

# 2003: Valencia et al v. Liberté

## Hypothetical Case

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### I. Historical Background

1. Liberté has been difficult to govern since it gained its independence in 1833, after a long and bloody war. It is bordered on three sides by neighboring countries, and to the west by the Pacific Ocean. It has a population of approximately 20 million, of whom approximately 50 percent are mestizo, 20 percent are indigenous, 20 percent are descendants of settlers from various European countries, and 10 percent are descendants of African lineage. As with the majority of its neighbors in the region, Liberté has been marked by severe disparities in the distribution of income, and strong divisions within society based on economic, ethnic and cultural lines.

2. The most recent milestone in the history of Liberté was the 1996 signing of the peace accords negotiated under the auspices of the United Nations to conclude a bitter internal conflict. While the conflict had spanned a decade, the armed insurgency never amassed enough power or popular support to obtain political control. At the same time, gross and systematic human rights violations committed by the Armed Forces and National Police, and to a lesser extent by the insurgency, during the conflict largely discredited the political parties and figures that had traditionally held power. In fact, between 1986 and 1996, the Inter-American Commission conducted four on-site visits, published four country reports, and approved 58 reports on individual cases finding the State of Liberté responsible for human rights violations. Five of those cases were submitted to the Inter-American Court, which declared the State responsible and ordered measures of reparation. While the conflict had been sporadic and concentrated in certain areas of the country, it had nonetheless been so violent, claiming over 10,000 lives, and so damaging to the vital interests of the country, that its conclusion marked a turning point. The insurgency had been suppressed, but the forces responsible were no longer capable of governing effectively. Both sides had lost their legitimacy.

3. National elections were held in December of 1997, and the new administration took office on January 15, 1998. The new President, Claudia Reina, was the leader of the recently formed Liberté United Party, which characterized itself as representative of the citizen consensus against both rebellion through violence and control through repression. Its platform was fiscally centrist tending toward conservative, and moderately progressive on social issues, with its agenda based on the revitalization of democratic institutions and implementation of the peace accords.

4. The process of negotiating those accords had opened new spaces for political dialogue and provided important opportunities for the participation of non-traditional political actors in decision-making. Claudia Reina was herself the first woman elected President in Liberté. Among her Cabinet were women ministers of Justice and Economy, an indigenous Minister of Development and a Minister of Education of African descent. Incoming members of the National Congress were likewise more representative of the diversity of the country than in the past.

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5. In 1998, in compliance with the peace accords, a Constitutional Assembly approved amendments to the Constitution, which were subsequently ratified by a national referendum. In the area of human rights, there were three principal modifications aimed largely at preventing the kinds of abuses perpetrated during the conflict. First, the Constitution was amended to guarantee the protection of human rights recognized in treaties ratified by Liberté, with such treaties accorded juridical status equivalent to the Constitution itself. Second, the emergency powers vested in the Executive were further defined and limited. According to Article 101 of the Constitution of Liberté, as amended:

The President of the Republic may declare a state of emergency in all or part of the national territory in the event of imminent external aggression, war, serious internal disturbances, or natural disaster. Any individual rights affected must be expressly indicated in the decree. The President must notify the Congress of this declaration within 48 hours of its issuance. The state of emergency may last no longer than the exigencies for which it is required; if the state of emergency is not lifted within 90 days of issuance, it shall lapse automatically at the end of that period. The Congress may, if the circumstances justify it, revoke the decree at any time by majority vote.

Third, the constitution was amended to define the role of the Armed Forces as pertaining to external security, with the National Police responsible for internal citizen security.

6. In 1999, in furtherance of its commitment to the inter-American human rights system, Liberté established an inter-institutional working group to analyze the possible friendly settlement of individual cases, and assist in the implementation of decisions of the Inter-Commission and Court. In fact, the State was able to enter into friendly settlement processes in eleven individual cases, and settlements were reached in eight of those. In late 1999, Liberté ratified the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).

