml (accessed July 18, 2008). These figures do not include deaths with indeterminate causes (*muertes por determinai*), prison deaths, and deaths in resistance to authority (*resistencia a la autoridad*). PROVEA, "Derecho a la seguridad ciudadana," *Informe 2006*, October 2006-September 2007, http://www.derechos.org.ve/publicaciones/infanual/2006_07/pdf/17seguridadCIUDADANA.pdf (accessed May 4, 2008), p. 335.

⁶⁸⁴ According to Datanálisis, 48 percent of Venezuelans consider crime the principal problem affecting their lives, followed by unemployment (23 percent). Datanálisis, public opinion poll, September 28-October 10, 2007, cited in Eugenio Martínez, "Problemas del Venezolano sin respuesta en la reforma," *El Universal*, November 6, 2007, http://politica.eluniversal.com/2007/11/06/pol_art_problemas-del-venezo_580848.shtml (accessed May 4, 2008).

lodged charges against 1,500 of them.⁶⁸⁵ But as of February 2007, only 204, or roughly 13 percent of those charged, have been convicted.⁶⁸⁶

Despite the gravity of the situation revealed by these official figures, the government has blamed the media and civil society groups for exaggerating crime and impunity. The press office of the investigative police, traditionally responsible for crime statistics, was closed in 2003 on the pretext that the opposition manipulated statistics for political gain.⁶⁸⁷ As former Attorney General Isaías Rodríguez noted in a press conference speaking about human rights groups:

We are conscious that they want to manipulate impunity as a simple theme, nationally and internationally, in order to articulate insecurity and with the help of the media create a sense of an epidemic that affects governability, public peace and the political and social stability of the country.⁶⁸⁸

Despite the denials, the government has acknowledged the centrality of police reform for effective crime control. In particular, the extreme decentralization of the police has been blamed for the high levels of abuse and uneven performance of police departments.⁶⁸⁹ As such, the 1999 Constitution included a transitory provision

⁶⁸⁵ In 2007 alone, 256 police officials were accused for involvement in homicides. Eligio Rojas, “256 policías acusados por crímenes en 2007,” *Últimas Noticias*, January 11, 2008.

⁶⁸⁶ *Informe Anual del Fiscal General de la República*, 2006, presented to the National Assembly on August 9, 2007, p. 11.

⁶⁸⁷ Sandra Guerrero, “Los ajustes de cuenta no son homicidios,” *El Nacional*, May 8, 2007.

⁶⁸⁸ “La corrupción no se resuelve reformando leyes sino voluntades,” *Agencia Bolivariana de Noticias*, August 9, 2007, <http://www.aporrea.org/contraloria/n99292.html> (accessed May 5, 2008).

⁶⁸⁹ During the 1990s, government efforts to combat crime centered on the decentralization and expansion of the police. Over one hundred municipal police forces were created under the 1989 Decentralization Law, in addition to existing state police forces, the National Guard, the Criminal and Investigative Police, and the Metropolitan Police. While many new police forces were created, they were not required to adopt common standards, training rules or codes of conduct and governors remained in control of security policy. Former Interior and Justice Minister Chácon openly expressed his dissatisfaction with the free reign of governors over police actions. Chácon insisted that the way to transform the police was to “take away from governors and mayors the possibility to maintain paramilitary groups, which they use for personal benefits and not for collective benefit. At that moment, crime indices will begin to fall.” María Lourdes Sandoval, “Jesse Chacón: Mi frustración más grande es el tema de la seguridad,” *El Mundo*, October 4, 2006; Shelley de Botton, “Reforma de la policía en Venezuela: ¿utopía o realidad?” *Comunidad Segura*, November 15, 2007, <http://www.comunidadessegura.org/?q=es/node/37219> (accessed May 6, 2008); Luís Gerardo Gabaldón and Andrés Antillano (eds.), *La policía venezolana: desarrollo institucional y perspectivas de reforma al inicio del tercer milenio, Tomo II* (Caracas: Conarepol, 2007).

that committed the National Assembly to form a national civilian police.⁶⁹⁰ In 2001, legislators drafted the first version of the National Police Law, but the law languished in legislative discussions.⁶⁹¹

The idea of sweeping police reform resurfaced in 2006 after a wave of street protests following the kidnapping and murder of three brothers with Canadian citizenship.⁶⁹² Minister Chacón responded by forming the National Commission for Police Reform (Comisión Nacional para la Reforma Policial, Conarepol) to analyze the police system and make recommendations for its improvement, including the potential formation of a national police force.

Conarepol was unusual in several respects. First, the commission drew together a diverse group of experts, including civil society groups, academics, and government officials.⁶⁹³ Its technical secretary was a member of the NGO Justice and Peace Support Network (Red de Apoyo por la Justicia y la Paz), which has worked for more than a decade offering legal assistance and counseling to victims of police abuse. Another of Conarepol's members was the director of the Centro Gumilla, a Jesuit research institute. Given the government's frequent antagonism toward civil society groups, the inclusion of representatives from NGOs was a rare recognition of their work.⁶⁹⁴

Second, the commission conducted an unusually thorough diagnostic process. Over the course of nine months, some 70,000 citizens took part in focus groups, interviews, online forums, and telephone surveys.⁶⁹⁵

⁶⁹⁰ Constitution of 1999, art. 332 (1), fourth transitory provision, art. 9.

⁶⁹¹ Draft of the National Police Law [Anteproyecto del Ley del Cuerpo de Policía Nacional], March 21, 2001, Chapter IV, arts. 22-23.

