

**REPORT No. 29/19**  
**CASE 13.015**  
MERITS  
EMILIO PALACIO URRUTIA AND OTHERS  
ECUADOR  
MARCH 19, 2019

**I. SUMMARY**

1. On October 24, 2011, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") received a petition claiming the international responsibility of the Republic of Ecuador (hereinafter "the State" or "Ecuador") for the alleged violation of articles 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 13 (Freedom of Thought and Expression), and 21 (Right to Property) of the American Convention on Human Rights (hereinafter "the American Convention" or "Convention"), in relation to articles 1.1 and 2 thereof, to the detriment of Emilio Palacio Urrutia, journalist and editorialist of the newspaper El Universo, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga, executives of said newspaper (hereinafter "the petitioners" or "the alleged victims").

2. The Commission approved the Admissibility Report No. 66/15 on October 27, 2015 and notified said report to the parties, being open to reaching a friendly settlement. The parties had the statutory deadlines to present their additional observations on the merits. All the information received was duly transferred between the parties.

**II. POSITIONS OF THE PARTIES**

**A. Petitioners**

3. The petitioners reported that the alleged victims were convicted for expressing opinions about an elected official and regarding acts related to the exercise of their office, in a trial marked by irregularities and with disproportionate sanctions incompatible with the standards of freedom of expression, in addition to the fact that their rights to due process, to personal freedom, and to private property were affected, in a context of "[systematic] use of the Public Power to persecute journalists and media and thus censor them".

4. With regard to the right to freedom of expression, the petitioners said that in this context, the highest government authorities unleashed a political and judicial persecution against journalist Emilio Palacio Urrutia and the directors of the newspaper El Universo of Guayaquil as part of a government policy aimed at suppressing criticism, accountability through the press, and free democratic debate. They indicated that the newspaper "El Universo and its directors, Messrs. Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga have been victims of a merciless persecution by the Ecuadorian State," through a series of sanction procedures that have resulted in "high fines and continue to harm the precarious economic situation of the newspaper."

5. The petitioners indicated that the alleged victims were sentenced to imprisonment for a crime that protects public officials, which "it is not compatible with a democratic society" and that, in this sense, the penalty imposed "was not necessary or proportional". They argued that the criminal offense applied becomes more burdensome given the existence of "misuse of power, since this judgement was issued in response to a direct request (complaint) from the [p]resident of the Republic" and that he himself requested that to typify the crime it be taken in account "his role as 'Head of State and government'". Likewise, the petitioners alleged that they were imposed an economic sanction for the crime of slanderous insult with exorbitant amounts that violate the right to property, with the potential impact of the closure of the newspaper, the silencing of an independent media, and the potential loss of employment of several people.

6. They also alleged violations of the right to a fair trial due to the "lack of independence of the Judiciary" in a context of "judicial harassment and persecution against journalists"; irregularities in the appointment of temporary judges, in the issuance of the judgment of first instance, in the denial of evidence, and in the preparation of the judge who issued the judgment of first instance. Finally, the petitioners argued that although once the process was over, then President Correa pardoned the convictions, the fact that "[t]he absolute extinction of the right was not materialize, it does not mean that it has not been violated through a

firm criminal conviction [...]. In any case, this sanction did not disappear, but its execution was suspended" which caused serious damage to the rights of the victims and society as a whole.

## **B. State**

7. The State maintained that the process was pursued due to the publication of the article called "*No a las mentiras*", published on February 6, 2011 in the newspaper "El Universo", in which the author referred to the then President Correa as "dictator" and "accused him of committing crimes against humanity", for which the affected party requested on February 28 "that a preparatory proceedings for the document be carried by the Provincial Prosecutor's Office of Guayas".

8. It indicated that Ecuador has a normative framework compatible with inter-American standards and that "[i]n the domestic sphere a criminal proceeding was carried out for the commission of a crime that was fully established in the domestic legal system and that it is not contrary to the American Convention. Also, the process was respectful of the rights of the parties and concluded to convict those involved; subsequently, this conviction was archived because the affected party pardoned the sentence imposed, as well as cancelled the monetary damage compensation ordered by the judgment, for which reason, the ruling was never executed." "In addition, it has been proven that the petitioners have never stopped expressing themselves freely, since to date [...] they have freely exercised the right enshrined in Article 13 of the Convention."

9. It stated that the alleged victims, during the criminal proceedings instituted against them for the aforementioned criminal offense, were able to exercise their right to defense, and presented remedies and appeals that they had considered "pertinent," which included "several recusals". The State argued that "[t]hese actions were heard by competent judges and courts." In addition, it indicated that they had the right to be heard and that "the judges and courts, when deciding their case, considered all the elements presented and, after conducting the respective analysis, concluded that the criminal offense of serious slanderous insult was perpetrated by the petitioners against the complainant."

10. It alleged that they were tried by "competent judges and tribunals in accordance with legally established procedures", that "they belonged to the [j]udicial [f]unction complying with the requirements provided by law," that the Ecuadorian regulations "guarantee the independence of the [j]udicial [f]unction", and that the judges were impartial subjectively and objectively. It also indicated that the alleged victims "were heard, within a reasonable time" and that "[the right to] the presumption of innocence was not violated." Regarding the evidence requested by the alleged victims that were not admitted, the State said that a large part of them were presented extemporaneously, some "repeated" and "the judge applying the rule of sound criticism, admitted to processing those pertinent to the case". It concluded that "due process was respected" at all times.

11. The State argued that the petitioners had an extraordinary protection action, which constituted an appropriate remedy for the claims; in this sense, it argued that if there was a violation of rights in the decision of the criminal proceeding by which they had been prosecuted, they were entitled to file an extraordinary appeal for protection, but "they decided not to do so, a situation that cannot be attributed to the State "

## **III. FACTUAL ANALYSIS**

### **A. Context**

12. During the period of 2007-2017 the IACHR and its Office of the Special Rapporteur for Freedom of Expression (hereinafter "the Office of the Special Rapporteur") expressed its concern regarding a series of acts and State measures that deviate from the international standards on freedom of expression. In the same way, concern was expressed on several occasions for a speech made by high authorities that stigmatized journalists and media that maintained a critical editorial line; as a result, several journalists and

media outlets were subject to judicial proceedings under laws on *desacato*, defamation, and libel; they were sued civilly for moral damages; laws that seriously affected the functioning of the media were also adopted<sup>1</sup>.

13. Recently, within the framework of an official visit by the Office of the Special Rapporteur to Ecuador, between August 20 and 24, 2018, the Office of the Special Rapporteur documented that between 2007 and 2017 "the government of Ecuador designed and implemented a systematic policy to discredit, stigmatize, constrain, and punish [...] journalists, the media, human rights defenders, and political opponents". It also documented that "[t]he journalists [who] were investigating and disseminating information that the government understood to be false or contrary to their interests, social leaders, human rights defenders, and opponents who spread opinions and ideas contrary to the political movement that was called the 'citizen revolution' [...] were subject to special persecution"<sup>2</sup>.

#### **B. Regarding the newspaper El Universo and the government of President Rafael Correa**

14. The newspaper El Universo was founded on September 16, 1921 and is one of the most widely circulated written media in Ecuador. According to the statute reform of 2003, the "El Universo S.A." —a legal person whose corporate purpose is to publish the aforementioned newspaper— had a social capital authorized at that time of five million twenty thousand dollars<sup>3</sup>. Currently, it has at least eight hundred employees<sup>4</sup>. In addition, it has received numerous recognitions and prizes for the journalistic work during almost a century of operation<sup>5</sup>.

15. In the context of the government presided by Rafael Correa, El Universo was subject to sanction measures ordered by the State apparatus and to statements uttered against the aforementioned newspaper<sup>6</sup>. For example, on April 29, 2008, then President Rafael Correa asked the Governor of Guayas to initiate a criminal proceeding against the newspaper for a publication<sup>7</sup>; On January 12, 2009, an assault was recorded against a journalist of the media when trying to conduct an interview; On August 4 of the same year, several media outlets -including El Universo- would have been threatened simultaneously through an email and accused of manipulating information<sup>8</sup>; in 2010, the Office of the Special Rapporteur registered in its Annual Report the conviction of three years of imprisonment against journalist Emilio Palacio who had been sued for crimes against honor by the then head of the National Financial Corporation [*Corporación Financiera Nacional*] (CFN)<sup>9</sup>; In the same year, journalist Peter Tavra Franco was sentenced to six months in prison and to pay a compensation of three thousand dollars, following a published journalistic note for which a trial was initiated<sup>10</sup>; in 2014, the newspaper had to pay a fine of 90,000 dollars for the publication of a humor caricature of cartoonist

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<sup>1</sup> In this sense, see: IACHR. Press Release No. R51/09. Office of Special Rapporteur for Freedom of Expression concerned about prison sentence for journalist in Ecuador. July 21, 2009; IACHR. Press Release No. R40/10. Office of the Special Rapporteur for Freedom of Expression concerned about prison sentence for journalist in Ecuador. March 31, 2010; IACHR. Press Release No. R104/11. Office of the Special Rapporteur expresses concern regarding confirmation of conviction against journalist, directors, and media outlet in Ecuador. September 21, 2011; IACHR. Press Release No. R134/11. Office of the Special Rapporteur expresses concern over criminal verdict against journalist in Ecuador. December 27, 2011; IACHR. Press Release No. R32/11. Office of the Special Rapporteur for Freedom of Expression expresses concern regarding the existence and application of criminal defamation laws against persons who have criticized public officials in Ecuador. April 15, 2011.

<sup>2</sup> IACHR. Press Release No. R188/18. Office of the Special Rapporteur concludes its visit to Ecuador and presents its preliminary observations and recommendations on freedom of expression in the country. August 24, 2018.

<sup>3</sup> Modification of the Bylaws of El Universo Anonymous Company. Annex No. 93 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>4</sup> See: El Universo, "Quienes somos", no date. Available at: <https://www.eluniverso.com/quienessomos/organizacion.htm#3>

<sup>5</sup> Annex 5. Acknowledgments El Universo. Annex No. 87 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>6</sup> Annex 2. Compilation of statements by the National Government against the newspaper El Universo. Annex N° 85 of the Initial Petition presented to the IACHR on October 24, 2011. See also, Initial Petition presented to the IACHR on October 24, 2011, pages 39 to 44.

<sup>7</sup> IACHR. Annual Report 2008. Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter II (Evaluation of the state of freedom of expression in the hemisphere). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. February 25, 2009. Para. 106.

<sup>8</sup> IACHR. Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter II (Evaluation of the state of freedom of expression in the hemisphere). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Paras. 197 y 202.

<sup>9</sup> IACHR. Annual Report 2010. Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter II (Evaluation of the state of freedom of expression in the hemisphere). OEA/Ser.L/V/II. Doc. 5. March 7, 2011. Para. 213.

<sup>10</sup> IACHR. Annual Report 2010. Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter II (Evaluation of the state of freedom of expression in the hemisphere). OEA/Ser.L/V/II. Doc. 5. March 7, 2011. Para. 212.

Bonil that was considered by the government as false, defamatory, and "inaccurate"<sup>11</sup>, who in an unprecedented event was forced to rectify said caricature. As for the stigmatizing statements, for example, on January 7, 2017, during the show hosted by President Correa himself called "*Enlace Ciudadano*", he described the Expreso and El Universo media, and some of their columnists as "corrupt press" and "ignorant", and accused them of "bad faith" and of being the "shame of others," after they published articles and opinions on the financial management of the country<sup>12</sup>. In addition, he has publicly qualified journalists on several occasions as "ink hitmen", "journalists without ethics", "clowns"<sup>13</sup>, among other public statements.

### **C. Regarding the alleged victims**

#### **1. Emilio Palacio Urrutia**

16. Emilio Palacio Urrutia, worked as a journalist, columnist, and "Opinion Editor" in the newspaper El Universo since February 1, 1999<sup>14</sup>. In 2005, at the time when Correa was the Minister of Finance, Palacio published an article called "*Bocazas*" —in which he criticized the statements made by the then official regarding the adoption of the dollar as the official currency—<sup>15</sup>. As he has stated in public media, that article would have been rejected by the then official —later President of the Republic—<sup>16</sup>. On May 19, 2007, Palacio participated in a public debate with invited journalists —which was broadcasted from the weekly radio link of then President Correa—. During the debate, the journalist expressed critical opinions and amid interruptions, the then president ordered his expulsion from the program<sup>17</sup>. On May 13, 2009, due to his criticism, the journalist would have been threatened via email; consequently, the journalist reported the events and was assigned police protection<sup>18</sup>. In 2010, he was sentenced to three years in prison for having published a critical article against the then head of the National Financial Corporation (CFN) of Ecuador, Camilo Samán<sup>19</sup>. After the trial and conviction as a result of the article "*No a las Mentiras*", on July 7, 2011, Palacio decided to resign to his position at El Universo<sup>20</sup>. Later, in 2012, he obtained political asylum in the United States of America<sup>21</sup> and currently has a blog on the Internet where he publishes opinion articles<sup>22</sup>.

#### **2. Carlos Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga**

17. At the time of the events, Carlos Nicolás Pérez Lappenti served as president and legal representative of the El Universo Company, and also as deputy director of "Nuevos Medios" of the same company. As president and legal representative, he had the functions of "[p]residing the sessions of the general meeting of shareholders". Also, as deputy director of "Nuevos Medios", he had the mission "to design and plan the development and creation of digital products and services for Grupo El Universo". For his part, Carlos Eduardo Pérez Barriga served as executive vice president and legal representative of El Universo and was a journalistic director of said media since 2002. As director, he had the mission of "defining the editorial line, as

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<sup>11</sup> IACHR. Press Release No. R188/18. [Office of the Special Rapporteur concludes its visit to Ecuador and presents its preliminary observations and recommendations on freedom of expression in the country](#). August 24, 2018.

<sup>12</sup> IACHR. [Annual Report 2017. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the state of freedom of expression in the hemisphere OEA/Ser.L/V/II. Doc. 210/17. December 31, 2017. Para. 453.

<sup>13</sup> See: Knight Center for Journalism in the Americas. The University of Texas at Austin, "[Discurso estigmatizante de Correa fomentaría agresiones contra la prensa en Ecuador, aseguran organizaciones](#)". May 23, 2015.

<sup>14</sup> Annex 3. Documents El Universo. Annexes No. 25, 90, 91 93, 94, 97 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>15</sup> See: El Universo, "[Bocazas](#)", July 17, 2005; Emilio Palacio, "[Mi vida en 850 palabras](#)", no date.

<sup>16</sup> See: Emilio Palacio, "[Mi vida en 850 palabras](#)", no date.

<sup>17</sup> See: El Universo, "[Correa expulsa a columnista al que invitó a su cadena](#)", May 20, 2007; presidenciaecuador / You Tube channel. [Cadena Radial Diálogo con el Presidente 2](#). May 29, 2007.

<sup>18</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the state of freedom of expression in the hemisphere). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 201

<sup>19</sup> IACHR. [Annual Report 2010. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the state of freedom of expression in the hemisphere). OEA/Ser.L/V/II. Doc. 5. March 7, 2011. Para. 213. This case is under the admissibility stage before the IACHR.

<sup>20</sup> See: El Universo, "[Emilio Palacio renunció a El Universo](#)", July 10, 2011.

<sup>21</sup> See: El Universo, "[Estados Unidos concede asilo político a Emilio Palacio](#)", August 30, 2012.

<sup>22</sup> See: <http://www.emiliopalacio.com/portada.html>

well as the guidelines governing the newspaper El Universo and its products" and "to resolve, in matters of great importance, the focus and content of the news"; "to receive the letters of the readers, and to arrange the answers, clarifications, or rectifications of publications that were necessary". César Enrique Pérez Barriga served as general vice president and legal representative of El Universo. In December 2002, he was appointed to the position of deputy editor of the newspaper. As vice president, he had the legal representation functions of the company and "of approving the design and editorial scheme of any company product"<sup>23</sup>.

#### **D. Facts of the Case**

##### **1. Case context and the article "*No a las Mentiras*"**

18. On September 30, 2010, Ecuador was immersed in a political crisis that was described as an attempt "coup d'état" by the government of the time<sup>24</sup>. On that occasion, the IACHR condemned any attempt to alter the constitutional and democratic order<sup>25</sup>.

19. In addition to the well-known public interest of the information on these episodes, its circumstances generated diverse reactions, interpretations, and opinions on the part of political leaders, legislators, officials, journalists, and academics. In this context, on February 6, 2011, Emilio Palacio Urrutia published an article called "*No a las mentiras*", in which he offered his point of view about the events of September 30 that shocked the country and in which he harshly criticized the performance of the then president in this and other events.

