

**EIGHTH ANNUAL INTER-AMERICAN
HUMAN RIGHTS MOOT COURT COMPETITION**

VALENCIA ET AL. v. LIBERTÉ

BENCH MEMORANDUM¹

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

....

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

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

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

I. INTRODUCTION

A. The focus of the hypothetical case

The member States of the Organization of American States (“OAS”) have placed special value and emphasis on representative democracy as the system through which the peoples of the Americas can achieve their common goals. In recent years, the system has devoted special attention to defining the elements of representative democracy, and the attendant rights of individuals and obligations of States. Taking the adoption of the Inter-American Democratic Charter in 2001 as a point of departure, this year’s hypothetical examines the linkages between democracy, human rights and the rule of law. Drawing from the basic principles and purposes of the OAS, the Inter-American Democratic Charter recognizes that the “peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it,” and that respect for human rights and the rule of law are “essential elements of representative democracy.”³

The context of this year’s hypothetical – a declaration of emergency involving limitations on certain individual rights – calls upon the participants to analyze the interrelation between democracy and human rights. Within the inter-American system, the very legitimacy of such emergency measures depends on their having been adopted for the purpose of defending a democratic system. Historically such measures have often been abused by non-democratic regimes seeking to maintain power through illegitimate means. This year’s hypothetical case seeks to explore the line between permissible and impermissible state action involving limitations on the rights of individuals in times of serious threat.

Within the context of the declaration of emergency, the hypothetical presents three central questions. The first concerns limitations applied to the right to personal liberty, with the additional factor that the individuals affected were youngsters whose rights required special protection. The second addresses changes in the conditions under which an electoral contest was carried out, with the third concerning limitations on the right to organize within a trade union in order to carry out a strike. With respect to each issue, participants need to consider whether the right in question might permissibly be subject to limitation, and if so under what conditions. With respect to the latter, participants must consider the extent to which the Executive is entitled

³ The Charter of the OAS establishes the promotion and consolidation of representative democracy as one of the essential purposes of the Organization. In 1991, the member States adopted Resolution 1080, providing for a system to collectively address situations involving the interruption of democracy. In 1997, the Protocol of Washington entered into force, providing that the Organization may suspend any member whose democratically elected government has been overthrown by force. The Summit process (periodic meetings of the Heads of State of the Americas) has played a strong role in furthering the implementation of these principles. In fact, the Inter-American Democratic Charter was developed in response to a mandate of the 2001 Summit of the Americas.

In terms of the key human rights instruments, the American Convention refers in its preamble to the goal of consolidating a system of social justice, based on the essential rights of man, “within the framework of democratic institutions.” It recognizes the right to vote and to stand for election, which is not subject to derogation. Further, the Convention indicates that its terms may not be interpreted so as to limit other rights “derived from representative democracy as a form of government.” The American Declaration of the Rights and Duties of Man recognizes not only the right to participate in voting and elections, but also refers to the duty of the citizen to vote, and the advancement of democracy as a key regional value.

to decide on or impose such limitations, and the extent to which judicial or other control is required for such limitations to be legitimate in practice.

B. Initial considerations

The present bench memorandum is intended to outline the principal legal issues and the corresponding arguments each team may raise in the public hearing convened by the Inter-American Court of Human Rights (“Inter-American Court” or “Court”). It is a guide and is not intended to be exhaustive. While the teams will naturally vary in terms of their perspectives and points of emphasis, and may not necessarily cover all the arguments suggested or be familiar with all the applicable case law, they are expected to address each of the principal legal issues raised in the hypothetical.

In terms of methodology, this memorandum provides a very summary review of the points relative to the State’s waiver of its right to present preliminary objections and the bases for the Inter-American Court’s jurisdiction. The hypothetical for this year was designed to concentrate on arguments concerning the merits of the claims raised; little attention to the requirements of admissibility is necessary. The arguments concerning the merits of the case are presented as follows: First, a brief summary of the issue and the applicable law to provide the general context for the argument, then the potential arguments of the Inter-American Commission on Human Rights (“Inter-American Commission” or “Commission”), followed by the possible arguments of the State.

As mentioned in the hypothetical, these proceedings before the Inter-American Court are governed by the new Rules of Procedure of both the Court and the Commission.⁴ While the respective new Rules provide the petitioners with independent standing to present their positions in all the stages subsequent to the filing of the application by the Inter-American Commission, for the purposes of this hypothetical case, the petitioners and the Commission share the positions taken before the Court.

The petition that gave rise to the present proceedings denounced:

- Irregularities in the declaration of emergency of November 17, 2001.
- The detention of Joel Valencia and ten other minors of age; that they were held with adults, and *incommunicado*; and that the writs of *habeas corpus* presented in their favor were then denied.
- The postponement of the general elections.

⁴ Both sets of new Rules entered into force in 2001. Please note that information about the system, its instruments, and the jurisprudence of the Inter-American Commission is available at www.cidh.org. Information about the Inter-American Court, its instruments, and its jurisprudence is available at www.corteidh.or.cr. Another useful source in analyzing the jurisprudence of the system is *Repertorio de jurisprudencia del sistema interamericano de derechos humanos 1980-1997* (Claudio Grossman et al.), *Centro de Derechos Humanos y Derecho Humanitario* (Washington College of Law, 1998).

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

The petitioners presented their claims before the Inter-American Commission as violations of the following Articles of the American Convention of Human Rights: 1(1) (obligation to respect and ensure), 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to judicial guarantees), 16 (right to freedom of association), 19 (rights of the child), 23 (political rights), 25 (right to judicial protection) and 27 (suspension of guarantees); as well as of Article 8 (trade union rights) of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador” or “Protocol”).⁶

In its report of June 30, 2002, the Inter-American Commission declared the petition admissible. On November 25, 2002, the Commission adopted its reports on the merits of the case, establishing that the situations denounced constituted violations of Articles 1(1), 5, 7, 8, 16, 19, 23, 25 and 27 of the American Convention and Article 8 of the Protocol of San Salvador. In consequence, it recommended that Liberté adopt the legislative and other measures necessary to reinstate and ensure the enjoyment of the rights concerned to the extent possible, and provide reparation where such reinstatement was not possible or sufficient. Information submitted by the State on January 5, 2003 in response to the merits report indicated that these recommendations had not been implemented.⁷ The case was then presented to the Inter-American Court on January 25, 2003, within the three-month time limit set forth in the American Convention.

It is expected that in their written and oral arguments the teams will address each of the principal legal issues raised with respect to Articles 1(1), 5, 7, 8, 16, 19, 23, 25 and 27 of the American Convention and Article 8 of the Protocol of San Salvador. The hypothetical case does not define which acts or omissions of the State were deemed violative by the Commission, or for which reasons. It is up to the participants to determine how to orient their positions in this regard.

II. ISSUES OF ADMISSIBILITY

General considerations and applicable law

Liberté has been a State Party to the American Convention since 1978, having recognized the contentious jurisdiction of the Inter-American Court that same year, without special agreement.⁸ Consequently, according to the provisions of Article 62(3) of the Convention, the Court is competent to hear the present case.

⁵ See hypothetical case, para. 31.

⁶ *Id.*, para. 33.

⁷ *Id.*, para. 34.

⁸ *Id.*, para. 35 bis.

The hypothetical case suggests that the State has waived its right to present preliminary objections in the expectation that the Inter-American Court would declare that the challenged measures were adopted to ensure the exercise of fundamental rights.⁹

As indicated by the Inter-American Court: “It is generally accepted that the procedural system is a means of attaining justice and that the latter cannot be sacrificed for the sake of mere formalities.”¹⁰ In this regard, the Court has often reiterated that, according to generally recognized principles of international law and practice, the rule requiring the prior exhaustion of domestic remedies is designed for the benefit of the State, as it seeks to excuse the latter from having to respond to alleged acts imputed to it before having had the chance to remedy them through the internal system.¹¹ The requirement has accordingly been considered a means of defense, and as such, may be waived,¹² either expressly or implicitly, by the State having the right to invoke it.¹³ Once a State has waived its right to interpose this defense, it is estopped from asserting it at a later point.¹⁴ The Inter-American Court has applied these same principles in analyzing compliance with the rule requiring that petitions be filed in a timely way.¹⁵

Without prejudice to the State’s waiver, it may in any case be noted that the Democratic Forum presented the petition before the Commission within the period set forth in Article 46(1)(b) of the Convention, that is, within six months from the date of the final judgment. Accordingly, an objection for failure to file in a timely way would not apply. Finally, the case is not pending resolution before another international proceeding, so any objection on this ground would also be inapplicable.

⁹ *Id.*, para. 35.

¹⁰ IACtHR, *Cayara Case*, Judgment of February 13, 1993, Ser. C N° 14, para. 42.

