

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 65/04; Petition 28/04
Session: Hundred Twenty-First Regular Session (11 – 29 October 2004)
Title/Style of Cause: Dudley Stokes v. Jamaica
Doc. Type: Decision
Decided by: President: Jose Zalaquett;
First Vice-President: Clare K. Roberts;
Second Vice-President: Susana Villaran;
Commissioners: Paulo Sergio Pinheiro and Florentin Melendez.
Commissioners Evelio Fernandez Arevalos and Freddy Gutierrez Trejo
dissented from the decision of the majority. The dissenting opinion of Freddy
Gutierrez Trejo is included immediately after this report.

Dated: 14 October 2004
Citation: Stokes v. Jamaica, Petition 28/04, Inter-Am. C.H.R., Report No. 65/04,
OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004)
Represented by: APPLICANT: Claudio Grossman

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I. SUMMARY

1. On January 14, 2004, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition filed by Mr. Claudio Grossman (hereinafter the “Petitioner”) on behalf of Mr. Dudley Stokes, the former Editor-in-chief of the Gleaner newspapers (hereinafter “Mr. Stokes” or the “alleged Victim”). The complaint alleges violation by the State of Jamaica (hereinafter “the State” or “Jamaica”) of Article 13 (Freedom of Thought and Expression) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), in conjunction with the overall obligations enshrined in Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the Convention, to the detriment of Mr. Stokes.

2. The Petitioner alleges that the State violated Mr. Stokes' right to freedom of expression by awarding unprecedented civil damages to Mr. Eric Anthony Abrahams against Mr. Stokes and the Gleaner Company for printing allegedly libelous statements in their newspapers about Mr. Abrahams' involvement in a kickback arrangement while serving as the Minister of Tourism. The Petitioner claims that this award produces a chilling effect on the exercise of the right to freedom of expression.

3. The State argues that the alleged Victim has failed to exhaust his domestic remedies before bringing the case to the Commission. Furthermore, the State asserts that the proper

reading of Article 13 does not permit the Petitioner to draw the conclusion that the amount of damages awarded in effect restricts the freedom of expression.

4. After reviewing the positions of the parties in light of the admissibility requirements set out in the Convention, and without prejudging the merits of the matter, the Commission decided to declare the petition admissible with respect to the alleged violations of Articles 1(1), 2, and 13 of the American Convention, to transmit this Report to the parties, to continue with the analysis of the merits of the case, and to publish this Report and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING BY THE COMMISSION

5. The petition was received by the Commission on January 14, 2004. On January 20, 2004, the Commission acknowledged receipt of the petition and designated it with petition N° P-28-04.

6. On February 19, 2004, the pertinent parts of the petition were forwarded to the State, which was given the period of two months in which to submit its response.

7. On February 26, 2004, Freedom House submitted an amicus curiae brief to the Commission in support of the petition. The Commission acknowledged receipt of the brief and transmitted it to the two parties on March 3, 2004.

8. On March 2, 2004, the Nation Corporation of Barbados submitted an amicus curiae brief to the Commission in support of the petition. The Commission acknowledged receipt of the brief and transmitted it to the two parties on March 8, 2004.

9. On April 6, 2004, the Inter-American Press Association (IAPA) submitted an amicus curiae brief to the Commission in support of the petition. The Commission transmitted the brief to the two parties on April 14, 2004. In a letter to IAPA dated April 19, 2004, the Commission acknowledged receipt of the brief and requested the missing exhibits described in Chapter IX on page 35. On May 12, 2004, IAPA sent the corresponding exhibits. The Commission acknowledged receipt of the exhibits and transmitted them to the two parties on May 24, 2004.

10. On April 19, 2004, the State submitted its response to the petition. The Commission acknowledged receipt on April 22, 2004. On the same day, the State's response was transmitted to the Petitioner, who was asked to submit his observations within one month of the date of transmission.

11. On April 27, 2004, the Committee to Protect Journalists submitted an amicus curiae brief to the Commission in support of the petition. The Commission acknowledged receipt of the brief and transmitted it to the two parties on April 30, 2004.

12. On May 23, 2004, the Petitioner submitted "Observations on the Government of Jamaica's Reply to the Commission." The Commission acknowledged receipt of the observations on May 28, 2004. On the same day, pertinent parts of the information were

transmitted to the State, which was asked to submit any observations it may have within a period of one month.

