INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF CABRERA GARCIA AND MONTIEL FLORES V. MEXICO

JUDGMENT OF NOVEMBER 26, 2010
(Preliminary Objection, Merits, Reparations and Legal Costs)

In the Case of *Cabrera Garcia and Montiel Flores*,

The Inter-American Court of Human Rights (hereinafter, the "Inter-American Court", the "Court" or the "Tribunal"), composed of the following judges:

Diego García-Sayán, President;
Leonardo A. Franco, Vice-President;
Manuel E. Ventura Robles, Judge;
Margarette May Macaulay, Judge;
Rhadys Abreu-Blondet, Judge;
Alberto Pérez Pérez, Judge;
Eduardo Vio Grossi, Judge and
Eduardo Ferrer Mac-Gregor Poisot, *ad hoc* Judge;

Also present:

Pablo Saavedra Alessandri, Secretary and,
Emilia Segares Rodríguez, Deputy Secretary,

Pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter, the "Convention" or the "American Convention") and Articles 30, 32, 38, 56, 57, 58 and 61 of the Court's Rules of Procedure[1] (hereinafter, the "Rules of Procedure") delivers this Judgment, which is organized in the following way:

[1] According to the terms of article 79.1 of the Court's Rules of Procedure that entered into force on January 1, 2010, "[c]ontentious cases which have been submitted for the consideration of the Court before January 1, 2010, will continue to be processed, until the issuance of a judgment, in accordance to the previous Rules of Procedure". Thus, the Court's Rules of Procedure applied to this case corresponds to the instrument approved by the Tribunal in its XLIX Regular Period of Sessions held from November 16 to 25, 2000, partially amended by the Court in its LXXXII Regular Period of Sessions, held from January 19 to 31, 2009, and which was in force from March 24, 2009 until January 1, 2010.

I
INTRODUCTION OF THE CASE AND PURPOSE OF THE APPLICATION

1. On June 24, 2009 the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission" or the "Commission") filed a claim against the United States of Mexico (hereinafter the "State", the "Mexican State" or "Mexico"), pursuant to articles 51 and 61 of the Convention, in relation to case 12.449. The initial petition was submitted to the Commission on October 25, 2001 by Ubalda Cortés Salgado, Ventura López and the following organizations: Sierra Club, Greenpeace International, Centro de Derechos Humanos Miguel Agustín Pro Juárez – PRODH (Center for Human Rights Miguel Agustín Pro Juárez - PRODH) and Center for Justice and International Law (CEJIL). On February 27, 2004 the Commission adopted Report 11/04 whereby the case was declared admitted.[2] On October 30, 2008 the Commission approved Report on Merits 88/08, prepared according to article 50 of the Convention.[3] After considering that Mexico had not adopted the recommendations included in such report, the Commission decided to submit this case to the Court's jurisdiction. The Commission appointed the following delegates: Messrs. Florentín Meléndez, Commissioner, and Santiago A. Cantón, Executive Secretary of the Inter-American Commission, and the following legal advisors: Elizabeth Abi-Mershed, Assistant Executive Secretary, and Isabel Madariaga, Juan Pablo Albán Alencastro, and Marisol Blanchard, specialists at the Executive Secretariat.

2. The claim is related to the alleged responsibility by the State for subjecting Messrs. Teodoro Cabrera García and Rodolfo Montiel Flores (hereinafter Messrs. "Cabrera García" and "Montiel Flores" or "Messrs. Cabrera and Montiel") "to cruel, inhuman and degrading treatment, while detained and under the custody of members of the Mexican army, for their non-appearance without delay before a judge or any other official authorized to carry out judicial functions in order to control the legality of their detention, and for the irregular procedures during the criminal proceedings against them." Furthermore, the claim refers to the alleged lack of due diligence in the investigation and punishment of those responsible for the facts, the lack of adequate investigation into the alleged torture, and the use of military privileges to investigate and judge human rights violations. The detention of Messrs. Cabrera and Montiel took place on May 2, 1999.

