

REPORT No. 13/19
CASE 12.268
REPORT ON MERITS
GONZALO CORTEZ ESPINOZA
ECUADOR
February 12, 2019

I. INTRODUCTION

1. On March 29, 2000, the Inter-American Commission on Human Rights (hereinafter "the Commission", "Inter-American Commission", or "the IACHR") received a petition lodged by the Human Rights Clinic of the Faculty of Jurisprudence of the Catholic University of Ecuador (hereinafter "the petitioner"), alleging the responsibility of the Republic of Ecuador (hereinafter "the Ecuadorian State" or "Ecuador") for harm done to Gonzalo Cortez Espinoza by the two detentions served on him in 1997 and 2000, alleged acts of torture, and violations of due process.

2. The Commission approved admissibility report No. 148/11 on November 1, 2011.¹ On November 9, 2011, the Commission notified the parties of that report and placed itself at their disposal with a view to reaching a friendly settlement. The parties were allowed time, in accordance with regulations, to submit additional observations on the merits. All the information received was duly relayed between the parties.

II. POSITION OF THE PARTIES

A. Petitioner:

3. The petitioner argued that the State was internationally responsible for the two detentions of Gonzalo Cortez Espinoza, in 1997 and 2000, which it deemed illegal, and for violations of due process in connection with criminal proceedings instituted against him on charges of theft.

4. With regard to the alleged violation of the right to personal liberty, the petitioner alleged that Mr. Cortez had been detained by State agents in 1997 without an arrest warrant and with no evidence attesting flagrante delicto. The petitioner pointed out that the arrest warrant was issued five days after his detention. The petitioner further alleged that Mr. Cortez was detained a second time, without an arrest warrant and without his being in flagrante delicto, in 2000. It alleged that on neither occasion was he brought before a competent authority and habeas corpus writs were to no avail.

5. As regards the alleged violation of the right to personal integrity, the petitioner alleged that during his first detention Mr. Cortez has been subjected to acts of torture. It indicated that he had been held incommunicado for almost 20 days. It pointed out that, repeatedly, he had not been allowed to sleep by guards kicking the door of his cell. The petitioner added that on several occasions the food he was given had been chewed and spat out.

6. Concerning the alleged violation of rights to due process and judicial protection, the petitioner alleged that criminal proceedings had initially been brought before the military jurisdiction even though Mr. Cortez was a civilian. It indicated that that contravene the right to be heard by a competent judge. The petitioner added that Mr. Cortez's right to defense had been impaired inasmuch as he was held incommunicado, with no access to his attorneys. The petitioner also stated that the criminal proceedings, even after they were conducted, in an ordinary law court, took an unwarranted amount of time.

7. As for the right to private property, the petitioner held that Mr. Cortez had been required to pay bond set illegally in order to gain his release. The petitioner indicated that, since the second instance court in the military criminal jurisdiction had ordered the lifting of precautionary measures as a result of the proceedings being

¹ IACHR. Report No. 148/11. Case 12.268. Admissibility. Gonzalo Cortez Espinoza. Ecuador. November 1, 2011.

vacated, Mr. Cortez had requested that the bond be given back to him. However, the petitioner said, that request was denied by the competent authorities.

B. State

8. The State argued that it bears no international responsibility in the instant case. This was because both detentions of Mr. Cortez and the criminal proceedings against him had been conducted in accordance with the provisions of the domestic legal order and international standards.

9. With regard to the criminal proceedings before the military criminal jurisdiction, the State indicated that "the referral of the proceedings to the ordinary jurisdiction had corrected any irregularity or violation of human rights." It maintained that the criminal proceedings in a civilian court had observed all guarantees of due process. It stated that the alleged victim had always known the reasons for his detention.

10. Regarding Mr. Cortez's first detention, Ecuador argued that he had never filed a habeas corpus writ querying it. With respect to the second detention, the State maintained that it had been based on an arrest warrant. It added that the alleged victim had filed a habeas court writ, as a result of which an order had been issued to release Mr. Cortez.

11. Concerning the allegations of acts of torture, the Ecuadorian State maintained that the petitioner had not presented any documentary evidence in support of them. The State held that the statements made by Mr. Cortez regarding them are inconsistent. The State added that the medical certificate issued during Mr. Cortez's first detention described him as being in good health.

12. As for the allegations of violation of the right to private property, the State indicated that the bond had been set legally as an alternative to pre-trial detention. It pointed out that said bond had been collected as required by law and deposited in the Central Bank of Ecuador.

III. DETERMINATIONS OF FACT

A. Regarding Mr. Cortez' first detention and the military criminal proceedings

13. At the time of the facts, Gonzalo Orlando Cortez Espinoza had been a member of the Ecuadorian Armed Forces, who had started as an aeronautical technician and had then risen to the rank of Second Sergeant in the Air Force.² On February 28, 1994, the Ministry of National Defense granted Mr. Cortez the discharge he had voluntarily requested.³ Following his discharge until early 1997, Mr. Cortez had worked as a technician in Ícaro, a private sector company.⁴

14. On January 21, 1977, Mr. Cortez testified before the Head of the Department of Intelligence of the Military Air Transportation Command and the Military Prosecutor of the First Air Division (*Primera Zona Aérea*) in connection with an investigation into a possible theft and sale of radio-navigation equipment from a plane pertaining to the Ecuadorian Air Force. Mr. Cortez' s testimony reads as follows:

I was visited approximately three months ago by engineer Juan Guevara, a representative of several American aviation equipment maintenance and repair companies (...), who asked me if I could get him some airplane electronic system parts. I told him that I was not in a position to do that but that I might perhaps be able to contact another person to see if he could get what he wanted. So I contacted First Air Force Sergeant Patricio Caizapanta, who said he would look into the possibility of doing and obtaining what the engineer wanted, so that I was practically longer involved in the matter. At no point did I have any idea of the cost of this or of the avionics equipment concerned, although I did point out to Sergeant Caizapanta that

² Ministry of Defense. Archive of Armed Forces personnel. Severance pay No. No. 000557 of March 3, 2005. Appendix to the petitioner's communication of December 2, 2013.

³ Ministry of Defense. Archive of Armed Forces personnel. Severance pay No. No. 000557 of March 3, 2005. Appendix to the petitioner's communication of December 2, 2013.

⁴ Ecuadorian Social Security Institute Membership card of Gonzalo Orlando Cortez Espinoza. Employer certificates of employee/worker entries and departures. Attached to the petition of March 29, 2000.

under no circumstances should those items be taken from operative units (...). I don't know whether anyone else was more involved. I myself did not receive the equipment, or money, nor did I pay for it, since my participation was limited to having organized a meeting between the interested party and the aforementioned person. I hereby place on record that during my stay in the First Air Division (Primera Zona Aérea) I have not been subjected to any form of physical or mental mistreatment, as attested in the attached medical certificate.⁵

15. The IACHR notes that the military proceedings file submitted to it did not include the military certificate allegedly issued during Mr. Cortez's testimony.

16. In the file before the IACHR there is a statement by Mr. Cortez addressed to the IACHR and delivered before the First Notarial Office in Quito on March 8, in which he refers to the testimony he gave in January 1997. In that statement he points out that:

In January 1996, while I was working in the Ícaro company hangar, someone arrived asking for me. When I went to the entrance, he handed me a document containing an order for my arrest, issued by the Military Prosecutor of the First Air Force Division (...) for inquiries into the theft of radio-navigation equipment from one of the planes of the First Air Force Division. I did not agree to go, but the person bearing the order, Sergeant Chávez, forced me with violent means to get into a vehicle. (...) The next day they performed a quick medical checkup and released me. It should be noted that I was not in any comfortable room and nobody else knew where I was. Nor did I make this statement before any judge, prosecutor, or competent authority. I was left in an office with no protection and having to put up with the cold all night long. After a few days, I was told I had nothing to do with this matter and that I shouldn't worry.⁶

17. On February 19, 1997, the Commander-in-Chief of the Air Force sent a communication to the Criminal Court of the First Air Force Division "to institute appropriate legal proceedings to determine responsibilities." The Commander-in-Chief attached a report by the Head of the Intelligence Department of the Air Force stating the following:

On January 10, 1997, Air Force intelligence personnel provided (...) the recording (audio) of a telephone call between two individuals which suggested that an illicit act was being plotted in the Air Transportation Command installations. (...) Through Official Letter (...) of (...), dated January 21, 1997, the Commander of the Materials Group (...) reports (...) detection of the loss of VOR equipment (...) pertaining to the airplane (...). Through tests and voice comparisons, it was determined that the voices on the phone were those of Messrs.: Retired sergeants Gonzalo Orlando Cortez Espinosa (...), who according to the dialogue were agreeing to deliver some kind of equipment in exchange for a considerable sum of money. Once the aforementioned individuals were arrested, and following legal procedures, their statements/testimony were received.⁷

18. The military proceedings file contains no documentation relating to the investigations allegedly conducted prior to Mr. Cortez' statement, and no indication that said information was provided to him at that moment. Nor is there any indication that an attorney was present while he rendered said statement.

