Mr. Chavero

Applicant

v.

Republic of Vadaluz

Respondent

MEMORIAL OF THE STATE

TABLE OF CONTENTS

INDEX OF AUTHORITIES

A. Cases

a. Inter-American System of Human Rights

i. Advisory Opinions

ii. Case-law

b. Other international courts

B. Legal books, articles and reports

a. Legal books and articles

b. Reports

i. IACHR

ii. Other international organizations

C. Other contributions of international organizations

STATEMENT OF THE FACTS

The State of Vadaluz (hereinafter: the State or Vadaluz) distinguishes itself from other countries in the region by its democratic tradition. It has held continuous elections for over a century and has not been under a military dictatorship.[1] At the end of the 20th century the people of Vadaluz made clear that they wanted to progress towards a social state under the rule of law. This evolution was consolidated in the 2000 Constitution.[2]

In January 2020, the State was struck by a worldwide pandemic. The swine virus caused a severe flu resulting in acute respiratory infections and even deaths.[3]

The unfortunate passing of a woman waiting to receive health care on January 10, 2020, sparked protests demanding universal health coverage.[4]

Simultaneously, the World Health Organization (hereinafter: WHO) stated that the virus's mortality rate was unknown and that it was highly contagious. The WHO advised social distancing measures while researchers gathered a better understanding of the virus and developed a vaccine.[5] The State took that advice to heart and published Executive Decree 75/20 (hereinafter: the Decree) declaring a state of emergency and listing the adopted measures.[6]

Despite the worldwide health emergency and the distancing measures, a small group of students decided to put themselves and others at risk by gathering in the streets.[7] After police officers kindly

[1] Hypothetical,§2.
[2] *Ibid*,§6.
[3] *Ibid*,§14,16; CQ 1.
[4] Hypothetical,§12-14.
[5] *Ibid*,§16.
[6] *Ibid*,§17.
[7] *Ibid*,§18-20.

and repeatedly asked the students to go home, since public gatherings of more than three people were banned by the Decree, the students refused to do so. The officers warned the students that they would start making arrests if the protests continued.[8]

Eventually, Mr. Chavero (hereinafter: Mr Chavero or the Applicant) was arrested and held in custody in accordance with the Decree.[9] He had the opportunity to consult with his lawyer before his appearance before the chief of police, which took place within the first twenty-four hours of his arrest. The ensuing order established that the Applicant was guilty of violating Article 3 of the Decree and therefore would be subject to the penalty provided therein.[10] During his detention the Applicant was treated with dignity and he stated afterwards that he had not been subjected to cruel, inhuman treatment or torture.[11]

On March 4, 2020, Directive No. 1 of 2020 was published, stating that the judicial branch would not be included as an essential activity in the sense of the Decree.[12] From that day on lawsuits and pleadings were processed through the judiciary's digital portal.[13] On March 6, 2020, Ms. Kelsen, the Applicant's lawyer, filed a writ of *habeas corpus,* including a request for adoption of a precautionary measure, and an unconstitutionality action.[14] On March 7, 2020, the urgent precautionary measure was dismissed as unnecessary since the Applicant would be released that day.[15] On March 30, 2020, the Federal Supreme Court (hereinafter: the Supreme Court) dismissed the unconstitutionality action as unfounded.[16]

[8] *Ibid*,§20.
[9] *Ibid*,§20-22.
[10] *Ibid*,§22-23.
[11] *Ibid*,§31.
[12] *Ibid*,§26.
[13] *Ibid*,§25.
[14] *Ibid*,§30.
[15] *Ibid*,§31.
[16] *Ibid*,§32.

LEGAL ANALYSIS

A. Preliminary objections

a. The requirements of Articles 46(1)(a) and 47(a) ACHR were not met because domestic remedies were not exhausted

The Inter-American Human Rights System (hereinafter: IAHRS) is subsidiary in nature. Consequently, the State has to be given the opportunity to resolve issues under its internal law before being confronted with international proceedings.[17] This principle is embodied in the requirement of exhaustion of domestic remedies in Articles 46(1)(a) and 47(a) ACHR.

Two main issues can be identified regarding this requirement.

Firstly, the Applicant failed to exhaust the appropriate domestic remedies to address state responsibility for the alleged violations of Articles 7(1), 7(2), 7(3), 7(4), 7(5), 8, 9, 13, 15 and 16 ACHR. The appropriate remedy to address these violations is an administrative appeal.[18] The Applicant only filed the writ of *habeas corpus* and the unconstitutionality action.[19] However, these remedies were not appropriate to address state responsibility.

The writ of *habeas corpus* is a judicial remedy specifically designed to address an alleged unlawfulness of a deprivation of liberty to *secure the release* of the detainee.[20] It is therefore only suited to protect personal liberty[21] *in this respect* and not to address state responsibility for

[17] *Velásquez Rodríguez v. Honduras*, IACtHR,(1988),§61; *Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil*, IACtHR,(2020),§30.
[18] CQ 20,24,30.
[19] Hypothetical,§25,30.
[20] *Advisory Opinion OC-8/87*, IACtHR,(1987),§33.
[21] CQ 3,10,17,20,24,30,42.

violations of a citizen's subjective rights, be it personal liberty or other. This explains why the trial court dismissed the *habeas corpus* action as moot on March 15, 2020.[22] Since the *habeas corpus* proceeding lost its object after the Applicant's release, it could not be continued solely to address state responsibility.

The unconstitutionality action is designed specifically to challenge the legality of a rule or regulation in the abstract,[23] and therefore not a suitable remedy to address state responsibility for violating a citizen's subjective rights either.

In the domestic legal system, the ordinary remedy to challenge the legality of an administrative act, is an administrative appeal.[24] The alleged violation of Articles 7(1), 7(2), 7(3), 7(4), 7(5), 8, 9, 13, 15 and 16 ACHR would all be the consequence of administrative acts, be it the arrest, the detention and the acts of the proceedings at Police Headquarters No. 3.[25] Hence, the State did have a suitable remedy available that the Applicant failed to exhaust.

Secondly, the Applicant had the possibility to file for a review of the proceeding of *habeas corpus*. The proper remedy to fully address the effectiveness of the writ of *habeas corpus* under domestic law would have been this review by the Supreme Court to allege a manifest error of law.[26] The Applicant, however, failed to do so.

The State acknowledges that it carries the burden of proving that other domestic remedies remain when it raises the lack of exhaustion of the appropriate remedies.[27] These remedies have to

[22] Hypothetical,§32.
[23] CQ 20,24,30.
[24] *Ibid*.
[25] Article 3 Decree *juncto* CQ 6,22,38,59 *juncto* Hypothetical,§23.
[26] CQ 7,42.
[27] *Loayza-Tamayo v. Peru*, IACtHR,(1996),§40; *Castillo-Páez v. Peru*, IACtHR,(1996),§40.

formally exist,[28] be appropriate, adequate and effective to remedy the type of violation alleged, and available to the Applicant.[29] It is clear that the administrative appeal and the Supreme Court review meet these requirements.

Firstly, the remedies were appropriate and adequate since they were suitable to address the alleged violation of the specific legal rights.[30] As explained above, the administrative appeal was specifically designed to handle cases in which the unlawfulness of administrative acts is a point of controversy. The review procedure before the Supreme Court is equally adequately tailored.[31] They are therefore appropriate remedies.

Secondly, the remedy must be effective and thus capable of producing the anticipated result.[32] The Court previously decided that remedies were ineffective for being illusory due to the circumstances[33] or for being unjustifiably delayed.[34] Due to the emergency response, some impact on the proper functioning of the judiciary was inevitable. However, this did not unduly inhibit access to justice or the effectiveness of any of the judicial procedures (*infra B.*b.vi.). Furthermore, there are no indications that the remedy of an administrative appeal or the request for review to the Supreme Court would be ineffective for any other reason.

