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REPORT No. 156/17
PETITION 585-08
REPORT ON ADMISSIBILITY

CARLOS ALFONSO FONSECA MURILLO
ECUADOR

Approved by the Commission at its session No. 2110 held on November 30, 2017.
166th Special Period of Sessions.

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PETITION P-585-08
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 ECUADOR
 NOVEMBER 30, 2017

I. INFORMATION ABOUT THE PETITION

Petitioner:	Ecumenical Human Rights Commission (CEDHU)
Alleged victim:	Carlos Alfonso Fonseca Murillo
State denounced:	Ecuador
Rights invoked:	Articles 5 (Humane Treatment), 7 (Personal Liberty), 8 (Fair Trial) and 25 (Judicial Protection) of the American Convention on Human Rights, ¹ in relation to Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof

II. PROCEDURE BEFORE THE IACHR²

Date on which the petition was received:³	May 16, 2008
Date on which the petition was transmitted to the State:	April 23, 2012
Date of the State's first response:	October 24, 2012
Additional observations from the petitioner:	December 12, 2012 and June 6, 2017
Additional observations from the State:	October 27, 2014 and September 5, 2017

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (ratification instrument deposited on December 28, 1977) and Inter-American Convention to Prevent and Punish Torture (ratification instrument deposited on November 9, 1999)

¹ Hereinafter "Convention" or "American Convention."

² The observations presented by each party were duly transmitted to the opposing party.

³ After filing the petition, the petitioner requested information about its processing, on March 17, 2010 and January 19, 2011 and requested the Commission to admit the petition by submitting on January 9, 2012 a written document to expedite the process.

IV. ANALYSIS OF DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 5 (Humane Treatment), 7 (Personal Liberty), 8 (Fair Trial) and 25 (Judicial Protection) of the American Convention, in relation to its Articles 1.1 and 2; Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, under the terms of Section VI of this report
Timeliness of the petition:	May 16, 2008

V. ALLEGED FACTS

1. The petitioner indicates that Mr. Carlos Alfonso Fonseca Murillo (hereinafter "Mr. Fonseca Murillo" or "the alleged victim") was a civil employee at the 25th Logistic Support Brigade ("Support Brigade") of the Army of the Republic of Ecuador ("the State"), working for twenty-five years as a lathe operator.

2. The petitioning party asserts that on April 4, 2003, Mr. Fonseca Murillo was violently arrested without a judicial warrant by two men who tied his hands, covered his head with a balaclava and took him to the Geographic Institute, where Quito's Intelligence Office used to be and where he was held *incommunicado*. Once at these premises, his captors made him undress and interrogated him on whether he was involved with the FARC. At his denial, they beat him in the stomach, the ribs and the head; they threw cold water all over his body and electrocuted him, and trampled on his feet with the heels of their shoes. In the two following days, they kicked him and injured him; they threatened to go to his house and sexually abuse his wife, daughter and sons and to do the same to him, to the point of undressing him and pretending that they would rape him. The petitioner submits that on April 7, 2003 someone attacked Mr. Fonseca Murillo with a "foot strike in the rectum" as the latter was lying in fetal position. Then he was forced to make a statement in front of a video camera and, by physical aggression, made to confess that he was going to build a machine to fabricate ammunitions for the FARC. He was told to resign from the army and to "disappear" from Quito as soon as they released him; otherwise, his family would be at risk. On that same day, they took him to Amaguaña Avenue, took the balaclava off him and pushed him off the car to side of the road.

3. On the following day, Mr. Fonseca Murillo reported the foregoing to his superiors at the Support Brigade, and on April 10 he underwent a medical examination at the Health Specialties and Surgery Unit in Quito. Numerous traumas with bruises were found in his abdomen. Later, at the Hospital of the Social Security in Quito, he had an anal fissure surgery in view of the above acts of torture.

4. The petitioner indicates that on April 16, 2003, Mr. Fonseca Murillo appeared at the Office of the Commanding General of the Army to find out why he was being searched. At that moment, he was read an arrest warrant, detained by military staff and taken to the Detention Center of the Barracks of Epiclachima, by order of the Second Judge of the Military Criminal Court of Army Zone No. 1 ("Second Military Criminal Judge"). Said military criminal court filed a suit against him on the charge of acts against the security and existence of the Army, due to his alleged supply of lathe works to the FARC. Consequently, he was held in pretrial detention and a search warrant was executed on his house, where the authorities found material that Mr. Fonseca Murillo had received to make keyrings for the Army, according to the petitioner.

