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Decided by: Chairman: Ambassador John Donaldson;
First Vice Chairman: Dr. Carlos Manuel Ayala Corao;
Second Vice Chairman: Professor Robert Kogod Goldman
Members: Ambassador Alvaro Tirado Mejia, Dr. Oscar Lujan Fappiano, Dean Claudio Grossman, Dr. Jean Joseph Exume.
Dated: 12 March 1997
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I. BACKGROUND

A. Violations Alleged

1. The petitioners allege that, on April 9, 1988, Manuel García Franco, then 44 years old, was disappeared by two Naval officers and three members of the Ecuadorean Naval Marine. They maintain that he was abducted from the neighborhood of Ciudadela Bolivariana in Guayaquil, held at the San Eduardo Naval Base, tortured, and presumably died as a result of the treatment to which he was subjected. He has neither been seen nor heard from since his detention. Although members of the victim's family sought information on his whereabouts, and invoked the applicable judicial remedies, they contend that these attempts to ascertain his fate were fruitless because the authorities failed to investigate or process their claims.

2. Consequently, the petitioners maintain that the Republic of Ecuador (herein after the "State" or "Ecuador") bears responsibility for having failed to respect and ensure the rights and freedoms protected under the American Convention on Human Rights as required by Convention Article 1.1. They assert that state agents abducted and detained Manuel García, illegally and arbitrarily, in violation of Article 7; tortured him, in violation of Article 5; denied his access to habeas corpus and judicial protection, in violation of Articles 7.6 and 25; caused his death, in violation of Article 4; and, that the failure of the State to investigate or process the claims of the García family denied them justice in violation of Articles 8 and 25.

B. Position of the State of Ecuador

3. The State initially provided information in response to the petition which, it maintained, demonstrated that although Manuel García was in fact illegally arrested and detained by state

agents, he was released within a matter of hours. Notwithstanding this position, the State has acknowledged that Mr. García has been disappeared since April 9, 1988. Additionally, the State has affirmed that, while the First Criminal Court of Guayas initiated a criminal action against Naval Captain Fausto López Villegas in 1988, accusing him of the illegal and arbitrary detention of Manuel García, he has never been tried. The Prosecutor issued his opinion on the charges to be brought in May of 1992, and no further judicial action has been taken.

C. Processing of the Case

4. The petition, dated August 8, 1988, denounced the disappearance of Manuel García Franco, a 44 year old Ecuadorean citizen who had worked as a carpark guard in the Ciudadela Bolivariana neighborhood of Guayaquil for more than ten years. The petition recounted that, early the evening of April 9, 1988, Mr. García had been waiting to begin his shift when he was forcibly abducted into a gray Trooper by members of the Ecuadorean Naval Marine. A teenager named Pedro C. V., who periodically worked with Mr. García as a carpark guard, was forcibly abducted into the Trooper at the same time. This took place in the presence of witnesses, who recorded the license plate number of the vehicle into which they were abducted as 112438.

5. Pedro reappeared four to five hours later. According to the petition, Pedro had been whipped, the soles of his feet were badly burned, and he had been beaten. The petitioners reported that Pedro told the victim's sister, Fanny García, that the Marines had Manuel hanging from a tree. Nothing further was known about the whereabouts or fate of Manuel García.

6. The petitioners reported that family members immediately set out to gather information about Mr. García. Pursuant to their inquiries, the family was unofficially told by sources inside the Navy that, on April 8, 1988, the wife of a Naval officer had been assaulted and her vehicle stolen. The following day, the Naval officer, Lieutenant Fausto López Villegas, reportedly took several agents of the Naval Marine or the Criminal Investigation Service out with him in a gray Trooper to investigate the assault and theft of his wife's vehicle. Petitioners reported that it was later confirmed that the vehicle registered to license number 112438, a gray Trooper, belonged to Lieutenant López' father in law, a Naval Captain.

7. The petition indicated that the family had filed a habeas corpus petition on Mr. Garcia's behalf, and had denounced Mr. Garcia's disappearance before the municipal authority of Guayaquil and the police. The petition included a copy of the April 14, 1988 denunciation filed by the victim's sister, Fanny García Franco, before the Chief of the Criminal Investigation Service of Guayaquil. The latter set forth all the information the family had gathered, and asked for urgent measures of investigation. Fanny García further indicated her belief that, due to her brother's delicate state of health, he would have been unable to withstand the kind of treatment to which it appeared he had been subjected. The petitioners later sought the intervention of the Subsecretary of National Defense to further their appeals for a full investigation of the whereabouts of Manuel García.

8. On October 12, 1988, the Inter-American Commission transmitted the pertinent information from the petition to the State of Ecuador, and informed it that, without prejudice to a

decision the question of admissibility, a case had been opened. The State was requested to provide information deemed relevant to the situation denounced within 90 days.

9. The Commission's request for information was reiterated by means of a note of April 5, 1989. On September 5, 1989, this was followed by a note indicating that, if the Commission did not receive the information requested from the State within 30 days, it would consider the possible application of Article 42 of its Regulations. This provision allows the Commission to presume the facts set forth in a petition to be true in the absence of a response from the State or other information to the contrary.

10. On October 31, 1989, the State of Ecuador submitted its response to the petition consisting of two brief reports authored by the Minister of State and Police, Andres Vallejo Arcos, and the General Commander of the Naval Marine, Viceadmiral Fernando Alfaro Echeverria. The Minister's report, dated October 28, 1989, was addressed to the Foreign Ministry, and had been prepared in response to a request by the Tribunal of Constitutional Guarantees for information relevant to the disappearance of Manuel García. The Minister wrote that, as the allegations in question attributed the disappearance to members of the Navy, any requests for information should be directed to the Minister of Defense, and that his Ministry had already transmitted data relative to this denunciation to the Minister, Division General Jorge Felix.

