INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF MONTESINOS MEJÍA V. ECUADOR

JUDGMENT OF JANUARY 27, 2020

(Preliminary objections, merits, reparations and costs)

In the case of Montesinos Mejía*,*

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following Judges:[*]

Elizabeth Odio Benito, President;
Eduardo Vio Grossi, Judge;
Humberto Antonio Sierra Porto, Judge;
Eduardo Ferrer Mac-Gregor Poisot, Judge;
Eugenio Raúl Zaffaroni, Judge; and
Ricardo Pérez Manrique, Judge

also present,

Pablo Saavedra Alessandri, Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter, "the American Convention" or "the Convention") and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules") issues this Judgment, which is structured as follows:

[*] Judge L. Patricio Pazmiño, an Ecuadorian national, did not participate in the deliberation of this judgment, pursuant to Articles 19(2) of the Statute and 19(1) of the Rules of Procedure of the Court.

TABLE OF CONTENTS

I INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE.... ¡Error! Marcador no definido.
II PROCEEDINGS BEFORE THE COURT... ¡Error! Marcador no definido.
III JURISDICTION.. ¡Error! Marcador no definido.
IV PRELIMINARY OBJECTIONS... ¡Error! Marcador no definido.
A. Lack of jurisdiction of the Court ratione temporis................. *¡Error! Marcador no definido.*
B. Failure to exchaust domestic remedies................................ *¡Error! Marcador no definido.*
C. Lack of jurisdiction ratione materiae to review domestic decisions.... *¡Error! Marcador no definido.*
D. Control of legality of the actions of the Inter-American Commission.. *¡Error! Marcador no definido.*
V EVIDENCE... ¡Error! Marcador no definido.
VI FACTS .... ¡Error! Marcador no definido.
A. Arrest of Mr. Montesinos in the context of the "Cyclone" police operation .... *¡Error! Marcador no definido.*
B. Pretrial detention of Mr. Montesinos.................................... *¡Error! Marcador no definido.*
C. Regarding the crimes of illegal enrichment and conversion and transfer of assets *¡Error! Marcador no definido.*
D. Regarding the crime of testaferrismo .... *¡Error! Marcador no definido.*
VII MERITS .... ¡Error! Marcador no definido.
VII-1 RIGHT TO PERSONAL LIBERTY, TO THE PRESUMPTION OF INNOCENCE AND TO EQUALITY BEFORE THE LAW .... ¡Error! Marcador no definido.
A. Arguments of the parties and the Commission .... *¡Error! Marcador no definido.*
B. Considerations of the Court .... *¡Error! Marcador no definido.*
B.1 Initial arrest and pretrial detention of Mr. Montesinos .... **¡Error! Marcador no definido.**
B.2 Review of pretrial detention .... **¡Error! Marcador no definido.**
B.3 Reasonableness of the period of pretrial detention .... **¡Error! Marcador no definido.**
B.4 Right to have recourse to a judge regarding the legality of the detention **¡Error! Marcador no definido.**
B.5 Presumption of innocence .... **¡Error! Marcador no definido.**
B.6 Conclusion .... **¡Error! Marcador no definido.**
VII-2 RIGHT TO PERSONAL INTEGRITY AND OBLIGATION TO INVESTIGATE COMPLAINTS OF TORTURE .... ¡Error! Marcador no definido.
A. Arguments of the parties and the Commission .... *¡Error! Marcador no definido.*
B. Considerations of the Court .... *¡Error! Marcador no definido.*
VII-3 RIGHT TO JUDICIAL GUARANTEES....................................... ¡Error! Marcador no definido.
A. Arguments of the parties and the Commission .... *¡Error! Marcador no definido.*
B. Considerations of the Court .... *¡Error! Marcador no definido.*
B.1 Regarding Article 8 of the Convention................................. **¡Error! Marcador no definido.**
B.2 Reasonable time of criminal proceedings (Article 8(1) Convention)......... **¡Error! Marcador no definido.**
B.3 Right of defense .... **¡Error! Marcador no definido.**
B.4 Rule of exclusion of evidence obtained under coercion .... **¡Error! Marcador no definido.**
B.5 Right to not be subjected to a new trial for the same facts ..... **¡Error! Marcador no definido.**
VII-4 PRINCIPLE OF LEGALITY AND NON-RETROACTIVITY, PROTECTION OF HONOR AND DIGNITY AND RIGHT TO PROPERTY .... ¡Error! Marcador no definido.
A. Arguments of the parties.. *¡Error! Marcador no definido.*
B. Considerations of the Court .... *¡Error! Marcador no definido.*
VIII REPARATIONS .... ¡Error! Marcador no definido.
A. Injured party.. *¡Error! Marcador no definido.*
B. Measures of satisfaction and restitutions .... *¡Error! Marcador no definido.*
C. Investigation of acts of torture.. *¡Error! Marcador no definido.*
D. Measures of rehabilitation .... *¡Error! Marcador no definido.*
E. Compensation... *¡Error! Marcador no definido.*
F. Other measures of reparation requested .... *¡Error! Marcador no definido.*

G. Costs and expenses .... *¡Error! Marcador no definido.*
H. Reimbursement of expenses to the Victims' Legal Assistance Fund.... *¡Error! Marcador no definido.*
I. Mode of compliance with the payments ordered .... *¡Error! Marcador no definido.*
IX OPERATIVE PARAGRAPHS... ¡Error! Marcador no definido.

I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On April 18, 2018, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court the case of Montesinos Mejía against the Republic of Ecuador (hereinafter "the State", "the Ecuadorian State" or "Ecuador"), pursuant to Articles 51 and 61 of the American Convention. The case concerns the alleged unlawful and arbitrary detention of the alleged victim in 1992, the acts of torture committed against him, and the lack of judicial guarantees in the criminal proceedings brought against him. The Commission considered that the State violated the rights to personal integrity, personal liberty, judicial guarantees and judicial protection to the detriment of Mr. Mario Montesinos Mejía.

2. *Procedure before the Commission.* The procedure before the Inter-American Commission was as follows:

a) *Petition.* On August 30, 1996, the Commission received a petition presented by Alejandro Ponce Villacís against Ecuador.

b) *Admissibility and Merits Report.* On December 10, 1996, the State presented its observations on the admissibility of the complaint. On February 9, 2004, the Commission informed the parties that, pursuant to Article 37(3) of its Rules of Procedure then in force, it had decided to defer the admissibility process until after the discussion and decision on the merits. On March 9, 2004, the petitioner presented additional observations. On July 15, 2016, the State presented additional observations on the admissibility and the merits. Finally, on October 25, 2017, the Commission issued Admissibility and Merits Report No. 131/17 (hereinafter "Merits Report"), pursuant to Article 50 of the American Convention, in which it determined that the only victim was Mr. Mario Montesinos Mejía. It also reached a series of conclusions[1] and made various recommendations to the State.

c) *Notification to the State.* On January 18, 2018, the Commission notified the Merits Report to the State, granting it two months to report on its compliance with the recommendations. Ecuador did not present substantive information on the progress made in complying with the recommendations and, furthermore, did not request an extension in accordance with the Commission's Rules of Procedure for such purposes.

3. *Submission to the Court.* On April 18, 2018, the Commission submitted to the Court all the facts and human rights violations described in its Merits Report.

II
PROCEEDINGS BEFORE THE COURT

[1] It concluded that Ecuador was responsible for the violation of Articles 5(1), 5(2), 7(1), 7(2), 7(3), 7(4), 7(5), 7(6), 8(1), 8(2), 8(2)(d), 8(3), 24, 25(1), 25(2)(c) of the American Convention, in relation to Articles 1(1) and 2 of said instrument.

4. *Notification to the State and to the representative.* On May 9, 2018, the submission of the case was notified to the State, to the representative of the alleged victim and to the Commission.

5. *Brief of pleadings, motions and evidence.* On June 29, 2018, the representative presented his brief of pleadings, motions and evidence (hereinafter "pleadings and motions brief"), pursuant to Articles 25 and 40 of the Rules of the Court.[2] In his brief the representative agreed in general terms with the arguments presented by the Inter-American Commission but in addition alleged the violation of Articles 5(3), 7(4), 11 and 21 of the American Convention to the detriment of Mr. Montesinos and his wife.

6. *Preliminary objections and answer brief.* On September 6, 2018, the State submitted a brief containing preliminary objections and its answer to the submission of the case (hereinafter "answer" or "answering brief"), as well as observations to the pleadings and motions brief, pursuant to Article 41 of the Court's Rules of Procedure.[3] The State filed four preliminary objections.

7. *Observations to the preliminary objections.* Through briefs received on October 17 and 19, 2018, the representatives and the Inter-American Commission presented, respectively, their observations to the preliminary objections. The Commission's brief was considered to be time-barred and, therefore, inadmissible, since the term granted for presenting its observations expired on October 18, 2018.

8. *Legal Assistance Fund*. In a letter dated October 31, 2018, the Secretariat of the Inter-American Court of Human Rights admitted the request of the alleged victim to have recourse to the Victims' Legal Assistance Fund of the Court.

9. *Public hearing.* On June 25, 2019, the President of the Court issued an Order[4] summoning the parties and the Commission to a public hearing on the preliminary objections and possible merits, reparations and costs, and to hear the final oral arguments and observations of the parties and of the Commission, respectively. The President further ordered that the statements of one witness and an expert witness proposed by the representative and the State be received. In addition, she requested the affidavits rendered by the alleged victim, six witnesses and three expert witnesses, proposed by the representative and the State. The public hearing took place on August 29, 2019, during the Court's 62nd Special Session, held in Barranquilla, Colombia.[5]

[2] The representative requested that the Court declare the international responsibility of the State for the violation of: 1) the right to personal integrity (Article 5(1), 5(2) and 5(3) of the American Convention); 2) the right to personal liberty (Article 7(1), 7(2), 7(3), 7(4), 7(5), 7(6) of the American Convention); 3) the right to judicial guarantees (Article 8(1), 8(2), 8(2)(b), 8(2)(d), 8(3) and 8(4) of the American Convention); 4) the principle of legality and non-retroactivity (Article 9 of the Convention); 4) the right to protection of honor and dignity (Article 11 of the Convention); 5) the right to private property (Article 21 of the Convention); 6) the principle of equality before the law (Article 24 of the Convention) and 7) the right to judicial protection (Article 25(1), 25(2)(a) and 25(2)(c) of the Convention), all in relation to Articles 1(1), 2 and 3 of the American Convention.

[3] On that occasion the State appointed Carlos Espín Arias as its Agent for this case, and Daniela Ulloa Saltos and Alonso Fonseca as Alternate Agents.

[4] *Cf. Case of Montesinos Mejía v. Ecuador, Order of the President of the Inter-American Court of Human Rights* of June 25, 2019. Available at: http://www.Courtidh.or.cr/docs/asuntos/montesinosmejia_25_06_19.pdf.

[5] The following persons appeared at the public hearing: a) for the Inter-American Commission: Luis Ernesto Vargas, Marisol Blanchard, Jorge H. Meza Flores, Piero Vásquez Agüero, Analía Banfi Vique; b) the representative of the alleged victim: Alejandro Ponce Villacís; c) for the State: María Fernanda Álvarez Alcivar, National Director of Human Rights of the Attorney General's Office, Alonso Fonseca Garcés, National Director of Human Rights of the Attorney General's Office and Carlos Espín Arias, Agent.

10. *Final written arguments and observations.* On September 27, 2019, the Commission, the representatives and the State submitted their final written observations and arguments, respectively.

11. *Expenditures of the Legal Assistance Fund.* On October 23, 2019, following the instructions of the President of the Court, the Secretariat provided the State with information on the expenditures made in the application of the Victims' Legal Assistance Fund in this case and, as established in Article 5 of the Court's Rules on the Operation of the Fund, granted a period to submit any observations deemed pertinent. The State did not present any observations.

12. *Deliberation of this case*. The Court began its deliberations on this Judgment on January 27, 2020.

III
JURISDICTION

13. The Inter-American Court has jurisdiction to hear this case, pursuant to Article 62(3) of the Convention, given that Ecuador has been a State Party to the American Convention since December 28, 1977, and accepted the Court's contentious jurisdiction on July 24, 1984.

IV
PRELIMINARY OBJECTIONS

14. In its answer brief, the State submitted four preliminary objections related to: a) the Court's lack of jurisdiction *ratione temporis*, b) the failure to exhaust domestic remedies, c) the Court's lack of jurisdiction *ratione materiae* and the use of the Inter-American System of Human Rights as a fourth instance in relation to the criminal trial for *testaferrismo* or *front operations* (i.e. acting as a "front" in commercial transactions), and d) control of legality of the actions of the Commission and violation of the State's right of defense (Article 48(1)(b) of the American Convention).

A. The Court's lack of jurisdiction ratione temporis

A.1 Arguments of the State and of the representative

15. The ***State*** argued that the Court does not have jurisdiction to examine violations of treaties and conventions ratified by the State after the date of the alleged violations. Although Ecuador ratified the Inter-American Convention to Prevent and Punish Torture (hereinafter "IACPPT") on September 30, 1999, the facts alleged by the representatives and the Commission took place in June 1992. It further argued that the acts of torture alleged are of an immediate nature and effect, so that no liability could be established since this would occur retroactively.

16. Regarding the alleged failure to investigate and punish the facts, the State indicated that given the instantaneous nature of the crime of torture, the alleged failure to investigate could not be analyzed.

17. The ***representative*** pointed out that Ecuador signed the IACPPT in May 1986 and ratified it in September 1999. He added that, regardless of the date on which the treaty was ratified, Ecuador's obligation predates even the treaty itself. Therefore, the Court can rule on the alleged violations, in terms of non-compliance with the international norms of mandatory law.

A.2 Considerations of the Court

18. The State ratified the Inter-American Convention to Prevent and Punish Torture on September 30, 1999, and deposited the document of ratification with the General Secretariat of the Organization of American States on November 9,1999. The treaty entered into force for Ecuador, in accordance with Article 22, on December 9, 1999. Based on this and on the principle of non-retroactivity, codified in Article 28 of the 1969 Vienna Convention on the Law of Treaties, the Court may examine acts or facts that have taken place after the date of entry into force of said treaty for the State[6] and that have resulted in violations of human rights.

19. In view of the foregoing, this Court considers that it does not have jurisdiction to rule on the alleged torture to which the alleged victim was subjected on the basis of the IACPPT, but rather as a possible violation of Article 5 of the American Convention on Human Rights. Furthermore, as it has done in other cases,[7] the Court decides that it does have jurisdiction *ratione temporis* to analyze the alleged violation of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture with respect to the alleged failure to investigate the facts after December 9, 1999, as is argued both by the Commission and the representatives in the instant case. In view of the foregoing, the Court dismisses the preliminary objection filed by the State.

B. Failure to exhaust domestic remedies

B.1 Arguments of the State and of the representative

20. The ***State*** pointed out that as of the date of presentation of the initial petition to the Commission, the domestic remedies in the three criminal proceedings against the alleged victim had not yet been exhausted.

21. It indicated that making a claim before the Inter-American System without having exhausted domestic remedies would be contrary to the provisions of the Convention, generating two parallel and simultaneous proceedings on the same facts, one in the national jurisdiction and the other at the international level. It reiterated that the fact that a petitioner files a claim before the Inter-American system when proceedings are still ongoing in the domestic sphere means that the principle of subsidiarity is not observed. It added that this situation would cause changes in the case and therefore uncertainty for the parties.

22. With respect to the burden of proof that the State has to argue regarding the exhaustion of remedies and their effectiveness, it referred to the remedies within the criminal proceedings for the crime of front operations *(testaferrismo*), the application for amparo while at liberty in the three criminal trials and finally the *habeas corpus*[8] that concluded with the order to release the alleged victim.

23. The ***representative*** pointed out that the allegation of failure to exhaust remedies in the domestic jurisdiction was not made immediately after the filing of the initial petition, but

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[6] *Cf. Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 61 and *Case of Terrones Silva et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2018. Series C No. 360, para. 33.

[7] *Cf. Case of the Gómez Paquiyauri Brothers v. Peru. Merits, reparations and costs.* Judgment of July 8, 2004. Series C No. 110, para. 196, *Case of Tibi v. Ecuador, para. 62, Case of J v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of November 27, 2013. Series C No. 291, para. 21 and *Case of Terrones Silva et al. v. Peru,* para. 34.

[8] In this Judgment the Court will use the term "habeas corpus" as provided for in the Constitution of the Republic of Ecuador.

rather in 2016, that is, almost 20 years after the petition was filed. This would imply a tacit waiver to file the objection of failure to exhaust domestic remedies. He also mentioned that at the time of filing the initial petition, the exceptions established in Article 46(2) of the Convention were in operation. He also mentioned that the writ of *habeas corpus* filed after the filing of the initial petition did not imply the failure to exhaust domestic remedies because, on the contrary, it confirmed the ineffectiveness of the existing domestic remedies in Ecuador in the case of Mr. Montesinos. He added that the alleged victim was not required to exhaust remedies of an extraordinary nature.

B.2 Considerations of the Court

24. Article 46(1)(a) of the American Convention establishes that in order to determine the admissibility of a petition or communication submitted to the Commission, pursuant to Articles 44 and 45 of the Convention, the remedies under domestic law must have been pursued and exhausted, based on generally recognized principles of international law.[9]

25. In this regard, the Court has developed clear guidelines for analyzing a preliminary objection based on an alleged failure to comply with the requirement to exhaust domestic remedies. First, it has interpreted the objection as a defense available to the State, as a defense available to the State, which as such it may waive, either expressly or tacitly. Second, it has established that this objection must be presented in a timely manner, during the admissibility proceedings before the Commission, and that the State must clearly specify the remedies that it considers have not been exhausted. Third, the Court has affirmed that the State presenting this objection must specify the domestic remedies that are effective and that have not yet been exhausted.[10]

26. On this matter, the Court notes that in its first answering brief to the Commission, dated December 10, 1996, the State limited itself to submitting documentation on the domestic process, without alleging the failure to exhaust domestic remedies or indicating those that had not been exhausted and were effective. In other words, it did not present arguments on the admissibility of the case. Ten years later, on July 15, 2016, the State ruled on the admissibility of the case, and alleged that certain remedies had not been exhausted at the time the petition was lodged with the Commission and, subsequently, during the course of the criminal proceeding related to front operations (*testaferrismo*).

27. With regard to the moment for assessing the exhaustion of remedies, the Court has ruled that this should be when the decision on the admissibility of the petition is made and not on the date of presentation of the petition.[11] Thus, at the time of the issuance of the Commission's Report on Admissibility and Merits, Mr. Montesinos had exhausted all the remedies. In relation to the State's argument on the need to exhaust the remedy of review, the Court considers that this argument was not presented to the Commission and is therefore time-barred.

28. In view of the foregoing, the Court declares this preliminary objection inadmissible.

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[9] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections. Judgment of June 26, 1987. Series C No. 1, para. 85 and Case of López Soto et al. v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2019. Series C No. 396, para. 20.

[10] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections,* para. 88 and *Case of López Soto et al. v. Argentina,* para. 21.

[11] *Case of Wong Ho Wing v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2015. Series C No. 297, para. 25 and *Case of Díaz Loreto. Preliminary objections, merits, reparations and costs.* Judgment of November 19, 2019. Series C No. 392, para. 18.

C. Lack of jurisdiction ratione materiae to review domestic decisions ("fourth instance objection")

C.1 Arguments of the State and of the representative

29. The ***State*** mentioned that international bodies do not have jurisdiction to examine alleged errors of fact and law that may have occurred in national courts, except when human rights norms protected by international treaties have been flagrantly violated. It argued that that the intention of the alleged victim is to use the Inter-American System as a court of appeal with respect to the criminal proceeding against him for the crime of front operations (*testaferrismo*).