13. On June 30, 2004, the Associated Press, Bloomberg News, Dow Jones & Company, Inc., Gannett Company, Inc., the Hearst Corporation, NYP Holdings, Inc., The New York Times Company, Reuters America LLC and the Washington Post submitted an amicus curiae brief to the Commission in support of the petition. The Commission acknowledged receipt of the brief and transmitted it to the two parties on July 1, 2004.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioner

14. The Petitioner argues that the claims in his petition are admissible, on the basis that domestic remedies have been exhausted and that the complaint states facts that tend to establish violations of Articles 1(1), 2, and 13 of the American Convention. In support of these arguments, the Petitioner provided a description of the procedural history of the circumstances underlying Mr. Stokes' complaints.

15. According to the petition, Mr. Stokes was the Editor-in-Chief of the three most important and widely circulated newspapers in Jamaica owned by the Gleaner Company, Ltd.: the Daily Gleaner, the Sunday Gleaner, and the Star.

16. The petition states that on September 17, 1987, the Star reproduced an article that it had received via wire from the Associated Press (hereinafter "AP"), which claimed that federal authorities in the United States were investigating whether American public relations firms had paid kickbacks to Jamaican tourism officials in relation to lucrative tourism contracts. The article named Mr. Eric Anthony Abrahams, a former Minister of Tourism in Jamaica, as being suspected of receiving kickbacks.

17. The petition also indicates that the article was published for a second time in the Daily Gleaner on September 18, 1987, and a third time in the Daily Gleaner on September 19, 1987, together with a clarification that the reference to the Minister of Tourism in the September 18, 1987 article did not relate to the then-current Minister. Mr. Abrahams denied the AP story. On September 20, 1987, Mr. Stokes and the Gleaner Company published a denial that had been prepared by Mr. Abrahams and his lawyers.

18. According to the Petitioner, the publication of these articles led to civil proceedings before the domestic courts in Jamaica. On September 23, 1987, Mr. Abrahams filed a claim in the Jamaican Supreme Court against Mr. Stokes and the Gleaner Company, alleging that they had published libelous words with knowledge that they were libelous or with reckless disregard as to whether they were libelous, and that the words complained of were reasonably understood to mean that Mr. Abrahams had committed a criminal offense and was not fit to hold office, and that he had therefore been gravely injured in his character, credit, and reputation.

19. The petition further indicates that a default judgment was entered in favor of Mr. Abrahams on October 23, 1987. Mr. Stokes and the Gleaner Company moved to set aside the judgment, which the Court of Appeal of Jamaica granted in December 1991. In their defense, Mr. Stokes and the Gleaner Company filed pleadings of justification and qualified privilege, and submitted an affidavit from Mr. John Gentles', a prior Director of Tourism and afterwards Chairman of the Jamaica Tourist Board, in support. The affidavit stated that U.S. federal authorities were investigating public relations and advertising executives suspected of making payments to Jamaican government officials for the award of contracts by Jamaican agencies to the firms of those executives, as well as stating that Mr. Gentles had given evidence before the Grand Jury identifying Mr. Abrahams.

20. The Petitioner states that Mr. Abrahams sought further and better particulars with respect to pleadings of justification and qualified privilege raised by the defense. The summons was dismissed on October 13, 1992 by the Supreme Court, which decided that further and better particulars were not necessary.

21. According to the Petitioner, Mr. Abrahams appealed, and in a judgment dated January 24, 1994, the Court of Appeal of Jamaica concluded that on the pleadings, there was no defense of either justification or qualified privilege, ordered the defense to be struck, and remitted the case to the court below to proceed as if there was no defense. This effectively meant that Mr. Stokes and the Gleaner Company were presumed legally responsible for having committed the tort of libel and faced a trial confined only to the extent of liability in damages. The Petitioner stated that the decision appeared to be based on the undeveloped state of domestic law concerning justification and qualified privilege at the time, together with the absence of evidence to support the claims in the defense.

22. The petition indicates that on July 10, 1995, the Star and the Gleaner published an apology indicating that, at the time they published the AP story, they honestly believed the information to be true and accurate.

23. The petition states that the trial for damages took place on July 17, 1996, at the conclusion of which the jury at trial awarded Mr. Abrahams J\$80.7 million (equivalent to 1.2 million British pounds at the time), an unprecedented amount for a Jamaican libel or personal injury case. Mr. Abrahams had pleaded general damages without any specific evidence as to losses. Therefore, the jury was charged not to consider any specific damages.

24. According to the Petitioner, Mr. Stokes and the Gleaner Company appealed, and the Court of Appeal rejected all criticisms of the trial judge's summing up, but decided that the damages were excessive. The award was set aside and substituted with J\$35 million (equivalent to 527,100 British pounds at the time). The substituted award, also alleged to be unprecedented in Jamaican libel and personal injury awards, was rendered without identifying any underlying criteria or justification. The Court stated that the sum awarded was "sufficient to achieve the purpose of punishing the appellants and to deter others from similar conduct."

