Team Number: 223

2010 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

INTER-AMERICAN COURT OF HUMAN RIGHTS

Radical Radio *et al*.

Applicants

v.

The Federal Republic of Chirilaqua

Respondent

MEMORIAL FOR THE STATE

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STATEMENT OF FACTS

The Federal Republic of Chirilagua has been a sovereign state since the beginning of the nineteenth century.[1] Chirilagua (State) is currently a stable democracy and a member of the main UN human rights treaties and the Organization of American States (OAS).[2] On April 9, 1980, the State ratified the American Convention on Human Rights (ACHR), a body of the OAS, and recognized the jurisdiction of the Inter-America Court.[3]

Every four years a popular election is held in the State to determine which of the two main political parties, the Popular Chirilaguan Party (PCP) or the Party for the Democratic Renewal of Chirilagua (RDC), will control the legislative and executive branches.[4] The current President, Atilio Escalante Norris, is a PCP representative.[5] With an eighty percent approval rate many of the Preside him to remain in office for an additional four years.[6] In the 2008 general elections, the quantify support for the President . The ballot passed according to the current Congressional reform process however, this is non-binding according to the Constitution.[7]

Although this mechanism is provided for in the Constitution, the RDC party and others have openly opposed the reform.[8] A march named Facebookazo was organized by students to protest the reform a week before the elections. In addition to other media, the protest was given publicity by several radio stations, including Radical Radio and Radio Su-Version.[9]

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[1] Hypothetical, ¶ 1.
[2] *Id.*
[3] Hypothetical, ¶ 1; Clarif7 3.0-m4nti2 T 2(1)

coverage.[20] The Association of Landless Communities of San Pedro de Los Aguados (ACOSINTI) owns all the assets of Radio Su-Version.[21] ACOSINTI considers Radio Su-Version a community radio station; however COFERETEL has never given the station a license to broadcast.[22] COFERETEL does recognize community radio in Article 70 of the Telecommunications Act which holds community radio shall have the right to a proportional percentage of the radio frequencies. [23]

ACOSINTI has only placed two bids for public service concessions; neither was approved.[24] After making several requests to COFERETEL seeking information on the public bids, ACOSINTI filed a constitutional remedy which sought mandatory responses. The First Court of Gorgia ruled in ACOSINTI . In responding, COFERETEL outlined that the Commission is the legal authority who holds the right to determine when public service concessions will be granted based on set principles of opportunity and management;

subsequent motion against the commission for failure to comply was denied, as the court found there was a substantial response.[25] Rather than participating in another bid, in 1996 ACOSINTI began broadcasting political content under the name Radio Su-Version without the concession rights as granted by the Act. Radio Su-Version was operated by Francis Hoffman as director, and with their own equipment.[26]

William Garra hosts a show that is aired on both radio stations, which includes in part a controversial impersonation of the President.[27] Days before Facebookazo, the programming focused on Facebook groups who

permitted to call and express their support of the groups and make their own angry attacks on the President; these listeners were then directed to participate in Facebookazo.[28]

Just before the protest, President Escalante stated that he felt Facebookazo was a means and therefore had given the police orders to prevent violence and social disturbance.[29] On March 3, 2008, the day of Facebookazo, City and Federal Police were further instructed to oversee the events to guard against criminal disturbance and confrontations between groups holding contrary views.[30] As protests unfolded across Chirilagua, Radical Radio dedicated the entire broadcast to its coverage, reported by William Garra.[31] In San Pedro, an antigovernment group had assembled who had learned of the protest solely through the joint broadcastings of the radio stations. William Garra reported that in San Pedro the Federal Police and Government supports were gathering to inhibit Facebookazo and that the defend their rights at all costs against the authoritarian [32]

Inflamed by the reports on Radio, Facebookazo protesters in San Pedro raced for Central Square, using an unauthorized street as a shortcut. As they approached a group of Government supporters, the police tried to keep the groups divided, but were attacked with sticks and rocks by dozens of Facebookazo protesters as they rushed forward. This violence directly resulted in the injury of five officers and ten civilians and the deaths of one officer and five civilians.[33]

