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CASE 12.931

REPORT ON THE MERITS (PUBLICATION)

DARÍA OLINDA PUERTOCARRERO HURTADO
ECUADOR

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I. SUMMARY

1. On July 16, 2007, the Inter-Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) received a petition presented by the Law Clinic (Clínica Jurídica) at the Universidad San Francisco de Quito (hereinafter “the petitioner”), alleging the international responsibility of the Republic of Ecuador (hereinafter “the Ecuadorian State,” “the State,” or “Ecuador”), to the detriment of Daría Olinda Puertocarrero Hurtado.

2. The Commission approved Report on Admissibility No. 91/13 on November 4, 2013.¹ On November 12, 2013, the Commission notified the parties of that report and put itself at their disposal to pursue a friendly settlement. On March 13, 2014, the petitioner indicated that it did not have any further observations on the merits. On May 12, 2015, the State presented its observations on the merits. Subsequently both parties submitted communications, which were duly forwarded to the other party.

3. The petitioner alleged that the arrest of Ms. Puertocarrero, related to allegedly having committed an offense involving the trafficking of narcotic and psychotropic substances, became arbitrary in August 2005, due to the application of the statute on “definitive detention” (“*detención en firme*”), which is unconstitutional and in violation of Ecuador’s commitments under the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) insofar as it is a compulsory pretrial detention without taking into account the particularities of the case. It indicated that the *detención en firme* imposed on Ms. Puertocarrero was maintained even after the Constitutional Court declared the unconstitutionality of that statutory provision. It noted that keeping of Ms. Puertocarrero detained until a guilty verdict was handed down at trial was unreasonably prolonged, almost three years. It argued that the petition for habeas corpus filed to challenge her detention was not an effective remedy. It added that the duration of the criminal proceeding against Ms. Puertocarrero exceeded a reasonable time.

4. The State argued that Ms. Puertocarrero’s deprivation of liberty met all applicable legal requirements. It indicated that the *detención en firme* was imposed in keeping with the provisions of the Code of Criminal Procedure. Ecuador argued that the *detención en firme* continued to apply to Ms. Puertocarrero since it was decreed prior to it being found unconstitutional. In addition, the State argued that the petition for habeas corpus is adequate and effective, and that mere inconformity with its result does not render it violative of the American Convention. Finally, the Ecuadorian State indicated that the proceeding against Ms. Puertocarrero was carried out in a reasonable time.

5. Based on the findings of fact and law, the Inter-American Commission on Human Rights concluded that the State of Ecuador is responsible for violating Articles 5(1) (humane treatment); 7(1), 7(2), 7(3), 7(5), and 7(6) (personal liberty); 8(1) and 8(2) (fair trial); 24 (equality before the law); and 25(1) (judicial protection) of the American Convention on Human Rights, in relation to the obligations established at Articles 1(1) and 2 of the same instrument, to the detriment of Daría Olinda Puertocarrero Hurtado.

II. THE ARGUMENTS OF THE PARTIES

A. Petitioner

6. The petitioner argued that the Ms. Puertocarrero’s arrest, related to having allegedly committed the crime of trafficking of narcotic and psychotropic substances, became arbitrary in August 2005. This is because the rule regarding “*detención en firme*” was applied to her; in petitioner’s opinion, it is unconstitutional and a violation of Ecuador’s treaty obligations. The petitioner indicated that *detención en firme* establishes pretrial detention until there is a firm judgment, based on the type of crime committed. It added that pretrial detention should be exceptional in nature, and that the rule on *detención en firme* violates that guarantee. In addition, it

¹ IACHR. Report No. 91/13. Case of Daría Olinda Puertocarrero Hurtado. November 4, 2013.

indicated that the *detención en firme* imposed on Ms. Puertocarrero was maintained even after it was found to be unconstitutional by the Constitutional Court in October 2006.

7. It indicated that the duration of Ms. Puertocarrero's detention up until the handing down of a guilty verdict at trial was unreasonable and lasted almost three years. The petitioner argued that according to the Constitution, pretrial detention could not extend beyond one year.

8. It argued that the petition for habeas corpus filed to challenge her detention was ineffective. It indicated that the procedure when a petition for habeas corpus is filed is that it goes before the mayor, and not a judicial authority, which the organs of the inter-American system have already found to be a violation of the American Convention. It further emphasized the following irregularities: (i) the authority took more than 48 hours to call a hearing when the Constitution indicates that the time for doing so was 24 hours; and (ii) the order that called the hearing was sent out three hours before it was to be held. It added that the decision that denied the habeas corpus was not reasoned, rendering it an illusory remedy.

9. Petitioner further noted that the duration of the criminal proceeding against Ms. Puertocarrero, which extended for almost four years, exceeded a reasonable time.

B. The State

10. The State argued that the deprivation of liberty of Ms. Puertocarrero complied with all requirements provided by law. It explained that the October 2004 arrest was legal insofar as it was in a situation of flagrancy. It argued that pretrial detention for 10 months was ordered for the purpose of initiating the trial for the crime of trafficking in narcotic and psychoactive substances.

11. Ecuador argued that it was not until August 2005 that the judge in charge of the proceeding applied the rule on *detención en firme*, which was legally established in the domestic law. Regarding the application of that law, the State noted as follows:

It should be noted that the legislator does his or her job mindful of lofty principles and that this collegial body [the Judicial Branch] seeks to improve the quality of the national law, but that similarly it may have failings, for which there is an adequate process for redress if the law issued is not in accordance with the parameters established in the Constitution, as in fact occurred with the rule on *detención en firme*.²

12. The State argued that the *detención en firme* was maintained in the case of Ms. Puertocarrero since it was decreed prior to it being found unconstitutional by the Constitutional Court in October 2006.

13. Ecuador added that the declaration of unconstitutionality of the provision enshrining *detención en firme* did not modify procedural legal situations that came about while it was in force, for the purpose of ensuring the principle of juridical security.

14. In addition, the State highlighted that before *la detención en firme* was found unconstitutional Ms. Puertocarrero never appealed or questioned the legality of her detention.

15. As regards the duration of pretrial detention, the State argued that the IACHR, in a report on inadmissibility, has established that while Ecuador's legislation includes specific times for the different judicial stages domestically, these merely provide guidance, accordingly it could not be determined that they had been exceeded.³ It added that the reasonableness of the time is not determined by the law but by the prudent weighing of each situation by the judicial authorities, as happened in the instant case.

² Brief of the State, November 26, 2008.

³ The State cited the following report: IACHR, Report No. 38/04, Petition 547/01, Inadmissibility, Ecuador, Maria Esther Geuna Zapcovich, March 12, 2004.

16. With respect to the petition for habeas corpus filed in November 2006, the State indicated that it is an adequate and effective remedy, and that mere inconformity with its result does not make it violative of the American Convention. It indicated that the reasoning behind the denial of the habeas corpus was duly set forth.

17. In addition, the Ecuadorian State indicated that the proceeding against Ms. Puertocarrero complied with all due process guarantees. It argued that the duration of the proceeding for almost four years was reasonable. It added that Ms. Puertocarrero's procedural conduct was absolutely passive in the face of the purported delay in the resolution of her case, as she refrained from pursuing remedies available to that end, such as the motion to recuse (*juicio de recusación*). It also indicated that once the resolution of pardon was adopted for some persons convicted under the Law on Narcotic and Psychotropic Substances, the State itself assumed the Ms. Puertocarrero's defense and processed her release in an expeditious and timely manner.

