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

Miranda is also a party to the United Nations Optional Protocol to the International Covenant on Civil and Political Rights. The fact situation does not indicate whether the petitioners have also filed a case with the UN Human Rights Committee. Miranda may argue that such a petition was filed and consequently the Commission, under article 46.1.c of the American Convention, is barred from considering the case and the case should have been declared inadmissible.

Argument for the petitioners

Admissibility

The case is before the Court, the State should not be allowed to raise issues challenging the admissibility of the case before the Commission. The case has been duly litigated and issues of admissibility have been decided by the Commission. They cannot be re-litigated before the Court (See dissents of Antonio Cançado Trindade). As regards the presentation of a petition before the UN Human Rights Committee on behalf of the same victims, petitioners may argue that the claims in that case are distinguishable from those raised before the Commission, and consequently, are not barred by article 46(1)(c).

Timing

There is no 6 (six) months problem since Freedom International presented the petition on behalf of Pérez, de Leon and Villán on July 10, 1997, at a time when the petitioners were facing the death penalty four days later. The petitioners were unable themselves to file the petition and their lawyers did not have access to them. The victims became co-petitioners on the case on January 2, 1998, as soon as they had access to their lawyers and the petition could be prepared. On July 11, 1997, the Commission requested the State of Miranda to stay their executions, which the State responded it was unable to do since the death penalty was legal in Miranda and the three individuals had had a fair trial and had been granted all the necessary due process guarantees. Miranda had flaunted the Commission's procedures from the beginning and the Commission requested provisional measures from the Court. On July 12, 1997, the Commission requested the Court to order Miranda to issue provisional measures to stay the executions. It was not until the Court ordered the stay, by a Resolution dated July 13, 1997, that Miranda finally granted the stay of execution and eventually the lawyers were permitted access to their clients.

II. Facts concerning the declaration of a state of emergency

A. Applicable norms and general considerations

Situations of emergency that threaten the independence or security of a State are governed by article 27 of the American Convention, which provides that:

> 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 of non-derogable rights by Miranda cannot be legitimized by the declaration of a state of emergency. A state of emergency, however, does permit suspension of provisions of article 7 (Right to Personal Liberty), for example, (but not 7(6) *infra*), and it permits the Executive to issue decree laws. The fact that Decree Law No. 100 on "Treason to the Democratic State" and

[1] Hypothetical Case, para. 16.

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

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[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 rights and freedoms protected by that provision and whose denial or restriction would endanger their full enjoyment."[6] By "judicial guarantees" the Court understands the Convention as referring to "those judicial remedies that are truly capable of protecting these rights. Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency."[7]

In relation to *habeas corpus*, the Court states that:

> In order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.[8]

In the *Loayza Tamayo Case*, the Court had to analyze a legal norm that provided that "at no stage of the police investigation and the criminal proceedings are guarantee actions admissible for persons detained for, implicated in, or on trial for the crime of terrorism [.]"[9] The Court considered that the application of this norm denied the detained woman the right to bring a guarantee action to protect her freedom or to question the lawfulness of her detention. Consequently, the Court found that the State had violated Mrs. Loayza Tamayo's rights to personal liberty and to judicial protection under the American Convention.[10]

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[5] I/A Court H.R. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights),* Advisory Opinion OC-9/87 of October 6, 1987, Ser. A, No. 9 1987, para 21.

[6] 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. 29.

[7] Id., para. 30.

[8] Id., para. 35.

[9] I/A Court H.R., *Loayza Tamayo Case*, Judgment of September 17, 1997, para. 51.

[10] *In the Case of Neira Alegría et al*., Judgment of January 19, 1995, the Court found that the right of habeas corpus established by Article 7(6) had been violated in connection with the prohibition contained in Article 27(2) of the Convention since, although the habeas corpus procedure was not expressly suspended, the way in which the decrees declaring the state of emergency were enforced had the effect of suspending that remedy (see paras. 77 through 84 and 92(2)).

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 state of emergency in Miranda.