The next day the Government condemned the violence and the facilitation of it through the media and organizers. The public was assured perpetuators would be charged. On March 5,

[28] Hypothetical, ¶ 17.
[29] Hypothetical, ¶ 7.
[30] Hypothetical, ¶¶ 24-25.
[31] Hypothetical, ¶¶ 8,18.
[32] Hypothetical, ¶ 18.
[33] Hypothetical, ¶¶ 8, 26.

2008 COFERETEL implemented a review of state concessions as the first step in establishing unity of access to the electromagnetic spectrum. [34]

On March 10, 2008, Radical Radio covered the general election, which was jointly broadcasted by Radio Su-Version. While reporting on an unverified allegation of election fraud, William Garra asked all citizens,

[35] As the election proceeded, 25 youths reportedly opposed to the , tried to steal and burn ballot boxes. Local inhabitants attempted to intervene, causing an eruption of violence during which three of the youths were killed.[36]

pursue.[41] On April 30, 2008, Byron Dayle and Melanie Peroni, as individuals, filed a constitutional remedy known as amparo; the action was permitted although the case law requires the remedy to be filed by the legal representatives of the media source.[42] In May, the Second Circuit Court denied the remedy, citing the cancellation as lawful based on the Act and due process was not violated. The judgment was appealed to the First Court of Appeals of Cedulopolis, the court of last resort for constitutional remedies, which affirmed on the same grounds on June 2, 2008.[43]

On May 5, 2008, Francis Hoffman filed an amparo remedy as legal representative of Radical Radio and on the behalf of the station. The Court of First Instance denied the remedy, which was affirmed by the Gorgia Court of Appeals on June 15, 2008, but other courts have granted amparo remedies for cases of social importance. Both courts found that the

[44]

Criminal complaints were made against Byron Dayle, Melanie Peroni, and Francis Hoffman on June 25, 2008, for theft of s ating and

[45] On June 30, 2008, criminal complaints were also made against the three defendants on allegations of instigation to commit a crime and defamation. On June 2, 2008, criminal charges were filed against William Garra for instigation to commit a crime, defamation, and the murder of two civilians and a police officer on March 3, 2008. Each of the alleged , and were tried at the typical rate of criminal proceedings.[46] Garra was formally indicted on July 25, 2009 and on

[41] Hypothetical, ¶ 35; Clarification Questions & Answers, page 11-12.
[42] Hypothetical, ¶ 35, Footnote 5.
[43] Hypothetical, ¶ 35.
[44] Hypothetical, ¶ 36; Clarification Questions & Answers, page 12.
[45] Hypothetical, ¶ 31.
[46] Hypothetical, ¶¶ 32-33; Footnote 8; Clarification Questions & Answers page 10.

November 23, 2008, he was convicted by the Third Criminal Court for Federal Offenses on all counts and sentenced to 12 years in prison; the judgment was affirmed December 1, 2008, in The Federal Appeals Court, the court of last resort for criminal appeals.[47]

The theft of state property charge against Byron Dayle was dismissed in the First Criminal Court for Federal Offenses on November 8, 2008, but Melanie Peroni and Francis Hoffman were convicted; the judgment was affirmed on appeal in the court of last resort.[48] The Third Criminal Court for Federal Offenses found Melanie Peroni and Francis Hoffman guilty and sentenced them to six months in prison for the crimes of instigation to commit a crime and defamation against the President; Byron Dayle was acquitted entirely. This judgment made September 15, 2008, was affirmed by the court of last resort on October 1, 2008.[49]