18. Finally, the State argued that the IACHR, in its Report on Admissibility No. 91/13, found admissible, in application of the principle of *iura novit curia*, the right to freedom from ex post facto laws, and the right to humane treatment. The State indicated that the inclusion of those rights was not duly explained in its report on admissibility. Without prejudice to that situation, Ecuador indicated that the criminal proceeding was carried out for a crime defined in the Law on Narcotic and Psychotropic Substances, thus it guaranteed the principle of freedom from ex post facto laws. It added that Ms. Puertocarrero's right to humane treatment was also guaranteed while she was detained through access to medical services.

III. FINDINGS OF FACT

A. On the detention and criminal proceeding against Ms. Puertocarrero

19. At the time of the facts Daría Olinda Puertocarrero Hurtado was 40 years old, resided in the city of Quito, and worked as a domestic employee.⁴

20. According to the police report, on the morning of October 14, 2004 police agents Franklin Aguilar and Jorge Espinoza received an anonymous call indicating that at the intersection of Mariscal Sucre and Los Libertadores avenues "she was apparently engaged in a drug transaction" ("*estaría negociando droga*"). That report indicated that a police operation began and that at approximately 4:30 p.m. police agents entered a hairdressing salon situated near that zone and arrested two persons, including Ms. Puertocarrero. The police report indicates that Ms. Puertocarrero had a black bag inside of which 98 grams of cocaine were found.⁵

21. The report indicates that in all six persons were arrested during the operation, including Ms. Puertocarrero; and that they were informed of the reasons for their arrest and of their rights.⁶ In addition, according to the Provisional Intake Certificate Ms. Puertocarrero was transferred to the Women's Social Rehabilitation Center (Centro de Rehabilitación Social Femenino) of Quito, and that on that same day she underwent a medical exam. In that exam it was concluded that Ms. Puertocarrero "does not present any bony lesions or traumatism."⁷

22. The Ecuadorian State indicated that on October 15, 2004, the prosecutor of the Anti-Narcotics Unit for the District of Pichincha filed charges and asked that pretrial detention be imposed on the persons arrested, including Ms. Puertocarrero.⁸

23. On October 18, 2004, the Fourth Criminal Court of Pichincha took cognizance of the criminal case against Ms. Puertocarrero and five others for the crime of trafficking narcotic and psychotropic substances,

⁴ Report on Arrest of Ms. Puertocarrero Hurtado, October 14, 2004, and indictment issued by the agent of the Anti-Narcotics Unit of the District of Pichincha, October 14, 2004, attached to the brief of the State of May 20, 2015.

⁵ Report on Arrest of Ms. Puertocarrero Hurtado, October 14, 2004, attached to the brief of the State of May 20, 2015.

⁶ Report on Arrest of Ms. Puertocarrero Hurtado, October 14, 2004, attached to the brief of the State of May 20, 2015.

⁷ Provisional intake certificate issued by the provincial anti-narcotics division of the National Police, October 15, 2004, attached to the State's brief of May 20, 2015.

⁸ State's brief of May 12, 2015.

established at Article 60 of the Law on Narcotic and Psychotropic Substances.⁹ In that ruling the court ordered the pretrial detention of those persons, indicating as follows:

Responding to the request of the prosecutor as it is considered that the requirements set forth at Article 167 of the Code of Criminal Procedure have been met: I issue an Order of Pretrial Detention, in keeping with what is provided at Article 168 of the [same] law..., as there are clear and precise indicia that indicate that the accused are the presumed perpetrators of the crime described in the bill of charges.¹⁰

24. The next day the Superior Court of Justice issued a constitutional certificate of incarceration in the form of pretrial detention as provided for in Articles 167 and 168¹¹ of the Code of Criminal Procedure.¹²

25. On October 22, 2004, Ms. Puertocarrero, accompanied by her attorney, gave her free and voluntary version of the facts to the prosecutor of the Anti-Narcotics Unit, noting as follows:

On Thursday, October 14, 2004 at approximately 4 p.m. I was walking along with my little dog having lunch ... a man approached, I don't know his name, and he told me to deliver a bag ... at a hairdressing salon ... he told me he was going to give me 20 dollars for delivering this bag.... Just as I was delivering the bag some men from INTERPOL told me stop there ... I then realized that they were police, and when they opened the bag, they told me it was drugs.¹³

26. The State indicated that on January 25, 2005, the prosecutor in the case filed an indictment against Ms. Puertocarrero and five others.¹⁴ On August 30, 2005, the Fourth Judge for Criminal Matters of Pichincha issues a summons to trial (*auto de llamamiento a juicio*) against three persons, including Ms. Puertocarrero, as the perpetrators of the crime defined at Articles 60 and 62 of the Law on Narcotic and Psychotropic Substances. The judge also ordered the "*detención en firme*" of those persons.¹⁵ As regards the legal rule on *detención en firme*, it was incorporated in the Ecuadorian legal system by Law 2003-101 of January 13, 2003, which reformed the Code of Criminal Procedure.¹⁶

⁹ Article 60. Sanctions for illicit trafficking. Those who purchase, sell, or deliver in whatever guise, distribute, sell, import, export, or, in general, engage in illicit trafficking of narcotic, psychotropic, and other substances subject to control shall be repressed by special extended incarceration (*reclusión mayor extraordinaria*) of 12 to 16 years and a fine of sixty to eighty thousand general minimum salaries. Illicit trafficking of narcotic, psychotropic, and other substances subject to control shall be understood to refer to every commercial transaction or every delivery, in whatever guise, of such substances, carried out in violation of the provisions of this Law." Provision codified in Supplement to Official Register No. 490, of Monday, December 27, 2004.

¹⁰ Pretrial detention order handed down by the Fourth Criminal Court of Pichincha, October 18, 2004, attached to the State's brief of May 20, 2015.

¹¹ Article 167. (Amended by Article 11 of Law 2003-101, R.O. 743, January 13, 2003). Pretrial detention. When the judge considers it necessary to guarantee the appearance of the accused at trial or to ensure that the sentence is served, he or she may order pretrial detention, so long as the following requirements are met:

1. Sufficient indicia as to the existence of a crime of public action;
2. Clear and precise indicia that the accused is the perpetrator of the crime or an accomplice thereto; and,
3. That it is a crime punished by a penalty entailing deprivation of liberty greater than one year.

Article 168. (Amended by Article 12 of Law 2003-101, R.O. 743, January 13, 2003). Jurisdiction, form and content of the decision. The pretrial detention order may only be handed down by the judge with jurisdiction, by his or her own decision or at the request of the Prosecutor, and it should contain:

1. The personal information of the accused or, if unknown, such information as is useful for identifying him or her;
2. A succinct statement of the act or acts attributed to him or her, and the criminal law characterization thereof;
3. The clear and precise basis for each of the conditions provided for in the previous article; and,
4. A statement of the applicable provisions of law.

¹² Constitutional certificate of incarceration of the alleged victim, October 19, 2004, attached to the State's brief of May 20, 2015, and petitioner's brief of May 9, 2017.

¹³ Record of the free and voluntary version of Ms. Daría Puertocarrero given October 22, 2004.

¹⁴ State's brief of June 5, 2008.

¹⁵ Resolution of the Fourth Criminal Court of Pichincha, August 30, 2005, attached to the State's brief of June 5, 2008.

¹⁶ As regards *detención en firme*, special mention is made of the following provisions of Law 2003-101, promulgated January 13, 2003: Article 10. Article 160 is hereby reformed; the new wording should say:

Article 160.- Classes. The precautionary measures personal in nature are detention, pretrial detention, and *detención en firme*.... The *detención en firme* shall be ordered in all cases in which a summons to trial is issued ... and may only be revoked by a judgment of acquittal and suspended in crimes that carry a prison sentence of *prisión*.

