

**PRELIMINARY REPORT**  
**OF AMERICAN BAR ASSOCIATION OBSERVER**  
**OF PROSECUTION OF SUMATE LEADERS IN VENEZUELA**

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Respectfully submitted,

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This preliminary report is presented by American Bar Association observer Douglass Cassel, following a visit to Venezuela during pretrial proceedings held on July 6 and 7, 2005, in case no. 41-C-4077-04 before the Fourth Court of Control of First Instance in the Criminal Judicial Circuit of the Metropolitan Area of Caracas.<sup>1</sup>

## 1. Introduction.

Venezuelan prosecutors have charged two leaders of a civic group for soliciting funds from the National Endowment for Democracy (“NED”) in Washington to educate voters about their right to participate in a referendum to recall Venezuelan President Hugo Chávez Frías. Two trainers who led voter education workshops are charged as accomplices. The recall referendum, held in August 2004, was unsuccessful.

The case is brought in a context of political polarization between Venezuela’s government and the opposition, and amid disputes between its government and the government of the United States and NED, a private, non-profit organization with an independent board of directors, but which by law receives annual funding from the US State Department.

As an independent professional organization dedicated to the rule of law, the American Bar Association takes no position on Venezuela’s internal political affairs. Nor does the ABA take a position on policy differences between the governments of Venezuela and the US, or on whether the NED grant in question was advisable as a matter of policy. The ABA’s sole concern is whether the proceedings in this case comport with international standards governing criminal prosecutions and rights of political participation, and the implications of this case for the rule of law and the exercise of internationally protected rights in Venezuela.

The civic group that solicited the NED grant is called *Súmate* (“Join up”). Venezuelan prosecutors appear to concede that, except for the solicitation of NED funds, *Súmate*’s educational and promotional activities relating to the referendum were lawful. However, they accuse *Súmate*’s President, Alejandro Plaz, and Vice President, María Corina Machado, of violating a law that imposes prison terms of 8 to 16 years on any Venezuelan who “solicits foreign intervention in the internal political affairs of Venezuela.”<sup>2</sup>

In the opinion of this observer, both that law as applied in this case and the criminal proceedings to date fail to meet international standards.

First, as applied in a novel way in this case, the law is impermissibly vague. Although it dates from early in the last century, it apparently has never previously been

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<sup>1</sup> The observer was accompanied and assisted by Carlos María Pelayo Moller, a Mexican attorney and specialist in criminal law. During academic year 2005-06 Mr. Pelayo will be a student of Professor Cassel in the LL.M. program in international human rights law at Notre Dame Law School.

<sup>2</sup> Criminal Code of Venezuela, art. 132, quoted in part 5 below.

used to prosecute foreign funding of otherwise lawful activity in Venezuela. Its meaning in this context is so unclear as to violate international standards requiring fair notice to defendants of what conduct is deemed criminal. How are Venezuelan citizens to know whether a civic group's seeking foreign funding for lawful activities equates to soliciting "foreign intervention"?

Second, the ambiguities in the law should be resolved in a manner consistent with Venezuela's international legal obligations. So interpreted, the law would not criminalize Súmate's solicitation of NED funds. International law protects both the right to solicit funds to educate citizens about the exercise of fundamental rights, and the right to make effective the exercise of the vote in a referendum.

Third, the case is brought before a Venezuelan judiciary that fails to meet international standards of judicial independence. More than 80% of Venezuelan judges, including the pretrial judge in this case, are "provisional" judges. They have no tenure and can be removed by the Supreme Court at any time without explanation.

The Supreme Court likewise lacks structural independence. During 2004 it was expanded from 20 to 32 justices, and other justices were replaced, so that the overwhelming majority of justices are now considered pro-Chávez. And their appointments may be suspended or annulled based on such subjective standards as omitting "true facts" from their opinions or bringing the judiciary into "disrespect."

The vulnerability of the judiciary to outside influence is of particular concern in the politicized context of this case. Not only did Súmate promote a referendum to recall the President, but the President publicly accused Súmate leaders of committing crimes by soliciting NED funds. The prosecution began soon thereafter and has continued during public, mutual recriminations between Venezuelan authorities and NED.

Fourth, certain aspects of the pretrial proceedings to date violate due process of law. For example, even though Súmate leaders were the targets of the preliminary criminal inquiry, the prosecutor initially accorded them rights only as witnesses rather than as suspects. However, it is not yet clear whether these violations will ultimately be prejudicial at trial.

On the other hand, Venezuelan courts have protected the rights of the accused to remain at liberty pending trial. The Supreme Court ruled in November 2004 that they should not be incarcerated pending trial. In July 2005 the pretrial judge again refused the prosecutor's request that they be jailed pending trial.

Despite these laudable rulings, the proceedings overall fail to meet international standards of the rule of law. Súmate leaders are being prosecuted in a highly charged political atmosphere under an impermissibly vague law, interpreted in a manner inconsistent with their internationally protected rights, before a judiciary that lacks independence and has already violated certain of their due process rights.

Moreover, during a pretrial hearing on July 6, 2005, the prosecutor warned that additional persons may be charged, and that further charges may be brought against Súmate leaders. Internationally respected human rights lawyers in Venezuela expressed concern to the observer that the prosecution of Súmate could have a chilling effect on the exercise of political rights, and that it is part of a broader pattern of persecution of groups opposed to President Chávez.

At the conclusion of that hearing on July 7, 2005, the pretrial judge overruled defense motions to dismiss and ordered that the case against all four defendants proceed to trial. Although the timing is uncertain, the trial could begin as early as August 2005.

The European Union has reportedly decided to send an observer if the case is taken to trial.<sup>3</sup> For the reasons discussed in part 10 below, the ABA should likewise send an observer to the trial. An ABA decision on further action, if any, can and should await the observer's final report.

## **2. Observer's Mandate.**

On July 1, 2005, ABA President Robert J. Grey, Jr., designated this observer as the ABA representative to observe the criminal proceedings involving Maria Corina Machado in Venezuela "and, in addition, to become informed generally regarding the status of due process safeguards and related matters in the Venezuelan judiciary."

The objects of the observation were to make known to Venezuelans and Venezuelan authorities the ABA interest in the proceedings and related issues, to obtain information about the proceedings, to collect background information on the circumstances leading to the trial and on the status of due process and independence of the Venezuelan judiciary, and to prepare a thorough and unbiased report "regarding what further action, if any, the ABA may wish to take with respect to those proceedings."

The observer was in Caracas from July 5-8, 2005, accompanied by an assistant, Mexican lawyer Carlos Pelayo. The observer met with the accused and their defense lawyers, who kindly provided voluminous documents, including the formal charges which detail the prosecution's legal theory and summarize its evidence.

The observer was also privileged to meet with Venezuela's Vice Minister of Foreign Relations for North America, Licenciada María Pilar Hernández Domínguez, as well as with officials of the legal adviser's office of the Foreign Ministry. All were exceedingly courteous and generous with their time and information. Minister Hernández gave a detailed explanation of the government's position on the case.

For background and perspective, the observer also met with several prominent Venezuelan lawyers who have extensive international experience in human rights matters at senior levels for the United Nations and the Organization of American States.

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<sup>3</sup> *Abogados de EEUU y La Unión Europea Monitorearán el Juicio*, EL UNIVERSAL, p. I-4, July 7, 2005.

