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**REPORT No. 73/19**  
**PETITION 1233-09**  
REPORT ON ADMISSIBILITY

SANTIAGO EFRAÍN VELÁZQUEZ COELLO  
AND JORGE GUILLERMO ALVEAR MACÍAS  
ECUADOR

Approved electronically by the Commission on May 19, 2019.

**Cite as:** IACHR, Report No. 73/19, Petition 1233-09. Admissibility. Santiago Efraín Velázquez Coello and Jorge Guillermo Alvear Macía. Ecuador. May 19, 2019.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Santiago Efraín Velázquez Coello and Jorge Guillermo Alvear Macías
<b>Alleged victim:</b>	Santiago Efraín Velázquez Coello and Jorge Guillermo Alvear Macías
<b>Respondent State:</b>	Ecuador
<b>Rights invoked:</b>	Article 5 (humane treatment), Article 8 (fair trial), Article 9 (principle of legality and retroactivity), Article 11 (honor and dignity), Article 23 (political rights), Article 24 (equality before the law), and Article 25 (judicial protection) of the American Convention on Human Rights <sup>1</sup> in connection with its Article 1 (obligation to respect rights) and Article 2 (duty to adopt provisions under domestic law)

**II. PROCEEDINGS BEFORE THE IACHR<sup>2</sup>**

<b>Filing of the petition:</b>	October 5, 2009
<b>Additional information received at the stage of initial review:</b>	March 15 and October 3, 2011; March 19, 2012; January 11, April 16, and December 17, 2013; June 30, September 16, and October 30, 2014
<b>Notification of the petition to the State:</b>	May 26, 2015
<b>State's first response:</b>	September 29, 2015
<b>Additional observations from the petitioner:</b>	June 3 and August 19, 2015; October 14 and December 13, 2016
<b>Additional observations from the State:</b>	November 21, 2016; February 24, 2017; and June 15, 2018

**III. COMPETENCE**

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

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

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	Article 5 (humane treatment), Article 8 (fair trial), Article 9 (principle of legality and retroactivity), Article 11 (honor and dignity), Article 23 (political rights), Article 25 (judicial protection), and Article 26 (economic, social and cultural rights) of the American Convention in connection with its Article 1.1 (obligation to respect rights) and Article 2 (duty to adopt provisions under domestic law)
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, under the terms of Section VI
<b>Timeliness of the petition:</b>	Yes, under the terms of Section VI

<sup>1</sup> Hereinafter "the Convention" or "American Convention."

<sup>2</sup> The observations submitted by each party were duly transmitted to the opposing party.

## V. ALLEGED FACTS

1. Santiago Efraín Velázquez Coello and Jorge Guillermo Alvear Macías point out that, on February 22, 2006, the National Congress issued a resolution appointing them to hold the office of members of the Constitutional Court for a four-year term, in conformity with Article 275 of the Constitution.

2. The petitioners indicate that, on April 23, 2007, the court to which they belonged accepted an appeal for protection on constitutional grounds (*amparo*) filed by 50 parliament members opponents of the President, who had been dismissed from their jobs by the Supreme Electoral Court, and ordered that they be reinstated. They indicate that, as soon as this decision was adopted, the building where they were located was invaded by persons who reached the court's plenary sessions room, armed with sticks and blunt objects. They point out that these persons were shouting insults and slogans against the members of the court and threatening them directly and telling them they "would throw them over the balcony and then burn them." They indicate that the invaders also stole recordings of that day's session and secretarial documents, among others, the absence excuses submitted by two members of the court who did not participate in the session.

3. They allege that, in view of the mood of conflict that the country was experiencing, the state should have taken measures to safeguard the physical, psychological, and moral safety of the court's members, but that the forces of public law and order did not make any efforts to protect them; on the contrary, they allowed protesters to enter into the court's various units and offices. They highlight that the police officers did not attempt to stop the assailants and that it was only because the media were present and because of the repeated insistent request for assistance that they were finally provided assistance to be able to leave the premises of the building. They add that, in contrast to the others, two members of the court who had ties with the current administration's political forces were not attacked. They point out that the events have been fully documented by the press and that many of the persons who participated in the assault were clearly identifiable and that, although the incidents constitute crimes prosecutable *ex officio*, the state has not investigated or punished the perpetrators, their accomplices, or accessories to the cover-up.

