

BENCH MEMORANDUM 1

The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it.

Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting... the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.²

¹ The hypothetical case and bench memorandum were prepared by Juan Pablo Albán A., attorney and former Rómulo Gallegos Fellow of the Inter-American Commission on Human Rights and Elizabeth Abi-Mershed, attorney, Inter-American Commission on Human Rights. The authors wish to recognize the helpful assistance of Commission attorneys Brian Tittimore and Ariel Dulitzky for their comments on the hypothetical case. Further, Claudio Grossman, Dean of the and attorneys Shazia Anwar, Competition Coordinator, and Hadar Harris, Executive Director of the Center for Human Rights and Humanitarian Law of the WCL, provided excellent advice and assistance throughout the preparation of these materials.

² Inter-American Democratic Charter (Lima, September 11, 2001), excerpts of Articles 1 and 3.

I. INTRODUCTION

A. The focus of the hypothetical case

The member States of the Organization of American States value and emphasize on representative democracy as the system through which the peoples of the Americas can achieve their common goals. In recent years, the system has devoted special attention to defining the elements of representative democracy, and the attendant rights of individuals and obligations of States. Taking the adoption of the Inter-American Democratic

democracy, human rights and the rule of law. Drawing from the basic principles and purposes of the OAS, the Inter-American system has a right to democracy and their governments have an obligation to promote

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a declaration of emergency involving limitations on certain individual rights calls upon the participants to analyze the interrelation between democracy and human rights. Within the inter-American system, the very legitimacy of such emergency measures depends on their having been adopted for the purpose of defending a democratic system. Historically such measures have often been abused by non-democratic

- The presidential order suspending the strike initiated by the dockworkers in October of 2001.⁵

The petitioners presented their claims before the Inter-American Commission as violations of the following Articles of the American Convention of Human Rights: 1(1) (obligation to respect and ensure), 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to judicial guarantees), 16 (right to freedom of association), 19 (rights of the child), 23 (political rights), 25 (right to judicial protection) and 27 (suspension of guarantees); as well as of Article 8 (trade union rights) of the Additional Protocol to the American Convention in the Area

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In its report of June 30, 2002, the Inter-American Commission declared the petition admissible. On November 25, 2002, the Commission adopted its reports on the merits of the case, establishing that the situations denounced constituted violations of Articles 1(1), 5, 7, 8, 16, 19, 23, 25 and 27 of the American Convention and Article 8 of the Protocol of San Salvador. In consequence, it recommended that Liberté adopt the legislative and other measures necessary to reinstate and ensure the enjoyment of the rights concerned to the extent possible, and provide reparation where such reinstatement was not pos

The hypothetical case suggests that the State has waived its right to present preliminary objections in the expectation that the Inter-

Third, individual guarantees identified as nonderogable may not be suspended to any extent or under any circumstance. Pursuant to Article 27(2), the following may never be subject to derogation: Article 3 (right to judicial 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 govern

rights, the Inter-American Court has indicated that:

It must also be understood that the declaration of a state of emergency whatever its breadth or denomination in internal law cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency.²⁰

The judicial guarantees that have been defined as remedies necessary to preserve basic nonderogable rights include *habeas corpus* and *amparo*.²¹

Fourth, the State Party wishing to avail itself of this prerogative must immediately notify the other States Parties through the Secretary General of the OAS. The notification must indicate a) the provisions that have been suspended, b) the reasons therefore, and c) the date set for termination. The case law of both the Inter-American Court and Commission indicate that the above-mentioned conditions must, in accordance with the object and purpose of the terms, be interpreted restrictively.

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2. Arguments of the Inter-American Commission

Both the basis for declaring the state of emergency and the nature of the limitations adopted exceeded the requirements of necessity and proportionality set forth in Article 27. In this regard, the jurisprudence of the Inter-American Commission points out that the resort to emergency measures must be justified by a threat to the conditions necessary to maintain the political organization of the state in accordance with the principles of representative democracy.²² In the present case, the to a level of domestic unrest extraordinary enough to justify such a declaration. Such forms of civil disobedience can and should be dealt with through ordinary procedures. While not denying from these internal disturbances.

