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STATEMENT OF THE FACTS

The State of Vadaluz (hereinafter: the State or Vadaluz) distinguishes itself from other countries in the region by its democratic tradition. It has held continuous elections for over a century and has not been under a military dictatorship.¹ At the end of the 20th century the people of Vadaluz made clear that they wanted to progress towards a social state under the rule of law. This evolution was consolidated in the 2000 Constitution.²

In January 2020, the State was struck by a worldwide pandemic. The swine virus caused a severe flu resulting in acute respiratory infections and even deaths.³

The unfortunate passing of a woman waiting to receive health care on January 10, 2020, sparked protests demanding universal health coverage.⁴

Simultaneously, the World Health Organization (hereinafter: WHO) stated that the virus's mortality rate was unknown and that it was highly contagious. The WHO advised social distancing measures while researchers gathered a better understanding of the virus and developed a vaccine.⁵ The State took that advice to heart and published Executive Decree 75/20 (hereinafter: the Decree) declaring a state of emergency and listing the adopted measures.⁶

Despite the worldwide health emergency and the distancing measures, a small group of students decided to put themselves and others at risk by gathering in the streets.⁷ After police officers kindly

¹ Hypothetical, §2.

² *Ibid*, §6.

³ *Ibid*, §14,16; CQ 1.

⁴ Hypothetical, §12-14.

⁵ *Ibid*, §16.

⁶ *Ibid*, §17.

⁷ *Ibid*, §18-20.

and repeatedly asked the students to go home, since public gatherings of more than three people were banned by the Decree, the students refused to do so. The officers warned the students that they would start making arrests if the protests continued.⁸

Eventually, Mr. Chavero (hereinafter: Mr Chavero or the Applicant) was arrested and held in custody in accordance with the Decree.⁹ He had the opportunity to consult with his lawyer before

LEGAL ANALYSIS

A. Preliminary objections

a. The requirements of Articles 46(1)(a) and 47(a) A

violations of a citizen's subjective rights, be it personal liberty or other. This explains why the trial court dismissed the *habeas corpus* action as moot on March 15, 2020.²² Since the *habeas corpus* proceeding lost its object after the Applicant's release, it could not be continued solely to address state responsibility.

The unconstitutionality action is designed specifically to challenge the legality of a rule or regulation in the abstract,²³ and therefore not a suitable remedy to address state responsibility for

formally exist,²⁸ be appropriate, adequate and effective to remedy the type of violation alleged, and available to the Applicant.²⁹ It is clear that the administrative appeal and the Supreme Court review meet these requirements.

Firstly, the remedies were appropriate and adequate since they were suitable to address the alleged violation of the specific legal rights.³⁰ As explained above, the administrative appeal was specifically designed to handle cases in which the unlawfulness of administrative acts is a point of controversy. The review procedure before the Supreme Court is equally adequately tailored.³¹ They are therefore appropriate remedies.

Secondly, the remedy must be effective and thus capable of producing the anticipated result.³² The Court previously decided that remedies were ineffective for being illusory due to the circumstances³³ or for being unjustifiably delayed.³⁴ Due to the emergency response, some impact on the proper functioning of the judiciary was inevitable. However, this did not unduly inhibit access to justice or the effectiveness of any of the judicial procedures (*infra B.b.vi.*). Furthermore, there are no indications that the remedy of an administrative appeal or the request for review to the Supreme Court would be ineffective for any other reason.

Thirdly, to be available, the remedy must exist at the time the petition was filed with the Commission, and the alleged victim must be the proper party to pursue the remedy.³⁵ This is not at issue in the present case. The administrative appeal and the request for review existed as a

²⁸ *Las Palmeras v. Colombia*, IACtHR,(2001),§58; *Martínez Esquivia v. Colombia*, IACtHR,(2020),§20.

²⁹ *Chitay Nech et al. v. Guatemala*, IACtHR,(2010),§31; *Martínez Esquivia v. Colombia*, IACtHR,(2020),§20.

³⁰ *Godínez Cruz v. Honduras*, IACtHR,(1989),§67.

³¹ CQ 7, 42.

³² *Velásquez Rodríguez v. Honduras*, IACtHR,(1988),§66; *Carranza Alarcón v. Ecuador*, IACtHR,(2020),§15.

³³ *Las Palmeras v. Colombia*, IACtHR,(2001),§58; *Constitutional Court v. Peru*, IACtHR,(2001),§93.

³⁴ *Constitutional Court v. Peru*, IACtHR,(2001),§93; *Mayagna (Sumo)Awas Tingni Community v. Nicaragua*, IACtHR,(2001),§134.

