

REPORT N° 11/04
PETITION 735/01
ADMISSIBILITY
TEODORO CABRERA GARCÍA AND RODOLFO MONTIEL FLORES
MEXICO
February 27, 2004

I. SUMMARY

1. On October 25, 2001, the Inter-American Commission on Human Rights (hereafter "the Inter-American Commission" or "the IACHR") received a complaint presented by Ubalda Cortés Salgado, Ventura López, and the Sierra Club, Greenpeace International, the Miguel Agustín Pro Juárez Center for Human Rights-PRODH, and the Center for Justice and International Law-CEJIL (hereafter, referred to jointly as "the petitioners"), invoking the international responsibility of the United Mexican States ("the State") for the illegal detention and torture of Rodolfo Montiel Flores and Teodoro Cabrera García, and for their imprisonment following a trial that failed to respect the standards of due process, and included the use of a confession that had been extracted under torture. The petitioners also invoked the international responsibility of the Mexican State for failing to investigate and punish the deeds denounced.

2. Subsequent to submission of the complaint, on November 8, 2001, Teodoro Cabrera García and Rodolfo Montiel Flores were released from prison by a decision of the Mexican Executive Power. On August 14, 2002, the Second Circuit Court of Mexico convicted Teodoro Cabrera García and Rodolfo Montiel Flores of bearing weapons that are exclusively for use of the Army, while acquitting them of the crimes of carrying prohibited weapons and sowing marijuana. On the date of approval of this report, Teodoro Cabrera García and Rodolfo Montiel Flores remain in liberty by virtue of the aforementioned Executive decision.

3. The petitioners argue that these facts constitute violation of various provisions of the American Convention on Human Rights (hereafter "the American Convention"): the right to humane treatment (Article 5); the right to personal liberty (Article 7); the right to a fair trial (Article 8); the right to judicial protection (Article 25), as well as the duty of the State to respect and guarantee the individual rights of persons under its jurisdiction (Article 1(1)). They also argue that all the requirements of admissibility stipulated in the American Convention have been fulfilled.

4. The Mexican State maintained in its first response that the decision to release Messrs. Montiel Flores and Cabrera García safeguarded their right to pursue such further domestic legal action as they deemed fit; that appeal proceedings were underway against the court judgment that had confirmed the conviction; and that the charges of torture were being investigated by the Military Prosecutor's Office (PGJM). In its second communication with observations on the matter, the State reiterated that petitions are pending decision in both the administrative and judicial systems, and that domestic remedies have therefore not been exhausted. Consequently, the State asks the Inter-American Commission to declare the petition inadmissible.

5. Without prejudging the merits of the case, the IACHR concludes in this report that the case is admissible, because it meets the requirements of Articles 46 and 47 of the American Convention. The Inter-American Commission therefore decides to notify the decision to the parties and to continue its analysis of the merits of the case with respect to the alleged violations of Articles 5, 7, 8 and 25 of the American Convention, in connection with Article 1(1) of that instrument; and of Articles 1, 6, 8 and 10 of the Inter-American Convention to Prevent and Punish Torture.

II. PROCEEDINGS BEFORE THE IACHR

6. On November 2, 2001, the processing of petition P735/01 began, with the transmission of the relevant portions of the petition to the State, with a request for information within two

months. On November 8, 2001, the Mexican State reported to the Inter-American Commission that Teodoro Cabrera García and Rodolfo Montiel Flores had been released from prison on that date, and it asked the IACHR to grant precautionary measures, at its own initiative, in favor of both individuals.¹ The Inter-American Commission replied to the Mexican State on that same day, and asked it to take immediately "all concrete measures necessary to protect the physical integrity and life of Messrs. Cabrera García and Montiel Flores."

7. On November 10, 2001, a communication was received from the two alleged victims and from PRODH, reporting that the Federal Prevention Police had kept them under guard ever since their release, and that they had asked to have the police withdrawn. They declared that they would henceforth "be resting with their families in a safe place"; that as of November 12, 2001, they would be accompanied by the International Peace Brigades; and that they would report in due course on other possible measures that might be necessary for their protection. This communication was relayed to the Mexican State on November 13, 2001. On that date, the Mexican State sent information on the protective custody that had been provided for Messrs. Cabrera García and Montiel Flores, and declared that it would offer the International Peace Brigades "the necessary facilities" to fulfill the task of protecting the petitioners as requested. The IACHR transmitted a copy of this communication to the petitioners on November 29, 2001.