Thirdly, to be available, the remedy must exist at the time the petition was filed with the Commission, and the alleged victim must be the proper party to pursue the remedy.[35] This is not at issue in the present case. The administrative appeal and the request for review existed as a

[28] *Las Palmeras v. Colombia*, IACtHR,(2001),§58; *Martínez Esquivia v. Colombia*, IACtHR,(2020),§20.
[29] *Chitay Nech et al. v. Guatemala*, IACtHR,(2010),§31; *Martínez Esquivia v. Colombia*, IACtHR,(2020),§20.
[30] *Godínez Cruz v. Honduras*, IACtHR,(1989),§67.
[31] CQ 7, 42.
[32] *Velásquez Rodríguez v. Honduras*, IACtHR,(1988),§66; *Carranza Alarcón v. Ecuador*, IACtHR,(2020),§15.
[33] *Las Palmeras v. Colombia*, IACtHR,(2001),§58; *Constitutional Court v. Peru*, IACtHR,(2001),§93.
[34] *Constitutional Court v. Peru*, IACtHR,(2001),§93; *Mayagna (Sumo)Awas Tingni Community v. Nicaragua*, IACtHR,(2001),§134.
[35] *Gomes Lund et al. v. Brazil*, IACtHR,(2010),§46.

remedy at the time, and it is clear the Applicant would have been the proper party to pursue them.[36] Moreover, both the Decree and the police order given to the Applicant clarify that all legal actions remain available during the state of emergency.[37]

The State acknowledges the fact that it did not previously file a preliminary objection before the Commission[38] and that this could result in tacitly waiving the possibility to do so at a later stage.[39] In principle, challenges to the admissibility of the petition should be submitted in a timely manner[40] and preliminary objections should be filed in the briefs during the admissibility stage before the Commission.[41] However, the Commission previously acknowledged that the ability of States to respond in a timely manner to the IACHR's requests, could be impacted when suffering under a pandemic. In these circumstances, the Commission put on hold the deadlines in the petition and case system.[42] As the State found itself in these difficult and exceptional circumstances of a pandemic at the time of the procedure before the Commission, the relevant information may not have been promptly diverted to the appropriate domestic body responsible for providing an answer.

Therefore, the State would like to request the Court to consider its preliminary objections.

b. The exceptions in Article 46(2) ACHR do not apply

For the requirement of exhaustion of domestic remedies to be applicable, it is required that the exceptions in Article 46(2) ACHR do not apply.

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[36] CQ 20,24,30.
[37] Hypothetical,§23; Article 3 Decree.
[38] CQ 29.
[39] *Velásquez Rodríguez v. Honduras*, IACtHR,(1987),§88; *Montesinos Mejía v. Ecuador*, IACtHR,(2020),§25.
[40] Article 30(6) Rules of Procedures IACHR; *Martínez Esquivia v. Colombia*, IACtHR,(2020),§21,27.
[41] Articles 41(1)(a) *juncto* (d) *juncto* 42(1) Rules of Procedure IACtHR; *Martínez Esquivia v. Colombia*, IACtHR, (2020),§27.
[42] IACHR. *Press Release IACHR Extends Suspension of Deadlines for Petition, Case, and Friendly Settlement System by One Month in Response to COVID-19 Health Emergency*,(2020).

Firstly, the State has to afford due process of law for the protection of rights that have allegedly been violated.[43] There are no indications that the judiciary of Vadaluz would not function impartially and independently. Moreover, judicial governance is provided by the Superior Council for the Administration of Justice as an independent public entity.[44] This requirement is further elaborated upon in the merits (*infra* B.b.vi.).

Secondly, the Applicant has not been denied access to the domestic remedies nor was he prevented from exhausting them.[45] The arguments in the merits equally apply (*infra* B.b.vii.).

Thirdly, there cannot be an unwarranted delay in rendering a final judgment.[46] This exception is not relevant with regard to the request for review and the administrative appeal, as they were not filed.

Therefore, no exceptions are applicable, and the requirement of domestic remedies stands. In conclusion, the State asks the Court to dismiss the petition on ground of inadmissibility of the application.

[43] Article 46(2)(a) ACHR.
[44] CQ 27.
[45] Article 46(2)(b) ACHR.
[46] Article 46(2)(c) ACHR.

B. Arguments on the merits

a. The State did not violate Article 27 juncto 1(1) and 2 ACHR regarding the Decree because the derogations were in accordance with its requirements

To deal with the exigencies of the pandemic, Article 2(3) of the Decree limited public meetings and demonstrations to three people. In doing so, the State derogated from Articles 13, 15 and 16 ACHR in a manner conformant with Article 27 ACHR.

Article 27(2) ACHR prohibits the suspension of the guarantees of certain Articles of the ACHR containing non-derogable rights, and Article 27(3) ACHR mandates that a suspension of rights is immediately brought to the attention of the Secretary General of the Organization of American States (hereinafter: OAS). Article 2(3) of the Decree does not entail any derogation of the rights enshrined in Article 27(2) ACHR. Moreover, the State forwarded a copy of the Decree to the OAS General Secretariat,[47] which indicated the reasons for suspension,[48] the suspended rights[49] and the date of termination[50]. Therefore, the requirements of Articles 27(2) and 27(3) ACHR are met. The only requirements left to be considered are those of Article 27(1) ACHR.

Article 27(1) ACHR poses a five-fold requirement for a measure to validly derogate from a convention right.

[47] CQ 19,39,55.
[48] Preamble Decree.
[49] Article 2 Decree.
[50] *Ibid*.

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

When one of the exceptional circumstances mentioned in Article 27(1) ACHR occurs, states may institute temporary suspensions of certain rights and freedoms enshrined in the ACHR that under normal circumstances should be respected and guaranteed by the State.[51] The circumstance of public danger intends to refer to a situation that was not necessarily a threat to internal or external security.[52] Situations that were kept in mind in this respect were, amongst others, epidemics.[53] This is exactly the situation in which the State finds itself: A epidemic of the swine-flu.[54] Therefore, this first requirement is met.

ii. No further than strictly required by the exigencies of the situation

Article 27(1) ACHR refers to the principle of proportionality.[55] According to the IACtHR *"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".*[56]

[51] *Advisory Opinion OC-8/87*, IACtHR,(1987),§27.
[52] IACHR. *Acta de la Decimacuarta Sesión de la Comisión "I," in Conferencia Especializada Interamericana sobre Derechos Humanos*,(1973),260,264.
[53] Norris, R.E.; Reiton, P.D., "The Suspension of Guarantees: A Comparative Analysis of the American Convention on Human Rights and the Constitutions of the States Parties", *Am . U. L. Rev* . 189,(1980),199.
[54] Hypothetical,§16.
[55] Cfr. HRC. *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*,(2001),§4.
[56] *Advisory Opinion OC-8/87*, IACtHR,(1987),§22; *Zambrano Vélez v. Ecuador*, IACtHR,(2007),§45.

Hence, it must be satisfied that in light of the character, intensity, pervasiveness and particular context of the pandemic, the measures derogating from Articles 13, 15 and 16 established in Article 2(3) of the Decree, relevant to the facts of the present case, are reasonable and proportionate.

The relevant measure is the prohibition on public meetings and demonstrations of more than three people.[57] It is clear that these measures were reasonable and proportionate in light of the pandemic. The highly contagious character[58] of the swine flu is of this nature that any gatherings, large or small, will facilitate its spread. The seriously disturbing health consequences, dangerous acute respiratory infections, and potentially catastrophically high mortality rate[59] illustrate the enormous intensity of the emergency. Add the dramatic rise of infection numbers across the country at the time and the collapsing of the health care facilities,[60] and the scale of the emergency the government faced becomes apparent.

