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## **REPORT No. 131/17**

### **CASE 11.678**

REPORT ON THE ADMISSIBILITY AND MERITS

MARIO MONTESINOS MEJÍA  
ECUADOR

Approved by the Commission at its session No. 2102 held on October 25, 2017  
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**I. SUMMARY**

1. On August 30, 1996 the Inter-American Commission on Human Rights (hereinafter, "the Commission" or "the IACHR") received a petition filed by Alejandro Ponce-Villacís (hereinafter, "the petitioner") alleging the international responsibility of the Republic of Ecuador (hereinafter, "the State," "the Ecuadorian State" or "Ecuador") for the illegal and arbitrary arrest of Mario Montesinos Mejía (hereinafter, "the alleged victim") by police officers in 1992, for the acts of torture inflicted on him, and for the lack of judicial protection in the criminal cases brought against him.

2. The State alleged that the case was inadmissible inasmuch as Mr. Montesinos had failed to exhaust domestic remedies prior to lodging the petition. It held that the arrest was made in accordance with domestic law and that due process guarantees were respected during the criminal proceedings.

3. After examining the points of fact and law presented by the parties, the Commission concludes that the State is responsible for violating the rights to humane treatment, personal liberty, a fair trial, and judicial protection set forth in Articles 5(1), 5(2), 7(1), 7(2), 7(3), 7(4), 7(5), 7(6), 8(1), 8(2), 8(2)(d), 8(3), 24, 25(1), and 25(2)(c) of the American Convention on Human Rights (hereinafter, "the American Convention" or "the Convention") in connection with Articles 1(1) and 2 thereof, to the detriment of Mario Montesinos Mejía. The Commission further concludes that the State is responsible for the violation of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter, "the IACPPT").

**II. PROCEEDINGS BEFORE THE COMMISSION**

4. The IACHR received the initial petition on August 30, 1996. On September 24, 1996 the Commission forwarded the petition to the State, requesting that it submit its observations on admissibility within ninety days. The State presented its comments on December 10 of that year. The IACHR subsequently received communications from both parties, each of which was duly forwarded.

5. On February 9, 2004 the IACHR informed the parties that, pursuant to Article 37(3) of its Rules of Procedure in force at the time, it had decided to defer its examination of admissibility until it deliberated and decided on the merits. The petitioner furnished additional observations on March 9, 2004. On December 15, 2005 the IACHR forwarded those observations to the State and asked it to provide further comments within two months. The State submitted additional observations on the admissibility and merits on July 15, 2016.

**III. POSITIONS OF THE PARTIES**

**A. The Petitioner**

6. The petitioner alleged the international responsibility of the Ecuadorian State for the illegal and arbitrary arrest of Mario Montesinos Mejía by police officers in 1992, the torture he suffered, and the lack of judicial protection during the criminal cases brought against him. Details about Mr. Montesinos Mejía's arrest and the criminal prosecutions can be found in the "Determination of Facts" section.

7. The petitioner held that the case was admissible inasmuch as two of the three cases brought against Mr. Montesinos were ultimately dismissed, meaning that domestic remedies had been exhausted. He stated that the third case remained open.

8. As to the alleged violation of the **right to personal liberty**, the petitioner indicated that police officers had arrested Mr. Montesinos without a warrant and without catching him in *flagrante delicto*. He maintained that the alleged victim was not informed about why he was being arrested and that he was not brought before a judicial authority within a reasonable timeframe. The petitioner added that the *habeas corpus* appeals to challenge the arrest were neither adequate nor effective. He further noted that the time the alleged victim was held in pretrial detention was unreasonable insofar as it lasted more than six years.

9. Regarding the alleged violation of the **right to humane treatment**, the petitioner claimed that while in custody, Mr. Montesinos was tortured by the guards at the prison in an effort to get him to confess to having committed a crime. He indicated that the torture consisted of beatings, electric shocks, and gas attacks. The petitioner added that the sanitary conditions in the cell where Mr. Montesinos was held for the first few days were deplorable.

10. With respect to the alleged violation of the **rights to a fair trial and judicial protection**, the petitioner held that the criminal prosecutions were plagued with irregularities. He indicated that from the outset, the alleged victim was not apprised of the charges against him and was unable to contact his attorney, which undermined his right to a defense. The petitioner stated that motions filed by Mr. Montesinos' defense team for an inquiry during the proceedings were rejected.

11. The petitioner stated that the application of Article 116 of the Law on Narcotics and Psychotropic Substances to Mr. Montesinos' case also violated his right to a defense. This, because it stipulates that a defendant's preliminary statement and the initial police report may be considered serious indicia of guilt. He added that the length—six years—of the criminal proceedings that were ultimately dismissed was not reasonable based on international standards.

12. The IACHR takes note that the petitioner further alleged the violation of freedom from *ex post facto* laws, protection of honor and dignity, and [equal] protection before the law.

## **B. The State**

13. The State alleged that the case is inadmissible and that it has not incurred international responsibility. Ecuador noted that when the petition was filed domestic remedies for the three criminal cases brought against Mr. Montesinos had not been exhausted, and claimed that appeals proceedings and requests for judicial review were still available for the third case.

14. Regarding the right to personal liberty, Ecuador indicated that Mr. Montesinos was arrested in accordance with domestic law, specifically the Law on Narcotics and Psychotropic Substances. It stated that when he was arrested, Mr. Montesinos was suspected of having been involved in crimes related to drug trafficking. The State added that an arrest warrant had been issued and that leave was granted for a *habeas corpus* appeal to be lodged for purposes of challenging the arrest.

15. As to the alleged violation of the right to humane treatment, the State held that the petitioner had failed to effectively prove the acts of torture reportedly inflicted on Mr. Montesinos. Ecuador also indicated that the documents furnished for these proceedings do not include forensic medical exams that might demonstrate acts of torture, adding that Mr. Montesinos never filed a complaint about alleged acts of torture inflicted on him.

16. With respect to the alleged violation of the rights to a fair trial and judicial protection, Ecuador held that the criminal cases brought against Mr. Montesinos respected due process. It indicated that this is evident in the fact that two of the three criminal prosecutions were dismissed based on the principle of

presumption of innocence, adding that there were appeals available to Mr. Montesinos to challenge any alleged irregularity in the proceedings.

17. The State also alleged that the petitioner had not substantiated his allegations of reported violations of freedom from *ex post facto* laws, protection of honor and dignity, and [equal] protection before the law.

#### IV. ANALYSIS OF ADMISSIBILITY

##### A. Competence, international duplication of proceedings and *res judicata*

Competence <i>ratione personae</i> :	Yes
Competence <i>ratione loci</i> :	Yes
Competence <i>ratione temporis</i> :	Yes
Competence <i>ratione materiae</i> :	Yes
International duplication of proceedings and <i>res judicata</i> :	No

##### B. Exhaustion of domestic remedies and timeliness of the petition

18. With respect to the three criminal cases brought against Mr. Montesinos, which the State alleged were still open when the petition was filed, the Commission reiterates that the situation that must be taken into account to determine whether or not domestic remedies have been exhausted is that which exists when deciding on admissibility.<sup>1</sup>

19. The Commission observes that two of the cases were closed after they were ultimately dismissed in 1998. As to the third case, the Commission takes note that in his March 2004 communication, the petitioner indicated that the alleged victim had been acquitted and that the prosecuting authority had filed an appeal. The IACHR lacks information about whether a decision was ever made regarding that appeal.

20. The information available indicates that domestic jurisdiction was definitively exhausted with respect to two of the proceedings. In the case of the third, however, as it ended in an acquittal, the appeal of which remains pending, the IACHR is of the understanding that Mr. Montesinos is not required to pursue any further remedy whatsoever in connection with his exoneration. In light of the foregoing, the IACHR considers that as far as the criminal cases are concerned, the requirement to exhaust domestic remedies has been met. Moreover, bearing in mind that the remedies were exhausted after the petition was submitted, the IACHR believes that fulfillment of the requirement to file the petition in a timely manner is intrinsically linked to the exhaustion of domestic remedies and has thus been met.

21. Regarding the allegations of torture, the IACHR recalls that the appropriate and effective remedy is a criminal investigation and proceeding and that the State has the *ex officio* duty to foster and advance both.<sup>2</sup> The documents furnished by the parties reveal that the alleged torture and abuse were reported in the *habeas corpus* appeal filed in September 1996. Despite this, the case file does not indicate, nor has the State claimed, that any investigation whatsoever was ever launched. Consequently, the IACHR has concluded that Article 46(2)(c) of the Convention applies to this aspect of the petition inasmuch as the State engaged in unwarranted delay by not offering the alleged victim the suitable remedy for his reports of torture. With respect to this matter, the IACHR contends that the petition was filed in a timely manner.

22. As to the allegations about Mr. Montesinos' arrest and length of his pretrial detention, the Commission recalls that at that time, a *habeas corpus* appeal had to be filed with an administrative authority,

<sup>1</sup> IACHR, Report No. 84/12, Petition 677-04, Admissibility, Luis Fernando García García et. al., Ecuador, November 8, 2012, paragraph 39.

<sup>2</sup> IACHR, Report No. 20/17, Petition 1500-08, Admissibility, Rodolfo Piñeyro, Argentina, March 12, 2017, paragraph 5.

namely, the Office of the Mayor. Both the Commission<sup>3</sup> and the Court have held that filing for *habeas corpus* with an administrative authority does not, in principle, constitute an effective remedy under the standards of the American Convention<sup>4</sup> and thus, the Commission has deemed that it is not necessary to exhaust it.<sup>5</sup> On this point, the jurisprudence of the Inter-American Court has found that requiring those detained to file an appeal with the mayor and then to appeal [the mayor's decisions] in order for their case to be heard by a judicial authority, places obstacles to a remedy that should, by its very nature, be simple.<sup>6</sup> In the instant case, although not required to do so, the alleged victim filed two *habeas corpus* appeals that were ultimately decided in August 1998, in other words, subsequent to the submission of the petition. In such regard, taking that into account, the IACHR considers that fulfillment of the timely presentation requirement with respect to this aspect of the petition is also intrinsically linked to the exhaustion of domestic remedies.

### C. Characterization of the facts alleged

23. The Commission believes that, if proven, the facts alleged by the petitioner could characterize violations of the rights to humane treatment, personal liberty, a fair trial, and judicial protection set forth in Articles 5, 7, 8, 24, and 25 of the American Convention, in accordance with the obligations established under Articles 1(1) and 2 thereof. The alleged facts could likewise constitute violations of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture with respect to the alleged lack of investigation of the reports of torture as of November 9, 1999.

