

REPORT No. 155/11
PETITIONS 12.087 WALTER ERNESTO REYES MANTILLA,
12.089 VICENTE HIPÓLITO ARCE RONQUILLO,
12.235 JOSÉ FRANK SERRANO BARRERA
ADMISSIBILITY
ECUADOR
November 2, 2011

I. SUMMARY

1. The present report refers to three petitions lodged by José Leonardo Obando Laaz (hereinafter referred to as “the petitioner”) representing Walter Ernesto Reyes Mantilla (petition 12.087)¹, Vicente Hipólito Arce Ronquillo (petition 12.089),² and José Frank Serrano Barrera (petition 12.235)³ (hereinafter referred to as “the alleged victims”), alleging violation by the Republic of Ecuador (hereinafter referred to as “Ecuador” or “the State”) for the arrest, without a court-issued warrant, of the alleged victims and their preventive detention without a trial beyond the time-limits stipulated in domestic law, as well as for alleged psychological torture and being held incommunicado to which they were allegedly subject during their custody.

2. In petitions 12.087 and 12.089, the petitioner alleged that the State was responsible for the violation of the rights to humane treatment, personal liberty, a fair trial, property and judicial protection enshrined in Articles 5, 7, 8, 21 and 25 of the American Convention on Human Rights (hereinafter referred to as “the Convention” or “the American Convention”). As for the State, it alleged that the petitioner’s complaints were inadmissible, because the petitioner wishes the Commission to act as a fourth forum of proceedings because he does not agree with the court rulings issued under domestic law.

3. In petition 12.235, the petitioner alleged that the State was responsible for the violation of the rights to humane treatment, personal liberty, a fair trial and judicial protection enshrined in Articles 5, 7, 8 and 25 of the American Convention on Human Rights (hereinafter referred to as “the Convention” or “the American Convention”). As for the State, it alleged that the petitioner’s complaints were inadmissible, because the petitioner wishes the Commission to act as a fourth forum of proceedings because he does not agree with the court rulings issued under domestic law.

4. As the facts involving the present petitions are similar, the Commission has decided to analyze their admissibility together. After examining the positions of the parties and compliance with the requirements provided for in Articles 46 and 47 of the American Convention, the Commission decided to declare that the complaints are admissible as regards the alleged violation of Articles 5, 7, 8, and 25, in keeping with Article 1.1 and 2 of the Convention and Article 5 as regard damages to the next of kin of the alleged victims. It also decided to declare admissibility of the complaint lodged in petition 12.087 regarding the alleged violation of Article 21 and decided to declare inadmissibility of the complaint lodged in petition 12.089 regarding the alleged violation of Article 21 in connection with Article 1.1 of the American Convention, to notify the parties thereof, and to order publication of the report in its Annual Report to the General Assembly.

II. PROCESSING BY THE COMMISSION

5. Petition 12.087 was received on August 10, 1998 and a copy of the relevant parts was sent to the State on January 25, 1999, with a 90-day deadline for submitting information, in keeping with the Rules of Procedure currently in force. On June 7, 1999, the State sent its reply, which was passed on

¹ On August 10, 1998, José Leonardo Obando Laaz lodged a petition for Walter Ernesto Reyes Mantilla.

² On August 19, 1998, José Leonardo Obando Laaz lodged a petition for Vicente Hipólito Arce Ronquillo.

³ On August 10, 1998, José Leonardo Obando Laaz lodged a petition for José Frank Serrano Barrera.

to the petitioner, with a 45-day deadline for submitting his observations. In August 1999, the Commission received a document with additional information from the petitioner, which was passed on to the State for its observations. On September 23, 1999, the petitioner's observations regarding the State's reply were received by the IACHR and, in turn, passed on to the State for its observations. On February 22, 2000, the State submitted a document of observations, which was passed on to the petitioner for his observations. On April 4 and May 23, 2000, the State submitted additional information, which was passed on to the petitioner for his observations.

6. On October 2, 2000, the Commission received two documents from the petitioner, which were transmitted to the State for its observations. On May 24, 2001, the Commission received from the petitioner a document of additional information, which was passed on to the State for its observations. On June 19, 2009, the Commission indicated that it was at the disposal of the parties to reach a friendly settlement and requested the parties to indicate, within one month, if they were interested in beginning proceedings for this purpose. On August 5, 2009, the petitioner sent a communication indicating his interest in beginning proceedings aimed at achieving a friendly settlement, which was conveyed to the State for its observations, without receiving any reply. On April 12, 2011, the petitioner was requested to provide up-to-date information regarding the case being referred to, but no reply has been received.