[continues ...]

27. The State reported that on January 30, 2006, the Fourth Judge for Criminal Matters of Pichincha ordered that the proceeding be referred to the Chamber for Distribution of Matters of the Judicial Function (Sala de Sorteos de la Función Judicial), to continue with the processing of the case in the corresponding criminal court.¹⁷ It added that on March 9, 2006, the Office of Distribution of Matters assigned the case to the Second Criminal Court of Pichincha.¹⁸ On September 25, 2007, the trial hearing was held in which the statements of the accused and of various witnesses were heard.¹⁹

28. On January 2, 2008, the Second Court for Criminal Matters of Pichincha handed down a guilty verdict against Ms. Puertocarrero, considering her an accomplice in the crime of trafficking in narcotic and psychotropic substances, defined at Article 60 of the Law on Narcotic and Psychotropic Substances. The court sentenced her to four years in prison and the payment of 80 times the minimum salary.²⁰

29. In that judgment the court took into account the testimony of two police agents who indicated that they had seen that a black bag was handed to Daría Puertocarrero, who in turn delivered it to Marco Alvarado at a hairdressing salon. Both agents reported that a substance was found in that pillowcase which, after chemical analysis, was determined to be cocaine.²¹

30. On January 21, 2008, the Second Criminal Court of Pichincha forwarded the case (in consultation) to the Third Specialized Criminal Chamber of the Superior Court of Justice of Quito.²²

31. On May 14, 2009, the Third Chamber handed down a judgment that amended the judgment referred to it and found Ms. Puertocarrero guilty as perpetrator of the same crime. The Third Chamber imposed the penalty of eight years in prison and the payment of 80 times the minimum salary.²³

32. On July 4, 2008, the Constituent Assembly of Ecuador approved the "Resolution for the pardon of persons who transport small amounts of psychotropic and narcotic substances." Article 1 of that resolution indicates:

Every person who was sentenced to a penalty entailing deprivation of liberty for the crimes of illicit trafficking ... of narcotic and psychotropic substances is hereby pardoned, in keeping with the following requirements:

(a) Having been convicted, at the moment of the publication of this resolution....

(b) The net weight of the substance ... for which one was sentenced must be no greater than 2 kilograms....

(c) The person applying must have served 10% of the sentence imposed....²⁴

Article 16. Following Article 173, a new chapter is hereby created whose title shall be "*La detención en firme*" and it shall have the following articles:

Article 173-A. *Detención en Firme*. In order to ensure the presence of the accused in the trial stage and avoid any interruption, in the summons to trial the Judge hearing the case shall as a matter of obligation order the *detención en firme* of the accused, with the exception of the following cases:

1. For one who has been characterized as a purported aider and abettor; and,

2. For those who are being tried for an infraction whose sentence does not exceed one year.

If the accused had a pretrial detention order imposed on him or her, upon issuance of the summons to trial it shall be changed to *detención en firme*.

Article 173-B. Appeal. If the summons to trial is appealed, the order of *detención en firme* shall not be suspended."

Available at: <http://www.derechoecuador.com/productos/producto/catalogo/registros-oficiales/2003/enero/code/17723/registro-oficial-13-de-enero-del-2003#anchor480794>

¹⁷ State's brief of June 5, 2008.

¹⁸ State's brief of June 5, 2008.

¹⁹ Record of the trial hearing, September 25, 2007. Attached to the State's brief of May 12, 2015.

²⁰ Judgment of the Second Criminal Court of Pichincha, January 2, 2008, attached to the State's brief of June 5, 2008.

²¹ Judgment of the Second Criminal Court of Pichincha, January 2, 2008, attached to the State's brief of May 12, 2015.

²² The State's briefs of June 5, 2008 and July 12, 2017.

²³ Judgment of the Third Specialized Chamber for Criminal Matters of the Superior Court of Justice, May 14, 2008, attached to the State's brief of May 12, 2015.

²⁴ Resolution of the National Constituent Assembly of Ecuador, July 4, 2008, attached to the State's brief of June 25, 2015.

33. On August 5, 2008 Ms. Puertocarrero's public defender applied to the chief judge of the Second Criminal Court of Pichincha, based on the resolution of the Constituent Assembly of Ecuador, to issue an order for her release.²⁵ The next day the Fifth Criminal Court of Pichincha issued an order for Ms. Puertocarrero's immediate release.²⁶ As appears in constitutional certificate of release from prison, Ms. Puertocarrero was released that same day.²⁷

B. On the petition for habeas corpus

34. On October 23, 2006, the Official Register published a judgment of the Constitutional Court that resolved a constitutional action challenging the application of "*detención en firme*." The Constitutional Court found *detención en firme* to be unconstitutional and indicated as follows:

Clearly, the provisions contained in Law No. 101-2003..., that introduces *detención en firme* as a precautionary measure that replaces pretrial detention at a given moment of the criminal proceeding, are unconstitutional as they violate the fundamental right guaranteed at Article 24(8) of the Constitution on the lapsing of pretrial detention, and Article 9(3) of the International Covenant on Civil and Political Rights, and Article 7(5) of the American Convention ... which establish that persons detained have the right to be tried in a reasonable time or be released, without prejudice to the continuation of the criminal proceeding.²⁸

35. On November 18, 2006, Ms. Puertocarrero's attorney filed a petition for habeas corpus with the mayor of the Metropolitan District of Quito. The attorney asked that the release of Ms. Puertocarrero be ordered since: (i) the October 2006 judgment of the Constitutional Court decreed the unconstitutionality of *detención en firme*, a legal rule that was being applied to the alleged victim; and (ii) in keeping with Article 24(8) of the Constitution and Article 169 of the Code of Criminal Procedure²⁹, since the maximum time allowed for her detention had lapsed. The defense counsel asked the mayor to set the date for the hearing for a fuller presentation of her arguments.³⁰

36. The petitioner indicated that on November 22, 2006, at 7:00 am, they received an order from the Office of the Mayor summoning them to the habeas corpus hearing at 10:00 a.m. that that same day.³¹ The IACHR notes that said order does not show the date it was issued. That information was not controverted by the State.³²

37. On November 27, 2006 the Second Vice President of the Council of the Metropolitan District of Quito, in charge of the Office of the Mayor, dismissed the petition for habeas corpus. The decision indicated as follows:

Mindful of the status of the case, it is the Second Criminal Court of Pichincha that is competent to resolve her procedural situation, accordingly in the exercise of the powers conferred upon

²⁵ Brief filed with the Fifth Criminal Court of Pichincha by Ms. Luz Marina Serrano, July 24, 2008, attached to the State's brief of June 25, 2015.

²⁶ Order of the Fifth Criminal Court of Pichincha, August 6, 2008, attached to the State's brief of June 25, 2015.

²⁷ Certificate of release from prison of Ms. Puertocarrero, August 6, 2008, attached to the State's brief of June 25, 2015.

²⁸ Resolution of the Constitutional Court of Ecuador No. 002-05-TC, September 26, 2006, published in the Official Register of October 23, 2006, attached to the State's brief of May 20, 2015.

