1999: Alejandro Pérez ("Alejandro Mayta") v. the Republic of Miranda
Bench Memorandum

I. Procedural questions: preliminary exceptions

A. General considerations regarding the jurisdiction of the Inter-American Court

The Inter-American Court has jurisdiction to hear the instant case. The State of Miranda became a party to the American Convention on June 3, 1989. Pursuant to article 62, Miranda declared at that time that it recognized as binding the jurisdiction of the Inter-American Court with respect to all cases concerning the interpretation and application of the Convention. All facts at issue in the present case fall within the time period during which Miranda has been subject to the binding jurisdiction of the Court.

The Inter-American Commission decided to submit the instant case against the State of Miranda in accordance with article 51 of the American Convention. The case is submitted before the Inter-American Court in accordance with the guidelines established in article 26 et seq. of the Court's Rules of Procedure. The terms and definitions referred to conform to the glossary appearing in Article 2 of those Rules.

Argument for the State

Timing

Pursuant to article 46.1.b of the American Convention a case must be presented to the Commission within 6 (six) months following the date of the final judgment of the highest tribunal of that State. In this case the Supreme Court of Miranda issued its decision on June 27, 1997. The "victims" in the case, Alejandro Pérez, de Leon and Villán, did not petition the Commission until January 2, 1998, more than 6 months after the date of the final judgment. Therefore, the Commission should never have declared the case admissible. Freedom International presented the petition to the Commission on July 10, 1997, challenging the extension of the death penalty in Miranda to include the crime of "Treason against the democratic State" but it did not have a power of attorney of the "victims" to act on their behalf. The Commission should never have admitted their petition. In the alternative, if the petition is considered to have been filed in a timely manner, the issues considered should be limited to the extension of the death penalty to include the crime of "Treason against the democratic State," as presented by Freedom International in July 1997, and should not be allowed to include the issues of denial of due process, torture, etc. as presented by Pérez, de Leon and Villán in their petition on January 2, 1998. The petition should be declared inadmissible *ratione personae and ratione materiae.*

Fourth Instance

The Commission is acting like a 4th instance Court of Appeal from the Mirandan Supreme Court. That is not its function. The issues have been fully litigated before the Courts of Miranda, and the member states of the OAS did not create the Commission to review judgments of domestic courts in a democratic state simply because the petitioners were dissatisfied with the outcome of the decisions of the domestic courts.

Duplication

> 1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
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> 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

On November 1 of 1996, after the FPFM declared war on the government of Miranda (September 15, 1996) and launched a series of terrorists attacks throughout the country, the Government declared a state of emergency for a period of 6 (six) months. On May 1, 1997, the state of emergency was extended for an additional 6 (six) months. The state of emergency imposed a curfew that was in force from 10 p.m. to 6 a.m. As of January 15, 1997, the FPFM was destroyed;[1] consequently the issue arises as to whether the extension of the state of emergency was warranted. Pursuant to Article 27(3) of the Convention:

> Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States (OAS), of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

The State of Miranda duly notified the OAS of the declaration as well as the rights which had been suspended. As to the circumstances that gave rise to the declaration of the state of emergency, the State and the petitioners may argue that the declaration and/or the extension was justified or not, but the outcome in relation to the rights thereby suspended will not be different inasmuch as article 27(2) does not authorize the suspension of non-derogable rights, inter alia, the following articles: article 4 (Right to Life), article 5 (Right to Humane Treatment) and the judicial guarantees essential for the protection of such rights. Consequently, the suspension

Decree Law No. 101 providing for the procedures for the trials under Decree Law No. 100, were both issued on October 1, 1996, one month prior to the declaration of the state of emergency, raises some issues as to the "legality" of these decree laws under the Mirandan judicial system. The Constitution of Miranda, of course, is superior to the decree laws.

III. Habeas Corpus in States of Emergency

Facts:

Decree Law Nº 100 characterized the crime of 'Treason against the Democratic State.' This legal norm also provided that in cases of detainees accused of carrying out such crimes it was forbidden to present writs of habeas corpus on their behalf. When Alejandro Pérez was arrested, his lawyer filed a writ of habeas corpus arguing that his arrest was illegal and claiming that his client had been the victim of torture.

Applicable norms and general considerations

According to the case law of the Inter-American Court, habeas corpus may not be suspended in states of emergency.