³⁵ *Gomes Lund et al. v. Brazil*, IACtHR,(2010),§46.

remedy at the time, and it is clear the Applicant would have been the proper party to pursue them.³⁶ Moreover, both the Decree and the police order given to the Applicant clarify that all legal actions remain available during the state of emergency.³⁷

The State acknowledges the fact that it did not previously file a preliminary objection before the Commission³⁸ and that this could result in tacitly waiving the possibility to do so at a later stage.³⁹ In principle, challenges to the admissibility of the petition should be submitted in a timely manner⁴⁰ and preliminary objections should be filed in the briefs during the admissibility stage before the Commission.⁴¹ However, the Commission previously acknowledged that the ability of States to respond in a timely manner to the IACHR's requests, could be impacted when suffering under a pandemic. In these circumstances, the Commission put on hold the deadlines in the petition and case system.⁴² As the State found itself in these difficult and exceptional circumstances of a pandemic at the time of the procedure before the Commission, the relevant information may not have been promptly diverted to the appropriate domestic body responsible for providing an answer.

Therefore, the State would like to request the Court to consider its preliminary objections.

b. The exceptions in Article 46(2) ACHR do not apply

For the requirement of exhaustion of domestic remedies to be applicable, it is required that the exceptions in Article 46(2) ACHR do not apply.

³⁶ CQ 20,24,30.

³⁷ Hypothetical, §23; Article 3 Decree.

³⁸ CQ 29.

³⁹ *Velásquez Rodríguez v. Honduras*, IACtHR, (1987), §88; *Montesinos Mejía v. Ecuador*, IACtHR, (2020), §25.

⁴⁰ Article 30(6) Rules of Procedures IACHR; *Martínez Esquivia v. Colombia*, IACtHR, (2020), §21,27.

⁴¹ Articles 41(1)(a) *juncto* (d) *juncto* 42(1) Rules of Procedure IACtHR; *Martínez Esquivia v. Colombia*, IACtHR, (2020), §27.

⁴² IACHR. *Press Release IACHR Extends Suspension of Deadlines for Petition, Case, and Friendly Settlement System by One Month in Response to COVID-19 Health Emergency*, (2020).

Firstly, the State has to afford due process of law for the protection of rights that have allegedly been violated.⁴³ There are no indications that the judiciary of Vadaluz would not function impartially and independently. Moreover, judicial governance is provided by the Superior Council for the Administration of Justice as an independent public entity.⁴⁴ This requirement is further elaborated upon in the merits (*infra* B.b.vi.).

Secondly, the Applicant has not been denied access to the domestic remedies nor was he prevented from exhausting them.⁴⁵ The arguments in the merits equally apply (*infra* B.b.vii.).

Thirdly, there cannot be an unwarranted delay in rendering a final judgment.⁴⁶ This exception is not relevant with regard to the request for review and the administrative appeal, as they were not filed.

Therefore, no exceptions are applicable, and the requirement of domestic remedies stands. In conclusion, the State asks the Court to dismiss the petition on ground of inadmissibility of the application.

⁴³ Article 46(2)(a) ACHR.

⁴⁴ CQ 27.

⁴⁵ Article 46(2)(b) ACHR.

⁴⁶ Article 46(2)(c) ACHR.

B. Arguments on the merits

a. The State did not violate Article 27 juncto 1(1) and 2 ACHR regarding the Decree because the derogations were in accordance with its requirements

To deal with the exigencies of the pandemic, Article 2(3) of the Decree limited public meetings and demonstrations to three people. In doing so, the State derogated from Articles 13, 15 and 16 ACHR in a manner conformant with Article 27 ACHR.

Article 27(2) ACHR prohibits the suspension of the guarantees of certain Articles of the ACHR containing non-derogable rights, and Article 27(3) ACHR mandates that a suspension of rights is immediately brought to the attention of the Secretary General of the Organization of American States (hereinafter: OAS). Article 2(3) of the Decree does not entail any derogation of the rights enshrined in Article 27(2) ACHR. Moreover, the State forwarded a copy of the Decree to the OAS General Secretariat,⁴⁷ which indicated the reasons for suspension,⁴⁸ the suspended rights⁴⁹ and the date of termination⁵⁰. Therefore, the requirements of Articles 27(2) and 27(3) ACHR are met. The only requirements left to be considered are those of Article 27(1) ACHR.

Article 27(1) ACHR poses a five-fold requirement for a measure to validly derogate from a convention right.

⁴⁷ CQ 19,39,55.

⁴⁸ Preamble Decree.

⁴⁹ Article 2 Decree.