## V. DETERMINATIONS OF FACT

### A. The arrest of Mr. Montesinos in the framework of the *Ciclón* police operation

24. On June 19, 1992 the Counter Narcotics Intelligence Service of the National Police launched *Operación Ciclón* [Operation Cyclone] in an effort to dismantle a large drug trafficking organization.<sup>7</sup>

25. According to a police report, *Operación Ciclón* entailed the arrest of several individuals and the search of residences tied to the drug trafficking organization being investigated.<sup>8</sup> According to the report, weapons, ammunition, and explosives were seized at those homes.<sup>9</sup> The Commission notes that the report indicates that one of the individuals arrested was Mr. Montesinos and that the search of his home led to the seizure of firearms such as pistols, revolvers, and shotguns.<sup>10</sup> The report also indicates that another one of the individuals arrested was Rafael Iván Suárez Rosero, whose case was taken up by the Commission and later by the Inter-American Court of Human Rights.<sup>11</sup>

26. As to the specific circumstances surrounding the arrest, the version contained in the police reports indicates that on June 21, 1992 police officers intercepted the vehicle being driven by Mario

<sup>3</sup> IACHR, Report No. 139/10, P-139-10, Admissibility, Luis Giraldo Ordóñez Peralta, Ecuador, November 1, 2010, paragraph 29; IACHR, Report No. 66/01, Case 11.992, Merits, Dayra María Levoyer Jiménez, Ecuador, June 14, 2001, paragraphs 78-81; IACHR, Report No. 91/13, P-910-07, Admissibility, Daria Olinda Puertocarrero Hurtado, Ecuador, November 4, 2013.

<sup>4</sup> I/A Court H.R. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, paragraph 128.

<sup>5</sup> IACHR, Report No. 91/13, P-910-07, Admissibility, Daria Olinda Puertocarrero Hurtado, Ecuador, November 4, 2013, paragraph 30.

<sup>6</sup> I/A Court H.R. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, paragraph 129.

<sup>7</sup> Investigative Report No. 080-JPEIP-CP1-92 of July 17, 1992 in connection with Case No. P1-142-JPEIP-CP1-92 for the Provincial Head of Narcotics and Interpol of Pichincha regarding the so-called *Operación Ciclón*.

<sup>8</sup> Investigative Report No. 080-JPEIP-CP1-92 of July 17, 1992 in connection with Case No. P1-142-JPEIP-CP1-92 for the Provincial Head of Narcotics and Interpol of Pichincha regarding the so-called *Operación Ciclón*.

<sup>9</sup> Investigative Report No. 080-JPEIP-CP1-92 of July 17, 1992 in connection with Case No. P1-142-JPEIP-CP1-92 for the Provincial Head of Narcotics and Interpol of Pichincha regarding the so-called *Operación Ciclón*.

<sup>10</sup> Investigative Report No. 080-JPEIP-CP1-92 of July 17, 1992 in connection with Case No. P1-142-JPEIP-CP1-92 for the Provincial Head of Narcotics and Interpol of Pichincha regarding the so-called *Operación Ciclón*.

<sup>11</sup> See: I/A Court H.R. *Case of Suárez Rosero v. Ecuador*. Merits. Judgment of November 12, 1997. Series C No. 35.

Montesinos Mejía and proceeded to arrest him.<sup>12</sup> According to the report, Mr. Montesinos was informed that they had a warrant for his arrest as well as a warrant to search his home.<sup>13</sup> The case file does not contain either the arrest warrant or the search warrant.

27. The *Operación Ciclón* police report indicates that the alleged victim stated he had received the weapons from strangers sent by the wife of Jorge Reyes Torres, who asked him keep them as a favor. The following conclusion was drawn:

That the detainees (...) were in possession of illegal firearms and ammunition (...) Given that Jorge Hugo Reyes Torres and the other detainees (...) comprise an international drug trafficking organization, we concluded that the weapons were being used for this organization's illegal activities.<sup>14</sup>

28. The petitioner's version, however, indicates that the members of the police who arrested Mr. Montesinos were dressed in camouflage and wore balaclavas over their faces. He stated that the police had their weapons trained on Mr. Montesinos as they took him out of the car, and further alleged that when Mr. Montesinos asked why he was being arrested, the police responded that he was being arrested "because the police has the power to do so."<sup>15</sup>

29. With respect to the search, the petitioner's version indicates that when he was taken to his home after his arrest, Mr. Montesinos remained in the police vehicle for two hours. The petitioner noted that police officers entered the home and, upon returning to the vehicle, told Mr. Montesinos that they had found weapons and so he would have to sign a record thereof. He stated that when Mr. Montesinos refused, a hood was placed over his head.<sup>16</sup>

## **B. What happened to Mr. Montesinos after his arrest**

30. The case file includes a report from the Medical Department of the National Police indicating that Mr. Montesinos was given a medical examination the same day he was arrested. The report stated that Mr. Montesinos' diagnosis was "without observations."<sup>17</sup> The petitioner stated that Mr. Montesinos was never given a medical examination and was only asked some questions.<sup>18</sup>

31. The petitioner described how Mr. Montesinos was placed in a cell measuring approximately 11 m<sup>2</sup> that was guarded by two plainclothes guards carrying machine guns. He stated that 13 other people were lying on the floor inside the same cell and that the next day Mr. Montesinos observed a number of those individuals being taken from the cell to be interrogated and that they returned "beaten and scared, talking about the use of electricity and gas during the interrogations." He added that on June 23, 1992, Mr. Montesinos indicated to the guards that he had been in custody for more than a day without knowing why he had been arrested, but received no response.<sup>19</sup>

32. On June 25, 1992, the alleged victim made a preliminary statement to three police officers and three prosecutors from the Public Prosecution Ministry.<sup>20</sup> The petitioner alleged that Mr. Montesinos did not have a defense attorney present when he gave that statement. The State did not contest that assertion.

<sup>12</sup> Report submitted to the Chief of the Office of Criminal Investigation, issued by Police Lieutenant Hugo Durán Castro at 8:00 p.m. on June 21, 1992.

<sup>13</sup> Report submitted to the Chief of the Office of Criminal Investigation, issued by Police Lieutenant Hugo Durán Castro at 8:00 p.m. on June 21, 1992.

<sup>14</sup> Investigative Report No. 080-JPEIP-CP1-92 of July 17, 1992 in connection with Case No. P1-142-JPEIP-CP1-92 for the Provincial Head of Narcotics and Interpol of Pichincha regarding the so-called *Operación Ciclón*.

<sup>15</sup> Communication from the petitioner from August 30, 1996.

<sup>16</sup> Communication from the petitioner from August 30, 1996.

<sup>17</sup> Police health evaluation of Mario Alfonso Montesinos Mejía; document issued on July 27, 1992.

<sup>18</sup> Resolution 182-96-CP, issued by the Constitutional Rights Court in the framework of Case No. 45/96-TC.

<sup>19</sup> Communication from the petitioner from August 30, 1996.

<sup>20</sup> Statement by Mr. Mario Alfonso Montesinos Mejía, taken by the National Investigations Bureau, Command/Sub-Command of Interpol-Pichincha. Part of Case P1-142-JPEIP-CP-1-92 and Report No. 080-JPEIP-CP-1-92. Given on June 25, 1992.



The statement does not contain the signature of a defense attorney. The official document on that preliminary statement indicates that Mr. Montesinos stated that he worked as the supervisor of a property called *El Prado* and knew Mr. Reyes Torres. He claimed that a couple of weeks before his arrest, two individuals who identified themselves as acquaintances of the wife of Mr. Reyes Torres, entered his home with several weapons and asked him to keep them for a few days.<sup>21</sup>

33. The petitioner indicated that, after giving his statement, Mr. Montesinos realized that the document “contained some changed and enhanced parts.” He claimed that the alleged victim was told to sign the document and not to worry since “you are innocent.”<sup>22</sup>

34. On July 12, 1992, Mr. Montesinos gave a new statement to three prosecutors from the Public Prosecution Ministry and four police investigators.<sup>23</sup> The petitioner alleged that Mr. Montesinos also did not have a defense attorney present when giving that statement. The State did not contest that assertion. The statement does not contain the signature of a defense attorney. The official document on that preliminary statement indicates that Mr. Montesinos stated that when he took possession of the weapons from the unknown individuals, he asked them to sign an affidavit of liability, but that they never did.

35. The petitioner indicated that the alleged victim’s statement was taken between 2:00 and 4:00 a.m. amid “constant threats and intimidation” and that Mr. Montesinos was forced to sign the document.<sup>24</sup>

36. The petitioner stated that on July 23, 1992, 25 members of the National Police Response and Rescue Group beat Mr. Montesinos and other detainees while they were out in the yard of the detention center known as *Regimiento Quito No. 2*. He added that that same day, the alleged victim was transferred to the Men’s Social Rehabilitation Center No. 1 in Quito and that during the ride, his eyes and mouth were taped, and his hands were bound behind his back. The petitioner indicated that once Mr. Montesinos arrived at that prison, he was held incommunicado and in solitary confinement for eight days in a cell without access to anyone. He added that the alleged victim was given food under the door, without any utensils or toiletries, and that they banged hard on his door.<sup>25</sup>

37. The State did not provide any documentation to disprove that Mr. Montesinos was held incommunicado.

38. The IACHR takes note that there is a July 11, 1992 order for remand into custody issued by the Pichincha Police Commissioner, which ordered the Director of the Men’s Social Rehabilitation Center in the city of Quito to keep Mario Montesinos, among others, in custody.<sup>26</sup> The order indicates that Mr. Montesinos was being prosecuted for the crime of conversion and transfer of assets.<sup>27</sup> The IACHR notes that the order does not indicate the reasons for which the alleged victim was placed in pretrial detention. The Commission also takes note that the petitioner claimed that that order was really issued on July 31, 1992.

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<sup>21</sup> Statement by Mr. Mario Alfonso Montesinos Mejía, taken by the National Investigations Bureau, Command/Sub-Command of Interpol-Pichincha. Part of Case P1-142-JPEIP-CP-1-92 and Report No. 080-JPEIP-CP-1-92. Given on June 25, 1992.

<sup>22</sup> Communication from the petitioner from August 30, 1996.

<sup>23</sup> Although the initial part of the statement makes clear that it was given on July 12, 1992, the transcript of the victim’s declaration stipulates that the statement was made on June 12, 1992. However, based on what the petitioner indicated in the petition and on the report submitted to the Chief of the Office of Criminal Investigation, the Commission concluded that document was signed on July 12, 1992 because the alleged victim was not in custody on June 12, 1992.

<sup>24</sup> Communication from the petitioner from August 30, 1996.

<sup>25</sup> Communication from the petitioner from August 30, 1996.

<sup>26</sup> Constitutional Order to Remand into Custody No. 172- IGPP-04 issued in Quito on July 11, 1992 by Fernando Almeida Gallardo, Police Commissioner of Pichincha.

<sup>27</sup> Constitutional Order to Remand into Custody No. 172- IGPP-04 issued in Quito on July 11, 1992 by Fernando Almeida Gallardo, Police Commissioner of Pichincha.



39. On August 13, 1992 the First Judge of the Criminal Court issued an order for remand into custody, imposing pretrial detention on Mr. Montesinos pursuant to Article 177 of the Code of Criminal Procedure.<sup>28</sup>

40. On November 17 and 30, 1994 Mr. Montesinos' defense team asked the Superior Court of Justice of Quito to revoke the pretrial detention.<sup>29</sup> The petitioner claimed that those requests never received a response. The State did not contest that information, nor did it furnish documentation to the contrary.<sup>30</sup>

41. On October 13, 1995 Mr. Montesinos sent a communication to the Supreme Court of Justice, challenging the length of his pretrial detention and the criminal prosecution against him.<sup>31</sup> He also alleged deplorable conditions at "Social Rehabilitation Center No. 1 in Quito."

