

FAX ORIGINAL

RAMSEY CLARK

LAWRENCE W. SCHILLING



FAX TRANSMISSION SHEET

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DATE: November 6, 2002
FAXED TO: Hon. Manuel E. Ventura-Robles
Secretary
IACHR
FAXED NUMBER(S): 011-506-234-0584
FAXED FROM: Lawrence W. Schilling
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RE: Lori Berenson Case (No. 11.876)
Emergency Motion For Summary
and Final Judgment
Your ref: CDH-11.876

COMMENTS:

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RAMSEY CLARK

LAWRENCE W. SCHILLING

November 6, 2002

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Hon. Manuel E. Ventura-Robles
Secretary
Inter-American Court of Human Rights
Apdo. 6906-1000
San Jose, Costa Rica

By fax: 506-234-0584
and Express Delivery

Re: Lori Berenson Case (No. 11.876)
Emergency Motion For Summary
and Final Judgment
Your ref: CDH-11.876

Dear Secretary Ventura-Robles:

We are transmitting with this letter by fax and express delivery as our observations on this case, an emergency motion by Ms. Berenson for the Court's consideration, urgently requesting a Summary And Final Judgment On The Merits To Prevent Irreparable Injury.

Please accept the renewed assurances of our highest consideration.

Sincerely,

Lawrence W. Schilling

TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS
Lori Berenson -against- the Republic of Peru
Case No. 11.876

Emergency Motion

by Lori Berenson

for

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A Summary And Final Judgment On The Merits
To Prevent Irreparable Injury

Holding Peru To Be In Violation Of
The American Convention On Human Rights

On The Basis Of Uncontested Facts
And
Prior Decisions Of This Court

1. Lori Berenson, the original claimant and alleged victim, pursuant to Article 23.1 of this Court's Rules of Procedure, urgently requests this Court to enter summary and final judgment against Peru without unnecessary and harmful delay, or formality, and respectfully states as follows in support of this emergency motion.

2. Undisputed facts in the record of this case establish Peru's responsibility for the multiple violations of the American Convention on Human Rights presented in this proceeding. No fact essential to prove Peru's violation of the American Convention on Human Rights is in dispute.

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3. The principles of law controlling this case have been clearly decided by the Court in cases in which Peru was a party and in international jurisprudence. The several violations of the American Convention on Human Rights presented in this proceeding can be decided on the basis of undisputed facts and settled law without delay. Peru is well aware of its violations. To permit it to re-litigate decided issues will result in lengthy and unnecessary delays in this and other cases and further violations of the rights of Lori Berenson and others facing unlawful prosecutions at this time, undermining the protection of human rights in Peru, continuing the illegality of its judicial proceedings and impairing the effectiveness of this Court.

4. The principal violations of the American Convention on Human Rights in the proceedings against Lori Berenson are:

4.1 The failure of Peru to respect the rights and freedoms recognized in the Convention and to ensure to all persons subject to its jurisdiction the free and full exercise of those rights and freedoms as required by Article 1.1 of the Convention, and to undertake to adopt, in accordance with its constitutional processes and the provisions of the Convention, legislative or other measures which are necessary to give effect to those rights and freedoms as required by Article 2 of the Convention. Years have passed since Peru's obligations under the Convention were adjudicated by this Court during which it has failed to fulfill its commitment to conform its laws to the Convention. Loayza Tamayo Case, Judgment of September 17, 1997, Series C. No. 33;

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Loayza Tamayo Case, Judgment on Reparations, November 27, 1998, Series C. No. 42, Castillo Petruzzi at al Case, Judgment of May 30, 1999, Series C. No. 52.

4.2 Lori Berenson was tried for treason against the homeland and convicted before the military courts of Peru in 1995-96 of violating the unlawful 1992 Fujimori era Decree-Law 25,659. The conviction violates the right to a fair trial under Article 8 of the American Convention on Human Rights in that, among other things, as this Court held with respect to such a military trial in Castillo Petruzzi at al Case, supra, the right to a competent, independent and impartial Tribunal under Article 8(1), see paras. 132-140, see also para. 161; the right to prior notification of charges and adequate time and means to prepare a defense under Article 8(2)(b) and (c), paras. 141-142; the right to assistance of counsel and communication with counsel under Article 8(2)(d), paras. 146, 148-149; the right to examine witnesses under Article 8(2)(f), paras. 153-156; the right to appeal the judgment to a higher court under Article 8(2)(h), paras. 161-162; the right to public proceedings under Article 8(5), paras. 172-173; see also the violation of Article 8(1) in Cantoral Benavides Case, Judgment of August 18, 2000; Series C. No. 69, paras. 112-114.