7. During the first Reina Administration, as Liberté moved forward with implementing the peace accords, it also experienced a period of greater than expected economic growth. Accordingly, the State was able to effectively channel the additional revenue into infrastructure, rural development initiatives, and education and health care spending, thereby beginning to reverse some of the economic and social consequences of the conflict.

## **II. The Current Situation**

8. President Reina formally launched her reelection campaign in January of 2001. The political scenario at that point had become more complex. Figures who had exercised power and influence during the internal conflict had been able to regroup and were seeking to regain the influence they had lost by the end of the conflict.

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9. January of 2001 also marked the beginning of a drastic decline in Liberté's economic situation. An almost year-long drought in the southwest of Liberté, the country's agricultural center, had produced the worst harvest season in 50 years. The drought also had a serious impact on Liberté's system of inland waterways, the backbone of its freshwater fishing industry. These factors sparked inflation and a severe drop in exports. These, in turn, negatively affected foreign trade and the national balance of payments. The agriculture and fishing sectors were in deep trouble, with many workers laid off or unemployed. Inflation, rising unemployment, the disruption of trade and related effects were pulling down the industrial sector as well, leading to rising unemployment in areas throughout the country.

10. Over the first months of 2001, cuts in public sector spending, required because of the recession and the need to service the external debt, further added to the levels of unemployment and social discontent. As the situation worsened, a number of unions adopted a strategy of escalating actions designed, as they put it, to stand up for the rights of workers whose salaries and benefits were at risk, as well as to advocate for the rights of those already laid off.

11. In mid-2001, these challenges began to converge. The unrest and discontent of significant segments of the population were by this point generating popular protests in the capital and throughout the country. Protests were being led by unemployed workers, students and teachers feeling the effects of cuts in education spending, and increasingly, members of the middle class worried about their ability to protect their families' interests. In July of 2001, dockworkers' unions began a massive work slowdown against the transport companies to protest threatened job and benefits cuts they claimed would violate their contracts.

12. The Government was becoming increasingly concerned about how growing unrest might affect the electoral process scheduled for December of 2001. While the protests generally reflected real concerns, reports from a wide variety of media sources indicated that, in some cases, forces from the far right or left were inciting more aggressive dissent and sometimes even violent confrontation. Local operatives were used to incite crowds into anger, hatred and sometimes violence. In some areas, speeches were given attempting to pit one class or social group against another, suggesting that accounts from the era of the conflict had yet to be settled, or spreading unfounded rumors about deeper spending cuts.

13. By early September of 2001, a substantial number of protests were ending with violence, either between protesters and the police or among protesters of conflicting political factions, or both. During the month of September, over 50 protesters and more than two-dozen police officers sustained serious injuries in such confrontations. As the situation escalated, on October 1, 2001, the Government ordered sharply increased security measures, with a greatly increased police presence at all protests. At this point as well, the dockworkers' slowdown initiated in July was beginning to have a serious

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impact on the economy of the country, as imports and exports were piling up on the docks.

14. In mid-October of 2001, these confrontations took a more dangerous turn. In several instances, gunshots were fired in the midst of protests that had turned violent. During the second half of October, five people were killed in such incidents, including a police officer. Ballistics tests confirmed what the State had insisted – that the guns used were not the regulations arms used by the security forces. A wide range of media sources began reporting that there were elements at work trying to destabilize the country and frustrate or manipulate the upcoming elections. Two prominent newspapers published unconfirmed reports that opposition figures planned to use protests to block roads in certain areas during the upcoming election.

15. As it became clear that the outbreaks of violence, including shootings, were not necessarily isolated or spontaneous, the State ordered the National Police to redouble its efforts to ensure security at these protests, investigate the shooting incidents and apprehend those responsible. The National Police assigned the greater part of its human and material resources to dealing with the protests and investigating the incidents of violence.

16. On October 28, 2001, the dockworkers' unions, frustrated at the refusal of the employers to negotiate on their demands that their contract terms be respected, called for a strike. The ports of Liberté were paralyzed. The gravity of the situation was exacerbated by the fact that some areas of the southwest hit hardest by the drought were now dependent on imported foodstuffs, which were rotting on ships because the workers refused to unload them. At this point, polls indicated that President Reina's approval rating was the lowest it had ever been.

