

# Oswaldo Álvarez Paz's Imprisonment

Legal Opinion<sup>1</sup>  
Human Rights Foundation  
April 5, 2010

## A. Background

### a. Who is Oswaldo Álvarez Paz?

Oswaldo Álvarez Paz was elected governor of the state of Zulia in 1989. He was reelected in 1992 and resigned from office in order to run for president in 1993. He finished third in that presidential race, after obtaining over 23% of the national vote. For the presidential elections of 2006, Oswaldo Álvarez Paz supported Manuel Rosales as the main opposition candidate.

### b. Situation of Freedom of Expression in Venezuela

Since 2000, the Venezuelan state has systematically restricted freedom of expression within its territory. The systematic nature of these violations has been consolidated through the executive's effective control of the judiciary, the usurpation of legislative powers by the president, and the restrictions arbitrarily imposed on opposition candidates and public officials to participate in elections and to carry out their duties.<sup>2</sup>

Since 2007, the Inter-American Human Rights Commission (IACHR) and Court (I/A Court H.R.) have repeatedly found Venezuela internationally responsible for violating freedom of expression.<sup>3</sup> Venezuela is the only state in the Americas that has

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<sup>1</sup> This legal opinion was prepared by the Legal Department of the Human Rights Foundation.

<sup>2</sup> On the stacking of the courts by the executive power, *see* HRF Letter No. 2 to the Secretary General of the OAS. Available at: <http://thehrf.org/InsulzaLetterOct17.pdf>. On the usurpation of legislative powers by the president, *see* HRF Letter No. 4 to the Secretary General of the OAS. Available at: <http://thehrf.org/InsulzaLetterFeb26.pdf>. On the restrictions arbitrarily imposed on opposition candidates and public officials to participate in elections and to carry out their duties, *see* INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *Democracy and Human Rights in Venezuela*, 2009, pages 5-29.

<sup>3</sup> • On January 24, 2010, the IACHR's Commissioner for Venezuelan Affairs, Paulo Sérgio Pinheiro, and Special Rapporteur for Freedom of Expression, Catalina Botero, expressed their emphatic rejection of the closing of cable television channels in Venezuela and requested that the guarantees of freedom of expression and due process be reestablished. Available at:

<http://www.cidh.org/relatoria/showarticle.asp?artID=781&IID=1>

• On November 20, 2009, the Inter-American Court of Human Rights ruled that Venezuela had violated, among other fundamental rights, the right to freedom of expression of Francisco Usón Ramírez. *See* I/A Court H.R., Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, ¶ 199(2). Available at:

[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_207\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_207_ing.pdf)

• On August 5, 2009, the Rapporteur for Venezuelan Affairs of the Inter-American Commission on Human Rights (IACHR) and the IACHR's Special Rapporteur for Freedom of Expression sent a communication to the Minister of Foreign Affairs of the Bolivarian Republic of Venezuela, Nicolás Maduro, in order to express their deep concern about the deterioration of the situation of freedom of expression, to request information on recent events in that country, and to submit observations with respect to the Special Legislative Bill on Media-Related Crimes proposed by the Attorney General's Office. Pinheiro and Botero Marino stated that, "If this bill is passed, no person in the Bolivarian Republic of Venezuela will be able to

denied the Inter-American Commission access to its territory in order to monitor the situation of human rights *in situ*.<sup>4</sup> In 2008, after various instances of blatant disregard of international rulings, the Supreme Justice Tribunal of Venezuela finally declared a decision by the Inter-American Court of Human Rights “non-enforceable,” and expressly called on the executive power to “denounce” the American Convention on Human Rights, “given the evident usurpation of power that the Inter-American Court has carried out...”<sup>5</sup>

On December 30 2009, the IACHR approved the report “Democracy and Human Rights in Venezuela,” which states:

As to freedom of expression, the IACHR reiterates the conclusions reached in previous reports regarding the absence of a climate of national tolerance to foster active participation and the exchange of ideas among diverse sectors of society. In particular, the IACHR anxiously observes how, in recent years, major overhauls of the legal framework have tended to shut down rather than to promote public debate. The protection of values such as pluralism and diversity, integral parts of democratic models, requires shaping institutions that develop public deliberation, not inhibit or muzzle it. Yet numerous acts of violence and intimidation perpetrated by private violent groups against journalists and the media; disqualifying statements by highly placed civil servants; the systematic filing of administrative proceedings predicated on vague legal norms that allow for great margins of discretion when implemented, coupled with disproportional sanctions, all serve to create a restrictive scenario that also dampens the full observance of freedom of expression as a condition of democracy rooted in pluralism and public debate.<sup>6</sup>

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feel free to express his critical or dissident thoughts without fear of being the target of distressing criminal persecution.” Available at:

<http://www.cidh.oas.org/relatoria/showarticle.asp?artID=759&IID=1>

• On August 3, 2009, the Inter-American Commission of Human Rights (IACHR) expressed it was deeply concerned about the deterioration of the situation of freedom of expression in Venezuela. The IACHR stated that, since 2000, it had observed a gradual deterioration and restriction on the exercise of this right in Venezuela, as well as a rising intolerance of critical expression. Through information received by the Office of the Special Rapporteur for Freedom of Expression, the Commission stated that it had learned about new events that showed the situation was growing more serious, such as the closing of 34 radio stations, the armed attack on the Globovisión channel and the presentation of a bill that sought to impose new restrictions on freedom of expression. Available at:

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

• On May 22, 2009, the United Nations (UN) Rapporteur for Freedom of Opinion and Expression, Frank La Rue, and the Special Rapporteur for Freedom of Expression of the Organization of American States’ Inter-American Commission on Human Rights (IACHR), Catalina Botero, expressed their concern over statements made by high-level authorities of the Venezuelan government against the Globovisión television network and other privately owned media outlets in Venezuela. Available at:

<http://www.cidh.org/relatoria/showarticle.asp?artID=747&IID=1>

<sup>4</sup> On March 9, 2007, the Inter-American Commission on Human Rights (IACHR) regretted that Venezuela had not allowed and then subsequently placed conditions on the visit of Commissioner Paulo Sergio Pinheiro, in his role as Rapporteur for that country. The IACHR then stated that the last visit to Venezuela was in May 2002 and that for the last three years the Commission had requested, “both verbally and in writing, the consent of the state for a visit without success. This has the effect of interfering with the verification of the situation of human rights in the country and with the promotion of a dialogue with state authorities and different sectors of the Venezuelan civil society.” Available at:

<http://www.cidh.oas.org/Comunicados/English/2007/13.07eng.htm>

<sup>5</sup> See note 2 *supra*.

<sup>6</sup> *Id.*, at 290.

Since 2009, the freedom of expression world index, monitored annually by Freedom House, has ranked Venezuela as “not free.” Other countries in this category include Burma, China, Eritrea, Libya, North Korea, and Turkmenistan.<sup>7</sup>

## B. Chronology of Events

On March 8, 2010, Álvarez Paz was interviewed for over 40 minutes on the TV show *Aló Ciudadano*, which is broadcasted by Globovisión. The following excerpts are the most significant statements Álvarez Paz made during the interview:<sup>8</sup>

There are three issues for which the international community has put its eyes on Venezuela.

[The first issue is] *terrorism*—the example being the judicial decree issued by the Spanish judge [Eloy Velasco] which gives legal and procedural grounds to old suspicions and new convictions that something very serious is happening with regards to the relationship between the Venezuelan regime, not only with ETA [Euskadi Ta Askatasuna] and the FARC [Revolutionary Armed Forces of Colombia], but with other subversive and terrorist groups around the world.

Another extremely important issue, which causes a great deal of concern among the international community, is that of *drug-trafficking*. Venezuela is being systematically singled out as one of the most important drug transit countries in the world. We all know that drug-trafficking structures, including money laundering schemes, give a lot of support to terrorist activities around the world.

...

It is not just the United States that is accusing Venezuela of being a drug transit country. It is not only the DEA. It is the European Union, the Spanish government, the English government, the African Union governments, Central American countries, and the Mexican government. There are a lot of elements that lead to the contention that Venezuela is one of the three main countries for drug transit and drug-trafficking cooperation around the world.

...

The third issue is *human rights*.

...

I, unfortunately, do not believe a single thing the president of the Bolivarian Republic of Venezuela says, not even the Lord's Prayer if he said it while kneeling. Because all the evidence that has appeared indicates that there are concurrent proofs that point in the same direction.

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<sup>7</sup> Available at: <http://www.freedomhouse.org/template.cfm?page=251&year=2009>.

<sup>8</sup> Emphasis added. See full interview on YouTube:

Part 1: <http://www.youtube.com/watch?v=BQM0dvlv6uE>;

Part 2: [http://www.youtube.com/watch?v=25VmU\\_JWYio](http://www.youtube.com/watch?v=25VmU_JWYio);

Part 3: <http://www.youtube.com/watch?v=nXLOrQGV7zs>;

Part 4: <http://www.youtube.com/watch?v=cxknq-u3B9I>;

Part 5: <http://www.youtube.com/watch?v=c0zPL4V3ers>;

Part 6: <http://www.youtube.com/watch?v=aY3RpjM6w98>.

All of this - regarding the relationship of the Venezuelan government with the FARC, with drug trafficking, and with human rights violations - are consigned to and accumulated in processes that are underway at the International Criminal Court in The Hague.

...

If I were Chávez, if I were in the government and found myself in this situation, I would cooperate as much as possible with the Spanish judiciary, regardless of who turns out to be implicated. The problem when one says 'regardless of who turns out to be implicated,' is that the one who may just turn out to be implicated is the head of state himself, don't you think? ... [Chávez] could be an active or passive collaborator, or tolerant, or an accomplice. Let's not forget that the ETA guy was no less than the director of intelligence of the National Lands Institute of Venezuela.

...

Venezuela has become a center of operations that facilitates drug-trafficking activities. In fact, each day I am more convinced that the hand of drug trafficking is behind every port and commercial airport that was confiscated from mayors and governors. Because they are not interested in having watchful eyes to control, neutralize or denounce those structures that nowadays operate at their absolute will. This is a personal subjective interpretation, but it is based on experience, and on many things that are happening at ports and at airports.