A. Applicable law and general considerations

There are preliminary questions regarding the “legality” under Mirandan law of the two decree laws, since they were issued prior to the declaration of the state of emergency and are in conflict with the Mirandan Constitution. Article 134 of the 1959 Constitution states that “active service members of the military shall be tried in military courts for the crimes committed while in service, and that civilians shall not be subject to military tribunals except in the interest of national security.” There is no information in the fact situation that the President, upon declaring a state of emergency, suspended the Constitution and thus we can presume that the Constitution is still in force. Decree Law No. 101 provides for trials to take place before three judges, a civilian judge accompanied by two military judges, and a conviction requires the vote of two of the three judges. Since the two military judges can be expected, although not necessarily, to vote together, the petitioners might argue that this is really a military tribunal, the civilian judge can be dispensed with, in clear violation of article 134 of the Constitution, which prohibits the trials of civilians by military judges. The State, for its part, can be expected to argue that such military trials are “legal” under the Constitution since article 134 provides the exception that civilians may be tried by military tribunals “in the interest of national security.”

Secondly, Article 135 of the 1959 Constitution provides that “the death penalty shall only be imposed for the most serious crimes.” Decree Law No. 102, also issued on October 1, 1996, prior to the declaration of the state of emergency, allowed for the imposition of the death penalty for those convicted for the crime of “Treason to the Democratic State.” The petitioners can be expected to argue that this provision violates article 4(3) [”The death penalty shall not be reestablished in states that have abolished it.”] of the American Convention and the general abolitionist tendency thereof, whereas the State may argue that “Treason” is clearly one of the most serious crimes in any Penal Code and has always existed in the Mirandan Penal Code and

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:

> Article 8 recognizes the concept of 'due process of law,' which includes the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination…. The concept of due process of law expressed in Article 8 of the Convention should be understood as applicable, in the main, to all the judicial guarantees referred to in the American Convention, even during a suspension governed by Article 27 of the Convention.[11]

Accordingly the question of whether the declaration of emergency was objectively justifiable or not, the guarantees of article 8 are fully applicable to the present facts.

B. Whether the detention and trial of Alejandro Pérez and the other leaders of the FPFM violated article 8 and 25 of the Convention

1. Was the tribunal independent and impartial?

Pursuant to Decree Law No. 101, the court was composed of three judges, a civilian judge accompanied by two military judges trained in law and licensed to practice in Miranda. A conviction requires the vote of two of the three judges. The three judges were to sit behind a colored glass window so that the accused and his lawyer could not identify them. This provision was designed to guarantee the security and safety of the judges, many of whom, in the past, had received death threats and feared for their lives.

Argument for the petitioners

The UN Human Rights Committee has stated in its General Comments that:

> The provisions of article 14 [of the ICCPR] apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for

[11] See I/A Court H.R., *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87 of October 6, 1987, (Ser. A) No. 9, paras. 28-29.

> the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice.[12]

In the Report of the Commission of International Jurists ("*Comisión de Juristas Internacionales*" hereinafter "CJI") on the Administration of Justice in Peru, also known as "The Goldman Report," the CJI, regarding the issue of independence of military courts stated:

> When these officers [the military ones] assume the role of judges, they are still subordinated to their superiors in keeping with the established military hierarchy. The manner in which they fulfill their assigned task will play a decisive role in their future promotions, professional rewards, as well as assignment. Their dependence is determined by the very nature of the military institution. Consequently, military justice becomes a derivative of the policies inspired and directed by the military command…. Where, as here, the putative defendants before these tribunals are the military's avowed enemies, then we simply do not believe that these courts can be considered to be objective finders of fact and dispensers of impartial justice….[13]

The Court created by DL 101 is a specialized one inasmuch as it has been created to try only persons charged with the crime of Treason. Two of the three judges are military judges and a conviction would not require a unanimous vote, but only the vote of two of the three judges, which gives the military members the power to convict and gives the court a military character. In addition, Decree Law No. 101 states that if the accused does not have a lawyer he would be provided with a "military" court-appointed lawyer, again emphasizing the military character of the tribunal. Thus, the court's independence and impartiality are undermined.

Even if the presence of the two military judges on the court is not enough, by itself, to undermine its independence, the restrictions on the due process guarantees established by DL 101 do not reduce the scope of guarantees of article 8 of the American Convention. The CJI, regarding the relationship between "faceless" judges and the requirement of impartiality, has stated that:

> In our opinion, basic notions of fairness, at a minimum, require that a defendant in any criminal proceeding know who is judging him and that this person is competent to do so, i.e. that he possesses the requisite legal training and experience commensurate with his solemn responsibility. The anonymity of these judges not only robs the defendant of this basic safeguard, but also violates his

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[12] Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994), p. 14.