⁶⁹² "Venezuela killings spark protests," *BBC News*, April 6, 2006, <http://news.bbc.co.uk/2/hi/americas/4881848.stm> (accessed May 4, 2008).

⁶⁹³ The commission's core members included representatives from civil society groups, business, and academics, as well as government officials and representatives of the police, the judiciary, the legislature, the attorney general's office, and the human rights ombudsman.

⁶⁹⁴ Ironically, the Justice and Peace Support Network was one of the organizations accused by Chávez in 2004 of conspiring against the government, as described below.

⁶⁹⁵ "Entregado informe preliminar de la Conarepol sobre la reforma policial en el país," Ministry of Interior and Justice press release, October 30, 2006, http://www.vive.gob.ve/imprimir.php?id_not=2807 (accessed April 30, 2008).

Third, the government did not interfere in the work of Conarepol. Its technical secretary, Soraya El Achkar, told Human Rights Watch that the autonomy and political neutrality of the commission was central to its success: “We were given complete autonomy to contract the best people in each given area so we didn’t enter into political debates.”⁶⁹⁶

The final recommendations of Conarepol, published in January 2007, called for the formation of a new national civilian police force and for the establishment of a national police system to monitor and standardize the quality of state and municipal police forces.⁶⁹⁷ However, while the initial consultation process granted civil society groups an important role, the final discussions to translate the Conarepol project into law occurred behind closed doors with little explanation of the final form.

The Organic Law of Police Service and National Police (*Ley Orgánica del Servicio de Policía y del Cuerpo de Policía Nacional*), passed by decree in April 2008 after numerous delays, is largely based on the proposals of Conarepol.⁶⁹⁸ A key part of the law offers measures to improve police accountability, a vital element championed by NGOs like the Justice and Peace Support Network, which had dedicated years to combating impunity. For example, Conarepol recommended a system of routine evaluation of police departments⁶⁹⁹ and the law creates a new office within the Ministry of Interior and Justice, called the Police Rector, to continuously evaluate the performance of all police departments, including their compliance with human rights standards.⁷⁰⁰ The law also requires all police forces to establish internal affairs units, as well as independent disciplinary units.⁷⁰¹

⁶⁹⁶ Human Rights Watch interview with Soraya El Achkar, Caracas, September 12, 2007.

⁶⁹⁷ Conarepol, “Recomendaciones Finales,”

<http://www.derechos.org.ve/actualidad/coyuntura/2007/pdf/Conarepol%20recomendaciones%20finales.pdf> (accessed April 15, 2008).

⁶⁹⁸ Organic Law of Police Service and National Police [*Ley Orgánica del Servicio de Policía y del Cuerpo de Policía Nacional*], *Official Gazette*, No. 5.880, April 9, 2008.

⁶⁹⁹ Conarepol, “Recomendaciones finales,” para. 5(3).

⁷⁰⁰ Organic Law of Police Service and National Police, art. 19.

⁷⁰¹ *Ibid.*, art. 80.

Similarly, as recommended by Conarepol, the law envisions a central role for citizens in police supervision.⁷⁰² Through community councils, in particular, citizens are assigned an audit function in which they can request reports on police activities and make recommendations to improve policing.⁷⁰³

Conarepol also identified serious shortcomings in police recruitment and training that have resulted in low levels of police professionalism. The commission recommended standardized police training and common criteria for the entrance, promotion, and demotion of officers.⁷⁰⁴ These recommendations were followed in the law, which requires that all police attend a police academy to complete a uniform curriculum and receive specialized instruction.⁷⁰⁵

The law decreed by Chávez differs in some important ways from the Conarepol proposal, however. Commission members have criticized the law for its failure to create a special public defender to conduct independent investigations of alleged human rights abuses committed by police officers, as proposed by Conarepol.⁷⁰⁶ Another concern, aroused by recent government statements, is that politicization of the force could undercut the goal of professionalization.⁷⁰⁷

⁷⁰² Ibid., art. 77.

⁷⁰³ Ibid., art. 79.

⁷⁰⁴ Conarepol, "Recomendaciones finales," no. 20. The integrated police system would include a subsystem for police training that would ensure a common curriculum and standards.

⁷⁰⁵ Organic Law of Police Service and National Police, arts. 25(2), 57-59.

⁷⁰⁶ Ibid., art. 28. An independent office to conduct investigations of police abuse would have been an important step to improve police accountability. Alis Boscán, a member of Conarepol and director of human rights in the attorney general's office, explained, "[W]hat happens is when we speak of a presumed confrontation, police organizations come to the site of the incident and experience has shown that when the incidents implicate their friends, in some cases they alter the scene of the crime." Juan Francisco Alonso, "80 funcionarios investigarán a policías," *El Universal*, January 11, 2008, http://www.eluniversal.com/2008/01/11/pol_art_80-funcionarios-inve_667464.shtml (accessed May 6, 2008).

⁷⁰⁷ For example, while the law states that the National Police will be impartial and professional, Minister Chacón has stated that the police will be "Bolivarian, revolutionary, insurgent, and subversive" and Chávez has called for a "revolutionary police" composed of members of the government's social missions. "Dice que la nueva Policía será 'insurgente y subversiva,'" *Noticias24*, February 13, 2008, <http://www.noticias24.com/actualidad/?p=11991&cp=4> (accessed May 5, 2008). The narrow composition of the presidential commission appointed to design the guidelines for the national police also has drawn criticism from civil society groups. Eligio Rojas, "Designan comisión para activar policía nacional," *Últimas Noticias*, March 7, 2008.

