

**REPORT No. 1/10**  
PETITION 2723-02  
ADMISSIBILITY  
HOMERO FLOR FREIRE  
ECUADOR  
March 15, 2010

**I. SUMMARY**

1. On August 30, 2002, the Inter-American Commission on Human Rights (hereinafter “the Commission”) received a petition presented by Alejandro Ponce Villacís and Juan Manuel Marchán (hereinafter “the petitioners”) in which it is alleged that the Republic of Ecuador is responsible for the discharge of Homero Flor Freire, Officer of the Military Police of the Ecuadorian Armed Force (hereinafter the “Army”) for having alleged committed a disciplinary breach.

2. The petitioners alleged that the State was responsible for violating the rights to judicial guarantees, the principle of legality and non-retroactivity, protection of honor and dignity, equality before the law, and judicial protection, established at Articles 8(1), 9, 11, 24, and 25 of the American Convention on Human Rights (hereinafter the “Convention” or the “American Convention”) in conjunction with Articles 1(1) and 2 of the same treaty and Article XIV of the American Declaration of the Rights and Duties of Man (hereinafter the “American Declaration”). For its part, the State alleged that the petitioners’ claims were inadmissible for failure to exhaust domestic remedies.

3. After analyzing the parties’ positions and compliance with the requirements spelled out at Articles 46 and 47 of the American Convention, the Commission decided to declare the claim admissible for the purposes of the examination of the alleged violation of Articles 8(1), 24, and 25 in conjunction with Articles 1(1) and 2 of the American Convention, to declare the alleged violations of Articles 9 and 11 inadmissible, and to notify the parties of this report, order its publication, and include it in its Annual Report to the OAS General Assembly.

**II. PROCESSING BEFORE THE COMMISSION**

4. The Commission recorded the petition under number P2723-02, and on March 20, 2003 proceeded to transmit a copy of the pertinent parts to the State, which was given two months to submit information, in keeping with Article 30(2) of the Rules of Procedure. On August 27, 2003 the State sent its response, which was transmitted to the petitioner with one month to submit observations. On April 12, 2004, a brief was received from the petitioners, which was forwarded to the State for its observations. On August 8, 2007 the request for observations was reiterated to the State.

5. On November 30, 2007, the Commission requested additional information from the petitioners, which was received on March 17, 2008. On June 8, 2008, a brief was received from the petitioners containing additional information, which was forwarded to the State for its observations. The State submitted its final observations on December 10, 2008. On November 9, 2009, a brief of additional information was received from the petitioner, which was forwarded to the State.

### III. THE PARTIES' POSITIONS

#### A. The petitioners

6. The petitioners allege that in November 2000 the authorities initiated an administrative procedure known as summary information of investigation (*información sumaria de investigación*)<sup>1</sup> against Military Police Officer Homero Flor Freire for allegedly having committed a disciplinary breach of "professional misconduct" ("*mala conducta profesional*"), based on the testimony of several persons who alleged they had seen him engaging in homosexual conduct in the dormitories of the Amazonas Military Fort (Fuerte Militar Amazonas). They allege that Mr. Homero Flor denies having engaged in the conduct that led to the proceeding. They also alleged that in the conduct of the summary information procedure Homero Flor had no opportunity to witness the statements of witnesses against him or to question them.

7. The petitioners allege that by resolution of January 17, 2001, the Court of Law of the Fourth Military Zone concluded that "... there is disciplinary liability of Lt. Homero Fabián Flor Freire ... accordingly the preliminary characterization of his misconduct by the Councils of Subaltern Officers and Troops, respectively, [must] be [sanctioned] as provided for by Article 117 of the Rules of Military Discipline, ... should be ... suspended from active duty prior to the discharge ... for misconduct in keeping with the provisions of Article 87(i)<sup>2</sup>; and Article 76(j) of the Law on Personnel of the Armed Forces." They allege that on May 7, 2001, the Council of Subaltern Officers of the Armed Force (*Consejo de Oficiales Subalternos de la Fuerza Terrestre*) ruled to accept the request from the Court of Law of the Fourth Military Court and suspended Homero Flor from active duty prior to his discharge from active duty in the Armed Force. They allege that in response to this decision, a request for reconsideration was filed, which was denied on June 5, 2001, and a motion of appeal was filed, which was dismissed by the Council of Superior Officers of the Armed Force (*Consejo de Oficiales Superiores de la Fuerza Terrestre*) on June 18, 2001.