A petition was filed with the Inter-American Commission on Human Rights December 2, 2008, alleging violations of Articles 7, 8, 13, 21, 24 and 25 of the Convention, in relation to Article 1.1 against Radical Radio, Radio Su-Version, Melanie Peroni, Byron Dayle, Francis Hoffman, William Garra and the Chirilaguan people generally.[50] Chirilagua responded after the petition was admitted, that there were no violations, the legal entities were without standing, a

policy related to the concession of licenses with invitations to bid opening soon.[51]

The Commission composed a report, in which it purported to find violations of Articles 8, 13, and 15 of the American Convention, all in relation to Article 1.1, in the cases of Melanie Peroni, Byron

recommended changes within the time permitted, therefore on December 25, 2009, based upon the same violations within the IACHR report, the case was submitted to the Inter-American Court of Human Rights.[53] It was subsequently requested by the representatives that Radical Radio and Radio Su-Version be considered victims by the Court.[54]

LEGAL ANALYSIS

I. THE REPUBLIC OF CHIRILAGUA IS SUBJECT TO THE JURISDICTION OF THE INTER-AMERICAN SYSTEM UNDER THE ORGANIZATION OF AMERICAN STATES (OAS).

The Republic of Chirilagua has ratified all of the Inter-American treaties, and consented to the jurisdiction of the Inter-American Court on April 9, 1980.

II. THE REPUBLIC OF CHIRILAGUA OBJECTS TO THE JURISDICTION OF THE INTER-AMERICAN COURT REGARDING THE ALLEGED VIOLATIONS OF ARTICLE 8, 13, AND 15 IN RELATION TO ARTICLE 1(1) OF THE AMERICAN CONVENTION FOR THE CASES OF RADICAL RADIO, RADIO SU-VERSION, ACOSINTI, BYRON DAYLE, MELANIE PERONI, AND FRANCIS HOFFMAN.

A. Chirilagua objects to the standing of Radical Radio, Radio Su-Version, and ACOSINTI at the Inter-American Court because the American Convention expressly states that the rights and freedoms of human beings are protected.

Article 1 of the American Conve

[55] The Court has broadened the American Convention to protect a business, but only through the petition of a shareholder.[56] The Court explained that the petitioner had brought an

[53] Hypothetical, ¶ 43.
[54] Hypothetical, ¶ 44.
[55] Organization of American States, American Convention on Human Rights, Art. 1, (Nov. 22, 1969), O.A.S.T.S. No. 36.
[56] *Cantos v. Argentina*, September 7, 2001, Preliminary Objections, Inter-Am. Ct. H.R. Series C No. 85, ¶ 26, 29.

therefore assert the violation before the Inter-American system.[57]

Byron Dayle, Melanie Peroni, Francis Hoffman, and William Garra are human beings and thus each is explicitly protected within Article 1 of the American Convention. Alternatively, Radical Radio, Radio Su-

generally recognize [58] The Court has found, along with customary international law, that the State has the burden of proving that domestic remedies remain to be exhausted. [59] The State should be given the chance to resolve the matter within their legal system before answering to an international tribunal.[60] The State must demonstrate that the remedy is adequate and effective, thus suitable to resolve the infringement and capable of producing the intended result.[61] After the State proves the remedy is adequate and effective, the burden shifts to the victim to show that the exceptions in Article 46 are maintainable.[62]

i. Chirilagua requests that the Court review the exhaustion of local remedies with the merits of the case because they are closely tied.

The appropriate time for the Court to rule on the objection to exhaustion of local remedies depends on the facts and circumstances of the case.[63] The Court may rule on the objection before a review of the case or combine the objection with the merits.[64] The Court must on the objection would prejudice the merits.[65] The Court should resolve the objection and merits together when the victim states that the domestic remedies violate due process of law.[66]