The observer attended preliminary hearings in the case on July 6 and 7. However, since they were closed to the public, his attendance was limited to discussions before and after with defense lawyers, and to being visibly present in the corridors outside the courtroom. The Venezuelan press reported on his presence. Pursuant to ABA trial observation guidelines, the observer declined to answer questions or to make any comment to the media.<sup>4</sup>

In all contacts the observer made clear that the ABA is independent of the US government, that ABA trial observation criteria are legal and professional in nature, and that the ABA takes no position on Venezuela's internal political affairs or its bilateral relations with the US government. Although the observer neither sought nor received any assistance from the US government, he paid a courtesy visit on US Ambassador William Brownfield in order to explain the nature of the ABA interest in the proceedings and ABA practice in regard to trial observations.

The observer also requested meetings with the prosecutor in the case, the Prosecutor General, and Venezuela's Vice President (who submitted a declaration in the case), as well as a courtesy visit with the pretrial judge. The prosecutor declined to meet with the observer. No reply was received to the other requests which, it should be noted, were made on very short notice.

In addition to extensive documents from the case file and publicly available documents from the US and Venezuelan governments and NED, the observer reviewed recent reports on the situation of the judiciary and human rights in Venezuela by the Inter-American Commission on Human Rights, the Special Rapporteur of the United Nations Commission on Human Rights, and other monitoring organizations.

### 3. **Background of the Accused.**

**Alejandro Plaz** is President of *Súmate*. Before retiring and founding *Súmate*, he had a career with the McKinsey and Company management consulting firm in Venezuela. *Súmate* was formally organized in July 2002. Its principal purpose is to educate Venezuelans about their civic and electoral rights. One of its principal activities was to lead the organizing of signature campaigns to support the referendum to recall President Chávez. *Súmate* claims to have mobilized thousands of volunteers and generated millions of signatures.

**María Corina Machado** is Vice President of *Súmate*. Previously she ran a Venezuelan non-governmental organization devoted to helping children. Government officials accuse her of involvement in the April 2002 coup, which she denies. She signed *Súmate*'s contract with NED.

Defendants **Luis Enrique Palacios Alzuru** and **Ricardo Ludwig Estévez Mazza** are accused as "accomplices" for preparing workshop materials and leading the workshops funded by NED. Both are charged as "unnecessary" accomplices because, the

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<sup>4</sup> *Id.* and *El Nacional*, July 7, 2005.

formal accusation explains, Súmate could have carried out its NED-funded activities without them by, for example, contracting with other persons to lead the workshops.<sup>5</sup>

#### 4. **Venezuela's Legal System.**

Venezuela's Constitution provides for five formally independent branches of government. In addition to the executive, legislative and judicial branches, the electoral branch is headed by the National Electoral Council. A fifth, "Citizen Power" branch consists of the Comptroller General, the Ombudsman (Defender of the People), and the Prosecutor General.<sup>6</sup>

Both the Prosecutor General and the courts, then, are formally independent of the executive branch.

Venezuela's legal tradition is a civil law system whose criminal procedures are significantly influenced by German approaches.

Venezuelan criminal procedure subjects the preliminary investigative activities of the prosecutor to the supervision of a "control" or pretrial judge, whose functions are akin to those of a US federal magistrate. When serious cases, such as that of Súmate's leaders, go to trial, they generally are heard by a professional judge together with two lay judges, on the German model. Application of sentences is overseen by executive judges.

Appeals are heard by three-judge appeals panels, and may be reviewed by the Criminal Chamber of the Supreme Court.

#### 5. **Facts of the Case.**

##### (a) Charges Against Súmate Leaders.

The President and Vice President of Súmate, Alejandro Plaz and María Corina Machado, are accused under article 132 of the Venezuelan Criminal Code, which imposes a punishment of eight to sixteen years imprisonment on "a Venezuelan who solicits foreign intervention in the internal political affairs of Venezuela, ..."<sup>7</sup>

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<sup>5</sup> Escrito de Acusación por la Fiscal Luisa Ortega Díaz, Fiscal Sexta a Nivel Nacional con Competencia Penal, 30 de septiembre de 2004, at 78, 81.

<sup>6</sup> Constitution of the Bolivarian Republic of Venezuela (2000), Title V.

<sup>7</sup> Article 132 is in Chapter I of the Criminal Code, which is entitled, "On treason against the nation and other crimes against the nation." (All English translations herein unofficial, by the author.) Article 132 reads in pertinent part:

"Whoever, within or outside the national territory, conspires to destroy the republican political form of the Nation, will be punished by **eight to sixteen years in the presidium.**" [Footnote continues next page.]

**"The same punishment will be incurred by a Venezuelan who solicits foreign intervention in the internal political affairs of Venezuela, ...."**

The alleged “foreign intervention” was a grant from the National Endowment for Democracy (“NED”) in Washington, D.C. NED is a private, non-profit organization, with an independent board of directors. Its purposes include “to encourage free and democratic institutions throughout the world through private sector initiatives” and to “strengthen democratic electoral processes abroad through timely measures in cooperation with indigenous democratic forces.”<sup>8</sup>

NED is understandably perceived as close to the US government. Of 27 officers and directors listed on its web page, seven are current members of Congress, including the Senate majority leader and House minority leader, and two are former members. Four are former US Ambassadors; one is a former White House official; and one is a retired US General. The remaining 12 come from US business, labor, academia and think tanks.<sup>9</sup>

NED is recognized by a federal statute, the National Endowment for Democracy Act, which directs that the State Department “shall make an annual grant” to NED to enable it to carry out its purposes.<sup>10</sup> Quoting NED’s articles of incorporation, the Act specifies that NED’s encouragement of democratic development abroad shall be “in a manner consistent ... with the broad concerns of United States national interests ...”<sup>11</sup>

Before the August 2004 recall referendum in Venezuela, Súmate solicited, and in September 2003 was awarded, a \$53,400 NED grant to fund workshops to train its supporters on how to educate and encourage voters to participate in the referendum.<sup>12</sup> Súmate actually accepted only the first \$31,150 of the grant. It used these funds, it contends, to prepare workshop materials and to conduct the first two workshops.<sup>13</sup>

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The Spanish original of the Código Penal de Venezuela, as of the September 30, 2004 date of the formal criminal charges, reads as follows:

“Capitulo I, De la traición a la patria y otros delitos contra esta”

...

Artículo 132.

“Cualquiera que, dentro o fuera del territorio nacional, conspire para destruir la forma política republicana que se ha dado la Nación, será castigado con presidio de **ocho a dieciséis años.**”

**“En la misma pena incurrirá el venezolano que solicitare la intervención extranjera en los asuntos de la política interior de Venezuela, ....”**

<sup>8</sup> NED articles of incorporation, as quoted in 22 USCS section 4411(b)(1) and (4) (2005). Related NED purposes are quoted in section 4411(b)(2)-(3) and (5)-(6).

<sup>9</sup> See <http://www.ned.org/about/who.html> (visited July 14, 2005).

<sup>10</sup> 22 USCS sections 4411 and 4412(a)(2005).

<sup>11</sup> 22 USCS section 4411(b)(6) (2005).

<sup>12</sup> National Endowment for Democracy, Grant Agreement No. 2003-548.0, between NED and Súmate, September 25, 2003, par. 3, admitted into evidence July 7, 2005.