...

The character [Chávez] is atypical, subversive, and is not a democrat.

...

The candidates who run, aside from being good, in my opinion, have to commit to the idea that one goes to the National Assembly to change the [totalitarian] regime, to change the judicial structure that serves as its foundation, to direct policies that put an end to this situation and that somehow oblige the president to retract the incredible amount of nonsense he has engaged in—or [oblige him] to leave office, as a result of legitimate pressure from the National Assembly.

On March 9, 2010, the president of the Permanent Commission of Science, Technology, and Social Communication of the National Assembly, Manuel Villalba, filed a criminal complaint against Álvarez Paz with the Office of the Attorney General (Ministerio Público), due to his statements on the TV show *Aló Ciudadano*.<sup>9</sup> On March 15, 2010, as part of the investigation, the following witnesses testified: Leopoldo Castillo (host of *Aló Ciudadano*), journalist Adreína Fuenmayor, and producers María Gabriela Puche and Rosa María Atencia. On March 19, 2010, the Attorney General's office, represented by Gineira Rodríguez, charged Álvarez Paz with the crimes of "conspiracy," "public instigation to commit crimes," and "dissemination of false information."<sup>10</sup>

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<sup>9</sup> See El Universal, 9 March 2010, *Solicitan investigación penal contra Oswaldo Álvarez Paz*. Available at: [http://www.eluniversal.com/2010/03/09/pol\\_ava\\_solicitan-investigac\\_09A3557931.shtml](http://www.eluniversal.com/2010/03/09/pol_ava_solicitan-investigac_09A3557931.shtml)

<sup>10</sup> Spanish original: "1. *Conspiración: Artículo 132 del Código Penal*. ¶ Cualquiera que, dentro o fuera del territorio nacional, conspire para destruir la forma política republicana que se ha dado la nación será castigado con presidio de ocho a dieciséis años. ¶ En la misma pena incurrirá el venezolano que solicitare la intervención extranjera en los asuntos de la política interior de Venezuela, o pidiere su concurso para trastornar la paz de la República o que ante sus funcionarios, o por publicaciones hechas en la prensa

On March 22, 2010, at approximately 9:30 p.m., Álvarez Paz was detained in his residence under an arrest warrant issued by Tribunal 25 of the Metropolitan Area of Caracas. The tribunal issued the warrant at the request of Gineira Rodríguez. The warrant was executed by a commission of the National Bolivarian Intelligence Service (SEBIN)<sup>11, 12</sup>.

On March 24, 2010, during the preliminary hearing, the tribunal ratified Álvarez Paz's preventive imprisonment. Currently, Álvarez Paz is imprisoned in El Helicoide, SEBIN's headquarters. His preventive imprisonment was granted due to a "danger of escape"<sup>13, 14</sup>.

### **C. Freedom of expression standards, under international human rights law**

#### **a. Freedom to impart opinions freely, even when these opinions "offend, shock or disturb"**

According to international human rights law,<sup>15</sup> "everyone shall have the right to hold opinions without interference," and "everyone shall have the right to freedom of expression." This right includes freedom "to seek, receive, and impart information and ideas of all kinds - regardless of frontiers - either orally, in writing, in print, in the form of art, or through any other medium of one's choice." This right includes the freedom to "impart" and "receive" all sorts of opinions and information through the media. These rights must encompass not only favorable information or ideas, but also those that

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extranjera, incitare a la guerra civil en la República o difamare a su Presidente o ultrajare al representante diplomático o a los funcionarios consulares de Venezuela, por razón de sus funciones, en el país donde se cometiere el hecho. 2. *Instigación Pública a delinquir: Artículo 285 del Código Penal.* Quien instigare a la desobediencia de las leyes o al odio entre sus habitantes o hiciere apología de hechos que la ley prevé como delitos, de modo que ponga en peligro la tranquilidad pública, será castigado con prisión de tres años a seis años. 3. *Difundir información falsa: Artículo 296-A del Código Penal.* ¶ Todo individuo que por medio de informaciones falsas difundidas por cualquier medio impreso, radial, televisivo, telefónico, correos electrónicos o escritos panfletarios, cause pánico en la colectividad o la mantenga en zozobra, será castigado con prisión de dos a cinco años. Ver nota de prensa del diario venezolano El Universal de 20 de marzo de 2019, *Fiscalía imputó a Álvarez Paz por opiniones ofrecidas en Globovisión.* Available at: [http://eluniversal.com/2010/03/20/pol\\_art\\_fiscalia-imputo-a-al\\_1803591.shtml](http://eluniversal.com/2010/03/20/pol_art_fiscalia-imputo-a-al_1803591.shtml)

<sup>11</sup> Formerly known as DISIP.

