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Decided by: Chairman: Paolo Carozza;
First Vice-Chairwoman: Luz Patricia Mejia Guerrero;
Second Vice-Chairman: Felipe Gonzalez;
Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Florentin Melendez, Victor E. Abramovich.
Dated: 18 July 2008
Citation: Cuesta Caputti v. Ecuador, Case 12.487, Inter-Am. C.H.R., Report No. 36/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2008)
Represented by: APPLICANTS: Xavier A. Flores Aguirre and Jorge Sosa Mesa
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I. BACKGROUND

1. On May 23, 2003, the Inter-American Commission on Human Rights (hereinafter “the Commission,” or “the IACHR,”) received a petition lodged by Messrs. Xavier A. Flores Aguirre and Jorge Sosa Mesa (hereinafter, the “petitioners”), on behalf of Mr. Rafael Ignacio Cuesta Caputti^[FN1] (hereinafter “Mr. Cuesta Caputi,” or “the victim,”) News Director in the Guayaquil offices of the TC-Televisión television channel. The petition alleges that the State of Ecuador (hereinafter “the State,” or “Ecuador”) did not carry out a proper investigation of the events surrounding a bomb which exploded in Mr. Cuesta Caputi’s hands and injured him, allegedly as a result of his journalistic activities. The petitioners allege that the State, to the detriment of the victim, violated Articles 13 (Freedom of Thought and Expression), 8 (Right to a Fair Trial), 25 (Right to Judicial Protection), of the American Convention on Human Rights (hereinafter “the Convention,” or “the American Convention,”) as well as the general obligation recognized in Article 1(1) (Obligation to Respect Rights).

[FN1] The case file contains references to the names Rafael Ignacio Cuesta “Caputti” and Rafael Ignacio Cuesta “Caputi” to address the victim. The first of those names shall be used hereafter.

2. The State, in relation to the merits of the case, argued that it had duly investigated the facts, and found that it had not committed the violations alleged by the petitioners.

3. The Commission concludes that to the detriment of Mr. Rafael Ignacio Cuesta Caputi, the State violated his rights to a fair trial, to judicial protection, to have his personal integrity respected, and to freedom of thought and expression as recognized respectively in Articles 8.1, 25, 5, and 13, of the American Convention, together with the general obligation to respect and protect rights as recognized in Article 1.1 of the aforementioned treaty.

II. PROCESSING BY THE COMMISSION AFTER ADMISSIBILITY REPORT N° 10/05

4. On February 23, 2005, the Inter-American Commission approved Report No. 10/05, declared the admissibility of the petition, and assigned the case number 12,847. On April 18, 2005, both parties were notified that the admissibility report had been accepted, they were offered the opportunity to reach a friendly settlement, and a period of sixty days was established for the petitioners to present their observations on the merits of the case.

5. The petitioners lodged their observations on the merits on June 24, 2005, and indicated that having explored the possibility of a friendly settlement with the State, no agreement had been reached on the case.

6. On July 2, 2005, the observations of the petitioners on the merits of the case were transmitted to the State and a period of two months was set for the State to present its observations on the merits. The State lodged its observations by note on February 6, 2006.

7. On March 13, 2006, a hearing was held before the IACHR on aspects of the merits of the case.

8. Both parties filed additional notes at different stages of the proceedings, which were duly transmitted to the other party.

III. POSITION OF THE PARTIES

A. The Petitioners

9. The petitioners allege that Mr. Cuesta Caputi was News Director in the Guayaquil offices of the television channel Canal TC Televisión (Channel 10). On January 21, 2000, during a live broadcast, he is said to have criticized the coup d'état that took place in Ecuador that day. The petitioners state that during the broadcast, the television channel received an anonymous telephone call warning it that "someone should make Rafael Cuesta shut up, or else, they would." They add that another anonymous call was received that day warning that a bomb would be sent to the television channel's offices in Quito.

10. They state that at the beginning of February 2000, someone contacted Mr. Cuesta Caputi, identified himself as a private investigator, and offered him a video containing information about the participants in the recent coup d'état. The victim replied that it was not the television channel's policy to buy videos, but that it might be accepted by the channel. The petitioners allege that on February 16, 2006, the television channel's messenger, Mr. Pedro Toaza Ochoa, collected the package containing the video as requested by the victim. They state that Mr. Cuesta

Caputi received the package that day and when he pulled out the videocassette, it exploded, injuring his hands, face, thorax, and abdomen, so that he had to spend the night under medical supervision in a Guayaquil hospital.

11. According to the petitioners, that same afternoon, Mr. Jairala Vallazza, the victim's partner, was contacted by telephone by strangers, who in turn put him in contact with a man who said he represented those responsible for the attack, and that they were demanding that Mr. Cuesta Caputi and another employee should both leave the channel. The petitioners state that during this conversation, the unknown man threatened Mr. Jairala Vallazza that a second attack would take place during a live broadcast, and that the third would blow up the station's antennae.

12. According to the petitioners, on February 17, 2000, Dr. Santiago San Miguel Treviño, the Prosecutor for Guayas and Galápagos, lodged a formal order (excitativa fiscal) to launch criminal proceedings on the basis of the news of the attack published in the "Expreso" and "El Telégrafo" newspapers.

13. The petitioners state that there was an unwarranted delay because the case was under investigation for three years and three months up to the date on which the petition was lodged. They add that after several years, the judicial authorities responsible for examining the case "have not even produced circumstantial evidence regarding the perpetrators of the attack, despite the fact that the possible suspects have been named in public." [FN2] The latter event is allegedly related to the news broadcast by Ecuadorian media on the date of the attack, where it was indicated who the possible culprits were.

[FN2] Petitioners' document, June 24, 2005, page 5.

14. They state that the Inter-American Court of Human Rights has established that in order to define what constitutes a reasonable period, the complexity of the issue must be assessed, as well as the promptness of the interested party in pursuing his proceedings, and the conduct of the judicial authorities. With regard to the first factor, the petitioners are of the opinion that it is not a complex matter given that the event that gave rise to the criminal proceedings was an attack on one person alone, the motives were plain, there were not many people involved, and there were sufficient leads with which to try to identify those responsible. [FN3]

[FN3] Idem, pages 10 and 11.

15. With regard to the prompt pursuit of proceedings by the interested party, the petitioners argue that the case judge (Edgar Salazar Vera) was directly responsible for investigating the attack, "and he, in spite of the fact that there were indications, some of which had even been published, that the people who had made the attempt on Cuesta's life were connected to the coup d'état that had taken place on January 21, deliberately ignored these indications and failed to summon those who had taken part in the coup d'état to give statements." [FN4]

[FN4] *Idem*, page 11

16. They state that judicial activity on the case has been limited and not designed to identify those responsible for the crime. Some enquiries were made of those who had witnessed the events but “the justice administration has done very little and issued instructions which were not implemented.”[FN5]

[FN5] Petitioners’ document, May 20, 2003

17. They allege that the investigation carried out by the State was restricted to, “opening envelopes, requesting information regarding identification card and telephone numbers, and taking statements from people who were witnesses and who wanted to make statements.” They also state that “none of these activities can be described as effective in order to establish the causes, perpetrators, accomplices, and accessories to the crime.” They state that judicial action was ineffectual, focused on measures that were merely informative regarding the facts themselves that were already known, so that no real investigation took place. The petitioners allege that the police did nothing but copy out the information provided by the press, which in turn became the information provided by the police.[FN6]

[FN6] Document for the hearing with the Inter-American Commission on March 13, 2006.

18. The petitioners allege that sufficient evidence exists of the possible participation in the attack on Mr. Cuesta Caputi of those involved in the coup d’état.[FN7] Therefore they claim that on the basis of Article 63[FN8] of the former Code of Criminal Procedure in force at the time of the investigation, the State should have called said persons to make statements.

[FN7] *Idem*, page 25.

[FN8] Article 63 of the Code of Criminal Procedure in force at the time of the events: At the preliminary stages, the judge should investigate the backgrounds of those persons accused, as well as the factors immediately and less immediately related in time and space consequent upon the crime. In the same way he must also meticulously investigate the behavior of the accused before the crime was committed.

19. The petitioners state that as a consequence of a reorganization of the Ecuadorian Attorney General’s Office when the new Code of Criminal Procedure entered into force on July 13, 2001, all the trials that were underway under the old system were transferred into the hands of a special prosecutor. The result of this was that the case of Mr. Cuesta Caputi could no longer be heard

within the established time limits because the backlog of cases was too great for one official to handle.