Prosecutorial Harassment

The government's constructive engagement on the issue of police reform has been the exception during the Chávez presidency. Much more typical has been a tendency to discredit human rights critics, especially those that have links to the United States or have engaged in vigorous advocacy in Inter-American human rights forums.

In two major cases, the authorities opened criminal investigations against prominent civil society members. In the first case, the charges were apparently without any substance; in the second they were grossly inflated.

Carlos Ayala

In April 2005 the attorney general opened a criminal investigation for conspiracy against human rights lawyer Carlos Ayala, president of the Andean Commission of Jurists and a former president of the Inter-American Commission of Human Rights.⁷⁰⁸ Ayala was to be investigated for having allegedly participated in the drafting of the “Carmona decree,” by which Pedro Carmona, the *de facto* president briefly installed during the 2002 coup, proposed to suspend Venezuela's democratic institutions.

The attorney general did not state on what evidence Ayala was under suspicion of engaging in conspiracy. In a reply to a press release issued by Human Rights Watch expressing concern about Ayala's legal situation, Attorney General Isaías Rodríguez stated only that he was under investigation for the presumed commission of a crime “in relation to the events of April 2002.”⁷⁰⁹ Ayala was not told when he appeared before the prosecutor what the evidence against him was, beyond press articles that appeared immediately after the April 2002 events. The only article that mentioned Ayala by name reported him as saying that he had been alarmed when he read the

⁷⁰⁸ He was investigated under art.144 (2) of the Criminal Code for allegedly “conspiring to violently change the Constitution of the Bolivarian Republic of Venezuela.” “Ministerio Público imputó por presunta conspiración al abogado Carlos Ayala Corao,” Attorney General's Office, press release, April 14, 2005, <http://www.fiscalia.gov.ve/Prensa/A2005/prensa1404.htm> (accessed August 18, 2008).

⁷⁰⁹ “Advierte el Fiscal General: no se suspenderán investigaciones sobre el golpe de estado por exigencias de Human Rights Watch,” Attorney General's Office press release, April 6, 2005, <http://www.fiscalia.gov.ve/Prensa/A2005/prensaabril2005.asp> (accessed December 7, 2007); “Venezuela: Rights Lawyer Faces Judicial Persecution,” Human Rights Watch news release, April 5, 2005, <http://hrw.org/english/docs/2005/04/05/venezu10423.htm>.

draft decree, promptly left the government palace, and met with human rights advocates to agree to a position rejecting the coup.⁷¹⁰

Despite the attorney general's categorical denial that Ayala's incrimination was politically motivated, his office never issued detailed information about the evidence warranting investigation. Ayala's activities as an advocate in the inter-American system for Venezuelan victims of human rights abuse were well known. On March 3, 2005, a month before his first appearance before the prosecutor, he participated in a special session of the Inter-American Commission devoted to an examination of human rights in Venezuela. After the meeting, the commission issued a statement expressing concern at the stigmatization of human rights defenders in Venezuela and risks they face as a result.⁷¹¹ An official of the Venezuelan permanent mission to the OAS later justified the legal action against Ayala because of his alleged failure to question the coup d'état publicly and before the international community. "The rule of law was dissolved and it was his duty to denounce it to the world and he didn't, but Ayala doesn't mention that when he's accused."⁷¹²

By December 2007, two-and-a-half years after the investigation was opened against Carlos Ayala, no charges had been filed but he had received no notification of its closure either. He found himself in a legal limbo: not guilty, not formally indicted for any crime, but not declared to be innocent either.⁷¹³ In December 2007 Ayala was granted amnesty under a presidential amnesty decree,⁷¹⁴ but he continued to press the Attorney General's Office to formally close his case.

⁷¹⁰ "La Breve Visita," *El Universal*, April 30, 2002, http://www.eluniversal.com/2002/04/30/apo_art_30108BB.shtml (accessed December 5, 2007).

⁷¹¹ "Venezuela: Rights Lawyer Faces Judicial Persecution," Human Rights Watch news release, April 5, 2005, <http://hrw.org/english/docs/2005/04/05/venezu10423.htm>.

⁷¹² "Representante de Venezuela en la OEA cuestiona papel del órgano durante abril de 2002," *El Universal*, April 28, 2005, http://www.eluniversal.com/2005/04/22/pol_ava_22A553611.shtml (accessed December 8, 2007).

⁷¹³ Under Venezuelan law, if the prosecutor has been unable to find enough evidence to file charges within the time allowed by the court, he may opt between requesting the judge to close the case, or hold it on file pending further evidence. This latter practice allows cases to remain open but dormant for long periods, compounding the stress caused to those who have been imputed for crimes on weak or non-existent evidence. Organic Code of Criminal Procedure, arts. 314, 315.

