I. SUMMARY

1. On March 18, 2002 the Inter-American Commission on Human Rights (hereinafter "the IACHR" or "the Commission") received a complaint lodged by Roberto Sassen van Elsloo and Cesar Torres Herbozo (hereinafter "the petitioners") against the Republic of Ecuador (hereinafter "the State" or "Ecuador"), alleging the failure to provide judicial guarantees and a failure to protect personal honor and dignity by reason of an alleged violation of the right to be heard by the competent court in that two civilians are being judged in absentia by a military court. The petitioners claim violations of Articles 8 (fair trial) and 11 (privacy) of the American Convention on Human Rights (hereinafter, "the American Convention"), all in breach of the obligations set forth in Article 1(1) thereof. The State argued failure of the petitioners to exhaust domestic remedies.

2. In this report, the Commission analyzes the information available in terms of the American Convention and concludes that it is competent to consider the petitioners' complaints that they were accused of a crime and did not have access to judicial remedies within a reasonable time and were not tried by a competent court, in alleged violation of Articles 8, 25 and 1(1) of the American Convention, and that the petition is admissible pursuant to Articles 46 and 47 of the American Convention. Also, the Commission decides that the claims raised concerning Article 11 of the Convention are inadmissible and decides to publish this report.

II. PROCESSING BY THE COMMISSION

3. On May 3, 2002 the Commission began processing this petition as Nº P-183/02; it also forwarded the relevant parts to the Ecuadorian State, with a 90-day deadline for it to submit information.

4. On July 15, 2002 the IACHR received additional information from the petitioners, together with a request for precautionary measures. On July 24, the Commission informed the State of this request for precautionary measures and, once again, asked it to submit information in order for this petition to be adequately resolved.

5. To date the Ecuadorian State has not replied to the Commission's request for information as regards the information related to the precautionary measures. On September 5, 2002 the State asked for an extension of one month for submitting its reply to the petition and this extension was granted until October 4, 2002. On October 1, 2002 the State presented its response to the petition, which was transmitted to the petitioners on October 4, 2002.

6. The State replied to the petition on October 1, 2002. The petitioners, on September 20, 2002, requested the Commission not to consider the State's response, should one be forthcoming, since it was presented in violation of the three month time period granted to the State to respond set forth in Article 30(3) of the Commission's Rules of Procedure.[FN2]

[FN2] Article 30(3) states in relevant part: "[The Executive Secretariat] ... shall not grant extensions that exceed three months from the date of the first request for information sent to the State." As regards this petition, the first request for information was sent to the State on May 3, 2002.

III. POSITIONS OF THE PARTIES REGARDING ADMISSIBILITY

A. Petitioners

7. According to the petition, Messrs. Sassen van Elsloo Otero and Torres Herbozo were brought to trial before the military courts, in spite of their civilian status. On the grounds that constitutional provisions were being violated, Dr. Cesar Torres Herbozo submitted a number of motions to the military criminal judge for the First Zone, asking him to recuse himself from the case. However, none of these requests was admitted by the military justice system.

8. Military criminal proceedings Nº 02-97 were begun on December 10, 1996 under Document Nº 0003026 HJDN-DE, signed by Gen. Victor Manuel Bayas Garcia of the Ecuadorian army in his capacity as Minister of Defense. The military justice system has continually and unduly changed the judicial officers charged with hearing and ruling on the case. According to the petitioners, the judges also suffer from a lack of preparation that undermines their ability to administer justice. Consequently, the proceedings have not ensured the minimum guarantees necessary for due process.

9. In the case at hand, there is an ongoing trial that began on March 13, 1997, with a trial initiated before Dr. Slim Boada Aldaz, the military criminal judge for the First Air Zone on December 10, 1996. The proceedings initiated there have not yet been brought to a conclusion–a violation of the provisions of military law, which sets extremely short deadlines and seeks to encourage swift trials. The trial referred to in the instant case, as of the date the petition was lodged with the Commission, had been ongoing for a total of five years, from March 1997 to March 2002.

