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Title/Style of Cause:	Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)
Doc. Type:	Advisory Opinion
Decided by:	President: Thomas Buergenthal; Vice President: Rafael Nieto-Navia; Judges: Rodolfo E. Piza E.; Pedro Nikken; Hector Fix-Zamudio; Hector Gros Espiell; Jorge R. Hernandez Alcerro
Dated:	30 January 1987
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## THE COURT

gives the following Advisory Opinion:

1. The Inter-American Commission on Human Rights (hereinafter "the Commission"), by note of October 10, 1986, submitted to the Inter - American Court of Human Rights (hereinafter "the Court") an advisory opinion request seeking the interpretation of Articles 25(1) and 7(6) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") when read in conjunction with the final clause of Article 27(2) of that instrument.
2. In a note of October 21, 1986, acting pursuant to Article 52 of the Rules of Procedure of the Court, 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.
3. The President of the Court directed that the written observations and other relevant documents be filed with the Secretariat before January 26, 1987 in order for them to be considered by the Court during its Sixteenth Regular Session, which was held January 24-30, 1987.
4. A response to the Secretariat's communication was received from the Governments of Ecuador, Panama and Venezuela.

5. Furthermore, the following non-governmental organizations, as amici curiae, submitted their points of view on the request: Americas Watch Committee and the International Human Rights Law Group.

6. A public hearing was held on Monday, January 26, 1987, for the purpose of enabling the Member States and the OAS organs to present to the Court their arguments on the issues raised in the request.

7. At this public hearing the Court heard the following:

For the Inter-American Commission on Human Rights:

Dr. Luis Adolfo Siles Salinas, Delegate and President

## I. ADMISSIBILITY

8. This request for an advisory opinion has been submitted to the Court by the Commission pursuant to the power conferred upon it by the Convention, which enables the organs listed in Chapter X of the OAS Charter to seek, within their spheres of competence, an "interpretation of (the American) Convention or of other treaties concerning the protection of human rights in the American States" (Art. 64(1)). The Commission is one of the organs listed in said Chapter. Moreover, as the Court has already indicated:

given the broad powers relating to the promotion and observance of human rights which Article 112 of the OAS Charter confers on the Commission...the Commission enjoys, as a practical matter, an absolute right to request advisory opinions within the framework of Article 64(1) of the Convention (The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 16).

9. The request of the Commission seeks the interpretation of Articles 25(1) and 7(6) of the Convention when read in conjunction with the final clause of Article 27(2) thereof. Accordingly, it meets the requirements of Article 64(1).

10. Since there is no reason for the Court to make use of the power permitting it, in advisory proceedings, to refrain from rendering an opinion ("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. 31), the Court rules the request admissible and proceeds to answer it.

## II. STATEMENT OF THE ISSUES

11. The Commission submitted the following question to the Court:

Is the writ of habeas corpus, the legal basis of which is found in Articles 7(6) and 25(1) of the American Convention on Human Rights, one of the judicial guarantees that, pursuant to the last

clause of Article 27(2) of that Convention, may not be suspended by a State Party to the aforementioned American Convention?

12. In its request, the Commission deal at length with the considerations that gave rise to the request. Among other points, the Commission declared that:

some States Parties to the American Convention on Human Rights have assumed that one of the rights that may be suspended in emergency situations is the right to judicial protection afforded by the writ of habeas corpus. Some States have even promulgated special laws or have instituted a practice enabling them to hold a detainee *incomunicado* for a prolonged period of time, in some cases for as long as fifteen days. During that time, the detainee may be refused all contact with the outside world, thus preventing resort to the writ of habeas corpus.

The Commission believes that it is precisely in these special circumstances that the writ of habeas corpus acquires its greatest importance.

The Commission recognizes, of course, that, pursuant to Article 27 of the American Convention, the right to personal liberty may be temporarily suspended in time of war, public danger or other emergency that threatens the independence or security of the State, and that the authority vested in the executive branch permits the temporary detention of a person solely on the basis of information that he or she endangers the independence or security of the State.

The Commission nevertheless considers that, even in emergency situations, the writ of habeas corpus may not be suspended or rendered ineffective. As has been pointed out already, the immediate aim of this remedy is to bring the detainee before a judge, thus enabling the latter to verify whether the detainee is still alive and whether or not he or she has been subjected to torture or physical or psychological abuse. The importance of this remedy cannot be overstated, considering that the right to humane treatment recognized in Article 5 of the American Convention on Human Rights is one of the rights that may not be suspended under any circumstances.

