The case of *Montesinos Mejía vs. Ecuador*: reflection upon the right to personal liberty in the IACHR's jurisprudence

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Keywords: Inter-American Court of Human Rights; Right to personal liberty; "Cyclon operation"; Arbitrary arrest.

1. – On January 27th, 2020, the Inter-American Court of Human Rights (hereinafter as "The Court" or "The Inter-American Court") issued a judgement declaring unanimously the State of Ecuador (hereinafter "Ecuador", "The State" or the Ecuadorian State") responsible for the violation of the right to personal liberty, to the presumption of innocence and to judicial protection, enshrined in art. 7, § 1, § 2, § 4, § 5, in art. 8 § 2 and 24 of the American Convention on Human Rights (hereinafter as "ACHR", "the Convention" or "the American Convention"), in relation to art. 1, § 1 of the above mentioned Convention.

At the same time, the State was held responsible for the violation of arts. 7, § 1, § 3, § 6 of the ACHR, in conjunction with arts. 1 § 1 and 2, in prejudice to Mario Alfonso Montesinos Mejía (hereinafter "the victim" or "Mr. Montesinos"). Moreover, the Court asserted that Ecuador violated Mr. Montesinos's right to personal integrity, provided for in art. 5 of the ACHR and in arts. 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, (hereinafter "IACPT") and the judicial guarantees contained in art. 8 § 1, 8 § 2 b), c), d) and e) and art. 8 § 3 of the ACHR.

Lastly, the Court concluded that the State was not responsible for the violation of the right not to be tried twice for the same facts and for the principle of legality and non-retroactivity, respectively established in arts. 8 § 4 and 9 of the ACHR.

2. – In the case at stake, the sequence of the events which have led to the decision issued by the Inter-American Court are complicated. For these reasons, it seems appropriate to firstly underline that the analyzed judgement concerns a series of violations made in the context of a drug trafficking in Ecuador. Indeed, in 1992 the Anti-Drug Intelligence Service of the Ecuadorian National Police (*Servicio de Inteligencia Antidrogas de la Policía Nacional del Ecuador*) launched the Operation "Cyclone", with the aim of dismantling a drug trafficking organization in the South American State.

The operation involved the arrest of several persons allegedly linked to the narco-traffic organization, including Mr. Mario Alfonso Montesinos Mejía – a former

member of the Ecuadorian Army – arrested in 1992 by police agents in the City of Quito (Ecuador). The same day he was arrested, the officers kept him inside the police vehicle for approximately two hours, confiscating various weapons located inside his home. Few days later, Mr. Montesinos gave its statement without a legal representative to the National Directorate of Investigation (*Dirección Nacional de Investigaciones*), where he clarified he was administering the weapons for someone else.

Following his arrest, he was held in a cell measuring approximately 11 square meters with other thirteen detainees and – one month after being arrested – he reported that twenty-five members of the National Police Intervention and Rescue Group had beaten him and other detainees, while they were in the courtyard of the Quito Regiment No. 2 detention center. Succeeding his complaints, he was transferred to the Social Rehabilitation Centre: throughout the transfer, his eyes and mouth were covered with adhesive tape and his hands tied behind his back. While in the place of detention, he claimed to have been held *incommunicado* (*i.e.* with no possibility of making or receiving any communications from the prison facility) and isolated from the date of his arrest (June 21st, 1992) until July 28th, 1992.

Because of the ongoing situation, in 1996 Mr. Montesinos filed a petition for *habeas corpus* with the Mayor of the Quito Metropolitan District, in which he alleged he had been subject to inhuman and degrading treatment and been held in prison for fifty months without judgement. The application for *habeas corpus* was declared inadmissible, therefore Mr. Montesinos's representative appealed the Mayor's decision to the Ecuador's Court of Constitutional Guarantees (*Tribunal de Garantías Constitucionales*). One month later, the Supreme Court ruled in favor of the applicant, granting *habeas corpus* and ordering his immediate release. Since the previous decision had not been complied with, in 1998 Mr. Montesinos lodged a second *habeas corpus* with the Mayor of Quito who – for the second time – declared the writ inadmissible. Once again, Mr. Montesinos's lawyer appealed the decision to the Constitutional Court, which ruled in favor of Mr. Montesinos, ordering his immediate release, also considering that the time spent in pretrial detention was unreasonable.

3. – With regard to the specific proceedings before the domestic courts, Mr. Montesinos was accused of different and related crimes, respectively concerning: the crime of illicit enrichment; the crime of conversion and transfer of property; and the crime of front running (*i.e.* carried out activities as a front man for a criminal organization). With regard to the first two asserted crimes, the Fourth Chamber of Judges of the Superior Court of Justice of Quito issued two orders to dismiss in favor of Mr. Montesinos.