20. The petitioners say that the State expressly rejected its obligation to investigate by issuing a provisional stay of proceedings [auto de sobreseimiento provisional] with the argument that neither the Judicial Police, nor the Office of the Attorney General, nor the victim, had been able to establish who had been responsible for the attack. They are the opinion, however, that the police have only an auxiliary role in the investigation because the police are only a third party in the case, not instigators. They claim that it is the judge who should drive and direct investigations, which is why he should not have passed the aforementioned stay of proceedings on the basis only of the police investigation.[FN9]

[FN9] Document from the IACHR hearing dated March 13, 2006, page 18.

21. Therefore, they claim that according to Article 249[FN10] of the former Code of Criminal Procedure, the stay of proceedings has the effect of suspending the proceedings for a period of five years, a period during which new evidence relating to the crime may be presented. However, they point out that this would be impossible and pointless in view of the fact that the crime of injury will have prescribed because five years will have passed since it was committed.

[FN10] Article 249 of the Code of Criminal Procedure in force at the time of the events: The stay of proceedings suspends the substantiation of the proceedings for a period of five years; and the provisional stay of accusation suspends substantiation for three years. During these periods, new evidence may be presented in connection with the crime, in favor of either the guilt or innocence of the person charged.

22. Given these facts, the petitioners allege that because it should have investigated the attack on and threats to the victim, the State of Ecuador is responsible for violating the terms of Articles 8(1) and 25, and its generic obligation recognized in Article 1(1) of the American Convention.

23. They claim that the explosion of the aforementioned letter bomb injured Mr. Cuesta Caputi's face and hands. They state that "although agents of the State did not participate directly in the attack, the lack of an appropriate investigation and the inaction of the case judge in failing to take the necessary steps to ensure that the proceedings continued being substantiated, make the Ecuadorian State responsible for Mr. Cuesta Caputi's[FN11] physical integrity. They point out that the State's argument regarding the possibility that the victim could file recourses of cassation or recusal is only aimed at distracting from the fact that there was no diligence or impartiality in the processing of the matter, and they stress that the recourse mentioned above would not have corrected the omissions in the investigation.

[FN11] Petitioners' document dated June 24, 2005, pages 15 and 16, and document from the IACHR hearing dated March 13, 2006, page 33.

24. Therefore, the petitioners state that the attempted murder of Mr. Cuesta Caputi on December 16, 2000, was linked to the criticisms he had voiced of the coup d'état in Ecuador.[FN12] They state that the refusal by the State to carry out a complete investigation to punish the perpetrators who had attempted to silence Mr. Cuesta Caputi constitutes a violation of freedom of expression and of the right of all citizens to receive freely information and ideas of any nature.

[FN12] Petitioners' document dated June 24, 2005, page 17, and document from the IACHR hearing dated March 13, 2006, page 30.

25. In short, the petitioners state that because the State did not identify, bring to trial, or punish those responsible for the attack on Mr. Cuesta Caputi, this constitutes a violation of his right to judicial guarantees (Article 8(1)), to judicial protection (Article 25), to personal integrity (Article 5), and to freedom of expression (Article 13); and each of these in relation to the obligation of the State to respect and protect rights (Articles 1(1)).

B. The State

26. The State claims that it has not violated the judicial guarantees recognized in Article 8(1) of the American Convention because it was processing the case within a period "according to the type of proceedings, within the range of possibilities available to the State," and therefore meets the definition of reasonableness established by the Court and by the Inter-American Commission on Human Rights. It points out that the delay in carrying out investigations into the attack on the alleged victim is justified by the complexity of the case.[FN13]

[FN13] State document dated February 7, 2005, page 14.

27. The State points out that the authorities responded quickly to the act committed against Mr. Cuesta Caputi. However, the physical evidence collected was not sufficient to identify with certainty those responsible for the crime. As a result, they argue that there is no evidence that would allow them to assign responsibility for any act or omission by a state official.

28. The State describes specific steps taken by the police and judicial authorities who were in charge of the investigation. Prominent amongst these is a document dated January 23, 2000, directed to the first criminal judge in Guayas, requesting his presence in order to open the three envelopes sent by the same person who had dispatched the envelope to Mr. Cuesta; a copy of a receipt for the dispatch of a packet sent to Mr. Rafael Cuesta and signed on the back by Gustavo Mendez; a document dated February 16, 2000, requesting a certified copy of the index of identity

cards of those citizens throughout the Republic called Gustavo Mendez; technical reports from the judicial police; witness statements and affidavits.[FN14]

[FN14] *Idem*, pages 3, 4, and 5.

29. The State alleges in relation to Article 25 of the American Convention, that the petitioners have had “unlimited access” to the remedies available under domestic law to protect the right to “personal freedom” and other basic human rights, amongst which are both appeal and annulment, neither of which were exhausted.[FN15]Therefore, the State considers that it has protected the right of the alleged victim to free access and full exercise of judicial guarantees, and that the victim at no time has been prevented from exercising his right to be heard on an equal basis by the competent bodies.

[FN15] *Idem*, page 14.

30. The State claims that “the Inter-American Court has indicated in this regard that although the State is obliged to prevent violations of human rights, the mere fact that a right has been violated is not sufficient proof that the State has failed to observe its obligation,” and furthermore that the State has responded to the attack by attempting to clarify the events, and to bring those responsible to justice and punishment.[FN16]

[FN16] Document of observations by the State on the merits of the case dated January 7, 2006.

31. With regard to its duty to investigate, the State claims that according to the Inter-American Court, “the duty to investigate, like the duty to prevent, is an obligation by means or behavior that is not breached merely because the investigation does not produce a satisfactory result,”[FN17] and that therefore, there has not existed on the part of the State a lack of care in investigating this case, but rather, by assumed by the State “as its own legal duty to search for the truth” and has not underestimated the gravity of the crime nor has allowed either the initiative behind proceedings or the search for evidence to be assumed by third parties.[FN18]

[FN17] I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C, No. 4, paragraph 177.

[FN18] State’s document, February 7, 2005, pages 2 and 3.

32. In as far as the violation of the right to personal integrity is concerned, the State claims that there is no evidence that would amount to responsibility under international instruments because it has not been shown that any state agents participated in the attack on Mr. Cuesta

Caputi.[FN19] Furthermore, the case of Acosta Calderón[FN20] is quoted where the Court concluded that where there is not sufficient evidence to prove the case, no judgment can be reached concerning the violation of Article 5 by the State.

[FN19] *Idem*, page 11.

[FN20] I/A Court H.R., Acosta Calderón Case. Judgment of June 24, 2005. Series C, No. 129, paragraph 143.

33. In short, the State claims that none of the alleged violations of the human rights of Mr. Rafael Ignacio Cuesta Caputi took place.

IV. CONSIDERATION OF THE MERITS

A. The Facts

34. In the present case, the Inter-American Commission observes that the State did not in any of its presentations dispute in totum the facts as presented by the petitioners. In fact, the response of the State consisted merely of describing specific proceedings that were part of the criminal investigation, emphasizing that the delay was due to the alleged complexity of the matter, and that it has not been shown that any state agents took part in the attack on Mr. Cuesta Caputi.

35. The IACHR observes that the State has not answered all the facts and evidence presented by the petitioners. In this regard, the Commission recalls that Article 39 of its Rules of Procedure states that:

The facts alleged in the petition, the pertinent parts of which have been transmitted to the State in question, shall be presumed to be true if the State has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion.

36. Although the burden of proof in the proceedings before the Inter-American Commission corresponds, in principle, to the party lodging the complaint, lack of contradiction by the State produces in practice an inversion of that burden. If the State does not contradict the facts of the merits of the case and nor does it produce evidence to question the facts, the Commission may presume that the alleged facts are true, as long as other evidence does not lead to a different conclusion.

37. The Commission is empowered to request information from the parties, to carry out in loco investigations of matters submitted for its examination, and to request any evidence that it considers relevant. The State, for its part, as well as assuming the burden of proving the facts on which it bases its defense, is obliged to collaborate, including by supplying any information requested by the Commission and provide all the facilities necessary for the investigations requested by the Commission.[FN21] The Inter-American Court of Human Rights has indicated that in proceedings relating to human rights violations, “the State cannot rely on the defense that

the complainant has failed to present evidence when it cannot be obtained without the State's cooperation. The State controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State."

[FN21] See in this respect, for example, Article 48(a), (d), and (e) of the American Convention.