<sup>12</sup> See El Universal, 23 March 2010, *Detienen y recluyen a Oswaldo Álvarez Paz en El Helicoide.* Available at: [http://caracas.eluniversal.com/2010/03/23/pol\\_art\\_detienen-y-recluyen\\_23A3629571.shtml](http://caracas.eluniversal.com/2010/03/23/pol_art_detienen-y-recluyen_23A3629571.shtml)

<sup>13</sup> See El Universal, 24 March 2010, *Ratifican la medida privativa de libertad contra Oswaldo Álvarez Paz.* Available at: [http://politica.eluniversal.com/2010/03/24/pol\\_ava\\_ratifican-la-medida\\_24A3638171.shtml](http://politica.eluniversal.com/2010/03/24/pol_ava_ratifican-la-medida_24A3638171.shtml)

<sup>14</sup> See March 24 Communiqué by the Attorney General's office, *Ratifican medida de privación de libertad contra Oswaldo Álvarez Paz.* Available at: <http://www.fiscalia.gov.ve/Prensa/A2010/prensa2403.htm>

<sup>15</sup> See American Convention on Human Rights, Art. 13(1) ("1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."). Venezuela ratified the American Convention on Human Rights on August 9, 1977. See also International Covenant on Civil and Political Rights, Art. 19(2) ("2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."). Venezuela ratified the International Covenant on Civil and Political Rights, and its Optional Protocol, on May 10, 1978.

“offend, shock or disturb” because “such are the demands of pluralism, tolerance and broadmindedness, without which there is no democratic society.”<sup>16</sup>

The preamble and Principle 1 of the Declaration of Principles on Freedom of Expression set forth that “consolidation and development of democracy depends upon the existence of freedom of expression,” and that, “freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals.” Additionally, freedom of expression “is an indispensable requirement for the very existence of a democratic society.”

## **b. Prohibition against “criminalizing expression”**

### **i. General prohibition against criminalizing expression**

Article 13 of the American Convention on Human Rights, as interpreted by Principle 10 of the Declaration of Principles on Freedom of Expression,<sup>17</sup> provides that:

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

### **ii. Special prohibition against criminalizing expression directed at public officials**

In its interpretation of the Declaration of Principles, the Inter-American Commission on Human Rights explained that the prohibition against criminalizing expression specifically applies to public officials:<sup>18</sup>

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

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<sup>16</sup> See Inter-American Commission on Human Rights, *Background and Interpretation of the Declaration of Principles* (citing the European Court of Human Rights case *Castells v. Spain*, Judgment of April 23, 1992, Series A, N1 236, ¶ 20). Available at:

<http://www.cidh.oas.org/relatoria/showarticle.asp?artID=132&IID=1>

<sup>17</sup> See 2002 Annual Report by the Special Rapporteur on Freedom of Expression, Chap. V, ¶ 10 (“In October 2000, the IACHR approved the Declaration of Principles on Freedom of Expression, promulgated by the Office of the Special Rapporteur for Freedom of Expression. *The Declaration is meant to be a definitive interpretation of Article 13 of the Convention.*”).

<sup>18</sup> See note 16 *supra*. Emphasis added.

*their representatives.* In this regard, the IACHR stated: “A law that targets speech that is considered critical of public administration by virtue of the individual who is the object of the expression, strikes at the very essence and content of freedom of expression.”

44. Thorough and effective oversight of public management as a tool to guarantee the existence of a democratic society requires a different type of protection for those responsible for public affairs than that accorded an individual not involved in matters of public interest. In this regard, the Inter-American Commission has stated that *the application of laws protecting the honor of public officials acting in an official capacity unjustifiably grants them a right to protection that other members of society lack.* This distinction indirectly inverts the fundamental principle of a democratic system in which the government is subject to controls, including public scrutiny, to prevent or check abuses of its coercive power. Moreover, *the fact that public officials and public figures generally have easy access to the mass media* allowing them to respond to attacks on their honor and personal reputation, is also a reason to provide for a lower level of legal protection of their honor.

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

### **iii. Prohibition against criminalizing “subjective opinions” or “value judgments”**

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

48. *The Commission has stated that this is particularly the case in the public arena where criticism is often based on value judgments rather than purely fact-based statements.* Since value judgments cannot be proven, it may be impossible to demonstrate the veracity of such declarations. Thus, *a rule that compels someone who criticizes public officials to guarantee the veracity of the assertions has a chilling effect on criticism of government conduct.* Such rules raise the specter that someone who criticizes the government in good faith may be penalized for his or her criticism.

### **iv. Prohibition against criminalizing “faithful reproduction of information” and the “publication of information provided by third parties”**

49. Additionally, according to the doctrine of faithful reporting, *the faithful reproduction of information does not give rise to responsibility,* even in cases in which the information is not correct and could cause harm to the honor of a person. This doctrine arises from the necessity of freedom of expression and information for the existence of a democratic society. In a democratic society, debate must be fluid and open. *The publication of information provided by third parties should not be restricted by the threat of responsibility simply for repeating what has been stated by another person.* This constitutes an unnecessary restriction that limits the right of individuals to be informed.

