

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.

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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

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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.

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

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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

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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

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Argument for the petitioners

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

Argument for the State

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

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

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

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

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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.

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.

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

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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:

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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, with full equality, 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

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

Argument for the State

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

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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

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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

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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.

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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

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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

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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.

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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.

⁵⁷ Id., at para. 146.

⁵⁸ Id., at para. 148

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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