

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 President's supporters want him to remain in office for an additional four years.⁶ In the 2008 general elections, the PCP included a referendum named the 'Democracy Ballot' to quantify support for the President's reappointment. 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

¹ Hypothetical, ¶ 1.

² *Id.*

³ Hypothetical, ¶ 1; Clarification Questions & Answers, page 1.

⁴ Hypothetical, ¶ 1.

⁵ Hypothetical, ¶¶ 2-3.

⁶ Hypothetical, ¶¶ 3-4.

⁷ Hypothetical, ¶ 4; Clarification Questions & Answers, page 2.

⁸ Hypothetical, ¶ 5.

⁹ Hypothetical, ¶¶ 5-6.

The Federal Telecommunication Regulatory Commission (COFERETEL) oversees the radio spectrum in the State.¹⁰ Specifically, the COFERETEL regulates the use of the spectrum through Article 92 of the Telecommunication Act (Act). The Act grants or renews the use of the spectrum to a concession holder, and the right cannot be transferred or assigned.¹¹ However, one may apply for ‘substitution of ownership’ granted the provisions of the Act are satisfied.¹²

Radio Cadena Basica was founded by Byron Dayle and Maria Peroni in 1965. Maria Peroni passed away in 2000 and her daughter, Melanie Peroni, was named shareholder and director in her absence.¹³ In 2001, Melanie Peroni went to the COFERETEL seeking ownership of the concession that had been granted to her mother and to change the station’s name to Radical Radio.¹⁴ COFERETEL informed Peroni that there was an inconsistency pertaining to the legal representative and the holder of the concession on record, but granted the name change.¹⁵ After, Peroni requested an explanation but did not receive a response.¹⁶ Since Peroni’s request was an inquiry, the administrative rules of COFERETEL hold that a lack of response will not generate rights.¹⁷ Peroni did not further contact the COFERETEL to be established as the holder of the concession, and did not use the available constitutional remedy.¹⁸ Peroni, instead, assumed the rights to the concession without the granted ownership.¹⁹

Radial Radio was the first to promote Facebookazo within its region, as was Radio Su-Version, who since 2002 had jointly broadcast Radial Radio’s programs to offer more political

¹⁰ Hypothetical, ¶ 12, Footnote 1; Clarification Questions & Answers, pages 5-6.

¹¹ *Id.*

¹² *Id.*

¹³ Hypothetical, ¶ 11.

¹⁴ Hypothetical, ¶ 12.

¹⁵ Hypothetical, ¶ 13.

¹⁶ *Id.*

¹⁷ Clarification Questions & Answers, page 5.

¹⁸ *Id.*

¹⁹ Hypothetical, ¶ 13.

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’s favor. 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; ACOSINTI’s 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 aggressively condemned the President. Listeners were also

²⁰ Hypothetical, ¶¶ 16, 24.

²¹ Hypothetical, ¶ 5; Clarification Questions & Answers, page 8.

²² Hypothetical, ¶¶ 20-21.

²³ Hypothetical, ¶ 20; Clarification Questions & Answers, page 5.

²⁴ Hypothetical, ¶¶ 20-21.

²⁵ Hypothetical, ¶ 22.

²⁶ Hypothetical, ¶ 23.

²⁷ Hypothetical, ¶ 15.

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 to “generate an atmosphere of anxiety,” 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 supporters were gathering to inhibit Facebookazo and that the listeners should “defend their rights at all costs against the authoritarian advance.”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 perpetrators 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 “media pluralism and equal opportunity 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, “not to let themselves be intimidated and to protect their constitutional rights.”³⁵ As the election proceeded, 25 youths reportedly opposed to the President’s reelection, 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

On April 6, 2008 COFERETEL announced all radio stations found in noncompliance with the Telecommunication Act or illegally broadcasting without concessions must immediately cease operations. COFERETEL publically announced “it would take pertinent criminal action for the misuse of the radio spectrum.”³⁷ Radical Radio was found to be in noncompliance with Article 92 of the Act because it did not hold a valid concession, resulting in the station’s cancelation. On COFERETEL’s approval, Radio Su-Version was raided on April 19, 2008, during which its equipment was confiscated in accordance with established law.³⁸ The station was illegally operating because they had never been awarded a concession.³⁹

On April 10, 2008, Bryon Dayle, acting as the unverified legal representative of Radical Radio, sought to have the cancellation overturned in the Administrative Court.⁴⁰ The COFERETEL was promptly served, filed an answer, and requested discovery from Dayle. The case was at the evidentiary stage on January 15, 2009, and takes an average of five years to

³⁴ Hypothetical, ¶¶ 28-29.

³⁵ Hypothetical, ¶¶ 19, 27.

³⁶ Hypothetical, ¶¶ 19, 27; Clarification Questions & Answers, page 1.

³⁷ Hypothetical, ¶¶ 29-30.

³⁸ Hypothetical, ¶¶ 29-30; Clarification Questions & Answers, page 5.