[58] American Convention, supra note 55, Art. 46(1).
[59] *Velásquez-Rodrígues v. Honduras*, June 26, 1987, Preliminary Objections, Inter-Am. Ct. H.R. Series C No. 4, ¶ 88; Exemptions to the Exhaustion of Domestic Remedies (Art. 46 (1), 46 (2) (a) and 46 (2) (b) American Convention on Human Rights), Advisory Opinion OC-11/90, August 10, 1990, Inter-Am Ct. H.R. Series A No. 11 ¶ 41; Key Case Law Issues: Exhaustion of Domestic Remedies (Article 35(1) European Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11) April 28, 2006, ¶ 11.
[60] *Velásquez-Rodrígues v Honduras*, supra note 59, ¶ 60, 92-93; Key Case Law Issues, supra note 59, ¶ 4; *Selmoni v. France*, July 28, 1999, Eur. Ct. H.R., No. 25803/94, ¶ 74.
[61] Advisory Opinion OC-11/90, supra note 59, ¶ 36; Key Case Law Issues, supra note 59, ¶ 8, 10; Jo M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights, (Cambridge University Press 2003), 131-132; *Selmoni v. France*, supra note 60, ¶ 75.
[62] Advisory Opinion OC-11/90, supra note 59, ¶ 41; *Selmoni v. France*, supra note 60, ¶ 76.
[63] *Fairén-Garbi and Solís-Corrales v. Honduras*, June 26, 1987, Preliminary Objections, Inter-Am. Ct. H.R. Series C No. 2, para. 83; The Practice and Procedure of the Inter-American Court, supra note 61, ¶ 174-175.
[64] *Velásquez-Rodrígues v. Honduras*, supra note 59, ¶ 84.
[65] *Velásquez-Rodrígues v. Honduras*, supra note 59, ¶ 91, 95; *Fairén-Garbi and Solís-Corrales v. Honduras*, supra note 63, ¶ 90.
[66] *Velásquez-Rodrígues v. Honduras*, supra note 59, ¶ 91, 95; *Fairén-Garbi and Solís-Corrales v. Honduras*, supra note 63, ¶ 90.

There is an alleged violation of due process under the American Convention in the case of Byron Dayle, Melanie Peroni, Francis Hoffman, and William Garra. The merits of the case demand the review of Article 8, and thus the local remedies of Chirilagua. The merits show that the domestic remedies were not exhausted for Dayle, Peroni, and Hoffman. Moreover, the merits demonstrate that the exceptions to the requirement are not applicable. The exceptions specifically review the due process rights under Article 8. If the Court rules on the objection prior to the consideration of Article 8, the State is prejudiced in the merits. Thus, the State requests that the Court review the exhaustion of domestic remedies with the merits of the case.

III. THE REPUBLIC OF CHIRILAGUA DID NOT VIOLATE ARTICLE 8 IN RELATION TO ARTICLE 1(1) OF THE AMERICAN CONVENTION IN THE ADMINISTRATIVE, CIVIL, OR CRIMINAL PROCEEDINGS FOR BYRON DAYLE, MELANIE PERONI, FRANCIS HOFFMAN, AND WILLIAM GARRA.

Article 8 of the American convention is the right and obligation, within Article 1(1), to due process of law.[67] [e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and

[68] Article 8(1) is applicable when a person is

[69]

H

[70] The Court,

[67] American Convention, supra note 55, Art. 1(1), 8; Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights) Advisory Opinion OC-9/87, October 6, 1987, Inter-Am Ct. H.R. Series A No. 9, ¶ 28.
[68] American Convention, supra note 55, Art. 8(1).
[69] *Id.*
[70] American Convention, supra note 55, Art. 8(2).

Following, Peroni responded to the COFERETEL with more questions about the

was not an application that resulted in a denial. In fact, Peroni asked for information on the necessary procedures to repair the inconsistencies. The COFERETEL did not respond to

proceeding or process, such as amparo. All of the communications were plain questions and

The COFERETEL has the authority to grant rights for the radio spectrum, as stated by the Telecommunications Act. The Act does not specify that the concession right can be revoked, and therefore does not provide punitive power to the COFERETEL. The Telecommunications Act simply states that the rights may not be transferred or assigned. The COFERETEL does not have the authority to cancel the concession if the right to use the concession was granted in

station. The COFERETEL did not punish Francis Hoffman for operating the station without a license, but prevented the illegal use of the spectrum. The authority exercised by COFERETEL was not within the scope of the due process of law under Article 8.

