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File Number(s): Report No. 14/02; Petition 12.352
Session: Hundred and Fourteenth Regular Session (25 February – 15 March 2002)
Title/Style of Cause: Bruce Campbell Harris Lloyd v. Guatemala
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Decided by: President: Juan Mendez;
Second Vice-President: Jose Zalaquett;
Commissioners: Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts, Susana Villaran.
Commissioner Marta Altolaguirre, of Guatemalan nationality, did not take part in the discussion and voting on the present report, pursuant to Article 17(2)(a) of the new Rules of Procedure of the Commission, which came into force on May 1, 2001.

Dated: 28 February 2002
Citation: Harris Lloyd v. Guatemala, Petition 12.352, Inter-Am. C.H.R., Report No. 14/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)
Represented by: APPLICANT: the Center for Justice and International Law and the Office of the Archdiocese for Human Rights in Guatemala

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I. SUMMARY

1. On September 23, 1999, Mr. Bruce Campbell Harris Lloyd, the Regional Director of Casa Alianza, the Center for Justice and International Law (CEJIL), and the Office of the Archdiocese for Human Rights in Guatemala (hereinafter “the petitioners”) submitted a petition to the Inter-American Commission on Human Rights (hereinafter “the Commission” or the “IACHR”). The complaint alleges violation by the State of Guatemala of Articles 13 (Freedom of Thought and Expression) and 24 (the Right to Equal Protection) in relation to the overall obligations enshrined in Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the Inter-American Convention on Human Rights (hereinafter “the Convention”) to the detriment of Mr. Bruce Harris Campbell.

2. The petitioners allege that the State of Guatemala violated the right to Freedom of Expression, Article 13 of the Convention, when the Supreme Court of Justice of Guatemala decided in a final judgment to institute criminal proceedings against Mr. Harris for public statements to the media on the subject of anomalies in international adoptions, specifically naming a notary purportedly involved in illegal adoptions. The petitioners allege that Mr. Harris had the right to be tried by a press tribunal pursuant to Article 35 of the Guatemalan Constitution.

3. The State of Guatemala argues that domestic remedies will be exhausted only upon final judgment in the criminal proceedings.

4. After reviewing the positions of the parties in the light of the admissibility requirements set out in the Convention, the Commission decided to declare the petition admissible as it relates to the alleged violations of Articles 8, 13 and 24 of the American Convention.

II. PROCESSING BY THE COMMISSION

5. On December 18, 2000 the Commission opened the case and transmitted the pertinent portions of the petition to the State, granting it 90 days to submit its observations.

6. On March 7, 2001 the State requested a 90-day extension, to enable it to obtain the data necessary to comply with the Commission's request.

7. On June 8, 2001, the State submitted its reply, arguing that the petition should be deemed inadmissible because domestic remedies had still not been exhausted, and would not be until the criminal proceedings came to conclusion.

8. On August 27, 2001, the petitioners submitted their observations on the State's reply regarding the facts and the admissibility of the petition.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

On the facts

9. In 1994, Casa Alianza concluded an agreement with the Prosecutor General's Office (Procuraduría General) of Guatemala for the purpose of carrying out investigations on issues affecting children, especially the illegal traffic in children. On several occasions Mr. Harris stated to various branches of the media that over the previous three years there had been a disproportionate increase in the number of adoptions of Guatemalan children abroad without any legal check of the possibility that these adoptions amounted to illegal traffic.

10. On September 11, 1997 Casa Alianza, through its representative Bruce Harris, reported on the results of the investigation to a press conference in the branch of the Office of the Prosecutor (Procuraduría) in the Thirteenth District (Zona 13) of Guatemala City. On that occasion he expressed his concern at the involvement of lawyers in international adoption processes, and specifically singled out the notary Susana María Luarco Saracho de Umana, as having abused her status as spouse of the President of the Supreme Court of Justice to speed up adoption processes.[FN2] The investigations had purportedly revealed that many children had been bought or stolen, and that in several cases their parents had been manipulated or forced into giving up their children for adoption.

[FN2] At a press conference he gave in 1997, Bruce Harris stated that the fact that Susana de Umana was the wife of the President of the Supreme Court of Justice inhibited members of the Judiciary and, generally speaking, facilitated the processing of adoptions because of the pressure exerted on officers in various government agencies to speed up cases as much as possible.