Even with respect to the right to personal liberty, which may be temporarily suspended in special circumstances, the writ of habeas corpus enables the judge to determine whether the warrant of arrest meets the test of reasonableness, which is the standard prescribed by the case law of certain countries that have found themselves in states of emergency. To hold the contrary view -- that is, that the executive branch is under no obligation to give reasons for a detention and may prolong such a detention indefinitely during states of emergency, without bringing the detainee before a judge empowered to grant the remedies set forth in Articles 7(6) and 25(1) of the Convention-- would, in the opinion of the Commission, be equivalent to attributing uniquely judicial functions to the executive branch, which would violate the principle of separation of powers, a basic characteristic of the rule of law and of democratic systems.

13. Articles 27 (1) and 27(2), 25(1) and 7(6) of the Convention provide that:

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.

#### Article 25. Right to Judicial Protection

1. Everyone has the right 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, even though such violation may have been committed by persons acting in the course of their official duties.

#### Article 7. Right to Personal Liberty

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

### III. MERITS

14. The interpretation of Articles 25(1) and 7(6) of the Convention seeking to determine whether the suspension of habeas corpus is permissible during states of emergency, given the provisions of Article 27(2), must take account of the rules of interpretation set out in the Vienna Convention on the Law of Treaties, which may be deemed to state the relevant international law principles applicable to this subject (cf. 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. 48 and other advisory opinions of the Court), and which read as follows:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (Art. 31(1)).

15. Note should also be taken of the provisions of Article 29 of the Convention. That article provides:

#### Article 29. Restrictions Regarding Interpretation

No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

16. Article 27(2) must, therefore, be interpreted "in good faith" and keeping in mind the "object and purpose" (cf. The Effect of Reservations, supra 8, para. 29) of the American Convention and the need to prevent a conclusion that could give rise to the suppression of "the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for (therein" (Art. 29(a)).

17. The Court will begin by examining some of the general problems involved in the interpretation of Article 27 of the Convention and then determine whether the proceedings to which Articles 25(1) and 7(6) apply are included among the essential judicial guarantees referred to in Article 27(2).

18. Article 27 contains certain phrases that should be emphasized for purposes of this advisory opinion request. Thus, the title of this Article is "Suspension of Guarantees;" its first paragraph speaks of "derogating from... obligations under the present Convention;" the second paragraph deals with the "suspension of...articles (rights)"\* guaranteeing certain rights; and the third paragraph refers to the "right of suspension." When the word "guarantees" is used in the second paragraph, it is precisely in order to prohibit suspension of essential judicial guarantees. An analysis of the terms of the Convention in their context leads to the conclusion that we are not here dealing with a "suspension of guarantees" in an absolute sense, nor with the "suspension of... (rights)," for the rights protected by these provisions are inherent to man. It follows therefrom that what may only be suspended or limited is their full and effective exercise. It is useful to note these differences in the terminology being used in order to clarify the conceptual basis of the instant advisory opinion. Nevertheless, the Court will use the phrase "suspension of guarantees" that is found in the Convention.

19. The starting point for any legally sound analysis of Article 27 and the function it performs is the fact that it is a provision for exceptional situations only. It applies solely "in time

of war, public danger, or other emergency that threatens the independence or security of a State Party."

And even then, it permits the suspension of certain rights and freedoms only "to the extent and for the period of time strictly required by the exigencies of the situation." Such measures must also not violate the State Party's other international legal obligations, nor may they involve "discrimination on the ground of race, color, sex, language, religion or social origin."

20. It cannot be denied that 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. The Court cannot, however, ignore the fact that abuses may result from the application of emergency measures not objectively justified in the light of the requirements prescribed in Article 27 and the principles contained in other here relevant international instruments. This has, in fact, been the experience of our hemisphere. 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. The soundness of this conclusion gains special validity given the context of the Convention, whose Preamble reaffirms the intention (of the American States) "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man." The suspension of guarantees lacks all legitimacy whenever it is resorted to for the purpose of undermining the democratic system. That system establishes limits that may not be transgressed, thus ensuring that certain fundamental human rights remain permanently protected.