3. The Commission requested the Court to declare that the Mexican State is responsible for the violation of the rights under articles 5(1) and 5(2) (Humane Treatment), 7(5) (Personal Liberty), 8(1), 8(2)(g), 8(3) (Fair Trial) and 25 (Judicial Protection) of the American Convention; for default in complying with the general

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[2] In the Report of Admissibility N° 11/04, the Commission declared the 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 international instrument, and Articles 1, 6, 8 and 10 of the Inter-American Convention to Prevent and Punish Torture" (record of annexes to the application, volume I, annex 2, folio 93).

[3] In the Report on the Merits N° 88/08, the Commission concluded that the State has failed to comply with the obligations derived from articles 7 (Right to Personal Liberty), 5 (Right to Humane Treatment [Personal Integrity]), 8 and 25 (Right to a Fair Trial [Judicial Guarantees] and to Judicial Protection) of the American Convention, as well as articles 1, 8 and 10 of the Inter-American Convention to Prevent and Punish Torture, all this within the general obligation to respect rights (Article 1(1) of the American Convention). The Commission also concluded that the State violated the obligation contained in Article 6 of the Inter-American Convention to Prevent and Punish Torture in relation to Articles 1(1) and 2 of the American Convention, to the detriment of Teodoro Cabrera García and Rodolfo Montiel Flores. Furthermore, the Commission considered that the information submitted in the present case was not sufficient for a finding of violations of the rights contained in articles 13, 15, and 16 of the American Convention (record of annexes to the application, volume I, annex 1, folio 1).

obligations under article 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the Convention; and for default in complying with the obligations in articles 1, 6, 8 and 10 of the Inter-American Convention to Prevent and Punish Torture, in detriment of Messrs. Cabrera and Montiel. Likewise, the Commission requested the Tribunal to order the State to adopt several reparation measures.

4. On November 2, 2009, the Human Rights Center Miguel Agustín Pro Juárez A.C.[4] [Centro de Derechos Humanos Miguel Agustín Pro Juárez A.C.] (hereinafter "Centro Prodh"), the Center for Justice and International Law[5] (hereinafter, "CEJIL") and the Human Rights Center of the Mountain Tlachinollan A.C.[6] [Centro de Derechos Humanos de la Montaña Tlachinollan A.C.] (all of them, hereinafter "the representatives") filed the brief containing pleadings, motions and evidence (hereinafter, "brief of pleadings and motions"). Apart from the rights alleged by the Commission, the representatives alleged that torture was committed in the instant case; therefore, they alleged the violation of article 5 (Humane Treatment [Personal Integrity]) to the detriment of the alleged victims' relatives, due to the "suffering caused by the violations against their beloved ones and the impunity that remains of such violations;" the violation of article 16 (Right to Assembly) of the American Convention against Messrs. Cabrera García and Montiel Flores, since the violations against them were as a "retaliation for their participation in an organization for the defense of the environment and because the State did not ensure that they could carry out their work in safe conditions." Within the framework of the foregoing, they also alleged the violation of article 7 (Personal Liberty) in relation to paragraphs 7(1), 7(2), 7(3) and 7(4) of the American Convention. Lastly, the representatives requested the Tribunal to order the State to adopt several reparation measures.

5. On February 7, 2010 the State lodged preliminary objections, answered the claim and made observations to the brief of pleadings and motions (hereinafter "answer to the claim"). The State lodged the preliminary objection about the "[l]ack of competence of the Court to hear the merits of the […] claim in the light of the principle of fourth instance." Likewise, the State denied its international responsibility for the violation of the rights alleged by the other parties. The State appointed Ambassador Zadalinda González y Reynero as its Agent.

6. According to article 38(4) of the Rules of Procedure, on April 2, 2010 the Commission and the representatives submitted their arguments to the preliminary objection lodged by the State.

II
PROCEEDINGS BEFORE THE COURT

7. The application of the Commission was notified to the representatives and the State on September 2, 2009. On that same day, following the instructions by the Court's President and according to the applicable Court's Rules of Procedure, the State was asked about its purpose to appoint an *ad hoc* Judge for this case.[7]

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[4] On behalf of Centro Prodh, Stephanie Erin Brewer, Jaqueline Saenz, Jorge Santiago Aguirre Espinosa and Luis Arriaga Valenzuela, Director of Centro Prodh signed the brief.

[5] On behalf of CEJIL, Annette Martínez, Luis Diego Obando, Gisela de León, Alejandra Nuño and Viviana Krsticevic, Director of CEJIL, signed the brief.