8. The *campesino* environmentalists Teodoro Cabrera García and Rodolfo Montiel Flores declared in writing on December 19, 2001, that they had decided to accept assistance from the organization "Global Exchange" as of November 21, 2001, and that they reserved the right to bring that decision back to the Inter-American Commission. On January 7, 2002, the Inter-American Commission reported this communication to the Mexican State. No further steps were taken with respect to precautionary measures, and they therefore expired on April 8, 2002, according to the terms under which they were granted.

9. The Mexican State requested an extension of the January 3, 2002 deadline for responding to the request for information made pursuant to Article 30 (3) of the IACHR rules of procedure. On January 9, 2002, the Commission granted an extension until February 2, 2002, and the State submitted its report on February 5. The Inter-American Commission relayed that communication to the petitioners on February 22, 2002, and received a response on March 25, 2002. On April 2, 2002, the petitioners' observations were sent to the Mexican State.

10. On May 6, 2002, the State requested a further extension of the time limit for responding, and it was granted an additional month, to May 21, 2002. The second report, containing the State's position on this matter, was received on June 25, 2002, and was transmitted to the petitioners. On July 5, 2002, the petitioners requested an extension for their response, which was granted on August 26, 2002, for 15 days. On September 8, 2002, the petitioners submitted their observations. The Commission transmitted that report to the State on November 4, 2002, requesting information within one month.

11. The petitioners submitted an "expanded petition" on November 11, 2002, and the Inter-American Commission sent this to the Mexican State on December 2, 2002, requesting information within one month.

12. On December 5, 2002, the IACHR transmitted to both parties the *amicus curiae* brief that it had received on August 15, 2002, from the Center for Human Rights and Environment and the Center for International Environmental Law, and this was placed on the file of case P735/01.

13. The petitioners requested an admissibility hearing, in a note of January 3, 2003. On January 31, 2003, the IACHR advised that it had not accepted that request. On February 18, 2003, the petitioners approached the IACHR to inquire whether a response to the expanded petition had been received from the Mexican State. On this point, on March 26, 2003, the

¹ The State declared that it concurred with the concerns expressed by the petitioners, who feared for the safety of Messrs. Cabrera García and Montiel Flores in light of the harassment that various members of the *campesino* environmental organization (OCESP) had suffered. Communication of the Mexican State of November 8, 2001, addressed by the Undersecretary for Human Rights and Democracy to the President of the IACHR.

Commission addressed the Mexican State to reiterate the request for information that it had made on December 2, 2002.

14. On June 3, 2003, the petitioners submitted a request for an admissibility report on this matter, and the Commission so advised the Mexican State on June 23, 2003. On January 12, 2004, the petitioners requested a hearing in order to place before the Commission the statements of witnesses and arguments as to the substance of the case. On February 2, 2004, the Commission responded that it had not accepted that request.

III. POSITIONS OF THE PARTIES AS TO ADMISSIBILITY

A. The petitioners

15. According to the petitioners, the Mexican State is responsible for various violations of human rights to the prejudice of Teodoro Cabrera García and Rodolfo Montiel Flores. Those two persons belonged to the environmental group, *Organización de Campesinos Ecologistas de la Sierra de Petatlán y Coyuca de Catalán* (OCESP), which was created in 1998 to prevent the indiscriminate logging of that mountainous area.² According to the petitioners, the violations committed by agents of the Mexican State against Cabrera García and Montiel Flores were intended to suppress the *campesino* environmentalists and thereby remove the obstacle posed by the independent action of OCESP.³

16. The alleged deeds began on May 2, 1999, when some 40 soldiers fired on a group of people assembled outside the home of Mr. Teodoro Cabrera García in the community of Pizotla in the State of Guerrero. During the shooting, Mr. Salomé Sanchez was killed, while the soldiers subsequently captured Cabrera García and Montiel Flores. The petitioners allege that the soldiers had no arrest warrant, nor did the circumstances of *in flagrante delicto* apply. They also allege that the soldiers tortured Teodoro Cabrera García and Rodolfo Montiel Flores repeatedly after their capture and during their *incommunicado* detention in the barracks of the 40th Infantry Battalion in Ciudad Altamirano, Guerrero, where they were held until the evening of May 6, 1999.