To assess the proportionality between the measure taken and the emergency addressed, the State follows a quadruple test, namely rationality,[61] necessity,[62] proportionality *sensu stricto*[63] and absence of misuse of power.[64]

[57] Article 2 Decree.
[58] Hypothetical,§15.
[59] *Ibid*.
[60] *Ibid*,§18.
[61] *Advisory Opinion OC-8/87*, IACtHR,(1987),§39; ECHR. *Report Ireland v. UK*, (1976),§97.
[62] *Ibid*.
[63] *Advisory Opinion OC-8/87*, IACtHR,(1987),§39; Special Rapporteur of the Human Rights Sub-Commission. *Report on the Question of Human Rights and States of Emergency*, (1997),§84.
[64] *Advisory Opinion OC-8/87*, IACtHR,(1987),§39; ECHR. *Report Ireland v. UK*, (1976),§97,101.

1. Rationality of the measure

The measure must be a rational way of addressing the emergency. In the present case, this holds true in an obvious way. Putting a limit on the possible attendees of gatherings avoids the flocking together of large groups of people where the virus could spread freely.[65]

2. Necessity

There was no less intrusive alternative available. This goes for both the geographical and material scope of the measure.

As for the geographical scope, the infection numbers were rising dramatically throughout the whole country.[66] Therefore, measures had to be taken for the entire territory of Vadaluz.

As for the material scope of the measure, considering the scale of the emergency the pandemic posed, it becomes clear that a prohibition of gatherings of more than three people was necessary to impose. Other possible measures, such as the imposition of social distancing, the obligation to wear mouth masks or allowing a larger group of people to gather, would have fallen short to address the public danger at hand. They would have failed to recognize the inherent uncertainty that existed about the virus at the time. The mortality rate was still unknown[67] and while the WHO recommended social distancing,[68] it was in no way certain this would adequately cap the spread of the virus.

[65] Hypothetical,§16.
[66] *Ibid*,§18.
[67] *Ibid*,§16; CQ 1.
[68] Hypothetical,§16.

At the time the measures were adopted, further scientific data was absent. Furthermore, the IACtHR[69] has stated that under certain circumstances a restriction of the full enjoyment of rights, such as the right of assembly, may be required to achieve sufficient social distance. Taking any more lenient measures at the time would have been in breach of the international obligations to protect the right to health[70] and the right to life[71] of its citizens to which the State attaches the utmost importance.

3. Proportionality sensu stricto

When balancing on the one hand the right to publicly gather with more than three people and on the other hand the protection of the right to health and preventing the health system from collapsing, the proportionality of restricting the former in favor of the latter becomes apparent.

The mere scale of the threat, made clear in the above considerations, together with the uncertainty surrounding the swine flu and the State's obligation to ensure the right to life and the right to health should suffice to show that the measure of prohibiting protests of more than three people was not unreasonably intrusive.

Moreover, different methods of voicing dissent with public policy, such as petitions online and virtual protests,[72] were still available to the populace.

[69] *Advisory Opinion OC-8/87*, IACtHR,(1987),§20.
[70] Article 12(2)(c) ICESCR; Article XI American Declaration of the Rights and Duties of Man.
[71] Article 4 ACHR; Article I American Declaration; Article 2 UDHR; Article 26 ICESCR.
[72] OHCHR. *Report of the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association,* (2013); Instituto Nacional de Derechos Humanos. *Internet y Derechos Humanos, Serie de Cuadernillos de Temas Emergentes*,(2013),29.

4. Absence of abuse of power

It is clear that the measure in question was not adopted in an attempt to secure some hidden agenda on behalf of Vadaluz. On the contrary, as discussed above, rationality, necessity and proportionality *sensu stricto* left the State no choice but to take precisely those measures it imposed. Moreover, the State made sure to install several safeguards countering potential misuse. It specifically made clear in Article 3 of the Decree that all judicial remedies would remain fully available to all who would feel victimized by any emergency measure.[73] Equally, it did not interfere with the possibility to challenge the Decree on its constitutionality before the Supreme Court.

In conclusion, the derogation does not exceed the extent of the requirements of the exigencies of the situation.

iii. No longer than strictly required by the exigencies of the situation

Articles 1 and 2 of the Decree put a time limit on the duration of the derogating measures. The state of emergency is only imposed for the duration of the pandemic and the measures are only issued for the duration of the state of emergency. The State opted for a time limit linked to the pervasiveness of the swine flu. As long as it is so broadly spread as to merit the label of *pandemic*, the measures would stay in place. A pandemic is defined as "*an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people*".[74] By using this criterion to delineate the state of emergency, the State essentially deferred the decision of how long the measures would last to the consensus within the scientific

[73] Article 3 Decree.
[74] J.M. Last (ed), *A dictionary of epidemiology*,OUP,2001.

community. After all, assessing whether such a situation continues to exist is a scientific question, to be answered by epidemiologists. In doing so, the State heeded the call made by, among others, the IACHR in the context of the outbreak of the COVID-19 virus to let the response to pandemic outbreaks be guided by the best scientific knowledge.[75] Given the novelty of the virus at the time and the consequent lack of scientific estimates regarding its duration, this was the most responsible and reasonable way the State could limit its actions to the period of time strictly required by the exigencies of the situation.

This criterion is therefore met.

iv. Not inconsistent with other State obligations under international law

Since the State, in drawing up the emergency measures, was fully aware of its obligations under international law and respected them accordingly, this criterion is met.

v. No discrimination on the basis of race, color, sex, language, religion or social origin

The IACtHR has defined discrimination as differential treatment lacking a reasonable, objective, and proportionate justification.[76] This justification requires that *"there must be a reasonable relationship of proportionality between [the differential treatment] and the aims of the legal rule under review",*[77] where *"[this] aim cannot be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind".*[78] In other words, the measures must have a legitimate purpose[79] and there must be a relationship of proportionality with this purpose.

[75] E.g. IACHR. *Resolution 1/2020 Pandemic and Human Rights in the Americas,*(2020),§1,6,7; CESCR. *Statement on the coronavirus disease (COVID-19) pandemic and ESC rights,*(2020),§1.
[76] *Vélez Loor v. Panama*, IACtHR,(2010),§248; *Advisory Opinion OC-4/84*, IACtHR,(1984),§56.
[77] *Advisory Opinion OC-4/84*, IACtHR,(1984),§57.
[78] *Ibid.*
[79] *Atala Riffo and Daughters v. Chile*, IACtHR,(2012),§110.

Proportionality must be understood as entailing a requirement of appropriateness,[80] necessity[81] and reasonable proportion between measure and purpose.[82]

The only differentiation made in the derogating measures of the Decree is that between gatherings of people in the context of their religious practice[83] and people gathering in a different context, such as the protests in which the Applicant was participating. The State clearly pursued a legitimate purpose with this differentiation, namely the safeguarding of the possibility of people to exercise their religion, a conventionally protected and non-derogable right,[84] while still curbing public gatherings as much as possible to avoid the spread of the virus.

Equally, it is clear the differentiation was appropriate to address this aim. An essential part of most religions is the congregation in places of worship. Providing for an exception on the ban of group gatherings is therefore a useful measure in safeguarding the full enjoyment of the right to freedom of religion.

It was also necessary to make the distinction with non-religious gatherings. If the exception would have been formulated any broader than those gatherings protected by the special non-derogable status of Article 12 ACHR, this would have seriously undermined the efficacy of the measures in general, namely safeguarding the right to life and right to health of the population of Vadaluz.