30. It added that Mr. Montesinos' intention was to allege the violation of rights only in the trial in which the result was adverse to him, without mentioning any violation in relation to the other two criminal proceedings in which he was acquitted. It held that there is no doubt that the alleged victim's intention is focused on having the Court overturn the decisions of the national court on the facts and circumstances of the case and, as if it were a higher instance than the national bodies, order the annulment of the criminal proceedings against him.

31. The ***representative*** argued that the Court has not been asked to assess the evidence in the domestic proceedings nor has it been asked to rule on the application of Ecuadorian domestic norms with respect to the trial of Mario Montesinos. On the contrary, it has been asked to rule on the conduct of the State in the proceedings in relation to its international obligations under the American Convention. The Court considers that it is important for the Inter-American Court to rule on the value of actions and evidence that originate in human rights violations, such as the taking of statements while a person is held incommunicado or the issuance of a police report obtained and generated during the incommunicado detention.

C.2 Considerations of the Court

32. The Court has reiterated that one of the characteristics of the international jurisdiction is its adjuvant and complementary nature. Thus, in order for the preliminary objection of fourth instance to be applicable, the petitioner would need to apply to the Court for a review of the decision of the domestic court, based on its incorrect assessment of the evidence, the facts or domestic law, without alleging a violation of the international treaties over which the Court has jurisdiction.[12]

33. Furthermore, this Court has established that, in assessing compliance with certain international obligations, there may be an intrinsic interrelationship between the analysis of international law and domestic law. Therefore, the determination of whether or not the actions of judicial bodies constitute a violation of the State's international obligations may lead it to examine the respective domestic proceedings to establish their compatibility with the American Convention.[13] Thus, although this Court is not a fourth instance of judicial review and does not examine the assessment of evidence carried out by national judges, it is competent, exceptionally, to decide on the content of judicial decisions that clearly contravene the American Convention in a manifestly arbitrary manner and, consequently, engage the international responsibility of the State.

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[12] *Cf. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010, Series C No. 220, para. 18 and *Case of Díaz Loreto et al. v. Venezuela*, para. 20.
[13] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 222 and *Case of Díaz Loreto et al. v. Venezuela,* para. 21.

34. In this particular case, the Court considers that the arguments made by the representative do not seek to have this Court analyze the decisions of the domestic courts, the facts established therein or the application of domestic law. Rather, they allege the violation of the victim's rights within the system of administration of criminal justice, which would have resulted in arbitrary detention, acts of torture and being held incommunicado.

35. Bearing in mind the foregoing and considering, moreover, that the assessment of whether the proceedings and the judgment contravened the provisions of the Convention is a matter of substance, the Court dismisses this preliminary objection.

D. Control of legality of the actions of the Inter-American Commission

D. 1 Arguments of the State and of the representative

36. The ***State*** argued that as a result of the passage of time in the proceeding before the Commission, difficulties arise for its defense, since it was forced to modify its objections due to factual changes in the proceeding. It indicated that the passage of time without resolving the matter creates legal uncertainty for the parties, reduces the possibilities of defense and violates the legality with which the Commission must act.

37. The ***representative*** argued that the delay in the case before the Commission does not prejudice the State, but rather the alleged victim. He mentioned that, in principle, this delay corresponds to the Commission, but it is also attributable to the member states of the Organization of American States, since they do not ensure that the Organization has all the tools to achieve a more efficient protection of human rights. In addition, the representative stated that "during the last decade there have been significant efforts on the part of certain states of the continent to seek an institutional weakening of the Commission. Certainly the Republic of Ecuador has been one of those that has led the quest for such a weakening."

D.2 Considerations of the Court

38. This Court has already ruled on the control of legality of the proceedings before the Commission. In this regard it has stated that this is applicable when there has been a grave error that violates the State's right of defense, which justifies the inadmissibility of a case submitted to the Court.[14] It is thus appropriate to analyze whether the Commission's actions resulted in a violation of the State's right of defense.

39. Although the Court notes that the proceedings before the Commission lasted more than 21 years, the State's argument regarding the alleged violation of the right of defense is limited to the fact that, owing to the passage of time, "difficulties arise for the State's defense strategy," since "it has been forced to modify its initial objections on admissibility, given that the factual relationship changed and the grounds for the proposed objection would be insufficient." The Court considers that this argument does not provide specific grounds for the inadmissibility of the case, because although the passage of time has meant that the State has had to change its defense strategy regarding preliminary objections, it does not imply that there has been a serious error that has prevented it from exercising its right of defense before the Commission or the Court.

[14] *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2006. Series C No. 158, para. 66, and *Case of Herrera Espinoza et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2016. Series C No. 316, para. 39.

40. The Court considers that the time elapsed in the processing of the case before the Commission fundamentally prejudices the alleged victims, whose right of access to inter-American justice is affected.

41. Therefore, the Court rejects this preliminary objection.

V
EVIDENCE

42. The Court admits those documents submitted by the parties and the Commission (Article 57 of the Rules of Procedure) at the proper procedural opportunity, the admissibility and authenticity of which was neither contested nor challenged.[15] The Court also finds it pertinent to admit the statements provided at the public hearing and by affidavit,[16] as well as the expert opinions[17] insofar as they are in keeping with the purpose defined by the President in the order requiring them and the purpose of this case.

43. As to the procedural opportunity for presenting documentary evidence, in accordance with Article 57(2) of the Rules, this should generally be presented along with the briefs submitting the case, of pleadings and motions or the answer brief, as appropriate. The Court recalls that evidence provided outside of the proper procedural opportunities is not admissible, except in the circumstances established in the aforementioned Article 57(2) of the Rules, namely, *force majeure*, serious impediment or if it concerns a fact that occurred after (supervening fact) the cited procedural moments.[18]

44. As to the evidence provided during the public hearing, the Court received the statements of the witness Marcia González Rubio, proposed by the representative, and the expert opinion provided by Leonardo Jaramillo, proposed by the State. The Court also received the affidavits of Marcella de Fonte, proposed by the State; and Maritza Montesinos González, María del Carmen Montesinos González, Vinicio Montesinos González, Rafael Iván Suárez Rosero and Reinaldo Aníbal Calvachi Cruz, proposed by the representative. The ***representative*** objected to the expert opinion of Leonardo Jaramillo, while the ***State*** presented objections to the statements of Marcia González Rubio, Maritza Montesinos González, María of the Carmen Montesinos González, Vinicio Montesinos González, Rafael Iván Suárez Rosero and Reinaldo Aníbal Calvachi Cruz. These objections do not relate to the admissibility of the evidence, but rather to the purpose and scope of the statements. In conclusion, the Court deems it pertinent to admit the statements rendered during the public hearing and by affidavit, insofar as they are in keeping with the purpose of the Order that required them and the purpose of this case.

VI
FACTS

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[15] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Jenkins v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 26, 2019, para. 38.

[16] These were presented by: Marcia González Rubio, Maritza Montesinos González, María del Carmen Montesinos González, Vinicio Montesinos González, Rafael Iván Suárez Rosero and Reinaldo Aníbal Calvachi Cruz, proposed by the representative; and Leonardo Jaramillo, Marcella da Fonte, proposed by the State. The purpose of these statements was established in the Order of the President of the Court of February 14, 2019.

[17] In the instant case the Court decided to require the expert opinions of Ernesto Albán Gómez and Mario Luis Coriolano, rendered in the cases of *Suárez Rosero v. Ecuador and Herrera Espinoza et al. v. Ecuador*, in an Order dated June 25, 2019 (merits file, folio 448).

[18] *Cf. Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs.* Judgment of October 13, 2011. Series C No. 234, para. 22, and *Case of Arrom Suhurt et al. et al. v. Paraguay. Merits.* Judgment of May 13, 2019. Series C No 377, para. 40.

A. Arrest of Mr. Montesinos in the context of the "Cyclone" police operation

45. The facts of this case took place within the framework of Ecuador's war against drug-trafficking. In that context, on June 19, 1992, the Anti-narcotics Intelligence Service of the National Police of Ecuador launched "Operation Cyclone" in an effort to dismantle a large drug-trafficking organization.[19] The operation entailed the arrest of several individuals and the search of residences allegedly tied to the drug-trafficking organization, which resulted in the seizure of weapons, ammunition and explosives.[20]

46. On June 21, 1992, police agents arrested Mario Alfonso Montesinos Mejía who was intercepted while driving his car in the city of Quito, Ecuador.[21] At the time of his arrest Mr. Montesinos was accompanied by his wife and sister.[22] During the arrest, the police officers reportedly told Mr. Montesinos that they had a search warrant to enter his home which, according to the police officer involved, had been issued by the First Commissioner of Canton de Quito.[23] The Court notes that the file does not contain the aforementioned order for his arrest or for the search of his home. That same day Mr. Montesinos was given a medical examination, after which the diagnostic report stated "no observations."[24]

47. After his arrest, police agents took Mr. Montesinos to his residence and kept him inside the police vehicle for approximately two hours[25] while they seized various weapons from his house.[26]

B. Pretrial detention of Mr. Montesinos

48. On June 25, 1992, Mr. Montesinos made a statement before the National Directorate of Investigations without the presence of a legal representative.[27] In that statement he mentioned that while working as supervisor of the Hacienda "El Prado" he had met Mrs. Daira Levogyre, who, a few days prior to his arrest, had sent two individuals to his home to leave several weapons in his custody.[28] Following his arrest Mr. Montesinos was escorted by two

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[19] Investigative report No. 080-JPEIP-CP1-92 (evidence file, folio 4).

[20] Investigative report No. 080-JPEIP-CP1-92 (evidence file, folio 6).

[21] At the time of the events Mr. Mario Montesinos was 52 years old. Three years earlier he had requested voluntary discharge from the Ecuadorian Army. During his military career he attained the rank of Colonel and held senior positions; he worked directly with the Presidency of the Republic as an adviser of then President Febres Cordero on anti-drugs issues. After obtaining military discharge, he went on to administer a property. Report submitted to the Chief of the Office of Criminal Investigation (evidence file, folio 18 and 2089).

[22] Report submitted to the Chief of the Office of Criminal Investigation (evidence file, folio 18 and 2089).

[23] Report submitted to the Chief of the Office of Criminal Investigation (evidence file, folio 18 and 2089).

[24] Police Medical Certificate of Mr. Mario Alfonso Montesinos Mejía, document issued on July 27, 1992 (evidence file, folio 44).

[25] Communication of the petitioners of August 30, 1996 (evidence file, folio 23).

[26] Report submitted to the Chief of the Office of Criminal Investigation. The communication listed the following weapons seized: a Smith Wesson revolver, cal. 38 especial, short barrel, No. D9792276 - AWT8046 and 28 cartridges of .38 caliber; a Smith Wesson revolver, short barrel, cal. 38, No. B1811788 - 2001096; a Beretta pistol, Italian made, cal. 380, No. 425P202136 plus two feeders with 25 cartridges cal. 38; one Browning pistol, cal. 9mm, No. T0393. 2 feeders with 13 9mm caliber cartridges; one Beretta assault rifle, cal. 2.23, Italian made, No. M31303 patent No. 909566, 2 feeders with 13 cartridges cal. 2. 23; one Mossberg 12 gauge shotgun, No. J888993; one Mossberg 12 gauge shotgun, nickel plated, No. K679676; one Mossberg 12 gauge shotgun, nickel plated, No. K679676. 23; one Mossberg 12 gauge nickel-plated shotgun, No. K684074; one Mossberg 12 gauge shotgun, with cylinder magazine No. 102664; one shotgun cal. 16, double barrel, No. 598381, Gwehrlsufs brand; one shotgun cal. 16, Spanish manufacture s/n; one shotgun cal. 22, Sauage brand, USA, Mod. 987, No. E920747; one shotgun cal. 22, German manufacture, DIANA brand with 2 telescopic sights, one knife Wonka brand; one shotgun cal. 22, German manufacture, DIANA brand with 2 telescopic sights, a Wonka knife with case; 1 machete with case; 79 cartridges cal. 12; 65 cartridges cal. 9 mm; 4 cartridges cal. 16 (evidence file, folio 18 and 2089).

[27] Statement of Mr. Mario Alfonso Montesinos Mejía received by the National Investigations Bureau, Command/Sub Command of Interpol Pichincha. Case N° P1-142-JPEIP-CP-1-92 (evidence file, folio 56).

[28] Statement of Mr. Mario Alfonso Montesinos Mejía taken by the National Investigations Bureau, Command /Sub Command of Interpol Pichincha. Part of case N° P1-142-JPEIP-CP-1-92 (evidence file, folio 58).

guards and taken to a cell measuring approximately 11 square meters, where there were around 13 other people.[29]

49. On July 23, 1992, Mr. Montesinos and other detainees were reportedly beaten by 25 members of the Intervention and Rescue Group of the National Police, outside in the yard of the *Regimiento Quito No. 2* detention center. That same day Mr. Montesinos was transferred to the Social Rehabilitation Center No. 1. His eyes and mouth were covered with adhesive tape and his hands were tied behind his back throughout the transfer.[30] He claimed to have been held incommunicado and in isolation from the time of his arrest until July 28, 1992.[31]

50. On July 11, 1992, a constitutional order of imprisonment was issued requiring that Mr. Montesinos remain in custody, since he was being tried for the crimes of conversion and transfer of assets.[32]

51. On August 13, 1992, a second order of imprisonment was issued requiring that Mr. Montesinos remain in pretrial detention, in accordance with Article 177 of the Code of Criminal Procedure.[33]

52. Subsequently, on November 28, 1994,[34] Mr. Montesinos' defense filed a petition with the President of the Superior Court of Justice of Quito, indicating, among other things, that he had sufficient evidence to disprove the requirements stipulated in Article 177 of the Code of Criminal Procedure and requested that the order for pretrial detention be revoked.[35]

53. On October 13, 1995, Mr. Montesinos sent a letter to the President of the Supreme Court of Justice stating that he was being held in pretrial detention without having received a final judgment.[36]

54. On September 10, 1996, Mr. Montesinos filed a *habeas corpus* petition with the Mayor of the Metropolitan District of Quito, alleging that he had been beaten, subjected to inhuman and degrading treatment, and imprisoned for 50 months without being sentenced.[37] On September 16, 1996, the mayor ruled the petition inadmissible.[38] Mr. Montesinos' lawyer appealed the mayor's decision before the Court of Constitutional Guarantees. On October 30, 1996, that court granted the *habeas corpus* and ordered his immediate release.[39] In the same resolution the Court of Constitutional Guarantees indicated that it could not rule on the alleged

[29] Communication from the petitioner of August 30, 1996 (evidence file, folio 23).
[30] Communication of the petitioner of August 30, 1996 (evidence file, folio 25).
[31] Affidavit of Mr. Rafael Iván Suárez Rosero of August 7, 2019 (evidence file, folio 2895-2896).
[32] Constitutional Order of Imprisonment N° 172-IGPP-04 issued in Quito on July 11, 1992 (evidence file, folio 62).
[33] Constitutional Order of Imprisonment N° 089-92-EC issued on August 13, 1992, by the First Criminal Judge of Pichincha (evidence file, folio 64).
[34] Answer of the State of Ecuador, dated September 6, 2018 (merits file, folio 180).
[35] Petition within proceeding 91-92 of Rodrigo Bucheli Mera, addressed to the President of the Superior Court of Justice of Quito (evidence file, folio 66).
[36] Letter dated October 13, 1995, from Mr. Montesinos to Carlos Solorzano Constantine, President of the Supreme Court of Justice (evidence file, folios 68-69).
[37] Resolution 182-96-CP issued by the Constitutional Court in the context of Case No. 45/96-TC. (Evidence file, folio 46).
[38] Resolution 182-96-CP issued by the Constitutional Court in the context of Case No. 45/96-TC. (Evidence file, folio 46).
[39] Resolution 182-96-CP issued by the Constitutional Court in the context of Case No. 45/96-TC. (Evidence file, folio 53).

acts of torture for "lack of evidence."[40] The Court added that there was an unjustified judicial delay on the part of the judges to issue a judgment.[41]

55. On April 14, 1998, Mr. Montesinos filed a second *habeas corpus* petition before the Mayor of the Metropolitan District of Quito given that the ruling of the previous *habeas corpus* (October of 1996) had not been implemented. On April 21, the Mayor declared the petition inadmissible arguing that the length of the detention was reasonable and that it was necessary to wait for the final decision in the criminal proceedings. Again, Mr. Montesinos' attorney appealed this decision before the Constitutional Court. On August 13, 1998, said Court ordered the immediate release of Mr. Montesinos, and officially notified the Director of the Social Rehabilitation Center for Men of Quito No. 1, without prejudice to the continuation of the criminal proceedings for front operations. Likewise, it considered unreasonable the time Mr. Montesinos had spent in pretrial detention.[42] The Court has no record of the date on which Mr. Montesinos was released.

C. Regarding the crimes of illicit enrichment and conversion and transfer of assets (Articles 76 and 77 of the Law on Narcotics and Psychotropic Substances)

C.1 Regarding the crime of illicit enrichment

56. On November 30, 1992, the Superior Court of Quito ordered the opening of proceedings against Mr. Montesinos (and others) for allegedly acting as an accomplice and accessory to the crime of illicit enrichment. It considered that the police had established the mechanism used by the criminal organization to which Mr. Montesinos presumably belonged, to achieve the illicit enrichment and transfer of money obtained from drug trafficking.[43]

57. On November 22, 1996, the President of the Superior Court of Justice declared open the plenary stage against Mr. Montesinos[44] and determined his "presumed responsibility" as co-perpetrator of the crime of illicit enrichment. The court also confirmed his pretrial detention and the seizure of all property, money, and other assets that may have been used or resulted from the commission of the crime.[45]

58. Mr. Montesinos filed an appeal against the opening of proceedings, which was accepted for processing on December 3, 1996.[46]

59. On May 7, 1998, the Fourth Chamber of the Superior Court of Quito considered the appeal filed by Mr. Montesinos and issued a final order of acquittal in the proceedings.[47]

C.2 Regarding the crime of conversion and transfer of assets

60. On November 30, 1992, the Superior Court of Quito issued an order to initiate proceedings against Mr. Montesinos, considering that there were serious indications of his participation as an accomplice and accessory to the crime of conversion or transfer of assets.

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[40] Resolution 182-96-CP issued by the Constitutional Court in the context of Case No. 45/96-TC. (Evidence file, folio 47).
[41] Resolution 182-96-CP issued by the Constitutional Court in the context of Case N° 45/96-TC (evidence file, folios 53).
[42] Answer of the State of Ecuador of September 6, 2018 (merits file, folio 213).
[43] Decision of the Superior Court of Quito of November 30, 1992 (evidence file, folios 971-974).
[44] Answer of the State of Ecuador of September 6, 2018 (merits file, folio 186).
[45] Decision of the Presidency of the Superior Court of Justice (evidence file, folios 177-339 and 414-576).
[46] Answer of the State of Ecuador of September 6, 2018 (merits file, folio 187).
[47] Decision of the Superior Court of Justice of May 7, 1998, in the case for illicit enrichment, for which Mr. Montesinos was finally acquitted (evidence file, folios 1265-1277).

