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REPORT No. 168/18
PETITION 101-07
REPORT ON ADMISSIBILITY

GUILLERO NOBOA MOLINA
ECUADOR

Approved electronically by the Commission on December 21, 2018.

Cite as: IACHR, Report No. 168/18. Petition 101-07. Admissibility. Guillermo Noboa Molina.
Ecuador. December 21, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Law Clinic of the University of San Francisco de Quito (<i>Clínicas Jurídicas de la Universidad San Francisco de Quito</i>)
Alleged victim:	Guillermo Noboa Molina
Respondent State:	Ecuador
Rights invoked:	Articles 3 (right to juridical personality), 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 24 (right to equal protection), and 25 (right to judicial protection) of the American Convention on Human Rights, ¹ in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects)

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition:	January 29, 2007
Additional information received at the stage of initial review:	April 31, 2008
Notification of the petition to the State:	May 22, 2008
State's first response:	February 24, 2010
Additional observations from the petitioner:	April 14, 2014
Additional observations from the State:	January 26, 2016

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (deposit of instrument made on December 28, 1977)

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

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 24 (right to equal protection), and 25 (right to judicial protection) of the American Convention on Human Rights, in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in the terms of Section VI
Timeliness of the petition:	Yes, in the terms of Section VI

¹ Hereinafter "the Convention" or "the American Convention".

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

V. FACTS ALLEGED

1. The petitioners maintain that Mr. Guillermo Noboa Molina (hereinafter also "the alleged victim") was arbitrarily detained on July 13, 1992, and held incommunicado for 15 days. They point out that he was held in preventive detention for more than six years in the context of four criminal proceedings on the same facts and police report and that this period represented punishment prior to conviction. They argue that while detained he was subjected to psychological torture and physical and moral mistreatment, that his conditions of detention were degrading and had consequences that lasted until his death on November 1, 2007.

2. They argue that on July 13, 1992, the alleged victim was detained in the context of a large counter-narcotics operation called "Operation Cyclone." That day, police officers arrived at the General Rumiñahui Bank (hereinafter "BGR") -where he worked as Manager of Auditing, Control and Methodology. They state that even though he was not *in flagrante delicto*, he was taken to the Quito Headquarters where they took his details and belongings and performed a physical examination, all without an arrest warrant, or any indication that he was under arrest. They allege that the police officers intimidated the alleged victim and held him incommunicado in a dark cell.

3. On July 14, 1992, he made a formal statement in a hostile atmosphere of threats, shouting and accusations and without a defense lawyer or a member of the competent judicial authorities being present. They complain that he was forced to sign a self-incriminating statement prepared by members of the National Police and a Prosecutor who was present. Later he was taken to a cell in the Quito Headquarters, where detainees were crowded and slept on the damp ground, with newspapers used as covers, and exposed to diseases. They report that in these conditions the alleged victim became ill without adequate and timely attention.

4. The petitioners indicate that on July 23, the alleged victim and other detainees were subjected to "el teque." This procedure consisted of the detainees trotting around the patio, while the police jostled them, spat on them, hit them with rifle butts and their fists, and tripped them over. In addition, they were forced to do sit-ups, push-ups, and squatting walks while they put gun barrels in their mouths, firing blanks, and calling them by name and accusing them of being the perpetrators of crimes. On the night of July 23, 1992, he was transferred to the Social Rehabilitation Center No. 1 of Quito with his hands tied with electricity cord, his eyes and mouth covered and piled on top of other detainees' bodies. They argue that during the trip he was intimidated several times by a policeman who pulled the trigger of a weapon aimed at his temple.

5. The petitioners allege that he was held in a maximum-security wing at the Social Rehabilitation Center where he remained incommunicado until July 28, 1992, when he was able to receive visits from his family and have access to limited legal representation, due to the presence of the police or by having to communicate through his wife. They maintain that he was kept at the Centre locked in a cell for prolonged periods, with short outings to a patio; his sleep being interrupted by the police and in fear due to shots fired into the air inside the wing. They complain that the alleged victim developed a severe depressive disorder and that his health deteriorated progressively while he received minimal or inadequate treatment. According to the doctors treating him upon his release, his conditions of detention caused him bone marrow aplasia and other ailments.