17. The petitioners maintain that as a result of the pain and threats to which they were subjected, Montiel Flores and Cabrera García were forced to sign self-incriminating statements that the soldiers had prepared, according to which they mutually acknowledged having committed the crimes of "sowing marijuana" and "carrying firearms".⁴ Those statements were used by the Federal Prosecutions Office (PGR) to bring criminal charges against the two individuals.⁵

18. The defense team for Messrs. Cabrera García and Montiel Flores asked the presiding judge, on August 26, 1999, to report to the Public Ministry the acts of torture that had been committed by soldiers against the defendants. Yet in November 1999, the PGR declared itself incompetent to continue investigating the torture charges, and handed the matter over to the PGJM, on the grounds that those allegedly responsible were military personnel on active duty. According to the petitioners, the investigation was resolved and closed on June 13, 2000, pursuant to the military investigator's finding that there was no evidence to support charges of torture.⁶

² The petitioners point out that "the committed efforts for the independent defense of natural resources conducted by OCESP and, in particular, by Teodoro Cabrera and Rodolfo Montiel, have been widely recognized by major organizations working for the defense of the environment and human rights". They note that Amnesty International has declared them as "prisoners of conscience" (March 2000), that they were awarded the Goldman Environmental Prize (April 2000), the Chico Mendes Prize conferred by the Sierra Club (February 2001), the Sergio Mendes Human Rights Prize (May 2001) and Roque Dalton medal (May 2001). *Idem*, pages 5 and 6.

³ *Idem*, para 9, page 9.

⁴ Communication of the petitioners, October 25, 2001, para. 8, page 3.

⁵ The petitioners report that Rodolfo Montiel and Teodoro Cabrera were formally detained and processed, first by the First Instance Criminal Court of Mina under criminal case 13/99 (even though that body is not competent to take on the case, as it deals with alleged federal crimes), and subsequently by the Fifth District Court of the 21st Circuit under case file 61/99. Communication of the petitioners, October 25, 2001, para. 11, page 3.

⁶ *Idem*, para.13, page 3.

19. The victims' defense team also laid a complaint before the National Human Rights Commission of Mexico (CNDH), which issued Recommendation 8/2000 on July 14, 2000. In that document, the CNDH found, among other things, that soldiers acting without a proper court warrant conducted acts of harassment and searched the home of Teodoro Cabrera García, in violation of the right to legality and juridical security,⁷ and that acts of torture reported by the defense for the *campesino* environmentalists were amply demonstrated.⁸ The four recommendations in the document were addressed to the National Defense Ministry, but, as the petitioners allege, the CNDH "omitted to state its position over the unconstitutionality of the competence of the Military Prosecutor's Office for the torture investigation."⁹

20. The petitioners report that on August 28, 2000, the Fifth District Judge of the 21st Circuit Court sentenced Teodoro Cabrera to ten years of imprisonment and Rodolfo Montiel to six years and eight months of imprisonment, primarily "based on the confession extracted from the victims under torture and *incommunicado* detention, and without access to a lawyer."¹⁰ The victims' defense team appealed those sentences on the grounds that torture had been used to obtain a confession, but they were upheld by the First Unitary Tribunal of the 21st Circuit; that ruling was then appealed on the basis of the same violation of due process. The petitioners also declared that they offered medical evidence from two forensic experts, proving the torture suffered by Cabrera García and Montiel Flores, but that the Tribunal did not accept it as proof, and upheld the convictions.