**v. Prohibition against criminalizing the production of information with “actual malice”**

46. This principle also *establishes the standard of “actual malice” as a legal doctrine used to protect the honor of public officials or public figures*. In practice, this standard means that *only civil sanctions are applied in cases where false information has been produced with “actual malice,” in other words, produced with the express intention to cause harm, with full knowledge that the information was false or with manifest negligence in the determination of the truth or falsity of the information*. The burden of proof is on those who believe they have been affected by the false or inaccurate information to demonstrate that the author of the news item acted with malice.

**vi. Single exception to the prohibition against criminalizing expression: “Hate speech and incitement to violence” that has “seriously impaired” other fundamental rights**

In *Kimel v. Argentina*, the Inter-American Court of Human Rights held:

*[The] possibility [of a criminal sanction regarding the right to inform or give one’s opinion] should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception. At all stages the burden of proof must fall on the party who brings the criminal proceedings....*<sup>19</sup>

The court cited only one instance of “exceptional circumstances” that could justify the “possibility of a criminal sanction” regarding the right to inform or give one’s opinion, notably where “other fundamental rights have been seriously impaired” - as in the case of “hate speech or incitement to violence.”<sup>20</sup>

**D. Examination of Venezuela’s conduct vis-à-vis the international standard of freedom of expression**

**a. Violation of Oswaldo Álvarez Paz’s right to freedom to express opinions without interference, even if those opinions “offend, shock or disturb”**

**i. Opinions that could have “offended, shocked or disturbed” Venezuelan government officials**

Because of their irreverent nature, the following opinions by Oswaldo Álvarez Paz may have offended, shocked or disturbed Venezuelan government officials:

I, unfortunately, do not believe a single thing the president of the Bolivarian Republic of Venezuela says, not even the Lord’s Prayer if he said it while kneeling.

....

The character [Chávez] is atypical, subversive, and is not a democrat.

...

<sup>19</sup> I/A Court H.R., Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, ¶ 78.

<sup>20</sup> *Id.*, note 57.

If I were Chávez, if I were in the government and found myself in this situation, I would cooperate as much as possible with the Spanish judiciary, regardless of who turns out to be implicated. The problem when one says ‘regardless of who turns out to be implicated,’ is *that the one who may just turn out to be implicated is the head of state himself, don't you think? ... [Chávez] could be an active or passive collaborator, or tolerant, or an accomplice.* Let's not forget that the ETA guy was no less than the director of intelligence of the National Lands Institute of Venezuela.

...

The candidates who run, aside from being good, in my opinion, have to commit to the idea that *one goes to the National Assembly to change the [totalitarian] regime*, to change the judicial structure that serves as its foundation, to direct policies that put an end to this situation and that somehow oblige the president to retract the incredible amount of nonsense he has engaged in—or [oblige him] to leave office, as a result of legitimate pressure from the National Assembly.

## **ii. General protection for these opinions**

As seen above, those opinions that “offend, shock or disturb” anybody are protected by the international standard of freedom of expression. According to the Inter-American Court of Human Rights, these opinions are protected because “such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.”<sup>21</sup>

## **iii. Special protection for opinions directed at public officials**

The degree of protection for opinions that “offend, shock or disturb” is greater when these opinions are directed at public officials. According to the Inter-American Commission of Human Rights:

*...society retains ownership of these matters and must enjoy a broad right, with the fewest restrictions possible, to exercise control over the management of public affairs by their representatives. [...] [T]he existence of a democratic society requires a different (lower) type of protection for those responsible for public affairs than that accorded an individual not involved in matters of public interest.*

...

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

## **b. Violation of the general prohibition against criminalizing expression, and of the special prohibition against criminalizing expression directed at public officials**

### **i. Criminal actions arising of opinions**

Oswaldo Álvarez Paz's March 8 opinions gave rise to penal charges brought against him for the crimes of “conspiracy”, “public incitement to commit crimes” and “dissemination of false information.”

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<sup>21</sup> See note 16 *supra*.

## 1. Critical opinions aimed at President Chávez

Oswaldo Álvarez Paz's opinions that were expressly or implicitly directed against President Chávez are as follows:

I, unfortunately, do not believe a single thing the president of the Bolivarian Republic of Venezuela says, not even the Lord's Prayer if he said it while kneeling.

....

The character [Chávez] is atypical, subversive, and is not a democrat.

...

If I were Chávez, if I were in the government and found myself in this situation, I would cooperate as much as possible with the Spanish judiciary, regardless of who turns out to be implicated. The problem when one says 'regardless of who turns out to be implicated,' is that *the one who may just turn out to be implicated is the head of state himself, don't you think? ... [Chávez] could be an active or passive collaborator, or tolerant, or an accomplice.* Let's not forget that the ETA guy was no less than the director of intelligence of the National Lands Institute of Venezuela.

...

The candidates who run, aside from being good, in my opinion, have to commit to the idea that *one goes to the National Assembly to change the [totalitarian] regime*, to change the judicial structure that serves as its foundation, to direct policies that put an end to this situation and that *somehow oblige the president to retract the incredible amount of nonsense he has engaged in—or [oblige him] to leave office*, as a result of legitimate pressure from the National Assembly.