<sup>13</sup> Information supplied by the defense. The \$31,150 amount corresponds to the first two payments under the NED grant, which were scheduled to be made in September 2003 and February 2004. *Id.* at p. 8, Attachment B.

The prosecution disputes this contention, charging that Súmate received NED funds not only for workshops, but for gathering signatures as well.<sup>14</sup> However, the prosecution's claim is not expressly supported by the terms of the NED grant,<sup>15</sup> appears to be inconsistent with Súmate's bank records,<sup>16</sup> and lacks clear support in the other evidence summarized in the prosecution's formal explanation of the charges.<sup>17</sup>

Súmate chose not to accept the remainder of the grant, instead using its own funds for the remaining 24 workshops, because on February 15, 2004, President Chávez publicly accused Súmate leaders of committing crimes by seeking NED funding. During his weekly television program the President instructed his Attorney General to give him a legal opinion, and stated he would ask the independent Prosecutor General to begin a preliminary criminal inquiry, "because here I presume there are crimes against the Nation, conspiracy against the Republic and in addition I believe that this approaches treason against the Nation, where some Venezuelans go looking for support up there in Washington in order to generate all this."<sup>18</sup>

President Chávez' protest of Súmate's NED funding is understandable. Relations between the US and his government have been and continue to be strained. In part this flows from ideological differences, illustrated by his political alliance with Cuban President Fidel Castro.

The background of the internal and bilateral disputes is relevant here, not because the ABA takes a position on them, but to understand the heated political context in which the case is brought, and in which the Venezuelan courts are called upon to exercise judicial independence.

(b) NED and the 2002 Coup.

Bilateral tensions are aggravated because many Venezuelans accuse the US and NED of backing an apparent coup d'état in April 2002, during which President Chávez, it

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<sup>14</sup> Escrito de Acusación por la Fiscal Luisa Ortega Díaz, Fiscal Sexta a Nivel Nacional con Competencia Penal, 30 de septiembre de 2004, at 33.

<sup>15</sup> National Endowment for Democracy, Grant Agreement No. 2003-548.0, between NED and Súmate, September 25, 2003, at Attachment A, section III, admitted into evidence by the pretrial judge on July 7, 2005.

<sup>16</sup> Banco Mercantil statement of checking account no. 1079-54616-2 in the name of Asociación Civil Súmate, admitted into evidence by the pretrial judge on July 7, 2005.

<sup>17</sup> Escrito de Acusación por la Fiscal Luisa Ortega Díaz, Fiscal Sexta a Nivel Nacional con Competencia Penal, 30 de septiembre de 2004, at 85 et seq.

<sup>18</sup> Unofficial transcription of "Hello President" No. 182, February 15, 2004, RNV-VTV, supplied to ABA observer by the lawyers for the accused. The original Spanish transcription reads in pertinent part: "Yo quiero, estoy instruyendo a la Procuradora General de la República que me presente en el mas corto tiempo que pueda, doctora Marisol, por favor, una opinión, una recomendación más bien para dirigirme al Fiscal General de la República y pedir una averiguación porque aquí yo presumo que hay delitos contra la Nación, conspiración contra la República y además creo que esto se acerca a la traición a la Patria, unos venezolanos que andan buscando apoyo allá en Washington para generar todo esto."

was falsely claimed at the time, resigned “voluntarily,” until he was reinstated a few days later.

US officials claim that they repeatedly informed the opposition of their opposition to any coup. However, the US did not condemn the removal of President Chávez until two days after the event, and even then, not until after the coup leader was forced to resign.<sup>19</sup> Declassified documents make clear that even though they publicly denied advance knowledge at the time, the CIA and senior US executive officials knew that military officers were attempting to organize a coup, “possibly as early as this month.”<sup>20</sup>

During the six months before the coup, NED spent \$2.1 million in Venezuela through its US “core grantees”<sup>21</sup> and through grants to Venezuelan civic groups (but not Súmate, which was organized only later).<sup>22</sup> While the State Department Inspector General found no evidence that NED funding “directly contributed, or was intended to contribute” to the coup, he also found that NED aided “individuals and organizations understood to be actively involved in the brief ouster of the Chávez government ...”<sup>23</sup>

“Of particular concern,” reported the *New York Times*, was a grant of over \$150,000 by an NED core grantee, the American Center for International Labor Solidarity, to assist the main Venezuelan labor union in advancing labor rights. That union, according to the *Times*, “led the work stoppages that galvanized the opposition to Mr. Chávez,” and its leader “worked closely” with the coup leader.<sup>24</sup>

The day after the temporary ouster of President Chávez, another NED core grantee, the International Republican Institute (“IRI”), issued a statement praising “Venezuelan Civil Society’s Defense of Democracy.” Venezuelans, it stated, “were provoked into action as a result of systematic repression by the Government of Hugo Chávez.”<sup>25</sup>

Three days later (after the coup had failed) NED’s President wrote to IRI, objecting to the statement and noting that President Chávez’ “removal through unconstitutional means was understandably seen by many democrats in this hemisphere and beyond as itself a blow to democracy in Venezuela.”<sup>26</sup> Three more weeks passed

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<sup>19</sup> Christopher Marquis, *U.S. Cautioned Leader of Plot Against Chávez*, NEW YORK TIMES, April 17, 2002, p. A5.

<sup>20</sup> Juan Forero, *Documents Show C.I.A. Knew of a Coup Plot in Venezuela*, NEW YORK TIMES, Dec. 3, 2004, p. A5.

<sup>21</sup> NED’s four core grantees are the National Democratic Institute for International Affairs, the International Republican Institute, the American Center for International Labor Solidarity, and the Center for International Private Enterprise. See <http://www.ned.org/about/how.html> (visited July 10, 2005).

<sup>22</sup> United States Department of State and the Broadcasting Board of Governors, Office of Inspector General, *A Review of U.S. Policy Toward Venezuela, November 2001 – April 2002*, Report No. 02-OIG-003, July 2002, (hereafter “OIG Report”) at p. 28, Chart 1.

<sup>23</sup> OIG Report at 3.

<sup>24</sup> Christopher Marquis, *U.S. Bankrolling Is Under Scrutiny for Ties to Chávez Ouster*, NEW YORK TIMES, April 25, 2002, p. A6.

<sup>25</sup> *Id.* at 31.

<sup>26</sup> *Id.* at 32.

before IRI clarified that its statement “was not an endorsement of extra-constitutional measures to forcibly remove an elected President, ...”<sup>27</sup>

(c) NED and the Recall Referendum.

The following year, as the campaign to initiate a recall referendum was underway, NED and its core grantees spent another \$1 million in Venezuela.<sup>28</sup> Again, all or most went to groups, like Súmate, perceived as opposed to President Chávez.

Soon after the President’s public accusation of Súmate in February 2004, criminal complaints were filed by pro-Chávez members of Venezuela’s Congress.<sup>29</sup> Prosecutors opened a preliminary criminal inquiry. In September 2004 they filed formal charges against Plaz, Machado and two trainers who led Súmate’s voter education workshops.<sup>30</sup>

In November 2004 NED released a letter to President Chávez and other officials, signed by more than 70 “democrats from around the world,” including such figures as Madeleine Albright, Emma Bonino, Richard Goldstone, Vaclav Havel and John McCain. The signers were “appalled” that Súmate was “singled out” for prosecution “for accepting international assistance to help educate citizens about their rights under Venezuela’s constitution.”