11. The report of the General Commander of the Naval Marine, dated August 9, 1988, was addressed to the Subsecretary of National Defence, and had been prepared in response to an inquiry dated June 29, 1988, which had annexed a report by Amnesty International on the disappearance of Mr. García. The Commander indicated that, according to information he had received, on April 8, 1988 at 19:30 hours, the wife of Lieutenant Fausto López Villegas had been assaulted by four armed unidentified individuals. They struck and injured her, and took her belongings and her 1988 Chevrolet San Remo vehicle. Later that day, her husband filed a complaint with the Criminal Investigation Service and the Transit Commission. On April 9, Lieutenant López, with the aid of four agents from the First Naval Zone, proceeded to carry out a search for the stolen vehicle through the suburbs of Guayaquil. "[T]hat day, at approximately 18:15 hours, two individuals of the sector where the assault and robbery occurred were picked up by [members of] the Infantry Corp of the Marine to make inquiries." They were Manuel García and Pedro C. V. The General Commander stated that Mr. García had been detained once, on February 12, 1987, under suspicion of car theft. He further reported that, since neither Mr. García nor Pedro offered any information relevant to the investigation, both had been freed that day at 22:00 hours in the area near the Ciudadela Universitaria. Investigations carried out showed that they suffered no psychological or physical pressure, especially since, as he stated, members of the Navy were prohibited from intervening in Police matters.

12. This information was transmitted to the petitioners on November 14, 1989, with a request that they provide any corresponding observations within 30 days. This request was reiterated by means of a note dated April 17, 1990.

13. The petitioner's reply, dated April 20, 1990, indicated that the State's submission had failed to provide any details about the supposed release of Manuel García, such as his physical

condition, or the precise manner, place and time he was freed. The petitioners emphasized that the State's response made no reference to measures to investigate why, if Mr. García had supposedly been released, he had never been seen again.

14. These observations were transmitted to the State of Ecuador on May 30, 1990, with a request that the State provide any further relevant information within 30 days.

15. On June 4, 1990, the State replied with a brief note reiterating the position that, in accordance with the reports submitted previously: "Mr. García Franco was momentarily detained April 9, 1988, on suspicion that he had been one of those who assaulted [the wife of the Lieutenant]. However, this citizen was freed three hours later because he had not offered any data for the investigation." The note further indicated that the Foreign Ministry had requested that the relevant authorities provide updated information about the case of Manuel García.

16. This information was transmitted to the petitioners by a note of August 6, 1990, with a request that any observations or new information be submitted within 30 days.

17. On August 28, 1990, the petitioners submitted their response, principally indicating that attempts to invoke domestic processes had been fruitless. Family members had denounced Mr. García's disappearance before various authorities without any result. The Ecumenical Human Rights Commission had presented a complaint on their behalf before the Tribunal of Constitutional Guarantees, which had assigned it a case number but failed to make any further progress. The petitioners reiterated their contention that the relevant authorities had failed to investigate this case, despite having been placed on notice that: Mr. García had been neither seen nor heard from since his detention; Lieutenant López admitted to having detained him; and that Pedro reported being subjected to brutal treatment, as well as having seen Mr. García hit with a stick and hanging from a tree. They reiterated that the State had failed to offer any details with respect to the alleged release of Mr. García, and had, moreover, failed to require that the Naval Marine provide this information.

18. The foregoing information was transmitted to the State by a note of September 26, 1990, with a request that it forward any other relevant information to the Commission within 30 days.

19. On November 6, 1990, the State submitted a copy of the unsworn declaration given by Officer López (apparently promoted from Lieutenant to Captain) on October 21, 1989 at the request of the Minister of Defense. The declaration was given in Guayaquil, before CPFG-IM Manuel Zapater Ramos, Chief of the Second Department of the Naval Operations.

20. In the declaration, Captain López recounted the assault on his wife and theft of the vehicle she had been driving. He had filed a complaint before the Transit Commission (number 31556), and had then gone to the Naval Zone and had unsuccessfully attempted to seek the assistance of the Patrol Chief. He then went to the National Police and filed a denunciation number 88-3092-SIC-G. The next day, he went to the San Eduardo Base to request help in searching for his vehicle. The officer on duty directed him to the Second Commander, then CPCB-IM Manuel Zapater Ramos, who, upon hearing the problem, placed four members of the Naval Marine at his orders to aid in the search. Captain López recounted that he and the Marines

then drove around the city to search for the vehicle, returning to the Base at approximately 1700 to drop off one of the Marines. López stated that, at that time, Sergeant Proaño suggested that he investigate at the site of the robbery with the carpark guards who worked nearby. Officers López and Proaño, with the three remaining Marines, then went to the Ciudadela Bolivariana in front of the University. Captain López stated that Sergeant Proaño and two Marines got out there to investigate, but that he did not join them because he wanted to go home to check on his wife's condition. The declaration recounts that when Captain López arrived home, he was met with a phone message to return to the Ciudadela area, because two of the carpark guards were acting nervous.

21. Captain López stated that he detained the two carpark guards and took them to the San Eduardo Base to investigate the whereabouts of his vehicle. After he carried out this investigation, at approximately 20:00 to 20:30 hours he and the detainees left the Base. He further stated that one of the detainees was released near July 5 [Avenue] and the other near the University Obelisk. He and several Marines continued to search through various sectors of the city until the early hours of the morning, when he dropped the Marines off at the Base and returned home.

22. Captain López could not recall the names of the Marines who were placed at his orders to carry out this search. He recounted that the stolen Chevrolet vehicle was located on April 14, 1988. Captain López stated that he first learned of the allegations that Manuel García had disappeared when a priest approached his wife asking about a relative whom her husband had detained who was missing. Captain López recalled that the Naval Operations Command had forwarded a denunciation brought against him in the matter, and that his response should be in the files of the Command.