## 2. Critical opinions aimed at the Venezuelan government

Oswaldo Álvarez Paz's opinions that were directed against the Venezuelan government are as follows:

There are three issues for which the international community has put its eyes on Venezuela.

[The first issue is] *terrorism*—the example being the judicial decree issued by the Spanish judge [Eloy Velasco] which gives legal and procedural grounds to old suspicions and new convictions that something very serious is happening with regards to the relationship between the Venezuelan regime, not only with ETA [Euskadi Ta Askatasuna] and the FARC [Revolutionary Armed Forces of Colombia], but with other subversive and terrorist groups around the world.

Another extremely important issue, which causes a great deal of concern among the international community, is that of *drug-trafficking*. Venezuela is being systematically singled out as one of the most important drug transit countries in the world. We all know that drug-trafficking structures, including money laundering schemes, give a lot of support to terrorist activities around the world.

...

The third issue is *human rights*.

...

All of this, regarding the relationship of the Venezuelan government with the FARC, with drug trafficking, and with human rights violations, are consigned to and accumulated in processes that are underway at the International Criminal Court in The Hague.

### 3. “Subjective opinions” or “value judgments”

Oswaldo Álvarez Paz also made some specific value judgments:

Venezuela has become a center of operations that facilitates drug-trafficking activities. In fact, each day I am more convinced that the hand of drug trafficking is behind every port and commercial airport that was confiscated from mayors and governors. Because they are not interested in having watchful eyes to control, neutralize or denounce those structures that nowadays operate at their absolute will. *This is a personal subjective interpretation*, but it is based on experience, and on many things that are happening at ports and at airports.

### 4. “Faithful reproduction of information” and “publication of information provided by third parties”

The following opinions by Oswaldo Álvarez Paz were a “faithful reproduction of information” and “publication of information provided by third parties.”

#### a. Venezuela’s cooperation with “terrorist groups” such as ETA and FARC

[The first issue is] *terrorism*—the example being the judicial decree issued by the Spanish judge [Eloy Velasco] which gives legal and procedural grounds to old suspicions and new convictions that something very serious is happening with regards to the relationship between the Venezuelan regime, not only with ETA [Euskadi Ta Askatasuna] and the FARC [Revolutionary Armed Forces of Colombia], but with other subversive and terrorist groups around the world.

According to news reports from around the world dated March 1, 2010, Eloy Velasco, a Spanish judge, issued a decree pointing at “manifest cooperation of the Venezuelan government with the illegal collaboration between FARC and ETA, specifically with regards to Arturo Cubillas Fontan, who even held public office in Venezuela.”<sup>22</sup>

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<sup>22</sup> See El País, 1 March 2010, *La Audiencia cree que el Gobierno de Chávez ayuda a ETA y las FARC*. Available at:

[http://www.elpais.com/articulo/espana/Audiencia/cree/Gobierno/Chavez/ayuda/ETA/FARC/elpepuesp/20100301elpepunac\\_13/Tes](http://www.elpais.com/articulo/espana/Audiencia/cree/Gobierno/Chavez/ayuda/ETA/FARC/elpepuesp/20100301elpepunac_13/Tes); Público, 1 March 2010, *Velasco acusa a Venezuela de cooperar en alianza entre ETA y las FARC*. Available at:

<http://www.publico.es/espana/298790/audiencia/nacional/procesa/presuntos/miembros/eta/farc>; ABC, 1 March 2010, *La Audiencia Nacional acusa al Gobierno de Chávez de “cooperar” en la unión ETA – FARC*. Available at: <http://www.abc.es/20100301/nacional-terrorismo/seis-etarras-procesados-intentar-201003011246.html>. See also English news report by AOL News. Available at:

<http://www.aolnews.com/world/article/spain-charges-hugo-chavezs-venezuela-with-aiding-eta-and-farc/19377022>. See page 26 of the original decree by Judge Velasco. Available at:

[http://www.elpais.com/elpaismedia/ultimahora/media/201003/01/espana/20100301elpepunac\\_1\\_Pes\\_PDF.pdf](http://www.elpais.com/elpaismedia/ultimahora/media/201003/01/espana/20100301elpepunac_1_Pes_PDF.pdf)

FARC and ETA are designated as terrorist organizations in Australia,<sup>23</sup> Canada,<sup>24</sup> the European Union,<sup>25</sup> and the United States.<sup>26</sup>

All of this, regarding the relationship of the Venezuelan government with the FARC, with drug trafficking, and with human rights violations, are consigned to and accumulated in processes that are underway at the International Criminal Court in The Hague.

There is no evidence of processes “underway” at the International Criminal Court with regards to the “relationship of the Venezuelan government with the FARC, with drug trafficking, and with human rights violations.” However, there are several news reports with regards to the statement made by the Colombian government on March 4, 2008, announcing that it would take the Venezuelan government to the International Criminal Court for “financing and sponsoring genocide.”<sup>27</sup>

### **b. Venezuela as a drug-transit country**

Another extremely important issue, which causes a great deal of concern among the international community, is that of *drug-trafficking*. Venezuela is being systematically singled out as one of the most important drug transit countries in the world. We all know that drug-trafficking structures, including money laundering schemes, give a lot of support to terrorist activities around the world.

