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**REPORT No. 60/19**  
**CASE 12.744**  
REPORT ON MERITS

FREDY MARCELO NUÑEZ NARANJO  
ECUADOR

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**I. INTRODUCTION**

1. On December 1, 2003, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission” or “the IACHR”) received a petition lodged by Sixto Rodríguez Núñez Naranjo, Napoleón Amores and José Santana, contending international responsibility of the Republic of Ecuador (hereinafter “the State,” “the Ecuadorian State” or “Ecuador”) for the alleged forced disappearance of Fredy Marcelo Núñez Naranjo.

2. The Commission approved Report on Admissibility No. 02/10 on March 15, 2010.<sup>1</sup> On March 30, 2010, the Commission notified the parties of this report and placed itself at their disposal with a view to reaching a friendly settlement, though this process did not come to fruition. The parties were given the time period provided for under the rules to submit their additional observations on the merits. All information received by the IACHR was properly forwarded to the opposing party.

**II. ALLEGATIONS OF THE PARTIES**

**A. Petitioners**

3. The petitioners claimed that on July 15, 2001, Fredy Marcelo Núñez Naranjo was together with his family at the “Latinos” Pool Hall, which is owned by his mother and is located in the Province of Tungurahua, Ecuador, when at approximately 5:00 PM several individuals in a state of intoxication entered the premises, including Octavio Morales, and caused physical damage to the property. They asserted that, in response, the alleged victim asked these individuals to pay for the damages they caused.

4. They argued that this demand for payment triggered a confrontation, which brought the police and led to the arrest of Fredy Núñez and Octavio Morales, who were held in custody at the police station jail cells of the Canton (administrative subdivision) of Quero. They recounted that 30 minutes later, approximately 400 people from the Puñachisag Community, members of the *Juntas de Defensa del Campesinado* (“Rural Community Self-Defense Juntas”) forced their way into the jail and took away the two prisoners to the Shausi Community, along with Fredy Núñez’s mother and sister, who were looking for their family member at the detention facility.

5. The petitioners contended that the police went to the Shausi Community and managed to secure the release of the mother and sister, but were unable to secure the release of Fredy Núñez. They claimed that after remaining in the Shausi Community for a few hours, he was put into a vehicle and as of that time his whereabouts have been unknown.

6. The petitioners argued that the *Juntas de Defensa del Campesinado*, members of which actually perpetrated the disappearance of the alleged victim, were acting under the auspices of the Prosecutor’s Office, because there were close ties between them and the Attorney General of the Nation, and the State itself allowed these juntas to be created and thrive.

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<sup>1</sup> IACHR, Report No. 02/10, Petition P1011-03, Admissibility Fredy Marcelo Núñez Naranjo et al, Ecuador, March 15, 2010, pars. 6-42. In this report, the IACHR found the petition admissible as to potential violation of the rights enshrined in Articles 1(1), 3, 4, 5, 7, 8(1) and 25 of the American Convention and Article 1 of the Inter-American Convention on Forced Disappearance of Persons.

7. They further alleged that, in the context of the investigations, the State breached its duty to investigate with due diligence. They claimed that even though the State indicted seven individuals for the disappearance of the victim, on December 11, 2002, the Fourth Criminal Court dismissed the case against them all without prejudice. The petitioners noted that, in its decision, the Fourth Criminal Court refused to admit the evidence gathered by the Prosecutor's Office in the preliminary investigation, on the grounds that this office violated the Organic Law of Public Prosecution, which requires defendants' legal representatives to participate in evidentiary-gathering proceedings.

8. With respect to the search for the whereabouts of the alleged victim, they recounted that on October 18, 2004, the Fourth Criminal Court certified that since the dismissal without prejudice was issued, it had not received any motions to collect evidence from the Prosecutor's Office.

9. As for the law, the petitioners argued that the alleged victim's **right to life and personal liberty** have been violated, because more than 17 years have elapsed since Fredy Núñez was abducted from the Police outpost and his whereabouts have remained unknown.

10. They also asserted that the **right to recognition of legal personality** was violated, because the deprivation of liberty of the alleged victim prevented him from exercising his rights.

11. Lastly, the petitioners argued the violation of the **right to a fair trial and judicial protection**, due to the failure to adequately investigate the facts that are the subject of the petition.

## **B. State**

12. The State first denied that the facts are tantamount to a forced disappearance. In this regard, it contended that State's agents did not remove the alleged victim from the jail where he was being held, and claimed that private actors could be involved in the disappearance of the alleged victim. It noted that there was no involvement of any public official either actively or through tolerance or acquiescence.

13. It further contended that the investigation into the acts has been conducted thoroughly and impartially and in keeping with the required due diligence standards. It claimed that, from the very beginning, the family members of the alleged victim were allowed to actively take part in the investigation, the steps of which have been open to them. It recounted that on August 16, 2001, the National Police looked into evidence of threats made by the members of the Puñachisag and Shausi communities against the family members of the alleged victim.

14. The State asserted that on November 21, 2001, the Prosecuting Attorney of the Province of Tungurahua ordered the preliminary investigation to be opened; on May 8, 2002, an investigation was opened into the crime of abduction; and on May 10, 2002, an arrest warrant was issued against seven people.

15. It also claimed that on July 11, 2002, the detained individuals filed a motion for release via *amparo* (*amparo de libertad*) with the Superior Court of Justice, which granted their release on the grounds that there was no clear evidence of their participation or of the extent to which they were involved in the crime they were charged with.

16. The State asserted that on December 10, 2002, a preliminary hearing was held at the Fourth Criminal Court, which dismissed the case without prejudice. It noted that this decision was not appealed by the petitioners, who had the opportunity to challenge the ruling.

17. Notwithstanding, it noted that on October 15, 2004, the Chief of the Judicial Police reported that the investigations would continue to search for the whereabouts of the alleged victim. Nonetheless, the State did not provide details about any specific investigatory steps.

18. As for the law, the State argued that it did not violate **the right to recognition of legal personality, to life, to humane treatment and the right to personal liberty, as enshrined in the American Convention,**

nor did it violate Article 1 of the Inter-American Convention on Forced Disappearance and that there is no evidence in the facts to support any acquiescence.

19. With respect to **the right to a fair trial and judicial protection**, the State claimed that these rights were not violated, inasmuch as several steps have been taken to investigate those responsible for the crimes; however, it is an obligation of means and not of results. Additionally, it contended, the alleged victims' family members have widely participated in the process and had remedies available to them to challenge the decisions issued by the judicial bodies.

### III. FINDINGS OF FACT

20. The Commission recalls that in cases of alleged forced disappearance, circumstantial and presumptive evidence is of special importance, because "this type of violation is characterized by the attempt to eliminate any element that would allow the detention, whereabouts, and fate of the victims to be determined."<sup>2</sup>

#### A. Background on the *Juntas de Defensa del Campesinado* (Rural Community Self-Defense Juntas)

21. The petitioners allege that the disappearance of the alleged victim was perpetrated by members of the Self-Defense Juntas.

22. According to available information, the *Juntas de Defensa del Campesinado* are an informal, parallel justice system,<sup>3</sup> which were created to promote development and prevent cattle rustling and other common crimes. They are organized by parish and have a president for each locality, who is elected by the residents. The juntas belong to a national federation of juntas. The rural community juntas are particularly powerful in the provinces of the mountains of Cotopaxi, Tungurahua, Chimborazo, Bolívar, and in some areas of los Ríos.<sup>4</sup>

23. National and international bodies have reported gross human rights violations committed by the juntas.

24. In 2007, the United Nations Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination noted that non-governmental organizations reported to it that the *Juntas de Defensa del Campesinado* get involved in cases of security, litigation over land and common crime, and that in many of these cases "they apparently assume functions of public authorities, with accusations of abuses, to include violation of the right to privacy, acts of tortures and degrading treatment, homicides and disappearances, as exemplified in the case of Mr. Fredy Núñez, who went missing in 2001."<sup>5</sup> Therefore, it urges the Ecuadorian State to "ensure that the Juntas de Defensa del Campesinado do not become paramilitary actors."<sup>6</sup>

25. In 2010, the Committee against Torture voiced concern over the Defense Boards' active participation in security in rural areas, citing abuses committed by some members of said organizations, including lynching.<sup>7</sup>

26. In 2015, following his Mission to Ecuador, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions noted that he received information about threats, abductions, torture or

<sup>2</sup> I/A Court of H.R. Case of González Medina and Family v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 27, 2012 Series C No. 240, par. 134.