The declaration of emergency refers to two basic factors for its justification, namely the these were not continuous events that left the authorities with no alternatives to control public order. While they may have happened in different areas of the country, they were nonetheless affected the coastal area of the country where the harbor is located.

Additionally, the duration of the state of emergency as declared -- over four months was unrelated to the true exigencies of the situation and therefore unduly prolonged. In this regard, it will be recalled that the Constitution of Liberté itself provides that the imposition of allows for a duration of no more than three months before such measures lapse automatically. This essentially establishes a presumption that three months is the maximum period for which it would be foreseeable that such measures could be justified by the exigencies of any extraordinary situation of threat. At that point, a new declaration could presumably be issued, but only pursuant to a new evaluation of the situation of threat with the corresponding last longer than the actual, real, and provable situation ²³ The projection of such measures for four months into the future was not justified.

In terms of the necessity and proportionality of the specific measures adopted, as the Inter-American Commission has expressed on reiterated occasions, measures that permit the military to perform police functions raise profound concerns.²⁴ First and foremost, the military mission is clearly distinct from that of the police. The mobilization of the armed forces to address issues of citizen security in the domestic sphere means deploying troops trained for combat in situations which require specialized training in law enforcement. Law enforcement

²² See IACHR, Report N° 48/00, case 11.166, *Walter Humberto Vásquez Vejarano*, Peru, April 13, 2000, para. 32.

²³ IACHR, *Report on the Situation of Human Rights in Chile*, OEA/Ser.L/V/II.34, doc. 21, 1974, para. 5.

²⁴ See e.g., IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II.111, doc. 21, rev. 2001, paras. 52-56; *Report on the Situation of Human Rights in Ecuador*, *supra*, ch. II.A.4; *Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.84, doc. 39 rev., October 14, 1993, ch. III f.

The State has not only the right to protect citizen security, but the duty to take reasonable measures to prevent violence and the breakdown of public order. As the Inter-American Court has recognized:

under certain circumstances the suspension of guarantees may be the only way to deal with emergency situations and, thereby, to preserve the highest values of a
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American system is founded, the Court must emphasize that the suspension of
ise of representative
democracy" referred to in Article 3 of the OAS Charter.³⁰

The State is necessarily in the best position to evaluate, first, the gravity and extent of the threat, and, second, the scope of the measures necessary to meet it. In the present case, having evaluated these factors and implemented the measures required, President Reina then immediately informed the Secretary General of the OAS in accordance with the terms of Article 27(3).³¹ Moreover, invoking the terms of the Inter-American Democratic Charter, she also reported to the Organization on the situation of crisis, requested its assistance in strengthening and preserving the democratic system, and requested that an electoral observation mission be dispatched to monitor the upcoming elections.³² Pursuant to a special session, the Permanent Council of the OAS issued a resolution taking note of the gravity of the situation, expressing support for the democratic system of Liberté, calling for support for the upcoming electoral process and accepting to send an electoral observer mission.³³ Through this resolution, the OAS essentially recognized both the gravity of the situation and the need for special measures.

In this sense, it must also be noted that the special measures provided in the declaration of emergency do not eliminate the safeguard of judicial control. The measure concerning arrest and detention by members of the security forces, for example, provides for the presentation before a judge of any person thereby detained within 48 hours. This ensures the availability of prompt judicial oversight. Furthermore, the notification to the Secretary General and the Permanent Council of the OAS demonstrate that Liberté is acting with openness and transparency, and welcomes regional oversight.

³⁰ IACtHR, *Advisory Opinion OC-8/87*, *supra*, para. 20.

³¹ *See* hypothetical case, para. 19.

³² *See id.*

³³ *See id.*, para. 20.