The signers were “equally troubled that this prosecution appears to be just the beginning of a larger effort to criminalize the receipt of foreign funds by Venezuelan NGO’s.” They noted:

NED is but one of dozens of democracy foundations in North America, Europe, and Asia that receive public funding from their respective parliaments for the purpose of providing assistance to support democracy-related programs no different from the one conducted by Súmate.<sup>31</sup>

Venezuela’s Ambassador to the US responded by requesting “an independent investigation of the funding and activities of the National Endowment for Democracy in Venezuela,” including NED funding before or after 2002 of anyone who “participated in or supported the coup.”<sup>32</sup> Since Venezuelan officials contend that María Corina Machado supported the coup, this request implicitly included the grant to Súmate.

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<sup>27</sup> *Id.* at 33.

<sup>28</sup> See listing at <http://www.ned.org/grants/03programs/grants-lac.html#Venezuela> (visited July 14, 2005).

<sup>29</sup> Criminal complaint dated February 25, 2004 (on file with ABA observer).

<sup>30</sup> Escrito de Acusación por la Fiscal Luisa Ortega Díaz, Fiscal Sexta a Nivel Nacional con Competencia Penal, 30 de septiembre de 2004.

<sup>31</sup> NED press release, *International Coalition Expresses Concern for Democracy in Venezuela, Havel, Albright, McCain Among Signers of Letter to Chávez*, Nov. 11, 2004, accessible at <http://www.ned.org/press/releases.html> (visited July 10, 2005).

<sup>32</sup> Letter from Ambassador Bernardo Alvarez Herrera to Mr. Vin Weber, Chairman, NED Board of Directors, dated December 9, 2004, citing earlier letter from Ambassador Alvarez to Mr. Weber dated November 16, 2004, accessible at [http://www.embavenez-us.org/?pagina=pag\\_ambassadors\\_bernardo.php&titulo=The%20Ambassador](http://www.embavenez-us.org/?pagina=pag_ambassadors_bernardo.php&titulo=The%20Ambassador) (visited July 10, 2005).

The political controversy intensified in May 2005 when, during a visit to the US, María Corina Machado met with US President George Bush. Venezuela's Foreign Minister termed the meeting a "provocation." A pro-Chávez member of Venezuela's Congress was quoted in a Venezuelan newspaper: "We know that the NED has connections to the Central Intelligence Agency. And that Machado follows the instructions of Bush and the State Department to destabilize the country."<sup>33</sup>

Except for the use of NED funds, Venezuelan prosecutors appear to concede that Súmate's activities relating to the referendum were lawful.<sup>34</sup>

## **6. International and Regional Legal Standards.**

The principal international standards relied on by the observer are the following:

- a. Clarity and Precision in Criminal Laws.
  - i. Article 15.1 of the International Covenant on Civil and Political Rights, ratified by Venezuela on 10 May 1978.
  - ii. Article 9 of the American Convention on Human Rights, ratified by Venezuela on 9 August 1977.
  
- b. Rights to Take Part in the Conduct of Public Affairs, Including Referenda, and to Solicit Support for Activities to Promote the Exercise of Fundamental Rights.
  - i. Article 25 of the International Covenant on Civil and Political Rights, and UN Human Rights Committee General Comment 25.
  
  - ii. Article 23 of the American Convention on Human Rights.

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<sup>33</sup> Steven Dudley and Nancy Sam Martin, *Bush's meeting with Venezuelan activist intensifies tensions*, THE MIAMI HERALD, June 5, 2005, International News Section.

<sup>34</sup> Escrito de Acusación por la Fiscal Luisa Ortega Díaz, Fiscal Sexta a Nivel Nacional con Competencia Penal, 30 de septiembre de 2004, at 49: "La ciudadana MARÍA CORINA MACHADO, utilizando para ello la Asociación Civil SÚMATE, tal y como ya hemos señalado, llevó a cabo actos de política interna del país, antes, durante y después de la realización del Referéndum Revocatorio que si bien es cierto las podía realizar, también es cierto que no debió nunca recibir financiamiento de organismos extranjeros, ..."

The following English translation, like all translations herein, is an unofficial translation by the ABA observer: Formal charges by prosecutor Luisa Ortega Diaz, Sixth National Prosecutor in Criminal Matters, September 30, 2004, (hereafter "Charges") at 49: "Citizen MARÍA CORINA MACHADO, using for that purpose the Civil Association SÚMATE, in the manner previously indicated, carried out acts of internal politics of the country, before, during and after the holding of the Recall Referendum which although it is true that she could carry them out, it is also true that she should never receive funding from foreign entities ..."

- iii. Article 6 of the Inter-American Democratic Charter, adopted by the Organization of American States General Assembly, September 11, 2001.
  - iv. Article 13 of the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by General Assembly resolution 53/144 of 9 December 1998.
- c. Independence of the Judiciary.
- i. Article 14.1 of the International Covenant on Civil and Political Rights, and UN Human Rights Committee General Comment 13 to Article 14.1.
  - ii. Article 8.1 of the American Convention on Human Rights.
  - iii. Article 12 of the United Nations Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
- d. Due Process of Law and Fair Trial.
- i. Article 14 of the International Covenant on Civil and Political Rights.
  - ii. Article 8 of the American Convention on Human Rights.

## **7. The Proceedings – Assessment of Compliance with Law.**

This analysis focuses on whether the proceedings to date comply with international law, including treaties of the United Nations and the Organization of American States ratified by Venezuela without applicable reservation.

### a. Clarity and Precision Required in Criminal Laws.

Article 132 of the Venezuelan Criminal Code imposes prison terms of 8 to 16 years on any Venezuelan who “solicits foreign intervention in the internal political affairs of Venezuela.”

What this means as a matter of Venezuelan law, and whether it satisfies Venezuelan legal standards of clarity, are matters to be resolved by Venezuelan courts. This analysis focuses on whether article 132, as applied in this case, meets international standards accepted by Venezuela.

Article 15.1 of the International Covenant on Civil and Political Rights (“ICCPR”) provides in pertinent part, “No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed.”<sup>35</sup>

According to an authoritative commentary, “This gives rise not only to the prohibition of retroactive criminal laws in the narrow sense but also to a general duty on States parties to define precisely by law all criminal offenses in the interest of legal certainty ...”<sup>36</sup>

As applied in this case, article 132 fails to “define precisely” what conduct is criminal. It does not define “foreign intervention.” Does “foreign intervention” include providing funds to educate voters about their political rights? Or not? How are Venezuelans who solicit such funds to know?

These questions are especially acute in the apparent absence of any previous application of this law to the solicitation of funds for lawful activities, despite prior solicitations – and receipts – of foreign funds for lawful voter education and similar activities by civic groups in Venezuela.<sup>37</sup>

Venezuelan law – not cited in the charges against the Súmate leaders – does expressly prohibit “political parties” from accepting funds from foreign governments.<sup>38</sup> Vice Minister Hernandez informed the ABA observer of the government’s view that Súmate in effect acted as a “political party.”