19. That same day, the Military Criminal Court of the First Air Division issued a court order to institute proceedings against the following four persons, including Mr. Cortez, for the crime of stealing and selling Ecuadorian Air Force equipment. The Court indicated that:

(...) The Intelligence Secretariat immediately proceeded to analyze all the material provided and concluded that a crime was being plotted in the Institution by retired Sergeant Gonzalo Orlando Cortez Espinoza (...)

⁵ Testimony of Mr. Cortez before the Head of the Department of Intelligence of the Military Air Transportation Command and the Military Prosecutor of the First Air Division (*Primera Zona Aérea*) on January 21, 1997. Page 5 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

⁶ Statement by Mr. Cortez, addressed to the Inter-American Commission on Human Rights, on March 8, 2012. Attached to the petitioner's communication of April 3, 2012.

⁷ Ministry of Defense. Air Transportation Command. Department of Intelligence. Report, undated, on the findings of the investigation into the theft of VOR-2-51-RV-4 S/N 5037 equipment. Attached to Official Letter No. 0338-CC-6-D-0-97, sent by the Commander-in-Chief of the Air Forces on February 19, 1997. Pages 1 to 4 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

and First air technician Sergeant Patricio Estuardo Caizapanta Diaz, who had agreed to deliver some kind of equipment in exchange for a considerable sum of money. Based on that information, and after notifying the aforementioned Military Criminal Proceedings Judge, said authority issued a writ on January 20 (...) as a pre-trial measure ordering the detention on remand of citizen Gonzalo Orlando Cortez Espinoza, and issuing the arrest warrant to that effect (...). Pursuant to Article 25 of the Military Code of Criminal Procedure, the pre-trial detention of the accused is hereby ordered (...) In the case of military in active service, detention will be in the Division Barracks, while retired Sergeant Cortez Espinoza Gonzalo Orlando and engineer Juan José Guevara Ruiz shall be detained in the Men's Detention Center in Quito, to which end the constitutionally required arrest warrants shall be issued.⁸

20. The Commission notes that the case file for the military proceedings does not contain the arrest warrant of January 20, 1997, mentioned in the Military Criminal Court's resolution.

21. On March 24, 1997, the Military Criminal Court of the First Air Division issued a writ to the Director of Intelligence of the Ecuadorian Armed Forces instructing him to execute the order referring to the pre-trial detention of Mr. Cortez. The Court indicated that "this writ shall serve the same effects as the constitutionally required arrest warrant."⁹

22. Two days later, the Court issued writs relating to Mr. Cortez's situation to the following institutions: 1) Superintendency of Banks of Ecuador, ordering the retention and blocking of funds; ii) the National Directorate for Immigration and Matters relating to Foreign Nationals, with a view to prohibiting departure from the country; and iii) the Private Property Registries in the districts of Cuenca, Ambato, Guayaquil, and Quito with a view to banning the sale or disposal of real estate assets.¹⁰

23. The petitioner maintained that Mr. Cortez was detained on July 11, 1997 by 11 armed agents of the Ecuadorian Air Force Intelligence Service.¹¹ In his statement on July 30, 1997 as an accused during preliminary inquiries, Mr. Cortez stated that:

I have been detained in this unit under orders of the judge since Friday, July 11, 1997, when I was detained and brought by a group of members of the Intelligence Service of this Division. Captain Salazar of the Intelligence Service told me that I was being brought for further investigations. On the night of the following (...) day I was taken to the bedroom or cell where I am being held, without ever having been told or notified that there was a warrant for my arrest, or of the reason why, even today when I have been called to testify. Specifically (I would like to point out), not all the clothes I was wearing or documents I was carrying when I was arrested have been returned, in full or at the same time, by the Department of Intelligence (...).¹²

24. In the statement he gave at the First Notarial Office in Quito, Mr. Cortez gave a more detailed description of the circumstances of his detention:

While I was heading for the land terminal in Quito, 11 military intelligence personnel armed with submachine guns detained me and took me to the First Air Division, where I was taken to a cell that had formerly been used as a dormitory for non-commissioned officers and was known as Villa Avi6n. Also detained in that cell was a Compa1a Ecuatoriana de Aviaci6n employee. I was put there, too, and held incommunicado for 19 days. During that time they did not let me sleep as guards kicked the door of the cell all night. The food they gave me had frequently been spat out and I wasn't even allowed to speak to the

⁸ Military Criminal Court of the First Air Division. Order to open military criminal proceedings, Resolution N° 03/-97 of March 19, 1997. Pages 26 to 27 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

⁹ Military Criminal Court of the First Air Division. Writ 047-CM-2-0-97 in military criminal proceedings N° 03/-97 of March 24, 1997. Page 28 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

¹⁰ Military Criminal Court of the First Air Division. Writ 052-CM-2-0-97 in military criminal proceedings N° 03/-97 of March 26, 1997. Page 31 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000. Military Criminal Court of the First Air Division. Writ 053-CM-2-0-97 in military criminal proceedings N° 03/-97 of March 26, 1997. Page 32 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000. Military Criminal Court of the First Air Division. Writs 054-CM-2-0-97, 055-CM-2-0-97, 057-CM-2-0-97, and 058-CM-2-0-97 of military criminal proceeding 03-97 of March 26, 1997. Pages 33 to 37 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

¹¹ Initial petition.

¹² Military Criminal Court of the First Air Division. Preliminary inquiries statement by Mr. Cortez in military criminal proceedings 03-97 of July 30, 1997. Pages 123 to 125 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

guard. (...) One night, one of the non-commissioned officers on guard (...) arrived at the cell (...), recognized me and asked me what I was doing there. I told him that I had been detained and had been there for several days, and asked him to get in touch with my family. Thanks to him, my family learned where I was and under what conditions, and managed to find me a defense attorney. Then, after 19 days they took me, in a completely run-down state, to make a statement before the military judge, where I stated that I had no knowledge of the offense and, much less, accepted any responsibility or participation in it. I was held in detention at the Air Force base for five months and three weeks. I was never formally summoned. (...) My family (...), who lived in Guayaquil, had to move to Quito to find out how I was. This time the detention was due to the Head of Intelligence changing his version to accuse me of being the instigator (...).¹³

25. At the same time as the detention described above, on July 14, 1997, the Department of Intelligence of the Air Transportation Command issued an Official Letter to the Head of the Department of Intelligence indicating that Mr. Cortez had been placed under the jurisdiction of the Military Criminal Court of the First Air Force Division. That Official Letter stated:

As instructed (...), and having detained Mr. (...) Gonzalo Orlando Cortez Espinoza, I take it upon myself to place said INDIVIDUAL at the disposal of you, my superior, for you to consider pursuing the appropriate legal procedures. Attached hereto, please also kindly find the corresponding medical certificate (...).¹⁴

26. The IACHR takes note of a medical certificate of the same date, which reads as follows:

I certify having performed a psychological and physical examination of Mr. Gonzalo Cortez, 38 years of age, who exhibits no abnormalities. There is no evidence or signs of trauma in any part of his body.¹⁵

27. On July 16, 1997, the Military Criminal Court of the First Air Force Division issued an arrest warrant addressed to the Commander of the No. 11 Transportation Wing to request that Mr. Cortez remain detained in that place. The Court wrote this:

Pursuant to the detention order issued by the Court hearing this case (...), [the Court] places at the disposal of said authority detained air technician Sergeant Gonzalo Cortez Espinoza. In light of the above, I request that you, Colonel, give orders for him to be kept in detention while certain procedural arrangements are made (...), after which this Court will immediately order the detainee's transfer to the Provisional Detention Center in Pichincha, given his civilian status. "This writ shall serve the same effects as the constitutionally required arrest warrant."¹⁶

28. In their statement, the petitioner and Mr. Cortez stated that the latter was a detained and held incommunicado from July 11 to July 30, 1997, the day on which he was placed under the jurisdiction of the Military Judge to make his preliminary investigation statement.¹⁷ The State did not contest that information.

29. On July 30, 1997, Mr. Cortez made his preliminary investigation statement cited above. Nothing in the case file indicates that Mr. Cortez was assisted by a defense attorney on that occasion. ¹⁸.

30. On August 11, 1997, Mr. Cortez wrote to the Military Criminal Court of the First Air Force division as follows:

¹³ Statement by Mr. Cortez, addressed to the Inter-American Commission on Human Rights, on March 8, 2012. Attached to the petitioner's communication of April 3, 2012.

¹⁴ Ministry of Defense. Air Transportation Command. Department of Intelligence. Official Letter No. 085-CZ-2b-0-97, sent by the Head of the Department of Intelligence on July 14, 1997. Page 119 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

¹⁵ Ministry of Defense. Health Service of the Ecuadorian Armed Forces. Medical certificate issue in the health unit in Quito on July 14, 1997. Page 120 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

¹⁶ Military Criminal Court of the First Air Division. Constitutionally required Arrest Warrant 150-CM-2-0-97 in military criminal proceedings N° 03/-97 of July 16, 1997. Page 121 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

¹⁷ Writ by the petitioner, Monday, November 8, 2010. Statement by Mr. Cortez, addressed to the Inter-American Commission on Human Rights, on March 8, 2012. Attached to the petitioner's communication of April 3, 2012.