As far as the last alleged crime, on 9 September 2003, the Deputy Chief Justice of the Quito Superior Court issued a judgement of acquittal at first instance in favor of Mr. Montesinos. The Office of the State Procurator-General and the Public Prosecutor's Office lodged an appeal against the decision and on September 8, 2008, the First Specialized Criminal, Transit and Collusion Chamber of the Quito Superior Court of Justice sentenced Mr. Montesinos to 10 years' imprisonment and a fine of six times the minimum living wage for the crime of "*testaferrismo*". Mr. Montesinos lodged an appeal in Cassation against the aforementioned sentence, which was rejected on August 2010 by the First Chamber of the National Court of Justice, on the basis that the evidence presented warranted that the defendants should be deemed as the author and accomplices of the crime of testaferrismo.

On September 29th, 2010, Mr. Montesinos filed an extraordinary action for protection against the sentence issued on August 31st, 2010. On January 18th, 2011, the Constitutional Court ruled that the appeal was inadmissible, because the allegations of the defendants were focused on the facts or acts that gave rise to the criminal proceedings, over which it had no jurisdiction to rule.

4. – In accordance with articles 51 and 61 of the American Convention, the case was submitted to the jurisdiction of the Court by the Inter-American Commission on Human Rights ("the Commission" or "the Inter-American Commission"). The Commission claimed that the Ecuadorian State violated the rights to personal integrity, personal liberty, judicial guarantees and judicial protection to the detriment of Mr. Mario Montesinos Mejía (cfr. IACHR, Report No. 131/17, Case 11.678, *Admissibility and Merits*, Mario Montesinos Mejía, Ecuador, October 25, 2017).

For the purpose of this analysis, it seems interesting to examine the argumentations submitted in the preliminary objections by the Ecuadorian State. In its brief of response (October 6th, 2018) the State raised four preliminary objections to the Court, claiming: *i)* the Inter-American Court does not have jurisdiction over violations of treaties and Conventions ratified after the date of the alleged violation, since Ecuador signed the IACPT in 1986 and ratified it in 1999 and the facts took place in 1992, noting in any case that the acts of torture are of an immediate effect, therefore no responsibility could be established retroactively; *ii)* the lack of exhaustion of local remedies, since at the date of submission of the initial petition to the Commission the domestic remedies had not yet been exhausted in the three criminal proceedings against the alleged victim; *iii)* the incompetence *ratione materiae* of the Court due to the subject matter, specifying that the petitioner used the Inter-American System as a "Court of Appeal" or "fourth instance Court" with respect to the criminal proceedings against him for the crime of "testaferrismo"; lastly, *iv)* due to the delay of the proceedings before the Commission, the State had difficulties in preparing its defense, since it was forced to modify its exceptions considering the factual changes within the proceedings, indicating that the passage of time without solving the case generates legal uncertainty for the parties. Remarkably, the preliminary objections of the State government were totally dismissed by the Court.

Considering the first objection, the Inter-American Court noteworthy recalled the principle of non-retroactivity – as codified in art. 28 of the Vienna Convention on the Law of Treaties of 1969 (United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331) – explaining the it may take cognizance only of acts or facts that have taken place after the date of entry into force of a treaty against the State who caused the human rights violations (Corte IDH, *Caso Tibi vs. Ecuador*, 7-9-2004, [*Excepciones Preliminares, Fondo, Reparaciones y Costas*] § 61; Corte IDH, *Caso Terrones Silva et al. vs Peru*, 26-09-2018, [*Excepciones Preliminares, Fondo, Reparaciones y Costas*], § 33. For a specific evaluation of art. 28 VCLT, see Von Derken, *Article 28. Non-retroactivity of treaties*, in *Vienna Convention on the Law of Treaties a Commentary*, Second Edition, (eds.) Oliver Dörr, Kirsten Schmalenbach, page from 507 to 520). That being sad, despite the Court confirmed the lack of jurisdiction to rule on the alleged torture in the light of the IACPT, in any case it considered and sanctioned the aforementioned violation according to art. 5 of the ACHR. Moreover, recalling its previous jurisprudence on the matter (Corte IDH, *Caso de los Hermanos Gómez Paquiyauri Vs. Perú*, 8-7-2004, [*Fondo, Reparaciones y Costas*], § 196; *Caso Tibi Vs. Ecuador*, § 62; *Caso J Vs. Perú*, 27-11-2013, [*Excepción Preliminar, Fondo, Reparaciones y Costas*], § 21; *Caso Terrones Silva y otros Vs. Perú*, § 34) the Court endorsed the plea of both the Commission and the representative, claiming that it does have temporary jurisdiction to analyze the alleged violation of arts. 1, 6 and 8 IACPT with respect to the alleged failure to investigate the facts occurred after 1999 (*i.e.* after the IACPT entered into force in Ecuador).