- B. The arrest and detention of Joel Valencia and his classmates**
 - 1. The context: balancing the right of the State to derogate certain guarantees during a legitimate emergency with its duty to apply special measures of protection to children under all circumstances**

The arrest and detention of Joel Valencia and his classmates, all minors,³⁴ poses the following problem: while the right to personal liberty may be subject to derogation in a situation of emergency, the rights of the child and the right to *habeas corpus* are never derogable. The

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In the words of the Inter-American Court, Article 7:

Contains specific guarantees against illegal or arbitrary detention or arrests, as described in clauses 2 and 3, respectively. Pursuant to the first of these provisions, no person may be deprived of his or her personal freedom except for the reasons, cases or circumstances expressly defined by law (material aspect) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (formal aspect). The second provision addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality.⁴²

In summary, the analysis of the compatibility of a deprivation of liberty with Article 7 examines: (1) whether it was carried out in accordance with domestic law; (2) was that domestic law itself in conformity with the requirements of the American Convention; and (3) assuming that the foregoing conditions were met, was the application of the law arbitrary in the particular case.⁴³

b. Arguments of the Inter-American Commission

The basis for the detention of the protesters is not a legal disposition, but a presidential decree that declares the suspension of the right to personal liberty.⁴⁴ The fact that the State had to release all of the detainees without apparently having initiated any legal action against them proves that their conduct (the legitimate exercise of their right to freedom of expression through a public protest) could not be deemed to fall within any preexisting infraction defined under the

which the protesters were arrested consisted of acts that ranged from verbal and physical

Moreover, with respect to the status of Joel Valencia and his classmates as minors, it must be emphasized that the conditions of the violent protest required the arrest of a large group of individuals. Given that Joel and his friends were sixteen years of age or so, and had been voluntary participants in a very violent situation, it would not have been evident to the relevant authorities that they were minors of age. In fact, those arrested were held only until such time as their identity and status could be verified, and then all were released.

4. The legality and conditions of detention

a. General considerations and applicable law

In its report on the merits of November 25, 2002, the Inter-American Commission established that the State of Liberté had violated Articles 5 and 7 of the American Convention with respect to the detention of Joel Valencia and 10 other minors of age.⁵⁶ Article 5 establishes, *inter alia*

proceedings shall be separated from adults and brought before specialized tribunals, as speedily

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should be implemented without infringing on other rights enjoyed by persons subject to detention.⁶⁷

The objective of any measure that restricts the personal liberty of a minor is not punishment, but in any case educational (rehabilitational) in nature. In the present case, the detention of the minors in and of itself constituted a form of punishment for their participation in the public protest of November 17, 2001, independently of whether any proceedings had been brought against them.

Even assuming for the sake of argument that the arrests in question had been carried out in accordance with the law, the State of Liberté was obliged to adopt special measures to protect Joel Valencia and his 10 classmates by virtue of their status as minors of age. However, in the present case, the detainees were not placed in detention centers, but in the auditorium of a military base close to the plac
liberty must be kept in officially recognized detention centers.⁶⁸

Furthermore, the State of Liberté has violated Article 5(5) of the American Convention because it detained at least 11 minors of age in the same holding area as adults (who had shown signs of aggressive behavior). The facts of the case indicate that, at the time of his arrest, Joel Valencia was 16 years old,⁶⁹ and that his classmates from school were also minors of age.⁷⁰ Accordingly, the primary obligation of the State following their arrest was to place them in a specialized facility separated from adult detainees, and to subsequently place them at the disposition of a specialized judge. In this regard, the Human Rights Commission of the United

must be made with attention to the difference between adults and minors. In particular, minors must be separated from adults.⁷¹

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minors in facilities separate from those housing adults. It is obvious that the obligation that follows from Article 19, namely, to grant a child special protection, cannot be interpreted solely as requiring the creation of juvenile courts; instead, the prote

⁶⁷ See, IACHR, *Rights of the Child*, in *Third Report on the Situation of Human Rights in Paraguay*, OEA Ser./L/VII.110 doc. 52, 9 March 200

minors shall be housed separately from adults, in other words, in special juvenile facilities.⁷²

Additionally, because it failed to separate the minors from the rest of the detainees or to place them at the disposition of a specialized judge, the State placed the former in a situation of particular vulnerability and danger. The massive arrest had just taken place precisely because some of the protesters had engaged in acts of violence. Moreover, even following the detention,

⁷³ The minors in question were naturally extremel

⁷⁴ As the Inter-American Commission has indicated:

5(5) of the American Convention) concerning the separation of minor and adult detainees allows for no exceptions.⁷⁹