42. The Commission has no information about the date Mr. Montesinos was released.

### C. The criminal proceedings

43. The case file reveals that three criminal cases were brought against Mr. Montesinos for the following offenses: (i) Illicit enrichment; (ii) conversion and transfer of assets; and (iii) engaging in front operations.<sup>32</sup> The orders to initiate proceedings for the first two charges were issued on November 30, 1992, while the order for the third charge was issued on November 18, 1992.<sup>33</sup>

44. The IACHR notes that the grounds for these proceedings lay in the September 1990 Law on Narcotics and Psychotropic Substances and underscores the following provisions:

Article 116. Probative value of pretrial actions. The police report and the pretrial statement given by the accused in the presence of the public prosecutor shall constitute a serious assumption of guilt, provided that the *corpus delicti* is proven.

Article 121.- Mandatory referral. The order revoking pretrial detention, suspension, or cassation of arrest, detention, and seizure measures shall not have effect unless confirmed by a higher body, with a prior, mandatory, and favorable opinion<sup>34</sup> from the respective Prosecutor, which body shall issue an opinion within 24 hours of receiving the proceeding.

Article 122.- Judgment. When issuing a ruling, the judge, taking into account the facts and evidence, shall adhere to the principles of reasoned judgment (...) whether a conviction or acquittal, the ruling must be referred to a higher body. The accused shall not be released until this higher body issues its decision.

45. The IACHR further points out that it lacks full details about how each of the criminal proceedings unfolded. The determinations made below are based on the information contained in the case file.

<sup>28</sup> Constitutional Order to Remand into Custody No. 089-192-EC issued in Quito on August 13, 1992 by Isabel Villavicencio, First Judge of the Criminal Court of Pichincha.

<sup>29</sup> Petition in the framework of Proceeding 91-92 by defense attorney Dr. Rodrigo Bucheli Mera, addressed to the Chief Judge of the Superior Court of Justice of Quito, received on November 17, 1994. August 30, 1996 petition against the Government of the Republic of Ecuador for violations of the American Convention on Human Rights, filed by the petitioner, Dr. Alejandro Ponce-Villacis, in representation of the alleged victim, Mr. Mario Alfonso Montesinos Mejía; observations from the State from July 28, 2016.

<sup>30</sup> August 30, 1996 petition against the Government of the Republic of Ecuador for violations of the American Convention on Human Rights, filed by the petitioner, Dr. Alejandro Ponce-Villacis, in representation of the alleged victim, Mr. Mario Alfonso Montesinos Mejía; observations from the State from July 28, 2016.

<sup>31</sup> Letter dated October 13, 1995, from Colonel Mario Montesinos to Carlos Solorzano Constantine, Chief Justice of the Supreme Court.

<sup>32</sup> Resolution 182-96-CP, issued by the Constitutional Rights Court in the framework of Case No. 45/96-TC.

<sup>33</sup> Resolution 182-96-CP, issued by the Constitutional Rights Court in the framework of Case No. 45/96-TC.

<sup>34</sup> This was declared unconstitutional on the merits via Resolution No. 119-1-97 of the Constitutional Court (Official Record No. 222 of December 24, 1997).

## 1. Conversion and transfer of assets (Article 77 of the Law on Narcotics and Psychotropic Substances<sup>35</sup>)

46. On September 30, 1996, the Superior Court of Justice of Quito ordered the initiation of proceedings in the case being brought against, among others, the alleged victim for the crime of conversion and transfer of assets, set forth in Article 77 of the Law on Narcotics and Psychotropic Substances. The Chief Judge determined that evidence of the material existence of the offense had been demonstrated in accordance with the law by means of the details of the property found in the residences of different individuals, specified in the report entitled *Operación Ciclón*. With respect to Mr. Montesinos, it was noted that in the statement he gave to prosecutors in Pichincha, he acknowledged having weapons in his house at the behest of Jorge Reyes. In addition, the pretrial detention of the defendants was upheld and an order was given to seize all of the property that had been used to commit the crime being prosecuted.<sup>36</sup>

47. On April 29, 1998 the Superior Court of Justice of Quito dismissed the case on the grounds that the existence of an offense had not been adequately proven.<sup>37</sup>

## 2. Illicit enrichment (Article 76 of the Law on Narcotics and Psychotropic Substances<sup>38</sup>)

48. On November 22, 1996 the Chief Judge of the Superior Court of Quito ordered a trial in the case brought against the alleged victim for the crime of illicit enrichment, set forth in Article 76 of the Law on Narcotics and Psychotropic Substances. The Chief Judge determined that “evidence of the material existence of the offense” had been demonstrated in accordance with the law and indicated that the Pichincha Prosecutor had alleged that:

[A]t its core, illicit enrichment encompasses all property and personal rights and the legal provision that governs this crime places the burden of proof on the defendants, who are required to demonstrate the legality of the means used to make the expenditures or increase their net worth or that they derive from sources not directly linked to the crimes established under the Law on Narcotics and Psychotropic Substances.<sup>39</sup>

49. The Chief Judge decided to uphold the pretrial detention provided for in the order to initiate proceedings and ordered the seizure of all the goods, currency, and other valuables that had been used in the commission of the crime being prosecuted or that resulted or derived therefrom.<sup>40</sup>

50. On May 7, 1998 the Superior Court of Justice of Quito dismissed the case on the grounds that the existence of an offense had not been adequately proven.<sup>41</sup>

<sup>35</sup> Article 77. Conversion or transfer of assets. Anyone who intentionally conceals the origin, contributes to the purchase or sale of assets, or converts or transfers them with the knowledge that these assets were obtained through the commission of offenses classified in this Law, shall be punished by imprisonment for up to four to eight years and fined 20 to 4,000 times the prevailing minimum wage.

If this offense is committed via the creation of a group conspiring to prepare, facilitate, or ensure outcomes or impunity, the punishment shall be 8 to 12 years in prison and a fine of 40 to 6,000 times the prevailing minimum wage.

<sup>36</sup> Opening of the trial. Criminal Trial for Conversion and Transfer of Assets No. 94-92. Order dated September 30, 1996; issued by the Chief Judge of the Superior Court of Justice, Dr. Fausto Argudo.

<sup>37</sup> April 29, 1998 ruling by the Superior Court of Justice of Quito – Fourth Chamber of Associate Judges in the trial of Mario Montesinos for conversion or transfer of assets.

<sup>38</sup> Article 76. Illicit enrichment. Anyone who is presumed to be the producer or an illegal trafficker of narcotic drugs, psychotropic substances, or specific chemical precursors, or who is involved in other crimes covered by this law, and who directly, or through an intermediary, engages in spending or increases his net worth or that of a third party by an amount not in proportion to his income without substantiating that the increase occurred by legal means faces a prison term of 12 to 16 years.

<sup>39</sup> Opening of the trial. Criminal Trial for Illicit Enrichment No. 94-92. Order dated November 22, 1996 at the beginning, and November 25, 1996 at the end; issued by the Chief Judge of the Superior Court of Justice, Dr. Nelson Almeida García.

<sup>40</sup> Opening of the trial. Criminal Trial for Illicit Enrichment No. 94-92. Order dated November 22, 1996 at the beginning, and November 25, 1996 at the end; issued by the Chief Judge of the Superior Court of Justice, Dr. Nelson Almeida García.

<sup>41</sup> April 29, 1998 ruling by the Superior Court of Justice of Quito – Fourth Chamber of Associate Judges in the trial of Mario Montesinos for conversion or transfer of assets.

### 3. Front operations and straw men (Article 78 of the Law on Narcotics and Psychotropic Substances<sup>42</sup>)

51. The information available on this proceeding is minimal. The information that does exist reveals that there was an order to initiate proceedings charging Mr. Montesinos with this crime that also ordered pretrial detention. In an interlocutory order issued on November 5 of that year, the preliminary proceedings were formally concluded and the Pichincha Prosecutor was ordered to make a decision regarding who was required to issue an opinion within a period of six days.<sup>43</sup>

52. The IACHR notes that the petitioner indicated, in his March 2004 communication, that Mr. Montesinos had been acquitted and that the prosecuting authority had filed an appeal challenging that decision. As indicated in the section on admissibility, the IACHR has no additional information.

#### D. Habeas corpus appeals

53. On September 10, 1996 the alleged victim filed a *habeas corpus* appeal with the Mayor of the Metropolitan District of Quito, alleging that his arrest had been illegal inasmuch as he was arrested without a warrant. He indicated that he had not been informed of the reasons for his arrest and that he had been beaten and forced to make a statement without his attorney present. The alleged victim added that he had been detained for more than 50 months, which is unreasonable.<sup>44</sup>

54. The Mayor ruled the appeal inadmissible six days later, stating that Mr. Montesinos was being prosecuted in three criminal proceedings.<sup>45</sup>

55. On October 30, 1996, after receiving an appeal [of the above decision], the Constitutional Rights Court upheld the *habeas corpus* appeal. The Court considered that the “periods and timeframes that procedural laws” stipulate for issuing judgments in the cases being prosecuted against Mr. Montesinos “had been overly and unwarrantedly exceeded” and ordered the Director of Men’s Social Rehabilitation Center No. 1 in Quito to immediately release Mr. Montesinos.<sup>46</sup> As to the allegations of torture and cruel or inhuman treatment and the application of the Law on Narcotics and Psychotropic Substances, the Court chose to refrain from taking a position because Mr. Montesinos had not presented “evidence in this regard.”<sup>47</sup>

56. The case file contains a newspaper article that indicates that Mr. Montesinos filed a complaint for contempt in mid-November 1996 against the Director of the prison he was being held at because of the Director’s failure to comply with the October 1996 judgment ordering Mr. Montesinos’ release. The article notes that the Chief Judge of the Court warned the Director that he would be removed from his position if he failed to release Mr. Montesinos.<sup>48</sup>

57. On April 14, 1998 the petitioner filed a second *habeas corpus* appeal with the Mayor of the Metropolitan District of Quito on behalf of Mr. Montesinos. He held that the alleged victim had been in pretrial detention for nearly six years without any final decision, as of that time, in the criminal prosecutions against

<sup>42</sup> Article 78. Punishment of front operations and straw men. Anyone who lends his name or the name of the company of which he is a part for the purpose of acquiring goods by using resources that are derived from offenses punishable under this law shall be punished by an ordinary maximum prison term of 8 to 12 years and a fine of 40 to 6,000 times the prevailing minimum wage.

If such offense is committed via the organization of a group conspiring to prepare, facilitate, or ensure outcomes or impunity, the punishment shall be 8 to 12 years in prison and a fine of 40 to 6,000 times the prevailing minimum wage.

<sup>43</sup> Official Letter No. 2078-CSJQ – 96 issued in Quito on November 25, 1996 by the Chief Judge of the Superior Court of Justice of Quito, Dr. Nelson Alemida García, in response to the IACHR request for more information on the case.