¹¹ IACtHR, *In the matter of Viviana Gallardo et al.*, Resolution of November 13, 1981, Ser. A N° G101/81, para. 26.

¹² ECHR, *De Wilde, Ooms and Versyp v. Belgium (“Vagrancy” Cases)*, Judgment of 18th June 1971, Ser. A N° 12.

¹³ See IACtHR, *Velásquez Rodríguez Case*, Judgment of June 26, 1987, para. 88; *Case of Neira Alegría et al.*, Judgment of December 11, 1991, Ser. C N° 13, para. 30; *Castillo Páez Case, Preliminary Objections*, Judgment of January 30, 1996, Ser. C N° 24, para. 40; *Loayza Tamayo Case, Preliminary Objections*, Judgment of January 31, 1996, Ser. C N° 25, para. 40.

¹⁴ The principle of estoppel prevents a party from adopting a position beneficial to it or detrimental to the other party, and then subsequently adopting the contrary position. *Neira Alegria Case, supra*, para. 29.

¹⁵ However, it must be cautioned that the Court’s practice in this regard is very limited and has yet to be clarified. See *id.*, paras. 30-31. The practice of the Inter-American Commission is mixed, but tends to suggest that review of compliance with this requirement may be required regardless of whether the State has invoked an exception in this regard. See, for example, IACHR, Report N° 47/02, admissibility, petition 12.357, Peru, Oct. 9, 2002, para. 23.

III. ISSUES ON THE MERITS

A. The declaration of emergency under Article 27 of the American Convention

1. General considerations and applicable law

Participants may wish to address the legitimacy of the declaration of emergency as a general matter first, or in conjunction with each of the specific situations raised in the hypothetical. The present section sets forth the overall factors used to assess the validity of a declaration of emergency involving the suspension or limitation of individual rights.

Article 27 of the American Convention allows a State Party to take measures derogating from certain obligations to the extent and for the duration necessary in time of “war, public danger, or other emergency that threatens [its] independence or security.”¹⁶ In principle, the imposition of a state of exception is, according to international law as well as the domestic law of Liberté, a constitutionally authorized mechanism to respond to a situation of external attack or a serious disturbance of public order that cannot be controlled by ordinary measures. The employment of exceptional measures necessarily presupposes that the normally applicable processes are insufficient to resolve the presumed threat to the country.¹⁷

The terms of Article 27 indicate that, while not all protected rights are absolute, they may only be subject to limitation or suspension under certain specific conditions. The conditions for this type of exceptional action are stipulated and strict.¹⁸ First, the circumstances invoked to justify exceptional measures must be extraordinarily serious, constituting an imminent threat to the life of the nation. Possible, latent or future situations of risk do not meet this standard.

Second, any measures taken pursuant to a declaration of emergency are valid only “to the extent and for the period of time strictly required by the exigencies of the situation,” and only in so far as they do not involve discrimination and do not conflict with other international obligations. The measures must be necessary, proportional and temporary. Restrictions on rights that are not required are prohibited, as are restrictions that are more severe or prolonged than necessary, or that are extended to areas not affected by the situation.¹⁹

¹⁶ It should be noted that the inter-American system has developed extensive jurisprudence on limitations on individual rights in states of emergency dating back to the 1960’s, when the Inter-American Commission first began addressing this issue. Its approaches emerged principally on the basis of the need to react to grave abuses of human rights perpetrated through the imposition of such limitations, as reflected in a number of early country reports. *See generally*, Grossman, Claudio, “Algunas consideraciones sobre el régimen de situaciones de excepción bajo la Convención Americana sobre Derechos Humanos,” en CIDH, *Derechos Humanos en las Américas, Homenaje a la Memoria de Carlos A. Dunshee de Abranches*, 1984.

¹⁷ *See* IACHR, *Report on the Situation of Human Rights in Ecuador*, OEA/SerL/V/II.96, doc. 10, rev. 1 1997, Ch. II.

¹⁸ *See id.*

¹⁹ IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, doc. 59, rev. 2000, ch. II, para. 70.

Third, individual guarantees identified as nonderogable may not be suspended to any extent or under any circumstance. Pursuant to Article 27(2), the following may never be subject to derogation: Article 3 (right to judicial personality); Article 4 (right to life); Article 5 (right to humane treatment); Article 6 (freedom from slavery); Article 9 (freedom from ex-post facto laws); Article 12 (freedom of conscience and religion); Article 17 (rights of the family); Article 18 (right to a name); Article 19 (rights of the child); Article 20 (right to nationality); and Article 23 (right to participate in government); as well as “the judicial guarantees essential for the protection of such rights.”

With respect to “the judicial guarantees necessary for the protection” of nonderogable rights, the Inter-American Court has indicated that:

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

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

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

In accordance with the notification requirement of Article 27(3), on November 7, 2001, the President of Liberté informed the Secretary General of the OAS that she considered that the country’s democratic political institutional process was under threat. The declaration of emergency she issued refers to “the situation of risk posed by increasingly violent protests in areas throughout the country” as well as the damage to the national economy and hardship to those affected being caused by the dockworkers’ strike. In response to the threat identified, the declaration provided for the suspension of certain guarantees concerning the right to personal liberty; the postponement of national elections for one month; and the immediate lifting of the dockworkers’ strike. The declaration indicated that the special measures would take effect as from November 7, 2001 and last through March 15, 2002.

²⁰ IACtHR, *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987, Ser. A No. 9, para. 25.

²¹ See e.g., IACtHR, *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87 of Jan. 30, 1987, Ser. A No. 8 and OC-9/87, *supra*.

2. Arguments of the Inter-American Commission

Both the basis for declaring the state of emergency and the nature of the limitations adopted exceeded the requirements of necessity and proportionality set forth in Article 27. In this regard, the jurisprudence of the Inter-American Commission points out that the resort to emergency measures must be justified by a threat to the conditions necessary to maintain the political organization of the state in accordance with the principles of representative democracy.²² In the present case, the situation of protests and the workers' strike did not amount to a level of domestic unrest extraordinary enough to justify such a declaration. Such forms of civil disobedience can and should be dealt with through ordinary procedures. While not denying the seriousness of the situation, at no time was the democratic "life of the nation" under threat from these internal disturbances.

The declaration of emergency refers to two basic factors for its justification, namely the situation of protests and the dockworkers' strike and its effects. With respect to the protests, these were not continuous events that left the authorities with no alternatives to control public order. While they may have happened in different areas of the country, they were nonetheless temporary and local in nature. Moreover, the dockworkers' strike and its effects primarily affected the coastal area of the country where the harbor is located.

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

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

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

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

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

personnel are trained to interact with civilians; combat troops are trained to fight a designated enemy.

Further, Article 27(2) of the American Convention expressly prohibits any suspension of the judicial guarantees that are essential to protect non-derogable human rights.²⁵ The Inter-American Court has stated that this requires "that in any state of emergency there be appropriate 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."²⁶ Accordingly, the right to judicial recourse for protection against the violation of a protected non-derogable right may not be suspended.²⁷

When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These restraints may not be considered to be non-existent, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the circumstances justifying the grant of such exceptional legal measures. The Court has already noted, in this connection, that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law.²⁸

It remains the function of the judicial branch to protect legality and the rule of law during a state of emergency.

3. Arguments of the State

The risk posed by the protests and the damage being caused by the strike was of a magnitude requiring the adoption of the extraordinary measures provided for under both international and domestic law to respond to emergency situations. As the Inter-American Commission itself has characterized with respect to situations of internal unrest: "Law – whether domestic or international – does not ignore such realities. It weighs them fairly and gives solutions for dealing with them, while adequately evaluating the good that is endangered."²⁹

Prior to adopting these emergency measures, the State had attempted to use graduated measures of response to deal with the protests, employing increasingly stronger measures to try to maintain control and citizen security. These measures proved insufficient, however, and the interest of protecting the citizenry and ensuring public order required the application of further protections.

²⁵ See generally IACtHR, *Advisory Opinions OC-8/87 and 9/87, supra*.

²⁶ IACtHR, *Advisory Opinion OC-9/87, supra* para. 21.

²⁷ *Id.* at paras. 23, 24.

²⁸ IACtHR, *The Word "Laws" in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86 of May 9, 1986, Ser. A N° 6, paragraph. 32.

²⁹ IACHR, *Report on the Situation of Human Rights in Chile, supra*, para. 5.

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

under certain circumstances the suspension of guarantees may be the only way to deal with emergency situations and, thereby, to preserve the highest values of a democratic society. Therefore, given the principles upon which the inter-American system is founded, the Court must emphasize that the suspension of guarantees cannot be disassociated from the "effective exercise of representative democracy" referred to in Article 3 of the OAS Charter.³⁰

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

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

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

³¹ *See* hypothetical case, para. 19.

³² *See id.*

³³ *See id.*, para. 20.