⁵⁰ *Ibid.*

- i. Time of war, public danger or other emergency that threatens the independence or security of a State Party

When one of the exceptional circumstances mentioned in Article 27(1) ACHR occurs, states may institute temporary suspensions of certain rights and freedoms enshrined in the ACHR that under normal circumstances should be respected and guaranteed by the State.⁵¹ The circumstance of public danger intends to refer to a situation that was not necessarily a threat to internal or external security.⁵² Situations that were kept in mind in this respect were, amongst others, epidemics.⁵³ This is exactly the situation in which the State finds itself: A epidemic of the swine-flu.⁵⁴ Therefore, this first requirement is met.

- ii. No further than strictly required by the exigencies of the situation

Article 27(1) ACHR refers to the principle of proportionality.⁵⁵ According to the IACtHR *“it is clear that what might be permissible in one type of emergency would not be lawful in another. The lawfulness of the measures taken to deal with each of the special situations referred to in Article 27(1) will depend, moreover, upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures”*.⁵⁶

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Hence, it must be satisfied that in light of the character, intensity, pervasiveness and particular context of the pandemic, the measures derogating from Articles 13, 15 and 16 established in Article 2(3) of the Decree, relevant to the facts of the present case, are reasonable and proportionate.

The relevant measure is the prohibition on public meetings and demonstrations of more than three people.⁵⁷ It is clear that these measures were reasonable and proportionate in light of the pandemic. The highly contagious character⁵⁸ of the swine flu is of this nature that any gatherings, large or small, will facilitate its spread. The seriously disturbing health consequences, dangerous acute respiratory infections, and potentially catastrophically high mortality rate⁵⁹ illustrate the enormous intensity of the emergency. Add the dramatic rise of infection numbers across the country at the time and the collapsing of the health care facilities,⁶⁰ and the scale of the emergency the government faced becomes apparent.

To assess the proportionality between the measure taken and the emergency addressed, the State follows a quadruple test, namely rationality,⁶¹ necessity,⁶² proportionality *sensu stricto*⁶³ and absence of misuse of power.⁶⁴

⁵⁷ Article 2 Decree.

⁵⁸ Hypothetical, §15.

⁵⁹ *Ibid.*

1. Rationality of the measure

The measure must be a rational way of addressing the emergency. In the present case, this holds true in an obvious way. Putting a limit on the possible attendees of gatherings avoids the flocking together of large groups of people where the virus could spread freely.⁶⁵

2. Necessity

There was no less intrusive alternative available. This goes for both the geographical and material scope of the measure.

As for the geographical scope, the infection numbers were rising dramatically throughout the whole country.⁶⁶ Therefore, measures had to be taken for the entire territory of Vadaluz.

As for the material scope of the measure, considering the scale of the emergency the pandemic posed, it becomes clear that a prohibition of gatherings of more than three people was necessary to impose. Other possible measures, such as the imposition of social distancing, the obligation to

community. After all, assessing whether such a situation continues to exist is a scientific question, to be answered by epidemiologists. In doing so, the State heeded the call made by, among others, the IACHR in the context of the outbreak of the COVID-19 virus to let the response to pandemic outbreaks be guided by the best scientific knowledge.⁷⁵ Given the novelty of the virus at the time and the consequent lack of scientific estimates regarding its duration, this was the most responsible and reasonable way the State could limit its actions to the period of time strictly required by the exigencies of the situation.

This criterion is therefore met.

Proportionality must be understood as entailing a requirement of appropriateness,⁸⁰ necessity⁸¹ and reasonable proportion between measure and purpose.⁸²

The only differentiation made in the derogating measures of the Decree is that between gatherings of people in the context of their religious practice⁸³ and people gathering in a different context, such as the protests in which the Applicant was participating. The State clearly pursued a legitimate purpose with this differentiation, namely the safeguarding of the possibility of people to exercise gatherings as much as possible to avoid the spread of the virus.

Equally, it is clear the differentiation was appropriate to address this aim. An essential part of most religions is the congregation in places of worship. Providing for an exception on the ban of group gatherings is therefore a useful measure in safeguarding the full enjoyment of the right to freedom of religion.

It was also necessary to make the distinction with non-religious gatherings. If the exception would have been formulated any broader than those gatherings protected by the special non-derogable status of Article 12 ACHR, this would have seriously undermined the efficacy of the measures in general, namely safeguarding the right to life and right to health of the population of Vadaluz.

been substantiated above (*supra* B.a.ii.), there was a dire need for the State to take social distancing measures to stop the uninhibited spread of the virus. In doing so, the State sought to avoid restricting the rights of its citizens as much as possible. Given the central importance to religious communities of continuing their respective sacred practices, a need that has no equivalent in secular communities and that is conventionally protected,⁸⁵ the State deemed it appropriate to make this exception part of their complicated balancing act, aimed at safeguarding all rights of all its citizens as much as possible in these times of major distress.

Therefore, no discrimination is found.

