

IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Case No. 12.828

MARCEL GRANIER ET AL.

v.

VENEZUELA

Written Comments

of

Media Legal Defence Initiative

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I. Introduction

1. The Media Legal Defence Initiative (MLDI) is grateful for the opportunity to offer a written statement to the Inter-American Court of Human Rights. It respectfully submits this amicus curiae brief to assist the Court in its consideration of the case of *Marcel Granier et al. v. Venezuela*.
2. The amicus is submitted pursuant to Article 28 and Article 44 of the Rules of Procedure for the Inter-American Court of Human Rights.
3. MLDI is a non-governmental organization and registered charity that works in all regions of the world to provide legal support to journalists and media outlets seeking to protect their right to freedom of expression. It is based in London and works closely with a global network of people concerned about defending media freedom. The MLDI network includes experienced media and human rights lawyers, local, national, and international organizations, and donors, foundations, and advisors.
4. The case before the Court involves the Venezuelan government's decision not to renew the broadcasting license for Radio Caracas Televisión (RCTV) in 2007. The government officially justified its decision not to renew the license by stating that it hoped to “enable democratization of the use of the electromagnetic spectrum and make it available to a wide range of messages and content” by creating a free-to-air public television station.¹
5. However, the government's justification for the decision has not remained consistent. The Minister of Communications and Information asserted that RCTV was broadcasting adult programming during time reserved for children's programming and was therefore not legally entitled to a renewal. Various other reasons have been offered for the decision not to renew RCTV's license, however, an official media campaign and multiple statements by government officials indicate that the decision was actually based on political differences between RCTV and the Venezuelan government.²
6. RCTV's broadcasting license expired at midnight on May 27, 2007 at which time it ceased broadcasting operations.³ It resumed its programming via cable and satellite as RCTV Internacional, but was forced by the Government of Venezuela to cease these broadcasting operations as well on January 23, 2010. After this, RCTV ceased to exist.
7. In February 2007, a group of RCTV executives, journalists, and other staff filed a claim contesting the non-renewal decision and seeking constitutional *amparo* relief. In May 2007, the Constitutional Chamber of the Venezuelan Supreme Court of Justice found

¹ *Marcel Granier et. al. v. Venezuela*, Case 12,828, Inter-Am. Comm'n H.R., Report No. 112/12, ¶ 75-83, 85 (2012) [hereinafter Report No. 112/12].

² *Id.* at ¶ 75-83 (2012).

³ *Id.* at ¶ 20.

that the petition was inadmissible on several grounds and refused to rule on the merits of the licensing decision.⁴

8. The petition was held to be inadmissible against the President of Venezuela, because a Venezuelan agency, CONATEL, had made the licensing decision, and not the President himself. It was found to be inadmissible against Jesse Chacón Escamillo, Minister of the People's Power for Telecommunications and Information Technology and Director of CONATEL, because the grievance was deemed to be no longer current. Lastly, the petition was held to be generally inadmissible under Article 6(5) of the Venezuelan *Amparo* Act. The *Amparo* Act states that a petition will not be admitted before the Constitutional Chamber of the Supreme Court of Justice when parties have alternative suitable judicial avenues by which they can make their legal challenges. The Constitutional Chamber found that the administrative law system provided a suitable alternative by which RCTV could pursue its challenge.⁵
9. RCTV employees had already begun pursuing administrative remedies by the time the Supreme Court reached its decision regarding the inadmissibility of RCTV's claims. In April 2007, they filed petitions with the Political-Administrative Chamber of the Supreme Court. The petitions requested that the Political-Administrative Court nullify the broadcast licensing decision as unconstitutional and also requested injunctive relief. These petitions were dismissed after court-imposed delays.⁶
10. The Political-Administrative Court found RCTV's initial petitions for injunctive relief inadmissible. It held that the State was not required to provide indefinite broadcasting concessions and found that freedom of thought and expression is not violated when expired concessions revert to the State. In response, RCTV re-filed similar petitions with new facts on three different occasions. Two were dismissed, while one had received no response as of August 2011.⁷
11. Meanwhile, the Trial Court of the Political-Administrative Chamber began to hear the petition regarding nullification of the broadcast licensing decision in October 2007. In May 2008, it offered a decision on the admissibility of the evidence presented by the parties. Both the State and RCTV filed appeals challenging the Chamber's decision. However, despite multiple requests to the presiding magistrate, the parties received no response to their appellate filings. As of December 2011, more than four years after the nullification petition had been submitted, the administrative petition for nullification was still pending before the Political-Administrative Chamber.⁸
12. Many international organizations, governments, and nonprofits have declared their concern about the actions taken by the Venezuelan government during RCTV's licensing

⁴ *Id.* at ¶ 96-99.