The definition of “political party” in Venezuelan law is indeed so broad that it might appear on first reading to encompass civic groups: “Political parties are groups of a permanent nature whose members agree to associate in order to participate, by lawful means, in the political life of the country, in accordance with programs and statutes freely agreed upon by them.”<sup>39</sup>

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<sup>35</sup> Article 9 of the American Convention on Human Rights embodies the same norm.

<sup>36</sup> Manfred Nowak, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY (2d rev. ed. 2005) (N.P. Engel pub.), at 360. International law has long required clarity and precision in criminal proscriptions.

<sup>37</sup> See, e.g., IRI grants from January 2001 through February 2003, in OIG Report at 28.

<sup>38</sup> Law of Political Parties, Public Meetings and Demonstrations, as published in the Official Gazette No. 27.620 of 16 December 1964, article 2. In Spanish: Ley de Partidos Políticos, Reuniones Públicas y Manifestaciones, Según la Gaceta Oficial N° 27.620 de 16 de diciembre de 1964, Artículo 25.4.

<sup>39</sup> Law of Political Parties, Public Meetings and Demonstrations, as published in the Official Gazette No. 27.620 of 16 December 1964, article 2. In Spanish: Ley de Partidos Políticos, Reuniones Públicas y Manifestaciones, Según la Gaceta Oficial N° 27.620 de 16 de diciembre de 1964, Artículo 2: “Los partidos políticos son agrupaciones de carácter permanente cuyos miembros convienen en asociarse para participar,

Even if Súmate were a political party, however, article 132 of the Criminal Code does not incorporate the law on political parties by reference. Even though the law on political parties bans parties from accepting foreign contributions, it does not purport to make their doing so a violation of article 132.

Moreover, it is doubtful that Súmate is a political party. It does not nominate or endorse candidates for election to public office. On the contrary, its materials advise organizers that the most suitable persons for involvement in Súmate are persons not affiliated with any political party.<sup>40</sup>

Súmate's self-description is that of a civic association, not a political party. On its web page under the heading, "Who We Are," Súmate explains that it is a "not-for-profit civic association ... whose objectives are to promote individual liberty, the expression of free thought and the full exercise of constitutional rights and duties in Venezuela. ... In order to achieve its objectives, the civic association Súmate promotes the exercise of the political rights of citizens, debate and discussion of ideas and matters of public interest, and procedures of consultation and collective decision making."<sup>41</sup>

Vice Minister Hernández contends that Súmate is widely perceived as supporting the opposition to President Chávez. That seems plain: Why else would Súmate labor so hard to promote a recall referendum?

Yet the written materials for Súmate's NED-funded workshops stay within non-partisan bounds: they merely educate voters on how to participate in the referendum, without taking the further, partisan step of urging them to vote for or against the President. No evidence to the contrary is presented in the prosecution's voluminous summary of its proof in the formal charges.

Súmate's purpose appears to be not to participate in politics, but to educate and motivate others to exercise their right to do so. And Venezuela appears to have no law expressly prohibiting civic groups from soliciting foreign funds to conduct workshops to

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por medios lícitos, en la vida política del país, de acuerdo con programas y estatutos libremente acordados por ellos."

<sup>40</sup> Manual for Participants in Súmate Workshops, p. 7 ("Manual del Participante") (on file with ABA observer).

<sup>41</sup> The Spanish original, accessible at [http://www.sumate.org/quienes\\_somos.asp#mision](http://www.sumate.org/quienes_somos.asp#mision) (visited July 11, 2005) states as follows: "Súmate es una Asociación Civil ... sin fines de lucro que tiene como objetivo fomentar la libertad individual, la expresión del libre pensamiento y el pleno ejercicio de los derechos y deberes constitucionales en Venezuela. ...."

"Para lograr sus objetivos, la Asociación Civil Súmate promueve el ejercicio de los derechos políticos de los ciudadanos, el debate y la discusión de ideas y de asuntos de interés público, y procesos de consulta y toma de decisiones colectivas."

educate voters about their rights. Certainly article 132 does not amount to such a penal norm with the clarity and precision required by article 15.1 of the ICCPR.

The least that can be said, then, is that article 132, the only criminal law Súmate's leaders are accused of violating,<sup>42</sup> does not make a civic group's soliciting foreign funds for educational workshops a crime in terms clear enough to meet international standards of fair notice.

b. Consistency with Internationally Protected Rights.

If the ambiguities in article 132 are interpreted in a manner consistent with Venezuela's international obligations, then article 132 should not be read to criminalize Súmate's solicitation of the NED grant.

(1) Right to Solicit Funds to Promote Fundamental Freedoms.

Any reading of article 132 to bar civic groups from soliciting foreign funds to promote the exercise of fundamental rights would arguably conflict with international norms. Article 13 of the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by the General Assembly in 1998, proclaims:

Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration.

Venezuela was among the States that introduced the draft resolution to adopt the UN Declaration.<sup>43</sup> The Declaration confirms the right of Súmate leaders, in association with others, to solicit and receive resources for the express purpose of promoting the exercise of fundamental freedoms – such as voting in a referendum – through peaceful means, such as educational workshops.

The breadth of international consensus underlying this right is reinforced by regional commitments. A General Assembly resolution of the Organization of American

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<sup>42</sup> The pretrial judge's decision of July 7, 2005 also cites articles 130 and 131 of the Venezuelan Constitution. But neither is a penal norm, and neither adds clarity to the ambiguous terms of article 132 of the Criminal Code. Article 130 of the Constitution states in broad language, "Venezuelans have the duty to honor and defend the country, its symbols, cultural values, [and] to shelter and protect its sovereignty, nationality, territorial integrity, self-determination and national interests." Article 131 states, "Everyone has the duty to obey and follow this Constitution, the laws and other orders given within the exercise of their functions by the organs of public authority."

<sup>43</sup> UN General Assembly, Report of the Third Committee, UN Doc. A/53/625/Add.2, 30 November 1998, par. 14.

States invites OAS member states to “publicize and enforce” the UN Declaration.<sup>44</sup> The 55 member states of the Organization for Security and Co-Operation in Europe likewise commit to allow non-governmental organizations “to solicit, receive and utilize for the purpose of promoting and protecting human rights and fundamental freedoms voluntary financial contributions from national and international sources as provided for by law.”<sup>45</sup>

As set forth in the UN Declaration, this international right is not unlimited.<sup>46</sup> Whether it would permit Venezuela to enact an express ban on solicitation by civic groups of foreign funds for voter education activities is uncertain. But if there is to be criminal enforcement, any such ban must at least be clear and express, and not implied by novel interpretation of a vague law that does not even mention solicitation of funds.

(2) Right to Effective Participation in Referenda.

Moreover, the fundamental *right of citizens to participate* in an election or referendum is a matter of international, not merely internal concern. Article 25 of the ICCPR guarantees every citizen the right to “take part in the conduct of public affairs” and to vote at “genuine periodic elections,”<sup>47</sup> including in referenda.<sup>48</sup> These are fundamental, internationally guaranteed rights. The UN Human Rights Committee emphasizes that article 25 “lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.”<sup>49</sup>

The Inter-American Democratic Charter, adopted by the Organization of American States, similarly declares that citizens have both a “right and responsibility” to

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<sup>44</sup> AG/Res. 1842 (XXXII-O/02), Human Rights Defenders in the Americas: Support for the individuals, groups, and organizations of civil society working to promote and protect human rights in the Americas, Adopted at the 4th plenary session, June 4, 2002, par. 4.