It also ordered the pretrial detention of Mr. Montesinos and the seizure of his movable and immovable assets.[48]

61. On September 30, 1996, the Superior Court of Quito declared the plenary stage open.[49] In its resolution, it ordered that the preventive detention against Mr. Montesinos be maintained and that the trial against him for allegedly being co-perpetrator of the crime of conversion and transfer of assets be continued.[50] Mr. Montesinos filed an appeal against the opening of the plenary stage.[51]

62. In a decision dated April 29, 1998, the Fourth Chamber of the Superior Court of Justice accepted the appeal and issued a final dismissal order in favor of Mr. Montesinos.[52] In this decision, the Superior Court determined that the offense contemplated in Article 77 of the Law on Narcotics and Psychotropic Substances had not been justified, since the crime of conversion and transfer of assets is typically an act consequent to the main crime of drug trafficking and not concurrent with it. Thus, upon finding that there was no procedural evidence that the defendants had been convicted for the crime of drug trafficking, it concluded that this fundamental element for the initiation of criminal proceedings for the crime of conversion and transfer of assets had not been met.[53]

D. Regarding the crime of front operations (Article 78 of the Law of Narcotics and Psychotropic Substances)

63. On November 18, 1992, the Presidency of the Superior Court of Quito issued an order to open proceedings against Mr. Montesinos and ordered his pretrial detention for allegedly having carried out "front activities" for a criminal organization.[54]

64. In response, Mr. Montesinos filed a complaint with the President of the Court of Constitutional Guarantees indicating that he had been unlawfully prosecuted for the crime of front operations, presenting as evidence in his favor the deeds to his property. He also added other arguments regarding the trials against him for the crimes of illicit enrichment and conversion and transfer of assets.[55]

65. On March 26, 1996, the Court of Constitutional Guarantees rejected the complaint filed by Mr. Montesinos on the grounds of "improper joinder of actions" on the part of the alleged victim."[56] On April 23 of that year the Court again rejected the complaint on the grounds that it had already ruled on the same matter.[57]

66. On September 12, 1996, the Public Prosecutor's Office of Pichincha issued a final ruling stating that, since Mr. Montesinos had been the supervisor of Hacienda El Prado and had

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[48] Decision of the Superior Court of Quito of November 30, 1992 (evidence file, folios 964-969).
[49] Answer of the State of Ecuador of September 6, 2018 (merits file, folio 182).
[50] Decision of the Superior Court of Quito of September 30,1996 (evidence file, 71-162 and 577-668) and Official Letter N° 2078-CSJO-96, issued by the Presidency of the Superior Court of Justice of November 25, 1996 (evidence file, 341 and 398) and Answer of the State of Ecuador of September 6, 2018 (merits file, folio 182).
[51] Decision of the Fourth Chamber of the Superior Court of Justice of April 29, 1998 (evidence file, folio 164)
[52] Decision of the Fourth Chamber of the Superior Court of Justice of April 29, 1998 (evidence file, folios 164-175).
[53] Ruling of April 29, 1998, of the Fourth Chamber of Associate Judges of the Superior Court of Justice of Quito in the trial for conversion or transfer of assets against Mario Montesinos (evidence file, folio 171); Ruling of the Superior Court of Justice of May 7, 1998, final dismissal of the case against Mr. Montesinos for illicit enrichment (evidence file, folios 1270 and 1271).
[54] Decision of the Presidency of the Superior Court of Quito of November 18, 1992 (evidence file, folios 765-770).
[55] Complaint addressed to the President of the Constitutional Rights Court, February 1996 (evidence file, folios 350 to 356).
[56] Decision of the Court of Constitutional Guarantees N° 083-96-CA of March 26, 1996 (evidence file, folio 358).
[57] Decision of the Court of Constitutional Guarantees N° 093-96-CA of April 23, 1996 (evidence file, folio 360).

signed blank checks, it was presumed that he was the 'front man' for the criminal organization.[58]

67. On March 23, 1998, the Deputy President of the Superior Court of Justice of Quito ordered the opening of the plenary stage against Mr. Montesinos for the alleged crime of front man operations as co-perpetrator. As a result, it ordered the seizure of all property, money and other assets used to commit the crime.[59]

68. On September 9, 2003, the Deputy President of the Superior Court of Quito issued a judgment of acquittal in first instance in favor of Mario Alfonso Montesinos Mejía, against which the Attorney General's Office and the Public Prosecutor's Office filed an appeal.[60] On September 17, 2003, the Presidency of the Superior Court of Justice granted the appeals. Based on said appeal, on September 8, 2008, the First Specialized Criminal, Transit and Collusive Court of the Superior Court of Justice of Quito, sentenced Mr. Montesinos to 10 years imprisonment and a fine of six minimum vital salaries for the crime of front operations.[61]

69. Mr. Montesinos filed a cassation appeal against the aforementioned conviction on appeal.[62] On August 31, 2010, the First Chamber of the National Court of Justice rejected the cassation appeal, considering that the evidence presented merited that the defendants should be considered as perpetrators and accomplices of the crime of front activities.[63]

70. On September 29, 2010, Mr. Montesinos filed a special appeal for protection against the judgment issued on August 31, 2010.[64] On October 28, 2010, the First Criminal Chamber of the National Court of Justice referred the case to the Constitutional Court.[65] On January 18, 2011, the Constitutional Court ruled that the appeal was inadmissible because the allegations of the parties involved focused on the facts or acts that gave rise to the criminal proceedings, on which it lacked jurisdiction to rule.[66]

71. From the judgment of September 8, 2008, it is clear that Mr. Montesinos was convicted as a co-perpetrator of the crime of "front man" operations (*testaferrismo*).

VII
MERITS

72. The instant case concerns the alleged arbitrary and unlawful arrest of Mr. Mario Montesinos Mejía on June 21, 1992, the cruel, inhuman, degrading treatment and torture he allegedly suffered and the supposed lack of judicial guarantees in the criminal proceedings against him.

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[58] Answer of the State of Ecuador of September 6, 2018 (merits file, folios 193 and 194).
[59] Order of March 23, 1998, to open the plenary stage of proceedings for the crime defined in Art. 78 of the Law on Narcotics and Psychotropic Substances, (evidence file, folios 2224 to 2447); Answer of the State of Ecuador dated September 6, 2018 (merits file, folios 195 to 198).
[60] Judgment of First Instance of September 9, 2003, of the Presidency of the Superior Court of Quito (evidence file, folios 2539 to 2579); Answer of the State of Ecuador of September 6, 2018 (merits file, folio 200 and 201).
[61] Appeal ruling of September 8, 2008 (evidence file, folios 2588 to 2686); Answer of the State of Ecuador of September 6, 2018 (merits file, folio 201).
[62] Order granting the cassation appeal, of September 8, 2008 (evidence file, folios 2688 to 2690).
[63] Judgment of Cassation, of August 31, 2010 (evidence file, folios 2719 a 2764); Answer of the State of Ecuador of September 6, 2018 (merits file, folio 202).
[64] Special Application for Protection presented before the Constitutional Court on September 29, 2010 (evidence file, folios 2766 to 2776).
[65] Order for extension/clarification of cassation ruling, First Criminal Chamber of the National Court of Justice of October 5, 2010 (evidence file, folios 2778 to 2781).
[66] Constitutional Court. Case No. 1657-10-EP. Inadmissibility order of January 18, 2011. Admissions chamber of the Constitutional Court for the transition period (evidence file, folios 2783 to 2786).

73. This Court is aware of the important role played by the alleged victim and the serious nature of the conduct of a person who is in that position. However, in no way is it appropriate to assume a criminal law of "*de facto*" perpetrator; consequently, it is inadmissible that the elementary judicial guarantees that are inherent to all persons should be disregarded because of the position of the alleged perpetrator of the crime.

74. In order to address these issues, in this chapter the Court will develop its legal analysis in the following order: i) the rights to personal liberty, to the presumption of innocence and to equality before the law during initial arrest and pretrial detention; ii) the right to personal integrity, and iii) the rights to judicial guarantees and judicial protection.

VII-1
RIGHT TO PERSONAL LIBERTY,[67] TO THE PRESUMPTION OF INNOCENCE[68] AND TO EQUALITY BEFORE THE LAW[69]

A. Arguments of the parties and the Commission

75. The ***Commission*** noted that, according to the Constitution and the Code of Criminal Procedure in force at the time of the facts, for an arrest to be legal under the Convention, a court order was required. The only exceptions to this rule were that the person was caught committing an offence *in flagrante delicto* or that there was a serious presumption of responsibility.

76. The Commission mentioned that the case file contained no evidence to show that at an individualized warrant issued by the competent authority existed for the arrest of Mr. Montesinos or, failing that, that he had been captured *in flagrante delicto*. It observed that the "grave presumption of responsibility" went beyond the current Ecuadorian Constitution and opened the door for the police authorities to restrict personal liberty, which would depend on the subjective assessment of the individual officer.

77. In relation to the pretrial detention of Mr. Montesinos, the Commission recalled that this is a precautionary measure, not a punitive one, and that any decision that restricts an individual's freedom in a preventive manner must be properly justified. It also indicated that the improper use of pretrial detention may affect the presumption of innocence, which has a special impact in cases where its application is based on the expectation of punishment or the mere existence of evidence against the accused.

78. In this specific case, the Commission held that the law in force at the time of the facts allowed for pretrial detention based solely on indications of responsibility. It added that the pretrial detention of Mr. Montesinos lasted at least six years, and was therefore extended unreasonably without any conventional justification.

79. In that regard, it noted that during more than half of Mr. Montesinos' pretrial detention, Article 114 of the Criminal Code was in force, which provided for the inadmissibility of the application for release in crimes related to the Law on Narcotics and Psychotropic Substances. Therefore, by virtue of this article, there was unequal treatment in Ecuador until December 24, 1997, when the Constitutional Court declared the law unconstitutional.

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[67] Articles 7(1), 7(2), 7(3), 7(5) and 7(6) of the American Convention.
[68] Article 8(2) of the American Convention.
[69] Article 24 of the American Convention.

80. In relation to Article 7(5) of the Convention, the Commission recalled that any person subjected to detention has the right to have that detention reviewed by a judicial authority without delay, as an effective means of control to prevent arbitrary and unlawful arrests. In this specific case, the first judicial ruling is dated August 13, 1992, and the arrest report does not make it possible to establish with certainty that the alleged victim was indeed brought before the judicial authority.

81. With respect to the *habeas corpus* appeal, the Commission held that the first remedy filed in September 1996 before the Mayor of the Metropolitan District of Quito was not of a judicial nature. Subsequently, the judgment issued by the Court of Constitutional Guarantees on appeal was not implemented until a second ruling was issued by the same Court after a second *habeas corpus* was filed in 1998, for which reason the Commission determined that the remedy was not effective.

82. Consequently, the Commission concluded that the State of Ecuador violated Articles 7(1), 7(2), 7(3), 7(5), 7(6), 8(2), 24 and 25(2)(c) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 thereof, to the detriment of Mr. Mario Montesinos Mejía.

83. The ***representative*** generally agreed with the Commission. He added that the incommunicado detention to which the alleged victim was subjected was arbitrary and that the detention center did not comply with international standards. He further argued that Mr. Montesinos was not informed of the reasons for his detention or of the charges against him, which he did not know about until November 1992.

84. He also argued that Article 7(6) of the Convention, in relation to Article 25(1) thereof, was violated because the *habeas corpus* was not examined by a judicial authority. In addition, he pointed out the failure to comply with the order issued by the Court of Constitutional Guarantees on appeal.

85. The ***State*** indicated that it carried out a series of reforms to Ecuador's legal system in accordance with international human rights standards and in order to combat drug trafficking. It argued that these adjustments are sufficient to comply with the mandate of Article 2 of the American Convention.

86. Regarding the alleged violations of Article 7 of the Convention, in particular the alleged lack of an arrest warrant in violation of Article 7(2) of the Convention, the State argued that the police investigations mentioned in the report of the National Directorate of Investigations showed that the arrest were not motivated by a "false perception" but by a series of evidentiary elements. It also stressed that the fact that in the judicial proceedings the alleged victim had refuted this evidence and obtained favorable rulings did not imply that the decision to open investigations had been unjustified.

87. Regarding the violation of Article 7(3), the State mentioned that the alleged victim presented before the Court of Constitutional Guarantees his arguments on incommunicado detention and arbitrary detention, given the unconstitutionality of the police report.

88. In relation to Article 7(4) of the Convention, the State held that Mr. Montesinos voluntarily waived his right to a defense at the beginning of the trial. It also pointed out that this free exercise of the right to defense is in addition to the right to file a *habeas corpus* petition.

89. In relation to the alleged violation of Article 7(5) of the American Convention, the State held that the decisions on pretrial detention were properly argued, emphasizing the decision of March 23, 1998, in the trial for front operations. It added that, given the scope of Operation "Cyclone," it considered that pretrial detention was an appropriate mechanism for ensuring that all those implicated in the offenses appeared at the trial.

90. With regard to Article 7(6) of the Convention, the State argued that this right was respected through the granting of *habeas corpus* by the Constitutional Court on August 13, 1998. In addition, it established that the four-year delay in filing the appeal was solely attributable to Mr. Montesinos, noting that in another case filed in 1994, the release was granted in an expeditious manner.

91. Regarding the alleged violation of Article 24 of the Convention, the State argued that the benefit granted in Article 112 of the Criminal Code, which excluded persons convicted for crimes defined in the Law on Narcotics and Psychotropic Substances, was not discriminatory since its nature is precisely an additional benefit and not a guarantee to which all persons have access. It added that the Constitutional Court of Ecuador considered the rule to be constitutional and non-discriminatory.

92. With respect to Article 25 of the Convention, the State argued that there were various constitutional guarantees that allowed for the exercise of this right. In particular, it argued that the writ of habeas corpus guaranteed personal liberty, stressing that although the writ of *habeas corpus* was heard by a mayor, who was not a judge in the strict sense, his capacity when deciding the matter was comparable to that of a judge. It further argued that the fact that the appellant's petition was upheld in the second instance court, together with the assessment of the Court of Constitutional Guarantees in both proceedings, shows that judicial protection was assured.

B. Considerations of the Court

93. The Court has argued that the essential content of Article 7 of the American Convention is the protection of individual liberty against all arbitrary or unlawful interference by the State.[70] It has affirmed that this article contains two types of clearly differentiated rules or provisions: one of a general nature and the other specific. The general rule is contained in the first subparagraph: "[e]very person has the right to personal liberty and security." The specific provision consists of a series of guarantees that protect the right to not be deprived of liberty unlawfully (Article 7(2)) or arbitrarily (Article 7(3)), the detainee's right to be informed of the reasons for his detention and the charges against him (Article 7(4)), to legal oversight of his deprivation of liberty and the reasonable time of pretrial detention (Article 7(5)), to challenge the legality of the detention (Article 7(6)) and to not to be detained for debt (Article 7(7)).[71] Thus, any violation of subparagraphs 2 to 7 of Article 7 of the Convention will necessarily result in a violation of Article 7(1) of the thereof.[72]

94. Article 7(2) of the Convention establishes that "no one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." This

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[70] *Cf. Case of the "Juvenile Reeducation Institute " v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, para. 223, and *Case of Romero Feris v. Argentina. Merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 391, para. 76.

[71] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 51, *and Case of Romero Feris v. Argentina*, para. 76.

[72] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 54, and *Case of Romero Feris v. Argentina*, para. 76.

subparagraph of Article 7 recognizes the main guarantee of the right to physical liberty: the legal exception, according to which the right to personal liberty can only be affected by a law.[73] The legal exception must necessarily be accompanied by the principle of legal definition of the offense (*tipicidad*), which obliges the States to establish, as specifically as possible and "beforehand," the "reasons" and "conditions" for the deprivation of physical liberty. Furthermore, its application is strictly subject to the procedures objectively defined by law.[74] Hence, Article 7(2) of the Convention refers automatically to domestic law. Accordingly, any requirement established in domestic law that is not complied with when depriving a person of his liberty will cause this deprivation to be unlawful and contrary to the American Convention.[75]

95. With respect to the prohibition of "arbitrariness" in the deprivation of liberty, mandated by Article 7(3) of the Convention, the Court has established that no one may be subjected to detention or imprisonment for reasons and methods that - even if classified as legal - may be considered incompatible with respect for the fundamental rights of the individual because they are, *inter alia*, unreasonable, unpredictable or disproportionate.[76] The Court has also established that domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. Thus, the concept of "arbitrariness" should not be equated with that of "contrary to law," but should be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.[77]

96. As to Article 7(4), this Court has stated that "it refers to two guarantees for the individual who is being detained: i) oral or written information on the reasons for the detention, and ii) notification of the charges, which must be in writing."[78]

97. Article 7(5), for its part, establishes that "[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial." The meaning of this provision indicates that custodial measures in the context of criminal proceedings are conventional provided that they have a precautionary purpose, in other words, they are a means to neutralize procedural risks, and particularly to guarantee the presence of the accused at the judicial proceedings.

98. Article 7(5) of the Convention imposes limits on the time of pretrial detention in relation to the duration of the proceedings, indicating that the accused may be released without

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[73] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 56, and *Case of Romero Feris v. Argentina*, para. 76.

[74] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 57, and *Case of Romero Feris v. Argentina*, para. 77.

[75] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 57, and *Case of Romero Feris v. Argentina*, para. 77.

[76] *Cf. Case of Gangaram Panday v. Suriname. Merits, reparations and costs.* Judgment of January 21, 1994. Series C No. 16, para. 47, and *Case of Romero Feris v. Argentina*, para. 91.

[77] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 92, and *Case of Romero Feris v. Argentina*, para. 91.

[78] The Court has stated that "Information on the "reasons" for the detention must be provided "at the time of the arrest," and this is a mechanism to avoid unlawful or arbitrary detentions at the very moment of the deprivation of liberty and, also, to ensure the individual's right of defense. In addition, this Court has indicated that the agent who makes the arrest must provide information, in simple language, free of technicalities, on the fundamental facts and legal grounds on which the detention is based and that the provisions of Article 7(4) of the Convention are not met if only the legal grounds are mentioned. If the person is not adequately informed of the reasons for his detention, including the facts and their legal grounds, he does not know the charges against which he must defend himself and, consequently, the judicial control is illusory." (*Case of Yvon Neptune v. Haiti. Merits, reparations and costs.* Judgment of May 6, 2008. Series C No. 180, para. 109; *Case of Herrera Espinoza et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2016. Series C No. 316, para. 154, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, para. 246).

prejudice to the continuation of the proceedings.[79] The Court has understood that "even when there are reasons for keeping a person in preventive detention, Article 7(5) guarantees that he will be released if the detention period has exceeded a reasonable time.[80]

99. As is apparent from the foregoing considerations, in some aspects, the judicial guarantees established in Article 8 of the Convention may be closely related to the right to personal liberty. Thus, for the purposes of this case, it is relevant to point out that since pretrial detention is a precautionary rather than a punitive measure,[81] depriving a person of their liberty beyond a reasonable time to achieve the purposes that justify his detention would be tantamount to anticipating a sentence,[82] which would not only breach the right to personal liberty but also against the presumption of innocence contemplated in Article 8(2)of the Convention. Another link between the right to personal liberty and judicial guarantees refers to the time of the procedural actions, in case in which a person is deprived of liberty. Thus, the Court has indicated that "the purpose of the principle of "reasonable time" to which Articles 7(5) and 8(1) of the American Convention refer is to prevent accused persons from remaining in that situation for a protracted period and to ensure that the charge is promptly disposed of."[83]

100. Based on the foregoing considerations and on more specific guidelines described below, this Court will examine the facts of this case, and will assess: i) the arrest and pretrial detention of Mr. Montesinos; ii) the continuation of pretrial detention and reasonable time thereof; iii) the right to have recourse to a judge regarding the legality of the detention and the right to obtain compliance with the judicial decision, and iv) the principle of presumption of innocence. Finally, the Court will present its conclusions.

B.1 Initial arrest and pretrial detention Mr. Montesinos

B.1.1. Initial arrest

101. Mr. Montesinos was arrested on June 21, 1992, while driving his car in the city of Quito. During the intervention, police agents told him that they had a warrant to search his home and to subsequently detain him. According to the police agent involved, the warrant had been issued by the First Commissioner of the Canton of Quito. The Court notes that this information is recorded in the report submitted to the Chief of the Office of Criminal Investigation on that same day; however, the case file contains no arrest and search warrant issued by a judicial authority.

102. At the time of the facts, Article 19(17)(g) of the Ecuadorian Constitution provided that:

> [n]o one shall be deprived of his liberty except by virtue of a written order from a competent authority, in the cases, for the time and with the formalities prescribed by law, except in cases of *flagrante delicto*, in which case he may not be held without trial for more than 24 hours; in any case, he may not be held incommunicado for more than 24 hours.

