

INTER-AMERICAN COURT OF HUMAN RIGHTS

**ADVISORY OPINION OC-9/87
OF OCTOBER 6, 1987**

**JUDICIAL GUARANTEES IN STATES OF EMERGENCY
(ARTS. 27(2), 25 AND 8
AMERICAN CONVENTION ON HUMAN RIGHTS)**

REQUESTED BY THE GOVERNMENT OF URUGUAY

Present:

Rafael Nieto-Navia, President
Héctor Gros Espiell, Vice President
Rodolfo E. Piza E., Judge
Thomas Buergenthal, Judge
Pedro Nikken, Judge
Héctor Fix-Zamudio, Judge

Also present:

Charles Moyer, Secretary
Manuel Ventura, Deputy Secretary

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. By note of September 17, 1986, the Government of Uruguay (hereinafter "the Government") submitted to the Inter-American Court of Human Rights (hereinafter "the Court") an advisory opinion request on the scope of the prohibition of the suspension of the judicial guarantees essential for the protection of the rights mentioned in Article 27(2) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention").

2. The Government asked the Court "to interpret the scope of the Convention's prohibition of the suspension of 'the judicial guarantees essential for the protection of such rights.' Because even 'in time of war, public danger, or other emergency that threatens the independence or security of a State Party' (Art. 27(1)) it is not possible to suspend 'the judicial guarantees essential for the protection of such rights,' the Government of Uruguay requests the Court's opinion, in particular, regarding: (a)

which of these judicial guarantees are 'essential' and (b) the relationship between Article 27(2), in that regard, and Articles 25 and 8 of the American Convention. "

3. By note of October 29, 1986, acting pursuant to Article 52 of the Rules of Procedure of the Court (hereinafter "the Rules"), the Secretariat requested written observations on the issues involved in the instant proceedings from the Member States of the Organization of American States (hereinafter "the OAS") as well as, through the Secretary General, from the organs listed in Chapter X of the Charter of the OAS.

4. By telex of April 1, 1987, the President asked the Government, pursuant to Article 49(2)(a) of the Rules, to present any additional considerations or reasons that it took into account in deciding to request the advisory opinion. The Government responded by telex of April 24, 1987, in which it expressed the following:

Under normal circumstances in democratic systems of law in which human rights are respected and regulated, the judicial protection afforded by internal norms is generally recognized in practice.

This is not the case in those systems or situations in which the violation of fundamental rights is not only of a substantive nature but also affects the judicial guarantees which have developed alongside them.

As recognized by the Inter-American Commission and by the Inter-American Court of Human Rights in its Advisory Opinion OC-8, of January 30, 1987, the political history of Latin America shows that it is during states of exception or of emergency that the failure of these judicial guarantees is most serious insofar as the protection of the rights that cannot be suspended even in such situations.

5. On that same date, the Government appointed Dr. Didier Opertti, Director of the Legal Adviser's Office of the Ministry of Foreign Affairs, as its Agent.

6. The President of the Court directed that the written submissions and other relevant documents be filed with the Secretariat before January 26, 1987. He later extended this deadline to June 8, 1987.

7. The Governments of Bolivia and Panama replied to the communication from the Secretariat.

8. The International Human Rights Law Group, the International Commission of Jurists, the Lawyers Committee for Human Rights and Amnesty International, all non-governmental organizations, submitted **amicus curiae** briefs.

9. The Court set a public hearing for June 18, 1987 for the purpose of enabling the Member States and OAS organs to present to the Court their arguments on the issues raised in the request for an advisory opinion. It continued the hearing at the Government's request made by telex of June 12, 1987.

10. By telex of September 22, 1987, the Government made the following clarifications regarding the continuance of the hearing originally set for June 18, 1987, and the telex of the President of the Court, dated June 16, 1987:

1. The scope of the request by the Government of Uruguay refers, specifically, to the interpretation of the expression "essential" judicial guarantees found in Article 27 (2) of the American Convention on Human Rights, as related to Articles 25 and 8 of the Convention.

2. In the opinion of the Government of Uruguay, the definition of the scope of that expression for the purposes of international law and in particular of the American Convention is without prejudice to that of the legal system of the State requesting the opinion and its condition as a democratic State.

11. That telex does not modify the terms of the request as they were originally presented. Paragraph one reiterates the questions posed and the second paragraph merely reserves the point of view of the Government.

I PROCEDURE

12. The Court continued the public hearing set for June 18, 1987, at the Government's request. Since the Government has already informed the Court by telex of the clarifications it deemed necessary, the Court finds that setting another hearing would serve no purpose and that it should take up consideration of the request for an advisory opinion without further delay.

II ADMISSIBILITY

13. The Government has submitted this request under the authority of Article 64(1) of the Convention. Uruguay is a Member State of the OAS and, therefore, has the right to submit requests for advisory opinions to the Court.