Dealing with the alleged non exhaustion of local remedies, the Court first stated that the latter is a generally recognized principle of international law (Corte IDH, *Caso Velásquez Rodríguez vs. Honduras*, 26-6-1987, [*Excepciones Preliminares*], § 85; *Caso López Soto y otros vs. Argentina*, 25-11-2019, [*Excepciones Preliminares, Fondo, Reparaciones y Costas*], § 20). On the basis of its previous case-law, the Court recalled an evaluation that

could be considered as a "preliminary objection test" in order to analyze an alleged failure to comply with this mandatory requirement: first, the exception should be considered as a defense available to the State; second, the exception must be presented in a timely manner by State, specifying the remedies it considers have not been exhausted; and lastly, the Court has stated that the State presenting the exception must specify the domestic remedies that are effective and have not yet been exhausted (this "preliminary objection test" or quoting the words of the Court "*pautas claras*" [*"clear guidelines"*] are an clear elaboration of the IACTHR jurisprudence, cfr. *Caso Velásquez Rodríguez Vs. Honduras*, [*Excepciones Preliminares*] § 88; *Caso López Soto y otros Vs. Argentina*, § 21).

As far as the third complaint is concerned, the Court reiterated that one of the characteristics of international jurisdiction is its adjuvant and complementary nature. Keeping in mind the clear above-mentioned considerations, the IACHR repeatedly held that – in order for the preliminary objection of fourth instance to be applicable – it is necessary that the applicant seek a review of a judgment of a national court on the basis of an incorrect assessment concerning the evidence, facts or domestic law, without alleging that there has been a violation of the international treaties over which the Court has jurisdiction (Corte IDH, *Caso Cabrera García y Montiel Flores vs. México*, 26-11-2010, [*Excepción Preliminar, Fondo, Reparaciones y Costas*], § 18; *Caso Díaz Loreto y otros vs. Venezuela*, 19-11-2019, [*Excepciones Preliminares, Fondo, Reparaciones y Costas*], § 20). However, when the San José judges assess the fulfilment of certain international obligations, they have the power to investigate if there may be an intrinsic interrelationship between the analysis of international law and domestic law. In fact, the determination of whether or not the actions of judicial organs constitute directly a violation of the State's international obligations may lead to the need to examine the respective domestic processes to establish their compatibility with the American Convention (Corte IDH, *Caso de los "Niños de la Calle" (Villagrán Morales y otros) vs. Guatemala*, 19-11-1999, [*Fondo*], § 222; *Caso Díaz Loreto y otros vs. Venezuela*, § 21). In the case at stake, the Court founds that the allegations made by Mr. Montesinos's representative concerns the violation of the alleged victim's rights within the criminal justice administration system, which would have resulted in arbitrary detention, acts of torture and *incommunicado* detention. That being said, the Inter-American Court reminds that its duty does not consist in a "fourth instance of judicial review", nor does it examine the evaluation of evidence carried out by national judges. The Court, on an exceptional basis, have the authority to decide on the content of judicial decisions that manifestly violate the American Convention and, consequently, implies the international responsibility of the State. For this reason, the Court rejected this preliminary objection, also considering that the assessment of whether the proceedings and the judgment violated the provisions of the Convention is a question of substance.

The last objection, mainly regarding the length of procedure before the Commission, raised a particular and interesting point of view of the Court. Indeed, the San Jose judges firstly remind that the issue concerning the legality of the procedure before the Commission is applicable only when the existence of a serious error prejudicial to the State's right to defense is established, justifying the inadmissibility of a case submitted to the Court (Corte IDH, *Caso Trabajadores Cesados del Congreso (Aguado Alfaro y otros) vs. Perú*, 24-11-2006, [*Excepciones Preliminares, Fondo, Reparaciones y Costas*], § 66; *Caso Herrera Espinoza y otros Vs. Ecuador*, 1-9-2016, [*Excepciones Preliminares, Fondo, Reparaciones y Costas*], § 39). In the light of the above, the Court founds appropriate to scrutinize whether the proceedings before the Commission caused any violation to the State's right to defense. In doing so, although the IACHR ascertained that the proceeding before the Commission lasted more than twenty-one years, the argument raised by the State Government – mainly focusing on the difficulties for the State's defense strategy leading to a modification of the initially proposed exceptions on admissibility, due to the changed factual relationship – did not

raise a specific ground in relation to the inadmissibility of the case at stake (§ 39). In order to justify the dismissal, the Inter-American Court clarify that: on one hand, the passage of time has meant that the State has had to modify its defense strategy in the matter of preliminary objections, so it does not imply that a serious error has occurred, preventing it from exercising its right to defense before the Commission or the Court; on the other hand, the time elapsed in the processing of the case before the Commission fundamentally harms the alleged victims, whose right of access to Inter-American justice is affected, thus confirming the argument raised by Mr. Montesinos's representative.