20. The journalistic piece in its entirety is the following:

This week, for the second time, the Dictatorship informed through one of its spokespersons that the Dictator is considering the possibility of pardoning the criminals who rose on September 30, for which he is studying a pardon. I do not know if the proposal includes me (according to the dictatorial chains, I was one of the instigators of the coup); but if so, I reject it.

I understand that the Dictator (a Christian devotee, a man of peace) does not miss an opportunity to forgive criminals. He pardoned the drug trafficking mules, he sympathized with the murdered detained in the Littoral Penitentiary, he asked the citizens to let themselves be robbed so that there were no victims, and he cultivated a great friendship with the land invaders and turned them into legislators, until they betrayed him

But Ecuador is a secular state where it is not allowed to use faith as a legal basis to exempt criminals from paying their debts. If I committed a crime, I demand that you prove it to me; otherwise, I expect no judicial forgiveness but the due apologies.

What actually happens is that the Dictator finally understood (or his lawyers made him understand) that he has no way of demonstrating the alleged crime of September 30, since everything was the product of an improvised script, in the midst of running, to hide the irresponsibility of the Dictator to go into rebellious barracks, to open his shirt and

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<sup>23</sup> Annex 3. Documents El Universo. Annexes No. 25, 90, 91 93, 94, 97 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>24</sup> OAS. Permanent Council. [OAS Permanent Council Repudiates Events in Ecuador and Supports the Government of President Correa](#). September 30, 2010.

<sup>25</sup> IACHR. Press Release No. N° 99/10. [IACHR condemns any attempt to alter democratic order in Ecuador](#). September 30, 2010.

scream out to be killed like a wrestling [*cachacacán*] fighter who strives in his show in a circus tent in a forgotten village.

At this point, all the "evidence" to accuse the "coup plotters" has been unraveled:

The Dictator recognizes that the bad idea of going to the Quito Regiment and entering by force was his. But then nobody could be prepared to kill him since nobody expected it.

The Dictator swears that the former director of the Police Hospital closed the doors to prevent his entry. But then there was no plot there either because they did not even want to see his face.

The bullets that killed the police officers disappeared, but not in the offices of Fidel Araujo but in an enclosure guarded by forces loyal to the dictatorship.

To show that on September 30 he did not wear an armored vest, Araujo put one on in front of his judges and then put on the same shirt he was wearing that day. His accusers had to blush at the palpable demonstration that armored vests simply cannot be hidden.

I could go on, but space does not allow it. However, since the Dictator understood that he must retreat with his ghost story, I offer him a way out: it is not the pardon that must be processed, but the amnesty in the National Assembly.

Amnesty is not pardon, it is legal oblivion. It would imply, if it is resolved, that society came to the conclusion that on September 30 too many stupidities were committed, by both sides, and that it would be unfair to condemn some and reward others.

Why could the Dictator propose the amnesty for the "*pelucones*" Gustavo Noboa and Alberto Dahik, but instead wants to pardon the "*cholos*" police?

The Dictator should remember, finally, and this is very important, that with the pardon, in the future, a new president, perhaps his enemy, could take him to a criminal court for ordering fire at will and without warning against a hospital full of civilians and innocent people.

Crimes against humanity, lest not forget, do not prescribe<sup>26</sup>.

## **2. The trial for insult**

21. As a consequence of the article that has been transcribed, the then President Rafael Correa carried out a preparatory procedure before the Provincial Prosecutor's Office of Guayas to identify the author of the article. On February 28, 2011, the Prosecutor's Office request the director of El Universo to send in 48 hours the names and surnames of the author or those responsible for the entire content, as well as an original copy of the article<sup>27</sup>.

22. Subsequently, on March 21, then President Correa filed a lawsuit against Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, César Enrique Pérez Barriga, and Carlos Eduardo Pérez Barriga, for the criminal offense "serious slanderous insult to authority", as well as against the company El Universo. In the complaint, he mentioned his "authority" role and, therefore, requested the "maximum penalty" of three years in prison for each one. He also requested that the declaration of the monetary estimate of the damage be an amount not less than 50 million dollars. He also requested that the company El Universo be declared the author of the crime of slanderous insult and that the declaration of the monetary estimate of the damage be an amount not less than 30 million dollars<sup>28</sup>.

23. On May 3, 5, 9, and 26, of 2011, the defendants answered, and they argued the nullity and lack of jurisdiction of the court due to the impossibility of judging legal persons; the incompatibility of criminal norms that criminalize freedom of expression; the persecution through judicial measures with the purpose of censoring freedom of expression and the lack of responsibility of the directors of the media; as well as regarding the dual role of the complainant, both as president and as private citizen<sup>29</sup>.

24. On May 12, 2011, the secretariat of the Fifteenth Court of Criminal Guarantees of Guayas notified the parties of an order mentioning that the officials of the court were mistreated by the lawyers of Rafael Correa, who stated that they deserved a "Special treatment" for being representatives of the president. As a result of this order, on May 30, 2011 Correa's lawyers filed a criminal complaint against Judge Oswaldo Sierra, before the provincial prosecutor's office of Guayas for allegedly committing the crime of "denaturalization [of] the matter" in the drafting of the document. On May 17, 2011, the then head of the Fifteenth Court of Criminal Guarantees of Guayas, Oswaldo Sierra, was notified of a decision to suspend him in

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<sup>26</sup> Annex 4. Article *No a las Mentiras*. Annex No. 1 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>27</sup> Annex 5. Correa's previous procedures. Annex No. 2 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>28</sup> Annex 6. Complaint by Rafael Correa. Annex No. 3 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>29</sup> Annex 7. Briefs to rebut the complaint. Annexes No. 4, 5, 6, and 9 of the Initial Petition presented to the IACHR on October 24, 2011.

his post for a term of 90 days as a result of a disciplinary sanction in relation to another case in his docket. As a result, Juan Paredes Fernández undertook the case, with temporary status, as of May 19<sup>30</sup>.

25. On June 6, 2011, the court issued and notified the parties the order granting a six-day period for the presentation of documentary evidence, the request for expert opinions, and the announcement of witnesses. On June 8, and then on July 1, respectively, orders for admission and inadmissibility of evidence from the complainant and the defendants were issued. Of the evidence requested by Palacio, the court denied the linguistic expert opinion of the text of the article "*No a las mentiras*"<sup>31</sup>. In this regard, the State notes that "this refusal was framed in the provisions of Article 94 of the Criminal Procedure Code", which states, "experts refers to professionals specialized in different subjects that have been accredited as such, by a previous qualification process of the Regional Directorates of the Council of the Judiciary." Finally, the State notes that "the requested expert opinion was denied since the linguistic expert requested by the defendant Emilio Palacio Urrutia, did not appear accredited in the Provincial Directorate of the Council of the Judiciary"<sup>32</sup>. Likewise, most of the evidence requested by the other defendants was denied and a small group was not dismissed by the court<sup>33</sup>. In this regard, the State indicates that "the requests were presented on June 13, 2011, that is, outside the evidence period provided for in Article 372 of the Criminal Procedure Code, as Judge Encalada analyzed in her July 1, 2011 ruling, the evidence period expired on June 12, 2011"<sup>34</sup>.

26. On June 10 and 29, 2011, and then on July 4 of the same year, respectively, the defendants recused the judges Juan Paredes Fernández, Sucre Garcés Soriano, and Mónica Encalada, who on different dates undertook the case temporarily due to the previous recusals. Then, on July 5, July 11, and 13, respectively, the respective recusals were denied, and Juan Paredes Fernández resumed in the case, who appears as the judge who issued the first instance ruling<sup>35</sup>. The minutes of June 16 and 30, and July 5, 2011, indicate that the judges who undertook the case due to the recusals were within the "Eligible Bank"; however, information was not provided on how the bank was drawn up in relation to the "initial training course", the declaration of "eligible" and the "contest of opposition and merits" indicated in article 72 of the Organic Code of the Judicial Function<sup>36</sup>. The State did not provide documentation on these requirements. Likewise, the minutes do not reflect the participation or scrutiny of the defendants during the lottery process.

27. On July 1, 2011, the temporary Judge Mónica Encalada summoned the parties to the trial hearing for July 19, the date on which it was actually held<sup>37</sup>. Between 9 and 16 July 2011, Correa publicly stated that he would withdraw the complaint if the defendants admitted that they had lied and if they "rectified the lie"<sup>38</sup>. However, on July 19, during the substantiation of the hearing, before the offer by the executives of El

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<sup>30</sup> Annex 8. Documents judge Oswaldo Sierra and designation of Juan Paredes. Attachments No. 7, 8, 22, and 23 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>31</sup> Annex 9. Documents regarding the opening, application, admission and denial of evidence. Annexes No. 18, 25, 26, 27, 28, and 95 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>32</sup> Fact affirmed by the State in its brief of observations submitted to the Commission on December 13, 2016.

<sup>33</sup> Annex 9. Documents regarding the opening, application, admission and denial of evidence. Annexes No. 18, 25, 26, 27, 28, and 95 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>34</sup> Fact affirmed by the State in its brief of observations submitted to the Commission on December 13, 2016..

<sup>35</sup> Annex 10. Brief of recusals and actions of personnel, minutes, and inadmissibility of recusals. Attachments No. 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>36</sup> Article 72. Eligible Bank.

Those who pass the initial training course, having been declared eligible in the competitions of opposition and merits, and yet not being appointed, will be included in a bank of eligible persons that will be in charge of the Human Resources Unit.

If it is necessary to fill vacancies, priority will be given to those who make up the eligible bank, in strict order of qualification.

This bank will also choose who should replace the heads of courts in case of foul, impediment, or contingency.

The stay in the eligible bank will be six years.

It will be valued as merit to have integrated the eligible bank for new competitions, in accordance with the respective regulations.

In the case of vacancies of judges of Provincial Courts, Prosecutors, and Public Defenders of the different territorial sections, the same rules established in this article will apply.

<sup>37</sup> Annex 11. Documents Judgment hearing. Annexes No. 18 and 31 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>38</sup> Annex 12. Documents *Enlace Sabatino*. Attachments No. 29 and 30 of the Initial Petition presented to the IACHR on October 24, 2011; See: [archivodigital.eu / You Tube](#). July 9, 2011. [Enlace 228 09-07-11 Correa sobre demanda a El Universo editorial 30-S.mpg](#). See: El Universo, "[Correa pidió en varias ocasiones una rectificación a El Universo: ahora sus abogados la rechazan](#)", July 19, 2011.

Univero to reproduce in its entirety the text "of the required rectification" to end the trial, the then president rejected the conciliation, a less harmful means to freedom of expression<sup>39</sup>.

## 2.1 First instance judgment

28. The first instance judgment was published on July 20 under the signature of Judge Juan Paredes Fernández, and declared Emilio Palacio Urrutia responsible in the degree of perpetrator of "the offense established in Article 489 of the Criminal Code under the circumstances of Article 491 and sanctioned in the first paragraph of Article 493 of the same body of law". As a result, he was sentenced to three years in prison. Likewise, Carlos Nicolás Pérez Lapentti, César Enrique Pérez Barriga, and Carlos Eduardo Pérez Barriga were found responsible for the degree of intervening authors and sentenced to three years in prison. The directors of the media were also condemned to pay in solidary —for damages— 30 million dollars. The company El Universo was sentenced to pay additional ten more million dollars. In addition, those responsible were sentenced to pay the costs of the trial<sup>40</sup>.

29. The first instance judgment notes the possibility of criminal judges determining the civil damages. In addition, it concludes on the legal possibility of condemning a legal person, in order to hold liable by means of a criminal trial the company El Universo. Likewise, it expresses that the inter-American principles and standards regarding freedom of expression, conventionality control, and inter-American jurisprudence are not binding and do not form part of the constitutional block. It affirms that the Constitution of Ecuador only admits the text of ratified international treaties to domestic law<sup>41</sup>. Below, the main arguments that were considered in the judicial decision are extracted.

30. Regarding the assessment of the article written by Emilio Palacio Urrutia, the considerations of the Judgment states:

When reading the article mentioned, from its beginning it is preparing and inducing the reader against "the Dictator" with a series of minor insults that seek to put in the mind of the reader a marked disaffection against the economist Rafael Vicente Correa Delgado [...] Undoubtedly, this "animus injuriandi" is present when Emilio Palacio Urrutia writes in a social media that is read nationally and worldwide, [...] accusing him of committing a serious crime, perhaps the worst that exists in the world, a crime against humanity, as it is "ordering fire at will against a hospital full of civilians", and it is not a value judgment as the defendant alleges, because although the word "could" suggests an event that can or not happen, but then immediately makes the affirmation of "ordering fire at will and without warning against a hospital full of civilians and innocent people"; that is to say, this affirmation that "could" or could not happen, in no way alters the nuclear meaning of the insult reigning verb, be it that the "new president" wants to take it or not to the Criminal Court, the affirmation -ordering fire at will- does not change the vexation of which the complainant is a victim. [...]

31. Regarding the assessment of the damage allegedly brought to the then President Rafael Correa, the considerations of the Judgment states:

[...] in this process, with the documentary evidence that has been provided, it has been determined that the complainant, economist Rafael Vicente Correa Delgado, is a professional who has his family, who has been distinguished with multiple academic degrees, thanks to his studies inside and outside the country, who has been Minister of Finance and is currently the Constitutional President of the Republic, who has had under his responsibility the General Budget of the State [...]; administration that has been entrusted to him by the sovereign people of Ecuador given his impeccable conduct, resume, and activities in the public and private sphere, besides being a professor, prominent speaker in world forums, etc. [...] This does cause serious damages, both an emerging damage, because it

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<sup>39</sup> Annex 11. Documents Judgment hearing. Annexes No. 18 and 31 of the Initial Petition presented to the IACHR on October 24, 2011. See: El Universo, "[Correa rechaza ofrecimiento de EL UNIVERSO de publicar el texto íntegro de su rectificación](#)", July 19, 2011.

<sup>40</sup> Annex 13 First instance judgment. Annex No. 32 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>41</sup> Annex 13. First instance judgment. Annex No. 32 of the Initial Petition presented to the IACHR on October 24, 2011.

undermines the trust that people have in him, as well as a loss of income, which is related to the future projection that a statesperson has in his activities, both public as well as private, [...].

32. Regarding the limitations on the right to freedom of expression, the considerations of the Judgment states:

[...] Freedom of expression has a limit. For those people who are not clear about it, making comments, opinions, etc., that go beyond this limit is called insult in Ecuadorian law and it is a crime that, as such, is judged by criminal law. [...]

## 2.2 Second instance and appeals

33. On July 22, then-President Rafael Correa filed an appeal, through which he appealed the amount of the complementary conviction and demanded that the "amount be increased"<sup>42</sup>. However, at the second instance "oral, public and contradictory" hearing, "he withdrew his appeal"<sup>43</sup>. On July 22 and 26, 2011, the company El Universo, Carlos Pérez Barriga, César Pérez Barriga, and Carlos Nicolás Pérez Lappenti filed an appeal against the first instance judgment. Likewise, Emilio Palacio filed a remedy for annulment and appeal on July 26<sup>44</sup>.

34. On August 9, 2011, the Second Criminal Chamber of the Provincial Court of Justice of Guayas undertook the process. On August 16, said court set the appeal hearing for August 25, also stating that "video recordings of the proceeding will not be made"; On August 22, the hearing was postponed for August 30, on the grounds that Rafael Correa would not be present due to a trip, and decided to deny the request for separate hearings on nullity and appeal; on August 26, the court pointed out that due to the integration of Judge Henry Morán on that day, and the requirement of "appropriate time to study the process," the hearing would be postponed until September 13, 2011; On September 5, the appeal hearing was postponed for October 4, 2011, due to the integration of Judge Helen Mantilla Benítez de Infante set for September 12, "which would make it impossible for her to hear the process and the court to discuss the arguments"<sup>45</sup>.

35. On September 9 and then 14, of 2011, the defendants asked the court to change the date of the hearing scheduled for October 4, due to a trip to be made by Nicolás Pérez Lapentti for health reasons on September 12, which was not granted. The complainant, for his part, opposed this request through a document submitted on September 13, for the hearing to be called "as soon as possible"<sup>46</sup>.

36. On September 14, 2011, the Second Criminal Chamber of the Provincial Court of Justice of Guayas resolved, among others, not to grant the request for the suspension of the case and its referral to the Constitutional Court requested by the attorney Mónica Vargas Cerdán; that the nullity and appeal proceedings be resolved at the same hearing; that the "Public and Contradictory Oral Hearing" will be held on September 16, 2011, revoking "in its entirety" the orders of September 5 and 12, 2011. Likewise, the ruling stated that the "deadline had long elapsed since the first twenty days since the process was assigned to the substation chamber." On the other hand, the ruling resolved to grant "certified copies" required by the attorney Jorge Roditti "as long as the process is not under study and review by the judges that make up this chamber"<sup>47</sup>.