[6] On behalf of Centro de Derechos Humanos de la Montaña "Tlachinollan", Abel Barrera, Director of Tlachinollan, signed the brief.

[7] The Court informed on the declaration by Judge Sergio García Ramírez about not hearing this case "[s]ince as he h[a]s constantly expressed, he consider[s] that it is not appropriate for a judge to participate if he has the same nationality as the respondent State.."

On October 15, 2009 the State appointed Eduardo Ferrer Mac-Gregor Poisot in such capacity.

8. By means of Resolution of July 2, 2010, the Court's President (hereinafter "the President") convened a public hearing in the instant case and ordered the forwarding of certain affidavits and other statements in said hearing.[8] The parties had the opportunity to present observations to the affidavits.

9. Moreover, the Tribunal received twelve *amicus curiae* briefs from the following individuals, institutions and organizations: The Human Rights Clinic of the Human Rights Program at Harvard Law School,[9] regarding the admissibility of the arguments of the alleged victims related to the duration of the unlawful detention and the abuse suffered during their detention; the Human Rights Clinic at University of Texas,[10] on the vulnerable situation of the persons who are detained without an arrest warrant and the need to be brought, without delay, before a court; Gustavo Fondevila, professor at Centro de Investigación y Docencia Económicas (Economic Research and Teaching Center) (CIDE),[11] regarding the unlawful detentions conducted by the Mexican Army and the legalization of torture under the concept of coerced confession; Asociación para la Prevención de la Tortura (Association for Torture Prevention),[12] regarding the exclusion of evidence obtained under torture; Miguel Sarre, professor at Instituto Tecnológico Autónomo de México (Autonomous Technological Institute of Mexico) (ITAM),[13] regarding the State's obligation to regulate a detainees' registry as a measure of non-repetition; Clínica de Derechos Humanos de la Escuela Libre de Derecho (Human Rights Clinic at the Free Law School),[14] on the duty to protect, guarantee and provide an effective recourse to human rights and environmental defenders; Comisión Mexicana de Defensa y Promoción de los Derechos Humanos A.C. (Mexican Commission for the Defense and Promotion of Human Rights A.C,[15] on the broad discretionality of the Mexican Public Prosecutor's Office during the conduct of preliminary inquiry; Centro Mexicano de Derecho Ambiental (Mexican Center for Environmental Law) (CEMDA) and Asociación Interamericana para la Defensa del Medio Ambiente (Inter-American Association for Environmental Defense) (AIDA),[16] on the importance of environmental defenders in Mexico, the attacks suffered and

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[8] *Cf. Case of Cabrera García and Montiel Flores v. Mexico*. Order of the President of the Inter-American Court of Human Rights of July 2, 2010.

[9] The brief was filed on March 15, 2010 by James L. Cavallaro, Virginia Corrigan, Alexia De Vincentis, Kathleen Gibbons, Cecilia Cristina Naddeo and Charline Yim of the Human Rights Clinic of the Human Rights Program at Harvard Law School.

[10] The brief was filed on July 5, 2010 by Emily Johnson on behalf of the Human Rights Clinic at University of Texas.

[11] The brief was filed on August 3, 2010 by Gustavo Fondevilla on behalf of the Centro de Investigación y Docencia Económicas (Economic Research and Teaching Center) (CIDE).

[12] The brief was filed on September 30, 2010 by Mark Thomson, Secretariat at Asociación para la Prevención de la Tortura (Association for Torture Prevention).

[13] The brief was filed on September 24, 2010 by Miguel Sarre Iguíniz, professor at Instituto Tecnológico Autónomo de México (Autonomous Technological Institute of Mexico) (ITAM).

[14] The brief was filed on September 13, 2010 by Luis Miguel Cano Lopez, Director of Clínica de Derechos Humanos de la Escuela Libre de Derecho (Human Rights Clinic at the Free Law School).

[15] The brief was filed on September 10, 2010 by Humberto F. Guerrero Rosales, Juan Carlos Gutierrez, Nancy J. Lopez Pérez, Lucia Chavez Vargas and Ulises Quero García on behalf of the Comisión Mexicana de Defensa y Promoción de los Derechos Humanos A.C. (Mexican Commission for the Defense and Promotion of Human Rights A.C).