³⁹ Hypothetical, ¶ 30.

⁴⁰ Hypothetical ¶ 35.

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 COFERETEL's conduct was consistent with the Telecommunications Act.⁴⁴

Criminal complaints were made against Byron Dayle, Melanie Peroni, and Francis Hoffman on June 25, 2008, for theft of state property by “unlawfully appropriating and benefiting from the nation’s radio spectrum.”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 crimes are within Chirilagua’s Criminal Code, 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 case in relation to the petition was still pending in the State's court, and lastly that there was new 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 Dayle, Francis Hoffman, and William Garra.⁵² Chirilagua did not make the

⁴⁷ Hypothetical, ¶ 39; Clarification Questions & Answers, page 12.

⁴⁸ Hypothetical, ¶ 37; Clarification Questions & Answers, page 12.

⁴⁹ Hypothetical, ¶ 38; Clarification Questions & Answers, page 12.

⁵⁰ Hypothetical, ¶ 40.

⁵¹ Hypothetical, ¶ 41.

⁵² Hypothetical, ¶ 42.

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 Convention protects “the rights and freedoms . . . to all persons” and person is defined, for the purposes of the American Convention, as a “human being.”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.

action in his “own name and in the name of the company” at the domestic court, and could 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-Version, and ACOSINTI, are organizations which are not protected under the American Convention. The American Convention is unequivocal in the protection of the rights for human beings, but not the rights of a company.

Furthermore, the Court’s expansion of the American Convention is not applicable in the case of Radical Radio, Radio Su-Version, and ACOSINTI. Byron Dayle is the founder of Radical Radio, but he is not an established shareholder. Likewise, William Garra is the commentator for Radical Radio but is not a known shareholder. While Melanie Peroni is a shareholder in Radical Radio, Peroni has not asserted that the rights of Radical Radio were violated in the domestic courts of Chirilagua. The local remedy which Melanie Peroni initiated on her own behalf was not filed in accordance with Chirilagua law. Melanie Peroni must exhaust the local remedies in her own name and the name of the company to petition before the Inter-American system. Lastly, there is not a shareholder on behalf of Radio Su-Version or ACOSINTI that has alleged a violation. Therefore, the State objects to the standing of Radical Radio, Radio Su-Version, and ACOSINTI as victims before the Court.

B. Chirilagua objects to the Court’s jurisdiction over the petition of Byron Dayle, Melanie Peroni, and Francis Hoffman based on Article 46 of the American Convention because the local remedies have not been exhausted.

Article 46(1) states that the admissibility of a petition under Article 44 is conditioned on “that the remedies under domestic law have been pursued and exhausted in accordance with

⁵⁷ *Cantos v. Argentina*, supra note 56, ¶ 27, 30.

generally recognized principles of international law.”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 decide if the exhaustion requirement is “closely tied with the merits of the case” where a ruling 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-Rodríguez 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-Rodríguez 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-Rodríguez v. Honduras*, supra note 59, ¶ 84.

⁶⁵ *Velásquez-Rodríguez v. Honduras*, supra note 59, ¶ 91, 95; *Fairén-Garbi and Solís-Corrales v. Honduras*, supra note 63, ¶ 90.

⁶⁶ *Velásquez-Rodríguez 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 Specifically, Article 8(1) states that “[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law.”⁶⁸ Article 8(1) is applicable when a person is accused of a crime or when a person is establishing “his rights and obligations of a civil, labor, fiscal, or any other nature.”⁶⁹

However, Article 8(2) of the convention expressly applies to a “criminal offense” and outlines the “minimum guarantees” for the accused during a criminal proceeding.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).

in case law, has increased the scope of 8(2) as to require due process of law in administrative or judicial proceedings that determine the rights and obligations of a person.⁷¹

A. Chirilagua did not violate the right to due process in the case of Byron Dayle, Melanie Peroni, and Francis Hoffman because there was not an administrative proceeding or process that required due process of law under Article 8.

“Due process of law must be respected in any act or omission on the part of the State bodies in a *proceeding*, whether of a *punitive* administrative, or of a judicial nature.”⁷² The Court reasoned, an administrative proceeding which is punitive in nature can be decisive of a person’s rights, and thus due process of law must be guaranteed.⁷³ The proceeding must be “disciplinary” on the person’s right in order to be considered punitive.⁷⁴ Hence, a proceeding that has “punitive power” is different than one with “discretionary power.”⁷⁵

i. Byron Dayle, Melanie Peroni, and Francis Hoffman were not subject to an administrative proceeding or process by the COFERETEL, and thus their individual rights to due process of law were not violated.

In June 2001, Melanie Peroni went to the COFERETEL to ask that she be recognized as the concession holder for Radical Radio. Peroni did not apply for the substitution of ownership, as required by the Telecommunications Act, but assumed that the concession rights would be assigned to her. The COFERETEL made a simple response to the inquiry, and stated that there were discrepancies in the information. The contact with COFERETEL was not an administrative proceeding, but a request for information.