37. On September 15, 2011, the attorneys for the alleged victims were notified of the order of September 14 and challenged the court's decision in writing and argued that the ruling that set the hearing was not "enforceable", for which it could not remain "firm". They also stated that the revocation of the September 12 ruling was made "ex officio". Emilio Palacio Urrutia, on the other hand, requested the "partial revocation" of the ruling of September 14 and requested that the provisions of the order of September 5, 2011 be maintained, that is, to keep the October 4 hearing. In addition, by writing of the attorneys Mónica Vargas Cerdán and Jorge Roditi questioned that Judge Monfilio Florentino Serrano "did not appear on the list of eligible to undertake the

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<sup>42</sup> Annex 14. Correa and defendants appeal documents. Annexes No. 35 and 39 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>43</sup> Annex 15. Second instance judgment. Annex No. 59 of the Initial Petition presented to the IACHR on October 24, 2011, page 7.

<sup>44</sup> Annex 16. Correa and defendants appeal documents. Annexes No. 35, 36, 37, 38 and 39 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>45</sup> Annex 17. Documents second instance, hearing determination. Annexes No. 45, 46, 47, 48 and 49 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>46</sup> Annex 18. Request for change of hearing defendants and opposition of Correa. Annexes No. 50 and 51 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>47</sup> Annex 19. Order September 14, 2011. Annex No. 53 of the Initial Petition presented to the IACHR on October 24, 2011.

Criminal Chamber" and that he "undertook the position a few hours before the issuance of the order", given the temporary absence of Judge Primo Díaz. They also mentioned in the letter that "if the hearing has not taken place, it was precisely at the request of the complainant, since at the first hearing he was out of the country" and that this was one of the reasons "for the alleged excess of the established deadline." Finally, the brief noted violations of the "right to defense" and the "equality of conditions of the parties"<sup>48</sup>.

38. On September 16, César Pérez Barriga recused Judges Hellen Mantilla Benítez, Henry Morán Morán, and Guillermo Freire, who were members of the Second Criminal Chamber of the Provincial Court of Justice of Guayas, for "lack of integrity" and "lack of impartiality"<sup>49</sup>; however, a hearing was held in which Emilio Palacio Urrutia and his lawyers did not participate<sup>50</sup>.

39. The court rejected the arguments on the nullity and immediately went on to hear the arguments on the appeal. At the end of the day of approximately 12 hours, the procedure was suspended for September 22, but continued on September 20 after an irregular action by the Second Criminal Chamber of the Provincial Court of Justice of Guayas, which issued a providence on Saturday the 17th which that was notified on September 19. On September 20, the hearing continued and on September 22 the judgment was published with a vote that declared the innocence of Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga, "as well as the non-responsibility of the company El Universo S.A." and "confirms the culpability in the degree of author of Emilio Palacio Urrutia" with a penalty of "six months in prison". In that regard, the appeal was rejected and the judgment of first instance "in all its parts" was ratified<sup>51</sup>.

40. Regarding linguistic expertise, the second instance judgment mentions, "we note that this request was not applicable, because the imputed offence, slanderous insult, is one of those committed through social media -in this case written press- and therefore it was enough to read the article, as a common citizen, to establish its meaning and scope, being therefore adequate according to the procedural rule, the appreciation of said expertise request by the Temporary Judge [...]"<sup>52</sup>.

## **2.3 Proceedings pursued**

### **2.3.1 Extension of the appellate court ruling**

41. On September 23, 2011, former President Correa requested the clarification and extension of the second instance judgment, despite having withdrawn the appeal as mentioned. In the letter, he requested that the recusal presented by César Enrique Pérez Barriga on September 16 be declared "unfounded" for having presented it before "the Chamber" and not before the "Secretariat of the Presidency of the Provincial Court of Guayas, so that it would be sorted among one of the District Criminal Chambers"; and declare the "abandonment of the remedies for annulment and appeal filed by Messrs. Emilio Palacio Urrutia, Carlos Pérez Barriga, Carlos Pérez Lappenti, and the Company El Universo" because they were not present at the beginning of the hearing". On September 26, based on the brief presented by Correa, the Second Criminal Chamber of the Provincial Court of Justice of Guayas, without communicating this to the parties, extended the sentence in the sense of marking the recusal claim filed by the defendants on the day of the hearing as "not filed", and the abandonment of the remedies for annulment and appeal filed by Emilio Palacio Urrutia for not having participated in the appeal hearing; the enforcement of the judgment of first instance against Palacio was ordered<sup>53</sup>.

42. On September 30, 2011, former President Correa presented a brief before the Second Criminal Chamber of the Provincial Court of Justice of Guayas, in which he reiterated the request to declare the abandonment of the remedies presented by Carlos Eduardo Pérez Barriga, Carlos Nicolás Pérez Lapentti, and

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<sup>48</sup> Annex 20. Briefs of challenges. Annex No. 54 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>49</sup> Annex 21. Recusal of judges by César Enrique Pérez. Annex No. 55 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>50</sup> Annex 22. Nullity and Appeal Hearing Certificate. Annex No. 56 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>51</sup> Annex 23. Second instance documents, continuation of hearing and sentence. Annexes No. 57, 58, 59, 60 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>52</sup> Annex 23. Second instance documents, continuation of hearing and sentence. Annexes No. 57, 58, 59, 60 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>53</sup> Annex 24. Request for extension and clarification; and extension sentence. Annexes No. 61 and 62 submitted by the petitioners to the IACHR in the petition brief of October 24, 2011.

the Company El Universo<sup>54</sup>. On September 30, Emilio Palacio Urrutia filed a brief with the Second Criminal Chamber of the Provincial Court of Justice of Guayas, requesting that the decision of September 26, 2011, regarding the declaration of "abandonment" of the "nullity and appeal" remedies and the "execution of the judgment"<sup>55</sup>.

### **2.3.2 Cassation appeal**

43. On September 27, 28 and 30, 2011, Emilio Palacio Urrutia, the representatives of El Universo, César Pérez Barriga, Carlos Eduardo Pérez Barriga, and Carlos Nicolás Pérez Lapentti, filed a cassation appeal<sup>56</sup>.

44. On October 4, 2011, the Second Criminal Chamber of the Provincial Court of Justice of Guayas declared "inadmissible" the cassation appeal filed by Emilio Palacio Urrutia because he was not present, nor his lawyers, in the oral appeal hearing<sup>57</sup>. On October 21, 2011, the then president expressed in writing the nullity of the cassation appeals for those who did not attend the appeal hearing<sup>58</sup>.

45. On December 27, 2011, the Second Criminal Chamber of the National Court of Justice, which heard the case on November 7, decided to deny the cassation appeal filed by Emilio Palacio Urrutia, and set the hearing to substantiate the cassation appeal with respect to César Pérez Barriga, Carlos Eduardo Pérez Barriga, and Carlos Nicolás Pérez Lapentti for January 13, 2012<sup>59</sup>.

46. After a series of procedural acts, on February 15, 2012, the cassation appeal court hearing set by the National Court was held<sup>60</sup>. At the hearing, the president of the court prevented Emilio Palacio's lawyer from intervening in his defense on the understanding that he was not part of the appeal under study<sup>61</sup>, which had been denied with the denial of the cassation appeal filed. On February 17, the National Court decided by judgment and declared firm the criminal convictions,<sup>62</sup> and ten days later notified the judgment<sup>63</sup>. The court decision states that the "court of appeal, in issuing a conviction against the appellants imposing the penalties and compensation described therein have not violated the principles, international precedents, laws applicable to the case, the existence of animus injuriandi, and that the participation of the accused had been assessed and determined according to the law"<sup>64</sup>.

### **2.3.3 Factual remedy filed by Emilio Palacio Urrutia**

47. On October 7, 2011, Emilio Palacio filed a factual appeal. In the letter, he mentioned that Article 327 of the Criminal Procedure Code states that "[w]hen a process involving several co-defendants, the appeal filed by one of them will benefit the others, provided that the decision is not based on exclusively personal grounds." In this regard, he stated that "the order issued by that Chamber on October 4, 2011 [...] expressly provides that the cassation appeal filed by Messrs. César Enrique Pérez Barriga, Carlos Eduardo Pérez Barriga, and Carlos Nicolás Pérez Lapentti, and by the representatives of the company EL UNIVERSO was admitted" and that "having been admitted the cassation appeal to these procedural parts, it was applicable for obvious reasons to the cassation appeal filed by me, which has been denied by the Chamber"<sup>65</sup>.

48. On October 7, 2011, the Second Chamber of the Provincial Court of Guayas decided to admit the factual appeal "to be the Superior, the Criminal Chamber of the National Court of Justice, who by lottery

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<sup>54</sup> Annex 25. Brief of Abandonment of Nullity and Appeal remedies. Annex No. 80 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>55</sup> Annex 26. Brief against Order. Annex No. 81 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>56</sup> Annex 27. Cassation Appel briefs. Annexes No. 77, 78 and 79 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>57</sup> Annex 28. Inadmissibility of cassation appeal. Annex No. 82 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>58</sup> Fact affirmed by the State in its brief of observations submitted to the Commission on December 13, 2016.

<sup>59</sup> Fact affirmed by the State in its brief of observations submitted to the Commission on December 13, 2016.

<sup>60</sup> Fact affirmed by the State in its brief of observations submitted to the Commission on December 13, 2016.

<sup>61</sup> Fact affirmed by the State in its brief of observations submitted to the Commission on December 13, 2016.

<sup>62</sup> Fact affirmed by the State in its brief of observations submitted to the Commission on December 13, 2016.

<sup>63</sup> Fact affirmed by the State in its brief of observations submitted to the Commission on December 13, 2016.

<sup>64</sup> Fact affirmed by the State in its brief of observations submitted to the Commission on December 13, 2016.

<sup>65</sup> Annex 29. Factual remedy filed by Emilio Palacio. Annex No. 83 of the Initial Petition presented to the IACHR on October 24, 2011.

hears this process, and pronounces itself on the appropriateness or not of this factual appeal and on the cassation appeal filed by the other defendants ". Consequently, it also decided to suspend the execution of the judgement against Emilio Palacio Urrutia<sup>66</sup>. Finally, on December 27, 2011, the Second Criminal Chamber of the National Court of Justice decided to deny the factual appeal filed by Emilio Palacio Urrutia<sup>67</sup>.

### **2.3.4 Correa's pardon**

49. On February 27, 2012, then President Correa presented in writing before the National Court of Justice and informed his decision of granting "pardon of the judgment in favor of Messrs. Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga, César Enrique Pérez Barriga, and the "El Universo" Company, as well as the cancellation of the obligation to pay damages, and the lawyers' waiver of the right to request the payment of costs<sup>68</sup>. On February 28, 2012, the Criminal Chamber accepted the request for the pardon of the penalty, remission of the payment for damages and procedural costs, and ordered the case to be archived<sup>69</sup>.

### **2.4 Facts related to the case**

50. On August 24, 2011, the representatives of the newspaper El Universo filed a constitutional motion for precautionary measures before the Tenth Court of Children and Adolescents of Guayas, in order to access the information in the computer equipment of the Fifteenth Court of Criminal Guarantees of Guayas with respect to the defendants. The next day, the court admitted the measure against Judge Oswaldo Sierra Ayora, who at that time was the head judge. The precautionary measure ordered a full copy of the contents of the hard disk of "the computer used by the operator and the information relating to the process" in question. On August 26, the expert and technician of the Council of the Transitional Judiciary, Jaime Martínez, made a copy of the hard disk of the Secretariat of the Court in the presence of a Public Notary and Oswaldo Sierra. On September 2, technical specialist Alex Rivera presented a report on the expertise made with respect to the cloned hard drive. In his report he reached a series of conclusions that show that the computer file that had the text presented in the first instance judgment was not created in the computer equipment of the corresponding court, but that it came from an external team<sup>70</sup>.

51. On September 7, 2011, the Temporary Provincial Director of the Council of the Judicature instructed ex officio Carlos Ayala Flores, who served as judge of the Eleventh Court of Family, Women, Children and Adolescents of Guayas; Judge Oswaldo Sierra Ayora, who served as Fifteenth Judge of Criminal Guarantees of Guayas; Nelson Gómez Mauilón, who served as Notary Twenty Fifth Substitute of the Guayaquil canton; and the technician Jaime Martínez Jaramillo, who worked as an Assistant of the Informatics Unit of the Provincial Directorate of the Council of the Judiciary of Guayas, having allowed the completion of the diligence. On September 12, 2011, they were suspended in the exercise of their duties for 90 days by the Council of the Transitional Judiciary<sup>71</sup>.

52. On this point, a series of facts exposed in a public manner and through a public interview given by Mónica Encalada in the media, who acted as a first instance judge in the case temporarily from June 30 to July 16, 2011, exposed a hidden camera recording made by Encalada regarding a conversation held with Juan Paredes, about the judicial case to which Emilio Palacio Urrutia and the executives of El Universo were being subjected, who affirm that Juan Paredes admitted having received from Correa's lawyers the text of the first instance judgment, to which he only made changes in the amount of the conviction<sup>72</sup>.

53. On the other hand, on September 5, 2011, the Executive Power promulgated Decree No. 872 and declared a "state of exception" in the Judicial Branch for (60) sixty days "in order to resolve the critical

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<sup>66</sup> Annex 30. Resolution of October 7, 2011. Annex No. 84 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>67</sup> Fact affirmed by the State in its brief of observations submitted to the Commission on December 13, 2016.

<sup>68</sup> Annex 31. Correa's Brief of Pardon. Annex No. 20 of the observations on the merits presented by the State.

<sup>69</sup> Annex 32. National Court of Justice of February 28, 2012. Annex No. 21 of the observations on the merits presented by the State.

<sup>70</sup> Annex 33. Precautionary measures, admission, notarial deed, and report. Annexes 40, 41, and 42 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>71</sup> Annex 34. Summary documents and suspensions. Annexes 43 and 44 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>72</sup> See: El Universo, "Diálogo entre extécnico de la Corte con el ab. Gutemberg Vera", December 13, 2011; El Universo, "Exjudicial confirma que habló con Gutemberg Vera sobre Chucky Seven", December 14, 2011; "Entrevista (23-04-12) Mónica Encalada",

situation that is going through and duly guarantee the right to justice contemplated in the Constitution of the Republic and to prevent an imminent internal commotion" and declared as a "priority action the formulation, execution, and implementation of projects to improve the judiciary in Ecuador, through the Transformation Plan of the Judiciary"<sup>73</sup>.

54. With regard to the foregoing, the Commission notes that on March 7, 2009, Rafael Correa made a public statement in which he stated that "the President of the Republic is not only the head of the executive power, he is the head of the complete Ecuadorian State; and the Ecuadorian State is the executive power, legislative power, judicial power." Likewise, on January 15, 2011, he mentioned in a public statement, in the context of a series of questions about the constitutional reform, that "the President is going to get his hands in the Court; of course he's going to get them in, to improve that Court with which nobody can be satisfied"<sup>74</sup>.

55. Finally, the Commission observes that in a series of opportunities, Rafael Correa, in his role as President of the Republic, through the so-called show "*Enlace Ciudadano*" through and state media, as well as in his social network, during the time of the trial against the alleged victims, he made stigmatizing public statements against the press in general, against *El Universo*, against Emilio Palacio, and against Joffre Campaña Mora who served as one of the defense lawyers<sup>75</sup>.

56. Among the statements released, prior to the complaint, he mentioned that he would not let *El Universo* "get involved" with the September 30, 2010 events<sup>76</sup>, and he also described this media as "corrupt press"<sup>77</sup>. Another time, he referred to Emilio Palacio as a "poor man" and indicated he "hurt the government"<sup>78</sup>. Also, on February 15, 2012, in the framework of the cassation appeal hearing, he called for a "vigil" for the case to "conclude"<sup>79</sup>. Also, through the same account, he added, "[a]ll in vigil to not leave the hearing without a resolution by the chamber. I fear that the strategy is to aim for the trial to not end today"<sup>80</sup>.

#### **IV. LEGAL ANALYSIS**

57. The Commission will analyze whether, as the petitioner affirms, in the present case there has been a violation of articles 13, 25, 9, 8, and 25 all in relation to Articles 1.1 and 2 of the American Convention on Human Rights.