5. On June 18, 2003, the Second Military Criminal Judge revoked the pretrial detention order on the grounds that the elements found at Mr. Fonseca Murillo's domicile had been given to Mr. Fonseca Murillo by the army for the fabrication of key rings; that he did not have big amounts of money; and that his goods

had been acquired before May 1998; as a result of which, he did not seem to have received money from the FARC. On June 20, a release order was issued in favor of the alleged victim; however, the investigation continued. One year and a half later, on February 22, 2005, the Second Military Criminal Court ruled the conclusion of the preliminary investigation and forwarded the case to its hierarchical superior. Thus, on February 28, a Brigade General, Commander of the Army's First Division, acting as a judge of the appellate court (hereinafter "the Brigade General") ordered that the Area Second Prosecutor of the Army issue her opinion. On March 14, 2005, said Prosecutor concluded that the alleged victim did not commit any offense, did not accuse him and requested the Brigade General to dismiss the proceedings. Nevertheless, on April 7, 2006, the latter ordered to summon the alleged victim on the charges of stealing ammunition and profiting from acts contrary to military duties (Articles 184, 185.2 and 157 of the Military Criminal Code).

6. On April 12, the alleged victim lodged an appeal with the Military Court of Justice. On June 14, the Attorney General of the Military Court of Justice, by a judgment requested by said court, concluded that the acts attributed to Mr. Fonseca Murillo did not constitute a military infringement, and recommended the dismissal of proceedings. However, by its decision of July 25, the Court admitted only the remedy concerning articles 184 and 185.2 of the Military Criminal Code, on the grounds that there was reason to continue the proceedings in relation to the acts described in article 157, which consists in obtaining money, promises or offers in exchange for any action contrary to military duties. As a result, on November 23, 2005, before issuing his verdict, the Brigade General requested the Military Attorney General's opinion concerning article 157 of the Military Criminal Code, who, on January 12, 2007, decided not to accuse the alleged victim. Despite this judgment, on April 11, 2007, the Brigade General sentenced Mr. Fonseca Murillo to a two-year prison term for the abovementioned offense.

7. To contest this decision, on April 19, the alleged victim filed a second appeal at the Military Court of Justice, claiming that the Brigade General failed to consider article 251 of the Criminal Code of Procedure –under which the trial stage applies only based on the final accusation–, invented acts not proved in the proceedings, and failed to consider that under the January 22, 2007 reform of the Law for Army Staff "civil employees were excluded from military trial." On September 18, the Military Court of Justice rejected the appeal and confirmed the conviction; but changed it to a one-year term. In view of this decision, on September 27, 2007, the alleged victim lodged an appeal for review before the National Supreme Court of Justice but this court dismissed it on October 17, on the grounds that military trials consist in only two instances, the last of which is the Military Court of Justice; and that appeals for review are not applicable in said jurisdiction. Later, on April 10, 2008, the alleged victim filed an appeal for review before the Second Military Criminal Judge, who, by a resolution dated October 28, commuted the alleged victim's punishment to 328 days; by then, Mr. Fonseca Murillo had already served 50 per cent of it. The petitioner indicates that the alleged victim was finally released on October 29, 2008.

8. The petitioner alleges that Mr. Fonseca Murillo reported the acts of torture committed against him in the following occasions: (a) on April 22, 2003 before the Second Military Criminal Judge and the Area Second Prosecutor of the Army, in his initial statement in the investigation; (b) on April 25, 2003 before the same judge, in a new investigatory witness statement; (c) on October 6, 2006 before the Brigade General by a written statement; and (d) on August 31, 2007, before the Military Court of Justice through a written document submitted by his lawyers, by which they requested the review of the guilty verdict. In addition, a statement was filed before the Truth Commission established in 2007 and was included in the Final Report of said Commission (Section of investigated cases, Case 102, page 380, references on pages 235 and 236). The petitioner also indicates that in said document the Truth Commission includes a survey of the place where Mr. Fonseca Murillo was arrested and of the acts of torture that he was subjected to.

9. In sum, the petitioner claims that the denounced acts violated the alleged victim's rights to personal integrity, personal liberty, a fair trial and judicial protection; and that his arbitrary detention and the several acts of torture against him by means of physical and psychological aggression have not yet been punished.

10. For its part, the State alleges that Mr. Fonseca Murillo's case was processed by the Military Court in Ecuador based on the information available then, and that on April 7, 2003 a report was prepared

concerning links between army staff and Colombian guerrilla groups that revealed that the former had fabricated spare parts for AK-47 rifles for Colombian guerrilla members. For this reason, measures were issued against the accused, such as his pretrial detention and a search on his house, where high-caliber ammunitions and other elements for military use were purportedly found.