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

The arrest and detention of Joel Valencia and his classmates, all minors,³⁴ poses the following problem: while the right to personal liberty may be subject to derogation in a situation of emergency, the rights of the child and the right to *habeas corpus* are never derogable. The questions for the participants to address therefore include, first, whether the arrests were legal, either as having complied with normally applicable law or because normally applicable guarantees were legitimately suspended pursuant to the declaration of emergency. Second, they must analyze the legality and conditions of detention, which in the case of these youngsters included having been detained with adults and having been unable to contact their parents for approximately 34 hours. Third, they must consider the legal consequences, if any, of the unavailability of judicial control over detention during that period.

In terms of this context, the general considerations with respect to the declaration of emergency are set forth above in section III.A. Because Article 19 and the special measures of protection it requires are relevant with respect to each of the three principal points to be addressed, the present section includes an analysis of the general considerations and applicable law in this regard. More specific arguments of the Inter-American Commission and State that relate to the rights of the child will be included in the analysis of each of the three substantive points that follows.

2. The rights of the child: general considerations and applicable law

As the Inter-American Commission has affirmed: “Respect for the human rights of children is a question of primordial importance for every State. It is for this reason that Article 19 establishes special measures of protection for children corresponding to their vulnerability as minors.”³⁵ The Article in question guarantees to every child “the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”

While the American Convention does not define the age limit that applies in defining who is a child, the Convention on the Rights of the Child and the legislation of most OAS member States place this at 18 years of age.³⁶ Liberté likewise defines 18 years of age as the age of majority.

³⁴ Hypothetical questions and responses, 58.

³⁵ IACHR, Report N° 40/00, Cases 10.588, 10.608, 10.796, 10.856 and 10.921, *Isabela Velásquez et al.*, Guatemala, 13 April 2000, para. 83.

³⁶ See Convention on the Rights of the Child, Article 1. Both the Inter-American Commission and Court have utilized 18 years of age as the standard. See generally, IACtHR, “Condición Jurídica y Derechos Humanos del Niño,” Opinión Consultiva OC-17/2002 de 28 de agosto de 2002, paras. 40, 42.

The Inter-American Court has determined that “[b]oth the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the rights of the child” that should serve to “define the scope of the ‘measures of protection’ referred to in Article 19 of the American Convention from different angles.”³⁷ In the adoption of any legal, administrative or other measure concerning children, the guiding principle for the State under the Convention on the Rights of the child and other applicable instruments is the best interests of the child. The duty of States to apply “special measures of protection” in the case of children necessarily includes both respecting and ensuring their rights, in accordance with the overarching obligations set forth in Article 1(1) of the American Convention. The duty to ensure – that is, the preventive and protective aspect of the State’s obligations – has special importance in the case of children.³⁸

States Parties to the Convention on the Rights of the Child, such as Liberté, have committed themselves to respect the rights set forth therein and to assure their application to each child within their jurisdiction (Article 2). They have also committed themselves to ensure that no child is deprived of his or her liberty illegally or arbitrarily, and that in any case, the child “shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age” (Article 37).³⁹ In this regard, it must be emphasized that the Convention on the Rights of the Child stipulates that the deprivation of liberty in the case of minors must be a measure of last resort (Article 37(b)).

Finally, while due process guarantees apply to all persons, their application with respect to children presupposes the adoption of specific measures aimed at making them effective. That is to say, given the special vulnerability of children as minors, ensuring them effective due process guarantees will often require the adoption of additional special measures.⁴⁰

3. The legality of the arrests

a. General considerations and applicable law

The Inter-American Commission has applied the view that:

Under the terms of Article 7 of the Convention, the legality or arbitrariness of an arrest must be analyzed on the basis of whether or not there was observance of the constitution and/or domestic laws enacted pursuant thereto that prescribe the reasons why an individual can be deprived of his or her freedom and establish the procedures that must be carried out in arresting an individual.⁴¹

³⁷ IACtHR, *Case of Villagrán Morales et al. (the “Street Children Case”)*, *supra*, paras. 194 and 196.

³⁸ *See generally*, IACtHR, *id.*, paras. 191-98, and the Concurring Vote of Judges A. A. Cançado Trindade and A. Abreu Burelli; *OC-17/2002*, *supra*, paras. 87-91.

³⁹ Liberté ratified the Convention on the Rights of the Child on February 21, 1998. See Hypothetical questions and responses, 12.

⁴⁰ *See OC-17/2002*, *supra*, para. 98.

⁴¹ *See*, IACHR, Report N° 1/95, Case 11.006, *Alan García*, Peru, 7 February 1995.

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

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

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

b. Arguments of the Inter-American Commission

The basis for the detention of the protesters is not a legal disposition, but a presidential decree that declares the suspension of the right to personal liberty.⁴⁴ The fact that the State had to release all of the detainees without apparently having initiated any legal action against them proves that their conduct (the legitimate exercise of their right to freedom of expression through a public protest) could not be deemed to fall within any preexisting infraction defined under the law of Liberté. In fact, the State didn't even pursue an investigation aimed at establishing whether the protest had been carried out in violation of domestic law; rather, it limited its actions to verifying the identity of the protesters. Accordingly, the deprivation of liberty was violative of the right established in Article 7(2) of the American Convention.

In the present case, the detention of the 11 youngsters was carried out without any consideration for the formal aspects that must characterize a deprivation of liberty in order for it to be legal. They were detained by military personnel while they were participating in a protest against the policies of the Government in the legitimate exercise of their right to freedom of expression. Further, the arrest was effectuated absent any arrest order having been issued against them.

In this sense, the Inter-American Commission emphasizes that, given the number of individuals arrested and the circumstances, it is evident that the arresting authority was not acting on the basis of any individualized suspicion of wrongdoing. There is no information or evidence

⁴² IACtHR, *Gangaram Panday Case*, Judgment of January 21, 1994, Ser. C N° 16, para. 47.

⁴³ See, e.g., IACHR, Report N° 53/01, Case 11.565, Ana, Beatriz and Celia González Pérez, Mexico, April 4, 2001, para. 23.

⁴⁴ See note 83, *infra*, referring to the meaning of the word "laws" applied by the Inter-American Court.

suggesting that any of the victims in the present case were detained *in flagrante delicto*. Rather, it appears that the military recruits lacked sufficient training or experience to know how to deal with the crowd control issues in any other way. Given that the military recruits began arresting people immediately after they arrived on the scene, the State has made no showing as to why normal crowd control methods would not have been sufficient to address the situation and disperse the crowd.

With respect to the arrests having been carried out by military personnel, the Inter-American Commission has consistently affirmed that arrests must be effectuated by the authority deemed competent under domestic law. Noncompliance with that requirement, as well as with the procedures required under international law to carry out a detention lead to a situation in which “arrests cease to be arrests *per se* and become kidnappings...”⁴⁵ In the situation under study, the use of recent military recruits to arrest men, women and children raises special concerns, especially with respect to the children.⁴⁶

The Inter-American Commission has previously established that the term “arbitrary” is synonymous with “irregular, abusive, contrary to law.” A detention is arbitrary when it occurs: “a) for reasons or according to procedures other than those prescribed by the law, or b) pursuant to a law [in the case at bar the declaration of emergency that expressly denied the right to personal liberty] the basic purpose of which is incompatible with respect for the individual’s right to liberty and security.”⁴⁷ The detention of the youngsters was accordingly arbitrary, and therefore violative of Article 7(3) of the American Convention.

For its part, the United Nations Human Rights Committee has said that the notion of “arbitrary” is not only synonymous with “contrary to law” but must be interpreted in more ample terms to include the terms “inappropriate” or “unjust.” Moreover, holding a person in custody where it is not necessary (necessary meaning to prevent flight or the hiding of evidence) may also be considered arbitrary.⁴⁸ In the present case, the State has made no showing as to the necessity for arresting a group of 16-year olds in order to preserve the democratic system. Even accepting the validity of President Reina’s declaration of emergency for the sake of argument, an emergency situation in no way relieves a State Party of its obligations to take special measures of protection with respect to minors.

c. Arguments of the State

In the present case, the State has acted within the guidelines of the American Convention and the Inter-American Commission in the sense that “people may only be detained if they have taken part, or are suspected of having taken part, in acts classified as crimes,” and that the only purpose of a detention must be to avoid the escape of a person suspected of a crime and thereby assure his or her appearance before a judge.⁴⁹ The facts of this case indicate that the violence for

⁴⁵ See IACHR, *Report on the Situation of Human Rights in Chile*, 1985, OEA/Ser.L/V/II.66 doc. 17, p. 138.

⁴⁶ See note 23 *supra* and accompanying text, referring to those basic concerns.

⁴⁷ IACHR, Report 35/96, Case 10.832, *Luis Lizardo Cabrera*, Dominican Republic, April 7, 1998, para. 66.