##### **A. Considerations regarding the scope of the case**

58. The State observed that the "petitioners, throughout the inter-American proceeding, have referred to facts unrelated to the object of the controversy." In this regard, it alleges that "the facts that must be considered by the Inter-American Commission are exclusively those raised in the criminal proceedings, for

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<https://www.youtube.com/watch?v=7p5igztYCs> ; *El Universo*, "Transcripción de parte del diálogo entre Mónica Encalada y Juan Paredes", April 21, 2012. See: <https://www.youtube.com/watch?v=2vVVt4gozg4>

<sup>73</sup> Annex 35. Executive Decree No. 872. Annex No. 76 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>74</sup> Archivodigitaleu / You Tube. October 15, 2011. [Correa Vs. El Universo.mov](https://www.youtube.com/watch?v=2vVVt4gozg4).

<sup>75</sup> Annex 2. Compilation of statements by the National Government against the newspaper *El Universo*. Annex N° 85 of the Initial Petition presented to the IACHR on October 24, 2011, and Annex 2. Documents Under-Secretariat of Information. Annex No. 96 of the Initial Petition presented to the IACHR on October 24, 2011. See also, *Enlace Ciudadano* N° 224, 333, 388, y 369. Available at: <https://www.youtube.com/watch?v=5vyGZ4dHDgw>; <https://www.youtube.com/watch?v=UsKLPhIVkH4>; <https://www.youtube.com/watch?v=SedofUeWSYQ>, and <https://www.youtube.com/watch?v=1u6qck3DM5w>, respectively. See also, Initial Petition presented to the IACHR on October 24, 2011, pages 37 to 44.

<sup>76</sup> Annex 2. Compilation of statements by the National Government against the newspaper *El Universo*. Annex N° 85 of the Initial Petition presented to the IACHR on October 24, 2011, page 6, citing a piece of news from Ecuador TV, March 31, 2011.

<sup>77</sup> Annex 2. Compilation of statements by the National Government against the newspaper *El Universo*. Annex N° 85 of the Initial Petition presented to the IACHR on October 24, 2011, and *Enlace Ciudadano* N° 224. Available at: <https://www.youtube.com/watch?v=5vyGZ4dHDgw>

<sup>78</sup> Annex 2. Compilation of statements by the National Government against the newspaper *El Universo*. Annex N° 85 of the Initial Petition presented to the IACHR on October 24, 2011, pages 10 and 11. See also, *Enlace Ciudadano* N° 224 and 225. Available at: <https://www.youtube.com/watch?v=5vyGZ4dHDgw>, y <https://www.youtube.com/watch?v=qS7FBwDSR7E>

<sup>79</sup> Rafael Correa / Official Twitter account @MashiRafael. February 15, 2012. Available at: <https://twitter.com/mashirafael/status/169909175403560961>

<sup>80</sup> Rafael Correa / Official Twitter account @MashiRafael. February 15, 2012. Available at: <https://twitter.com/mashirafael/status/169892120109387776>

the crime of slanderous insult, which constitute the subject of the dispute, with the evident procedural limitation of introducing other elements"<sup>81</sup>.

59. In this regard, the Commission, implementing Article 43.1 of the Rules of Procedure of the IACHR, examined the allegations and evidence provided by the parties, and took into account information of public knowledge<sup>82</sup>, including reports from the IACHR itself on the general situation of the human rights in Ecuador, publications of non-governmental organizations, laws, decrees, and other normative acts in force at the time of the facts of this case.

60. On the other hand, this body has the purpose of issuing recommendations to the States in case human rights of violations, for which purpose it must necessarily assess the circumstances of the case and the context in which they occurred. In addition, it should be recalled that it falls to the State, in accordance with Article 38 of the Rules of Procedure of the IACHR, to provide relevant information to contest the facts alleged by the alleged victims.

## **B. Supervening facts since the admissibility report that may lead to an incidental admissibility analysis**

### **1. Amicus Curiae**

61. On November 23, 2015, the Commission was notified of document No. 036301 dated November 19, 2015, in which the State requested the rejection of the presentation of *Amicus Curiae* by various organizations, and argued that said figure was alien to the process. However, the request submitted was not considered by the IACHR in the admissibility report, since it was filed after the date of its deliberation. In this regard, the IACHR has previously admitted the presentation of *amicus curiae*<sup>83</sup>. In this sense, the presentation of writings of non-governmental organizations and experts in the field of human rights has the purpose of observing different positions and opinions on an issue under study, which, vitally, enriches the analysis and decision making at the time of assessing the situation and the context in general. Also, the standing of friends of the court is an institution recognized in a large number of legal systems, especially when dealing with matters of public interest.

62. In accordance with the rules of procedure of the Inter-American Court of Human Rights, the *amicus curiae* is a person outside the litigation, which is the situation in this case; however, this does not constitute a procedural disadvantage for the State. In addition, it should be noted that Article 65.1 of the Regulations empowers the Commission to receive testimony from witnesses or experts. Although the friends of the court are not properly witnesses or experts, the information of experts could also be requested by the Commission itself, so it would be unreasonable to reject the presentation of briefs in the capacity of *amicus curiae*. On the other hand, the State is also entitled to present this type of briefs if it considers it necessary.

### **2. Recusal of the Special Rapporteur for Freedom of Expression**

63. The State recused the then Special Rapporteur for Freedom of Expression, Catalina Botero, for the publication of several press releases in which she "expressed her position of condemnation against the Ecuadorian State." In this regard, the IACHR reiterates, as mentioned in the admissibility report of this case, that "a public statement by the Special Rapporteur for Freedom of Expression of the Inter-American Commission that, after a rigorous examination of information, alerted the State about the concern of the Office on possible infractions of the right to freedom of expression, cannot be interpreted as affecting the impartiality of the IACHR, but as the exercise of its powers of promotion and protection."

64. The IACHR reiterates that "maintaining that the issuance of a press release [...] is a ground for inhibiting the members of the IACHR to hear an individual petition on certain facts, unreasonably restricts the essence of the IACHR's primary function and it voids the effectiveness of two of the most important mechanisms

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<sup>81</sup> Fact affirmed by the State in its brief of observations submitted to the Commission on December 13, 2016.

<sup>82</sup> Article 43.1 of the Rules of Procedure of the IACHR: The Commission shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge.

<sup>83</sup> For example, see: IACHR. Report No. 75/02, Merits, Mary Carrie Dann. United States. Available at: <http://cidh.org/annualrep/2002eng/USA.11140.htm>

of promotion and protection of the Inter-American Human Rights System, to the detriment of the victims of human rights violations in the hemisphere."

65. In addition, it adds to the foregoing, "the fact that the Special Rapporteur for Freedom of Expression is not a member of the IACHR and therefore does not participate in the voting of reports on individual petitions." Likewise, it is recorded that the former Rapporteur Catalina Botero has not held the position since October 2014 and did not participate in the evaluation of this case in its admissibility and merits stages.

### **3. Admission of article 25**

66. The State objected in its observations on the merits, the admissibility of Article 25 of the Convention by the Commission in its admissibility report. The State observes that "it is strange that the Inter-American Commission, without further argument, has decided to admit the alleged violation of the aforementioned article, without the facts argued by the parties being able to infer their violation." Regarding this point, although the petitioners did not allege a violation of the aforementioned article, the Commission, after analyzing the circumstances described, determined the admissibility of an alleged violation of Article 25 without prejudging the matter, in accordance with the Rules of Procedure that it provides, in Article 36, paragraph 2, "[t]he adoption of an admissibility report does not constitute a prejudgment as to the merits of the matter."

67. On the other hand, the State, in its observations on the merits, has presented in a timely manner the considerations of fact and law that it considered relevant in order to object to the existence of an alleged violation of Article 25 of the Convention, which fully verifies the exercise of the right to the defense of the State.

68. Finally, it is important to mention that the Commission can automatically observe possible violations of human rights not contemplated by the petitioners, provided that the case comes to the attention of the IACHR. Particularly, according to the testimony and the documentaries presented by the alleged victims, the Commission considered admissible the inclusion of Article 25 of the Convention, which will be analyzed in the present report on the merits.

### **C. Freedom of thought and expression (Article 13) in relation to Articles 1.1 and 2 of the American Convention<sup>84</sup>**

69. The IACHR, in accordance with the doctrine and jurisprudence of the Inter-American Court, has emphasized the importance of the right to freedom of thought and expression in accordance with the protection granted by Article 13 of the American Convention. This enshrines the right to seek, receive, and disseminate information and ideas of all kinds<sup>85</sup>. Likewise, it has highlighted the importance of this right for the development of personality, the exercise of personal autonomy, and other fundamental rights and, and as well for the consolidation and strengthening of democratic society<sup>86</sup>.

70. In this regard, the Commission and the Inter-American Court have held that freedom of

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<sup>84</sup> Article 13 of the American Convention provides that:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
  2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
    - a. respect for the rights or reputations of others; or
    - b. the protection of national security, public order, or public health or morals.
  3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
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<sup>85</sup> I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 30; IACHR, Report No. 82/10, Case 12,524, Merits, Jorge Fontevecchia and Hector d'Amico, Argentina, July 13, 2010, para. 86. Available at: <http://www.cidh.oas.org/demandas/12.524Esp.pdf>.

<sup>86</sup> I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, paras. 31 and 32; IACHR, Report No.

expression has two dimensions: an individual dimension and a social dimension. The first is the right of each person to express their own thoughts, ideas, and information, which is not exhausted as the theoretical recognition of the right to speak or write, but also includes, jointly, the right to use any appropriate means to disseminate the thought and that it reaches the greatest number of recipients<sup>87</sup>. The second is the right that society has to procure and receive any information, which includes knowing the thoughts, ideas, and information of others and being informed<sup>88</sup>. In this sense, the Court has established that this freedom includes the right of each person to try to communicate their points of view to others, but it also implies the right of everyone to freely know opinions, stories, and news of all kinds<sup>89</sup>.

71. The Commission emphasizes that one of the purposes of Article 13 of the Convention is the strengthening of democratic, pluralist and deliberative systems, by protecting and promoting the free flow of information, ideas and expressions of all kinds<sup>90</sup>. This has also been recognized by the European Court of Human Rights<sup>91</sup>, the United Nations Human Rights Committee<sup>92</sup>, and the African Commission and the African Court of Human and Peoples' Rights<sup>93</sup>. It should be noted that Article 4 of the Inter-American Democratic

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82/10, Case 12,524, Merits, Jorge Fontevecchia and Hector d'Amico, Argentina, July 13, 2010, para. 85. Available at: <http://www.cidh.oas.org/demandas/12.524Esp.pdf>.

<sup>87</sup> I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 31.

<sup>88</sup> I/A Court H.R., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 53; I/A Court H.R., Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 75; I/A Court H.R., Case of López Álvarez v. Honduras. Merits, Reparations and Costs. Judgment of February 1, 2006. Series C No. 141, para. 163; IACHR. Arguments before the Inter-American Court in the case of Herrera Ulloa v. Costa Rica. Transcribed in: I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 101.1 a); I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 108; I/A Court H.R., Case of Ivcher Bronstein v. Peru. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74, para. 146; I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 77; I/A Court H.R., Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73, para. 64; I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 30; IACHR. Annual Report 1994. Chapter V: Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights. Title III. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995; IACHR. Report No. 130/99. Case No. 11,740. Víctor Manuel Oropeza Mexico. November 19, 1999. Para. 51; IACHR. Report No. 11/96, Case No. 11,230. Francisco Martorell. Chile. May 3, 1996. Para. 53.

<sup>89</sup> I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 110; I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 79; I/A Court H.R., Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73, para. 66.

<sup>90</sup> IACHR. Arguments before the Inter-American Court in the case of Herrera Ulloa v. Costa Rica. Transcribed in: I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 143. d); IACHR. Arguments before the Inter-American Court in the case "The Last Temptation of Christ" (Olmedo Bustos et al.) V. Chile. Transcribed in: I/A Court H.R., Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73, para. 61. b).

<sup>91</sup> I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 83; I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 113; I/A Court H.R., Case of Ivcher Bronstein v. Peru. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74, para. 152; I/A Court H.R., Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73, para. 69. See also, Eur. Court H.R., Scharsach and News Verlagsgesellschaft v. Austria, no. 39394/98, para. 29, ECHR 2003-XI; Eur. Court H.R., Perna v. Italy [GC], no.48898/98, para. 39, ECHR 2003-V; Eur. Court H.R., Dichand and others v. Austria, no. 29271/95, para. 37, ECHR 26 February 2002; Eur. Court H.R., Case of Lehideux and Isorni v. France, Judgment of 23 September, 1998, para. 55; Eur. Court H.R., Case of Otto-Preminger-Institut v. Austria, Judgment of 20 September, 1994, Series A no. 295-A, para. 49; Eur. Court H.R. Case of Castells v. Spain, Judgment of 23 April, 1992, Serie A. No. 236, para. 42; Eur. Court H.R. Case of Oberschlick v. Austria, Judgment of 25 April, 1991, para. 57; Eur. Court H.R., Case of Müller and Others v. Switzerland, Judgment of 24 May, 1988, Series A no. 133, para. 33; Eur. Court H.R., Case of Lingens v. Austria, Judgment of 8 July, 1986, Series A no. 103, para. 41; Eur. Court H.R., Case of Barthold v. Germany, Judgment of 25 March, 1985, Series A no. 90, para. 58; Eur. Court H.R., Case of The Sunday Times v. United Kingdom, Judgment of 29 March, 1979, Series A no. 30, para. 65; y Eur. Court H.R., Case of Handyside v. United Kingdom, Judgment of 7 December, 1976, Series A No. 24, para. 49.

<sup>92</sup> UN, Human Rights Committee, *Aduayom and others v. Togo* (422/1990, 423/1990 y 424/1990), decision of July 12, 1996, para. 7.4; and UN, Human Rights Committee. General Comment No. 34: Article 19 Freedom of opinion and freedom of expression. September 12, 2011.

<sup>93</sup> African Commission on Human and Peoples' Rights, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96, Decision of 31 October, 1998, para. 54; African Commission on Human and Peoples' Rights.

Charter characterizes freedom of expression and the press as "fundamental components of the exercise of democracy"<sup>94</sup>.

72. Despite its fundamental importance, freedom of expression is not an absolute right. Article 13.2 of the American Convention, which prohibits prior censorship, also provides for the possibility of establishing restrictions on freedom of expression, through the application of subsequent liabilities, for the abusive exercise of this right. However, these restrictions are exceptional and must satisfy the conditions imposed by the Convention, that is, they must be provided for in law, have a legitimate purpose, and be necessary and proportional to the attainment of that end in a democratic society<sup>95</sup>. Failure to comply with any of these requirements implies that the measure imposed is contrary to the American Convention.

73. Regarding compliance with the aforementioned conditions, the IACHR and the Inter-American Court of Human Rights have repeatedly pointed out that States have a more limited scope to impose restrictions on the right to freedom of expression "whenever it refers to expressions related to the State, matters of public interest, public officials in the exercise of their functions or candidates for public office, or individuals voluntarily involved in public affairs, as well as discourse and political debate"<sup>96</sup>.

74. In the same vein, it has been said that the analysis of proportionality of restrictive measures must take into account: "(1) the highest degree of protection enjoyed by expressions related to the suitability of public officials and its management or those who aspire to hold public office; (2) the political debate or the debate on matters of public interest —given the need for a greater margin of openness for the broad debate required by a democratic system and the citizen control inherent in it—; and (3) the correlative threshold of greater tolerance to criticism that state institutions and officials must demonstrate in the face of affirmations and assessments made by persons in the exercise of such democratic control[...]" The Inter-American Court stresses that "expressions concerning the suitability of a person for the performance of a public office or acts performed by public officials in the performance of their duties enjoy greater protection, in such a way as to encourage democratic debate"<sup>97</sup>.

75. In particular, it is essential that journalists who work in the media enjoy the necessary protection and independence to carry out their duties fully, since they are the ones who keep society informed, an essential requirement so that it enjoys full freedom and public debate strengthens<sup>98</sup>.

76. In this case, it has not been disputed that the State used criminal law to sanction an expression protected in principle by the right to freedom of expression, being the most restrictive and severe instrument it has. Nor has it been questioned that the statements made by journalist Emilio Palacio Urrutia are related to a matter of public interest linked to the actions of the President of the Republic, acting as an elected official. It

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Declaration of Principles on Freedom of Expression in Africa. 17 - 23 October, 2002; African Court on Human Rights and Peoples' Rights. In the Matter of Lohé Issa Konaté v. Burkina Faso. Application No. 004/2013. Judgment December 5, 2014.

<sup>94</sup> Art. 4, Inter-American Democratic Charter, approved September 11, 2001. Available at: [http://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/resolution1_en_p4.htm).