38. When weighing up the evidence, the Commission takes into account those criteria mentioned by the Inter-American Court of Human Rights. In this context, the Court has stated, for example, that:

The Court has previously stated that the procedures adopted for the receipt and assessment of evidence are not subject to the same formalities as for domestic judicial proceedings (...) Furthermore, the Court takes account of international jurisprudence, considering that international courts are empowered to study and assess evidence in line with the rules of healthy criticism, and have avoided adopting a rigid definition of the quantum of evidence necessary to substantiate a finding. This criterion is especially valid in relation to international human rights courts that avail of great flexibility in assessing the evidence put before them regarding the relevant facts, in line with the rules of logic and on the basis of experience.[FN22]

[FN22] I/A Court H.R., Case of the Ituango Massacres. Judgment of July 1, 2006, Series C, No 148, paragraph 108; I/A Court H. R., Case of the Massacre of Pueblo Bello. Judgment of January 31, 2006. Series C No. 140, paragraph 63; I/A Court H. R., Case of Blanco Romero et al. Judgment of November 28, 2005. Series C No. 138, paragraph 39; I/A Court H. R., Case of García Asto and Ramírez Rojas. Judgment of November 25, 2005. Series C No. 137, paragraph 84; and I/A Court H. R., Case of Gómez Palomino. Judgment of November 22, 2005. Series C No. 136, paragraph 46.

39. In accordance with the foregoing, on the basis of the allegations by the petitioners, given the absence of express response by Ecuador to the facts that have been presented, having copies of the judicial files and other evidence contained in the documentation, the Commission is in a position to pronounce on the facts established in this case.

The attack on Mr. Cuesta Caputi

40. Mr. Cuesta Caputi was News Director at the Guayaquil office of the television channel Canal TC Televisión (Channel 10). On January 21, 2000, a coup d'état took place in Ecuador in which members of some indigenous political movements took part along with members of the Ecuadorian armed forces. Immediately after the coup, Mr. Gustavo Noboa Bejarano, who until that day had been the vice president, took power.[FN23] That same day, the victim and an associate, Mr. Jaime Jairala Vallazza, were making a live broadcast during which they criticized the coup and described it as a threat to the democratic stability of the country.[FN24] During the

broadcast, the television channel received an anonymous telephone message warning it that someone “should make Rafael Cuesta shut up, or if not, they would.” The same day, another telephone message was received at the offices of the television channel in Quito, differing in that this call included a threat to bomb the Quito offices.[FN25]

[FN23] Permanent Council of the Organization of American States, CP/RES.764 (1221/00), January 26, 2000.

[FN24] State document, February 7, 2005, page 7 and paragraph 71 of this same report.

[FN25] Annex 1, Judicial file, “Statement by María Guevara,” page 1.

41. Between February 9 and 14, 2000, other letter bombs were sent to both journalists and politicians in Ecuador, all of which were intercepted and deactivated by the police.[FN26] In the same period, letters with threats supposedly signed by the “Ejército Ecuatoriano de Liberación Popular” (Ecuadorian Popular Liberation Army) were sent to journalists in this country.[FN27] Some in the media in Ecuador accused that insurgent group of possibly participating in those activities.[FN28]

[FN26] Committee to Protect Journalists, The Americas 2000, available at: <http://www.cpj.org/attacks00/americas00/Ecuador.html>.

[FN27] Idem.

[FN28] Annex 2, “Recortes de Prensa”; ‘Diario Expreso de Guayaquil,’ ELP claims attacks, note on February 25, 2000; ‘Diario El Universo,’ Attacks place Police on alert, note February 25, 2000, and ‘Revista Vistazo,’ Bombs in Cuenca, report on March 2, 2000.-----

42. In early February, 2000, a person identifying himself as Luis Ortiz rang the office of Mr. Jairala Vallazza, and offered to negotiate an agreement by which he would sell to the channel a videocassette in which appeared the main conspirators in the coup to bring down the then president of Ecuador, Jamil Mahuad Witt. Mr. Jairala Vallazza’s office told the caller to ring Mr. Cuesta Caputi’s number because as head of the channel’s news department, he would be the most appropriate person to take the call.[FN29]

[FN29] Annex 1, Judicial file, “Statement by Jaime Jairala,” Page 1 and 2; Annex 1, Judicial file “Statement by María Aragundi,” Page 1.

43. On February 4, 7, and 14, 2000, the caller rang Mr. Cuesta Caputi at his office and on his mobile telephones. The caller identified himself as a private investigator and stated that he wanted these images to be shown for the good of the country. Mr. Cuesta Caputi told him that it was not channel policy to buy videos but that if the caller wanted to send it to him anyway, he could do so, at which the supposed private agent said that he would send the first part on February 9, 2000. On February 14, 2000, Mr. Cuesta Caputi received a call in which someone

stated that the video would arrive on February 16 in the morning, in a Semería service package.[FN30]

[FN30] Annex 1, Judicial file “Evidence of Rafael Cuesta,” Page 1.

44. On February 16, 2000, Mr. Cuesta Caputi dispatched the channel messenger, Mr. Pedro Toaza Ochoa, to collect the packet which consisted of a brown envelope with the sender’s name recorded as “Gustavo Méndez.” The packet had been sent from the city of Cuenca on February 14, 2000, via the transport company Super Semería, under invoice No. 001150, and waybill No. 08176, on vehicle No. 15. Mr. Pedro Toaza returned to the offices of TC-Televisión and handed the envelope to Mr. Cuesta Caputi.[FN31]

[FN31] Annex 1, Judicial file, “Evidence of Rafael Cuesta,” Page 1; Judicial file, “Evidence of Pedro Toaza,” Page 1.

45. Immediately after Mr. Cuesta Caputi received the packet he opened it and found the videocassette inside a box. While walking to the door of his office, he took the videocassette out of the box and at that moment it exploded.[FN32] Mr. Cuesta Caputi suffered injuries to his body[FN33], caused by fragments of the bomb, in his hands, face, thorax, and abdomen, and was taken to the Clínica Guayaquil.[FN34]

[FN32] Annex 1, Judicial file, “Evidence of Rafael Cuesta,” page 1.

[FN33] Statement of May 23, 2003, Annex. Video “Television reports.”

[FN34] Judicial file, “Certification by Clínica Guayaquil” and “Clinical History.”

46. That same afternoon, Mr. Jairala Vallazza was contacted by strangers, who in turn put him in contact with a man who said he represented the people behind the attack, and that they were demanding that Mr. Cuesta Caputi and one other employee, should retire from the channel. During this conversation, the man threatened Mr. Jairala Vallazza and told him the second attack would take place during a live broadcast, and that the third would blow up the station’s antennae.[FN35]

[FN35] Annex 1, Judicial file, “Statement by Jaime Jairala,” page 2.

Proceedings relating to the attack on Rafael Ignacio Cuesta Caputi

47. On February 17, 2000, Santiago San Miguel Treviño, Prosecutor for the District of Guayas and Galápagos, lodged a formal request [excitativa fiscal] to launch criminal proceedings

relating to the investigation of the facts, basing his request on the news about the attack published in the newspapers “Expreso” and “El Telégrafo.”[FN36] On that same day, agents of the judicial police began their examination of the scene of the events and also began an investigation.[FN37]

[FN36] Annex 1, “Auto cabeza de proceso”, Página 1.

[FN37] Annex 1, Judicial file, “Informative part: Detonation of a bomb,” dated February 16, 2000, signed by Police Captain Carlos Julio Logroño.

48. On February 18, 2000, Edgar Salazar Vera, tenth criminal judge for Guayas, replaced the seventh criminal judge for the same province and declared proceedings open [auto cabeza de proceso]. The tenth criminal judge for Guayas instructed several procedural actions including the taking of statements from the victim and witnesses. He also requested Mr. Cuesta Caputi’s clinical history, and visited Channel 10’s offices.[FN38]

[FN38] Annex 1, Judicial file, “Cabeza de Proceso document,” pages 1 and 2.

49. On February 21, 2000, the seventh criminal judge for Guayas sent an official letter to the Provincial chief of the judicial police in Guayas asking him to carry out an investigation into the affair.[FN39] That same day, the same judge sent an official letter to the Director of the Clínica Guayaquil asking him to send him the clinical history of Mr. Cuesta Caputi,[FN40] and also received the statement from Hugo Gavilanes Borrero[FN41].

[FN39] Annex 1, Judicial file, “Official letter No. 132-JSPG.”

[FN40] Annex 1, Judicial file, “Official letter No. 133-JSPG.”

[FN41] Annex 1, Judicial file, “Statement by Hugo Gavilanes,” page 2

50. Between February 17 and March 1, 2000, the judicial police in Guayas received several voluntary statements and interviewed Mrs. Yolanda Cruz Guille, employee of the Super Semería Transport Cooperative.[FN42] On February 23, 2000, the Provincial chief of the judicial police of Guayas, Efraín Vega Gutiérrez, requested the first criminal judge of Guayas to be present when the three envelopes sent by the same sender, “Gustavo Méndez” to three different persons were to be opened.[FN43] The judge replied the same day[FN44], and issued an instruction ordering the envelopes to be opened that same afternoon[FN45].

