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REPORT No. 77/19
PETITION 74-08
REPORT ON ADMISSIBILITY

CLAUDIO ROBERTO FOSSATI
ECUADOR

Approved Electronically by the Commission on May 28, 2019.

Cite as: IACHR, Report No. 77/19. Petition 74-08. Admissibility. Claudio Roberto Fossati.
Ecuador. May 25, 2019.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Claudio Roberto Fossati, Xavier Gonzalo Arregui Camacho, and Eduardo William Verdezoto Paredes
Alleged victim:	Claudio Roberto Fossati
Respondent State:	Ecuador
Rights invoked:	Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 9 (freedom from <i>ex post facto</i> laws) and 25 (judicial protection) of the American Convention on Human Rights, ¹ in relation to its Articles 1 (obligation to respect rights) and 2 (domestic legal effects); articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture; ² and other international treaties ³

II. PROCEDURE BEFORE THE IACHR⁴

Filing of the petition:	January 22, 2008
Notification of the petition to the State:	January 13, 2013
State's first response:	March 24, 2015
Notification of the possible archiving of the petition:	July 10, 2018
Petitioner's response to the notification regarding the possible archiving of the petition:	August 24, 2018

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 on December 28, 1977); IACPPT ⁵ (deposit of instrument on September 30, 1999)

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 (humane treatment), 8 (fair trial) and 25 (judicial protection) of the American Convention, in relation to its Article 1 (obligation to respect rights); articles 1, 6 and 8 of the IACPPT
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, under the terms of Section VI
Timeliness of the petition:	Yes, under the terms of Section VI

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

² Hereinafter, "IACPPT."

³ Articles 1, 7, 10, 14 and 15 of the International Covenant on Civil and Political Rights; articles 5, 9 and 11 of the Universal Declaration of Human Rights; and article 36 of the Vienna Convention on Consular Relations.

⁴ The observations submitted by each party were duly transmitted to the opposing party.

⁵ Entry into force under the terms of article 22 of the IACPPT.

V. ALLEGED FACTS

1. The petitioners submit that on February 12, 2003, the Ecuadorean police arrested María Verónica Acosta, Mr. Claudio Roberto Fossati's ("Mr. Fossati" or "the alleged victim") live-in partner, for money laundering, taking her to the Narcotics Police Unit. Upon learning of her arrest, the alleged victim traveled to Ecuador on the same day and went to the abovementioned police station.

2. They affirm that at the police station, Mr. Fossati spoke to some officers who did not inform him that his live-in partner had been released but lied to him that she was still under arrest and under investigation and she could be convicted to a 12-year prison term. The petitioners assert that the officers did this to pressure and blackmail Mr. Fossati to give and sign a false statement, which he did. They argue that Mr. Fossati gave a statement without due process of law or the right of defense, as he was not assisted by an attorney of his trust —instead his declaration was signed by an unknown attorney. It appears that he incriminated himself and was never informed of his right to contact the Consulate of his country of origin.

3. They add that on that occasion, the police arrested the alleged victim without a warrant and that he was neither heard by judicial authorities nor brought before them. Thus, they claim that his arrest was arbitrary and illegal. They indicate that on February 13, 2003, an investigation was lodged against Mr. Fossati and that on February 18, the criminal judge of Pichincha ordered his pretrial detention, which did not meet the standards of the inter-American system. On that same day, the prosecutor in charge of the case pressured him to give a different version of his statement to charge him with the crime.

4. They affirm that on May 16, 2003, the prosecutor's office accused the alleged victim of participating in an international organization of money laundering criminals using Ecuador as a transit country for smuggling cash into Colombia. They submit that, at that time, the act of transferring proceeds or smuggling cash from an unknown origin or illicit activities was not classed as a crime in the Ecuadorean laws; therefore, the charges against him were contrary to the principle of freedom from *ex post facto* laws. They manifest that in the arraignment hearing, the prosecutor expressed that the offense attributed to the alleged victim was not criminalized under the Law on Narcotic Drugs and Psychotropic Substances and that the court should consider the crimes mentioned in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. The petitioners claim that the decision was illegal and unreasonable given that this Convention does not criminalize actions nor establish measures of punishment.

5. They argue that a lawful conviction of the alleged victim required that the following was proven: i) that a national or foreign court had found him guilty of the crime of drug trafficking; and ii) that the money came from drug trafficking. Although none of these had been proven, on June 14, 2004, the criminal court sentenced Mr. Fossati to 12 years in prison and to pay a fine equivalent to one thousand minimum wages. It sent the case to the Superior Court of Justice of Quito ("the Superior Court"), which took up the case on July 21, 2004. On May 11, 2006, the Superior Court ordered to send the case file to the District Prosecutor's Office. On August 21, 2006, the District Prosecutor requested the annulment of the conviction on the grounds that the investigation had not produced any evidence that proved beyond a reasonable doubt the existence of a final judgment, issued by a national or foreign judge or court, in which the alleged victim was found guilty of drug trafficking. On September 28, 2006, the Superior Court revoked the conviction on considering that no crime had been committed. On October 18, 2006, the Criminal Court ordered the alleged victim's release.