⁴⁸ UN Human Rts. Committee, Communication N° 560/1993, *A v. Australia*, April 30, 1997, section 9.2.

⁴⁹ IACHR, Report 40/97, *supra*, paras. 90 and 91.

which the protesters were arrested consisted of acts that ranged from verbal and physical aggression to injuries, and that the legislation of Liberté authorized the detention of the perpetrators of such transgressions.⁵⁰ That detention was carried out to investigate those crimes. In other words, the basis for the detention of the protesters was set forth in preexisting law; accordingly, the principle enshrined in Article 7(2) of the Convention was not violated.

The arrests of November 17, 2001 were carried out in accordance with the law, the pertinent constitutional provisions and the American Convention on Human Rights, which in Liberté has the same level of authority as the Constitution.⁵¹ The formal requirements for the detention were complied with. The decree that established the state of emergency clearly provided that the right to personal liberty set forth in Article 22 of the Constitution of Liberté was suspended, and that arrest in the event of disturbances of public order or acts of violence was therefore to be expected. The measure of arresting those responsible for acts of violence was proportionate to the necessity to safeguard the life and physical integrity of the protesters' fellow citizens.⁵² Finally, the detention of the protesters was reasonable given the violent character of the protest and the fact that greater violence was imminent.⁵³

In view of the extraordinary situation, it must also be emphasized that, as the Inter-American Commission has stated:

When emergency situations arise, states may be justified in derogating from certain limited aspects of the right to personal liberty and security. This may include, for example, subjecting individuals to periods of preventive or administrative detention for periods longer than would be permissible under ordinary circumstances. As with all derogations, however, any extended detention must be strictly necessary in the exigencies of the situation, must remain subject to the non-derogable protections noted above, and may in no case be indefinite.⁵⁴

In this sense, the State wishes to underline that the measures taken were the least intrusive and restrictive possible under the circumstances. As indicated above, these circumstances included a generalized situation of violent protests including serious injuries and death. The protesters arrested in this instance were dealt with in a respectful, nondiscriminatory fashion. In accordance with the terms of Article 7(4) of the American Convention, the detainees were informed in a timely way of the charges against them (disturbance of public order).⁵⁵ Further, the time for which they were held was minimal, only a day and a half.

⁵⁰ See, hypothetical questions and responses, 32.

⁵¹ See, hypothetical case, para. 8.

⁵² Further, it must be taken into account that various persons had died or been injured as a consequence of other violent protests. See *id.*, para. 13, 14 and 17.

⁵³ See *id.*, para. 22.

⁵⁴ IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1, 22 Oct. 2002, para. 25.

⁵⁵ See, hypothetical questions and responses, 25.

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

4. The legality and conditions of detention

a. General considerations and applicable law

In its report on the merits of November 25, 2002, the Inter-American Commission established that the State of Liberté had violated Articles 5 and 7 of the American Convention with respect to the detention of Joel Valencia and 10 other minors of age.⁵⁶ Article 5 establishes, *inter alia*, that “[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person” (subsection 2) and that “[m]inors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors” (subsection 5). Further, Article 7 is relevant with respect to the legality of the detention as it continued after arrest.

The detention of Joel and his friends raises several principal issues with respect to its legality and the conditions under which they were held. First, as will be analyzed further below, minors may only be detained as a last resort and for the briefest possible period.⁵⁷

Second, when they are detained, they must be held in facilities that are appropriate to their status. The Inter-American Commission has identified the confinement of youths with adult detainees and prisoners as one of the areas requiring greater attention within the larger question of the conditions of detention in the majority of the countries of the Americas⁵⁸ and has exhorted a number of countries to cease the practice of jointly detaining minors and adult detainees.⁵⁹ For its part, the International Covenant on Civil and Political Rights sets forth in Article 10(2)(b) that “[a]ccused juvenile persons shall be separated from adults.” The same principle has been included in the Convention on the Rights of the Child⁶⁰ (Article 37(c)); the Standard Minimum Rules for the Administration of Juvenile Justice⁶¹ (“Beijing Rules”); and the

⁵⁶ Hypothetical case, paras. 31 and 34.

⁵⁷ *OC-17/2002, supra*, para. 118 and note 110, citing Article 37 of the Convention on the Rights of the Child.

⁵⁸ See generally, IACHR, *Progress Report on Conditions of Detention in the Americas*, in *Annual Report of the IACHR 1995*, Ch. V, OEA/Ser.L/V/II/91, doc. 7 rev., 1996.

⁵⁹ See, IACHR, *Prison Conditions and the Condition of Prisoners, Report on the Situation of Human Rights in the Dominican Republic*, OEA/Ser.L/V/II.104, doc. 49 rev. 1, 1999.

⁶⁰ GA Res. 44/25 of 20 November 1989.

⁶¹ GA Res. 40/33 of 29 November 1985.

Standard Minimum Rules for the Treatment of Prisoners⁶² (Articles 8(d) and 85(2)), among other international instruments.

The facts of the hypothetical case indicate that Joel Valencia, 16 years of age, and ten of his classmates from school, also minors of age, were detained in the auditorium of a military base along with over 100 adults. They were held from 9:30 a.m. on November 17, 2001 until 7:30 p.m. on November 18, 2001,⁶³ without having been permitted to contact their families.

Third, the detention must necessarily be subject to appropriate supervision and control. Detention *incommunicado* has been described by the Inter-American Commission as “the situation of a person in official custody who is cut off from communication with the outside world. Those responsible for the detention thus have exclusive control over the fate of the detainee.”⁶⁴ In the case of detained minors of age, parental notification and contact is crucial in safeguarding the rights of the detainee. The guarantees that exist under Article 7 to prevent such exclusive control and the abuses that often follow from it -- requiring the prompt presentation of any detainee before a judge and guaranteeing the right to seek the protection of *habeas corpus* -- will be analyzed in section III.B.5, which follows.

b. Arguments of the Inter-American Commission

The guarantee that no person may be deprived of liberty without due process of law lies at the heart of any democratic system that proclaims respect for the rule of law, and reinforces the right of the individual to respect for his or her physical security. Detention of children is an extremely exceptional measure that was not justified by the circumstances in the present case.

The Inter-American Commission has previously considered that, when dealing with a minor, “illegal detention ... is a clear violation of the duty of the ... State to accord [him or her] the special protection guaranteed under the American Convention and other applicable international instruments.”⁶⁵ In accordance with the provisions of these instruments, the Inter-American Commission has considered that the imprisonment of children may only be used as a last resort and for the briefest period possible, and that in no case may they be held *incommunicado* or confined jointly with adults.⁶⁶ This signifies that, even assuming that the deprivation of liberty of a child is ordered and implemented in accordance with the law, this measure “should be used only as a last resort ... [in accordance with] the Convention of the Rights of the Child, and

⁶² E.S.C. Res. 663C (XXIV), 24 UN ESCOR, Supp. (No. 1) at 11 (1957).

⁶³ See, hypothetical case, paras. 22 and 23.

⁶⁴ See, IACHR, *The Right to Humane Treatment*, in *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev. 1, 1997, ch. V.

⁶⁵ IACHR, Report N° 53/01, Case 11.565, *Ana, Beatriz and Celia González*, México, 4 April, 2001, para. 60.

⁶⁶ See, IACHR, *Report on Terrorism and Human Rights*, October 22, 2002, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., para. 172.

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

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

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

Furthermore, the State of Liberté has violated Article 5(5) of the American Convention because it detained at least 11 minors of age in the same holding area as adults (who had shown signs of aggressive behavior). The facts of the case indicate that, at the time of his arrest, Joel Valencia was 16 years old,⁶⁹ and that his classmates from school were also minors of age.⁷⁰ Accordingly, the primary obligation of the State following their arrest was to place them in a specialized facility separated from adult detainees, and to subsequently place them at the disposition of a specialized judge. In this regard, the Human Rights Commission of the United Nations has established in its “Report on the Application of International Standards Concerning the Human Rights of Detained Juveniles” that the decision as to whether to detain a minor or not must be made with attention to the difference between adults and minors. In particular, minors must be separated from adults.⁷¹

In the [Inter-American] Commission’s view, Article 5(5), taken in combination with Article 19 of the Convention, make clear the State’s duty to house detained minors in facilities separate from those housing adults. It is obvious that the obligation that follows from Article 19, namely, to grant a child special protection, cannot be interpreted solely as requiring the creation of juvenile courts; instead, ‘the protection required by his status as a minor’ also means that

⁶⁷ See, IACHR, *Rights of the Child*, in *Third Report on the Situation of Human Rights in Paraguay*, OEA Ser./L/VII.110 doc. 52, 9 March 2001, para. 18.

⁶⁸ IACHR, Report 40/97, Cases 10.941, 10.942 and 10.945, *Camilo Alarcón*, Peru, 19 February, 1998, para. 92.