⁵ *Id.* at ¶ 96-99.

⁶ *Id.* at ¶ 100-102.

⁷ *Id.* at ¶ 101-2.

⁸ *Id.* at ¶ 103.

renewal process.⁹ They have expressed criticism about the lack of transparency and due process during the decision-making process, as well as during RCTV's subsequent attempts to access judicial or administrative review of the decision.¹⁰

13. These concerns are compounded by the fact that Venezuela's media environment is known to lack pluralism, which could be worsened by the absence of transparency and due process in licensing decisions.
14. In this amicus submission, MLDI suggests that the Inter-American Court of Human Rights consider four factors when deciding the current case:
 - a. the general theoretical and foundational principles underlying broadcast licensing support the right to freedom of expression. They require clear and detailed criteria, due process procedures, and comprehensive judicial review for broadcast licensing decisions;
 - b. international case law from the European Court of Human Rights supports the need for due process in broadcast licensing procedures;
 - c. regulatory law from countries around the globe requires due process and transparency in broadcast licensing renewal decisions. Countries with such procedures include South Africa, the United States, Canada, Uruguay, France, South Korea, and Australia; and
 - d. media pluralism is critical in ensuring the right to freedom of expression and democratic rule. Venezuela lacks media pluralism, while international courts have stressed its importance on several occasions.

II. Broadcast Licensing Regulation: Principles and Practice

a. General principles of broadcast licensing require transparent and comprehensive due process procedures and review

15. When determining appropriate action for broadcast renewal, various overarching principles should be applied due to the media's importance as a platform for public debate about important matters of public interest. These principles can be applied through two mechanisms: regulation of licensing and licensing processes. The section

⁹ *Id.* at ¶ 88.

¹⁰ *See, e.g., Venezuela: TV Shutdown Harms Free Expression*, HUMAN RIGHTS WATCH (May 22, 2007), <http://www.hrw.org/en/news/2007/05/21/venezuela-tv-shutdown-harms-free-expression>; *CPJ, IPYS Cite "Lack of Transparency" in Venezuela Broadcast Case*, COMM. TO PROTECT JOURNALISTS (Jan. 12, 2007, 12:00 PM), <http://cpj.org/2007/01/cpj-ipys-cite-lack-of-transparency-in-venezuelan-b.php>.

below provides a brief overview of the guiding principles that are intended to protect the right to freedom of expression within the framework of broadcast licensing.

16. The main objectives for licensing of commercial broadcasting services should be to:
 - a. remain fair and transparent, allowing no arbitrary or oppressive rules to be implemented;
 - b. promote diversity; and
 - c. meet the needs and interests of listeners and viewers, while providing high quality services.¹¹

17. The Inter-American Declaration of Principles on Freedom of Expression declares that “every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights.”¹²

18. Principle 5 addresses censorship of expression by declaring:

Prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression.¹³

19. In order to limit censorship and ensure protection of the right to freedom of expression during the broadcast licensing process, governmental licensing bodies should follow several recommended best practices, which include the following:
 - a. an independent body should oversee regulation;¹⁴
 - b. no blanket prohibitions on holding or participating in ownership of a broadcast license should be established, except when in relation to political parties where a ban may be legitimate;¹⁵

¹¹ Steve Buckley, Kreszentia Duer, Toby Mendel & Seán Ó Siochrú, *Broadcasting, Voice, and Accountability: A Public Interest Approach to Policy, Law, and Regulation* 231 (The University of Michigan Press, 2008).

¹² Inter-Am, Comm’n H.R., *Inter-American Declaration of Principles on Freedom of Expression* adopted during the 108th regular session (“All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition”) (2002).

¹³ *Id.*

¹⁴ Buckley, *supra* n. 11, at 227.

¹⁵ *Id.* at 231.