²⁹ Article 169: "Pretrial detention may not exceed six months, in cases punished by *prisión*, or one year for crimes punished by *reclusión*. In both cases, the term for expiration shall be counted from the date on which the pretrial detention order was enforced. If these terms are exceeded, the pretrial detention order shall cease to have effect, under the responsibility of the judge hearing the case. When the terms provided for by the constitutional provisions and the provisions of the Code of Criminal Procedure are exceeded and the pretrial detention lapses, granting, as a result, the release of the person who has been effectively deprived of liberty, the Judge or Court with jurisdiction shall necessarily and immediately refer the complete record of each case to the National Council of the Judiciary, which will keep an individualized record of these situations." Available at:

http://www.oas.org/juridico/mla/sp/ecu/sp_ecu-int-text-cpp-ro360s.html

³⁰ Petition for habeas corpus on behalf of Daría Olinda Puertocarrero Hurtado, November 18, 2006, attached to the initial petition.

³¹ Initial petition.

³² Order stating the date and time of the hearing in the context of the processing of the writ of habeas corpus on behalf of Daría Olinda Puertocarrero Hurtado, November 21, 2006, attached to the initial petition.

it by Article 93 and Article 199 of the Constitution..., this Office of the Mayor rules to deny the petition for habeas corpus.³³

38. On January 14, 2007 Ms. Puertocarrero's attorney appealed that ruling.³⁴ On February 15, 2007, the Constitutional Court affirmed the November 2006 decision of the Office of the Mayor. The Constitutional Court noted:

Fourth. The appellant grounds her claim on the fact that that once the unconstitutionality of *detención en firme* was found, Article 24(8) of the Constitution has not been heeded..., and the time of her imprisonment in the context of the criminal proceeding has been extended....

Fifth. The appellant lost her liberty on October 25, 2004 ... because of narcotics trafficking.... That the authority that has taken cognizance of the proceeding is the Second Criminal Court of Pichincha....

Sixth. That one notes the official note ... signed by the ... chief judge of the Second Criminal Court of Pichincha ... that states "please find a duly certified copy of the corresponding constitutional certificate of release from prison...."

Seventh. Therefore, based on what is analyzed in the foregoing lines, one concludes that the appellant is detained lawfully and following applicable procedures and, as the case is before the Second Criminal Court of Pichincha, and moreover as there is a summons to trial, the petition for habeas corpus must be rejected on procedural grounds since the *detención en firme* ordered against the appellant is prior to the ruling of the Constitutional Court to which her action makes reference.³⁵

IV. LEGAL ANALYSIS

A. Rights to personal liberty and judicial guarantees (Articles 7(1), 7(2), 7(3), 7(5), 7(6), 8(2), 24, and 25(1) of the American Convention in relation to Articles 1(1) and 2 of the same instrument)³⁶

1. General considerations on pretrial detention

39. The Commission and the Court have indicated that pretrial detention is limited by the principles of legality, presumption of innocence, necessity, and proportionality.³⁷ In addition, it has indicated that it is a

³³ Administrative resolution issued by the mayor of the Metropolitan District of Quito, November 27, 2006, attached to the initial petition.

³⁴ Motion for appeal against the resolution issued by the mayor of the Metropolitan District of Quito, November 27, 2005, January 14, 2007, attached to the initial petition.

³⁵ Order of the Third Chamber of the Constitutional Court of Ecuador, February 15, 2007, attached to the initial petition.

³⁶ Article 7(1). Every person has the right to personal liberty and security.

Article 7(2). No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

Article 7(3). No one shall be subject to arbitrary arrest or imprisonment.

Article 7(5). Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

Article 8(2). Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.

Article 24. All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Article 25(1). Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

³⁷ IACHR, Report on measures aimed at reducing the use of pretrial detention in the Americas. OEA/Ser.L/V/II. December 30, 2013, para. 20. I/A Court HR. *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 67; *Case of García Asto and Ramírez Rojas v. Rojas*. Judgment of November 25, 2005. Series C No. 137, para. 106; *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, para. 197; and *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 74.

precautionary measure, not a punitive one³⁸ and that is the most severe such measure that can be imposed on the accused, thus it must be applied on an exceptional basis. In the view of both organs of the inter-American system, the rule should be the release the accused while the question of his or her criminal liability is resolved.³⁹

40. The Court and the Commission have emphasized that the personal characteristics of the alleged perpetrator and the seriousness of the offense of which he or she is accused are not, in themselves, sufficient justification for pretrial detention.⁴⁰ With respect to the reasons that may justify pretrial detention, the organs of the system have interpreted Article 7(3) of the American Convention to mean that indicia of responsibility are a necessary but not sufficient condition for imposing the measure. In the words of the Court:

... there must be sufficient evidence to allow reasonable supposition that the person committed to trial has taken part in the criminal offense under investigation.⁴¹ Nevertheless, “even in these circumstances, the deprivation of liberty of the accused cannot be based on general preventive or special preventive purposes, which could be attributed to the punishment, but [...] based on a legitimate purpose, which is: to ensure that the accused does not prevent the proceedings from being conducted or elude the system of justice.”⁴²

41. For its part, the IACHR has held as follows:

[A]ny decision restricting the right to personal liberty by means of the enforcement of pretrial detention should contain sufficient and individualised grounds to allow evaluation of whether such detention satisfies the necessary conditions for enforcement, particularly the existence of procedural purposes and the reasons for which less detrimental measures do not proceed to achieve such ends.⁴³

42. As regards the existence of procedural purposes, the IACHR has held that once the relationship is established between the act investigated and the person accused, one must determine the existence of the procedural risk sought to be mitigated by applying pretrial detention during trial: (i) the risk of flight; or (ii) the risk of interference in the investigations.⁴⁴ The need must be based on objective circumstances, thus merely invoking or enouncing the grounds for it without considering and analyzing the circumstances of the case does not satisfy this requirement.⁴⁵

43. In addition to its effects on the exercise of the right to personal liberty, both the Commission and the Court have indicated that the improper use of pretrial detention may have an impact on the principle of the presumption of innocence contained in Article 8(2) of the American Convention. In this respect, special emphasis has been placed on the criterion of reasonableness, for keeping a person locked up beyond the reasonable time for attaining the purposes that justify his or her detention would be equivalent, in practice, to an anticipated sentence.⁴⁶

³⁸ I/A Court HR. *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 77.

³⁹ IACHR. Report on measures aimed at reducing the use of pretrial detention in the Americas. OEA/Ser.L/V/II. December 30, 2013, para. 21. I/A Court HR. *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 67; *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, para. 196; and *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 74.

⁴⁰ IACHR. Report on measures aimed at reducing the use of pretrial detention in the Americas. OEA/Ser.L/V/II. December 30, 2013, para. 21; I/A Court HR. *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 69; *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, para. 106; *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 75; and *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 180.

⁴¹ I/A Court HR. *Case of Barreto Leiva v. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, para. 111.

⁴² I/A Court HR. *Case of Barreto Leiva v. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206. para. 111; *Case of Chaparro Álvarez and Lapo Iñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 103; and *Case of Servellón García et al. v. Honduras*. Merits, Reparations and Costs. Judgment of September 21, 2006. Series C No. 152, para. 90.

⁴³ IACHR. Report 42/17. Case 12,031. Merits. Jorge Rosadio Villavicencio. Peru. May 23, 2017, para. 195.

⁴⁴ IACHR. Report on measures aimed at reducing the use of pretrial detention in the Americas. December 30, 2013, para. 185.

⁴⁵ IACHR. Report No. 86/09, Case 12,553, Merits, José, Jorge y Dante Peirano Basso, Uruguay, August 6, 2009, paras. 80 and 85.

⁴⁶ IACHR. Report No. 2/97. Case 11,205. Merits. Jorge Luis Bronstein et al. Argentina. March 11, 1997, para. 12; Third Report on the Situation of Human Rights in Paraguay, OEA/Ser./L/VII.110. Doc. 52, adopted March 9, 2001. Ch. IV, para. 34. See also: I/A Court HR. *Case* [continues ...]