The case law of the Inter-American Court is unvarying in the sense that the habeas corpus procedure may not be suspended even when a state of emergency is in effect. In Advisory Opinion 8, the Court established that habeas corpus is among those judicial guarantees that are essential for the protection of the right to life and physical integrity, whose derogation is prohibited by Article 27(2) of the Convention.[2]

In addition, despite the fact that the right to personal liberty may be suspended, the existence of a judicial remedy to ensure the lawfulness of that detention may not be suspended, since:

> [i]n a system governed by the rule of law [it is necessary] for an autonomous and independent judicial order to exercise control over the lawfulness of such measures by ascertaining, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency.[3]

By the same token, the Court makes it clear that the suspension of guarantees neither implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality.[4] In that regard the Court states that, "From Article 27(1), moreover, comes the general requirement that in any state of emergency there be appropriate

[2] I/A Court H.R. *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1), and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87 of January 30, 1987, Ser. A, No. 8, para. 42.

[3] *Id.*, at para. 40.

[4] *Id.*, at para 24.

means to control the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it.”[5]

In interpreting the meaning of “essential guarantees,” the Court states that the term refers to “the judicial remedies [...] that ordinarily will effectively guarantee the full exercise of the

Argument for the petitioners

The petitioners should cite the case law of the Court in relation to this point, since it favors their claims. They should argue that the State violated Articles 7(6), 25, and 27(2) of the Convention.

Argument for the State

The State may allege that, under Article 27(2), the right to personal liberty may be suspended and, therefore, habeas corpus as well. The State may also claim that in situations of emergency a democratic government has the right to suspend the guarantee in question.

IV. Facts concerning the detention and trial of Alejandro Pérez and the other leaders of the FPFM

The detention of Alejandro Pérez and the 15 other leaders took place on March 1, 1996, and they were tried on March 30, 1996. The detention and trial took place during the ce tTm[(to,3.914 550.

that a State must be allowed to defend itself against threats to its very existence, as in this case. In addition, the American Convention contemplates the continued existence of the death penalty and article 4(2) provides that the death penalty “may be imposed only for the most serious crimes.”

1. Article 8 due process issues

Interpreting article 27(2) of the American Convention, the Inter-American Court has held that:

> right to be tried by an impartial court since it is impossible for him to seek the recusement of a judge who is thought to be biased or partial.[14]

The security provisions on behalf of the judges are designed to guarantee their security and safety since many of them, "in the past," received death threats and feared for their lives.[15] Since the fear is not a current one, one might argue that the measures should be lifted. The fact that the judges who tried the FPFM leaders are "faceless" contributes to the lack of impartiality of the court.

Argument for the State

The Court that tried Pérez and others is not military since one of its members is a civilian judge. So, it can be said it has some military members but not that it is a military court, in the sense of the aforementioned comment of the Human Rights Committee. The State of Miranda

present in the set criteria (ideals of the new Miranda) could be interpreted as establishing certain bias against the accused in these proceedings.

Argument for the State

privately. Hence, the Court considers that Ecuador violated Article 8(2)(c), 8(2)(d) and 8(2)(e) of the American Convention."[22]

The CJI has also addressed this issue:

> Since the right to counsel of choice is integral to the prisoner's right to prepare his defense and this right, in turn, must be accorded the prisoner before and during his trial, the prisoner's right to counsel, perforce, must be understood to apply to every stage of the criminal proceedings. We believe that if this right is to be

> routinely faced by defense counsel foreclose any real possibility of preparing an adequate defense.[25]

Twenty-one days had lapsed between the FPFM leaders' access to counsel and their trial. In addition, under DL 101, the defense of the FPFM leaders was obliged to present its case in no more than two weeks. Preparation of the defense involved the following limitations:

a) Restricted access to the file (which they could consult but not copy).

b) The ability of the judge to strike some information from the files which could frustrate the counsel's control of the evidence on which the charges relied.

c) The aforementioned limitations on time for communicating with clients.

Therefore, the petitioners had neither sufficient time nor adequate means for the preparation of their defense, in violation of article 8(2)(c) of the American Convention.

Argument for the State

The jurisprudence of the Inter-American Court in the Suarez Rosero case (supra) held the 36-day long incommunicado detention to be incompatible with the State's obligations in that case. In addition, the detainee, upon acquiring a lawyer, could not privately communicate with him. Consequently, the conclusions in *Suarez Rosero* cannot be applied to the case at hand where the incommunicado-period lasted for a much shorter period of time (seven days), and during that time the detainees had access to legal counsel with whom they could communicate in private.