[13] Report of the Commission of International Jurists on the Administration of Justice in Peru, November 30, 1993, at 38.

> 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 has a democratic elected government but relies on the military to assist in times of national crisis and to preserve national security. For a democratically-elected president to invoke the assistance of the military does not convert the State into a military dictatorship. Even assuming that it is a military court, according to the UN Human Rights Committee:

> While the Covenant does not prohibit such categories of [military] courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.[16]

Consequently, the trying of civilians by military courts is not inherently incompatible with the guarantees of due process, but such trials may be established only during exceptional conditions, and they must respect all due process guarantees as was the case with this court.

The CJI stated the following regarding Peru's military courts: "In the civilian courts, all the judges that try the facts and make a legal determination in the case are members of the legal profession. In the military courts only one of the five judges on the panel is an attorney, the other four members are career military officers who have no legal training."[17] The conclusions of the CJI as to the lack of independence of these tribunals were, at least partially, due to the fact that the majority of the judges were not trained in law, and not only to the fact that they were members of the military. In the court in question in this case, all the judges, regardless of their military or civilian origin, are trained in law and licensed to practice law in Miranda.

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[14] Id., at 34.

[15] Hypothetical Case, at para. 19.

[16] Human Rights Committee, *supra*, para. 14.

[17] Report of the CJI, *supra*, at 38.

As to the "faceless" character of the judges, the situation of internal armed conflict and the threats to the judges made it necessary to protect them by preventing the accused and their lawyers from identifying them and turning them into future targets. Although the threats were "in the past" the State must always be vigilant and take measures to protect those who are vulnerable.

Finally, the judgment of the court could be appealed, as it was, before the Supreme Court of Miranda, which was neither military nor "faceless." So, even assuming that the court that tried the FPFM leaders was a military one and its impartiality was questionable, the judgment was reviewed by a civilian court whose independence and impartiality cannot be questioned.

2. Whether the detention and trial violated article 8(2) (the presumption of innocence)

Argument for the petitioners

Pursuant to article 8.2 of the American Convention: "Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law." One of the derivations of this rule is the principle 'in dubio pro reo,'[18] that any reasonable doubt must be resolved in favor of the accused. By providing that a reasonable doubt would be solved in the light of the "democratic ideals of the New Miranda", DL 101 sets a standard that is unlike the 'pro reo' standard derived from the presumption of innocence guarantee. Such a political criterion leads to an evaluation of the evidence that is incompatible with the presumption of innocence.

Moreover, the "democratic ideals" standard is a highly imprecise one which could easily lead to a conviction, particularly taking into account the following background:

> a) A recent situation of internal war against terrorists that allegedly threaten the life of the nation and its democratic system giving rise to the declaration of state of emergency. It would follow that the need for preserving the nation should prevail.
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> b) The criterion is a discriminatory one as long as it is different from the general criteria for weighing evidence set forth in the criminal procedure code of Miranda. Given the fact that the ordinary criterion is compatible with the presumption of innocence, the implementation of this special criterion should be interpreted as a derogation of the presumption of innocence guarantee in these trials.
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> c) Apart from being applicable to only one specific crime, the crime at issue is called "treason against the democratic state". Thus, the component of nationalism

[18] Julio B. J. Maier, Derecho Procesal Penal Argentino, p. 257, "The conviction, sentence and hence, the application of a punishment, can only rely upon the certainty of the judging tribunal as to the existence of a punishable offence which the accused is responsible for." Cited also in the complaint presented by the Inter-American Commission on H.R. before the Inter-American Court in the *Maqueda Case*.

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

The expression at issue ("democratic ideals of the New Miranda") is not too different from other ones like the "sana crítica", used by the Inter American Court.[19] In addition, the DL provision at issue echoes the principles set forth in the American Convention and affirms them.

When DL 101 refers to "democratic ideals", it tries to take into account no more than the democratic values embodied in different instruments of the inter-American system.[20] The Inter-American Court has noted that there exists an inseparable bond between "the principle of legality, democratic institutions and the rule of law."[21] Stating that while weighing the evidence the judge must take into account democratic ideals could hardly be seen as incompatible with any of the rights set forth in the American Convention, especially as regards the right to the presumption of innocence.