17. The situation threatened to slip out of control. There were now thousands of people protesting in different areas of the country almost every day. Because the protests were springing up in so many different areas, it was difficult, if not impossible, for the National Police to respond quickly and effectively to each. At the end of each day, news reports included a recap of the number of injured in that day's protests. In the first half of November, four protesters and three police officers lost their lives from injuries sustained in violent confrontations. Dozens more were seriously injured. Three other protesters and two passers-by were killed as the result of gunshots fired in the midst of protests. At this point, the strike was estimated to be causing the equivalent of hundreds of thousands of dollars (US\$) in damage to the economy.

18. On November 7, 2001, President Reina declared a national state of emergency. The decree indicated that:

1. Given the situation of risk posed by increasingly violent protests in areas throughout the country; that elements acting in violation of the law are evidently distorting these protests to sow fear, confusion and turmoil;

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and with full attention to the duty of the State to defend the lives and personal integrity of its inhabitants, I order: (a) the immediate mobilization of the armed forces to serve in joint patrols with the National Police; and, (b) the suspension of Article 22 of the Constitution in order to enable members of the security forces to carry out necessary arrests, with presentation of any person detained before a competent judicial authority within 48 hours.

2. In order to provide the conditions necessary for the security forces to ensure a full return to public order and thereby safeguard the ability of citizens to exercise their right to vote in the upcoming national elections without fear, I hereby order the postponement of those elections for one month, until January 10, 2002.

3. In view of the gravity of the situation being caused by the strike in the western ports, including hundreds of thousands of dollars in damage to the national economy and the exacerbation of the hardship being faced by farmers and their families, I order the parties to cease any collective work actions and enter immediately into binding arbitration facilitated by the National Board of Arbitration to settle their contract disputes.

4. Given the exigencies of the situation, this declaration enters into effect immediately, and shall apply through March 15, 2002.

Article 22 of Liberté's Constitution establishes, *inter alia*, that:

All persons have the right to personal liberty, and may only be deprived of that liberty for cause, pursuant to judicial order or an arrest *in flagrante delicto*, in accordance with the conditions established by law. Detainees shall be placed at the disposition of a competent judicial authority within 10 hours. Detainees may only be housed in authorized detention facilities, and in all cases, those suspected or accused of crimes shall be held separately from those already sentenced.

19. That same day, President Reina notified the Secretary General of the OAS of the declaration of a state of emergency. The following day, invoking Article 17 of the Inter-American Democratic Charter, she directed a communication to the President of the Permanent Council of the OAS to: report on the situation of crisis; indicate that she considered that Liberté's democratic political institutional process was under threat; request assistance in strengthening and preserving it; and, request that the OAS send an electoral observer mission, as soon as possible, to monitor the upcoming national elections.

20. After meeting in special session on November 12, 2001, the Permanent Council of the OAS issued a resolution: taking note of the gravity of the situation in Liberté;

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affirming the fundamental principles of the regional system in favor of representative democracy, including as set forth in the Inter-American Democratic Charter; resolving to support the constitutional Government and the institutions of the rule of law; and calling on all public institutions to ensure the conditions necessary for a valid electoral process. Following consultations with Liberté, it was agreed that the OAS would send an electoral observation mission to arrive as soon as possible.

21. In the interim, the Armed Forces of Liberté had begun joint patrols with the National Police. Given the expansive areas to be covered, and the number and size of the protests, it soon became apparent that there were simply not enough police officers available, and that some situations would have to be dealt with by soldiers.

22. On November 17, 2001, twenty recent military recruits were assigned to respond to a protest in a rural area of the southwest. While the protest had initially been small, by the time they arrived at 9:00 a.m., the crowd had grown to over 500 people, scuffles between opposing political factions had broken out, and more severe violence appeared imminent. Anxious to avoid further violence or losing control of the situation, by 9:30 a.m. the recruits had arrested over 150 people, including men, women and some children. Since the local police station was small, those arrested were bused to the nearest military base.