¹⁸ Military Criminal Court of the First Air Division. Preliminary inquiries statement by Mr. Cortez in military criminal proceedings 03-97 of July 30, 1997. Pages 123 to 125 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

[I request] revocation of my pre-trial detention so that, in freedom, I can better exercise my legitimate right of defense (...). Currently, as I find myself detained, unjustly and for the first time in my life, my family and I are suffering veritable moral and psychological trauma.¹⁹

31. On October 22, 1997, Mr. Cortez asked the Military Criminal Court of the First Air Force Division to set a bond to enable him to be released. That request was accepted on December 17 of the same year.²⁰ After paying US\$1,500, Mr. Cortez was released on December 19, 1997.²¹

32. The IACHR takes note of the Forensic Psychological Report of July 2013 presented by the petitioner, which refers to Mr. Cortez's detention. That report stated:

(Mr. Cortez) mentions that he was deprived of liberty from July through December 1997 and regained his freedom by paying a bond. At the start of his detention, he was held incommunicado for 17 days, without any contact with family members. Only afterwards was he able to communicate with his wife. He says he was kept locked up in an improvised cell, where unknown persons kicked the door to stop him from sleeping. That went on for several days, with the exhaustion affecting his mental awareness, so much so that he says "I was a zombie when I gave my statement", referring to what was possibly emotional disturbance caused by lack of sleep. He complains that he was never examined by a doctor during his detention and that his captors took it out on him with acts showing contempt and hate, by spitting in his food. "I didn't eat the spat out food with phlegm and sputum, but other times I was so hungry that I ate it," he said in describing his reactions to that degrading treatment. "They bundled me out like a criminal surrounded by escorts," he said describing how the military took him to interrogations, in the facilities of the same air base at which he had served, a matter he considers an affront to his dignity given the cultural environment within the Air Force in which he had served and had reached a certain rank in the hierarchy. (...) Once the solitary confinement period was over, conditions improved although frequent cell searches continued, but at least he had a decent bed and bathroom and could practice sport. However, he was allowed no personal privacy during visits.²²

33. The report reached the following conclusions:

The person examined describes facts and circumstances of an illegal detention, solitary confinement, judicial proceedings without due process, and degrading treatment during captivity. (...) He tells of having been kept incommunicado and subjected to constant psychological stimuli that prevented him from sleeping or resting. For the person examined, deprivation of liberty radically altered his life plan and productive activity, with his dignity demeaned by being imprisoned under those conditions in a military unit in which he had served with an important, unblemished record. Although we did not detect unambiguous signs of psychical damage or trauma, there is abundant evidence of the suffering he went through. (...) The wife and children of the person examined are vicarious victims, too, since they had to suffer economic hardship, instability, and all the attitudes and conduct of a husband and father repeatedly subjected to emotional distress.²³

34. On July 29, 1998, the Cortez's defense counsel asked the Military Court of Law of the First Air Force Division to dismiss the proceedings and lift the other pre-trial detention measures against him, as follow:

It is also fair to add that, being innocent, I was arbitrarily detained for approximately five months and one week, without being summonsed to trial, all of which has caused me grave harm, lacing my honor and

¹⁹ Military Criminal Court of the First Air Division. Written statement of defense of Mr. Cortez in military criminal proceedings 03-97 of August 11, 1997. Pages 127 to 129 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of Wednesday, March 29, 2000.

²⁰ Military Criminal Court of the First Air Division. (Unnumbered) writ in military criminal proceedings N° 03/-97 of December 17, 1997. Page 186 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

²¹ Military Criminal Court of the First Air Force Division. Official Letter No. 145-AB-B-0-2000 of April 5, 2000. Attached to the petitioner's communication of April 20, 2000.

²² National Police of Ecuador. National Directorate of Judicial and Investigative Police. Forensic Medicine Department. Forensic Psychological Report No. 2013-892, performed on July 16, 19, 24, and 29, 2013. Attached to the petitioner's communication of December 2, 2013.

²³ National Police of Ecuador. National Directorate of Judicial and Investigative Police. Forensic Medicine Department. Forensic Psychological Report No. 2013-892, performed on July 16, 19, 24, and 29, 2013. Attached to the petitioner's communication of December 02, 2013.

dignity in doubt, as a result of which I have also lost my job. I therefore with all respect request that in the dismissal of proceedings you issue in my favor, you also lift all the measures taken against me, including the blocking of my bank accounts, the ban on disposing of my assets, writ of no exeat, and so on.²⁴

35. On November 23, 1998, the Military Prosecutor of the First Air Force Division issued his opinion requesting the dismissal of proceedings against Mr. Cortez, stating as follows:

(...) in respect of retired Sergeant Gonzalo Orlando Cortez Espinoza, may Your Honor order dismissal of proceedings as he did not take part in the theft of the VOR equipment.²⁵

36. On the same day, the Military Court of Law of the First Air Force Division issued a summons for the second phase of the proceedings (*emitió un auto de llamamiento a plenario*) and declared itself competent to hear the case.²⁶ The Court ruled as follows:

The offense that gave rise to this investigation has been ascertained both by the intelligence report which states: "the aforementioned equipment was delivered in a sale to engineer Juan Guevara, for a price of three million eight hundred thousand sucres, which were handed over to Sergeant Caizapanta," and by the other documents remitted by Superiors in connection with this case, as well as the statements made by the accused during investigations (...), except in the case of engineer Juan Guevara, a fugitive from justice. Those documents, along with others cited in the proceedings, establish both the pre-existence of this item (the VOR equipment) (...) [and] the commission of this offense, together with the alleged responsibility in this crime of the accused Sergeant Patricio Caizapanta, Sergeant Milton Noroña, as the perpetrator and accessory, respectively, of this offense; as well as former Sergeant Cortez and engineer Juan Guevara as the instigators. For that reason, and in line with the opinion expressed by the Division Prosecutor, the aforementioned accused are hereby summoned to trial, as their participation in the aforementioned crime has not been ruled out.²⁷

37. On November 12, 1999, the Military Court of Justice ruled on the appeal filed by the defense counsel for Mr. Cortez against the summons to the second phase of trial by the Court. The Military Court of Justice annulled all actions taken in respect of the alleged victim and considered that the Trial Court was not competent to hear the case against Mr. Cortez, given his status as a civilian. Consequently, it ordered a copy of the case file to be sent for handling by a court in the ordinary jurisdiction chosen by lot.²⁸

38. On December 7, 1999, Mr. Cortez requested the Court of Law of the First Air Force Division to order the immediate return of the bond paid, given the annulment of all proceedings against him in the military jurisdiction.²⁹ One week later, the Court of Law of the First Air Force Division declared itself incompetent to order the return of the bond pursuant to the November 12 resolution of the Military Court of Justice.³⁰

39. On December 24, 1999, the defense counsel for Mr. Cortez sent a communication to the Court of Law of the First Air Force Division stating that:

²⁴ Military Criminal Court of the First Air Force Division. Concluding written statement of Mr. Cortez in military criminal proceedings 03-97 of July 29, 1998. Pages 222 to 228 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

²⁵ Military Criminal Court of the First Air Force Division. Opinion of the Military Prosecutor of the First Air Force Division in the 03-97 military criminal trial of August 28, 1998. Pages 232 to 233 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

²⁶ Military Criminal Court of the First Air Force Division. Order for a plenary session of the Court in military criminal proceedings 03-97 of November 23, 1998. Pages 235 to 236 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

²⁷ Military Criminal Court of the First Air Force Division. Order for a plenary session of the Court in military criminal proceedings 03-97 of November 23, 1998. Pages 235 to 236 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

²⁸ Court of Military Justice. Ruling on appeal in military criminal proceedings N° 03/-97 of November 12, 1999. Page 244 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000. Appendix 2 of the State's communication of December 20, 2012.