<sup>45</sup> OSCE, *Document of the Sixth Meeting of the Ministerial Council*, Copenhagen, 18-19 December 1997, par. 10.4.

<sup>46</sup> The right in article 13 of the UN Declaration is “in accordance with” article 3, which provides: “Domestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed and within which all activities referred to in the present Declaration for the promotion, protection and effective realization of those rights and freedoms should be conducted.”

Thus, the right to solicit funds to promote the exercise of fundamental freedoms is subject to domestic law, but that domestic law, in turn, must be consistent with relevant international law. For reasons stated in the text above, article 132 would not be consistent with international law if its vague proscription were interpreted to criminalize the solicitation of foreign funds to promote the exercise of political rights.

<sup>47</sup> Article 23.1(a) and (b) of the American Convention on Human Rights guarantee the same rights.

<sup>48</sup> UN Human Rights Committee, General Comment No. 25, *The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)*, 12/07/96, par. 10 makes clear: “The right to vote at elections *and referenda* must be established by law and may be subject only to reasonable restrictions, ...” (Emphasis added.)

<sup>49</sup> *Id.*, par. 1.

participate in public decisions, and that promoting their participation “strengthens democracy.”<sup>50</sup>

It is not enough for these rights to be recognized formally or by law; they must also be made effective in practice. As the Human Rights Committee explains, article 25 “requires States to ... ensure that citizens have an *effective opportunity* to enjoy the rights it protects.”<sup>51</sup> Electoral laws must guarantee “the *effective* exercise of voting rights. Persons entitled to vote must be free to vote ... for or against any proposal submitted to referendum ...,”<sup>52</sup>

What Súmate did was to make the right of citizens to petition for and participate in a recall referendum, formally recognized by the Venezuelan constitution,<sup>53</sup> effective in practice. Toward that end, Súmate organized educational workshops and solicited funding from NED. Súmate leaders both exercised their own right to “take part in the conduct of public affairs,” and helped to make effective the rights of other citizens.

Like the right to solicit funds, the right to participate in public affairs is not without limits. Article 25 requires that it be guaranteed “without unreasonable restrictions.” Prohibiting a political party from soliciting foreign funds is not unreasonable.<sup>54</sup> Prohibiting a civic group from soliciting foreign funds for educational workshops might well be unreasonable. But in any case, Venezuela has enacted no such criminal prohibition with the clarity required of penal norms.

In sum, article 132 should not be interpreted implicitly to criminalize solicitation by civic groups of foreign funds for activities to promote fundamental rights, in view of the internationally recognized rights of Venezuelans to solicit funds to promote the exercise of fundamental rights and to take part effectively in referenda.

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<sup>50</sup> Article 6 provides: “It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.”

<sup>51</sup> *Id.* (emphasis added).

<sup>52</sup> *Id.* par. 19 (emphasis added).

<sup>53</sup> Art. 72.

<sup>54</sup> Like Venezuela, the US prohibits its citizens from soliciting foreign contributions to political parties or in connection with elections. 2 USC 441e(a)(2)(2005). In addition, foreign nationals are barred from contributing to political parties, making contributions in connection with elections, or paying for “electioneering communications” in support of candidates for election. 2 USC 441e (2005) (a)(1); see also 2 USC 434(f)(3) (2005).

c. Independence of the Judiciary.

Under the ICCPR and the American Convention on Human Rights, persons accused of crime are entitled to trial before “independent and impartial” tribunals.<sup>55</sup> An essential element of that right is recognized by article 12 of the United Nations Basic Principles on the Independence of the Judiciary, which specifies that judges “shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”<sup>56</sup>

International human rights observers express serious doubts about the independence of the Venezuelan judiciary. There are two systemic problems. First, more than 80% of Venezuelan judges, including the pretrial judge in this case,<sup>57</sup> are “provisional” judges, who have no tenure in office and can be removed by the Supreme Court at any time without explanation.<sup>58</sup> Plans to hold competitive tests for judicial placements have been stalled for over two years.<sup>59</sup>

This deficiency, the Inter-American Commission on Human Rights found, “seriously undermines the right of the citizenry to the proper administration of justice, and vitiates the right of magistrates to tenure in their position as a guarantee of their independence and autonomy.” The Commission was also concerned that, “since May 6, 2003, the appointment of magistrates selected through competition, who would thereby have guarantees of stability allowing them to exercise their functions independently and impartially, has been suspended. The practice of appointing temporary judges contracted

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<sup>55</sup> ICCPR art. 14.1; American Convention art. 8.1.

<sup>56</sup> The UN Human Rights Committee similarly requires States parties to the ICCPR to ensure that courts “... are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, ..., and the duration of their terms of office; [and] the conditions governing ... cessation of their functions ....” General Comment No. 13, *Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)*, 13/04/84, par. 3.

<sup>57</sup> Defense counsel contend that the pretrial judge lacks impartiality. After unsuccessfully asking her to recuse herself, in October 2004 some counsel filed a complaint against her with the Executive Office of the Judiciary. The Inspector General of the Courts then formally charged her with abuse of authority. However, the Commission on Functioning and Restructuring of the Judiciary found her not guilty. The Inspector General then petitioned for administrative review. As of mid-July 2005 his petition remained pending before the Administrative Chamber of the Supreme Court. On July 14, 2005, defense counsel filed another complaint against the pretrial judge with the Executive Office of the Judiciary, again objecting to her failure to recuse herself. Escrito ante la Dirección Ejecutiva de la Magistratura, 14 de Julio de 2005. For purposes of this preliminary report, and in view of the structural lack of independence of the Venezuelan judiciary and in particular of the pretrial judge, there is no need for the ABA observer to express a view on the pending challenges to her impartiality.

<sup>58</sup> Inter-American Commission on Human Rights, *Follow-Up Report on Compliance by the State of Venezuela with the Recommendations Made by the IACHR in its Report on the Situation of Human Rights in Venezuela (2003)*, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2004, (Feb. 23, 2005), (hereafter “IACHR”), chapter V, at pars. 138, 186 (81.7% of Venezuelan judges provisional as of February 9, 2005).

<sup>59</sup> IACHR par. 184.

for three months does not provide for the stability necessary to safeguard judicial personnel against possible interference or pressure in the conduct of their duties.”<sup>60</sup>

A second systemic problem is the weakening of the Supreme Court in two ways. One involves apparent court-packing. In 2004 the Supreme Court was expanded from 20 to 32 full justices, and others were replaced, so that the Court now consists almost entirely of justices who are considered pro-Chávez. As the Inter-American Commission explains, the new Organic Law of the Supreme Court of Justice appears

to have helped the executive manipulate the election of judges during 2004. The IACHR learned of complaints filed from various quarters, including law faculties, international observers and opposition forces, to the effect that a simple majority of the National Assembly, composed of government supporters, had arranged to the election of judges to “pack” the Supreme Court with a clear government majority. As a result, the 49 judges (17 full judges and 32 alternates) elected were politically sympathetic to the government, and they included among their number two judges who are sitting parliamentary members for the government majority.