[FN42] Annex 1, Judicial file, “Report No. 2000-1453-P1.Guayas.”

[FN43] Annex 1, Judicial file “Official letter No. 2000-3572-P.J.Guayas.”

[FN44] Annex 1, Judicial file “Official letter No. 133-JPPG.”

[FN45] Annex 1, Judicial file “ Instruction dated February 23, 2000;” Annex 1, Judicial file “Procedure to open envelopes.”

51. On February 24, 2000, the tenth criminal judge for Guayas sent numerous official letters asking those people connected with the proceedings to appear before his court in order to give evidence.[FN46] That same day, the Provincial Head of the Guayas Judicial Police was given the technical report on the fingerprint examination carried out on the two envelopes sent by the so-called People’s Liberation Army (ELP) to Messrs. Germán Lobos and Ricardo Polo,[FN47] as well as a technical report containing the transcription of a micro cassette.[FN48]

[FN46] Annex 1, Judicial file, “Official letter No. 0473-JSPG,” “Official letter No. 0474-JSPG,” “Official letter No. 0475-JSPG,” “Official letter No. 0476-JSPG,” “Official letter No. 0478-JSPG.”

[FN47] Annex 1, Judicial file, “Official letter No. 0626-DCG-2000.”

[FN48] Annex 1, Judicial file, “Official letter No. 0627-DCG-2000.”

52. On February 28, 2000, the tenth criminal judge for Guayas received instructive testimony from Mr. Cuesta Caputi.[FN49] On February 29, 2000, the Provincial Head of the Guayas Judicial Police asked the aforementioned judge to extend the respective search warrants for two addresses.[FN50] On the same day, the judge issued a writ agreeing to the search request[FN51]and sent an official letter to the Head of the Judicial Police in Guayas to ensure the instructions would be followed.[FN52]

[FN49] Annex 1, Judicial file, “Evidence from Rafael Cuesta.”

[FN50] Annex 1, Judicial file, “Official letter No. 3948-PJ.Guayas.”

[FN51] Annex 1, Judicial file, “Writ, February 29, 2000.”

[FN52] Annex 1, Judicial file, “Official letter No. 0479-JSPG.”

53. On March 1, 2000, the tenth criminal judge for Guayas received evidence from Jorge Kronfle[FN53] and official letter No. 4134-PJ.GUAYAS, from the Judicial Police. On the following day, he went to the offices of Canal 10 Televisión in order to examine the scene of the events.[FN54] On that same day, the judge received report No. 2000.1453-PJG signed by Police Major Edwin Echeverría Albuja reporting the results of the investigations carried out so far.[FN55] The only conclusions of this report were that a) on February 14, 2000, a letter bomb had been sent to Rafael Ignacio Cuesta Caputi Mendez, following the offer by an alleged private investigator to send a videocassette to the TC Televisión offices; b) on February 16, 2000, the victim had received the letter in question; c) when he was trying to extract the videocassette it had exploded, injuring him in the hands, face, thorax and abdomen; and d) the bomb consisted of a VHS cassette box with a nine volt battery, explosive capsules and other electronic devices.[FN56]

[FN53] Annex 1, Judicial file, "Evidence from Jorge Kronfle."

[FN54] Annex 1, Judicial file, "Examination of the scene of the events."

[FN55] Annex 1, Judicial file, "Official letter No. 4134-PJ.GUAYAS," and "Report No. 2000-1453-P-J-G."

[FN56] Annex 1, Judicial file, "Report No. 2000-1453-P-J-G," Pages 10 and 11.

54. On March 15, 2000, the tenth criminal judge for Guayas issued a writ instructing that a number of steps should be taken in order to corroborate the contents of the police report that had been presented earlier.[FN57]

[FN57] Annex 1, Judicial file, "Writ dated March 15, 2000."

55. On April 4, 2000, the seventh criminal judge for Guayas sent two official letters, the first to the Director of Canal 10 Televisión, requesting the attendance of Messrs. Manuel Ortega, Juan Carlos Drouet, and Jhonny Rodríguez, in order for them to give evidence;[FN58] and the second to the forensic doctors of the Guayas Judicial Police asking them to carry out a forensic medical examination of Mr. Rafael Cuesta Caputi in order to "establish any possible after-effects of the cuts and wounds caused by the bomb attempt on his life." [FN59]

[FN58] Annex 1, Judicial file, "Official letter No. 442-J7PG," and "Official letter No. 448-J7PG."

[FN59] Annex 1, Judicial file, "Official letter No. 448-J7PG."

56. On July 7, 2000, the same judge deeming the preliminary stage of the proceedings to have expired declared the investigation closed. These orders were sent to the office of the government attorney Mr. Mazzini Plaza, so that he could lodge his opinion within a period of six days.[FN60]

[FN60] Annex 1, Judicial file, "Writ dated July 7, 2000."

57. In response to the judge's request, on August 16, 2000, the government attorney concluded that the investigation to date had been inadequate and he requested that proceedings should be reopened in order to carry out a series of crucial investigations that were not yet complete.[FN61]

[FN61] Annex 1, Judicial file, "Statement dated August 16, 2000." The actions requested by the prosecutor were:

1) to find out about the quote used by Mr. Cuesta Caputi, when he gave his instructive testimony: that is, that Channel 10 employees; News Producer Manuel Ortega; Editor Juan Carlos Thoret; and information newsman Jhonny Rodríguez; give their own testimony, to which purpose a date and time must be indicated, so that he may be present when this action is carried out and so that he may be able to conduct the interrogation on behalf of the Office of the Public Prosecutor. 2) That the testimony is received from Lieutenant DARWIN SUAREZ FLORES; and Police Major EDWIN ECHEVERRIA ALBUJA both of whom drafted the investigation report; as well as Captains CARLOS JULIO LOGROÑO and ENRIQUE ESPINZA DE LOS MONTEROS; authors of the informative reports, to which purpose a date and time must be established so that he may be present when this action is carried out and so that he may be able to conduct the interrogation on behalf of the Office of the Public Prosecutor. 3) That a formal notification be issued to the Head of Judicial Police of Guayas; so that he may send the result of the search ordered by the previous judge, by resolution dated February 29, 2000; at 16h15 as set forth at page 27 of the case file, and requested by the Police. 4) That a notification be sent to Pacifictel so that they forward the name of the person, company or institution that has registered telephone number 983478; also to the cell ppphone companies BELLSOUTH and PORTA CELULAR; so that they may inform the name of the person, company or institution that has registered cell phone number 09983478. 5) That the legal doctors of the Judicial Police of Guayas carry out a legal-medical exam on Mr. Rafael Cuesta Caputi, so that they may determine the effects that could have been caused against him by the explosion of the artifact.

58. On August 30, 2000, the fifth criminal judge for Guayas ordered the preliminary stages of the proceedings to be reopened for a period of ten days in order to take certain steps.[FN62]

[FN62] Annex 1, Judicial file, "Writ dated August 30, 2000."

59. On July 8, 2003, Mr. Efren Gavilanes, head of defense in the office of the Attorney General, sent an official letter asking the judge for information concerning criminal case No. 033-2000. The regular seventh judge, responded that according to the former Code of Criminal Procedure, the proceedings were at the stage awaiting the prosecutor's opinion. The State through the office of the Attorney General played no further part in the proceedings, not even to the extent of informing the Judge and prosecutor of the international petition lodged in respect of the case.

60. On January 10, 2005, the Prosecutor for the district of Guayas presented his opinion stating that in accordance with Article 454 of the Penal Code he had verified the actual occurrence of the crime according to law, but that however it had not been possible to establish the participation and responsibility of the alleged perpetrators, accomplices, and accessories, because they had not been fully identified at the summary stage, and he therefore refrained from incrimination.[FN63]

[FN63] Writ of observations by the State on the merits of the case dated January 17, 2006.

61. On December 23, 2005, the seventh criminal judge for Guayas determined that it had not been possible at the summary stage investigation for the judicial police, the Attorney General's office, or the victim to establish who had taken part in the crime and therefore their culpability. According to Article 242[FN64] of the Code of Criminal Proceedings in force at the time of the present case, the judge issued a stay of proceedings and stated that, "for the moment, the case may be substantiated no further." [FN65]

[FN64] Article 242 of the Code of Criminal Proceedings valid at the date of the events: If the Judge considers that the existence of a crime has not been sufficiently established, or if, having established the existence of a crime those responsible have not been identified, or if there is insufficient proof of the participation of a suspect, a provisional stay of proceedings and of the accused may be ordered, establishing that for the moment, no further substantiation of the case may take place.

[FN65] Writ of observations by the State on the merits of the case dated January 17, 2006.