²⁹ Military Criminal Court of the First Air Force Division. Written request of Mr. Cortez in military criminal proceedings 03-97 of December 7, 1999. Page 245 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

³⁰ Military Criminal Court of the First Air Force Division. (Unnumbered) writ in military criminal proceedings N° 03/-97 of December 15, 1999. Page 250 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

"(...) precisely due to lack of competence (...) you are under an obligation to restore all Mr. (...) Cortez's rights, which were violated in your court, through a writ of ne exeat, blocking of bank accounts, ban on the disposal of assets, setting of a bond (...); it is you, Your Honor (...) who must ordain that all his rights and bond be restored immediately."³¹

40. The Court of Law of the First Air Force Division remitted that writ to the Military Criminal Prosecutor of the First Air Force Division who issued the following opinion on January 13, 2000:

(...) You, Judge, having been declared incompetent in the criminal action against the aforementioned Sergeant Cortez Espinoza, are not allowed, due to that legal incompetence, to issue any writ at all. On the contrary, you must all the litigation to the competent judge, for that authority to resolve on the petitioner's request (...) You, Judge, must deny what is requested in the writs submitted by retired Sergeant Cortez Espinoza, aimed at lifting the precautionary measures and the bond, given that his petition cannot endow competence to your authority for an act that would benefit the applicant.³²

41. On January 19, 2000, the Court of Law of the First Air Force Division denied Mr. Cortez's request. The IACHR notes that the Court restricted itself to pointing out that it had "heeded the legal opinion" of the Military Prosecutor.³³

B. Regarding the second detention of Mr. Cortez and the continuity of the criminal proceedings

42. On January 12, 2000, the Court of Law of the First Air Force Division remitted the case file of the military proceedings to the Allocation of Cases by Lot (*Sala de Sorteo*) Room at the Supreme Court of Justice of Quito.³⁴

43. On January 28, 2000, the Third Criminal Court of Pichincha ordered proceedings against Mr. Cortez indicating that "the fact recounted constitutes a punishable offense that can be investigated ex officio, wherefore I issue the present court order for the PRE-TRIAL DETENTION of the person I accuse in the instant case, given that the requirements of Article 177 of the Code of Criminal Procedure are met."³⁵

44. On February 28, 2000, a private bill of indictment was filed by the Ministry of Defense against Mr. Cortez addressed to the Third Criminal Court of Pichincha, requesting that the Military Criminal Court of the First Air Force Division be ordered to remit the US\$1,500 bond deposited in that jurisdiction in order to preemptively safeguard that sum against the item stolen in the illicit act. The writ further requested that Mr. Cortez be summonsed.³⁶

45. The file contains, in response to the various requests by Mr. Cortez for the return of the bond deposited during the military criminal proceedings, a certificate dated March 22, 2000 by the Head of the Finance Department of the Air Transportation Command, which states as follows:

(...) I hereby certify that on February 28, 2000, the sum of US\$1,500 was handed over to retired First Sergeant Gonzalo Cortez Espinoza (...) that being the sum deposited in this cashier's office as a bond in connection with the military criminal proceedings. Said return of the bond was made on (...) orders of the

³¹ Military Criminal Court of the First Air Force Division. Written request of Mr. Cortez in military criminal proceedings 03-97 of December 24, 1999. Page 252 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

³² Military Criminal Court of the First Air Force Division. Opinion of the Military Prosecutor of the First Air Force Division in the 03-97 military criminal trial of January 13, 2000. Page 255 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

³³ Military Criminal Court of the First Air Force Division. Resolution of January 19, 2000. Page 256 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

³⁴ Ministry of Defense. Ecuadorian Air Force. Criminal Court of the First Air Division. Official Letter 012-B-B-0-2000, dated January 12, 2000. Page 254 of the 03-07 Judicial case file of the military criminal proceedings. Attached to the petition of March 29, 2000.

³⁵ Third Criminal Court of Pichincha. Order to open civil criminal proceedings LP-46-2000 of January 28, 2000. Attached to the petition of March 29, 2000.

³⁶ Third Criminal Court of Pichincha. Private bill of indictment of the Ministry of Defense against Mr. Cortez in civil criminal proceedings LP-46-2000 of January 28, 2000. Attached to the petition of March 29, 2000.

Commander-in-Chief of the Air Transportation Command and Judge of the Court of Law of the First Air Force Division.³⁷

46. The Court of Law of the First Air Force Division also lifted the additional precautionary measures against Mr. Cortez, consisting of the ban on disposal of real estate property, the withholding and blocking of funds, and the prohibition on leaving the country.³⁸

47. The IACHR takes note of the statement rendered by Mr. Cortez on March 8, 2012 at the First Notarial Office in Quito regarding what happened on February 28, 2000:

(...) On February 28, 2000, I decided to go to the First Air Force Division so that they could return me the bond money and I went without being accompanied by my lawyer (...). Major Gutierrez,, Head of Intelligence of the First Air Force Division came up to me accompanied by two sergeants and told him that he had a detention order issued by the Judge of the Third Criminal Court (...). That order indicated that the arrest was to be carried out by the National Police, not by any member of the military. (...) Around 2 p.m., Colonel Vélez, a Judge of the First Military Division asked the Head of Intelligence whether they had already taken me as a detainee to the National Police. Major Gutierrez said that I was waiting for a member of my family in order to hand over the money to him and Colonel Vélez said "if we don't keep the money, let them take it away from him in prison." He then sent me with two sergeants to the Judicial Police. When we went there, the officer on guard decided not to proceed to detain me because the intelligence agent showed a photocopy of the order and indicated that I was free. At that point, the sergeant pointed his pistol at me and took me in the vehicle to the Quito Regiment (...) where he asked for a member of the police force, who came and proceeded to book me in as a criminal. Afterwards a police record was drawn up stating that I had handed myself in voluntarily, and then I was sent in a police patrol car to the Provisional Detention Center. (...) I entered the Detention Center and three days later the original arrest warrant appeared. In other words, I had been detained without an original warrant.³⁹

48. On March 3, 2000, the Third Criminal Court of Pichincha issued a writ ordering the following:

Summons the accused Gonzalo Orlando Cortez Espinoza (...). Considering (...) that the accused citizen (...) is detained in the Provisional Detention Center in Quito, let the respective arrest warrant be issued against the aforementioned accused, who shall remain detained on the orders of this jurisdiction.⁴⁰

49. Mr. Cortez filed a habeas corpus writ before the Mayor of the City of Quito, which was declared inadmissible.⁴¹ The IACHR does not have that resolution. Against that resolution, Mr. Cortez filed a remedy of complaint appeal with the Constitutional Guarantees Tribunal pointing out that his habeas corpus had been denied "without knowledge of the case".⁴² The IACHR has no information as to how said appeal was resolved.

50. On March 17, 2000, the defense counsel for Mr. Cortez wrote to the Court asking that the detention order be revoked and that the court disqualify itself from hearing the case.⁴³ The reason adduced was that Mr. Cortez had already been accused and tried in first instance by the Military Criminal Court of the First Air Force

³⁷ Ministry of Defense. Air Transportation Command. Finance Department. Certificate of the return of the bond to Mr. Cortez on March 22, 2000. Appendix 5 of the State's communication of December 20, 2012.

³⁸ Military Criminal Court of the First Air Force Division. Writ No. 114-AB-B-0-2000, of March 10, 2000 in military criminal proceedings 03-97. Attached to the petitioner's communication of April 20, 2000.

³⁹ Statement by Mr. Cortez, addressed to the Inter-American Commission on Human Rights, on March 8, 2012. Attached to the petitioner's communication of April 3, 2012.

⁴⁰ Third Criminal Court of Pichincha. Writ agreeing to process the private bill of indictment against Mr. Cortez in civil criminal proceedings LP-46-2000, dated March 3, 2000. Attached to Official Letter No. 993-2010-JTPP of December 23, 2010 addressed to the National Human Rights Directorate of the Office of the Attorney General (*Procuraduría General del Estado*). Attached to the State's communication of March 2, 2011.

⁴¹ Constitutional Tribunal. Resolution No. 131-III-SALA-2000 in Case #012-2000-HC, dated May 10, 2000. Attached to the State's communication of June 19, 2000.

⁴² Constitutional Tribunal. Written request of Mr. Cortez in Case #012-2000-HC, dated March 15, 2000. Attached to the petitioner's communication of April 20, 2000.

⁴³ Third Criminal Court of Pichincha. Written request of Mr. Cortez in civil criminal proceedings LP-46-2000, dated March 17, 2000. Attached to the petition of March 29, 2000.

Division, and, in an appellate procedure, by the Military Court of Justice. The defense added that the military trial "had been declared null in order to trick it into calling for a new trial on the same charges."⁴⁴

51. On March 29, 2000, a second habeas corpus writ was filed with the Mayor of the City of Quito.⁴⁵ That same day, the Mayor declared the writ inadmissible, and stated the following:

In the matter of the habeas corpus filed by Mr. Cortez, Espinoza Gonzalo Orland, seeing that on March 8, 23000, this Mayor's Office already resolved on and denied the same petition and the circumstances have not changed, the petition is hereby denied as inadmissible, pursuant to Article 24.16 of the Political Constitution of the Republic of Ecuador.⁴⁶

52. On April 4, 2000, Gerardo Cortez, the alleged victims brother, filed a writ addressed to the Third Division of the Constitutional Tribunal in order to i) complain at the failure to notify the first rejection of the habeas corpus remedy; and ii) request a review of the constitutionality of the habeas corpus remedies filed by his brother.⁴⁷

53. On May 10, 2000, the Constitutional Tribunal revoked the resolution of March 8, 2000, issued by the Mayor of Quito and stated as follows:

(...) Gonzalo Orlando Cortez Espinoza was detained on February 28, 2000 without an order for deprivation of liberty issued by the competent judge. Proof of that is that on March 3, 2000, in a writ issued at 10:15 a.m., the Judge of the Third Criminal Court of Pichincha, having heard reports by Admiral Hugo Unda Aguirre that he was detained, ordered that an arrest warrant be issued to keep him detained on the Court's orders; in other words, the arrest warrant was issued when the acting mayor of the metropolitan district of Quito, upon processing the habeas corpus writ, had ordered that Gonzalo Orlando Cortez Espinoza be brought before him at 9:30 a.m. on March 3.⁴⁸

54. The next day, Mr. Cortez was released.⁴⁹

55. The IACHR does not have information on the status of proceedings until September 2, 2009, when the Third Criminal Court of Pichincha declared that the criminal case against Mr. Cortez had prescribed under the statute of limitations. The Third Criminal Court ruled as follows:

1. - That the crime of which Mr. Gonzalo Orlando Cortez Espinoza was accused is one which should be punished with imprisonment;
 - 2.- That since July 19, 1997, when the judge of Third Criminal Court of Pichincha issued the order instituting criminal proceedings, until now, the lapse of time provided for in the aforementioned legal instrument has been exceeded by far.
- Therefore, and pursuant to Article 101 of the Criminal Code, the present criminal case is hereby declared prescribed.⁵⁰

⁴⁴ Third Criminal Court of Pichincha. Written request of Mr. Cortez in civil criminal proceedings LP-46-2000, dated March 17, 2000. Attached to the petition of March 29, 2000.