⁷¹ *Baena-Ricardo et al. v. Panama*, February 2, 2001, Inter-Am. Ct. H.R. Series C No. 72, ¶¶ 124-127; *Claude-Reyes et al. v. Chile*, September 19, 2006, Inter-Am. Ct. H.R. Series C No. 151, ¶¶ 116, 118-119; Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights, OEA/Ser.L/V/II.129 Doc. 4 September 7, 2007, Inter-Am Cm. H. R., ¶ 97.

⁷² *Baena-Ricardo et al. v. Panama*, supra note 71, ¶ 124, emphasis added.

⁷³ *Baena-Ricardo et al. v. Panama*, supra note 71, ¶¶ 126-131; *Ivcher-Bronstein v. Peru*, September 24, 1999, Inter-Am. Ct. H.R. Series C No. 54, ¶¶ 104-105.

⁷⁴ *Baena-Ricardo et al. v. Panama*, supra note 71, ¶ 129-131.

⁷⁵ *Id.*

Following, Peroni responded to the COFERETEL with more questions about the discrepancies. Peroni's response was not an appeal to a proceeding or a process because there 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 Peroni's final request, and thereafter Peroni did not oblige with the COFERETEL in any other proceeding or process, such as amparo. All of the communications were plain questions and answers, not an administrative proceeding or process. Also, Dayle did not initiate a proceeding or process with the COFERETEL, nor was he subject to any. Thus, Peroni and Dayle were not subject to an administrative proceeding or process with the COFERETEL that required due process of law.

Likewise, Francis Hoffman was not involved in a proceeding or a process with the COFERETEL. Hoffman was appointed as the communications director of Radio Su-Version in June 1996 which was after the bidding for a concession. ACOSINTI, the owner of Radio Su-Version, was not granted the concession in 1976. The organization petitioned for information from a branch of the COFERETEL, because Hoffman was not yet employed. Ultimately, ACOSINTI received a substantial response with the support of a constitutional remedy, but Hoffman again was not involved. Hoffman was hired at Radio Su-Version after ACOSINTI was denied a license, and thus the station operated illegally for the term of his employment. Francis Hoffman was never subject to an administrative proceeding or process with the COFERETEL that required the protection of due process.

- ii. Byron Dayle, Melanie Peroni, and Francis Hoffman were not engaged in a proceeding or process by the COFERETEL that was determinative of their fundamental rights, and thus their individual rights to due process were not violated.*

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 accordance with the Telecommunications Act.

Byron Dayle was not granted the concession rights of Radio Cadena Basica in 1965, which became Radical Radio. The concession holder in 1965 was Dayle's founding partner, Maria Luisa Peroni. After Maria Peroni's death, the concession rights could not be transferred or assigned to Dayle. The rights were at the discretion of the COFERETEL to regulate the use, development, and operation of the radio spectrum. Similarly, Melanie Peroni wanted to assume the rights to her mother's concession, but those rights had not been granted by the COFERETEL.

Byron Dayle and Melanie Peroni did not have the legal right to use the spectrum for Radical Radio. The rights to operate a radio station are not fundamental, as to be granted to every person, but at the discretion of the COFERETEL. The cancellation was not decisive of Dayle's and Peroni's rights because those rights were not granted by the COFERETEL. The cancellation was the exercise of the COFERETEL's discretion in upholding the law, not a punishment. The COFERETEL did not discipline Dayle and Peroni nor Radical Radio. Therefore, the discretion exercised by the COFERETEL is not subject to the due process of law.

Likewise, Francis Hoffman did not have the rights to a concession for Radio Su-Version. The concession rights were never granted to Hoffman, as the holder, nor to Radio Su-Version, and thus the actions of the COFERETEL did not invalidate a right. Radio Su-Version operated illegally from 1996 to 2008, when the COFERETEL ordered the cessation of the

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 “within the procedural scope prescribed to hear and decide the case.”⁷⁶ The Court has also held that a tribunal must be “objective,” as prescribed in Article 8(1), throughout a proceeding or hearing.⁷⁷ The Court has furthered that the judgment must be “duly justified” and the petitioner is entitled to the tribunal’s “reasoning,” but a thorough explanation is not required.⁷⁸ The Court has consistently determined that the final judgment must be rendered within a reasonable time, as required in 8(1), and is found in the context of three elements: “(a) the complexity of the matter, (b) the procedural activities of the interested party, and (c) the conduct of judicial authorities.”⁷⁹ The complete time period must be evaluated, from the “first pleading” that is filed to the “final and non-appealable judgment.”⁸⁰

The Court has applied the minimum guarantees of 8(2) to all proceedings, administrative or judicial, which determine a person’s rights.⁸¹ Article 8(2) establishes the procedural guarantees of a criminal proceeding, including the presumption of innocence.⁸²

⁷⁶ *La Cantuta v. Peru*, November 30, 2007, Inter-Am. Ct. H.R. Series C No. 173, ¶ 140; *Ivcher-Bronstein v. Peru*, supra note 73, ¶ 112; *Herrera-Ulloa v. Costa Rica*, July 2, 2004, Inter-Am. Ct. H.R. Series C No. 107, ¶ 169.