⁷¹⁴ Chávez announced an amnesty law on December 31, 2007 to release from charge all those accused or under investigation for crimes connected to the 2002 coup. The amnesty excluded those responsible for grave human rights abuses, including three Metropolitan Police officers accused of killings on April 11, 2002, as well as those who did not present themselves before Venezuelan courts. Special Amnesty Law Decree [Decreto de Ley Especial de Amnistía], *Official Gazette*, No. 5.870,

Súmate

While Ayala was never formally charged, the attorney general did bring charges of criminal conspiracy against members of Súmate, a non-profit organization that played a key role in promoting voter participation in the recall referendum against Chávez in 2004.⁷¹⁵ The conspiracy charges were based on the fact that, while engaged in its referendum-related activity, Súmate had received a grant from the National Endowment for Democracy (NED), a Washington-based institute funded by the United States Congress.⁷¹⁶

What was particularly troubling about the Súmate prosecution was the gravity of these charges. If Súmate's use of foreign funding indeed violated Venezuela's campaign finance laws, it would have been reasonable for the attorney general to seek an appropriate sanction. Instead the prosecutor sought a conviction for the far more serious crime of "conspiracy to destroy the nation's republican form of government," which carries a maximum 16-year prison sentence.⁷¹⁷

Both Súmate and the NED insist that the funds, totaling U.S. \$53,400, were not used for electoral activities but rather for workshops to educate citizens regarding Venezuela's constitutional referendum process.⁷¹⁸ But even if the NED funds did

December 31, 2007; "Presidente Chávez firma Decreto de la Ley de Amnistía," *Radio Nacional de Venezuela*, December 31, 2007, <http://www.rnv.gov.ve/noticias/index.php?act=ST&f=2&t=58418> (accessed January 4, 2008).

⁷¹⁵ Founded in 2002, Súmate describes itself as a non-profit organization dedicated to building democracy and fostering popular participation. Claiming to have 30,000 volunteers across the country, it recognizes that it played a "key role" in organizing the recall referendum against Chávez in 2004. See SUMATE, "La organización," http://web.sumate.org/quienes_somos.asp#quienes%20somos (accessed May 19, 2007); SUMATE, "Logros: Proyectos ejecutados," <http://web.sumate.org/documentos/Proyectos%20ejecutados%20sumate%202007.pdf> (accessed May 19, 2007).

⁷¹⁶ The National Endowment for Democracy is a bipartisan private institution funded by the United States Congress to promote democracy across the world. Its projects in Venezuela in 2006 included programs to monitor the judiciary; to promote democratic participation; to monitor freedom of expression violations; and to strengthen political parties "across the ideological spectrum," all politically sensitive areas in today's Venezuela. National Endowment for Democracy, Latin American and Caribbean Program Highlights, 2006. <http://www.ned.org/grants/06programs/grants-laco6.html#venezuela> (accessed December 17, 2007).

⁷¹⁷ Venezuelan Criminal Code (Código Penal de Venezuela), *Official Gazette*, No. 5,494, October 20, 2000, <http://www.mintra.gov.ve/legal/codigos/penaldevenezuela.html> (accessed December 15, 2007), art. 132. The actions covered in the article also include "requesting foreign intervention in the internal affairs of Venezuela," "soliciting its help in disturbing the peace of the Republic," "inciting civil war," or "defaming the President" in the foreign press.

⁷¹⁸ The National Endowment for Democracy, "NED Venezuela Program FAQ," <http://www.ned.org/grants/venezuelaFacts.html> (accessed December 15, 2007).

actually support electoral activity, the recall referendum was itself a legal process envisaged in the 1999 Constitution, not an act of subversion.

In July 2005 a Caracas court ordered a trial for Súmate Vice-President María Corina Machado, her colleague, Alejandro Plaz, and two other Súmate staffers. The trial was suspended in February 2006, when the appeals court ruled that the trial judge had committed due process violations, including refusing to empanel a jury or to allow key defense witnesses, such as the NED directors, to testify. A new jury trial ordered by the appeals court has been repeatedly postponed. After three years, the case against Súmate is still open.⁷¹⁹

Public Condemnation

The Chávez government has repeatedly denounced and sought to discredit the work of human rights advocates by making unfounded accusations that they are funded by and doing the bidding of foreign governments.

In a broadcast on February 15, 2004 about alleged destabilization efforts by the United States, Chávez complained that the Center for Justice and International Law (CEJIL), a Washington-based organization that litigates human rights cases in the Inter-American Commission and Court of Human Rights, had received a \$83,000 grant from the National Endowment for Democracy (NED) to file complaints against Venezuela in the inter-American system.⁷²⁰ Chávez also accused several Venezuelan organizations—including PROVEA, COFAVIC, the Justice and Peace Support Network, and some church-affiliated groups—of conspiring against his government because they had worked with CEJIL. “They are nothing but actors in a macabre cast, in a great conspiracy against Venezuela,” Chávez declared.⁷²¹

PROVEA wrote to Chávez, pointing out correctly that it had received no money from NED and is independent of CEJIL, and requested that he retract his factually incorrect

⁷¹⁹ Human Rights Watch interview with Juan Martín Echeverría, Súmate’s defense lawyer, Caracas, January 25, 2007.

⁷²⁰ CEJIL is a nongovernmental, non-profit organization whose objective is to achieve the full implementation of international human rights norms in the member States of the Organization of American States through the use of the Inter-American System for the Protection of Human Rights and other international protection mechanisms.

⁷²¹ Transcript of “Aló Presidente,” No. 192, February 15, 2004, http://alopresidente.gob.ve/component/option,com_docman/Itemid,0/task,doc_view/gid,413/ (accessed August 21, 2008).

comments.⁷²² After receiving no response, it sent another letter to Chávez in August 2004, which was also ignored.⁷²³ To date, Chávez has never acknowledged his mistake or offered an apology to the organizations affected.