10. According to the petitioners, the criminal proceedings have been plagued with permanent violations of the two civilians' human rights; in particular, Cesar Torres was imprisoned for a period of one hundred days, in three different prisons, including one military jail. In this military facility, where he was kept for 30 days, he was confined in an area with no access to sunlight and was subjected to a strict regime of controlled visits and prison regulations.

11. Messrs. Sassen and Torres negotiated arms sales from the Argentine armed forces to the Ecuadorian military during the Peru-Ecuador war. According to the petitioners, while the criminal proceedings continued, on July 6, 1998 a transaction settlement agreement was signed by the National Defense Board and the insurance company, settling in full the financial guarantees granted by the policies covering purchase contract
Nº 95-a-31. During the criminal trial, the Minister of Defense accused Dr. Torres of potentially endangering the physical safety of the country's troops and undermining national security by delivering obsolete materials. Contradicting that, in the aforesaid transaction agreement, the Minister recognized the material supplied by the contractor as being worth USD $1,826,334 and accepted the comments of a third technical report, dated July 1, 1997 that ruled that the guns still had more than 60% of their working life left and the munitions could be used for a further five years.

B. State

12. The State's response is comprised of two letters, one dated October 1, 2002 from Mr. Efrain Baus Palacios, the Interim Representative of Ecuador before the Organization of American States and the second dated September 27, 2002 from Dr. Ramón Jiménez Carbo, the Attorney ("Procurador") General of Ecuador.

13. The arguments presented in both letters are the same. The essential point made by the State is that domestic remedies have not been exhausted. Article 46 of the American Convention specifies that, in order for a case to be admitted, "remedies under domestic law [must] have been pursued and exhausted in accordance with generally recognized principles of international law." This requirement exists to ensure the State concerned the opportunity to resolve disputes within its own legal framework.

14. The State reported that the petitioners are subject to a criminal trial with all the guarantees of due process and that the trial has been carried out normally and correctly. It maintained that there has not been an unwarranted delay in the proceedings, but rather, on the contrary, it pointed out that the international supervisory bodies have established a series of

criteria to determine whether in a concrete case there has or has not been unwarranted delay. The State alleged that the presence of one complex element could be decisive in this determination.

15. The State maintained that in the instant petition there are a series of complexities caused by the fact that the punishable events occurred while Ecuador was in a state of armed conflict with Peru and both the internal and external security of the country were at issue. Furthermore, the State pointed out that the petitioners have judicial proceedings pending against them in third countries which obliged the Government to collect information from the Republic of Argentina related to this case, which required government officials to carry out a trip to that country. It is evident, the State argued, that not only the interests of Ecuador but also of other nations are involved, which has repercussions on the official proceedings, the size of the file and the complexity of the analysis of the imputed crimes.

16. The State argued by analogy that as regards the complexity of the case, the Italian Government argued before the European Court (in an unspecified case) that a matter was complex for three reasons: the nature of the charges, the number of the accused and the political and social situation prevailing in Reggio Calabria at that time. In that case, the delay was 10 years. The Inter-American Court, the State continued, accepted the criteria set forth in the Genie Lacayo case when it referred to the complexity of the matter, and said that it was clear that the matter under examination was sufficiently complex, given that the investigations were very extensive and there was a great deal of evidence. All of this, asserted the State, can justify that the trial has lasted longer than other trials with distinct characteristics. The State concluded that the proceedings in this case are much more complex and therefore the delay is justified.

17. As regards the actions of the petitioners, the State continued that it is necessary to point out that they never cooperated with the investigations which the agents of the State carried out, nor did they at any time facilitate the speedy resolution of these investigations. The State considers the lack of cooperation in the investigations and in the conduct of the trial to be a deliberate action on the part of the petitioners to delay the proceedings. Further, the fact that the petitioner (sic) was a fugitive further delays the substantiation of the charges.