The State did not violate Article 27 *juncto* 1(1) and 2 ACHR regarding the Decree because the derogations were in accordance with its requirements.

b. The State did not violate Articles 7, 8, 9, 13, 15 and 16 juncto 1(1) and 2 ACHR regarding

- i. The State did not violate Articles 7(1), 7(2) and 9 *juncto*

conditions for the deprivation of physical liberty, (c) the arrest must be carried out in accordance with the reasons and conditions for deprivation of liberty.⁸⁶

Firstly, *law* in the sense of this Article, is generally understood by the IACtHR as “*a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose*”.⁸⁷

This means that, as a general rule, the legal basis of an arrest or detention must be found in an act adopted by the legislature. In the present case however, the arrest of the Applicant was based on the Decree, an instrument emanating from the executive branch.⁸⁸

The IACtHR corrected this general rule: “*The above does not necessarily negate the possibility of delegations of authority in this area, provided that such delegations are authorized by the Constitution, are exercised within the limits imposed by the Constitution and the delegating law, and that the exercise of the power delegated is subject to effective controls, so that it does not impair nor can it be used to impair the fundamental nature of the rights and freedoms protected by the Convention*”.⁸⁹

This correction creates the possibility for an arrest or detention to find its legal basis in an instrument of the executive branch, such as the Decree, as long as this delegation was constitutionally valid under the domestic legal system and

force of law in the legal system of Vadaluz.⁹⁰ This means it was issued in an exercise of a delegation of legislative power which was constitutionally valid. The fact that Congress did not deliberate on the Decree, does not have any legal consequences and does not impact the validity of the delegation. The extraordinary circumstances were to be taken into account in this respect. The Supreme Court explicitly confirmed this.⁹¹ As for the existence of an effective control mechanism, this was present in the form of judicial control by the Supreme Court.⁹²

Secondly, the Decree gives a clear list of reasons for and the conditions in which persons may be arrested in its third Article, namely a congregation of more than three people and an interception *in flagrante delicto*.⁹³

Thirdly, the State has complied with its own domestic rules regarding the arrest of the Applicant. It was carried out for one of the explicit grounds listed in the Decree and in accordance with the conditions set forth therein.⁹⁴

Considering the above, there is no violation of Articles 7(1), 7(2) *juncto* 1(1) and 2 ACHR.

Article 9 ACHR establishes the principle of legality and the prohibition of *ex post facto* laws. The Court clarified that “*the definition of an act as an unlawful act and the determination of its legal effects must precede the conduct of the individual who is alleged to have violated it; because, before a behavior is defined as a crime, it is not unlawful for penal effects*”.⁹⁵ This principle governs the actions of different bodies of the State in their respective fields of competence,⁹⁶

⁹⁰ CQ 20,24,30.

⁹¹ Hypothetical, §32; CQ 11,31,45.

⁹² Hypothetical, §7.

⁹³ *Ibid*, §17.

⁹⁴ Hypothetical, §20-22.

⁹⁵ *De la Cruz Flores v. Peru*, IACtHR, (2004), §104.

⁹⁶ *Rico v. Argentina*, IACtHR, (2019), §102.

including an administrative punitive action,⁹⁷

was and could be known prior to the violating act, being the protests on March 3, 2020. Moreover, the scope of and discretion with which Article 3 of the Decree would be exercised, is indicated with sufficient clarity (*supra* the second criterion of Article 7(2) ACHR). Hence, the Decree provides for legal certainty and leaves no room for ambiguity.

Consequently, the Applicant was not exposed to *ex post facto* laws, the principle of legality was respected and Article 9 ACHR *juncto* 1(1) and 2 ACHR was not violated.

- ii. The State did not violate Articles 13, 15 and 16 *juncto* 1(1) and 2 ACHR because limitations were crucial to protect public health

The State recalls that, as has been substantiated above, the Decree suspended the guarantees related to the freedom of expression, right to assembly and freedom of association, and took the derogating measure of prohibiting public protests of more than three people. As this was done in conformity with the requirements of Article 27 ACHR, *ipso facto* there can be no violation of the aforementioned rights.

At a subsidiary level, the State emphasizes that even in the absence of a suspension of guarantees, this measure would not have been in violation of the Convention as it could equally be justified within the framework of the restriction clauses in Articles 13(2), 15 and 16(2) respectively.

In the context of restrictions on demonstrations and protests, a three-part “test” can be applied to the three rights simultaneously to prove this.¹⁰⁴

¹⁰⁴ Office of the Special Rapporteur for Freedom of Expression of the IACHR. *Thematic Report IACHR Protest and Human Rights*, (2019), §33.