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The new law further weakens the Supreme Court by undermining the security of tenure of the justices. The Citizen Power branch (Prosecutor General, Comptroller General and Ombudsman) may suspend justices based on “highly subjective categories such as: a judge’s refusal to disqualify himself in a specific case; acting in a manner that brings the judiciary into disrespect; abusing or exceeding his authority; including fictitious facts in his decisions, or excluding true facts; or violating any of the prohibitions established in the Constitution and in legislation.”<sup>62</sup> Alternatively, a simple majority of the Chávez-controlled National Assembly may annul the appointment of a disfavored justice if in its view “the public attitude of the judge offends against the dignity or prestige of the Supreme Court or any of its members”; or if “the judge impedes the functioning of the judicial branch.”<sup>63</sup>

As the Inter-American Commission concludes, “The rules on the appointment, removal and suspension of judges lack adequate provisions to prevent other branches of government from affecting the independence of the Court, .... [T]he law creates grounds for removal and suspension of judges that compromise the independence of the court.”<sup>64</sup>

The United Nations Commission on Human Rights Special Rapporteur on the Independence of Judges and Lawyers recently expressed even stronger criticisms.<sup>65</sup> His inquiries prompted the government of Venezuela to explain that enlarging the Supreme Court was necessary because of increased caseload and administrative duties following

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<sup>60</sup> *Id.* par. 191.

<sup>61</sup> *Id.* par. 180 (footnote omitted).

<sup>62</sup> *Id.* par. 177; see also par. 178

<sup>63</sup> *Id.* par. 178.

<sup>64</sup> *Id.* pars. 174-75 (footnotes omitted).

<sup>65</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Addendum, Situations in specific countries or territories*, UN Doc. E/CN.4/2005/60/Add.1, 18 March 2005, at 65 par. 167.

the elimination of the council on the judiciary. The new justices, said the government, were appointed following input from a “plurality of organs” and elected by a bare majority of the National Assembly only as a “last resort.”<sup>66</sup>

In response, the Special Rapporteur stated that he

laments that the adoption and application of this law, contrary to the Venezuelan Constitution and the principles of international law, has created a highly politicized judiciary. Therefore, he urges the Government to take steps to restore the independence of the judiciary in Venezuela.<sup>67</sup>

Thus, even if there were a lawful basis to prosecute Súmate leaders, the case could not lawfully be brought before Venezuelan courts as currently constituted, because they do not meet international standards for the independence of the judiciary.

d. Due Process of Law and Fair Trial.

At least two violations of due process of law occurred during pretrial proceedings to date. However, it is premature to assess whether they will ultimately be prejudicial to the defense.

The first was the prosecutor’s treatment of Súmate leaders – even after they were publicly accused of crimes – as witnesses rather than suspects. This resulted in a denial of their rights to assistance of counsel during interviews, among other rights guaranteed by article 8 of the American Convention on Human Rights.<sup>68</sup>

The second violation, as determined by the Criminal Chamber of the Supreme Court, was the refusal of the prosecutor and pretrial court to obtain certain evidence requested by the defense, in violation of the right of defense under the Venezuelan

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<sup>66</sup> *Id.* par. 166.

<sup>67</sup> *Id.* par. 167.

<sup>68</sup> “[T]he European Court [of Human Rights] and [the Inter-American] Commission [of Human Rights] consider that the following rights should apply to preliminary proceedings in a criminal trial: 1) the right to legal assistance of his own choosing; the right to have adequate time and facilities for the preparation of his defense; the right to defend himself; the right to be informed of the nature and cause of the accusation against him; the right to examine witnesses; the right to remain silent; and the right to have the free assistance of an interpreter. The generally recognized principle, as the European Court of Human Rights has stated, is that the guarantees of due process apply to proceedings prior to trial, including preliminary investigations, “if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.” Int.-Am.Comm.H.Rts., *Figueredo v. Venezuela*, Case 11.298, Report No. 50/00, April 13, 2000, par. 87 (footnotes omitted) (accessible at <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/OASpage/humanrights.htm>, visited July 16, 2005). See generally Eur.Ct.H.Rts., *Murray v. United Kingdom*, Case no. 41/1994/488/570, Judgment of 25 January 1996, pars. 41-70 (right to remain silent and right to counsel during police investigation).

constitution and code of criminal procedure.<sup>69</sup> Examples include transcripts and videos of the television program in which President Chávez accused Súmate leaders of committing crimes, and the testimony by interrogatory or deposition of senior NED officials.

The pretrial court ruled on July 7, 2005 that this evidence would be admissible at trial. However, instead of ordering the prosecution to obtain it or securing the evidence on its own, the pretrial court placed the burden on the defense to present it. This shifts to the defense a potentially significant burden. It could include, for example, costs of taking depositions in Washington and translating the testimony of NED officials.

Still, it is premature to assess whether these violations will ultimately prejudice the defense. The defense has not disavowed statements taken from Súmate leaders while they were treated as “witnesses.” The extent of the burden in securing and translating NED testimony remains to be seen.

The ABA observer should monitor whether these violations are prejudicial at trial.

## **8. Judicial Rulings to Date.**

The prosecutor filed criminal charges on September 30, 2004. On November 16, 2004, following denial of relief by the pretrial judge, the Criminal Chamber of the Supreme Court ruled that the refusal of the prosecutor and pretrial judge to obtain certain evidence violated the right of the defense, under Venezuela’s Constitution and Code of Criminal Procedure, to request that the prosecution secure exculpatory evidence.

The Criminal Chamber ordered the pretrial judge to conduct a preliminary hearing and, in the event she ordered the case to proceed to trial, to admit certain evidence requested by the defense, namely videos and transcriptions of the February 15, 2005 television program in which President Chávez accused Súmate leaders of committing crimes; financial records which the defense claims show that NED funds were used not to gather signatures, but to conduct workshops; and the testimony by interrogatory or deposition of four NED officials: President Carl Gershman, Board Chair Vin Weber, Board Vice Chair Thomas Donahue and Treasurer Julie Finley.

The Chamber also suggested that the pretrial judge clarify and the prosecutor pose various questions to NED officials concerning how the funds awarded to Súmate were spent, and about NED’s concept of democracy, including NED President Carl Gershman’s statement in a Venezuelan newspaper on November 10, 2004, that “Venezuela is neither a democracy nor a dictatorship, but is somewhere in between.”

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<sup>69</sup> Ponencia del Magistrado Doctor Alejandro Angulo Fontiveros, 16 de noviembre de 2004, p. 7, citing Constitution art. 49.1 and the Organic Code of Criminal Procedure art. 125.5. Similar rights are guaranteed by article 8 of the American Convention and by article 14 of the ICCPR.

Finally, the Chamber ordered that the accused not be held in pretrial detention, but remain at liberty.<sup>70</sup>

After several postponements, the pretrial hearing was held July 6 and 7, 2005. The pretrial judge denied the defense motion to dismiss and ordered that the case proceed to trial. She denied the prosecutor's request that the accused be held in pretrial confinement. She also denied the defense request that the prosecutor be directed to obtain NED testimony and certain other evidence, permitting the defense to offer it instead. Pursuant to article 331.5 of the Code of Criminal Procedure, she ordered the parties to appear before a trial judge in five days.

During the hearing on July 6, 2005, the prosecutor warned that additional persons may be charged and that further charges may be brought against the Súmate leaders.