4. Furthermore, the petitioners claim that their decision to grant protection as requested by the congresspersons was received with hostility by government authorities. They allege, for example, that President Correa made declarations on April 23, 2007, indicating that Congress would dismiss the members of the Constitutional Court and warned that, if the congresspersons benefiting from the protection attempted to enter Congress, they would be arrested. In addition, they indicate that a congressperson filed a complaint against them whose true motivation was to prevent the reinstatement of the congresspersons who were benefiting from the protection.

5. On April 24, 2007, the National Congress issued a resolution whereby the terms of office of the members of the Constitutional Court were "declared terminated," bringing to an end the duties of both the standing members and their alternates. The petitioners allege that, although this resolution was disseminated to the media, they themselves were never notified and it was not published in the Official Gazette until August 14, 2007. They consider that this resolution was unconstitutional and contrary to the rights contained in the American Convention.<sup>3</sup> In addition, the petitioners claim that the true reason for the decision of "declaring

<sup>3</sup> Among other reasons, because: (1) National Congress was only competent, according to Article 130, subparagraph 11, of the Constitution, "to appoint the members of the Constitutional Court, review their excuses or resignations, and designate their replacements" not to "to declare terminated" their terms of office, a figure that does not exist in the legal system; (2) the constitutional norm that set their term of office at 4 years is clear and does not require any interpretation and, even if it had required it, the process established by the Constitution itself for its interpretation was not followed; (3) the resolution did not meet the requirement of motivation because, although certain legal standards were quoted, they were not applicable and the resolution did not explain their relevance, which was required by the Constitution; (4) when adopting the resolution, the National Congress was unlawfully established because the dismissed congresspersons did not participate although the decision that granted them protection was in force, as it was not until July 24, 2007 that the new members of the Constitutional Court declared this decision to be null and void; (5) the resolution amounted to a sanction of dismissal that was enforced without following due process of law as required by the Constitution, ignoring their right to defense and violating their right to equality in comparison with other high-ranking officials to whom, in the past, impeachment proceedings were filed as provided for in the Constitution; (6) if it is accepted that members of the Constitutional Court can be dismissed by a mere resolution issued by Congress, that would violate their right to equality with respect to the other operators of justice who cannot be dismissed without having an administrative proceeding filed against them first; and (7) the decision unjustifiably

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terminated” their terms of office was to prevent their ruling from being enforced and the dismissed congresspersons from returning to Congress. They highlight that one of the members who voted against the decision was once again appointed to the same post and that the decision was eventually declared null and void by the members who replaced them, precisely because of the absence of the documents that were taken by the protesters during the events of April 23, although their disappearance was never investigated.

6. On November 23, 2007, the petitioners filed an appeal for protection on constitutional grounds (*amparo*) against the resolution of Congress. This was turned down on December 19, 2007, because it deemed that the protection order was against an illegitimate action or omission of a public authority that “imminently threatens to bring severe harm.” The court considered that “the petition for protection was filed seven months after, when the imminent severe harm had disappeared.” The petitioners filed an appeal with the Constitutional Court, which dismissed the appeal on May 26, 2009 on the basis of the same reason. They allege that the Court that heard the appeal for protection was comprised of the persons who had replaced them in their jobs and who would have been dismissed had they granted the protection and therefore they were not impartial.

7. The petitioners indicate that they did not file a subjective or full jurisdiction remedy because it was not clear if it was the admissible means to challenge the decisions of Congress and because it was neither adequate nor effective to remedy their situation. They allege that it did not provide an opportunity to suspend the impacts of the action being challenged and that it requires exhausting the cassation appeal, the proceedings of which would have taken about five years to process. They add that they were aware that another of the dismissed Constitutional Court members had filed a full jurisdiction remedy with the Administrative Disputes Court, which was dismissed, with the court concluding that the resolution by Congress “is not one of those actions that are subject to the administrative disputes jurisdiction.” They argue that, if a full jurisdiction remedy had been filed by them, it would have been ruled on by the same court that turned down the appeal of the other member and it was evident that it would have had no possibility of succeeding. In addition, they point out that the Office of the Prosecutor argued that the resolution being challenged was not an administrative action but rather an interpretation of the resolutions of Congress on the basis of “political reasons,” and therefore the state could not allege that said resolution constituted an administrative action that could be challenged by the administrative disputes court.