<sup>3</sup> Human Rights Committee, Review of reports submitted by the States Parties under Article 40 of the Covenant, pursuant to the optional reporting procedures, Ecuador, August 6, 2015, CCPR/C/ECU/6, par. 164.

<sup>4</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/17/28/Add.2, May 9, 2011.

<sup>5</sup> Human Rights Council, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, February 7, 2007, A/HRC/4/42/Add.2, Par.25.

<sup>6</sup> Human Rights Council, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, February 7, 2007, A/HRC/4/42/Add.2, Par.53 e).

<sup>7</sup> Committee against Torture, Review of reports submitted by the States Parties under Article 19 of the Convention, Concluding Observations of the Committee against Torture, December 7, 2010, par.19, CAT/C/ECU/CO/4-6.

killings of persons at the hands of the self-defense juntas. He said that, according to accounts provided to him, the juntas have been using force to exert control over the criminal justice system and public officials rarely responded effectively to complaints about junta activities, which has been borne out by “officials who were generally unwilling or unable to answer questions about junta abuses, let alone acknowledge the need to investigate them.”<sup>8</sup>

27. Additionally, the Ecuadorian State reported to the Human Rights Committee in 2015 that it received information about complaints against members of the juntas for human rights violations. It further noted that, in many judicial proceedings in Tungurahua, Chimborazo and Bolívar, that were brought against the junta presidents, the cases have been thrown out or have been dismissed with prejudice, and all cases related to these juntas have unfolded in much the same way. Therefore, it claimed that it is carrying out measures to strengthen the processes of investigation into these cases, such as: 1) implementing indicators to identify future cases related to the Juntas; 2) assigning an additional prosecuting attorney to the Office of the Truth Commission to investigate the abuses committed by the juntas; and 3) conducting a study to determine what junta abuse cases can be reopened as gross human rights violations, to prevent impunity.<sup>9</sup>

## **B. About the alleged victim and his family**

28. According to information available at the time of the events, Fredy Marcel Núñez Naranjo was 27 years old, he was divorced and a driver by profession. His immediate family consisted of his parents, Sixto Núñez and Maria Gregoria Naranjo, his sisters Marcia Núñez and Silvia Núñez and their respective families.<sup>10</sup>

## **C. Facts of the case**

29. As reflected in the case file, on July 15, 2001, Mr. Octavio Morales and other individuals, who were in a state of intoxication, entered the “latinos” pool hall, located on Eloy Alfaro and Juan Leon Mera Streets, in the Canton of Quero, intending to consume alcohol, but in response to owner Gregoria Naranjo’s refusal to serve them alcoholic beverages, Morales destroyed the door and window panes of the pool hall, and left the premises.<sup>11</sup>

30. Then, Fredy Núñez, the owner’s son, left to get Morales and brought him back into the pool hall, where he proceeded to assault him.<sup>12</sup> In response, the police arrived in the premises and arrested Fredy Núñez, Octavio Morales and Orlando Freire, a friend of Octavio Morales, who demanded they be released, and they were taken to the Jail of the Police Station of the Canton of Quero.<sup>13</sup>

31. According to the Police Report, after 30 minutes had elapsed, 400 members of the Puñachisag community showed up at said police station, forced their way inside, released Octavio Morales and Orlando Freire and took as hostages Fredy Núñez, Gregoria Naranjo and Marcia Núñez, his mother and sister respectively.<sup>14</sup> Based on the information in the police report of August 16, 2001, the abduction of the alleged victim was led by Ángel Raúl Bayas Villacres, who served as president of the Coalition of Juntas of the Canton

<sup>8</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/17/28/Add.2, May 9, 2011, Pars. 44, 46, 50-51.

<sup>9</sup> Human Rights Committee. Review of reports submitted by States Parties under Article 40 of the Covenant, pursuant to the optional reporting procedure, Ecuador, August 6, 2015, CCPR/C/ECU/6, par. 166.

<sup>10</sup> Annex 1. Private complaint of Sixto Núñez Naranjo filed with the judge of the Fourth Criminal Court, May 23, 2002. Annex 3 to petitioners’ observations of December 1, 2003.

<sup>11</sup> Annex 2. Official Letter No. 2070-PJT-CP9-2001 from the Chief of the Judicial Police of Tungurahua to the Prosecutor of Tungurahua, containing Police Report no. 1123-PJT-CP9-2001, August 17, 2001. Annex to petitioners’ observations of December 1, 2003.

<sup>12</sup> Annex 3. Police Report no. 1123-PJT-CP9-2001, August 16, 2001, consisting of the order dismissing the case without prejudice, issued by the Judge of the Fourth Criminal Court of Tungurahua, December 11, 2002. Annex to State’s observations of June 31, 2005.

<sup>13</sup> Annex 2. Official Letter No. 2070-PJT-CP9-2001 from the Chief of the Judicial Police of Tungurahua to the Prosecutor of Tungurahua, containing Police Report no. 1123-PJT-CP9-2001, August 17, 2001. Annex to petitioners’ observations of December 1, 2003.

<sup>14</sup> Annex 4. Report issued by the Technical Judicial Police of Tungurahua (No. 1123-PJT-CP9-2001), consisting of the prosecutorial charging document (no. 53-2002), brought by the Prosecuting Attorney of the District of Tungurahua, May 8, 2002. Annex to State’s observations of June 31, 2005.

of Quero, as well as by other individuals.<sup>15</sup> The Police Report does not provide an account of the measures taken by the security guards of the police station to confront the alleged forced entry of the aforementioned individuals or to prevent detainees under their custody, among other persons, from being abducted.

32. According to the police report, after being taken hostage, Fredy Núñez, Gregoria Naranjo and Marcia Núñez were transferred to the Puñachisag community, where they were “flogged.”<sup>16</sup> Based on the statement of Sixto Núñez, who is Fredy Núñez’s father, Fredy, his mother and his sister Marcia were tied up with wire and beaten and pricked with pointed rods.<sup>17</sup> In this regard, a policeman said that the two women “were released after being punished.”<sup>18</sup>

33. Subsequently, the three individuals were driven to the Shausi community. According to the case file, Gregoria Naranjo and Marcia Núñez were released in this community.<sup>19</sup> In the words of the Juntas through a communiqué:

(...) while it is true that the *campesinado* (local residents) [ , who are] tired of enduring the abuses, robberies and murders that Fredy Marcelo Núñez Naranjo had been committing jointly with his gang of highway robbers he had been taken to the local community [*campesinos*] jail, and that is when taking advantage of the rustic nature of the jail cell and being the good criminal [that he is] Fredy Marcelo Núñez breaks through the jail security and flees. (...) <sup>20</sup>

34. As for the alleged victim, according to his father’s account, after the women were released, one of the members of the Puñachisag community ordered five hooded men to seize Fredy and they interrogate him, and each answer was followed by beating and, therefore, he was constantly screaming “until it all went silent,” and this was the last that he heard of his son.<sup>21</sup> He said that he has heard that his son “was burned, that water was thrown on him and from that time nobody knows anything more and it has been nine months I hope we find my son alive or dead.”<sup>22</sup> The Police Report states that after the two women were released, the alleged victim was put into a vehicle, which drove off in an unknown direction.<sup>23</sup>

#### D. Criminal proceedings

35. On July 23, 2001, the alleged victim’s father filed a complaint for the disappearance of his son with the Judicial Police of Tungurahua.<sup>24</sup>

36. On August 13, 2001, the Inspector General of the National Police asked for the investigations to be opened and added five police reports written by different police officers to the case file, confirming the arrest

<sup>15</sup> Annex 5. Addendum to technical police investigation report no. 1376-CP9-2001, consisting of the prosecutorial charging document (no. 53-2002), issued by the Prosecuting Attorney of the District of Tungurahua, May 8, 2002. Annex to State’s observations of June 31, 2005.