103. Article 172 of the Ecuador's Code of Criminal Procedure of 1983, in force at the time of the facts, established that:

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[79] *Cf. Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of October 30, 2008. Series C No. 187, para. 70, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of April 25, 2018, para. 361.
[80] *Cf. Case of Bayarri v. Argentina,* para. 74, and *Case of Amrhein et al. v. Costa Rica,* para. 362.
[81] *Case of Suárez Rosero v. Ecuador. Merits.* Judgment of November 12, 1997. Series C No. 35, para. 70, and *Case of Norín Catrimán et al. v. Chile. Merits, reparations and costs. Series C No. 279*, para. 354.
[82] *Cf. Case of Suárez Rosero v. Ecuador,* para. 77, and *Case of Norín Catrimán et al. v. Chile*, para. 311.
[83] *Case of Suárez Rosero v. Ecuador,* para. 70.

> In order to investigate whether a crime has been committed, before initiating the respective criminal proceedings, the competent judge may order the arrest of a person, based on either personal knowledge, or verbal or written reports of the National Police or the Judicial Police or any other person, which establish that a crime has been committed together with the corresponding presumptions of responsibility.
>
> This arrest shall be ordered by means of a warrant that shall include the following requirements:
> 1. The reasons for the arrest;
> 2. The place and date of issue; and
> 3. The signature of the competent judge.
>
> In order to carry out the arrest order, the said warrant shall be delivered to an agent of the National Police or the Judicial Police.

104. Likewise, Article 174 of the said Code established that:

> [i]n the case of *flagrante delicto*, any person may apprehend the perpetrator and bring him before the competent Judge or before an Agent of the National Police or the Judicial Police. In the latter case, the Agent shall immediately place the detainee under the orders of a Judge, together with the respective report.
> […]

105. In accordance with the aforementioned regulations, in force at the time of the facts, a court order was required to arrest a person, unless he/she had been apprehended in flagrante delicto.[84] In the absence of a warrant for the arrest of Mr. Montesinos and the absence of flagrante delicto, it is evident that he was arrested illegally, in violation of Ecuadorian law and, therefore, in violation of Article 7(2) of the American Convention on Human Rights.

B.1.2. Pretrial detention

106. After his arrest on June 21, 1992, Mr. Montesinos was taken to an unidentified location where he was held in detention. His family were unaware of where he was being detained.[85] There is no record in the file that he was notified in writing of the reasons for his detention, although on June 25, 1992, he made a statement before the National Directorate of Investigations, but without a legal representative being present.

107. It was not until July 11, 1992, that the General Intendent of the Pichincha Police issued a Constitutional Order of Imprisonment, ordering that Mr. Montesinos remain in custody, after being "accused […] of the crime of conversion and transfer of assets, in accordance with the Law on Narcotics and Psychotropic Substances […] until a judge [..] rules according to the law."[86] On August 13, 1992, the First Criminal Judge of Pichincha issued a new Constitutional Order of Imprisonment, which repeated the formula of the previous order issued by the police authority.[87] The case file provided to the Court indicates that Mr. Montesinos made preliminary statements, also without the presence of a lawyer, before the First Criminal Judge of Pichincha, on January 20 and December 30, 1993.[88]

108. None of the orders of imprisonment nor the report describing the arrest and search of Mr. Montesinos' home made any reference to his individual situation, to the crimes for which he had been arrested or to the circumstances that would justify keeping him in prison.

[84] This was previously confirmed by the Court: *Cf. Case of Tibi v. Ecuador,* para. 103.
[85] *Cf.* Statements rendered by affidavit by Maritza Elizabeth, María del Carmen and Vinicio Ricardo Montesinos González (evidence file, folios 2873, 2874, 2880, 2881, 2887 and 2888).
[86] Annex 7 IACHR (evidence file, folio 62).
[87] Annex 8 IACHR (evidence file, folio 64).
[88] Annexes 11 and 12 (evidence file, folios 2148 to 2158).

Moreover, when he made his statement on June 25, 1992, it is not clear whether he was informed of the reasons and circumstances of his detention.

109. Article 7(3) of the Convention clearly establishes that to ensure that deprivation of liberty does not become an arbitrary measure, the following requirements must be met: i) there must be evidence to formulate charges or bring the person to trial, i.e. there must be sufficient evidence to allow for the reasonable supposition that the person committed to trial has taken part in the criminal offense under investigation;[89] ii) its purpose must be compatible with the Convention,[90] i.e. to ensure that the accused does not prevent the proceedings from being conducted or evade justice;[91] iii) it must be appropriate, necessary and strictly proportionate[92] and iv) the decision to impose such measures must be based on sufficient reasons to allow for an assessment regarding their compliance with the above conditions.[93] Any restriction of personal liberty that is not based on sufficient justification, allowing for an assesment of whether it is in keeping with the conditions indicated, will be arbitrary and, therefore, will violate Article 7(3) of the Convention.[94]

110. The pretrial detention of Mr. Montesinos was authorized *post facto*, first by the Police Intendent and subsequently by a criminal court. The first order of imprisonment states that he was being accused under the Law on Narcotics and Psychotropic Substances, while the order of imprisonment issued by the criminal court, on August 13, 1992, ordered pretrial detention based on Article 177 of the Code of Criminal Procedure (hereinafter CCP).

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[89] *Cf. Case of Servellón García et al. v. Honduras*, *Preliminary objection, merits, reparations and costs.* Judgment of September 21, 2006. Series C No. 152, para. 90 and *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, paras. 101 and 103. This should not in itself constitute an element that is likely to undermine the principle of presumption of innocence contained in Article 8(2) of the Convention. On the contrary, it is an additional assumption to the other requirements. This decision should not have any effect on the judge's decision regarding the defendant's responsibility. Suspicion must be based on specific facts, expressed in words; that is, not on mere conjectures or abstract intuitions. Consequently, the State should not detain someone to investigate him; on the contrary, it is only authorized to deprive a person of liberty when it has sufficient information to be able to commit him to trial.

[90] *Cf. Case of Servellón García et al. v. Honduras*, para. 90, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, para. 251.

[91] *Cf. Case of Suárez Rosero v. Ecuador*, para. 77, *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 170, *Case of Wong Ho Wing v. Peru*, para. 250, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, para. 250. This requirement is based on Articles 7(3), 7(5) and 8(2) of the Convention (*Cf. Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 207, para. 144).

[92] *Cf. Case of Palamara Iribarne v. Chile. Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 135, para. 197, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, para. 251. This means: i) *appropriate,* or suitable to accomplish the objective pursued; ii) *necessary*, in the sense that it is absolutely essential to achieve the purpose sought and that, among all possible measures, there is no less burdensome one in relation to the right involved, that would be as suitable to achieve the proposed objective, and iii) strictly proportional, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the objective pursued (*Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 92, *Case Argüelles et al. v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2014. Series C No. 288, para. 120, *Case of Wong Ho Wing v. Peru*, para. 248, and *Case of Amrhein et al. v. Costa Rica*, para. 356).

[93] *Cf. Case of García Asto and Ramírez Rojas v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 25, 2005. Series C No. 137, para. 128, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, para. 251. In fact, the Court has considered that any restriction of liberty that is not based on a justification (Article 8(1)) that will allow an assessment of whether it is adapted to the conditions set out above will be arbitrary and, therefore, will violate Article 7(3) of the Convention. Thus, in order to respect the presumption of innocence (Article 8(2)), when ordering precautionary measures that restrict liberty, the State must provide clear and reasoned grounds and evidence, according to each specific case, of the existence of the aforementioned requirements of the Convention.

[94] *Case of Garcia Asto and Ramirez Rojas v. Peru,* paras. 128 and 129 and *Case of Women Victims of Sexual Torture in Atenco v. Mexico,* para. 251.

111. Said Article 177 of the CCP empowered the judicial authority to order pretrial detention based solely on evidence of the existence of a crime that warranted the penalty of deprivation of liberty and on the presumption that the accused was responsible for the offense.[95]

112. In the case of Herrera Espinoza, the Court concluded in its judgment that this provision violated Article 2 of the Convention:

> "it left in the hands of the judge the decision on pretrial detention based solely on the assessment of "indicia" regarding the existence of a crime and its authorship, without considering its exceptional nature, or its use based on strict necessity and the possibility that the accused could hinder the process or evade justice […] The decision to automatically impose preventive deprivation of liberty based on the type of crime prosecuted is contrary to [conventional] guidelines, which require proof, in each specific case, that the detention is strictly necessary and that its purpose is to ensure that the accused will not impede the development of the proceedings or evade justice. […] In view of the foregoing, this Court finds that article [...] 177 [...] was contrary [...] to the international standard established in its constant case law regarding pretrial detention."[96]

113. The Court notes that the case file contains no formal justification or reason by the judicial authority for ordering the pretrial detention of Mr. Montesinos. Not even the orders to initiate proceedings of November 1992 contain a justification to keep the alleged victim in pretrial detention or any reasons to explain the need to have done so since his initial arrest. Although the crimes of which he was accused, under the Law on Narcotics, were considered serious, the lack of arguments and reasoning to keep him in pretrial detention violated the Convention.

114. Thus, the Court concludes that the pretrial detention order issued against Mr. Montesinos was arbitrary and, consequently, contravened Articles 7(1) and 7(3) of the Convention, in relation to Articles 1(1) and 2. Likewise, since Mr. Montesinos was not formally notified of the charges against him until the issuance of the order to initiate proceedings for the crime of front operations (*testaferrismo)* on November 18, 1992 (*infra* para. 192), the Court concludes that Ecuador violated Article 7(4) of the American Convention, in relation to Article 1(1) of the same instrument, to his detriment.

B.2 Review of the pretrial detention

115. The Court will now examine whether the continuation or prolongation of the pretrial detention was appropriate in this case.

116. The Court has established that the national authorities are responsible for assessing the appropriateness of maintaining the precautionary measures they order in accordance with their own legal system.[97] Preventive detention should not be prolonged when the reasons that gave rise to the adoption of this precautionary measure no longer exist.[98] The judge should periodically assess whether the reasons and necessity for the measure and its proportionality are maintained, and whether the duration of the detention has exceeded the limits established

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[95] Code of Criminal Procedure of Ecuador, Article 177: "[t]he court may issue a writ of preventive imprisonment when it deems it to be necessary, provided the following procedural data are presented: 1. Evidence leading to the presumption of the existence of an offense that merited the penalty of deprivation of liberty; and, 2. evidence leading to the presumption that the accused was the author of, or an accomplice to, the offense that is the subject of the proceedings."

[96] *Case of Herrera Espinoza et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2016. Series C No. 316, paras. 148, 149 and 150.

[97] *Cf. Case of Chaparro Álvarez and Lapo Iniguez v. Ecuador,* para. 107 and *Case of Romero Feris v. Argentina*, para. 111.

[98] *Cf. Case of Bayarri v. Argentina*, para. 74, and *Case of Romero Feris v. Argentina*, para. 111.

by law and reasonableness. Whenever it appears that such preventive detention does not fulfill these conditions, the person detained should be released. When assessing the continuity of the measure, "the domestic authorities must provide sufficient grounds to know the reasons for maintaining the restriction of liberty, which, in order to be compatible with Article 7(3) of the American Convention, must be based on the need to ensure that the detainee will not impede the efficient development of the investigations or evade justice."[99] Similarly, for each request for the release of a detainee, the judge must give reasons - even if only minimal- why he or she considers that pretrial detention should be maintained.[100]

117. This Court has examined the three orders to initiate proceedings issued by the judicial authorities regarding the crimes of illicit enrichment, conversion and transfer of assets, and front operations (*supra* paras. 56 to 59, 60 to 62 and 63 to 71). Notwithstanding the description of the facts for which the possible existence of the aforementioned crimes was considered, the judges only referred to alleged compliance with the requirements of Article 177 of the Code of Criminal Procedure to remand the defendants in custody, including Mr. Montesinos. These orders do not contain any reasoning on the need to maintain the preventive detention of all the defendants and, therefore, did not consider the requirements of exceptionality, necessity and proportionality in adopting such a measure.[101]

118. Throughout the period indicated, the only reviews of pretrial detention were carried out by virtue of the *habeas corpus* petitions filed by Mr. Montesinos (*supra* paras. 54 and 55). As will be seen in the corresponding section, in both cases the Court of Constitutional Guarantees and the Constitutional Court ruled in favor of the petitioner, although he was not released until after the ruling of 1998.

119. In view of the foregoing, this Court concludes that the pretrial detention to which Mr. Montesinos was subjected was arbitrary, without *ex officio* review by the judiciary for at least four years (between 1992 and 1996), and subsequently, between the first (1996) and second *habeas corpus* decisions (1998), which violated Articles 7(1) and 7(3) of the Convention, in relation to Article 1(1) thereof.

B.3 Reasonableness of the pretrial detention period

120. With respect to the reasonable time of the detention, the Court has indicated that when the term of pretrial detention exceeds what is reasonable, the State may restrict the liberty of the accused with other less injurious measures that ensure his appearance at trial, other than the deprivation of liberty.[102] According to Article 7(5) of the Convention, a detained person has the right "to be tried within a reasonable time or to be released." If a person is preventively deprived of his liberty and the proceedings do not take place within a reasonable time, this provision of the Convention (Article 7.5 of the Convention) is violated.

121. The Court also notes that in this case the pretrial detention lasted more than six years, that is, between June 1992 and August 1998. This prolonged period of time of deprivation of liberty without a conviction against him is evidence that this measure was disproportionate and allows the Court to conclude that the duration of Mr. Montesinos' pretrial detention was unreasonable.

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[99] *Cf. Case of Bayarri v. Argentina*, para. 74, and *Case of Romero Feris v. Argentina*, para. 111.

[100] *Case of Arguelles et al. v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2014. Series C No. 288, para. 122 and *Case of Romero Feris v. Argentina*, para. 111.

[101] In that regard, the expert witness Reinaldo Calvachi Cruz stated that at the time of the events in Ecuador, "personal precautionary measures, especially pretrial detention, did not comply with the requirement of exceptionality." Expert opinion rendered by affidavit by Reinaldo Cavachon Cruz on August 8, 2019 (evidence file, folio 2903).

[102] *Cf. Case of Bayarri v. Argentina*, para. 70, and *Case of Romero Feris v. Argentina*, para. 109.

122. With respect to the argument that Article 114 of the Criminal Code prohibited applications for release of defendants charged under the Law on Narcotics and Psychotropic Substances,[103] the Court refers to the ruling in the case *of Suárez Rosero v. Ecuador*, in which said provision was also applied. In this regard, the Court affirmed that the exception contained in the last paragraph of Article 114 bis "deprives part of the prison population of a fundamental right by virtue of the crime of which they are accused and, therefore, intrinsically injures all defendants in that category. This rule has been applied in the specific case of Mr. Suárez-Rosero and has caused him undue harm. The Court also observes that, in its opinion, this law *per se* violates Article 2 of the American Convention, whether or not it was enforced in the instant case."[104]

123. In the case of Mr. Montesinos, Article 114 was applied by the administrative authority since it did not comply with the *habeas corpus* resolution of the Court of Constitutional Guarantees of October 31, 1996, which granted Mr. Montesinos' his freedom. Given the failure to comply with that decision, the alleged victim's lawyer filed a complaint before the Constitutional Court, requesting Mr. Montesinos' immediate release and the dismissal of the Director of the Social Rehabilitation Center. In this regard, the First Chamber of the Constitutional Court issued a decision on August 19, 1997, ordering that "the defendant [Montesinos] should be released in all the cases indicated therein, with the exception of those punishable under the Law on Narcotics and Psychotropic Substances," and denied the request of Mr. Montesinos' attorney.[105] Thus, it is clear that Article 114 of the Criminal Code indeed resulted in an undue and unequal restriction of liberty for those accused of crimes under the Law on Narcotics and Psychotropic Substances, as compared to all other persons accused of committing crimes in Ecuador. In the instant case, such differentiated treatment was concretely established through the aforementioned decisions.[106]

124. Based on the foregoing, this Court concludes that the period of six years and two months during which Mr. Montesinos was held in pretrial detention was unreasonable, excessive and violated Articles 7(1) and 7(5) of the Convention, in relation to Article 1(1) thereof.

125. In relation to the unequal treatment alleged by the representative and the Commission, the Court has established that States must refrain from actions that in any way are aimed at creating, directly or indirectly, situations of discrimination *de jure* or *de facto.*[107] Likewise, if discriminatory treatment implies unequal protection under domestic Law or its application, the

[103] Criminal Code, Article 114 bis: "[p]ersons who, having been kept in detention for a time equal to or greater than one-third of the period established in the Criminal Code as the maximum sentence for the offense with which they are charged, have neither had their case discontinued nor been committed to trial, shall be immediately released by the judge hearing the case. Likewise, persons, who have been kept in detention without sentence for a time equal to or greater than half the period established by the Criminal Code as the maximum sentence for the offense with which they are charged, shall be released by the criminal court hearing the case. These provisions do not include persons charged with offenses punished under the Law on Narcotics and Psychotropic Substances."

[104] *Case of Suárez Rosero v. Ecuador,* paras. 97 and 98.

[105] Ruling of August 19, 1997, of the First Chamber of the Constitutional Court (evidence files, folio 2083).

[106] In this regard, the expert witness Reinaldo Cavalchi Cruz stated that "there is no doubt that while [Article 116 of Law 108 on Narcotics] was in force (more than 7 years), it affected all those prosecuted under Law 108. It should be added that this norm also contravened the right to equality and the principle of non-discrimination recognized in subparagraph 4 of Article 19 of the Constitution." Expert opinion rendered by affidavit por Reinaldo Cavalchi Cruz on August 8, 2019 (evidence file, folio 2907).

[107] *Cf. Juridical condition and rights of undocumented migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 103, and *Case of Jenkins v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 26, 2019. Series C No. 397, para. 91.

matter must be analyzed in light of Article 24 of the American Convention[108] in relation to the categories protected by Article 1(1)of the Convention. The Court recalls that a difference in treatment is discriminatory when it has no objective or reasonable justification -[109] in other words, when it does not seek a legitimate purpose and when the means used are disproportionate to the purpose sought.[110]

126. In the present case, the Court notes the differentiated treatment that resulted from the application of Article 114 bis of the Criminal Code, which limited the enjoyment of the writ of *habeas corpus* (*supra* para. 123). The Court observes that the automatic exclusion of the benefit of release from prison is based solely on the specific crime with which Mr. Montesinos was charged - with no explanation of the specific purpose of the difference in treatment, its appropriateness, necessity, proportionality and, furthermore, with no consideration of the personal circumstances of the accused.[111]

127. Without prejudice to the foregoing, it should be noted that on December 16, 1997, several articles of the Law on Narcotics and Psychotropic Substances[112]were declared unconstitutional, among them, the fourth paragraph of Article 114 of the Criminal Code, which excluded defendants from the benefit of being at liberty while standing trial.

128. For all the foregoing reasons, the Court concludes that the exception contained in Article 114 bis of the Criminal Code in force at the time of the facts violated the right to equality before the law established in Article 24 of the American Convention on Human Rights, in relation to Articles 1(1), 2, 7(5) and 7(6) thereof, to the detriment of Mr. Mario Montesinos.

B.4 Right to have recourse to a judge regarding the legality of detention

129. As the Court has established, Article 7(6) of the Convention protects the right of anyone who is deprived of his liberty to have recourse to a competent court, in order that the court may decide, without delay, on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.[113] In this regard, the Court has emphasized that the authority that should decide on the lawfulness of the arrest or detention should be a judge or court. It has also stressed that the remedies available to protect this guarantee "should not only exist formally in legislation but must also be effective, that is, they must fulfill the objective of obtaining, without delay, a decision regarding the legality of the arrest or detention of the alleged victim."[114]

130. In this context, the Court has already ruled on the incompatibility of the *habeas corpus* remedy available in Ecuador at the time of the facts of this case with the American Convention on Human Rights. Thus, in the case of *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, the Court decided that although a mayor is competent to examine a *habeas corpus* appeal under domestic law, he did not constitute a judicial authority, since, as determined by the Ecuadorian

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[108] *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of Jenkins v. Argentina*, para. 91.