Finally, restricting the gathering of more than three people, unless for religious reasons, is reasonable in light of the pursued aim, being the guaranteeing of the exercise of freedom of religion, while still imposing responsible social distancing measures as much as possible. As has

[80] *Ibid*,§114.
[81] *Ibid*,§144, referencing *Karner v. Austria*, ECtHR,(2003),§41.
[82] *Ibid*,§143, referencing *Salgueiro da Silva Mouta v. Portugal*, ECtHR,(1999),§34-36.
[83] Article 2(4) Decree.
[84] Articles 12 *juncto* 27(2) ACHR.

been substantiated above (*supra* B.a.ii.), there was a dire need for the State to take social distancing measures to stop the uninhibited spread of the virus. In doing so, the State sought to avoid restricting the rights of its citizens as much as possible. Given the central importance to religious communities of continuing their respective sacred practices, a need that has no equivalent in secular communities and that is conventionally protected,[85] the State deemed it appropriate to make this exception part of their complicated balancing act, aimed at safeguarding all rights of all its citizens as much as possible in these times of major distress.

Therefore, no discrimination is found.

The State did not violate Article 27 *juncto* 1(1) and 2 ACHR regarding the Decree because the derogations were in accordance with its requirements.

b. The State did not violate Articles 7, 8, 9, 13, 15 and 16 juncto 1(1) and 2 ACHR regarding the Applicant's arrest and detention

i. The State did not violate Articles 7(1), 7(2) and 9 *juncto* 1(1) and 2 ACHR because the arrest and detention found their basis in law and were carried out in accordance with the reasons and conditions established in it

Article 7(2) ACHR requires the arrest and detention to have a basis in domestic law. The Court has clarified a tripartite test to assess whether this right has been violated or not. The deprivation of liberty (a) must find its legal basis in a *law*, (b) the *law* must establish specific reasons and

[85] Article 12 ACHR.

conditions for the deprivation of physical liberty, (c) the arrest must be carried out in accordance with the reasons and conditions for deprivation of liberty.[86]

Firstly, *law* in the sense of this Article, is generally understood by the IACtHR as "*a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose*".[87]

This means that, as a general rule, the legal basis of an arrest or detention must be found in an act adopted by the legislature. In the present case however, the arrest of the Applicant was based on the Decree, an instrument emanating from the executive branch.[88]

The IACtHR corrected this general rule: *"The above does not necessarily negate the possibility of delegations of authority in this area, provided that such delegations are authorized by the Constitution, are exercised within the limits imposed by the Constitution and the delegating law, and that the exercise of the power delegated is subject to effective controls, so that it does not impair nor can it be used to impair the fundamental nature of the rights and freedoms protected by the Convention".*[89]

This correction creates the possibility for an arrest or detention to find its legal basis in an instrument of the executive branch, such as the Decree, as long as this delegation was constitutionally valid under the domestic legal system and as long as the exercise of the delegated powers is subject to effective controls. In the present case, it is established that the Decree has

[86] *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, IACtHR,(2007),§56-57; *Vélez Loor v. Panama*, IACtHR, (2010),§164; *Montesinos Mejía v. Ecuador*, IACtHR,(2020),§94.
[87] *Advisory Opinion OC-6/86*,IACtHR,(1986),§38.
[88] Hypothetical,§17.
[89] *Ibid*,§36.

force of law in the legal system of Vadaluz.[90] This means it was issued in an exercise of a delegation of legislative power which was constitutionally valid. The fact that Congress did not deliberate on the Decree, does not have any legal consequences and does not impact the validity of the delegation. The extraordinary circumstances were to be taken into account in this respect. The Supreme Court explicitly confirmed this.[91] As for the existence of an effective control mechanism, this was present in the form of judicial control by the Supreme Court.[92]

Secondly, the Decree gives a clear list of reasons for and the conditions in which persons may be arrested in its third Article, namely a congregation of more than three people and an interception *in flagrante delicto*.[93]

Thirdly, the State has complied with its own domestic rules regarding the arrest of the Applicant. It was carried out for one of the explicit grounds listed in the Decree and in accordance with the conditions set forth therein.[94]

Considering the above, there is no violation of Articles 7(1), 7(2) *juncto* 1(1) and 2 ACHR.

Article 9 ACHR establishes the principle of legality and the prohibition of *ex post facto* laws. The Court clarified that *"the definition of an act as an unlawful act and the determination of its legal effects must precede the conduct of the individual who is alleged to have violated it; because, before a behavior is defined as a crime, it is not unlawful for penal effects"*.[95] This principle governs the actions of different bodies of the State in their respective fields of competence,[96]

[90] CQ 20,24,30.
[91] Hypothetical,§32; CQ 11,31,45.
[92] Hypothetical,§7.
[93] *Ibid*,§17.
[94] Hypothetical,§20-22.
[95] *De la Cruz Flores v. Peru*, IACtHR,(2004),§104.
[96] *Rico v. Argentina*, IACtHR,(2019),§102.

including an administrative punitive action,[97] and therefore applies to the sanction of administrative detention imposed in Article 3 of the Decree.

Furthermore, the foreseeability of the penalty set forth by the law is important regarding Article 9 ACHR. In order to provide for certainty and to be foreseeable, the "*scope of discretion and the manner in which it should be exercised is indicated with sufficient clarity so as to provide adequate protection from arbitrary interference".*[98] The Court also stated that, in the interest of legal certainty, *"it is essential that the norm establishing the sanction exists and is known or can be known, before the act or omission occurs that violates it and that it is sought to sanction".*[99]

The arrest and detention were based on Article 3 of the Decree, which was already published on February 2, 2020.[100] Consequently, the principle of legality is respected because the definition of the act as unlawful, namely the failure to comply with Article 2(3) of the Decree, and the determination of its legal effects,[101] precedes the unlawful conduct of the Applicant on March 3, 2020.[102] Congress's inaction concerning the Decree has no consequence under domestic law. The Supreme Court further confirmed that the Decree was constitutional, leaving no issue as to the legality of the detention.

The sanction set forth by law is equally in accordance with the requirement of foreseeability under Article 9 ACHR. Firstly, the Decree was published by the executive branch in the official gazette, in the most widely circulating newspapers, and disseminated in the media.[103] Therefore, the Decree

[97] *Baena-Ricardo et al. v. Panama*, IACtHR,(2001),§106.
[98] *López Mendoza v. Venezuela*, IACtHR,(2011),§202; *López Lone et al. v. Honduras*, IACtHR,(2015),§264; *Rico v. Argentina*, IACtHR,(2019),§103.
[99] *López Lone et al. v. Honduras*, IACtHR,(2015),§257; *Flor Freire v. Ecuador*, IACtHR, (2016),§146.
[100] Hypothetical,§17.
[101] Article 3 Decree.
[102] *Ibid*,§20-22.
[103] Article 4 Decree.

was and could be known prior to the violating act, being the protests on March 3, 2020. Moreover, the scope of and discretion with which Article 3 of the Decree would be exercised, is indicated with sufficient clarity (*supra* the second criterion of Article 7(2) ACHR). Hence, the Decree provides for legal certainty and leaves no room for ambiguity.

Consequently, the Applicant was not exposed to *ex post facto* laws, the principle of legality was respected and Article 9 ACHR *juncto* 1(1) and 2 ACHR was not violated.

ii. The State did not violate Articles 13, 15 and 16 *juncto* 1(1) and 2 ACHR because limitations were crucial to protect public health

The State recalls that, as has been substantiated above, the Decree suspended the guarantees related to the freedom of expression, right to assembly and freedom of association, and took the derogating measure of prohibiting public protests of more than three people. As this was done in conformity with the requirements of Article 27 ACHR, *ipso facto* there can be no violation of the aforementioned rights.

At a subsidiary level, the State emphasizes that even in the absence of a suspension of guarantees, this measure would not have been in violation of the Convention as it could equally be justified within the framework of the restriction clauses in Articles 13(2), 15 and 16(2) respectively.

In the context of restrictions on demonstrations and protests, a three-part "test" can be applied to the three rights simultaneously to prove this.[104]

[104] Office of the Special Rapporteur for Freedom of Expression of the IACHR. *Thematic Report IACHR Protest and Human Rights,* (2019), §33.