<sup>95</sup> Cfr. I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 120; I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 95, and I/A Court H.R., Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 79; I/A Court H.R., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 54. See also: Annual Report of the Inter-American Commission on Human Rights, Annual Report 2009 of the Office of the Special Rapporteur for Freedom of Expression, page. 258, paras. 68 and 69.

<sup>96</sup> IACHR. Annual Report 1994. Chapter V: Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights. Title III. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995, and Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 100. See also, I/A Court H.R., Case of Ivcher Bronstein v. Peru. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74; Corte IDH, I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107; I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111; I/A Court H.R., Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135; I/A Court H.R., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177.

<sup>97</sup> IACHR. Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 101.

<sup>98</sup> IACHR. Arguments before the Inter-American Court in the case of Herrera Ulloa v. Costa Rica. Transcribed in: I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 119.

was not contested that the article published in the newspaper El Universo, under the title "*No a las mentiras*", was an opinion article<sup>99</sup>. Likewise, the first instance conviction, confirmed in higher instances, condemned for serious slanderous insult against the authority to a severe sentence of imprisonment against journalist Emilio Palacio Urrutia -author of the article- and to Carlos Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga, executives of El Universo. The courts imposed a compensation for damages unprecedented in the region, valued at 30 million dollars to be paid by the natural persons. They also condemned the legal entity that publishes El Universo to ten million dollars. After these judgements were finalized, the complainant forgave and condoned the convictions imposed.

77. The Commission assessed that in the present case we are faced with an opinion article written by journalist Emilio Palacio Urrutia and published by the newspaper El Universo in 2012, in the context of a controversial event of greater public interest, of which the main protagonist was the then President Rafael Correa. It should be noted that the then President Correa did not lack means, resources, or spaces to defend his position in a public way and respond to criticisms and questions addressed to his administration. Similarly, there is no doubt that at the time of the events there was a policy of confrontation and hostility led by the president and the state apparatus against a good part of journalists and the media in Ecuador, in particular against the newspaper El Universo.

### **1. Criminal conviction against journalist Emilio Palacio Urrutia**

78. The circumstances of the episodes that occurred on September 30, 2010 in Ecuador, which began with a police strike, followed by the intervention of the then President and the Army, drew national and international attention. Due to this, Emilio Palacio Urrutia wrote the opinion article "*No a las Mentiras*", about an event that gave rise to a controversy that continues to date, related to the nature of the episode, the responsibilities that can fit both the officers who exercised the protest, as to the acts of the President and other high authorities, as well as on the use of force by the state security agencies.

79. The IACHR observes in the present case that the opinions published by journalist Emilio Palacio Urrutia were expressed in the form of intense questions to a presidential action, but they do not escape the margin of tolerance required by a democracy in which public officials are subject to citizen control. As the IACHR has pointed out on other occasions, "[t]he kind of political debate that the right to freedom of expression gives rise to will inevitably generate certain critical or even offensive speeches for those who hold public office or are intimately linked to the formulation of public policy"<sup>100</sup>.

80. The IACHR understands that this case deals with the importance of freedom of expression and journalism in a democratic society, while it refers to public officials and matters of high public interest. At the same time, the IACHR wishes to emphasize that journalistic activity must also be governed by ethical conduct, although these should not be imposed by the States. As the Inter-American Court and the European Court have pointed out, the development of a responsible and ethical journalism is of particular relevance in a contemporary society where the media not only informs but can also suggest, through the way they present the information, the way that information should be understood.<sup>101</sup>

81. "In the democratic context, expressions of public officials or persons exercising public functions, as well as of candidates for public office, should enjoy a particularly reinforced margin of openness"<sup>102</sup>. It should be stressed that "public officials and those who aspire to be, in a democratic society, have a different threshold of protection, which exposes them to a greater degree to public scrutiny and

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<sup>99</sup> Fact affirmed by the petitioner in his petition brief, presented on October 24, 2011 to the IACHR. This fact has not been contested by the State. In document No. 08162 dated June 5, 2012, submitted to the IACHR, the State mentions: "On February 6, 2011, the article was published by Mr. Emilio Palacio titled '*No a las mentiras*' in the Columnists section of the newspaper 'El Universo'".

<sup>100</sup>IACHR. Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 41. IACHR. Annual Report 1994. Chapter V: Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights. Title III. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995.

<sup>101</sup> IACHR, Declaration of Principles on Freedom of Expression, Principle 6, available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26&IID=1>. See also, I/A Court H.R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, para. 139.

<sup>102</sup> IACHR. Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 40.

criticism, which is justified by the public interest nature of the activities that they carry out, because they have been voluntarily exposed to a more demanding scrutiny and because they have an enormous capacity to controvert the information through their power of public dissemination"<sup>103</sup>.

82. On the other hand, the commission observes that State officials holding elective positions, in particular the Presidency of the Republic, have a greater possibility of disseminating, expressing, defending and even of replicating accusations that they consider unfair or offensive, since they attract the attention of the media and have the resources of the State to disseminate them. This is a particularly important element in the case under study, given that the Commission itself has verified in its monitoring tasks that the then President Correa had wide spaces in the media and at official events to defend his positions and even to refer to the journalists and the media.

83. As has been explained, in these types of cases, the Commission is responsible for analyzing, under a strict judgment of necessity, whether the measure imposed is authorized in light of the terms of Article 13.2 of the American Convention, that is to say: (a) it is defined in an express, exhaustive, precise and clear way through a law in a formal and material sense; (b) pursues compelling objectives authorized by the Convention; and (c) it is absolutely necessary in a democratic society to achieve those ends, and strictly proportionate to the purpose pursued<sup>104</sup>.

## 2. Tripartite test

### 2.1. Strict formulation of the provision establishing the limitation or restriction (legal provision)

84. Following the IACHR's and the Inter-American Court of Human Rights doctrine, the requirement of *legality* means that the legal provision that creates a restriction on freedom of expression must be contained in a law in precise and clear terms<sup>105</sup>. The criminalization must be formulated "in an express, precise, exhaustive, and prior manner, even more so when criminal law is the most restrictive and severe means to establish responsibilities with respect to unlawful conduct, taking into account that the legal framework must provide legal security for the citizen"<sup>106</sup>.

85. The IACHR has referred to and emphasized that the norms that limit freedom of expression must be written with such clarity so that any effort at interpretation is unnecessary. In the *Kimel v. Argentina* case, the Inter-American Court determined that the criminalization of libel and insult offenses violated articles 13 and 9 of the American Convention, in relation to articles 1.1 and 2, because it was excessively ambiguous and broad<sup>107</sup>, and subsequently in the monitoring stage declared that the State had complied with the ruling when it reformed the criminal offences, specifying the element of intentionality of the crimes and delimiting the scope of application of the criminal norm in order to protect speeches referring to matters of public interest, among others<sup>108</sup>.

86. In the present case, by a complaint filed by the then President of the Republic of Ecuador Rafael Correa, the petitioners Emilio Palacio Urrutia (journalist), Carlos Nicolás Pérez Lapentti, César Enrique Pérez Barriga, and Carlos Eduardo Pérez Barriga (directors of the newspaper El Universo), as well as the legal

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<sup>103</sup> IACHR. Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 40.

<sup>104</sup> IACHR. Report No. 4/7. Case 12.663. Merits. Tulio Alberto Álvarez. Venezuela. January 26, 2017, para. 64. Available at: <http://www.oas.org/en/iachr/decisions/court/2017/12663FondoEn.pdf>

<sup>105</sup> IACHR. Report No. 4/7. Case 12.663. Merits. Tulio Alberto Álvarez. Venezuela. January 26, 2017, para. 65. Available at: <http://www.oas.org/en/iachr/decisions/court/2017/12663FondoEn.pdf>

<sup>106</sup> IACHR. Report No. 4/7. Case 12.663. Merits. Tulio Alberto Álvarez. Venezuela. January 26, 2017, para. 65. Available at: <http://www.oas.org/en/iachr/decisions/court/2017/12663FondoEn.pdf>

<sup>107</sup> The Court analyzed the formulation of Article 109, which provided that "insult or false accusation of an offense that gives rise to public action, shall be punished with imprisonment of one to three years," and Article 110, which provided that "he who dishonors or discredits another shall be punished with a fine of one thousand five hundred pesos to ninety thousand pesos or imprisonment from one month to one year," and found that "the deficient criminal regulation of this matter" in the configuration of the crime constituted a violation of Articles 9 and 13.1 of the American Convention. I/A Court H.R., Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, paras. 64-67.

<sup>108</sup> I/A Court H.R., Case of *Kimel v. Argentina*. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of May 18, 2010, paras. 30-35. See also, Law 26.551, enacted on November 26, 2009, available at: <http://infoleg.gov.ar/infolegInternet/anexos/160000-164999/160774/norma.htm>.

entity El Universo, were condemned for the commission of the crime of serious slanderous insult against the authority, in accordance with the interpretation of the Criminal Code then in force in Ecuador.

87. Article 489 of the Criminal Code in force at the moment of issuing the judgment, prescribed the following: "insult is: slanderous, when it consists in the false imputation of a crime; and, not slanderous, when it consists in any other expression uttered in discredit, dishonor, or disparagement of another person, or in any action executed for the same purpose". Article 490 of the same legal body states that "non-slanderous insults are serious or minor: serious are: [...] imputations that rationally deserve the classification of serious, given the state, dignity, and circumstances of the victim and the offender [...]". Then, article 491 states that "the inmate of slanderous insult shall be punished with imprisonment from six months to two years and a fine of six to twenty-five dollars from the United States of North America, when the accusations have been made: [...] by means of writings, printed or not, images or emblems fixed, distributed, or sold, offered for sale, or exposed to the eyes of the public [...]". Finally, article 493 states that "it shall be punished with one to three years of imprisonment and a fine of six to twenty-five dollars from the United States of America, those that have addressed to the authority accusations that constitute slanderous insult. If the accusations made to the authority constitute non-slanderous but serious insults, the penalties shall be imprisonment from six months to two years and a fine of six to nineteen dollars of the United States of North America".

88. In the specific case, these three articles have been interpreted by the Ecuadorian courts as a criminal offense of "serious slanderous insults against public authority"<sup>109</sup>.

89. As stated above, the Inter-American Court in the *Kimel v. Argentina* case, concluded that the criminalization of libel and insult offenses violated articles 13 and 9 of the American Convention, in relation to articles 1.1 and 2<sup>110</sup>, because they were formulated in a manner ambiguous and broad. Likewise, in the case of *Usón Ramírez v. Venezuela*, the IACHR determined that a criminal offense referred to the "insult, offense, or disregard of the national armed forces", which did not clearly establish the elements of the crime, and did not specify the required fraud by the active subject, allowing the subjectivity of the offended person to determine the existence of a crime, violated articles 9 and 13 of the American Convention, in relation to articles 1.1 and 2<sup>111</sup>. In this regard, it considered that the ambiguity and breadth of the rule allows any complaint, criticism, or objection to the actions of public authorities to give rise to long criminal proceedings that in themselves involved psychological, social, and economic costs that the person is not in the obligation to stand given the ambiguous nature of the norm that establishes them<sup>112</sup>. Consequently, it reiterated that "if the State decides to keep the regulations that sanction insult and libel, it must specify it in such a way that freedom of expression is not affected based on the actions of public bodies and their members"<sup>113</sup>.

90. The IACHR understands that Article 489 of the Ecuadorian Penal Code applied to the case was incompatible with the principle of strict criminal legality and the right to freedom of expression, because it did not establish clear parameters that would allow the prohibited conduct and its elements to be foreseen. In its first hypothesis, it sanctions "the false imputation of a crime" and the seriousness refers to the "dignity" of the victim and to his or her position of "authority". This formulation does not establish a clear and unambiguous frontier to determine when it is lawful or not to publicly denounce criminal acts or to issue a critical opinion regarding a state authority. On the contrary, the indeterminacy of the norm opens the way to the use of

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<sup>109</sup> The State, in its observations on the merits, says: "On March 21, 2011, Rafael Correa Delgado, brought before the Judge of Criminal Guarantees of Guayas, a private accusation against the Company 'El Universo,' and Emilio Palacio Urrutia, Carlos Nicolás Pérez Lapentti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga, for the alleged crime of serious slanderous insults against public authorities, a criminal offense that was established in articles 48910 and 49311 of the Ecuadorian Criminal Code."

<sup>110</sup> The Court analyzed the formulation of Article 109, which provided that "insult or false accusation of an offense that gives rise to public action, shall be punished with imprisonment of one to three years," and Article 110, which provided that "he who dishonors or discredits another shall be punished with a fine of one thousand five hundred pesos to ninety thousand pesos or imprisonment from one month to one year," and found that "the deficient criminal regulation of this matter" in the configuration of the crime constituted a violation of Articles 9 and 13.1 of the American Convention. I/A Court H.R., I/A Court H.R., Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, paras. 64-67.

<sup>111</sup> 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, paras. 56-57.

<sup>112</sup> IACHR, *Report No. 88/10, Case 12.661*, Merits, Néstor José and Luís Uzcátegui et al., Venezuela, July 14, 2010, para. 279.

<sup>113</sup> Arguments of the Inter-American Commission in the *Kimel v. Case Argentina*, I/A Court H.R., Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 29.

criminal law to generate an intimidating environment that inhibits speech and debate about episodes of public interest<sup>114</sup>.

91. The second hypothesis of the rule in question subjects the definition of unlawful conduct to the verification of subjective criteria such as the expression "proffered in discredit, dishonor, or disparagement". That is, it refers to elements that can only be defined by the judge *ex post facto* and is not capable of guiding the conduct of individuals, in the face of the serious consequence that imprisonment and the derogation of political rights mean.

92. In the present case, the State has not shown that the elements of the criminal offense under study have been specified in the judgment in this case, in such a way as to permit the broadest debate on matters of public interest and the exceptional use of criminal law to establish subsequent liabilities when faced with speeches specially protected by the right to freedom of expression as the jurisprudence of the Inter-American System has repeatedly demanded. On the contrary, the court considered as a basis of criminal attribution subjective elements, such as that the article "*No a las mentiras*", has had national and world-wide dissemination, which insults [President Correa] regarding the events of September 30, 2010 (...), because it undermines the trust that people have in him"<sup>115</sup>.

93. The Commission notes that in the specific case an aggravating circumstance was applied, increasing criminal liability: the fact that the slanderous insult was "directed to an authority" (Article 493). In this regard, the Inter-American Commission reaffirmed that *desacato* laws, which offer greater protection to public officials, are not compatible with the spirit of the Convention. "The implementation of *desacato* laws to protect the honor of public officials who act in an official capacity, unjustifiably gives them a right to protection that is not available to other members of society. Moreover, by protecting officials against defamatory expressions, *desacato* laws establish a structure that ultimately protects the government itself from criticism," the Commission said in its 1995 report<sup>116</sup>.

94. The Commission is aware that in 2014, the State of Ecuador modified the crime of slander, through Article 182 of the new Comprehensive Criminal Organic Code. Which was drafted as follows: "[t]he person who, by any means, makes a false accusation of one crime against another person, shall be punished with imprisonment from six months to two years." In its second paragraph, it adds: "it is not considered slander statements issued before authorities, judges, and courts, when the accusations have been made based on the defense of the case." And continues: "it shall not be responsible for slander the person who proves the veracity of the accusations. However, in no case will evidence be admitted about the imputation of an offense that has been the subject of a sentence ratifying the innocence of the accused or dismissing or archiving the case."

95. Despite the 2014 amendment and the repeal of the criminal offense of slanderous insult, the State did not unequivocally eliminate the possibility of criminalizing criticism directed at public authorities. This could open the way to criminal proceedings that have an inhibitory effect on speeches of public interest. Likewise, the judgment against Palacio and the executives of El Universo has not been reviewed or revoked by the State in light of the elements of the new criminal offense, thus the sanction remains firm to this day.

96. In view of the foregoing, the Commission concludes that the ambiguity and scope of Article 489 and following of the Criminal Code, applied in this case, imply a breach of the requirement of strict legality in the imposition of restrictions on the rights to freedom of expression of Emilio Palacios, Carlos Nicolás Pérez Lapentti, César Enrique Pérez Barriga, and Carlos Eduardo Pérez Barriga, resulting in a violation of Article 13.1 and 13.2 of the American Convention, in relation to Article 1.1 thereof. In the same way, since this violation has occurred as a result of the application of a law that does not comply with the requirements of strict legality and,

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<sup>114</sup> IACHR, *Report No. 88/10, Case 12.661*, Merits, Néstor José and Luís Uzcátegui et al., Venezuela, July 14, 2010, para. 279.