8. As for the state, it requests that the petition be declared inadmissible because it does not meet the requirement of exhaustion of domestic remedies, with emphasis on the fact that this requirement is not a simple formality for admissibility but rather an essential condition which, if not observed, prevents the state from performing its role as the primary entity responsible for safeguarding human rights in its jurisdiction.

9. The state alleges that the petitioners failed to submit the subjective full jurisdiction remedy, which was provided for in the legislation in force at the time and was adequate and effective so that the claim of the petitioners could be dealt with under domestic law. They point out that the resolution of Congress which declared that the terms of office of the petitioners had terminated was not a general normative action but rather a declaration that led to legal impacts for certain specific individuals, and therefore it qualified as an administrative act that could be challenged in the administrative jurisdiction. It quotes various examples of cases in which the subjective full jurisdiction remedy was effective, including against administrative decisions of the legislative branch. It considers that Mr. Loayza is a person extraneous to the proceeding, because of which the fact that he unsuccessfully attempted a full jurisdiction remedy does not exempt the petitioners from having to exhaust this remedy and, on the contrary, highlights its procedural relevance. It stresses that the petitioners cannot seek exemption from their failure to exhaust domestic remedies on the basis of the simple perception that they are ineffective.

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[... continuation]

created a void in the country’s constitutional justice system because, even if their terms of office had actually expired, by law they should have continued to discharge their duties until their replacements had been appointed.

10. It points out that, in any case, Mr. Loayza did not attempt a cassation appeal, which would have been an effective remedy to safeguard rights and to monitor the legality of the decision of the court of first instance. It quotes various examples of cases where the cassation appeal was effective in correcting errors committed by lower courts with regard to ruling on full jurisdiction remedies. It indicates that, if their full jurisdiction remedy had led to a resolution of dismissal, the petitioners would have been able to appeal this decision through a cassation appeal. It argues that the cassation appeal cannot be viewed as an unnecessary procedural burden and that the assertions made by the petitioners that ruling in this proceeding would involve a long delay have not been confirmed nor are they well-founded. Stressing that, according to the standards of the inter-American system, the examination of what constitutes a “reasonable delay” must be done case by case, depending on the complexity of each case. It considers that the cassation appeal is indispensable to appraise the procedural performance of the full jurisdiction remedy and therefore the petitioners cannot argue the absence of its effectiveness or suitability on the basis of an isolated case in which the cassation appeal was not used.

11. It is also alleged that the principle of estoppel only applied to actions that take place within the same proceeding, therefore it is not applicable to the discrepancy which, according to the petitioners, exists between the stance taken by a state agent in a domestic proceeding for protection and the stance taken by the state in an international setting. It also pointed out that both proceedings were different in nature and pursued different ends.

12. Furthermore, it argues that the “amparo” appeal for protection constituted an effective and suitable remedy so that the claims of the petitioners could be processed under domestic law and that the state cannot be blamed because the petitioners, out of negligence, filed the remedy late.<sup>4</sup> It indicates that it was impossible, according to applicable law, for domestic courts to proceed with a review of the merits of the appeal for protection filed by the petitioners because they submitted it seven months after the action being challenged had been issued, when the harm claimed by them could no longer be considered in any way imminent. It alleges, by quoting examples, that this was not a decision made on a whim or an isolated case but rather the result of a long line of case law on the concept of imminent harm. It highlights the fact that the petitioners, as members of the Constitutional Court, contributed to the development of this case law and therefore they could not “ignore their own rulings.” It emphasizes two decision of the Constitutional Court, signed by the petitioner Velázquez Coello as president of the court, where appeals for protection were turned down because of the time elapsed between the issuance of the action being challenged and the filing of the appeal (seven months in the one case and ten months in the other).<sup>5</sup> It deems that the petitioners have abused the right to petition and have tried to “build” a case illegitimately before the inter-American system by filing a protection action that they knew was untimely for the purpose of making it seem like if domestic remedies had been exhausted.