7. Petition 12.089 was received on August 19, 1998 and the Commission proceeded to convey a copy of the relevant parts to the State on January 25, 1999, with a 90-day deadline for submitting information, in conformity with the Rules of Procedure currently in force. On June 28, 1999, the State sent its reply, which was passed on to the petitioner, with a 45-day deadline to submit his observations. On September 23, 1999, the Commission received from the petitioner a document of additional information, which was sent to the State for its observations. On February 16, 2000, the State submitted a document of observations, which was passed on to the petitioner for his observations. On May 24, 2000, the petitioner submitted additional information, which was passed on to the State for its observations. On April 13, 2009, the Commission requested the State and the petitioner to provide up-to-date information on the case being referred to, in conformity with Article 30(5) of the Convention. On June 8, 2009, the State sent a communication repeating the observations it had sent in 2000. On March 25, 2011, the Commission requested the petitioner to provide up-to-date information on the case being referred to, but it did not receive any reply.

8. Petition 12.089 was received on August 19, 1998, and the Commission proceeded to convey a copy of the relevant parts to the State on December 3, 1999, with a 90-day deadline for submitting information, in conformity with the Rules of Procedure currently in force. On April 4, 2000, the State sent its reply, which was passed on to the petitioner for his observations. On October 2, 2000 and on May 24, 2001, the Commission received from the petitioner documents of additional information, which were passed on to the State for its observations. On September 24, 2001, the State submitted a document of observations, which was transmitted to the petitioner for his observations. On April 14, 2009, the petitioner was requested to provide information regarding the case being referred to, and this information was sent on August 5, 2009 and then passed on to the State for its observations. On April 12, 2011, the request for observations from the State was reiterated, but no reply was received.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

1. Common allegations

9. The petitioner contends that the petitions are being made in the context of police operations aimed at investigating crimes involving drug trafficking.

10. The facts regarding the arrest and detention of Walter Ernesto Reyes Mantilla and José Frank Serrano Barrera involve the operation called "White Storm" (*Tormenta Blanca*) in which members of INTERPOL apprehended 32 persons. The petitioner contends that, on January 21, 1995, José Frank Serrano Barrera, a Colombian national, and his wife were at their home in the city of Guayaquil when, at about 3:00 AM, a group of heavily armed and hooded policemen broke into their home and violently arrested them without showing any court warrant for their arrest. He indicates that, on March 1, 1995, the alleged victim's deposition was taken without due process of law or the presence of his attorney or any consular agent of Colombia.

11. Likewise, the petitioner alleges that, on February 21, 1995, Walter Ernesto Reyes Mantilla was driving his son's car in the city of Guayaquil, when a group of policemen, allegedly without a court warrant for his arrest, arrested him with verbal abuse. He also indicated that the car he was driving was impounded.

12. Furthermore, the petitioner alleges that, on September 18, 1996, Vicente Hipólito Arce Ronquillo was arrested, with physical and verbal abuse, by a group of policemen who supposedly had no court warrant for his arrest.

13. He alleges that, for the three arrests, the court warrants for the arrests had been processed and issued after the detention of the alleged victims and that they were denied access to an attorney or communication with their next of kin. He adds that the alleged victims were held incommunicado and that, during the first 7 to 15 days of their detention, they were the victims of psychological torture and were threatened with physical torture so that they would confess that they belonged to criminal organizations involved in drug trafficking. He also contends that, during this period, the depositions of the alleged victims had been taken without due process of law or the presence of their attorneys.

14. The petitioner alleges that keeping the alleged victims in prison for three years and seven months in the cases of Walter Ernesto Reyes Mantilla and José Frank Serrano Barrera and three years in the case of Vicente Hipólito Arce Ronquillo and holding them incommunicado and subjecting them to psychological torture so that they would confess that they had been involved in criminal activities, as well as the State's delay in processing the criminal case beyond the time-limits provided for under domestic law, constitute a violation of the rights to humane treatment, personal liberty, a fair trial, and judicial protection safeguarded by Articles 5, 7, 8 and 25 the American Convention. Furthermore, he alleges that the incidents had affected their marriage and family.