- c. limited public service requirements should be allowed if they further public interest objectives and are not so disproportionate in scope that they threaten the viability of the service.¹⁶
20. Perhaps most importantly, there should be established application and assessment processes for broadcast licenses and renewals. The processes should:
 - a. be clear and precisely detailed in law or regulations;
 - b. be fair, open, and transparent, including defined time limits within which decisions must be made;
 - c. detail procedures by which the public can provide effective input and the applicant can be given the opportunity to be heard;
 - d. utilize a tender (bidding) process when there is competition for limited frequencies; and
 - e. identify reasonable fees for applications that reflect development of the sector, competition for licenses, and general considerations of commercial viability.¹⁷
21. In addition, the licensing body that reviews applications for broadcast licenses or renewals should:
 - a. delimit objective laws, regulations, and/or decision-making criteria prior to review;
 - b. prevent monopolization of broadcasting channels without being unduly restrictive;
 - c. assess the financial and technical capacity of the applicant;
 - d. provide written reasons when refusing an application; and
 - e. ensure that there is the possibility of judicial review of licensing decisions.¹⁸
22. By utilizing these principles in its broadcast licensing and renewal procedures, a government can promote the right to freedom of expression while maintaining the ability to provide a basic level of structure and coherence for its overall broadcasting scheme.

¹⁶ *Id.* at 236.

¹⁷ *Id.* at 232.

¹⁸ *Id.*

b. International case law supports the need for due process in broadcast licensing procedures

23. General principles of broadcast licensing provide the philosophical foundations and fundamental requirements for State broadcast licensing procedures. Unfortunately, States do not always adhere to such principles when instituting licensing procedures and making licensing decisions. Moreover, many of the principles are broadly construed, so it can be difficult to determine when a State's actions are in violation of these principles. In this context, reviewing judgments of international and regional courts assists in better understanding when State broadcast licensing procedures and actions are legal, and when they are not. However, international and regional courts rarely have the opportunity to review a State's use of due process procedures during the broadcast licensing renewal process as the topic is very specific and not often raised beyond the jurisdiction of national courts.
24. Nonetheless, several relevant cases highlight factors that courts and commissions have considered important when dealing with similar issues in the past.
25. In 2008, the European Court of Human Rights (ECHR) held in the case of *Meltex Ltd. and Mesrop Movsesyan v. Armenia* that national broadcast licensing procedures that did not require a State's licensing body to provide justification for its decisions were insufficient to protect the right to freedom of expression.¹⁹ The court explicitly stated that a broadcast "licensing procedure whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression."²⁰
26. The court supported its decision in part by reference to guidelines adopted by the Council of Europe's Committee of Ministers in the domain of broadcasting regulation. These guidelines advocate transparency and clarity in State licensing procedures. They specifically recommend that "[a]ll decisions taken ... by the regulatory authorities ... be ... duly reasoned," "open to review by the competent jurisdictions according to national law," and "made available to the public."²¹
27. The facts of *Meltex* were quite similar to those involved in the case currently before the court. A1+, later restructured as Meltex Ltd., was the first independent television company in Armenia. Between 2000 and 2001, the Armenian legislature made several major changes to the Armenian television broadcasting scheme that affected Meltex's ability to renew its broadcasting license. The new laws required a call for tenders (bids) each time a broadcasting license became available and instituted criteria to be used to select the winning bid.²²

¹⁹ *Meltex Ltd. and Mesrop Movsesyan v. Armenia*, App. No. 32283/04, 2008-III Eur. Ct H.R., ¶ 82-85, available at <http://hudoc.echr.coe.int>.

²⁰ *Id.* at ¶ 83.

²¹ *Id.* at ¶ 63, 83.

²² *Id.* at ¶ 10-15.