⁷⁷ *Herrera-Ulloa v. Costa Rica*, supra note 76, ¶ 171.

⁷⁸ *Claude-Reyes et al. v. Chile*, supra note 71, ¶ 119-120, 122; *Tristán Donoso v. Panamá*, January 27, 2009, Inter-Am. Ct. H.R. Series C No. 193, ¶ ¶ 152-154; Access to Justice, supra note 71, ¶ 148, 197.

⁷⁹ *La Cantuta v. Peru*, supra note 76, ¶ 149; Access to Justice, supra note 71, ¶ 156, 160, 205.

⁸⁰ *López-Álvarez v. Honduras*, February 1, 2006, Inter-Am. Ct. H.R. Series C No. 141, ¶ 129-130; *Ximenes-Lopes v. Brazil*, November 30, 2005, Inter-Am. Ct. H.R. Series C No. 139, ¶ 195.

⁸¹ *Baena-Ricardo et al. v. Panama*, supra note 71, ¶ 125; Access to Justice, supra note 71, ¶ 171.

⁸² American Convention on Human Rights, supra note 55, Art. 8(2); *López-Álvarez v. Honduras*, supra note 78, ¶ 142.

Specifically, a person in a criminal proceeding “cannot be convicted unless there is clear evidence of his criminal liability.”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 “right to appeal to a higher court,” in Article 8(2)(h), beyond a criminal proceeding.⁸⁵ The Court emphasized that the appeal must ensure a “full review of the decision being challenged.”⁸⁶ If the remedy is decided against the petitioner, this is not a per se violation of “judicial protection.”⁸⁷

i. Byron Dayle’s right to due process of law was not violated, according to 8(1), during his civil suit at the Administrative Court, yet, the proceeding remains to be completed and thus the domestic remedy has not been exhausted.

Byron Dayle’s right to a competent, independent, and impartial tribunal, previously established by law, was recognized throughout the proceedings at the Administrative Court. The tribunal has jurisdiction over the disputes of citizens and the state, and was established competent in the particular matter. The Administrative Court is a judicial body not an executive body, and maintained independence from the government. The tribunal promptly accepted the case and served the government agency COFERETEL. The court did not delay the proceeding, or show bias but demonstrated impartiality to the matter. The tribunal was previously established by law by at least five years which is demonstrated through the average length of proceedings. Thus, the tribunal was within the procedural scope to hear the matter and did not violate the requirements of Article 8(1).

The proceeding was conducted within a reasonable time given the complexity of the matter. The purpose of the suit was to find the cancellation of Radical Radio null and void. On the surface, the lawsuit appears to have one issue before the court. However, the suit is more

⁸³ *Ricardo Canese v. Paraguay*, August 31, 2004, Inter-Am. Ct. H.R. Series C No. 111, ¶¶ 153-154.

⁸⁴ *López-Álvarez v. Honduras*, February 1, 2006, Inter-Am. Ct. H.R. Series C No. 141, ¶ 149.

⁸⁵ American Convention, supra note 55, Art. 8(2)(h); *Herrera-Ulloa v. Costa Rica*, supra note 76, ¶ 157-158.

⁸⁶ *Herrera-Ulloa v. Costa Rica*, supra note 76, ¶ 165.

⁸⁷ *Aguado - Alfaro et al. v. Peru*, November 24, 2006, Inter-Am. Ct. H.R. Series C No. 158, ¶ 125.

complex because there are compounding sub-issues. First, Byron Dayle was never granted the concession rights to Radical Radio. Second, there was a discrepancy with the station's legal representative. Last, the specifications of the Telecommunications Act had to be reviewed to determine compliance.

Dayle's action is progressing in accordance with the regular stages of a lawsuit. The Administrative Court admitted the case within months which is reasonable in comparison to the average adjudication time of five years. The tribunal promptly served the COFERETEL, and the agency filed a timely answer. Dayle remains in control of the proceeding, and has not responded to the COFERETEL with discovery. The parties must complete the production of evidence before the court can review the merits. As a result, the domestic remedy for Byron Dayle in behalf of Radical Radio has not been exhausted. The remedy is suitable to review the cancellation within the law, and capable of producing a result. The average five year time period does not change the adequacy or effectiveness because the amparo remedy is available.

ii. Byron Dayle's and Melanie Peroni's right to due process of law was not violated, as specified in Article 8(1) and 8(2)(h), during the constitutional remedy, but the filing was not proper based on case law and thus remains to be exhausted.

The constitutional remedy, amparo, can be raised at any court in Chirilagua. The Second Circuit Court of Cedulopolis, as the court of first instance, and the First Circuit Court of Cedulopolis, as the court of second instance, were each of competent jurisdiction for the remedy. The tribunals were in the judicial body not the executive, and thus independent from the State. There was not an indication that the tribunals had a subjective interest in the action, but were impartial. Hence, both courts were competent, independent, and impartial as required by 8(1).