11. On September 24, 1997 Mrs. Umana brought a criminal suit for defamation against Mr. Harris, for his statements at the press conference. On 22 April she brought three more defamation charges against him for statements made, on the subject of the investigations, in the magazine El Proceso, El Periódico, and an e-mail message he had sent out via an alert network.

12. Mr. Harris filed several motions to have the criminal charges against him declared inadmissible, without success. As soon as the criminal investigation was initiated, Bruce Harris entered, on October 1, 1997, a declinatory plea in the Fourth Court (Tribunal Cuarto), claiming that the statements in question were made in the exercise of the right of free expression, and asked for the matter to be heard by the press tribunal set up by the Freedom of Expression Act under Article 35 of the Constitution.

13. It should be noted that on March 25, 1998, after the Fourth Court requested a recusation and the Fifth Criminal Court for Narcotics and Environmental Offenses (Tribunal Quinto de Sentencia Penal de Narcoactividad y Delito Contra el Ambiente) was designated as the competent court to hear the case, Bruce Harris once more filed a motion to dismiss the case, on grounds of the substance of the case.

14. On March 31, 1998 the Fifth Court denied the motion on grounds of incompetence, arguing that Bruce Harris was a private individual who used the media to express his opinions on the issue in question, and that since he was not a member of the press he could not invoke the illegality of the suit brought against him. The petitioners stated that that court had concluded that as a private individual, Bruce Harris could not invoke protection under the Freedom of Expression Act. They further stated that on July 28, 1998 the Fifth Court had declared inadmissible Bruce Harris' request to repeal the earlier decision.

15. The petitioners' statements show that on May 19, 1998 Bruce Harris filed an application for protection (writ of amparo) in the Tenth Chamber of the Court of Appeal (Sala Décima de la Corte de Apelación) against the Fifth Court's decision to institute criminal proceedings against him as an individual, although the charges against him did not constitute a criminal offense. On May 19, 1998 the Tenth Chamber of the Court of Appeal accepted the application. On May 22, 1998, the Fifth Court submitted its report to the Tenth Chamber of the Court of Appeal, stating that it had based its decision on Mr. Harris' status as a private individual, who had made use of the media, and that since he was not a member of the press his actions were not protected under Article 35 of the Constitution or by the Freedom of Expression Act.

16. On July 10, 1998, the Tenth Chamber of the Court of Appeal turned down the motion for amparo, arguing that Bruce Harris was not a member of the press that was subject to the special jurisdiction arising out of the Freedom of Expression Act. The Court considered that Bruce

Harris had failed in his obligation to prove that the slanderous statements referred to acts performed as part of the functions of a public official, that is to say, a notary public.

17. The petitioners state that on July 31, 1998 Bruce Harris had appealed the decision of the Tenth Chamber of the Court of Appeal before the Constitutional Court. After exhausting the legal procedures, that Constitutional Court upheld the decision appealed in a ruling on 19 January 1999. The Constitutional Court decided that in this case competence lay with the criminal courts, since Bruce Harris had not proved that Notary Umaña had acted in her capacity as a public official.

18. Despite the foregoing, the petitioners claimed that on 26 March 1999 the Twelfth Court, to which the case had been forwarded, issued, in accordance with the law, - an order to summon a panel of jurors (Press Tribunal), pursuant to Article 46 of the Freedom of Expression Act. According to the report, this Tribunal concluded that the Freedom of Expression Act applied not only to journalists but to everyone, since what was at issue was a constitutional right. Consequently, crimes by virtue of an abuse of freedom of expression must be heard exclusively by a jury.

19. On March 27, 1999 Notary Susana de Umaña filed a motion with the Court of Appeal challenging the earlier decision based on the decision of the Constitutional Court of January 19, 1999. In a ruling on April 30, 1999, the Twelfth Court granted the motion for appeal in response to which Bruce Harris filed an appeal for a reversal of this decision and, alternatively (en subsidio), appeal, on 4 May 1999, which was found to be out of order. On 11 May 1999 the Court of Appeal decided that the case must be heard in a criminal court. Pursuant to this judgment and that of the Tenth Chamber of the Court of Appeal, on 8 June 1999 the Twelfth Court opened public and oral criminal proceedings against Bruce Harris for defamation.