[16] The brief was filed on September 10, 2010 by Samantha Namnum García, Regional Director of the Centro Mexicano de Derecho Ambiental (Mexican Center for Environmental Law) (CEMDA); Astrid Puentes Riaño, Executive Co-Director of Asociación Interamericana para la Defensa del Medio Ambiente (Inter-American Association for Environmental Defense) (AIDA); Jacob Kopas, Legal Advisor of AIDA; and Juan Carlos Arjona Estévez, Coordinator of the Human Rights and Environment Program of CEMDA.

their right to freedom of association; Programa de Derechos Humanos de la Universidad Iberoamericana (Human Rights Program of the Ibero-American University),[17] regarding the prohibition to assess evidence obtained under torture and without judicial control; International Forensic Program of Physicians for Human Rights,[18] on the non-compliance with the international requirements regarding the evidence of sodium rhodizonate; EarthRights International,[19] on the human rights abuses in the context of resistance of communities against extractive industries and Environmental Defender Law Center,[20] on the serious situation of Mexican environmental defenders, the international acknowledgment of environmental defenders and the violation of the rights of Messrs. Cabrera and Montiel.

10. The public hearing was held on August 26 and 27, 2010 during the LXXXVIII Regular Sessions of the Court, at the Court's seat.[21] The judges asked various questions during the hearing and requested evidence to facilitate adjudication of the case.[22]

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[17] The brief was filed on September 10, 2010 by Vanessa Coria Castilla, Sandra Salcedo Gonzalez and Jose Antonio Ibañez on behalf of the Human Rights Program of the Ibero-American University.

[18] The brief was filed on September 9, 2010 by Ronald L. Singer and Stefan Schmitt on behalf of the International Forensic Program of Physicians for Human Rights.

[19] The brief was filed on September 9, 2010 by Jonathan Kaufman and Marco Simons on behalf of EarthRights International.

[20] The brief was filed on August 12, 2010 by Nicholas Hesterberg on behalf of the Environmental Defender Law Center.

[21] To this hearing, there appeared: a) on behalf of the Inter-American Commission: Rodrigo Escobar Gil, Commissioner; Karla Quintana Osuna, legal advisor, and Silvia Serrano Guzmán, legal advisor; b) on behalf of the representatives: Luis Arriaga Valenzuela, S.J. Centro Prodh, Stephanie Erin Brewer and Jaqueline Sáenz Andujo, from Centro Prodh; Alejandra Nuño, Agustín Martin, Luis Carlos Buob, Gisela De León and Marcia Aguiluz, from CEJIL and c) on behalf of the State: Minister Alejandro Negrín Muñoz, Director General of Human Rights and Democracy of the Foreign Affairs Secretariat; Ambassador Zadalinda González y Reynero, State Agent and Ambassador of Mexico in Costa Rica; Mrs. Yéssica De Lamadrid Téllez, Director General for International Cooperation of the Juridical Under-Secretariat and International Affairs of the Attorney General's Office; Mr. Carlos Garduño Salinas, Assistant Director General for Cases of the Unity for the Defense and Promotion of Human Rights of the Secretariat of the Interior; Brigade General J.M. and Mr. Rogelio Rodríguez Correa, Subdirector of International Affairs of the General Direction of Human Rights of the National Defense Secretariat; Mr. José Ignacio Martín del Campo Covarrubias, Director of the International Litigation Area in Human Rights of the Foreign Affairs Secretariat; Mr. David Ricardo Uribe González, Subdirector of the International Litigation Area in Human Rights of the Foreign Affairs Secretariat; Mr. Enrique Paredes Frías, Subdirector of International Litigation Area in Human Rights of the Foreign Affairs Secretariat; Mr. Luis Manuel Jardón Piña, Head of the Litigation Department of the Legal Advisory Department of the Foreign Affairs Secretariat; and Mr. Rafael Barceló Durazo, Diplomatic Attaché for Political and Human Rights Affairs of the Embassy of Mexico in Costa Rica.