28. Accordingly, as Meltex's broadcasting license approached its expiration date in 2002, the Armenian government called for tenders for the broadcast signal ("band 37") that Meltex had been using. Meltex appropriately submitted its bid, but the Armenian government refused to re-issue the broadcasting license to Meltex. It did not offer any reasons for its decision. In addition, Meltex's tenders for six alternative broadcasting bands were also denied by the licensing body without justification. Meltex pursued its case through the Armenian courts and eventually seized the ECHR.²³
29. Both the holding of *Meltex* and the statement by the Council of Europe's Committee of Ministers indicate that there is international agreement that due process is required when making broadcast licensing decisions. This due process requires transparent, reasoned, non-arbitrary, reviewable procedures, which result in sufficiently justified decisions.
30. Although the facts underlying the *Meltex* and RCTV cases are similar in many ways, the licensing procedures used by Armenia in the *Meltex* decision actually provided more due process protections than those provided by Venezuela in the RCTV decision. Meltex was provided in advance with the criteria that would be used to make tender decisions and was able to access the courts in a timely manner to appeal the decision. RCTV was not given either of these opportunities. In addition, neither Meltex nor RCTV was able to gain access to the administrative case files concerning their licensing renewal decisions.²⁴
31. Lastly, both the *Meltex* and RCTV licensing procedures resulted in decisions which gave minimal justification for their conclusions. The Armenian government did not provide Meltex with any reasons for its decision. In comparison, the Venezuelan government publicly offered various reasons for its renewal decision, but officially sent RCTV only one communication about the decision, which contained justifications unsupported by any evidence.²⁵ The administrative decisions in these cases therefore do not appear to have met due process standards of clarity and justifiability.
32. Later in 2008, the ECHR concluded another broadcast licensing case – *Glas Nadezhda EOOD and Elenkov v. Bulgaria* – whose conclusions are relevant to RCTV. In *EOOD and Elenkov*, the ECHR found that the Bulgarian government's licensing procedures lacked sufficient guarantees against arbitrariness and therefore interfered with Eood's and Elenkov's right to freedom of expression.²⁶
33. Elenkov had applied for a license that would permit EOOD, his company, to broadcast Christian radio programs. The State Telecommunications Commission denied the license

²³ *Id.* at ¶ 16-57.

²⁴ Report No. 112/12, at ¶ 110 (2012).

²⁵ *Id.* at ¶ 152.

²⁶ *Glas Nadezhda Eood and Elenkov v. Bulgaria*, App. No. 14134/02, 2007-V Eur. Ct H.R., ¶ 46-53, available at <http://hudoc.echr.coe.int>.

based on the recommendations of the National Radio and Television Committee (NRTC). The NRTC believed that EOOD would not meet several of its criteria for licensing, but provided no justification to support this conclusion.²⁷ EOOD's and Elenkov's attempts to secure judicial review were dismissed.²⁸

34. The ECHR judgment focused on the NRTC's decision not to hold public hearings regarding the licensing decision, its refusal to disclose its deliberations despite a court order requiring their release, and its failure to provide justification for its decision. In addition, the ECHR noted that the lack of due process was further compounded by the absence of comprehensive judicial review. Once again, the ECHR cited the Council of Europe's guidelines as being particularly relevant to its decision.²⁹
35. Unlike RCTV or *Meltex*, *EOOD and Elenkov* involved a company that had never previously held a broadcasting license. However, the decision of the ECHR is still relevant as it reiterates the need for clear conditions and criteria in broadcasting decisions, as well as transparent, well-reasoned, publicly available licensing procedures and decisions. *EOOD and Elenkov* also underscores the importance of access to comprehensive judicial review. Essentially, the decision highlights the need for due process throughout the licensing process.
36. Although *EOOD and Elenkov* and the current case before the court revolve around different aspects of licensing procedures, RCTV experienced similar problems during the licensing process. Each company was denied access to information about the administrative deliberations regarding the licensing decision, was given limited justification for the final licensing decision, and was unable to secure comprehensive judicial review of its case. In *EOOD and Elenkov*, the ECHR found that these procedural limitations amounted to governmental interference with the right to freedom of expression, specifically the freedom to impart information and ideas.
37. A 2010 ECHR case further underscores the need for efficient review processes for broadcast licensing decisions. In *Nur Radyo Ve Televizyon Yayınılığı A.Ş. v. Turkey*, the ECHR found a violation of the right to freedom of expression when a Turkish broadcasting company had its broadcasting license revoked.³⁰
38. *Nur Radyo Ve Televizyon Yayınılığı A.Ş.* had its broadcast license revoked by the Turkish Broadcasting Authority after a "pirate broadcast" was attributed to the station.

²⁷ *Id.* at ¶ 6-10, 28.

²⁸ *Id.* at ¶ 11-18.

