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REPORT No. 49/18
PETITION 1542-07
REPORT ON ADMISSIBILITY

JUAN ESPINOSA ROMERO
ECUADOR

Approved by the Commission at its session No. 2126 held on May 5, 2018
168th Special Period of Sessions.

Cite as: IACHR, Report No. 49/18, Petition 1542-07. Admissibility. Juan Espinosa Romero.
Ecuador. May 4, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Xavier Bermeo Tapia
Alleged victim:	Juan Espinosa Romero
Respondent State:	Ecuador
Rights invoked:	Articles 7 (Personal Liberty), 8 (Fair Trial), 9 (Freedom from Ex Post de Facto Laws), 10 (Right to Compensation), 11 (Right to Privacy) and 25 (Judicial Protection) of the Convention American on Human Rights, in relation to its Article 1.1 (obligation to respect rights); and articles I (life, liberty, security and integrity of the person), V (protection of honor, reputation and private and family life), XVII (justice), XXV (protection against arbitrary detention) and XXVI (regular process) of the American Declaration of the Rights and Duties of Man

II. PROCEEDINGS BEFORE THE IACHR¹

Filing of the petition:	December 4, 2007
Additional information received at the stage of initial review:	February 28, 2012
Notification of the petition to the State:	January 18, 2013
State's first response:	September 13, 2013

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (ratification instrument deposited on December 28, 1977)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 7 (personal liberty), 8 (Fair Trial) and 25 (Judicial Protection) of the American Convention, in regards to its articles 1.1 (obligation to respect rights) and 2 (Domestic Legal Effects)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, August 12, 2008
Timeliness of the petition:	Yes, December 4, 2007

¹ Hereinafter "the American Convention" or "the Convention".² Hereinafter "the American Declaration" or "the Declaration".³ The observations of each party were duly transferred to the opposing party. In August and October 2016, the petitioners contacted the IACHR to express their interest in continuing the process and requesting its advance.

V. ALLEGED FACTS

1. The petitioner alleges that the Ecuadorian State would be internationally responsible for violating the human rights of Mr. Juan Espinosa Romero, a former army colonel (hereinafter "the alleged victim" or "Mr. Espinosa"), within the framework of two successive criminal prosecutions for drug trafficking and for drug possession. In this context, he claims that his right to presumption of innocence was violated and that he was arbitrarily arrested, since his participation in the criminal acts would not have been proven; and that in general there was an unjustified delay in the administration of justice. All of which would have caused him serious damage on a personal, professional level and even in his own health.

2. On October 11, 2002, the National Police arrested Mr. Espinosa on charges of drug trafficking, based on a preventive detention order issued on October 10, 2002 by the Eighth Criminal Judge of Pichincha, who also ordered the confiscation of his assets and bank accounts. The detention order was issued because a merchant to whom Mr. Espinosa sold roses, would fill the stalks with cocaine hydrochloride and export them to Amsterdam. On December 20, 2002, the Superior Court of Justice of Quito (hereinafter "the Superior Court of Quito") confirmed the preventive detention of the alleged victim and the prohibition of alienation of his assets. The petitioner alleges that this arrest warrant was issued without clear indications of Mr. Espinosa's participation in the facts investigated. On February 13, 2003, the Superior Court of Quito set the case for trial; on January 27, 2004, he ordered his immediate release; and on February 12, 2004, this Court pronounced an acquittal in favor of Mr. Espinosa, considering that his responsibility and guilt in the crime attributed to him was not justified with certainty. This decision was later confirmed by the Third Criminal Chamber of the Supreme Court of Justice on June 28, 2006.