B. Chirilagua did not violate the right to due process of law under Article 8(1) and 8(2), in the case of Byron Dayle, Melanie Peroni, Francis Hoffman, and William Garra in their respective judicial proceedings.

The Court has determined that a tribunal, in compliance with Article 8(1), must act

[76] The Court has also held

hearing.[77]

t a thorough explanation is not required.[78] The Court has consistently determined that the final judgment must be rendered within a reasonable time, as

(b) [79]

and non-

Specifically, a person in

[83] The Court has held that the requirement of prior notification in 8(2)(b) contributes to the right to a defense for the accused.[84] The Court has also extended the

[85] The Court

[86] If the remedy is decided against the petitioner, this [87]

i.

his civil suit at the Administrative Court, yet, the proceeding remains to be completed and thus the domestic remedy has not been exhausted.

decided that relief was not proper in this case. The court reasoned that the license was cancelled according to the law, and due process was not violated. The court was not arbitrary, but considered the law with the facts over a two week period. The First Circuit affirmed, based on the same grounds, and thus each court justified their ruling.

The entire proceeding occurred within a month and a few days, which is a reasonable time based on the circumstances as there were several issues before the court including the alleged violation of due process and freedom of expression. This complexity required the evaluation of the concession rights for Radical Radio under the law, and then in comparison to facts, and thus the parties were efficient in using a constitutional action. The parties conduct did not delay the proceedings, but followed the process for a constitutional remedy in Chirilagua.

The judicial activity was prompt and diligent for both courts. The plaintiffs exercised their right to appeal when the Second Circuit did not grant the remedy. The plaintiffs appealed to the court of last resort, but the ruling was affirmed. While the plaintiffs did not obtain relief, the unfavorable result is not a violation of due process. The First and Second Circuit Courts had the capability of finding for the plaintiffs but the facts did not support the recourse.

However, the plaintiffs did not properly file the constitutional remedy. The case law of Chirilagua requires a constitutional remedy to be filed by the legal representative of the radio station. The plaintiffs were not established as the legal representatives of Radical Radio. The representation could have been delegated to either Dayle or Peroni, but there is not an

Although the Gorgia Court of Appeals did not grant the remedy, Hoffman can appeal the decision to the First Court of Appeals of Chirilagua. There is not

right to appeal under Article 8(h) was violated, but rather he decided not to appeal to the court of last resort. The local remedies are not exhausted for Hoffman in this action. The constitutional remedy, like in the action for Dayle and Peroni, is an adequate and effective remedy in the determination of rights.

iv.

rights were not violated under Article 8, and more specifically under 8(1); 8(2); 8(2)(b); 8(2)(h), at any time during their respective criminal trials.

The criminal charges against Byron Dayle, Melanie Peroni, Francis Hoffman, and William Garra involved the State and thus are presumed to have properly been in federal court. The courts were competent to hear the matter as the charges were brought in a court of first instance, either the First or Third Criminal Court, and then appealed to the court of second instance, the Criminal Court of Appeals.

The criminal courts have the same hierarchy as the civil courts, and hence do not report to the State. There is not an indication that either of the tribunals had a conflict of interest with the case or a personal connection, but objectively adjudicated the matter. The Public Prosecutor further acted professionally and ethically to seek the truth of the matters. The prosecutor investigated and prosecuted the defendants without subjective intentions, but in accordance with established law. The courts were previously established by law with the prosecutor in office before the start of any proceedings. Hence, the tribunals and the prosecutor, together, were competent, independent and impartial as required by Article 8(1).