21. The petitioners also declare that they pursued the remedies available within domestic jurisdiction to resolve their situation, but that these are ineffective because the military justice system lacks impartiality and independence for investigating the facts, and proceedings were unduly drawn out.¹¹ Subsequently, in their "expanded petition", they maintain that in this case two separate domestic proceedings are involved, one of them before the ordinary courts, and one before military jurisdiction. As to the first, they refer in the following terms to the judgment of August 14, 2002, which upheld the convictions for "bearing weapons of exclusively military use":

The appeal decision handed down by the Second Circuit Court no doubt constitutes more serious violations of the rights of Messrs. Montiel Flores and Cabrera García, because the Mexican State had the opportunity to put an end to a series of human rights violations, and yet failed to guarantee the impartiality of the judiciary, nor did it give the environmentalists access to judicial protection, thereby violating Articles 8(1), 25 and 1(1) of the Convention. This in turn has led to cover up and justification of illegal action by the Mexican army.¹²

B. The State

22. The first communication from the Mexican State on this matter was received on November 8, 2001 (six days after case P735/01 was opened), reporting that on that day Messrs. Cabrera García and Montiel Flores had been released from prison. At that time, the State asked the IACHR to grant precautionary measures for the protection of the environmentalists, as summarized in the corresponding section of this report.

23. In its response to the request for information on the petition, the Mexican State explained the reasons why it had decided to release the environmentalists, and it maintained that it had thereby "safeguarded the rights of Messrs. Montiel Flores and Cabrera García and of their defense attorneys to pursue such further proceedings before the competent jurisdictional

⁷ CNDH, Recommendation 08/2000 of July 14, 2000, page 22.

⁸ The Mexican ombudsman arrived at this conclusion after considering "the repeated silence" of the PGJM in the face of requests to deliver various documents, including a copy of the initial investigation 35ZM/06/99. CNDH, Recommendation 08/2000 of July 14, 2000, pages 24 and 25.

⁹ Communication of the petitioners of October 25, 2001, paragraph 15, page 4.

¹⁰ *Idem*, para. 17, page 4.

¹¹ Communication of the petitioners of October 25, 2001, page 9.

¹² Communication of the petitioners of November 11, 2002, page 2.

bodies as they deemed necessary".¹³ The State also maintains that the authorities cooperated fully with the alleged victims for purposes of bringing an appeal,¹⁴ but that on July 16, 2001, the First Unitary Tribunal of the 21st Circuit Court "examined and assessed the document and decided nevertheless to uphold the judgment".¹⁵ The State also declared in its submission that the new appeal brought by Messrs. Cabrera García and Montiel Flores on October 14, 2001, "could invalidate the self-incriminating statements made by Messrs. Montiel Flores and Cabrera García during the proceedings".¹⁶ It adds the following:

It must be stressed that various bodies of the Federal Executive Power had intervened on behalf of Rodolfo Montiel Flores and Teodoro Cabrera García, recognizing that they were victims of torture, so that this fact could be considered by the court. The foregoing is independent of the merits as to their guilt, which it is up to the jurisdictional bodies to determine.

Under the circumstances, the Federal Executive Power decided to examine the options available by law to release Messrs. Montiel Flores and Cabrera García, given the nature of the crimes for which they had been convicted. It was determined subsequently that the only available route was that stipulated in Article 75 of the Federal Criminal Code.¹⁷

24. The Mexican State offers further explanations of the proceedings by the CNDH and mentions the recommendation addressed by that body on July 14, 2000, to the National Defense Ministry. With respect to the proceedings conducted by the military prosecutor, the State declares that "in order to pursue more thoroughly the investigation of the violations of human rights, the Ministry of Foreign Relations requested the PGJM expressly, on January 15, 2002, to reconsider the possibility of continuing or beginning a new investigation into the matter."¹⁸ The State's submission concludes by indicating that the document was transmitted to the PGJM on January 30, 2002, and that "it will keep the Commission and the petitioners informed of decisions and resolutions, both administrative and judicial, taken by the national authorities in this matter."¹⁹

25. As to the petitioners' interpretation of the reasons that led to the decision to release Messrs. Cabrera García and Montiel Flores, the Mexican State maintains:

This in no way implies that the government of Mexico admits or confirms those violations since, while it is clear that the Mexican government considers it a fact that those persons were victims of human rights violations, it is also clear that at no time and under no circumstances were Messrs. Montiel Flores and Cabrera García prevented or obstructed from enforcing their rights before the various jurisdictional bodies, either personally or through their representatives.²⁰

¹³ Communication of the Mexican State of February 5, 2002, page 1.