8. The petitioners allege that they filed an *amparo* action against the process and the judicial resolution issued by the Judge of Law of the Fourth Military Zone, and requesting suspension of the summary information of investigation. By ruling of July 18, 2001, the Sixth Court for Civil Matters of Pichincha determined that the summary information of investigation is not a "mere administrative act, but a whole investigative process ... accordingly ... the *amparo* action is totally inadequate as it was illegally proposed; for if the illegitimate act occurred, it would not be known what the act was and where it came from." In addition, it determined that the resolution of January 17, 2001 by the Court of Law of the Fourth Military Zone is a decision "judicial in nature" that is not yet final; and "as the *amparo* action is residual in nature, i.e. that one recurs to it when all remedies have been exhausted, the one presented is totally unfounded."

9. The petitioners indicate that a motion of appeal was brought against the ruling of the Sixth Court, and that on February 4, 2002, the Constitutional Court ruled "to dismiss the constitutional *amparo* remedy as out of order" and held that "there is no illegitimate act on the part of the Court of Law of the Fourth Military Zone on issuing the resolution [of January 17, 2001] and on not finding the constitutional violation proved by the party bringing the *amparo* action, this case does not merit the *amparo* action, and in addition, the requirements indicated by the Law on Constitutional Control have not been met."

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<sup>1</sup> The petitioners indicate that the administrative process called "summary information" (*información sumaria*) is conducted before a military judge. The Rules of Procedure for the Processing of Summary Information proceedings in the Armed Forces was issued by Ministerial Decision 1046 and published in General Ministerial Order 240 of December 22, 1993. Original petition received at the IACHR on August 30, 2002.

<sup>2</sup> The petitioner makes reference to Article 87 of the Law on Personnel of the Armed Forces: "A member of the military shall be discharged for one of the following causes: ... (i) For breach of good service, whether due to misconduct or professional incompetence of the member of the military, so characterized by the respective Council, in keeping with what is established in the corresponding Rules of Procedure, when he does not have the right to suspension.... Law No. 118. RO/ Sup 660 of April 10, 1991. Original petition received at the IACHR on August 30, 2002.

10. The petitioners allege that the State is responsible for the violation of the principle of legality and non-retroactivity, established in Article 9 of the American Convention. They allege that the conduct for which Homero Flor Freire was sanctioned was established in Rules adopted by the Ministry of National Defense, and not a law of Congress.<sup>3</sup> They also allege that the State is responsible for the violation of the protection of honor and dignity established in Article 11 of the American Convention to the detriment of Homero Flor Freire, since the false accusation against him had a radical impact on his family life, and led to his divorce.

11. The petitioners allege that neither the Sixth Court for Civil Matters of Pichincha nor the Constitutional Court ruled on the alleged decriminalization of homosexuality ordered by the Constitutional Court in 1997, or on Article 23(25) of the Constitution<sup>4</sup>, which guarantees sexual freedom and therefore deprives the State of its power to impose sanctions in relation to conduct that may be related to that freedom. They further argue that the alleged victim had indicated on numerous occasions that he is not homosexual and that he did not engage in any of the acts of which he was accused and for which a proceeding was begun against him that resulted in his discharge from active service.