²⁹ *Id.*

³⁰ *Nur Radyo Ve Televizyon Yayınılığı A.Ş. v. Turkey*, App. No. 42284/05, 2010-II Eur. Ct H.R., available in French at <http://hudoc.echr.coe.int>. For explanations of the case in English, see *Freedom of Expression, the Media, and Journalists: Case-Law of the European Court of Human Rights*, EUROPEAN AUDIOVISUAL LIBRARY (2013), available at [http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+III+\(final+9+December+2013\).pdf/2e748bd5-7108-4ea7-baa6-59332f885418](http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+III+(final+9+December+2013).pdf/2e748bd5-7108-4ea7-baa6-59332f885418). See also *Nur Radyo Ve Televizyon Yayınılığı A.Ş. v. Turkey*, NETHERLANDS INST. OF H. R. (Jan. 13, 2014, 4:18 PM), available at <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/1d4dodd240bfee7ec12568490035df05/d3e2b85675fdc13ac12577c0003233a7?OpenDocument>.

Although there was minimal evidence to prove that Nur Radyo had actually transmitted the program, the government found Nur Radyo to be responsible since the content was “along the editorial line” of the station. Nur Radyo had previously faced six temporary broadcasting bans due to its religious programming and the government considered this pirate broadcast to be the breaking point, resulting in the revocation of Nur Radyo’s license.³¹

39. In addition to concern that the Turkish government’s punishment for the pirate broadcast was arbitrary and contrary to the rule of law, one of the main grounds for the ECHR’s decision involved the Turkish government’s delayed review of the decision to revoke Nur Radyo’s license. The ECHR noted that administrative review of the Nur Radyo decision had been pending for over four years. It then concluded that Turkey’s actions had violated the procedural safeguards required of broadcast licensing decisions and violated Nur Radyo’s right to freedom of expression.³²

c. Regulatory law in multiple countries requires due process and transparency in broadcast licensing application and renewal decisions

40. In addition to international case law, regulatory law worldwide indicates the importance of ensuring due process protections during broadcast licensing procedures.
41. Statutes from other regions of the world illustrate the manner in which States issue broadcast licenses and renewals in order to ensure adherence to international and constitutional guarantees of the right to freedom of expression. As such, they serve as evidence of generally accepted practices concerning the scope and nature of the obligation to protect the right to freedom of expression.
42. The regulation of broadcasting should be the responsibility of an independent regulatory body, established on a statutory basis with powers and duties set out explicitly in the law.³³ In January of 1989, the French government passed legislation which created a new regulatory body. The *Conseil supérieur de l’audiovisuel* (CSA) was charged with guaranteeing broadcasting freedom in France.³⁴ Article 3.1 states that the CSA is an independent authority that “guarantees the exercise of the freedom of audiovisual communication with regard to radio and television by any means of electronic communication under conditions defined by the present law.”³⁵ In South Africa, the independence of a broadcasting regulatory body is constitutionally prescribed. Section 192 of the South African Constitution states that “national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.”³⁶ To that

³¹ For more information, see sources cited *supra* n. 22.

³² *Id.*

³³ Buckley, *supra* n. 4 at 156.

³⁴ *An Independent Authority to Protect Audiovisual Communication*, available at <http://www.csa.fr/en/The-CSA/An-Independent-Authority-to-Protect-Audiovisual-Communication-Freedom>

³⁵ Buckley, *supra* n. 4 at 157.

³⁶ The Constitution of the Republic of South Africa, Feb. 2, 1996 (amended 2003), Sec. 192.

end, the Independent Communications Authority of South Africa (ICASA) was established in 2000.³⁷

43. In exercising its power to grant or renew broadcasting licenses, the independent broadcast regulator should be required by law to operate openly and transparently and to facilitate public participation in their affairs, including through public consultation on their policies and procedures.³⁸ In South Africa, ICASA is obliged by law to engage in public consultation with respect to any inquiry it conducts with respect to frequency planning, license applications, license renewals and amendments to licenses.³⁹ ICASA communicates to the public which factors they take into account when assessing licensing applications,⁴⁰ including demand for the proposed service within the relevant area, the need for the service, the technical capacity of the applicant, the financial means of the applicant, and the ownership and control structure of the applicant.⁴¹ In the United States, the Federal Communications Commission (FCC) encourages citizens and other interested parties to participate in the broadcast licensing renewal process.⁴² In Canada, the law explicitly states that the regulatory body, Canadian Radio Television and Telecommunications Commission (CRTC), must post on its website a notice of consultation in relation to any application made to the Commission for the issuance or renewal of a license and that the CRTC must provide an electronic link to the application in said notice.⁴³
44. A refusal to issue/renew a license should be accompanied by written reasons and should be subject to judicial review.⁴⁴ In Australia, reasons for non-renewal decisions are published in a table of enforcement actions.⁴⁵
45. A strong presumption of license renewal is common in many countries. In 1994, France enacted Law No. 94-88, which, among other things, provides for an automatic renewal for two or five year periods.⁴⁶ The Australian Broadcasting Services Act of 1992 provides for a right of renewal unless, under very limited criteria, the Australian Communications and Media Authority is satisfied that the licensee would not be suitable.⁴⁷ ICASA may refuse to renew a license only if the licensee has materially failed to comply with the license conditions or the provisions of the broadcasting law and ICASA is satisfied that

