

**SEVENTH ANNUAL INTER-AMERICAN
HUMAN RIGHTS MOOT COURT COMPETITION**

BENCH MEMORANDUM*

WILLIAMS ET AL. V. STATE OF BUENAVENTURA

I. INTRODUCTION

A. Initial considerations

* The hypothetical case and bench memorandum were prepared by Elizabeth Abi-Mershed and Mario López, attorneys at the Inter-American Commission on Human Rights. The authors recognize with gratitude the integral participation of Juan Pablo Albán, attorney and Rómulo Gallegos Fellow at the Commission, in the preparation of both documents, and the assistance of Commission attorneys Brian Tittermore and Andrea Galindo. Claudia Martín, Co-Director of the Academy on Human Rights and Humanitarian Law at the Washington College of Law, and Commission attorney Veronica Gómez provided comments on the hypothetical case. Claudio Grossman, Dean of the Washington College of Law, and attorney Shazia Anwar, Competition Coordinator, provided important advice and assistance throughout this process.

“American Convention” or “Convention”]. In its admissibility report of January 22, 2001, the Commission determined that the claims concerning Articles 1(1) (obligation to respect and ensure), 4 (right to life), 8 (right to judicial guarantees), 13 (right to freedom of expression) and 25 (right to judicial protection) were admissible, and the denunciations concerning Articles 5 (right to humane treatment), 16 (right to freedom of association) and 24 (right to equal protection) were inadmissible.³

On October 10, 2001, the Commission adopted its report on the merits of the case, finding that the acts denounced constituted violations of Articles 1(1), 4, 8, 13 and 25 of the American Convention. In consequence, the Commission recommended that Buenaventura: (1) investigate and clarify the circumstances of the violations; (2) prosecute and punish those responsible; and (3) provide just reparation to those affected. The response of the State to that report, dated December 10, 2001, indicated that these recommendations had not been implemented.⁴ Rather, the State submitted a brief response listing the investigations underway.⁵

It is expected that in their written and oral arguments the teams will address each of the principal legal issues raised with respect to Articles 1(1), 4, 8, 13 and 25 of the American Convention. The hypothetical case does not define which acts or omissions of the State were deemed violative by the Commission, or for which reasons. It is up to the participants to determine how to orient their positions in this regard.

In summary, this year's hypothetical concentrates on three basic issues, all firmly within the framework of the American Convention. The first concerns the right to life and the nature and scope of the State's duty to investigate killings that may or may not be tied to State agents. The central question is at what point deficiencies in an investigation implicate the responsibility of the State for a lack of due diligence in discharging its duty to investigate. The further question is whether, or at what point such deficiencies would give rise to responsibility for a violation of the right to life itself.

The second issue concerns the scope of freedom of expression, ostensibly pitting the value of free access to information against that of restrictions arguably required to safeguard the right of third persons to life and physical integrity. The third issue also concerns the question of safeguarding rights, insofar as it seeks to explore the legitimate scope of provisional measures. While such measures have traditionally been granted in favor of persons whose life or physical

were denounced by the group, and subjected to investigation by the Special Prosecutor appointed to handle the EJM complaint about police abuses.¹⁰ With respect to these claims, the competent authorities indicate they have been unable to establish the identity of those responsible, thus no one has been accused, and no final judgment has been issued.¹¹

In terms of the burden of proof with respect to the requirements of Article 46(2), it should be noted that, when a petitioner alleges that he or she is unable to prove exhaustion, Article 31 of the Commission's Rules of Procedure establishes that the burden then shifts to the State to7()1(hed3)9(t

©

CONFIDENTIAL

CONFIDENTIAL

cases, it can only be demanded that the petitioner exhaust domestic remedies where the State concerned investigates the facts alleged with due diligence and proceeds to punish any persons found responsible in accordance with its duties under both domestic law and the Convention.²²

Deficiencies in the early stages of the investigation of the killings of Williams and Jones included failing to find certain physical evidence, or to take scrapings under the fingernails of Alberta Jones, or to interview all potential witnesses at the scene of Elena Williams' murder. These errors, coupled with the negligent loss or criminal concealment of the bullets used in both killings are so grave as to vitiate the possibility that this investigation could produce effective results.²³

Second, there has been undue delay in the domestic legal proceedings, which date back to the fall of 1999. While over two and half years have passed since the killings and threats, the investigation remains in its initial stage. Not a single person has been implicated in connection with these crimes. Nor do the facts refer to ongoing measures that have any reasonable possibility of correcting those deficiencies or otherwise producing effective results. With the passage of time, the physical and testimonial evidence only becomes harder to find and less reliable, thereby further impeding the possibility of clarifying the crimes and holding those responsible to account.