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It is not just the United States that is accusing Venezuela of being a drug transit country. It is not only the DEA. It is the European Union, the Spanish government, the English government, the African Union governments, Central American countries, and the Mexican government. There are a lot of elements that lead to the contention that Venezuela is among the three main countries on drug transit and drug-trafficking cooperation around the world.

According to a February 24, 2010, EFE note, the International Narcotics Control Board (INCB) determined in its 2009 Annual Report that Venezuela was the main

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<sup>23</sup> FARC is part of Australia’s list pertaining to the implementation the UN Security Council Financial Sanctions, available at [http://www.dfat.gov.au/icat/UNSC\\_financial\\_sanctions.html#7](http://www.dfat.gov.au/icat/UNSC_financial_sanctions.html#7) (last visited March 31, 2010)

<sup>24</sup> Canadian listed terrorist entities are available at <http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx> (last visited March 31, 2010)

<sup>25</sup> European Union Council’s terrorist list is available at: [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l\\_169/l\\_16920070629en00580062.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_169/l_16920070629en00580062.pdf) (last visited March 31, 2010)

<sup>26</sup> US Dep’t of State, *Country Reports on Terrorism 2007*, 304 (April 2008), available at <http://www.state.gov/documents/organization/105904.pdf> (last visited March 31, 2010)

<sup>27</sup> See Bloomberg, 4 March 2008, *Uribe Seeks Trial for Chavez in International Court*. Available at: <http://www.bloomberg.com/apps/news?pid=20601086&sid=aD8nON228xnU>. In Spanish see Noticias 24, 4 March 2008, *Colombia denunciará a Hugo Chávez ante la Corte Penal Internacional*. Available at: <http://www.noticias24.com/actualidad/noticia/12538/urgente-alvaro-uribe-denunciara-a-hugo-chavez-ante-la-corte-penal-internacional/>; El Mundo (source EFE), 4 March 2008, *Uribe denunciará a Chávez ante la Corte Penal Internacional ‘por patrocinio de genocidas’*. Available at: <http://www.elmundo.es/elmundo/2008/03/04/internacional/1204640940.html>; Clarín (source AP), 4 March 2008, *Colombia denuncia a Chávez en la Corte Penal Internacional y Venezuela cierra su frontera*. Available at: <http://www.clarin.com/diario/2008/03/04/um/m-01621051.htm>

departure point for cocaine entering into Europe.<sup>28</sup> Also, a U.S. Department of State Drug Control Strategy Report published earlier this year, stated:

Venezuela is a major drug-transit country; flows of drugs to the United States, Europe and West Africa via Venezuela increased sharply in 2009. Venezuela continues to suffer from high levels of corruption and a weak judicial system. Inconsistent international counternarcotics cooperation and an increase in trafficking patterns through Venezuela enable a growing illicit drug transshipment industry.<sup>29</sup>

### **c. Human Rights in Venezuela**

The third issue is human rights.

Despite this announcement made early in the interview, Oswaldo Álvarez Paz did not address the issue of human rights in Venezuela.

## **5. Reproduction or publication of information with “actual malice”**

From the review above, the opinions and information produced and published by Oswaldo Álvarez Paz, including his very critical and irreverent comments against President Chávez and the Venezuelan government, were not made with “actual malice,” because they were not “produced with the express intention to cause harm, with full knowledge that the information was false or with manifest negligence in the determination of the truth or falsity of the information.” On the contrary, his assertions were based in publicly-available documentary evidence and extensive news reports. In any circumstance, even if he had acted with “actual malice,” international freedom of expression standards call for “civil sanctions,” instead of criminal ones, as the only means to address this conduct.

### **ii. All opinions by Oswaldo Álvarez Paz are protected**

#### **1. Violation of the general prohibition against the criminalization of expression**

As seen above, according to the international human rights legal standard on freedom of expression, there is a general prohibition against the criminalization of any form of expression. The exercise of the right to express oneself freely can never lead to criminal charges and eventual criminal sanctions. The protection of one’s reputation can only be guaranteed through civil proceedings and eventually a civil sanction—never through criminal ones. Furthermore, a person that has exercised the right to freedom of expression may only be subjected to a civil proceeding when his opinions have violated the fundamental rights to privacy and honor of a third party.

Oswaldo Álvarez Paz was criminally charged because he exercised his right to express himself freely. As a result, the Venezuelan state is internationally responsible for violating the general prohibition against the criminalization of expression.

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<sup>28</sup> See Público, 24 Feb. 2010, *De Venezuela sale la mayor parte de la cocaína hacia Europa Occidental*. Available at:

<http://www.publico.es/297671/venezuela/sale/mayor/parte/cocaina/hacia/europa/occidental>

<sup>29</sup> US Dep’t of State, Bureau for International Narcotics and Law Enforcement Affairs, *International Narcotics Control Strategy Report*, 2010, at page 648. Available at:

<http://www.state.gov/documents/organization/137411.pdf>.