First, any limitation must be provided for in law.[105] The restrictions are established by and in conformity with the law as imposed by Article 2(3) of the Executive Decree and thus providing a legal basis (s*upra* B.b.i).

Second, it should pursue one of the legitimate objectives expressly set out in the American Convention. By applying these restrictions, the State aims to protect public health, one of the objectives formulated in the restriction clauses of the three rights.[106]

Third, the restrictions must be necessary in a democratic society for the achievement of the aim they pursue. This test consists of the following criteria: There must be an overriding social need, no less intrusive measures,[107] weight must be attributed to competing legitimate rights and interests,[108] and lastly, restrictions must be strictly proportionate[109] to the aims.[110]

These criteria are essentially analogous with those set out above as part of the proportionality assessment of the derogating measures (*supra* B.a.ii.). The difference only being that at the level of restriction, less leeway is afforded to states in conducting the balancing act under the proportionality assessment.

Therefore, it can be concluded that the State did not violate Articles 13, 15 and 16 *juncto* 1(1) and 2 ACHR.

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[105] Office of the Special Rapporteur for Freedom of Expression of the IACHR. *The Inter-American Legal Framework regarding the Right to Freedom of Expression,* (2010), §69.
[106] Articles 13(2)(b), 15 and 16(2) ACHR.
[107] *Dudgeon v. UK*, ECtHR,§51; Office of the Special Rapporteur for Freedom of Expression of the IACHR. *The Inter-American Legal Framework regarding the Right to Freedom of Expression,*(2010),§85.
[108] IACHR. *Report on Citizen Security and Human Rights* (2009),§195.
[109] Office of the Special Rapporteur for Freedom of Expression of the IACHR. *The Inter-American Legal Framework regarding the Right to Freedom of Expression,* (2010),§88; *Kimel v. Argentina*, IACtHR,(2008),§83.
[110] Office of the Special Rapporteur for Freedom of Expression of the IACHR. *The Inter-American Legal Framework regarding the Right to Freedom of Expression,*(2010),§67.

iii. The State did not violate Articles 7(1) and 7(3) *juncto* 1(1) and 2 ACHR because the arrest and detention were not arbitrary

It is established in Article 7(3) ACHR that *"no one shall be subject to arbitrary arrest or imprisonment"*. According to the IACtHR, no one may be arrested or imprisoned for reasons, which may be legal, but could be deemed incompatible with respect for the fundamental rights of the individual because they are unreasonable, disproportionate and unforeseeable.[111]

Regarding the proportionality and reasonableness in the sense of this general rule, the Court has specified a fourfold test. The liberty depriving measure must (a) have a legitimate purpose, (b) be appropriate to realize that purpose, (c) be necessary to realize it, and (d) must be proportionate *sensu stricto*.[112]

The administrative detention of the Applicant for four days, as a way to enforce the emergency prohibition of large protests, meets these requirements.

Firstly, the *legitimate purpose* of the measure can hardly be put to question. The pandemic posed an enormous threat to public health (*supra*, B.a.ii.). The undertaken measure helps in the battle against it, by putting a sanction on one of the emergency measures addressing the pandemic. The State aims to protect the right to health of all its citizens,[113] since it endeavors to be in accordance

[111] *Vélez Loor v. Panama*, IACtHR,(2010),§165; *Chaparro Álvarez and Lapo Íñiguez*, IACtHR,(2007),§90; *Neptune v. Haiti*, IACtHR,(2008),§97; *Montesinos Mejía v. Ecuador*, IACtHR,(2020),§95; *Romero Feris v. Argentina*, IACtHR,(2019),§91.
[112] *Vélez Loor v. Panama*, IACtHR,(2010),§166; *Chaparro Álvarez and Lapo Íñiguez*, IACtHR,(2007),§93; *Neptune v. Haiti*, IACtHR,(2008),§98; *Montesinos Mejía v. Ecuador*, IACtHR,(2020),§109.
[113] Article XI American Declaration; Article 12(1) ICESCR.

with its international obligation to guarantee the full realization of the right to health by controlling epidemic diseases.[114]

Secondly, the measure is *appropriate* to achieve this purpose. In other words, it addresses the purpose in a way that genuinely helps to accomplish it. Putting an administrative detention forward as a consequence of disregarding measures implemented in the general interest, incentivizes people to conform with them. This logic is inherent to any system of sanctioning implemented by law. Therefore, it will surely have impacted the level of compliance with the emergency measures, making it appropriate.

Thirdly, imposing a detention sanction was *necessary* to achieve sufficient compliance with the emergency measures. Opting for a less intrusive alternative, such as a monetary fine, would not adequately stress the urgency of complying with the emergency measures. At the time, it was critical that the incentive inherent to sanctions was sufficiently large. The State again stresses the uncertainties surrounding the virus and its obligation to act. Halfhearted enforcement regimes would not have been adequate in this context.

Fourthly, the measure was proportionate *sensu stricto*. In balancing the impact on personal liberty and the necessity to have a sufficiently salient deterrence mechanism, the State has arrived at a fair equilibrium by, on the one hand installing a detainment sanction and, on the other hand limiting it to only four days. This period of detention is sufficient to avoid that those who disregard the emergency measures, would rejoin protests immediately after their release. Four days is a period of time the State deemed adequate to stabilize any situation where mass defiance of the measures in the form of a protest or otherwise would occur. Therefore, by designing this measure, the State

[114] Article 12(2)(c) ICESCR.

displayed all the restraint it could, while still living up to its obligation to adequately protect the lives and health of its entire population by avoiding that actions of some, could endanger all.

Regarding the foreseeability, it is required that any restriction of liberty is based on a justification that allows an evaluation of whether it is in keeping with the conditions set out above.[115] The Decree clearly specifies all elements necessary to come to the above evaluation, referring to considerations such as the unknown health consequences of the virus, its highly contagious character, the urgent need for social distancing measures and the constitutional status of the right to health.[116]

Taking into account the above, it can be concluded that the State did not violate Articles 7(1), 7(3) *juncto* 1(1) and 2 ACHR.

iv. The State did not violate Articles 7(1), 7(4), 8(2)(b), 8(2)(c) and 8(2)(d) *juncto* 1(1) ACHR because the Applicant was aware of the reasons for his arrest and the charges, and there was an adequate defense preparation

The first objective of Article 7(4) ACHR is for the detainee to be informed of both the reasons for his arrest and the charges brought against him.[117]

Regarding the reasons for his arrest, the Court has previously found that there is no violation of Article 7(4) ACHR, even if the detainee was not formally informed about the reasons for his arrest, when the detainee was arrested in the act.[118] Mr. Chavero was arrested *in flagrante delicto*[119] while

[115] *Vélez Loor v. Panama*, IACtHR,(2010),§166; *Montesinos Mejía v. Ecuador*, IACtHR,(2020),§109.
[116] Preamble Decree.
[117] *Carranza Alarcón v. Ecuador*, IACtHR,(2020),§63; *Montesinos Mejía v. Ecuador*, IACtHR,(2020),§96.
[118] *Acosta Calderón v. Ecuador*, IACtHR,(2005),§73.
[119] Hypothetical,§20-21.

participating in a prohibited protest. Prior to the arrest, the police kindly asked the protesters to leave and informed them that they would make arrests under the Decree.[120] This shows that the Applicant was fully aware of the reasons for his arrest.