⁴⁵ Office of the Mayor of the Metropolitan City of Quito. Habeas Corpus petition of Mr. Cortez addressed to the Mayor of the Metropolitan City of Quito, dated March 29, 2000. Attached to the petitioner's communication of April 20, 2000.

⁴⁶ Office of the Mayor of the Metropolitan District of Quito. Denial of the constitutional habeas corpus writ filed by Mr. Cortez, dated March 29, 2000. Attached to the petitioner's communication of April 20, 2000.

⁴⁷ Constitutional Tribunal. Third Division. Written request of Gerardo Cortez, dated April 4, 2000. Attached to the petitioner's communication of April 20, 2000.

⁴⁸ Constitutional Tribunal. Resolution No. 131-III-SALA-2000 in Case #012-2000-HC, dated May 10, 2000. Attached to the State's communication of June 19, 2000.

⁴⁹ Human Rights Commission of the National Congress. Brief by Mr. Cortez, dated May 18, 2000. Attached to the State's communication of June 19, 2000.

⁵⁰ Third Criminal Court of Pichincha. Writ of prescription of civil criminal proceedings LP-46-2000, dated September 2, 2009. Attached to Official Letter No. 993-2010-JTPP of December 23, 2010 addressed to the National Human Rights Directorate of the Office of the Attorney General (*Procuraduría General del Estado*). Attached to the State's communication of March 2, 2011.

56. The Commission takes note of the personal background check record for Mr. Cortez, dated October 10, stating that he has a criminal record with the National Police of Ecuador.⁵¹ The IACHR further notes the information in the public domain regarding the Criminal Record Certification of the Ministry of the Interior, dated March 2017, indicating that Mr. Cortez has no criminal record with said authority.⁵²

IV. LEGAL ANALYSIS

A. Right to personal liberty and due process (Articles 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, and 8.253 of the American Convention in conjunction with Article 1.1 and 2 thereof).

1. Regarding the detentions of Mr. Cortez on January 21, 1997, July 11, 1977, and February 28, 2000

57. Regarding Article 7.2 of the Convention, the Inter-American Court has pointed out that it "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."⁵⁴ The legal exception required to impair the right to personal liberty pursuant to Article 7(2) of the Convention 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. 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.⁵⁵

58. The Inter-American Court has established that, pursuant to the Constitution and the Code of Criminal Procedure of Ecuador, for detention to be legal under the American Convention, a judicial warrant was required, unless the person was caught in flagrante delicto.⁵⁶ From the case file, the Commission's understanding is that such were the legal grounds for detention in both 1997 and in 2000.

59. Article 7.5 of the Convention provides that any person detained has a right to have a judicial authority promptly review said detention, as a control measure designed to avoid arbitrary and illegal detentions. Immediate judicial control is a measure that seeks to avoid arbitrariness or unlawfulness of detentions, taking into account that under the rule of law the judge must ensure the detainee's rights, authorize precautionary or

⁵¹ National Police of Ecuador. National Directorate of the Judicial Police. Personal background check record certificate for Mr. Cortez No. 12464177, issued on October 12, 2010. Attached to the petitioner's communication of November 8, 2010.

⁵² Ministry of the Interior of Ecuador. Criminal Record Certificate for Mr. Cortez. Consulted on March 19, 2018. Available at: <http://www.mdi.gob.ec/minterior1/antecedentes/certificado.php?idr=23626009>

⁵³ Article 7 of the American Convention: Right to personal liberty:

1. Every person has the right to personal liberty and security.

2. 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.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to 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.

6. Anyone who is deprived of his liberty shall be entitled to 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. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

The pertinent portions of Article 8.2 of the American Convention provide: 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. [...]."

⁵⁴ I/A Court HR. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, par. 56. See also: IACHR. *Report on Citizen Security and Human Rights*. December 31, 2009, paras. 144-146.

⁵⁵ I/A Court HR. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, par. 55. See also: IACHR. *Report on Citizen Security and Human Rights*. December 31, 2009, paras. 144-146.

⁵⁶ I/A Court HR. *Case of Acosta Calderón v. Ecuador*. Merits, Reparations and Costs. Judgment of June 24, 2005. Series C No. 129, par. 61; and *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 7, 2004. Series C No. 114, par. 103.

coercive measures, when strictly necessary, and in general make sure that the accused is treated in a manner consistent with the presumption of innocence.⁵⁷

60. Regarding this guarantee, in its Report on the Situation of Persons Deprived of Liberty in the Americas, the Commission considered the following:

"[T]he single most important protection of the rights of a detainee is prompt appearance before a judicial authority responsible for overseeing the detention. And that the right to request a decision on the lawfulness of the detention is the fundamental guarantee of the constitutional and human rights of a detainee deprived of his liberty by agents of the State."⁵⁸

61. Likewise, the Inter-American Court has pointed out that "the terms of the guarantee in Article 7(5) of the Convention are clear in what refers to the fact that the person arrested must be taken before a competent judge or judicial authority, pursuant to the principles of judicial control and procedural immediacy." This is "essential for the protection of the right to personal liberty and to grant protection to other rights, such as life and personal integrity." The Court has likewise specified that "the simple awareness of a judge that a person is detained does not satisfy this guarantee, since the detainee must appear personally and give his statement before the competent judge or authority."⁵⁹

62. Based on the established facts of the case, Mr. Cortez was deprived of liberty on three occasions: January 21, 1997, July 11, 1997, and February 28, 2000.

63. As regards the legality of those detentions, the Commission notes that from Mr. Cortez's statement it transpires that in the first he was shown a detention order issued by the Military Prosecutor of the First Air Force Division. On the second occasion, it transpires from the preliminary investigation statement and from his later accounts he was not shown any order to detain him and was not informed of the reasons for his detention. The State did not provide any information or documentary evidence to the contrary. On the third occasion, Mr. Cortez was deprived of liberty after being taken to the Judicial Police. According to his statement, which was not contested by the State producing any evidence to the contrary, he was only shown the original of the arrest warrant three days later.

64. Accordingly, the Commission concludes that the second and third detentions were clearly illegal. As for the first, the Commission observes that the State did not explain the reasons why the Office of the Military Prosecutor had competence to issue the order to detain Mr. Cortez, particularly given his status as someone who had retired from the military. For that reason, the Commission considers that that detention was also illegal. Likewise, judging by Mr. Cortez's description of the detentions and the fact that the State has not disproved them, the IACHR is of the understanding that there was also a failure to provide detailed information regarding the reasons for the detentions.

65. As regards judicial oversight of the detention, the Commission notes that, after being deprived of liberty on July 11, 1997, Mr. Cortez was held incommunicado for 14 days, until he was brought before the competent judicial authority. The impairments of Mr. Cortez's personal integrity due to the above will be referred to later on in this report. On this matter, the IACHR underscores that during the aforementioned period the Ecuadorian State failed to comply with its obligation under the Convention to ensure prompt judicial oversight.

66. In light of the foregoing considerations, the IACHR concludes that the Ecuadorian State is responsible for violating the rights established in Articles 7.2, 7.4, and 7.5 of the American Convention, in conjunction with the obligations established in Article 1.1 of the same instrument, to the detriment of Gonzalo Cortez

⁵⁷ I/A Court HR. *Case of Acosta Calderón v. Ecuador*. Merits, Reparations and Costs. Judgment of June 24, 2005. Series C No. 129, par. 61; and *Case of Tibi v Ecuador*. Judgment of September 7, 2004. Series C No. 114, par. 76.

⁵⁸ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, December 31, 2011, par. 120.

⁵⁹ I/A Court HR. *Case of Acosta Calderón v. Ecuador*. Merits, Reparations and Costs. Judgment of June 24, 2005. Series C No. 129, par. 61 [Tr: 78?]; and *Case of Tibi v Ecuador*. Judgment of September 7, 2004. Series C No. 114, par. 78.