The Second Circuit denied relief to Byron Dayle and Melanie Peroni by evaluating the law. The plaintiffs in other constitutional remedies have been granted relief, however, the court

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 Chirilagua's constitution. The other remedies available were not appropriate under the 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 affirmation of that fact. Thus, Byron Dayle and Melanie Peroni have arguable not exhausted the domestic remedy in accordance with the American Convention. The remedy is adequate, as a

constitutional remedy is prompt in determining the rights of a person, and effective, as there is the capability of producing relief which is evidenced in the known high social impact cases.

iii. Francis Hoffman's right to due process of law was not violated, as specified in Article 8(1) and 8(2)(h), during the constitutional remedy, but the remedy has not been exhausted since the judgment was not appealed to the court of last resort.

The Court of First Instance is of competent jurisdiction because any court in Chirilagua may preside over a constitutional remedy. The Gorgia Court of Appeals is the court of second instance in the state of Gorgia, and thus was likewise competent to hear the appeal. The courts do not report to the State nor does the tribunal have a conflict of interest with the case to make the judgments subjective. Thus, the independent and impartial requirements of a tribunal under Article 8(1) are satisfied. Furthermore, these courts were not created for the particulars of the case but were previously established by law.

The plaintiffs were provided the reasoning of both courts. The court of first instance stated that the conduct of the COFERETEL was consistent with the procedures of the Telecommunications Act in granting or renewing the right to a concession. The tribunals did not arbitrarily decide the matter, but held the conduct was consistent with that procedure. The appeals court affirmed, for the same reason, and thus the judgments were duly justified.

The remedy was filed on May 5, 2008 and concluded at the Gorgia Court of Appeals on June 15, 2008 which is a reasonable time to consider the merits. The complexity of the action was minimal, and reduced by the prior remedy filed by ACOSINTI. The remedy brought by ACOSINTI, gave the Court of First Instance established facts to consider. The current remedy is directly related to the prior remedy, and likely simplified the action. The case was further simplified for the Gorgia Court of Appeals, because ACOSINTI had brought the prior action before that particular tribunal. The proceedings were not delayed by the judicial authorities, but produced a decision in just over a month.

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 an indication that Hoffman's 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. Byron Dayle's, Melanie Peroni's, Francis Hoffman's and William Garra's due process 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

the final non-appealable judgment. Dayle, Peroni, and Hoffman were charged with a total of three crimes, but the theft charges were brought in a different court. The dispersion of the charges to other courts decreased the number of issues for each court, and in turn the complexity. The theft charges required the court to evaluate the sub-issues of the concession rights, which were somewhat complex. Alternatively, the other two charges were simple violations of the criminal code which only Peroni and Hoffman were convicted.

Garra was also charged with the two crimes of instigation and defamation in a single court. The instigation and defamation charges would likely be less complex for Garra than for Dayle, Peroni, and Hoffman because he was the commentator for Radical Radio. However, Garra was also charged with murder which is a more complex crime. The three crimes that Garra was indicted for were to have occurred from the radio station. As a result, the court would need to review Garra's actions in conjunction with the results of Facebookazo.

The procedural activity of the interested parties was without delay, and followed the procedural necessities of their respective cases. Dayle was not convicted for any of the crimes, and thus did not appeal. However, Peroni, Hoffman and Garra were convicted and appealed. The defendants appealed to the court of last resort, and were not deprived the review of an appeals court under Article 8(2)(h) in any capacity. The judicial authorities did not delay the proceedings, but promptly rendered their decisions.

After the public announcements by the state, the defendants were indicted two to three months later. The indictments were detailed so that the defendants each knew the charges against them in accordance with Article 8(2)(b). The proceedings were over a five month period for each defendant without an indication that a defense was inhibited. The courts and prosecutor did not presume that the defendants were guilty prior to their respective trials. In fact, Dayle had

charges dismissed by the prosecutor, and was acquitted by the court for the other charges. The courts and the prosecutor pursued 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 Article 8 in their criminal trials.

IV. THE REPUBLIC OF CHIRILAGUA MET ITS DUTY TO PROTECT THE RIGHT OF ASSEMBLY EMBODIED IN ARTICLE 15 OF THE AMERICAN CONVENTION BY PROVIDING POLICE OFFICERS, INVESTIGATING THE EVENTS, AND CHARGING THE INDIVIDUALS WHO CRIMINALLY INTERFERED WITH THE RIGHT TO ASSEMBLY.

A. Chirilagua provided a police presence at Facebookazo as an affirmative measure to ensure the right of assembly embodied within Article 15.