[109] *Cf. Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17*,* para. 46, and *Case of Jenkins v. Argentina,* para. 91.

[110] *Cf. Case of Norín Catrimán (Leaders, Members and Activist of the Mapuche Indigenous People) et al. v. Chile***,** para. 200, and *Case of Jenkins v. Argentina,* para. 91.

[111] *Cf. Case of Argüelles et al. v. Argentina,* para. 227, and *Case of Jenkins v. Argentina***,** para. 92.

[112] Decision No. 119-1-97 of the Constitutional Court (evidence file, folios 2054 to 2056).

[113] *Cf. Habeas Corpus Under the Suspension of Guarantees (arts. 27.2, 25(1) and 7(6) American Convention on Human Rights).* Advisory Opinion OC-8/87 of January 30, 1987, para. 33; *Case of Romero Feris v. Argentina,* para. 122.

[114] *Cf. Case of Acosta Calderón v. Ecuador. Merits, reparations and costs*. Judgment of June 24, 2005. Series C No.129, para. 97; *Case of Amrhein et al. v. Costa Rica*, para. 370.

Constitution in force at the time, the mayor is an authority of the "sectional regime", that is, he is part of the Administration.[115]

131. In the aforementioned case, the Court also examined the appeal lodged with the Court of Constitutional Guarantees regarding the *habeas corpus* process in Ecuador. In this regard, it established that by requiring detained persons to appeal the mayor's decisions in order for their case to be heard by a judicial authority, the State was placing obstacles to a remedy that should, by its very nature, be simple. In addition, the Court noted that the law established that it was the duty of the mayor to resolve the appeal within 48 hours and, within the same period of time, to refer the proceedings to the Constitutional Court if the latter so required, which meant that the detainee had to wait at least 4 days for the Constitutional Court to hear his case. To this must be added the fact that the law did not establish a time limit for the Constitutional Court to resolve the appeal. It also indicated that the Constitutional Court was the only judicial body competent to hear appeals from throughout the country against the denial of *habeas corpus*.[116]

132. In the instant case, it has been proven that on September 10, 1996, Mr. Montesinos filed a writ of *habeas corpus* before the Mayor of the Metropolitan District of Quito, which was rejected six days later.[117] It has also been proven that he appealed this decision before the Court of Constitutional Guarantees, which ordered his immediate release on October 30, 1996.[118] Moreover, there is no dispute and it has been proven that, despite the order for his immediate release, Mr. Montesinos continued to be deprived of his liberty;[119] it was not until the decision of the Constitutional Guarantees Court of August 13, 1998[120] that, once the appeal filed by the alleged victim against the rejection of a new *habeas corpus* petition was accepted,[121] the order for the immediate release of Mr. Montesinos was issued and complied with.[122] Thus, it has been proven that Mr. Montesinos was detained for approximately six years and two months[123] without a judgment being issued.

133. Therefore, by not implementing the *habeas corpus* remedy in force at the time of the facts of the instant case with the duty to submit, without delay, before a judicial authority, and the lack of effectiveness of the Decision of October 30, 1996, the Court declares that in the instant case the State violated Article 7(6) of the Convention, in relation to Articles 1(1) and 2 thereof.

134. In relation to Article 7(6) of the American Convention, based on the analysis made in this section on the ineffectiveness of the *habeas corpus* remedy in force in Ecuador at the time

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[115] *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 128.
[116] *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 129.
[117] Decision 182-96-CP issued by the Constitutional Court in the context of Case No. 45/96-TC (evidence file, folio 46); *Habeas corpus* filed by Mr. Alejandro Ponce Villacís in favor of Mario Montesinos Mejía on April 14, 1998 (evidence file, folios 346 to 348).
[118] Decision 182-96-CP issued by the Constitutional Court in the context of Case No. 45/96-TC (evidence file, folios 53 and 2814).
[119] Press report: "Human Rights - the CC requests release. Montesinos: his freedom under debate." Article published in *El Comercio* newspaper on November 23, 1996 (evidence file, folio 344); Ruling of the First Chamber of the Constitutional Court of August 19, 1997 (evidence file, folio 2083); *Habeas corpus* filed by Mr. Alejandro Ponce Villacís in favor of Mario Montesinos Mejía on April 14, 1998 (evidence file, folio 346); Decision 119-HC-98-I.S. of August 13, 1998, issued by the Constitutional Court in the context of Case No. 207-98-HC (evidence file, folio 2827).
[120] Decision 119-HC-98-I.S. of August 13, 1998, issued by the Constitutional Court in the context of Case No. 207-98-HC (evidence file, folio 2825 to 2830).
[121] *Habeas corpus* appeal filed by Mr. Alejandro Ponce Villacís in favor of Mario Montesinos Mejía on April 14, 1998 (evidence file, folios 346 and 347).
[122] Brief of pleadings, motions and evidence (merits file, folio 85); Answering brief of the State (merits file, folio 213).
[123] Decision 119-HC-98-I.S. of August 13, 1998, issued by the Constitutional Court in the context of Case No. 207-98-HC (evidence file, folio 2827).

of the facts of this case, the Court does not consider it necessary to analyze the same facts under Article 25(2)(c) of the Convention.

B.5 Presumption of innocence

135. Article 8(2) of the Convention establishes that "[e]very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven."

136. As the Court has indicated, pretrial detention is the most severe measure that can be imposed on an accused person and, therefore, should only be applied in exceptional circumstances: the rule should be the release of the person being prosecuted pending adjudication of his or her criminal responsibility.[124] One of the principles that limit pretrial detention is the presumption of innocence, contained in Article 8(2), according to which a person is innocent until his guilt has been proved.[125] Under this guarantee, the elements that substantiate the existence of legitimate purposes for pretrial detention cannot be presumed; rather, the judge must justify his decision based on the objective and true circumstances of the specific case,[126] which must be proved by the person prosecuting the case rather than by the accused, who should also be able to exercise the right of rebuttal and be duly assisted by a lawyer.[127] Moreover, the Court has held that the personal characteristics of the supposed perpetrator and the seriousness of the crime attributed to him are not, *per se*, sufficient justification for pretrial detention.[128]

137. Thus, the general rule must be that the defendant remains at liberty while a decision is made regarding his criminal responsibility.[129] Otherwise, an injustice would be committed by depriving of liberty, for a disproportionate period of time, persons whose criminal responsibility has not been established, which would imply anticipating a penalty for the accused.[130]

138. This Court has determined that Mr. Montesinos' detention was unlawful and that the preventive detention order and its validity were neither justified nor motivated, and were therefore arbitrary. Therefore, the prolongation of his deprivation of liberty until the second *habeas corpus* appeal was resolved by the Constitutional Court was tantamount to an anticipated sentence, contrary to the presumption of innocence.

139. Consequently, the State violated Mr. Montesinos' right to presumption of innocence enshrined in Article 8(2)of the Convention, in relation to Article 1(1) thereof.

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[124] *Inter alia, Case of Tibi v. Ecuador,* para. 106; *Case of Acosta Calderón v. Ecuador,* para. 74; *Case of Palamara Iribarne v. Chile,* para. 196; *Case of Lopez Alvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No 191, para. 67 and *Case of Jenkins v. Argentina,* para. 72.

[125] *Cf. Case of Ricardo Canese v. Paraguay. Merits, reparations and costs.* Judgment of August 31, 2004. Series C No. 111, para. 153 and *Case of Hernández v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 22, 2019. Series C No 395, para. 109.

[126] *Cf. Case of Amrhein et al. v. Costa Rica*, para. 357, and *Case of Hernández v. Argentina*, para. 109.

[127] *Cf. Case of Bayarri v. Argentina,* para. 74 and *Case of Hernández v. Argentina,* para. 116.

[128] *Cf. Case of López Álvarez v. Honduras,* para. 69 and *Case of Hernández v. Argentina,* para. 109. Similarly, the Inter-American Commission has stated: "Consequently, the justification of pretrial detention for preventive reasons – such as the dangerousness of the accused, the possibility of his committing crimes in the future, or the social repercussions of such acts – runs contrary to this provision and to the right to the presumption of innocence and is inconsistent with the principle of pro homine interpretation. This is true not only for the reasons given, but because such stances are based on criteria of substantive, not procedural, criminal law, which are characteristic of the punitive response." Report on the Use of Pretrial Detention in the Americas. OEA/Ser.L/V/II. Doc. 46/13. December 30, 2013, para. 144.

[129] *Case of López Álvarez v. Honduras,* para. 67 and *Case of Hernández v. Argentina,* para. 106.

[130] *Case of Suárez Rosero v. Ecuador,* para. 77 and *Case of Amrhein et al. v. Costa Rica,* para. 387.

B.6 Conclusion

140. For the foregoing reasons, the Court finds that Ecuador violated the rights to personal liberty, judicial guarantees and judicial protection, established in Articles 7(1), 7(2), 7(4), 7(5), 8(2)and 24 of the American Convention on Human Rights, in relation to Article 1(1) thereof, as well as Articles 7(1), 7(3) and 7(6), in relation to Articles 1(1)and 2.

VII-2
RIGHT TO PERSONAL INTEGRITY[131] AND OBLIGATION TO INVESTIGATE COMPLAINTS OF TORTURE[132]

A. Arguments of the parties and the Commission

141. The ***Commission*** alleged that the American Convention expressly prohibits torture and cruel, inhuman or degrading punishment and treatment and that inter-American jurisprudence has established that said prohibition emanates from *ius cogens*. It also mentioned that victims of torture do not have the means to prove the existence of the elements necessary to define such conduct as torture.

142. Regarding this specific case, the Commission pointed out that Mr. Montesinos was detained with Mr. Suárez Rosero[133] in the context of the same operation, for which reason his arguments were similar. Specifically, it determined that Mr. Montesinos was threatened, confined in a cell measuring 11 square meters with 13 other persons, was beaten by State agents and was held incommunicado. It also noted that the medical certificate dated June 21, 1992, was prepared by the police, that is, by the body responsible for the aforementioned facts. In addition, it determined that the State did not initiate any investigation into the complaint made by Mr. Montesinos in his first *habeas corpus* petition related to the beatings and threats he allegedly received.

143. In view of the foregoing, the Commission concluded that, in the present case, there was at least cruel, inhuman and degrading treatment, in violation of conventional guarantees, as well as violations of Mr. Montesinos' personal integrity owing to the failure to investigate the alleged facts, and therefore found the State responsible for the violation of Articles 5(1) and 5(2) of the American Convention. It also found that the State did not investigate Mr. Montesinos' complaints despite the fact that, in his first *habeas corpus* appeal, he alleged that he had suffered beatings, ill-treatment and threats. Therefore, it concluded that the State violated the rights to judicial guarantees and judicial protection. In addition, taking into account that the Inter-American Convention to Prevent and Punish Torture entered into force in Ecuador on December 9, 1999, it considered that the failure to investigate complaints of torture in this case also constituted a violation of the obligations contained in Articles 1, 6 and 8 of the Convention, since the entry into force of said instrument.

144. The ***representative*** argued that the actions taken by State agents at the time of Mr. Montesinos' arrest constituted a violation of the right to personal integrity. He added that Article 5(2) of the Convention was violated to the detriment of Mr. Montesinos, since he was subjected to torture and cruel, inhuman and degrading treatment due to the prison conditions, being held incommunicado and the treatment he received at the detention centers. He added that the Court had already assessed these facts in the case of *Suárez Rosero v. Ecuador*. He

[131] Articles 5(1), 5(2) of the American Convention.
[132] Article 5(2) of the American Convention and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.
[133] *Cf. Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35**.**

further alleged a violation of Article 5(3) of the Convention, given that the criminal proceedings against Mr. Montesinos also affected the rights of Mrs. Marcia González Rubio.

145. The ***State*** argued that the Constitution in force at the time of the facts, as well as the subsequent Constitution, established the guarantee of personal integrity and prohibited torture and cruel, inhuman or degrading treatment. It emphasized that in its reports, the Commission positively assessed the efforts made by the State of Ecuador in its responses to complaints of this type, so that the allegations of systematic practices would not have any support whatsoever.

146. As to the alleged breach of Article 5(1)of the American Convention, the State held that the police reports confirmed the existence of court orders authorizing the arrest of Mr. Montesinos and the subsequent search of his house; it added that Mr. Montesinos himself gave permission for the agents to enter his home. It also argued that there is no evidence to substantiate the alleged threats at the time of his arrest.

147. The State further argued that there was no violation of Article 5(2)of the Convention, since the information presented by the representative is neither concrete nor specific. It pointed out that the alleged acts of collective torture do not specifically refer to Mr. Montesinos and that and that there is no factual support for this position in the proceedings.

148. With respect to Article 5(3) of the American Convention, the State argued that the representative did not prove the violation of the personal integrity of Mr. Montesinos' spouse, but rather violations of the right to property. It also argued that she was not detained or subjected to cruel, inhuman or degrading treatment.

149. The State also pointed out that its institutions and norms of protection have evolved dynamically since the Constitution of the Republic in force at the time of the facts alleged in this case. It emphasized that Ecuador's 2008 Constitution has established a national human rights protection network within the framework of which the current comprehensive criminal law, known as the Comprehensive Organic Criminal Code, which responds to inter-American and universal human rights standards, is implemented. Finally, it emphasized that the Code criminalizes offenses such as failure to report torture, forced disappearance and sexual violence in armed conflict. Therefore, the State concluded that it has honored its commitments by complying with inter-American and universal human rights standards.

B. Considerations of the Court

150. The American Convention expressly recognizes the right to personal, physical and mental integrity, the violation of which "is a type of violation that has various connotations of degree and […]whose physical and psychological consequences vary in intensity according to endogenous and exogenous factors that must be demonstrated in each specific situation."[134] This Court has also indicated that, pursuant to Article 5(1)and 5(2)of the Convention, every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity.[135] In this regard, it has indicated that the State, being responsible for detention facilities, is in a special position as guarantor of the rights of all persons in its custody.[136]This implies the duty to safeguard the health and wellbeing of

[134] *Cf. Case of Loayza Tamayo v. Peru. Merits. Judgment of September 17, 1997. Series C No. 33,* para. 57, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico,* para. 177.
[135] *Cf. Case of Neira Alegría et al. v. Peru. Merits.* Judgment of January 19, 1995. Series C No 20, para. 60 and *Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of October 14, 2019. Series C No 387, para. 71.
[136] *Cf. Case of Neira Alegría et al. v. Peru,* para. 60 and *Case of Rodríguez Revolorio et al. v. Guatemala*, para. 71.

detainees, providing them, *inter alia*, with the required medical care, and ensuring that the manner and method of deprivation of liberty does not exceed the level of suffering inherent to imprisonment.[137]

151. As established by the Court, in accordance with Article 1(1) of the American Convention, the obligation to guarantee the rights recognized in Articles 5(1) and 5(2) of the American Convention implies the duty of the State to investigate possible acts of torture or other cruel, inhuman or degrading treatment. This obligation is specified in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture,[138] all within the general obligation of the States themselves to guarantee the free and full exercise of the rights recognized by the Convention to all persons under their jurisdiction (Article 1(1)).[139] Regarding the duty to investigate, it has specified that this is an obligation of means and not of result, which must be assumed by the State as its own legal duty[140] and be initiated *ex officio* and immediately when there is a complaint or there are grounds to believe that an act of torture has been committed.[141]

152. Likewise, in relation to the events that occurred during deprivation of liberty in State custody, this Court has indicated that the lack of investigation "prevents the State from presenting a satisfactory and convincing explanation of the alleged mistreatment and from disproving the allegations of its responsibility, by means of adequate evidence."[142]

153. In the instant case, the allegations of the Commission and the representative refer to the treatment Mr. Montesinos received while he was deprived of his liberty, in particular, that he was threatened, confined in a cell measuring 11 square meters with 13 other persons, beaten by State agents and held incommunicado for eight days. The State has not provided evidence to refute the allegations presented by the Commission and the representative, nor has it refuted the allegations of threats and incommunicado detention. However, it did deny the alleged violent intervention and beatings by the Police Intervention and Rescue Group on July 23, 1992. Moreover, the only medical document in the file is a very brief examination carried out on the day of the arrest, on June 21, 1992, which simply states "there is nothing new."

154. In relation to the case of *Suárez Rosero v. Ecuador*, the Court observes that Mr. Montesinos was indeed detained together with Mr. Suárez Rosero at the *Regimiento Quito* and also at the García Moreno Prison.[143] In his testimony before this Court, Mr. Suárez Rosero confirmed the ill-treatment, poor conditions of detention and beatings that he and Mr. Montesinos received there.

155. The State has not been able to disprove the violations of Mr. Montesinos' personal integrity because it has not presented concrete arguments or facts in this regard, and because it has not provided any evidence to determine Mr. Montesinos' state of health and conditions of detention during the more than six years in which he was deprived of his liberty. This,

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[137] *Cf. Case of the Juvenile Reeducation Institute. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, para. 159, and *Case of Rodríguez Revolorio et al. v. Guatemala,* para. 71.

[138] *Cf. Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006. Series C No. 149, para. 147; *Case of Herrera Espinoza et al. v. Ecuador*, para. 103.

[139] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, para. 91, and *Case of Herrera Espinoza et al. v. Ecuador*, para. 103.

[140] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, para. 177, and *Case of Herrera Espinoza et al. v. Ecuador*, para. 103.

[141] *Case of Tibi v. Ecuador*, para. 159, and *Case of Herrera Espinoza et al. v. Ecuador*, para. 103.

[142] *Case of J. v. Peru,* para. 353 and *Case of Herrera Espinoza et al. v. Ecuador,* para. 105.

[143] Statement of Rafael Iván Suárez Rosero rendered by affidavit on August 7, 2019 (evidence files, folios 2895 and 2896).

together with the factual and legal findings made by the Court in the Suárez Rosero judgment on the treatment received during his detention,[144] lead the Court to conclude that the conditions of detention and treatment to which Mr. Montesinos was subjected amounted to cruel, inhuman and degrading treatment.

156. It has also been proven that in his writ of *habeas corpus,* filed on September 10, 1996, Mr. Montesinos denounced that he was subjected to torture and inhuman and degrading treatment. This was also referred to by the Court of Constitutional Guarantees in its appeal judgment of October 30, 1996, in which it merely stated that it could not rule on the alleged inhuman treatment "because no evidence has been presented on this matter," without ordering - despite having granted the writ of *habeas corpus* and in light of the incommunicado detention of Mr. Montesinos-[145] the opening of any investigation in this regard.[146]

157. In addition to filing the *habeas corpus* petitions, it is important to note that Mr. Montesinos and his legal representative informed the judicial authorities of the ill-treatment and torture he had suffered during his imprisonment. In the letter sent by Mr. Montesinos to the President of the Supreme Court of Justice on October 13, 1995, he denounced the "abysmal conditions" in which the prisoners in his cellblock were being held.[147]

158. Based on the foregoing, it is clear that the State was aware of the acts of violence committed against Mr. Montesinos; however, it did not initiate an investigation in this regard.

159. Therefore, the Court concludes that the State failed to fulfill its obligations to respect and guarantee the right to personal integrity, and thus violated Articles 5(1)and 5(2), in relation to Article 1(1) of the Convention, to the detriment of Mario Montesinos Mejía.

160. The Court also concludes that, after December 9, 1999, the failure to investigate the complaint of torture and ill-treatment resulted in the violation of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Mr. Montesinos.

161. Regarding the alleged violation of Article 5(3) of the Convention to the detriment of Mrs. Marcia González Rubio, the Court recalls that she is not the alleged victim in this case (*supra* para. 2(b)), so it is not appropriate to analyze the aforementioned allegation.