44. Respect for the right to the presumption of innocence also requires that the State establish a basis and show, clearly and spelling out the reasoning, in each specific case, the existence of valid requirements for imposing pretrial detention.⁴⁷ Therefore, the principle of the presumption of innocence is also violated when pretrial detention is imposed arbitrarily; or when its application is determined essentially, for example, by the type of offense, the expectation of the penalty, or the mere existence of reasonable indicia that indicate the involvement of the accused in the crime in question.⁴⁸

2. On the pretrial detention of Ms. Puertocarrero

45. In the instant case the IACHR notes that on October 18, 2004, the Fourth Criminal Court of Pichincha issued a ruling ordering the pretrial detention of Ms. Puertocarrero in the context of the proceeding against her for the crime of trafficking in narcotic and psychotropic substances. As regards the reasons for that order, and as indicated in the section on findings of fact, the applicability of pretrial detention was based on Article 167 of the Code of Criminal Procedure in force at the time. The day after the order was issued, the Superior Court of Justice issued a constitutional certificate of pretrial detention in keeping with that article of the Code of Criminal Procedure.

46. Article 167 of that Code provided that the judge, “when he or she believes it necessary,” could order pretrial detention so long as there were: (i) “sufficient indicia as to the existence of a crime”; and (ii) “clear and precise indicia that he accused is the perpetrator or accomplice of the crime.”

47. In this respect, the Commission observes that this provision did not require procedural purposes for ordering pretrial detention. To the contrary, it established as sufficient grounds the existence of indicia of responsibility for a crime that carries a penalty of deprivation of liberty. The Commission has said that this provision inverts, in practice, the exceptional nature of pretrial detention, and makes it the rule in those cases punished by deprivation of liberty, for it suffices, in order to impose it, that there be a crime that carries the sanction of deprivation of liberty and “indicia of responsibility.”⁴⁹

48. In effect, and as a direct consequence of this provision, the decisions that imposed pretrial detention on Ms. Puertocarrero are based essentially on the elements that point to her responsibility. The IACHR takes note that in the documentation produced by the parties there was no indication that Ms. Puertocarrero would interfere in the investigation or that there was any risk of flight. In that regard, both the applicable law and the decisions handed down based on it gave rise to the imposition of pretrial detention as a rule, and not as an exception, without thereby pursuing any procedural purpose.

49. Accordingly, from the outset her pretrial detention was arbitrary and, as per the standards cited above, was a punitive and not a precautionary measure, in violation of the right to personal liberty and the principle of the presumption of innocence. Therefore, the Commission concludes that the State of Ecuador is responsible for violating Articles 7(1), 7(3), and 8(2) of the American Convention in relation to the obligations established at Articles 1(1) and 2 of the same instrument, to the detriment of Daría Puertocarrero Hurtado.

3. On the *detención en firme* of Ms. Puertocarrero

50. On this point, the Commission will analyze the rule on “*detención en firme*” and its application to the instant case in light of the international standards on pretrial detention set out in the previous section and other relevant international standards.

of López Álvarez v. Honduras. Judgment of February 1, 2006. Series C No. 141, para. 69; *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 111; *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 180; *Case of the “Juvenile Reeducation Institute” v. Paraguay*. Judgment of September 2, 2004. Series C No. 112, para. 229; and *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 77.

⁴⁷ I/A Court HR. *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 144.

⁴⁸ IACHR. [Informe Report on measures aimed at reducing the use of pretrial detention in the Americas](#). OEA/Ser.L/V/II. December 30, 2013, para. 137.

⁴⁹ IACHR. Report No. 40/14. Case 10,438. Report on the Merits. Herrera Espinoza et al. Ecuador. July 17, 2015, para. 135.

51. The law on *detención en firme* was established in Article 173-A of the Code of Criminal Procedure, which was amended by Law 2003-101. That provision established the application of pretrial detention in the summons to trial with exception of those that: (i) are characterized as purported aiders and abettors; and that (ii) are tried for an infraction whose penalty does not exceed one year in prison. In addition, the provision also indicated that in the event that pretrial detention had been applied to a person, on issuing the summons to trial it would be changed to *detención en firme*.

52. In the instant case, Ms. Puertocarrero was in pretrial detention since October 2004, and on August 30, 2005 the judge handling the proceeding issued a summons to trial against her. According to the provision indicated above, the judge amended the pretrial detention of Ms. Puertocarrero, replacing it by *detención en firme*. *Detención en firme* means that the pretrial detention was obligatory, without considering the particularities of the case or of the person detained. Ms. Puertocarrero was deprived of liberty under the rule on *detención en firme* from August 30, 2005 until May 14, 2008, the date on which the judgment on appeal was handed down. The rule on *detención en firme* was in force until 2006, when the Constitutional Court ruled that it was unconstitutional.

53. In this respect, in its 2005 Annual Report the IACHR observed “with great concern” that certain conditions provided for by Law 2003-101 that give rise to *detención en firme* allow for the confinement of persons “for an unreasonably long time between indictment and trial.”⁵⁰ The next year the IACHR held that the *detención en firme* was used in the Ecuadorian State to extend pretrial detention beyond the limit allowed by the Constitution.⁵¹

54. The UN Committee against Torture indicated as follows in its February 2006 conclusions on the Ecuadorian State:

The Committee notes with concern the practice of *detención en firme*, under which the court must, when issuing a [summons to trial], order the detention of the accused allegedly in order to ensure his or her presence at the trial and avoid suspension of the proceedings (art. 2).

The State party should foster legislative improvements which will help to shorten periods of pretrial detention, including removal of the concept of *detención en firme* from the Code of Criminal Procedure.⁵²

55. The Commission emphasizes that *detención en firme* as it was regulated and applied in the case was a compulsory and automatic pretrial detention based exclusively on the seriousness of the penalty attached to the crime, the modality by which it was supposedly committed, and the procedural stage, i.e. that fact that it was in the trial phase. It did not require the respective authorities to analyze or justify whether procedural purposes were being attained in keeping with their obligations under the American Convention.

56. And so, the judicial authorities limited themselves to validating the application of the *detención en firme* against Ms. Puertocarrero without conducting an individualized analysis of her situation much less an assessment of its compatibility with the requirements of American Convention, an aspect that will be taken up again in relation to the right to judicial protection. Accordingly, from the outset her *detención en firme* was arbitrary and, as per the standards cited above, was a punitive measure, not a precautionary one, in violation of the principle of the presumption of innocence of Ms. Puertocarrero.

57. In addition, even though the rule was found unconstitutional by the Constitutional Court in October 2006, it continued to be applied to Ms. Puertocarrero. Accordingly, the IACHR considers that as of October 2006 the *detención en firme* of Ms. Puertocarrero became illegal.

⁵⁰ IACHR, 2005 Annual Report, Chapter IV, para. 187.

⁵¹ IACHR, 2006 Annual Report, Chapter II, para. 25.

⁵² United Nations, Committee against Torture, Conclusions and Recommendations, Ecuador, February 8, 2006, para. 19.