First, any limitation must be provided for in law.¹⁰⁵ The restrictions are established by and in conformity with the law as imposed by Article 2(3) of the Executive Decree and thus providing a legal basis (*supra* B.b.i).

Second, it should pursue one of the legitimate objectives expressly set out in the American Convention. By applying these restrictions, the State aims to protect public health, one of the objectives formulated in the restriction clauses of the three rights.¹⁰⁶

Third, the restrictions must be necessary in a democratic society for the achievement of the aim they pursue. This test consists of the following criteria: There must be an overriding social need, no less intrusive measures,¹⁰⁷ weight must be attributed to competing legitimate rights and interests,¹⁰⁸ and lastly, restrictions must be strictly proportionate¹⁰⁹ to the aims.¹¹⁰

These criteria are essentially analogous with those set out above as part of the proportionality assessment of the derogating measures (*supra* B.a.ii.). The difference only being that at the level of restriction, less leeway is afforded to states in conducting the balancing act under the proportionality assessment.

Therefore, it can be concluded that the State did not violate Articles 13, 15 and 16 *juncto* 1(1) and 2 ACHR.

¹⁰⁵ Office of the Special Rapporteur for Freedom of Expression of the IACHR. *The Inter-American Legal Framework regarding the Right to Freedom of Expression*, (2010), §69.

¹⁰⁶ Articles 13(2)(b), 15 and 16(2) ACHR.

¹⁰⁷ *Dudgeon v. UK*, ECtHR, §51; Office of the Special Rapporteur for Freedom of Expression of the IACHR. *The Inter-American Legal Framework regarding the Right to Freedom of Expression*, (2010), §85.

¹⁰⁸ IACHR. *Report on Citizen Security and Human Rights* (2009), §195.

¹⁰⁹ Office of the Special Rapporteur for Freedom of Expression of the IACHR. *The Inter-American Legal Framework regarding the Right to Freedom of Expression*, (2010), §88; *Kimel v. Argentina*, IACtHR, (2008), §83.

¹¹⁰ Office of the Special Rapporteur for Freedom of Expression of the IACHR. *The Inter-American Legal Framework regarding the Right to Freedom of Expression*, (2010), §67.

- iii. The State did not violate Articles 7(1) and 7(3) *juncto* 1(1) and 2 ACHR because the arrest and detention were not arbitrary

It is established in Article 7(3) ACHR that “*no one shall be subject to arbitrary arrest or imprisonment*”. According to the IACtHR, no one may be arrested or imprisoned for reasons, which may be legal, but could be deemed incompatible with respect for the fundamental rights of the individual because they are unreasonable, disproportionate and unforeseeable.¹¹¹

Regarding the proportionality and reasonableness in the sense of this general rule, the Court has specified a fourfold test. The liberty depriving measure must (a) have a legitimate purpose, (b) be appropriate to realize that purpose, (c) be necessary to realize it, and (d) must be proportionate *sensu stricto*.¹¹²

The administrative detention of the Applicant for four days, as a way to enforce the emergency prohibition of large protests, meets these requirements.

Firstly, the *legitimate purpose* of the measure can hardly be put to question. The pandemic posed an enormous threat to public health (*supra*, B.a.ii.). The undertaken measure helps in the battle

with its international obligation to guarantee the full realization of the right to health by controlling epidemic diseases.¹¹⁴

Secondly, the measure is *appropriate* to achieve this purpose. In other words, it addresses the purpose in a way that genuinely helps to accomplish it. Putting an administrative detention forward

displayed all the restraint it could, while still living up to its obligation to adequately protect the lives and health of its entire population by avoiding that actions of some, could endanger all.

Regarding the foreseeability, it is required that any restriction of liberty is based on a justification that allows an evaluation of whether it is in keeping with the conditions set out above.¹¹⁵ The Decree clearly specifies all elements necessary to come to the above evaluation, referring to considerations such as the unknown health consequences of the virus, its highly contagious character, the urgent need for social distancing measures and the constitutional status of the right to health.¹¹⁶

Taking into account the above, it can be concluded that the State did not violate Articles 7(1), 7(3) *juncto* 1(1) and 2 ACHR.

- iv. The State did not violate Articles 7(1), 7(4), 8(2)(b), 8(2)(c) and 8(2)(d) *juncto* 1(1) ACHR because the Applicant was aware of the reasons for his arrest and the charges, and there was an adequate defense preparation

The first objective of Article 7(4) ACHR is for the detainee to be informed of both the reasons for his arrest and the charges brought against him.¹¹⁷

Regarding the reasons for his arrest, the Court has previously found that there is no violation of Article 7(4) ACHR, even if the detainee was not formally informed about the reasons for his arrest, when the detainee was arrested in the act.¹¹⁸ Mr. Chavero was arrested *in flagrante delicto*¹¹⁹ while

¹¹⁵ *Vélez Loor v. Panama*, IACtHR,(2010),§166; *Montesinos Mejía v. Ecuador*, IACtHR,(2020),§109.