6. With regard to the four legal proceedings against the alleged victim - two for conversion and transfer of assets, one for unlawful enrichment and the other for being a front (*testaferrismo*) - they argue that these proceedings were based on police report No. 080-JPEIP-CPI -92 violating the principle of *non bis ibídem*. They maintain that in none of the four proceedings did the alleged victim appear or was brought before the competent judicial authorities to inform him of the charges against him. They argue that although the Police Superintendent issued arrest warrants on July 30 and 31, 1992, the orders for preventive detention were issued in November 1992, four months after the arrest. Additionally, they argue that the State violated Article 3 of the American Convention given that the alleged victim was restricted in the enjoyment of his rights by not being able to properly engage the judicial system to defend himself against the accusations.

7. On July 30, 1992, 17 days after his arrest, in the proceedings for unlawful enrichment the Chief Constable of Police of Pichincha initiated proceedings accusing him of being guilty. On August 25, 1992, the Fourth Criminal Judge of Pichincha refused to hear the case because one of the parties under investigation could only be tried before a Superior Court. The case was referred to the Superior Court of Quito, which charged the alleged victim without issuing a preventive detention order. On November 22, 1996, the President of the Superior Court opened the plenary trial stage and indicted the alleged victim. In November 1996, the then Attorney General issued a provisional acquittal, and on May 7, 1998, the Fourth Criminal Chamber of Pichincha issued a final dismissal order.

8. On July 31, 1992, 18 days after his arrest, in the first proceedings for conversion and transfer of property, the Chief Constable of Police of Pichincha initiated proceedings accusing him of being guilty. On September 29, 1992, the First Criminal Judge of Pichincha refused to hear the case because there were parties under investigation who could only be tried before a Superior Court. The case was referred to the presidency of the Superior Court of Quito, which in November 1992 accepted jurisdiction in the case and issued a formal investigation against the alleged victim. On September 30, 1996, the Public Prosecutor of Pichincha issued a decision not to indict the alleged victim; however, in October 1996, the President of the Superior Court of Quito opened the plenary trial stage indicting the alleged victim. In August 1997, the then Attorney General of Pichincha issued a new order provisionally acquitting the alleged victim. On April 29, 1998, the Fourth Criminal Chamber of Pichincha issued a final dismissal order.

9. On August 3, 1992, 21 days after the arrest, in the proceedings for acting as a front (*testaferrismo*), the Chief Constable of Police of Pichincha initiated proceedings and decided not to indict the alleged victim. The VII Criminal Judge of Pichincha accepted jurisdiction and did not charge him. Days later, at the request of the VII Criminal Prosecutor, the same judge extended the proceedings and indicted the alleged victim for the offense of acting as a front (*testaferrismo*). The VII Criminal Judge of Pichincha refused to hear the case on the ground that one of the defendants could only be tried before a Superior Court. The case was referred to the presidency of the Superior Court of Quito, which accepted jurisdiction over the case, issued an order initiating proceedings and indicted the alleged victim. They allege that in December 1992, after four months of detention, the president of the Superior Court of Justice of Quito issued an arrest warrant. In March 1998, the President of the Superior Court ordered the opening of the trial stage and accused the alleged victim of complicity. In October 1998, the Attorney General's Office of Pichincha again issued an opinion not to charge the alleged victim. On September 9, 2003, the Deputy President of the Superior Court of Justice of Quito, issued a provisional acquittal order, elevating the process for consultation. The petitioners indicate that this consultation resolution is necessary for the judgment to be enforceable and therefore, without it, the proceedings are still ongoing. They maintain that by the time the petition was filed, 14 years had elapsed without any definitive resolution, exceeding any reasonable period of time to resolve proceedings. They add that due to the denial of justice and unjustified delay in resolving these criminal proceedings, the alleged victim has suffered unjustified damage, in view of the fact that, for instance, freezing orders were issued on his property.

10. With regard to the second proceedings for conversion and transfer of property, on November 11, 1992, the Fourth Criminal Judge of Pichincha assumed jurisdiction in the case and issued an order initiating proceedings for embezzlement. In May 1993, the Fourth Criminal Prosecutor of Pichincha accused the alleged victim for the offense of adulteration of documents and money laundering. On August 16, 1993, the Fourth Criminal Judge of Pichincha issued an order to open a plenary trial accusing the alleged victim of embezzlement and ordering his preventive detention, elevating the decision for consultation. In January 1995, the Public Prosecutor of Pichincha issued an indictment accusing the alleged victim of money laundering, conversion and transfer of assets. On March 20, 1996, the Third Chamber of Justices of the Superior Court of Justice of Quito sentenced him to two years' imprisonment for embezzlement. On March 22, 1996, the alleged victim filed a *cassation* appeal, which was dismissed on February 4, 1997.