18. The State concluded that if one takes into consideration the complexity of the matter and the actions of the petitioners there is “no doubt” that the judicial authorities have acted efficiently and promptly.

19. In summary, throughout its presentation the State indicated that the petition should be declared inadmissible for failure to exhaust domestic remedies. Furthermore, the State argued that there are a series of remedies that the petitioners can pursue to guarantee the rights that they consider to have been violated. but that they have not invoked these remedies. The State mentioned specifically that the Code of Military Criminal Procedure contemplates the right of the petitioner to file for an appeal, revision, cassation and nullity;--all remedies that may be brought once the judgment has been issued. Further the State presented arguments that go to the merits of the claim, for example, regarding available remedies to challenge the petitioner’s claim that the trials are being carried out in an inappropriate forum. A discussion of these arguments will be postponed until the consideration of the merits of the case.

IV. ANALYSIS

A. Competence of the Commission Ratione Personae, Ratione Loci, and Ratione Temporis

20. The petitioners are entitled, under Article 44 of the American Convention, to lodge complaints with the Commission. The petition names the alleged victims as being Messrs. Roberto Sassen van Elsloo and Cesar Torres Herbozo, both of whom are persons under the terms of Article 1(2) of the American Convention. The respondent State, the Republic of Ecuador, ratified the American Convention on December 28, 1977. The Commission therefore has competence ratione personae to examine the petition.

21. As regards its competence ratione loci, all the alleged violations were committed within the jurisdiction of the Republic of Ecuador.

22. With respect to its competence ratione temporis, the alleged violations were committed at a time following the State's ratification of the American Convention on December 28, 1977.

23. As for its competence ratione materiae, the alleged violations, if proven true, could characterize violations of Articles 8 and 11 of the American Convention.

B. Other Requirements for Admissibility

a. Exhaustion of Domestic Remedies

24. As mentioned above, the petitioners, on September 20, 2002, requested the Commission not to consider the State's response since it was presented in violation of the three-month time period granted to the State to respond, set forth in Article 30(3) of the Commission's Rules of Procedure.[FN3]

[FN3] Article 30(3) states in relevant part: "[The Executive Secretariat] ... shall not grant extensions that exceed three months from the date of the first request for information sent to the State." As regards this petition, the first request for information was sent to the State on May 3, 2002.

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25. In light of the fact that the Commission requested additional information from the State on July 24th, in connection with precautionary measures, and in the interest of resolving the issues on admissibility, the Commission will summarize and consider the State's arguments.

26. The State alleges that the petitioners' claim should be declared inadmissible considering that the final decision on the case is still pending. The petitioners, for their part, argue that the fact that they are being tried by a military criminal court has deprived them of the judicial guarantees inherent in a fair trial, which include being tried within a reasonable time by a competent court. Accordingly, they invoke the exception provided for in Article 46(2)(c) of the American Convention.

27. Article 46(1) of the American Convention establishes, as an admissibility requirement for petitions, that domestic remedies first be exhausted. Nonetheless, Article 46(2) provides that this requirement is not applicable when:

a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

28. The Commission observes that, as appears from the record, the case was initiated on March 13, 1997 before Dr. Slim Boada Aldaz, the Military Criminal Judge for the First Air Zone. The trial has been ongoing for more than five years without having reached a final conclusion. It is appropriate to note at the outset, as the Commission has done in earlier cases, that invoking the exceptions to the prior exhaustion rule provided for in Article 46(2) of the Convention is closely bound up with the determination of possible violations of certain rights set forth therein, such as the guarantees of a fair trial within a reasonable time, as set forth in Article 8 of the Convention.[FN4]

[FN4] Cf. Report Nº 57/00, La Granja, Ituango Case 12.050 (Colombia) October 2, 2000 at para. 47.