<sup>16</sup> Annex 3. Report 1123-PJT-CP9-2001, August 16, 2001, consisting of official letter 2070-PJT-CP9-2001 written by the Chief of the Judicial Police of Tungurahua to the District Prosecutor of Tungurahua, August 17, 2001. Annex 3 to petitioners’ observations of December 1, 2001.

<sup>17</sup> Annex 6. Account given by Sixto Núñez on April 29, 2002, at the Opening of the preliminary investigation conducted by the Prosecuting Attorney on November 21, 2001. Annex 3 to petitioners’ observations of December 1, 2003.

Complaint filed by Sixto Núñez with the District Prosecutor of Tungurahua, consisting of the order to dismiss without prejudice issued by the Judge of the Fourth Criminal Court of Tungurahua, December 11, 2002. Annex to State’s observations of June 31, 2005.

<sup>18</sup> Annex 7. Testimonial statement of Marcelo Velasco. Annex 3 of petitioners’ observations of December 1, 2003.

<sup>19</sup> Annex 8. Official Letter No. 2780-PJT-CP9-2001 of the Chief of the Judicial Police of Tungurahua to the Prosecutor of Tungurahua containing Police Report no. 1123-PJT-CP9-2001, October 19, 2001. Annex to petitioners’ observations of December 1, 2003.

<sup>20</sup> Annex 9. Official Letter from the Coalition of Juntas (Central de Juntas del Campesinado) No. 88CJDCQ-2002 to the Prosecutor of Tungurahua, June 30, 2002. Annex to petitioners’ observations of December 1, 2003.

<sup>21</sup> Annex 10. Complaint filed by Sixto Núñez, consisting of the order to dismiss without prejudice, issued by the Judge of the Fourth Criminal Court of Tungurahua, December 11, 2002. Annex to State’s observations of June 31, 2005.

<sup>22</sup> Annex 6. Account given by Sixto Núñez on April 29, 2002, within the Opening of the Preliminary Investigation by the Prosecutor on November 21, 2001. Annex 3 to petitioners’ observations of December 1, 2003.

<sup>23</sup> Annex 4. Report 1123-PJT-CP9-2001, August 16, 2001, which appears in Official Letter 2070-PJT-CP9-2001, written by the Chief of the Judicial Police of Tungurahua to the District Prosecutor of Tungurahua, August 17, 2001. Annex 3 to petitioners’ observations of December 1, 2003.

<sup>24</sup> Annex 2. Official Letter No. 2070-PJT-CP9-2001 from the Chief of the Judicial Police of Tungurahua to the Prosecutor of Tungurahua, containing Police Report no. 1123-PJT-CP9-2001, August 17, 2001. Annex to petitioners’ observations of December 1, 2003.

of Fredy Núñez, Octavio Morales and Orlando Freire, as well as the incidents arising at the facilities of the police station of the Canton of Quero, and the subsequent capture of Fredy Núñez by those who broke into said premises.<sup>25</sup>

37. On August 15, 2001, a statement was given by police officer Marcelo Fabian Velasco Jacome, who participated in the detention of the alleged victim, and he stated that on July 15, 2001, after the detention, at around 5:00 or 5:30 PM, approximately 400 people arrived in the Station who “broke through the jail security and freed the two members of the Puñachisag Community” (...) and took Fredy Marcelo Núñez Naranjo, Gregoria Naranjo and Marcia Núñez hostage. When he was asked whether the Provincial Commander is aware of what happened to the alleged victim he stated: “the Provincial Commander is aware of this development, likewise, the authorities of this locality have not gotten involved.”<sup>26</sup>

38. On the same date, a statement was given by police officer Luis Amable Paredes Valle, who state, when asked about the actions taken to investigate the whereabouts of the alleged victim, that “contact has been made with the different authorities of the Canton, in order to ascertain the whereabouts of citizen Fredy Núñez Naranjo, without anyone collaborating in this regard.”<sup>27</sup>

39. On August 16, 2001, the National Police of Ecuador released an investigation report establishing that several investigatory steps were taken into the disappearance of Fredy Núñez Naranjo. In this report it is noted that the President of the Juntas del Campesinado of Tungurahua mentioned that the alleged victim escaped from the jail of that community on July 15, 2001. It further notes that the Police have been unable to interview the family members of the alleged victim because they have claimed that they cannot give more information for fear of retaliation that could be taken by the Puñachisag and Shaushi community.<sup>28</sup>

40. In the report, it was noted that at the interview of Mr. Sixto Rodriguez Núñez Naranjo, he stated that the Provincial Police Commander told him “to make contact with Police Major Carlos Aguirre, in order to coordinate with Dr. Manuel Gallegos to try to obtain information about the missing person. Dr. Gallegos told him that Fredy Marcel Núñez Naranjo is a member of a gang of felons that have been found to be up to no good in Quero Canton (...)”<sup>29</sup> In the report, it emphasizes as “pending work” to try to locate the alleged victim.<sup>30</sup>

41. Lastly, the report reflects that on July 29, 2001, more than 400 local rural residents (*campesinos*), who belong to the communities of Quero Canton and are members of the Consortium of Rural Community Self-Defense Juntas held a march to demonstrate that they are tired of abuses committed by criminals, and that one of them is Fredy Marcelo Núñez, and they stated that “they are willing to collaborate and support the eight policemen who are detained in the city of Riobamba, to fight crime.”<sup>31</sup>

42. On November 21, 2001, the alleged victim’s father filed another complaint with the District Prosecutor of Tungurahua on the grounds that his son’s disappearance was caused by members of the Puñachisag communities, including Macario Raúl Bayas Villacrés and other individuals and he requested that proper

<sup>25</sup> Annex 2. Official Letter No. 2070-PJT-CP9-2001 from the Chief of the Judicial Police of Tungurahua to the Prosecutor of Tungurahua, containing Police Report no. 1123-PJT-CP9-2001, August 17, 2001. Annex to petitioners’ observations of December 1, 2003.

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<sup>28</sup> Annex 2. Official Letter No. 2070-PJT-CP9-2001 from the Chief of the Judicial Police of Tungurahua to the Prosecutor of Tungurahua, containing Police Report no. 1123-PJT-CP9-2001, August 17, 2001. Annex to petitioners’ observations of December 1, 2003.

<sup>29</sup> Annex 2. Official Letter No. 2070-PJT-CP9-2001 from the Chief of the Judicial Police of Tungurahua to the Prosecutor of Tungurahua, containing Police Report no. 1123-PJT-CP9-2001, August 17, 2001. Annex to petitioners’ observations of December 1, 2003.

<sup>30</sup> Annex 2. Official Letter No. 2070-PJT-CP9-2001 from the Chief of the Judicial Police of Tungurahua to the Prosecutor of Tungurahua, containing Police Report no. 1123-PJT-CP9-2001, August 17, 2001. Annex to petitioners’ observations of December 1, 2003.