15. As for meeting the requirement of prior exhaustion of remedies under domestic law, the petitioner alleges that domestic remedies have been exhausted because prosecution of the cases of Walter Ernesto Reyes Mantilla and José Frank Serrano Barrera had been discontinued (*nolle prosequi*) although they were not released from prison until the 1998 reform of the Constitution, despite appeals filed for their release and to which they did not receive any reply. As for Vicente Hipólito Arce Ronquillo, the petitioner alleges that remedies under domestic law have been exhausted because the alleged victim had filed several appeals for his release, which were turned down.

2. Specific allegations of petitions 12.087 and 12.235

16. Regarding Walter Ernesto Reyes Mantilla, on February 23, 1995, the Judge of the Fourth Criminal Court of Guayas issued a court order for a preliminary hearing and to start proceedings in the case against the alleged victim and the other arrested suspects for the alleged perpetration of crimes involving drug trafficking, as provided for in the Law on Drugs and Psychotropic Substances. It is alleged that the criminal proceedings extended beyond the time-limits set forth in the law for the submittal of evidence and that, on August 15, 1997, the Prosecutor of the Fourth Criminal Court refrained from bringing charges against the alleged victim, as there were no procedural merits to considering he was the perpetrator of the crimes being investigated.

17. Regarding José Frank Serrano Barrera, the petitioner alleges that, on March 7, 1995, he was transferred to the Correctional Facility for Men of Guayaquil and located in a wing of the prison along with those who had been sentenced and those awaiting trial. He indicated that, by means of a letter of March 24, 1995, the Provincial Head Office of Interpol of Guayas, remitted to the Judge of the Fourth Criminal Court of Guayas Police Report No. 051-JPEIG-95, indicating the results of the investigation and that the alleged victim was responsible for the crimes of forgery and impersonation; nevertheless, he claims that he was being tried for the case called "White Storm" for crimes involving drug trafficking, as provided for in the Law on Drugs and Psychotropic Substances. He alleges that, eight months after his arrest, on October 13, 1995, José Frank Serrano Barrera's preliminary deposition was taken before the Judge of the Fourth Criminal Court of Guayas.

18. The petitioner indicates that, on August 28, 1996, the preliminary investigation was concluded and, on October 16, 1996, the Fourth District Attorney issued her court decision, in which José Frank Serrano Barrera was charged with the crimes of forgery and impersonation. He indicates that, on the basis of this ruling, two new proceedings were filed against the alleged victim. He alleges that, after closing and reopening the investigation, on August 15, 1997, the Public Prosecutor of the Fourth Criminal Court presented a new court decision in which José Frank Serrano Barrera was charged with being a front man.

19. The petitioner indicates that, on November 20, 1997, the Judge of the Fourth Criminal Court of Guayas issued a provisional order of discontinuation of prosecution (*nolle prosequi*) of the case against Walter Ernesto Reyes Mantilla and José Frank Serrano Barrera, which was notified on December 1, 1997.⁴ He alleges that, in the same order of discontinuation of prosecution (*nolle prosequi*), the Judge had ordered that the Fiat car being driven by the alleged victim, Walter Ernesto Reyes Mantilla, at the time of his arrest and which belonged to his son be returned to him.

20. The petitioner alleges that, once the order of discontinuation of prosecution (*nolle prosequi*) was issued, the alleged victims should have been released from prison; nevertheless, he contends that the proceedings were referred to further consultation, pursuant to Article 121 of the Law on Drugs and Psychotropic Substances, which provides that the order cannot be enforced until it is ratified by a higher authority.

21. Likewise, he indicates that Law No. 44 of December 18, 1997 amended the Law on Drugs and Psychotropic Substances and provided that:

[t]he Consultations for issuing an order overturning the warrant for pretrial detention or terminating measures of arrest, detention or seizure as a result of the provisional or definitive discontinuation of prosecution (*nolle prosequi*), in all of its forms, and the judgments convicting or acquitting the accused currently being processed by the Superior Courts must be settled within 30 days after the enactment of the present Amendment Law. If this provision fails to be complied with, the Magistrates shall be punished pursuant to the present Amendment Law.

⁴ As for José Frank Serrano Barrera, the petitioner alleges that the Public Prosecutor for the Fourth Court filed an appeal regarding this proceeding before notification and therefore contends that there was complicity between the Court Clerk and the Public Prosecutor.