20. On 18 June 1999 Bruce Harris lodged an application for protection (writ of amparo) with the Supreme Court, alleging the inadmissibility of the appeal to the Tenth Chamber of the Court of Appeal, on the grounds that the application for revocation predated it. The Supreme Court of Justice, in a decision (proveído) of 25 June 1999, ruled the application inadmissible, stating that “the circumstances make it inadvisable”.

On the legal issues

21. The petitioners allege that their statements are not criminal because the information disseminated was of extreme public interest and that Mrs. Umaña acted in her capacity of public official, in terms of Article 35 of the Political Constitution of the Republic of Guatemala, which states that “Publications containing accusations, criticisms or imputations against public officials and employees for acts done in the performance of their duties shall not constitute faults or offences. Public officials or employees may request that a court of honor, composed as may be determined by law, declare the publication affecting them to be based on inaccuracies or that the charges against them are groundless”.

22. The petitioners allege that the fact that Mr. Harris is now being prosecuted for defamation on the basis of public statements he is said to have made on Guatemalan adoptions, imputing to a

public official the responsibility for concrete facts, constitutes an arbitrary and unjustified limitation or restriction of his right to freedom of expression, and that the State of Guatemala is therefore in breach of Article 13 of the Convention.

23. The petitioners argue that Mrs. Umaña can be classified as a notary public by virtue of her professional activities in the adoption of Guatemalan children, in terms of Article 1, General Provisions, of Volume Three of the Penal Code: “For penal purposes, by public official is meant a person who, after popular election or due appointment, exercises an official function or authority, jurisdiction or representation, as determined by law. Notaries shall be considered public officials in relation to offences they may commit in the course or as a result of acts performed in the exercise of their profession”.

24. The petitioners argue that the right of freedom of expression enshrined in Article 35 of the Constitution applies to all persons and not solely to journalists. Therefore, the petitioners allege that the decision of the Constitutional Court and then of the Tenth Chamber of the Court of Appeal denying Bruce Harris trial by a jury “constitutes discrimination as between ‘journalists’ and the rest of society”, and as such violates the right to equality before the law enshrined in Article 24 of the American Convention.

25. The petitioners allege that the suit for defamation brought by Mrs. Umaña against Bruce Harris should be heard by a Press Tribunal in accordance with Article 35 of the Constitution, since the statements made by Harris naming the notary were based on her professional and public acts, she being classifiable as a public official. The petitioners argue that the decision to prosecute Bruce Harris before a criminal court and not a press tribunal constitutes a violation of Article 13 of the Convention guaranteeing freedom of thought and expression.

26. Finally, the petitioners maintain that domestic remedies were exhausted in this case when the Supreme Court rejected Mr. Harris’ protection application, invoking his constitutional right to be tried by a press tribunal for public statements protected by the Freedom of Expression Act. It also confirmed the previous judgment by ordering criminal proceedings to be initiated against Mr. Harris.

B. Position of the State

27. The State admits that Mr. Harris’ statements to the media were made in a context of concern to bring to public attention a national problem, to wit, the matter of international adoptions, and that in them Mr. Harris “emphasized the need to amend and modernize present laws and strengthen the means of controlling and ensuring compliance with the law.” It further admits that, in the setting of the press conference and in his concern to illustrate the present working of the adoption system, Mr. Harris alluded to Notary Umaña, whom he described as putting pressure on the responsible officials of government agencies and using her power to speed up the adoption cases she was handling.

28. The State argues that the Freedom of Expression Act provides for a procedure applicable exclusively to journalists in the exercise of their profession, which does not mean that other persons, who are not journalists, are deprived of the same right. As a result, the State does not

consider Bruce Harris a journalist protected by this statute, but rather as a private individual. The only restriction on freedom of expression is the possibility of damage to the interests of persons who believe themselves to be injured in their honor, prestige or reputation. Such persons may seek remedy through criminal proceedings intended to prevent abuse of freedom of expression by false imputation to them of criminal acts.