25. The petition indicates that Mr. Stokes and the Gleaner Company then appealed the decision to the Judicial Committee of the Privy Council (hereinafter "Privy Council"), the

highest appellate court in Jamaica, arguing that the award was disproportionate, it erred in including an element of punishment, and it was so out of line with existing awards that it violated the principles of legal certainty and proportionality. They also argued that the Court of Appeal decision violated the constitutional rights of Mr. Stokes and the Gleaner Company and their readers to freedom of expression by seriously chilling the freedom of political expression of the media and the public.

26. The petition states that on July 14, 2003, the Privy Council dismissed the appeal and ordered Mr. Stokes and the Gleaner Company to pay Mr. Abrahams' costs, expressly stating that "this is not a case in which the freedom to publish is an issue."

27. Finally, the Petitioner indicates that on October 6, 1989 a Grand Jury in Connecticut delivered indictments alleging corruption of various forms against an American advertising agency hired by the Jamaican Tourism Board in 1981, as well as against Mr. Abrahams and one other Jamaican national. The indictment against Mr. Abrahams was subsequently lifted in 1990, three years after the AP story was reproduced in Mr. Stokes' newspapers.

28. Based upon the procedural history outlined above, the Petitioner argues that Mr. Stokes has exhausted domestic remedies and that the facts alleged tend to establish a violation of the American Convention.

29. With regard to the issue of exhaustion of domestic remedies, the Petitioner asserts that Mr. Stokes has appealed the damage award in his case as far as the Judicial Committee of the Privy Council, the highest appellate court in the State. In the appeal to the Privy Council, Mr. Stokes and the Gleaner Company argued that the damage award in their case was disproportionate and had a chilling effect on the exercise of political expression of the media, public, and the constitutional right of the Appellants (Mr. Stokes and the Gleaner Company) and their readers to freedom of expression. The Privy Council dismissed the appeal on July 14, 2003 and the petition was filed with the Commission on January 14, 2004. It therefore appears to the Petitioner that the alleged Victim's domestic remedies have been exhausted with respect to the issues raised before the Commission.

30. The Petitioner acknowledges the fact that Mr. Stokes did not appeal the January 24, 1994 decision of the Jamaican Court of Appeal striking his defense of justification and qualified privilege. The Petitioner contends in this regard, however, that appealing the decision was both needless and counterproductive to his interests and those of the Gleaner Company. In particular, Petitioner argues that at the time of the Court's judgment, the law of qualified privilege was less developed in Jamaica than elsewhere in the Commonwealth (thereby implying that there may have been no arguable grounds for appealing the decision), and that appealing the decision would have resulted in an even larger award of damages against Mr. Stokes and the Gleaner Company due to the fact that Jamaican law considers attempts to plea justification to constitute an aggravating factor.

31. Furthermore, the Petitioner argues that although a separate constitutional motion was not pursued, the constitutional issues were addressed in the course of the appeals in Mr. Stokes' case, and were therefore exhausted. In particular, the Petitioner indicates that the President of the

Court of Appeal, Mr. Justice Forte, before concluding his judgment, made reference to the case of *Rantzen v. Mirror Group* (introduced by Petitioner) concluding that: “I am therefore of the view that...the award of J\$80 million is excess of an amount which is reasonably required by law to protect the reputation of the Respondent, given the provision of Section 22 of the Constitution (emphasis added). Nevertheless...damages must be of a high level in order to vindicate the respondent’s reputation.”

32. The Petitioner similarly notes that the Honorable Mr. Justice Langnin expressly recognized that a contravention of Section 22 of the Jamaican Constitution was raised as a ground of appeal by the Petitioner during the hearing of the appeal by the Jamaican Court of Appeal, stating “...the award of the jury contravenes Section 22 of the Jamaican Constitution (emphasis added), which guarantees to the appellants/defendants the right of freedom of expression and right to hold opinions and to receive and impart ideas without interference.”

33. Further, the Petitioner argues that the Judicial Committee of the Privy Council also addressed the issue of constitutionality. In the judgment of the court, Lord Hoffman observed, “the chief submission of Lord Lester of Hem Hill QC who appeared for the appellants...was that the Court of Appeal had insufficient regard to the constitutional provision to which Forte referred (emphasis added).” The Petitioner asserts that in rendering judgment, this constitutional provision was taken into account and addressed, and that their Lordships’ opinions on this issue can be found in paragraphs 64 and 65 of the Privy Council judgment.