22. He alleges that these time-limits had not been observed; nevertheless, on September 1, 1998, the Sixth Chamber of the Superior Court of Justice of Guayaquil issued an order indicating that, pursuant to Article 24, paragraph 3 of the Political Constitution of Ecuador⁵ which had been in force since August 10, 1998, the release of all the accused whose cases had been the subject of a definitive or provisional discontinuation of prosecution (*nolle prosequi*) in the resolution issued on December 1, 1997 had been ordered. He indicates that, after this order, Walter Ernesto Reyes Mantilla and José Frank Serrano Barrera were released from prison.⁶

23. As for Walter Ernesto Reyes Mantilla, the petitioner contends that, on February 17, 1999, the Sixth Chamber of the Superior Court of Justice of Guayaquil had ratified the order that had been referred to consultation by a higher authority and therefore confirmed discontinuation of prosecution (*nolle prosequi*) of the case against the alleged victim and return of the car that had been impounded.

24. The petitioner alleges that, during the three years seven months imprisonment of Walter Ernesto Reyes Mantilla and José Frank Serrano Barrera, various appeals had been filed to obtain their release from prison, namely, two writs of *habeas corpus* filed with the Mayor of Guayaquil, the first one on June 12 and June 25, and the second one on June 12 and June 18, 1998, but that no reply had been obtained. Likewise, Walter Ernesto Reyes Mantilla had filed an appeal on constitutional grounds with the President of the Superior Court of Justice of Guayaquil on July 9, 1998, but no reply had been obtained to this appeal either.

25. As for Walter Ernesto Reyes Mantilla, the petitioner alleges that, although the law provides that, after acquittal of the charges brought by the State, seized assets must be returned, the car that had been impounded at the time of the arrest has not as yet been returned, which he alleges is a violation of the right to private property as protected by Article 21 of the American Convention.

3. Specific allegations of petition 12.089

26. The petitioner indicates that, on September 25, 1996, the Judge of the Third Criminal Court of Guayas ordered a preliminary investigation and issued a warrant for the pretrial detention of Vicente Hipólito Arce Ronquillo. He alleges that the order for a preliminary investigation had not specified the evidence substantiating the pretrial detention, as required by Article 22 of the Political Constitution of Ecuador. He contends that, on June 13, 1997, the Public Prosecutor of the Third Criminal Court of Guayas issued a court ruling refraining from charging the alleged victim and that, on July 22, 1997, the Third Criminal Court of the Guayas overturned the warrant for pretrial detention against the alleged victim. On September 5, 1997, the Public Prosecutor ratified his first ruling; nevertheless he alleged that, on October 13, 1997, the alleged victim was charged with being an accomplice, although, according to petitioner's allegations, there was no evidence against him.

27. The petitioner indicates that, on November 4, 1998, the Fourth Criminal Court of Guayas had supposedly sentenced Vicente Hipólito Arce Ronquillo to four years imprisonment to be carried out in the Correctional Facility for Men of Guayaquil for being an accomplice in perpetrating the crime of "money laundering or transfer" as stipulated in Article 77 of the Law on Drugs and Psychotropic Substances.

28. He indicates that the judgment was referred for mandatory consultation to the First Chamber of the Superior Court of Justice of Guayaquil although he indicates no date for the ruling. On August 30, 1999, the National Director for Correctional Facilities, pursuant to Articles 33 and 34 of the Code for Enforcement of Sentences and Corrections, reduced the sentence to 720 days imprisonment. He indicates that, on September 2, 1999, this Department advised the Fourth Criminal Court of Guayas of the reduced sentence so that it would issue the corresponding release from prison, after which he would have been set free.

⁵ "In any case, without exception, once the order of discontinuation of the prosecution or judgment of acquittal is issued, the detained person shall immediately be set free, without detriment to any pending consultation or remedy."

⁶ José Frank Serrano Barrera was released on September 4, 1998.

29. The petitioner alleges that, pursuant to the reduction in sentence of Vicente Hipólito Arce Ronquillo, he should have been released in September 1998; nevertheless, he was kept in prison for a total period of three years because of the mandatory referral for consultation. He claims that, during his imprisonment, the alleged victim lodged various proceedings to be set free, namely a request for a writ of *habeas corpus* filed with the Mayor of Guayaquil on July 16, 1998, which was turned down, and after an appeal was filed, the Constitutional Court ratified the refusal on July 31, 1998, and an appeal on constitutional grounds was lodged with the President of the Superior Court of Justice of Guayaquil, which was also turned down on September 14, 1998 because it was deemed to be without merit.

30. The petitioner alleges a violation of the right to private property as provided for in Article 21 of the Convention but he does not provide any specific information on the alleged violation or on the proceedings that had been filed.

B. Position of the State

31. The State believes that the petitions do not meet the requirements provided for in Article 46.1.a of the American Convention and requests that the Commission declare their inadmissibility.