<sup>31</sup> Annex 2. Official Letter No. 2070-PJT-CP9-2001 from the Chief of the Judicial Police of Tungurahua to the Prosecutor of Tungurahua, containing Police Report no. 1123-PJT-CP9-2001, August 17, 2001. Annex to petitioners’ observations of December 1, 2003.

investigations be conducted to find the perpetrators, accomplices, and accessories.<sup>32</sup> He claimed that according to the police report, the alleged victim's disappearance was in response to bodily harm that he caused to Octavio Morales.<sup>33</sup>

43. On April 26, 2002, the facilities where the National Police of Quero Canton operated was inspected, as was the jail where the alleged victim was held; however, no physical damage was found.<sup>34</sup> It must be noted that this inspection was carried out nine months after the events occurred.<sup>35</sup>

44. On May 8, 2002 the Prosecutor of the District of Tungurahua brought formal charges for the crime of abduction against Luis Adan Segundo Bemos Casa, Macario Raúl Bayas Villacrés, Luis Bolívar Tipan Salan, Holger Adán Bemos Sánchez, Fausto Aníbal Jerez Llamuca, Edwin Absalón Cevallos Villacres and María Umbelina Barreno Sánchez, and forwarded the case proceedings to the Fourth Criminal Court of Tungurahua on the same date.<sup>36</sup>

45. On May 10, 2002, the Fourth Criminal Court of Tungurahua ordered the seven suspects to be held in pre-trial detention, as perpetrators of the crime of abduction and also charged them with the crime of conspiracy to commit civil disruption.<sup>37</sup>

46. On June 30, 2002, the Consortium of Rural Community Self-Defense Juntas of the Canton of Quero requested the Prosecutor of Tungurahua to release the defendants being held in custody on the grounds of innocence and stated that because they were tired of putting up with the abuses that the alleged victim had been committing, he was taken to the junta's jail, he escaped from there and has become a member of the FARC of Colombia. The Juntas Consortium also stated that, "due to the thoughtfulness that you know how to show to this request, [we are] sure that we are not going to have any problem with our request because otherwise the high respect we have for the authorities and the Police, we wouldn't like to get into problems and worse come to any confrontation." It also stated: "the only crime that we are committing is making a living and combat (sic in original) in some way the criminal."<sup>38</sup>

47. On July 11, 2002 the defendants filed a motion for release via *amparo* against the Fourth Criminal Court Judge of Tungurahua<sup>39</sup> with the Superior Court of Justice of Tungurahua, on the grounds of failure of the Judge to provide reasoning when issuing the arrest warrant, which triggered a due process violation and a lack of legal certainty.<sup>40</sup>

48. On July 17, 2002, the Fourth Criminal Court of Tungurahua reported to the Superior Court of Justice of Tungurahua, that the pre-trial detention decision was based on five pieces of evidence: the complaint against the alleged perpetrators [filed] on behalf of the alleged victim, Octavio Morales's medical report and photographs proving his [the alleged victim's] detention as well as the detention of Marcelo Núñez Naranjo at the police station of the Canton of Quero, the on-site inspection at the Police Station of Quero Canton, the

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<sup>32</sup> Annex 10. Complaint filed by Sixto Núñez with the District Prosecutor of Tungurahua, consisting of the order to dismiss without prejudice, issued by the Judge of the Fourth Criminal Court of Tungurahua, December 11, 2002. Annex to State's observations of June 31, 2005.

<sup>33</sup> Annex 2. Official Letter No. 2070-PJT-CP9-2001 from the Judicial Police Chief Tungurahua to the Prosecutor of Tungurahua, containing Police Report no. 1123-PJT-CP9-2001, August 17, 2001. Annex to petitioners' observations of December 1, 2003.

<sup>34</sup> Annex 2. Official Letter No. 2070-PJT-CP9-2001 from the Judicial Police Chief Tungurahua to the Prosecutor of Tungurahua, containing Police Report no. 1123-PJT-CP9-2001, August 17, 2001. Annex 3 to petitioners' observations of December 1, 2003.

<sup>35</sup> Annex 111. Inspection of national police facilities of the Canton of Quero carried out by the District Prosecutor of Tungurahua, April 16, 2002. Annex 3 to petitioners' observations of December 1, 2003.

<sup>36</sup> Annex 12. Prosecutorial charging document No. 53-2002, issued by the Prosecuting Attorney of the District of Tungurahua, May 8, 2002. Annex to State's observations of June 31, 2005.

<sup>37</sup> Annex 13. Ruling of the Fourth Criminal Court of Tungurahua, May 10, 2002. Annex 3 to petitioners' observations of December 1, 2003.

<sup>38</sup> Annex 9. Official Letter from the Consortium of Rural Community Self-Defense Juntas No. 88CJDCQ-2002 to the Prosecutor of Tungurahua, June 30, 2002. Annex to petitioners' observations of December 01, 2003.

<sup>39</sup> Annex 14. Motion for release via *amparo* against the Fourth Criminal Court of Tungurahua, filed with the Superior Court of Tungurahua of July 11, 2002. Annex 1 to petitioners' observations of December 01, 2003.

<sup>40</sup> Annex 14. Motion for release via *amparo* against the Fourth Criminal Court of Tungurahua, filed with the Superior Court of Tungurahua of July 11, 2002. Annex 1 to petitioners' observations of December 01, 2003.

police reports making a record of the events, and the complainant's account. She stated that that was sufficient evidence to issue the measure.<sup>41</sup>

49. On July 31, 2002, the Second Chamber of the Superior Court of Justice of Tungurahua granted the motion for release via *amparo*, on the grounds that even though there may be enough evidence to determine that a prosecutable criminal offense was committed, there must be clear and precise evidence to prove that the suspects were the perpetrators or accomplices thereof, inasmuch as it considers the information to be a group of persons rendering it impossible to individually identify the actors.<sup>42</sup>

50. On December 10, 2002, a preliminary hearing was held.<sup>43</sup>

51. On December 11, 2002, the Fourth Criminal Court Judge of Tungurahua dismissed the case without prejudice underscoring that the evidence gathered during the initial stage of the investigation did not comply with the Organic Law of Public Prosecution and that no investigatory steps were taken at all during the judicial investigation stage. In this regard, she wrote that:

(...) the initial investigation stage is at the discretion of the prosecutor, and it is not a "sine qua non" condition to [be able to] open a judicial investigation proceeding, however it must fulfill certain requirements, in this regard Article 26 of the Organic Law of Public Prosecution establishes that the Public Prosecutor's Office must guarantee the intervention of the suspects' defense in the initial inquiries and preliminary investigation proceedings for crimes that are prosecutable *ex officio*, who must be summoned and notified for the purpose of intervention in the taking and gathering of evidence (...)

(...) in the instant case there is nothing in the record [to indicate] that the initial inquiry stage has complied with the established citation, consequently all of this evidence would lack evidentiary validity, then in the judicial investigation proceeding state, there does not exist any inculpatory or exculpatory evidence either and, therefore, since there is no evidence to sustain the existence of the crime (...) one is unable to speak of any responsibility at all.<sup>44</sup>

52. On October 15, 2004, the chief of police announced: "he is carrying on with the investigations in the instant case, with the purpose of determining the whereabouts of the missing citizen and the result of the investigations will be brought to the attention of the competent authority."<sup>45</sup>

53. On October 18, 2004, the Fourth Criminal Court of Tungurahua wrote that "on the date of December 11, 2002, the Alternate Judge in chambers, issues an order to dismiss the case of the suspects without prejudice, which is executed by operation of law. Since the time that order was issued, no other investigative step has been taken by the Office of the Prosecutor, as of the current date."<sup>46</sup>

54. Based on police reports, and testimony,<sup>47</sup> as a consequence of their quest for justice, Gregoria Naranjo and Sixto Núñez, parents of the alleged victim, as well as other family members, have been threatened in order to force them to abandon their properties in the Canton of Quero or otherwise their property will be

<sup>41</sup> Annex 15. Report of the Fourth Criminal Court of Tungurahua to the Superior Court of Justice of Tungurahua, July 17, 2002. Annex 1 to petitioners' observations of December 1, 2003.

<sup>42</sup> Annex 16. Decision to process the Motion for Constitutional Relief (*Amparo* Constitutional) issued by the second chamber of the Superior Court of Justice of Tungurahua, July 31, 2002. Annex 1 to petitioners' observations of December 1, 2003.

<sup>43</sup> Annex 17. Record of preliminary hearing of the Fourth Criminal Court of Tungurahua Alternate Judge, December 10, 2002. Annex 4 to petitioners' observations of December 1, 2003.

<sup>44</sup> Annex 18. Order to dismiss without prejudice [issued] by the Judge of the Fourth Criminal Court of Tungurahua, December 11, 2002. Annex 4 to petitioners' observations of December 1, 2003.