34. In addition, the Petitioner argues that, in the practice of Jamaican courts, a constitutional issue can be raised as an interlocutory at any point during the trial. If the provision involved becomes a contested issue after the Supreme Court’s decision has been given and is directly relevant as a result of that decision (which the Petitioner claims is the case here), then the relevant constitutional matter may be raised on appeal. The constitutional motion may even occur after a hearing by the highest court of appeal, the Judicial Committee of the Privy Council. If the constitutional breach has already been argued or addressed during the trial and/or appeals, however, then the party cannot file a separate motion to again argue a point which has already been exhausted before the court and upon which the court has already made and given a decision (*res judicata*). The Petitioner claims that the matter of a constitutional violation was addressed both in the Jamaican Court of Appeal and in the U.K. Privy Council and that therefore it would not be open to Mr. Stokes to pursue a constitutional motion on the same issue.

35. With respect to the merits of the complaint, the Petitioner argues that the State violated Mr. Stokes’ rights under Article 13 of the American Convention, in conjunction with Articles 1(1) and 2 of the Convention, on four main grounds.

36. First, the Petitioner argues that the State violated the proportionality requirement under Article 13 for imposing subsequent liability by ordering exorbitant damages. The Petitioner claims that the State fails to acknowledge that imposition of subsequent liability is to be only “to the extent necessary” to ensure respect for the rights or reputations of others. Subsequent impositions of liability must not limit Article 13 rights “more than strictly necessary,” and “the restriction must be in proportion to the interest that justifies it and it must be strictly adapted to the attainment of that legitimate objective.” The Petitioner claims that the amount of damages

awarded restricts the right to freedom of expression to a greater extent than is necessary, is not proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it, and bears no rational relationship to the harm suffered, citing Advisory Opinion OC-5/85 of the Inter-American Court of Human Rights.

37. Second, the Petitioner argues that State courts failed to apply the “actual malice” test. In the La Nación case before the Inter-American Court and in the Declaration of Principles on Freedom of Expression, the Commission has taken the position that an “actual malice” test is necessary under Article 13 of the Convention in deciding civil liability for libel with regard to speech aimed at public officials. Under such a test, “it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.”[FN1] In the present case, the Petitioner alleges that no proof was produced by Mr. Abrahams to establish actual malice on the part of Mr. Stokes or the Gleaner Company.

[FN1] Petition at page 15, quoting the Declaration of Principles on Freedom of Expression, Principle 11.

38. In addition, the Petitioner claims that the State imposed subsequent liability on the reproduction of a reputable third party publication. In this regard, the Petitioner claims that finding liability for the reproduction of information supplied by a third party, in this case, AP, constitutes a direct restriction on freedom of expression, has a chilling effect on the right to freedom of expression, and imposes a requirement of third person censorship on Jamaican journalists and editors contrary to Article 13(3).

39. Finally, the Petitioner argues that the State's actions threaten the free exchange of ideas in Jamaica. The Petitioner claims the libel judgment against the Mr. Stokes and the Gleaner Company undermines the interest and the right of the Jamaican populace to be informed of actions of their public officials, and ignores the view expressed in Principle 11 of the Declaration of Principles on Freedom of Expression that public officials are, by the very nature of their positions, justifiably subject to a greater degree of criticism and scrutiny for their actions.

B. Position of the State

40. The State does not contest the basic issues of fact set forth in the petition. However, the State argues that the Petitioner's claims are inadmissible, on the basis that domestic remedies have not been exhausted, and on the ground that the petition fails to characterize a violation of the American Convention.

41. First, Jamaica submits that the alleged Victim has not exhausted the domestic remedies available to him as he has failed to bring a separate constitutional motion before the Jamaican courts alleging a violation by the Government of Jamaica for which redress is sought. Without attempting to prejudge the validity of any claim that may be brought in the Jamaican Courts, Jamaica argues that the substance of the Petitioner’s claim concerns freedom of expression, a

freedom that is expressly preserved in the Jamaican Constitution in order to satisfy the domestic remedies rule. Since no motion specifically regarding the constitutional issues has been introduced, the State claims that the petition is premature, due to the fact that the purported Victim has not yet sought redress within the Jamaican constitutional scheme for the alleged violation of his right to freedom of expression.

42. The State asserts in this respect that according to Section 22(1) of the Jamaican Constitution, “except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communications.”

43. The State also argues that Section 25 of the Jamaican Constitution permits individuals to file constitutional motions with the domestic courts by providing that “if any person alleges that any of the provisions in sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.”

44. In support of its argument, the State relied upon the Commission's admissibility decision in the case of Santander Tristan Donoso (Panama) for the proposition that “this requirement [exhaustion of domestic remedies] has the purpose of allowing the State to resolve issues raised within its own legal framework before having to be brought before an international body.” The State asserts that in the present case the alleged Victim, having raised issues for the first time in the petition to the Commission, is seeking to avoid recourse to the Jamaican Courts.