¹¹⁶ Preamble Decree.

participating in a prohibited protest. Prior to the arrest, the police kindly asked the protesters to leave and informed them that they would make arrests under the Decree.¹²⁰ This shows that the Applicant was fully aware of the reasons for his arrest.

Regarding the charges, the detainee must be informed hereof previous to his first statement before the authorities¹²¹ to be in compliance with Article 8(2)(b) ACHR. The Applicant was immediately charged with the administrative offence provided in Articles 2(3) and 3 of the Decree upon his arrival at the Police Headquarters No. 3, twenty-four hours prior to his first statement.¹²²

Second objective of Article 7(4) ACHR is for the relatives of the detainee to be informed about his detention and his location, to allow them to assist him in preparing his defence.¹²³ Mr. [REDACTED]'s parents and Ms. Kelsen visited the Police Headquarters No. 00556-5(4405,854F1 12 T4y)10(on)-9(

to Mr. Chavero's appearance before the chief of police and Ms. Kelsen accompanied him during his first statement.¹³⁰

In view of the above, the State did not violate Articles 7(1), 7(4), 8(2)(b), 8(2)(c) and 8(2)(d) *juncto* 1(1) ACHR.

- v. The State did not violate Articles 7(1), 7(5) *juncto* 1(1) ACHR concerning the Applicant's procedure before the chief of police

According to Article 7(5) ACHR, a person's detention must promptly undergo judicial review, as a suitable means of control to avoid arbitrary and unlawful captures.¹³¹

Firstly, the judicial review must be prompt. The standing case law¹³² shows that judicial review within the first twenty-

Since the chief of police had full jurisdiction and the authority to order a release, examined the detention and heard the Applicant personally and examined the information provided, the chief of police fulfills these criteria.¹³⁷

Additionally, *a contrario Tibi v. Ecuador*, where the IACtHR did not accept the public prosecutor as a judicial officer because the national government did not list the public prosecutor as a body authorized to carry out judicial functions,¹³⁸ in Vadaluz the police authorities have the power to perform judicial functions under the constitution.¹³⁹

Within the right to due process of Articles 8 and 25 ACHR, the broad right of access to justice is established.¹⁴² The Court stated that “*while the right of access to a court is not absolute and therefore may be subject to certain discretionary limitations set by the State, the fact remains that the means used must be proportional to the aim sought*”.¹⁴³ When the means are not proportional, the limitations obstruct the access to justice and constitute a violation of Article 8(1) ACHR.¹⁴⁴

Directive No. 1 of 2020 of the judicial union, entailing the transition to digital filing of the applications,¹⁴⁵ was a proportional limitation aimed to guarantee the administration of justice and the health of the people of Vadaluz, despite the subsequent temporary server crash of the filing system.¹⁴⁶

The digital transition is not an unproportioned obstruction. The courts were closed in a necessary effort to avoid further spreading of the virus, which posed a substantial threat to the people of Vadaluz.¹⁴⁷ Consequently, the filing of applications could not happen in person. Therefore, the shift to digital filing of the applications ensured a normal continuation during the pandemic. As declared by the IACHR in a press release concerning pandemics, “*it is essential that states ensure there are suitable, flexible means available for filing appeals*”.¹⁴⁸ In the same vein, the European Commission for the Efficiency of Justice confirmed that “*the public service of justice must be maintained as much as possible, possibly by alternative means such as online services*”.¹⁴⁹

¹⁴² *Lagos del Campo v. Peru*, IACtHR,(2017),§174; *Goiburú et al. v. Paraguay*, IACtHR,(2006),§131.

¹⁴³ *Cantos v. Argentina*, IACtHR,(2002),§54.

¹⁴⁴ *Ibid*,§54; *Acosta et al. v. Nicaragua*, IACtHR,(2017),§163.

¹⁴⁵ Hypothetical,§25-26.

¹⁴⁶ *Ibid*, §29.

¹⁴⁷ Hypothetical,§25-26.

¹⁴⁸ IACHR. *Press Release IACHR Calls for Guarantees for Democracy and Law during the COVID-19 Pandemic*,(2020).

¹⁴⁹ European Commission for the Efficiency of Justice. *Declaration Lessons learnt and Challenges faced by the Judiciary during and after the COVID-19 Pandemic*,(2020),principle 2.

The two challenges associated with this shift to online proceedings did not amount to an intrusion on the access to justice, disproportionate to the aim of protecting public health and continuing the administration of justice.