Regarding the charges, the detainee must be informed hereof previous to his first statement before the authorities[121] to be in compliance with Article 8(2)(b) ACHR. The Applicant was immediately charged with the administrative offence provided in Articles 2(3) and 3 of the Decree upon his arrival at the Police Headquarters No. 3, twenty-four hours prior to his first statement.[122]

The second objective of Article 7(4) ACHR is for the relatives of the detainee to be informed about his detention and his location, to allow them to assist him in preparing his defense.[123] Mr. Chavero's parents and Ms. Kelsen visited the Police Headquarters No. 3, already on the same day as the arrest.[124] Consequently, they undoubtedly knew about the Applicant's arrest and location, which made it no longer necessary to inform them.

Additionally, under Articles 8(2)(c) and 8(2)(d) ACHR it is critical for the detainee to be able to meet privately with his lawyer,[125] before making his first statement before the authorities,[126] and to be accompanied by his lawyer during that statement.[127] Ms. Kelsen knew the facts concerning his arrest and circumstances of his detention and since the case consists of a simple administrative offence, the fifteen minutes consultation[128] was adequate.[129] This consultation was private, prior

[120] *Ibid*,§20.
[121] *Women Victims of Sexual Torture in Atenco v. Mexico,* IACtHR,(2018),§247.
[122] Hypothetical,§22.
[123] *Tibi v. Ecuador*, IACtHR,(2004),§112; *Bulacio v. Argentina*, IACtHR,(2003),§130.
[124] Hypothetical,§22.
[125] *López et al. v. Argentina*, IACtHR,(2019),§205.
[126] *Argüelles et al. v. Argentina,* IACtHR,(2014),§175.
[127] *Ibid.*
[128] Hypothetical,§23.
[129] *J. v. Peru,* IACtHR,(2013),§202.

to Mr. Chavero's appearance before the chief of police and Ms. Kelsen accompanied him during his first statement.[130]

In view of the above, the State did not violate Articles 7(1), 7(4), 8(2)(b), 8(2)(c) and 8(2)(d) *juncto* 1(1) ACHR.

v. The State did not violate Articles 7(1), 7(5) *juncto* 1(1) ACHR concerning the Applicant's procedure before the chief of police

According to Article 7(5) ACHR, a person's detention must promptly undergo judicial review, as a suitable means of control to avoid arbitrary and unlawful captures.[131]

Firstly, the judicial review must be prompt. The standing case law[132] shows that judicial review within the first twenty-four hours after the arrest, like in the present case,[133] is in compliance with this obligation.

Secondly, the detainee must be brought before a judge or other officer authorized by law to exercise judicial power. The Court has established the criteria the officer must be in compliance with. First, the judicial officer must have full jurisdiction over the matter and authority to order a release.[134] Second, the judicial supervision must be effective in examining the actions of the arresting authorities and in reestablishing the rights of the detainee.[135] Third, the officer must hear the detainee personally and examine all information provided.[136]

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[130] Hypothetical,§23.
[131] *Herrera Espinoza et al. v. Ecuador*, IACtHR,(2016),§158; *Montesinos Mejía v. Ecuador*, IACtHR, (2020),§97.
[132] *E.g. Landaeta Mejías Brothers et al. v. Venezuela*, IACtHR,(2014),§178; *Bayarri v. Argentina*, IACtHR, (2008), §66.
[133] Hypothetical,§23.
[134] *Acosta Calderón v. Ecuador*, IACtHR,(2005),§80.
[135] *Bayarri v. Argentina*, IACtHR,(2008),§67.
[136] *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, IACtHR,(2007),§85.

Since the chief of police had full jurisdiction and the authority to order a release, examined the detention and heard the Applicant personally and examined the information provided, the chief of police fulfills these criteria.[137]

Additionally, *a contrario Tibi v. Ecuador,* where the IACtHR did not accept the public prosecutor as a judicial officer because the national government did not list the public prosecutor as a body authorized to carry out judicial functions,[138] in Vadaluz the police authorities have the power to perform judicial functions under the constitution.[139]

Consequently, the procedure before the chief of police constitutes an appropriate prompt judicial review and there was no violation of Articles 7(1), 7(5) *juncto* 1(1) ACHR.

vi. The State did not violate Articles 8 and 25 *juncto* 1(1) ACHR because it guaranteed due process of law and access to justice

The right to due process is combined in Articles 8 and 25 *juncto* 1(1) ACHR.[140] The Court has determined that due process protections should be evaluated on a case-by-case basis, taking into account the circumstances, the protections' significance, their legal character and their context in a particular legal system.[141] The circumstances of the pandemic in March 2020, both in Latin America and the rest of the world, were highly exceptional and should be taken into account. Undoubtedly, there was a dire need to act decisively and fast.

[137] Hypothetical,§23.
[138] *Tibi v. Ecuador*, IACtHR,(2004),§119.
[139] CQ 48.
[140] *Flor Freire v. Ecuador*, IACtHR,(2016),§164-165; *Indigenous Communities of the Lhaka Honhat Association v. Argentina*, IACtHR,(2020),§294.
[141] Antkowiak T.M.; Gonza A., *The American Convention on Human Rights*,OUP,2017,183; *Advisory Opinion OC-11/90*,IACtHR,(1990),§28.

Within the right to due process of Articles 8 and 25 ACHR, the broad right of access to justice is established.[142] The Court stated that "*while the right of access to a court is not absolute and therefore may be subject to certain discretional limitations set by the State, the fact remains that the means used must be proportional to the aim sought*".[143] When the means are not proportional, the limitations obstruct the access to justice and constitute a violation of Article 8(1) ACHR.[144]

Directive No. 1 of 2020 of the judicial union, entailing the transition to digital filing of the applications,[145] was a proportional limitation aimed to guarantee the administration of justice and the health of the people of Vadaluz, despite the subsequent temporary server crash of the filing system.[146]

The digital transition is not an unproportioned obstruction. The courts were closed in a necessary effort to avoid further spreading of the virus, which posed a substantial threat to the people of Vadaluz.[147] Consequently, the filing of applications could not happen in person. Therefore, the shift to digital filing of the applications ensured a normal continuation during the pandemic. As declared by the IACHR in a press release concerning pandemics, "*it is essential that states ensure there are suitable, flexible means available for filing appeals*".[148] In the same vein, the European Commission for the Efficiency of Justice confirmed that "*the public service of justice must be maintained as much as possible, possibly by alternative means such as online services*".[149]

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[142] *Lagos del Campo v. Peru*, IACtHR,(2017),§174; *Goiburú et al. v. Paraguay*, IACtHR,(2006),§131.
[143] *Cantos v. Argentina*, IACtHR,(2002),§54.
[144] *Ibid*,§54; *Acosta et al. v. Nicaragua*, IACtHR,(2017),§163.
[145] Hypothetical,§25-26.
[146] *Ibid*, §29.
[147] Hypothetical,§25-26.
[148] IACHR. *Press Release IACHR Calls for Guarantees for Democracy and Law during the COVID-19 Pandemic*,(2020).
[149] European Commission for the Efficiency of Justice. *Declaration Lessons learnt and Challenges faced by the Judiciary during and after the COVID-19 Pandemic*,(2020),principle 2.

The two challenges associated with this shift to online proceedings did not amount to an intrusion on the access to justice, disproportionate to the aim of protecting public health and continuing the administration of justice.

Firstly, the slightly slowing effect associated with a sudden change in operations does not invalidate the proportionality of the digitalization. While some acclimation efforts were required from the judicial personnel, and while the new system required some optimization, the judiciary continued to improve its functioning. So much so that both applications filed by the Applicant were adjudicated within the respective domestic time limits (*infra* B.b.vii.-viii.). The digital transition was therefore no disproportionate intrusion to the access to justice and does not constitute a violation of Article 8(1) *juncto* 1(1) ACHR.

Secondly, the server crash did not affect the proportionality either. It was only a temporary and technical issue due to the rapid emergence of the digital portal. Some time was needed to optimize the functioning of the relevant software programs. In *Aguado-Alfaro et al*., the Court established a violation of Article 8 ACHR because the applicants were *ab initio* prohibited to contest the effects of a decree-law.[150] However, for Mr. Chavero the server crash was merely a temporary hindrance.