45. The State also submits that the petition is inadmissible by virtue of Article 47(b) of the American Convention, which requires that a petition be dismissed if it fails to set forth facts that tend to establish a violation of the Convention. The State asserts that it has sought to promote and protect the right to freedom of expression in accordance with the American Convention and the Jamaican Constitution, but it is to be exercised within certain parameters.

46. The State also notes in this respect that Article 13(2) expressly allows the “subsequent imposition of liability” to the extent that this is necessary “to ensure...respect for the rights or reputations of others,” and asserts that the alleged victim was subject to the “subsequent imposition of liability” to the extent necessary to ensure “respect for the rights or reputations of others.”

47. The State also contends that the wording of this article of the Convention does not provide the basis for an argument that Jamaica has acted in breach of the Convention. In the State's view, it is significant that neither Article 13(2) nor 13(3) mentions the quantum of damages to be awarded as a factor in limiting freedom of expression. The State asserts that surely it was open to those who prepared Article 13 to stipulate that the quantum of damages to be awarded should be given an upper limit in libel cases. According to the State, the fact that this was not included in Article 13 indicates that there was no agreement that libel awards should be capped as a means of promoting freedom of expression.

48. Jamaica further submits that the quantum of damages awarded by the courts in a particular libel case should not be regarded as one of the “indirect methods or means” of restricting the right to expression prohibited by Article 13(3). The State asserts that the types of indirect methods or means prohibited by Article 13(3) are exemplified by the cases listed in Article 13(3) itself and, significantly, it is the abuse of government controls over newsprint that is prohibited: the government may regulate matters concerning newsprint, but if it abuses this regulatory role, then there would be a violation of Article 13(3). Similarly, Jamaica submits that where there has been no executive abuse of the legal system (through, for example, denial of the right to a fair trial), there can be no claim that the quantum of damages awarded by independent courts can amount to a breach of Article 13(3).

49. Jamaica submits that the *eiusdem generis* principle should be applied in interpreting the terms of Article 13(3) of the American Convention. Where Article 13(3) prohibits “any other means tending to impede the communication and circulation of ideas and opinions,” this indicates to the State that the government must not abuse its position in order to impede communication and circulation of ideas and opinions. The State submits that this is clearly the intent of Article 13(3), for otherwise, it could be used to suggest that the right of expression prohibits anything, whether originating from the Government or otherwise, that tends to impede communication and circulation of ideas.

50. Finally, the State argues that the Commission lacks the competence to require Jamaica to “erase all the consequences deriving from its violation of the Convention” in the context of this case. If the Commission were to do this, asserts the State, it would go against the separation of powers by requiring the Executive to set aside a ruling by the independent courts of Jamaica.

IV. ANALYSIS OF THE ISSUE OF ADMISSIBILITY

A. Preliminary Questions

51. The Commission will first address the issue raised by the State regarding the Commission's competence to consider cases in which the alleged human rights violation is committed by an independent court acting in its discretion. The Inter-American Court of Human Rights addressed this issue in the case of the Last Temptation of Christ,[FN2] stating:

This Court understands that the international responsibility of the State may be engaged by acts or omissions of any power or organ of the State, whatsoever its rank, that violate the American Convention. That is, any act or omission that may be attributed to the State, in violation of the norms of international human rights law engages the international responsibility of the State.[FN3]

[FN2] IACtHR, “The Last Temptation of Christ” Case (Olmedo Bustos et al.), Judgment of February 5, 2001, Series C., N°73.

[FN3] Id. at para. 72.

52. In the present case, the acts giving rise to the alleged violation of Article 13 were committed by bodies of the judiciary, which are organs of the State, and therefore the State's international responsibility is engaged.

B. Competence *ratione personae*, *ratione loci*, *ratione temporis*, and *ratione materiae* of the Commission

53. The Commission will next address the remaining the questions with respect to the Commission's competence. The Petitioner has *locus standi* to submit petitions to the IACHR, in accordance with Article 44 of the Convention. The petition identifies as the alleged victim Mr. Stokes, an individual person, whose rights under the Convention the State of Jamaica is committed to respect and ensure. The Commission understands that as Mr. Stokes is named as a defendant along with the Gleaner Company, he is liable in his personal capacity for the payment of the damages awarded to Mr. Abrahams. Therefore, Mr. Stokes could be considered a victim if the Commission were to consider that the damages award violates the Convention. The Commission further notes that Jamaica is a State party to the American Convention, having ratified it on August 7, 1978. The Commission therefore has competence *ratione personae* to study the petition.

54. 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.

55. 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.

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

57. Accordingly, the Commission finds that it is competent to address the claims raised in the petition.

C. Other admissibility requirements

1. Exhaustion of Domestic Remedies

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

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

a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law[.]