23. This information was transmitted to the petitioners by a note dated November 28, 1990, with a request that they present any corresponding observations or additional data within 30 days.

24. On July 4, 1991, the petitioners informed the Commission that they had experienced difficulty in collecting further data on the case, and requested an additional 30 days to submit their observations. This request was granted by means of a reply dated July 17, 1991.

25. On January 7, 1992, the Commission reiterated its request that the petitioners send any information deemed pertinent. By means of a note of the same date, the Commission requested that the State provide updated information on the investigation into the disappearance of Manuel García.

26. By means of a note of February 26, 1992, the petitioners provided their observations with respect to the November 6, 1990 communication of the State. They reiterated that the information offered to date by the State reflected its failure to initiate a serious investigation into the disappearance of Mr. García, notwithstanding that the declaration of Captain López proffered by the State demonstrated his participation in an illegal detention. The petitioners reviewed the actions that had been taken to invoke domestic remedies, and indicated that the Ecumenical

Human Rights Commission had unsuccessfully petitioned the National Congress to investigate this case.

27. The petitioners also transmitted a copy of the official declaration Pedro C. V. provided at the Criminal Investigation Service of Guayas on April 2, 1991. The declaration was given with the assistance of his tutor, due to the fact that Pedro suffers from a speech impediment. In his statement, Pedro recounted that he and his friend, Manuel García, had been forcibly abducted into a gray Trooper by five Marines. Their eyes were taped, so Pedro did not know where they were taken. On the way, the Marines hit them and asked them questions concerning the location of a vehicle. When they arrived at their destination, Pedro recalled, he was tied up so that he was suspended. The Marines hit him, threw scalding water on his feet, and applied electric current to various parts of his body. He was later released near the Catholic University. He stated that the Marines who hit him had stayed with Manuel García, about whose whereabouts he knew nothing further.

28. On July 5, 1994, the petitioners addressed the Commission to reiterate their position on this case, and to request that it be resolved.

29. During the Commission's November, 1994 on site visit to Ecuador, co-petitioners in this case submitted additional and updated information on the disappearance of Manuel García. After reviewing the events as previously described, they summarized the status of case 326-88 before the First Criminal Court of Guayas. On March 6, 1992, they reported, the Judge had declared the investigation stage closed, and had requested that the Prosecutor issue his opinion on the charges to be brought. On May 5, 1992, the Prosecutor presented his opinion accusing Captain Fausto López Villegas of having arbitrarily detained Manuel García in violation of Article 180 of the Criminal Code. Captain López was duly notified. The petitioners indicated that no further measures had been taken in case 326-88.

30. The petitioners provided a copy of several documents from the judicial file compiled in case 326-88, including:

multiple petitions filed by Fanny García, as private accuser in case 326-88, seeking a resolution of motions she had filed;

a letter from the Provincial Chief of the Office of Criminal Investigation of Guayas to the Judge seized of case 326-88 indicating, in response to the Judge's inquiry, that his files disclosed no criminal record for Manuel García;

the May 5, 1992 opinion of the Prosecutor on the charges to be brought, which made reference to: the contents of the complaint by Fanny García; the statement given by Captain López in which he admits to having detained Manuel García and Pedro; a statement by Pedro's employer indicating that, upon his release from detention, Pedro had burns on his feet and contusions over his body; the April 2, 1991 statement of Pedro (described above); and the formal statement required of Captain Fausto López by the Judge. According to the Prosecutor, in his statement given on September 12, 1991, Captain López indicated that two carpark guards who were 'collaborating' in the investigation into the theft of his car were taken to the San Eduardo Base.

Captain López indicated that when the two guards were brought back to their sector a few hours later, Mr. García asked to be left in front of the Quito Tennis Club, and Captain López gave him 200 sucres.

The Prosecutor concluded that members of the Marines had carried out a crime by abandoning their proper duties to kidnap and mistreat two citizens, absent any judicial order or authorization, abusing the force vested in them, to torture one of those detained and disappear the other. The Prosecutor accordingly accused Captain López of criminal responsibility for the arbitrary detention of Manuel García and Pedro C. V.

31. This information was transmitted to the State by a note dated May 26, 1995, with a request that it provide updated information on the case within 30 days. This documentation was again transmitted to the State on October 5, 1995, with a request that it provide information on the status of case 326-88 or the result reached, and a copy of the complete judicial file compiled in the matter, within 60 days. This request was reiterated by means of a note dated February 20, 1996, with a response solicited within 45 days.

32. On April 8, 1996, the petitioners filed their final submission on the disappearance of Manuel García. They indicated that the process remained before the First Criminal Court of the Superior Court of Justice of Guayas, but had been paralyzed since the issuance of the Prosecutor's charges against Captain López on May 5, 1992. The next procedural step, i.e., the call to trial of Captain López, had yet to be initiated. The petitioners noted that, notwithstanding the lack of progress, the Ecumenical Commission on Human Rights, the Service for Peace and Justice and the Permanent Committee for the Defense of Human Rights had continued to press the case with authorities of the judiciary and the Ministry of Defense, having met with the latter a dozen times between 1994 and 1996, but to no avail.

33. The petitioners attached a copy of the habeas corpus petition which had been filed by Fanny García and received at the Municipal Secretariat in Guayaquil on June 2, 1988. The petition indicated the precise place and time of the alleged abduction, noted that there had been witnesses, gave the license number of the vehicle used, the name of Naval official López and indicated that he was accompanied by individuals presumed to be Marines. The petitioners reaffirmed that the habeas corpus motion had produced no result.

34. This data was transmitted to the State by a note of April 22, 1996, with a request that it adopt the measures necessary so that the Commission could receive all of the information relative to the case within 60 days, and consider it during its next period of session.