5. – Once dismissed the preliminary objections raised by the State Government, the Inter-American Court addressed the legal consideration made by both parties in the following order.

First, the Court found that – in accordance with the regulations in force in Ecuador at the time of the events – a court order was required to arrest a person, except for arrest in *flagrante delicto*. In the absence of a judicial order determining the detention of Mr. Montesinos and the absence of *flagrante delicto* in his arrest, the IACHR concluded that his apprehension was illegal, which is therefore a violation of Article 7 § 2 of the American Convention on Human Rights. Similarly, the Court warned that there is no formal justification or reasoning from the judicial authority to order Mr. Montesinos' detention on remand, nor was the order for pretrial detention reviewed during the time he spent as a detainee. For that reason, the order for Mr. Montesinos' preventive detention was arbitrary and, consequently, in violation of Articles 7, § 1 and § 3 of the ACHR. Furthermore, since Mr. Montesinos was not formally notified of the charges against him – until the issuance of the order for the prosecution of the crime of conspiracy on November 18, 1992 – the Court decided that Ecuador had violated Article 7 § 4 of the American Convention to his detriment.

The Court also concluded that the period of six years and two months during which Mr. Montesinos was in preemptive detention was unreasonable, excessive and in violation of Articles 7§ 1) and § 5 of the Convention. On the legal consideration concerning the reasonable time limit for pre-trial detention, the Court warned that Mr. Montesinos received differentiated treatment as a result of the application of article 114 *bis* of the Ecuador Criminal Code, which limited the enjoyment of the remedy of *habeas corpus* for crimes related to drug trafficking. In this regard, the Court noted that the automatic exclusion of the benefit of release, solely on the basis of the specific crime with which Mr. Montesinos was charged – without any explanation being provided as to the specific purpose for which the difference in treatment was sought, its appropriateness, necessity, proportionality and, furthermore, without taking into account the personal circumstances of the accused – violated the right to equality before the law, established in Article 24, in relation to Articles 1 §1, 2, 7 § 5 and § 6 of the same instrument, to the detriment of Mr. Mario Montesinos.

Moreover, in the context of the right to appeal to a judge related to the legality of detention, the Court declared the violation of Article 7 § 6 of the Convention on the basis of two different reasons: first, the San José judges noted that at the time of the facts the remedy of *habeas corpus* in Ecuador was at the first instance recognized as an administrative and not as judicial remedy, thus violating the right to an effective remedy according to art. 7, § 6 ACHR; second, because of the lack of effectiveness of the Resolution of October 30, 1996, which ordered the release of Mr. Montesinos, since it has been proven that Mr. Montesinos was detained for approximately six years and two months without being sentenced (he was only released in 1998, § 132).

Likewise, the Court considered that Mr. Montesinos' presumption of innocence enshrined in art. 8 § 2 ACHR had been violated because the illegal detention, the lack

of justification and review of the order for preventive detention and the unreasonable prolongation of his deprivation of liberty were equivalent to an anticipated sentence. In addition, the State did not produce any evidence that would make possible to determine the state of health and conditions of detention of Mr. Montesinos during the more than six years he was deprived of his liberty.

On the basis of these facts, in conjunction with the factual and legal findings made by the Court in the judgment in the *Suárez Rosero case* regarding the treatment received during his detention, the IACHR established that the conditions of detention and treatment – to which Mr. Montesinos was subjected – represented cruel, inhuman and degrading treatment. Therefore, the San José judges concluded that Ecuador violated Articles 5§ 1 and § 2 of the Inter-American Convention. Also, the Court concluded that the failure to investigate the torture and ill-treatment denounced resulted in the violation of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, affecting Mr. Montesinos.