14. The second question posed by the Government refers specifically to the interpretation of norms of the Convention, being the relationship among Articles 27(2), 25 and 8. Therefore, the request falls within the subject matter suitable for an advisory opinion, that is, "the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states." (Art. 64(1)).

15. The Court finds, therefore, that the request meets the requirements of admissibility.

16. The terms of the request and the considerations which, according to the Government, prompted the request, show that the matter submitted to the Court is a juridical question which does not refer, specifically or concretely, to any particular fact situation. The Court recognizes that these circumstances could, in certain cases, lead it to make use of the discretionary powers implied in its advisory jurisdiction and to abstain from responding to a request formulated in those terms ("**Other treaties**" **Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights)**, Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 30 and **Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)**, Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 10). As the Court has said, the advisory jurisdiction of the Court is "an alternative judicial method" (**Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American**

Convention on Human Rights), Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 43) for the protection of internationally recognized human rights, which shows that this jurisdiction should not, in principle, be used for purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion.

17. Nevertheless, the question raised in the request of the Government is related to a specific juridical, historical and political context, in that states of exception or emergency, and of human rights and the essential judicial guarantees in those moments, is a critical problem in the Americas. From that perspective, the Court understands that its opinion could be useful within a reality in which the basic principles of the system have often been questioned. Therefore, it sees no reason to refrain from rendering an opinion. Thus, the Court admits the request.

III THE MERITS

18. The Government's request refers to Article 27 of the Convention which reads as follows:

Article 27. Suspension of Guarantees

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from **Ex Post Facto** laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

19. The Government makes the following request:

3. The Government of Uruguay asks the Court to interpret the scope of the Convention's prohibition of the suspension of "the judicial guarantees essential for the protection of such rights."

Because even "in time of war, public danger, or other emergency that threatens the independence or security of a State Party" (Art. 27(1)) it is not possible to suspend "the judicial guarantees essential for the protection of such rights," the Government of Uruguay requests the Court's opinion, in particular, regarding: (a) which of these judicial guarantees are "essential", and (b) the relationship between Article 27 (2), in that regard, with Articles 25 and 8 of the American Convention.

20. The Court shall first examine what are, according to the Convention, the "essential" judicial guarantees alluded to in Article 27(2). In this regard, the Court has previously defined in general terms that such guarantees are understood to be "those that ordinarily will effectively guarantee the full exercise of the rights and freedoms protected by that provision and whose denial or restriction would endanger their full enjoyment" (**Habeas Corpus in Emergency Situations, supra** 16, para. 29). Likewise, it has emphasized that the judicial nature of those guarantees implies "the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency" (Ibid., para. 30).

21. From Article 27(1), moreover, comes the general requirement 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.

22. The Convention provides other criteria for determining the basic characteristics of judicial guarantees. The starting point of the analysis must be the obligation of every State Party to "respect the rights and freedoms recognized (in the Convention) and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" (Art. 1(1)). From that general obligation is derived the right of every person, set out in Article 25(1), "to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention."

23. As the Court has already pointed out, Article 25(1) of the Convention is a general provision that gives expression to the procedural institution known as amparo, which is a simple and prompt remedy designed for the protection of all the fundamental rights (**Habeas Corpus in Emergency Situations, supra** 16, para. 32). This article also establishes in broad terms the obligation of the States to provide to all persons within their jurisdiction an effective judicial remedy to violations of their fundamental rights. It provides, moreover, for the application of the guarantee recognized therein not only to the rights contained in the Convention, but also to those recognized by the Constitution or laws. It follows, **a fortiori**, that the judicial protection provided by Article 25 of the Convention applies to the rights not subject to derogation in a state of emergency.

24. Article 25(1) incorporates the principle recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights. As the Court has already pointed out, according to the Convention:

... States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdictions (Art. 1) **(Velásquez Rodríguez, Fairen Garbi and Solís Corrales and Godínez Cruz Cases, Preliminary Objections, Judgments of June 26, 1987, paras. 90, 90 and 92, respectively).**

According to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.

25. In normal circumstances, the above conclusions are generally valid with respect to all the rights recognized by the Convention. But 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.

26. Therefore, any provision adopted by virtue of a state of emergency which results in the suspension of those guarantees is a violation of the Convention.

27. Article 8(1) of the Convention points out that

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

In the Spanish text of the Convention, the title of this provision, whose interpretation has been specifically requested, is "Judicial Guarantees."* This title may lead to confusion because the provision does not recognize any judicial guarantees, strictly speaking. Article 8 does not contain a specific judicial remedy, but rather the procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees under the Convention.

* "Right to a Fair Trial" in the English text.

28. Article 8 recognizes the concept of "due process of law", which includes the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination. This conclusion is justifiable in that Article 46(2)(a) uses the same expression in establishing that the duty to pursue and exhaust the remedies under domestic law is not applicable when

the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated.

29. The concept of due process of law expressed in Article 8 of the Convention should be understood as applicable, in the main, to all the judicial guarantees referred to in the American Convention, even during a suspension governed by Article 27 of the Convention.