III. THE MERITS

The analysis concerning the merits of the case is focussed on the rights to life (Article 4 of the Convention), freedom of expression (Article 13), and judicial protection and guarantees

anonymous source. The hypothetical case pits his interest in free expression against the presumed need to protect members of EJN against threats to their lives and physical integrity.

Responsibility may also be imputed to the State -- even where the act denounced was committed by a private actor, or responsibility has not been clarified -- if it is shown that the State failed to apply due diligence in preventing the violation or responding to it as required by the Convention. It has been long-established that:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its

Station, including premeditated killings; the publication of a front page article in the Free Press recounting the allegations; the suspension of eight officers linked to the abuses; the declaration by Jones; the arrest and preventive detention of the three officers linked to the shooting witnessed by Alberta Jones; and the receipt of anonymous threats aimed at intimidating EJM to drop the investigation.³³

Strikingly, Alberta Jones' body was found at almost the same exact location as the police shooting she herself had witnessed.³⁴ Further, it appears that 9 mm. weapons, the type utilized by the Buenaventura police, were used in the killings of both Jones and Williams. Moreover, the killings of both Jones and Williams were followed by the disappearance of the bullets used.³⁵ Given that the police were the first to arrive on the scene, it can only be concluded that the investigating officers took the bullets as part of a plan to obstruct justice in this case.

Second, the State of Buenaventura bears responsibility because it failed to take reasonable measures to prevent these violations. Given the context of this investigation of grave abuses by the police, the State was on notice of the need to adopt special measures of protection for those involved. The allegations raised by EJM implicated officers of the Central Police Station, indicating that they had abused the power and authority vested in them by the State to torture and even kill. The fact that the abuses alleged by EJM were not isolated, but part of a pattern evidently involving multiple officers, and that the investigation opened as a result of EJM's complaint was being carried out by the police department itself, should have raised clear warning signals for the competent authorities to adopt protective measures for all involved in pursuing the investigation.

The need for protective measures was especially evident with respect to individuals such as Alberta Jones and Elena Williams, who were playing critical roles in seeking justice for those abuses. Particularly following the receipt of anonymous threats aimed at intimidating EJM into dropping their participation, the competent authorities were on notice that it was those most directly involved in the investigation who were at the greatest risk. While the anonymous threats were nominally directed at EJM and Elena Williams,³⁶ the authorities would clearly have been aware that, as the only witness to have implicated officers of the Central Police Station in crimes involving torture and killings, Alberta Jones was also at grave risk.

The duty to prevent violations "includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights."³⁷ "States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent [their] agents from violating it."³⁸ Similarly, in emphasizing the "paramount importance" of the need to protect against arbitrary

³³ See id. paras. 12-19.

³⁴ See id. para. 20.

³⁵ See id. paras. 20, 23, 30.

³⁶ See id. paras. 18-19.

³⁷ IACtHR, Velásquez Rodríguez, supra, para. 175.

³⁸ IACtHR, Case of the Street Children, supra, para. 144.

to undertake a judicial investigation by a criminal court designed to "prosecute criminally, try and punish those held responsible for such violations."⁴⁵

Accordingly, in certain cases where the State concerned failed to adequately investigate allegations of arbitrary killings, international human rights tribunals have established State responsibility for violations of the right to life, notwithstanding that the circumstances of the deaths had not been fully clarified.⁴⁶ Given the pattern of obstruction of justice in the present case, and the failure of the State to apply due diligence to clarify these crimes, the proper application of the Convention's guarantees requires that Buenaventura be held responsible for these violations of the right to life.⁴⁷

3. Arguments of the State

First, there has been no showing of participation by State agents in the killings of Alberta Jones and Elena Williams, and thus no basis for the attribution of responsibility to the State. Notwithstanding that the competent authorities responded to these killings promptly, and carried out the prescribed measures of investigation at the crime scenes, these measures produced limited physical evidence and no eye witnesses.⁴⁸ There is, accordingly, no evidence linking these crimes to any State agents. While it may be noted that the killers apparently utilized 9 mm. weapons, which happen to be in use by the public security forces, it is well known that such weapons are also g 28 >>i1(al6 0 us)-2(de by)9(t)-7(he c)9(r)-6(i)3(m)-6iwal (l)3(mr)-6(ent)4(i)3n (B)2(ue res(ons)-2(i)3(bi)3(l)3(i)3(t)73(y)9(