[22] On September 13, 2010, following the full Court's instructions, the Secretariat forwarded a communication to all the parties in which it indicated some of the questions made by the Judges of the Tribunal at the public hearing, dealing with: i) The presence of the Armed Forces in Guerrero: a) the existence of an express, well-grounded and reasoned request of the civil authorities for the military forces to intervene in the scene of the facts and b) further information about the jurisprudence of the Supreme Court of Justice of Mexico in relation to the participation of the Armed Forces in matters of public security; ii) the detention of the alleged victims: c) the legal framework governing the competence of the military authorities to arrest and/or detain civilians, d) a detailed description of the facts since the detention of Messrs. Montiel Flores and Cabrera García until they were brought before a judge or a competent authority, explaining if applicable, the excess of time in reasonable terms, and e) information and evidence about the alleged flyers that the alleged victims were distributing and the activities they were allegedly carrying out on the day of their detention; iii) The alleged arms seized from the alleged victims at the time of their detention: f) minutes of the rising up in arms when Messrs. Cabrera García and Montiel Flores were detained, the type of arms found and their exact number, the final judicial decisions regarding the responsibility of the alleged victims for holding such arms and which arms gave rise to an advance of the corresponding criminal investigation. In case of contradictions in some minutes, specific motions about them, g) information about the Mexican legislation on the classification of weapons in terms of how dangerous they are for public security, h) information about the validity and skill of the sodium rhodizonate test to evidence the use or manipulation of weapons, i) information and motions on the alleged contradictions resulting from the sodium rhodizonate test in this

11. On October 11, 2010 the Inter-American Commission, the representatives[23] and the State forwarded their final written arguments, which were transmitted to the parties to present the observations they deem pertinent regarding certain documentation presented by Mexico and by the representatives together with such briefs. In said final arguments, the parties presented arguments and evidence related to the questions and evidence to facilitate adjudication of the case requested by the Court.

III

PRELIMINARY OBJECTION OF THE "FOURTH INSTANCE RULE"

1. Arguments of the parties

12. The State lodged a preliminary objection stating the Court's "lack of competence to hear the merits of this claim in the light of the principle of the fourth instance." The State sustained that "the Court cannot determine whether the national tribunals applied the domestic law correctly or whether the decision was wrong or unfair" and that the Court "should only determine" whether the judicial criminal proceedings "abided by the principles of guarantee and judicial protection under the American Convention or whether there is any judicial error that may be or has been proven evidencing serious injustice." The State asserted that the latter would not have happened in this case since Messrs. Cabrera and Montiel filed "a motion challenging their formal imprisonment, a motion whereby they obtained partially favorable results," and that "they also had access to instances at which they could appeal the condemnatory decision in first instance and other instances to challenge further decisions; they also benefited from such motions," even by accepting evidence submitted untimely. In fact, Mexico sustains that "all the State's acts or omissions" alleged as "violations of the American Convention, even those acts or omissions of a procedural nature, have already been evaluated and determined by independent and impartial Mexican judicial bodies through effective and efficient motions" and "with full respect of the right to a fair trial and judicial protection."

13. The State further alleged that the Court "has uniformly declared that the preliminary objections based on a fourth instance criterion were inapplicable." However, this case would be exceptional because in previous cases the plaintiffs had not tried to obtain "the revision of the judgments or decisions by the domestic tribunals," but the determination of "whether an act or omission by the State ha[d] resulted in a violation of a right protected by the American Convention," while in this case "the idea would be to review the decisions made by the domestic

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case, and j) newsletter from the General Attorney's Office including the depositions stating that the rhodizonate test does not work on wet hands; iv) the physical and psychological treatment of the alleged victims: k) reasons why the alleged victims were released, and identification and specification of the corresponding medical reports, l) did the State conduct proceedings to collaborate with the entrance of Physicians for Human Rights to the penitentiary center where the alleged victims were held?, m) was a medical check-up allowed to be made by the physicians not belonging to state institutions when the alleged victims were detained?, n) explanation about the coincidences and/or differences in the medical reports that seem to have provided the grounds for the decision to release the alleged victims in November 2001 and the medical report by Mr. Tramsen, Ph. and Mr. Tidball-Binz, Ph., from Physicians for Human Rights- Denmark on July 31, 2000. Lastly, independent of the above questions to all the parties, the Inter-American Commission was requested to establish clearly the reason why the elements considered in the claim were not sufficient to conclude that there were acts of torture against the alleged victims.