2. Regarding the pre-trial detentions of Mr. Cortez.

67. The Commission and the Court have pointed out that the use of pre-trial detention is limited by the principles of legality, presumption of innocence, necessity, and proportionality.⁶⁰ Moreover, the Court has pointed out that it is a precautionary, not a punitive, measure⁶¹ and that it is the harshest measure that can be imposed on an accused, which should therefore be used exceptionally. Both organs of the inter-American system consider that the general rule should be liberty of the accused while a resolution is reached on his or her criminal responsibility.⁶²

68. The Court and the Commission have underscored that the personal characteristics of the alleged perpetrator and the seriousness of the crime of which he or she is charged are not in themselves sufficient grounds to warrant pre-trial custody.⁶³ Regarding the grounds that may warrant pre-trial detention, the organs of the inter-American system have interpreted Article 7.3 of the Convention to mean that circumstantial evidence of responsibility is a necessary but not sufficient condition for imposing that measure. In the words of the Court:

" there must be sufficient evidence to allow reasonable supposition that the person committed to trial has taken part in the criminal offense under investigation.⁶⁴ Nevertheless, even in these circumstances, the deprivation of liberty of the accused cannot be based on general preventive or special preventive purposes, which could be attributed to the punishment, but [...] on a legitimate purpose, which is: to ensure that the accused does not prevent the proceedings from being conducted or elude the system of justice.⁶⁵

69. Along these lines, any decision that restricts personal liberty by applying preventive custody must be accompanied by sufficient, individualized substantiation to make it possible to appraise whether such custody meets the requirements for its application.⁶⁶

70. As regards the need for periodic review of the grounds for pre-trial detention/preventive custody and of how long it should last, the Court has indicated that:

(...) preventive detention or imprisonment must be subject to periodic review, to ensure that it does not continue when the reasons for it no longer subsist (...). As soon as it becomes apparent that preventive custody no longer meets these requirements, the accused must be released, without prejudice to the proceedings continuing.⁶⁷

71. Apart from its effects on the exercise of the right to personal liberty, both the Commission and the Court have pointed out that improper use of preventive custody may impact the principle of the presumption of

⁶⁰ IACHR. *Report on the Use of Preventive Custody in the Americas*. OEA/Ser.L/V/II. December 30, 2013, par. 20; I/A Court H.R. *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, par. 67; *Case of García Asto and Ramírez Rojas v. Rojas*. Judgment of November 25, 2005. Series C No. 137, par. 106; *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, par. 197; and *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, par. 74.

⁶¹ I/A Court HR. *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, par. 77.

⁶² IACHR. *Report on the Use of Preventive Custody in the Americas*. OEA/Ser.L/V/II. December 30, 2013, par. 21; I/A Court H.R. *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, par. 67; I/A Court H.R. *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, par. 196; and I/A Court H.R., *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, par. 74.

⁶³ IACHR. *Report on the Use of Preventive Custody in the Americas*. OEA/Ser.L/V/II. Monday, December 30, 2013, par. 21; I/A Court H.R. *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, par. 69; *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, par. 106; and *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, par. 75; and *Case of Tibi v Ecuador*. Judgment of September 7, 2004. Series C No. 114, par. 180.

⁶⁴ I/A Court HR. *Case of Barreto Leiva v. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, Par. 111. Citing: *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, par. 101; and *Case of Servellón García et al. v. Honduras*. Merits, Reparations and Costs. Judgment of September 21, 2006. Series C No. 152, par. 90.

⁶⁵ I/A Court HR. *Case of Barreto Leiva v. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, Par. 111. Citing: *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, par. 103; and *Case of Servellón García et al. v. Honduras*. Merits, Reparations and Costs. Judgment of September 21, 2006. Series C No. 152, par. 90.

⁶⁶ IACHR. *Report on the Use of Preventive Custody in the Americas*. OEA/Ser.L/V/II. Doc. 46/13. December 30, 2013, par. 21.

⁶⁷ I/A Court HR. *Case of Arguelles et al. v. Argentina*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 20, 2014. Series C No. 288, par.121; IACHR,

innocence upheld in Article 8.2 of the American Convention. Here the importance of the "reasonableness" criterion has been stressed, because keeping a person detained for more than a reasonable period of time needed to comply with the purposes warranting his or her detention, de facto, means applying "premature punishment."⁶⁸

72. As the IACHR points out, unreasonable prolongation of preventive custody:

In addition, the risk of inverting the presumption of innocence increases with an unreasonably prolonged pre-trial incarceration. The guarantee of presumption of innocence becomes increasingly empty and ultimately a mockery when pre-trial imprisonment is prolonged unreasonably, since presumption notwithstanding, the severe penalty of deprivation of liberty which is legitimately reserved for those who have been convicted, is being visited upon someone who is, until and if convicted by the courts, innocent.⁶⁹

(...)

If the use of that procedure by the State fails to assign blame within a reasonable length of time and the State is able to justify further holding of the accused in pre-trial incarceration, based on the suspicion of guilt, then it is essentially substituting pre-trial detention for the punishment.⁷⁰

73. Observance of the right of presumption of innocence likewise requires that the State substantiate clearly and on good grounds in each concrete case the existence of valid prerequisites for allowing preventive custody.⁷¹ Thus, the principle of the presumption of innocence is violated when preventive custody is arbitrarily imposed; or else, when its application is essentially determined by the type of offense, the expected sentence, or the mere existence of circumstantial evidence implicating the accused.⁷²

74. Regarding this guarantee, in its Report on the Situation of Persons Deprived of Liberty in the Americas, the Commission considered the following:

"[T]he single most important protection of the rights of a detainee is prompt appearance before a judicial authority responsible for overseeing the detention. And that the right to request a decision on the lawfulness of the detention is the fundamental guarantee of the constitutional and human rights of a detainee deprived of his liberty by agents of the State."⁷³

75. Likewise, the Inter-American Court has pointed out that "the terms of the guarantee in Article 7(5) of the Convention are clear in what refers to the fact that the person arrested must be taken before a competent judge or judicial authority, pursuant to the principles of judicial control and procedural immediacy." This is "essential for the protection of the right to personal liberty and to grant protection to other rights, such as life and personal integrity." The Court has likewise specified that "the simple awareness of a judge that a person is detained does not satisfy this guarantee, since the detainee must appear personally and give his statement before the competent judge or authority."⁷⁴

76. In the instant case, Mr. Cortez was in preventive custody between July 30 and December 19, 1997 and between February 28 and May 11, 2000. From the facts of the case it transpires that on neither occasion were individualized grounds provided regarding the procedural purposes pursued. Rather, it would appear that the grounds for those detentions were circumstantial indications of liability (*indicios de responsabilidad*). The above was consistent with the criminal procedure laws in force at the time which did not require said purposes for preventive custody.

⁶⁸ IACHR Report No. 2/97, Case 11.205, Merits, Jorge Luis Bronstein et al, Argentina, March 11, 1997, par. 12 *Third Report on the Situation of Human Rights in Paraguay*, OEA/Ser./L/VII.110. Doc. 52, March 9, 2001. Chapter IV, par. 34. See also: I/A Court HR. *Case of López Álvarez v. Honduras*. Judgment of February, 2006. Series C No. 141, par. 69; and *Case of Acosta Calderón. Ecuador*. Judgment of June 24, 2005. Series C No. 129, par. 111.

⁶⁹ IACHR, Report 12/96, Caso 11.245, Admissibility and Merits, Jorge Giménez, Argentina, March 1, 1996, para. 80.

⁷⁰ IACHR, Report 12/96, Case 11.245, Admissibility and Merits, Jorge Giménez, Argentina, March 1, 1996, para. 114.

⁷¹ I/A Court HR. *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, par. 144.

⁷² IACHR *Report on the Use of Preventive Custody in the Americas*. OEA/Ser.L/V/II. December 30, 2013, par. 137.

⁷³ IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, December 31, 2011, par. 120.

⁷⁴ I/A Court HR. *Case of Acosta Calderón v. Ecuador*. Merits, Reparations and Costs. Judgment of June 24, 2005. Series C No. 129, par. 61 [Tr: 78?]; and *Case of Tibi v Ecuador*. Judgment of September 7, 2004. Series C No. 114, par. 78.

77. Accordingly, both instances of preventive custody were arbitrary and violated the right established in Articles 7.1, 7.3, and 8.2 of the American Convention, in conjunction with Articles 1.1 and 2 of the same instrument, to the detriment of Mr. Gonzalo Cortez.

3. Regarding the *habeas corpus* appeals

78. With respect to Article 7.6 of the Convention, the Inter-American Court has pointed out that it has its own legal content, consisting of the protection of personal or physical freedom, by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the legality of the detention may be determined and, if appropriate, order the release of the detainee.⁷⁵ The Court has also indicated that the right established in Article 7.6 of the American Convention is not fulfilled by the merely formal existence of the remedies it regulates. Those remedies have to be effective, because their purpose, according to Article 7.6 itself, is to elicit a prompt decision "on the lawfulness of the arrest or detention" and, if they are unlawful, to obtain, also without delay, an order for release.⁷⁶ In the same vein, the IACHR has highlighted, as a basic principle, that access to judicial review of a detention must be granted "as it provides effective assurances that the detainee is not exclusively at the mercy of the detaining authority."⁷⁷

79. As regards the detention that began in July 1997, the Commission notes that Mr. Cortez did not file a habeas corpus appeal. However, the Commission recalls that under the laws in force at the time such an appeal had to be filed with the Mayor. In that regard, both the Commission⁷⁸ and the Court have established that a habeas corpus filed with an administrative authority does not constitute an effective appeal by the standards of the American Convention.⁷⁹ Although that remedy could be appealed before a judicial authority, in that regard the Court has maintained that the requirement that detainees had to file an appeal with the Mayor and then have to file an appeal in order for a judicial authority to be cognizant of it creates obstacles hampering a remedy that, by its very nature, should be simple.⁸⁰ Consequently, the IACHR considers that Mr. Cortez was not in a position to file a judicial remedy with the characteristics required by the American Convention for reviewing the lawfulness of a detention.