### **9. Opportunities for Relief in the Domestic Courts.**

Defense counsel for one workshop leader, Luis Enrique Palacios, has appealed from the July 7, 2005 decision of the pretrial judge to send the case to trial, alleging that its errors are so serious as to render it a nullity.<sup>71</sup> Even if successful, that appeal would not appear directly to impede the trial of the other three accused. Separately, defense counsel for all four accused have asked the Executive Office of the Judiciary to remove the pretrial judge for alleged false statements in her ruling.<sup>72</sup> That petition, even if successful, would not appear to interfere with the case going to trial.

At trial, it remains possible that the court will find the defendants not guilty. However, if the trial court accepts the pretrial court's theory that soliciting foreign funds to conduct lawful political activity amounts to the crime of soliciting "foreign intervention," the defendants are at serious risk of being convicted.

On the other hand, the trial court may have an "out," if it chooses to take it. If the prosecution cannot prove its claim (not clearly supported by any evidence to date; see part 5.A above) that NED funds were used to gather signatures for the recall referendum (and not merely, as the defense claims, for workshops), then the court might acquit on the ground that merely funding workshops does not constitute "foreign intervention." At this stage, of course, one cannot predict how the trial court will view the evidence and the law.

If convicted, the accused will have a right of appeal. Again, the Court of Appeals or the Supreme Court could use the same or some other "out" in order to reverse a conviction. However, after the 2004 reform, one may question whether the new, overwhelmingly pro-Chávez Supreme Court justices, who also lack secure tenure, would be sufficiently independent to do so.

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<sup>70</sup> Ponencia del Magistrado Doctor Alejandro Angulo Fontiveros, 16 de noviembre de 2004, pp. 7-11.

<sup>71</sup> Appeal to Court of Appeals, July 14, 2005.

<sup>72</sup> Complaint before the Executive Office of the Judiciary, July 14, 2005.

## 10. Findings and Recommendations.

### A. Findings.

- i. As applied to the facts of this case, article 132 of the Venezuelan Penal Code fails to meet international standards for clarity and fair notice of criminal laws. Based on the evidence summarized by the prosecutor in the charges, the accused cannot lawfully be prosecuted for violation of article 132. Any resulting conviction would violate Venezuela's international legal obligations under article 15.1 of the International Covenant on Civil and Political Rights and article 9 of the American Convention on Human Rights.
- ii. If article 132 were read to impose an implied criminal sanction on a civic group's solicitation of foreign funds for lawful activities to promote the effective exercise of fundamental rights to participate in a referendum, it would to that extent violate internationally protected rights.
- iii. The pretrial court that denied the motion to dismiss and ordered this case to proceed to trial fails to meet international standards of judicial independence. Any resulting conviction would violate Venezuela's international legal obligations under article 14.1 of the International Covenant on Civil and Political Rights, article 8.1 of the American Convention on Human Rights and the UN General Principles on the Independence of the Judiciary.
- iv. The prosecution's initial treatment of the accused as witnesses rather than as suspects, and the pretrial court's imposing certain evidentiary burdens on the defense rather than the prosecution, violated international standards of due process of law. However, it is premature to assess whether these violations will prejudice the defense at trial. Any further observation should monitor whether they cause prejudice.

### B. Recommendations.

#### i. The ABA should send an observer to the trial.

Except for representatives of the Venezuelan government, all persons with whom the observer consulted in Venezuela – the accused and their defense counsel, other Venezuelan lawyers with internationally recognized human rights expertise, and the US Embassy – recommended that the ABA should send an observer to the trial.

Nonetheless, one might ask whether, given the tense relations between the US and Venezuela, the ABA's presence at trial and any subsequent report would be likely to have a positive effect on any branch of the Venezuelan State.

The answer is "yes," according to the Venezuelan experts consulted by the observer, for the following reasons.

First, an ABA observation is unlikely to have a negative effect. Experience in this case indicates that international pressure – even from NED -- can be helpful. In November 2004, shortly after NED released a letter from 70 democrats criticizing the proceedings,<sup>73</sup> the Supreme Court issued a ruling favorable to the defense.<sup>74</sup>

Moreover, to the extent the government of Venezuela might be provoked by outside criticism, it is already provoked by others. For example, following the July 7 Order by the pretrial judge referring the case to trial, both the US State Department and Human Rights Watch issued sharp, public criticisms of the decision.<sup>75</sup> This prompted a heated retort from Venezuela's Vice President.<sup>76</sup>

By contrast, even though the presence of the ABA observer was publicly reported by major Caracas newspapers (along with his "no comment" in response to questions),<sup>77</sup> the Vice President did not mention the ABA in his public statement.

Likewise at trial, the strictly professional presence of an ABA observer, who under ABA trial observation guidelines cannot make substantive comments to the press, is unlikely to provoke a strong negative reaction, especially when other agencies are more vocal in publicly denouncing any unfair proceedings.

Second, an ABA observation and subsequent report including a careful legal analysis could be persuasive to other governments and international agencies. They, in turn, would likely have greater

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<sup>73</sup> See note 31 above.

<sup>74</sup> See part 8 above.

<sup>75</sup> A State Department spokesman commented that "the judicial actions that are being taken here are, from our perspective, simply part of a Venezuelan government campaign that's designed to intimidate members of civil society and prevent them from exercising their democratic rights." Federal News Service, July 8, 2005. The Americas director of Human Rights Watch commented: "The court has given the government a green light to persecute its opponents. Prosecuting people for treason when they engage in legitimate electoral activities is utterly absurd." Human Rights News, *Venezuela: Court Orders Trial of Civil Society Leaders*, July 8, 2005.

<sup>76</sup> *Rangel califica de "absurdas" críticas al gobierno por juicio a Súmate*, EL UNIVERSAL, July 9, 2005.

<sup>77</sup> E.g., *Abogados de EEUU y La Unión Europea Monitorearán el Juicio*, EL UNIVERSAL, p. I-4, July 7, 2005.

capacity to persuade the government of President Chávez and other institutions of the Venezuelan State to comply with their international legal obligations in this case.

Finally, the fact of an ABA observer at the trial could encourage bar associations in other countries to send observers as well. The cumulative presence of a number of observers, including the observer the European Union reportedly plans to send, could well have a positive impact.

- ii. **Once the final report of the trial observer is received, the ABA can then decide what, if any, further action to take, including whether to publish or disseminate the report.**

A decision to send an observer to the trial need not commit the ABA at this time to take further action, including publication or dissemination of the report. That decision can and should wait until the results of the Venezuelan criminal proceedings, and the manner in which they are conducted, are known.

Respectfully submitted,

Douglass Cassel  
ABA Observer

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## APPENDIX 1: Curriculum Vitae of Douglass Cassel

August 2005

Douglass Cassel is Lilly Foundation Professor of Law and Director of the Center for Civil and Human Rights at Notre Dame Law School, where he teaches international human rights law. Previously he directed similar centers at Northwestern University School of Law and DePaul University College of Law, as well as DePaul University's Jeanne and Joseph Sullivan Program for Human Rights in the Americas.

He is President of the Due Process of Law Foundation in Washington, D.C., and a member and former President of the Board of Directors of the Justice Studies Center of the Americas, to which he was elected by the Organization of American States. Both organizations promote judicial reform throughout the hemisphere.

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