35. By notes of June 24, 1996, the Commission addressed the State and the petitioners to inform them that, as the procedural steps contemplated in the first five subsections of Article 48.1 of the American Convention had been taken, it now placed itself at the disposal of the parties, in accordance with Article 48.1.f, to facilitate any efforts they may wish to undertake to reach a friendly settlement of this matter based on the principle of respect for the rights set forth in the Convention. The parties were asked to indicate their interest in participating in such a process within 30 days. Having received no direct response to this offer from any party, the Commission deemed this procedural step closed.

36. The final submission of the State, dated August 26, 1996, stated the following in pertinent part:

CASO MANUEL GARCIA FRANCO: Detained and disappeared since Saturday April 9, 1988, by Naval Marine official Fausto López and a group presumably of Marines.

1. The First Criminal Court of Guayas is processing the criminal action No. 326-88, having issued as the last judicial measure in the case to establish responsibilities, the prosecutor's opinion, issued by Dr. Juan Ramos Machado on May 5, 1992, accusing Frigate Captain CPMG Fausto López Villegas as the presumed author of the crime of arbitrary detention.

2. Since that date the cause has been paralyzed, notwithstanding the time that has transpired, the legal investigation has not been concluded.

37. During its 93rd session (September 30 to October 18, 1996), the Commission decided to transmit Report No. 53/96 to the Government of Ecuador, which pursuant to the provisions of Article 50 of the Convention is not authorized to publish it.

38. The Commission agreed to give the Government of Ecuador a period of two months to give effect to the recommendations made, and to ask it to inform the Commission within that period of the measures taken to comply with the recommendations set out in paragraph 78. Pursuant to Article 50, the two month period for giving effect to the recommendations begins to run on the date the report is transmitted.

39. Report No. 53/96 was transmitted to the Government of Ecuador on October 30, 1996. On the same date, the Commission informed the petitioner of the approval status of that report, and that it had sent the report to the Government of Ecuador.

40. During its 95th session (February 24 to March 14, 1997), the Commission decided, in light of the fact that the time period stipulated in paragraph 80 had expired without any response from the Government of Ecuador, to approve the present report, pursuant to Article 51 (2) of the Convention, and to allow a period of 60 days for the Government to take the necessary steps to give effect to the Commission's recommendations, with a view to rectifying the situation in question.

41. On September 17, 1997, the Commission officially transmitted Report No. 1/97 to the Government of Ecuador, pursuant to Article 51 of the Convention, and advised that it would also be sending the report to the petitioners, with notice that the report was confidential.

42. At the same time, the Commission advised the Government of Ecuador that it had a period of sixty days to report on the measures taken to give effect to the Commission's recommendations, and to resolve the situation in question.

43. At the end of the period referred to in the preceding paragraph, the Commission will decide whether the Government has taken suitable measures, and whether the present report should be published.

II. ANALYSIS

A. Admissibility

Basic procedural requirements

44. The present petition fulfills the requirements for admissibility set forth in the American Convention and the Regulations of the Commission. The Inter-American Commission is competent to consider the case of Manuel García Franco because it alleges facts which, in accordance with Article 47.b, may "tend to establish a violation of the rights guaranteed by this Convention," specifically, Articles 1, 4, 5, 7, 8 and 25. Ecuador ratified the American Convention on December 28, 1977, and it entered into force on July 18, 1978.

45. In accordance with the requirements of Articles 46.1.c and 47.d of the Convention, the subject of the petition is not pending settlement in another international proceeding, nor does it duplicate a petition previously examined by the Commission. The petition met the basic requirements of Article 32 of the Regulations of the Commission.

46. The petition in the instant case was timely filed, as required by Article 46.1.b, as the central facts alleged took place on April 9, 1988, and the petition was filed approximately five months later. In general, a petition must be filed within six months of the date the party concerned was notified of the final judgment in the case. As set forth in Article 38.2 of the Commission's Regulations, where there has been no final judgment, as in the instant case, the petition must be submitted within a reasonable time in light of the circumstances of the case. The filing in this case clearly met this standard.

Exhaustion of domestic remedies

47. Article 46.1.a of the Convention specifies that in order for a case to be admitted, "remedies under domestic law [shall] have been pursued and exhausted in accordance with generally recognized principles of international law." The purpose of this requirement is to ensure the state concerned the opportunity to resolve the matter within its own legal framework.

48. The facts set forth in the present case indicate that Manuel García has neither been seen nor heard from since he was forced into a gray Trooper on April 9, 1988. Mr. Garcia's disappearance was denounced, inter alia, before the National Police, the Criminal Investigation Service of Guayas and the Police Commissary of Guayaquil. On June 2, 1988, the family filed a habeas corpus petition on his behalf. Although a case was initiated before the First Criminal Court of Guayas to establish criminal responsibility for the illegal detention of Mr. García, the State acknowledges that case 326-88 has been paralyzed since May of 1992. Pursuant to a complaint filed by the petitioners, a separate proceeding was initiated under case number 383-88 by the Tribunal of Constitutional Guarantees. The petitioners indicated that this case was never investigated or properly processed, and produced no result.

49. In accordance with Article 46.2, the requirement that domestic remedies have been invoked and exhausted is inapplicable if: the legislation of the state concerned fails to afford due process for the protection of the right allegedly violated; or if the party alleging violation has been hindered in his or her access to domestic remedies; or where there has been unwarranted delay in the issuance of a final judgment through domestic recourse. These exceptions apply "to situations where domestic remedies cannot be exhausted because they are not available either as a matter of law or as a matter of fact." (Advisory Opinion OC-11/90 of August 10, 1990, Exceptions to the Exhaustion of Domestic Remedies (Art. 46.1, 46.2.a and 46.2.b American Convention on Human Rights), Ser. A No. 11, para. 17.)