<sup>115</sup> Annex 13. First instance judgment. Annex No. 32 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>116</sup> IACHR. Annual Report 1994. Chapter V: Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights. Title III. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995, pages 210 to 223. Annex D.

in the exercise of its jurisdiction, *iura novit curia*, the Commission concludes that the State also failed to comply with Article 9 and 2 of Convention.

## **2.2. Legitimate aim of the restriction**

97. The limitations imposed on freedom of expression must also pursue the achievement of some of the overriding objectives established exhaustively in the American Convention. According to Article 13.2 of the American Convention, the protection of the honor and reputation of others can be a reason to establish subsequent liabilities for the abusive exercise of freedom of expression<sup>117</sup>, which implies that anyone who considers themselves injured in their reputation may resort to the judicial means of the State available for their protection<sup>118</sup>.

98. In the present case, the IACHR observes that the crime of "serious slanderous insult against the authority", for which the journalist Emilio Palacio Urrutia was sentenced, sought to protect the reputation and honor of then President Rafael Correa. The Commission finds then that the second element of the test would be satisfied. However, the Commission warns that this element alone does not authorize the use of criminal law in cases such as the one under analysis. Next, it will be analyzed if the limitation imposed in order to protect the honor or reputation was strictly necessary for the functioning of the democratic society.

## **2.3. Strict necessity and proportionality of the restriction**

99. As mentioned, the Commission and the Inter-American Court have consistently held that the test of the need for limitations on freedom of expression must be applied more strictly to political discourse and matters of public interest<sup>119</sup>, as well as the discourse about public officials and candidates for public office<sup>120</sup>. Democratic control through public opinion promotes the transparency of state activities and promotes the responsibility of public officials for their public management, which is why there must be a reduced margin for any restriction of political debate or debate on issues of public interest<sup>121</sup>. In the case of *Kimel v Argentina*, the Inter-American Court of Human Rights stated that there should be extremely serious data "that highlights the absolute need to use, in a truly exceptional manner, criminal measures"<sup>122</sup>.

100. The Commission has mentioned that "[t]he kind of political debate that gives rise to the right to freedom of expression will inevitably generate certain critical or even offensive speeches for those who occupy public positions or are intimately linked to the formulation of public policy"<sup>123</sup>. In this regard, the IACHR has maintained that the protection of honor or reputation should only be guaranteed through civil sanctions in cases where the offended person is a public official or a public or private person who has voluntarily been involved in matter of public interest<sup>124</sup>, always in accordance with the principles of democratic pluralism<sup>125</sup>. As

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<sup>117</sup> I/A Court H.R., Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para.71; I/A Court H.R., Case of *Tristán Donoso v. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, para. 118.

<sup>118</sup> I/A Court H.R., Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 55; I/A Court H.R., Case of *Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 101.

<sup>119</sup> I/A Court H.R., Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, paras. 57 and 87; I/A Court H.R., Case of *Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, paras. 84, 86, and 87; I/A Court H.R., Case of *Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 83; I/A Court H.R., Case of *Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 127.

<sup>120</sup> I/A Court H.R., Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 86; I/A Court H.R., Case of *Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 82.

<sup>121</sup> IACHR, Report No. 82/10, Case 12,524, Merits, Jorge Fontevecchia and Hector d'Amico, Argentina, July 13, 2010, para. 99. See also, I/A Court H.R., Case of *Ivcher Bronstein v. Peru*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74, para. 155; I/A Court H.R., Case of *Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 127.

<sup>122</sup> I/A Court H.R., Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 78.

<sup>123</sup> IACHR. Annual Report 1994. Chapter V: Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights. Title III. OEA/Ser. L/V/IL.88. doc. 9 rev. February 17, 1995.

<sup>124</sup> IACHR, Declaration of Principles on Freedom of Expression, Principle 10.

<sup>125</sup> I/A Court H.R., Case of *Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 128.

a consequence, the use and application of criminal mechanisms to sanction expressions on issues of public interest, and especially on public or political officials, *per se* violates article 13 of the American Convention, since there is no imperative social interest that justifies it, it is unnecessary and disproportionate, and can also constitute a means of indirect censorship given its intimidating and inhibiting effect on the debate on matters of public interest<sup>126</sup>.

101. In this regard, it is relevant to mention that the European Court of Human Rights has repeatedly considered unnecessary and/or disproportionate, and therefore incompatible with the right to freedom of expression enshrined in Article 10 of the European Convention, the imposition of criminal sanctions (even when they have not been made effective) in relation to expressions on matters of public interest<sup>127</sup>, as a consequence of speeches clearly offensive or disturbing that may affect the rights of public servants. In effect, in the case *Castells v. Spain*, the European Court determined that the Spanish State violated Article 10 by sentencing a senator to a year and a day in prison who accused the national government and the monarchy of complicity in a series of murders in the Basque Country<sup>128</sup>.

102. However, in the last decade, the European Court, in addition to finding that the application of criminal law is unnecessary and disproportionate in the specific case, has developed a general rule on the exceptional nature of criminal sanctions when it comes to expressions on matters of public interest. Thus, the European Court has stated that "a prison sentence imposed for an offense committed in the field of political discourse is compatible only with the freedom of expression guaranteed by Article 10 of the Convention in exceptional circumstances, in particular, when other fundamental rights have been seriously affected, as in the hypothesis, for example, for the dissemination of hate speech or incitement to violence"<sup>129</sup>.

103. This jurisprudential rule was established by the Court in 2004 in the case of *Cumpănă and Mazăre v. Romania* mentioned above, and reiterated subsequently in the *Fatullayev v. Azerbaijan* and *Otegi Mondragon v. Spain*, among others. Regarding this last case, the Court analyzed the existence of a possible violation of the right to freedom of expression in a criminal conviction for the crime of insults against the King, uttered by a politician. The Court understood that the expressions that gave rise to the criminal conviction, according to which the questioned official (in this case the King) was the head of an army of torturers that had been imposed by the political regime through the exercise of terror, even if they were annoying, disturbing, or unfair, they were part of the political debate or of public interest. To this end, the Court considered that while the determination of penalties is in principle, a prerogative of national jurisdictions, the imposition of a prison sentence is not compatible with freedom of expression when it is applied to sanction expressions issued against public figures in the framework of the political debate, except in the case of extreme cases, such as when expressions constitute hate speech or incitement to violence<sup>130</sup>.

104. The European Court has since emphasized, in addition, the fact that the existence of prison sentences in terms of freedom of expression has an "evident" and "inevitable" chilling effect on the exercise of this right, and inhibits investigative journalists from reporting on matters of general public interest<sup>131</sup>. For the European Court, the rights to reputation, honor, and privacy of officials must be protected by adequate and

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<sup>126</sup> IACHR. Arguments before the Inter-American Court in the case of Herrera Ulloa v. Costa Rica. Transcribed in: I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 101.2); IACHR. Arguments before the Inter-American Court in the case of Ricardo Canese v. Paraguay. Transcribed in: I/A Court H.R., Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 72.h).

<sup>127</sup> See, for example, European Court of Human Rights, *Castells v. Spain*. Complaint no. 11798/85. April 23, 1992; *Dalban v. Rumania*. Complaint no. 28114/95. September 28, 1999; *Şener vs. Turkey*. Complaint no. 26680/95. July 18, 2000; *Halis v. Turkey*. Complaint no. 30007/96. January 11, 2005; *Fatullayev v. Azerbaijan*. Complaint no. 40984/07. April 22, 2010; *Gutiérrez Suarez v. Spain*. Complaint no. 16023/07. June 1, 2010.

<sup>128</sup> European Court of Human Rights, *Castells v. Spain*. Complaint no. 11798/85. April 23, 1992.

<sup>129</sup> European Court of Human Rights, *Cumpănă y Mazăre v. Rumania*, Complaint no. 33348/96. December 17, 2004, para. 115; *Fatullayev v. Azerbaijan*. Complaint no. 40984/07. April 22, 2010, para. 103; *Otegi Mondragon v. España*. European Court of Human Rights. Complaint no. 2034/07. September 15, 2011, para. 59.

<sup>130</sup> European Court of Human Rights. *Otegi Mondragon v. Spain*. Complaint no 2034/07. September 15, 2011, paras. 50 and 59.

<sup>131</sup> European Court of Human Rights, *Cumpănă y Mazăre v. Rumania*, Complaint no. 33348/96. December 17, 2004, paras. 113-114; *Fatullayev v. Azerbaijan*. Complaint no. 40984/07. April 22, 2010, para. 102.

proportionate remedies that do not inhibit the vigor of the debate on topics of high public relevance, or that may silence criticism or dissent.

105. The African Court of Human and Peoples' Rights has considered that "freedom of expression in a democratic society should be subject to a lower degree of interference when it originates in the context of public debate regarding public persons". It has mentioned that "people who assume a highly visible public role must necessarily face a greater degree of criticism than private citizens, otherwise the public debate can be completely stifled"<sup>132</sup>. In the ruling issued in the *Lohé Issa Konaté case v. Burkina Faso*, the African Court considered as contrary to the right to freedom of expression recognized in article 9 of the African Charter, the prison sentence imposed on the general editor of a weekly for the publication of an article denouncing the counterfeiting and laundering of counterfeit bills by judicial authorities<sup>133</sup>. The African Court held that "except in serious and very exceptional cases, such as incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or group of people, due to specific criteria such as race, color, religion or nationality, infractions of the laws on freedom of expression and the press cannot be punished with prison sentences"<sup>134</sup>.

106. In a similar vein, the UN Human Rights Committee indicated in its General Comment No. 34 on *Article 19 Freedom of opinion and freedom of expression*, that States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others"<sup>135</sup>.

107. In the present case, we are facing a prison sentence imposed in the context of political speech of evident public interest, properly, on the manner in which a public official handled a situation of high public relevance as, in effect, were the events of September 30, 2010. As explained below, the IACHR considers that the State has not demonstrated compliance with the requirement of necessity of the measure imposed in this type of circumstances.

108. On the one hand, journalist Emilio Palacio, in his usual column in the newspaper *El Universo*, expressed his opinion, under his name, on a strike or protest involving a section of the police and the decisions taken by the President of the Republic to deal with that situation, a matter without doubt of high public relevance. While some of his expressions may be considered, unfair, controversial, or even not shared, they were in no way expressions of incitement to violence. All of which, in accordance with the standards mentioned above, does not enter into the hypotheses that make the use of criminal law and prison sentences necessary.

109. In this regard, the IACHR notes that the column published by Palacio is basically an opinion, which falls within the sphere of public debate. In effect, the columnist describes the government as a "dictatorship", in charge of a "dictator", and believes that during the episodes of September 30 the government acted "product of an improvised script, in the midst of running, to hide the irresponsibility of the Dictator to go into rebellious barracks, to open his shirt and scream out to be killed (...)". He also understands that "the 'proofs' to accuse the 'coup leaders' have been unraveled."

110. The Commission does not enter to assess the fairness of write's opinions, but considers that these are opinions and interpretation about a series of events that occurred and that were part of the democratic debate on episodes that moved the country. As inter-American jurisprudence has indicated, when pondering the value judgments of the Argentinean journalist Eduardo Kimel on the actions of a judge who was in charge of a massacre that took place during the dictatorship in Argentina, "opinions cannot be considered

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<sup>132</sup> African Court on Human Rights and Peoples' Rights. In the Matter of Lohé Issa Konaté v. Burkina Faso. Application No. 004/2013. Judgment December 5, 2014. Para. 155.

<sup>133</sup> African Court on Human Rights and Peoples' Rights. In the Matter of Lohé Issa Konaté v. Burkina Faso. Application No. 004/2013. Judgment December 5, 2014. Para. 164.

<sup>134</sup> African Court on Human Rights and Peoples' Rights. In the Matter of Lohé Issa Konaté v. Burkina Faso. Application No. 004/2013. Judgment December 5, 2014. Para. 165.

<sup>135</sup> UN, Human Rights Committee. General Comment No. 34: Article 19 Freedom of opinion and freedom of expression. September 12, 2011. Para. 47.

true or false; such an opinion cannot be sanctioned, especially when it is a value judgment on an official act of a public official in the performance of his duty"<sup>136</sup>.

111. The sentencing ruling also notes the following paragraph: "[t]he Dictator should remember, finally, and this is very important, that with the pardon, in the future, a new president, perhaps his enemy, could take him to a criminal court for ordering fire at will and without warning against a hospital full of civilians and innocent people. Crimes against humanity, lest not forget, do not prescribe." In this regard, the judge believes that the journalist "accuses Correa of being the perpetrator of a crime against humanity."

112. The Commission considers that this mention cannot be considered as the attribution of an offense to the former agent, given that it is a conditional opinion on episodes of public interest, whose meaning divides Ecuadorian society up to the present. Different social and political sectors, as well as journalists and analysts, tend to describe the situation as a protest of a dissatisfied sector of the police, whose virulence increased after the decision adopted by the Ecuadorian president himself to enter in person and without a security strategy to the place of the events, after which he was detained; On the other hand, the narrative of the former government presented these episodes as a coup plot with the aim of, supposedly, displacing the president from power.

113. The existence of an incursion by Special Forces of the police ordered by the President, as well as the balance of 10 people killed and 300 injured as a final result of the crisis, is not disputed either.

114. The Commission considers that the opinions and value judgments included in the Palacio column refer to episodes that generated narratives and conflicting interpretations and that polarized society, linked to the actions of who exercised the highest public function during an institutional crisis. As the Commission has repeatedly mentioned, "political criticism often involves value judgments"<sup>137</sup>. The Inter-American Court has indicated that "within the framework of public debate, the margin of acceptance and tolerance of criticism by the State itself, public officials, politicians, and even individuals who carry out activities subject to public scrutiny must be much greater than that of individuals"<sup>138</sup>.

115. As the IACHR has stated, "[t]he functioning of democracy requires the highest possible level of public discussion on the functioning of society and the State in all its aspects, that is, on matters of public interest"<sup>139</sup>. In this regard, it has also stated that "[i]n a democratic and pluralist system, the actions and omissions of the State and its officials must be subjected to rigorous scrutiny, not only by the internal control bodies, but also by the press and public opinion"<sup>140</sup>.

116. In the case of *Tristán Donoso v. Panama*, the Inter-American Court considered the issue of value judgments on cases of public interest and accusations made through the press. Specifically, it considered in the case that the complaint about the use of an illegal interception of a private conversation of a lawyer by the Attorney General of the Nation, in a context of intense questions about the faculty of the state official to order interception, was a matter of current public interest. In this regard, the Inter-American Court noted that, "the manner in which a high-ranking public official, such as the Attorney General of the Nation, performs the functions that have been assigned to him by law, in this case the interception of telephone communications, and if he carries them out in accordance with the provisions of the national legal order, it is of public interest nature. Within the series of public questions that were being made to the former Attorney General by various State authorities, such as the Ombudsman and the President of the Supreme Court, the victim, in a press conference, stated that said public official had recorded a telephone conversation and had informed the Board of Directors of the National Bar Association [...]. The [Inter-American] Court considers that Mr. Tristán Donoso made statements about facts that were of the greatest public interest in the context of an intense public debate

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<sup>136</sup> I/A Court H.R., Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 93.

<sup>137</sup> IACHR. Annual Report 1994. Chapter V: Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights. Title III. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995, pages 210 to 223. Annex D.

<sup>138</sup> I/A Court H.R., Case of *Ricardo Canese v. Paraguay*. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 104.

<sup>139</sup> IACHR. Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 33.

<sup>140</sup> IACHR. Annual Report 2009. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 33.

about the powers of the Attorney General to intercept and record telephone conversations, a debate in which were immersed, among others, judicial authorities". In the opinion of the Inter-American Court, the importance of not inhibiting democratic debate on a matter of public interest is an element that should be considered by the judge when establishing possible subsequent liabilities for the exercise of freedom of expression: "the judiciary must take into consideration the context in which expressions are made in matters of public interest; the judge must 'weigh respect for the rights or reputation of others with the value that open debate on issues of public interest or concern' has in a democratic society"<sup>141</sup>.

117. In a related manner, inter-American jurisprudence has highlighted the importance of the role of the media in the broad information on matters of public interest that affect society<sup>142</sup>; In this sense, it explained that freedom of expression grants both media executives and journalists working in them the right to investigate and disseminate facts of public interest in this way<sup>143</sup>; and has explained that the prosecution of people, including journalists and social communicators, by the mere fact of investigating, writing, and publishing information of public interest, violates freedom of expression by discouraging public debate on matters of interest to society<sup>144</sup> and generating an effect of self-censorship<sup>145</sup>.