30. Reading Article 8 together with Articles 7(6), 25 and 27(2) of the Convention leads to the conclusion that the principles of due process of law cannot be suspended in states of exception insofar as they are necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees. This result is even more clear with respect to habeas corpus and amparo, which are indispensable for the protection of the human rights that are not subject to derogation and to which the Court will now refer.

31. Paragraph 6 of Article 7 (Right to Personal Liberty) recognizes and governs the remedy of habeas corpus. In another opinion, the Court has carefully studied habeas corpus as a guarantee not subject to derogation. It said in that regard:

(H)abeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment (**Habeas Corpus in Emergency Situations, supra** 16, para. 35).

32. Regarding amparo, contained in Article 25(1) of the Convention, the Court asserted the following in the advisory opinion just mentioned above:

The above text (Art. 25(1)) is a general provision that gives expression to the procedural institution known as "amparo," which is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention. Since "amparo" can be applied to all rights, it is clear that it can also be applied to those that are expressly mentioned in Article 27(2) as rights that are non-derogable in emergency situations (**Ibid.**, para. 32).

33. Referring to these two judicial guarantees essential for the protection of the non-derogable rights, the Court held that

the 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 (**Ibid.**, para. 42).

34. The Court adds that, moreover, there are other guarantees based upon Article 29(c) of the Convention, which reads as follows:

Article 29. Restrictions Regarding Interpretation

No provision of this Convention shall be interpreted as:

...
c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.

35. The Court has already referred to the rule of law, to representative democracy, and to personal liberty, and has described in detail how essential they are to the inter-American system and in particular to the system for the protection of human rights contained in the Convention (see **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 November 13, 1985. Series A No. 5, para. 66; **The Word " Laws " in Article 30 of the American Convention on Human Rights**, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, paras. 30 and 34 and **Habeas Corpus in States of Emergency, supra** 16, para. 20). The Court considers it relevant to reiterate the following:

In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning (**Habeas Corpus in Emergency Situations, supra** 16, para. 26).

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 (**Ibid.**, para. 24; see also **The Word " Laws ", supra**, para. 32).

36. The Court also said that the suspension of guarantees must not exceed that strictly required and that

any action on the part of the public authorities that goes beyond those limits, which must be specified with precision in the decree promulgating the state of emergency, would also be unlawful... (**Habeas Corpus in Emergency Situations, supra** 16, para. 38).

(I)t follows that the specific measures applicable to the rights or freedoms that have been suspended may also not violate these general principles. Such violation would occur, for example, if the measures taken infringed the legal regime of the state of emergency, if they lasted longer than the time limit specified, if they were manifestly irrational, unnecessary or disproportionate, or if, in adopting them, there was a misuse or abuse of power (**Ibid.**, para. 39).

37. Thus understood, the "guarantees... derived from representative democracy as a form of government" referred to in Article 29(c) imply not only a particular political system against which it is unlawful to rebel (**Ibid.**, para. 20), but the need that it be supported by the judicial guarantees essential to ensure the legality of the measures taken in a state of emergency, in order to preserve the rule of law (**Ibid.**, para. 40).

38. The Court holds that the judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees.

39. When in a state of emergency the Government has not suspended some rights and freedoms subject to derogation, the judicial guarantees essential for the effectiveness of such rights and liberties must be preserved.

40. It is neither possible nor advisable to try to list all the possible "essential" judicial guarantees that cannot be suspended under Article 27(2). Those will depend in each case upon an analysis of the juridical order and practice of each State Party, which rights are involved, and the facts which give rise to the question. For the same reasons, the Court has not considered the implications of other international instruments (Art. 27(1)) that could be applicable in concrete cases.

41. Therefore,

THE COURT IS OF THE OPINION

Unanimously,

1. That the "essential" judicial guarantees which are not subject to derogation, according to Article 27(2) of the Convention, include habeas corpus (Art. 7(6)), amparo, and any other effective remedy before judges or competent tribunals (Art. 25(1)), which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the Convention.

Unanimously,

2. That the "essential" judicial guarantees which are not subject to suspension, include those judicial procedures, inherent to representative democracy as a form of government (Art. 29(c)), provided for in the laws of the States Parties as suitable for guaranteeing the full exercise of the rights referred to in Article 27(2) of the

Convention and whose suppression or restriction entails the lack of protection of such rights.

Unanimously,

3. That the above judicial guarantees should be exercised within the framework and the principles of due process of law, expressed in Article 8 of the Convention.

Done in Spanish and in English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this sixth day of October, 1987.

Rafael Nieto-Navia
President

Héctor Gros Espiell

Rodolfo E. Piza E.

Thomas Buergenthal

Pedro Nikken

Héctor Fix-Zamudio

Charles Moyer
Secretary

Judge Jorge R. Hernández Alcerro participated in the discussion and preliminary vote of this Advisory Opinion. He was not present, however, when it was signed.