21. It is clear that no right guaranteed in the Convention may be suspended unless very strict conditions --those laid down in Article 27(1)-- are met. Moreover, even when these conditions are satisfied, Article 27(2) provides that certain categories of rights may not be suspended under any circumstances. Hence, rather than adopting a philosophy that favors the suspension of rights, the Convention establishes the contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency.

22. Since Article 27(1) envisages different situations and since, moreover, the measures that may be taken in any of these emergencies must be tailored to "the exigencies of the situation," it is clear that what might be permissible in one type of emergency would not be lawful in another. The lawfulness of the measures taken to deal with each of the special situations referred to in Article 27(1) will depend, moreover, upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures.

23. Article 27(2), as has been stated, limits the powers of the State Party to suspend rights and freedoms. It establishes a certain category of specific rights and freedoms from which no derogation is permitted under any circumstances and it includes in that category "the judicial guarantees essential for the protection of such rights." Some of these rights refer to the physical integrity of the person, such as the right to juridical personality (Art. 3); the right to life (Art. 4);

the right to humane treatment (Art. 5); freedom from slavery (Art. 6) and freedom from ex post facto laws (Art. 9). The list of non-derogable rights and freedoms also includes freedom of conscience and religion (Art. 12); the rights of the family (Art. 17); the right to a name (Art. 18); the rights of the child (Art. 19); the right to nationality (Art. 20) and the right to participate in government (Art. 23).

24. The suspension of guarantees also constitutes an emergency situation in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled. This does not mean, however, that the suspension of guarantees implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times. 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 (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, para. 32).

25. It is not the intention of the Court to embark upon a theoretical exposition concerning the relation between rights and guarantees. It is enough to point out what the meaning of the term guarantee is as that concept is used in Article 27(2). Guarantees are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof. The States Parties not only have the obligation to recognize and to respect the rights and freedoms of all persons, they also have the obligation to protect and ensure the exercise of such rights and freedoms by means of the respective guarantees (Art. 1.1), that is, through suitable measures that will in all circumstances ensure the effectiveness of these rights and freedoms.

26. The concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. 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.

27. As the Court has already noted, in serious emergency situations it is lawful to temporarily suspend certain rights and freedoms whose free exercise must, under normal circumstances, be respected and guaranteed by the State. However, since not all of these rights and freedoms may be suspended even temporarily, it is imperative that "the judicial guarantees essential for (their) protection" remain in force. Article 27(2) does not link these judicial guarantees to any specific provision of the Convention, which indicates that what is important is that these judicial remedies have the character of being essential to ensure the protection of those rights.

28. The determination as to what judicial remedies are "essential" for the protection of the rights which may not be suspended will differ depending upon the rights that are at stake. The "essential" judicial guarantees necessary to guarantee the rights that deal with the physical

integrity of the human person must of necessity differ from those that seek to protect the right to a name, for example, which is also non-derogable.

29. It follows from what has been said above that the judicial remedies that must be considered to be essential within the meaning of Article 27(2) are 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.

30. The guarantees must be not only essential but also judicial. The expression "judicial" can only refer to those judicial remedies that are truly capable of protecting these rights. Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency.

31. The Court must now determine whether, despite the fact that Articles 25 and 7 are not mentioned in Article 27(2), the guarantees contained in Articles 25(1) and 7(6), which are referred to in the instant advisory opinion request, must be deemed to be among those "judicial guarantees" that are "essential" for the protection of the non-derogable rights.

32. Article 25(1) of the Convention provides that:

Everyone has the right 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, even though such violation may have been committed by persons acting in the course of their official duties.

The above text 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.

33. In its classical form, the writ of habeas corpus, as it is incorporated in various legal systems of the Americas, is a judicial remedy designed to protect personal freedom or physical integrity against arbitrary detentions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered. The Convention proclaims this remedy in Article 7(6), which states:

Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

34. If the two remedies are examined together, it is possible to conclude that "amparo" comprises a whole series of remedies and that habeas corpus is but one of its components. An examination of the essential aspects of both guarantees, as embodied in the Convention and, in their different forms, in the legal systems of the States Parties, indicates that in some instances habeas corpus functions as an independent remedy. Here its primary purpose is to protect the personal freedom of those who are being detained or who have been threatened with detention. In other circumstances, however, habeas corpus is viewed either as the "amparo of freedom" or as an integral part of "amparo."