B. The Law

62. The Commission goes on to examine whether in the present case the following legal rights have been prejudiced: the right to judicial guarantees (Article 8.1), the right to judicial protection (25), the right to personal integrity (5), and to freedom of expression (Article 13); and all of these in relation to the obligation of the Ecuadorian State to respect and protect the rights recognized in the American Convention (Article 1.1) to the detriment of Mr. Rafael Ignacio Cuesta Caputi.

1. The right to judicial guarantees and judicial protection (Articles 8 and 25 in relation to Article 1.1 of the American Convention)

63. Article 8(1) of the American Convention recognizes the right of every person to a hearing by a competent tribunal or judge within a reasonable time:

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.

64. Article 25 of the American Convention protects the right of everyone to simple and prompt recourse to a competent court or judge for protection against acts that violate his fundamental rights:

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.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

65. Article 1(1) of the American Convention establishes the obligation of the State to respect and ensure the free and full exercise of the rights recognized therein:

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.

66. The Inter-American Commission has indicated on previous occasions the importance of the State's obligation to "investigate and punish the perpetrators of human rights violations, and to compensate the victims of those violations or their next of kin." [FN66] This obligation derives from Article 1(1) of the Convention that "establishes the obligation of States to ensure to all persons subject to their jurisdiction the free and full exercise of the rights and freedoms recognized in said Convention."

[FN66] IACHR, Annual Report 2004, Report No. 33/04, Case 11.634 (Jailton Neri da Fonseca), Brazil, paragraph 94.

67. The Court has declared the fundamental importance of Article 1.1 in order to establish whether the violation of one of the articles of the Convention may be attributed to a State party, and in this regard states that:

that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. 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. [FN67]

[FN67] I/A Court H.R., Velásquez Rodríguez Case, supra footnote 17, paragraph 164.

68. As established by the Court's jurisprudence, when a criminal investigation is the remedy available to make good the violation of a right protected by the Convention, this must be

launched ex officio and without delay by the State,[FN68] vis-à-vis the rules of due process (Article 8(1)), and all in keeping with the general obligation to ensure the full and free exercise of the rights recognized in the Convention to all persons subject to their jurisdiction.[FN69] The Court has also highlighted that compliance with judicial guarantees requires due diligence in official investigation activities.[FN70]

[FN68] I/A Court H.R., Ximenes Lopes Case. Judgment of July 4, 2006, Series C, No. 149, Baldeón García Case. Judgment of April 6, 2006. Series C, No. 147, paragraphs 92 and 93; Case of the Massacre of Pueblo Bello. Judgment of January 31, 2006. Series C, No. 140, paragraph 143; and Case of the “Mapiripán Massacre”. Judgment of September 15, 2005. Series C, No. 134, paragraphs 219 and 223.

[FN69] I/A Court H.R., Case of the Moiwana Community. Judgment of June 15, 2005. Series C, No. 124, paragraph 142; Case of the Serrano Cruz Sisters. Judgment of March 1, 2005. Series C, No. 120, paragraph 76; Case of the “Mapiripán Massacre”, supra footnote 68, paragraph 195.

[FN70] I/A Court H.R., Goiburú Case. Judgment of September 2006. Series C No 153, párr. 110.

69. On the basis of these revered instruments, the IACHR will now summarize the lack of diligence in the investigation into the attack on Mr. Rafael Ignacio Cuesta Caputi, which resulted in no one being identified as responsible for the crime and the criminal act itself becoming statute-barred.

70. The Commission observes that in the present case, the State of Ecuador has not shown that an effective investigation was carried out. According to the established facts, it has been shown that on February 16, 2000, an investigation began into the events surrounding the attack on Mr. Caputi, which gave rise to the report 2000-1453-PJ-G dated March 2, 2000, and which stated that it had only been possible to verify that the crime had actually taken place, without establishing either the participation or responsibility of any intellectual or material authors.

71. The investigations established that on January 21, 2000, when Mr. Rafael Cuesta Caputi along with Mr. Jaime Jairala criticized the coup d'état during a live broadcast, someone made a call to the television channel to say that Mr. Cuesta Caputi should be silenced.[FN71]

[FN71] Annex 1 “Judicial file,” Police Report, page 9, and statement by Jaime Antonio Jairala Vallazza.

72. In addition to the statement by Mrs. María Verónica Guevara Lozano, who took the call on the television channel’s computer, there are several other pieces of evidence that might throw light on the link between the people who participated in the coup and those who carried out the attack on Mr. Cuesta Caputi. One of these pieces of evidence is the statement given by the victim who stated the need to investigate the links between the two events; the press cuttings that form part of the proceedings; the international publicity surrounding the coup d'état in 2000 and statements by other people who collaborated with the proceedings and reported the names of

people who might have taken part in the coup.[FN72] However, the judge in charge of the case failed to call any of those persons to give evidence even though he was empowered to do so by Articles 104 and 112 of the former Code of Criminal Procedure of Ecuador,[FN73] applicable to the case at the time of the events. Furthermore, he also omitted to use information that was available and even well known in the public forum concerning the names of those who had played a part in the coup d'état on January 21, 2000, and link it to the case, even though that same judge had earlier used information that had appeared in the local press as the basis for his own investigation.[FN74]

[FN72] Annex 1 "Judicial file," Statement by Jaime Antonio Jairada Vallazza, and Statement by María Aragundi Morales, Annex 2, "Press Cuttings."

[FN73] Article 104: If the witnesses, the victims, or the accused refer in their statements to other persons, stating that these persons saw the offense committed, or heard it spoken of, or have information concerning the offense or those involved, or regarding where they are; and in general, when the difference either alone or combined with another, might help uncover the truth, the Judge shall proceed, without delay to issue the appointment, if it is considered essential.

Once the appointment has been held, the statement which mentions him will be read to the witness, and will serve as the basis of his own statement.

Article 112: Not only the persons called by the judge, but anyone who has any knowledge concerning the committing of the offense is obliged to appear in person to give evidence. The judge can have recourse to the police force to ensure the appearance of the witness if he fails to respect his obligation.

[FN74] Annex 1 "Judicial file," Formal Order [Excitativa Fiscal] dated February 17, 2000.

73. In his statement on February, 28, 2000, Mr. Cuesta Caputi stated that on February 7, of the same year, he had received a call on his mobile phone from the persons who sent him the letter bomb, however, at no time did the authorities show that they had ordered the origin of those calls to be investigated.

74. It was also shown that on February 16, 2000, Mr. Cuesta Caputi received a packet that consisted of a brown envelope, the sender of which was shown as "Gustavo Méndez." That same day the judicial police in Guayas ordered the provincial head of the Guayas Civil Register to hand over a list of all the identity card numbers of citizens listed with that name throughout Ecuador.[FN75]

[FN75] Annex 1 "Judicial file," Letter No. 2000-3064 PJ Guayas.

75. It was also shown that the statement by Ana del Carmen Chaca, an employee of the Semería transport company, and the only person to have seen the person who handed in the letter bomb, was taken without the presence of the judge in charge of the case or of any other judicial officer who could direct the statement effectively and ask the appropriate questions.

Furthermore, when answering the question by police as to why she had not taken down the full details of the sender, she said that they never normally do.[FN76] This contradicts the statement by the company manager who said that when packets are received, “we take down details of the name, identity card number, and the person to whom it is being sent.” Given the discrepancy between the two statements, the case judge did not compare and contrast the two in order to look further into the identification of the attack suspect.

[FN76] Annex 1 “Judicial file,” Statement by Ana del Carmen Chaca Gutierrez, February 16, 2000.

76. Of the events proven in the present case, it is clear that on February 16, 2000, the day of the attack, someone calling himself Mark Antony contacted Mr. Jaime Antonio Jairala Vallaza, an associate of Mr. Cuesta Caputi, and gave him a mobile telephone number so that he could contact him. [FN77] However, the State did not prove that it carried out an investigation to identify neither the name he had given, nor its link with the mobile telephone number.

[FN77] Annex 1 “Judicial file,” Report of the Police Investigation, page 8.

77. The judicial police stated that in a call received by Mr. Carlos Mallitasing, a person unknown said that the Popular Fighters Group (GCP) claimed responsibility for the attack, a fact which also does not appear to have been taken into account in the investigation of the case, even though the place where the call originated was identified.[FN78]

[FN78] Annex 1 “Judicial file,” Letter No. 2000-0113-PJ-CP-6 and “Commando latest news.”

78. Neither the evidence collected at the scene of the attack nor the photographs taken of the materials used to make the letter bomb were used as the basis of serious efforts to establish the origin of the materials or the persons authorized to sell and distribute them. Likewise, no examination was made of the handwriting on the envelope in which the bomb was sent in order to establish whose it was.