<sup>44</sup> Resolution 182-96-CP, issued by the Constitutional Rights Court in the framework of Case No. 45/96-TC.

<sup>45</sup> Resolution 182-96-CP, issued by the Constitutional Rights Court in the framework of Case No. 45/96-TC.

<sup>46</sup> Resolution 182-96-CP, issued by the Constitutional Rights Court in the framework of Case No. 45/96-TC.

<sup>47</sup> Resolution 182-96-CP, issued by the Constitutional Rights Court in the framework of Case No. 45/96-TC.

<sup>48</sup> “DDHH El TC pide la excarcelación. Montesinos: su libertad en debate.” Article published on November 23, 1996 in the newspaper *El Comercio*. Unnamed author.

him. The petitioner added that the October 1996 judgment of the Constitutional Rights Court had not been implemented.<sup>49</sup>

58. On April 21, 1998, the Mayor ruled the *habeas corpus* appeal inadmissible, indicating that the length of detention was reasonable and that the final decisions in the criminal prosecutions had to be awaited.<sup>50</sup>

59. On August 13, 1998, the Constitutional Court ruled on the appeal filed by Mr. Montesinos' defense team and ordered his immediate release without prejudice to the continuation of the criminal proceedings against him.<sup>51</sup> The Court believed that the time Mr. Montesinos had spent in pretrial detention had exceeded a reasonable timeframe, bearing in mind the punishment he might receive if found guilty.<sup>52</sup>

### **E. Challenge to the constitutionality of the *Operación Ciclón* report**

60. In February 1996 Mr. Montesinos filed a complaint with the Chief Judge of the Constitutional Rights Court alleging that the *Operación Ciclón* police report of July 17, 1992 was unconstitutional. He indicated that as a result of its release, several cases had been brought against him in violation of the principle set forth in Article 160 of the Code of Criminal Procedure that provides that an individual cannot be prosecuted or punished more than once for the same act. Mr. Montesinos further alleged that the length of his pretrial detention had been unreasonable and that his right to property had been violated because his home had been under National Police administration for several years.<sup>53</sup>

61. Mr. Montesinos also challenged the constitutionality of several articles of the Law on Narcotics and Psychotropic Substances. He claimed that Article 115 provides for unequal treatment vis-à-vis defendants charged with other crimes in that it does not offer amnesties or pardons. He noted that Article 116 establishes a presumption of guilt insofar as it stipulates that a police report and pretrial statement given by a defendant in the presence of a prosecutor constitute a serious presumption of guilt.<sup>54</sup> The alleged victim also claimed that Article 121 violates the right to equal treatment because it provides for discriminatory treatment of defendants charged with drug-trafficking crimes by establishing pretrial detention as a rule, not an exception. He stated that Article 122 departs from the Constitutional standard by requiring judgments issued in drug-trafficking cases to be raised to a higher body, even if they are acquittals.<sup>55</sup>

62. On March 26, 1996 the Constitutional Rights Court decided against admitting the appeal filed by Mr. Montesinos. The Court considered that the alleged victim had presented an "improper joining of two cases" inasmuch as these cases "require different evidence and produce different effects."<sup>56</sup>

63. In light of this, Mr. Montesinos filed a new complaint with the Court requesting that it declare his arbitrary arrest, pretrial detention, and the holding of his property unconstitutional. On April 23

<sup>49</sup> *Habeas corpus* appeal filed by Mr. Alejandro Ponce Villacís on behalf of Mario Montesinos Mejía on April 14, 1998.

<sup>50</sup> Constitutional Court ruling on the *habeas corpus* appeal filed by Mr. Alejandro Ponce Villacís on behalf of Mario Montesinos Mejía on April 14, 1998 with the Mayor of the Metropolitan District of Quito.

<sup>51</sup> Constitutional Court ruling on the *habeas corpus* appeal filed by Mr. Alejandro Ponce Villacís on behalf of Mario Montesinos Mejía on April 14, 1998 with the Mayor of the Metropolitan District of Quito.

<sup>52</sup> Constitutional Court ruling on the *habeas corpus* appeal filed by Mr. Alejandro Ponce Villacís on behalf of Mario Montesinos Mejía on April 14, 1998 with the Mayor of the Metropolitan District of Quito.

<sup>53</sup> Challenge to constitutionality of February 1996, filed by Colonel Mario Montesinos Mejía with Dr. Ernesto López, Chief Judge of the Constitutional Rights Court.

<sup>54</sup> Challenge to constitutionality of February 1996, filed by Colonel Mario Montesinos Mejía with Dr. Ernesto López, Chief Judge of the Constitutional Rights Court.

<sup>55</sup> Challenge to constitutionality of February 1996, filed by Colonel Mario Montesinos Mejía with Dr. Ernesto López, Chief Judge of the Constitutional Rights Court.

<sup>56</sup> Resolution No. 088-96-CA, adopted on March 26, 1996 by the Constitutional Rights Court, regarding the complaint filed by Mr. Mario Montesinos Mejía with the Chief Judge of the Superior Court of Justice of Quito.

of that same year, the Constitutional Rights Court decided against admitting the complaint, indicating that a ruling to reject this same matter had already been made via its March 26 decision.<sup>57</sup>

## VI. LEGAL ANALYSIS

### A. The right to personal liberty and the right to equal protection before the law (Articles 7<sup>58</sup> and 24<sup>59</sup> of the American Convention, in connection with Articles 1(1) and 2 thereof)

#### 1. The right to not be deprived of liberty illegally

64. The Inter-American Court has indicated that Article 7(2) of the Convention “recognizes the main guarantee of the right to physical liberty: The legal exception, according to which the right to personal liberty can only be affected by a law.”<sup>60</sup> The legal exception required to affect the right to personal liberty pursuant to Article 7(2) of the Convention is that states must issue a statutory description of the criminal offense, as specifically as possible, and establish “beforehand” the “grounds” and “conditions” for the deprivation of physical liberty. Thus, any requirement established under domestic law that is not abided by when an individual is deprived of his or her liberty renders such deprivation illegal and a violation of the American Convention.<sup>61</sup>

65. The laws that govern arrests in Ecuador in the context of the alleged commission of crimes related to drug trafficking have been referred to on a number of occasions by the organs of the inter-American system. In the case of the Commission, its *Report on the Human Rights Situation in Ecuador*,<sup>62</sup> as well as its merits reports in the cases of Dayra María Levoyer Jiménez<sup>63</sup> and Ruth Rosario Garcés Valladares<sup>64</sup> bear mentioning. Similarly, the IACHR has referred several cases to the Court in which it has had the opportunity to examine Ecuadorian law in this area. Specifically, the Court rendered decisions in this regard in the cases of *Chaparro Álvarez and Lapo Ñiquez*; *Acosta Calderón*; and *Tibi and Suárez Rosero*, all with respect to Ecuador.<sup>65</sup>

<sup>57</sup> Resolution No. 088-96-CA, adopted on March 26, 1996 by the Constitutional Rights Court, regarding the complaint filed by Mr. Mario Montesinos Mejía with the Chief Judge of the Superior Court of Justice of Quito.

<sup>58</sup> Article 7 of the American Convention. Right to Personal Liberty:

1. Every person has the right to personal liberty and security.
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.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
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.

6. 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.

<sup>59</sup> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

<sup>60</sup> I/A Court H.R. *Case of Chaparro Álvarez and Lapo Ñiquez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, paragraph 56. See also: IACHR. *Report on Citizen Security and Human Rights*. December 31, 2009, paragraphs 144-146.

<sup>61</sup> I/A Court H.R. *Case of Chaparro Álvarez and Lapo Ñiquez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, paragraph 55. See also: IACHR. *Report on Citizen Security and Human Rights*. December 31, 2009, paragraphs 144-146.

<sup>62</sup> IACHR, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/II.96, Doc. 10 rev.1 of April 24, 1997. See Chapter VII – The Right to Personal Liberty. Available at: <http://www.IACHR.org/countryrep/Ecuador-sp/Capitulo%207.htm>

<sup>63</sup> IACHR, Merits Report No. 66/01, Case 11.992, Dayra María Levoyer Jiménez, Ecuador, June 14, 2001.

<sup>64</sup> IACHR, Merits Report No. 64/99, Case 11.778, Ruth del Rosario Garcés Valladares, Ecuador, April 13, 1999.

<sup>65</sup> I/A Court H.R. *Case of Chaparro Álvarez and Lapo Ñiquez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170; I/A Court H.R. *Case of Acosta Calderón v. Ecuador*. Merits, Reparations, and Costs. Judgment of June 24, 2005. Series C No. 129; and I/A Court H.R. *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations, and

[continues ...]



66. The Commission further observes that Article 19 of the Constitution in effect at the time provided that:

All persons enjoy the following rights: [...]16. Personal liberty and safety. Consequently: [...] h. No one is deprived of his liberty without a written order from a competent authority, in the cases, timelines, and with the formalities prescribed by law, except in cases of flagrant offenses.<sup>66</sup>

67. For its part, the 1983 Code of Criminal Procedure set forth the following:

Article 172.- For purposes of investigating the commission of a crime, before the respective criminal action is initiated, the competent Judge shall order the arrest of a person, whether by personal knowledge or verbal or written reports from officers of the National Police or Judicial Police or from any other individual that substantiate the crime and the corresponding presumptions of responsibility.

Such arrests shall be ordered via warrants that must contain the following:

- 1.- The grounds for the arrest;
- 2.- The place and date of issue; and
- 3.- The signature of the competent Judge.

In order to execute the arrest, the warrant shall be delivered to an officer of the National Police or Judicial Police.

68. Article 174 of the aforementioned Code also provided that:

[i]n the case of *flagrante delicto* any person may apprehend the perpetrator and take him or her to the competent judge or to a national or judicial police officer.

69. Additionally, the Commission notes that Article 54 of the Code of Criminal Procedure provides that one of the responsibilities of the Judicial Police is to “order and execute provisional detention of a person caught in *flagrante delicto* or about whom there are serious presumptions of responsibility and bring them to the respective examining magistrate within 48 hours of the order.”

70. The Inter-American Court has held that under the provisions of the Ecuadorean Constitution and Code of Criminal Procedure a court order was required for a detention to be legal in keeping with the American Convention, except where the person has been apprehended in *flagrante delicto*.<sup>67</sup>

71. In this case, there is no dispute that Mr. Montesinos was arrested on June 21, 1992. The IACHR notes that there is nothing in the case file demonstrating that at the time of his arrest there was a specific warrant for Mr. Montesinos that had been issued by a competent authority in accordance with the requirements of Article 172 of the Code of Criminal Procedure. As for the possibility that he was caught in *flagrante delicto*, the State has not asserted these grounds nor are there elements suggesting that he was caught committing a crime when he was arrested in his car.

72. That said, the Commission notes that Article 54 of the Code of Criminal Procedure “departs from the Constitutional standard” by establishing “a serious presumption of responsibility” as “additional grounds for an arrest without a warrant from the competent authority.”<sup>68</sup>

[... continuation]

Costs. Judgment of September 7, 2004. Series C No. 114; I/A Court H.R. *Case of Suárez Rosero v. Ecuador*. Merits. Judgment of November 12, 1997. Series C No. 35.