**2. Violation of the special prohibition against the criminalization of expression aimed at public officials**

As seen above, according to the international human rights legal standard on freedom of expression, the prohibition against the criminalization of any form of expression applies especially to speech that is directed against public officials.

Oswaldo Álvarez Paz was criminally charged because he exercised his right to express irreverent opinions against the president and the Venezuelan government. As a result, the Venezuelan state is internationally responsible for having violated the special prohibition against the criminalization of expression aimed at public officials.

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

As seen above, according to the international human rights legal standard on freedom of expression, the prohibition against the criminalization of any form of expression applies especially to “subjective opinions” or “value judgments.”

Oswaldo Álvarez Paz was criminally charged because he exercised his right to express “subjective opinions” or “value judgments” criticizing the president and the Venezuelan government. As a result, the Venezuelan state is internationally responsible for having violated the special prohibition against the criminalization of “subjective opinions” or “value judgments.”

**4. Violation of the prohibition against the criminalization of “faithful reproduction of information” and “publication of information provided by third parties”**

As seen above, according to the international human rights legal standard on freedom of expression, the prohibition against the criminalization of any form of expression applies especially in cases of “faithful reproduction of information” and “publication of information provided by third parties.”

Oswaldo Álvarez Paz was criminally charged because he exercised his right to “faithfully reproduce information” and “publish information provided by third parties.” As a result, the Venezuelan state is internationally responsible for having violated the special prohibition against the criminalization of the “faithful reproduction of information” and the “publication of information provided by third parties.”

**5. Violation of the prohibition against the criminalization of the reproduction or publication of information with “actual malice”**

As seen above, according to the international human rights legal standard on freedom of expression, the prohibition against the criminalization of any form of expression applies even in the cases where a person has acted with “actual malice.” None of the opinions by Oswaldo Álvarez Paz can be deemed to have been produced with “actual malice” because they were not “produced with the express intention to cause harm, with full knowledge that the information was false or with manifest negligence in the determination of the truth or falsity of the information.” On the contrary, his

assertions were based on publicly-available documentary evidence and extensive news reports. Even if he had acted with “actual malice,” he could only be subjected to civil proceedings instead of criminal ones.

Oswaldo Álvarez Paz was charged with three crimes because he exercised his right to express opinions that were not even produced with “actual malice.” As a result, the Venezuelan state is internationally responsible for having violated the special prohibition against the criminalization of any form of expression.

**6. Non-applicability of the single exception to the prohibition against criminalizing expression: “Hate speech and incitement to violence” that has “seriously impaired” other fundamental rights**

Oswaldo Álvarez Paz called on all candidates running for the National Assembly “to commit to the idea that one goes to the Assembly to change the [totalitarian] regime, to change the judicial structure that serves as its foundation, to direct policies that put an end to this situation, and that somehow *oblige the president to retract the incredible amount of nonsense he has engaged in—or [oblige him] to leave office*, as a result of legitimate pressure from the National Assembly.”

Oswaldo Álvarez Paz’s call was aimed exclusively at the National Assembly candidates, and was irreverent with the figure of the president or the Venezuelan government. He considers President Chávez “has engaged in” an “incredible amount of nonsense,” and that the Venezuelan government is a “totalitarian regime,” whose “legal structure” must be changed. This call directed at the National Assembly candidates to commit to a certain line of action in the case of their election does not amount to “hate speech and incitement to violence.” Furthermore, Álvarez Paz’s call has not “seriously impaired” anybody’s fundamental rights.

However, Oswaldo Álvarez Paz was charged with three crimes because he exercised his right to express opinions that cannot be considered “hate speech and incitement to violence” that “seriously impaired” another’s fundamental rights. As a result, the Venezuelan state is internationally responsible for having violated the general prohibition against the criminalization of any form of expression.

**E. Conclusion**

Oswaldo Álvarez Paz was indicted, arrested and imprisoned solely for having expressed opinions that were critical of President Chávez and his government.

The different legislative, administrative, and judicial public officials<sup>30</sup> that carried out Oswaldo Álvarez Paz’s indictment, detention, and preventive imprisonment, violated the international human rights legal standard on freedom of expression. This standard is set by Article 13 of the American Convention on Human Rights, ratified by Venezuela in 1977, and the Declaration of Principles on Freedom of Expression, which faithfully

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<sup>30</sup> Those directly responsible for this violation of the international human rights legal standards on freedom of expression are: the Permanent Commission of Science, Technology, and Social Communication of the National Assembly, the Attorney General’s office represented by Gineira Rodríguez, the Tribunal No. 25 of the Metropolitan Area of Caracas and the National Bolivarian Intelligence Service (SEBIN).

interprets Article 13. The Venezuelan state breached Article 13 of the American Convention on Human Rights and Principles 1 and 10 of the Declaration of Principles.

Specifically, Venezuela violated Oswaldo Álvarez Paz's right to hold opinions and impart information freely, without any kind of interference, even if these opinions "offend, shock, or disturb" somebody. Venezuela also violated the general prohibition against the criminalization of any form of expression, as well as the special prohibition against the criminalization of expression that is critical to the government or public officials.