<sup>45</sup> Annex 19. Official Letter No. 3585-CP9-2004 from the Chief of the Judicial Police of Tungurahua, October 15, 2004. Annex to petitioners' submission of November 3, 2004.

<sup>46</sup> Annex 20. Decision of the Fourth Criminal Court of Tungurahua Alternate Judge, October 18, 2004. Annex to petitioners' submission of November 3, 2004.

<sup>47</sup> See for example, police investigation report no. 1123-PJT-CP9-2001 and addendum to police investigative report no. 1376-CP9-2001, of August 16, 2001 and October 18, 2001 respectively. Annex 3 to petitioners' observations of December 1, 2003.

burned and their lives will be in jeopardy.<sup>48</sup> In said reports, it is noted that said threats come from members of the Puñachisag community.<sup>49</sup> The record in the case file does not reflect any investigative steps taken by the State to provide protection to the family members of the alleged victim in response to the threats that were reported.

#### IV. LEGAL ANALYSIS

##### A. **Rights to recognition of juridical personality, personal liberty, humane treatment, life, a fair trial and judicial protection (Articles 3, 7, 5, and 4, of the American Convention) in connection with the obligation to respect rights (Article 1.1 of the same instrument<sup>50</sup>); and Article I a) <sup>51</sup> of the Inter-American Convention on Forced Disappearance of Persons (IACFDP)**

55. Based on consistent legal precedent in the Inter-American system, cases of forced disappearance of persons constitute an unlawful act that gives rise to multiple, continuing violations of several rights protected by the American Convention and places the victim in a state of complete defenselessness, which involves other related crimes.<sup>52</sup>

56. Pursuant to its settled case law, the Commission considers forced disappearance to be a complex human rights violation, continuing for as long a time as the whereabouts of the victim or the remains thereof remain unknown. The disappearance as such comes to an end when the victim appears or his or her remains are located,<sup>53</sup> so that his or her identity may be determined with certainty.<sup>54</sup>

<sup>48</sup> Annex 8. Official Letter No. 2780-PJT-CP9-2001 from the Chief of the Judicial Police of Tungurahua to the Prosecutor of Tungurahua, containing Police Report no. 1123-PJT-CP9-2001, October 19, 2001. Annex to petitioners' observations of December 1, 2003.

<sup>49</sup> Annex 8. Official Letter No. 2780-PJT-CP9-2001 from the Chief of the Judicial Police of Tungurahua to the Prosecutor of Tungurahua, containing Police Report no. 1123-PJT-CP9-2001, October 19, 2001. Annex to petitioners' observations of December 1, 2003.

<sup>50</sup> The Articles of the American Convention cited above in the title establish the following:

Article 3. Right to Recognition of Juridical Personality: Every person has the right to recognition as a person before the law.

Article 4. Right to Life. 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

Article 5. Right to Humane Treatment. 1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

Article 7. Right to Personal Liberty: 1. Every person has the right to personal liberty and security.

Article 8. Right to a Fair Trial. 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

Article 25. Judicial Protection. 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

Article 1.1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

<sup>51</sup> Said articles establish the following:

Article I. The States Parties to this Convention undertake: a) Not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees; b) To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories;

<sup>52</sup> IACHR. Report 101/01. Case 10.247 et al. Extrajudicial executions and forced disappearances of persons. Peru. October 10, 2001. Par. 178; IACHR. Application to the Inter-American Court, Case No. 11.324, Narciso González et al, Dominican Republic, May 2, 2010, par. 103; IACHR. Application to the Inter-American Court, Case No. 12.517, Gregoria Herminia Contreras et al, El Salvador, June 28, 2010, par. 131; IA Court of HR, Case of Goiburú et al. Judgment on Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153. Par. 82; IA Court of HR, Case of Gómez Palomino. Judgment of November 22, 2005. Series C No. 136. Par. 92; IA Court of HR, Case of the Serrano Cruz Sisters. Preliminary Objections. Judgment of November 23, 2004. Series C No. 118, Pars. 100 to 106; IA Court of HR, Case of Molina Theissen. Reparations (Article 63.1 American Convention on Human Rights). Judgment of July 3, 2004, Series C No. 108, Par. 41.

<sup>53</sup> IACHR. Application to the Inter-American Court, Case No. 12.529, Rainer Ibsen Cárdenas and José Luis Ibsen Peña, Bolivia, May 12, 2009, par. 106.

<sup>54</sup> Case of Velásquez Rodríguez v. Honduras. Merits, supra, pars. 155 to 157, and Case of Osorio Rivera and Family v. Peru, supra, par. 31.

57. With respect to the violation of rights, forced disappearance violates the right to personal freedom and places the victim in a serious situation of risk of suffering irreparable harm to his or her rights to humane treatment and life. The Court has established that forced disappearance violates the right to humane treatment because “prolonged isolation and being held incommunicado constitute, in themselves, forms of cruel and inhuman treatment.”<sup>55</sup> The Commission and the Court have established that it is clear that in the case of forced disappearance, the victim’s personal integrity is affected in all its dimensions.<sup>56</sup> Furthermore, the Court has held that even when the acts of torture or deprivation of life of a victim of disappearance cannot be proven in a concrete case, subjecting detainees to agents of the State or private individuals acting with the acquiescence or tolerance thereof, who practice torture and murder with impunity, is itself a breach of the duty to prevent violations of the right to physical integrity and life.<sup>57</sup>

58. Pursuant to the legal precedent of both bodies of the Inter-American system, the practice of disappearance has frequently involved the secret execution of those detained, without trial, followed by concealment of the corpse in order to eliminate any material trace of the crime and to ensure absolute impunity, which amounts to a brutal violation of the right to life, as enshrined in Article 4 of the Convention.<sup>58</sup> Under the case law, it has also been established that the mere fact that a person has been missing for a protracted period of time and in a context of violence creates a reasonable presumption that the person was deprived of his or her life.<sup>59</sup>

59. Moreover, the Commission has consistently held that, because of the multiple-offending and complex nature of this serious human rights violation, cases of forced disappearance give rise to the specific violation of the right to recognition of juridical personality.<sup>60</sup> The Inter-American Court has also recognized it.<sup>61</sup> This stems from the fact that the victim of the disappearance is unable to continue to enjoy and exercise the rights to which he or she is entitled. Forced disappearance is “not only one of the most serious forms of placing the person outside the protection of the law, but it also entails denying that person’s existence and to place him or her in a kind of limbo or uncertain legal situation before society, and the State.”<sup>62</sup> The Commission finds that forced disappearance also involves a violation of the right to a fair trial and judicial protection with respect to the victim of the disappearance, because of the failure to take measures to search for his or her whereabouts through effective investigations and the inability to pursue remedies on his or her own behalf in response to the State’s denial of the fact that he or she is under its custody.

<sup>55</sup> IA Court of HR. Case of Chaparro Álvarez and Lapo Iñiguez v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, par. 171; and Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, par. 85.

<sup>56</sup> IA Court of HR. Case of Ticona Estrada et al v. Bolivia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 191, par. 58; and IACHR, Report No. 5/16, Cases 11.053, 11.054, 12.224, 12.225, and 12.823. Merits. Peru. April 13, 2016, par. 167.

<sup>57</sup> IA Court of HR. Case of Ticona Estrada v. Bolivia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 191, par. 59; Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparation and Costs. Judgment of September 22, 2009. Series C No. 202, par. 85; and Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, 154.

<sup>58</sup> IA Court of HR. Case of 19 Merchants. Judgment of July 5, 2004. Series C No. 109, par.154; IA Court of HR, Case of Bámaca Velásquez. Judgment of November 25, 2000. Series C No. 70, par.130; and IACHR, Report No. 44/00. Case 10.820. Américo Zavala Martínez. Peru. April 13, 2000, par. 41.

<sup>59</sup> IA Court of HR, Case of Velásquez Rodríguez v. Honduras. Judgment of July 29, 1988. Series C No. 4, par. 188; and IACHR. Application to the Inter-American Court in Case 12.529. Rainer Ibsen Cárdenas and José Luís Ibsen Peña v. Bolivia. May 12, 2009, par. 248.