Article 15 of the American Convention, read in conjunction with Article 1(1), guarantees “the right of peaceful assembly without arms.”⁸⁸ The exercise of this right is subject to restrictions when they are legally implemented and “necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or the rights of freedom of others.”⁸⁹ The police presence at Facebookazo was a protection of the people’s right to gather in safety and in peace. The Convention requires that a State not only refrain from restricting a peaceful assembly, but also to take affirmative steps to ensure it can be exercised, which includes protecting those holding contrary views from physical violence.⁹⁰

The Court found there was no violation of the right of assembly in *Baena Ricardo et al. v. Panama*, where a workers protest was overseen by officers “who ensured normal development thereof.”⁹¹ In Chirilagua, the President announced days before the march that the police had

⁸⁸ American Convention, *supra* note 55, Art. 15; see also Organization of American States, American Declaration on the Rights and Duties of Man, Art. XXI, April. 22, 1948, O.A.S. Res. XXX.

⁸⁹ *Id.*

⁹⁰ Report on the Situation of Human Rights Defenders in the Americas, ¶ 50, OEA/Ser.L/V/II.124 Doc. 5 rev. 1 (Mar. 7, 2006); Report on Terrorism and Human Rights, ¶ 359, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (Oct. 22, 2002).

⁹¹ *Baena-Ricardo et al. v. Panama*, *supra* note 71, ¶ 149.

been ordered to prevent violence and social disturbance as he observed Facebookazo was manifesting anxiety.⁹² On the day of the march, the police again were instructed by public officials to guard against criminal disturbances which would hinder participation in the gathering.⁹³ Chirilagua did not instruct the police to interfere with Facebookazo or pass any restrictive ordinances. The American Convention and other international human rights bodies such as Article 11 of the European Convention, hold that public safety is mandatory when exercising the right of assembly.⁹⁴ The Court has consistently viewed the American Convention as belonging to an international *corpus juris* for the protection of human rights.⁹⁵ The broadcast aired by Radical Radio and Radio Su-Version prior Facebookazo were aggressive toward the President and those who supported him;⁹⁶ Chirilagua had a duty to protect other participants in the march by dispatching the police.

B. Chirilagua had a responsibility in accordance with the law to investigate and charge Melanie Peroni, Byron Dayle, Francis Hoffman, and William Garra for criminally interfering with the right of assembly.

The actions of Peroni, Dayle, Hoffman, and Garra criminally interfered with the right of assembly. Article 15 recognizes the right of assembly whether organized or sporadic and regardless of purpose, requiring only that the meetings remain peaceful.⁹⁷ When individuals breach this right and incite violence, a State is obligated to handle the breach in accordance with the law to prevent repetition.⁹⁸

The reports by William Garra, on the day of Facebookazo, on the radio stations of Peroni, Dayle, and Hoffman incited violence. Garra reported to the Facebookazo participants the

⁹² Hypothetical, ¶ 7.

⁹³ Hypothetical, ¶ 25.

⁹⁴ Protocol No. 7 to the 1950 European Convention on Human Rights, Art. 11, E.T.S. 117 (Nov. 1, 1988).

⁹⁵ *The "Street Children" (Villagran-Morales et al.) v. Guatemala*, 1999 Inter-Am. Ct. H.R. (Ser. C) No. 63, ¶¶ 192-194 (November 19, 1999).

⁹⁶ Hypothetical, ¶ 17.

⁹⁷ *Escher et al. v. Brazil*, 2009 Inter-Am. Ct. H.R. (ser. C) No. 208, ¶ 169 (July 6, 2009).

⁹⁸ *Democracy and Human Rights in Venezuela* (2009), ¶ 136, OEA/Ser.L/V/II. Doc. 54, (Dec. 30, 2009).

police would block the protest and to “defend their rights at all costs.”⁹⁹ A confrontation ensued during which Facebookazo participants violently used sticks and rocks against the police and others who had assembled with adverse views; the violence caused injury to fifteen people and killed six people, including an officer.¹⁰⁰

For their interference with the right of peaceful assembly, the named individuals were, among other violations, indicted for instigation to commit a crime which is defined in part as being appropriate for “Any person who publicly incites another person or persons to commit a specific crime or types of crime”¹⁰¹ The charges are established in the Criminal Code of Chirilagua and were imposed to sustain a democratic society.

V. THE REPUBLIC OF CHIRILAGUA DID NOT VIOLATE ARTICLE 13 OF THE AMERICAN CONVENTION AS IT BROUGHT DEFAMATION CHARGES AGAINST MELANIE PERONI, BYRON DAYLE, FRANCIS HOFFMAN, AND WILLIAM GARRA, AND REGULATED THE RADIO CONCESSIONS IN FULL ACCORDANCE WITH THE RIGHT OF FREEDOM OF THOUGHT AND EXPRESSION.

Article 13 read in conjunction with Article 1(1) of the American Convention provides that freedom of expression is a right of every person, to be gained through any medium, “to seek, receive, and impart information and ideas of all kind.”¹⁰²

A. Chirilagua’s subsequent charges of criminal defamation against Melanie Peroni, Byron Dayle, Francis Hoffman, and William Garra are in conformity with Article 13(2) of the American Convention.