¹⁴ The State reported:

The President of Mexico instructed the Secretary of the Interior to review the file of Messrs. Montiel Flores and Cabrera García and, as appropriate, to take the necessary and possible steps according to law to remedy the situation.

As a result of the foregoing, the Ministry of the Interior supported and advised the defense team of Messrs. Montiel Flores and Cabrera García to appeal to the federal courts, and to complain that the medical report issued by the specialists Christian Tramsen and Morris Tidball-Binz had not been accepted as evidence.

On March 22, 2001, that tribunal granted *amparo* and the protection of the federal courts to the petitioners, ordering that the medical examination report issued on July 29, 2000, by two forensic experts belonging to the organization "Physicians for Human Rights" be accepted and assessed. This meant that the court of first instance would have to assess that document and, if appropriate, issue a new decision.

Meanwhile, government representatives worked with the defense to prepare arguments that would strengthen the juridical value of the forensic opinion, so that it could be considered by the court as trustworthy evidence that those persons had been the victims of human rights violations.

Communication of the State dated February 6, 2002, page 2.

¹⁵ *Idem.*

¹⁶ *Idem.*

¹⁷ *Idem.*

¹⁸ *Idem.*, page 3.

¹⁹ *Idem.*

²⁰ Communication of the State, dated June 25, 2002, page 1.

26. On this point, the State declares that Recommendation 8/2000 of the CNDH resulted in the opening of a preliminary investigation SC/304/2000/VII-1, in which the military prosecution decided not to lay criminal charges "because there were not sufficient elements for presuming that a crime had been committed by any member of the Mexican army".²¹ The State also argues that "in an effort to comply with the request of the petitioners themselves" the SEDENA decided to return the files of that preliminary investigation to the Inspection and General Control Unit of the Army and Air Force, which body decided to reopen the investigation of the facts. The State reports that, for that reason, preliminary investigation SC/304/2001/XVIII-1 was opened, and that that Unit is empowered to amend the decision not to take criminal action if it finds irregularities in the conduct of the previous investigation.

27. With respect to the petitioners' access to the military investigation, the State explains that the refusal of the PGJM to provide a copy of the order not to pursue criminal action is understandable, because it was under review, but that the SEDENA indicated that "the evidence found during the preliminary investigation is available to the petitioners, and to their legal representatives".²² The State continues:

Mention should be made of the involvement of the Federal Judicial Power in this matter, in the sense that the Circuit Court based in Chilpancingo, Guerrero granted the petitioners the protection of Federal Justice so that the respective tribunal should "admit and assess" as proof the medical examination report issued by two forensic experts belonging to the international organization Physicians for Human Rights.

Nevertheless, although the appeals court determined the validity of the evidence referred to, that body, pursuant to the judgment of *amparo* granted, did not consider it necessary to give it the value that the petitioners were asking.

The foregoing can in no way be considered a violation of human rights: it is a question of the implicit power of a court to assess evidence produced by the parties. Nevertheless, it must be remembered that the petitioners brought a new motion of *amparo* against the ruling issued by the Tribunal, which is now pending decision.

Finally, the Mexican government desires to establish clearly and precisely that, through both the administrative and the judicial routes (the Inspection and General Control Unit of the Army and Air Force and the appeals court), the respective petitions presented are pending decision, which means that domestic remedies have not been exhausted.²³

28. The State concludes its second report by asking the IACHR "to find that domestic remedies have not been exhausted, and therefore to declare the present matter inadmissible as a case".²⁴

IV. ANALYSIS

A. Jurisdiction of the Commission *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

29. In accordance with the terms of Article 44 of the American Convention, the petitioners have standing to present a claim before the Commission. The petition under study identifies as the alleged victims individuals with respect to whom the Mexican State was committed to respect and guarantee the rights protected in the American Convention. With respect to the State, the Commission notes that Mexico has been a party to the American Convention since March 24, 1981, at which time it deposited its instrument of ratification, and it has been a

²¹ *Idem*.

²² *Idem*, page 2.

²³ *Idem*, pages 2 and 3.

²⁴ *Idem*, page 3.

party to the Inter-American Convention to Prevent and Punish Torture since June 22, 1987. Accordingly, the Commission has jurisdiction *ratione personae* to examine the claims presented.