Lastly, the Inter-American Court found that the state authorities did not act with the due diligence and the duty of celerity that Mr. Montesinos' deprivation of liberty demanded. In the Court's reasoning, the above-mentioned violations led the criminal proceedings against him exceeded a reasonable time frame. In addition, it was proven that Mr. Montesinos gave his presumptive and even investigative statements without having a lawyer. Similarly, Mr. Montesinos was held *incommunicado* for 38 days from his arrest, which, in the view of the Inter-American Court, is sufficient evidence that he was not able to prepare his defense properly, since he did not have the legal assistance of a public defender or obtain a lawyer of his choice with whom he could communicate freely and privately. The Court also noted that Mr. Montesinos' presumptive statements were obtained under constraint but were not deprived of evidentiary value. For these reasons, the Court declared a violation of Articles 8 § 1, § 2 (b), (c), (d) and (e) and 8 § 3 of the Convention to the detriment of Mr. Montesinos.

6. – The judgment under consideration seems relevant because it offers different legal evaluation. Although there are several violations in the case at stake, this analysis will focus on the violation of the right to personal liberty, enshrined in article 7 of the Convention.

As a matter of fact, the Court's case law regarding arbitrary arrests and detentions has now assumed – within the OAS system – a real and continuous endorsement by the Inter-American Commission and by the Inter-American Court of Human Rights. Indeed, it should be noted that the Commission clearly established that article 7 concerns:

> "[C]ualquier forma de detención, encarcelamiento, institucionalización, o custodia de una persona, por razones de asistencia humanitaria, tratamiento, tutela, protección, o por delitos e infracciones a la ley, ordenada por o bajo el control de facto de una autoridad judicial o administrativa o cualquier otra autoridad, ya sea en una institución pública o privada, en la cual no pueda disponer de su libertad ambulatoria [...]" (See *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), General Provision, OEA/Ser.L/V/II.131 doc. 26).

Moreover, the Inter-American Court indicated that there is no need – as a mandatory requirement – of a specific duration of deprivation, since it could comprise a short-term period (Corte IDH, *Caso Torres Millacura et al. vs. Argentina*, 26-8-2011, [*Fondo, Reparaciones y Costas*] § 76), or a modest suspension for identification for several days (Corte IDH, *Palamara Iribarne vs. Chile*, [*Fondo, Reparaciones y Costas*], § 63) and

clearly include extensive terms of pretrial detention and post-conviction custody (Corte IDH, *Acosta Calderón vs. Ecuador*, 24-6-2006, [*Fondo, Reparaciones y Costas*], § 50).

As previously noted, this case is part of the countless cases of violation of fundamental rights of South American citizens, forced to suffer violations by the government's public security authorities. As well known, the situation of instability created in Latin America between the 1970s and 1990s led to a series of convictions aimed at ascertaining the violation of international obligations by the member states of the OAS. Frequently, the police operations concerned restrictions on the freedom of individuals who sometimes opposed a totalitarian regime (see, in this sense, the various cases decided by the Court following the famous "Condor" operation, see J.P. McSherry, *Predatory States: Operation Condor and covert war in Latin America*, eds. Rowman and Littlefield, 2005, p.3) or concerned individuals – as in the present case – who were suspected of having entered into direct and/or indirect relations with drug trafficking groups. Therefore, regardless of the reasoning on the basis of which the right to personal liberty was strongly limited, it seems that the case law of the Inter-American Court is a strong condemnation of the States' conduct aimed at limiting the fundamental guarantees of the individual. Indeed, It seems interesting to point out that the crime of "*testaferrismo*" (meaning appearing as a "front" in commercial transactions, for an in-depth analysis see J. C. Sandoval Pérez, "*Los sujetos activos en el delito de Testaferrismo*", in *Fundamentos y principios del derecho y sus aplicaciones*, 2019) has already been tackled previously within the IACHR against Ecuador (cfr. *Ruth del Rosario Garcés Valladares vs. Ecuador*, 13-4-199, Report N. 64/99, § 2).

In fact, the general considerations made by the Court (cfr. § 93 to § 99) are interesting from two main points of view: on one hand, there is a consolidation of the provisions aimed at protecting the right to personal freedom and this is corroborated by the abundant and sometimes corresponding case-law of the European Court of Human Rights (ECtHR), when specifically ruling on art. 5 of the European Convention of Human Rights (cfr. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, art. 5); on the other hand, it seems relevant the reference the Court made by linking articles 7 and 8 ACHR, which seems to guarantee even more effective protection to persons who are subject to restrictions in their personal sphere.