79. It was also established that further telephone threats to Mr. Cuesta Caputi after the attack came from two telephone numbers that were identified along with their place of origin. On February 29, 2000, the judge in charge of the case was asked for the corresponding search warrant for the places identified, in order to record them and identify the persons who made the calls; however, there is no record that those searches were carried out, and therefore there are no investigation results.[FN79]

[FN79] Annex 1, “Judicial file,” Letter No 3948-P1. Guayas, signed by Colonel Efraim Marcelo Veja Gutierrez and Information Report dated February 29, 2000.

80. It is evident from the above that there has been a series of omissions on the part of the State throughout the whole process which has helped to impede a real and effective investigation into the attack on Mr. Cuesta Caputi. The Inter-American Court has referred in previous cases to the close relationship that exists between the duty to ensure the free and full exercise of human rights with the duty to investigate any situation in which those rights may have been violated, and has said that:

(...)”The States Parties to the American Convention are obliged to provide effective judicial remedies for victims of human rights violations (Article 25), remedies that must be substantiated in line with the rules of due legal process (Article 8.1), and all consistent with the general obligation, of the States themselves, to ensure the free and full exercise of the rights recognized in the Convention for all persons within their jurisdiction (Article 1.1)”.[FN80]

[FN80] I/A Court H. R., Case of the “Mapiripán Massacre”. Preliminary Objections. Judgment of March 7, 2005. Series C No. 122, paragraph 195; Moiwana Community Case, supra footnote 69, paragraph 142 and Case of the Serrano Cruz Sisters, supra footnote 69, paragraph 76.

81. In relation to Article 8(1), the Inter-American Court has stated on numerous occasions that one of the elements of due process is that courts must decide on the cases brought before their jurisdiction within a “reasonable time.” In accordance with this principle the Court has developed three elements that should be taken into account in order to reach a determination regarding the reasonableness of the time taken for proceedings, and these are: a) complexity of the matter, b) procedural activity by the interested party and c) the conduct of the judicial authorities.”[FN81]

[FN81] I/A Court H. R., Case of López Álvarez. Judgment of February 1, 2006. Series C No. 141, paragraph 132; García Asto and Ramírez Rojas Case, supra footnote 66, paragraph 166; and Acosta Calderón Case, supra footnote 20, paragraph 105.

82. In the present case, having examined the few steps undertaken by the State in investigating the events, the Commission considers that the level of complexity of the case does not justify the omissions of the investigation. Furthermore, it considers that Mr. Cuesta Caputi’s role in the proceedings was to collaborate with the State whose duty it is to be the main drive behind proceedings because it was a case concerning a criminal action; and regarding the conduct of the authorities, the Commission considers that they did not act with the necessary diligence to ensure an effective investigation.

83. In terms of the effectiveness of the remedies, the Inter-American Court has stated that “the right to have access to justice is not exhausted by the use of domestic remedies although domestic remedies should protect, within a reasonable time, the right of alleged victims or their next of kin to do whatever is necessary in order to discover the truth and to ensure that any perpetrators are punished.”[FN82]

[FN82] I/A Court H. R., Case of the “Mapiripán Massacre”, supra footnote 68, paragraph 216.

84. Furthermore, the Court has restated the need for the State to ensure the existence of judicial remedies that are truly effective against acts that violate human rights and said that these “should be capable of producing results or responses to the violations of the rights enshrined in the Convention,” and it is not enough for formal remedies to merely exist if they are ineffective in domestic law.[FN83] In this context, the Court states:

Moreover, it is evident from Article 8 of the Convention that the victims of human rights violations or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation.[FN84]

[FN83] I/A Court H. R., Case of Acevedo Jaramillo et al. Judgment of February 7, 2006. Series C No. 144, paragraph 213; Case of López Álvarez, supra footnote 81, paragraph 137; Palamara Iribarne Case. Judgment of November 22, 2005, Series C, No. 135, paragraph 184.

[FN84] I/A Court H.R., The “Street Children” Case (Villagrán Morales et al.). Judgment of November 19, 1999. Series C No. 63, paragraph 227.

85. An examination of the present case indicates that the steps taken by the State were not effective. The last proceedings took place on April 4, 2000, and since that date the case judge has only moved to issue a stay of proceedings dated December 25, 2005 which was confirmed on march 7, 2006. Since the date of the formal order to launch proceedings [excitativa fiscal] (February 17, 2000) the case was inactive for more than 6 years.[FN85]

[FN85] See paragraph 61 of this report.

86. In this context it is appropriate to mention that by 1997, the IACHR was already pointing out that many violations of fundamental rights in Ecuador stemmed from deficiencies in the administration of justice, particularly from widespread delays in the judicial system.[FN86] The Inter-American Court commented on the excessive delay when a State is pursuing proceedings and said that:

(...) “rather than examining the reasonableness of the time taken in investigations, the responsibility of the State in the light of Articles 8.1 and 25 of the Convention should be established by evaluating the development and the results of the criminal process, that is to say, the effectiveness of the duty to investigate the facts in order to determine the truth of what happened, the punishment of the perpetrators and the reparation of the violations committed to the detriment of the victims.”[FN87]

[FN86] IACHR, Report on the Situation of Human Rights in Ecuador, April 24, 1997, chapter III.

[FN87] I/A Court H.R. “Mapiripán Massacre” Case, supra footnote 68, paragraph 222.

87. One of the State’s arguments is that on previous occasions the Inter-American Commission has stated that “the fact that no one has been convicted in the case or that, despite the efforts made, it was impossible to establish the facts, does not constitute a failure to fulfill the obligation to investigate.”[FN88] However, the Commission has also stated that “in order to establish in a convincing and credible manner that this result was not the outcome of a mechanical implementation of certain procedural formalities without the State genuinely seeking the truth, the State must show it has carried out an immediate, exhaustive and impartial investigation;[FN89]” which, in this case, has not been clearly proved. In this context, the Inter-American Court has stated the following:

In certain circumstances, it may be difficult to investigate acts that violate an individual’s rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.[FN90]

[FN88] IACHR, Annual Report 1997, Report No. 55/97, Case No. 11.137 (Juan Carlos Abella and others), Argentina, paragraph 412, Report No. 52/97, Case No. 11,218 (Arges Sequeira Mangas), Nicaragua, paragraphs 96 and 97.

[FN89] IACHR, 1997 Annual Report , Report No. 55/97, Case 11.137 (Juan Carlos Abella et al.). Argentina, para. 412.

[FN90] I/A Court H.R., Velásquez Rodríguez Case, supra footnote 17, paragraph 177.

88. Finally, in the present case, the Commission considers that the investigation carried out by the State was not effective, was restricted to verifying only certain obvious facts such as the scene of the attack and the physical existence of a crime against Mr. Cuesta Caputi. In addition,

the investigation failed to examine the possible participation in the attack of persons whom the facts of the case suggest could be behind the crime or accomplices to it, and omitted to investigate aspects such as the origin of calls, the details of which were known. Predictably, the investigation achieved no concrete results, the case was stayed, the crime of physical injury to Mr. Cuesta Caputi became statute-barred in domestic law, and the events have gone unpunished.

89. On the basis of the foregoing, the Inter-American Commission concludes that by not effectively investigating the attack on and threats to Mr. Rafael Ignacio Cuesta Caputi by using all means available at law, the State violated Articles 25 and 8(1) in relation to Article 1(1) of the American Convention.

2. Right to freedom of expression (Article 13 in relation to Article 1(1) of the American Convention)

90. Article 13 of the American Convention states that:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

(...)

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

91. Freedom of expression is essential in a democracy. Since its earliest statements on the issue the Inter-American Court has always stated that within a democracy it is necessary to “guarantee the widest possible circulation of news, ideas, and opinions as well as the widest access to information by society as a whole.”[FN91]

[FN91] I/A Court H.R., Compulsory Membership in an Association prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, Judgment of November 13, 1985, Series A, No. 5, paragraph 69; Ivcher Bronstein Case, Judgment of February 6, 2001. Series C, No. 74, paragraph 151; Herrera Ulloa Case. Judgment of July 2, 2004. Series C, No. 107, paragraph 112 and 116; Ricardo Canese Case. Judgment of August 31, 2004. Series C, No. 111, paragraphs 82 and 86.

92. In the Inter-American system for the protection of human rights, the right to freedom of expression is recognized in the Charter of the OAS, in Article 44(f); in the Declaration of the Rights and Duties of Man, in Article IV; in the American Convention on Human Rights, in Article 13 quoted supra; in the Inter-American Democratic Charter, in Article 4; and in the Declaration of Principles on Freedom of Expression on the Inter-American Commission on Human Rights.