13. It alleges that there was no situation of juridical abnormality in the state at the time of the incidents. It argues that the news clippings and editorials used by the petitioners to support the alleged situation of abnormality and to prove that human rights violations attributable to the state were being

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<sup>4</sup> The petitioners alleged that, contrary to what the state has claimed, their appeal for protection (*amparo*) was not filed late, because, among other reasons: (1) they were not notified of the resolution that was challenged until after it was published in the Official Gazette on August 14, 2007, three months (not seven) before they filed an appeal for protection and they could not file this appeal before because the law required them to provide a copy of the resolution they were challenging; (2) neither the Political Constitution nor the law in force at the time confined the appeal for protection to a given time, because the appeal did not have any statute of limitations and required that each case be examined on the basis of a sound critical review depending on its circumstances and context, which is something that the domestic courts did not do; (3) the harms caused by the resolution being challenged continued to occur when the first-instance judge issued his ruling; (4) “when the text of the Constitution referred to imminent harm it was not referring to any consideration of the time-period of the harm but rather to the impacts of the action”; (5) although there were many precedents regarding the appeals for protection that had been dismissed for lack of imminent harm, including decisions in which they participated, the cases were of a different nature and, in any case, did not constitute precedents of mandatory enforcement; (6) at the time of the incidents, Ecuador was experiencing an abnormal situation in terms of insecurity and instability, widely documented in newspaper reports, which should have been taken into account by the domestic courts, and which differentiated their case from the rulings issued by the constitutional justice in a context of normality; (7) they were deterred from filing an appeal earlier because of the criminal proceedings filed against them and the threats coming from declarations made by the Supreme Electoral Court and President Correa, in a context where there were persistent rumors spreading that a warrant for their arrest might be issued at any time.

<sup>5</sup> Cases marked No. 0559-2005-RA and No. 0617-2005-RA

committed do not meet the minimum parameters for consideration as documentary evidence. It points out that the petitioners, in their brief of November 13, 2016, responded to the arguments submitted by the state in its brief of November 12, 2016 by pointing out that “it is not necessary to disprove them item by item.” They believe that this assertion is a clear waiver of presenting observations, which produces the legal effect of confirming the legal and factual evidence established by the state and not disputed by the petitioners.<sup>6</sup>

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

14. Regarding the allegations of the petitioners regarding the alleged human rights violations in the context of the events of April 23, 2007 and the subsequent failure to investigate them, the Commission recalls it has repeatedly said that “when a purported offense subject to prosecution *ex officio* is committed the domestic remedy to be pursued and exhausted is the criminal investigation, which must be undertaken and furthered by the State.”<sup>7</sup> The Commission considers that, in view of the many indications highlighted by the media, it must be concluded that the state was at least aware of the allegations regarding the fact that serious human rights violations had been committed on April 23, 2007, as a result of which it was required to launch the relevant investigations to ascertain if they did in fact take place and, if so, to identify and punish those responsible. Because more than 11 years have elapsed since the incidents and the state has not indicated that it has conducted any investigations or made any efforts aimed at clarifying the incidents, the Commission considers that this item of the petition is admissible, because here the exception to exhaustion of domestic remedies as set forth in Article 46.2(c) of the American Convention is applicable and because it was submitted within a reasonable period of time pursuant to Article 32.2 of the Commission’s Rules of Procedure.

15. As for the allegations of the petitioners regarding the resolution taken by the National Congress declaring termination of their terms of office, the Commission observes that the petitioners filed an appeal for protection, which was dismissed in the first and second instances, and they explained their reason for not opting to file a full jurisdiction remedy. The state alleges that it did not have the opportunity to adequately examine the claims of the petitioners under domestic law because a full jurisdiction remedy was not submitted and the protection action was filed late. Regarding this, the Commission recalls that “the requirement to exhaust all domestic remedies does not necessarily mean that alleged victims are obligated to exhaust all remedies at their disposal. If an alleged victim pursued the matter through one of the valid and appropriate options in accordance with the domestic legal system, and the State had the opportunity to remedy the matter in its jurisdiction, the objective of international law has been achieved.”<sup>8</sup>

16. As for the full jurisdiction remedy, the Commission observes that the state has explained the reasons why this resolution could be viewed as a challengeable administrative action through this remedy. The petitioners have alleged that the admissibility of the appeal against a resolution of the National Congress was not clear, being proven that, in the case of the member who filed an appeal, the court considered that it was not competent to hear the appeal. The state has pointed out that this was an isolated decision, which was not confirmed through a cassation decision. Nevertheless, taking into account the features of the present case, the Commission deems it was not reasonable to require the petitioners to exhaust a remedy before the same court that had already declared itself incompetent to hear an identical appeal against the very same resolution.<sup>9</sup>

17. As for the appeal for protection, the Commission observes that domestic law does not have a statute of limitations for its filing but requires that the harm against which the appeal for protection is filed

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<sup>6</sup> After examining the arguments made by the state, the Commission considers that, on the basis of the brief submitted by the petitioners on November 13, 2016, it is not in any way possible to conclude that they have accepted the facts or allegations made by the state.