58. In addition, the IACHR takes note that this provision implies differential treatment as between: (i) persons tried for crimes that carry a sentence greater than one year who are not characterized as alleged aiders and abettors, and with respect to whom the summons to trial has been issued; and (ii) those persons tried for crimes with a penalty less than one year, or who are characterized as alleged aiders and abettors, or even with respect to whom, without them meeting the two foregoing requirements, the summons to trial has not been issued. Considering that pretrial detention is a precautionary measure, not a punitive one, the difference in treatment based on the sentence to be imposed, the modality of committing the alleged crime, or the procedural stage, is itself a violation of the Convention. Accepting those criteria for determining differences in applying or not applying pretrial detention in a specific case would be accepting the punitive nature of pretrial detention, which would be contrary not only to the right of personal liberty but also the principle of the presumption of innocence. The IACHR considers that in view of the considerations set forth in the foregoing paragraphs, this difference in treatment implies an arbitrary and discriminatory restriction on the right to personal liberty for those who are in the first category, as occurred in the case of Ms. Puertocarrero.

59. Accordingly, the IACHR concludes that the *detención en firme* was illegal, arbitrary, and in violation of the principles of presumption of innocence and equality before the law. Accordingly, the Commission finds that the Ecuadorian State violated the rights established at Articles 7(1), 7(2), 7(3), 8(2), and 24 of the American Convention, in relation to Articles 1(1) and 2 of the same instrument, to the detriment of Daría Puertocarrero Hurtado.

4. On the duration of Ms. Puertocarrero's detention

60. Article 7(5) of the American Convention imposes time limits on the duration of pretrial detention and, as a result, on the powers of the State to protect the purposes of the procedure through this type of precautionary measure. In addition, in keeping with the criterion of reasonableness, keeping a person deprived of liberty beyond a reasonable time would be equivalent, *de facto*, to an anticipated sentence.⁵³ That is why the State must produce information that justifies the prolongation of this measure.⁵⁴ In addition, the IACHR has argued that when the length of pretrial detention becomes unreasonable, the State may limit the liberty of the accused using other measures that are less restrictive than deprivation of liberty to ensure his or her appearance at trial.⁵⁵

61. With respect to the need for a periodic review of the grounds of pretrial detention of its duration, the Court has indicated as follows:

Pretrial detention must be subject to periodic review such that it is not prolonged when the reasons for it do not subsist. Along these lines, the judge does not have to wait until handing down a judgment of acquittal for a detained person to regain his or her liberty; rather, one must periodically assess whether the causes, necessity, and proportionality of the measure remain, and whether the length of the detention has surpassed the limits imposed by law and reason. At any time that it appears that pretrial detention does not meet these conditions, release should be ordered, without prejudice to the continuation of the respective proceeding.⁵⁶

62. In the instant case, the Commission observes that Ms. Puertocarrero was detained without a firm court judgment for three years and seven months: (i) 11 months in pretrial detention; and (ii) two years and eight months under *detención en firme*. The IACHR notes that during the pretrial detention no review was performed of Ms. Puertocarrero's situation. As regards the *detención en firme*, the IACHR notes that there was no periodic

⁵³ IACHR. Report No. 86/09, Case 12,553, Merits, José, Jorge and Dante Peirano Basso, Uruguay, August 6, 2009, para. 133; Report No. 2/97, Case 11,205, Merits, Jorge Luis Bronstein et al. Argentina, March 11, 1997, para. 12; and Third Report on the Situation of Human Rights in Paraguay, Ch. IV, para. 34.

⁵⁴ IACHR. Report No. 66/01, Case 11,992, Merits, Dayra María Levoyer Jiménez, Ecuador, June 14, 2001, para. 48.

⁵⁵ IACHR. Report No. 53/16, Case 12,056, Gabriel Oscar Jenkins, Argentina, December 6, 2016, para. 116. I/A Court HR. *Case of Barreto Leiva v. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, para.120.

⁵⁶ I/A Court HR. *Case of Arguelles et al. v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2014. Series C No. 288, para. 121.

review whatsoever of whether it continued to be justified. Moreover, the lack of a periodic review of the *detención en firme* was in keeping with what was established in the Code of Criminal Procedure, insofar as the *detención en firme* could not be revoked so long as the conditions that were the basis for imposing it in the first place persisted, which the Commission has, in this section, found to be in violation of the Convention.

63. In view of the foregoing, the IACHR considers that the time during which Ms. Puertocarrero was detained without a firm court judgment, both as pretrial detention and as *detención en firme*, was unreasonable and exceeded the criteria of reasonableness. Accordingly, the Commission concludes that the Ecuadorian State violated the rights established in Articles 7(1) and 7(5) of the American Convention, in relation to Articles 1(1) and 2 of the same instrument. In addition, the Commission concludes that the duration of that detention did not constitute treatment in keeping with her status as a person not convicted, in violation of the presumption of innocence, thus the State also violated the right established at Article 8(2) of the American Convention.

5. On the petition for habeas corpus filed by Ms. Puertocarrero

64. In November 2006 Ms. Puertocarrero filed a petition for habeas corpus with the mayor of the Metropolitan District of Quito, which was rejected. Both the Commission⁵⁷ and the Court have established that a petition for habeas corpus before an administrative authority does not constitute an effective remedy under the standards of the American Convention.⁵⁸ While that remedy could be appealed to a judicial authority, in this respect the Court has held that the requirement that persons who are detained have to pursue a remedy before the mayor and then have to appeal the mayor's decision in order for a judicial authority to be able to take cognizance of it generates obstacles to a remedy that should be, by its very nature, simple.⁵⁹

65. Without prejudice to the foregoing, in the instant case the decision to dismiss was appealed and then heard by the Constitutional Court, which affirmed the mayor's ruling. In this respect, the IACHR notes that the Constitutional Court limited itself to indicating that the habeas corpus was not admissible, since Ms. Puertocarrero was under the *detención en firme* regime, which did not allow for the possibility of it being overturned. In addition, the Court held that even though the institution of *detención en firme* was found to be unconstitutional, that decision came after its application to Ms. Puertocarrero.

66. The IACHR emphasizes that while declarations of unconstitutionality in the context of abstract constitutional actions do not necessarily have retroactive effect, it is problematic that the non-retroactivity of such rulings is used in the most restrictive manner, insofar as the situation in the instant case entailed a deprivation of liberty of a person, which was not consummated yet that persisted at the moment of the declaration of unconstitutionality. The Commission considers that based on a *pro homine* interpretation and taking into account the failings already described in relation to the *detención en firme*, it was reasonable for the judicial authorities who resolved the habeas corpus to rule to discontinue the deprivation of liberty based on a provision found to be unconstitutional. Nonetheless, that did not happen in the instant case. As indicated above, nor was the rule in question evaluated in light of the American Convention, failing to assure compliance with treaty obligations with respect to a matter – such as pretrial detention – addressed extensively in the case-law of the inter-American system in general and in relation to Ecuador in particular.

67. In view of the foregoing considerations, the IACHR concludes that habeas corpus, as it was regulated at the time of the facts in Ecuador, was not in keeping with Ecuador's treaty obligations, as it did not comply with the requirements of Article 7(6) of the American Convention. In addition, it did not constitute an effective judicial remedy for ensuring oversight of her deprivation of liberty in light of the standards of the Convention. Accordingly, the Commission finds that the State violated the rights established at Articles 7(1), 7(6), and 25(1)

⁵⁷ IACHR, Report No. 139/10, P-139-10, Admissibility, Luis Giraldo Ordóñez Peralta, Ecuador, November 1, 2010, para. 29; Report No. 66/01, Case 11,992, Merits, Dayra María Levoyer Jiménez, Ecuador, June 14, 2001, paras. 78-81; and Report No. 91/13, P-910-07, Admissibility, Daría Olinda Puertocarrero Hurtado, Ecuador, November 4, 2013.

⁵⁸ I/A Court HR. *Case of Chaparro Álvarez and Lapo Ñiñez. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 128.