12. The petitioners allege that the State is responsible for violating the right to equality before the law established in Article 24 of the American Convention in connection with Article 1(1) of the same treaty, as the Armed Forces of Ecuador maintain a discriminatory policy on considering homosexual conduct itself as "professional misconduct." They also allege that the discriminatory policy is manifested in the different treatment accorded to heterosexual and homosexual relations within a military facility. They note that Article 87 of the Rules of Military Discipline<sup>5</sup> established as a breach in violation of said rules "engaging in illegitimate sexual acts<sup>6</sup> within military facilities," for which the maximum sanction was a 30-day suspension. They allege that to the contrary, Article 117 of the same Rules establishes that "the members of the Armed Forces who are surprised in acts of homosexuality or in acts related to the possession, improper use, trafficking, and commercialization of drugs or narcotic substances on duty or off duty shall be subject to the provisions of Article 87(i) of the Law on Personnel of the Armed Forces..." i.e. would be discharged.

13. The petitioners allege that the State is responsible for the violation of the right to judicial guarantees established at Article 8(1) of the Convention to the detriment of Homero Flor Freire considering that the procedure of "summary information" to which he was subjected is not a procedure established in the Law but rather in a confidential Ministerial Decision that was not published in the Official Register and therefore is not available to all citizens. In addition, they allege that the State is responsible for violating the right to judicial protection established in Article 25 of the American Convention insofar as the alleged victim did not have access to an effective remedy to protect his rights. In that context, they argue that the remedies pursued were rejected for superfluous reasons.

14. The petitioners allege that the State is responsible for violating its duty to adopt provisions of domestic law established in Article 2 of the American Convention on introducing a discriminatory provision such as Article 117 of the Rules on Military Discipline. They also allege that said rule equates homosexual conduct with criminal conduct such as the unlawful use, trafficking, and

<sup>3</sup> The petitioners make reference to Article 24 (1) of the Constitution of the Republic of Ecuador of 1998: "To ensure due process, one should observe the following basic guarantees, without detriment to others established by the Constitution, international instruments, statutes, or the case-law: 1. No one may be judged for an act or omission that at the time it was committed is not legally codified as a criminal, administrative, or other infraction, no sanction shall be applied that is not provided for in the Constitution or statute. Nor may a person be tried other than in keeping with the pre-existing laws, observing the procedures particular to each proceeding...."

<sup>4</sup> The petitioners make reference to Article 23(25) of the Constitution of the Republic of Ecuador of 1998: "Without prejudice to the rights established in this Constitution and in the international instruments in force, the State shall recognize and guarantee the following for persons: ... 25. The right to make free and responsible decisions regarding their sexual life...."

<sup>5</sup> The petitioners make reference to the Regulation of Military Discipline in force at the time of the facts. Ministerial Decision No 831-A, published in the O.G.M. of October 1, 1998.

<sup>6</sup> The petitioners indicate that the nature of "unlawful sexual acts" apparently refers to heterosexual sexual relations in the absence of or outside of marriage.

commercialization of drugs or narcotics. Finally, they allege that the resolution adopted by the State by which it suspended the alleged victim and subsequently discharged him from active duty in the Armed Force had deprived him of his right to work and entailed, therefore, a violation of Article XIV of the American Declaration.

15. As for complying with the requirement of prior exhaustion of domestic remedies established at Article 46(1)(a) of the American Convention, the petitioners allege that the decision by the Constitutional Court of February 4, 2002, reported March 4, 2002, exhausted domestic remedies, which would meet said requirement. They argue that in the event that the Commission considers that the *amparo* action did not exhaust domestic remedies, the exceptions to the prior exhaustion requirement established at Article 46(2) of the American Convention would apply.

16. As for the State's argument on the domestic remedies that the alleged victim should pursue in response to the administrative act that ordered his discharge (see *infra* The State), the petitioners argue that the discharge was a consequence of the resolution of the Court of Law of the Fourth Military Zone of January 17, 2001. They allege that they pursued "the only remedy available under domestic legislation in an administrative venue," i.e. a motion of appeal (*recurso de apelación*) before the Council of Superior Officers of the Armed Force, which was dismissed on July 18, 2001. They further argue that the resolution of the Council of Superior Officers became final in keeping with Article 200 of the Law on Personnel of the Armed Forces.