Indeed, the Inter-American Court has often clarified that the main content of art. 7 ACHR is the protection of liberty of individual against any arbitrary or illegal interference by the State (Corte IDH, *Caso "Instituto de Reeducación del Menor" vs. Paraguay*, 2-9-2004, [*Excepciones Preliminares, Fondo, Reparaciones y Costas*], § 223; *Caso Romero Feris vs. Argentina*, 15-10-2019, [*Fondo, Reparaciones y Costas*] § 76). The Inter-American Court's case law has made it clear that Article 7 provides two specific forms of protection, one general and one specific, where the first one can be found in the first paragraph, the second in paragraphs 2 to 7 (Corte IDH, *Caso Chaparro Álvarez y Lapo Íñiguez vs. Ecuador*, 21-11-2007, [*Excepciones Preliminares, Fondo, Reparaciones y Costas*] § 51; *Caso Romero Feris vs. Argentina*, § 76). In any event, it seems interesting to note that the IDH Court has ruled that any infringement concerning paragraphs 2 to 7 will necessarily concern a breach of paragraph 1 (Corte IDH, *Caso Chaparro Álvarez y Lapo Íñiguez vs. Ecuador*, § 54; and *Caso Romero Feris vs. Argentina*, § 76). Preliminarily and more generally, it should be pointed out that all articles which can be identified in conventional instruments concerning the right to liberty and personal security (See, for example, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, art. 9; Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, art. 6) are subject in general to both positive and negative obligations (See, on the specific ECHR point of view, P. Pustorino, *Lezioni di tutela internazionale dei diritti umani*, Cacucci Editore – Bari, 2019, p. 139), which specify two different types of guarantees – of a substantive and

procedural nature respectively – which States must respect in order not to incur an international violation: (1) its procedures and reasons must be established by law, and (2) the detention or arrest cannot be arbitrary. Such discipline can be found in Article 7 § 2 of the ACHR, where the Court found that the reservation of law must necessarily be accompanied by the principle of criminality, which obliges States to establish, as concretely as possible and "in advance", the "causes" and "conditions" of the deprivation of physical liberty. In addition, it requires their application with strict adherence to the procedures objectively defined in the law (Corte IDH, *Caso Chaparro Álvarez y Lapo Íñiguez vs. Ecuador*, § 57; and *Caso Romero Feris vs. Argentina*, § 77). Article 7 § 2 of the Convention thus automatically refers to domestic legislation and any requirement – established in domestic law – that is not complied with when a person is deprived of his or her liberty will make such deprivation illegal and contrary to the American Convention (Corte IDH, *Caso Chaparro Álvarez y Lapo Íñiguez vs. Ecuador*, § 57; and *Caso Romero Feris vs. Argentina*, § 77). It is also interesting to examine in more detail the concept of arbitrariness set out in Article 7 § 3. Indeed, the Court has established that no one may be subjected to detention or imprisonment for causes and methods that – even when qualified as legal – may be deemed incompatible with respect for the fundamental rights of the individual because they are, among other things, unreasonable, unpredictable, or lack proportionality (Corte IDH, *Caso Gangaram Panday vs. Suriname*, 21-1-1994, [*Fondo, Reparaciones y Costas*] § 47; *Caso Romero Feris vs. Argentina*, § 91). Moreover, it has considered that the domestic law, the applicable procedure and the corresponding express or implied general principles are, in themselves, required to be compatible with the Convention. Thus, the concept of "arbitrariness" should not be equated with "contrary to law" but rather be interpreted more broadly to include elements of impropriety, injustice and unpredictability (Corte IDH, *Caso Chaparro Álvarez y Lapo Íñiguez vs. Ecuador*, § 92; and *Caso Romero Feris vs. Argentina*, § 91). By contrast, the European Convention's approach is narrower: it lists acceptable scenarios for the deprivation of liberty and omits the open-ended principle of arbitrariness (cfr. *European Convention*, art. 5 § 1).

Subsequently on this particular analysis, it is interesting to note the link that the San José courts make between the guarantees provided for in article 7 and article 8 of the Inter-American Convention. Firstly, the Court notes that in the present case since pretrial detention is a non-punitive precautionary measure (Corte IDH, *Caso Suárez Rosero vs. Ecuador*, 12-11-1997, [*Fondo*] § 70; *Caso Norín Catrimán y otros vs. Chile*, 29-5-2014, [*Fondo, Reparaciones y Costas*] § 354), keeping a person deprived of liberty beyond a reasonable time for the fulfilment of the purposes justifying his or her detention would, in fact, amount to an early penalty (Corte IDH, *Caso Suárez Rosero vs. Ecuador* § 77; *Caso Norín Catrimán y otros vs. Chile*, § 311), which would violate not only the right to personal liberty but also the presumption of innocence provided for in article 8.2 of the Convention. Secondly, the Court makes a subsequent link between the right to personal liberty and judicial guarantees concerns the time of procedural proceedings, in case a person is deprived of liberty. Thus, the Court stated that the principle of 'reasonable time' referred to in Articles 7 § 5 and 8 § 1 of the American Convention is intended to prevent the accused from remaining under indictment for a long time and to ensure that the indictment is decided promptly (Corte IDH, *Caso Suárez Rosero vs. Ecuador* § 70).