PROVEA is one of Venezuela's most important human rights organizations. It is non-partisan, and works on a wide range of human rights issues, including prisons, police abuses, women's rights, and the defense of social and economic rights. Because PROVEA's work brings it into close contact with many committed Chávez supporters, suspicions that it has a hidden political agenda could seriously damage the organization's credibility. According to PROVEA advocates, Chávez's comments thus had serious implications for the effectiveness of PROVEA's human rights work. As a result of Chávez's comments, which came at a moment of intense political polarization in the lead up to the 2004 referendum, PROVEA advocates received insulting emails and came under questioning and criticism from residents in a poor neighborhood where they were working on a project for the homeless.⁷²⁴

Chávez has appeared on the main state channel's popular evening program *La Hojilla* (The Razorblade) to denounce or ridicule rights advocates. An example is Chávez's comments about Sinergia, a consortium of community and human rights groups, made during the December 2007 referendum campaign. Sinergia distributed pamphlets in parts of Caracas with cartoons intended to provoke critical debate about the proposed constitutional reforms. It also broadcast radio spots featuring imaginary conversations between barrio residents discussing the reforms, using the voices of popular actors.⁷²⁵ On his November 18, 2007, program, *La Hojilla* host Mario

⁷²² Letter from Carlos Correa, general coordinator of PROVEA, to Hugo Rafael Chávez Frías, February 16, 2004, http://www.derechos.org.ve/actualidad/coyuntura/2004/coyuntura_133.htm#02 (accessed May 3, 2008).

⁷²³ The Support Network issued a press release denying that it received funds from CEJIL, NED, USAID, or any other agency of the United States government. Cenovia Casas, "ONGs denunciarán a Chávez ante instancias internacionales," *El Nacional*, February 17, 2008.

⁷²⁴ Human Rights Watch telephone interview with Carlos Correa, former coordinator of PROVEA, May 1, 2008. According to PROVEA's submission to the Supreme Court, "Not only did we receive insulting and threatening emails, but sectors of the community with which we have been working for years and which maintain high levels of sympathy with the national government expressed certain doubts about the transparency of the work we were doing and raised questions about whether there was not an intention behind our work to bring down the government. It is evident that these manifestations of distrust on the part of some individuals and groups were the result of [the president's] declarations and affected and continue to affect our work, and constitute a risk for the development of our activities in the context of the extreme polarization present in the country." Appeal to the Constitutional Chamber of the Supreme Court, November 11, 2004.

⁷²⁵ YouTube video transmissions, <http://www.sinergia.org.ve/detalle.asp?id=799&plantilla=1> (accessed December 15, 2007).

Silva denounced the series for “confusing the people.”⁷²⁶ Chávez then called *La Hojilla* in person from Saudi Arabia, where he was attending an OPEC meeting. Asked by Silva for his opinion of the Sinergia radio spots, Chávez replied, “without doubt, this comes from the hand of the empire, which has all the money in the world” and is the work of the “devil’s commando.” He told listeners: “We must pulverize this pretension.”⁷²⁷

During another broadcast of *La Hojilla* on April 16, 2008, Silva commented on a view expressed by Rocío San Miguel, director of Citizens Control for Security, Defense and the National Armed Forces (Control Ciudadano para la Seguridad, la Defensa y la Fuerza Armada Nacional), an NGO that monitors political rights, transparency, and military affairs, in which she had criticized the creation of a military reserve under the sole command of Chávez.⁷²⁸ “The trouble with Rocío,” said Silva, “a beautiful woman but a liar, is that she was fired from her job because she participated in the April 2002 coup.”⁷²⁹ (As we saw in chapter 2, San Miguel reports that she was fired from her job because she signed a petition for the recall referendum.) Minutes later, during the TV show, Silva spoke to Chávez, who was in a ministerial meeting in the presidential palace. Silva asked the president’s opinion of the “opposition” comments about the reserve force. “They want to articulate destabilizing actions because the regional elections are coming up,” Chávez replied.⁷³⁰

Attempts to Exclude NGOS from International Forums

Government officials have repeatedly challenged the participation of Venezuelan NGOs in international forums.

⁷²⁶ “Chávez habló anoche con La Hojilla,” *Noticias 24*, <http://www.noticias24.com/actualidad/?p=9805> (accessed December 15, 2007).

⁷²⁷ *Ibid.*

⁷²⁸ “Rocío San Miguel conversa con César Miguel Rondón,” *Unión Radio*, April 14, 2008, <http://venezuelanoticia.com/archives/2044> (accessed May 5, 2008).

⁷²⁹ “Mario Silva: decreto de la reserva tiene más de tres años,” *Noticiero Digital*, April 16, 2008, <http://publicacionesfranciscoalarcon.blogspot.com/2008/04/mario-silva-decreto-de-la-reserva-tiene.html> (accessed May 6, 2008).

⁷³⁰ *Ibid.*

For example, a senior foreign ministry official insisted that representatives of NGOs which received funds from foreign governments could not be civil society members of the Venezuelan delegation to the United Nations General Assembly meeting on HIV/AIDS in June 2001. The official referred to a Supreme Court ruling that NGOs which received funding from foreign governments could not be considered part of civil society, nor could civil society be represented by foreigners.⁷³¹ The announcement affected an important NGO working for HIV/AIDS victims, Citizen's Action against AIDS (Acción Ciudadana contra el SIDA, ACCSI), which received foreign funding and was helping to organize Venezuela's participation in the landmark meeting.⁷³² In the event, the government invited two members of ACCSI to participate in the official delegation, but the organization's executive director was excluded because of her German nationality.⁷³³