11. The petitioners indicate that during Mr. Guillermo Noboa Molina's detention, two writs of *Habeas Corpus* were filed in his favor. The first, on October 4, 1996, before the Mayor of Quito, which was

dismissed and an appeal with the Constitutional Court was then filed. The Court dismissed the appeal on the grounds that it was a case related to offenses under the law on narcotic and psychotropic substances.³ They indicate that this appeal took an excessive amount of time of 10 months. The second was filed on April 7, 1998, before the Mayor of Quito, who dismissed it. The same Habeas Corpus was appealed before the Constitutional Court on May 26, 1998. The Second Chamber of the Constitutional Court allowed the appeal and ordered the release of the alleged victim.

12. They point out that at the time, Habeas Corpus was the only means provided by Ecuadorian legislation to protect the alleged victim's right to freedom. They argue that although Ecuador formally provides remedies protecting the alleged victim against acts violating his fundamental rights, they were ineffective in practice since they only granted him freedom six years after his arrest. In addition to the foregoing, they alleged that Article 114 of the Ecuadorian Criminal Code established discriminatory treatment for individuals charged with offenses punishable under the Law on Narcotic and Psychotropic Substances. They maintain that the alleged victim remained deprived of his liberty in pretrial detention for more than six years, a period greater than one-third, and a half of the maximum sentence established in Ecuadorian law for the offences for which he was accused.

13. For its part, the State advances three main arguments, on the one hand that the criminal proceedings related to the trials of unlawful enrichment, conversion, transfer of property and embezzlement were resolved through final resolutions in 1997 and 1998, while the petition was filed in 2006, so such proceedings would be outside the six-month time limit. The second allegation refers to the trial for acting as a front (*testaferrismo*), where the State alleges a failure to exhaust domestic remedies at the moment of filing the petition with the IACHR. In the trial as an accessory, where he was acquitted on September 9, 2003, the alleged victim could have filed a recusal action as an adequate remedy to deal with the delay in the administration of justice so that a new judge could, effectively, carry on the proceedings. It states that these proceedings were definitively resolved on September 8, 2008, when the Superior Court of Justice issued a final acquittal of the alleged victim, and therefore maintains that the petitioners filed their complaints in advance before the IACHR without having exhausted domestic remedies.

14. The State's third argument refers to the failure to exhaust domestic remedies to obtain reparation for the alleged violations. The State indicates that the alleged victim could have filed a claim for damages before the Supreme Court of Justice against the Justices of the Superior Court of Justice for the delay, negligence or denial of justice in accordance with the provisions of the Code of Civil Procedure and the Organic Law of the Judiciary. This remedy could have led to the removal of the Justices of the Superior Court for serious misconduct in the performance of their duties and in addition could have resulted in the payment of damages in civil proceedings. In view of the above arguments, the State considers that the petition fails to comply with the requirements established in Art. 46 of the Convention and requests that it be declared inadmissible.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

15. The petitioners indicate that the alleged victim was detained on July 13, 1992, and subjected to four legal proceedings against him based on the same facts and police report. These proceedings took from

³ Article 114 of the Criminal Code of Ecuador, in force at the time of Guillermo Noboa's detention, provided as follows:

Any person who, having been in detention without receiving either an order dismissing or commencing a full trial for a period equal to or greater than a third of the time established under the Penal Code as the maximum sentence for the offense charged, shall be immediately released by the judge in charge of proceedings.

Similarly, any person who has been detained without having judgment passed, for a period equal to or greater than half the time established in the Penal Code as the maximum sentence for the offense charged shall be released by the court in charge of proceedings.

The preceding provisions shall not apply to any person charged with offenses under the Law on Narcotic or Psychotropic Substances.

four years and three months to 16 years to reach final decisions, namely: unlawful enrichment (initiated on July 30, 1992 with definitive dismissal of May 7, 1998), conversion and transfer of assets (initiated on July 31, 1992, with final dismissal on April 29, 1998), conversion and transfer of assets (commenced on November 11, 1992, with a sentence of two years in prison for embezzlement on February 4, 1997) and acting as a front (*testaferrismo*) (initiated on August 3, 1992, with a final acquittal on September 8, 2008).