93. The right to freedom of expression has two dimensions, one individual and the other social. The former, carries with it the freedom to express oneself, seek, receive, and impart information, thoughts, and ideas, and the latter implies the power to interchange them. The Inter-American Court has stated in this respect:

With regard to the content of the right to freedom of thought and expression, those who are protected by the Convention not only have the right and the freedom to express their own thoughts, but also the right and freedom to see, receive and impart information and ideas of all kinds. Consequently, freedom of expression has an individual and a social dimension.[FN92]

[FN92] I/A Court H.R., “The Last Temptation of Christ” Case (Olmedo Bustos et al.). Judgment of February 5, 2001. Series C No. 73, paragraph 64.

94. In the present case, the Commission must examine firstly whether the attack and threats suffered by Rafael Ignacio Cuesta Caputi infringed his right to freedom of thought and expression. In order to do this, it is necessary to describe the context in which the events took place.

95. On January 21, 2000, a coup d’état took place in Ecuador, by means of which Mr. Gustavo Noboa Bejarano was raised to power. On that date, Rafael Cuesta Caputi was working as a journalist and director of news in the Guayaquil offices of Canal TC Televisión. On January 21, 2000, during a live broadcast, Rafael Cuesta Caputi and his associate, Jaime Jairala Vallazza described the coup as a threat to the democratic stability of the country. That same day, the television channel received two anonymous telephone calls asking for the journalist Cuesta Caputi to be silenced and threatening to bomb TC Televisión’s headquarters.[FN93]

[FN93] See paragraph 71 of the present report.

96. At the beginning of February, 2000, a person passing himself off as a private investigator telephoned the offices of TC Televisión several times, as well as Mr. Cuesta Caputi’s mobile phone, offering to supply a video which he alleged contained information concerning the participants in the coup d’état. On February 16, 2000, the packet purporting to contain the video was delivered as had been agreed in the telephone conversation. When Mr. Cuesta Caputi took the video out of its packet, a bomb exploded and injured him.[FN94]

[FN94] See paragraph 45 of the present report.

97. On February 16, 2000, a person who said he represented those responsible for carrying out the attack, rang Mr. Jairala Vallazza and demanded that Rafael Cuesta Caputi and another employee should leave the channel. During the conversation the person threatened to carry out a

second attack during a live broadcast and said that a third attack would blow up the television channel's antennae.[FN95]

[FN95] See paragraph 46 of the present report.

98. The Commission does not possess enough information to be able to determine whether or not the threats and crime described were committed by agents of the State.[FN96] However, the evidence presented does indicate that they happened as a result of the journalistic activity of Rafael Ignacio Cuesta Caputi in order to silence his criticisms of the coup d'état that was currently underway in Ecuador, and this was an infringement of his right to express himself freely. Also, an attack of such nature, as well as the threats received by a journalist based on his opinions, produce a chilling effect that prevents the free exercise of the right to freedom of thought and expression.

[FN96] See paragraph 23 of the present report.

99. On the basis of the foregoing and in accordance with what is laid down in Article 25 in connection with Article 1(1) of the American Convention, the Ecuadorian State had the obligation to investigate promptly and diligently the events described, and to identify and punish those responsible in order to protect the right of Mr. Cuesta Caputi to freedom of thought and expression.

100. The Commission has previously stated that attacks on journalists are specifically intended to silence them and constitute violations of the right of a society to have free access to information.[FN97] Attacks such as those experienced by Mr. Cuesta Caputi compromise the independence of the media by generating fear of disseminating certain information and opinions, to the detriment of the widespread circulation of opinions and ideas that is so necessary in a democracy. The Inter-American Court has stated that in a democracy, society must guarantee "the widest possible circulation of news, ideas, and opinions, as well as the widest access to information by society as a whole." [FN98]

[FN97] I/A Court H.R., Report on the Situation of Human Rights in Mexico, September 24, 1998, paragraph 649, page 142. See also IACHR, Annual Report 1999, Report 50/99, Case 11.739 (Héctor Félix Miranda), Mexico.

[FN98] I/A Court of HR, Compulsory Membership in an Association Prescribed by law for the Practice of Journalism, Advisory Opinion OC-5/85, supra footnote 06, paragraph 69. See also Ivcher Bronstein Case, supra footnote 91, paragraph 151; Herrera Ulloa Case, supra footnote 91, paragraphs 112 and 116; Ricardo Canese Case, supra footnote 91, paragraphs 82 and 86.

101. On this point, it is important to point out that Principle 9 of the Declaration of Principles on Freedom of Expression of the IACHR states that:

The murder, kidnapping, intimidation, of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression. It is the duty of the state to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation. (Emphasis added.)

102. In interpreting Article 1(1) of the American Convention, the Inter-American Court has stated that fulfilling the duty to investigate is one of the conditions for ensuring the full exercise of the right recognized in the Convention.[FN99] The Court also considers that for an investigation to be proven effective, it must be fast, impartial and conducted with due diligence.[FN100] In the instant case, this means that the Ecuadorian authorities had the duty to undertake all the necessary inquiries in order to punish those responsible for the attack against Mr. Rafael Ignacio Cuesta Caputi. However, the crime was not effectively investigated, as was shown supra[FN101].

[FN99] I/A Court H.R., Ximenes Lopes Case, supra footnote 68, paragraph 147; Baldeón García Case, supra footnote 66, paragraph 92; Pueblo Bello Massacre Case, supra footnote 22, paragraph 142, and “Mapiripán Massacre” Case, supra footnote 68, paragraph 233.[FN100] I/A Court H.R., Case of the Serrano Cruz Sisters, supra footnote 69, párr. 65.
[FN101] See paragraphs 70 to 89 of this report.

103. The IACHR has stated in this context that this inhibiting effect can only be avoided by decisive action by the State in punishing those who commit, threaten, or carry out any retaliation on any individual for having expressed his ideas or opinions.[FN102]

[FN102] IACHR, Annual Report 1999, Report No. 50/99, Case 11.739 (Héctor Félix Miranda), Mexico, paragraph 52.

104. As established supra, the Commission considers it has been shown that no effective investigation was carried out into the events of February 16, 2000, and into the threats received by Mr. Cuesta Caputi during the months of January and February, 2000.[FN103] Consequently, more than six years after the events, no one has been identified as responsible for the crime and the crime is now statute-barred according to Ecuadorian legislation.[FN104]

[FN103] See paragraphs 70 to 89 of the present report.
[FN104] See paragraph 88 of this report.

105. In the light of the foregoing considerations, the IACHR concludes that the Ecuadorian State violated, to the detriment of Rafael Ignacio Cuesta Caputi, its obligation to protect the right to freedom of thought and expression, recognized in Article 13 in connection with Article 1(1) of the American Convention because it did not carry out an effective investigation and did not punish those responsible for the aforementioned attack and threats, mentioned supra, which resulted in a chilling effect on the free exercise of the right to freedom of thought and expression.

3. The right to physical integrity (Article 5 in relation to Article 1(1) of the American Convention)

106. Article 5(1) of the American Convention states that “every person has the right to have his physical, mental, and moral integrity respected.” Article 1(1) states that:

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.

107. Article 1(1) of the Convention covers general obligations for the States with regard to human rights. The first of these is to respect the rights recognized in the Convention, and the second is to ensure the exercise of those rights. The Inter-American Court of Human Rights has established that from the obligation to ensure the exercise of the rights protected in the Convention derives a series of obligations on the States, namely the obligations to “prevent, investigate, and punish any violation of the rights recognized by the Convention, and moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”[FN105]

[FN105] I/A Court H.R., Velásquez Rodríguez Case, supra footnote 17, paragraph 166.

108. With respect to the Article transcribed above, which the petitioner alleged as violated in his submission on the merits, the IACHR considers that, once violations of Articles 8(1), 25(1) and 13 of the American Convention have been established, it is not necessary to pronounce itself on the alleged violation of Article 5.

V. RECOMMENDATIONS

109. Based on the examination and conclusions of the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE

STATE OF ECUADOR:

1. Publicly acknowledge international responsibility for the human rights violations established by the IACHR in the present report.
2. Carry out a complete, impartial, and effective investigation into the attack on Rafael Ignacio Cuesta Caputi.
3. Grant adequate reparation to Mr. Rafael Ignacio Cuesta Caputi for the violations of his right to judicial guarantees, to judicial protection, to personal integrity, and to freedom of thought and expression.

VI. PROCEEDINGS AFTER REPORT N° 77/06

110. On October 21, 2006 the Commission approved Merits Report No. 77/06 with respect to this case, during its 126th regular sessions, pursuant to Article 50 of the American Convention.

111. On December 5, 2006 the IACHR sent the report to the State further to Article 43 of its Rules of Procedure, granting it two months from notification to report on the measures adopted to comply with the recommendations therein.