17. As for the contentious-administrative remedies indicated by the State (see *infra* The State), the petitioners argue that Article 6(c) of the Law on the Contentious-Administrative Jurisdiction indicates: "The following do not correspond to the contentious-administrative jurisdiction: ... (c) Matters that arise in relation to the political acts of the Government, such as those that affect the defense of the national territory, international relations, the internal security of the State, and the organization of the Armed Forces...." In this respect, they allege that the resolution of the Court of Law of the Fourth Military Zone refers to the organization of the Armed Forces, thus the contentious-administrative remedy would not be appropriate for protecting the legal situation of the alleged victim. They argue that in view of the limitation established in the Law on the Contentious-Administrative Jurisdiction it would not have been possible to obtain a judgment of last instance and therefore there would be no possibility of filing a motion for cassation. In summary, the petitioners argue that as long as the resolution of the Court of Law of the Fourth Military Zone continues in force, any challenge of other acts that derive it is totally ineffective and irrelevant.

## **B. The State**

18. The State argues that the petitioners' claim is inadmissible since the remedies provided for in the domestic jurisdiction have not been exhausted, as required by the American Convention. Specifically, it alleges that Ecuador's military legislation provides for two types of procedures for separating one of its members on active duty, one administrative for committing disciplinary breaches, and another criminal for committing some act classified as an offense in the Military Criminal Code. It argues that pursuant to Article 86 of the Law on Personnel of the Armed Forces, in both procedures the discharge constitutes an "administrative act ordered by the competent authority, which orders the separation of the member of the military from the Standing Armed Forces, placing him in passive service."

19. The State argues that pursuant to Article 201 of the Law on Personnel of the Armed Forces<sup>7</sup> the alleged victim could have filed a claim related to the illegality of the resolution ordering the discharge with the corresponding Council of Officers. It also argues that pursuant to Articles 1 and 3 of

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<sup>7</sup> The State quotes Article 201 of the Law on Personnel of the Armed Forces: "A member of the military who is suspended or discharged and who considers said Resolution illegal, may present his claim to the respective Council within 45 calendar days after publication in the General Order of the respective Decree or Resolution. The councils shall resolve the claims submitted within a maximum of 30 days." Official note 02848 from the Office of the Solicitor General of the State of August 11, 2003, forwarded by Note No. 4-2-144/03 of August 25, 2003.

the Law on Contentious-Administrative Jurisdiction<sup>8</sup> the administrative act of discharge could have been challenged, through that jurisdiction, before the competent District Courts (Tribunales Distritales). It argues that in the context of the contentious-administrative proceeding the motion of cassation (*recurso de casación*) would also be available and would be adequate<sup>9</sup> to challenge the judgment issued by the District Court in case of any errors *in iudicando* or *in procedendo*. In conclusion, the State argues that it has proven the existence of domestic remedies effective for resolving the alleged victim's legal situation.

20. The State indicates that the victim alleged violations of judicial guarantees in the process of the constitutional *amparo* proceeding, in particular that his right to be tried in a reasonable time was not respected. In response, the State argues that the principle of reasonable time "has as its purpose to keep the accused from remaining under accusation a long time and to ensure that it is decided promptly."<sup>10</sup> It alleges that in keeping with what has been held by the European Court of Human Rights, the reasonableness of a measure or of a time period should be analyzed in its own and specific context. Specifically, it considers that the duration of the domestic proceedings was within the limits of reasonableness established by the Court and the Commission, that it did not constitute a "denial of justice," and that therefore the State did not violate Article 8(1) of the Convention.