3. Whether the trial violated article 8(2)(c) and (d)(adequate time and means for the preparation of his defense and right of the accused to defend himself and to communicate freely and privately with his counsel)

Pursuant to DL 101, the defense attorney would only be permitted to consult the file (but not to copy it) in order to inform himself of the charges and evidence against his client. The judges could, in the interest of protecting the privacy of individuals, strike names and other sensitive information from documents on file, and mandate video depositions of witness. In the interest of a speedy trial, the Government is required to present its case within two weeks, and the defense is granted an equal amount of time. During the first week of detention the prisoners were held incommunicado. Thereafter, each prisoner was permitted private visiting rights of three hours per week. After a month in the police detention center the leaders of the FPFM were tried.

Argument for the petitioners

In the Suarez Rosero case, regarding an incommunicado detention of 36 days, the Inter-American Court held that "Mr. Suarez Rosero was denied adequate opportunity to prepare his defense, since he did not have the legal assistance of a public defender and, once he was able to obtain legal counsel of his own choosing, he was unable to communicate with him freely and

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[19] I/A Ct .H.R., *Paniagua Morales et al. case, Judgment* of March 8, 1998. Series C No. 37, para. 76; *Castillo Páez Case - Reparations,* Judgment of November 27, 1998, para. 40.

[20] OAS Charter, Declaration of Santiago 1959, Resolution 1080, et al.

[21] Habeas Corpus in Emergency Situations, *supra*, para. 24.

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 effective, then it should be permitted from the time of the prisoner's arrest. Denying prisoners access to independent counsel until days after their arrest and during police interrogations utterly defeats the basic purposes underlying this most fundamental right.[23]

In the instant case, the detainees were kept incommunicado for 7 days without the possibility of consulting legal counsel. Therefore, this is a violation of article 8(2)(c) and 8(2)(d) of the American Convention. Article 8(2)(c) and (d) provide that:

> Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: c. Adequate time and means for the preparation of his defense; d. The right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel.

Regarding, *inter-alia*, the difficulties that some Peruvian lawyers faced while trying to get a hold of a client's case file, the CIJ said that those restrictions made the task of defenders of choice all but futile, relegating them to playing a largely symbolic role in the trial proceedings.[24] Therefore, the difficulties encountered by petitioner's lawyers in the instant case amount to a violation of the right set forth in article 8(2)(c) and d of the Convention.

Regarding the military trial periods established in the treason laws in Peru, the CJI stated:

> …a treason trial can be completed within ten days, and an appeal to the Supreme Council of Military Justice in just five days The exceptional shortness of these military trial periods together with other obstacles and *de jure* restrictions

[22] I/A Ct. H.R., *Suarez Rosero Case,* Judgment of November 12, 1997, Series C No. 35, para. 83.

[23] The CJI Report, *supra*, at 31.

[24] Id., at 33.

> 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 time and means for the preparation of his defense." If the period for the defense is regarded as short it must be recognized that the time for presentation of the case is the equal to the amount of time allotted to the State to prepare its case. The American Convention does not specify how much time is "adequate" for the preparation of the defense.

4. Whether the trial violated article 8(2)(f) (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 facts).

Pursuant to DL 101 the judges could, in the interest of protecting the privacy of individuals, mandate video depositions of witnesses (allow cross examination by both parties while protecting identity of the deposed).

Argument for the petitioners

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[25] Id., at 39.

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 facts"). In this context, the European Court stated:

> Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperiled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defense are balanced against those of witnesses or victims called upon to testify.[27]

In the European case, as in this one, during the questioning of the witnesses, the defense counsel was present and was allowed to ask questions. The Court found that "in the circumstances the 'counterbalancing' procedure followed by the judicial authorities in obtaining the evidence of witnesses Y.15 and Y.16 must be considered sufficient to have enabled the defense to challenge the evidence of the anonymous witnesses and attempt to cast doubt on the reliability of their statements."[28] Further, "…even when 'counterbalancing' procedures are found

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[26] *Id.* at 33.

[27] E. Ct. HR, *Doorson v. The Netherlands*, Judgment of February 8, 1996, para .70.

[28] *Id.*, para. 75.

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 acted in blatant disregard of the petitioners' physical and moral integrity. Since there is no information regarding the ratification of the Convention, the petitioners may assume that Miranda has indeed ratified it. There is no doubt that from the moment the petitioners were arrested by State agents, their rights under articles 5 of the American Convention and articles 5 and 10 of the Torture Convention were placed in jeopardy. For example, the facts clearly establish at the time of their arrest, the petitioners were unarmed and in no way posed a threat to State agents, and that the State agents nevertheless used force against the petitioners while attempting to take them into custody, and killed González, who was unarmed.