1. Common allegations

32. The State alleges that the proceedings were based on the principles of due process of law and that the alleged victims had free access to the legal system and that, at no time, were they prevented from exercising their right to be heard in equal conditions by the bodies having jurisdiction. They also contend that the right to be heard and tried within reasonable time-limits was observed, by virtue of which no violation of Article 8(1) of the American Convention can be claimed.

2. Specific allegations of petitions 12.087 and 12.235

33. The State alleges that the mere fact that the alleged victims do not agree with the rulings issued under domestic law does not entitle the Commission to act as a fourth forum. They also indicate that the fact that a person is imprisoned does not prevent the filing of the remedies that are available in order to change a court decision. Concretely, the State indicates that the alleged victim could have filed the appeal of last resort if there had been a judgment of conviction or to review the case, which can be filed at any time after the enforcement of the sentence. In short, it requests that the Commission declare the petition inadmissible.

3. Specific allegations of petition 12.089

34. The State alleges that Vicente Hipólito Arce Ronquillo could have filed a lawsuit for damages against the Judge or Magistrate responsible for the court's miscarriage of justice as that was the suitable action to be taken to settle the petitioner's claims. The State also alleges that the petitioner could have filed an appeal.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

35. The petitioner is entitled, in principle, by Article 44 of the American Convention to lodge petitions with the Commission. The petition points out that the alleged victims are individual persons, whose rights, as enshrined in the American Convention, the Ecuadorian State has pledged to respect and guarantee. As for the State, the Commission points out that Ecuador is a State Party to the American Convention since December 28, 1977, date on which it deposited its ratification instrument. Therefore, the Commission is competent *ratione personae* to hear the petition.

36. The Commission is competent *ratione loci* to hear the petition, because the petition alleges violations of rights protected in the American Convention that were said to have occurred on Ecuadorian territory, which is a State Party to said treaty. The Commission is competent *ratione temporis* because the obligation to respect and guarantee the rights protected under the American Convention were already in force for the State when the incidents alleged by the petition had supposedly taken place. Finally, the Commission is competent *ratione materiae*, because the petition reports possible violations of human rights protected under the American Convention.

B. Requirements of admissibility

1. Exhaustion of remedies under domestic law

37. Article 46.1.a of the American Convention requires prior exhaustion of remedies available under domestic law in conformity with generally recognized principles of international law, as a requirement for admitting claims about the alleged violation of the American Convention.

38. Article 46.2 of the Convention provides that the requirement of prior exhaustion of domestic remedies 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.

As stipulated in the Commission's Rules of Procedure and as stated by the Inter-American Court, whenever a State alleges that the petitioners have not exhausted domestic remedies, it is required to identify the remedies that must be exhausted and to prove that the remedies that were not exhausted are "adequate" to resolve the alleged violation; it must be stressed here that the role of these remedies within the domestic law system is appropriate to protect the legal situation that is being infringed.⁷

39. In the present petitions, the State alleges that the claim of the petitioner does not meet the requirement of prior exhaustion of remedies under domestic law, as provided for in Article 46.1.a of the American Convention, because he could have filed an appeal of last resort and/or a request for review of the case. As for petition 12.089, the State also indicates that the alleged victim could have filed a lawsuit for damages against the Judge or Magistrate responsible for the court's miscarriage of justice and that this would have been the suitable proceedings to settle the petitioner's claims. As for the petitioner, he alleges that domestic remedies had been exhausted when the request for a writ of *habeas corpus* and appeal on constitutional grounds were filed. In addition, he contends that the remedies that the State deems suitable are not applicable to the present petitions.

40. The Commission observes that the purpose of the petitions refers to the incidents involving alleged violations of the rights to humane treatment, personal liberty, and due process of criminal law to the detriment of Walter Ernesto Reyes Mantilla, José Frank Serrano Barrera and Vicente Hipólito Arce Ronquillo, including allegations of holding them incommunicado and subjecting them to psychological torture, denying them access to legal aid during the investigation, violating their right to be presumed innocent until proven otherwise, keeping them in pretrial detention for long periods, and the absence of effective remedies under domestic law to overturn the order of detention.

41. According to the allegations by the parties, José Frank Serrano Barrera was arrested on January 21, 1995. On February 21, 1995, Walter Ernesto Reyes Mantilla was also arrested, presumably

⁷ Article 31.3 of the Rules of Procedure of the Commission. See also I/A Court of H.R., *Case of Velásquez Rodríguez*, Judgment of July 29, 1988, paragraph 64.

without an arrest warrant. Furthermore, on September 18, 1996, Vicente Hipólito Arce Ronquillo was arrested by a group of policemen who did not have an arrest warrant either.