<sup>66</sup> Constitution of the Republic of Ecuador adopted on January 15, 1978.

<sup>67</sup> I/A Court H.R. *Case of Acosta Calderón v. Ecuador*. Merits, Reparations, and Costs. Judgment of June 24, 2005. Series C No. 129, paragraph 61; and *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 7, 2004. Series C No. 114, paragraph 103.

<sup>68</sup> IACHR, Merits Report No. 66/01, Case 11.992, Dayra María Levoyer Jiménez, Ecuador, June 14, 2001, paragraph 36.

73. Had these been the grounds for the arrest, the Commission recalls that the Court has held that the requirement for making an exception under the law that curtails the right to personal liberty in accordance with Article 7(2) of the Convention is to issue a statutory description of the criminal offense, as specifically as possible, and establish “beforehand” the “grounds” for which, and the “conditions” in which, a person may be physically deprived of their liberty. Thus, any requirement established under domestic law that is not abided by when an individual is deprived of his or her liberty renders such a deprivation illegal and a violation of the American Convention.<sup>69</sup>

74. As stated in merit reports 66/01 and 40/14, the grounds of “serious presumption of responsibility” are not set forth in the Constitution.<sup>70</sup> Moreover, it opens the door to police officers making arrests based not on objective criteria, but rather on what he or she understands as a “serious presumption of responsibility” leaving “the definition to the discretion of the police officer making the arrest.”<sup>71</sup>

75. In said report, the Commission considered that this provision “contravenes the Convention” since “it leaves the decision as to the appropriateness of the arrest to the subjective judgment of the police officer carrying out the arrest.”<sup>72</sup> The Commission understood that the requirement for a statutory description of a crime in order to restrict personal liberty, “is not satisfied by a vague and general prescription such as ‘serious presumption of responsibility.’”<sup>73</sup>

76. Based on the foregoing, the Commission concludes that based on the available information, the arrest was carried out without an arrest warrant in keeping with domestic law or in a situation of *flagrante delicto*. Moreover, were the grounds for the arrest a serious presumption of responsibility, the Commission reiterates that said provision is in and of itself inconsistent with the principle of legality as it concerns personal liberty. Therefore, the Commission considers that the State of Ecuador violated Articles 7(1) ad 7(2) of the Convention with respect to the obligations set forth under Articles 1(1) and 2 thereof, to the detriment of Mario Montesinos Mejía.

## 2. The right not to be arbitrarily deprived of liberty and considerations on the length of pretrial detention

77. The Inter-American Commission and Court have held that pretrial detention is limited by the principles of legality, presumption of innocence, necessity, and proportionality.<sup>74</sup> The Court has also stated that it is a precautionary, rather than a punitive,<sup>75</sup> measure, and that, as the most severe measure that can be imposed on an accused, it should only be used exceptionally. In the view of both organs of the inter-American system, the rule should be for the accused to be on release until a decision is reached on their criminal responsibility.<sup>76</sup>

<sup>69</sup> I/A Court H.R. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, paragraph 55.

<sup>70</sup> IACHR, Report No. 66/01, Case 11.992, Merits, Dayra María Levoyer Jiménez, Ecuador, June 14, 2001, paragraph 36; and Report No. 40/14, Case 11.438, Merits, Herrera Espinoza et al., Ecuador, July 17, 2014, paragraph 120.

<sup>71</sup> IACHR, Report No. 66/01, Case 11.992, Merits, Dayra María Levoyer Jiménez, Ecuador, June 14, 2001, paragraph 36; and Report No. 40/14, Case 11.438, Merits, Herrera Espinoza et al., Ecuador, July 17, 2014, paragraph 120.

<sup>72</sup> IACHR, Report No. 66/01, Case 11.992, Merits, Dayra María Levoyer Jiménez, Ecuador, June 14, 2001, paragraph 37; and Report No. 40/14, Case 11.438, Merits, Herrera Espinoza et al., Ecuador, July 17, 2014, paragraph 121.

<sup>73</sup> IACHR, Report No. 66/01, Case 11.992, Merits, Dayra María Levoyer Jiménez, Ecuador, June 14, 2001, paragraph 37; and Report No. 40/14, Case 11.438, Merits, Herrera Espinoza et al., Ecuador, July 17, 2014, paragraph 121.

<sup>74</sup> IACHR, *Report on the Use of Pretrial Detention in the Americas*, OEA/Ser.L/V/II. December 30, 2013, paragraph 20; I/A Court H.R., *Case of López Álvarez v. Honduras*, Judgment of February 1, 2006, Series C No. 141, paragraph 67; *Case of García Asto and Ramírez Rojas v. Peru*, Judgment of November 25, 2005, Series C No. 137, paragraph 106; *Case of Palamara Iribarne v. Chile*, Judgment of November 22, 2005, Series C No. 135, paragraph 197; and *Case of Acosta Calderón v. Ecuador*, Judgment of June 24, 2005, Series C No. 129, paragraph 74.

<sup>75</sup> I/A Court H.R., *Case of Suárez Rosero v. Ecuador*. Merits. Judgment of November 12, 1997. Series C No. 35, paragraph 77.

<sup>76</sup> IACHR, *Report on the Use of Pretrial Detention in the Americas*, OEA/Ser.L/V/II. December 30, 2013, paragraph 21; I/A Court H.R., *Case of López Álvarez v. Honduras*, Judgment of February 1, 2006, Series C No. 141, paragraph 67; I/A Court H.R., *Case of Palamara Iribarne v. Chile*, Judgment of November 22, 2005, Series C No. 135, paragraph 196; and I/A Court H.R., *Case of Acosta Calderón v. Ecuador*, Judgment of June 24, 2005, Series C No. 129, paragraph 74.



78. The Court and the Commission have underscored that the personal characteristics of the alleged perpetrator and the seriousness of the offense with which they are charged are not, in themselves, sufficient justification for pretrial detention.<sup>77</sup> With respect to the reasons that may justify pretrial detention, the organs of the system have interpreted Article 7(3) of the American Convention in the sense that circumstantial evidence of guilt are a necessary condition but not sufficient alone to impose such a 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.<sup>78</sup> 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.”<sup>79</sup>

79. Thus, any decision to restrict the right to personal liberty through the imposition of pretrial detention must be justified by sufficient grounds in each instance to determine if said detention meets the requirements for its application.<sup>80</sup>

80. At the same time, Article 7(5) of the American Convention imposes time limits on pretrial detention and, consequently, on the power of the State to protect the purposes pursued by the proceeding with this type of precautionary measure. As the Inter-American Court has held, “[w]hen the duration of pretrial detention exceeds a reasonable time, the State can restrict the liberty of the accused by other measures that are less harmful than deprivation of liberty.”<sup>81</sup> The Court has indicated that even when there are reasons to keep someone in pretrial detention, the period of detention should not exceed what is reasonable.<sup>82</sup>

81. As regards the need for periodic review of the grounds for pretrial detention and its duration, the Court has stated that:

pretrial detention or imprisonment should be subject to periodic review, so that it is not prolonged when the reasons that supported it no longer exist .... Whenever it appears that pretrial detention does not meet those conditions, release should be ordered, without prejudice to the continuation of the proceedings.<sup>83</sup>

82. Besides its effects on the exercise of the right to personal liberty, both the Commission and the Court have stated that improper use of pretrial detention may undermine the principle of presumption of innocence contained in Article 8(2) of the American Convention. In that connection, the Commission has underscored the importance of the criterion of reasonableness, since to keep someone deprived of liberty

<sup>77</sup> IACHR, *Report on the Use of Pretrial Detention in the Americas*, OEA/Ser.L/V/II. December 30, 2013, paragraph 21; I/A Court H.R., *Case of López Álvarez v. Honduras*, Judgment of February 1, 2006, Series C No. 141, paragraph 69; *Case of García Asto and Ramírez Rojas v. Peru*, Judgment of November 25, 2005, Series C No. 137, paragraph 106; *Case of Acosta Calderón v. Ecuador*, Judgment of June 24, 2005, Series C No. 129, paragraph 75; and *Case of Tibi v. Ecuador*, Judgment of September 7, 2004, Series C No. 114, paragraph 180.

<sup>78</sup> I/A Court H.R., *Case of Barreto Leiva v. Venezuela*, Merits, Reparations and Costs, Judgment of November 17, 2009, Series C No. 206, paragraph 111.

<sup>79</sup> I/A Court H.R., *Case of Barreto Leiva v. Venezuela*, Merits, Reparations and Costs, Judgment of November 17, 2009, Series C No. 206, paragraph 111, citing *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 21, 2007, Series C No. 170, paragraph 103; and *Case of Servellón García et al. v. Honduras*, Merits, Reparations and Costs, Judgment of September 21, 2006, Series C No. 152, paragraph 90.

<sup>80</sup> IACHR, *Report on the Use of Preventive Custody in the Americas*, OEA/Ser.L/V/II. Doc. 46/13. December 30, 2013 paragraph 21.

<sup>81</sup> I/A Court H.R., *Case of Barreto Leiva v. Venezuela*, Merits, Reparations and Costs, Judgment of November 17, 2009, Series C No. 206, paragraph 120.

<sup>82</sup> I/A Court H.R., *Case of Argüelles et al. v. Argentina*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 20, 2014. Series C No. 288, paragraph 122.

<sup>83</sup> I/A Court H.R., *Case of Argüelles et al. v. Argentina*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 20, 2014. Series C No. 288, paragraph 121.

beyond a time that is reasonable to accomplish the ends that justified their detention would be tantamount, in effect, to a premature punishment.<sup>84</sup>

83. The IACHR has said the following with respect to unreasonably long pre-trial detention:

In addition, the risk of inverting the presumption of innocence increases with an unreasonably prolonged pretrial incarceration. The guarantee of presumption of innocence becomes increasingly empty and ultimately a mockery when pretrial imprisonment is prolonged unreasonably, since presumption notwithstanding, the severe penalty of deprivation of liberty, which is legally reserved for those who have been convicted, is being visited upon someone who is, until and if convicted by the courts, innocent.<sup>85</sup>

(...)

If the State fails to issue a judgment establishing blame justifies further holding the accused in pre-trial incarceration, based on the suspicion of guilt, then it is essentially substituting pre-trial detention for the punishment.<sup>86</sup>

84. Respect for the right to be presumed innocent also requires that the State demonstrate with clear and reasoned arguments in each specific case the existence of valid rules governing the applicability of pretrial detention.<sup>87</sup> Accordingly, the principle of presumption of innocence is also violated when pretrial detention is imposed arbitrarily, or when its application is essentially determined by such factors as the nature of the crime, the expected punishment, or the mere existence of reasonable indicia implicating the accused.<sup>88</sup>

85. In this case, the Commission notes that the First Judge of the Criminal Court's decision on the arrest warrant of August 13, 1992 held that all the requirements of Article 177 of the Criminal Code of Procedure had been fulfilled. Said Article stipulates that the judge may issue an order for pretrial detention "whenever she or he believed necessary" provided that the following legal elements exist: (a) indicia that suggest there has been a crime warranting a term of imprisonment; and (b) indicia that suggest the accused is the perpetrator or accomplice of the crime that is the subject of the proceedings. Furthermore, the same article required that "the court decision specify the indicia that are the grounds for the order to remand into custody."<sup>89</sup> In other words, the legislation in force provided that circumstantial evidence suggesting responsibility was sufficient grounds for pretrial detention, without requiring verification of the procedural aims. In this sense, this provision and the decision issued based thereon are contrary to the American Convention.