Generally, it must be emphasized that the judicial system gradually adapted to the extraordinary circumstances and continued to improve its functioning, to the extent that it still managed to process the applications in time, along with thousands of others in the first week of the transition.[151]

[150] *Aguado Alfaro et al. v. Peru*, IACtHR,(2006),§119.
[151] Hypothetical,§30; CQ 14.

The Applicant did not experience unproportioned limitations to his right of access to justice and the State has since improved the digital portal to diminish the limitations. Consequently, there was no violation of Articles 8 and 25 *juncto* 1(1) ACHR.

vii. The State did not violate Articles 7(1), 7(6) and 25 *juncto* 1(1) ACHR regarding the writ of *habeas corpus*

Article 7(6) ACHR entails a right to file a petition of *habeas corpus*[152] and is seen as an application of the more general right to a simple, prompt and effective judicial recourse against fundamental rights violations enshrined in Article 25 ACHR.[153]

It constitutes three requirements, namely (a) one must have recourse to a competent court[154], (b) the court must rule on the lawfulness of the detention without delay[155] and (c) the recourse must be effective[156]. The State did not violate Articles 7(1) and 7(6) ACHR on account of any of these requirements.

Firstly, the competence of the trial court, that Ms. Kelsen herself approached,[157] is not at issue here. In any case, the trial court, as part of the judiciary of Vadaluz, meets the demand that the body adjudicating the writ must be a judge or a court.[158]

Secondly, the Court must rule on the lawfulness of the detention without delay. The Court has not established an ultimate time limit in which this requirement demands the proceedings to be

[152] *Advisory Opinion OC-8/87*,IACtHR,(1987),§33
[153] *Ibid* §32,34.
[154] Article 7(6) ACHR; *Espinoza González v. Peru*, IACtHR,(2014),§135; *Romero Feris v. Argentina*, IACtHR, (2019),§122.
[155] *Ibid*.
[156] Article 25(1) ACHR; *Pollo Rivera et al. v. Peru*, IACtHR,(2016),§130; *Espinoza González v. Peru*, IACtHR, (2014),§135.
[157] Hypothetical,§24.
[158] *Espinoza González v. Peru*, IACtHR, (2014),§135; *Herrera Espinoza et al. v. Ecuador*, IACtHR,(2016),§165.

concluded in, nor has it established a clear general framework to analyze this requirement in.[159] It is only clear that it requires compliance with time limits set in domestic law.[160] As for potential further requirements, inspiration can be found with the European Court of Human Rights. This Court has emphasized that the determination of speediness in judging the legality of detention under Article 5(4) of the European Convention on Human Rights essentially turns on the circumstances of an individual case.[161]

The facts indicate that Ms. Kelsen first intended to file a petition of *habeas corpus* on March 4, 2020, at the Palace of Justice. There she learned that, due to safety precautions regarding the pandemic, lawsuits would have to be filed virtually. She, however, waited until the next day to attempt to file the petition via the official website of the judicial branch of Vadaluz. In other words, March 5, 2020, was the day on which Ms. Kelsen first attempted to file a writ of *habeas corpus* on behalf of the Applicant. Because the server was temporarily down on March 5, 2020, it would be less than a day later that the writ was actually filed in the early morning of March 6, 2020. On March 7, 2020, the precautionary measure was tried and the substance of the writ of *habeas corpus* was adjudicated on March 15, 2020.[162] This means that, strictly speaking, there was a period of nine days between the filing of the writ on March 6, 2020, and its adjudication on March 15, 2020. Although she did not try to file the writ a second time on March 5, 2020, the State acknowledges that the temporary server crash on that day hindered Ms. Kelsen in her attempt to file the writ a day earlier, and thus recognizes that it is reasonable to accept that in fact a ten-day period had

[159] Farrell B., "The Right to Habeas Corpus in the Inter-American Human Rights System", *Suffolk Transnational Law Review* 33, no. 2,(2010),219; Medina Quiroga C., *The American Convention on Human Right*, 2012,222; Antkowiak T.M.; Gonza A., *The American Convention on Human Rights*, OUP,2017,168.
[160] *Acosta Calderón v. Ecuador*, IACtHR,(2005),§97; *Tibi v. Ecuador*, IACtHR,(2004),§133-134; *"Juvenile Reeducation Institute" v. Paraguay*, IACtHR,(2004),§249-250.
[161] *Sanchez-Reisse v. Switzerland*, ECtHR,(1986),§20.
[162] Hypothetical,§25-30.

elapsed between the filing and the adjudicating of the writ. The State however emphasizes that it cannot be argued that the writ was filed on March 4, 2020, and that consequently an eleven-day period would have passed. It is clear from the facts that Ms. Kelsen neglected to attempt to file a writ through the judiciary's virtual portal on March 4, 2020, even though at that time she was already aware this would be the course to take in light of the emergency measures. For this reason, it would not be reasonable to locate the moment of filing at that point in time.

According to the domestic law of Vadaluz the time limit to process an *habeas corpus* writ is ten days. This means the ten-day period that elapsed between filing and adjudicating in any case meets the requirement of compliance with domestic time limits, the prime criterion the IACtHR has put forward in this regard.

With regard to further requirements of the principle of without delay, the ten-day period also passes the test. Previously, the IACtHR has found issues with periods of similar lengths.[163] The State, however, wishes to stress the circumstances that need to be taken into consideration in this individual case.

As has been elaborated upon under section B.b.vi., while the transitioning to a virtual system might have caused somewhat of a delay, it remained proportional to the aim of guaranteeing both the health of the citizens and the continued administration of justice.

Additionally, unlike most cases in which the Court has expressed itself on the timeliness of *habeas corpus* proceedings,[164] there were no indications that the Applicant was in any immediate risk of

[163] IACHR. *Resolution Nativi & Martinez v. Honduras*, (1987), §160.
[164] IACHR. *Resolution Nativi & Martínez v. Honduras*, (1987); *Tibi v. Ecuador*, IACtHR,(2004); *"Juvenile Reeducation Institute" v. Paraguay*, IACtHR,(2004); *Bayarri v. Argentina*, IACtHR,(2008); *Peasant Community of Santa Barbara v. Peru*, IACtHR,(2015).

harm to his physical integrity during his detention. The most cited reason by the Court for the need of speedy proceedings, is in other words not present in this individual case.

With those mitigating circumstances in mind, the ten-day period cannot be seen as a delay leading to a violation of Article 7(6) ACHR.

Thirdly**,** the *habeas corpus* proceedings were effective. The criterion of effectiveness hails from Article 25(1) ACHR. The Court has clarified that a remedy is effective if it is "*capable of producing the result for which it was designed*".[165] In the context of *habeas corpus,* this means it is essential to determine that the writ was capable of realizing its purpose of guaranteeing personal liberty by bringing the detainee before a competent judge to obtain judicial determination of the lawfulness of a detention[166] and, should the detention be unlawful, to obtain an order for his release.[167] In this case, it stands to reason that the effectiveness of the writ cannot be seriously challenged on these grounds.

The purpose of the *habeas corpus* writ cannot be said to have been rendered incapable of being realized in the present case. The mere fact that it was dismissed as moot on March 15, 2020,[168] in no way indicates that the judiciary system would not have thoroughly investigated the merits of the case relating to the legality of the detention, and would not have ordered the Applicant's release if its conclusion on the merits necessitated it. At the time the writ was presented before the trial court, the Applicant had already been released. It therefore rightfully concluded that the request made before it, the release of the Applicant, was without object and consequently moot.