4.3 In August 2000, Lori Berenson was acquitted of treason by the Supreme Council of Military Justice of Peru on her motion for special review which held the prosecution had failed to prove an essential element of the crime. An accusation was then filed

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against her on the same cause relying on the same evidence presented in the military proceedings in the regular criminal courts of Peru charging her with violation of the unlawful 1992 Decree-Law 25,475 a decree inextricably intertwined with Decree-Law 25,659, and she was convicted in a new unlawful trial in 2001. The same Public Prosecutor, Mario Cavagnaro, represented Peru throughout the military and regular court proceedings. The new trial and conviction of Lori Berenson in the regular courts of Peru began on August 28, 2000, nearly three years after the September 17, 1997 judgment of this Court in the Loayza Tamayo case, and months after the May 30, 1999 judgment in the Castillo Petruzzi case. Peru was a party in both of these cases which established the per se violation of Decree-Law 24,475 under which Peru proceeded against Lori Berenson. Peru continues to this day to prosecute civilians and others under Decree-Law 25,659 and Decree-Law 25,475. The new trial and conviction violates the right heretofore established by this Court to a fair trial under Article 8 of the American Convention on Human Rights in that, among other things, evidence gathered in the military jurisdiction in violation of the American Convention on Human Rights was the impermissible basis of the conviction and the entire proceeding in the regular court was inextricably intertwined with the unlawful proceedings in the military courts, the charges and trial took place under Decree-Law No. 25,475 which this Court has repeatedly held to be violative of the American Convention on Human Rights, see e.g. the Castillo

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Petruzzi Case, supra, para. 207, and Loayza Tamayo Case, supra, para. 61, and in disregard of this Court's repeated directions to the State to take measures to bring these laws into conformity with the Convention, see the Castillo Petruzzi Case, supra, para. 222. In the Loayza Tamayo Case, Judgment on Reparations, November 27, 1998, Series C. No. 42, this Court ruled unanimously in operative paragraph 5, following para. 192:

"That the State of Peru shall adopt the internal legal measures necessary to adapt Decree-Laws 25,475 (Crime of Terrorism) and 25,659 (Crime of Treason) to conform to the American Convention of Human Rights."

Subsequently, as appears in this Court's Order of November 17, 1999, Loayza Tamayo Case, Compliance with Judgment, Series C. No. 60, Peru charged this Court with "radical incompetence" in issuing the order in paragraph 5, quoted supra, see para. 12(a), which this Court rejected holding that Peru "has a duty to promptly comply with the November 27, 1998 Judgment on Reparations," see first decretal paragraph.

4.4 Lori Berenson has been subjected to a new trial following acquittal by a nonappealable judgment, in violation of the right not to be subjected to a new trial for the same cause under such circumstances recognized by Article 8(4) of the American Convention on Human Rights as this Court held in Loayza Tamayo Case, Judgment of September 17, 1997, Series C. No. 33, supra, paras. 67, 76-77.

4.5 Lori Berenson, while unlawfully incarcerated by Peru

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was subjected to inhumane punishment which has seriously and permanently injured her health in violation of the right to humane treatment under Article 5 of the American Convention on Human Rights as this Court has held in cases of similar inhumane treatment, see Loayza Tamayo Case, Judgment of September 17, 1997 supra, paras. 57-58; Castillo Petruzzi case, supra, para. 198; Velasquez Rodriguez Case, Judgment of July 29, 1988, Series C. No. 4, para. 156; Godinez Cruz Case, Judgment of January 20, 1989, Series C. No. 5, para. 164; Fairen Garbi and Solis Corrales Case, Judgment of March 15, 1989, Series C. No. 6, para. 149; Suarez Rosero Case, Judgment of November 12, 1997, Series C. No. 35, para. 90-92.