⁵⁹ I/A Court HR. *Case of Chaparro Álvarez and Lapo Ñiñez. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 129.

of the American Convention in relation to the obligations established at Articles 1(1) and 2 of that treaty, to the detriment of Daría Puertocarrero Hurtado.

B. Right to a fair trial (Article 8(1) of the American Convention in relation to Article 1(1) of the same instrument⁶⁰)

68. Article 8(1) of the American Convention establishes as one of the elements of due process that the courts decide cases put before them in a reasonable time. In this regard, a prolonged delay may constitute, in itself, a violation of the right to a fair trial.⁶¹ It is up to the State to set forth and prove why it has required more time than reasonable to hand down a final judgment in a particular case.⁶² Accordingly, the reasonableness of the time should be weighed in relation to the total duration of the criminal proceeding⁶³ and in light of the four elements that the Court has noted in its case-law, namely: (i) the complexity of the matter; (ii) the procedural activity of the interested party; (iii) the conduct of the judicial authorities; and (iv) the resulting impairment in the legal situation of the person involved in the proceeding.⁶⁴

69. As regards complexity, the IACHR considers first that the case is not especially complex so as to justify the total delay of more than three-and-a-half years in the criminal proceeding. In addition, the IACHR recalls that in order for an argument of complexity to be in order, the State must present specific information that directly ties the elements of complexity invoked with the delays in the proceeding. That has not happened in the instant case.

70. As regards the participation of the interested parties, the Commission notes that one preliminary criterion is that it is not the responsibility of the person accused to ensure the speediness of the proceeding, insofar as it is a responsibility of the State. In the instant case, the IACHR observes that there is no information in the record that indicates that Ms. Puertocarrero's obstructed the proceeding.

71. As regards the conduct of the judicial authorities, the Commission takes note of the prolonged delays during the proceeding, which have not been justified by the State. In this respect, one should note the more than two years between the summons to trial, issued August 30, 2005, and the holding of the hearing, which took place on September 25, 2007. The IACHR takes note that according to the documentation produced by the parties it does not appear that any procedural steps were taken during that period.

72. With respect to the impairment of the legal situation, the Commission notes that when a person is detained there is a special need for speedy criminal process. In this case, the IACHR observes that due to the application of both pretrial detention and *detención en firme*, the delay in the process prolonged the deprivation of liberty without a firm conviction that was suffered by Ms. Puertocarrero, with all the personal, family, and social implications entailed in such a situation.

73. In view of the foregoing, the Commission considers that the three-and-a-half years that elapsed from the beginning of the investigation until the judgment on appeal constituted an excessive time that has not been justified by the State. Accordingly, the Commission considers that the State violated the guarantee of a reasonable time, established in Article 8(1) of the American Convention, in relation to Article 1(1), to the detriment of Daría Puertocarrero Hurtado.

⁶⁰ 8(1). Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

⁶¹ I/A Court HR. *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, para. 166.

⁶² I/A Court HR. *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 142.

⁶³ IACHR. Report No. 77/02. Case 11,506. Merits. Waldemar Gerónimo Pinheiro and José Víctor dos Santos. Paraguay. December 27, 2002, para. 76.

⁶⁴ I/A Court HR. *Case of Santo Domingo Massacre v. Colombia*. Preliminary Objections, Merits and Reparations. Judgment of November 30, 2012. Series C No. 259, para. 164.

C. Right to defense (Article 8.2 of the American Convention in relation to Article 1.1 of the same instrument⁶⁵)

74. The Court has indicated that the right to defense must necessarily be exercised since a person is indicated as a possible author or participant of a punishable act and only culminates when the process ends.⁶⁶ This includes the investigation, accusation, prosecution and conviction of the accused person.⁶⁷ The Commission emphasizes that one of the guarantees of the right of defense is to appeal a conviction in order to avoid the consolidation of a situation of injustice.⁶⁸ In this regard, the right to appeal the judgment before a judge or higher court, established in Article 8.2 (h) of the American Convention, must include a material review in relation to the interpretation of the procedural norms that would have influenced the decision of the cause, when they have produced insanity nullity or caused defenselessness, as well as the interpretation of the norms regarding the valuation of the evidence, provided that they have led to a wrong application or the non-application of the same.⁶⁹

75. Likewise, the European Court of Human Rights has argued that another of the guarantees of the right of defense is the principle of coherence between the legal qualification of a sentence issued by a judge or court of first sentence and of a hierarchical court when it is presented an appeal.⁷⁰ The ECHR held in the *Case Pelissier and Sassi v. France*, where the court of second instance modified the criminal type by which the victims were convicted in the first instance, that the right of defense of the accused person was violated. This is because after the judgment of the first instance, the accused person was not allowed to present allegations that would allow him to defend himself against an eventual change of criminal nature.⁷¹

76. For its part, the Inter-American Court in the *Case Fermín Ramírez v. Guatemala* argued that the principle of coherence, which was applied in this matter between the indictment and the first sentence, must safeguard the right of defense. This implies that the accused "has the right to know, through a clear, detailed and precise description, the facts that are imputed to him" and that "the procedural guarantees provided by law to carry out the new qualification are observed".⁷²

77. The IACHR emphasizes that a new legal classification of the crime must include the possibility of presenting or controversial evidence, as well as of questioning or cross-examining witnesses. The Commission considers that said guarantee must be understood within the general defense right provided for in Article 8.2 c) of the American Convention.

78. In the present case, the IACHR notes that in the first instance Mrs. Puertocarrero was convicted by the Second Criminal Court of Pichincha, considering her an accomplice to the crime of trafficking in narcotic and psychotropic substances. The penalty was set in four years in prison. The Commission also observes that said court referred the case in consultation to the Third Special Criminal Chamber of the Superior Court of Justice of Quito, which issued a conviction that declared Mrs. Puertocarrero guilty in the degree of author of the crime of narcotic and psychotropic substance trafficking. Due to the change in the legal qualification of the sentence, the penalty was increased to eight years in prison.

79. In this regard, the IACHR points out that the Superior Court of Quito that met in consultation with the case of Mrs. Puertocarrero modified the qualification of the crime charged in relation to the quality in which

⁶⁵ Article 8.2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
c) adequate time and means for the preparation of his defense.

⁶⁶ I/A Court H.R., Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, para. 29.

⁶⁷ I/A Court H.R., Case of Mohamed v. Argentina. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 23, 2012. Series C No. 255, para. 91.

⁶⁸ CIDH. Report No. 24/17. Case 12.254. Merits. Víctor Hugo Saldaño. United States. March 18, 2017, para. 204.

⁶⁹ CIDH. Report No. 55/97. Case 11.137. Merits. Juan Carlos Abella. Argentina. November 18, 1997, paras. 261-262.

⁷⁰ ECHR. *Pelissier y Sassi v. Francia*. Judgment of March 25, 1999, paras. 59-63.

⁷¹ ECHR. *Pelissier y Sassi v. Francia*. Judgment of March 25, 1999, paras. 59-63.

⁷² I/A Court H.R., Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs. Judgment of June 20, 2005. Series C No. 126, para. 67.

she would have committed it, passing as an accomplice to traffic of narcotic and psychotropic substances to its author. This meant that the sentence of four years in prison in the first instance should be doubled. The Commission notes that the State failed to comply with its duty to grant Mrs. Puertocarrero to raise the elements of defense indicated in the preceding paragraphs before the Superior Court of Quito against an eventual change of accomplice to the author of the crime for which she was convicted in the first instance.

80. Based on the foregoing, the Commission concludes that the Ecuadorian State violated the right of defense established in Article 8.2 c) of the American Convention, in relation to Article 1.1 of the same instrument, to the detriment of Daría Olinda Puertocarrero Hurtado.