³⁷ *Welcome to ICASA*, available at <https://www.icasa.org.za>.

³⁸ Buckley, *supra* n. 4 at 156.

³⁹ Buckley, *supra* n. 4 at 168.

⁴⁰ Buckley, *supra* n. 4 at 233.

⁴¹ *Id.*

⁴² *Public Participation in the Licensing Process*, available at <http://www.fcc.gov/guides/public-and-broadcasting-july-2008#LICENSING>.

⁴³ *Application for Issuance or Renewal of Licence or for Approval of Transfer of Ownership or Change in Control*, available at <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2010-277/page-11.html>.

⁴⁴ Buckley, *supra* n. 4 at 232.

⁴⁵ *Community Licence Allocations, Renewals and Transfers*, available at <http://www.acma.gov.au/Industry/Broadcast/Community-radio-and-TV/Community-licensing/licence-allocations-renewals-and-transfers-community-broadcasting>.

⁴⁶ Serge Regourd, "France", in: *WESTERN BROADCASTING AT THE DAWN OF THE 21ST CENTURY* 257 (Leen d'Haenens et. al., 2nd ed. 2001).

⁴⁷ Australian Broadcasting Services Act of 1992, Sec. 47, available at http://www.austlii.edu.au/au/legis/cth/consol_act/bsa1992214/s47.html.

the licensee would not comply if his or her license were renewed.⁴⁸ Uruguayan broadcast licenses often have no specific time limits or are automatically renewed.⁴⁹

46. Licensing regulations in nations around the world guarantee due process protections for broadcasters during the licensing application and renewal processes. In addition to promoting the right to freedom of expression, these protections help to ensure media pluralism by protecting against arbitrary denials of broadcasting licenses.

III. The Importance of Media Pluralism

a) Media pluralism is an important component of ensuring the right to freedom of expression

47. The right to freedom of thought and expression includes the freedom of seeking, receiving, and imparting any kind of information and ideas.⁵⁰ This is only possible if plurality of mass media is guaranteed.
48. Media pluralism is considered throughout the world as a necessary condition for exercising the right of freedom of speech and the right to information. It is vital for democracies and contributes to societal stability by allowing the sharing and exchanging of divergent views and ideas.
49. Pluralism is a societal value that should be protected. It plays an important role in guaranteeing the diversity of ideas and opinions and helps to promote a State's stability and legitimacy.⁵¹ Therefore, pluralism requires protection and should be actively guaranteed by all States.

b) Venezuela lacks media pluralism

50. Over the past decade, Venezuela has lacked the type of media pluralism described above. In 2002, Venezuela's government decided to alter the balance in the ownership of mass media to prevent the creation of private monopolies. In turn, these actions created a public communications and information monopoly that continues to this day.
51. The Venezuelan government owns or controls multiple types of media companies. Since 2002, six government-controlled channels have been added to Venezolana de Television (VTV), which had previously been the only national public television network.⁵² Three

⁴⁸ Buckley, *supra* n. 4 at 233.

⁴⁹ Buckley, *supra* n. 4 at 60.

⁵⁰ A. Canizalez, *Venezuela: Hegemony destroys Pluralism*, CENTRE FOR FREEDOM OF THE MEDIA (University of Sheffield) (2012), 1.

⁵¹ Cf. J. Mertens de Wilmars, *Libertés, pluralisme et droit, Pluralisme et intégration Européenne*, in L. van Goethem & L. Waelkens (eds.), *Liberté, pluralisme et droit*, Bruxelles (1995), 14.