29. The State affirms that Mrs. Umaña is not nor has ever been a public official, and that the State has conferred public authority on notaries for the sole purpose of endowing their acts with legal validity. The State further alleges that Bruce Harris did not show that Notary Umaña was classifiable as a public official when he invoked the protection of Article 35 of the Constitution.

30. The State considers that the petitioners' complaint is a dispute between private individuals, and that as such it does not fall within the purview of the inter-American system of protection of human rights.

31. Finally, the State holds that domestic remedies have not been exhausted until there is a final judgment in the criminal proceedings, that the case exhibits none of the exceptions to this rule, and that the petition should therefore be ruled inadmissible.

IV. ANALYSIS OF THE ISSUE OF ADMISSIBILITY

A. Competence of the Commission

32. The petitioners have locus standi to submit petitions to the ICHR, in accordance with Article 44 of the Convention. The petitions identify as purported victims individual persons, whose rights under the Convention Guatemala is committed to respect and ensure. The Commission notes that Guatemala is a State party to the American Convention, having ratified it on 25 May 1978. The Commission therefore has competence *ratione personae* to study the petition.

33. The Commission has competence *ratione loci* to take cognizance of this petition since it alleges violations of rights guaranteed by the American Convention that purportedly occurred in the territory of a State party.

34. The Commission has competence *ratione temporis*, since the events alleged in the petition took place at a time when the duty to respect and ensure the rights enshrined in the Convention was in force for the State.

35. Finally, the Commission has competence *ratione materiae*, since the petition alleges violations of human rights protected by the American Convention.

B. Exhaustion of domestic remedies

36. Article 46(1)(a) of the American Convention states:

Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

That the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.

37. The Commission has repeatedly insisted on its “reinforcing and complementary” status within the inter-American system of protection of human rights. This status is reflected in Article 46(1)(a) of the Convention, which permits States parties to decide cases within their own legal framework, before there is need for recourse to an international proceeding.

38. In the instant case, the petitioners allege that to find remedy for the purported violations of constitutional rights they have taken adequate action before the courts of domestic jurisdiction provided by Guatemalan law. They state, nevertheless, that these actions have not been sufficient to ensure the rights purportedly violated by the State.

39. The petitioners allege that domestic remedies were exhausted by the Supreme Court’s decision rejecting the protection application lodged by Bruce Harris, in which he asked for his case to be heard by a Press Tribunal under Article 35 of the Constitution of Guatemala. The final judgment of the Supreme Court set in motion the oral and public criminal proceedings against Bruce Harris for defamation.

40. For its part, the State of Guatemala contests the facts alleged by the petitioners with regard to the exhaustion of domestic remedies. The State alleges that to comply with the requirement of exhaustion of domestic remedies, the petitioners must await final judgment in the criminal proceedings against Bruce Harris.

41. On the subject of prior exhaustion of domestic remedies, the Inter-American Court of Human Rights has ruled as follows:

The States parties undertake to provide effective domestic legal recourse for victims of human rights violations (Art. 25), recourse which must be given effect in accordance with the rules of due process (Art. 8.1), subject to the overall duty of States to ensure the full and free exercise of the rights enshrined in the Convention by all persons within their jurisdiction (Art. 1).

42. Therefore, in order for a duty to exhaust domestic procedures to exist, these procedures must possess characteristics enabling them to be considered an adequate and effective remedy for the purported violation. Article 46 of the Convention stipulates that domestic remedies must be exhausted “in accordance with generally recognized principles of international law” and that they should also be adequate and effective.[FN3] Consequently, Article 25 of the Convention imposes on States a duty to provide all persons within their jurisdiction with effective judicial recourse against acts in violation of their fundamental rights, so that such recourse may be really capable of remedying the violation.[FN4]

[FN3] Judgment of the Court in the Velásquez Rodríguez case, 29 July 1988, para. 64. See also judgment of Court in the Godínez Cruz case, 20 January 1989, para. 67, and judgment in the Fairén Garbi and Solís Corrales case, 15 March 1989, Para. 88.

[FN4] Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of 6 October 1987 (Articles 27.2, 25,8, para. 24).