⁶⁹ See, hypothetical case, para. 23.

⁷⁰ See, hypothetical questions and responses, 58.

⁷¹ United Nations Commission on Human Rights, “*Application of International Standards Concerning the Human Rights of Detained Juveniles*”, report prepared by Mary Concepción Bautista, Special Rapporteur of the Subcommission on the Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1991/124, para. 77.

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

Additionally, because it failed to separate the minors from the rest of the detainees or to place them at the disposition of a specialized judge, the State placed the former in a situation of particular vulnerability and danger. The massive arrest had just taken place precisely because some of the protesters had engaged in acts of violence. Moreover, even following the detention, “[e]motions remained high, and several times there were incidents of verbal confrontation and pushing among groups of protesters and between protesters and the military recruits.”⁷³ The minors in question were naturally extremely afraid, and consequently “tried to keep to themselves in a corner of the room.”⁷⁴ As the Inter-American Commission has indicated:

[T]he State, by depriving a person of his liberty, places itself in the unique position of guarantor [...] The obligation that follows from being the guarantor of these rights means that agents of the State must not only refrain from engaging in acts that could harm the life and physical integrity of the prisoner, but must also endeavor, by all means at their disposal, to ensure that the prisoner is maintained in such a way that he continues to enjoy his fundamental rights, especially his right to life and to humane treatment. Thus, the State has a specific obligation to protect prisoners from attacks by third parties, including other inmates. [...] When the State fails to provide this protection to its prisoners, especially those who, by their particular circumstances, are defenseless or at a disadvantage, as in the case of juveniles, it violates Article 5 of the Convention and incurs international responsibility.⁷⁵

The Inter-American Court, in turn, has determined that “a person who is unlawfully detained ... is in an exacerbated situation of vulnerability creating a real risk that his other rights, such as the right to humane treatment and to be treated with dignity, will be violated.”⁷⁶

The inexperience of the recruits who carried out the arrest and the lack of sufficient physical space in the local police station⁷⁷ do not justify the confinement of minors of age with adults. It must be recalled in this regard that the obligation to adopt preventive measures to safeguard the personal integrity of persons deprived of liberty “become[s] all the more compelling when juveniles are involved. In such cases, the State must not only endeavor to protect their personal integrity but also to promote the full development of their personality.”⁷⁸ The United Nations Human Rights Committee has set forth that Article 10(2)(b) of the International Covenant on Civil and Political Rights (the contents of which are similar to Article

⁷² IACHR, Report N° 41/99, Case 11.491, *Minors in Detention*, Honduras, 10 March, 1999, para. 125.

⁷³ See, hypothetical case, para. 23.

⁷⁴ *Id.*

⁷⁵ IACHR, Report N° 41/99, *supra*, paras. 136, 137.

⁷⁶ IACtHR, *The Street Children Case*, *supra*, para. 166.

⁷⁷ See, hypothetical case, para. 22.

⁷⁸ IACHR, Report N° 41/99, *supra*, para. 140.

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

Further, the State of Liberté has violated Article 5(2) of the American Convention by having prevented communication between the 11 youths and their families.⁸⁰ In the present case, detention *incommunicado* not only wasn't necessary, it was arbitrary. This is particularly so given that no investigation of the alleged disturbance of public order, the putative basis for the arrests, was even being carried out, but merely a superficial review of the identification of the protesters.⁸¹

In this regard, in its first contentious case the Inter-American Court established that "deprivation of communication [is] in [itself] cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention."⁸² The Inter-American Court has further indicated that, even in the case that the deprivation of liberty is legitimate "[o]ne of the reasons that *incommunicado* detention is considered to be an exceptional instrument is the grave effects it has on the detained person. Indeed, isolation from the outside world produces moral and psychological suffering in any person, [and] places him in a particularly vulnerable position."⁸³ Such suffering has been put into evidence in the present case by the fact that, during their confinement, the youths were "completely intimidated" and tried to keep to themselves apart from the other detainees.⁸⁴

In summary, as the Inter-American Commission has stated previously with respect to the violation of Article 5(2) as a consequence of *incommunicado* detention: "Abuse of this exceptional measure renders the individual unnecessarily vulnerable, and itself may constitute a form of mistreatment."⁸⁵ The lack of communication between the minors and their families in this case meant the latter could not know their physical and mental state, the inadequate conditions of detention in which they were held (namely the auditorium of a military base), and, in particular, that they were being held jointly with adults demonstrating signs of aggressive behavior.

⁷⁹ Human Rts. Committee, General Comment 9/16 of 27 July, 1982, *Rights of Detainees*, § 2 and General Comment 21/44 of 6 April, 1992, *Rights of Detainees*, § 13.

⁸⁰ See, hypothetical questions and responses, 24.

⁸¹ See, hypothetical case, para. 23.

⁸² IACtHR, *Velásquez Rodríguez Case*, Judgment of 29 July 1988, Ser. C N° 4, para. 156.

⁸³ IACtHR, *Suárez Rosero Case*, Judgment of 12 November 1997, Ser. C N° 35, para. 90.

⁸⁴ See, hypothetical case, para. 23.

⁸⁵ See, IACHR, *Right to Humane Treatment*, in *Report on the Situation of Human Rights in Ecuador*, *supra*. Amnesty International has warned that: "Torture most often occurs during a detainee's first days in custody. Those vulnerable hours are usually spent *incommunicado*, when the security forces maintain total control over the fate of the detainee, denying access to relatives, a lawyer or an independent doctor." Amnesty International, *Torture in the Eighties*, 110 (1984). See generally, Amnesty International, *Torture: Report of Amnesty International* (1984).

d. Arguments of the State

International instruments contain no definitive prohibition of the arrest and detention of minors of age. In the present case, the detention was effectuated in order to preserve security and public order. In this regard, the Inter-American Court has indicated that “[w]ithout question, the State has the right and duty to guarantee its security.”⁸⁶

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

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

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

While it is true that contact between the minors and the parents in this case was not authorized, it must be mentioned that neither the Inter-American Court nor the Commission have criticized *incommunicado* detention as such; rather, it has been considered “an exceptional measure the purpose of which is to prevent any interference with the investigation of the facts.”⁸⁸

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

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

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

Moreover, principle 16(4) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁸⁹ authorizes the authorities to delay communications between a detainee and his family where the needs of an investigation so require. In fact, principle 18(3) of that same instrument even permits the suspension of communication between the detainee and his attorney in exceptional circumstances.

In general, the organs of the inter-American system have opposed *incommunicado detention* when its application has had the effect of denying the exercise of the minimum, nonderogable guarantees established in the Convention, and more concretely, the right to challenge the legality of detention. However, in the present instance, these guarantees were offered to all the detainees (including the 11 youngsters who, through their parents, filed writs of *habeas corpus*).⁹⁰

In referring to *incommunicado detention*, the United Nations Human Rights Committee has indicated that the determination as to whether this measure may be violative or not of Article 7 of the Covenant must be made on the basis of the specific circumstances of each case.⁹¹ In the case at bar, none of the youngsters was placed in solitary confinement; rather, the alleged “*incommunicado detention*” referred only to the fact that they were not in contact with their parents. In the final analysis, this was a situation that lasted for a mere period of hours, while the corresponding investigation was being carried out. Moreover, the parents did in fact receive confirmation through a State official as to the whereabouts of their children and why they were being held.

5. Access to judicial supervision and control

a. General considerations and applicable law

Articles 7(5) and (6) set forth complementary guarantees that apply in any case of detention. In requiring that any person deprived of liberty be promptly brought before a judge, Article 7(5) sets forth an automatic obligation that ensures that the decision to maintain detention does not rest with the detaining power but with the judiciary, and only after the defendant has been produced and had the opportunity to be heard. This judicial control constitutes the fundamental protection of the individual against arbitrary interference with his or her right to liberty. As expressed by the European Court of Human Rights, “[j]udicial control is implied by the rule of law,” and is “one of the fundamental principles of a democratic society.”⁹²

Article 7(6) in turn provides that any detainee is entitled to judicial review of the procedural and/or substantive conditions alleged to render a detention unlawful. The right to file a writ of *habeas corpus* attaches at the time of detention. Writs of *habeas corpus* provide protections that are indispensable. In the view of the Inter-American Court, “*habeas corpus* performs a vital role in ensuring that a person’s life and physical integrity are respected, in preventing his disappearance

⁸⁹ GA Res. 43/173 of 9 December, 1988.

⁹⁰ *See*, hypothetical case, para. 24.

⁹¹ Human Rts. Committee, General Comment 7/16 of 27 July, 1982, *Prohibition of Torture*, § 2.