7. – More deeply in the analysis of the relevant legal findings, in the present case the Court make an interesting "division" of the sequence of facts against Mr. Montesinos, making a sort of differentiation of all the particulars that led to the violation of Article 7.

For this reason, it seems relevant to investigate the sequence established by the Court's specifically related to art. 7: (i) the arrest and detention of Mr. Montesinos; (ii)

the continuation of the pretrial detention and its temporary reasonableness (§ 100). The differentiations on the timing allow an in-depth analysis of the case law relating to Article 7.

As for the period of initial detention, the Court first recalls the relevant regulations at the time the event occurred (Cfr. art. 19.17 Ecuador Constitution and arts. 172, 174 of Ecuador's 1983 Code of Criminal Procedure), specifying that a court order was required to detain a person, unless he or she had been apprehended in *flagrante delicto* (Previously stated by the Inter-American Court in the case *Tibi vs. Ecuador*, § 103). Bearing in mind the above mentioned regulations in force at the time of the initial detention, the Court considered that, in the absence of a warrant for Mr. Montesinos's arrest and the absence of flagrante delicto, it is clear that his arrest was illegal, in violation of Ecuadorian law, and therefore in violation of Article 7 § 2 of the American Convention on Human Rights (§ 105).

For what concerns the "pretrial detention" the Court first noted that, in order for the measure of deprivation of liberty not become arbitrary, art. 7 § 3 must meet five necessary and interrelated different conditions (§ 109). These conditions are the result of a progressive and constant analysis of the IACHR jurisprudence, mainly regarding an effort each State have to make.

First, there must be sufficient evidence to give reasonable grounds for believing that an unlawful act has occurred and that the person subjected to the proceedings may have participated in it (Corte IDH, *Caso Servellón García y otros vs. Honduras*, 21-9-2006, [*Excepción Preliminar, Fondo, Reparaciones y Costas*], § 90; *Caso Chaparro Álvarez y Lapo Íñiguez vs. Ecuador*, §§ 101, 103).

Secondly, the purpose of deprivation must be consistent with the Inter-American Convention (Corte IDH, *Caso Servellón García y otros vs. Honduras*, § 90; *Caso Mujeres Víctimas de Tortura Sexual en Atenco vs. México*, 28-11-2018, [*Excepción Preliminar, Fondo, Reparaciones y Costas*] § 251).

Thirdly, the measure must be taken in a manner consistent with the purposes for which it was intended: to ensure that the accused person will not impede the proceedings or evade justice (Corte IDH, *Caso Suárez Rosero vs. Ecuador* § 77; *Caso Chaparro Álvarez y Lapo Íñiguez vs. Ecuador*, § 170; *Caso Wong Ho Wing vs. Perú*, 30-6-2015, [*Excepción Preliminar, Fondo, Reparaciones y Costas*] § 250; *Caso Mujeres Víctimas de Tortura Sexual en Atenco vs. México*, § 250).

Fourth, that the measures are appropriate, necessary and strictly proportional (Corte IDH, *Caso Palamara Iribarne vs. Chile*, 22-11-2005, [*Fondo, Reparaciones y Costas*], § 197; *Caso Mujeres Víctimas de Tortura Sexual en Atenco vs. México*, § 251).

Lastly, that the decision imposing them contains sufficient reasoning to allow an assessment of whether they comply with the conditions set out (Corte IDH, *Caso García Asto y Ramírez Rojas vs. Perú*, 25-11-2005, [*Excepción Preliminar, Fondo, Reparaciones y Costas*], § 128; *Caso Mujeres Víctimas de Tortura Sexual en Atenco vs. México*, § 251).