Prosecutor offered police protection for their offices that same morning. Members of EJM declined that offer, as was their right, in view of preferences concerning their operations. Further, it may be noted, EJM personnel indicated that they had doubts as to the seriousness of the threat.⁵² When Elena Williams received a threatening phone call the next day, the police again initiated an immediate investigation. The Special Prosecutor reiterated the offer of police protection, and further offered to put a trace on their phone lines. Again, EJM declined that offer, as they were entitled to do.⁵³ Taking into account, inter alia, the rights of the members of EJM to privacy, expression and association, the State was not free to unilaterally impose the exercise of public power in any way it saw fit.

CONFIDENTIAL

CONFIDENTIAL

CONFIDENTIAL

The Inter-

broad principle of access to information “allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.”

As the Declaration of Chapultepec expresses: “No people or society can be free without freedom of expression and of the press. The exercise of this freedom is not something authorities grant, it is an inalienable right of the people.”⁷⁴ In this sense, journalists serve as the front-line of protection of the right to impart and receive information and ideas of all kinds, and journalism is a “primary and principal manifestation of freedom of expression of thought.”⁷⁵

The measures taken against Teodoro Collins by the State fail under each and every one of the criteria set forth to evaluate a measure tending to restrict freedom of expression. Pursuant to the established case law of the system, the first two criteria for any valid restriction require the existence of previously established grounds for liability, and that these grounds be expressly and precisely defined. In the present case, the judicial measures applied to coerce Mr. Collins to reveal his source were taken pursuant to the courts’ interpretations of the norms of Buenaventura concerning public security.⁷⁶ This application of general measures lacks the precision required under these criteria. In fact, it flies in the face of the Constitution of Buenaventura, which

CONFIDENTIAL

CONFIDENTIAL

CONFIDENTIAL

freedom, such a measure cannot be compatible with [the right to freedom of expression] unless it is justified by an overriding requirement in the public interest.⁸²

Further in this regard, the European Court has specified that “news reporting based on interviews ... constitutes one of the most important means whereby the press is able to play its vital role of `public watchdog.” “The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.”⁸³

In the face of Mr. Collins’ determination to demand respect for his rights under the American Convention and Constitution of Buenaventura, the courts ordered that he be subjected to a disproportionately high fine, and in view of his nonpayment, imprisoned for 48 days.⁸⁴

In this sense, Buenaventura shares the Commission's view that "the zone of legitimate State intervention begins at the point where the expression of an opinion or idea interferes directly with the rights of others or constitutes a direct and obvious threat to life in society."⁸⁷

The measures taken to impel Teodoro Collins to reveal the identity of his source pursued the imperative and very narrowly drawn objective of ensuring the security of the members of EJM, and the closely related goal of clarifying responsibility for the killings of Alberta Jones and Elena Williams. In this sense, the measures taken in no way constitute a form of prior censorship, a limitation strictly forbidden by the terms of Article 13. This was neither the intention nor the effect, as demonstrated by the fact that Mr. Collins subsequently published a second article citing the same confidential source. Rather, the State considers that, strictly speaking, it was applying interim or protective measures aimed at ensuring the protection of EJM and others involved in the investigation. It was holding Mr. Collins responsible for the consequences of the information he published only insofar as necessary to identify his source so as to protect these persons.

In terms of the first two criteria that flow from Article 13 and the related case law -- that any subsequent imposition of responsibility flow from previously established law, and that the grounds be expressly and precisely defined -- every legal system necessarily provides for the protection of public security.⁸⁸ The legal system of Buenaventura is no exception, and the national courts are vested with full competence to interpret and apply that law, as they did in this case. Measures of the type taken in this case could have been taken in the context of virtually any legal system, and in fact are periodically taken in countries throughout the hemisphere.

Reference may be made in this regard to the criteria set forth in the European human rights system, which has indicated that valid limitations must be "necessary in a democratic society," i.e., necessary to meet a "pressing social need" and "proportionate to the legitimate aim pursued."⁸⁹ Whether there is such a pressing social need is necessarily, at first instance, a question for the competent authorities to determine within their margin of appreciation.⁹⁰ The State wishes to emphasize in this regard the importance it attributes to the protection of human rights defenders, who play a crucial role in holding the State to account. It is for this reason that the pertinent authorities have worked very closely with EJM in pursuing greater police accountability. This collaboration has included EJM's involvement in the follow up to a number of investigations of police shootings and its participation in the establishment of the Cambacropolis Civilian Review Board which provides oversight of the Office of Professional Responsibility of the police department.⁹¹ It is also for this reason that Buenaventura has responded to the threats received by EJM with the utmost seriousness.