112. On December 5, 2006 the Commission notified the petitioners that it had adopted Report 77/06, and consulted them on their opinion with respect to the eventual submission of the case to the Court. Also, the IACHR requested them to supply evidence consisting of the available documents, expert witnesses, and witnesses, as well as their expectations in terms of reparations.

113. On December 15, 2006 Ecuador submitted a brief whereby it filed a “formal complaint” because, at the initiative of the victim, the TV station TC Televisión had reported on the national news that the IACHR had adopted a merits report where it “condemned” the Ecuadorian State to pay indemnifications to Mr. Cuesta Caputi. In this respect, the State indicated that the quasijudicial nature of the IACHR prevented it from establishing amounts for indemnification, which is an exclusive function of the Inter-American Court, and requested the Secretariat to notify “the report –if it existed– that motivates this complaint”. On December 20, 2006 the IACHR sent a note to the Ecuadorian State clarifying that the adoption of the report had been notified to the petitioners on December 5, 2006, strictly in accordance with Article 43.3 of the Rules of Procedure of the IACHR, but that the report itself had not been transmitted to the petitioner.

114. On December 20, 2006, the IACHR transmitted to the petitioners, on a reserved basis, certain considerations made by the Commission when examining this case, and it also informed them that the merits report had been transmitted to the State so that in the period of two months it informed on the measures adopted to comply with the recommendations of the IACHR.

115. On January 8, 2007 the petitioners sent a brief by which they requested the Commission to submit their case to the Inter-American Court. In the same note the petitioners reiterated their allegations on the merits and they sent additional information on other facts relating to the case. The additional information refers to the fact that the victim ceased to act as the main news anchor in TC Televisión for over a year “due to a natural fear that there might be another attack on his life”. Also, they indicated that the victim currently is not working as a newscaster in that station due to the presentation of six criminal proceedings against him, supposedly as a

consequence of critical commentaries he had made with respect to a former civil servant who worked in the Government of former President Gustavo Noboa. Among the grounds mentioned by the petitioners for sending the case to the Court, they pointed out that it could help develop jurisprudence with respect to the role of the State when it fails to investigate and the indirect censorship this situation generates.

116. Pursuant to Article 44(1) in fine of its Rules of Procedure, during its 127th regular sessions the IACHR decided by absolute majority of its members not to submit the instant case to the Inter-American Court of Human Rights. When adopting this decision the IACHR took into account, among other things, the evidence available in the case file.

117. On March 15, 2007 the State and the petitioners sent to the Commission a joint statement whereby they requested the Commission to suspend the processing of the case for 45 days while they agreed on the content and extent of a friendly settlement agreement. They based their request on Articles 48.1(f) and 49 of the American Convention “without prejudice to the possibility that either of the parties could desist of signing the agreement and continue the regular processing of the case”. In response to it, on March 22, 2007 the Commission granted the State an additional time period of 45 days to respond to the observations of the petitioners.

118. On April 12, 2007 the petitioners sent a brief in which they informed the Commission that they had reached a preliminary agreement, according to which the State accepted international responsibility for the violation of Articles 5, 13, 8, 25 and 1.1 of the American Convention. However, they indicated that an agreement had not yet been reached with respect to the final amount of indemnification to be paid by the State.

119. On May 14, 2007 the petitioners sent a brief to the IACHR by which they informed that they had not been able to reach a friendly settlement agreement with the Ecuadorian State regarding the indemnification amount that the State had originally offered to pay to the victim. However, they indicated, the State “retracted itself from the negotiation”, which shows in their opinion the “willingness to stall the case” and they added that the State would “continue arguing that there had been no violation” to the rights of the victim. In this regard, they requested that the case be submitted to the Inter-American Court. On June 4, the petitioners sent another submission with the same arguments.

120. On July 9, 2007, the petitioners sent another brief in which they alleged that the communication sent to the IACHR on March 15, 2007 implied a recognition of international responsibility with respect to the violation of the rights of the victim, since “its willingness to solve the case can only be done on the basis of the recognition of the violations alleged”, according to the very rules enshrined in the American Convention.

121. On October 19, 2007 the petitioners sent a brief in which they indicated that “more than two months have gone by without the State complying with the decision” of the IACHR. They also requested that the case be submitted to the Inter-American Court of Human Rights.

VII. ANALYSIS ON COMPLIANCE WITH THE RECOMMENDATIONS

A. With respect to the acknowledgement of international responsibility on the part of the Ecuadorian State

122. The IACHR notes that the petitioners indicated in their brief dated April 27, 2007 that they had reached a “preliminary agreement” with the State, by which the latter acknowledged its international responsibility for the violations declared by the IACHR regarding the rights of Mr. Cuesta Caputi, and they also indicated on July 9, 2007 that the State had recognized by communication of March 15, 2007 its responsibility in the violations of the rights of the victim (*supra* para. 117). However, the Commission notes that despite this information, the record of the case does not include a copy of such preliminary agreement or any brief by the State or signed by a representative of it that acknowledges such international responsibility. The submissions sent by the State simply indicate the possibility of reaching a settlement with the petitioners “for the alleged violation of the human rights of Mr. Rafael Cuesta Caputi”, without an express admission of its international responsibility in this case. In this regard, the Commission understands that the State has not complied with the recommendation of publicly acknowledging the violations established in its merits report, to the prejudice of Mr. Cuesta Caputi.

B. With respect to the complete, impartial, and effective investigation into the attack on Mr. Cuesta Caputi

123. To the date of preparation of this report, the State has not informed the Commission if it has carried out a complete, impartial or effective investigation into the attack suffered by Mr. Rafael Cuesta Caputi. Accordingly, the Commission concludes that this recommendation has not been complied with in the instant case.

C. With respect to granting adequate reparation to Mr. Cuesta Caputi

124. The Commission took note of the actions by both the State and the petitioners after the adoption of Report 77/06 in the instant case. In this regard, the IACHR highlights that since March 15, 2007 the parties have expressed their willingness to reach a settlement on compliance with the Commission’s recommendations. However, two months after that joint statement, the petitioners indicated that it was not possible to reach an agreement in the instant case. The lack of a later communication by the State leads the Commission to conclude that there has been no compliance with the recommendation on making adequate reparations to Mr. Cuesta Caputi.

VIII. CONCLUSIONS AND NOTIFICATION

125. The Commission concludes that the Ecuadorian State has incurred in international responsibility for violating, to the prejudice of Rafael Ignacio Cuesta Caputi, the rights to judicial guarantees, judicial protection and freedom of expression set forth, respectively, in Articles 8.1, 25 and 13 of the American Convention, in connection with the general duty to guarantee rights established in Article 1.1 of that treaty. The Commission also reiterates its decision not to pronounce itself on the alleged violations of Article 5 of the American Convention, which was included in the admissibility report in application of the *iura novit curia* principle, considering

that the allegations of the petitioner regarding violations of that Article were subsumed in the considerations with respect to Articles 8.1, 25 and 13.

126. More than 7 years have passed since the attack suffered by Rafael Cuesta Caputi, without any demonstration by the State that it has carried out a diligent investigation to determine the source of the threats, or other actions aimed at identifying and punishing those responsible. The prosecutor's investigation began on February 17, 2000, and the last actions in that process are dated April 4, 2000. On December 25, 2000 the intervening judge ordered the proceedings provisionally closed, decision which was confirmed on March 7, 2006.

127. In light of the foregoing considerations, the IACHR considers that the Ecuadorian State has not complied with the recommendations established by the Commission in Report 77/06 and therefore reiterates the violations mentioned in that report.

IX. PUBLICATION

128. On March 14, 2008, the Inter-American Commission approved Report 17/08 –reproduced above- pursuant to Article 51 of the American Convention. On April 16, 2008, the IACHR transmitted this report to the State of Ecuador and to the petitioners, in accordance with Article 51.1 of the American Convention, and granted the State a period of one month to report on compliance with the above-mentioned recommendations. Since that date, and until the adoption of the instant report, the State has not filed the information requested.

129. In light of the above, the Commission decides to reiterate the recommendations set forth in paragraph 109 supra and to publish this report and to include it in its Annual Report to the OAS General Assembly. Pursuant to its mandate, the Commission will continue to evaluate the measures adopted by the State of Ecuador in connection with the aforementioned recommendations, until they have been fully implemented.

Done and signed in the city of Washington, D.C., on the 18th day of the month of July, 2008. (Signed: Paolo Carozza, Chairman; Luz Patricia Mejía Guerrero, First Vice Chairwoman; Felipe González, Second Vice Chairman; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Florentín Meléndez, and Víctor E. Abramovich, members of the Commission.