On the basis of these assumptions, the Court recalled the reasoning made in the *Herrera Espinoza* case, where the Court declared that the provision contained in art. 177 of the Ecuador's Code of Criminal Procedure violated art. 2 of the ACHR. Since the article authorized the judicial authority to order pretrial detention only on the basis of evidence of the existence of an offence punishable by deprivation of liberty and the presumption of responsibility of the accused, the IACHR noted that:

> "[d]ejaba en manos del juez la decisión sobre la prisión preventiva solo con base en la apreciación de "indicios" respecto a la existencia de un delito y su autoría, sin considerar el carácter excepcional de la misma, ni su uso a partir de una necesidad estricta, y ante la posibilidad de que el acusado entorpezca el proceso o pudiera eludir a la justicia. [...] Esta determinación de privación preventiva de la libertad en forma automática a partir del tipo de delito perseguido penalmente, resulta contraria a [...] pautas [convencionales], que

> mandan a acreditar, en cada caso concreto, que la detención sea estrictamente necesaria y tenga como fin asegurar que el acusado no impedirá el desarrollo del procedimiento ni eludirá la acción de la justicia. [...] En razón de lo expuesto, este Tribunal constat[ó] que [el] artículo [...] 177 [...] result[ó] contrario [...] al estándar internacional establecido en su jurisprudencia constante respecto de la prisión preventiva" (Corte IDH, *Caso Herrera Espinoza y otros vs. Ecuador*, 1-9-2016, [*Excepciones Preliminares, Fondo, Reparaciones y Costas*], §§§ 148, 149 and 150).

Keeping in mind the established jurisprudence on this very specific matter, the San José judges noted that there is no formal justification or reasoning on the part of the judicial authority for ordering the detention of Mr. Montesinos. Not even in the November 1992 trial orders is there any justification for keeping the alleged victim in pretrial detention or any reasoning to explain the need to do so from the time of his initial detention. Although the offences for which he was accused, provided for in the Narcotic Substances Act, were considered serious, the lack of arguments and motivation for keeping him in pretrial detention violated the Convention (§ 113). For these reasons, the Court concluded that the preventative detention order issued against Mr. Montesinos was arbitrary and, consequently, contravened articles 7 § 1, § 3 of the Convention, in relation to Articles 1 §1 and 2.

8. – In conclusion, the Court ordered the State, as reparation measures: i) to publish the Judgment of the Inter-American Court and its summary; ii) to initiate the investigation necessary to determine, judge, and, if appropriate, punish those responsible for the cruel, inhuman, and degrading treatment established in this Judgment, as well as the torture denounced by Mr. Montesinos in 1996; iii) to provide free, immediate, adequate and effective psychological and psychiatric treatment required by Mr. Montesinos, with prior informed consent and for the time necessary, including the provision of free medication; iv) to pay the amount set in the judgment for non-pecuniary damage and costs.

Indeed, according to the provision enshrined in art. 63 § 1 of the ACHR, the Court clarified that any violation of an international obligation producing damages to an individual, entails the duty to make adequate reparation, also recalling that this provision reflects a customary rule that constitutes one of the fundamental principles of contemporary international law on State responsibility (Corte IDH, *Caso Velásquez Rodríguez vs. Honduras*, 21-7-1989, [*Reparaciones y Costas*], § 25; *Caso Jenkins vs. Argentina*, 26-11-2019. [*Excepciones Preliminares, Fondo, Reparaciones y Costas*], § 122).

Among the different passages in the reparation measures, it is possible to deeply analyzed two different relevant observations made by the Court, concerning respectively the investigation of the facts of torture and the rehabilitation measures to the detriment of Mr. Montesinos.

As far as the investigation for the facts of torture, the Court declared that the State failed to comply with its duty to investigate the allegations of torture and cruel, inhuman, and degrading treatment of Mr. Montesinos (§ 160). In this regard, the Court assesses the normative and institutional advances implemented in recent years by Ecuador (§ 149). Without prejudice to the foregoing, the Court provides that Ecuador shall, within a reasonable time, initiate the investigation necessary to determine, judge and, if appropriate, punish those responsible for the cruel, inhuman and degrading treatment established in this judgment, as well as the torture denounced by Mr. Montesinos in 1996.

Lastly, for what concerns the rehabilitation measures, the Court notes that it was proven in this case that Mr. Montesinos was a victim of cruel, inhuman and degrading treatment. Likewise, from the evidence provided and the statements of his next of kin

before the Court, it can be seen that Mr. Montesinos suffers from a series of ailments as a consequence of the six years he was deprived of his liberty. Although it takes into consideration the State's explanation that Mr. Montesinos can access medical care provided by the Social Security Institute of the Ecuadorian Armed Forces, the Court considers that the State must provide the psychological and psychiatric treatment requested by Mr. Montesinos immediately, adequately, and effectively, free of charge, with prior informed consent and for the time necessary, including the provision of free medication. Similarly, the respective treatments must be provided in a timely and differentiated manner, as far as possible, at the facility closest to his place of residence in Ecuador, for as long as is necessary. To that end, the victim has a period of six months from the date of notification of this Judgment to request such treatment from the State.

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