Firstly, the slightly slowing effect associated with a sudden change in operations does not invalidate the proportionality of the digitalization. While some acclimation efforts were required from the judicial personnel, and while the new system required some optimization, the judiciary continued to improve its functioning. So much so that both applications filed by the Applicant were adjudicated within the respective domestic time limits (*infra* B.b.vii.-viii.). The digital transition was therefore no disproportionate intrusion to the access to justice and does not constitute a violation of Article 8(1) *juncto* 1(1) ACHR.

Secondly, the server crash did not affect the proportionality either. It was only a temporary and technical issue due to the rapid emergence of the digital portal. Some time was needed to optimize the functioning of the relevant software programs. In *Aguado-Alfaro et al.*, the Court established a violation of Article 8 ACHR because the applicants were *ab initio* prohibited to contest the effects of a decree-law.¹⁵⁰ However, for Mr. Chavero the server crash was merely a temporary hindrance.

Generally, it must be emphasized that the judicial system gradually adapted to the extraordinary circumstances and continued to improve its functioning, to the extent that it still managed to process the applications in time, along with thousands of others in the first week of the transition.¹⁵¹

¹⁵⁰ *Aguado Alfaro et al. v. Peru*, IACtHR,(2006),§119.

¹⁵¹ Hypothetical,§30; CQ 14.

The Applicant did not experience unproportioned limitations to his right of access to justice and the State has since improved the digital portal to diminish the limitations. Consequently, there was no violation of Articles 8 and 25 *juncto* 1(1) ACHR.

- vii. The State did not violate Articles 7(1), 7(6) and 25 *juncto* 1(1) ACHR regarding the writ of *habeas corpus*

Article 7(6) ACHR entails a right to file a petition of *habeas corpus*¹⁵² and is seen as an application of the more general right to a simple, prompt and effective judicial recourse against fundamental rights violations enshrined in Article 25 ACHR.¹⁵³

It constitutes three requirements, namely (a) one must have recourse to a competent court¹⁵⁴, (b) the court must rule on the lawfulness of the detention without delay¹⁵⁵ and (c) the recourse must be effective¹⁵⁶. The State did not violate Articles 7(1) and 7(6) ACHR on account of any of these requirements.

Firstly, the competence of the trial court, that Ms. Kelsen herself approached,¹⁵⁷ is not at issue here. In any case, the trial court, as part of the judiciary of Vadaluz, meets the demand that the body adjudicating the writ must be a judge or a court.¹⁵⁸

Secondly, the Court must rule on the lawfulness of the detention without delay. The Court has not established an ultimate time limit in which this requirement demands the proceedings to be

¹⁵² *Advisory Opinion OC-8/87*, IACtHR, (1987), §33

¹⁵³ *Ibid* §32,34.

¹⁵⁴ Article 7(6) ACHR; *Espinoza González v. Peru*, IACtHR, (2012) 10 G., (9) -171(I)- m0reW*Ts1pA 0.00000912 0 612 792

concluded in, nor has it established a clear general framework to analyze this requirement in.¹⁵⁹ It is only clear that it

elapsed between the filing and the adjudicating of the writ. The State however emphasizes that it cannot be argued that the writ was filed on March 4, 2020, and that consequently an eleven-day period would have passed. It is clear from the facts that Ms. Kelsen neglected to attempt to file a writ through the judiciary's virtual portal on March 4, 2020, even though at that time she was already aware this would be the course to take in light of the emergency measures. For this reason, it would not be reasonable to locate the moment of filing at that point in time.

According to the domestic law of Vadaluz the time limit to process an *habeas corpus* writ is ten days. This means the ten-day period that elapsed between filing and adjudicating in any case meets the requirement of compliance with domestic time limits, the prime criterion the IACtHR has put forward in this regard.

With regard to further requirements of the principle of without delay, the ten-day period also passes the test. Previously, the IACtHR has found issues with periods of similar lengths.¹⁶³ The State, however, wishes to stress the circumstances that need to be taken into consideration in this individual case.

As has been elaborated upon under section B.b.vi., while the transitioning to a virtual system might have caused somewhat of a delay, it remained proportional to the aim of guaranteeing both the health of the citizens and the continued administration of justice.

Additionally, unlike most cases in which the Court has expressed itself on the timeliness of *habeas corpus* proceedings,¹⁶⁴ there were no indications that the Applicant was in any immediate risk of

¹⁶³ IACHR. *Resolution Nativi & Martínez v. Honduras*, (1987), §160.

¹⁶⁴ IACHR. *Resolution Nativi & Martínez v. Honduras*, (1987); *Tibi v. Ecuador*, IACtHR,(2004); “*Juvenile Reeducation Institute*” v. *Paraguay*, IACtHR,(2004); *Bayarri v. Argentina*, IACtHR,(2008); *Peasant Community of Santa Barbara v. Peru*, IACtHR,(2015).

harm to his physical integrity during his detention. The most cited reason by the Court for the need of speedy proceedings, is in other words not present in this individual case.