<sup>60</sup> IACHR. Applications to the Inter-American Court in cases: Renato Ticona Estrada et al (12.527), pars. 153-165; Rosendo Radilla Pacheco (12.511), pars. 138-145; Kenneth Ney Anzualdo Castro (11.385), pars. 167-176; Julia Gómez Lund et al (11.552), pars. 208-220; Florencio Chitay Nech (12.599), pars. 136-146; Rainer Ibsen Cárdenas and José Luís Ibsen Peña (12.529), pars. 251-262; and Narciso González Medina et al (11.324), pars. 138-149.

<sup>61</sup> IA Court of HR. Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, pars. 91-92; Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, par. 157.

<sup>62</sup> IA Court of HR. Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, par. 90. Also see: IACHR, Report No. 5/16, Cases 11.053, 11.054, 12.224, 12.225, and 12.823. Merits. Peru. April 13, 2016, par. 166.

60. The required elements for a case to constitute a forced disappearance are: i) deprivation of liberty; ii) direct involvement of governmental officials or the acquiescence thereof; and iii) refusal to acknowledge the deprivation of liberty and to disclose the fate or whereabouts of the missing person.<sup>63</sup>

61. Next, the Commission will determine whether what happened to Fredy Marcelo Núñez constituted a forced disappearance.

62. As for the first element, deprivation of liberty, the Commission notes that there is no dispute regarding the fact that the alleged victim was detained on July 15, 2001 by members of the Police after an incident that ensued at the “Latinos” Pool Hall, located in Quero Canton. Likewise, there is no dispute as to the fact that on that same day the alleged victim was taken from the jail, where he was being held in custody, by some 400 members of the community, taken away to Puñachisag community, then to the Shausi community, where according to accounts, he was beaten and burned; and that he was also put into a vehicle. In any case, as of that point in time, his whereabouts have been unknown. Based on the foregoing, the Commission finds as proven fact that Fredy Núñez was deprived of his liberty.

63. As to the second element of direct involvement of government agents or the acquiescence thereof, the Commission notes that there is no dispute that members of the Rural Community Self-Defense Juntas took the alleged victim away from the jail. This is not only based on several testimonies and police reports, but was also acknowledged by the Junta itself, as was mentioned in the proven facts section. The Commission points out that there are several pieces of evidence that prove the Juntas were acting with the acquiescence of the State.

64. Firstly, the IACHR recalls how national and international agencies have described the context of these events, as was mentioned above, noting that the rural communities self-defense juntas (*Juntas de Defensa del Campesinado*) have assumed public authority and accusations of serious human rights violations have been leveled against them. In fact, as a result of this situation, the State has been urged to ensure that these Juntas do not become paramilitary actors. Based on the case file, it is clear that the State was, at the time of the events, fully aware of the operation of the Self-Defense Juntas and of their role in functions that should be performed by public authorities. Nowhere in the case file does the State explain the basis for the legitimacy of the Juntas in performing public functions, nor is there any information about any measures being taken to put an end to this situation. Thus, the Commission finds as proven fact that from the time the disappearance of Fredy Núñez began to unfold, the Self-Defense Juntas were acting with the full knowledge of the State and with the tolerance and acquiescence thereof.

65. Also based on the context, government officials rarely responded effectively to the complaints of the activities of the juntas. The State also recognized in a report to the Human Rights Committee in 2015 that all judicial proceedings against members of the juntas for human rights violations in Tungurahua, Chimborazao and Bolívar have concluded with dropped charges or dismissals of the case and, therefore, it claimed it is taking measures to strengthen the investigation processes. This constitutes another piece of evidence to support the conclusion about the acquiescence of the State.

66. As for the third element of the refusal to recognize the detention or to reveal the fate or whereabouts of the alleged victim, the Commission notes that even though the individuals who abducted Fredy Núñez acknowledged that he was taken from the jail, they did not provide any information about his fate or whereabouts, and only stated that he had escaped from the jail facility. Because of its failure to act with diligence, the State allowed the whereabouts of the alleged victim to be concealed. Specifically, the Commission notes that despite the fact that the members of the Juntas acknowledged that after he was taken from the police jail and transferred to a community, the alleged victim was taken to a jail of these Juntas, no investigatory step was taken at this location or at any other one to determine his whereabouts. Additionally, the Commission cites the lack of due diligence, which will be examined in the next section of this report, but

<sup>63</sup> IACHR. Report No. 111/09. Case 11.324. Merits. Narciso González Medina. Dominican Republic. November 10, 2009. Par. 130; and IA Court of HR, Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, par. 60.

shows that the process as a whole was not aimed at determining the whereabouts of the alleged victim, but instead aided and abetted the perpetration of a gross human rights violation committed by the Juntas.

67. Based on the foregoing, the Commission concludes that Fredy Marcelo Núñez was the victim of forced disappearance as of July 15, 2001 and, therefore, the Ecuadorian State violated to his detriment, the rights set forth in Articles 3, 4.1, 5.1, 5.2 and 7 of the American Convention, in connection with Article 1.1 of the same instrument. Likewise, the State violated Article 1.a of the Inter-American Convention on Forced Disappearance of Persons.

**B. Right to a fair trial and judicial protection (Articles 8.1 and 25.1 of the American Convention on Human Rights) in connection with the obligation to respect rights and domestic legal effects (Articles 1.1 and 2 of the aforementioned instrument) and Articles I.b and III<sup>64</sup> of the IACFDP**

68. Inter-American legal precedent holds that when the disappearance of a person is reported, there is an indivisible link between the state's response and the protection of the life and integrity of the person who is reported missing. The immediate and exhaustive nature of state's response is independent of whether or not the case involves a potential disappearance at the hands of private individuals or state agents. The Commission reiterates that when there are reasonable grounds to suspect that a person has been a victim of a disappearance, it is essential for the prosecutorial and judicial authorities to act promptly and immediately and to take the necessary and timely measures aimed at determining the whereabouts of the victim or the location where he may be deprived of liberty.<sup>65</sup>

69. The Court has written that States are obliged, under the American Convention, to provide effective judicial remedies to the victims of human rights violations (Article 25), which must be substantiated in keeping with the rules of due process of the law (Article 8.1), all within the general State obligation to ensure the free and full exercise of the right recognized by the Convention to all persons subject to their jurisdiction (Article 1.1).<sup>66</sup>

70. Thus, the Court has held that the duty to investigate means that once the State authorities become aware of the incident, they should open a serious, impartial and effective investigation *ex officio* and immediately. This investigation should be conducted using all legal means available and be designed to determine the truth and to pursue, arrest, prosecute and potentially punish all perpetrators of the crimes,<sup>67</sup> especially when State agents are or may be involved.<sup>68</sup> This duty is an obligation of means and not of results, which should be assumed by the State as its own legal duty and not as a mere formality preordained to be ineffective, or as a mere step taken by private interests, that is contingent upon the initiative of the victim or of his family members or upon their offer

<sup>64</sup> Said Article establishes that the States Parties to this Convention undertake to "punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories."

<sup>65</sup> IACHR. Report No. 111/09. Case 11.324. Merits. Narciso González Medina. Dominican Republic. November 10, 2009. Par. 225; IA Court of HR. Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, par. 134; Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, par. 221, Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations and Costs. Judgment of September 1, 2010. Series C No. 217, par. 167. Also see Matter of Natera Balboa. Provisional Measure with respect to Venezuela. Resolution of the Court of February 1, 2010, Thirteenth whereas clause, and Matter of Guerrero Larez. Provisional Measures with respect to Venezuela. Resolution of the Court of August 29, 2013. Sixth whereas clause.

<sup>66</sup> IA Court of HR. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, par. 91; Case of Gutiérrez and Family v. Argentina. Merits, Reparations and Costs. Judgment of November 25, 2013. Series C No. 271, par. 97; and Case of Landaeta Mejías Brothers et al v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 27, 2014. Series C No. 281, par. 215.