Within the decisions of the Court, Article 13 reflects broad concepts of a right to freedom of expression and individual autonomy.¹⁰³ However, the Court has consistently held

⁹⁹ Hypothetical, ¶ 18.

¹⁰⁰ Hypothetical, ¶8, ¶ 26.

¹⁰¹ Hypothetical, ¶¶ 32-33, Footnote 3.

¹⁰² American Convention, supra note 55, Art. 13 and Art. 1(1); see also Organization of American States, American Declaration on the Rights and Duties of Man, Art. IV, April. 22, 1948, O.A.S. Res. XXX; Protocol No. 7 to the 1950 European Convention on Human Rights, Art. 10, (Nov. 1, 1988).

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, and, (3) they are necessary in a democratic society.”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 established in advance, in a formal and precise manner.¹⁰⁷ The charge of defamation subsequently brought against the indentified individuals for their parts in promoting hatred and inciting violence against President Escalante, was an established law, precisely written, in the Criminal Code of Chirilagua.¹⁰⁸ Chirilagua’s defamation law is more thorough and precise than Panama’s law for false accusation, which the Court held validly established liability.¹⁰⁹ Chirilagua has met the required condition of imposing subsequent liability through established law in compliance with Article 13.

ii. Imposing the crime of defamation was necessary to ensure the rights and reputation of President Escalante as guaranteed throughout the American Convention.

Article 13(2) of the American Convention calls for the imposition of liability to ensure two compelling objectives: “respect for the rights or reputations of others,” or “the protection of

¹⁰³ *Ivcher Bronstein v. Peru*, supra note 73, ¶ 143.

¹⁰⁴ *Kimel v. Argentina*, May 2, 2008, ¶ 54, Inter-Am. Ct. H.R. Series C No. 117.

¹⁰⁵ *Herrera-Ulloa v. Costa Rica*, supra note 76, ¶ 120.

¹⁰⁶ *Id*; See also Report of the Office of the Special Rapporteur for Freedom of Expression, ¶ 62, OEA/Ser.L/V/II.134 Doc. 5, (Feb. 25, 2009).

¹⁰⁷ Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, Series A No. 5. ¶ 39 and ¶ 40.

¹⁰⁸ Hypothetical, ¶ 32, Footnote 4.

¹⁰⁹ *Tristan Donoso v. Panama*, supra note 78, ¶ 117; see also *Dudley Stokes v. Jamaica*, Case 12.468, ¶ 78, ¶84, Inter-Am C.H.R. Report No. 23/08.

national security, public order, or public health or morals.”¹¹⁰ The charges against the defendants were imposed to ensure the rights and reputation of President Escalante.¹¹¹

Chirilagua recognizes that the President holds a public position, which would ordinarily mandate a higher level of tolerance within the Inter-American System.¹¹² This distinction is based on a view that public figures have voluntarily exposed themselves to public debate and therefore should absorb more criticism and scrutiny.¹¹³ However, the Court has also declared “every fundamental right is to be exercised with regard for other fundamental right.”¹¹⁴

All members within a democratic society, including public figures, are guaranteed the right to “enjoy the protections of the provisions of Article 11 of the Convention, which enshrines the right of honor.”¹¹⁵ The President was ridiculed and made the subject of violent attacks during programs under the control of Peroni, Dayle, Hoffman, and Garra.¹¹⁶ The judicial mechanism established by a State to protect one’s honor, is the proper place for an individual to turn when a violation has taken place.¹¹⁷ The defamation charges against the defendants were a proper use of the State’s judicial body, since they were brought to safeguard the reputation of President Escalante, which the Court has found to be a compelling interest in other cases.¹¹⁸

Further, the higher threshold with speech directed at public figures should only be afforded if there is not an identifiable imminent danger of violence.¹¹⁹ When another’s expressions amount to a direct and obvious threat to life in society, Article 13(2) and (5) mandate

¹¹⁰ American Convention, supra note 55, Art. 13(2).

¹¹¹ Hypothetical, ¶ 32, ¶¶ 38-39.

¹¹² *Herrera-Ulloa v. Costa Rica*, supra note 76, ¶¶ 128-129.

¹¹³ *Id*; *Ricardo Canese v. Paraguay*, supra note 83, ¶ 103.

¹¹⁴ *Kimel v. Argentina*, supra note 104, ¶ 75.

¹¹⁵ *Tristan Donoso v. Panama*, supra note 78, ¶ 118.

¹¹⁶ Hypothetical, ¶¶ 15-17.

¹¹⁷ *Ricardo Canese v. Paraguay*, supra note 83, ¶ 101.

¹¹⁸ *Tristan Donoso v. Panama*, supra note 78, ¶ 118; see also *Dudley Stokes v. Jamaica*, supra note 109, ¶ 78.

¹¹⁹ Annual Report of the Inter-American Commission on Human Rights (1994), Chap. V, OEA/Ser.L/V.88 Doc. 9 rev. 1(Feb. 17, 1995).