⁹² ECHR, *Case of Brogan and Others*, Ser. A, vol. 145, 23 Mar. 1988, at para. 58.

or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhuman, or degrading punishment or treatment.”⁹³

The history of the inter-American human rights system provides indisputable evidence that human rights violations such as torture and other forms of mistreatment occur when law enforcement officials are allowed to operate outside the boundaries of legal and institutional safeguards and oversight. It is for this reason that such writs are never subject to derogation under any circumstance. In this regard, the Inter-American Court has established that “writs of *habeas corpus* and of ‘amparo’ are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society.”⁹⁴

b. Arguments of the Inter-American Commission

The facts of the case indicate that the detainees, including the 11 youngsters, were not presented before a competent judicial authority, which characterizes a violation of Article 7(5) of the American Convention.

The jurisprudence of the European Court of Human Rights indicates that the provision of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention” or “Convention of Rome”) establishing that the person detained “shall be brought promptly before a judge” presupposes that an individual who has been deprived of his or her liberty absent judicial control must either be released or placed immediately at the disposition of a judge. This is indicated by the fact that the essential purpose of this provision is to protect individual liberty against arbitrary interference by the State. The European Court has affirmed that while the term “immediately” must be interpreted in conformity with the special characteristics of each case, no situation, however serious it might be, grants the authorities the right to indefinitely prolong the period of detention without running afoul of the terms of Article 5(3) of the European Convention.⁹⁵ That same position has been applied by the Inter-American Court.⁹⁶

Additionally, Liberté has violated the right of Joel and his classmates recognized in Article 7(6) of the American Convention insofar as the writ of *habeas corpus* presented by the parents of the minors was summarily denied.⁹⁷ According to the jurisprudence of the Inter-American Court:

the right enshrined in Article 7(6) of the American Convention is not exercised with the mere formal existence of the remedies it governs. These remedies must

⁹³ See, IACtHR, *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, Advisory Opinion OC-8/87 of 30 January, 1987, Ser. A N° 8, para. 35.

⁹⁴ *Id.*, para. 42.

⁹⁵ See, for example, ECHR, *Brogan and Others Case*, Judgment of 23 March 1968, Ser. A N° 145-B, paras. 58-59, 61-62.

⁹⁶ IACtHR, *Case of Castillo Petruzzi et al.*, Judgment of 30 May, 1999, Ser. C N° 52, paras. 108 et seq.

⁹⁷ See, hypothetical case, para. 24.

be effective, since their purpose, in terms of Article 7(6), is to obtain without delay a decision ‘on the lawfulness of arrest or detention,’ and should they be unlawful, to obtain, also without delay, an ‘order [for] his release.’⁹⁸

In the case at bar, however, notwithstanding the existence of the formal possibility to present a writ of *habeas corpus*, its inefficacy in practice was demonstrated when the judge referred to the suspension of the guarantees set forth in Article 22 of the Constitution of Liberté as the basis for rejecting that remedy.⁹⁹

The denial of the writ of *habeas corpus* was issued following a brief phone call by the judge to the military base, without even having complied with the requirement that the detainees be presented. Such presentation is essential so that this remedy may, in the words of the Inter-American Court, “achieve its purpose, which is to obtain a judicial determination of the lawfulness of the detention.”¹⁰⁰ “The Court has already ruled that a detained person must be guaranteed the right to *habeas corpus* at all times.”¹⁰¹

c. Arguments of the State

While it is true that the detainees were not presented before a competent judicial authority, that is primarily due to the fact that they were held for less than 48 hours. The applicable law at the time, as set forth in the declaration of emergency, allowed for individuals to be held for that period prior to presentation before a judge. As a practical matter, given the number of detainees, and the extraordinary demands on the security forces at the time, it was simply not practicable to present the detainees before a judge during the less than a day and a half they were held. In this sense, the State considers that the requirement of “prompt” presentation set forth in Article 5 should not be read to require something that is not possible in practical terms. Rather, it considers that the period of up to 48 hours set forth in the declaration of emergency was completely consistent with the requirement of prompt presentation of Article 7(5).

It must also be taken into account that, following the preliminary investigations, all of the detainees including young Valencia and his classmates¹⁰² were released. The facts of the case do not indicate any charges having been filed against them, which demonstrates that the only intention of the State was to guarantee order and public security. Consequently, there has been no violation of the right set forth in Article 7(5) of the Convention.

Nor did the denial of the writ of *habeas corpus* presented by the parents of the detained minors imply any violation of Article 7(6). The alleged victims had access to this remedy through their parents. It was processed by an independent judicial authority, who rapidly issued

⁹⁸ IACtHR, *Suárez Rosero Case*, *supra*, para. 63.

⁹⁹ *Id.*

¹⁰⁰ IACtHR, *Advisory Opinion OC-8/87*, *supra*, para. 35.

¹⁰¹ IACtHR, *Suárez Rosero Case*, *supra*, para. 59.

¹⁰² *See*, hypothetical case, para. 23.

a decision consistent with the law. The remedy was denied on the basis of the sensitive situation the country was in at that moment and the declaration of emergency. The right to personal liberty is, in this regard, one of the guarantees that may be suspended pursuant to the terms of Article 27 of the American Convention. Further, domestic law authorizes the detention of perpetrators of acts of violence consisting of verbal and physical aggression as well as injuries.¹⁰³

In this sense, it must also be taken into account that, while the judge interpreted the terms of the declaration of emergency to mean that the writ of *habeas corpus* should be denied as premature (given that the detainees had been held for only a few hours), he nonetheless took measures to verify the whereabouts of the youngsters. This was an appropriate means of responding to the fact that they were minors of age and ensuring that their wellbeing was not adversely affected. In this sense, it can hardly be contended that the State failed to uphold its duty to respect and ensure the rights of all concerned. In fact, Joel and his friends were treated with respect, provided food and water, and released as quickly as possible, with no risk to their wellbeing or ill effects.

C. The right to vote and stand for election under Article 23

1. General considerations and applicable law

In response to the “situation of risk posed by increasingly violent protests in areas throughout the country,” and in order to “provide the conditions necessary” to ensure that citizens would be able to cast their votes safely, President Reina postponed the national elections for one month, to January 10, 2002, via her declaration of emergency. The date on which elections in Liberté have traditionally been held, December 10, is established in the Law of Elections and Political Parties of Liberté.

The right of citizens to vote and stand for election is set forth in Article 23 of the American Convention. Article 23(1)(b) specifically provides for the right: “to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters.” Article 23 is formulated in terms that are stricter than comparable international instruments. In this sense, Article 23(2) indicates that the rights set forth may be “regulated ... only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.”¹⁰⁴ Moreover, Article 27(2) of the Convention stipulates that the rights set forth in Article 23 are not subject to derogation under any circumstance.

In contrast, while the International Covenant on Civil and Political Rights sets forth a similar formulation of these rights in Article 25(b), it permits restrictions that are not “unreasonable,” and this Article is not included in the list of rights that are nonderogable. The

¹⁰³ See, hypothetical questions and responses, 32.

¹⁰⁴ It may be noted, however, that the Inter-American Commission has found that legal restrictions prohibiting individuals who assumed political power by breaking the constitutional order from running for President are not incompatible with Article 23. See IACHR, Report No. 30/93, Case 10.804, *Rios Montt*, Guatemala, Oct. 12, 1993.

African Charter on Human and Peoples' Rights, for its part, speaks of a broad right to participate in the government of the country, without stipulating what that requires in terms of the right to vote or be elected.

In the European System, Article 3 of Protocol 1 sets forth the duty of the States Parties "to hold free elections at reasonable intervals by secret ballot under conditions which would ensure the free expression of the opinion of the people in the choice of the legislature." The right of the individual to vote and to be elected to the legislature has emerged through the jurisprudence established under this Article.¹⁰⁵ The European Court has indicated that States Parties may be accorded a considerable margin of appreciation in determining the conditions for exercising these rights; however, such conditions may not thwart the "free expression of the people" in their choice of a legislature.¹⁰⁶

As the Inter-American Commission has indicated, elections must be "authentic," "periodic" and "universal," and must be carried out "in a manner that preserves the freedom of expression of the will of the voter."¹⁰⁷ This means that the voters must have had the chance to express their will freely and without coercion, and that the results must be congruent with the expression of that will.¹⁰⁸ In this regard, the Inter-American Commission has examined a wide range of factors, including structural issues;¹⁰⁹ whether political parties and candidates had an equal opportunity to campaign;¹¹⁰ conditions of intimidation or insecurity in the campaign and voting periods, including restrictions on individual rights or situations of internal unrest or violence;¹¹¹ abuse of the resources of the state by incumbent parties to seek unfair advantage;¹¹² the extent to which different social sectors enjoyed full access to voting facilities and the information necessary to fully participate;¹¹³ and the capacity of the media to freely report on relevant issues.¹¹⁴

¹⁰⁵ See generally, ECtHR, *Mathieu-Mohin and Clerfaut v. Belgium*, Ser. A No. 113; *Gitonas v. Greece*, Judgment of July 1, 1997, 1997-IV.