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

36. This conclusion is buttressed by the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments. This experience has demonstrated over and over again that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended. As the President of the Commission stated in the hearing on this request,

The Commission is convinced that thousands of forced disappearances could have been avoided in the recent past if the writ of habeas corpus had been effective and if the judges had investigated the detention by personally going to the places that had been denounced as those of detention. This writ is the best instrument available to correct promptly abuses of authority involving arbitrary deprivation of freedom. It is also an effective means of preventing torture and other physical and psychological abuses, such as exile, perhaps the worst punishment, which has been so abused in our hemisphere, where thousands of exiles make up a true exodus.

As the Commission has painfully recalled in its last Annual Report, these tortures and constraints tend to occur during long periods of incommunication, during which the prisoner lacks the legal means and remedies to assert his rights. It is precisely under these circumstances that the writ of habeas corpus is of greatest importance.

Those who drafted the Convention were aware of these realities, which may well explain why the Pact of San Jose is the first international human rights instrument to include among the rights that may not be suspended essential judicial guarantees for the protection of the non-derogable rights.

37. A further question that needs to be asked, and which goes beyond the consideration of habeas corpus as a judicial remedy designed to safeguard the non-derogable rights set out in Article 27(2), is whether the writ may remain in effect as a means of ensuring individual liberty even during states of emergency, despite the fact that Article 7 is not listed among the provisions that may not be suspended in exceptional circumstances.

38. If, as the Court has already emphasized, the suspension of guarantees may not exceed the limits of that strictly required to deal with the emergency, 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 notwithstanding the existence of the emergency situation.

39. The Court should also point out that since it is improper to suspend guarantees without complying with the conditions referred to in the preceding paragraph, it 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.

40. If this is so, it follows that in a system governed by the rule of law it is entirely in order for an autonomous and independent judicial order to exercise control over the lawfulness of such measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency. In this context, habeas corpus acquires a new dimension of fundamental importance.

41. In this connection, the Court deems it appropriate to quote the Cámara Federal de Apelaciones en lo Criminal y Correccional of Buenos Aires, Argentina (Case No. 1980 of April 1977), which, in granting a writ of habeas corpus, ruled as follows:

It is not possible to accept the argument that the President of the Republic is alone empowered to examine the situation of those who are detained at his order. Although it is clearly beyond the scope of judicial activity to consider matters of political and not judicial import, it is equally clear that it is the duty of the Judiciary of the Nation to examine exceptional cases such as the present as to the reasonableness of the measures taken by the Executive and this is set out in Articles 23, 29 and 95 of the National Constitution.

The general interest has also to be balanced by individual liberty so that it must in no way be supposed that those who are detained at the pleasure of the Executive are simply to be left to their fate and are removed beyond the scope of any review by the national judiciary, no matter how long they might be kept under arrest.

...

In view of the need to choose between individual freedom and the hypothetical and undemonstrated dangerous nature (of the detainee), we choose the former, running the risks that it involves, safeguarding a value which no Argentine has renounced.

(Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Argentina, OEA/Ser.L/V/II.49, doc. 19 of 11 April 1980).

42. From what has been said before, it follows 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.

43. The Court must also observe that the Constitutions and legal systems of the States Parties that authorize, expressly or by implication, the suspension of the legal remedies of hábeas corpus or of "amparo" in emergency situations cannot be deemed to be compatible with the international obligations imposed on these States by the Convention.

44. Therefore, in response to the question posed by the Inter-American Commission relating to the interpretation of Articles 27(2), 25(1) and 7(6) of the Convention,

#### THE COURT IS OF THE OPINION

Unanimously,

That, given the provisions of Article 27(2) of the American Convention on Human Rights, the legal remedies guaranteed in Articles 7 (6) and 25(1) of the Convention may not be suspended because they are judicial guarantees essential for the protection of the rights and freedoms whose suspension Article 27(2) prohibits.

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

Thomas Buergenthal  
President

Rafael Nieto Navia  
Rodolfo E. Piza E.  
Pedro Nikken  
Héctor Fix- Zamudio  
Héctor Gros Espiell  
Jorge R. Hernández Alcerro

Charles Moyer  
Secretary