86. The Commission further notes that Mr. Montesinos pretrial detention lasted at least six years, bearing in mind the date of his second *habeas corpus* appeal in 1998. Given the arguments laid out, the

<sup>84</sup> IACHR, Report No. 2/97, Case 11.205, Merits, Jorge Luis Bronstein et al., Argentina, March 11, 1997, paragraph 12; IACHR, Third Report on the Situation of Human Rights in Paraguay, OEA/Ser./L/VII.110. Doc. 52, adopted on March 9, 2001, Ch. IV, paragraph 34. See also: I/A Court H.R., *Case of López Álvarez v. Honduras*, Judgment of February 1, 2006. Series C No. 141, paragraph 69; I/A Court H.R., *Case of Acosta Calderón v. Ecuador*, Judgment of June 24, 2005, Series C No. 129, paragraph 111; I/A Court H.R., *Case of Tibi v. Ecuador*, Judgment of September 7, 2004, Series C No. 114, paragraph 180; I/A Court H.R., *Case of the "Juvenile Reeducation Institute" v. Paraguay*, Judgment of September 2, 2004, Series C No. 112, paragraph 229; I/A Court H.R., *Case of Suárez Rosero v. Ecuador*, Judgment of November 12, 1997, Series C No. 35, paragraph 77.

<sup>85</sup> IACHR, Report No. 12/96. Argentina. Case 11.245, March 1, 1996, paragraph 80.

<sup>86</sup> IACHR, Report No. 12/96. Argentina. Case 11.245, March 1, 1996, par. 114.

<sup>87</sup> I/A Court H.R., *Case of Usón Ramírez v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 20, 2009, Series C No. 207, paragraph 144.

<sup>88</sup> IACHR, Report on the Use of Pretrial Detention in the Americas, OEA/Ser.L/V/II. December 30, 2013 paragraph 137.

<sup>89</sup> Article 177 of the Ecuadorian Code of Criminal Procedure of 1983. (L. 134-PCL. RO 511: 10-jun-1983). I/A Court H.R. *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, paragraph 146; and *Case of Chaparro Álvarez and Lapo Ñiquez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, paragraph 104.

IACHR concludes that his detention lasted an unreasonable amount of time without any justification as per the Convention.

87. Additionally, the IACHR notes that for over half the time Mr. Montesinos was in pretrial detention, Article 114 of the Criminal Code was in force. According to said Article, motions for release were inadmissible for drug trafficking-related crimes, not on the basis of procedural ends but rather on the category of indictment. This provision regulates pretrial detention and admissibility of motions for release. Article 114 specifies that “individuals who are charged with crimes punishable under the Law on Narcotics and Psychotropic Substances are excluded from these provisions.” Moreover, this provision excluded some individuals from being released not on the basis of procedural aims, but rather on the category of the charge against them. The IACHR highlights that this provision was ruled unconstitutional on December 24, 1997. The Commission has ruled that laws establishing mandatory pretrial detention or the ban on release for certain kinds of offenses, in addition to constituting a violation of the right to personal liberty, also constitute a violation of the principal of equal protection under the law.<sup>90</sup>

88. In view of the explanations provided above in this section, the Commission concludes that Mr. Montesinos pretrial detention was arbitrary, lasted an unreasonable amount of time, had no procedural purpose, rather just a punitive one, and was discriminatory. Therefore, the State of Ecuador is responsible for violating Articles 7(3) 7(5), 8(2), and 24 of the American Convention in connection with to Articles 1(1) and 2 thereof.

### 3. The right to judicial oversight of pretrial detention

89. Article 7(5) of the Convention provides that anyone subject to detention is entitled to have a judicial authority review such detention, without delay, as an appropriate oversight measure to prevent arbitrary and illegal arrests. Immediate judicial oversight is a measure that can prevent detentions of an arbitrary or illegal nature, considering that it is judges’ responsibility under the rule of law to guarantee the rights of detainees, authorize the adoption of precautionary or coercive measures, when these are absolutely necessary, and ensure, in general, that the accused is treated in a manner consistent with the presumption of innocence.<sup>91</sup>

90. With regard to this guarantee, in its *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, the Commission has considered the following:

[T]he single most important protection of the rights of a detainee is prompt appearance before a judicial authority responsible for overseeing the detention, and that the right to request a decision on the lawfulness of the detention is the fundamental guarantee of the constitutional and human rights of a detainee deprived of his liberty by agents of the State.<sup>92</sup>

91. Likewise, the Inter-American Court has held that “the terms of the guarantee set forth in Article 7(5) of the Convention are clear regarding the need for the detainee to be brought promptly before a Judge or competent judicial authority, in accordance with the principles of judicial control and procedural immediacy” in order to “protect the right to personal liberty and to protect other rights, such as the right to life and to humane treatment.” The Court has also specified that “the fact that a Judge is simply aware that a person is detained does not fulfill this guarantee, as the detainee must appear personally and give his statement before the Judge or competent authority.<sup>93</sup>

<sup>90</sup> IACHR. Report No. 53/16. Case 12.056. Merits Report. Gabriel Oscar Jenkins. Argentina. December 6, 2016. Paragraph 149.

<sup>91</sup> I/A Court H.R. *Case of Acosta Calderón v. Ecuador*. Merits, Reparations, and Costs. Judgment of June 24, 2005. Series C No. 129, paragraph 61; and *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, paragraph 76.

<sup>92</sup> IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, December 31, 2011, paragraph 120.

<sup>93</sup> I/A Court H.R. *Case of Acosta Calderón v. Ecuador*. Merits, Reparations, and Costs. Judgment of June 24, 2005. Series C No. 129, paragraph 61; and *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, paragraph 78.

92. In this case, the Commission notes that Mr. Montesinos was detained on June 21, 1992. As to the fact that it was a prosecutor who took the preliminary statements, the Commission recalls that, in keeping with the Court's judgement in *Acosta Calderón v. Ecuador*, prosecutors in these cases:

(...) do not have the attributes to be considered an "officer authorized to carry out judicial functions," in the sense of Article 7(5) of the Convention, since the Political Constitution of Ecuador itself, in force at that time, stated in its Article 98 which were the bodies that had the power to carry out judicial functions and it did not grant that competence to prosecutors.<sup>94</sup>

93. The Commission has no information on the exact date that Mr. Montesinos appeared before a judge for the first time. The proven facts reveal that the first court ruling on Mr. Montesinos' deprivation of liberty took place on August 13, 1992, a month and three weeks after his detention. Even from that ruling it is impossible to ascertain precisely when he actually appeared before the above-mentioned judge.

94. This information gives weight to Mr. Montesinos' description of being held incommunicado for eight days between July 23, 1992 and July 31, 1992. The Commission notes that there is a dispute about when the arrest warrant was issued by the Pinchincha Police Commissioner. Nevertheless, this warrant is not germane to the analysis of this particular Article of the Convention, given that it was not issued by a judicial authority, but rather by the police, who were denounced to have mistreated Mr. Montesinos during the time he was allegedly held incommunicado.

95. Given the above considerations, the Commission concludes that the State violated the guarantee set forth in Article 7(5) of the American Convention in relation to the obligations set forth in Article 1(1) thereof, to the detriment of Mr. Mario Montesinos Mejía.

#### 4. The right to a remedy to challenge detention

96. The Inter-American Court has held that Article 7(6) of the Convention "has its own legal content, consisting of the protection of personal or physical freedom, by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the legality of the detention may be determined and, if appropriate, order the release of the detainee."<sup>95</sup> The Court has likewise held that the right enshrined in Article 7(6) of the American Convention is not exercised with the mere formal existence of the remedies it governs. Those remedies must be effective, since their purpose, under the terms of Article 7(6), is to obtain without delay a decision "on the lawfulness of [his] arrest or detention," and, should they be unlawful, to obtain, also without delay, an "order [for] his release."<sup>96</sup> Along the same lines, the IACHR has held as a basic principle that access to judicial review of detention must be granted as it "provides effective assurances that the detainee is not exclusively at the mercy of the detaining authority."<sup>97</sup>

97. In September 1996 Mr. Montesinos filed a *habeas corpus* appeal with the Mayor of the Metropolitan District of Quito, which was ruled inadmissible. Both the Commission<sup>98</sup> and the Court have held that a *habeas corpus* appeal filed with an administrative authority does not constitute an effective remedy under the standards of the American Convention.<sup>99</sup> Although said remedy can be appealed before a judicial authority, the Court in this respect has held that making individuals who have been detained file a remedy

<sup>94</sup> I/A Court H.R. *Case of Acosta Calderón v. Ecuador*. Merits, Reparations, and Costs. Judgment of June 24, 2005. Series C No. 129, paragraph 61; and *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, paragraph 80.

<sup>95</sup> I/A Court H.R. *Case of Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218. Paragraph 124.

<sup>96</sup> I/A Court H.R. *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35. Paragraph 63.

<sup>97</sup> IACHR, Report No. 51/01. *Case 9903. Rafael Ferrer-Mazorra et al. v. United States of America*, April 4, 2001, paragraph 232.

<sup>98</sup> IACHR, Report No. 139/10, P-139-10, Admissibility, Luis Giraldo Ordóñez Peralta, Ecuador, November 1, 2010, paragraph 29; IACHR, Report No. 66/01, Case 11.992, Merits, Dayra María Levoyer Jiménez, Ecuador, June 14, 2001, paragraphs 78-81; IACHR, Report No. 91/13, P-910-07, Admissibility, Daria Olinda Puertocarrero Hurtado, Ecuador, November 4, 2013.

<sup>99</sup> I/A Court H.R. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, paragraph 128.

with the Mayor, to then have to resort to an appeal so a judicial authority can hear it creates barriers to a remedy that should be, by its very nature, simple.<sup>100</sup>

98. In any case, the Mayor's decision was appealed and the Constitutional Rights Court considered that Mr. Montesinos pretrial detention had "unjustifiably exceeded the timeframes and terms that the procedural laws" provided for. The IACHR notes that although this Court ordered Mr. Montesinos release, it was not enforced. This led to Mr. Montesinos filing a second *habeas corpus* appeal a year and a half after the Court's judgment was issued. In April 1998 the remedy was held inadmissible by the Mayor of the Metropolitan District of Quito and in August of that same year, the Constitutional Court ordered Mr. Montesinos' immediate release.