59. The Commission and the Court have repeatedly insisted on their “reinforcing and complementary”[FN4] status within the inter-American system of protection of human rights.[FN5] 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.

[FN4] American Convention on Human Rights, Preamble, para. 2.

[FN5] See, e.g., I/A Court H.R., Velasquez Rodriguez Case (Honduras), Series C N° 4, Judgment of July 29, 1988, para. 61; IACHR, Resolution N° 15/89, Case 10.208 (Dominican Republic), April 14, 1989, Conclusions, para. 5.

60. In the instant case, the Petitioner argues that to find a remedy for the alleged violations of constitutional rights, the alleged Victim has taken adequate action before the courts of domestic jurisdiction provided by Jamaican law. He asserts that these actions have not been sufficient to ensure the rights allegedly violated by the State.

61. The Petitioner argues that domestic remedies were exhausted when Mr. Stokes and the Gleaner Company appealed the damage award as far as the Judicial Committee of the Privy Council, the highest appellate court in the State, which was subsequently dismissed on July 14, 2003. The Petitioner notes that Mr. Stokes and the Gleaner Company addressed the matter of a constitutional violation of Section 22 of the Jamaican Constitution both in Jamaican Court of Appeal and in the Privy Council. The Petitioner also asserts that the Mr. Stokes cannot reassert these issues, which have already been exhausted before the domestic courts and decided by the domestic courts, because they are barred by the doctrine of *res judicata*.

62. The State argues that the alleged Victim has not exhausted the domestic remedies available to him, as he failed to bring a separate constitutional motion under Sections 22 and 25 of the Jamaican Constitution. The State asserts that the alleged Victim, having raised issues for the first time in the petition to the Commission, is seeking to avoid recourse to the Jamaican Courts. Section 25 of the Constitution provides that an individual who believes his or her rights under a number of substantive provisions, including Section 22, have been violated may apply to the Supreme Court for redress. The Commission recalls that Section 22 of the Jamaican Constitution recognizes the right to freedom of expression.

63. With respect to this issue, the Commission makes reference to the judgment of the Jamaican Court of Appeal, the appellants' (Mr. Stokes and the Gleaner Company) brief in the appeal to the Privy Council, and the judgment of the Privy Council.[FN6] In each of these documents, it is clear that Mr. Stokes and the Gleaner Company raised the constitutional issues related to freedom of expression and that the courts considered and ruled on them. In the judgment of the Jamaican Court of Appeal, the Honorable Mr. Justice Forte, P. stated:

The appellants next argued, using interpretations given to Article 10 of the European Convention on Human Rights ("Article 10") on the basis of its similarity with Section 22 of the Constitution,

("Section 22") that the award of \$80.7m to the respondent by the jury is in breach of the provisions of Section 22.[FN7]

[FN6] These documents were included as annexes to the petition. See Exhibits H, J, and K.

[FN7] Exhibit H, Judgment of the Court of Appeal of Jamaica, p. 26.

64. After an analysis of Section 22, Justice Forte concluded:

I am ... of the view that ... the award of \$80 million is in excess of an amount which is reasonably required by law to protect the reputation of the respondent, given the provisions of Section 22 of the Constitution.

65. Therefore, he recommended that the amount of damages be reduced to \$35 million. The other members of the three-judge panel also considered the appellants' argument based on Article 22 of the Constitution and agreed to reduce the award to \$35 million.

66. In their brief to the Privy Council, the appellants (Mr. Stokes and the Gleaner Company) stated:

1. This appeal concerns the proper interpretation and application of the right to freedom of expression protected by Section 22 of the Constitution of Jamaica ("the Constitution") as it relates to the appropriate measure of damages that should be awarded in defamation proceedings to compensate the Respondent ("Mr. Abrahams").

2. The Appellants contend that the Court of Appeal of Jamaica has misconstrued Section 22 of the Constitution by failing to apply the principles of legal certainty and proportionality correctly, and that the award substituted by the Court of Appeal of Jamaica of J\$35 million ... for the jury's award of J\$80.7 million ... is manifestly excessive and disproportionate. It amounts to an improper interference with the enjoyment of the Appellants' constitutional right to freedom of expression and goes beyond that which is necessary in a democratic society to protect the reputation of Mr. Abrahams.[FN8]

[FN8] Exhibit J, Appellants' Brief before the Judicial Committee of the Privy Council, page 1.