Arguments for the State

Members of FPFM, Alejandro Pérez, Leandro de Leon and Alfredo Villán were sentenced to death for committing "Treason to the Democratic State." This crime was defined as heinous and deserving of such sentencing by Decree Law No. 100, a domestic legal remedy which establishes that treason is committed by, "a) anyone who belongs to the leadership of a terrorist organization be it as leader, head, chief or another equivalent; b) anyone who belongs to an armed group which is dedicated to the destruction of the state or the physical elimination of persons; c) anyone who publishes information of propaganda in the media supporting the activities of a terrorist organization."[30] The facts do not reveal whether the petitioners were actually tortured.

C. Torture and cruel and inhuman treatment (violation of Article 5 of the American Convention)

1. Detention

[29] *Id.*, para. 76

[30] Hypothetical Case, para. 18.

Argument for the Petitioners

While the detention of the petitioners may not have been arbitrary, since the State arguably had reasons to question them on their subversive activities, it is nonetheless clear that the conditions of their detention were in violation of the Convention. Specifically, during the first seven days of detention, the petitioners were held incommunicado and thereby denied access not only to their families, but also to their attorneys and consulates. Afterwards, access to these individuals, while not prohibited, was greatly limited to only three hours a week.

Argument for the State

Miranda's police detained several members of the FPFM without violating Article 5 of the Convention. The officers who apprehended the petitioners were upholding the President's vow never "to negotiate peace treaties with terrorists." Article 5 of the American Convention states that an "[a]ccused persons shall [...] be subject to separate treatment as unconvicted persons." Miranda upheld this article of the American Convention while serving the needs of the State.

2. Forced confessions

Arguments for the petitioners

Article 5 of the Inter-American Torture Convention provides, in pertinent part, that: "Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture." The State violated petitioners rights when they forced them to make incriminating confessions during their detention which then became the basis for the charges presented against them and constituted the evidence to convict them. The State flatly denies that the petitioners were subjected to any kind of torture but have not offered convincing proof that this is the case. In fact, the State has simply made the sweeping allegation that there was no torture, without ever investigating the petitioners' claims (Answer to question 6). According to Velasquez the burden of proof lies on the State to show that torture did not occur. Lacking any evidence by the State disproving the petitioners' allegations of torture, the Court must conclude that the petitioners were, in fact, tortured.

Arguments for the State

While the Petitioners claim to have been tortured to force a confession, there is no evidence of such torture. Furthermore, Miranda does not bear the burden of proof on that issue.[31] There is no proof of torture because petitioners were not tortured. In fact, Miranda was in compliance with Article 5 of the Convention. The "punishments consisting of deprivation of

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[31] *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), in which the State is not burdened until there is evidence *contrary* to its claims.

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)

Arguments for the petitioners

Since the confessions of the petitioners were obtained through torture, these confessions should not be considered persuasive; as they constitute evidence contaminated by the State. Therefore, the conviction and death penalty sentence upheld by the Miranda Supreme Court against petitioners should be considered a miscarriage of justice, and a clear violation of the petitioners' rights under article 8(3) of the American Convention and article 10 of the Torture Convention.

Article 8(3) of the American Convention provides that "A confession of guilt by the accused shall be valid only if it is made without coercion of any kind." Article 10 of the OAS Torture Convention provides: "No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means."

This being the case, the petitioners are entitled to compensation by the State. In the *Loayza Tamayo Case*, the Inter-American Court ruled that the State was responsible for the violations against the rights to humane treatment and judicial protection articulated in article 5 of the American Convention and that the State must compensate individuals for sentences delivered against them in violation of this article.[33]

Arguments for the State

There is no law in Miranda that regulates the right of a person to be compensated as the result of a judicial error. While this is the substance for Article 10 of the Convention, in the necessity of the State was to choose the lesser evil: allow the citizens of Miranda to be victimized by terrorists or apprehend members of FPFM. Because the Petitioners' had in their possession an "arsenal of weapons,"[34] Miranda police felt justified in using force during the apprehension.

D. Whether the trial violated article 8(2)(h) (right to appeal the judgment to a higher court)

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[32] American Convention on Human Rights "Pact of San Jose", Nov. 22, 1969, art. 5(6).

[33] *Supra* note 9.