VII-3
RIGHT TO JUDICIAL GUARANTEES[148]

A. Arguments of the parties and of the Commission

162. The ***Commission*** established that the proceedings against Mr. Montesinos violated: i) the rule of exclusion of evidence obtained under duress; ii) the right of defense; iii) the principle of presumption of innocence and iv) the reasonableness of the duration of criminal proceedings.

163. First, it recalled that Article 8(3) of the American Convention prohibits the admission of evidence derived directly or indirectly from coercion. Based on the foregoing, it considered

[144] *Case of Suárez Rosero v. Ecuador*, para. 91.
[145] Decision 182-96-CP issued by the Constitutional Court in the context of Case No. 45/96-TC (evidence file, folio 48).
[146] Decision 182-96-CP issued by the Constitutional Court in the context of Case No. 45/96-TC (evidence file, folios 46 and 47).
[147] Letter sent to the President of the Supreme Court of Justice on October 13, 1995 (evidence file, folios 68 and 69).
[148] Article 8 of the American Convention.

that the presumptive statement given by Mr. Montesinos under duress was not duly excluded from the criminal proceeding. On the contrary, this presumptive statement was used in the proceedings without ever assessing the allegation of coercion or the need to exclude the alleged confessions. Therefore, the Commission concluded that Article 8(3) of the Convention was violated in this case.

164. Second, it recalled that the right to technical defense must be exercised as soon as a person is accused of a crime. Thus, in this specific case, it noted that Mr. Montesinos did not have a defense counsel to assist him in the presumptive statement and in the subsequent statements, and therefore concluded that Article 8(2)(d) of the American Convention was violated.

165. Third, regarding the presumption of innocence, the Commission recalled that this means that the burden of proof is on the accuser to demonstrate the commission of the crime. However, the Commission noted that in this specific case, Mr. Montesinos' presumption of innocence was violated because, by virtue of Article 116 of the Narcotics Law, a serious presumption of guilt was established for all those implicated in the crimes defined by that law. Therefore, the Commission concluded that Article 8(2) of the Convention was violated.

166. Finally, with respect to the reasonable time, the Commission observed that in the three criminal proceedings: i) the procedure was not particularly complex; ii) the State provided no evidence to demonstrate that the judicial authorities acted diligently to ensure that Mr. Montesinos obtained a decision within a reasonable period of time; iii) there is no evidence in the file to show that Mr. Montesinos obstructed the proceedings, and iv) the continuity of the proceedings under the circumstances of the case affected the alleged victim by maintaining his deprivation of liberty owing to the prohibition of his release from prison in force at the time of the facts. Thus, the Commission determined that the State violated the guarantee of reasonable time established in Article 8(1) of the American Convention.

167. The ***representative*** argued that the three criminal cases were excessively delayed, emphasizing that it took six years to conclude the two trials in which Mr. Montesinos was acquitted and nearly 18 years to convict him in the trial for the crime of front activities (*testaferrismo*). In addition, the representative pointed out that the judges' assessment was limited by the presumption of criminal responsibility in Article 116 of the Narcotics Law. He further argued that judicial independence was also undermined owing to the commitments between Ecuador and the government of the United States of America regarding the "fight against drug trafficking."

168. With respect to the alleged violation of Article 8(2) of the Convention, the representative joined the Commission's argument regarding the violation of the presumption of innocence based on Article 116 of the Narcotics Law. He also alleged the violation of Article 8(2)(b) of the Convention based on Mr. Montesinos' lack of knowledge regarding the charges made against him. He indicated that, as a result of the incommunicado detention, Mr. Montesinos was unable to choose or communicate with his defense counsel; and once he was able to communicate with his attorney, the communication was not free because there was a police agent watching the meetings. In addition, he argued that Article 8(3) of the Convention was violated because evidence used in the criminal proceedings was obtained by means of coercion.

169. Finally, he established that the right to a proper statement of reasons was violated in the conviction for the crime of front operations issued by the Chamber of the Provincial Court of Justice of Pichincha. He also indicated that this judgment violated Article 8(4) of the Convention, since the orders to initiate the three criminal proceedings were identical, i.e.,

three criminal proceedings were initiated for the same facts. He added that in the favorable decision of two trials, the relationship between the crimes was established, so that there could not be a conviction in the third trial on the basis of the same facts. Thus, according to the representative, in the instant case there was a violation of the *ne bis in idem* guarantee derived from Article 8(4) of the Convention.

170. The ***State****,* for its part, affirmed that there was no violation of the guarantees of Article 8 of the American Convention. Thus, in the first place, with respect to Article 8(1), it argued that: i) the Commission had made a general assessment regarding the reasonable time period of the three trials without analyzing the particular legal elements of each trial and its delay. Thus, it indicated that it was not taken into account that the defense of Mr. Montesinos carried out various actions that resulted in the delay of the process; ii) regarding the guarantee of a competent, independent and impartial judge, it maintained that Mr. Montesinos was tried by the competent judges in accordance with the regulations in force at the time. In addition, it emphasized that the allegations of the representative are directed against the judge of the criminal trial for front operations (*testaferrismo*) in which he was convicted. Likewise, it specified that in the framework of that process, the conviction was duly reasoned.

171. Second, with respect to Article 8(2), the State argued that the rules and procedures of the criminal proceedings guaranteed the presumption of innocence, as evidenced by the two criminal trials in which Mr. Montesinos was acquitted. In addition, it alleged that the representative expressed disagreement with the outcome of the proceedings, but not a violation of due process.

172. Third, the State argued that there was no violation of Article 8(3) since Mr. Montesinos always had a technical defense and legal sponsorship.

173. Finally, in relation to Article 8(4), the State specified that each of the criminal proceedings was carried out on a different legal and factual basis. It added that this was acknowledged by the representative during the proceedings before the Commission.

B. Considerations of the Court

B.1 Regarding Article 8 of the Convention

174. The Court has established that although Article 8 of the American Convention is entitled "Judicial Guarantees," its application is not limited to judicial remedies in the strict sense, "but rather to the procedural requirements that should be observed"[149] in the courts so that a person may defend himself adequately in the face of any action by the State that affects his rights.[150]

175. Thus, to ensure the full observance of judicial guarantees in a trial, in accordance with the provisions of Article 8 of the Convention, it is essential to observe all the requirements that ""serve to protect, to ensure or to assert the entitlement to a right or the exercise thereof."[151] In other words, the "conditions that must be observed to ensure the adequate

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[149] *Cf Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A, No. 9, para. 27.
[150] *Cf. Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 69 and *Case of López et al. v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2019, Series C, No. 396, para. 198.
[151] *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs.* Judgment June 21, 2002. Series C No. 94, para. 147 and *Case of Álvarez Ramos v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 30, 2019. Series C No. 380, para. 144.

defense of those whose rights or obligations are under judicial consideration."[152]

176. The Court has also established that, in accordance with Article 8(1) of the Convention, when determining the rights and obligations of persons, whether criminal, civil, labor, fiscal or of any other nature, "due guarantees" must be observed to ensure, according to the procedure in question, the right to due process; and that failure to observe one of these guarantees entails a violation of said conventional provision.[153] It has likewise indicated that Article 8(2) of the Convention establishes, additionally, the minimum guarantees that must be ensured by the States in accordance with the due process of law.[154] Thus, the right to obtain all the guarantees through which it may be possible to arrive at fair decisions is a human right that must be respected in any procedure whose decisions may affect the rights of persons.[155]

177. In this regard, the Court finds it useful to analyze the arguments of the parties concerning the supposed violation of Article 8 of the Convention as follows: a) reasonable time of the criminal proceedings; b) the right of defense; c) rule of exclusion of evidence obtained under duress, and d) the right to not be tried twice for the same facts.

B.2 Reasonable time of the criminal proceedings (Article 8(1) of the Convention)

178. The Court has established that the purpose of the principle of "reasonable time" is to prevent accused persons from remaining in that situation for a protracted period and to ensure that the matter is promptly decided.[156] Thus, a prolonged delay in the proceedings may in itself constitute a violation of judicial guarantees.[157]

179. The evaluation of reasonable time must be analyzed, in each case, in relation to the total duration of the process. Thus, the Court has considered four elements to determine whether the guarantee of reasonable time was observed: i) the complexity of the matter, ii) the procedural activity of the interested party, iii) the conduct of the judicial authorities, and iv) the effect produced on the legal situation of the person involved in the process. On this issue, the Court recalls that it is up to the State to justify, based on the criteria indicated, the reason why it has required the time elapsed to deal with the cases and, in the event that the State does not demonstrate it, the Court has broad powers to make its own estimate in this regard.[158]

180. Likewise, it has indicated that the "reasonable time" to which Article 8(1) of the Convention refers must be assessed in relation to the entire duration of the proceeding, from the first procedural act until the final decision is handed down, including any appeals that may be filed.[159] In this regard, in the aforementioned case of *Suarez Rosero v. Ecuador*, the Court

[152] *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago,* para. 147, and *Case Álvarez Ramos v. Venezuela,* para. 144.
[153] *Cf. Case of Claude Reyes et al. v. Chile. Merits, reparations and costs*. Judgment of September 19, 2006. Series C No. 151, para. 117, and *Case of López et al. v. Argentina,* para. 200.
[154] *Cf. Case of Baena Ricardo v. Panama*. *Merits, reparations and costs*. Judgment of February 2, 2001. Series C No. 72, para. 137.
[155] *Case of Baena Ricardo v. Panama*, para. 127, and *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2013. Series C No. 268, para. 167.
[156] *Case of Suárez Rosero v. Ecuador. Merits*, para. 70.
[157] *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, para. 145, and *Case of Jenkins v. Argentina*, para. 106.
[158] *Cf. Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of September 22, 2009. Series C No. 202, para. 156, and *Case of Jenkins v. Argentina*, para. 106.
[159] *Cf. Case of Suárez Rosero v. Ecuador. Merits*, para. 71, and *Case of Wong Ho Wing v. Peru*, para. 209.

determined that the first act of the proceeding was the arrest.[160] Accordingly, to assess compliance with the principle of reasonable time in this case the Court will consider the arrest of Mr. Montesinos on June 21, 1992, as the first procedural act.

181. In this context, from the documents contained in the case file and the statements of the parties, the Court considers that the trial for the conversion or transfer of assets concluded with a judgment of acquittal on April 29, 1998, that is, six years after the beginning of the process.[161] In the case of the trial for illicit enrichment, the parties have stated and it has been proven that this ended with the dismissal order issued by the Fourth Chamber of Judges of the Superior Court of Justice of Quito, on May 7, 1998,[162] that is, approximately six years after the start of the process. Finally, with respect to the action brought for front operations (*testaferrismo*), this ended on October 31, 2010, that is, more than 18 years after the beginning of the process, with the decision of the Criminal Chamber of the National Court of Justice[163] rejecting the appeal filed against the conviction handed down by the First Specialized Criminal, Transit and Collusive Court of the Superior Court of Justice of Quito of September 8, 2008.[164] Based on the foregoing, the Court will now determine whether the time elapsed is reasonable according to the criteria established in its case law.

182. To determine the complexity of the matter, the Court has defined different elements, including: i) the complexity of the evidence;[165] ii) the number of procedural subjects[166] or the number of victims;[167] iii) the time that has elapsed since the alleged offense was reported;[168] iv) the characteristics of the remedies available under domestic legislation;[169] or v) the context in which the facts occurred.[170] In the instant case, the Court notes that, in the proceedings for the crimes of conversion and transfer of assets and illicit enrichment, none of the aforementioned assumptions are present, given that the acquittal judgments issued by the Superior Court of Justice of Quito in favor of Mr. Montesinos are based exclusively on legal arguments. Specifically, the Superior Court of Justice of Quito found that these crimes constituted an action consequent to the main crime of drug trafficking, but not concurrent with it, as it had been mistakenly assumed*;* or, in other words - the Superior Court stated textually in both cases - "*first the responsibility should have been examined and proven in a criminal trial for drug trafficking, the sentence of which should be enforceable, be final so that the prosecution of the other consequent offenses can only take place (illegible) since according to lit. f) of Num. 17, Art. 22 of our political constitution, every person is presumed innocent until proven otherwise by an enforceable sentence."*[171] Therefore, it is clear that in the trials

[160] *Case of Suárez Rosero v. Ecuador*. Merits, para. 70.
[161] Ruling of April 29,1998 of the Superior Court of Justice of Quito – Fourth Chamber of Associate Judges in the trial for conversion or transfer of assets against Mario Montesinos (evidence file, folios 164 to 175).
[162] Ruling of the Superior Court of Justice of May 7, 1998, in the case for illicit enrichment, for which Mr. Montesinos was finally acquitted (evidence file, folios 1270 to 1271).
[163] Judgment of the Criminal Chamber of the National Court of Justice of October 31, 2010, which denied the cassation appeal (evidence file, folio 1566 to 1612).
[164] Conviction handed down by the First Specialized Criminal, Transit and Collusive Court of the Superior Court of Justice of Quito of September 8, 2008 (evidence file, folios 1466 to 1564).
[165] *Cf. Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs*. Judgment of January 29, 1997. Series C No. 30, para. 78, and *Case of Jenkins v. Argentina,* para. 110.
[166] *Cf. Case of Acosta Calderón v. Ecuador.* Merits, reparations and costs. Judgment of June 24, 2005. Series C No. 129, para. 106, and *Case of Jenkins v. Argentina,* para. 110.
[167] *Cf. Case of Furlan and Family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 156 and *Case of Díaz Loreto et al. v. Venezuela*, para. 113.
[168] Mutatis mutandis, *Cf. Case of Heliodoro Portugal v. Panama*. Preliminary objections, merits, reparations and costs. Judgment of August 12, 2008. Series C No. 186, para. 150, and *Case of Díaz Loreto et al. v. Venezuela*, para. 113.
[169] *Cf. Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits*. Judgment of May 6, 2008. Series C No. 179, para. 83, and *Case of Jenkins v. Argentina,* para. 110.
[170] *Cf. Case of Furlan and Family v. Argentina*, para. 156, and *Case of Díaz Loreto et al. v. Venezuela*, para. 113.
[171] Ruling of April 29, 1998, of the Superior Court of Justice of Quito – Fourth Chamber of Associate Judges in the trial for conversion or transfer of assets against Mario Montesinos (evidence file, folio 171); Ruling of the Superior Court

for the crimes of conversion and transfer of assets and illicit enrichment there were no elements of complexity that would justify the delay of more than 6 years in their completion.

183. On the other hand, regarding the trial for front operations,[172] from the information presented by the State in its answer brief, it is concluded that the evidence that led to Mr. Montesinos' conviction for this crime, in September 2008, did not vary from that presented for the opening of the main proceedings in 1992.[173] Accordingly, the Court does not find additional elements within this proceeding that are of such complexity as to justify the delay of more than 18 years in its processing[174] in accordance with the standards established by the Court in its jurisprudence.

184. In relation to the procedural activity of the interested party, the Court recalls that the use of legal remedies recognized by the applicable legislation for the defense of his rights, *per se*, cannot be used against him.[175] In this regard, this Court has considered that the filing of remedies constitutes an objective factor, which should not be attributed to either the alleged victim or the respondent State, but should be taken into account as an objective element in determining whether the duration of the proceedings exceeded the reasonable time.[176] Indeed, the Court has found that the main delay in the resolution of the proceedings has occurred in the presumptive stage and, furthermore, that once the summary proceeding was initiated, the delay in processing the appeals filed cannot be attributed to Mr. Montesinos, but to the procedural inactivity of the authorities. For example, on December 3, 1996, Mr. Montesinos filed an appeal against the decision of November 22, 1996, which ordered the opening of the plenary proceeding against him. This appeal was decided through an order of dismissal dated May 7, 1998, that is, approximately one year and 5 months after the appeal was filed.

185. Regarding the conduct of the judicial authorities, the Court has understood that, as the governing body of the process, they have the duty to direct and guide the judicial procedure so as not to sacrifice justice and due process in favor of formalism.[177] In the instant case the Court notes that since the order was issued to initiate proceedings, no relevant actions or procedures were carried out in the trials for illicit enrichment and conversion and transfer of assets, and no new evidence other than that collected at the time of the arrests of June 1992 was gathered. Furthermore, in relation to the proceedings for front operations, the Court does not observe any relevant actions between the issuance of the order at the start of the proceeding, on November 18, 1992, and the opening of the plenary stage on March 23, 1998. Likewise, the first instance judgment was issued in September 2003. After the presentation of appeals by the Prosecutor's Office, another five years passed until the second instance judgment was issued on September 8, 2008, a period in which no proceedings or other relevant acts were carried out in the process (*supra* para. 68), so that a lapse of 19 years until the issuance of the conviction cannot be justified.

186. From the foregoing it is clear that during the investigations and the proceedings there were several periods of unjustified inactivity by the Ecuadorian authorities, which caused

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of Justice of May 7, 1998, in the case of illicit enrichment, in which Mr. Montesinos was finally acquitted (evidence file, folios 1270 to 1271).

[172] Conviction handed down by the First Specialized Criminal, Transit and Collusive Court of the Superior Court of Justice of Quito of September 8, 2008 (evidence file, folios 1466 to 1564).

[173] Order to initiate proceedings for the crime of front activities, November 18, 1992 (evidence file, folios 765-770).

[174] In all cases the facts mention checkbooks of which he appears as the holder with blank checks signed, allegedly used to make payments of different types, and also that there are several real estate properties in the name of Mr. Montesinos but that actually belong to Jorge Hugo Reyes Torres (evidence file, folios 186 and 187).

[175] *Case of Genie Lacayo v. Nicaragua*, para. 79, and *Case of Jenkins v. Argentina,* para. 117.

[176] *Case of Mémoli v. Argentina*, para. 174; *Case of Wong Ho Wing v. Peru*, para. 211.

[177] *Cf. Case of Myrna Mack Chang v. Guatemala. Merits, reparations and costs*. Judgment of November 25, 2003. Series C No. 101, para. 211, and *Case of Villamizar Durán et al. v. Colombia*, para. 166.

undue delays in the process. The State did not prove that it could not have taken a different course of action that would have resulted in a more expeditious development of the investigations and the proceedings.

187. Finally, the Court recalls that, in order to determine the reasonableness of the time, the impact of the duration of the proceedings on the legal situation of the person being prosecuted must be taken into account, considering, among other elements, the subject matter of the dispute. Thus, this Court has established that if the passage of time has a significant impact on the individual's legal situation, it will be necessary for the procedure to move forward with greater diligence so that the case is resolved in a short period of time.[178] It should also be emphasized that proceedings in which a person is held in precautionary detention should be carried out as expeditiously as possible.[179] In this context, the Court observes that, in the instant case, the criminal proceedings against Mr. Montesinos lasted more than 18 years, as a result of which he was deprived of his liberty under preventive detention for more than 6 years. The Court also notes the situation of uncertainty in which the alleged victim was kept regarding his conviction for the crime of front operations for more than 18 years and the impossibility of using his assets seized in the framework of said proceedings.

188. In view of the foregoing, the Inter-American Court concludes that the State authorities did not act with due diligence and the duty of promptness required by the deprivation of liberty of Mr. Montesinos, for which reason the criminal proceedings against him exceeded a reasonable time, violating his right to the guarantees established in Article 8(1), in relation to Article 1(a) of the American Convention.