50. The writ of habeas corpus would normally be the effective "means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty." (Velásquez Rodríguez Case, Judgment of July 29, 1988, Ser. C No. 4, para. 65; Godínez Cruz Case, Judgment of January 20, 1989, Ser. C No. 5, para. 68.) The petitioners reported that the habeas corpus petition filed on behalf of Manuel García was not investigated or processed as the law required, and the State has provided no information to the contrary. In general, the writ of habeas corpus is the proper remedy in the case of a forced disappearance, and a petitioner in such a case need not invoke other remedies to meet the standard set in Article 46.1.a. (Caballero Delgado and Santana Case, Preliminary Objections, Judgment of January 21, 1994, Ser. C No. 17, para. 67.)

51. Nonetheless, it may be noted that the other remedies invoked have been essentially unavailable, ineffective and subject to undue delay. In addition to requesting information from numerous relevant authorities, the García family sought to invoke the competence of the Tribunal of Constitutional Guarantees and the First Criminal Court of Guayas. These judicial actions provided neither clarification as to the fate of Manuel García nor a determination of responsibility for the facts denounced, and in fact failed to produce any substantive result.

52. Pursuant to Article 37 of the Commission's Regulations, where a complainant before the Commission claims an inability to exhaust domestic remedies, the burden shifts to the State to demonstrate that remedies capable of redressing the matter remain available. The State has neither expressly challenged the admissibility of this case on the basis of non-exhaustion, nor proffered any information which would indicate that other existing, adequate and effective remedies remain to be exhausted.

B. Merits

The Right to Liberty under Article 7

53. Article 7.1 of the American Convention establishes that "[e]very person has the right to personal liberty and security." Accordingly, Article 7.2 specifies that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto," and Article 7.3 guarantees that "[n]o one shall be subject to arbitrary arrest or imprisonment." A lawful deprivation of liberty must issue from and be executed by a competent authority, and must

be effectuated in accordance with the substantive and procedural requirements of domestic law as well as of the American Convention.

54. In this case, the parties are in accord that, in the early evening of April 9, 1988, Manuel García Franco was forcibly abducted into a gray Trooper, license plate number 112438, by Naval official Fausto López, Sergeant Proaño and three members of the Naval Marine. The agents of the State acted without any judicial warrant or authorization. These facts are undisputed.

55. Article 19 of the Ecuadorean Constitution provides that: "No one shall be deprived of their liberty except by virtue of a written order by a competent authority, in the cases, for the time and with the formalities prescribed by law...." The Ecuadorean Code of Criminal Procedure further specifies the measures which may be taken to legally effectuate an arrest: pursuant to judicial order under Article 172, or in the case of a flagrant offense under Article 174. Neither of these provisions is applicable to the facts set forth in the instant case. Additionally, the agents who apprehended Mr. García were not authorized by law to perform that function. Article 176 specifies that, in general, no one shall be apprehended except by agents authorized by law. Article 4 of the Code attributes competence in dealing with criminal matters to the institutions of law enforcement and the judiciary, and vests no such authority in the institutions or members of the armed forces. Furthermore, Mr. García was held in a location which was not authorized for that purpose. Article 21 of the Code of Enforcement of Penalties and Social Rehabilitation specifies the types of facilities in which a detainee may be held, and does not include military bases. Manuel García was kidnapped by state agents acting arbitrarily and outside the margins of Ecuadorean law, and in contravention of the substantive and procedural requirements of the American Convention.

56. Article 7.5 provides that "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings". Article 7.6 provides that "[a]nyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful." Article 19 of the Constitution of Ecuador sets forth in pertinent part that: "Any person believed to be illegally deprived of their liberty is able to resort to the [writ of] habeas corpus. This right may be exercised by him or by his representative, without necessity of written order, before the Mayor or Council President of the jurisdiction in which he is found...." The right to habeas corpus applies regardless of the reason for the deprivation of liberty, and attaches at the time of detention.

57. The right to petition for a determination of the legality of detention is the fundamental guarantee of a detainee's constitutional and human rights in the case of deprivation of liberty by state agents. This right may not be suspended under any circumstances, and its importance cannot be overestimated. "[H]abeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment." (Advisory Opinion OC-8/87, of January 30, 1987, "Habeas Corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights)," Ser. A No. 8, para. 35.)

58. In view of the fact that Manuel García was illegally abducted, absent any judicial order, by state agents who lacked the legal authority to take such actions, and held incommunicado in a clandestine location, it may be presumed that Mr. García was prevented from exercising his right to be brought promptly before a judge and to habeas corpus protection in violation of Article 7 (5) and (6). Detention incommunicado describes the situation of a person in custody who is cut off from communication with the outside world. Those responsible for the detention thus have exclusive control over the detainee. "The situation [of incommunicado detention] creates an atmosphere conducive to other illegal practices, particularly torture; if those in charge need not produce the prisoner posthaste they can use brutal methods with impunity, for the purposes of either interrogation or intimidation." [FN1] Ecuadorean law provides for incommunicado detention only pursuant to judicial order. Its application in the instant case absent judicial authorization thus contravened the terms of domestic law, thereby constituting a further breach of Article 7.2.

[FN1] (Report on the Situation of Human Rights in Bolivia, OEA/Ser.L/V/II.53, doc. 6, 1 July 1981, p. 41-42., at p. 42.)