With those mitigating circumstances in mind, the ten-day period cannot be seen as a delay leading to a violation of Article 7(6) ACHR.

Thirdly, the *habeas corpus* proceedings were effective. The criterion of effectiveness hails from Article 25(1) ACHR. The Court has clarified that a remedy is effective if it is “*capable of producing the result for which it was designed*”.¹⁶⁵ In the context of *habeas corpus*, this means it is essential to determine that the writ was capable of realizing its purpose of guaranteeing personal liberty by bringing the detainee before a competent judge to obtain judicial determination of the lawfulness of a detention¹⁶⁶ and, should the detention be unlawful, to obtain an order for his release.¹⁶⁷ In this case, it stands to reason that the effectiveness of the writ cannot be seriously challenged on these grounds.

The purpose of the *habeas corpus* writ cannot be said to have been rendered incapable of being realized in the present case. The mere fact that it was dismissed as moot on March 15, 2020,¹⁶⁸ in no way indicates that the judiciary system would not have thoroughly investigated the merits of the case relating to the legality of the detention, and would not have ordered the Applicant’s release if its conclusion on the merits necessitated it. At the time the writ was presented before the trial court, the Applicant had already been released. It therefore rightfully concluded that the request made before it, the release of the Applicant, was without object and consequently moot.

¹⁶⁵ *Velásquez Rodríguez v. Honduras*, IACtHR,(1988),§66.

¹⁶⁶ *Advisory Opinion OC-8/87*, IACtHR,(1987),§35.

¹⁶⁷ *Suárez-Rosero v. Ecuador*, IACtHR,(1997),§63; *Espinoza González v. Peru*, IACtHR,(2014),§135.

¹⁶⁸ Hypothetical,§32.

object. It was therefore elaborated fully and explicitly, based on the facts, grounds and norms, excluding any sign of arbitrariness.

It can thus be concluded this decision was reasonably motivated and does not violate Articles 8(1) *juncto* 1(1) ACHR.

- ix. The State did not violate Articles 8(1) and 25 *juncto* 1(1) ACHR regarding the due process of the unconstitutionality action

1. Right to a reasoned ruling

The State did not violate Article 8(1) *juncto* 1(1) ACHR in this regard, because the Supreme Court motivated the dismissal of the unconstitutionality action on several grounds. The Decree restricted only rights that can be limited, did not entail a suspension of any non-derogable rights and the executive branch could not have waited for Congress, which was not in session due to the pandemic.¹⁷² Consequently, there was no constitutional violation.

The State concludes the dismissal of the unconstitutionality action was reasonably motivated.

2. Right to a hearing within reasonable time

In non-criminal proceedings, such as the proceedings on the action of unconstitutionality, the

action on that day but suffered a one-day delay due to the server crash, and May 30, 2020, consisting of a total of eighty-seven days.

There are four elements to determine whether this duration was reasonable.¹⁷⁴

The first element is the complexity of the matter. The Supreme Court was faced with the task of verifying the constitutionality of the Decree.¹⁷⁵ This required a careful analysis of all constitutional rights in light of the measures the Decree installed. Additionally, an analysis of the effects of the delay in approval by Congress was needed, as well as an inquiry into the requirements of Article 27 ACHR. The unprecedented circumstances of the pandemic, in light of which all of this needed to be assessed, made for an extremely complicated case for the Supreme Court to handle.

The second element is the conduct of the judicial authorities. The time limit to adjudicate an unconstitutionality action is ninety days under national law.¹⁷⁶ As established above, the Supreme Court decided within this time period¹⁷⁷ and therefore respected the domestic time limit.

The third element entails the procedural activity of the interested party. In *Andrade Salmón* the Court clarified this element as to whether the judicial authorities performed the interventions in the processes that were reasonably required.¹⁷⁸ It is already argued that the Applicant did not exhaust all possibilities to file the petition as soon as possible. The server crash was only temporary, and Ms. Kelsen had the opportunity to file the remedies sooner (*supra* B.b.vi.)

¹⁷⁴ *Genie Lacayo v. Nicaragua*, IACtHR,(1997),§77;*Perrone and Preckel v. Argentina*, IACtHR,(2019),§142; *Olivares Muñoz and others v. Venezuela*, IACtHR,(2020),§123.

¹⁷⁵ Hypothetical,§32.

¹⁷⁶ CQ 44.

¹⁷⁷ Hypothetical,§32.

¹⁷⁸

The fourth element is the possible adverse effect of the duration of the proceedings on the judicial