6. They indicate that the alleged victim spent almost four years in prison and had to wait almost two years to have his sentence reviewed. They also explain that during this time the alleged victim sustained episodes of violence that damaged his physical and mental health. In this regard, they claim that the alleged victim was beaten on several occasions, subjected to death threats, life-threatening attacks with thrusting and cutting weapons and firearms and even suffered fractures to the head. In one of those episodes, the alleged victim was punched, kicked, and beaten with clubs to such an extent that he lost three teeth and required dental implants. They further explain that the alleged victim was subjected to inhumane detention conditions and mistreatment by prison officers. In this respect, they indicate that officers made him run in the

yard unclothed twice or thrice a week and gave him cold showers afterwards, and that at the prison, the diet was poor, there was no health care, and hygiene conditions were inadequate.

7. In light of the foregoing, they allege that the State of Ecuador is responsible for violating the human rights of the alleged victim and that he is therefore entitled to compensation.

8. For its part, the State asserts that the alleged victim was not held in prison without being tried. It submits that, at first, he was deprived of liberty because of a pretrial detention order against him, and then, he was imprisoned because of the trial court's sentence to a 12-year term in prison. It also claims that the alleged victim lodged remedies and had his sentence reviewed and amended and that he was acquitted of the charges on October 2, 2006.

9. Moreover, it submits that the petition should be declared inadmissible in view of the non-exhaustion of domestic remedies. On the one hand, it affirms that under Ecuadorean laws, a person can file a speedy claim for damages against a judge or justice who, in the exercise of their duties, causes financial damage to the parties or interested third parties, either because of a delay or a denial of justice. It asserts that the petitioners should have lodged this remedy if they believe that judicial authorities' performance has caused damage to the alleged victim, which they have not. On the other hand, it argues that the petition was untimely because the judgment of acquittal is dated October 2, 2006, while the petition was only filed before the IACHR on January 22, 2008.

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

10. Regarding the prolonged pretrial detention period and the violations of due process, the Commission observes that during the criminal proceedings the alleged victim sought to be released from prison and reported the alleged violations of due process. Thus, it considers that domestic remedies filed in this regard were exhausted by the judgment of acquittal of October 2, 2006, when the said case was settled. In this regard, the petition meets the requirement established in Article 46(1)(a) of the Convention. However, as it was presented to the IACHR on January 22, 2008, the petition does not meet the requirement outlined in Article 46(1)(b) of the Convention.

11. As to the detention conditions and the purported acts of violence by officers and other inmates against the alleged victim while in prison, the IACHR reiterates that the State has the duty to protect the human rights of persons deprived of liberty and that it is obligated to conduct *ex officio* an investigation to establish and punish the acts of violence committed against such persons either by state agents or by other inmates.

12. In the present case, the State has not submitted information on the purported acts of violence or the investigations allegedly filed or completed to determine the alleged facts. At the same time, the petitioners have also not submitted information on the complaints lodged and the investigations conducted in relation to the alleged facts, but they claim that the alleged victim sustained fractures on the head and had to use dental implants to replace the teeth lost as a result of the attacks by other inmates. The IACHR assumes that, due to the gravity of the alleged injuries, the alleged victim would have been seen by a health professional and recalls that these professional have a duty to speak out and to report any unethical, abusive, or inadequate treatment of patients.⁶ Therefore, the IACHR reiterates that in situations such as these it is the State that must promote an investigation and, if applicable, criminal proceedings to establish the facts and the burden of promoting these proceedings does not fall on the alleged victim.

13. Under these circumstances, In these circumstances, the IACHR is satisfied that the authorities were aware of the situation of the alleged victim, and that he invoked the remedies readily

⁶ IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas. OEA/Ser.L/V/II, Doc. 64, December 31, 2011, para. 564.

available to him as a practical matter, and thus satisfied the requirements of Article 46.⁷ In that regard, given that the competent authorities were notified of the facts and that to date there is no information about the investigation of these events or the punishment of the persons responsible, the Commission believes that the exception to the requirement of exhaustion of domestic remedies established in Article 46(2)(c) of the Convention is applicable. Moreover, because the purported violations occurred until the alleged victim was released in October 2006, and as there is no information on whether the alleged facts had been or were being investigated by January 2008, when the petition was filed to the IACHR, the Commission believes that the petition was submitted within a reasonable time, according to Article 32(2) of the IACHR Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

14. The Commission considers that the purported attacks against the alleged victim by state agents or third parties, with the authorities' acquiescence or omission, as well as the lack of investigation into the facts and the lack of punishment of the persons responsible, if proven, may establish violations of the rights enshrined in Articles 5 (humane treatment), 8 (fair trial) and 25 (judicial protection) of the American Convention, in relation to its Article 1(1) (obligation to respect rights) and the rights enshrined in articles 1, 6 and 8 of the IACPPT.

15. As for the other international treaties invoked by the petitioners, the Commission is not competent to determine violations of rules established in those instruments. However, under Article 29 of the American Convention, it may consider them for the purpose of interpreting the norms of the Convention during the report on the merits of the instant case.

VIII. DECISION

1. To find the instant petition admissible regarding Articles 5, 8 and 25 of the American Convention, in relation to its Article 1(11);

2. To find the instant petition admissible in connection with articles 1, 6 and 8 of the IACPPT; and

3. 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 28th day of the month of May, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Francisco José Eguiguren Praeli, Luis Ernesto Vargas Silva, and Flávia Piovesan, Commissioners.

⁷ IACHR, Report No. 89/17. Petition 788-08. Admissibility. Curtis Armstrong A.K.A. Tyrone Traill. Jamaica. July 7, 2017, para. 10.