<sup>67</sup> IA Court of HR. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 1, par. 177; and Case of Veliz Franco et al v. Guatemala. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 19, 2014. Series C No. 277, par. 183.

<sup>68</sup> IA Court of HR. Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101, par. 156; and Case of Displaced Afro-descendant Communities of the Cacarica River Basin (Operation Genesis) v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270, par. 371.

of proof.<sup>69</sup> The State's obligation to investigate must be fulfilled diligently in order to avoid impunity and a repetition of this type of act.<sup>70</sup>

71. As to due diligence in the course of the investigation, the Inter-American Court has also held that "each act of the State that forms part of the investigative process, as well as the investigation as a whole, should have a specific purpose: the determination of the truth, and the investigation, pursuit, capture, prosecution and, if applicable, punishment of those responsible for the facts."<sup>71</sup> In this regard, the State must prove that it has conducted an immediate, thorough, serious and impartial investigation,<sup>72</sup> which should be aimed at exploring all possible lines of investigation.<sup>73</sup> The State may be held liable for not ordering, collecting or evaluating evidence that could have been very important for proper clarification of the facts.<sup>74</sup>

72. Additionally, Article 8.1 of the American Convention establishes, as one of the elements of due process guarantees, that courts must decide the cases submitted to them within a reasonable time. According to the terms of this provision, the Commission must take into consideration, in light of the specific circumstances of the case, the elements that the bodies of the Inter-American system have taken into account, which are: i) the complexity of the matter; ii) the procedural activity of the interested party; iii) the conduct of the judicial authorities; and iv) the importance of what is at stake for the party in the case.<sup>75</sup> The Inter-American Court has held that a protracted delay may *per se* constitute a violation of the principle of due process<sup>76</sup> and, therefore, it is for the State to explain and prove why it has required more time than would be reasonable, in principle, to deliver final judgment in a specific case.<sup>77</sup>

## 1. Diligence in the investigation

73. The Commission recalls that in the instant case, the alleged victim was abducted from the jail where he was being held in custody on July 15, 2001. Furthermore, the family members filed at least two complaints about his disappearance.

74. The IACHR first notes that said facts did not trigger any immediate search to determine the whereabouts of the alleged victim or any investigation, even though there was evidence that a forced disappearance may have been afoot, thus requiring an expeditious and thorough response without delay as soon as authorities became aware of the situation. In the first police report on the incidents, which was issued one month after the events took place, "trying to locate the alleged victim" is identified as a pending task. Likewise, as the case file reflects, the criminal investigation was opened more than one month after the incidents, in August 2001, at the request of the Inspector General of the Police.

<sup>69</sup> IA Court of HR. Case of Velásquez Rodríguez. v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 1, par. 177; and Case of Veliz Franco et al v. Guatemala. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 19, 2014. Series C No. 277, par. 183.

<sup>70</sup> IA Court of HR. Case of the Massacres of Ituango v. Colombia. Judgment of July 1, 2006, Series C. No. 148, par. 319; Case of Veliz Franco et al v. Guatemala. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 19, 2014. Series C No. 277, par. 183; and Case of Landaeta Mejías Brothers et al v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 27, 2014. Series C No. 281, par. 216.

<sup>71</sup> IA Court of HR. Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, par. 131.

<sup>72</sup> IACHR. Report on Merits, N° 55/97, Juan Carlos Abella et al (Argentina), November 18, 1997, par. 412.

<sup>73</sup> IACHR. Report No. 25/09 Merits (Sebastião Camargo Junior) Brazil, March 19, 2009, par. 109. Also see, IACHR, Access to Justice for Women Victims of Violence in the Americas. OEA/Ser. L/V/II. doc.68, January 20, 2007, par. 41.

<sup>74</sup> IA Court of HR. Case of the "Street Children" (Villagrán Morales et al). Judgment of November 19, 1999. Series C No. 63, par. 230. Also see, IACHR, Access to Justice for Women Victims of Violence in the Americas. OEA/Ser. L/V/II. doc.68, January 20, 2007, par. 41.

<sup>75</sup> IACHR. Report No. 111/10, Case 12.539, Merits, Sebastián Claus Furlan and Family, Argentina, October 21, 2010, par. 100. IA Court of HR, Case of the Massacre of Santo Domingo v. Colombia. Preliminary Objections, Merits and Reparations. Judgment of November 30, 2012. Series C No. 259, par. 164.

<sup>76</sup> IA Court of HR. Case of García Asto and Ramírez Rojas v. Peru. Judgment of November 25, 2005. Series C No. 137, par. 166; Case of Gómez Palomino v. Peru. Judgment of November 22, 2005. Series C No. 136, par. 85; Case of the Moiwana Community v. Suriname. Judgment of June 15, 2005. Series C No. 124, par. 160.

<sup>77</sup> IA Court of HR. Case of Ricardo Canese v. Paraguay. Judgment of August 31, 2004. Series C No. 111, par. 142.

75. The IACHR further notes that the State failed to take even the most minimal investigative steps to locate the whereabouts of the alleged victim and identify those responsible. In particular:

- There is not a single record of any search to determine the whereabouts of the alleged victim.
- The on-site inspection to the jail, from where the alleged victim was taken, was conducted nine months after the events and, therefore, no physical damage was found nor was it possible to determine the use of force at the time he was taken away from the jail.
- There is no record that the State conducted an inspection of the Jail of the rural community self-defense juntas, even though the Juntas Consortium reported that the alleged victim was taken to that location, but that he escaped by force from it.
- There is no record that, because of the preceding fact, the members of the Juntas have been criminally prosecuted, even though they explicitly acknowledged taking Mr. Núñez and detaining him in a jail.

76. Additionally, the Commission notes the clear lack of due diligence in the decision to dismiss the case with prejudice. As was explained in that ruling, the evidence gathered during the initial inquiry did not meet the legal requirements under the Organic Law of Public Prosecution, because there is no record that the defendants were summoned to intervene in evidence collection. This failure, which triggered the suppression of the evidence, is fully attributable to the State. Additionally, beyond the fact that this situation is clear, no measure has been ordered to cure the aforementioned failures and reconduct the process, so the facts could be elucidated and those responsible, punished. It also takes note that no evidence was introduced during the preliminary investigation stage.

77. Finally, the IACHR notes that despite the information of October 15, 2004, from the Chief of Police that the investigations are carrying on to determine the whereabouts of the alleged victim, on October 18, 2004, the Fourth Criminal Court reported that as of the time the dismissal without prejudice was issued, no evidence has been received from the prosecutor's office. This shows that no procedure was followed to overturn the decision to dismiss the case, despite the omissions established above.

78. All of the foregoing evidence, taken as a whole, leads to the conclusion that the State has not investigated the facts of the instant case with due diligence, in violation of the rights set forth in Articles 8.1 and 25.1 of the American Convention in connection with Articles 1.1 of the same instrument, as well as Article I.b of the Inter-American Convention on Forced Disappearance of Persons, to the detriment of Fredy Marcelo Núñez, as well as his family members.

## **2. Reasonable time**

79. The Commission will examine hereunder whether the State fulfilled its duty to conduct an investigation into the facts of the instant case within a reasonable time, taking into account the evidence laid out above.

80. The IACHR takes note that 17 years have elapsed since the time the State became aware of the facts, as a result of the abduction from the jail where the alleged victim was being held in custody.

81. As for the first element, the case can be viewed *prima facie* as complex, taking into account the context of the facts and the number of individuals involved. Nonetheless, the Commission recalls that even in cases that may be considered as complex due to their very nature, the State concerned is required to specifically explain how the complexity has affected the investigations. The Commission finds that this was not done in the instant case. The Commission does not believe that the complexity has been the reason why those responsible for the crimes have not been identified, the facts have not been clarified or the respective punishments have not been imposed, as of the present date. On the contrary, as was explained in the previous section, the investigation has not been conducted with due diligence or geared toward ascertaining the truth about what happened. Even though evidence of who may have been the perpetrators of the crimes was introduced in the case proceedings, the cases of these individuals have not been properly followed up.