The Right to Humane Treatment and to be Free from Torture under Article 5

59. Article 5.1 of the American Convention guarantees the right of every person "to have his physical, mental, and moral integrity respected." Article 5.2 establishes that: "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." Torture may be more specifically understood as, "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining ... information or a confession," or for the purposes of punishment or intimidation. [FN2]

[FN2] See e.g., Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," GA Res. 3452 (XXX), 9 Dec. 1975. It should be noted that Article 44 of the Constitution of Ecuador sets forth that the State guarantees to all subject to its jurisdiction the free and full exercise of the civil, political and other rights established in "the declarations, agreements, conventions and other international instruments in effect." (Emphasis added.) Ecuador signed the Inter-American Convention to Prevent and Punish Torture on May 30, 1986, but has yet to deposit its instrument of ratification.

60. It is uncontroverted that Manuel García was abducted by a group of state agents and held for a period of time at the San Eduardo Base, and that a youth named Pedro C. V. was abducted with him. It is also uncontroverted that Pedro was held with Mr. García for approximately four to five hours, and was then released. Pedro stated in his April 2, 1991 deposition before the Criminal Investigation Service of Guayas that he and Manuel were forced against their will into

a gray Trooper by five Marines. Prior to the being driven away, their eyes were taped so they could not see where they were being taken. During the journey, he stated, they were both hit by the Marines with sticks and interrogated about a missing vehicle. He testified that when they reached their destination, he had been subjected to beatings and the application of electric current to his body, and had scalding water thrown on his feet. He further stated that when he was taken away, the Marines who had abused him stayed with Mr. García, about whose whereabouts he knew nothing further.

61. Immediately after his release, Pedro had told the García family and his employers that the Marines had Mr. García hanging from a tree, and that they were beating him. Within days after Mr. Garcia's disappearance, on April 14, 1988, Fanny García filed a written denunciation before the Chief of the Criminal Investigation Service which placed the authorities on notice that the García family had information which led them to believe that Manuel García had been tortured. Fanny García indicated her belief that, due to her brother's delicate state of health, he would not have withstood the kind of treatment to which it appeared he had been subjected.

62. The sole Governmental response to these allegations is contained in the report of the General Commander of the Naval Marine, dated August 9, 1988, in which he stated that "investigations carried out" showed that Mr. García and Pedro suffered no psychological or physical pressure. However, the General Commander did not proffer this as first-hand information, and made no reference as to its source. The record before the Commission contains no evidence of any investigation into allegations of torture as a result of the complaints filed at the domestic level or in connection with the processing of this case before the Commission.

63. The state necessarily bears a certain responsibility for any individual who has been detained by its agents. This is particularly so where an individual has been illegally and arbitrarily detained by state agents, and where there are prima facie indications that he or she may have been tortured while under their control. Consequently, the burden of proof corresponds to the State, as the means to investigate and any available evidence were or should have been at the disposal of the authorities.[FN3]

[FN3] See generally, ECtHR, *Ribitsch v. Austria*, Ser. A No. 336, 4 Dec. 1995, paras. 31-40 (affirming that the State was responsible for any person in detention at the hands of its agents, and therefore bore the burden to produce evidence casting doubt on allegations of mistreatment brought by a detainee who had been injured while in custody).

64. Under these circumstances, given the evidence proffered by the petitioners, and given the fact that clandestine conditions of detention are utilized precisely to evade the judicial oversight required by law, thereby rendering the victim utterly vulnerable to abuse, the Commission finds that the State failed to discharge its burden to investigate and produce evidence tending to show that Mr. García had not been subjected to physical violence. Accordingly, considering the foregoing circumstances, the Commission finds that Mr. García was subjected to physical violence amounting to torture.

The Right to Life under Article 4

65. Article 4 of the American Convention provides that: "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." The State of Ecuador is legally required to take steps to respect and ensure the right to life set forth in Article 4:

to guarantee [to] every person subject to its jurisdiction the inviolability of the right to life and the right not to have one's life taken arbitrarily. These rights imply an obligation on the part of States Parties to take reasonable steps to prevent situations that could result in the violation of that right.

(Velásquez Rodríguez, Judgment of July 29, 1988, para. 188.)

66. The petitioners invoked and attempted to exhaust various domestic remedies in order to gather information on Mr. García's whereabouts or fate. Their attempts were frustrated by the refusal or inability of the relevant authorities to process their claims.

67. The State relied on a statement given by Captain López in initially contending that Manuel García Franco had been detained (admittedly illegally) and released approximately four to five hours later. The Commission has noted that the October 21, 1989 statement was unsworn, and was given before CPF-G-IM Manuel Zapater Ramos, the Naval Official who, according to the statement, had a year and a half previously placed four Marines at the disposal of Captain López to carry out functions they were not authorized to perform. In its June 4, 1990 submission to the Commission, the State of Ecuador reaffirmed that, in accordance with the reports of the Ministries of State and Defense:

Mr. García Franco was momentarily detained April 9, 1988, on suspicion that he had been one of those who assaulted [the wife of the Lieutenant]. However, this citizen was freed three hours later because he had not offered any data for the investigation.

The State has since acknowledged that Mr. García remains disappeared, having proffered information in its final submission of August 26, 1996, to the effect that Mr. García had been "[d]etained and disappeared since Saturday April 9, 1988, by Naval Marine official Fausto López and a group presumably of Marines."

68. It is uncontroverted that Manuel García Franco was illegally and arbitrarily detained by state agents on April 9, 1988, and the Commission has determined that he was tortured while under the exclusive control of those agents. The parties to this case are in accord that Manuel García Franco has neither been seen nor heard from since that time. Under such circumstances, the burden of proof rests with the State. (See, Case of Neira Alegria and Others, Judgment of January 19, 1995, Ser. C No. 20, paras. 60, 65.) "The State controls the means to verify acts occurring within its territory." (Id., citing, Velásquez Rodríguez Case, supra, Ser. C No. 4, paras. 135-36, Godínez Cruz Case, supra, Ser. C No. 5, paras. 141-42.)