B.3 Right of defense

189. The Court has understood that "[t]he right of defense is a central component of due process," and "must necessarily be exercised from the moment a person is identified as a possible perpetrator or participant in a punishable act, and ends when the proceedings conclude, including, where applicable, the enforcement phase."[180]

190. Article 8 of the Convention includes specific guarantees with respect to the right to defense. Thus, in subparagraph "b" of the second paragraph, it determines the need for "the accused" to be informed of the "accusation" against him in a "prior and detailed" manner. The Court has stated that this rule "applies even before an 'accusation' in the strict sense is formulated, [since] in order for the aforementioned article to satisfy the purposes inherent to it, it is necessary that the notification occurs before the accused makes his first statement before any public authority."[181]

191. The Convention establishes guarantees for the technical defense and the right to be assisted by a defense lawyer (Article 8(2)(d) and (e). This last right is violated when the State does not ensure that the defendant's technical defense can participate by assisting him in the central acts of the process, such as, for example, in receiving the defendant's statement without the assistance of his defense counsel.[182] Thus, in decisions on previous cases concerning Ecuador, the Court has considered the circumstances in which a person "gave his pretrial statement to the prosecutor without the assistance of a defense counsel" or did not

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[178] *Case of Valle Jaramillo et al. v. Colombia*, para. 155.
[179] *Case of Bayarri v. Argentina*, para. 70, and *Case of Wong Ho Wing v. Peru*, para. 268.
[180] *Cf. Case of Barreto Leiva v. Venezuela. Merits, reparations and costs*. Judgment of November 17, 2009. Series C No. 206, para. 29, and *Case of Herrera Espinoza et al. v. Ecuador*, para. 181.
[181] *Cf. Case of Barreto Leiva v. Venezuela,* para. 30 and *Case of Herrera Espinoza et al. v. Ecuador,* para. 182.
[182] *Cf. Case of Tibi v. Ecuador, paras.* 193, 194 and 196, *Case of Herrera Espinoza et al. v. Ecuador,* para. 183

have such assistance "at the time of the initial questioning before the police" as part of a set of facts in violation of the second section of Article 8(2), subparagraphs (d) and (e) of the second paragraph of Article 8(2)."[183]

192. In this case, there is no document in the case file to prove that Mr. Montesinos was informed of the reason for his detention or that such information was provided before the order to initiate proceedings was issued in November 1992 (*supra* paras. 113 and 114). Furthermore, there is no record in Mr. Montesinos' statements[184] that he was informed of the crime attributed to him. Likewise, the specific facts for which Mr. Montesinos was linked to these cases were also not determined in the orders to initiate proceedings for the crimes of illicit enrichment and conversion or transfer of assets.[185] The latter was also noted by the Court of Constitutional Guarantees of Ecuador in the *habeas corpus* of 1996, which stated that "insofar as the content of the writs ordering the proceedings, we must conclude that, effectively, their wording does not specify facts that personally implicate Colonel Mario Alfonso Montesinos Mejía in the commission of a crime and, therefore, they do not express the charges against him."[186]

193. In addition, it has been duly proven that Mr. Montesinos rendered his preliminary statements and was even questioned without the presence of a lawyer.[187] Similarly, the Court of Constitutional Guarantees acknowledged that Mr. Montesinos was held incommunicado during the 38 days of his detention[188] which, in the view of the Inter-American Court, is sufficient evidence that the alleged victim did not have an opportunity to properly prepare his defense, since he did not have the legal assistance of a public defender or of an attorney of his choice with whom he could communicate freely and privately.

194. It should also be noted that in the Ecuadorian judiciary acknowledged the unjustified delay in the procedural terms and deadlines in the *habeas corpus* granted by the Court of Constitutional Guarantees on October 30, 1996.[189]

195. In view of the foregoing and taking into account that, as will be explained below (*infra* para. 214), Mr. Montesinos' presumptive statement had great relevance in his conviction in the criminal proceeding for front operations (*testaferrismo*), the Court considers that the State violated the rights established in Article 8(2) (b), (c), (d) and (e) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Mario Montesinos Mejía.

B.4 Rule of exclusion of evidence obtained under coercion

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[183] *Cf. Case of Tibi v. Ecuador*, paras. 193, 194 and 196, *Case of Acosta Calderón v. Ecuador*, paras. 124 and 126, and *Case of Herrera Espinoza et al. v. Ecuador*, para. 181-187. Similarly, in the Case of Chaparro *Álvarez and Lapo Íñiguez v. Ecuador,* para. 158), the Court found that the fact that the victim "did not have the presence of a defense attorney at the time of his interrogation by the police" was part of the violation of Article 8(2)(d) of the Convention.
[184] Preliminary statement of Mr. Montesinos of July 12, 1992, at the Interpol Office of Pichincha (evidence file, folios 815 and 816); Preliminary statement of Mr. Mario Montesinos Mejía of June 25, 1992 (evidence file, folios 56 to 60).
[185] Order of the Superior Court of Justice for the opening of proceedings for the crime of conversion or transfer of assets, November 30, 1992 (evidence file, folios 964 to 968); Order to initiate proceedings of the Superior Court of Justice for the crime of illicit enrichment of November 30, 1992 (evidence file, folios 971 to 975).
[186] Decision 182-96-CP issued by the Constitutional Court in the context of Case No. 45/96-TC (evidence file, folios 47 to 48).
[187] Preliminary statement of Mr. Montesinos of June 12, 1992 at the Interpol Office of Pichincha (evidence file, folios 815 to 816); Preliminary statement of Mr. Mario Montesinos Mejía of June 25, 1992 (evidence file, folios 56 to 60); investigative testimonies of January 20, 1993 and December 30, 1993 (evidence file, folios 2149 to 2158).
[188] Decision 182-96-CP issued by the Constitutional Court in the context of Case No. 45/96-TC (evidence file, folio 48).
[189] Decision 182-96-CP issued by the Constitutional Court in the context of Case No. 45/96-TC (evidence file, folios 47 and 48).

196. The Court has observed that the rule of exclusion of evidence obtained through torture or cruel and inhuman treatment (hereinafter the "exclusionary rule") has been recognized by various treaties[190] and international bodies for the protection of human rights, which have established that this rule is intrinsic to the prohibition of such acts.[191] Thus, the Court has considered that this rule has an absolute and non-derogable character.[192]

197. In this regard, the Court has held that the annulment of procedural documents resulting from torture or cruel treatment is an effective measure to halt the consequences of a violation of judicial guarantees.[193] The Court has also reiterated that the exclusionary rule not only applies to cases in which acts of torture or cruel treatment have been committed. In this sense, Article 8(3) of the Convention is clear in indicating that "[t]he defendant's confession is only valid if made without duress of any kind," that is, it is not limited to the factual situation of torture or cruel treatment, but extends to any form of duress. Indeed, whenever it is proven that any form of duress has interfered with the spontaneous expression of a person's will, this necessarily implies the obligation to exclude that evidence from the judicial proceeding. The annulment of such evidence is a necessary means to discourage the application of any form of coercion.[194]

198. Furthermore, this Court has considered that statements obtained under duress are seldom truthful, because the person tries to say whatever is necessary to make the cruel treatment or torture stop. Accordingly, the Court considers that accepting or granting evidentiary value to statements or confessions obtained by coercion, which affect the person or a third party, constitutes, in turn, an infringement of a fair trial. Similarly, the Court has indicated that the absolute nature of the exclusionary rule is reflected in the prohibition on granting probative value not only to evidence obtained directly by coercion, but also to evidence derived from such action.[195]

199. In the instant case, it has been determined that Mr. Montesinos was subjected to cruel, inhuman and degrading treatment and that he denounced acts of torture that were not investigated. Specifically, Mr. Montesinos was held incommunicado for 38 days, which, as was determined in the case of *Suarez Rosero v. Ecuador*,[196] leads to the conclusion that Mr. Montesinos was subjected to cruel, inhuman and degrading treatment.

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[190] Article 15 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment establishes that "[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." For its part, Article 10 of the Inter-American Convention to Prevent and Punish Torture indicates that "[n]o statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means."

[191] In this regard, the U.N. Committee Against Torture has stated that "the obligations established in Articles 2 (according to which "no exceptional circumstances whatsoever…may be invoked as a justification of torture"), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer) and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) must be observed in all circumstances." Cf. United Nations. Committee Against Torture. General Comment No. 2, 'Application of Article 2 by States Parties' of January 24, 2008 (CAT/C/GC/2), para. 6. For its part, the Committee on Human Rights has indicated the following: "The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. (…) Similarly, as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by Article 14." United Nations. Committee of Human Rights. General Comment N° 32, Right to equality before courts and courts and to a fair trial (HRI/GEN/1/Rev.9 (vol. I), para. 6.

[192] *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 26, 2010. Series C No. 220, para. 165.

[193] *Cf. Case of Bayarri v. Argentina*, para. 108; *Case of Cabrera García and Montiel Flores v. Mexico*, para. 166.

[194] *Case of Cabrera García and Montiel Flores v. Mexico*, para. 166.

[195] *Case of Cabrera García and Montiel Flores v. Mexico*, para. 167.

[196] *Case of Suárez Rosero v. Ecuador*, para. 91.

200. Therefore, the Court understands that Mr. Montesinos' statements were obtained under coercion, in spite of which, they were not deprived of evidentiary value. On the contrary, as stated in the judgment issued by the First Specialized Criminal, Transit and Collusive Court of the Superior Court of Justice of Quito, of September 8, 2008, for the crime of front operations, the preliminary statement obtained under duress constitutes central element in Mr. Montesinos' conviction for this crime. Thus, as established in said judgment, the proof of the material existence of the infraction was demonstrated *"according to law, with: (…) the pre-trial statements made by the defendants in the presence of representatives of the Public Prosecutor's Office, in which the facts that have been the subject of this investigation have been recounted."*[197] *Likewise, it has been confirmed that in the preparation of the aforementioned sentence, the presumptive statements made by Mr. Montesinos are cited on several occasions as central elements for his conviction*.[198]

201. Based on the foregoing considerations, the Court finds that the State violated Article 8(3) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Mario Montesinos Mejía.

B.5 Right to not be subjected to a new trial for the same facts

202. With regard to the right to not be subjected to new trial for the same facts, the representative affirmed that the three proceedings initiated against Mr. Montesinos for the crimes of illicit enrichment (No. 91-92), front operations (*testaferrismo)* (No. 92-92) and conversion and transfer of assets (No. 94-92) were based on the same alleged criminal acts. In this regard, he argued that this was evidenced in the orders to initiate proceedings issued on November 18 and 30, 1992, respectively.

203. From the analysis of the three aforementioned orders to initiate proceedings, the Court observes that the orders related to the crimes of illicit enrichment and conversion and transfer of assets do not establish or individualize the actions through which Mr. Montesinos would have committed such crimes as perpetrator, co-perpetrator or accomplice. These documents generically describe the operation of the drug trafficking organization but do not make it possible to determine the prohibited conduct on the part of the victim in this case. In that regard, the Court of Constitutional Guarantees stated the following in its Decision granting the first *habeas corpus* on October 30, 1996: "as regards the content of the orders to initiate proceedings, it must be concluded that, in fact, their wording does not give details of the facts that personally implicate Colonel Mario Alfonso Montesinos Mejía in the commission of a crime and, therefore, they do not state the charges existing against him."[199]

204. Taking into account the lack of specific charges against Mr. Montesinos in the aforementioned orders to initiate proceedings, the Court understands that in reality the problem evidenced by the representative is the fact that Mr. Montesinos was not informed in advance and in detail of the accusation made against him. This matter was analyzed as a violation of Article 8(2)(b), in section B.3 *supra*.

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[197] Conviction handed down by the First Specialized Criminal, Transit and Collusive Court of the Superior Court of Justice of Quito, on September 8, 2008 (evidence file, folio 1473).
[198] Conviction handed down by the First Specialized Criminal, Transit and Collusive Court of the Superior Court of Justice of Quito, on September 8, 2008 (evidence file, folios 1525 to 1527).
[199] Decision 182-96-CP issued by the Constitutional Court in the context of Case No. 45/96-TC (evidence file, folios 47 and 48).

205. Furthermore, the order to initiate proceedings for the crime of front operations (*testaferrismo*) describes the specific behaviors of Mr. Montesinos that would fall within the prohibited criminal act, which allowed him to defend himself against the accusation.

206. Accordingly, the Court considers that there is no violation of Article 8(4) of the Convention, since the facts for which Mr. Montesinos was accused in two of the three proceedings were not individualized and do not allow it to determine a similarity between the punishable acts in each of the proceedings initiated against him.

VII-4
PRINCIPLE OF LEGALITY AND RETROACTIVITY,[200] PROTECTION OF HONOR AND DIGNITY[201] AND RIGHT TO PROPERTY[202]

A. Arguments of the parties

207. The ***representative*** alleged a violation of Article 9 of the American Convention because Mr. Montesinos was retroactively punished for the crime of front operations, given that the Ecuadorian legislation defining this act as a crime was issued on September 17, 1990, and the purchase of the "Santa Clara" property occurred on June 27, 1990. He established that there was a violation of the guarantee of legality since Mr. Montesinos was convicted for having signed blank cheques, an action that was not defined in the Criminal Code. He added that this decision violated Article 25 of the Convention by not considering the defense based on the non-retroactivity of criminal law.

208. He also alleged a violation of Article 11 of the Convention, because Mr. Montesinos had been presented to public opinion as a criminal and because there had been interference with the private life of his family and his home due to the search of his home.

209. The representative added that the State did not have an order to seize the "Santa Clara" property, which constituted a violation of Article 21 of the American Convention.

210. The ***State*** argued that its actions adhered to the principle of *nullum crimen* and *nulla pena sine lege* and added that the conduct for which Mr. Montesinos was convicted was defined in the domestic legal system.

211. It argued that there was no evidence that Mr. Montesinos had been presented to the national and international media as a criminal and argued that the mere fact that a person is being criminally prosecuted does not imply a violation of Article 11 of the Convention.

212. The State also held that the forfeiture of the "Santa Clara" property was a consequence of the criminal proceedings against Mr. Montesinos, which were in accordance with inter-American standards. It emphasized that in the domestic courts this sanction has been considered as an accessory penalty to the commission of crimes related to drug trafficking. Therefore, it considered that there was no violation of Article 21 of the American Convention.

B. Considerations of the Court

213. The Court considers that the representative's arguments in relation to the alleged violation of Article 11 were not supported by convincing evidence that would allow it to conclude that the victim was presented to public opinion as a criminal; therefore, it will not rule on this matter. Regarding the alleged violation of Article 9 related to the retroactive application of the criminal law to the date of purchase of the "Santa Clara" property, the Court observes that the judicial decision that convicted Mr. Montesinos for the crime of front activities was not based exclusively on the acquisition of that property, but rather on a series of actions subsequent to the aforementioned rule and evidence, which, in their totality, generated conviction of the commission of the crime. That said, the Court does not consider that the retroactive application of the criminal law has been established and does not find a violation of Article 9 of the American Convention.

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[200] Article 9 of the American Convention.
[201] Article 11 of the American Convention.
[202] Article 21 of the American Convention.

214. Without prejudice to the foregoing, the Court points out that by not specifying the offenses charged and limiting itself to mentioning the legal definition of the conduct in the proceedings for the crimes of illicit enrichment and conversion and transfer of assets, it was not possible to determine whether those acts were classified *prima facie* under those criminal offenses, and, even less, whether such offenses involved several concurrent crimes or, on the contrary, involved a single action resulting in several offenses, with the result of subjecting the accused to two or more proceedings. Therefore, in addition to violating the right of defense (*supra* paras. 189 to 195), the principle of legality (Article 9 of the American Convention) may possibly have been violated. The lack of precision in defining the conduct in the proceedings neutralizes the effectiveness of this principle by making it impossible to verify its observance.

215. Finally, with respect to the alleged violation of Article 21 of the Convention owing to the confiscation of the Santa Clara property during the processing of the criminal proceedings, the Court recalls that the factual framework of the proceedings before the Court is constituted by the facts contained in the Merits Report submitted to the Court for its consideration.[203] Consequently, it is not admissible to allege new facts different from those stated in said Report, without prejudice to presenting facts that may explain, clarify or reject those mentioned therein, or responding to the claims of the petitioner (also known as "supplementary facts"). The exception to this principle are those facts classified as supervening, which may be referred to the Court at any stage of the proceedings prior to the issuance of the judgment.

216. In the instant case, the Court finds that the Commission did not include within the factual framework, or as a substantive consideration, i) the facts alleged by the representative in relation to the alleged violation of Article 21, ii) the judicial decisions related to the alleged violation of Article 21. Therefore, the Court will not rule on these facts or on the legal arguments made by the representative in this regard.

VIII
REPARATIONS

217. Based on the provisions of Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has produced harm entails the obligation to make adequate reparation, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[204]

218. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), consisting of the re-establishment of the previous situation.[205] If this is not feasible, as in most cases of human rights violations, the Court will determine measures to guarantee the rights that have been violated and to redress the consequences of those violations, pursuant to Article 63(1) of the Convention and in accordance with international law.[206] Therefore, the Court has considered the need to grant various measures of reparation in order to fully redress the damage, so that

[203] *Case of I.V. v. Bolivia. Preliminary objection, merits, reparations and costs.* Judgment of November 30, 2016. Series C No. 329, para. 45 and *Case of Rodríguez Revolorio v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 14, 2019. Series C No. 387, para. 24.

[204] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Jenkins v. Argentina,* para. 122.

[205] *Cf. Case of Velásquez Rodríguez v. Honduras*, para. 26, and *Case of Jenkins v. Argentina*, para. 123.

[206] *Cf. Case of Velásquez Rodríguez v. Honduras*, para. 26, and *Case of Jenkins v. Argentina,* para. 123.

in addition to pecuniary compensation, the measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition have special relevance for the damage caused.[207]

219. The Court has established that reparations should have a causal link with the facts of the case, the violations declared, the damage proven and the measures requested to redress the respective harm. Therefore, the Court will observe such concurrence in order to rule appropriately and according to the law.[208]

220. In consideration of the violations declared in the preceding chapter, the Court will proceed to analyze the claims presented by the Commission and the representative, as well as the arguments of the State, in light of the criteria established in the Court's case law regarding the nature and scope of the obligation to make adequate reparation, with the aim of ordering measures to redress the harm caused to the victim.[209]

221. International jurisprudence and, in particular that of the Court, has repeatedly established that the judgment *per se* constitutes a form of reparation.[210] However, considering the circumstances of this case and the suffering caused to the victim by the violations committed, the Court considers it pertinent to establish other measures.

A. Injured party

222. This Court reiterates that, under the terms Article 63(1) of the American Convention, the injured party is considered to be anyone who has been declared a victim of the violation of any right recognized therein. Therefore, this Court considers as "injured party" Mr. Mario Montesinos Mejía, who as the victim of the violations declared in Chapter VII of this Judgment, will be the beneficiary of the measures ordered by the Court.

B. Measures of satisfaction and restitution

223. The ***Commission*** requested that the State adopt measures of financial compensation and satisfaction.

224. The ***representative*** requested the following: i) the full annulment of the proceeding against Coronel Mario Alfonso Montesinos Mejía on the charge of front operations, which resulted in his conviction. This includes the annulment and exclusion of all evidence that was obtained or generated from the illegal arrest and incommunicado detention of Mr. Montesinos, in particular the police report that served as the basis for the order to initiate proceedings; ii) the recognition by the State that as long as there is no valid process, the presumption of innocence subsists and therefore he should be treated as an innocent person, and iii) the elimination from all public records of the name of Mario Alfonso Montesinos Mejía as the person responsible for the crime of front operations, and of any sanction or fine against him.

225. The ***State*** pointed out that the Court does not have jurisdiction to reverse judicial decisions issued by the domestic courts, since it does not act as a fourth instance. Likewise, it considered inadmissible the annulment of the proceedings for front operations, and the fact of attributing the name of Mr. Montesinos to an anti-narcotics unit.

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[207] *Cf. Case of the Massacre of Dos Erres v. Guatemala, Preliminary objection, merits, reparations and costs*. Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Jenkins v. Argentina,* para. 123.

[208] *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Jenkins v. Argentina, para. 124.*

[209] *Cf. Case of Velásquez Rodríguez v. Honduras*, paras. 25 to 27, and *Case of Jenkins v. Argentina,* para. 125.

[210] *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Jenkins v. Argentina*, para. 106.