[34] Hypothetical Case, para.17.

Argument for the petitioners

The judgment issued by the trial court was not issued by an independent and impartial tribunal. So, it cannot be considered a first instance judgment appealable before the Supreme Court of Miranda. The Supreme Court judgment is actually the only judgment issued by an independent and impartial court as required by article 8 of the American Convention. Therefore, Pérez and others did not have right to have the judgment reviewed by a higher court. Moreover, since the Supreme Court, when issuing its decision, had to limit its scope to the law, in this case it cannot even be said that there was a proper first instance judgment.

Argument for the State

The trial court's judgment could be appealed, as it was, before the Supreme Court of Miranda. Then, the petitioners exercised their right to appeal to a higher court. The fact that this tribunal could not take into account issues of fact does not matter inasmuch as article 8(2)(h) does not make any relevant distinction.

E. Whether the conditions of the trial, per se, violated Article 8 of the Convention

Despite the conditions of the trial of the FPFM's leaders, they were convicted by the unanimous vote of the judges of the tribunal. The judgment relied upon a confession allegedly made by them under torture but, at the same time, publicly and without any coercion, they confessed to having committed the acts attributed to them. Finally, this same circumstance means that the court made no use of other evidence, allegedly presented at the trial in violation of Article 8(2).

Argument of the petitioners

The CJI stated, regarding the courts in Peru,

> we find that they prima facie do not offer the essential guarantees of independence and impartiality and that their procedures do not permit the effective exercise of minimum due process rights… Consequently, we must ineluctably conclude that persons who have been tried by these military tribunals have per se been denied the right to a fair trial.[35]

Accordingly, the mere fact of being judged by a tribunal which does not fulfill the requirements of independence and impartiality means a deprivation of rights set forth in the Convention. At the same time, the mere application of the other DL 101 provisions to the petitioner's trial has affected their guaranteed rights in violation of article 8 of the Convention, in the way required by Advisory Opinion 14. Therefore, the Inter-American Court has jurisdiction over the alleged violations of article 8.

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[35] The CJI, *supra*, at 40.

Argument for the State

The Inter-American Court has no jurisdiction as to the alleged violations of article 8. The Inter-American Court held that

> The contentious jurisdiction of the Court is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions. There is no provision in the Convention authorizing the Court, under its contentious jurisdiction, to determine whether a law that has not yet affected the guaranteed rights and freedoms of specific individuals is in violation of the Convention.[36]

In the case at hand, despite the alleged partiality of the military judges, the civilian judge also voted to convict the petitioners. The judgment relied upon a confession allegedly made by them under torture but at the same time, publicly and without any coercion, they confessed to having committed the acts attributed to them. This means that the court need not make use of other evidence allegedly presented in violation of article 8(2) of the American Convention. Nor does the court need to make use of them in the Supreme Court of Miranda, whose impartiality is not in question, when reviewing the judgment issued by the inferior tribunal. Therefore, the Inter-American Court cannot issue a pronouncement as to those pleadings because, despite the possible failures that the created DL 101 process may have in principle, the application of this process to the petitioners did not result in any concrete grievances by them.

V. The issue of the Death Penalty

The Constitution of 1959, reinstated by President Antonio Cruz in 1988, did not prohibit the death penalty and provided that it would be applied only for the most serious crimes. Decree Law No.102 was promulgated on October 1, 1996, enabling the death penalty to be imposed on persons convicted of the crime of 'treason against the democratic state.' The State of Miranda ratified the American Convention on Human Rights on June 3, 1989, without reservation.

Applicable norms and general considerations:

Article 4 of the Convention states:

> 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
>
> 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment,

[36] Inter-Am.Ct.H.R., "International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)", Advisory Opinion OC-14/94 of December 9, 1994, (Ser. A) No. 14 (1994), para. 49.

enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

The Convention prohibits the extension of the death penalty to crimes for which such punishment was not provided for.[37] In Advisory Opinion OC 3/83, the Commission put the following question to the Court: *May a government apply the death penalty for crimes for which the domestic legislation did not provide such punishment at the time the American Convention on Human Rights entered into force for said state?* The Court responded with the unanimous opinion that, "the Convention imposes an absolute prohibition on the extension of the death penalty and that, consequently, the Government of a State Party cannot apply the death penalty to crimes for which such a penalty was not previously provided for under its domestic law."[38]