3. The alleged victim claims that he was not able to recover his liberty because on January 23, 2004 – less than one month before his acquittal of the first trial and four days before his release was ordered – the Public Prosecutor's Office initiated a new proceeding against him. The new charge was based on the same facts, but now accusing him of possession of narcotics. In this regard, the petitioner further argues that it is unreasonable that the Public Prosecutor's Office waited more than one year and a half to investigate the alleged victim for this different alleged crime, when it is derived from the same facts, instead of, from the beginning for both crimes. The petitioner sustains that the new charge was made to keep Mr. Espinosa in custody in response to the forthcoming acquittal of the initial charge. Thus, on January 23, 2004, the Superior Court of Quito again ordered preventive detention of Mr. Espinosa.

4. Against this resolution, the alleged victim filed a motion for annulment on February 2, 2004, in which he alleged his lack of participation in the facts alleged against him and the principle of *non bis in idem*, for which he could not be prosecuted two times for the same facts. On April 20, 2004, the Superior Court of Quito decided that these were separate but related crimes; and that if the possession of the drug by the alleged victim was not proven, his preventive detention should be revoked. Subsequently, on July 7, 2004, the same judicial authority ordered the immediate release of Mr. Espinosa; and on January 18, 2005, he ordered the provisional dismissal of the case and elevated it to consultation with his superior as provided by law. Finally, on July 31, 2008, following the express request of the alleged victim, the Superior Court of Quito ordered the permanent dismissal of the case and the cancellation of all precautionary measures affecting the assets of the alleged victim. In both judgments of dismissal, the court refers to the fact that the Public Prosecutor's Office did not charge the petitioner, for which reason they ordered their dismissal.

5. The petitioner alleges that Mr. Espinosa was in preventive detention for a total of twenty-one months, from October 11, 2002 to July 12, 2004, without there being a minimally reasonable basis to establish his participation in the facts reported. Against this allegedly unjustified deprivation of liberty, Mr. Espinosa filed two motions for annulment with the Public Prosecutor of the District of Pichincha, on October 16 and December 15, 2002; and after the acquittal of the first trial (for drug trafficking), he formally requested his release by means of a document presented on March 15, 2004 to the President of the Superior Court of Quito, already within the framework of the second proceeding (for drug possession). In addition, he mentions having filed a writ of habeas corpus with the Mayor of Quito, regarding the arrest made in the first process. He complains that none of these requests or actions related to his right to personal liberty were

answered by the corresponding authorities, for which reason he considers that he did not have access to the remedies of domestic jurisdiction.

6. The petitioner also alleges that this deprivation of liberty would have caused Mr. Espinosa a detriment to his health situation, since he had a prostate tumor and could not access to adequate treatment or necessary surgical intervention. It also affected his honor and good name, and, in the end, caused him a substantial reduction in his patrimony, since he had to pay the judicial expenses with the sale of his goods, and suffer the loss of his income by not being able to exploit his floriculture business. He argues that he has submitted his petition to the IACHR within a reasonable time and that there is no due process in Ecuador for the protection of the rights alleged in this petition. Finally, he requests the compensation for the violations perpetrated against him and that Ecuador be urged to adopt the necessary measures to avoid the repetition of similar events.

7. For its part, the State alleges that in the case of drug trafficking (first proceeding) on January 27, 2004, the Third Criminal Chamber of the Superior Court of Quito overturned the preventive detention order issued against Mr. Espinosa; but previously, on January 23, 2004, the President of the Superior Court of Quito had ordered his preventive detention in the case for possession of drugs (second process). And that, when the Third Criminal Chamber of the Supreme Court of Justice confirmed in 2006 the acquittal issued on February 12, 2004 by the Superior Court of Quito in the process for drug trafficking, the alleged victim had already regained his freedom. It argues that it was a highly complex trial due to the number of accused (four in the process for drug trafficking and six in the possession of narcotics), due diligence and evidence, and that in any case the domestic courts were diligent and agile, those who delayed the process were the accused. In this regard, Ecuador argues that the process before the IACHR is subsidiary in nature, and that admitting this petition would be acting as a fourth instance.