Further, the State of Liberté has violated Article 5(2) of the American Convention by having prevented communication between the 11 youths and their families.⁸⁰ In the present case, detention *incommunicado* given that no investigation of the alleged disturbance of public order, the putative basis for the arrests, was even being carried out, but merely a superficial review of the identification of the protesters.⁸¹

In this regard, in its first contentious case the Inter-American Court established that [itself] cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the C⁸² The Inter-American Court has further indicated that, even in the case that the *incommunicado* detention is considered to be an exceptional instrument is the grave effects it has on the detained person. Indeed, isolation from the outside world produces moral and psychological suffering in any

d. Arguments of the State

International instruments contain no definitive prohibition of the arrest and detention of minors of age. In the present case, the detention was effectuated in order to preserve security and public order. In this regard, the Inter-

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Throughout the entire period of detention (34 hours), the detainees were treated with full respect for their dignity, in accordance with the terms set forth in Article 5(2) of the American Convention. They were provided with food and water, and, for their own wellbeing, were placed in an auditorium (as opposed to barracks or cells), in a military base close by the police station that lacked sufficient space to house them.

The confinement of all the detainees in the same holding area was not the result of any intention to affect the rights of Joel Valencia or his 10 classmates but simply a question of space. Additionally, given the circumstances in which the arrest took place and the number of detainees, it was not possible to differentiate between the minors and the adults, or to confirm their age without the corresponding verification of their identification documents. This had to be done offering all the persons affected equal guarantees, as to do otherwise would not have amounted to a protective action under Article 19 of the Convention but to a form of discrimination under Articles 24 and 1(1) of that instrument. That verification was in fact carried out once the detainees had been placed in the auditorium of the military base.

Article 5(5) of the American Convention recognizes the obligation to separate minors from adult detainees solely when the former are being processed. In the present case, once the initial investigation was completed, all the detainees were released and the facts provide no indication of a decision to pursue legal action against any of them. Given that it was never determined that Joel Valencia and his 10 classmates would be prosecuted, the obligation set forth in Article 5(5) of the Convention did not apply and was not violated. In this respect, the United Nations Human Rights Committee has concluded that Article 10(2) of the International Covenant on Civil and Political Rights (which corresponds to Article 5(5) of the American Convention) refers solely to accused persons. In other words, it refers only to those persons against whom charges have been brought, or with respect to whom a request has been submitted to initiate proceedings that could result in charges being brought.⁸⁷

While it is true that contact between the minors and the parents in this case was not authorized, it must be mentioned that neither the Inter-American Court nor the Commission have criticized *incommunicado*

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⁸⁶ IACtHR, *Velásquez Rodríguez Case*, *supra*, para. 154.

⁸⁷ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel Publisher, 1993, p. 190.

⁸⁸ IACtHR, *Suárez Rosero Case*, *supra*, para. 51. *See also*, IACHR, Report N° 66/01, Case 11.992, *Darío María Levoyer*, Ecuador, 14 June 2001, para. 67.

or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhuman,

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The history of the inter-American human rights system provides indisputable evidence that

be effective, since their purpose, in terms of Article 7(6), is to obtain without

a decision consistent with the law. The remedy was denied on the basis of the sensitive situation the country was in at that moment and the declaration of emergency. The right to personal liberty is, in this regard, one of the guarantees that may be suspended pursuant to the terms of Article 27 of the American Convention. Further, domestic law authorizes the detention of perpetrators of acts of violence consisting of verbal and physical aggression as well as injuries.

in the government of the country, without stipulating what that requires in terms of the right to vote or be elected.