Article 4(2) establishes in fine that, "the application of such punishment shall not be extended to crimes to which it does not presently apply." On this article the Court states that: "Although in the one case the Convention does not abolish the death penalty, it does forbid extending its application and imposition to crimes for which it did not previously apply. In this manner any expansion of the list of offenses subject to the death penalty has been prevented."[39]

The Court also stated that:

[...] in interpreting the last sentence of Article 4 .2 "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose " [Vienna Convention, article 31.1], there cannot be the slightest doubt that Article 4.2 contains an absolute prohibition that no State Party may apply the death penalty to crimes for which it was not

[37] American Convention on Human Rights "Pact of San Jose", Nov. 22, 1969, art. 4(2), *supra*.

[38] I/A Court H.R., restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83 of September 8, 1983, Ser. A No. 3 (1983).

[39] *Id.*, para. 56.

> 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 aforementioned provision in relation to the State making the reservation. Such a reservation, of course, would have to be compatible with the object and purpose of the treaty.[40]

In addition, the Court has established that:

> The Court finds that the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the state in question.[41]

VI. The issue of the Amnesty Law

Decree Nº 103 (Amnesty Law) extended the provision contained in Decree Law Nº 999 to cases of military and police personnel involved in the "four-month war." This legal norm was applied in the case of the army captain who shot at short range and caused the death of Arturo González (head of the armed dissident group), who was unarmed at the time of the military assault. The army captain in question was tried by a military tribunal, which abstained from finding him guilty,[42] because of his honorable conduct in the fight against the FPFM and his cooperating with the investigation.

Applicable Legal Norms and General Considerations

The case law of the Commission establishes as incompatible with the Convention those laws that prevent substantiation of criminal proceedings designed to verify serious violations of human rights. In several individual cases brought against Argentina, Uruguay, Chile, El Salvador and Peru, the Commission has stated that laws that make it impossible to investigate human rights violations, to identify their authors, accomplices and accessories after the fact, and to impose the corresponding punishments, violate the American Convention.

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[40] *Id*., para. 59.

[41] International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of December 9, 1994, I/A Court H.R. (Ser. A) No. 14 (1994), para. 50. FN36

[42] Decree Law Nº 999 provided that offences pardonable by amnesty were to be investigated, their perpetrators tried, and, as the case warranted, found guilty. Nevertheless, the military tribunal did not pass a guilty verdict on the army captain.

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 agreement between the political parties and the Armed Forces in August 1984 and in order to complete the transition to full constitutional order, any State action to seek punishment of crimes committed prior to March 1, 1985, by military and police personnel for political motives, in the performance of their functions or on orders from commanding officers who served during the de facto period, has hereby expired.[46] The law was declared constitutional by the Uruguayan Supreme Court and was approved by a national referendum. In both cases the Commission determined that the laws were incompatible with Article XVIII (Right to a Fair Trial) of the American Declaration and with Articles 1, 8, and 25 of the American Convention.[47]

In relation to the judicial guarantees under Article 8(1) of the Convention, the Commission established that, in countries where it is allowed, access by the victim of a crime to the courts is a right that the State has the obligation to respect and ensure under Article 1(1) of the Convention. Given that the laws of both countries prevented the petitioners from exercising that right, the Commission resolved that the States violated Article 8 of the Convention.

[43] Law Nº 23,492.

[44] Law Nº 23,521.

[45] Presidential Decree of Pardon Nº 1002.

[46] *Mendoza et. al.* v. Uruguay, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report No. 29/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 154 (1993).

[47] IACHR Annual Report 1992-1993, Report Nº 28/92 (Argentina) of October 2, 1992, and Report Nº 29/92 (Uruguay) of the same date.

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 taking measures to prevent it or to punish those responsible."[50] "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation,"[51] "...If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction."[52] As for the obligation to investigate, it states that the investigation "...must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government..."[53]

In the case of Chile, the legal norm challenged was an amnesty decree law issued under the military regime. Later, under democratic rule, the Supreme Court of Chile declared that the amnesty decree was constitutional and must be applied. In addition, the democratic government set up the National Commission for Truth and Reconciliation with the aim of establishing the

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[48] *Velasquez Rodriguez Case, Judgment* of July 29, 1988, I/A Court H.R. (Ser. C) No. 4 (1988).

[49] Id at para.166.

[50] Id., at para. 173.

[51] Id., at 174.