⁵² In one example of the effect that government control has had on the programming of these television stations, former President Hugo Chavez would defend his government's measures on the "Hello President" program aired on

national radio channels (Radio Nacional de Venezuela, YVKE Mundial, and Rumbos) and more than 250 community radios are controlled by the government as well. The newspapers *Veja*, *El Correo del Orinoco*, and *Ciudad CCS* are also financed through public funds.⁵³

52. Studies by different national organizations, including the Instituto de Investigaciones de la Comunicación de la Universidad Central de Venezuela, have concluded that the Venezuelan government seeks to create a communication hegemony and close down the independent media under the cover of a war against “media terrorism.”⁵⁴
53. Human Rights Watch issued a report in 2008 entitled “A Decade Under Chavez,” which stated that the Venezuelan Government had undermined freedom of expression by controlling and influencing the media.⁵⁵ It found that the Venezuelan government had “engaged in discriminatory actions against media airing opposition view points, strengthened the state’s capacity to limit free speech, and created powerful incentives for government critics to engage in self-censorship.”⁵⁶
54. According to recent reports, this situation has not changed. In 2014, Venezuela was ranked 116th out of 180 countries in the “Reporters Without Borders World Press Freedom Index.”⁵⁷ Reporters Without Borders has warned that the right to information is more endangered than ever in Venezuela and the safety of journalists is in jeopardy.⁵⁸ It classified Venezuela’s freedom of information as being at the “difficult situation level.”⁵⁹
55. The Inter-American Commission on Human Rights stated its opinion on the situation in Venezuela in its “Democracy and Human Rights in Venezuela” report from December 30, 2009:

[T]he numerous violent acts of intimidation carried out by private groups against journalists and media outlets, together with the discrediting declarations made by high-ranking public officials against the media and journalists on account of their editorial lines and the systematic opening of administrative proceedings based on legal provisions that allow a high level of discretion in their application and enable drastic sanctions to be

TVT. *See A Decade Under Chavez: Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela*, HUMAN RIGHTS WATCH, September 22, 2008.

⁵³ T. Petkoff, “Miedo a los Medios”, *Tal Cual Newspaper*, Feb. 2, 2010, 1-2.

⁵⁴ Communication from the Instituto de Investigacion de la Comunicacion and from the Universidad del Centro de Venezuela school of Comunicacion Social, Feb. 18, 2014, Caracas, Venezuela.

⁵⁵ *See A Decade Under Chavez: Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela*, HUMAN RIGHTS WATCH, September 22, 2008.

⁵⁶ *Id.*

⁵⁷ *World Press Freedom Index 2014*, REPORTERS WITHOUT BORDERS. Retrieved 5 Apr. 2014.

⁵⁸ *Right to Information More Endangered than Ever in National Crisis*, REPORTERS WITHOUT BORDERS (Feb. 26, 2014), available at <https://en.rsf.org/venezuela-right-to-information-more-26-02-2014,45933.html>.

⁵⁹ *Freedom of the Press Worldwide in 2014*, REPORTERS WITHOUT BORDERS. http://rsf.org/index2014/data/carte2014_en.png, retrieved 5 Apr. 2014.

imposed, along with other elements, make for a climate of restriction that hampers the free exercise of freedom of expression as a prerequisite for a vigorous democracy based on pluralism and public debate.⁶⁰

56. In sum, multiple national, international, and non-governmental organizations have concluded that Venezuela has gradually restricted expression by the media and is limiting the right to freedom of expression.

c) International courts have recognized the importance of media pluralism

57. International courts, particularly the ECHR, have highlighted the importance of media pluralism on several occasions. They have particularly emphasized its role in securing the rights to freedom of expression and information.

58. In *Manole and Others v. Moldova*, the ECHR concluded that the Moldovan government had exerted improper editorial control over Teleradio-Moldova (TRM), a State-owned television and radio station, when it restricted programming that criticized the government or provided alternative political viewpoints. The ECHR held that the government's actions violated the journalists' right to freedom of expression. In addition, the ECHR found that it was critical for TRM to broadcast accurate and balanced information reflecting the full range of political opinion and debate because TRM held a monopoly over audiovisual broadcasting in Moldova. Accordingly, the ECHR held that the State authorities had a duty to adopt laws that would promote pluralistic programming and ensure TRM's independence from political interference and control.