16. The petitioners, among other allegations, complain of violations of due process based on allegations of illegal detention without lawful warrants; having been forced to incriminate himself; having been held incommunicado for a period exceeding that established by law; and having had limited opportunities for arranging his defense and for meeting freely with his defense counsel. They also argue that having been tried more than once for the same facts exceeded the limits of reasonableness. The petitioners argue that the alleged victim was held in preventive detention for six years, in violation of the principle of the presumption of innocence and in inhumane conditions of detention. Two Habeas Corpus writs were filed on behalf of Mr. Guillermo Noboa Molina, one on October 4, 1996, which was dismissed on the grounds of the application of a law they claim to be discriminatory, and another on April 7, 1998, which was accepted and which ordered his release. For its part, the State adduced lateness in the filing period regarding the proceedings for unlawful enrichment, conversion, transfer of property and embezzlement and a lack of exhaustion of domestic remedies with respect to the proceedings for acting as a front (*testaferrismo*). It maintains that the alleged victim could have filed a recusal action and a lawsuit for damages.

17. According to the Commission's Rules of Procedure and as the Inter-American Court has established, whenever a State claims that a petitioner has not exhausted the relevant domestic remedies, it is required to identify the remedies that have not been exhausted and to demonstrate that they are "adequate" for redressing the alleged violation, meaning that the role of those remedies within the domestic legal system is relevant to the protection of the rights violated.

18. With respect to excessive length of the proceedings, the Commission must evaluate the circumstances and conduct a case-by-case analysis to establish whether an undue delay has occurred. As a general rule, the Commission determines that "a criminal investigation should be carried out promptly to protect the interests of the victims and to preserve evidence." To determine whether an investigation has been carried out "promptly", the Commission takes into account a number of factors, such as the time elapsed since the crime was committed, whether the investigation has moved beyond the preliminary stage, the measures adopted by the authorities, and the complexity of the case.⁴

19. With respect to recusal proceedings and the lawsuit for damages identified by the State as the appropriate remedies available to the alleged victim, the Commission observes that their features are not adequate to redress the claim brought by the petitioners. With respect to the recusal proceedings, the IACHR observes that the State failed to demonstrate how such a remedy could be effective to expedite the criminal proceedings, in view of the fact that it is a procedural remedy designed to protect the right to be tried by an impartial organ and that it is not necessarily a definitive element for these proceedings be decided more expeditiously. Regarding the lawsuit for damages, the IACHR notes that this would not be an adequate remedy since it seeks to establish a monetary compensation for the individual liability of State officials, and therefore fails to provide integral reparation and justice to the alleged victim and his next-of-kin.

20. The Commission notes that from the beginning of the proceedings initiated against the alleged victim until the last final decision – issued after the petition was presented to the IACHR - 16 years had elapsed. Therefore the Commission concludes that the petition has been filed within a reasonable period of time based on Article 32.2 of its Rules of Procedure.

21. In view of the context and characteristics of the facts in the present case, the Commission considers that the petition was filed within a reasonable time and that the admissibility requirement on

⁴ IACHR, Report, N° 50/08 (Admissibility), Petition 298-2007 Admissibility, Néstor Jose Uzcategui and others, Venezuela, July 24, 2008, para. 42.

timeliness has been satisfied, in the context of the application of the exception to the exhaustion of domestic remedies. The petition before the IACHR was received on January 29, 2007; the facts alleged in the complaint began on July 13, 1992, and their effects continued until the alleged victim's death on November 1, 2007, given that the last definitive decision in the proceedings for acting as a front (*testaferrismo*) was issued on September 8, 2008.

VII. ANALYSIS OF COLORABLE CLAIM

22. In view of the factual and legal elements presented by the parties and the nature of the matter brought to its attention, upon proof of the alleged violations relating to a lack of due process and access to justice, the arbitrary deprivation of liberty, prolonged incommunicado detention, the excessive duration of preventive detention, the psychological torture, physical abuse, and discriminatory treatment before the law, could constitute *prima facie* violations of the rights enshrined in Articles 5 (right to humane treatment), 7 (right to personal liberty), 8 (right to a fair trial), 24 (right to equal protection) and 25 (right to judicial protection) of the American Convention on Human Rights in relation to Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) of the same instrument, to the detriment of Mr. Guillermo Noboa Molina.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 7, 8, 24, and 25 of the American Convention, in the light of the obligations set out in Articles 1.1 and 2 of the same instrument; and

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 21st day of the month of December, 2018. (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.