State intervention.¹²⁰ The named individuals facilitated direct threats on the President's life. The defendants facilitated programming which promoted Facebook groups, among others, to make threats like "I too want Atilio Escalante Norris and all of the landowners who have exploited us to die," and "People who want to fuck up little master Atilio Escalante Norris".¹²¹ General listeners were also permitted to call and express their support for the groups and make their own angry attacks on the President. The radio stations directed these listeners to participate in Facebookazo, during which they digressed to violence, resulting in the death of six people.¹²²

The Court has observed, "In some cases the balance will be tilted to the prevalence of freedom of thought and expression, while in others it will be titled to safeguarding the right to have one's honor respected."¹²³ After careful evaluation, Chirilaguan Courts imposed criminal charges for the legitimate purpose of protecting the safety and reputation of President Escalante because the invocation of violence and hatred is not a protected right in the convention.

iii. The charges of defamation were imposed as necessary in a democratic society.

The imposition of sanctions must be shown as necessary in a democratic society to serve the compelling objectives pursued.¹²⁴ Criminal sanctions have not been deemed to be in opposition to the Convention.¹²⁵ After Chirilagua imposed criminal sanctions, Dayle was acquitted, while Peroni, Hoffman, and Garra were each convicted and sentenced to a term in prison; Peroni and Hoffman could have alternatively paid \$15,000.¹²⁶ Chirilagua maintains these judgments were necessary in relation to the gravity of the actions taken by the convicted.

¹²⁰ Annual Report of the Inter-American Commission on Human Rights (1994), supra note 119, *Id.*

¹²¹ Hypothetical, ¶ 17 and Footnote 2.

¹²² Hypothetical, ¶ 17, ¶ 32, and ¶ 26.

¹²³ *Kimel v. Argentina*, supra note 104, ¶ 84.

¹²⁴ *Herrera-Ulloa v. Costa Rica*, supra note 76, ¶¶ 120-123; see also OC-5/85, supra note 107.

¹²⁵ *Kimel v. Argentina*, supra note 104, ¶ 78.

¹²⁶ Hypothetical, ¶¶ 38-39.

In the case of *Dudley Stokes v. Jamaica*, the Commission held, to determine the necessity of sanctions, “domestic courts are generally best situated to assess the numerous factors required for such an evaluation given they have more information available to them to measure the impact of harm on the plaintiff within the context of his/her community.”¹²⁷ The Commission ultimately ruled that Article 13 was not violated when a judgment of \$35 million dollars was imposed on Mr. Stokes for committing libel against a Jamaican State Official.¹²⁸

The damages imposed on the individuals who defaming President Escalante were grounded in the national standards of the Republic’s Criminal Code. The damages were necessary to ensure the rights and reputation of the President. Chirilagua has met each the specific conditions required to impose sanctions under Article 13 of the Convention.

B. Chirilagua has implemented criteria, democratic in nature, in regulating radio concessions, which promotes diversity and provides equal opportunity of access to all persons, in full compliance with Article 13(3) of the American Convention.

Under Article 13(3) of the American Convention, indirect restrictions to freedom of expression are prohibited.¹²⁹ In accordance with this provision every state has a duty to refrain from actions restricting the right “to seek, receive and impart information and ideas.”¹³⁰ The bodies of the inter-American system have not to date ruled expressly on, “the issue of regulation of the communications media and the requirements that must be met in order to prevent the violation of freedom of expression,” however Chirilagua is in full compliance with the Joint Declaration of the UN, OAS and OSEC Special Rapporteurs on Freedom of Expression, which has made direct proclamations.¹³¹ The 2003 Joint Declaration, reaffirmed in 2007, 2009, and

¹²⁷ *Dudley Stokes v. Jamaica*, supra note 109, ¶ 85.

¹²⁸ *Dudley Stokes v. Jamaica*, supra note 109, ¶¶ 91-95.

¹²⁹ American Convention, supra note 55, Art. 13(3).

¹³⁰ Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter II, ¶ 55, OEA/Ser.L/V/II.1117 Doc. 5, (Mar. 7, 2003).

¹³¹ Special Rapporteur for Freedom of Expression, supra note 130, Chapter III, ¶ 135.

2010, declares “the allocation of broadcasting frequencies should be based on democratic criteria and should ensure equitable opportunity of access” and “broadcasters should not be required to register in addition to obtaining a broadcasting license.”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 92¹³³ and in Article 70, “recognizes community radio broadcasting and establishes that community radio shall have the right to a proportional percentage of the radio frequencies.”¹³⁴ These provisions were developed from Chirilagua’s Constitution, which provides “the State shall administer the radio frequency taking into account criteria of equity and bearing in mind the principle of equal opportunity and media pluralism.”¹³⁵ The State’s newest legislation awards concessions in tripartite fashion to ensure an equal division 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 where 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 note 107, ¶ 76; See also *Ivcher Bronstein v. Peru*, supra note 73, ¶¶ 158 -163.

¹⁴² Hypothetical, ¶ 29-30.