69. The State of Ecuador has produced no evidence of an investigation into the events of April 9, 1988 or into the subsequent disappearance of Manuel García. Accordingly, the State has failed to discharge its burden of proof. Consequently, considering: 1) the fact that Mr. García was last known to be in the custody of state agents; 2) that the State acknowledges that Mr. García remains disappeared; 3) that "a `disappearance' not only constitutes an arbitrary deprivation of liberty but also a serious danger to the personal integrity and safety and even the very life of the victim;"[FN4] and, 4) that over eight years have passed since Mr. García was last seen or heard from, it may be presumed that Manuel García Franco was in fact deprived of his right to life, arbitrarily and illegally, by agents of the Ecuadorean State.

[FN4] IACHR, Ten Years of Activities, 319 (1982).

The Right to Justice under Articles 25 and 8

70. Article 25 of the American Convention provides that:

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.

The appropriate mechanism to ensure Mr. Garcia's right to judicial protection would have been a writ of habeas corpus. However, the circumstances of his enforced disappearance prevented him from exercising that right.

71. Ecuadorean law provides that the right to file a habeas corpus petition may be exercised by the person concerned or by another person on his or her behalf. Accordingly, Fanny García filed a writ of habeas corpus on her brother's behalf on June 2, 1988. While that filing should have engendered the corresponding legal procedures and investigation, in fact it was never investigated or otherwise acted upon. This fundamental protection was thereby denied.

72. In addition, the García family pursued claims before the Tribunal of Constitutional Guarantees, and exercised the right to intervene in the case against Captain López before the First Criminal Court of Guayas. In this regard, the Commission notes that the remedies which Article 25 requires the state to make available and effective must be implemented in accordance with the procedural guarantees established in Article 8 of the Convention. As the Honorable Court has stated:

Under the Convention, State Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art.25), remedies that must be substantiated in accordance with the rules of due process of law (Art.8.1), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art.1).

(Velásquez Rodríguez, Preliminary Objections, para. 91.) Notwithstanding that the García family has pursued justice in this case through all possible channels, domestic proceedings have been characterized by their failure to produce any substantive result. The case initiated by the Tribunal of Constitutional Guarantees was never fully processed. The case before the First Criminal Court of Guayas apparently remains pending, despite having lain dormant since May of 1992. Such prolonged delay means that the family's right to be heard promptly has effectively been suspended and thereby denied.

73. The State of Ecuador failed to honor its obligation to provide simple, swift and effective legal recourse to the García family, so that they could know the full truth about what happened to Manuel, including the circumstances of his torture and death. This duty flows from the obligation of the state under Article 1.1 to "use all the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction [in order] to identify those responsible." (Velásquez Rodríguez Case, *supra*, para. 166.) Family members are entitled to information as to what happened to their relative.[FN5] The record in this case discloses no meaningful effort to investigate the fact that the whereabouts of Manuel García could not be accounted for after his detention at the hands of state agents.

[FN5] (See, e.g., Annual Report of the IACHR 1985-86, OEA/Ser.L/V/II.68 doc. 8 rev. 1, at 193, 26 Sept. 1986.)

74. This right to know the truth about what happened is also based on the need for information to vindicate another right. In the case of a disappearance, family members have the right to know the exact fate of the victim, not only for the purpose of learning exactly how his or her rights were violated, but also in order to enforce their own right to compensation from the State. Under Ecuadorean law, the right to civil compensation cannot be pursued in the absence of a judicial determination of criminal responsibility.

75. Furthermore, the Commission has established that victims and their relatives have a right to a judicial investigation by a criminal court designed to identify the perpetrators of human rights violations and sanction them accordingly.[FN6] Although the Prosecutor in case 326-88 issued an accusation against Captain Fausto López in May of 1992 for having illegally and arbitrarily detained Mr. García, the case has never gone to trial. There is nothing in the record to indicate that the other State agents involved, all of whom were or should have been identified, were even investigated. While no petitioner enjoys a right to see a particular individual prosecuted, the State is obliged to investigate alleged human rights violations, and to submit those implicated to appropriate prosecution and punishment. As the United Nations Human Rights Committee has stated: "This duty applies a fortiori in cases in which the perpetrators ... have been identified." [FN7]

[FN6] See generally, Report Numbers 28/92 (Argentina), and 29/92 (Uruguay), Annual Report of the IACHR 1992-93, OEA/Ser.L/V/II.83, Doc. 14, corr. 1, March 12, 1993, pp. 35, 154.

[FN7] UNHRCComm., Communication No. 563/1993, Decision of 27 October 1995, para. 8.6.

The Right to be Recognized as a Person under Article 3

76. Mr. García was forcibly disappeared by state agents, a multiple and continuing violation of the American Convention on Human Rights. The objective of those who perpetrate a disappearance is to operate beyond the margins of the law, to conceal all evidence of their crimes, and to escape any sanction. When a disappearance is carried out, the fundamental protections established by law are circumvented and the victim is left defenseless. For the victim, the consequence of an enforced disappearance is, in essence, to be denied every essential right that -- as a matter of law -- is deemed to inhere in the very fact of being human. In this sense, the act of enforced disappearance violates the right of the individual under Article 3 of the American Convention "to recognition as a person before the law." [FN8]

[FN8] See, Article 1.2, Declaration on the Protection of All Persons from Enforced Disappearance, characterizing enforced disappearance as placing the victim: outside the protection of the law ... inflict[ing] severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life. GA Res. 47/133 of 18 Dec. 1992 (emphasis added). See generally, Inter-American Convention on the Forced Disappearance of Persons, adopted June 9, 1994, OEA/Ser.P, AG/doc.3114/94 rev. 1, 8 June 1994.

The Obligations of the State under Article 1.1

77. Article 1.1 of the American Convention charges States Parties with the fundamental obligation to respect the rights and freedoms recognized therein, and to ensure their free and full exercise to all persons subject to their jurisdiction. "Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention." (Velásquez Rodríguez Case, *supra*, para. 164; Godínez Cruz Case, *supra*, para. 173.)