5. Only a prompt decision by the Court in this case can prevent irreparable injury to the many accused persons in Peru undergoing and facing trials for violations of Treason and Terrorism decrees unlawfully promulgated by the Fujimori government in 1992 which have been repeatedly held to violate the American Convention on Human Rights. Unfortunately, the IACHR was overly confident in its Draft Follow-up Report dated April 23, 2002 on Peru's Compliance with the IACHR's recommendations in its Report on the Situation of Human Rights in Peru (2000), when it wrote that Peru "...acknowledges that amending the anti-terrorist legislation is a step that still needs to be taken." Para. 19. The debate whether Peru will conform its laws to protect the rights recognized by the Convention continues in the government, the media and the human rights community. Typical of

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the comments in that debate, on November 6, 2002, Expreso, a leading newspaper in Lima, reported

"El ministro de Justicia, Fausto Alvarado Dodero, aseguro que el gobierno peruano considera "correcta y sin fallas" la actual legislacion antiterrorista..."

On November 6, 2002, CPN radio (wire services) reported that Walter Alban, Peru's ombudsman and Salomon Lerner, President of Peru's Commission for Truth and Reconciliation stated

"que el Estado peruano debera acatar la eventual recomendacion de la Comision Interamericana de Derechos Humanos (CIDH), para revisar los juicios de los terroristas condenados. ..."

"Alban Paralta recordo que la Comision y la Corte Interamericana de Derechos Humanos se pronunciaron en el sentido de que la legislacion, que rige en el Peru en materia de terrorismo, no es compatible con la Convencion Americana..."

The views of the human rights community were recently summed up in IDEELE, issue No. 149, September 2002, where Carlos Rivera wrote in an article entitled "Legislacion antiterrorista: La hora del Cambio"

Diez anos despues de su promulgation, la legislacion antiterrorista no solo constituye un lastre para una efectiva vigencia del Estado de derecho sino que, ademas, su existencia se ha convertido en un elemento que vicia sustancialmente los procesos por terrorismo y traicion a la patria.

Durante todos estos anos no solo fue cuestionada sistematicamente por los organismos de derechos humanos, puesto que se convirtio en uno de los principales instrumentos de violacion de estos derechos, sino que tambien tanto la Comision quanto la Corte interamericana de Derechos Humanos en los Informes y Sentencias, el Comité de Derechos Humanos y los relatores especiales de la ONU han senalado reiteradamente que esta legislacion contiene normas que contravienen y vulneran las disposiciones contenidas en al Convencion Americana sobre Derechos Humanos y el Pacto Internacional de Derechos Civiles y Politicos.

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Tanto es así que ya en 1999 la Corte declaró que le correspondía al Estado peruano "adoptar las medidas apropiadas para reformar las normas que han sido declaradas violatorias de la Convención".

Pero a pesar de tales recomendaciones y mandatos del sistema interamericano y de la evidencia de que esta es una legislación que contradice las normas mínimas de un Estado de derecho, hasta la fecha no ha sido reformada.

Failure to immediately confirm to the government of Peru that trials under Decree-Laws 25,475 and 25,659 violate the American Convention on Human Rights and that no new trials should be commenced under them will cause irreparable injury to the judicial system and rule of law in Peru and to efforts by the OAS, this Court, and the IACHR to protect human rights. Lori Berenson was imprisoned under inhumane conditions for nearly five years under an unlawful conviction by the military courts in Peru and has remained unlawfully imprisoned more than two years since, during and after proceedings in a second trial in the regular courts of Peru under an unlawful statute. Only an affirmance now of the prior decisions of this Court can prevent further unlawful imprisonment and consequent irreparable injury which will result from the continuation of trials under these illegal Decree-Laws. The need for a final judgment is urgent.

6. For the foregoing reasons it is requested that the Court act now to enforce its prior decisions, protect the purposes of the American Convention on Human Rights, avoid the procedural chaos and injustice caused by delay for all parties, and protect the lives and rights of persons presently facing proceedings in Peru from further violations of settled

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international law. To avoid delay, if before entering the summary and final judgment requested, the Court asks for, or any party wishes to make additional submissions on the merits or on acts of Peru required to conform to rights recognized by the American Convention on Human Rights, the Court should by order, limit the time for such submissions to not more than thirty days.

November 6, 2002

Respectfully submitted,

Ramsey Clark

Lawrence W. Schilling
Thomas H. Nooter
Jose Luis Sandoval Quesada

Attorneys for Lori Berenson