82. With respect to the second element of the procedural activity of the interested party, the Commission notes that the family of the alleged victim reported the crimes more than once to the pertinent State authorities and, as such, it was incumbent upon the State to properly move the investigations forward.

83. As for the conduct of State authorities, the Commission reiterates the failure to act described in the section on due diligence. The Commission notes periods of inactivity of the State for which no adequate cause was given, in the immediate aftermath of the disappearance, as well as in the context of the investigation, in addition to the sparse investigative steps taken to determine the whereabouts of the alleged victim, and identify, try and punish those responsible for the crimes.

84. Based on the foregoing considerations, the Commission concludes that the State has breached its duty to investigate the facts of the instant case within a reasonable time, in violation of the rights established in Articles 8.1 and 25.1 of the American Convention in connection with Article 1.1 of the same instrument, and Article I.b. of the Inter-American Convention on the Forced Disappearance of Persons to the detriment of Fredy Marcelo Núñez and his family.

### **C. Right to humane treatment of next of kin (Article 5 in connection with Article 1.1 of the American Convention)**

#### **1. Right to humane treatment as a consequence of the forced disappearance**

85. The right to humane treatment, enshrined in Article 5.1 of the American Convention, establishes that “every person has the right to have his physical, mental, and moral integrity respected.” The Commission and the Court have held that the family members of victims of certain human rights violations can, in turn, be considered as victims.<sup>78</sup> In this regard, the Court has found that the right to mental and moral integrity of the next of kin of victims can be violated as a consequence of the additional suffering they have endured and the subsequent acts or omissions of the State authorities in relation to the facts.<sup>79</sup>

86. The Commission notes that, pursuant to the legal precedents of the Court, “in cases involving the forced disappearance of persons, it can be understood that the violation of the right to mental and moral integrity of the victims’ next of kin is a direct result, precisely, of this phenomenon, which causes them severe anguish owing to the act itself, which is increased, among other factors, by the constant refusal of the State authorities to provide information on the whereabouts of the victim or to open an effective investigation to clarify what occurred.”<sup>80</sup>

87. In the instant case, the Commission finds that the mere fact of the forced disappearance of the victim has given rise to a deep feeling of grief, anguish and uncertainty in his next of kin, which has been growing deeper because of the violations found in the previous section, including the protracted quest for justice, and the failure to elucidate what happened to their loved one.

88. Additionally, the Commission takes note that based on the police reports and testimonial evidence, as a result of their quest for justice, the parents of the alleged victim, Gregoria Naranjo and Sixto Núñez, have been threatened in order to force them to abandon their properties or that their belongings will be set ablaze and their lives will be in jeopardy. Notwithstanding, there is no record of any investigative step taken by the State to provide them with protection.

<sup>78</sup> IACHR. Report No. 11/10. Case 12.488. Merits. Barrios Family Members. Venezuela. March 16, 2010. 91. IACHR. Report on Terrorism and Human Rights. Par. 227; IA Court of HR. Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167. par. 112; and Case of Bueno Alves v. Argentina. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C. No. 164. par. 102.

<sup>79</sup> IA Court of HR. Case of Vargas Areco v. Paraguay. Judgment of September 26, 2006. Series C No. 155. par. 96.

<sup>80</sup> IA Court of HR. Case of Blake v. Guatemala. Merits. Judgment of January 24, 1998. Series C No. 36, par. 114; Case of Ticona Estrada v. Bolivia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 191, par. 87; Case of La Cantuta v. Peru. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, par. 123 and Case of Anzualdo Castro v. Peru, Judgment of September 22, 2009, Series C No. 202, par. 105.

89. Based on the foregoing considerations, the Commission concludes that the State is responsible for the violation of the right to mental and moral integrity, as established in Article 5.1 of the American Convention in connection with the obligations set forth in Article 1.1 of the same instrument, to the detriment of the family members of Fredy Marcelo Núñez Naranjo, who are identified in the instant report.

## 2. Facts relating to Gregoria Naranjo y Marcia Núñez

90. The Commission recalls that on July 15, 2001 when the alleged victim was abducted from the jail, where he was deprived of his liberty, he was taken together with his mother Gregoria Naranjo and his sister Marcia Núñez to the Puñachisag Community where, according to information appearing in the alleged victim's own father's testimony, the police report of August 16, 2001 and the prosecutorial initial inquiry, the three of these persons were subjected to "flogging" and mistreatment. Notwithstanding, there is no record of the State ever conducting an investigation to identify those responsible for this mistreatment.

91. On this score, the Commission recalls that when there is a complaint or reasonable grounds to believe that an act of torture has been committed, it is the State's obligation to open *ex officio* and immediately an effective investigation to make it possible to identify, prosecute and punish those responsible, pursuant to the general obligation to ensure to all persons under its jurisdiction the human rights enshrined in the Convention, as established in Article 1.1 thereof, in conjunction with the right to humane treatment.<sup>81</sup>

92. Based on the foregoing considerations, the Commission concludes that the State is responsible for the violation of the right to a fair trial and judicial protection, as established in Articles 8.1 and 25.1 of the American Convention in connection with the right to humane treatment, as set forth in Article 5.1, as well as the obligations established in Article 1.1 of the same instrument, to the detriment of Gregoria Naranjo and Marcia Núñez.

## V. CONCLUSIONS AND RECOMMENDATIONS

93. The Commission concludes that the Ecuadorian State is responsible for the violation of the right to recognition of juridical personality, life, humane treatment, personal liberty, a fair trial, and judicial protection enshrined in Articles 3, 4.1, 5.1, 5.2, 7, 8.1 and 25.1 of the American Convention, in connection with Article 1.1 of the same instrument, as well as Articles I.a) and I.b) of the Inter-American Convention on the Forced Disappearance of Persons, to the detriment of the individuals named throughout the instant report.

### THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, RECOMMENDS THE ECUADORIAN STATE:

1. Conduct a thorough, impartial and effective investigation into the whereabouts of Fredy Marcelo Núñez and, if applicable, take the necessary measures to identify and hand over his remains to his family in keeping with their wishes.
2. Conduct a diligent and effective investigation into the bodily harm endured by Gregoria Naranjo and Marcia Núñez, within a reasonable time in order to thoroughly clarify the crimes, identify the perpetrators and impose punishment, when applicable.
3. Carry out domestic proceedings relating to the human rights violations declared in the instant report and conduct the appropriate proceedings for the crime of the forced disappearance of Fredy Marcelo Núñez, impartially, effectively and within a reasonable time, in order to clarify the crimes thoroughly, identify all persons responsible and impose punishment, as appropriate.

<sup>81</sup> IA Court of HR, *Case of Baldeón García*. Merits, Reparations and Costs. Judgment of April 6, 2006. Series C No. 147, par. 156; *Case of Gutiérrez Soler*. Merits, Reparations and Costs. Judgment of September 12, 2005. Series C No. 132, par. 54; *Case of Tibi*. Judgment of September 7, 2004. Series C No. 114, par. 159 and *Case of Ximenes Lopes*. Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149, par. 148. Also, *Eur.C.H.R., Assenov and others v. Bulgaria*, no. 90/1997/874/1086, Judgment of 28 October 1998, par. 102 and *Eur.C.H.R., İlhan v. Turkey* [GC], no. 22277/93, Judgment of 27 June 2000, pars. 89-93.

4. Make adequate reparation for the human rights violations found in the instant report addressing both the material and moral aspects, including fair compensation, determining and disseminating the historical truth of the facts, and implementing an adequate assistance program for the family, in consultation with the members thereof.

5. Adopt the necessary measures of non-repetition to prevent similar events from occurring in the future. The measures of non-repetition in the instant case should include legislative, administrative or other types of measures aimed at eliminating the Rural Community Self-Defense Juntas (*Juntas de Defensa del Campesinado*) as entities that exercise public functions. Also, to adopt necessary measures so that investigations into forced disappearances of persons in Ecuador, including criminal investigations and judicial proceedings, as well as processes for the search of the remains of missing persons, meet the standards described in the instant report.