59. The ECHR highlighted that there can be no democracy without pluralism:

Freedom of expression, as secured in Article 10 § 1, thus constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress (*Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103). Freedom of the press and other news media afford the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. It is incumbent on the press to impart information and ideas on political issues and on other subjects of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them (see, for example, *Handyside v. the United Kingdom*, § 49, 7 December 1976, Series A no. 24; *Lingens*, cited above, §§ 41-42).⁶¹

60. The Court continued by considering the dangers of a licensing system dominated by a powerful economic or political group:

⁶⁰ *Democracy and Human Rights in Venezuela*, INTER-AMERICAN COMM'N FOR HUMAN RIGHTS, Dec. 30, 2009.

⁶¹ *Manole & Others v. Moldova*, App. No. 13936/02, 2009-IV Eur. Ct. H.R., available at <http://hudoc.echr.coe.int>.

A situation whereby a powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (see *VGT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, §§ 73 and 75, ECHR 2001-VI; see also *De Geillustreerde v. the Netherlands*, no. 5178/71, Commission decision of 6 July 1976, § 86, Decisions and Reports (DR) 8, p. 13). This is true also where the position of dominance is held by a State or public broadcaster. Thus, the Court has held that, because of its restrictive nature, a licensing regime which allows the public broadcaster a monopoly over the available frequencies cannot be justified unless it can be demonstrated that there is a pressing need for it (*Informationsverein Lentia and Others v. Austria*, 24 November 1993, § 39, Series A no. 276).⁶²

61. Similarly, in *Informationsverein Lentia and Others v. Austria*, the ECHR stressed the fundamental role of the right to freedom of expression in a democratic society and noted that the right to freedom of expression cannot be fully achieved unless it is grounded in the principle of pluralism. The Court concluded that a public monopoly imposes the greatest of restrictions on those fundamental rights and that a monopoly could only be justified where it corresponded to a “pressing need”.⁶³

62. The ECHR observed:

The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audiovisual media, whose programmes are often broadcast very widely.⁶⁴

63. The ECHR has consistently reiterated the importance of media pluralism in securing democracy and the right to freedom of expression. In order to adequately protect the right to freedom of expression, States should maintain media pluralism within their broadcast licensing systems and protect this pluralism by ensuring that licensing procedures include due process guarantees.

⁶² *Id.* at ¶ 98.

⁶³ *Informationsverein Lentia v. Austria*, App. No. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, 1993 Eur. Ct. H.R.), ¶ 38.

⁶⁴ *Id.*

IV. Conclusion

64. General principles pertaining to the right to freedom of expression, international case law, and worldwide regulatory law all require State broadcast licensing procedures to provide due process guarantees. Licensing procedures must be transparent, non-arbitrary, and based on clear, pre-established criteria. The decisions resulting from these procedures must provide explicit, well-reasoned justifications for their conclusions and be subject to judicial and/or administrative review.
65. These due process protections are intended to ensure that a wide variety of broadcasting companies are able to transmit their content to the public without undue interference from governments that might not support their views. By keeping the State accountable for making well-reasoned, non-discriminatory licensing decisions, due process guarantees encourage increased media pluralism within a State.
66. Media pluralism plays a crucial role in promoting democratic rule. It promotes the rights to freedom of expression and to information, which in turn encourage debate on matters of public interest. Divergent views and ideas can be presented without fear of retribution. Members of opposition groups can safely criticize the government and present alternative methods of governance. In sum, the promotion of media pluralism and the right to freedom of expression is essential for the functioning of a democracy and the assurance of individual rights and freedoms, as well as for the growth of tolerance and cooperation among the people of the world.⁶⁵
67. Broadcast licensing procedures and decisions that incorporate due process protections are critical in securing media pluralism, democracy, and the right to freedom of expression. Given the importance of ensuring that licensing procedures meet due process standards, MLDI asks the Court to consider the principles, cases, and laws detailed in this submission when it reviews the actions of the Venezuelan government in the case before the Court.

⁶⁵ Inter-Am. Comm'n H.R., Inter-American Declaration of Principles on Freedom of Expression adopted during the 108th regular session (2002).

68. If the Court requires any further information or assistance from MLDI on the matters outlined above or otherwise, MLDI would seek to assist the court.

Signed, 20 May 2014

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