[165] *Velásquez Rodríguez v. Honduras,* IACtHR,(1988),§66.
[166] *Advisory Opinion OC-8/87,* IACtHR,(1987),§35.
[167] *Suárez-Rosero v. Ecuador*, IACtHR,(1997),§63; *Espinoza González v. Peru*, IACtHR,(2014),§135.
[168] Hypothetical,§32.

The fact that the proceedings suffered a one-day delay due to the temporary crash of the server or the fact the proceedings transpired through a digital portal, does not affect this conclusion. The conclusions reached above regarding access to justice equally apply in support of this assessment (*supra* B.b.vi.).

As to the proceedings on March 7, 2020, these were on the matter of precautionary measures,[169] hence did not pertain to the merits of the *habeas corpus* writ. At best a provisional, marginal test of the merits would have been in order. In other words, it does not fall within the confines of Article 7(6) to question whether or not the dismissal of these measures was legally appropriate.

For these reasons Articles 7(1), 7(6) and 25 ACHR *juncto* 1(1) ACHR were not violated.

viii. The State did not violate Article 8(1) *juncto* 1(1) ACHR regarding the precautionary measure of the writ of *habeas corpus*

Article 8(1) ACHR entails the right to a reasoned ruling. A court is required to offer explicit legal and factual considerations in its rulings, if not it could block the parties' right to formulate their own reasoned appeal and it would be arbitrary decisions.[170]

The State did not violate Article 8(1) *juncto* 1(1) ACHR in this regard, when dismissing the precautionary measure as unnecessary on March 7, 2020. The reasoning of this decision entailed that the Applicant would be released the same day,[171] making the precautionary measures without

[169] *Ibid*,§31.
[170] *YATAMA v. Nicaragua*, IACtHR,(2005),§152; *J. v. Peru*, IACtHR,(2013),§224; *Zegarra Marín v. Peru*, IACtHR, (2017),§146,178.
[171] Hypothetical,§31.

object. It was therefore elaborated fully and explicitly, based on the facts, grounds and norms, excluding any sign of arbitrariness.

It can thus be concluded this decision was reasonably motivated and does not violate Articles 8(1) *juncto* 1(1) ACHR.

ix. The State did not violate Articles 8(1) and 25 *juncto* 1(1) ACHR regarding the due process of the unconstitutionality action

1. Right to a reasoned ruling

The State did not violate Article 8(1) *juncto* 1(1) ACHR in this regard, because the Supreme Court motivated the dismissal of the unconstitutionality action on several grounds. The Decree restricted only rights that can be limited, did not entail a suspension of any non-derogable rights and the executive branch could not have waited for Congress, which was not in session due to the pandemic.[172] Consequently, there was no constitutional violation.

The State concludes the dismissal of the unconstitutionality action was reasonably motivated.

2. Right to a hearing within reasonable time

In non-criminal proceedings, such as the proceedings on the action of unconstitutionality, the relevant time period must be counted from the first action taken to initiate it and, when there is no compensation awarded to the complainant, ends at the time of the final judgement.[173] In the present case this is the period between March 5, 2020, acknowledging that Ms. Kelsen tried to file the

[172] *Ibid*,§32; CQ 5.
[173] *Furlan and Family v. Argentina*, IACtHR,(2012),§147-152; *Andrade Salmón v. Bolivia*, IACtHR,(2016),§157.

action on that day but suffered a one-day delay due to the server crash, and May 30, 2020, consisting of a total of eighty-seven days.

There are four elements to determine whether this duration was reasonable.[174]

The first element is the complexity of the matter. The Supreme Court was faced with the task of verifying the constitutionality of the Decree.[175] This required a careful analysis of all constitutional rights in light of the measures the Decree installed. Additionally, an analysis of the effects of the delay in approval by Congress was needed, as well as an inquiry into the requirements of Article 27 ACHR. The unprecedented circumstances of the pandemic, in light of which all of this needed to be assessed, made for an extremely complicated case for the Supreme Court to handle.

The second element is the conduct of the judicial authorities. The time limit to adjudicate an unconstitutionality action is ninety days under national law.[176] As established above, the Supreme Court decided within this time period[177] and therefore respected the domestic time limit.

The third element entails the procedural activity of the interested party. In *Andrade Salmón* the Court clarified this element as to whether the judicial authorities performed the interventions in the processes that were reasonably required.[178] It is already argued that the Applicant did not exhaust all possibilities to file the petition as soon as possible. The server crash was only temporary, and Ms. Kelsen had the opportunity to file the remedies sooner (*supra* B.b.vi.)

[174] *Genie Lacayo v. Nicaragua,* IACtHR,(1997),§77;*Perrone and Preckel v. Argentina,* IACtHR,(2019),§142; *Olivares Muñoz and others v. Venezuela*, IACtHR,(2020),§123.
[175] Hypothetical,§32.
[176] CQ 44.
[177] Hypothetical,§32.
[178] *Andrade Salmón v. Bolivia,* IACtHR,(2016),§158; *Díaz Loreto et al. v. Venezuela,* IACtHR,(2019),§117.

The fourth element is the possible adverse effect of the duration of the proceedings on the judicial situation of the person. The Applicant was already released on March 7, 2020. Since the Applicant was in no imminent danger and the remedy was fully adjudicated in the end, the duration of the proceeding in this case did not have any adverse effect on his judicial situation,[179] other than that the restrictions installed in the Decree, which remained in place. However, this was a nuance affecting the entire Vadaluz population and that was justified in the circumstances.

Taking all elements above into account, the State concludes the proceedings were handled within a reasonable time.

3. Right to an effective remedy

It is not enough for a remedy to formally exist, since it must equally be effective.[180] A remedy is effective if it is "*capable of producing the result for which it was designed*"[181] and provides redress.[182] The unconstitutionality action's purpose is to challenge the legality of a rule or regulation in the abstract, which has force of law.[183]

First of all, the Decree has force of law in Vadaluz.[184] Furthermore, the purpose of the unconstitutionality action, to challenge the legality of the Decree, was warranted. The Supreme Court could have found the Decree unconstitutional, but it dismissed the action on May 30, 2020.[185] This dismissal in itself does not cause any lack of inquiry into or disregard for the purpose

[179] Hypothetical,§31.
[180] *YATAMA v. Nicaragua*, IACtHR,(2005),§169-170; *Trabajadores Cesados de Petroperú et al. v. Peru*, IACtHR, (2017),§155.
[181] *Velásquez Rodríguez v. Honduras*, IACtHR,(1988),§66.
[182] *Flor Freire v. Ecuador*, IACtHR,(2016),§198.
[183] CQ 17,20.
[184] CQ 20.
[185] Hypothetical,§32.

of the action. Effectiveness does not depend upon a positive outcome, neither does it imply all remedies must necessarily be granted, but rather that there must be a serious possibility that they will be.[186] As established above, the Supreme Court reasonably motivated its decision and considered the possibility of unconstitutionality. It examined the exceptional circumstances of the pandemic and all its implications. The Supreme Court found no constitutional violation, because all constitutional requirements were fulfilled.[187] The unconstitutionality action was therefore effective.

Consequently, taking the above into account, the State did not violate Articles 8(1) and 25 *juncto* 1(1) ACHR.

[186] *Velásquez Rodríguez v. Honduras*, IACtHR,(1988),§67-68; *Trabajadores Cesados de Petroperú et al. v. Peru*, IACtHR,(2017),§155; *Casa Nina v. Peru*, IACtHR,(2020),§117.
[187] CQ 5.

REQUEST FOR RELIEF

Based on the foregoing submissions, the respondent State of Vadaluz respectfully requests this Honorable Court to declare and adjudge in favor of the State that:

1) The request of the petitioners is declared inadmissible for not exhausting domestic remedies.

2) In the alternative, that the State has not violated its international obligations under Articles 7, 8, 9, 13, 15, 16, 25 and 27 *juncto* 1(1) and 2 ACHR.