D. Right to humane treatment (Article 5(1) of the American Convention in relation to Article 1(1) of the same instrument⁷³)

81. Article 5(1) of the American Convention recognizes in general terms the right to humane treatment, encompassing physical, mental, and moral integrity. In the instant case, and in keeping with what is set forth in the preceding sections, Ms. Puertocarrero was arbitrarily detained for three years and seven months, a time that was unreasonable. In addition, that detention constituted, in reality, a punitive measure that did not take into account the particularities of her situation. Finally, she was kept from having an adequate and effective remedy such as would have allowed her to challenge the validity of that detention.

82. The IACHR considers that all these elements constituted a source of suffering and anguish in Ms. Puertocarrero's personal and family circle. Accordingly, the IACHR concludes that the State violated her right to humane treatment, established at Article 5(1) of the American Convention, in relation to Article 1(1) of the same instrument.

E. Freedom from ex post facto laws (Article 9 of the American Convention in relation to Article 1(1) of the same instrument⁷⁴)

83. As regards freedom from ex post facto laws, the petitioner argues that the application of the *detención en firme* against Ms. Puertocarrero subsequent to it being declared unconstitutional violated Article 9 of the American Convention. In this respect the IACHR recalls that the Court has established that the freedom from ex post facto laws in favor of the defendant "does not apply to regulations governing procedure."⁷⁵ Accordingly, and without prejudice to what is indicated in the foregoing sections on *detención en firme* being in violation of the Convention under the rights to personal liberty and to the presumption of innocence, the Commission considers that its application in the instant case did not violate the freedom from ex post facto laws as set forth at Article 9 of the American Convention.

V. PROCEEDINGS SUBSEQUENT TO REPORT No. 22/18

84. The Commission adopted the merits report No. 22/18 on February 24, 2018 and transmitted it to the State on May 2 of the same year. In that report the Commission recommended:

1. That it make full reparation to Daría Olinda Puertocarrero Hurtado through measures of compensation, satisfaction, and rehabilitation, that include the material and non-material harm caused the victim as the result of the violations found in this report.

⁷³ Article 5(1). Every person has the right to have his physical, mental, and moral integrity respected.

⁷⁴ Article 9. No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

⁷⁵ I/A Court HR. *Case of Liakat Ali Alibux v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 30, 2014. Series C No. 276, para. 70.

2. That it order measures of non-repetition as necessary to ensure that both the applicable law and the respective practices in the area of pretrial detention in Ecuador are compatible with the standards established in this report.

85. In the procedure followed after the notification of the merits report, the Commission received several reports from the State and briefs from the petitioners regarding compliance with the recommendations established by the IACHR. During this period, the Commission granted two extensions to the State for the suspension of the period established in Article 51 of the American Convention. In these extension requests, the Ecuadorian State reiterated its willingness to comply with the recommendations. Likewise, it expressly waived the filing of preliminary objections for breach of said term in the event that the case was submitted to the Inter-American Court.

86. After evaluating the information available on the status of compliance with the recommendations, on January 30, 2019, the Commission decided by absolute majority not to send the case to the Inter-American Court and proceed to the publication of the merits report. In the section included below, the Commission makes its determinations on compliance with its recommendations.

VI. ANALYSIS ON COMPLIANCE WITH THE RECOMMENDATIONS

87. The IACHR notes that on November 9, 2018, the parties signed an agreement to comply with the recommendations of the merits report No. 22/18.

88. **In relation to the first recommendation**, the State informed that i) the payment of the compensation agreed between the parties was made to the victim; ii) an act of acknowledgment of international responsibility was held with the presence of Mrs. Puertocarrero and her relatives; iii) the victim agreed to receive a program of literacy and comprehensive health care. The petitioners acknowledged the measures taken by the State. Notwithstanding the foregoing, they asked the Commission to follow up on the State's measures to guarantee the continuity of the victim's studies as well as to offer him the possibility of taking a technical specialty during the baccalaureate stage. In this regard, the IACHR values the measures adopted by the State and considers that it has made substantial progress in compliance. However, taking into account the petitioner's request, as well as the nature of the measure consisting of education, the IACHR requests the State to report on the measures adopted to ensure the effective continuity of said measure, as well as the one related to health.

89. **Regarding the second recommendation**, the State maintained that it has developed a training program at the Judicial Function School of the Judicial Council that has incorporated the inter-American standards on preventive detention. It added that the figure of firm detention is repealed from its legal system. The State also indicated that under the current Organic Criminal Code, preventive detention conforms to inter-American standards related to personal freedom and presumption of innocence. It argued that it is recognized as an exceptional figure and that it must conform to the principles of legality, necessity, proportionality and reasonableness. Ecuador added that specific terms for the duration of pretrial detention have been imposed so as not to arbitrarily restrict the right to personal liberty. In this regard, the IACHR values the measures adopted by the State and considers that it has complied with this recommendation.

VII. PROCEEDINGS SUBSEQUENT TO REPORT No. 123/19 AND COMPLIANCE INFORMATION

90. The Commission adopted Merits Report No. 123/19 on August 6, 2019 and transmitted it to both parties on May 7, 2020 granting them a period of two months to report to the IACHR on compliance with its recommendations.

91. The Commission notes that, subsequent to its decision not to send the instant case to the Inter-American Court, on March 26, 2020, the State reported that it published Preliminary Merits Report No. 22/18 on the website of the Judiciary Council for a period of one year. This, in accordance with the will of the parties, as a measure of satisfaction established in their agreement to comply with recommendations.

92. To date, the Commission has not received a response from Ecuador in relation to Report No. 123/19, nor has it received a response from the petitioning party. In view of this and the nature of the measures of

reparation, the Commission will continue to follow up on compliance to ensure: the continuity of the victim's studies, the possibility of her pursuing a technical specialty during the baccalaureate stage, and the continuity of comprehensive health care.

VIII. FINAL CONCLUSIONS AND RECOMMENDATIONS

93. Based on its findings of fact and law, the Inter-American Commission on Human Rights concluded in its merits report No. 22/18 that the State of Ecuador was responsible for violating Articles 5(1) (humane treatment); 7(1), 7(2), 7(3), 7(5), and 7(6) (personal liberty); 8(1) and 8(2) (fair trial); 24 (equality before the law); and 25(1) (judicial protection) of the American Convention on Human Rights, in relation to the obligations established at Articles 1(1) and 2 of the same instrument, to the detriment of Daría Olinda Puertocarrero Hurtado.

94. The Commission acknowledges the substantive progress in compliance with the recommendations and by virtue of the foregoing conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES TO THE STATE OF ECUADOR:

1. That it make full reparation to Daría Olinda Puertocarrero Hurtado through measures of compensation, satisfaction, and rehabilitation, that include the material and non-material harm caused the victim as the result of the violations found in this report.

IX. PUBLICATION

95. Pursuant to the foregoing and in accordance with the provisions of Article 51(3) of the American Convention, the Inter-American Commission on Human Rights decides to publish this report and include it in its Annual Report to the General Assembly of the Organization of American States. The Inter-American Commission, in accordance with the norms established in the instruments that regulate its mandate, will continue to evaluate the measures adopted by the State of Ecuador with respect to the above recommendation, until it determines that it has been fully complied with.

Approved by the Inter-American Commission on Human Rights on the 19th day of November 2021. (Signed): Antonia Urrejola Noguera, President; Julissa Mantilla Falcón, First Vice President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Joel Hernández García and Edgar Stuardo Ralón Orellana, Commissioners.