80. With respect to the detention of February 28, 2000, the Commission notes that, although Mr. Cortez was released on May 11 of that year as a result of the ruling by the Constitutional Tribunal, that happened after two habeas corpus remedies had been rejected by the Mayor and more than two months after Mr. Cortez was detained. Accordingly, the Commission considers that the habeas corpus remedy with respect to the detention in the year 2000 did not meet simplicity and speed standards either.

81. In light of the foregoing considerations, the IACHR concludes that the Ecuadorian State is responsible for violating the right established in Article 7.6 of the American Convention, in conjunction with Articles 1.1 and 2 of the same instrument, to the detriment of Gonzalo Cortez.

B. Right to humane treatment (Article 581 of the American Convention in connection with Article 1(1) thereof)

⁷⁵ I/A Court HR. *Case of Vélez Looz v. Panama*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010, Series C No. 218. Par. 124.

⁷⁶ I/A Court HR. *Case of Suárez Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, par. 63.

⁷⁷ IACHR Report No. 51/01. Case 9.903. Rafael Ferrer-Mazorra et al. v. United States of America, April 4, 2001, par. 232.

⁷⁸ IACHR, Report No. 139/10, P-139-10, Admissibility, Luis Giraldo Ordóñez Peralta, Ecuador, November 1, 2010, par. 29; IACHR, Report No. 66/01, Case 11.992, Merits, Dayra María Levoyer Jiménez, Ecuador, June 14, 2001, par. 78-81; IACHR, Informe Report No. 91/13, P-910-07, Admissibility, Daria Olinda Puertocarrero Hurtado, Ecuador, November 4, 2013.

⁷⁹ I/A Court HR. *Case of Chaparro Álvarez and Lapo Ñiiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, par. 128.

⁸⁰ I/A Court HR. *Case of Chaparro Álvarez and Lapo Ñiiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, par. 129.

⁸¹ The pertinent portions of Article 5 of the American Convention provide: 1. Every person has the right to have his physical, mental, and moral integrity respected. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

82. The IACHR has underscored that the American Convention prohibits torture or cruel, inhuman, or degrading treatment or punishment against anyone under any circumstances. The Commission has stated that "An essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations erga omnes."⁸² For its part, the Court has repeatedly pointed out that "torture and cruel, inhuman, or degrading punishment or treatment are strictly prohibited by International Human Rights Law. The absolute prohibition of torture, both physical and psychological, is currently part of the domain of the international *jus cogens*."⁸³

83. According to the case law of the inter-American system for conduct to be characterized as torture the following three elements must be present: i) the act is intentional; ii) it causes intense physical or mental suffering; and iii) it is committed to achieve a specific goal or purpose.⁸⁴ The Commission once again points out, with respect to allegations of torture, that in many cases, such as the present case, the person generally lacks the means to prove acts of violence against him or her.⁸⁵

84. In the instant case, Mr. Cortez alleged impairment of his personal integrity in connection with his detentions. He pointed out in that regard that violent methods were used and that he had to spend the night in the cold in an office. He mentioned, second, that in July 1997, while being held incommunicado, he was deprived of sleep and that at time the food he was given had been spat on. The Commission already established the fact that he was held incommunicado for 19 days, in addition to which there are these allegations of mistreatment. Given the fact that he was incommunicado and the nature of the alleged mistreatment, obviously Mr. Cortez has no direct proof of what happened. The Ecuadorian State did not contest the reference to solitary confinement, which in itself is a violation of personal integrity and constitutes a threat of other human rights violations being committed in a situation of total defenselessness, such as those described by Mr. Cortez.

85. Thus, although it is not possible to establish in detail the mistreatment endured by the victim, the IACHR considers that the fact of being held incommunicado and the exposure to additional mistreatment without judicial supervision for a period as long as that described constituted impairment of personal integrity and a violation of Articles 5.1 and 5.2 of the American Convention in conjunction with Article 1.1 of the same instrument, to the detriment of Mr. Cortez.

C. Right to judicial guarantees and judicial protection (Articles 8.1, 8.2, 8.2 b), c) and d)86 of the American Convention in conjunction with Article 1.1 thereof)

1. Regarding the right to a competent authority

86. Article 8.1 of the Convention upholds the right to a hearing by a "competent... tribunal previously established by law." Thus, persons "the right to be tried by ordinary courts of justice in accordance with legally established procedures." The State should not establish tribunals that do not apply duly established procedural

⁸² IACHR, *Report on Terrorism and Human Rights*, OEA/SER.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002. Citing: IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*. OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000, par. 118.

⁸³ I/A Court HR. *of Bueno-Alves v. Argentina*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 164, par. 76; I/A Court H.R. *Case of the Miguel Castro Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, par. 271; and I/A Court H.R., *Case of Baldeón García v. Peru*. Merits, Reparations and Costs. Judgment of April 6, 2006. Series C No. 147, par. 117.

⁸⁴ IACHR, Report No. 5/96, Case 10.970, Merits, Raquel Martín Mejía, Peru, March 1, 1996, section 3, and I/A Court of H.R. *Case of Bueno-Alves v. Argentina*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 164, par. 79.

⁸⁵ IACHR Report No. 82/13, Case 12.679, Merits, José Agapito Ruano Torres and family, El Salvador, November 4, 2013, par. 162. I/A Court HR. *Case of Cabrera García and Montiel Flores v. Mexico*. Judgment of November 26, 2010. Series C No. 220, par. 128.

⁸⁶ The pertinent portions of Article 8 of the American Convention provide: 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: (...)b) prior notification in detail to the accused of the charges against him; d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel.

rules as a replacement for the jurisdiction that would normally be exercised by the ordinary courts.⁸⁷ The idea is to prevent people from being tried by special or "ad hoc" tribunals.⁸⁸

87. Applying the above to the trying of civilians in the military criminal justice system, the Court has pointed out that said jurisdiction:

(...) in democratic States, in times of peace, has tended to be reduced and even disappear; therefore, in the case of a State that conserves it, its use should be minimal, as strictly necessary, and shall be inspired by the principles and guarantees governing modern criminal law. In a democratic State the military criminal jurisdiction shall have a restrictive and exceptional scope and shall be channeled to protect special juridical interests, related to the functions of the military forces under the law. Hence, it should only try military personnel for committing crimes or misdemeanors that, due to their nature, harm the juridical interests of the military system.⁸⁹

88. The Court has pointed out that the application of military justice must be strictly reserved for military in active service. For that reason, the Court has consistently declared that neither civilians nor "retired members of the military may be tried by military courts."⁹⁰

89. In the instant case, it is undisputed that Mr. Cortez was tried under the military criminal justice system between February 1997 and November 1999, that is to say, for a period of two years and nine months, even though he had retired from the military. Accordingly, as indicated above, the Commission concludes that during the aforementioned period the State violated his right to be tried by a competent authority as stipulated in Article 8.1 of the American Convention in conjunction with the obligations established in Article 1.1 of the same instrument.

2. Regarding the right to know the charges against him, the right of defense, and the principle of presumption of innocence

90. The Commission recalls that, under Article 8.2.b of the American Convention, during proceedings the accused is entitled, with full equality, to prior notification in detail of the charges against him. As the Inter-American Court has pointed out, in order to comply with Article 8.2.b, "the State must notify the accused not only of the charges against him, that is, the crimes or offenses he is charged with, but also of the reasons for them, and the evidence for such charges and the legal definition of the facts. The defendant has the right to know, through a clear, detailed and precise description, all the information of the facts in order to fully exercise his right to defense and prove to the judge his version of the facts."⁹¹

91. At the same time, the Court has established that the right to professional legal defense (*defensa técnica*) must be necessarily exercised as from the moment a person is accused of being the perpetrator or participant of an illegal act and ends when the jurisdiction thereby ceases.⁹² In the case of *Chaparro Álvarez and Lapo Ñíiguez v. Ecuador*, the Court considered that the State violated the right to defense because the attorneys for the victims could not attend a key procedure of the proceedings against the victims in a drug trafficking offense.⁹³

⁸⁷I/A Court H.R., Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, par. 75.

⁸⁸I/A Court H.R., Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, par. 75.