8. In addition, the State alleges that Mr. Espinosa did not exhaust all the remedies available in the domestic jurisdiction; and that it is the criterion of the Commission that when the petitioner alleges the impossibility of exhausting remedies in the domestic jurisdiction, the respondent State must demonstrate the existence and effectiveness of the same. Therefore, it indicates that the remedies that he was able to exhaust are: (a) the habeas corpus, and its eventual appeal; (b) the protection of liberty; (c) the appeal of the order for preventive detention ordered within the trial for possession of drugs; (d) a demand in the administrative channel to be compensated for the alleged deficient provision of public services or for the acts of public officials in the exercise of their functions; (e) the action for material damages against the judges that would have caused an economic loss as a result of their actions; as well as against judicial officials who, by act or omission, have caused some economic damage.

9. In addition, the State raises the lateness of the presentation of this petition, alleging that Mr. Espinosa went to the IACHR "forty-five months and twenty-two days" after the Third Chamber of the Superior Court of Justice of Quito issued an acquittal in his favor; and "seventeen months and six days" after the Third Criminal Chamber of the Supreme Court of Justice confirmed this acquittal, both in the context of the case against him for drug trafficking (first process).

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

10. In the present case, and after analyzing the allegations and the information provided by the parties, the Commission observes that the fundamental purpose of the petition is the claim by the petitioner of the criminal prosecution and the allegedly unjustified deprivation of liberty of the alleged victim, with the consequent personal and economic damages that he entails. In this regard, the petitioner alleges that Mr. Espinosa Romero was subjected to two consecutive criminal proceedings in time based on the same alleged initial criminal acts. Therefore, Mr. Espinosa Romero would have been deliberately kept in preventive custody by the Public Prosecutor's Office, when the Public Prosecutor initiated the second proceeding for the possession of narcotics, just at the time Mr. Espinosa Romero was acquitted in the first proceeding, for supposed drug trafficking. Therefore, it is alleged that the excessive extension of the preventive detention of the alleged victim is arbitrary because it is unjustified. In this regard, the Commission also notes that the

damages alleged by Mr. Espinosa are related to the criminal prosecution suffered against him from 2002 to 2008, and more specifically to his deprivation of liberty for twenty-one months.

11. With respect to criminal proceedings, it clearly emerges from the file of the petition and is not subject to dispute between the parties, that the first one followed against the alleged victim for drug trafficking culminated with the acquittal of the Third Criminal Chamber of the Supreme Court of Justice on June 28, 2006; and the second, for possession of narcotics, with the sentence of the Superior Court of Quito of July 31, 2008, notified on August 12 of that year. It also arises from the file that in these proceedings the petitioner made use of the ordinary resources provided by law.

12. Regarding the alleged arbitrary application of preventive detention, and in light of the State's arguments that Mr. Espinosa should have exhausted other additional remedies, the Commission notes that the latter filed two motions for revocation with the Public Prosecutor's Office. District of Pichincha, on October 16 and December 15, 2002; and after the acquittal in the first trial, he formally requested his release by means of an appeal for revocation filed on February 2, 2004 against the second preventive detention order issued against him on January 23, 2003; and a brief filed on March 15, 2004 with the President of the Superior Court of Quito, already within the framework of the second trial. In addition, before these judicial proceedings, during the initial period of his detention prior to the formal order of preventive detention, Mr. Espinosa alleges that he filed a writ of habeas corpus before the Mayor of Quito, as allowed by the legislation at that time. According to the petitioner, and it was not contested by the State, Mr. Espinosa would not have received a response to any of the requests for cessation of the deprivation of liberty that he presented and that have been indicated.