¹⁰⁶ *Mathieu-Mohin supra*, para. 52; *Gitonas, supra*, para. 39. This formulation signifies, however, that individuals must show how the interference complained of has affected the "free expression of the people," arguably a much more difficult standard to meet than that of showing an effect on the situation of an individual complainant.

¹⁰⁷ IACHR, *Final Report on Cases 9768, 9780 and 9829 of Mexico, Annual Report of the IACHR 1989-90*, para. 45.

¹⁰⁸ *Id.*, para. 47.

¹⁰⁹ See, for example, IACHR, *Second Report on the Situation of Human Rights in Peru; supra, Report on the Situation of Human Rights in Mexico*, OEA/Ser.L/V/II.100, doc. 7, rev. 1 1998; IACHR, Report No. 137/99, Case 11.863, *Andres Aylwin Azocar et al.*, Chile, Dec. 27, 1999.

¹¹⁰ See generally, IACHR, *Final Report on Cases 9768, 9780 and 9829 of Mexico, supra*, paras. 49, 70.

¹¹¹ See e.g., IACHR, *Report on the Situation of Human Rights in Chile*, OEA/Ser.L/V/II.66, doc. 17 1985; *Report on the Situation of Human Rights in Paraguay*, OEA/Ser.L/V/II.71, doc. 19, rev. 1, 1987; *Report on the Situation of Human Rights in Panama*, OEA/Ser.L/V/II.76, doc. 16, rev. 1, 1989; IACHR *Report on the Situation of Human Rights in Peru, supra*, ch. IV.

¹¹² See e.g. IACHR Report on the Situation of Human Rights in Peru, *supra*, ch. IV.

¹¹³ See, for example, IACHR, *Fifth Report on the Situation of Human Rights in Guatemala, supra*, ch. X, paras. 12, 25-32.

¹¹⁴ See generally, IACHR, *Report on the Situation of Human Rights in Paraguay, supra; Report on the Situation of Human Rights in Mexico, supra*, paras. 481-99; *Situation of Human Rights in Peru, supra*, ch. IV.

As with other rights, the right to vote and stand for election must be interpreted in congruence with the terms of Article 29 of the American Convention. Among those terms, this Article prohibits any interpretation that would preclude “other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.” The Inter-American Court has confirmed that “[t]he just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions.”¹¹⁵

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

2. Arguments of the Inter-American Commission

The postponement of the elections affected the right of the three victims both to vote and to stand as candidates in significant and prejudicial ways. It must be underlined that elections have been held in Liberté on the date of December 10 for the past 50 years.¹¹⁶ This is the date prescribed by law, and it was not changed even during the most intense periods of the internal conflict. Because the date coincides with the anniversary of Liberté’s independence, it has a special resonance for voters.¹¹⁷

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

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

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

¹¹⁶ Hypothetical case, para. 28.

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

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

¹¹⁹ *Id.*, para. 18(2).

intimidation. Moreover, it had the further effect of transmitting the message to the voting public that only the executive, and her incumbent political party, were capable of governing in a time of tension, thereby undermining the position of the three victims and their minority Justice Party.

Third, the date for the elections was changed through an emergency decree, as opposed to channels involving consultation and the possibility for civil society to be informed about and have a voice with respect to the change before it was made. There were less drastic alternatives available to deal with the situation, namely heightening the capacity and response of the entities responsible for civilian law enforcement. The normally applicable processes involving consultation with and action by Congress (for example to allocate special funds to deploy additional police officers) would have been the appropriate means for resolving the legitimate need for citizen security during the voting.

Fourth, the change in the timing of the elections created questions for many, including the three victims, as to the Government's commitment to the transparency of the elections. In this regard, it must be emphasized that, over the course of the period immediately preceding the declaration of emergency, President Reina's popularity ratings had fallen to their lowest point during her tenure in office, thereby creating a situation of disadvantage for the incumbent party. One means to reverse that situation was to buy additional time and impose measures to show a strong hand in bringing about the restoration of public order.

What happened in Liberté illustrates why states of exception have been considered highly suspect when imposed in relation to electoral processes, as these may provide the incumbent authority with powerful instruments of direct and indirect control over sources of political opposition.¹²⁰ It must be emphasized in this regard that reports following the election (once it was held on January 10, 2002) indicated that the citizenry generally felt that their right to vote had been affected by the postponement.¹²¹

3. Arguments of the State

A free and fair election requires that all citizens are able to cast their votes in conditions of security; it is both the right and the duty of the State to ensure those conditions. The decision to postpone the election by one month was taken precisely for that purpose, and was necessary and proportionate to the situation.

With respect to any given challenge to the public order of the nation, it is the national authorities that are necessarily in a position to evaluate its seriousness and determine how best to protect the rights of inhabitants and the democratic institutions. In the present case, the competent authorities were responding to a situation of daily protests throughout the country. By the middle of 2001, this was involving numerous injuries both to protesters and police.¹²²

¹²⁰ See generally, IACHR, *Report on the Situation of Human Rights in Mexico*, *supra*, para. 71. Forms of indirect coercion include measures that have the "effect of steering the reactions of the citizenry in a direction favorable to its [the State's] policies." See, for example, IACHR, *Annual Report 1987-1988*, OEA/Ser.L/V/II.74, doc. 10 rev. 1, ch. IV, Chile (concerning the 1988 plebiscite).

¹²¹ Hypothetical questions and responses, para. 4.

¹²² Hypothetical case, para. 13.

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

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

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

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

The foregoing analysis indicates that Liberté adopted special measures to deal with an extraordinary threat to the legitimacy of the electoral process and the ability of the citizenry to cast its vote freely and fairly. Far from constituting a limitation or a derogation of the rights protected under Article 23 of the American Convention, the measures adopted had the goal of and did in fact ensure that these rights could be exercised effectively.

¹²³ *Id.*, para. 12.

¹²⁴ *Id.*, paras. 13, 15.

¹²⁵ *Id.*, para. 14.

¹²⁶ *Id.*

¹²⁷ Hypothetical questions and responses, 4.

D. Right to freedom of association and trade union rights

1. General considerations

In its report of November 25, 2002 on the merits of the case, the Inter-American Commission determined that the State of Liberté had violated Article 16 of the American Convention in conjunction with Article 8 of the Protocol of San Salvador. The violation was committed against the rights of the members of five dockworkers' unions, as a consequence of the order to suspend the general strike declared on October 28, 2001.¹²⁸ (While the declaration of emergency had also ordered the dockworkers and management to engage in binding arbitration to resolve the disputes, the Constitutional Court overturned this order as unconstitutional, thereby leaving it without effect.)

Article 16(1) of the American Convention establishes that: "Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes." Article 16(2) in turn indicates that: "The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others."

For its part, Article 8 of the Protocol of San Salvador indicates in pertinent part that: "1. The States Parties shall ensure: a. The right of workers to organize trade unions and to join the union of their choice [...and] shall permit trade unions, federations and confederations to function freely." Additionally, they shall guarantee, "b. The right to strike." Even prior to the adoption of the Protocol of San Salvador, the Inter-American Commission had expressed that "the right to strike and to collective bargaining ... are closely linked to fundamental labor rights," and "should be considered, implicitly, as basic collective rights."¹²⁹ In addition, the Charter of the Organization of American States declares in its Article 43 that: "Employers and workers, both rural and urban, have the right to free association to defend and promote their interests, including the right of collective bargaining and the right to strike of workers."

The Committee on Freedom of Association of the International Labor Organization has recognized the right to strike as a legitimate right to which workers and their organizations may resort in the defense of their economic and social interests. It has further indicated that the right to strike of workers and their organizations constitutes one of their essential means to promote and defend their professional interests."¹³⁰

The European Court of Human Rights has indicated that the clear objective of the European Convention in establishing the right of freedom to associate in unions is to safeguard

¹²⁸ See, hypothetical case, paras. 18(3), 31 and 34.

¹²⁹ IACHR, *Seventh Report on the Situation of Human Rights in Cuba*, OEA/Ser.L/V/II.61, doc. 29, rev.1, 4 October, 1983, paras. 52 and 53.