226. In this regard the ***Court***, as it has done in other cases,[211] finds it pertinent to order the State to publish, within six months of notification of this judgment: a) the official summary of this judgment prepared by the Court, once, in the Official Gazette, in an appropriate and legible font; b) the official summary of the judgment prepared by the Court, once, in a newspaper with widespread national circulation, in an appropriate and legible font, and c) this judgment in full, available for at least one year on an official web site accessible to the public. The State shall advise the Court immediately when it has made each of the publications ordered.

227. With regard to the conviction for the crime of front operations, in view of the conclusions reached by the Court in Chapters VII-2 and VII-3, to the effect that Mr. Montesinos was subjected to cruel, inhuman and degrading treatment during the period of his pretrial detention, that he was not advised by a lawyer during his first statements and that his complaints of torture and ill-treatment were not investigated, the Court considers that the statements made by Mr. Montesinos during the initial stage of the proceedings, which were used by the Court to convict him of the crime of front operations (*testaferrismo*), should be excluded from the proceedings. Likewise, in view of the violations established in the instant case, this Court determines that the criminal proceedings against Mr. Montesinos cannot produce legal effects with respect to said victim and, therefore, requires the State to adopt all necessary measures under domestic law to annul the consequences of any kind arising from the aforementioned criminal proceedings, including any judicial or administrative, criminal or police record that may exist against him as a result of such proceedings. To this end, the State has six months from the date of notification of this Judgment.

C. Investigation of acts of torture

228. The ***Commission*** recommended that the State open a criminal investigation *ex officio* in a diligent and effective manner, and within a reasonable period of time, in order to clarify the acts of cruel, inhuman and degrading treatment denounced by Mr. Montesinos and to identify all those responsible and impose the corresponding sanctions with respect to the human rights violations declared in the Report. The ***representative*** requested an investigation and criminal sanctions for those responsible for the human rights violations committed against Mario Montesinos Mejía. The ***State*** did not present any arguments on this point.

229. The ***Court*** declared in this judgment that the State failed to comply with its duty to investigate the alleged torture and cruel, inhuman and degrading treatment suffered by Mr. Montesinos (*supra* para.160). In this regard, the Court appreciates the regulatory and institutional advances implemented in recent years by Ecuador (*supra* para. 149). Notwithstanding these advances, the Court orders that Ecuador, within a reasonable time, take the necessary steps to investigate, prosecute, and, if appropriate, punish those responsible for the cruel, inhuman and degrading treatment established in this judgment, and for the torture denounced by Mr. Montesinos in 1996.

230. In line with its constant case law, the Court considers that the State must ensure to victims or their next of kin full access and capacity to act in all stages of the investigation and prosecution of the perpetrators, in accordance with domestic laws and the provisions of the American Convention.

[211] *Cf. Case of Cantoral Benavides v. Peru,* para. 79, and *Case of López Soto et al. v. Argentina,* para. 237.

D. Measures of rehabilitation

231. The ***Commission*** requested that the Court order measures to ensure the provision of the necessary physical and mental health care for the rehabilitation of Mario Montesinos Mejía, if he so wishes, and in full agreement with him. The ***representative*** requested the implementation of physical and mental health care measures, taking into account Mr. Montesinos' current condition. The ***State*** recalled that, as a member of the Social Security Institute of the Armed Forces of Ecuador (ISSFA), Mr. Montesinos receives full and continuous medical care. Mr. Montesinos currently holds a retirement pension from ISSFA and enjoys 100% health insurance coverage. The benefits provided by ISSFA are specified in the Armed Forces Social Security Law. In addition, as a member of ISSFA, Mr. Montesinos may seek medical care through the Armed Forces health care providers, the Integral Public Health Network, and the Complementary Private Network. Consequently, Mr. Montesinos is adequately provided for and his expenses are duly covered by his health insurance; therefore, it is neither necessary nor pertinent for the Court to rule on medical care measures.

232. The ***Court*** notes that in this case it was proved that Mr. Montesinos was the victim of cruel, inhuman and degrading treatment. Moreover, based on the evidence provided to the Court and the statements of his family members, the Court observes that Mr. Montesinos suffers from a number of ailments as a consequence of the six years during which he was deprived of his liberty.[212] Although the Court takes into consideration the State's explanation that Mr. Montesinos has access to medical care provided by the Social Security Institute of the Armed Forces of Ecuador, the Court considers that the State must provide, free of charge and in an immediate, adequate and effective manner, the psychological and psychiatric treatment required by Mr. Montesinos, with his prior informed consent and for as long as may be necessary, including the provision of free medication. Likewise, the respective treatments must be provided in a timely and differentiated manner and, to the extent possible, at the health center nearest to his place of residence in Ecuador, for as long as is necessary. To this effect, the victim has a period of six months from the notification of this judgment to request such treatment from the State.

E. Compensation

233. The ***Commission*** requested comprehensive reparation, both pecuniary and non-pecuniary, for the human rights violations declared in its Merits Report.

234. The ***representative*** requested: i) the payment of compensation to Mr. Montesinos for being subjected to torture, cruel and inhuman treatment, as well as the arbitrary deprivation of his liberty for more than six years, of such magnitude as to have a preventive effect so that the State does commit similar acts, estimated at USD $1,000,000; ii) reparation for non-pecuniary and moral damages to be set by the Court in equity, considering the length of time that he suffered such harm, estimated at no less than USD $500,000; iii) reparation for the damage caused to his life project, as a certain and past fact, for the sum of at least USD $1,000,000, and iv) an indemnity corresponding to the current value of the "Santa Clara" property, the ownership of which both Mario Montesinos Mejía and his spouse Marcia González Rubio were deprived. On this point, the representative explained that the indemnification value is the only real mechanism to make reparations, since the property is currently invaded by more than a hundred peasant families.

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[212] Medical certificate of November 23, 1997, citing ischemic cardiopathy (evidence file, folio 2081); medical certificates confirming Mario Montesinos Mejía's current health status and disability carnet (evidence file, folio 2076 to 2079).

235. With regard to the compensation, the ***State*** indicated that: i) the special confiscation of Hacienda Santa Clara was ordered in the judgment of September 9, 1996, in a judicial proceeding in which it was determined that the property was being used for criminal purposes. The sanction affecting the property was imposed within the framework of a judicial proceeding aimed at guaranteeing public order; ii) the pecuniary damage alleged with respect to the alleged victim's property, which was associated with criminal purposes, does not constitute a compensable damage; iii) the judgment in the Fermín Ramírez case should be considered, in which the Court condemned the State of Guatemala for violations of judicial guarantees, judicial protection, the principle of legality, and personal integrity to his detriment; however, the Court did not order any pecuniary reparation, considering that there was no evidence to prove the alleged material damages, as well as the objective factual elements; iv) the amounts requested by the representative for non-pecuniary damage are disproportionate and, as such, must be rejected, since the principle of integral reparation cannot imply the enrichment of the alleged victim. Likewise, in relation to the "preventive nature" that the representative intends to give to the eventual reparation, the State recalls that the Inter-American Court is not authorized to order punitive compensation, but only to ensure that any redress is exclusively aimed at repairing the damage caused; v) regarding the alleged damage to the life project, it considered the amount disproportionate and that the claim was not justified by any financial evidence; the projects that would have been affected are not specified either. In addition, the State indicated that, as can be seen from Mr. Montesinos' curriculum vitae, his professional life has unfolded normally, and therefore he has not been limited in continuing his life project.

236. The ***Court*** has developed the concept of pecuniary damage[213] and the situations in which it must be compensated. In particular, the Court has established that pecuniary damage supposes "the loss of or detriment to the victim's income, the expenses incurred as a result of the facts and the consequences of a pecuniary nature that have a causal nexus with the facts of the case." Accordingly, the Court will consider the appropriateness of granting pecuniary reparations and will determine the respective amounts due in this case.

237. With respect to pecuniary damage, in its case law the Court has established that this supposes the loss of or detriment to the victims income, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the case.[214] In the instant case, the Court notes that the representative has not presented any evidence with his pleadings and motions brief to demonstrate the loss of or detriment to income directly resulting from the facts of the case, so that the Court does not have sufficient information to order compensation for pecuniary damage in favor of Mr. Montesinos.

238. With regard to non-pecuniary damage, in its case law the Court has established that non-pecuniary damage may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well any alteration of a non-pecuniary nature in the living conditions of existence of the victim. Since it is not possible to assign a precise monetary equivalent to non-pecuniary damage, it can only be compensated, for the purposes of full reparation to the victim, through the payment of a sum of money or the delivery of goods or services that can be valued in money, as determined by the Court in a reasonable application of judicial discretion and in terms of equity.[215] Therefore, considering the circumstances of this case, as well as other non-pecuniary consequences established in this judgment, the Court considers it appropriate to

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[213] *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002, Series C No. 91, para. 43; and *Case of Jenkins v. Argentina*, para. 145.

[214] *Cf. Case of Bámaca Velásquez v. Guatemala*, para. 43 and *Case of Jenkins v. Argentina*, para. 145.

[215] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Jenkins v. Argentina*, para. 158.

set in equity, for non-pecuniary damage, compensation equivalent to USD $50,000.00 (fifty thousand United States dollars) in favor of Mr. Montesinos Mejía.

239. Finally, the Court does not consider it necessary to grant additional measures of financial reparation for other alleged damages.

F. Other measures of reparation requested

240. The ***Commission*** requested that the State adopt the necessary measures to prevent similar events from occurring in the future. Specifically, it requested training programs for the security forces, judges and prosecutors on the absolute prohibition of acts of torture and cruel, inhuman or degrading treatment, as well as the obligations derived from the exclusionary rule; measures to ensure that the competent authorities are duly trained regarding their obligation to initiate, *ex officio*, criminal investigations in the event of a complaint or well-founded reason regarding possible acts of torture and cruel, inhuman or degrading treatment; and, measures to strengthen accountability mechanisms and ensure their proper application to officials in charge of the treatment of persons deprived of their liberty. The ***representative*** requested that the Republic of Ecuador be ordered to adopt the necessary measures to prevent similar events from occurring in the future and that the State apologize to Mr. Montesinos and his family for the human rights violations committed against them. Also, that the State designate the police unit in charge of the fight against drugs with the name of Mario Alfonso Montesinos Mejía.

241. The ***Court*** does not consider it necessary to order additional measures to those ordered previously.

G. Costs and expenses

242. The ***representative*** requested payment of the costs and expenses incurred, as well as professional fees for the legal defense, both at the domestic and the international levels. He estimated that the expenses incurred in the defense at the domestic level amounted to at least USD $100,000, and for the defense before the Inter-American System he estimated the sum of USD $100,000.

243. The ***State*** referred to the reasonable *quantum* of the compensation and considered that the amount claimed is excessive, in addition to not being supported by any evidence. It also requested a rigorous breakdown of the items that the victim's representative intends to include in the costs and expenses claimed, and that a reasonable amount be set.

244. The ***Court*** reiterates that, in accordance with its case law,[216] costs and expenses form part of the concept of reparation, since the activity carried out by the victims in order to obtain justice, both at the national and international level, implies expenses that must be compensated when the international responsibility of the State is declared by means of a condemnatory judgment. As for the reimbursement of costs and expenses, it is up to the Court to prudently assess its scope, which includes the expenses incurred before the authorities of the domestic jurisdiction, as well as those incurred in the course of the proceedings before the Inter-American System, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment

[216] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 79 and *Case of Jenkins v. Argentina*, para. 164.

may be made based on the principle of equity and taking into account the expenses indicated by the parties, provided that their *quantum* is reasonable.[217]

245. This Court has stated that "the claims of the victims or their representatives for costs and expenses, and the supporting evidence, must be presented to the Court at the first procedural opportunity granted to them, that is, in the pleadings and motions brief, without prejudice to those claims being updated subsequently with the new costs and expenses arising from the proceedings before this Court."[218] Likewise, the Court reiterates that "it is not sufficient to merely forward the probative documents; rather, the parties are required to include arguments that relate the evidence to the fact that it represents and, in the case of alleged financial disbursements, to establish clearly the items and their justification."[219]

246. In the instant case, there is no precise evidentiary support in the case file regarding the costs and expenses incurred by Mr. Montesinos or his representative in connection with the processing of the case at the domestic level or before the Court. However, the Court considers that such proceedings necessarily involved pecuniary expenses, and therefore determines that the State must pay the representative the sum of US$ 15,000.00 (fifteen thousand United States dollars) for costs and expenses. This amount must be delivered directly to the representative. During the stage of monitoring compliance with this judgment, the Court may order the State to reimburse the victim or his representative for reasonable expenses incurred in this procedural stage.[220]

H. Reimbursement of expenses to the Victims' Legal Assistance Fund

247. In a note issued by the Secretariat on October 31, 2018, the Court granted the request to have access to the Victims' Legal Assistance Fund. Likewise, in the Order convening a hearing on June 25, 2019, the President granted financial assistance to cover the travel and accommodation expenses necessary for the witness Marcia González Rubio to appear before the Court to testify at the public hearing held in this case. In said Order, the President decided that the reasonable costs of formalizing and sending the affidavit of the alleged victim, Mario Montesinos Mejía, could be covered with resources from the Victims' Legal Assistance Fund.

248. On October 23, 2019, a report on disbursements was sent to the State in accordance with the provisions of Article 5 of the Court's Rules of Procedure on the Operation of the Fund. Thus, the State had the opportunity to present its observations on the disbursements made in the instant case, which amounted to USD $176.00 (one hundred and seventy-six United States dollars). The State did not submit any observations on said expenditures.

249. In light of the violations declared in this judgment, and given that the requirements to have access to the Legal Assistance Fund have been met, this Court orders the State to reimburse said Fund in the amount of USD $176.00 (one hundred and seventy-six United States dollars) for the expenses incurred. This amount shall be reimbursed within six months of notification of this judgment.

I. Method of compliance with the payments ordered

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[217] *Cf. Case of Garrido and Baigorria v. Argentina*, para. 82 and *Case of Omeara Carrascal et al. v. Colombia. Merits, reparations and costs.* Judgment of November 21, 2018. Series C No. 368, para. 342.
[218] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 275 and *Case of Jenkins v. Argentina*, para. 164.
[219] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 277 and *Case of Jenkins v. Argentina*, para. 164.
[220] *Cf. Case of Gudiel Álvarez et al. (Diario Militar) v. Guatemala. Interpretation of Judgment, Merits, reparations and costs*. Judgment of August 19, 2013. Series C No. 262, para. 62, and *Case of Jenkins v. Argentina*, para. 165.

250. The State shall pay the compensation ordered in this judgment for pecuniary and non-pecuniary damage and to reimburse costs and expenses directly to the person indicated therein, within one year of notification of this judgment, without prejudice to the possibility of advancing full payment within a shorter period.

251. If the beneficiary should die before he receives the respective compensation, this shall be paid directly to his heirs in accordance with the applicable domestic law.

252. The State shall comply with its monetary obligations by paying in United States dollars or its equivalent in national currency, using for the respective calculation the exchange rate in effect at the New York Stock Exchange, United States of America, on the day prior to payment.

253. If, for reasons that can be attributed to the beneficiary of the compensation or his heirs, it is not possible to pay the compensation established within the time frame indicated, the State shall deposit these amounts in an account or certificate of deposit in a solvent Ecuadorian financial institution, in United States dollars, and on the most favorable financial terms permitted by banking law and practice. If the corresponding compensation is not claimed within ten years, the amounts shall be returned to the State with the accrued interest.

254. The amounts established in this judgment as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses shall be delivered in full to the person indicated, as established in this judgment, without any deductions arising from possible charges or taxes.

255. If the State should fall into arrears, including in the reimbursement of expenses to the Victims' Legal Assistance Fund, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Ecuador.

IX
OPERATIVE PARAGRAPHS

256. Therefore,

THE COURT

DECIDES,

Unanimously,

1. To dismiss the preliminary objection filed by the State regarding the Court's lack of jurisdiction *ratione temporis*, pursuant to paragraphs 18 and 19 of this Judgment.

Unanimously,

2. To dismiss the preliminary objection filed by the State regarding the failure to exhaust domestic remedies, pursuant to paragraphs 24 to 28 of this Judgment.

Unanimously,

3. To dismiss the preliminary objection filed by the State regarding the lack of jurisdiction *ratione materiae* to review domestic decisions, pursuant to paragraphs 32 to 35 of this Judgment.

Unanimously,

4. To dismiss the preliminary objection filed by the State regarding the control of legality of the actions of the Inter-American Commission, pursuant to paragraphs 38 to 41 of this Judgment.

DECLARES,

Unanimously, that:

5. The State is responsible for the violation of the rights to personal liberty, to the presumption of innocence and to judicial protection, provided for in Articles 7(1), 7(2), 7(4), 7(5), 8(2) and 24 of the American Convention on Human Rights, in relation to Article 1(1) of said instrument; as well as Articles 7(1), 7(3) and 7(6) of the American Convention, in relation to Articles 1(1)and 2 of the same instrument, to the detriment of Mario Alfonso Montesinos Mejía, pursuant to paragraphs 114, 119, 128, 133 and 139 of this Judgment.

Unanimously, that:

6. The State is responsible for the violation of the obligations to protect and guarantee the right to personal integrity, recognized in Articles 5(1)and 5(2) of the American Convention on Human Rights, in relation to Article 1(1) thereof, and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Mario Alfonso Montesinos Mejía, pursuant to paragraphs 159 and 160 of this Judgment.

Unanimously, that:

7. The State is responsible for the violation of the right to judicial guarantees, established in Articles 8(1), 8(2) (b), (c), (d) and (e), and 8(3) of the American Convention on Human Rights, in relation to Article 1(1) of the same instrument, to the detriment of Mario Alfonso Montesinos Mejía, pursuant to paragraphs 188 and 195 of this Judgment.

Unanimously, that:

8. The State is not responsible for the violation of the right not to be tried twice for the same facts and of the principle of legality and non-retroactivity, established respectively in Articles 8(4) and 9 of the American Convention, in the terms of paragraphs 206 and 213 of this Judgment.

AND ESTABLISHES:

Unanimously, that:

9. This Judgment constitutes, *per se*, a form of reparation.

Unanimously, that:

10. The State shall issue the publications indicated in paragraph 226 of this Judgment within six months of its notification.

Unanimously, that:

11. The State shall adopt, within six months of notification of this Judgment, all the measures necessary under domestic law to annul the consequences of any kind arising from the criminal proceedings against Mr. Mario Montesinos Mejía, pursuant to paragraph 227 of this Judgment.

Unanimously, that:

12. The State shall initiate, within a reasonable time, the necessary actions to investigate, prosecute and, if appropriate, punish those responsible for the cruel, inhuman and degrading treatment established in this Judgment, as well as for the torture denounced by Mr. Montesinos in 1996, pursuant to paragraph 229 of this Judgment.

Unanimously, that:

13. The State shall pay the amounts established in paragraphs 237 to 239 of this Judgment as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses, pursuant to paragraphs 250 to 255 of this Judgment.

Unanimously, that:

14. The State shall provide free of charge, and in an immediate, adequate and effective manner, the psychological and psychiatric treatment required by the victim, with his prior informed consent and for as long as may be necessary, including the provision of free medication, pursuant to paragraph 232 of this Judgment.

Unanimously, that:

15. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the amount disbursed during the processing of the present case, pursuant to paragraph 249 of this Judgment.

Unanimously, that:

16. The State shall provide the Court with a report, within one year of notification of this Judgment, on the measures adopted to comply with it.

Unanimously, that:

17. The Court shall monitor full compliance with this Judgment, in exercise of its authority and in compliance with its duties under the American Convention on Human Rights, and shall consider the present case closed once the State has fully complied with its provisions.

DONE at San José, Costa Rica, on January 27, 2020, in the Spanish language.

I/A Court HR. *Case of Montesinos Mejía v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 27, 2020.

Elizabeth Odio Benito
President

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Secretary

So ordered,

Elizabeth Odio Benito
President

Pablo Saavedra Alessandri
Secretary