23. Those arrested included 16-year old Joel Valencia, and ten classmates he had persuaded to skip morning classes to participate in the protest. The group of over 150 detainees was placed under guard in an auditorium while two recruits reviewed their identification papers and recorded their basic information. Emotions remained high, and several times there were incidents of verbal confrontation and pushing among groups of protesters and between protesters and the military recruits. Completely intimidated, Joel and his friends tried to keep to themselves in a corner of the room. The detainees were given food and water. They were held overnight and through the following day, before being released at 7:30 p.m. the following evening.

24. In the interim, Joel's parents and those of his friends, frantic when the youngsters did not arrive home, spent hours trying to gather information, before learning that their children had probably been arrested during the protest. At 3:00 p.m. on November 17, they went as a group to file writs of habeas corpus demanding their children's release. The local judge quickly ascertained where the detainees were being held, telephoned the base, and confirmed that the children were there. The judge informed the parents accordingly, but dismissed the writs on the basis of the emergency suspension of Article 22 of the Constitution.

### **III. The Constitutional Challenge**

25. Joel Valencia developed his interest in public affairs largely because his parents have been very active in civil rights in Liberté. Early in the internal conflict, his parents were among the civil rights leaders who founded the nongovernmental Democratic

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Forum aimed at protecting civil liberties and promoting democratic institutions. Members of the Democratic Forum, including lawyers, labor leaders and opposition activists, often took great risks to defend basic rights under attack during the conflict. Angela Valencia, Joel's mother, continues to work for the Forum as its legal advisor. Joel's father, Abraham Valencia, left the organization in late 1997, after he was elected to the National Congress as a candidate of the center-left Justice Party. He was campaigning for reelection in 2001 in one of many tight races.

26. Over the course of 2001, the Democratic Forum had been monitoring the Government's response to the deteriorating economic, social and political situation with mounting concern. The declaration of emergency had taken members of the organization aback in terms of its breadth, as well as the way it recalled the repressive measures imposed by executive decree during the internal conflict. The organization had immediately begun preparing a court action challenging the constitutionality of the declaration of emergency. For those working on the case, most especially Angela, what then happened to Joel illustrated precisely the gravity of the dangers posed by the undue breadth of the declaration of emergency.

27. On December 1, 2001, the Democratic Forum presented its constitutional challenge to the declaration of emergency to the Constitutional Court, a court of single jurisdiction, arguing in essence that it was unjustified and exceeded the limitations set forth in Article 101 governing such actions. Further, the organization attacked three specific measures adopted pursuant to the declaration. First, on behalf of Joel's parents, and those of his classmates, angered by what had happened to their children (and scared by what could have happened to them while detained), the suit challenged the legality of: (a) the arrest of the children, (b) that they had been held in detention with adults, and (c) the suspension of the constitutional protection of prompt access to habeas corpus. They argued that the actions in question were illegal in any case, but were absolutely prohibited in the case of minors.

28. Second, on behalf of Joel's father, and two other members of Congress up for reelection from the Justice Party, the organization asserted that the executive order to postpone the elections was an undue interference with their right to stand for election as well as to cast their votes. They argued that the measure was a cynical manipulation of the process that was designed to and would have the effect of benefiting the Liberté United Party by demonstrating the firm hand of the President in restoring order immediately before the vote. They noted that national elections had been held on December 10 for over 50 years, and had never been postponed, even in the worst period of the internal conflict. In fact, article 53 of the country's law of elections and political parties stated that "[t]he general elections shall be held on December 10, to coincide with the anniversary of the country's independence."

29. Third, on behalf of the five unions that had organized the dockworker's strike and their members, the organization alleged that the executive action to break the strike

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effectively gutted the unions' right to participate in collective bargaining and represent the interests of their members.