118. "This does not mean, in any way, that the honor of public officials or public persons should not be legally protected, but that it should be so in accordance with the principles of democratic pluralism; [...] this different threshold of protection is not based on the quality of the subject, but on the character of public interest that involves the activities or actions of a specific person. [...], consequently, are exposed to an increased risk of criticism, since their activities leave the domain of the private sphere to be inserted in the sphere of the public debate"<sup>146</sup>. At the same time, the IACHR reiterates that understands the need of encouraging responsible and ethical journalism and its particular relevance in a contemporary society.

119. The Commission considers that the severe criminal sanction and the exorbitant civil sanction applied to the alleged victims, constituted unnecessary and manifestly disproportionate sanctions. The IACHR has considered, in accordance with its reiterated doctrine, that the State has other ways and alternatives for the protection of privacy and reputation that are less restrictive than the application of a criminal sanction, this is to say, the civil route and, the guarantee of the right of rectification or response. In both situations, the State must adhere to international standards. As mentioned above, the president was also able to widely disseminate his version and interpretation of the facts before the public opinion.

### **3. The criminal and civil liability of El Universo's executives and of the legal entity El Universo**

120. In the present case, the courts that heard the case attributed the same criminal and civil responsibility to the directors of the media (El Universo) as to the author of the text that gave rise to the complaint of the offended official.

121. In addition to condemning the author of the column, the judicial body, by means of the first instance judgment of July 20, 2011, did the same with Carlos Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga, who were part of the executive board of the company El Universo. They were convicted as intervening authors and were sanctioned to three years in prison, as well as to pay in

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<sup>141</sup> I/A Court H.R., Case of Tristán Donoso v. Panama. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, para. 123.

<sup>142</sup> I/A Court H.R., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 57.

<sup>143</sup> Corte IDH, Caso Ivcher Bronstein Vs. Perú. Sentencia de 6 de febrero de 2001. Serie C No. 74, párr. 157.

<sup>144</sup> IACHR. Arguments before the Inter-American Court in the case of Kimel v. Argentina. Transcribed in: I/A Court H.R., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 37.

<sup>145</sup> IACHR. Arguments before the Inter-American Court in the Palamara Iribarne case v. Chile. Transcribed in: I/A Court H.R., Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 64. e).

<sup>146</sup> I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, paras. 128 and 129.

solidarity with Emilio Palacio the amount of thirty million dollars in damages. It also established the civil penalty of the legal entity of El Universo to pay US\$10 million.

122. According to the documentary evidence provided by the petitioners, among the various functions according to the bylaws of El Universo, the Ecuadorian courts understood that the directors, by not vetoing an insulting article, were participating or cooperating necessarily in its publication, so they should be considered as intervening authors. This interpretation affects the functioning of the media and journalism, assigning the directors and owners of the media the role of censors of journalists and columnists in the media.

123. Finally, the first instance judgment sentenced the legal entity El Universo to pay compensation of ten million dollars in damages. The judicial body understood that it was through the legal entity through which the crime was executed. The alleged victims argued during the judicial process that the judicial body was only competent to judge natural persons. However, the court concluded, through an extensive interpretation of criminal and civil law that legal persons could also be subject to criminal proceedings.

124. According to the Commission, there are several reasons to establish that the aforementioned decisions violate the rights to freedom of expression of Carlos Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga. First, as mentioned, in terms of the use of criminal law, the principle of minimum intervention is applicable, because of the nature of criminal law as *ultima ratio*. From this also derives the prohibition of the use of objective liability, establishing that the responsibilities apply to those who have had a direct participation in the events.

125. In the case under study, the author of the journalistic article in question is fully identified, being a journalist and long-standing columnist who exercised journalism inside and outside the media for which he worked. The article in question was published under his signature and it was not an editorial piece, like the usual ones, that are published only under the media's name and responsibility. On the other hand from the evidence provided, there was no participation of the directors of the media in the preparation of the column, on the contrary in a previous procedure they confirmed that the authorship of the column was from Mr. Palacio, so it is noted that the courts acted arbitrarily to extend criminal liability to those who did not act on the criminal offense that was in force at the time.

126. The Commission understands that this is a violation of the principles of due process in the criminal sphere, as well as to the protection of freedom of expression, given that the directors of the media were sanctioned for facilitating its publication in the media of their property, as it usually happens in the journalistic activity with a diversity of writers that otherwise would not reach the public.

127. In the Commission's opinion, imposing objective civil liability through a criminal trial to intermediaries -in this case, the newspaper's publishing company and on the media executives- for facilitating the publication of the journalistic column, constitutes an obstacle to the exercise of freedom of expression, by inhibiting the circulation of ideas, opinions, information from third parties, as well as being an invitation for the media and its directors to apply private censorship to journalists for fear of suffering a criminal sanction. Although media directors have specific responsibilities under the law for those contents in which they intervene or that are part of its editorial page, these responsibilities must not be objective not of a criminal nature. In the case of civil penalties, they must respond to the due diligence standard and be necessary and proportional.

128. Finally, in matters of compensation, the judgment condemns the three same directors of the media and the legal entity (El Universo Company) jointly. The Commission notes that although it does not consider disproportionate to apply joint liability to the company that owns a media, for the civil effects of the damages caused by its dependents, in the present case the requirements established in international law are not complied. Indeed, principle 10 of the Declaration of Principles of the IACHR on Freedom of Expression states the following: "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."

129. The Commission also wishes to draw attention to the amount of compensation established in this case, an amount of 40 million dollars in itself constitutes a disproportionate penalty. As the Inter-American Court of Human Rights stated, "the fear of a disproportionate civil sanction may be as clearly or more intimidating and inhibiting for the exercise of freedom of expression as a criminal sanction, since it has the potential to compromise personal and family life of who reports or, as in the present case, publishes information about a public official, with the evident and invaluable result of self-censorship, both for the affected party and for other potential critics of the acts of a public servant"<sup>147</sup>.

130. In the present case, even though the prison sentences and the large sums in compensation were not made effective, by virtue of the cancellation that took place after the final judgment was adopted, the Commission emphasizes that the measures adopted by the State have been disproportionate since there were other more adequate means than the imposition of prison sentences and that do not generate the inhibitory effect on debates of public interest. In this sense, the judicial body had to weigh the statements of the journalist in accordance with the circumstances of public interest with which they were connected and in accordance with the standards and doctrine developed by the inter-American system.

131. In the balance between the satisfaction of the right to honor and reputation and the measure imposed<sup>148</sup>, the IACHR considers that the applicants' violation of freedom of expression through the criminal conviction and the exorbitant civil sanctions that were applied were manifestly disproportionate.

132. Based on the foregoing, the Inter-American Commission concludes that the State violated Articles 9 and 13 of the American Convention, in relation to the general obligations contemplated in Articles 1.1 and thereof, to the detriment of Carlos Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga.

#### **D. Right to a Fair Trial (article 8)<sup>149</sup>**

133. According to the Inter-American Court, "all the bodies that exercise functions of a jurisdictional nature have the duty to adopt fair decisions based on full respect for the guarantees of due process established in Article 8 of the American Convention"<sup>150</sup>. In addition, according to the doctrine of this court, the "guarantees of independence and impartiality that are established by Article 8.1 are 'essential elements of due process of law'"<sup>151</sup>. The Inter-American Court has indicated that "the State must guarantee the autonomous exercise of the judicial function as regards both its institutional aspect, that is, in relation to the Judiciary as a system, and also as regards its individual aspect, that is, in relation to the person of the specific

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<sup>147</sup> I/A Court H.R., Case of Fontevecchia and D'Amico v. Argentina. Merits, Reparations and Costs. Judgment of November 29, 2011. Series C No. 238, para. 74.

<sup>148</sup> I/A Court H.R., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, para. 85.

<sup>149</sup> Article 8 of the Convention provides that:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]

c. adequate time and means for the preparation of his defense;

[...]

f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

[...]

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

<sup>150</sup> I/A Court H. R., Case of Favela Nova Brasília v. Brazil. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of February 5, 2018. Series C No. 345, para. 183.

<sup>151</sup> I/A Court H. R., Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52, párr. 132.

judge"<sup>152</sup>. "On the principle of independence, the Inter-American Court of Human Rights has pointed out that "respect for judicial guarantees entails respecting judicial independence"<sup>153</sup>. In this regard, it mentioned that "the institutional dimension is related to aspects that are essential for the rule of law, such as the principle of the separation of powers, and the important role played by the judicial function in a democracy"<sup>154</sup> and, consequently, "this institutional dimension goes beyond the office of the judge and has a collective impact on society as a whole"<sup>155</sup>.

134. However, with regard to the judge in particular, in accordance with the "Basic Principles on the Independence of the Judiciary", judges must resolve the cases " without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason"<sup>156</sup>. In this sense, judicial independence "consists in the negative obligation of the public authorities to refrain from undue interference in the Judiciary or its members, that is, in relation to the person of the specific judge"<sup>157</sup>.

135. Next, the Commission will analyze, in accordance with the proven facts, whether there were violations of the due process guarantees enshrined in Article 8 of the Convention in the context of the trial and the sentences against Emilio Palacio Urrutia, Carlos Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga, and Carlos Eduardo Pérez Barriga.

## **1. Guarantees of the competence, independence and impartiality of the judge (art. 8.1)**

### **1.1 Preliminary observations**

136. First, the minimum guarantees of due judicial process require that the parties be in full equality in accordance with the provisions of Article 8 of the Convention. This equality must be given from the formal to the material aspects. Particularly, the judicial process started against the opinion article "*No a las mentiras*" by journalist Emilio Palacio Urrutia was initiated by Rafael Correa at the time he held the public office of President of the Republic.

137. As the Inter-American Court has held, "public officials, like any other person, are covered by the protection afforded them by Article 11" of the Convention<sup>158</sup>, as well as in accordance with article 24 thereof, which emphasizes that "[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." Despite this, then President Correa was fully entitled to take the

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<sup>152</sup> I/A Court H.R., Case of López Lone et al. v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, paras. 194 and 218, and I/A Court H.R., Case of Valencia Hinojosa et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 29, 2016. Series C No. 327, para. 96.

<sup>153</sup> I/A Court H.R., Case of López Lone et al. v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para.192.

<sup>154</sup> I/A Court H.R., Case of López Lone et al. v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 194.

<sup>155</sup> I/A Court H.R., Case of López Lone et al. v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para.194.

<sup>156</sup> I/A Court H.R., Case of Chocrón Chocrón v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 1, 2011. Series C No. 227, para. 100; I/A Court H.R., Case of Atala Riffo and daughters v. Chile. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 186; I/A Court H.R., Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2013. Series C No. 266, para. 146, and I/A Court H.R., Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2013. Series C No. 268, para. 190.

<sup>157</sup> I/A Court H.R., Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 146; I/A Court H.R., Case of Atala Riffo and daughters v. Chile. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 186; I/A Court H.R., Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 23, 2013. Series C No. 266, para. 146, and I/A Court H.R., Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 293, para. 303.

<sup>158</sup> I/A Court H.R., Case of Fontevecchia and D'Amico v. Argentina. Merits, Reparations and Costs. Judgment of November 29, 2011. Series C No. 238, para. 53.

legal actions he considered appropriate to present his claim before an independent, impartial, and competent court.

138. However, as has been indicated during the analysis of Article 13 of this report, public officials are provided with less harmful tools to safeguard the rights to reputation and honor in accordance with the American Convention. The IACHR reiterates that the normative framework in force at the time was incompatible with the inter-American standards and the convictions, as a result of the process, were disproportionate for the purposes pursued.

139. However, it should be pointed out that the political and legal position of a President of the Republic, according to the nature of the position he occupies, is governed by the principle of separation and balance of powers, since it represents the highest incumbent of a state power. The guarantees of independence of the Judiciary in relation to the institutional aspect and in relation to the person of the judges must be specially observed and guaranteed throughout the judicial process with attention to the principles of transparency and publicity of the processes, to the person of the plaintiff, the interests at risks, and the public relevance of the matter.

140. In the present case, it was demonstrated that Correa filed the criminal action of insult "against the authority" and that he requested to apply the "maximum penalty". Although Correa appeared to litigate as a "common citizen", throughout the entire process, from the beginning to the end, he served as President of the Republic while carrying out official actions that affected the Judiciary. In this context, the filing of the action and subsequent actions by Correa, who on several occasions made a series of public statements about the case in his role as President and through the state media, created a situation of inequality between the parties and the guarantees of independence and impartiality of the judicial body were seriously affected.

141. With respect to the aforementioned, the Commission has said, "taking into account that the right of defense is a right of the person undergoing proceedings, it would not be admissible that such defense could be put at risk as a result of a chain of command or pressures from other actors or branches of the State"<sup>159</sup>.

142. In this context, the independence of the judiciary, in its institutional aspect, was affected at the time that the Executive issued, on September 5, 2011, the decree declaring the "state of exception" in the Judiciary for 60 days "in order to resolve the critical situation that it is going through and duly ensure the right to justice contemplated in the Constitution of the Republic and prevent an impending internal commotion" and declared "priority action the formulation, execution, and implementation of projects to improve the judiciary in Ecuador, through the Transformation Plan of the Judiciary"<sup>160</sup>.

143. In the context of Ecuador, the IACHR has monitored the process of restructuring the judiciary that began in 2011. As indicated in its 2013 annual report, at the end of the 18-month mandate of the body responsible for the administration of the judiciary, "according to figures offered by the Transitional Council itself, during its operation the agency decided in disciplinary proceedings, the dismissal of hundreds of officials of the Judiciary, including judges." In addition, the IACHR received information on the interference that the heads of the executive powers had exercised over the Judiciary through the control of the administration of justice, as well as in the processes of appointment of positions, and disciplinary proceedings of dismissal<sup>161</sup>.

## **1.2 Principle of competence**

144. According to the analysis, the legal entity El Universo was subjected to a criminal trial and also sanctioned in a disproportionate manner to pay an amount of 10 million dollars in the proceeding against Emilio Palacio Urrutia and the executives of El Universo. According to the analysis made, since the law did not clearly, specifically, and expressly stated the possibility of submitting to a criminal trial a legal entity, the Commission also understands that it is a violation of the principle of competence in accordance with article 8.1 of the Convention and in relation to article 9 of the same instrument.

145. With regard to the competence of the temporary judges who heard the case, the Commission highlights the lack of clarity regarding the selection of judges. In this sense, the State did not send substantial

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<sup>159</sup> IACHR. Guarantees for the Independence of Justice Operators. OEA/Ser.L/V/II. Doc. 44. December 5, 2013. Para. 46.

<sup>160</sup> Annex 35. Executive Decree No. 872. Annex No. 76 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>161</sup> IACHR. Annual report 2013. Chapter IVA. Para. 26

documentation on the public processes and competitions that the judges who were provisionally elected to hear the process had to pass. In accordance with what was stated by the parties, the normative framework in force at that time was the Organic Code of the Judicial Function [*Código Orgánico de la Función Judicial*]. In this sense, article 72 regulates what refers to the "Eligible bank" and article 214 regulates what relates to the "subrogation of the judge or the head judge". The first article states in its first paragraph, "[t]hose who pass the initial training course, having been declared eligible in the competitions of opposition and merits, and yet not being appointed, will be included in a bank of eligible persons that will be in charge of the Human Resources Unit". The second article provides in its first paragraph, "[i]n case of foul, impediment, or excuse of the head judge, or any of the situations established in the law, the temporary judge shall replace them, who shall be appointed by lottery of the eligible bank that will be integrated in accordance with the provisions of this Code."

146. The Commission highlights the lack of clarity regarding the appointment of the temporary judges who took part in the case, especially in the understanding that the appointment of provisional or temporary judges constitutes an exceptional situation. In this context, the State did not provide substantial documentation on the process for appointing temporary judges, particularly on the "initial training course", the approved "opposition and merits" contest and the declaration of "eligible". In addition, the IACHR observes the lack of control and publicity in the process of selecting the judges in the specific case, since according to the drawing certifications, there is no feature of the participation, scrutiny, and control by the alleged victims or their representatives.

147. In light of the foregoing, the Commission concludes that the State did not guarantee the principle of competence in accordance with Article 8.1 of the Convention, on the understanding that it failed to demonstrate sufficient and effective actions to guarantee the competence of the judges who heard the case in the first instance.

### **1.3 Principle of independence**

148. The Commission has mentioned that the principle of judicial independence is an inherent requirement of a democratic system and a fundamental prerequisite for the protection of human rights<sup>162</sup>. In this sense, it is enshrined as one of the guarantees of due process protected by Article 8.1 of the American Convention and, in addition, from this principle, in turn, "reinforced"<sup>163</sup> guarantees emerge which States must provide to judges in order to ensure their independence<sup>164</sup>. The organs of the inter-American system have interpreted the principle of judicial independence in the sense of incorporating the following guarantees: adequate appointment process, tenure in office, and guarantee against external pressures<sup>165</sup>.