21. The State argues that the alleged victim had free access to the judicial apparatus and to all remedies available in the face of the alleged violations of the Convention; indeed, the Second Court for Civil Matters of Pichincha and the Constitutional Court resolved the *amparo* action as per the law and abiding by the rules of due process.

22. As for the alleged discriminatory nature of the military laws applied to Homero Flor in the disciplinary proceeding that led to his discharge from the Armed Forces, the State alleges that if it is considered that the provisions were discriminatory and therefore unconstitutional, the alleged victim should have filed a constitutional motion (*acción de inconstitucionalidad*), which was provided for in the Constitution in force at the time of the facts<sup>11</sup>, and in the Constitution of 2008.

23. It considers that the claim does not meet the requirements established in the American Convention and the Commission's Rules of Procedure; accordingly, it asks that the petition be found inadmissible.

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<sup>8</sup> The State cites Articles 1 and 3 of the Law on the Contentious-Administrative Jurisdiction. Article 1: "The contentious-administrative remedy may be filed by physical or juridical persons against the regulations, acts, and resolutions of the Public Administration or of semi-public juridical persons that are definitive, and violate a right or direct interest of the plaintiff." Article 3: "The contentious-administrative remedy is of two kinds: of full jurisdiction or subjective, and of annulment or objective. The remedy of full jurisdiction, or subjective remedy, protects an individual right of the moving party, presumably denied, repudiated, or not recognized totally or partially by the administrative act in question. The remedy of annulment, or objective remedy, or remedy for abuse of power, protects compliance with the objective legal norm, administrative in nature, and may be brought by one who has a direct interest in bringing the action, requesting of the court that it annul the act challenged due to a legal defect." Official note 02848 from the Office of the Solicitor General of the State of August 11, 2003, forwarded by Note No. 4-2-144/03 of August 25, 2003.

<sup>9</sup> The State cites the I/A Court H.R., *Velásquez Rodríguez v. Honduras Case*. Series C No. 4. Judgment of July 29, 1988, para. 64. Official note 02848 from the Office of the Solicitor General of the State of August 11, 2003, forwarded by Note No. 4-2-144/03 of August 25, 2003.

<sup>10</sup> The State cites the I/A Court H.R., *Suárez Rosero v. Ecuador Case*. Judgment of November 12, 1997. Series C No. 35, para. 70. Official note 02848 from the Office of the Solicitor General of the State of August 11, 2003, forwarded by Note No. 4-2-144/03 of August 25, 2003.

<sup>11</sup> The State makes reference to Article 277 of the Constitution of the Republic of Ecuador of 1998: "Actions alleging unconstitutionality may be filed by: 1. The President of the Republic, in those cases provided for in Article 276(1). 2. The National Congress, after a resolution by the majority of its members, in those cases provided for in Article 276(1) and (2). 3. The Supreme Court of Justice, after a resolution by the Court sitting in plenary, in those cases described in Article 276(1) and (2). 4. The provincial councils or municipal councils, in those cases indicated in Article 276(2). 5. One thousand citizens in the enjoyment of their political rights, or any person after a favorable report by the Human Rights Ombudsman on its admissibility, in the cases of Article 276(1) and (2)...." Official note 05191 from the Office of the Solicitor General of the State of December 4, 2008, forwarded by Note No. 4-2-144/03 of August 25, 2003.

#### IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

##### A. Competence

24. The petitioners are authorized, in principle, by Article 44 of the American Convention to submit petitions to the Commission. The petition indicates as the alleged victim an individual person, in respect of whom the Ecuadoran State has undertaken to respect and ensure the rights enshrined in the American Convention. As regards the State, the Commission notes that Ecuador has been a state party to the American Convention since December 28, 1977, the date on which it deposited its instrument of ratification. Therefore, the Commission is competent *ratione personae* to examine the petition.