30. The January 6, 2002 decision of the Constitutional Court upheld the challenged measures with only one exception. It found, in essence, that the urgency and severity of the situation of unrest justified a certain amount of deference to the Executive as the organ responsible for enforcing the law as to the means necessary to ensure public order. Accordingly, it upheld the validity of the measures concerning arrest and detention. The Court affirmed that ensuring public order was, moreover, necessary to effectuate valid elections. With respect to the challenge concerning the dockworkers, it held that the Executive could initiate and facilitate *non-binding arbitration* between the parties as a means to negotiate, but could not impose binding arbitration if not provided for in the collective bargaining agreements. That, the Court found, would permanently deprive the workers of their right to seek judicial recourse. However, the Court sustained the order to lift the strike on the basis of urgent national interest.

#### **IV. Proceedings before the Inter-American System**

31. Convinced that the declaration of emergency and the specific measures challenged before the Constitutional Court served to underline crucial problems in the protection of human rights and the consolidation of the democratic system necessary to ensure such rights in Liberté, the Democratic Forum filed a petition before the Inter-American Commission on January 30, 2002, on behalf of the same parties they had represented at the domestic level, alleging that the State of Liberté was internationally responsible for violations of:

- Articles 27 and 1(1) of the American Convention with respect to the declaration of emergency generally;
- Articles 1(1), 5, 7, 8, 19 and 25 of the American Convention with respect to the arrest, detention and denial of judicial protection for Joel Valencia and his ten classmates;
- Articles 1(1) and 23 of the American Convention with respect to Abraham Valencia and the other two candidates for Congress respectively; and,
- Articles 1(1) and 16 of the American Convention, and Article 8 of the Additional Protocol in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) with respect to the dockworkers.

They sustained that the declaration and related measures threatened the most basic principles of the regional system, especially respect for human rights, the rule of law and the separation of powers, as articulated in the Inter-American Democratic Charter.



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32. On June 30, 2002, the Commission declared the case admissible with respect to the Articles listed, and placed itself at the disposal of the parties with a view to reaching a friendly settlement. The parties declined to enter into friendly settlement negotiations.

33. On November 25, 2002, the Commission adopted a report pursuant to Article 50 of the American Convention, finding that the situations denounced by the petitioners constituted violations of Articles 1(1), 5, 7, 8, 16, 19, 23, 25 and 27 of the American Convention, as well as Article 8 of the Protocol of San Salvador. The Commission recommended that Liberté take the legislative and other measures necessary to: reinstate and ensure the enjoyment of the rights concerned to the extent possible, and provide reparation where such reinstatement was not possible or sufficient. Information submitted by the State on January 5, 2003 in response to the Article 50 report indicated that these recommendations had not been implemented.

34. On January 25, 2003, the Commission referred the case to the Inter-American Court. On January 30, 2003, the Inter-American Court notified the State of Liberté accordingly. On February 5, 2003, Liberté directed a communication to the Inter-American Court indicating that, given that the measures questioned had been adopted precisely to uphold respect for basic rights, uphold the rule of law and ensure the effective exercise of the popular vote, it waived any preliminary objections. The Inter-American Court has scheduled a hearing for oral arguments on the merits of the case.

#### **V. Relevant Instruments**

35. Liberté has been a Member of the OAS since 1948. It is a Party to the American Convention, having ratified it in 1978 without reservations. It accepted the contentious jurisdiction of the Inter-American Court, through its declaration deposited in 1978 without special agreement. Liberté ratified the Protocol of San Salvador in 1999. As noted, Liberté participated with all the OAS member States in the adoption of the Inter-American Democratic Charter in 2001.

36. Outside the regional system, Liberté is Party to the ICCPR and the International Covenant on Economic, Social and Cultural Rights, both of which it ratified without reservation in 1980. It is also a member to the United Nations Convention on the Rights of the Child, ratified on February 21, 1998. The Universal Declaration of Human Rights and the American Declaration on the Rights and Duties of Man are also applicable to this case.

37. Finally, the Rules of Procedure of the Inter-American Commission that entered into force on May 1, 2001, and the Rules of the Inter-American Court that entered into force on June 1, 2001 apply in this case.