149. According to the document support observed, on May 12, 2011, the secretariat of the Fifteenth Court of Criminal Guarantees of Guayas, which at that time was headed by Judge Oswaldo Sierra, notified the parties of an order in which it informed that court officials were mistreated by the lawyers of Rafael Correa. Likewise, the ruling expresses that Correa's lawyers stated they deserve a "special treatment" for being

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<sup>162</sup> IACHR, Report on the Merits 12. 816, Report No. 103/13, November 5, 2013, para. 112. Citing See, United Nations. Human Rights Committee. General Comment No. 32, CCPR / C/GC/32, August 23, 2007, para.19. See in this regard Cf. Habeas Corpus under Suspension of Guarantees (articles 27.2, 25.1, and 7.6 of the American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 30. See also, IACHR, Democracy and Human Rights in Venezuela, III. Separation and independence of public authorities, December 30, 2009, para. 80

<sup>163</sup> I/A Court H.R., Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 67; IACHR, Democracy and Human Rights, December 30, 2009, para. 185. Available at: <http://www.cidh.org/countryrep/Venezuela2009eng/VE09.TOC.eng.htm>; IACHR, Second Report on the Situation of Human Rights Defenders, December 31, 2011, para. 359

<sup>164</sup> Thus, for example, the Inter-American Court has indicated that part of the obligations that the State has for the persons subject to proceedings before the courts, "rights for judges" arise in turn, among them, the Court has indicated that "the guarantee to not be subject to free removal means that the disciplinary and sanctioning processes of judges must necessarily respect the guarantees of due process and an effective remedy should be offered to those affected" I/A Court H.R., Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 147.

<sup>165</sup> IACHR. Guarantees for the Independence of Justice Operators. OEA/Ser.L/V/II. Doc. 44. December 5, 2013. Paras. 56, 109, and 184; I/A Court H.R., Case of López Lone et al. v. Honduras. Preliminary Objection, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, para. 191.

representatives of the president<sup>166</sup>. As a result of the issuance of this order, Correa's lawyers denounced the judge for allegedly issuing an order of false content. Also, as a result of a previous disciplinary process, on May 17 Judge Sierra was notified of a suspension for a duration of 90 days. Although the State mentioned that the suspension "was due to the action of said official within the framework of a process of precautionary measures, unrelated to the criminal proceeding against the petitioners,"<sup>167</sup> it does not detract from the content of the ruling drafted by the then official who points to indirect pressures to which the justice operators would have been subjected. The IACHR notes that "[i]f States do not guarantee the safety of their justice operators against all kinds of external pressures, including reprisals directly aimed at attacking their person and family, the exercise of the jurisdictional function may be seriously affected, affecting access to justice"<sup>168</sup>.

150. With respect to the precautionary measures filed on August 24 before the Tenth Court of Children and Adolescents of Guayas, which was admitted and ordered the cloning of the hard drive of the computer used by the Fifteenth Court of Criminal Guarantees of the Guayas, where the trial was carried out and the judgment of first instance was issued, with the purpose of knowing the information on the computer file that contained the text presented in the first instance judgment, the Council of the Judiciary proceeded to open an investigation against the officials involved in the diligence. Among the officials under investigation, was the then judge Oswaldo Sierra who initially heard the case as the natural judge. In this context, the Commission notes that although it was a separate process, the measure was linked to the process that was being carried out against Emilio Palacio Urrutia and the executives of El Universo, for which the aforementioned administrative measure seriously violated the guarantee of independence of the judges and generated pressures from the same judicial body. The Commission observes that the precautionary measure proposed was intended to shed light on alleged interference in the process of drafting the first instance judgment. According to the Inter-American Court of Human Rights, the State is obligated to guarantee that "provisional judges are independent"<sup>169</sup>.

151. On the other hand, the State does not invalidate the information provided by the petitioners with respect to the interference that could have affected the independence of the temporary judge Paredes in the preparation of the first instance judgment. Based on the aforementioned precautionary measure, an expert test was carried out on the hard disk of the court in which the first instance judgment was issued. According to the results of the expertise, a series of conclusions were reached that show that the computer file containing said judgment was not created in the computer equipment of the corresponding court, but that it came from an external equipment<sup>170</sup>. Although this fact in itself would not reveal who drafted the judgment, through testimonies and public interviews to Mónica Encalada, who heard the case temporarily, the temporary judge Juan Paredes would have admitted having received the text of the judgment by one of Correa's lawyers.

152. The IACHR emphasizes that it is up to each State to protect the operators of justice from attacks, acts of intimidation, threats, and harassment, investigating those who commit violations against their rights and effectively punishing them. Otherwise, if States do not guarantee the safety of their justice operators against all kinds of external pressures, including reprisals directly aimed at attacking their person and family, the exercise of the jurisdictional function can be seriously affected, impeding access to Justice<sup>171</sup>. From the foregoing, it appears that the judges acted under pressure and without the necessary guarantees to ensure their independence and impartiality.

153. On the other hand, for the determination of the hearing of appeal and nullity, the ruling of the Second Criminal Chamber of the Provincial Court of Justice of the District of Guayas, on August 16, expressly stated that "video recordings cannot be made of the hearing". Nonetheless, the IACHR notes that the appeal hearing was recorded and transmitted publicly. However, with this measure the State acted irregularly,

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<sup>166</sup> Annex 36. Order of May 12, 2011. Annex No. 7 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>167</sup> Fact affirmed by the State in its brief of observations submitted to the Commission on December 13, 2016.

<sup>168</sup> IACHR. Guarantees for the Independence of Justice Operators. OEA/Ser.L/V/II. Doc. 44. December 5, 2013. Para.147.

<sup>169</sup> I/A Court H.R., Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 43 I/A Court H.R., Case of Chocrón Chocrón v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 1, 2011. Series C No. 227, para. 117.

<sup>170</sup> Annex 37. Technical Report prepared by Engineer Alex Rivera Calero. Annex No. of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>171</sup> IACHR. Guarantees for the Independence of Justice Operators. OEA/Ser.L/V/II. Doc. 44. December 5, 2013. Para. 147.

especially when dealing with issues of high public interest and specifically the development of an oral, public, and contradictory hearing. In this sense the art. 8.5 of the Convention states that "[c]riminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice."

154. Consequently, the IACHR concludes that the State did not guarantee the right to be tried by an independent and impartial judge or tribunal, enshrined in Article 8.1 of the Convention, against Emilio Palacio Urrutia, Carlos Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga.

#### 1.4 Suitable means for defense preparation

155. The Commission notes that during the first instance trial, most of the evidence requested by the defendants was denied. In particular, it was demonstrated that of the evidence requested by Palacio, the court denied the linguistic expertise of the text of the article "*No a las mentiras*" and was considered in the second instance judgment as a probative element that "was not relevant to the case, because the imputed offense, slanderous insult, is one of those committed through social media -in this case written press- and therefore it was enough to read the article, as a common citizen, to establish its meaning and scope, being therefore adequate according to the procedural rule, the appreciation of said expertise request by the Temporary Judge... "However, both judicial decisions were based on the interpretation of the paragraph and the text published by Palacio, so that an expert could have shed light on the matter and offer a technical point of view so that the judges can make a broad assessment. With the denial of this evidence, Emilio Palacio Urrutia was prevented from exercising its defense broadly and with elements that could contribute substantially to the case.

156. The IACHR recalls that "the possibility of providing counter-evidence is a right of the defense to invalidate the accusatory hypothesis, contradicting it by means of counter-proofs or evidence of acquiescence compatible with alternative hypotheses (counter-hypotheses), which in turn the prosecution has the burden to invalidate"<sup>172</sup>. According to the State's assertion, "with respect to the linguistic expertise that was denied to the petitioners, this refusal was framed within the provisions of Article 94 of the Criminal Procedure Code" whose provision stated that "experts refers to professionals specialized in different subjects that have been accredited as such, by a previous qualification process of the Regional Directorates of the Council of the Judiciary". In the case of the petitioners, the requested expert opinion was denied since the linguistic expert requested by the defendant Emilio Palacio Urrutia, did not appear accredited in the Provincial Directorate of the Council of the Judiciary"<sup>173</sup>.

157. It should be noted that the State does not dispute the denial of the evidence, but attributes the situation to a formality. The Commission points out that the fact of producing or requiring means of evidence favorable to the accused of a crime constitutes a right and not an obligation. According to the Inter-American Court, "States have the obligation to ensure that, at all stages of the respective processes, victims can make statements, receive information, provide evidence, formulate allegations and, in short, assert their interests"<sup>174</sup> that "they can formulate their claims and present evidentiary elements and that they are analyzed in a complete and serious manner by the authorities before a decision is made on the facts, responsibilities, penalties, and reparations"<sup>175</sup>.

158. In another issue, on second instance, the Commission verifies that, according to the documents submitted, on Saturday, September 17, the Second Criminal Chamber of the Provincial Court of Justice of the

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<sup>172</sup> I/A Court H. R., *Case of Zegarra Marín v. Peru*. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of February 8, 2018. Series C No. 347, para. 140.

<sup>173</sup> Fact affirmed by the State in its brief of observations submitted to the Commission on December 13, 2016.

<sup>174</sup> C I/A Court H.R., *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, para. 247; I/A Court H.R., *Case of Gonzalez Medina and family v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 27, 2012. Series C No. 240, para. 251; I/A Court H.R., *Case of the Río Negro Massacres v. Guatemala*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 4, 2012. Series C No. 250, para. 193; I/A Court H.R., *Case of the Hacienda Brasil Verde Workers v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, para. 376; I/A Court H.R., *Case of the Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 30, 2016. Series C No. 328, para. 230; I/A Court H. R., *Case of Favela Nova Brasília v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 16, 2017. Series C No. 333, para. 238.

<sup>175</sup> I/A Court H.R., *Case of Barbani Duarte et al. v. Uruguay*. Merits, Reparations and Costs. Judgment of October 13, 2011. Series C No. 234, para. 120; I/A Court H.R., *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*. Preliminary Objections, Merits, Reparations

District of Guayas issued an order through which convened the parties for September 20 to "reinstate the hearing" on appeal that had been developed and suspended on September 16 and initially set for September 22<sup>176</sup>. The ruling of September 17 was notified on September 19. The IACHR observes that the notification was made one day previous to the continuation of the hearing. According to the petitioners, "according to the procedural law [...] all the orders can be subject to remedies within a term of 72 hours, which means that they cannot be executed until after this time, thus an order stating the date for a procedure, must be notified to the parties at least 78 hours before, so that the parties can exercise the right to appeal it".

159. In a communication by the State to the IACHR, by Note 10168 dated April 13, 2017, the State representatives disputed the petitioners' statement in the brief of February 27, 2017, regarding the fact that the State would have affirmed that the ruling would not have been enforceable. In this context, it states, "the petitioners fail to indicate that it is not an affirmation of the State, but a reference to the allegation made in the brief of September 19, 2011, of Mr. Emilio Palacio."

160. The State indicates that the hearing was originally scheduled for August 25, 2011 and, after being postponed three times, was set for September 20, so "the [petitioners] had sufficient time to present their defense to the appeal hearing, since it had been planned to be held a month earlier." It is demonstrated, however, that the court acted irregularly by issuing a ruling on a non-business day and notifying it one day prior to the appeal hearing. Although the initial hearing had been scheduled for August 25, the definitive procedural act of scheduling was the ruling of September 17 and its notification one day in advance. The IACHR observes that the State did not invalidate the allegation asserted by the petitioners with respect to the possibility of executing an order that is not final. In this context, the parties to the process had the legitimate expectation of holding the hearing for September 22, so the sudden rescheduling generated a state of defenselessness and violated the right to defense.

161. Consequently, the IACHR concludes that the State did not guarantee the right of defense enshrined in Article 8.2c and 8.2f to the detriment of Emilio Palacio Urrutia, Carlos Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga.

#### **E. Right to Judicial Protection (article 25)<sup>177</sup>**

162. The Commission observes that the remedies filed by the alleged victims after the first instance judgment that condemned Emilio Palacio Urrutia and the executives of El Universo, even though they were filed on different times, were not effective in the context of lack of guarantees of independence of the judiciary and interpretations contrary to the inter-American standards of the provisions of the American Convention. Despite that the Court has mentioned that the "fact that the remedies filed were not decided in a manner favorable to the interests of the complainant, does not imply that the alleged victim did not have access to an effective remedy to protect their rights"<sup>178</sup>. Also, in accordance with the doctrine of this court, the effectiveness of a remedy is not verified with its sole formal existence, but that it "must [give] a timely and exhaustive response according to its purpose, that is, to determine the responsibilities and to repair the victims in their case"<sup>179</sup>, and the State must "ensure the proper application of effective remedies filed before the competent authorities with the purpose of protecting all persons under its jurisdiction against acts that violate

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and Costs. Judgment of August 28, 2013. Series C No. 268, para. 181; I/A Court H.R., Case of Wong Ho Wing v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2015. Series C No. 297, para. 228.

<sup>176</sup> Annex 38. Nullity and Appeal Hearing Certificate. Annex No. 56 of the Initial Petition presented to the IACHR on October 24, 2011.

<sup>177</sup> 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

<sup>178</sup> I/A Court H.R., Case of Raxcacó Reyes v. Guatemala. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 133, para. 112.

<sup>179</sup> I/A Court H.R., Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 20, 2016. Series C No. 318, para. 395.

their fundamental rights or that lead to the determination of their rights and obligations”<sup>180</sup>. In addition, the Inter-American Court has mentioned that an appeal is not effective," when its uselessness has been demonstrated by practice, because the Judiciary lacks the independence necessary to decide impartially”<sup>181</sup>.

163. The IACHR observes that in the extension of the appeal judgment, on September 26, 2011, it was decided to abandon the appeal and annulment proceedings by Emilio Palacio Urrutia, so that his appeal was also subsequently declared as "inadmissible". With respect to César Pérez Barriga, Carlos Eduardo Pérez Barriga, and Carlos Nicolás Pérez Lappenti, the cassation ruling of confirmed the convictions.

164. Consequently, the IACHR concludes that the State did not guarantee the right to judicial protection enshrined in Article 25.1 of the Convention against Emilio Palacio Urrutia, Carlos Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga.

## V. CONCLUSIONS

165. Based on the considerations of fact and law contained in this report, the IACHR concludes that the State of Ecuador violated, to the detriment of Mr. Emilio Palacio Urrutia, Carlos Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga, the rights recognized in articles 8 (Right to a Fair Trial), 9 (Freedom from *ex post facto* laws), 13 (Freedom of Thought and Expression) and 25 (Right to Judicial Protection) of the American Convention, in relation to articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof.

## VI. RECOMMENDATIONS

166. Based on the analysis and conclusions of this report,

### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS TO THE STATE OF ECUADOR:**

1. To annul the criminal conviction imposed to Emilio Palacio Urrutia, Carlos Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga, César Enrique Pérez Barriga, and the company El Universo and all the consequences that derive from it;
2. Compensate Emilio Palacio Urrutia, Carlos Nicolás Pérez Lappenti, Carlos Eduardo Pérez Barriga, and César Enrique Pérez Barriga for the pecuniary and non-pecuniary damages caused by the violations established herein;
3. Adapt its domestic criminal law in accordance with the State's obligations under the American Convention on Human Rights in the area of freedom of expression, resorting to civil liability for cases of expression of public interest, or concerning the performance of public officials, with observance of the principle of proportionality and real malice.
4. Adapt the regime of civil sanctions in the area of freedom of expression, in accordance with its obligations under the American Convention on Human Rights, which implies establishing if the communicator in the dissemination of information intended to inflict harm or was conducted with manifest negligence in the search for the truth or falsity of the news, respecting the principles of necessity and proportionality in the establishment of compensation if applicable.
5. To carry out a public act of reparation in favor of journalist Emilio Palacio and the directors of El Universo with the presence of high authorities and to acknowledge that they suffered persecution and harassment for the performance off their duties.
6. Disseminate the present report in the Judiciary of Ecuador.

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<sup>180</sup> 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, para. 130; I/A Court H.R., Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, para. 141.

<sup>181</sup> I/A Court H.R., Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24; I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 108; I/A Court H.R., Case of Cesti Hurtado v. Peru. Merits. Judgment of September 29, 1999. Series C No. 56, para. 125; I/A Court H.R., Case of Ivcher Bronstein v. Peru. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74, para. 137; I/A Court H.R., Case of the "Five Pensioners" v. Peru. Merits, Reparations and Costs. Judgment of February 28, 2003. Series C No. 98, para. 136.