25. In addition, the Commission is competent *ratione loci* to hear the petition, insofar as it alleges violations of rights protected in the American Convention said to have taken place in the territory of Ecuador, a state party to that treaty. The Commission is competent *ratione temporis* insofar as the obligation to respect and ensure the rights protected in the American Convention was already in force for the State as of the date on which the facts alleged in the petition are said to have occurred. Finally, the Commission is competent *ratione materiae*, because the petition alleges possible violations of human rights protected by the American Convention.

26. With respect to the allegations of violations of the American Declaration, as per Articles 23 and 49 of its Rules of Procedure, in principle the Commission is competent *ratione materiae* to examine violations of the rights enshrined by that Declaration.<sup>12</sup> Nonetheless, the IACHR has previously established<sup>13</sup> that once the American Convention enters into force in relation to a State, it is that instrument – and not the Declaration – that becomes the specific source of the law that the Inter-American Commission will apply, so long as the petition alleges violations of rights that are substantially identical enshrined in both instruments.<sup>14</sup>

##### B. Admissibility requirements

###### 1. Exhaustion of domestic remedies

27. Article 46(1)(a) of the American Convention requires the prior exhaustion of remedies available in the domestic jurisdiction in keeping with generally accepted principles of international law, as a requirement for admitting claims on the alleged violation of the American Convention.

28. Article 46(2) of the Convention provides that the requirement of prior exhaustion of domestic remedies does not apply 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.

As the Inter-American Court has established, whenever a state alleges the failure to exhaust domestic remedies by the petitioners, it has the burden of showing that the remedies that have not been exhausted

<sup>12</sup> I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, July 14, 1989, Series A No. 10, para. 41.

<sup>13</sup> IACHR, Report No. 03/01, Case 11,670, *Amilcar Menéndez, Juan Manuel Caride, et al.*, (Argentina), January 19, 2001, para. 41.

<sup>14</sup> I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, July 14, 1989, Series A No. 10, para. 46.

are “adequate” to cure the violation alleged, i.e. that the function of those remedies within the domestic legal system is suitable to protect the legal situation infringed.<sup>15</sup>

29. The petitioners argue that the requirement to exhaust domestic remedies was met with the *amparo* judgment of the Constitutional Court of February 4, 2002. They argue that the administrative act of discharge is a consequence of the resolution of the Court of Law of the Fourth Military Zone of January 17, 2002, against which the contentious-administrative remedies would have been ineffective, considering the limitation on subject matter established in Article 6(c) of the Law on Contentious-Administrative Jurisdiction. They allege that the remedies against the resolution of the Court of Law of the Fourth Military Zone were exhausted and that so long as it continues to be in force, any challenge of other acts that stem from it would be totally ineffective and irrelevant.

30. For its part, the State argues that the petitioners’ claim does not satisfy the requirement of prior exhaustion of domestic remedies, provided for at Article 46(1) of the American Convention given that there were contentious-administrative remedies that would have been brought against the administrative act that decreed the discharge of the alleged victim and that they would have been effective for resolving the legal situation of the alleged victim. It also argues that in terms of the alleged discriminatory nature of the military disciplinary rules, the alleged victim had available to him a constitutional motion (*acción de inconstitucionalidad*) provided for in the Constitution in force at the time of the events.

31. First, one must clarify which domestic remedies need to be exhausted in the instant case. The Inter-American Court has indicated that one must only exhaust remedies adequate for curing the alleged violations.

Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable.<sup>16</sup>

32. In relation to this claim, it appears from the parties’ arguments that after the resolution of January 17, 2001 of the Court of Law of the Fourth Military Zone, which was accepted by the Council of Subaltern Officers of the Armed Force on May 7, 2001, a request for reconsideration of that resolution was submitted, which was denied on June 5, 2001<sup>17</sup>, and a motion of appeal was filed that was dismissed by the Council of Superior Officers of the Armed Force on June 18, 2001.<sup>18</sup> In addition, an *amparo* action was filed with the Sixth Court for Civil Matters of Pichincha that was rejected as unfounded on July 18, 2001, in the face of which a motion of appeal was filed. On February 4, 2002, the Constitutional Court ruled “to dismiss the constitutional *amparo* action as unfounded.”<sup>19</sup>

33. In view of the foregoing, the Commission observes that with respect to the processing of the summary information, the alleged victim filed the remedy available, i.e. the motion of appeal, which was rejected on June 18, 2001. The Commission observes that the decision mentioned became final, and no other remedy would be available against it in the administrative jurisdiction.