11. It also submits that the criminal proceedings against Mr. Fonseca Murillo came to an end when the appeal against the lower-court ruling was settled; and that the subsequent remedies as well as the special remedies filed by the alleged victim's defense counsel cannot be considered in determining the compliance with the six-month term presentation requirement foreseen in Article 46.1.b of the American Convention for the admissibility of petitions. Therefore, to the State, this petition was lodged with the IACHR beyond said term.

12. The State claims that on May 3, 2007, Ecuador created a Truth Commission that concluded its work by submitting its final report on June 7, 2010. In this report, conclusions and recommendations were made to obtain full redress for the allegedly identified victims. In view of these measures, the Attorney General filed a pre-trial investigation on Mr. Fonseca Murillo to verify the possible commission of wrongful and/or arbitrary detention and torture. In this regard, the State alleges that said investigation and reparation procedures undertaken after the Truth Commission's final report are subsequent to the filing of the petition, and that, as a result, these should be considered as remedies to be exhausted prior to deciding on the petition's admissibility. It also believes that the Inter-American Commission should give the State the opportunity to make reparations to the alleged victim by means of said mechanisms, and declare this petition inadmissible.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

13. As to the alleged acts of torture perpetrated against the alleged victim, the Commission reiterates that under international standards applicable to cases like this one, where serious human rights violations such as torture are alleged, the appropriate and effective remedy is precisely the filing and the undertaking of an effective criminal investigation aimed at the clarification of the facts and, if necessary, individualize the persons responsible and attribute the corresponding responsibilities.

14. In this regard, from the information provided by the parties, the Commission draws the following: (a) Mr. Fonseca Murillo reported these acts to his superiors of the Support Brigade where he worked, on the day following his release by his captors; (b) in the days immediately following his alleged torture, he underwent examinations and a surgery in two state hospitals and it was evidenced that he had been subjected to severe physical torture; and (c) he officially reported these acts at least four times to the military-judicial courts that tried him and no investigation was filed *ex officio* by any public authority. In addition, (d) the State asserts that as a result of the conclusions made by the Truth Commission, on November 14, 2010 a "pre-trial" investigation was open for the alleged wrongful and/or arbitrary detention and torture of Mr. Fonseca Murillo –which is still in its initial stage, according to the State's recent communication of September 5, 2017 to the IACHR. Therefore, the Commission concludes that the exception for unwarranted delay in the exhaustion of domestic remedies, set forth in Article 46.2.c of the American Convention is applicable to this case.

15. As to the lawsuit filed against the alleged victim in the military jurisdiction, the Commission believes that the last remedy exhausted was the appeal for review lodged with the Second Military Criminal Court on April 10, 2008, which was settled in favor of Mr. Fonseca Murillo on October 28 of the same year. In this regard, and in view of the fact that the alleged victim had already filed and exhausted the corresponding ordinary remedies, along with other special ones, the Commission concludes that the petition meets the requirement set forth in Article 46.1.a of the Convention regarding this aspect.

16. Likewise, the Commission notes that the petition was received on May 16, 2008 and that the alleged acts at issue began on April 4, 2003 and its effects concerning the alleged lack of investigation and punishment of said acts and the lack of reparation to the alleged victim continue to this date. As a result, in light of the context and the characteristics of this case, the Commission believes that the petition was filed in a

reasonable time, under the terms of Article 32.2 of the IACHR Rules of Procedure and pursuant to Article 46.1.b of the American Convention.

17. In this regard and in response to the State's claim of the purportedly untimely filing of this petition, the Commission recalls that although in a case like this one, in principle, it may be enough that the alleged victim exhaust ordinary remedies, if they exhaust special remedies in the reasonable expectation that they will obtain a favorable result, then these should be deemed as validly exhausted remedies when determining the petition's compliance with the admissibility requirements.

VII. COLORABLE CLAIM

18. In view of the elements of fact and law presented by the parties and the nature of the matter brought to its attention, the Commission believes that, if proved, the alleged acts may represent violations of the rights enshrined in Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial) and 25 (judicial protection) of the American Convention, in relation to the general obligations established in its Articles 1.1 and 2; as well as Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Mr. Carlos Alfonso Fonseca Murillo.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 7, 8 and 25 of the American Convention, in connection with its Articles 1.1 and 2; and in relation to Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture;

2. To notify the parties of this decision;

3. To continue with the analysis on the merits; and

4. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 30th day of the month of November, 2017. (Signed): Francisco José Eguiguren, President; Margarette May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, James L. Cavallaro, and Luis Ernesto Vargas Silva, Commissioners.