The trials for each defendant were pursued at the normal rate of an action in Chirilagua. The proceedings for each were a total of about five months, from the filing of the complaint to

charges dismissed by the prosecutor, and was acquitted by the court for the other charges. The courts and the prosecutor pursed the convictions in accordance with the law and within the rights of due process of law. Thus, the defendants were each provided the minimum guarantees of

there is no absolute right to the freedom of express.[104] Article 13(2) prohibits prior censorship but also provides for the possibility of imposing liability for an abusive exercise of the right.[105] The imposition of subsequent liability is compatible with the Convention where, (1) the restriction was previously established by law, (2) the limitation was intended to ensure the rights or reputation of others or to protect national security, public order, or public health or morals,

[106]

i. The crime of defamation was established in the Criminal Code of Chirilagua.

For a State to impose liability on the freedom of expression, the liability must be

tic criteria

132

i. The Radio Broadcasting Law of 1976 and the new Communications Act of Chirilagua are in compliance with the Joint Declaration.

The Radio Broadcasting law of 1976, overseen by COFERETEL, establishes concession regulations in Article 92[133]

broadcasting and establishes that community radio shall have the right to a proportional

134

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of licenses among commercial, institutional, and community stations.[136] An equal number of concessions were given to community and commercial stations in the most recent bid.[137]

The Office of Special Rapporteur has cited with approval highly similar laws in Uruguay were the State undertook promoting and guaranteeing community radio.[138] Chirilagua, in due diligence has enacted legislation that embraces the broad guarantees of Article 13 and the provisions of the Joint Declaration.

ii. Chirilagua has not imposed requirements beyond licensing on the broadcasting community.

[132] Joint Declaration of the UN, OAS and OSEC Special Rapporteurs on Freedom of Expression, On the Regulation of the Media, Declaration II, IACHR (December 18, 2003).
[133] Hypothetical, ¶ 12.
[134] Hypothetical, ¶ 20.
[135] *Id*.
[136] Hypothetical, ¶ 41.
[137] Clarification Questions & Answers, page 7.
[138] Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter II, ¶ 151, (2006) OEA/Ser.L/V/II.127 Doc. 4, (Mar. 3, 2007).

In the Joint Declaration and under Principle 5 and 13 of the Declaration of Principles on Freedom of Expression of the Inter-American Commission, it is held that regulations in addition to broadcasting licenses are generally in violation of the freedom of expression.[139] In Chirilagua, a broadcasting license is the only mandated regulation.[140] Chirilagua has not adopted additional measures the Inter-American system has condemned as indirect means of restricting the freedom of expression, such as requiring compulsory memberships in professional associations.[141]

Chirilagua has the right to regulate broadcasting licenses and when Radical Radio and Radio Su-Version were found in noncompliance with the regulations it was an appropriate State action to cancel the stations.[142] Peroni, Dayle, and Hoffman illegally used of the radio frequencies and were appropriately charged for the theft of State property. Chirilagua maintains that it has adopted regulatory provisions and protected them in full accordance with Article 13.

REQUEST FOR RELIEF

The Republic of Chirilagua respectfully requests the Court to find that Radical Radio, Radio Su-Version, and ACOSINTI do not have standing at the Court, and cannot be considered victims. Chirilagua requests that the Court find the exhaustion of domestic remedies requirement was not satisfied, and hence the Court does not have jurisdiction over Byron Dayle, Melanie Peroni, and Francis Hoffman. Chirilagua lastly maintains that Articles 8, 13, and 15, in connection with Article 1(1) of the American Convention were not violated.

[139] Joint Declaration, supra note 132, Declaration II, and Declaration of Principles on Freedom of Expression, Principles 5 and 13, IACHR, 108th regular sessions, October 2000.
[140] Hypothetical, ¶ 29.
[141] Advisory Opinion OC-5/85, supra note107, ¶ 76; See also *Ivcher Bronstein v. Peru*, supra note 73, ¶¶ 158 -163.
[142] Hypothetical, ¶ 29-30.