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<sup>15</sup> I/A Court H.R., *Velásquez Rodríguez v. Honduras Case*. Judgment of July 29, 1988. Series C No. 4, para. 64.

<sup>16</sup> I/A Court H.R., *Velásquez Rodríguez v. Honduras Case*. Judgment of July 29, 1988. Series C No. 4, para. 63.

<sup>17</sup> Resolution of the Council of Subaltern Officers of the Armed Force, reference 2001-10-COSB, June 5, 2001. Attachment to the original petition received at the IACHR on August 30, 2002.

<sup>18</sup> Resolution of the Council of Superior Officers of the Armed Force, reference 210090-COSFT, June 18, 2001. Attachment to the petitioners’ brief received at the IACHR on April 12, 2004.

<sup>19</sup> Judgment of the Constitutional Court, Case No. 739-2001-RA, February 4, 2002. Attachment to the original petition received at the IACHR on August 30, 2002.

34. As for the *amparo* action, the Commission observes that on July 18, 2001 the Sixth Judge for Civil Matters of Pichincha ruled to deny the *amparo* action. That resolution was appealed and on February 4, 2002, the Second Chamber of the Constitutional Court ruled to dismiss the *amparo* action as unfounded on not finding a constitutional violation that has been proven by the alleged victim, and for not having met the requirements indicated in the Law on Constitutional Control.

35. As regards the constitutional motion, Article 277 of the Constitution of Ecuador, in force at the time of the facts, established precisely those persons who had active standing to file that action and the requirements for filing it.<sup>20</sup> The Commission reiterates that the regulation of the remedy impeded its direct use by the alleged victim, since they first had to obtain the signatures of 1,000 citizens or obtain a favorable opinion from the Human Rights Ombudsman. In relation to those limitations, the State has not presented information on the efficacy, in practice, of the constitutional motion in cases of individual claims; accordingly it has not shown its efficacy for resolving the present matter in the domestic jurisdiction.<sup>21</sup>

36. The contentious-administrative jurisdiction would not have been exhausted by the petitioners insofar as they allege that the violations of human rights to the detriment of the alleged victim originated in the resolution of the Court of Law of the Fourth Military Zone of January 17, 2001, and that the administrative act of discharge was merely a consequence of that resolution, thus appealing it would not have been suitable for the alleged victim's claims.

37. In summary, the Commission observes that the petitioners exhausted the remedies available in the face of the ruling by the Court of Law of the Fourth Military Zone and in addition they filed an *amparo* action that was denied on appeal by the Constitutional Court of February 4, 2002. Therefore, given the characteristics of the claims submitted, which are focused on the issues of due process and alleged discriminatory treatment, the Commission considers that the petitioners met the requirement of prior exhaustion of domestic remedies, established in Article 46(1)(a) of the American Convention.

## **2. Deadline for filing the petition**

38. The American Convention establishes that in order for a petition to be admissible by the Commission it must be submitted within six months of the date on which the alleged victim has been notified of the final decision. In the instant case, the petition was received on August 30, 2002, and the decision of the Constitutional Court by which domestic remedies were exhausted was notified on March 4, 2002.<sup>22</sup> Therefore, the Commission considers that the petition was submitted within the six-month period and that the provisions of Article 32 of the Commission's Rules of Procedure should be considered satisfied as regards the admissibility requirement on time for submission.