42. In petitions 12.087 and 12.235, on September 1, 1998, the Sixth Chamber of the Superior Court of Justice of Guayaquil issued an order releasing all the accused whose cases had been dropped (*nolle prosequi*) definitively or provisionally in the resolution issued on December 1, 1996, in line with the provisions of the new Constitution that entered into force on August 10, 1998, which provided for the immediate release of all those held in custody for whom an order of discontinuation of prosecution (*nolle prosequi*) or acquittal had been issued, without detriment to any pending consultation or remedy. The Commission observes that, according to the information provided by the parties after this order, Walter Ernesto Reyes Mantilla and José Frank Serrano Barrera were released from prison.

43. In petition 12.089, on November 4, 1998, the Fourth Criminal Court of Guayas convicted Vicente Hipólito Arce Ronquillo to four years imprisonment. This judgment was referred to mandatory consultation and the date of this resolution does not appear in the case file. On August 30, 1999, the National Director of Correctional Facilities reduced the sentence of Vicente Hipólito Arce Ronquillo to 720 days imprisonment. On September 2, 1999, this Correctional Department notified the Fourth Criminal Court of Guayas of the reduced sentence so that it would issue the corresponding order of release, and on September 3, 1999, Vicente Hipólito Arce Ronquillo was released from prison.

44. It must be explained what remedies under domestic law have to be exhausted in the present case. The Inter-American Court has pointed out that only those remedies that are adequate to resolve the alleged committed violations must be exhausted. Adequate remedies mean:

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.⁸

45. The Commission understands that the Law on Drugs and Psychotropic Substances (Law 108 of August 7, 1990), on the basis of which the alleged victims were processed, provides in Article 115 that in the proceedings carried out under this Law “[...] no bail can be posted and no suspended sentence, pre-release or parole or the benefits of the Law of Clemency or pardon shall be granted [...]”.

46. Likewise, Article 121 provided for the mandatory character of referring the order that overturned pretrial detention to a higher authority, according to the following terms:

Mandatory consultation. The order overturning pretrial detention, suspending a sentence or appealing the measures of arrest, remand in custody or imprisonment cannot be enforced unless it is confirmed by a higher-ranking authority, after a mandatory and favorable report by the corresponding District Attorney, who shall issue a ruling within 24 hours after receiving the proceeding.

47. Likewise, its Article 122 established that the judgment, whether of conviction or acquittal, had to be referred obligatorily to a higher authority for ratification. As long as the ruling of the higher authority is not issued, the sentenced person shall not be released [...].

48. Thus, in the three petitions, the petitioner filed requests for a writ of *habeas corpus* with the Mayor of Guayaquil, although the Commission finds no evidence that he received any response, for Walter Ernesto Reyes Mantilla and José Frank Serrano Barrera and, regarding Vicente Hipólito Arce Ronquillo, these requests were turned down.

⁸ I/A Court of H.R., *Case of Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, Series C, No. 1, paragraph 64.

49. The Commission observes that, on the day the incidents that are the subject of the petition occurred, there were two remedies that were in force in Ecuador to challenge the order of detention: (i) the constitutional remedy of *habeas corpus*; and (ii) and the legal remedy of safeguard of liberty, or *habeas corpus*.

50. As for the legal remedy of safeguard of liberty, or *habeas corpus*, provided for in the Criminal Procedures Code,⁹ the Commission understands that it was not a suitable remedy to request the immediate release of the alleged victims either after the order for pretrial detention had been overturned or after the judgment of acquittal had been issued, because the legal basis for detention relied on Articles 121 and 122 of the Law on Drugs. IACHR has assessed the suitability of this remedy for persons charged under the Law on Drugs in a series of cases and has found that this Law excludes persons charged under this law from the safeguards normally available by means of a remedy of *habeas corpus*¹⁰.

51. As for the constitutional remedy of *habeas corpus*, it has to be filed with the Mayor or Chair of the Town Council.¹¹ Regarding this, both the Commission¹² and the Inter-American Court have established that the submittal of a remedy of *habeas corpus* with an administrative authority does not constitute an adequate remedy according to the standards of the American Convention.¹³

52. Therefore, the Commission deems that, at the time of the incident, the constitutional remedy of *habeas corpus* was not an adequate remedy, as a result of which it cannot be required that it be exhausted as a remedy under domestic law. In view of the above, the Commission understands that there was no effective remedy to challenge the provisions on mandatory referral in the Law on Drugs and to thus obtain the release of the alleged victims. Therefore, in view of the characteristics of the present case, the Commission considers that the exception set forth in Article 46.2 of the American Convention is applicable.