In the European System, Article 3 of Protocol 1 sets forth the duty of the States Parties
s which would
of the individual to vote and to be elected to the legislature has emerged through the
¹⁰⁵ The European Court has indicated that States
Parties may be accorded a considerable margin of appreciation in determining the conditions for
a legislature.¹⁰⁶

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¹⁰⁷ This means that the voters must have had the chance to express their will freely and without coercion, and that the results must be congruent with the expression of that will.¹⁰⁸ In this regard, the Inter-American Commission has examined a wide range of factors, including structural issues;¹⁰⁹ whether political parties and candidates had an equal opportunity to campaign;¹¹⁰ conditions of intimidation or insecurity in the campaign and voting periods, including restrictions on individual rights or situations of internal unrest or violence;

As with other rights, the right to vote and stand for election must be interpreted in congruence with the terms of Article 29 of the American Convention. Among those terms, this Article prohibits any interpretatio

inherent in the human personality or derived from representative democracy as a form of

must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of

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In addition to the work of the political organs of the OAS in this area, as well as that of the Inter-American Commission and Court, it should also be noted that, through its monitoring and reporting on electoral processes in the Hemisphere, the Unit for the Promotion of Democracy of the OAS has also provided an important contribution to the regional understanding of what is meant by genuine, free and fair elections.

2. Arguments of the Inter-American Commission

The postponement of the elections affected the right of the three victims both to vote and to stand as candidates in significant and prejudicial ways. It must be underlined that elections have been held in Liberté on the date of December 10 for the past 50 years.¹¹⁶ This is the date prescribed by law, and it was not changed even during the most intense periods of the internal

special resonance for voters.¹¹⁷

First, the postponement of the election in this context, in the final stages of the campaign, created a situation of uncertainty for both candidates and voters. The cited justification of concern as to whether the State could guarantee security for a free and fair vote¹¹⁸ had a chilling effect on the willingness of candidates and voters -- including Mr. Valencia and his fellow candidates -- to participate in pre-election rallies and other political events during the final stages of the campaign period.

Second, the mechanism applied to ensure the full restoration of public order for the elections was joint patrols by the military and police forces, with a loosening of the normally applicable judicial controls.¹¹⁹ This situation of sharply escalating control by the executive, at the expense of the normally applicable exercise of checks and balances by the judiciary and legislature, further increased the chilling effect on voters and candidates. More specifically, for voters and candidates such as Mr. Valencia, this abrogation of power during the electoral period created a sense that the incumbent Liberté United Party was engaging in a kind of institutional

¹¹⁵ IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of Nov. 13, 1985, Ser. A No. 5, para. 44.

¹¹⁶ Hypothetical case, para. 28.

¹¹⁷ *Id.*, and hypothetical questions and responses, 19.

¹¹⁸ Hypothetical case, para. 18(1) and (2).

¹¹⁹ *Id.*, para. 18(2).

Further, the Government was required to respond to widely reported, credible indications that forces from the far right and left of the political spectrum were utilizing the situation of social protest to incite aggressive dissent and violent confrontation.¹²³ As the gravity of the situation escalated, the authorities too greatly increased the measures they were taking in response. Accordingly, in early October of 2001, the Government ordered increased security measures, including a sharply increased police presence at all protests. It then further heightened that response at the end of that month.¹²⁴

In the interim, however, there had been a serious deterioration in the situation, with a number of people having been killed by gunshots fired in the midst of these protests.¹²⁵ Further reports indicated that there were elements at work trying to destabilize the country and frustrate the upcoming elections.¹²⁶ The Government had utilized the law enforcement and other measures normally available to ensure public order, but these had proven insufficient to deal with the gravity and profundity of the violence. Dealing with these kinds of threats aimed at destabilizing the democratic institutions of the State and interfering with the elections both justified and required the extraordinary measure taken. Had the State failed to react to this extraordinary situation with special heightened measures, it would have been in breach of its duty to protect its citizenry and their rights.

The postponement of the election by just one month was the least restrictive means the State had of providing the competent authorities the time necessary to ensure a full return to public order. Precisely because these measures were taken, once the elections were held on January 10, 2002, electoral observers from the OAS were able to report that they had been carried out in an orderly way.¹²⁷

The postponement of the election created no distinctions among different classes of voters or candidates. All had equal access to vote and be elected. No candidate or party was favored by the measures, nor has any been shown to have received any benefit. The Inter-American Commission has presented no evidence whatsoever of partiality in the way the

circumstances, such as the serious internal unrest that was affecting the Republic of Liberté,¹⁴² States may regulate the right to strike through legal procedures that must, in turn, respect the

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The Committee on Freedom of Association has established that the right to strike may be subjected to restrictions, and even prohibitions, when dealing with a public function or essential

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