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29. Considering the facts of this petition, the Commission finds that there has been an unwarranted delay in resolving the proceedings. In the matter of the instant petition, the proceedings began on March 13, 1997, and had not yet concluded as of the date on which it was lodged with the Commission. With regard to the fact that the petitioners are fugitives, the petitioners point out that a judicial proceeding which has been underway for over five and a half years cannot be considered to have been affected by something that has only occurred during 1/20th of the time in question. In a recent case, the Commission held the following, which it considers dispositive of the issue before it: the Commission notes that in the cases referred to, delays have been from approximately three to six years without a final decision being rendered. The Commission esteems that this constitutes prima facie an unwarranted delay. In consequence, the exception provided for in Article 46(2)(c) of the Convention is applicable and the requirement to exhaust domestic remedies set out in Article 46(1)(a) shall not be applied.[FN5]

[FN5] See Report Nº 03/01, Amilcar Menendez, Juan Manuel Caride, et al., Case 11.670, (Argentina), January 19, 2001 at para. 48.

Consequently, the Commission finds that the exception provided for in Article 46(2)(c) is applicable in this case.

30. The Commission has noted on previous occasions that invoking exceptions to the rule of prior exhaustion of domestic remedies provided for in Article 46(2) of the Convention is closely linked to the determination of possible violations of certain rights enshrined therein, such as the guarantees of access to justice. Nonetheless, Article 46(2), by its nature and purpose, has autonomous content with respect to the substantive provisions of the Convention. Therefore, the determination of whether the exceptions to the prior exhaustion rule that are set forth therein are applicable to the instant case should be made prior to and separate from the analysis of the merits, since it depends on a different standard of appreciation than that used to determine whether there has been a violation of Articles 8 or 25 of the Convention. It should be clarified that the causes and effects that have impeded the exhaustion of domestic remedies in this case will be analyzed, as pertinent, in the Report adopted by the IACHR on the merits of the dispute, so as to find whether they effectively constitute violations of the American Convention.

b. Timeliness of the Petition

31. According to Article 46(1)(b) of the American Convention, the general rule is that a petition must be lodged within a period of six months "from the date on which the party alleging violation of his rights was notified of the final judgment." Under Article 32(2) of the Commission's Rules of Procedure, this deadline does not apply when exceptions to the prior exhaustion requirement are applicable. In such a situation, the Rules of Procedure stipulate that the petition must be lodged within a reasonable period of time, considering the date on which the alleged violation of rights occurred and the specific circumstances of the case.

32. The Commission notes that more than five years have passed since the military criminal proceedings against Messrs. Sassen and Torres were opened, and that to date no final decision has been reached. Consequently, the Commission holds that the petition was submitted within a reasonable period of time.

c. Duplication of Proceedings and Res Judicata

33. The Commission understands that the substance of this petition is not pending in any other international proceeding for settlement, and that it is not substantially the same as any petition previously studied by the Commission or other international body. Hence, the requirements set forth in Articles 46(1)(c) and 47(d) have also been met.

d. Characterization of the Alleged Facts

34. The Commission considers that, prima facie, the petitioners present facts that, if proven to be true and not otherwise contradicted, could tend to establish a violation of the right to judicial protection and guarantees, which could tend to establish a violation of the rights protected under Articles 8 and 25, in conjunction with Article 1(1) of the American Convention. Further, the Commission is of the view that the petitioners have not established the facts to characterize a violation of Article 11 (right to reputation and honor) and consequently this article is declared inadmissible.

V. CONCLUSIONS

35. Based on the foregoing considerations of fact and law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this case admissible with respect to Articles 1(1), 8, and 25 of the American Convention and inadmissible with respect to Article 11.
2. To notify this decision to the petitioners and to the State.
3. To continue with its analysis of the merits of the case.
4. To publish this report and to include it in the Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 23rd day of October, 2002. (Signed): Juan Méndez, President; Marta Altolaguirre, First Vice-President; José Zalaquett, Second Vice-President; Commissioners Robert K. Goldman, Clare Roberts, and Susana Villaran.