53. The State indicated that the alleged victims would be entitled to benefit from the remedies of appeal of last resort for overturning and reviewing the judgment or to file a lawsuit for damages against the Judge or Magistrate responsible for the miscarriage of justice, but it did not refer to the remedies aimed at challenging the arrest and detention as such. Regarding this, the Commission observes that, because of their characteristics, these remedies did not turn out to be adequate to redress the situation that was reported by the petitioner, referring to the alleged prolonged pretrial detention of the alleged victims and obtaining their release.

54. Citing exceptions to the rule of prior exhaustion of remedies under domestic law in Article 46.2 of the Convention is closely tied to determining whether or not there were possible violations of certain rights enshrined in the Convention, such as guarantees of access to justice. Nevertheless, Article 46.2, because of its nature and purpose, is a rule that is autonomous in its content with respect to the substantive rules of the Convention. Therefore, the decision of whether or not the exceptions to the rule of exhaustion of remedies under domestic law are applicable to the present case must be taken prior to, and separately from, the examination of the merits of the case, as it depends on a standard of appreciation that is different from the one used to determine the possible violation of Articles 8 and 25 of the Convention. It must be clarified that the causes and effects that prevented the exhaustion of

⁹ Provided for in Article 458 of the 1983 Criminal Procedures Code of Ecuador.

¹⁰ See, among others, I/A Court of H.R., *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C, No. 35; I/A Court of H.R. *Case of Tibi v. Ecuador*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C, No. 114; IACHR. Report of Admissibility No. 90/00, Daniel David Tibi, Ecuador, October 5, 2000; and IACHR. Report of the Situation of Human Rights in Ecuador, OAS/Ser.L/V/II.96, Doc. 10 rev. 1, April 24, 1997, Chapter VII, Right to Personal Liberty.

¹¹ Article 19, number 17, subparagraph j) of the 1979 Constitution of Ecuador.

¹² IACHR, Report No. 66/01, *Dayra María Levoyer Jiménez* of June 14, 2001, paragraphs 78-81.

¹³ I/A Court of H.R., *Case of Chaparro Álvarez and Lapo Íñiguez*. Judgment of November 21, 2007. Series C, No. 114, paragraph 128.

remedies under domestic law shall be reviewed in the report adopted by the Commission on the merits of the case, in order to see whether or not they tend to establish violations of the American Convention.

55. As for petition 12.087 and return of the car that was impounded when Walter Ernesto Reyes Mantilla was arrested, the State does not indicate what procedures must be implemented to ensure its restitution and also the State did not indicate if the vehicle would have effectively been returned. Regarding this, the Commission observes that the order for provisional discontinuation of prosecution (*nolle prosequi*) of December 1, 1997, which had supposedly been ratified in consultation with the Sixth Chamber of the Superior Court of Justice of Guayaquil on February 17, 1999, stipulated that the car owned by the alleged victim's son be returned. Therefore, in view of the characteristics of the complaint and the failure to comply with the resolution for the benefit of Walter Ernesto Reyes Mantilla, the Commission considers that the petitioner's claim as regards Article 21 of the Convention meets the requirement of prior exhaustion of remedies under domestic law provided for in Article 46.1.a of the Convention.

56. As for petition 12.089 and the allegation regarding the alleged violation of Article 21 of the American Convention, the Commission observes that the petitioner did not cite the specific facts regarding the alleged violation of the right to private property or the report he had filed or the remedies he had exhausted under domestic law. Therefore, the IACHR deems that it does not have the necessary elements of information regarding the requirement of exhaustion of remedies under domestic law of Article 46.1.a of the American Convention, with respect to his allegation about the right to property.

2. Time-limits for submitting the petition

57. The American Convention establishes that, for a petition to be declared admissible by the Commission, it must have been lodged within a period of six months from the date on which the party alleging the violation was notified of the final judgment. In the complaint being reviewed, the IACHR has ruled that the exceptions to the requirement of exhaustion of remedies under domestic law, pursuant to Article 46(2)(c) of the American Convention, are applicable. Regarding this, Article 32 of the Rules of Procedure of the Commission establishes that, in those cases where exceptions to prior exhaustion of remedies under domestic law are applicable, the petition must be submitted within reasonable time-limits, at the Commission's criterion. For this purpose, the Commission must take into account the date when the alleged violation of rights took place and the circumstances of each case.