13. In this regard, the Commission recalls its consistent jurisprudence to the effect that the requirement of exhaustion of domestic remedies does not imply that the alleged victims have an obligation to exhaust all available resources at their disposal. Rather, if the alleged victim raised the issue by one of the valid and adequate alternatives according to the domestic legal system and the State had the opportunity to remedy the matter in its jurisdiction, the purpose of the international standard is fulfilled. In addition, and specifically in the case of petitions alleging the misapplication or excessive prolongation of preventive detention, the Commission has established that these claims may have, in relation to Article 46.1.a of the Convention, its own dynamics of exhaustion of domestic remedies, independent of that of the criminal process as a whole; and that for the exhaustion of resources, the request for release and rejection is sufficient.

14. On the other hand, the Commission considers that going to the civil jurisdiction would only serve as a legal mechanism to establish the pecuniary responsibility of the public officials responsible for the acts as private natural persons, not to question the situation comprehensively. With regard to the proceedings before the disciplinary jurisdiction and the contentious-administrative jurisdiction, the Commission has repeatedly argued that such proceedings do not constitute adequate remedies for the purposes of analyzing the admissibility of a claim of the nature of the present before the Commission. These processes are not a sufficient way to judge, punish and repair the consequences of human rights violations.

15. Thus, and in light of the above considerations, the Commission concludes that this petition complies with the requirement established in Article 46.1.a of the American Convention.

16. In addition, the Inter-American Commission notes that the petition was filed on December 4, 2007, and the judicial decision terminating the domestic judicial proceedings was notified on August 12, 2008; therefore, this petition meets the requirement of the filing period established in Article 46.1.b of the American Convention.

VII. ANALYSIS OF COLORABLE CLAIM

17. The petitioner alleges that the conduct of two criminal proceedings brought against him arbitrarily deprived him of liberty for twenty months without proving his involvement in any of the two processes. He also states that he was tried in both processes on the same facts; that he did not receive an answer to the legal remedies he filed against his detention, and that this caused serious personal and financial

losses. So, if the facts alleged by the petitioner are true, it could constitute *prima facie*, violations of the rights enshrined in Articles 7 (personal liberty), 8 (Fair Trial) and 25 (Judicial Protection) of the American Convention, in relation to its articles 1.1 (obligation to respect rights) and 2 (Domestic Legal Effects), in detriment of Mr. Espinosa Romero.

18. As for the claim regarding the alleged violation of Articles 9 (Freedom from Ex Post de Facto Laws), 10 (Right to Compensation) and 11 (Right to Privacy) of the American Convention; the Commission notes that the petitioners have not provided sufficient supporting allegations that may allow to consider possible *prima facie* violation.

19. With regard to the allegation of violation of Articles V (protection of honor, reputation and private and family life), XVII (Fair Trial), XXV (Protection From Arbitrary Arrest) and XXVI (Right to due process of law) of the American Declaration, the Commission has previously stated that once the Convention enters into force in relation to a State, it is this instrument, not the Declaration, which becomes the specific source of law which is applied by the Inter-American Commission, provided that the petition violations of substantially identical rights enshrined in both instruments are alleged. In this petition the Commission has examined the rights of the American Declaration invoked by the petitioner in light of the American Convention.

20. Finally, with regards to the allegation of the State of fourth instance, the Commission notes that in admitting this petition it is not intended to supplant the jurisdiction of domestic judicial authorities. but analyze in the merits phase of this petition, whether internal judicial proceedings fulfilled the guarantees of due process and judicial protection, and offered appropriate guarantees of access to justice for the alleged victims in the terms of the American Convention.

VIII. DECISION

1. To declare this petition admissible in relation to Articles 7, 8 and 25 of the American Convention on Human Rights, in relation to its Articles 1.1 and 2;

2. To declare this petition inadmissible in relation to the articles 9, 10, 11 and 25 of the American Convention on Human Rights; and

3. To notify the parties of this decision; To continue with the analysis on the merits; and To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Santo Domingo, Dominican Republic on the 4th day of the month of May, 2018. (Signed): In favor: Margarete May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva (abstention), Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, y Flávia Piovesan, Miembros de la Comisión.