99. In view of the foregoing, the IACHR concludes that the *habeas corpus* appeal, as governed in Ecuador at the time of the events did not meet the requirements of Article 7(6) of the American Convention. Furthermore, in this specific case, although the Constitutional Rights Court ruled the remedy admissible, prison authorities did not comply with it for a long period of time and measures were not taken to enforce this ruling. As a result, in practice, Mr. Montesinos had no effective legal remedy to ensure oversight of his deprivation of liberty and therefore the State violated to his detriment Article 7(6) of the American Convention in connection with the obligations set forth under Articles 1(1) and 2 thereof. Furthermore, given the lack of compliance with the favorable ruling, the State also is responsible for the violation of Article 25(2)(c) of the American Convention.

**B. Right to humane treatment and rights to a fair trial and judicial protection (Articles 5,<sup>101</sup> 8,<sup>102</sup> and 25<sup>103</sup> of the American Convention in connection with Article 1(1) thereof and Articles 1,<sup>104</sup> 6,<sup>105</sup> and 8<sup>106</sup> of the Inter-American Convention to Prevent and Punish Torture)**

100. The IACHR has emphasized that the American Convention prohibits the torture or cruel, inhuman, or degrading treatment or punishment of individuals under any circumstance. The Commission has stated that "an essential aspect of the right to personal security is the absolute prohibition of torture, a

<sup>100</sup> I/A Court H.R. *Case of Chaparro Álvarez and Lapo Ñíquez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, paragraph 129.

<sup>101</sup> Article 5 of the American Convention sets forth in this regard that: 1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

<sup>102</sup> Article 8 of the American Convention: "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. 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. [...]"

<sup>103</sup> Article 25(1) of the American Convention: "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."

<sup>104</sup> Article 1 of the Inter-American Convention to Prevent and Punish Torture: "The States Parties undertake to prevent and punish torture in accordance with the terms of this Convention."

<sup>105</sup> Article 6 of the Inter-American Convention to Prevent and Punish Torture: "In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.//The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.//The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction."

<sup>106</sup> Article 8 of the Inter-American Convention to Prevent and Punish Torture: "The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.//Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.//After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State."



peremptory norm of international law creating obligations *erga omnes*.<sup>107</sup> For its part, the Court has repeatedly held that "torture and cruel, inhuman or degrading punishment or treatment are strictly prohibited by international human rights law. The absolute prohibition of torture, both physical and mental, is currently part of the international *jus cogens*."<sup>108</sup>

101. In accordance with the inter-American system's jurisprudence, for an act to constitute torture, the following three elements must exist: (i) An intentional act committed by an agent of the State or with his authorization or acquiescence; (ii) which causes severe physical or mental suffering; (iii) for a specific purpose or aim.<sup>109</sup>

102. The Commission recalls that in many cases like the one at hand when there are allegations of torture, the individual generally has no way to prove the violence inflicted on them.<sup>110</sup> According to the petitioners, Mr. Montesinos was: (i) threatened while providing one of his statements; (ii) held in a cell measuring 11m<sup>2</sup> with 13 other individuals; (iii) beaten by police officers; (iv) held incommunicado for eight days; and (v) held upon arrest in the prison conditions that were deplorable.

103. As for official medical reports on Mr. Montesinos' physical and mental health, there is only one document from the Medical Department of the National Police dated July 27, 1992, which states that Mr. Montesinos underwent a medical examination the day he was arrested and that the result was "without observations." In said document no details are provided on how this examination was performed. Moreover, the Commission notes that the police performed this exam; the same police, who, according to Mr. Montesinos, were the authorities who mistreated him. The Commission has no information regarding other medical exams Mr. Montesinos' underwent.

104. The IACHR notes that in the case *Suárez Rosero v. Ecuador* the Inter-American Court considered that the victim was subjected to cruel, inhuman, and degrading treatment given that he: (i) was held incommunicado; (ii) suffered due to the impossibility of having an attorney or seeing his family; (iii) was in a cell that measured 15 m<sup>2</sup> with 16 other individuals, without the necessary sanitary conditions; and (iv) was beaten and threatened during his detention.

105. The Commission further notes that Mr. Montesinos was detained together with Mr. Suárez Rosero in the framework of the same operation and that their allegations are similar, even as regards being held incommunicado. As analyzed in the prior section, Ecuador failed to prove that this did not happen by submitting documentation that by its nature is in the hands of the State. What is more, the State failed to open any investigation regarding Mr. Montesinos' accusations, although his first *habeas corpus* appeal alleged he was subjected to beatings and threats to force him to sign his statements.

106. In keeping with the available information, and considering the State's serious omissions in failing to perform a serious and thorough medical examination of Mr. Montesinos, even when he was transferred from one correctional center to another, as well as the absence of any investigation on reports of torture, the Commission considers that the victim was subjected, at the very least, to cruel, inhuman, and degrading treatment during the initial stage of his detention.

<sup>107</sup> IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002. Citing IACHR, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000, paragraph 118.

<sup>108</sup> I/A Court H.R. *Case of Bueno Alves v. Argentina*. Merits, Reparations, and Costs. Judgment of May 11, 2007. Series C No. 164, paragraph 76; I/A Court H.R. *Case of the Miguel Castro-Castro Prison v. Peru*. Merits, Reparations, and Costs. Judgment of November 25, 2006. Series C No. 160, paragraph 271; and I/A Court H.R. *Case of Baldeón García v. Peru*. Merits, Reparations, and Costs. Judgment of April 6, 2006. Series C No. 147, paragraph 117.

<sup>109</sup> IACHR, Report No. 5/96, Case 10.970, Merits, Raquel Martín Mejía, Peru, March 1, 1996, section 3; and I/A Court H.R. *Case of Bueno Alves v. Argentina*. Merits, Reparations, and Costs. Judgment of May 11, 2007. Series C No. 164, paragraph 79.

<sup>110</sup> IACHR, Report No. 82/13, Case 12.679, Merits, José Agapito Ruano Torres and Family. El Salvador, November 4, 2013, paragraph 162. I/A Court H.R. *Cabrera García and Montiel Flores v. Mexico*. Judgment of November 26, 2010. Series C No. 220, paragraph 128.

107. Pursuant to the foregoing, the Commission considers that the State violated the right to humane treatment provided for in Article 5(1) and 5(2) of the American Convention in connection with Article 1(1) thereof, to the detriment of Mario Montesinos Mejía. Furthermore, the Commission concludes that due to the lack of any investigation whatsoever into the victim's reports of mistreatment, the State also violated, to his detriment, Articles 8(1) and 25(1) of the American Convention in relation to Article 1(1) thereof. Additionally, bearing in mind that the Inter-American Convention to Prevent and Punish Torture entered into effect in Ecuador on December 9, 1999, the Commission notes that, in accordance with the Court's jurisprudence, as from that date "compliance with the obligations contained in this treaty is binding."<sup>111</sup> In this regard, the Commission deems that the absence of an investigation of the torture allegations in this case also constituted a violation of the obligations provided for in Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, as from its entry into force.

**C. Right to a fair trial (Article 8<sup>112</sup> of the Convention in connection with Article 1(1) thereof)**

108. Bearing in mind the allegations of the parties and the facts proven, the Commission will rule on the following points regarding the proceedings undertaken against Mr. Montesinos: (i) The rule to exclude evidence obtained by coercion; (ii) the right to a defense; (iii) the principle of presumption of innocence; and (iv) reasonableness as to the length of criminal proceedings.

**1. Right to exclude evidence obtained by coercion**

109. The Inter-American Court has acknowledged that the rule to exclude evidence obtained through torture or cruel and inhuman treatment has been recognized by diverse treaties and international bodies for the protection of human rights,<sup>113</sup> as well as the fact that "this rule is absolute and irrevocable."<sup>114</sup>

110. For its part, the IACHR has held that:

(...) in the case of a statement or testimony in which there is a well-founded suspicion or presumption that it was obtained by some type of coercion, be it physical or psychological, the [...] courts must determine whether such coercion did actually exist. In the event that a statement or testimony obtained in these circumstances is admitted and used during the trial as an element of evidence or proof, that state may incur international responsibility.<sup>115</sup>

<sup>111</sup> I/A Court H.R. *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 7, 2004. Series C No. 114, paragraph 159.

<sup>112</sup> Article 8 of the Convention provides in this regard that: 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. 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: (...) d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; (...) 3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

<sup>113</sup> In this regard, the Committee Against Torture has held that "the obligations in articles 2 (whereby "no exceptional circumstances whatsoever...may be invoked as a justification of torture"), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions that "must be observed in all circumstances." See: United Nations. Committee Against Torture. General Comment No. 2, 'Implementation of Article 2 by States Parties' January 24, 2008 (CAT/C/GC/2), paragraph 6. For its part, the Human Rights Committee has stated the following: "The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of nonderogable rights. (...) no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency, except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred". United Nations. Human Rights Committee. General Comment No. 32, 'Article 14: Right to equality before courts and tribunals and to a fair trial' (HRI/GEN/1/Rev.9 (vol. I)), paragraph 6.

<sup>114</sup> I/A Court H.R. *Case of Cabrera García and Montiel Flores v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 26, 2010 Series C No. 220, paragraph 165. (Preliminary Objection, Merits, Reparations and Costs)

<sup>115</sup> IACHR, *Report on the Situation of Human Rights in Mexico*, Chapter IV: The Right to Humane Treatment, OEA/Ser.L/V/II.100, Doc. 7. rev. 1, September 24, 1998, paragraph 320.



111. From the prohibition of using any form of coercion to obtain the confession of an accused established in article 8.3 of the Convention, it follows that “annulment of procedural documents resulting from torture or cruel treatment is an effective measure to halt the consequences of a violation of judicial guarantees.”<sup>116</sup> Said measure not only includes confessions obtained through torture or cruel treatment, but also “extends to any form of duress” that can interfere with the “spontaneous expression of a person’s will,” which “necessarily implies the obligation to exclude that evidence from the judicial proceeding.”<sup>117</sup> This obligation, according to the Court, refers not only to evidence obtained directly by coercion, “but also to evidence derived from such action.”<sup>118</sup> The purpose of the exclusionary rule is precisely to discourage and prevent the use of principles that are unlawful and contrary to the Convention such as torture or other cruel treatment, and thus, compliance with such a rule is essential.

112. Taking the above into account, the Commission will analyze whether the preliminary statement made by Mr. Montesinos under duress—described in this report as constituting at the very least cruel, inhuman, and degrading treatment—was used during the proceedings or whether such statement was duly excluded.

113. The Commission notes first of all that Mr. Montesinos’ preliminary statement made on June 25, 1992, in which he confessed to having weapons in his home left in his care him by someone accused of drug trafficking, was included in the *Operación Ciclón* police report. In this report the official investigator establishes Mr. Montesinos’ involvement in an international drug trafficking gang based on the content of his preliminary statement. Based on what had been established in this police report, three orders were issued to initiate proceedings for the crimes of: (i) Illicit enrichment; (ii) conversion and transfer of assets; and (iii) engaging in front operations.

114. The Commission notes that the authorities who decided to continue the process did so not only taking into account his preliminary statement that was made under duress and—as indicated below—without professional legal counsel, but rather giving it preeminent importance. The court file does not show that authorities who heard the case conducted any assessment of reported coercion or the subsequent need to exclude such confessions. The Commission considers that this decision is independent of the final outcome of the proceedings.