Second, pursuant to article 8(2) of the American Convention, "[d]uring the proceedings, every person is entitled, <u>with full equality</u>, to the following minimum guarantees [...] adequate

According to the CJI, in ordinary criminal proceedings in Peru, the defense is able to request the court to call police personnel as witnesses for questioning. The CJI pointed out that "this basic due process right is denied a suspect or defendant at every stage of the terrorism proceedings [...] Defense counsel, accordingly, cannot examine or challenge the credibility or demeanor of DINCOTE [police] personnel the very persons who gathered the evidence against and effectively accused his client of terrorism."[26] Consequently, the impossibility of knowing the identity of witnesses who were deposed at trial deprived the defense of its right to challenge them before the court, thus, violating the right to an impartial tribunal set forth in article 8.

Argument for the State

The maintenance of secrecy regarding the identity of witnesses was required to ensure the security of State agents, taking into account the fact that they were going to testify against leaders of an irregular armed movement, some of whose members were still free and engaged in hostilities. The European Court of Human Rights analyzed the compatibility of depositions of anonymous witnesses with article. 6(3)(d) of the European Convention (which provides for the same right as article 8.(2)(f) of the American Convention; article 8(2)(f) protects “the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the M

to compensate sufficiently the handicaps under which the defense labors, a conviction should not be based either solely or to a decisive extent on anonymous statements. That, however, is not the case here [.]"[29] The conclusions of the European Court are wholly applicable to the instant case because the defense counsel had the same powers as the counsel therein and the final judgment did not rely even partially on the witnesses’ statements but on the confessions made by the accused. Hence, there is no violation of article 8(2)(f).

5. Whether the detention and trial violated article 5 (right to physical and moral integrity), article 8(2)(g) (right not to be compelled to be a witness against himself or to plead guilty) and article 8(3)(a confession of guilt by the accused shall be valid only if it is made without coercion of any kind).

Argument for the petitioners

The State is responsible for the violation of the petitioners' fundamental rights under article 5 (right to humane treatment) of the American Convention and under articles 5 and 10 of the Inter-American Convention to Prevent and Punish Torture, since the State and its agents

liberty ... [had] as an essential aim the reform and social readaptation of the prisoners." (Article 5(6))[32]

3. Sentencing of the Petitioners Constitutes a Miscarriage of Justice (Violation of American Convention Article 8 and of the Inter-American Torture Convention Article 10

provided previously under the domestic law of that State. No provision of the Convention can be relied upon to give a different meaning to the very clear text of Article 4.2, in fine. The only way to achieve a different result would be by means of a timely reservation designed to exclude in some fashion the application of the

In the Argentinean case, following the period of military dictatorship, the Congress passed two laws that had the aforesaid effects. The first of those laws set a 60-day deadline for terminating all criminal proceedings involving crimes committed as part of the so-called "dirty war.”[43] The second law established the irrefutable presumption that agents of the state who committed crimes during the "dirty war" were acting in the line of duty, thereby acquitting them of any criminal liability.[44] The Executive Branch also promulgated a decree which ordered that any proceedings against persons indicted for human rights violations who had not benefited from the earlier laws be discontinued.[45] Both laws and the presidential pardon were declared constitutional by the Supreme Court of Argentina.

Argentina also promulgated laws granting economic compensation to the victims and the relatives of victims of state terrorism. Furthermore, the Argentinean State tried and convicted the members of the military juntas that governed the country, even if they were subsequently pardoned. Lastly, Argentina created a National Commission on the Disappearance of Persons (CONADEP) that investigated and documented the disappearances that occurred during that time in its report "Nunca Más" (Never Again)”

In the case of Uruguay, a law was promulgated, Article 1 of which provided that:
It is hereby recognized that as a consequence of the logic of the events stemming from the

With respect to judicial protection, the Commission found that the States had violated Article 25 of the Convention because the petitioners, relatives or injured parties were denied their right to an impartial judicial remedy to ascertain the facts.

As to the obligation to investigate, the Commission considered that by their enactment of the laws and the Decree both countries failed to comply with their duty under Article 1.1 and have violated rights that the Convention accords to the petitioners. On this point the Commission cited the Inter-American Court in the *Velasquez Rodriguez Case*: [48]

> When interpreting the scope of Article 1(1), the Inter-American Court of Human Rights stated that, "The second obligation of the States Parties is to ‘ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction...."[49] The Court elaborates upon this concept in several paragraphs that follow: “What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without

facts and publishing its findings, and passed a law awarding compensation to the relatives of the victims of human rights violations.

Nevertheless, the Commission concluded that the amnesty decree law was incompatible with

The State may also cite in its defense Article 32 of the Convention, which provides that, “[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.” In light of that, it may assert that amnesty favors the demands of the general welfare.