67. In its judgment, the Privy Council considered the appellants' constitutional argument, stating:

[T]he judges of the Court of Appeal, like the trial judge, had well in mind the provisions of section 22. That was why they set aside the jury's award. This is not a case in which freedom to publish is in issue. It is accepted by the defendants ... that publication was wrongful and fell outside the permissible limits of section 22(1). So the only question is whether the damages were no more than was necessary adequately to compensate the plaintiff. For the reasons already

stated at length, their Lordships would not interfere with the Court of Appeal's assessment of the necessary amount.[FN9]

[FN9] Exhibit K, Judgment of the Privy Council, p. 28.

68. Thus, the Commission finds that the constitutional issues were indeed raised by the alleged Victim in the domestic legal arena, and were addressed by both the Jamaican Court of Appeal and the Privy Council. While it would appear that the domestic remedies have been exhausted, the State appears to argue that the alleged Victim should now be expected to file a constitutional motion in the Supreme Court, which is the court of first instance, as provided under Section 25 of the Constitution.

69. The Commission notes that the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that such remedies are adequate and effective.[FN10] "Adequate domestic remedies are those which are suitable to address an infringement of a legal right." [FN11] "Effectiveness" refers to the capability of particular remedy to produce the result for which it was designed.[FN12] The State has not shown why a constitutional motion before the Supreme Court would be an adequate and effective remedy for Mr. Stokes' complaint, given that the two higher courts have already considered and ruled on the constitutional issues raised in the alleged Victim's case.

[FN10] See IACt.HR, Velasquez Rodriguez Case, supra, paras. 59 & 63.

[FN11] Id. at 64.

[FN12] Id. at 66.

70. As the State correctly asserts, the requirement of exhaustion of domestic remedies has the purpose of allowing the State to resolve issues raised within its own legal framework before being brought before the Commission. In this case, however, the alleged Victim argued the issue of freedom of expression in the domestic courts, which ruled on this issue. Accordingly, the alleged Victim is not required to exhaust any further remedies as a mere formality, especially taking into account that the State did not provide any justification as to why these remedies would be effective.

71. Consequently, without prejudice to the merits of the case, the Commission considers that the requirements of Article 46(1)(a) of the Convention and Article 31(1) of the Rules of Procedure have been met.

2. Deadline for submission of the petition to the Commission

72. 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."

73. The instant petition was lodged with the Commission on January 14, 2004, six months after the Privy Council's decision dismissing the appeal filed by the Victim on July 14, 2004. Therefore, the petition meets the requirements with regard to timeliness established in Article 46(1)(b) of the Convention.

3. Duplication of proceedings

74. 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.

75. 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.

4. Colorable Claim

76. For purposes of admissibility, the Commission is required to determine whether the facts stated in the petition tend to establish a violation of rights set forth in the American Convention, as provided for under Article 47(b), or whether the petition must be dismissed as "manifestly groundless" or "obviously out of order" under Article 47(c). Article 27 of the Commission's Rules of Procedure mandates that petitions state facts "regarding alleged violations enshrined in the American Convention on Human Rights and other applicable instruments." In addition, Article 34(a) of the Commission's Rules of Procedure requires the Commission to declare a petition inadmissible when it does not state facts that tend to establish a violation of the rights referred to in Article 27 of the Rules.

77. The standard by which to assess these extremes is distinct that applied when deciding upon the merits of a petition. The Commission must undertake a *prima facie* evaluation, not for the purpose of establishing the existence of a violation, but rather to examine whether the petition states facts that tend to establish a potential or apparent violation of a right guaranteed by the Convention. That examination is a summary analysis that does not imply any prejudgment or advance opinion on the merits of the petition. By establishing two clearly separate phases—one for admissibility and the other one for the merits—the Commission's own Rules of Procedure reflect the distinction between the evaluation the Commission must make to declare a petition admissible, and the evaluation required to establish a violation.

78. With regard to the rights protected under Article 13 of the Convention in connection with Articles 1 and 2, the Petitioner alleges that the State's courts violated Mr. Stokes' rights under Article 13 of the Convention by violating the proportionality requirement, failing to apply the "actual malice" test, imposing subsequent liability on a third-party publication, and ignoring the

view expressed in Principle 11 of the Inter-American Declaration of Principles on Freedom of Expression. With respect to the alleged violation of Article 13 of the Convention, the State argues that Article 13(2) expressly allows the “subsequent imposition of liability” to “ensure...respect for the rights or reputations of others,” under the scope of which the actions taken against the purported Victim fall. In this case, the Commission must determine the scope of possible civil liability for libel under Article 13 of the Convention. While questions of law remain to be resolved during the merits phase of the case, the Commission considers that the arguments made by both of the parties show that the petition is not "manifestly groundless," nor is it "obviously out of order."

79. Therefore, without prejudice to the merits of the case, the Commission considers that the requirements of Article 47(b) and (c) of the American Convention have been met with respect to Article 13 of the Convention in conjunction with the general obligations enshrined in Articles 1 and 2.