58. In the present petition, José Frank Serrano Barrera was arrested on January 21, 1995, Walter Ernesto Reyes Mantilla on February 21, 1995, and Vicente Hipólito Arce Ronquillo on September 18, 1996, and the present petitions were filed with IACHR on August 10 and 19, 1998 when the alleged victims were being held in pretrial detention. In view of the characteristics of the present case, the Commission deems that the petition was lodged within reasonable time-limits and that therefore this requirement for admissibility, in terms of the time-limits for submittal of the petition, has been met.

3. Duplication of proceedings and international *res judicata*

59. Article 46.1.c of the Convention provides that the Commission's admission of a petition requires that "the subject of the petition or communication is not pending in another international proceeding for settlement," and Article 47.d of the Convention provides that the Commission shall consider inadmissible any petition or communication that "is substantially the same as one previously studied by the Commission or by another international organization." There are no indications in the file that the subject of the petition is pending in another international proceeding for settlement or that it is substantially the same as one previously examined by this or any other international organization. Therefore, it must be declared that the requirements set forth in Articles 46.1.c and 47.d of the Convention have been duly met.

4. Characterization of the facts alleged

60. On the basis of the information submitted by the parties and the nature of the case being submitted for review, the Commission finds that, in the present petitions, it must determine whether or not the allegations of the petitioner with regard to the alleged violations of the rights to humane treatment, personal liberty, a fair trial and judicial protection, if proven, tend to establish a violation of rights guaranteed by Articles 5, 7, 8 and 25 of the American Convention, pursuant to Article 1.1 of the same treaty, to the detriment of Walter Ernesto Reyes Mantilla, José Frank Serrano Barrera and Vicente Hipólito Arce Ronquillo.

61. Likewise, regarding petition 12.087, with respect to the alleged failure to return the impounded car, the Commission must examine, when studying the merits of the case, the alleged violation of Article 21 of the American Convention in connection with Article 1.1.

62. Neither the American Convention nor the IACHR Rules of Procedure require a petitioner to identify the specific rights allegedly violated by the State in the matter brought before the Commission, although petitioners may do so. It is for the Commission, based on the system's jurisprudence, to determine in its admissibility report which provisions of the relevant Inter-American instruments are applicable and could be found to have been violated if the alleged facts are proven by sufficient elements. The Commission considers that the allegations regarding the impacts on the next of kin of the alleged victims stemming from the prolonged pretrial detention of the latter could tend to establish violations of Article 5 of the American Convention, with respect to Article 1.1.

63. Likewise, the Commission observes that the legal framework in force during the detention of Walter Ernesto Reyes Mantilla, José Frank Serrano Barrera and Vicente Hipólito Arce Ronquillo stipulated time-limits for pretrial detention, but excluded from this safeguard persons like them who were charged under the Law on Drugs and Psychotropic Substances; therefore, the IACHR deems that the alleged facts could tend to establish violations of Article 7 of the American Convention, with respect to its Articles 1.1 and 2.¹⁴

V. CONCLUSIONS

64. The Commission concludes that it is competent to hear the complaints lodged by the petitioners regarding the alleged violation of Articles 5, 7, 8 and 25 in keeping with Article 1.1 and 2 of the American Convention and Article 5 of the Convention to the detriment of the next of kin of the alleged victims and that they are admissible, as they meet the requirements set forth in Articles 46 and 47 of the American Convention.

65. It also concludes that it must declare the complaint of petition 12.089, regarding the alleged violation of Article 21 of the American Convention, inadmissible.

66. Based on the arguments of fact and law set forth above and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the petitions admissible as regards the alleged violation of articles 5, 7, 8, 21 and 25 of the American Convention in relation to Articles 1.1 and 2 of the same treaty.

2. To declare petition 12.089 inadmissible as regards Article 21 of the American Convention.

¹⁴ Cf. I/A Court of H.R., *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C, No. 35, paragraph 98.

3. To notify the Ecuadorian State and the petitioners of this decision.
4. To proceed with its examination of the merits of the case.
5. To make this decision public and include it in its Annual report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 3rd day of November 2011. (Signed): Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Rodrigo Escobar Gil, Second Vice-President; Paulo Sérgio Pinheiro, Felipe González, Luz Patricia Mejía Guerrero, and María Silvia Guillén, Commissioners.