115. In light of the above, the Commission considers that the State not only violated the right to humane treatment as described previously, but also the right set forth under Article 8(3) of the American Convention in connection with Article 1(1) thereof, to the detriment of Mario Montesinos Mejía.

## 2. Right to legal representation

116. The Court has held this right must be exercised from the moment a person is accused of perpetrating or participating in an unlawful action and only ends when the proceeding concludes.<sup>119</sup> In the case of *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, the Court considered that the State violated the victims’ right to legal representation given that the victims’ attorneys were unable to be present when a procedure that was key in the victims’ trial for drug trafficking took place.<sup>120</sup>

<sup>116</sup> I/A Court H.R. *Case of Cabrera García and Montiel Flores v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 26, 2010 Series C No. 220, paragraph 166. I/A Court H.R. *Case of García Cruz and Sánchez Silvestre v. Mexico*. Merits, Reparations, and Costs. Judgment of November 26, 2013. Series C No. 273, paragraph 58, see, in particular, footnote 73.

<sup>117</sup> I/A Court H.R. *Case of Cabrera García and Montiel Flores v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 26, 2010 Series C No. 220, paragraph 166.

<sup>118</sup> I/A Court H.R. *Case of Cabrera García and Montiel Flores v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 26, 2010 Series C No. 220, paragraph 167.

<sup>119</sup> I/A Court H.R. *Case of Cabrera García and Montiel Flores v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 26, 2010 Series C No. 220, paragraph 154; and *Case of Barreto Leiva v. Venezuela*. Merits, Reparations, and Costs. Judgment of November 17, 2009. Series C No. 206, paragraph 29.

<sup>120</sup> I/A Court H.R. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, paragraph 154.

117. In this case, the Commission deems that it has been established that Mr. Montesinos was detained on June 21, 1992. The case file does not reveal that Mr. Montesinos had the opportunity to have a defense attorney at the initial proceedings following his arrest, including during his preliminary statement made on June 25, 1992. As noted previously, this statement was obtained under duress and was used in the *Operación Ciclón* police report, which was considered by the courts called upon to rule on Mr. Montesinos' responsibility. The case file furthermore shows that Mr. Montesinos did not have the opportunity to have a defense attorney present during subsequent statements made to police and prosecutors.

118. Having proven that Mr. Montesinos did not have a defense attorney present during the preliminary statement or during subsequent statements when he was already a crime suspect, the Commission deems that the State of Ecuador violated his right to a defense provided for under 8(2)(d) of the American Convention, in connection with to Article 1(1) thereof.

### 3. The principle of presumption of innocence

119. The Inter-American Court has asserted that the principle of the presumption of innocence implies that the defendant does not have to prove that he has not committed the offense of which he is accused, because the *onus probandi* rests with the prosecutor.<sup>121</sup> Thus, the convincing demonstration of guilt is an essential requirement for a criminal sanction, so that the burden of proof falls on the prosecutor and not on the accused.<sup>122</sup> In this regard, the Human Rights Committee has held that:

The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.<sup>123</sup>

120. For its part, the Inter-American Commission has stated:

In this context, another elementary concept of criminal procedural law, the objective of which is to preserve the principle of innocence, is the burden of proof. In criminal proceedings, the *onus probandi* does not lie with the accused; on the contrary, it is the State that has to demonstrate the accused's guilt. Modern doctrine accordingly maintains that "the accused does not need to prove his innocence, which has already been constructed by the presumption protecting him, but rather the accuser has to fully construct his position, leading to certainty that a punishable act was committed."<sup>124</sup>

121. The Commission observes that, in the present case, the conduct of the authorities aimed at validating the presumed declaration - in respect of which there were allegations of coercive and non-technical defense - to establish Mr Montesinos' explains the way in which the principle of presumption of innocence was understood in the framework of the Ecuadorian criminal process that at the time regulated the investigation of crimes related to drugs. Specifically, article 116 of the Law on Narcotic Drugs and Psychotropic Substances stated that "[t]he informative part of the public force and the pre-procedural statement rendered by the accused in the presence of the fiscal agent shall constitute a serious presumption of guilt." The IACHR notes that the content of this norm meant that the accused person would have the burden of reversing that "serious presumption", which has been analyzed by the IACHR, declaring that it is

<sup>121</sup> I/A Court H.R. *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, paragraph 154.

<sup>122</sup> I/A Court H.R. *Cabrera García and Montiel Flores v. Mexico*. Judgment of November 26, 2010. Series C No. 220, paragraph 182.

<sup>123</sup> Human Rights Committee. General Comment No. 32, 'Article 14: Right to equality before courts and tribunals and to a fair trial'. CCPR/C/GC/32. August 23, 2007, paragraph 30.

<sup>124</sup> IACHR, Report No. 5/96, Case 10.970, Fernando Mejía Egocheaga and Raquel Martín de Mejía, Peru, March 1, 1996.

incompatible with the American Convention and specifically with the principle of presumption of innocence<sup>125</sup>.

122. The Commission is aware that the Constitutional Court of Ecuador subsequently ruled that the Law was unconstitutional, acknowledging it was inconsistent with the presumption of innocence.<sup>126</sup> Nevertheless, this Law was applied in this case. In view of the foregoing, the IACHR concludes that the State is responsible for violating the principle of presumption of innocence provided for under Article 8(2) of the American Convention in relation to the obligations set forth in Articles 1(1) and 2 thereof, to the detriment of Mario Montesinos Mejía.

## 5. Reasonableness of [the duration] of criminal proceedings

123. The Court has held that “the reasonableness of time referred to in Article 8(1) of the Convention must be assessed in relation to the total time demanded by criminal proceedings against a specific defendant until a final and nonappealable judgment is rendered.” In criminal matters, this time period runs from the first procedural act addressed to a specific person allegedly responsible for a given offense.”<sup>127</sup> In considering whether the duration of criminal proceedings was reasonable, the Commission highlights that a case-by-case analysis must be conducted based on the particular circumstances thereof and that in accordance with the terms of Article 8(1) of the Convention, four elements must be considered: (a) The complexity of the matter; (b) the procedural activity of the interested party, and (c) the conduct of the judicial authorities; and (d) the effects that the delay in the proceedings may have on the victim’s legal situation.<sup>128</sup>

124. With respect to the three criminal proceedings, the Commission notes that two of them lasted approximately six years. With respect to the prosecution for engaging in front operations, the IACHR notes that it does not have information about the decision on the remedy of appeal of the judgment that acquitted Mr. Montesinos, but, in any case, it would have lasted for more than six years. As for the matter’s complexity, the IACHR notes that the records of the case file that it has do not reveal that the investigations were particularly complex with respect to the charges against Mr. Montesinos, nor was this proven by the State.

125. The IACHR also notes that from the time the investigation began, evidence available to judicial authorities from the initial phase of the proceedings—essentially, Mr. Montesinos’ preliminary statement—were used as grounds to show his criminal liability. This evidence was described in the *Operación Ciclón* police report that was published 30 days after Mr. Montesinos’ arrest. The Commission has no knowledge of subsequent procedures that were particularly complex and would have been considered in determining Mr. Montesinos’ criminal liability. Indeed, the States has not submitted pleadings or evidence in this regard.

126. As to the conduct of domestic authorities, the Commission notes that in this case the State did not explain or submit specific evidence showing that judicial authorities acted with the necessary diligence to ensure that Mr. Montesinos was provided with a decision on his criminal liability in a reasonable period of time. The IACHR considers that the decision of the Constitutional Rights Court regarding the *habeas corpus* appeal constitutes circumstantial evidence of the unreasonable length of time. Despite this, the first two proceedings lasted two additional years. With regard to the third, as was stated previously, there is no information about its conclusion. As for Mr. Montesinos, the Commission notes that there is nothing in the file indicating that he hindered proceedings or was accountable in any way for their delay.

<sup>125</sup> Report No. 40/14, Case 11.438, Merits, Herrera Espinoza et al., Ecuador, July 17, 2014, paragraphs. 215 and 216.

<sup>126</sup> Via Judgment of December 16, 1997. See in this respect, I/A Court H.R. *Case of Acosta Calderón v. Ecuador*. Merits, Reparations, and Costs. Judgment of June 24, 2005. Series C No. 129, paragraph 44( a).

<sup>127</sup> I/A Court H.R. *Case of Bayarri v. Argentina*. Judgment of October 30, 2008. Series C No. 187, paragraph 107; *Case of Baldeón García v. Peru*. Merits, Reparations, and Costs. Judgment of April 6, 2006. Series C No. 147, paragraph 150; and *Case of Genie Lacayo v. Nicaragua*, Judgment of January 29, 1997, paragraph 77.

<sup>128</sup> I/A Court H.R. *Case of Valle Jaramillo v. Colombia*. Merits, Reparations, and Costs. Judgment of November 27, 2008. Series C No. 192, paragraph 155.

127. With respect to the fourth element, the IACHR deems that the ongoing nature of the proceedings in the circumstances of this case resulted in the Mr. Montesinos' ongoing deprivation of liberty. This was due to release being barred in these kinds of proceedings.

128. In conclusion, the IACHR considers that the duration of the three criminal proceedings constituted an excessive amount of time, which has not been justified by the State. As a result, the Commission deems that the State failed to comply with the guarantee of a reasonable amount of time, as set forth in Article 8(1) of the American Convention, in connection with Article 1(1) thereof, to the detriment of Mario Montesinos Mejía.

## VII. CONCLUSIONS AND RECOMMENDATIONS

129. The Commission concludes that the State is responsible for the violation of the right to humane treatment, personal liberty, a fair trial, and judicial protection, set forth in Articles 5(1), 5(2), 7(1), 7(2), 7(3), 7(4), 7(5), 7(6), 8(1), 8(2), 8(2)(d), 8(3), 24, 25(1), and 25(2)(c) of the American Convention on Human Rights, in connection with Articles 1(1) and 2 thereof, to the detriment of Mario Montesinos Mejía. The Commission further concludes that the State is responsible for the violation of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

130. Based on the factual and legal arguments provided above,

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

1. Provide comprehensive reparations, both material and immaterial, for the violation of human rights declared herein. The State shall adopt measures for economic compensation and satisfaction.

2. Provide physical and mental health care necessary for Mario Montesinos Mejía's rehabilitation in an agreed upon manner, if he so wishes.

3. Initiate an *ex officio* criminal investigation that is diligent, effective, and done in a reasonable period of time in order to shed light on the acts of cruel, inhuman, and degrading treatment reported by Mr. Montesinos in order to identify all of those responsible and impose the appropriate penalties for the violations of human rights provided for in this report.

4. Adopt the necessary measures to prevent similar acts from occurring in the future. Specifically, develop training programs for law enforcement personnel, judges, and prosecutors regarding the absolute prohibition on acts of torture and cruel, inhuman, or degrading treatment, as well as their obligations stemming from the exclusionary rule. Furthermore, ensure that competent authorities are properly trained about the obligation to initiate *ex officio*, criminal investigations when there are reports or well-founded reasons to suspect acts of torture and cruel, inhuman, or degrading treatment. Additionally, strengthen accountability mechanisms and ensure their proper implementation by officials in charge of treating persons deprived of liberty.