30. The IACHR has jurisdiction *ratione loci* to consider the petition, because the alleged violation of rights protected in the American Convention occurred within the territory of Mexico, a State party to that treaty. The Inter-American Commission also has jurisdiction *ratione temporis* because the obligation to respect and guarantee the rights protected in the American Convention and in the Inter-American Convention to Prevent and Punish Torture was already in effect for the State at the time the alleged events took place. Finally, the Commission has jurisdiction *ratione materiae* because the petition complains of violations of human rights protected by the American Convention and by the Inter-American Convention to Prevent and Punish Torture.

B. Other requirements for the admissibility of the petition

1. Exhaustion of domestic remedies

31. Article 46(1)(a) of the American Convention specifies that, in order for a case to be admitted, "remedies under domestic law [must] have been pursued and exhausted in accordance with generally recognized principles of international law." Article 46(2) of the Convention specifies three situations under which the exhaustion of domestic remedies rule does not apply: (a) if the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) if the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) if there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

32. In the present case, the parties are in dispute over the exhaustion of domestic remedies in Mexico, and the Commission must therefore pronounce itself on this point. For its part, the State maintains that this requirement of the Convention has not been fulfilled, while the petitioners argue that domestic remedies were ineffective, and that there has been unwarranted delay that absolves them of the requirement to await the conclusion of the investigations initiated in that country with respect to the complaint.

33. When a State argues that domestic remedies have not been exhausted, it is incumbent upon the State to indicate those remedies that must be pursued, and to demonstrate their effectiveness.²⁵ In that case, it is up to the petitioners to demonstrate that those remedies were exhausted, or that one of the exceptions of Article 46(2) of the Convention applies.

34. The State in fact devoted a considerable portion of its first report to explaining the actions taken to assist possessors Cabrera García and Montiel Flores in terms of their personal protection and, with respect to their legal situation, to explain the motions pending before the regular courts and the PGJM. In its second communication, the State argues more directly that domestic remedies have not been exhausted, and it refers to the appeal that was pending at that time before the Mexican Federal Justice system.

35. On the other hand, the petitioners have maintained since their first communication to the Commission that the remedies pending decision at that time were not suitable for resolving the situation submitted to the IACHR. In the case of the preliminary military investigation, the petitioners argue that the PGJM lacks the necessary impartiality to conduct an investigation into alleged violations of human rights involving military personnel. With respect to the Federal

²⁵ I-A Court, *Velásquez Rodríguez* case, Judgment on Preliminary Objections, para. 88. See also the following cases: *Fairén Garbí and Solís Corrales*, Preliminary Objections, Judgment of June 26, 1987, Series C No 2, para. 8; *Godínez Cruz*, Preliminary Objections, Judgment of June 26, 1987, Series C No 3, para. 8; *Gangaram Panday*, Preliminary Objections, Judgment of Dec. 4, 1991, Series C No. 12, para. 38; *Neira Alegria et al.*, Preliminary Objections, Judgment of Dec. 11, 1991, Series C No 13, para. 30; *Castillo Páez*, Preliminary Objections, Judgment of January 30, 1996, Series C No 24, para. 40; *Loayza Tamayo*, Preliminary Objections, Judgment of Jan. 31, 1996, Series C No. 25, para. 40; Exceptions to Exhaustion of Domestic Remedies (Articles 46(1), 46(2)(a) & 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Series A No 11, para. 41.

Justice system, the petitioners argue, first, that it was ineffective because of excessive delay; subsequently, that the appeal decision went against Messrs. Cabrera García and Montiel Flores, who were sentenced despite the fact that they had been released at the initiative of the Federal Executive, as indicated above.

36. The Commission considers that the motion for *amparo* brought before the Second Circuit Court, by which the petitioners challenged the appeals ruling that had confirmed their conviction, was the appropriate route for resolving the matter. That appeal was decided on August 14, 2002, ten months after petition 735/01 was submitted. The Commission considers it unnecessary to examine the arguments of the petitioners as to applicability of the exceptions to the rule of exhaustion of domestic remedies (although it must note that the State did not respond to those arguments), because that requirement was clearly fulfilled during proceedings in this matter.