78. In the instant case, agents of the state of Ecuador carried out violations of the right to personal liberty, physical integrity, and of the right to life of Manuel García Franco. The conditions of Mr. García's enforced disappearance deprived him of the right to seek judicial protection, and denied him the right to be recognized as a person before the law. The refusal or inability of the relevant authorities to process and investigate the denunciations of the García family denied them their rights to judicial protection and to be heard, and effectively denied them justice.

79. As stated by the Court: "Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention...." "The State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even if they are acting outside the sphere of their authority or in violation of internal law." (Velásquez Rodríguez, *supra*, paras. 166, 170.) Moreover, "[i]f the State apparatus acts in such a way that the violation goes unpunished ... the State has failed to comply with its duty to ensure the free and full exercise of those rights." (Id., para. 176.)

80. Within the Inter-American system, the interrelated violations that constitute a disappearance have been subjected to special condemnation. The practice of disappearances has been condemned by the OAS General Assembly as "an affront to the conscience of the hemisphere and a crime against humanity." [FN9] The Inter-American Court has emphasized that:

The practice of disappearances, in addition to directly violating many provisions of the Convention ... constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the Inter-American system and the Convention.

(Velásquez Rodríguez, *supra*, para 158.) State responsibility in the case of a disappearance continues until the fate of the victim has been established and his remains located and turned over to the family, the perpetrators have been identified and prosecuted, and reparations have been made to the family.

[FN9] Resolutions AG/RES.443 (IX-0/79); AG/RES.510 (X-0/80); AG/RES.543 (XI-0/81); AG/RES.618 (XII-0/82); AG/RES.666 (XIII-0/83); AG/RES.742 (XIV-0/84), and AG/RES.890 (XVII-0/87).

III. FINDINGS

81. On the basis of the considerations analyzed in this report, the Commission draws the following conclusions:

82. The petition submitted in the case of Manuel García Franco meets all the applicable procedural and substantive requirements and is admissible.

83. With respect to the violations alleged, the Commission finds that Manuel García Franco was forcibly disappeared by agents of the State of Ecuador:

- a. State agents illegally and arbitrarily arrested and detained Manuel García Franco on April 9, 1988, in violation of Articles 7.1-7.3 of the American Convention.
- b. State agents prevented Mr. García from exercising the right be brought before a judge and to petition for habeas corpus, in violation of Article 7 (5) and (6).

- c. State agents tortured Mr. García, and subjected him to treatment contemptuous of his inherent dignity as a human being in violation of Articles 5.1 and 5.2.
- d. State agents arbitrarily deprived Manuel García Franco of his right to life, in violation of Article 4.1.
- e. The treatment to which Mr. García was subjected prevented him from accessing judicial protection in violation of Article 25. Additionally, the relevant authorities failed to investigate and process the judicial remedies invoked by the García family, thereby denying them their right to access judicial protection and their right to be heard within a reasonable time in violation of Articles 25 and 8.
- f. The enforced disappearance of Mr. García by state agents caused him to be held under conditions which placed him squarely beyond the reach of the law, thereby denying him the right to recognition as a person before the law required by Article 3 of the Convention.
- g. The foregoing violations indicate that the State of Ecuador failed to respect and ensure the free and full exercise of the rights protected under the American Convention in contravention of its Article 1.1 undertaking.

IV. RECOMMENDATIONS

84. In accordance with the foregoing conclusions, the Inter-American Commission on Human Rights finds that the State of Ecuador failed to uphold the obligations set forth in Article 1.1 of the American Convention on Human Rights to respect and ensure all the rights and freedoms set forth therein, and is accordingly responsible for having violated Articles 3, 4, 5, 7, 8 and 25.

85. The Commission therefore recommends to the State of Ecuador that it:

- a. Undertake a prompt, impartial and effective investigation of the facts denounced so that the circumstances under which they occurred may be fully brought to light, and those responsible identified and brought to trial.
- b. Immediately undertake the measures necessary to inform the family of Manuel García of the location of his remains, and facilitate the decisions they take as to the appropriate final resting place of his body.
- c. Redress the consequences of the violations set forth, through, inter alia, the payment of fair compensation to those injured as a result of the foregoing violations.

V. PUBLICATION

86. On September 17, 1997 -pursuant to Article 51.1 and 2 of the American Convention- Report 1/97 was sent to the State. In such Report the Commission granted Ecuador 60 days to adopt all necessary steps to comply with the aforementioned recommendations and repair the consequences of the situation examined.

87. On January 30, 1998 -once the corresponding time limit had already expired- the Ecuadorian State presented a certified copy of a decision issued by the First Criminal Court Judge of Guayas. According to such document, Captain Fausto Fabian Lopez Villegas has been formally charged -and his preventive detention ordered- for allegedly committing the offence of

abduction, as contemplated in Articles 188 and 189 of the Ecuadorian Criminal Code, in the case of Mr. Manuel Garcia Franco.

VI. FINAL ANALYSIS AND CONCLUSION

88. The Commission must decide whether the State has taken all necessary steps to comply with recommendations issued in this Report. In that regard, the Commission has taken note of the information furnished by the State and it hopes that, once it is duly completed, the judicial process will lead to the identification and punishment of those involved in the violations committed against Mr. Garcia Franco. The Commission expects the State to continue providing information on the evolution of this trial.

89. Therefore, based on the foregoing considerations and on the provisions set forth in Articles 51.3 of the American Convention and 48 of its Regulations, the Commission decides to ratify its conclusions and recommendations as established in sections III and IV *supra*; to make this Report public; and to include it in its Annual Report to the General Assembly of the OAS.