⁸⁷ IACHR, "Report on the Compatibility of 'Desacato' Laws with the American Convention on Human Rights," in Annual Report of the IACHR 1994, at ch. V, section V.

⁸⁸ See hypothetical case questions, answer 29 (specifying that the measures applied to impel Collins to reveal his source were based on judicial interpretations of norms concerning public security).

⁸⁹ See, e.g., Eur.Ct.H.R., *Incal v. Turkey*, Judgment of 9 June 1988, Reports 1998-IV, para. 54.

⁹⁰ See Eur.Ct.H.R., *Goodwin*, supra, para. 40.

⁹¹ See hypothetical, para. 6.



The exercise of freedom of expression carries with it duties and responsibilities that also apply to members of the press. These duties and responsibilities assume significance when the exercise of freedom of expression has consequences vis-à-vis to when the itvaf(h)1(i)3(t)5 729.48 TmJ 0.

In addition, the authorities must perform an adequate autopsy, compile and analyze all the material and documentary proof, and take the statements of witnesses. In the instant case, among the serious deficiencies in the State's investigation, the bullets disappeared from the scenes of both killings. In the case of Alberta Jones, the forensic pathologists were unable to find any hair, or fibers or similar evidence, and failed to take scrapings from under her fingernails, notwithstanding that there was evidence that she had resisted her assailants. In the case of Elena Williams, the police only partially canvassed the area around the scene of the crime for witnesses at the time of the shooting.¹⁰⁵ These errors and omissions, so basic in nature, demonstrate that the State was not applying due diligence in its investigation.

c dds, 17s dds(s)-2u a<</MCID 1 >ms,e

adequate compensation is both a recognition of the State's responsibility for the acts committed by its personnel and an expression of respect for the human being."¹¹⁰

Impunity is the "total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of rights protected by the American Convention."¹¹¹ Pursuant to the interrelated guarantees established in Articles 25, 8, and 1(1) of the American Convention, the State has the duty to use "all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations and total defenselessness of victims and their relatives."¹¹² As the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has emphasized, "impunity continues to be the principal cause of the perpetuation and encouragement of violations of human rights, and particularly extrajudicial, summary or arbitrary executions."¹¹³

With respect to the present case, the record reflects that the State failed to utilize the

For example, the Commission questions that the forensic pathologist failed to find certain kinds of physical evidence on the body of Alberta Jones. However, in some cases that kind of evidence simply isn't present. The Commission similarly argues that the police didn't complete()11(o)-7(t)-7a

Court is increasingly addressing situations requiring it to reconsider the contours of such measures.¹¹⁷

Provisional measures are provided for in Article 63(2) of the American Convention:

In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.¹¹⁸

Accordingly, the elements necessary to justify such measures are (1) extreme gravity, (2) urgency, and (3) the necessity to avoid irreparable damage to persons. The essential purpose of such measures is the protection of "fundamental rights, as long as [the measures] seek to prevent irreparable harm to persons."¹¹⁹

It was on the basis of events subsequent to the filing of the application in the case of Williams et al. v. Buenaventura, that the Commission addressed the Court to request provisional measures to (1) protect the lives and personal integrity of 18 named staff members of the EJN office in Cambacropolis, and (2) protect the right of Teodoro Collins to freedom of expression, and to that end, his personal liberty.¹²⁰

The Commission's request was based on the fact that Collins had, on January 17, 2002,

insist with the investigation and leave things as they are.” Collins was summoned to appear in court on January 22, 2002. Because he refused to identify his source, he was again fined, and because he refused to pay the fine, he was again jailed for contempt of court.¹²¹ He continues to be jailed.¹²²

B. Arguments of the Commission

1. *With respect to the EJM Members*

The information before the Court establishes prima facie the existence of threats against the lives and personal integrity of the members of EJM. It is this prima facie standard that has served as the basis for the application of provisional measures by the Court in previous situations.¹²³ The current situation of risk represents an escalation of the threats first manifested in August of 1999, with the anonymous note found in EJM’s offices, and the anonymous phone call received by Elena Williams.¹²⁴ The seriousness of those threats was heightened in light of the killing of Jones and Williams in September of 1999.¹²⁵ The gravity of the situation was reaffirmed later that month when Teodoro Collins reported that an anonymous source with evident links to the police had told him the situation was reported to the police to the

refused any security