The Venezuelan government has continued to cite this Supreme Court ruling to justify efforts to bar some NGOs from participating in international forums. In April 2006 a Venezuelan ambassador at the UN wrote to the chief of the UN's Non-Governmental Organizations Section requesting that the Venezuelan NGO Consortium for Development and Justice (Consortio Desarrollo y Justicia), be denied consultative status with the Economic and Social Council (ECOSOC). The ambassador stated that the Consortium had received funds from foreign governments "to develop political activities," which she said was against the law in Venezuela, citing the November 2000 Supreme Court ruling to this effect.⁷³⁴

⁷³¹ In November 2000 the Supreme Court ruled that "those who represent civil society may not be foreigners, or organizations directed by, affiliated to, subsidized, financed, or sustained directly or indirectly by states or movements or groups influenced by those states," Tribunal Supremo de Justicia, Sala Constitucional, Ponente Jesús Eduardo Cabrera Romero, Case No. 00-1901, November 21, 2000, <http://www.tsj.gov.ve/decisiones/scon/Noviembre/1395-211100-00-1901%20.htm> (accessed February 6, 2008). This decision is discussed further below.

⁷³² LACASSO, "LAC Info UNGASS, Información Sobre el UNGASS en la Región Latinoamericana y del Caribe," March 4-11, 2001, <http://www.lacaso.org/pdfs/lacinfo403esp.pdf> (accessed May 9, 2008); PROVEA, "Derechos Humanos y Coyuntura," *Boletín Informativo No. 73*, June 9-22, 2001, http://www.derechos.org.ve/actualidad/coyuntura/2001/coyuntura_73.pdf (accessed May 9, 2008).

⁷³³ ACCSI's executive director, Renate Koch, who attended the meeting without official status, told Human Rights Watch that ACCSI attached importance to forming part of the official Venezuelan delegation in order to be able to participate in the plenary sessions and help frame the resolutions. Human Rights Watch telephone interview with Renate Koch, executive director of ACCSI, July 16, 2008.

⁷³⁴ Letter from Ambassador Imeria Núñez de Odreman to Hanifa Mesoui, chief of ECOSOC Non-Governmental Organizations Section at the United Nations, April 7, 2006.

The Consortium had received funds administered by the United States government and Congress (from USAID and NED, respectively). In fact, according to a Consortium representative, the USAID grant helped support training programs for young community media journalists in low-income sectors of Caracas.⁷³⁵ The NED funds were provided to monitor judicial independence, to organize workshops for the defense of civil society, to present cases to the Inter-American Commission on Human Rights, and to organize youth training programs in human rights and conflict resolution in Táchira state.⁷³⁶ The Consortium's founding statutes expressly prohibit it from engaging in political action.⁷³⁷ After the Consortium successfully lobbied other governments for support, it gained consultative status with ECOSOC in 2007.⁷³⁸

In December 2006, the comptroller general wrote to an OAS judicial cooperation official opposing the participation of the Venezuelan branch of Transparency International in the debate on Venezuela's implementation of the Inter-American Convention against Corruption.⁷³⁹ The comptroller general used the same arguments as those given in the earlier case and cited also the November 2000 Supreme Court decision, as well as an earlier opinion of the court excluding organizations that receive foreign funding from being considered part of civil society.⁷⁴⁰ Specifically, Venezuelan officials objected to a Transparency Venezuela document posted on the OAS website, which criticized Venezuela's lack of compliance with the

⁷³⁵ Human Rights Watch telephone interview with the Consortium's administrative officer, Alejandra Freitas, July 16, 2008.

⁷³⁶ National Endowment for Democracy, Latin American and the Caribbean Program, 2006 grants, <http://www.ned.org/grants/o6programs/grants-laco6.html> (accessed July 16, 2008). The three grants listed totaled US\$156,996.

⁷³⁷ According to the letter from Ambassador Núñez, the funds were used to "get involved politically in the reform and invalidation of national laws approved by popular and democratic procedures; to participate in the internal political debate in Venezuela"; and were focused on "derailing the sociopolitical process that Venezuela is currently undergoing." Letter from Ambassador Imeria Núñez de Odreman to Hanifa Mesoui, April 7, 2006. In a letter to the UN official, the Consortium cited its statutes, which prohibit it from using its funds or name to engage in political campaigns or advocacy. Consorcio Desarrollo y Justicia, "Respuesta a los comentarios de la misión de la República Bolivariana de Venezuela," May 13, 2006.

⁷³⁸ Human Rights Watch telephone interview with the Consortium's administrative officer, Alejandra Freitas, July 16, 2008.

⁷³⁹ Letter from Clodosbaldo Russián Uzcátegui, comptroller general, to Jorge García González, chief of the Technical Secretariat for Judicial Cooperation Mechanisms, Organization of American States, December 22, 2006.

⁷⁴⁰ Under the rules of procedure governing the committee of experts, civil society organizations may present proposals and information to the committee "in accordance with the internal legislation of the respective State Party" (emphasis added). The Venezuelan comptroller-general cited this provision as the legal basis for his objection to Transparency Venezuela's participation. "Mechanism on Follow-up on Implementation of the Inter-American Convention against Corruption: Rules of Procedure and Other Provisions, OEA/Ser.L/SG/MESICIC/doc.9/04 rev.4, June 29, 2007. http://www.oas.org/juridico/english/mesicic_rules.pdf (accessed July 16, 2008).

recommendations of the OAS committee of experts in their 2004 report. According to the OAS website, publication of the document was suspended at the request of the Venezuelan government.⁷⁴¹ When the executive director of Transparencia Venezuela traveled to Washington in late June 2007 to brief the panel of the OAS on the document's conclusions, Venezuelan officials vetoed her appearance, thereby preventing her from speaking.⁷⁴²

The government has also tried, so far unsuccessfully, to have Súmate excluded from OAS meetings. In May 2005, the OAS Permanent Council approved a list of 119 invitees to an OAS civil society summit to be held the following month at Fort Lauderdale, Florida, disregarding Venezuela's formal objection to the presence of Súmate at the gathering.⁷⁴³ A second attempt to veto Súmate's participation in an NGO follow-up meeting in Panama in June 2007 failed when the OAS Permanent Council accepted Súmate's participation and that of the Consortium for Development and Justice.⁷⁴⁴

Proposed Legal Restrictions

The Chávez government and its allies have promoted legislation that would, if enacted, allow arbitrary governmental interference in the operations of human rights organizations, including fundraising activities.