[52] Id., at para. 176.

[53] Id., at para. 177. *See also* Case 10.029 (Paraguay),, Inter-Am. C.H.R Report Nº 28/99 at para50; and Case 10.147 (Argentina) at para. 40., Oct. 2, 1992.

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 American Convention, that the ruling of the Supreme Court violated the provisions of Article 1(1) and 2 of the Convention, and that the dismissal in criminal trials brought as a result of the detention and disappearance of the persons on whose behalf the proceedings were instituted "violate the right to justice of the families of the victims, the right to identify the perpetrators, establish their liability, impose fitting sanctions and obtain legal redress."[54]

With respect to the right to know the truth, the Commission said:

> In the particular case of Chile, the Truth and Reconciliation Commission carried out a commendable task, by gathering information on human rights violations and on the situation of those "disappeared", with a view to establishing their whereabouts, as well as the corresponding measures to redress their rights and clear their name. However, neither the investigation of the crimes committed by State agents nor their identification and punishment was allowed. Through the amnesty decree, the Chilean State impeded the realization of the right of the survivors and the families of the victims to know the truth.[55]

The Commission found that the Chilean State had violated Articles 2, 8, and 25 of the Convention because of the fact that it has not adapted its legislation on amnesty to the provisions of the Convention, and it recommended to the Chilean State that it adjust its domestic legislation in order to comply with the provisions of the American Convention, in order that the human rights violations of the de facto military government might be investigated, the perpetrators identified, their responsibility established and that they might be effectively punished, thus guaranteeing for the victims and their families the right to justice. The Commission further recommended that the families of the victims receive compensation for the damages incurred.

Finally, in the case of El Salvador, after an armed conflict that lasted from 1980 to 1991, peace was signed under the auspices of the United Nations. A truth commission was created that published a report on the serious human rights violations it investigated, and subsequently the National Congress approved an amnesty law.

The Commission concluded that the State had violated: Article 8(1) by preventing the victims from obtaining redress in the civil courts; Article 25 due to the fact that the amnesty law denied the victims an effective judicial remedy against the crimes denounced; its obligation to investigate; and the right to know the truth.[56]

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[54] Case 11.505, Inter-Am. C.H.R Annual Report 1997, Report Nº 25/98 of April 5, 1998 (Chile), OEA/Ser. L/V/II. 98, doc. 6 rev (13 April 1998), at para. 103.

[55] Id., at para. 97.

[56] Case 10.480 (El Salvador), Inter-Am. C.H.R Report Nº 1/99 approved on January 27, 1999, at para. 147.

As to the obligation to investigate:

> The IACHR considers that, despite the importance of the Truth Commission in establishing the facts relating to the more serious violations and in promoting national reconciliation, the functions it performs cannot be considered an adequate substitute for the judicial process. Neither do those functions substitute the obligation of the State to investigate any violations committed within its jurisdiction, to identify those responsible, to impose punishment and to ensure the victim adequate compensation (Article 1.1 of the Convention).[57]

With respect to the right to know the truth, the IACHR maintained that: "The right to know the truth about the events that gave rise to the serious human rights violations that took place in El Salvador, together with the right to know the identity of those who participated in those violations, constitutes an obligation that the State has to the relatives of the victims and to society as a consequence of the obligations and duties assumed by that country in its capacity as a State Party to the American Convention on Human Rights. Those obligations arise fundamentally from the provisions contained in Articles 1.1, 8, 25, and 13 of the aforesaid convention."[58]

Arguments for the petitioners

The petitioners should mention the case law of the Commission that establishes the incompatibility of amnesty laws with the obligations accepted by Miranda in ratifying the Convention. They should also state that the failure to convict the army captain violates their rights to judicial guarantees, to judicial protection, to know the truth, and the obligation to investigate. The petitioners should also allege that, despite the existence of a criminal proceeding, in accordance with the above-cited case law of the Commission and of the Court in the Velásquez Rodríguez Case and related cases, the failure to punish the agent of the state violates the State's obligations. Moreover, the failure to deliver a guilty verdict violates the amnesty decree.

Arguments for the State

The State may argue that the existence of a judicial investigation in the case means that the judicial guarantees under Article 8, judicial protection under Article 25, the obligation to investigate, and the right to know the truth were not violated. Furthermore, the existence of a truth commission favors that interpretation.

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[57] Id., at para. 146.

[58] Id., at para. 148

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.