43. In the instant case, the petitioners, by bringing the case before the Press Tribunal, which according to them is the competent judicial authority in the matter, invoked all the domestic remedies prescribed by the relevant Guatemalan law for the protection of the rights they allege to have been violated. The Commission considers that the petitioners took adequate legal steps pursuant to the procedural rules laid down in the Guatemalan Code of Criminal Procedure in order to contest the decision that located competence to hear the Bruce Harris case in the ordinary criminal justice system.

44. Therefore, without prejudice to the merits of the case, the Commission considers that the requirements of Article 47(b) and (c) of the Convention have been met.

C. Deadline for submission of the petition to the ICHR

45. Article 46(1)(b) of the American Convention stipulates that admission of a petition requires “that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment”.

46. The instant petition was lodged with the IACHR on 23 September 1999, three months after the Supreme Court of Justice’s decision rejecting the protection application filed by the petitioner on 25 June 1999. At no time during the processing of the case before the Commission did the State allege failure to comply with the timeliness requirements with regard to the exhaustion of domestic remedies.

D. Duplication of proceedings

47. Article 46(1)(c) of the Convention provides that admissibility of a petition by the Commission requires that the subject of the petition or communication is not pending in another international proceeding for settlement. Article 47(d) of the Convention also stipulates that the Commission shall declare inadmissible any petition that is substantially the same as one previously studied by the Commission or by another international organization.

48. From the statements of the parties and the documents in the file, it does not appear that the petition is pending in any other international proceeding or forum, or that it is substantially the same as any previously studied by the Commission or by another international organization. The Commission therefore considers that in the instant case the requirements for admissibility in Articles 46(1)(c) and 47(d) of the Convention have been met.

E. Nature of the facts alleged

49. With regard to the facts alleged concerning the competent legal forum for hearing the suit brought by Notary Susana de Umaña against Mr. Bruce Harris, the Commission considers that the decision to submit the case to an ordinary criminal court rather than to the Press Tribunal as provided by Article 35 of the Guatemalan Constitution, could constitute a violation of Article 8(1) of the American Convention. Although the petitioners allege that this action by the Guatemalan legal authorities gave rise to a violation of Article 13 of the American Convention, the Commission, by virtue of the principle of *iura curia novit*, considers that the facts alleged fall within the scope of protection of the right to a legal hearing with due guarantees. In fact, Article 8(1) of the Convention provides, *inter alia*, that every person has the right to a hearing, with due guarantees, by a competent tribunal. The petitioners allege that Mr. Bruce Harris was deprived of the right to trial by a jury as provided by Article 35 of the Guatemalan Constitution in regard to faults or offences connected with expression of opinion

50. With regard to the facts alleged concerning the discrimination of which the Guatemalan legal authorities were purportedly guilty in excluding Bruce Harris from the effects of Article 35 of the Constitution of Guatemala on the grounds that he was not a journalist, the Commission considers that this could constitute a violation of the right to equality before the law enshrined in Article 24 of the American Convention.

51. Finally, the petitioners argue that the mere existence of laws that establish defamation as a crime, as well as criminal proceedings against persons under such laws, constitute *per se* a violation of Article 13 of the American Convention, regardless of whether or not the proceedings have reached final judgment. The Commission considers that these arguments must be studied in the phase of examination of the merits of the case, in order to determine whether the facts alleged constitute a violation of Article 13 of the American Convention.

52. Therefore, without prejudice to the merits of the case, the Commission considers that the requirements of Article 47(b) and (c) of the above-mentioned international instrument have been met.

V. CONCLUSIONS

53. The Commission considers that it has competence to take cognizance of this petition and that it is admissible as regards the requirements for admissibility contained in Articles 46 and 47 of the American Convention on Human Rights, and as regards the alleged violations of Articles 8, 13 and 24 of the American Convention.

54. On the basis of the aforementioned arguments as to facts and law, and without prejudice to the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the instant case admissible as regards the presumed violations of rights protected by Articles 8, 13 and 24 of the American Convention.

2. To notify the parties of this decision.
3. To continue with the examination of the case; and
4. To make public this decision and to include it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 28th day of the month of February, 2002. (Signed): Juan E. Méndez, President; José Zalaquett, Second Vice-President; Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts, and Susana Villarán, Commissioners.