V. CONCLUSIONS

80. The Commission considers that it has competence to take cognizance of this petition and that it is admissible regarding the requirements for admissibility contained in Articles 46 and 47 of the American Convention on Human Rights, and regarding the alleged violations of Article 13 of the American Convention in conjunction with the general obligations enshrined in Articles 1 and 2.

81. 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 regarding the alleged violations of Dudley Stokes' rights protected by Articles 13, 1(1), and 2 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 14th day of the month of October, 2004. (Signed) José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Commissioners Paulo Sérgio Pinheiro and Florentín Meléndez. Commissioners Evelio Fernández Arévalos and Freddy Gutiérrez Trejo dissented from the decision of the majority. The dissenting opinion of Freddy Gutiérrez Trejo is included immediately after this report.

DISSENTING OPINION BY COMMISSIONER FREDDY GUTIÉRREZ TREJO

I hereby record my dissenting vote with respect to the decision by the Inter-American Commission on Human Rights to admit the case of Mr. Dudley Stokes and Gleaner Company, represented by Mr. Claudio Grossman, vs. the State of Jamaica. I do not believe that the Commission is competent to take cognizance of, examine, and decide on conflicts between private individuals that pertain to the sphere of civil legislation and entail calculating damages to reputation and property, which is the case in this instance. I do not believe that the facts show that Mr. Stokes and Gleaner Company are victims. On the contrary, they could be termed offenders, for having violated one of the rights protected under the American Convention to which the States of the Hemisphere subscribe. Thus a reading of the file reveals transgression of Article 11, which expressly states:

Right to privacy

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

The administration of justice of Jamaica is in no doubt as to the fact that Mr. Stokes and Gleaner Company insulted Mr. Abrahams when they accused him without evidence of collecting clandestine commissions. In fact, the petitioner himself admits that he attacked Mr. Abrahams in this way and even apologized for having done so (paragraph 22). For our purposes, the important consideration is that judicially in the lawsuit, the opinion expressed in the newspapers could not be proved using the means allowed under procedural law, nor sustained through to the end of the still partial proceedings, and was furthermore dismissed and in the ruling the perpetrators of the aggression condemned to pay compensation for the damage caused. I should mention that Article 13 of the American Convention establishes freedom of expression as a human right, but not in absolute terms, particularly since it restricts it when it may cause harm to minors, advocate violence, incite war, or attempt to undermine public order and, in conformity with Article 11, ejusdem harm a reputation, which is the same as a person's good name. To better understand this interpretation, let us transcribe part of Article 13 of the Convention:

Freedom of thought and expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others; or

(omissis)

(bold added)

The teleology of the Convention on this subject is absolutely clear. Taken in conjunction, Articles 11 and 13 aim to protect values such as the honor, honorableness, and good name of persons, and under no circumstances do they permit making a mockery, through libel, calumny and insults, of the dignity and decorum of persons going about their business in society, because actions of that nature incur subsequent liabilities or legal consequences. Any other interpretation would imply that anybody can say whatever he or she likes about anyone else without those statements having any consequences. That would mean accepting impunity.

Furthermore, it is necessary to point that it is a *requisitus impretermittibilis* [Tr: sine qua non] for admission that domestic remedies be exhausted (Article 46.1.a) and there is no doubt that this requirement was not met, especially since the petitioner has not brought the constitutional action provided for in Jamaican procedural law. It is striking that this circumstance is accepted by the petitioner (paragraph 30), who concludes by stating that appealing the decision could have given rise to a larger damages award against Mr. Stokes and Gleaner Company, because Jamaican legislation regards arguments justifying an offense as aggravating factors.

Finally, I do not believe that a case can be made in this instance of a possible curtailment of the freedom of reporters or the media to do their job, nor of a restriction on freedom of thought and opinion, which are inherent to human beings and rights protected under the American Convention. It could be interpreted differently as protection by the Commission of corporations conducting business for profit, when you consider that Gleaner Company Ltd. owns three newspapers (paragraph 15) and the *amicus curiae* initiative was taken by, *inter alia*, the Inter-American Press Association (IAPA), Dow Jones Company INC: The Hearst Corporation, and New York Times Company (paragraphs 7-13). Corporations are entitled to perform the business activities they set out to pursue when they were established, but in no way is it acceptable to violate internationally agreed upon norms, ratified by states through the domestic procedure that each legislation provides for. It is worth pointing out that a judgment establishing compensation for damages conforms to the provisions of Article 13 with respect to subsequent imposition of liability.

In the foregoing manner, I declare and explain my dissenting vote in Report N° 65/04, Petition P28/04.