⁸⁹I/A Court HR. *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, Par. 108. *Cf. Durand and Ugarte Case v. Peru. Merits*. Judgment of August 16, 2000. Series A No. 68, paragraph 117; *Case of Tiu Tojín v. Guatemala. Merits, Reparations and Costs*. Judgment of November 26, 2008. Series C No. 190, par. 118; and *Case of Zambrano-Vélez et al. v. Ecuador. Merits, Reparations and Costs*. Judgment of July 4, 2007. Series C No. 166, par. 66.

⁹⁰I/A Court HR. *Cesti Hurtado Case v. Peru. Merits*. Judgment of September 29, 1999. Series C No. 56, par. 151; and the *Palamara Iribarne Case, supra*, note 47, par. 139.

⁹¹I/A Court HR. Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs. Judgment of November 17, 2009, par.

⁹²I/A Court HR. *Case of Cabrera García and Montiel Flores v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 26, 2010, Series C No. 220, par. 154; and *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs*. Judgment of November 17, 2009. Series C No. 206, par. 29.

⁹³I/A Court HR. *Case of Chaparro Álvarez and Lapo Ñíiguez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, par. 154.

92. The Inter-American Court has held that the right of presumption of innocence implies that the defendant does not have to prove that he has not committed the offense of which he is accused, because the *onus probandi* (burden of proof) is on those who have made the accusation.⁹⁴ Hence, irrefutable demonstration of guilt is an essential requirement for punishment, so the burden of proof falls on the prosecutor and not the accused.⁹⁵ On this, the United Nations Human Rights Committee has established as follows:

The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.⁹⁶

93. For its part, the Inter-American Commission has pointed out the following:

In this context, another elementary concept of criminal processal [Tr. procedural] law, the objective of which is to preserve the principle of innocence, is the burden of proof. In criminal proceedings, the *onus probandi* does not lie with the accused; on the contrary, it is the State that has to demonstrate the accused's guilt. Modern doctrine accordingly maintains that "the accused does not need to prove his innocence, which has already been constructed by the presumption protecting him, but rather the accuser has to fully construct his position, leading to certainty that a punishable act was committed."⁹⁷

94. In the instant case, the IACHR observes that the signed statements of January 21, 1997 and July 31, 1997 were rendered without Mr. Cortez having professional legal counsel and without him knowing the specific charges against him, which in itself is sufficient to establish violation of Articles 8.2.b and c of the Convention.

95. At the same time, as regards presumption of innocence, the IACHR notes that, although on November 23, 1998, the military prosecutor of the First Air Force Division issued an opinion requesting the dismissal of proceedings against Mr. Cortez because he had not participated in the illegal deed, on the same day the Court of Law of the First Air Force Division issued a summons for the second phase of the lawsuit (*llamamiento a Plenario*), including Mr. Cortez. The Commission considers that, given the existence of a prosecutor's opinion establishing that a person being tried did not participate in the fact under investigation, the presumption of innocence principle requires very special substantiation of the reasons why it was admissible to continue the criminal proceedings against that person instead of granting the request for dismissal of proceedings contained in the legal opinion of the prosecution. That substantiation is not to be found in the ruling referred to. Therefore, the IACHR considers that continuing the criminal proceedings against Mr. Cortez violated the presumption of innocence,

96. In light of the foregoing considerations, the IACHR concludes that the Ecuadorian State is responsible for violating the rights established in Articles 8.2, 8.2.b, and 8.2.d of the American Convention, in conjunction with the obligations established in Article 1.1 of the same instrument, to the detriment of Mr. Cortez

3. Regarding the right to be tried within a reasonable period of time

97. The Court has established that "the reasonable time referred to in Article 8(1) of the Convention should be assessed in relation to the total duration of the criminal proceedings against an accused, until the final judgment is handed down" and that, in this regard, the time begins to count when the first judicial decision is

⁹⁴ I/A Court HR. *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, par. 154.

⁹⁵ I/A Court HR. *Case of Cabrera García and Montiel Flores v. Mexico*. Judgment of November 26, 2010. Series C No. 220, par. 182.

⁹⁶ Human Rights Committee, General Comment No. 32. Article 14: Right to equality before courts and tribunals and to a fair trial CCPR/C/GC/32. August 23, 2007, par. 30.

⁹⁷ IACHR, Report No. 5/96, Case 10.970, Fernando Mejía Egocheaga and Raquel Martín de Mejía, Peru, March 1, 1996.

taken charging a particular individual with being the person probably responsible for a specific offense."⁹⁸ When analyzing the reasonableness of the duration of the proceedings, the Commission points out that a case by case analysis of particular circumstances is required and, under Article 8.1 of the Convention, the following elements need to be assessed: (a) the complexity of the matter; (b) the procedural activity of the interested party, (c) the conduct of the judicial authorities, and d) the effects that a delay in the proceedings might have on the legal situation of the victim.⁹⁹

98. Mr. Cortez was subject to criminal proceedings for, altogether, 12 years and six months, from February 1997 to September 2009, when a ruling of prescription was applied. The State made no attempt to justify such a delay based on the aforementioned criteria, failing to comply with the burden of proof incumbent upon it. In any case, the IACHR notes that the matter was not especially complex and there is nothing in the case file that could warrant the length of time taken. Rather, the information available indicates that the case was frozen for many years, without there being any actions by Mr. Cortez that could be construed as having hampered progress in the case.

99. In light of the foregoing considerations, the IACHR concludes that the Ecuadorian State is responsible for violating the right to reasonable time established in Article 8.1 of the American Convention, in conjunction with Article 1.1 of the same instrument, to the detriment of Mr. Cortez.

D. Right to private property (Article 21.1 of the American Convention in connection with Article 1(1) thereof)

100. In their jurisprudence, both the Commission and the Court have developed a broad concept of property, which comprises, among other aspects, the use and enjoyment of "property," defined as those material objects susceptible of being appropriated, as well as any rights which may be part of a person's assets.¹⁰⁰ In addition, the Court has protected acquired rights, understood as rights that have been incorporated into personal net worth.¹⁰¹ The Commission recalls that the right to property is not absolute and, accordingly, may be subject to restrictions and limitations, provided that the latter are imposed through appropriate legal channels and in accordance with the parameters established in Article 21 of the American Convention.¹⁰²

101. In the instant case, Mr. Cortez paid a bond in the amount of US\$1,500 to obtain his release on December 19, 1997. The Commission has already established that the detention ordered on that occasion was arbitrary and constituted a violation of the presumption of innocence because it was not based on procedural purposes. The Commission also already established that Mr. Cortez should not have been tried in the military criminal jurisdiction, so that all decisions taken in that jurisdiction that impaired his rights must be understood to contravene the Convention. Accordingly, the IACHR considers that the payment of a bond under such circumstance constituted impairment of Mr. Cortez' property through to the moment when the money was returned on February 28, 2000.

102. In light of the foregoing considerations, the IACHR concludes that the Ecuadorian State is responsible for violating the right established in Article 21 of the American Convention, in conjunction with Article 1.1 of the same instrument, to the detriment of Mr. Cortez.

⁹⁸ I/A Court HR. *of Bayarri v. Argentina*. Judgment of October 30, 2008. Series C No. 187, par. 107. Baldeón García Case v. Peru. Merits, Reparations and Costs. Judgment of April 6, 2006. Series C No. 147, par. 150'; and Case of Genie Lacayo v. Nicaragua, Judgment of January 29, 1997, par. 77.

⁹⁹ I/A Court HR. *Case of Valle Jaramillo v. Colombia*. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, par. 155.

¹⁰⁰ IACHR, Case 12.357, Application to the I/A Court H.R., Members of the National Association of Discharged and Retired Staff of the Office of the Comptroller General of the Republic of Peru, April 1, 2008, par. 72. I/A Court HR. *Case of Chaparro Álvarez and Lapo Ñiquez v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2007. Series C No. 170, par. 174.

¹⁰¹ I/A Court HR. *Case of the "Five Pensioners" v. Peru*. Merits, Reparations and Costs. Judgment of February 28, 2003. Series C No. 98, par. 102.

¹⁰² I/A Court HR. *Case of Salvador Chiriboga v. Ecuador*. Preliminary Objections and Merits. Judgment of May 6, 2008. Series C No. 179, par. 54.

V. CONCLUSIONS AND RECOMMENDATIONS

103. Based on its determinations of fact and law described above, the Inter-American Commission concludes that the Ecuadorian State is responsible for violating the rights to humane treatment, personal liberty, due process, and private property established in Articles 5.1, 5.2, 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 8.1, 8.2, 8.2 b), 8.2 d) and 21 of the American Convention, in conjunction with the obligations established in Article 1.1 and 2 of the same instrument, to the detriment of Gonzalo Cortez Espinoza.

104. By virtue of the foregoing conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE STATE OF ECUADOR:

1. Provide full reparation for the human rights violations found in the instant report, including both material and moral dimensions; Adopt measures that prove both financial compensation and satisfaction.
2. Adopt such non-repetition measures as are needed to: 1) ensure that both applicable norms and the respective practices with respect to preventive custody/pre-trial detention are compatible with the standards established in this report; and ii) ensure that the military criminal jurisdiction is not applied to civilians under any circumstances, including in the case of persons who have retired from the military.