## **3. Duplication of procedure and international res judicata**

39. It does not appear from the record that the subject matter of the petition is pending any other procedure for international settlement, nor that it reproduces a petition already examined by this or

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<sup>20</sup> Article 277 of the Constitution of the Republic of Ecuador of 2008: "Las Acciones alegando unconstitucionalidad may be filed by: 1. The President of the Republic, in those cases provided for in Article 276(1). 2. The National Congress, after a resolution by the majority of its members, in those cases provided for in Article 276(1) and (2). 3. The Supreme Court of Justice, after a resolution by the Court sitting in plenary, in those cases described in Article 276(1) and (2). 4. The provincial councils or municipal councils, in those cases indicated in Article 276(2). 5. One thousand citizens in the enjoyment of their political rights, or any person after a favorable report by the Human Rights Ombudsman on its admissibility, in the cases of Article 276(1) and (2). The President of the Republic shall ask for the opinion established in Article 276(4) and (5)...."

<sup>21</sup> IACHR, Report No. 09/05 (Admissibility), Petition 1-03, *Eliás Gattass Sahih*, Ecuador, February 23, 2005, para. 32. IACHR, Report No. 5/07 (Admissibility), Petition 161-05, *Miguel Camba Campos et al. (Justices on the Constitutional Court)*, Ecuador, February 27, 2007, para. 23.

<sup>22</sup> Notice of the Ruling of the Constitutional Court of April 21, 2002, April 29, 2002, attached to the original petition received October 23, 2002.

any other international organization. Therefore, the requirements established in Articles 46(1)(c) and 47(d) of the Convention have been met.

#### **4. Characterization of the facts alleged**

40. In view of the elements of fact and law presented by the parties and the nature of the matter put before it for its consideration, the IACHR considers that the petitioners' allegations that the administrative procedure of summary information in the case of Homero Flor did not afford him an opportunity to hear the statements of the witnesses against him, or to question them, could tend to establish possible violations of the rights to judicial guarantees and judicial protection protected at Articles 8(1) and 25, in conjunction with Article 1(1) of the American Convention.

41. The Commission observes that as regards the claim of the petitioners on discriminatory treatment in relation to Article 24 of the American Convention on Human Rights in conjunction with Articles 1(1) and 2 of the same treaty, the arguments put forth require an analysis on the merits in light of the standards of the American Convention.

42. In terms of the petitioners' claim alleging violation of Articles 9 and 11 of the American Convention on Human Rights and Article XIV of the American Declaration of the Rights and Duties of Man, the Commission observes that the petitioners did not offer sufficient elements for their alleged violation, thus those claims are not declared admissible.

43. As these aspects of the claim are not manifestly groundless or out of order, the Commission considers the requirements established at Articles 47(b) and (c) of the American Convention to have been satisfied.

#### **V. CONCLUSIONS**

44. The Commission concludes that it is competent to examine the claims presented by the petitioners on the alleged violation of Articles 8(1), 24, and 25 in conjunction with Articles 1(1) and 2 of the American Convention, and that these are admissible, in keeping with the requirements established in Articles 46 and 47 of the American Convention. In addition, it concludes that the claims regarding the alleged violation of Articles 9 and 11 of the American Convention and Article XIV of the American Declaration of the Rights and Duties of Man to be inadmissible.

45. Based on the arguments of fact and law set forth above, without this meaning any prejudging on the merits of the matter,

#### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,**

#### **DECIDES:**

1. To find admissible the present claim in relation to Articles 8(1), 24 and 25 in conjunction with Articles 1(1) and 2 of the Convention.
2. To notify the Ecuadoran State and the petitioners of this decision.
3. To continue with the analysis on the merits.
4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 15<sup>th</sup> day of the month of March 2010. In favor: Felipe González, President; Paulo Sérgio Pinheiro, First Vice-president; Dinah Shelton, Second Vice-president; María Silvia Guillén, and José de Jesús Orozco Henríquez; Rodrigo Escobar Gil (dissenting), members of the Commission.