37. The Commission must also point out that the "expanded petition" submitted by the petitioners was intended to introduce as a new fact the judgment of August 2002 mentioned above. There was no response to that communication from the State, despite the IACHR's repeated request. The Commission considers this silence on the part of the State as tacit renunciation of the exception of exhaustion of domestic remedies that it alleged indirectly in its first submission, and expressly in the second, which in fact constituted the last communication on this petition. Consequently, the Commission considers that the judgment of August 14, 2002, fulfilled the requirement of Article 46(1)(a) of the American Convention.

38. The IACHR also notes that, since their first communication, the petitioners argued the exception to exhaustion of domestic remedies with respect to investigation of the torture that the victims suffered.²⁶ As explained above, that position is based on the fact that the PGJM lacks competence to investigate the deeds denounced, both under Mexican legislation and under jurisprudence of the inter-American system, because those deeds relate to violations of human rights attributed to members of the Armed Forces.

39. Although the State did not directly establish the suitability of the military investigation to determine the deeds denounced, it described to the Commission the steps taken to apply administrative punishment to any persons found responsible, and it referred to the access that the alleged victims' representatives were granted to the investigation opened by the PGJM. Nevertheless, it is also been shown that, despite the IACHR's repeated requests, the Mexican State did not respond to the request for information on the communication of the petitioners of November 11, 2002, nor did it present information subsequent to the note of June 23, 2003, with which the Commission transmitted the final arguments of the petitioners on admissibility in this case.

40. With respect to the preliminary investigation opened by the PGJM into the alleged acts of torture, the Commission has declared repeatedly that military jurisdiction is not an appropriate forum, and does not provide an adequate remedy for investigating, prosecuting and punishing violations of human rights protected in the American Convention.²⁷ In light of all the foregoing,

²⁶ On this point, the petitioners maintain:

As can be seen from the facts, the Military Prosecutor's Office was not competent to investigate the facts denounced, because it lacks the legal power to do so, since it can only consider acts of military personnel that contravene military discipline, and cases of human rights violations must be submitted to civilian jurisdiction. According to Article 21 of the Constitution, the investigation and prosecution of crimes falls to the Public Ministry, and because in this case the crime was perpetrated by federal public servants the investigation should have been conducted by the Federal Prosecutions Office, which is why the victims' attorneys have repeatedly demanded that the case be heard by that office and not by the military prosecutor. Nevertheless the Federal Prosecutions Office declined this responsibility, the National Commission on Human Rights ignored the complaint submitted on this point, and the Military Prosecutor also ignored the demand. The fact is that until this time, the military institution involved in the deeds announced earlier, and which has had the investigation of those deeds in its hands for the last two years and five months, has failed to act diligently and impartially for the purpose referred to in Article 25 of the Convention, and so the criminal action has been ineffective, and neither the facts nor those responsible for them have been identified. Communication of the petitioners of October 25, 2001, page 35

²⁷ IACHR, Report N° 43/02, Admissibility, Petition 12.009, *Leyli Dayan Sanchez*, Colombia, October 9, 2002, paragraph 23; Third Report on the Human Rights Situation in Colombia (1999), page 175; Second Report on the Human Rights Situation in Colombia (1993), page 246; Report on the Human Rights Situation in Brazil (1997), pages 40-42. As well,

and the information on the file in this case, the Commission finds, for purposes of admissibility, that the military investigation into the deeds denounced does not constitute an adequate remedy. Consequently, the IACHR considers that the exception to exhaustion of domestic remedies stipulated in Article 46(2) of the Convention applies in this case.

41. The Inter-American Court of Human Rights has held that invoking the exceptions to the rule of exhaustion of domestic remedies contemplated in Article 46(2) is closely linked to determining possible violations of certain rights protected in the Convention, such as the right to due process and the right to judicial protection established in Articles 8 and 25.²⁸

42. Nevertheless, Article 46(2), by its nature and objective, has independent effect with respect to the substantive standards of the Convention. Therefore, determining the applicability of the exceptions to the rule of exhaustion of domestic remedies must in this case be addressed previously and separately from analysis of the merits of the case, because it depends on different criteria from those used to determine violation of Articles 8 and 25 of the Convention. The causes and effects that have prevented exhaustion of the investigation of the facts in this case will be analyzed in the IACHR's report on the merits of the dispute, in order to determine whether they constitute violations of the American Convention.