<sup>7</sup> IACHR, Report No. 144/17. Petition 49-12. Ernestina Ascencio Rosario et al. Mexico. October 26, 2017, para. 6.

<sup>8</sup> IACHR, Report No. 16/18. Admissibility. Victoria Piedad Palacios Tejada de Saavedra. Peru. February 24, 2018, para. 12.

<sup>9</sup> IACHR, Report No. 18/12 (Admissibility), Petition 161-06, Juvenile offenders sentenced to life imprisonment without parole. United States. March 20, 2012, para. 48.

must be of an “imminent” nature. The state refers to a long line of case law, including rulings issued by the petitioners themselves, under which appeals for protection had been declared inadmissible because of the time that elapsed between the issuance of the action being challenged and the filing of the appeal. The petitioners alleged that the harm regarding which they are seeking protection was still relevant when they filed the appeal and that the case law did not set a rigid lapse of time for forbidding the filing of an appeal for protection, but rather required the judges to examine the requirement of imminence by conducting a sound critical review of each case in accordance with its circumstances and context. They also indicated that they did not have access to the resolution of the National Congress, a copy of which they had to bring as a condition for the admissibility of the appeal, but only had access when it was published in the Official Gazette three months (not seven months) before the filing of their appeal for protection.

18. It is not up to the Commission to replace the criterion of domestic authorities regarding the admissibility of the appeal for protection filed by the petitioners with its own. Nevertheless, on the basis of the evidence of fact and law submitted by both parties, it considers that filing the appeal for protection by the petitioners, at the time it was done, was not unreasonable and did constitute a valid remedy for their claims to be processed under domestic law. In addition, without prejudging the merits of the case, the Commission cannot dismiss *prima facie* the arguments made by the petitioners regarding the absence of impartiality of the court that dismissed the appeal in the second instance and that they had been deterred from filing the appeal earlier because of statements from state agents that would have created well-founded fears of retaliation.

19. Because of the above, the Commission considers that the arguments submitted by the state are not sufficient to disqualify the petitioners’ claim that they have exhausted domestic remedies in accordance with Article 46.1(a) of the American Convention by filing an appeal for protection. Furthermore, in view of the fact that the final ruling regarding the appeal for protection was issued by the Constitutional Court on May 26, 2009 and that the petition was submitted on October 5, 2009, the Commission deems that the latter fulfills the requirement of Article 46.1(b) of the American Convention and is therefore admissible.

## VII. ANALYSIS OF COLORABLE CLAIM

20. The Commission considers that, if it ascertains the allegations made by the petitioners that, on April 23, 2007, there were attacks made against them, about which the state was aware and did not act to protect them or investigate the incidents or attempt to punish those responsible; that they were subjected to dismissal by an authority that had no jurisdiction to do so and without the following of any kind of process, in violation of its judicial independence; and that their appeal for protection was processed, in the second instance, by a court that did not fulfill the requirement of impartiality; this could tend to establish violations of Article 5 (humane treatment), Article 8 (fair trial), Article 9 (principle of legality and retroactivity), Article 11 (honor and dignity), Article 23 (political rights), Article 25 (judicial protection), and Article 26 (economic, social, and cultural rights) of the American Convention in connection with its Article 1.1 (obligation to respect rights) and Article 2 (duty to adopt provisions under domestic law).

21. As for the claim on the alleged violation of Article 24 (equality before the law) of the American Convention, the Commission observes that the petitioner has not provided any allegations or sufficient evidence that would make it possible to consider *prima facie* its possible violation.

## VIII. DECISION

1. To declare the present petition admissible regarding Articles 5, 8, 9, 11, 23, 25, and 26 of the American Convention in connection with its Articles 1.1 and 2.

2. To declare the present petition inadmissible in connection with Article 24 of the American Convention.

3. To notify the parties of the present decision; to continue with a review of the merits of case; 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 19<sup>th</sup> 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; Margarette May Macaulay, Francisco José Eguiguren Praeli, Luis Ernesto Vargas Silva and Flávia Piovesan, Commissioners.