⁷⁴¹ OAS, MESICIC (Mecanismo de Seguimiento de la Implementación de la Convención Interamericana contra la Corrupción), "Segunda Ronda de Análisis: Respuestas al Cuestionario – Venezuela," http://www.oas.org/juridico/spanish/mesicic2_ven_sp.htm (accessed on May 7, 2008).

⁷⁴² Pablo Bachelet, "Chávez's Silencing of Critic Causes Uproar," *Miami Herald*, July 26, 2007, <http://www.miamiherald.com/583/story/182542.html> m/583/story/182542.html (accessed May 7, 2008). Transparencia Venezuela, "Gobierno Venezolano censura informe de Transparencia Venezuela," Boletín Informativo No. 22, 2007, http://www.transparencia.org.ve/tv_boletin.php?clave=34 (accessed May 7, 2008). See also the letter from the executive director of Transparencia Venezuela to Jorge García González, chief of the Technical Secretariat for Judicial Cooperation Mechanisms, Organization of American States, March 2, 2007, <http://www.fundar.org.mx/PDF/Carta%20OEA%20derecho%20a%20participar.pdf> (accessed May 7, 2008).

⁷⁴³ "¡Increíble! Pese a posición del gobierno, Súmate intervendrá en la OEA," *aporrea.org*, May 20, 2005, <http://www.aporrea.org/actualidad/n60621.html> (accessed May 7, 2008).

⁷⁴⁴ "Lista de Participantes en la reunión informal entre el secretario general de la OEA y representantes de la sociedad civil Ciudad de Panama," ("List of participants in the informal meeting between the secretary general of the OAS and representatives of civil society"), Panama City, June 2, 2007, <http://www.civil-society.oas.org/Interventions/Lista%20de%20participantes%20-%20Informal%20Meeting%20-%202002-June-07.doc> (accessed August 18, 2008); Jaqueline Jiménez, "Grave estocada recibió nuestro embajador, Jorge Valero," *Analítica Consulting*, May 17, 2007.

In June 2006, the National Assembly approved the first reading of a bill aimed at bringing the activities of Venezuelan NGOs receiving funds from abroad under closer government scrutiny and control.⁷⁴⁵ Presented by the Foreign Relations Committee, the bill required NGOs to register with a government agency in order to receive funding from foreign sources, whether public or private.

The committee's justification for the bill centered on the potentially negative consequences of foreign aid for Venezuela, which it considered to be "one of the most commonly used tools of imposition and intervention by the big powers."⁷⁴⁶ Congressman Saul Ortega, one of those who drafted the bill, made it clear that this demand for transparency was mainly directed at opposition organizations:

These are the same organizations that supported the coup, that didn't denounce the killings of April 11, 12, and 13 ... they are lackey organizations that don't care about what all Venezuelans want.... Most have a façade of defending human rights, while what they do is receive money from foreign governments to destabilize the government of President Chávez.⁷⁴⁷

The law made registration compulsory but did not specify the requirements for registration. These were to be defined in regulations (*reglamento de la ley*) to be issued subsequently by the executive branch at its discretion and without legislative debate.⁷⁴⁸ This meant in essence that NGOs that failed to meet the as yet undefined conditions for registration would not be authorized to receive foreign funds. The Inter-American Commission on Human Rights has urged governments to avoid onerous registration procedures that impede the work of human rights

⁷⁴⁵ República Bolivariana de Venezuela, Asamblea Nacional, Comisión Permanente de Política Exterior, *Informe que presenta la Comisión Permanente de la Asamblea Nacional sobre el anteproyecto de ley de cooperación internacional a los fines de someter a la consideración de la plenaria en primera discusión*, undated, p.2.

⁷⁴⁶ *Ibid.*, p. 2.

⁷⁴⁷ Sandra Ayala y Enrique Hernández, "Aprobados proyectos de leyes de Crédito, Promoción Turística y Cooperación Internacional," National Assembly press release, June 13, 2006, www.asamblea.nacional.gov.ve/ns2/noticia.asp?numn=9333 (accessed December 18, 2007).

⁷⁴⁸ Anteproyecto de Ley de Cooperación Internacional, Asamblea Nacional, art. 18.

organizations.⁷⁴⁹ After the European Union actively engaged the government on the issue, the National Assembly postponed debate on a final text of the bill, which has since been shelved.

More recently, a constitutional amendment, which was proposed by Chávez as part of the reform package that was defeated in the December 2007 referendum, explicitly prohibited “associations with political goals” from receiving foreign funds. The ambiguity of the term “association with political goals,” and the way government officials have interpreted it in the past, could have extended the prohibition to NGOs that are implementing projects in Venezuela with funding from foreign donors.

While the defeat of the reform package in the referendum removed this immediate threat, Chávez promised after the vote to continue to pursue all the proposed reforms through ordinary legislation.