43. The IACHR concludes that the judgment of August 14, 2002, exhausted domestic jurisdiction with respect to criminal proceedings against Messrs. Cabrera García and Montiel Flores. The IACHR also concludes that the military investigation does not constitute an adequate remedy for investigating the acts of torture denounced by the representatives of the victims, and consequently the petitioners are exempt from the requirement of exhausting that remedy.

2. Time period for submission of the petition

44. The petition in question was submitted on October 25, 2001, prior to the date of the ruling that exhausted domestic remedies with respect to criminal proceedings against Messrs. Teodoro Cabrera García and Rodolfo Montiel Flores. Therefore, the requirement established in Article 46(1) of the Convention is satisfied. With respect to investigation of the alleged acts of torture, the IACHR considers that the petition was submitted within a reasonable time.

3. Duplication of proceedings and *res judicata*

45. The petition does not provide any information from which it could be inferred that the matter is pending in another international proceeding, or that it has previously been decided by the Inter-American Commission. Consequently, the IACHR concludes that the exceptions stipulated in Article 46(1)(d) and in Article 47(d) of the Convention do not apply.

4. Characterization of the facts alleged

46. The petition refers to the alleged illegal detention and torture of Messrs. Cabrera García and Montiel Flores, and the denial of justice. The State has not directly denied that the alleged facts constitute possible violations of the Convention, although it argues that the petitioners had remedies available that could resolve their situation.

47. It is not appropriate at this stage of proceedings to determine whether the American Convention was actually violated. For purposes of admissibility, the IACHR must determine whether the facts as set forth characterize a violation, as stipulated in Article 47 of the Convention. The criterion for assessing these points is different from that which must be followed in deciding the merits of a complaint. The Commission must conduct a *prima facie* assessment to determine whether the complaint demonstrates an apparent or potential

the Inter-American Court has confirmed that military justice is appropriate only for trying soldiers accused of crimes or misdeeds that, by their nature, constitute offenses against legally protected military interests. I-A Court, *Durand and Ugartece*, Judgment of August 16, 2000, paragraph 117.

²⁸ I-A Court, *Velásquez Rodríguez* case, Preliminary Objections, Judgment of June 26, 1987, Series C Nº 1, para. 91. See also I-A Court, "Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987, Series A Nº 9, para. 24

violation of a right protected by the Convention. This is a summary analysis, which does not imply any prejudgment as to the merits of the dispute. The distinction between the examination required for declaring admissibility and that required for determining a violation is reflected in the IACHR's own rules of procedure, which clearly differentiate the stages of admissibility and merits.

48. The petitioners' allegations refer to facts that, if true, would characterize violations of several rights protected by the Convention. The IACHR considers that the facts set forth deserve closer and fuller examination of the petition during the merits stage.

49. The IACHR considers that the facts, if proven, would characterize violations of the rights protected in Articles 5, 7, 8 and 25 of the Convention, in connection with Article 1(1) of that instrument, and of Articles 1, 6, 8 and 10 of the Inter-American Convention to Prevent and Punish Torture. Therefore, the IACHR considers that the petitioners have demonstrated, *prima facie*, the requirements of Article 47(b) of the American Convention.

V. CONCLUSIONS

50. The Commission concludes that it is competent to consider the merits of the present case and that the petition is admissible, pursuant to Articles 46 and 47 of the American Convention. Based on the factual and legal arguments set forth above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, DECIDES:

1. To declare the present case admissible with respect to alleged violations of the rights recognized in Articles 5, 7, 8 and 25 of the American Convention, taken in connection with Article 1(1) of that instrument, and Articles 1, 6, 8 and 10 of the Inter-American Convention to Prevent and Punish Torture.
2. To notify the parties of this decision.
3. To continue with the analysis of the merits of the case.
4. To make this report public, and publish it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., this 27th day of February 2004. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Commissioners Evelio Fernández Arévalos, Paulo Sergio Pinheiro, Freddy Gutiérrez, and Florentín Meléndez.