¹³⁰ Committee on Freedom of Association, *Recopilación de decisiones y principios del Comité de Libertad Sindical del Consejo de Administración de la OIT*, 1985, International Labor Organization, para. 362.

the freedom to protect the labor interests of union members through the actions of the latter.¹³¹ There exists, in this sense, a collective right exercised by the unions to carry out actions to protect the rights of their members.¹³²

The position of the United Nations Human Rights Committee in this regard is less clear, given that it has in some instances concluded that the right to strike is not guaranteed within the trade union freedom,¹³³ but in other instances has concluded that governmental persecution against union activities constitutes a violation of Article 22 of the Covenant.¹³⁴

2. Arguments of the Inter-American Commission

The measures ordered by the President of Liberté in section 3 of the declaration of emergency constituted undue restrictions on freedom of association and the trade union rights of the dockworkers. The Inter-American Commission has established that the right of association includes the right to form unions and to participate in their activities.¹³⁵ Consequently, it has coincided with the Committee on Freedom of Association of the International Labor Organization in concluding that the right to strike is an “essential component of trade union freedom.”¹³⁶

For its part, in its interpretation of the contents of Article 16 of the American Convention the Inter-American Court has established that: “In labor union matters, freedom of association consists basically of the ability to constitute labor union organisations, and to set into motion their internal structure, activities and action programme, without any intervention by the public authorities that could limit or impair the exercise of the respective right.”¹³⁷

In spite of the fact that the right enshrined in Article 8(2)(b) [to strike] of the Protocol of San Salvador is not directly justiciable pursuant to the terms of Article 19(6) of that same instrument, it must be recalled that the exercise of the right to strike is a manifestation of the right to trade union freedom and one of the forms through which that is exercised. On this issue, the Committee on Freedom of Association of the ILO has considered that the right to strike is included within the right of unions to “organize their activities” and “formulate their own plan of action” in defense of the interests of the workers.¹³⁸

¹³¹ See, ECHR, *National Union of Belgian Police v. Belgium Case*, Judgment of 1 October, 1975, Ser. A N° 19, para. 39.

¹³² See, ECHR, *Young, James & Webster v. United Kingdom Case*, Separate Opinion of Judge Evrigenis, Ser. A N° 44.

¹³³ See, for example, UN Human Rts. Committee, Communication 118/1982, *Alberta Union v. Canada*.

¹³⁴ See, for example, UN Human Rts. Committee, Communication 52/1979, *López Burgos v. Uruguay*.

¹³⁵ IACHR, *Freedom of Association and Political Rights, Third Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102, doc. 9 rev. 1, 1999, para. 20.

¹³⁶ IACHR, Report 14/97 (admissibility), Case 11.381, *Milton García Fajardo*, Nicaragua, 12 March, 1997, para. 45.

¹³⁷ IACtHR, *Case of Baena Ricardo et al.*, Judgment of 2 February, 2001, Ser. C N° 72, para. 156.

¹³⁸ Committee on Freedom of Association, *La Libertad Sindical, Recopilación de decisiones y principios del Comité de Libertad Sindical del Consejo de Administración de la OIT*, 1996, International Labor Organization.

The order to lift the strike deprived the unions of the tools that are indispensable for carrying out their work in defense of the workers they represent. This lifting of the strike was not provided for as a matter of domestic law, nor was it necessary to protect the interests of the society of Liberté – the criterion to be met under Article 16(2) of the American Convention in order for a restriction on the right of association to be considered valid. In this regard, the Inter-American Court has stated that the protection of human rights is based on the affirmation of certain attributes “that cannot be legitimately restricted through the exercise of governmental power.”¹³⁹

The action of depriving the dockworkers’ unions of a right inherent in their plan of action by means of a presidential decree is incompatible *per se* with the freedom of association in the labor sphere established in Article 16 of the American Convention and Article 8 of the Protocol of San Salvador. This is so both because the measure involved was not a “law,”¹⁴⁰ nor was the measure adopted to meet the necessities of society. Lastly, the Inter-American Commission adopts as its own the position of the ILO that “a truly free and independent union movement can only be developed within a system that guarantees fundamental human rights.”¹⁴¹

3. Arguments of the State

Article 19(6) of the Protocol of San Salvador (“means of protection”) provides that:

Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

Consequently, independently of the State’s waiver as to preliminary objections, the Inter-American Court should *motu proprio* declare itself incompetent to hear any alleged violation with respect to the right to strike, as the terms of the above cited Article indicate that it is clearly not justiciable. Even accepting that all human rights are interrelated, it is evident that the creators of the inter-American instruments of protection did not intend to grant the Court competence to hear complaints in relation to all the rights set forth.

In the eventuality, however, that the Inter-American Court should decide to continue with its analysis of this alleged violation, it must take into account that freedom of association and/or labor union freedom may be subject to restrictions provided by law, and necessary in a democratic society to safeguard the public interest. As a consequence, in exceptional

¹³⁹ IACtHR, *The Word “Laws” in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86 of 9 May, 1986, Ser. A N° 6, para. 21.

¹⁴⁰ A “law” in this sense is “a legal norm passed by the legislature and promulgated by the Executive Branch, pursuant to the procedure set out in the domestic law of each State.” *Id.*, para. 27.

¹⁴¹ ILO, *Las Normas Internacionales del Trabajo*, Manual de Educación Obrera, Cuarta Edición, International Labor Organization, Geneva, 1998, p. 127.

circumstances, such as the serious internal unrest that was affecting the Republic of Liberté,¹⁴² States may regulate the right to strike through legal procedures that must, in turn, respect the juridical content of the right.”¹⁴³

The Committee on Freedom of Association has established that the right to strike may be subjected to restrictions, and even prohibitions, when dealing with a public function or essential services. Such limitations must correspond to the extent to which the strike could cause grave damage to national society, and are subject to the condition that the restrictions are accompanied by certain guarantees of safeguard.¹⁴⁴ It is evident that port activities constitute an essential service, and that the refusal of the workers was causing grave prejudice to the country. This prejudice was particularly acute in the case of the population in the southwest of the country, already affected by the drought and dependent on imported foodstuffs.¹⁴⁵

The European Court has recognized that States enjoy a certain margin of appreciation in relation to the needs of their societies and democratic institutions.¹⁴⁶ It is precisely this margin of appreciation that Liberté has applied in the present case. This same Court has established that “[t]he notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.”¹⁴⁷ It is evident in the present case that the legitimate end pursued was the maintenance of democracy.

The challenged declaration of emergency has not obviated freedom of association or the right to strike. Rather, it has suspended this right on the basis of the specific circumstances, having taken duly into account that the measure did not involve any of the rights identified in Article 27(2) as nonderogable.

In summary, the right to strike is not an absolute right but one that may legitimately be subject to restriction, and even prohibition. Furthermore, the fact that the State denied the workers the possibility to continue with their strike did not restrict their ability to exercise their right to association.¹⁴⁸

¹⁴² See, hypothetical case, paras. 11-22.

¹⁴³ Centro de Asesoría Laboral, Centro de Estudios Legales y Sociales, Centro de Derechos Económicos y Sociales, Comisión Colombiana de Juristas; *Actuando Juntos, Amicus Curiae*, Case 11.325 Baena Ricardo et al. v. Panama, CEPAL, Lima Perú, page 92.

¹⁴⁴ Committee on Freedom of Expression, *Trade Union Freedom*, *supra*, para. 533. What is understood as essential services in the strict sense of the word depends in large measure on the specific conditions that apply in each country. Further, the concept is not absolute, given that what is understood as a nonessential service may be converted into an essential service when the duration of a strike surpasses a certain period or scope and places the life, personal security or health of all or part of the population in danger. *Id.*, para. 541.

¹⁴⁵ See, hypothetical case, paras. 9 and 16.

¹⁴⁶ See, ECHR, *Lingens v. Austria Case*, Judgment of 8 July, 1986, Ser. A N° 103, para. 39.

¹⁴⁷ See, ECHR, *Leander v. Sweden Case*, Judgment of 26 March, 1987, Ser. A N° 116, para. 58.

¹⁴⁸ IACHR, Report 100/01 (merits), Case 11.381, *Milton García Fajardo*, Nicaragua, 11 October, 2001, para. 106.

IV. CONCLUSION: THE OBLIGATION TO RESPECT AND ENSURE

Article 1(1) of the American Convention sets forth the overarching obligations of States Parties to respect and ensure all the rights recognized therein. The situations dealt with in this year's hypothetical are aimed at provoking debate about the relation and balance between human rights, democracy and the rule of law. In this regard, while the State has the right and the duty to take measures in favor of citizen security and to protect the interests of all within its jurisdiction, such measures must conform to the rule of law. Moreover, as Article 29(c) stipulates, the Convention may never be read to allow the State to abrogate rights inherent in the human personality or to preclude other guarantees derived from representative democracy as a form of government.

In this regard, the guarantee that no person (much less a child) may be deprived of liberty without due process of law lies at the heart of any democratic system that proclaims respect for the rule of law. Genuine, free and fair elections sustain the legitimacy and continuation of the democratic system. Further, the right to strike, and other rights that originate in freedom of expression and association play a key role in the consolidation and strengthening of democratic systems. The question common to each of these elements of this year's hypothetical case is the balance between respecting and ensuring individual rights and the need to protect and uphold the democratic system that makes the preservation of those rights possible.