Judicial Rulings Affecting Civil Society

The Supreme Court helped establish the tone for discrediting NGOs early on in the Chávez government by ruling in two decisions that NGOs that receive funds from abroad do not form part of civil society. In these rulings, issued in 2000, the court defined “civil society” in such a way as to exclude organizations that receive foreign funding, thereby preventing them from exercising the rights to political participation that other NGOs enjoy. Such rulings remain in effect today.

In a June 2000 decision, the court defined civil society organizations as:

Venezuelan associations, groups, and institutions (*without external subsidy*) that through their purpose, permanence, number of members or affiliates and continuous activity have been working from different angles of that society to achieve a better quality of life for its members,

⁷⁴⁹ The OAS passed a resolution in June 2007 “to encourage member states to ensure that national regulations—including registration where applicable under national law—concerning human rights defenders and their organizations, allow their work to be carried out in a free, transparent, and open political environment and in a manner consistent with applicable international human rights and humanitarian law. *Human Rights Defenders, Support for the Individuals, Groups and Organizations of Civil Society Working to Promote and Protect Human Rights in the Americas*, OAS General Assembly Resolution AG/RES.2280 (XXXVII-O/07, adopted at the fourth plenary session, June 5, 2007.

without being attached to the government or to political parties [emphasis added].⁷⁵⁰

The following November, the court ruled that no NGO that is affiliated with or receives funds from foreign governments, or from “transnational or global associations, groups or movements that pursue political or economic goals to their own benefit,” may be considered part of civil society.⁷⁵¹ No foreigners may “represent” civil society, nor may foreign groups or those influenced by them. The court reasoned that:

To recognize the collective rights of foreign groups or entities or of those that are influenced by them, and to allow them to act in the name of the national civil society is to permit ethnic and foreign minorities to intervene in the life of the state in defense of their own interests and not those of the security of the nation, interests that may be harmful for the country and could end in separatist movements, aggressive and conflictive minorities that could even be founded on separatist movements like the self-determination of peoples.⁷⁵²

The court allowed an exception to the foreign funding rule in the case of organizations receiving money from international charities or those commissioned by international organizations to “carry out studies,” provided that Venezuelans

⁷⁵⁰ Sala Constitucional, case No. 00-1728, June 30, 2000. “Los representantes de la sociedad civil, son asociaciones, grupos e instituciones venezolanas (sin subsidio externo) que por su objeto, permanencia, número de miembros o afiliados y actividad continua, han venido trabajando desde diversos ángulos de esa sociedad, para lograr para ésta una mejor calidad de vida, desligadas del gobierno y de los partidos políticos...”

⁷⁵¹ The court stated that: “a result of this national character is that those who represent [civil society] cannot be foreigners, or organizations directed by, affiliated to, subsidized, financed, or sustained directly or indirectly by States or movements or groups influenced by those States; nor by transnational or global associations, groups or movements that pursue political or economic purposes to their own benefit.” (“Resultado de este carácter nacional es que quienes la representan no pueden ser extranjeros, ni organismos dirigidos, afiliados, subsidiados, financiados o sostenidos directa o indirectamente, por Estados, o movimientos o grupos influenciados por esos Estados; ni por asociaciones, grupos, o movimientos transnacionales o mundiales, que persigan fines políticos o económicos, en beneficio propio.”) Supreme Court Constitutional Chamber, Jesús Eduardo Cabrera Romero, Case No. 00-1901, November 21, 2000, <http://www.tsj.gov.ve/decisiones/scon/Noviembre/1395-211100-00-1901%20.htm> (accessed February 6, 2008).

⁷⁵² *Ibid.*

retained autonomy and control.⁷⁵³ By implication, those that received money for activities other than studies, such as human rights advocacy, were excluded. As we have seen, government officials have cited these rulings on various occasions as grounds for opposing the participation of Venezuelan nongovernmental organizations in international forums.

The rulings also denied NGOs receiving funds from foreign governments the possibility of participating as representatives of civil society in the appointment of key officials in the government and the judiciary. Under the constitution, “different sectors of society” are represented on the committees which select candidates for the Supreme Court, for the National Electoral Council (CNE), and for attorney general, the human rights ombudsman and comptroller general.⁷⁵⁴ As a result of these rulings, NGOs that receive funds from foreign sources to carry out development, social, or human rights projects in Venezuela have been excluded from participating in such selections.

Recommendations

The Chávez government should abandon its aggressively adversarial posture toward local human rights defenders and civil society organizations. As the experience with police reform demonstrates, even in the midst of a polarized political situation, constructive engagement is possible and can contribute to finding solutions to the country’s chronic human rights problems.

Specifically, government officials should:

- Refrain from unfounded attacks on the credibility of human rights defenders and civil society organizations;
- Publicly retract unfounded public statements against rights advocates and organizations;
- Engage constructively with human rights defenders in seeking solutions to address Venezuela’s chronic human rights problems; and

⁷⁵³ Ibid.

⁷⁵⁴ Venezuelan Constitution of 1999, arts. 264, 270, 279, 295. Under article 296 three of the CNE’s five members must be nominated by “civil society.”

- Cease discrimination against civil society organizations that receive international funding, including by blocking their participation in international forums or public appointment selection processes.

In addition, the Attorney General's Office should:

- Conclude outstanding criminal investigations against human rights defenders and civil society representatives in a timely manner; and
- Refrain from filing unsubstantiated or grossly exaggerated charges against human rights defenders and civil society leaders.

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