[23] Agustín Martin, Alejandra Nuño, Luis Carlos Buob and Viviana Krsticevic signed by CEJIL; Luis Arriaga, Stephanie E. Brewer and Jaqueline Sáenz signed by Centro Prodh; Abel Barrera signed by Centro de Derechos Humanos de la Montaña "Tlachinollan" [Human Rights Center of the Mountain "Tlachinollan"].

tribunals," since such tribunals would have exercised "effectively the *ex officio* 'conventionality control' that must prevail for a fourth instance exception to be applicable." Consequently, the State requested the Court to declare itself not competent since "all the merits of the case […] were analyzed judicially" in judicial instances at which "the non-existence of torture was determined" and "in a proceeding conducted pursuant to the right to a fair trial […] the criminal responsibility of the [alleged victims] was evidenced." Lastly, the State requested that, in case this exception was declared inapplicable, the Court should rule "on the criteria, juridical rationale and conditions in which, even if the national tribunals exercise a conventionality control," the Court "may hear the matters submitted to its jurisdiction."

14. Lastly, the Commission emphasized that "it is not its intention to present issues related to the interpretation or application of the domestic law of the State to the facts" in this case "but that it requests the Court to declare that the Mexican State is responsible for the violation" of the rights stipulated in the American Convention." Furthermore, the Commission highlighted the fact that "it may have timely and duly analyzed the question of admissibility in this case" and that in the Merits report and in the application, it concluded that there was "lack of investigation and substantiation of the application filed for the alleged acts of torture" and "the irregularities of the criminal proceedings against the [alleged] victims." Lastly, the Commission pointed out that "the exception lodged by the Mexican State is groundless, since the State's arguments presuppose an evaluation of the merits of the application and the evidence submitted in relation to the judicial system and the decisions of the domestic tribunals in this case."

15. In turn, the representatives pointed out that "the State's argument cannot be considered as a preliminary objection since such argument is based on the compatibility of the proceedings of its own domestic bodies with the American Convention," thus being "an argument regarding the merits." Furthermore, the representatives sustained that they do not request to revise "the way in which the Mexican tribunals applied their domestic legislation or adopted their decisions" but "the alleged violations of the Inter-American instruments," taking into account that the State is internationally responsible for the acts or omissions of any of its powers or bodies, including the tribunals. The representatives added that they also request to declare the "incompatibility of the military tribunals' competence to investigate the reported facts on torture with the provisions of the above-mentioned Convention." In view of the argument that the exception of "fourth instance" is applicable because all the violations alleged before the Court had already been evaluated and considered by the judicial bodies, the representatives affirmed that it would not be effective since "several human rights violations under examination in this case were never evaluated by the domestic tribunals or, if they [were], it was done in an [in]adequate manner", as would have been the case of torture. As regards the argument that the preliminary objection of "fourth instance" would apply because the domestic Judiciary would have exercised "the *ex officio* conventionality control that must prevail so that the exception of fourth instance is applicable," the representatives pointed out that the evaluation of compliance with such control "is within the competence of the Inter-American Court, like the rest of all the obligations under the Convention." Furthermore, they stated that "it is not true that such 'conventionality control' had really been exercised."

2. Considerations of the Court

16. This Court has established that the international jurisdiction is of a subsidiary,[24] reinforcing and complementary nature,[25] and therefore does not serve

[24] *Cf. Case of Acevedo Jaramillo et al v. Peru. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 24, 2006. Series C N° 157, para. 66;

as a court of "fourth instance." This implies that the Court cannot act as a higher court or as an appeal court to resolve in disagreements among parties on some scopes of the assessment of evidence or of the application of the domestic law to some aspects that are not directly related to compliance with the international obligations in human rights. Thus, this Court has sustained that, in principle, "courts of the State are expected to examine the facts and evidence submitted in particular cases."[26] The above implies that when assessing compliance with certain international obligations, such as ensuring that a detention was lawful, there is an intrinsic interrelationship between the analysis of international law and domestic law.

17. The Court has sustained that preliminary objections are acts that seek to prevent the examination of the merits of the aspect in question, by objecting the admissibility of an application or the competence of the Court to hear a specific case or any of its aspects, owing to the person, the matter, the time or the place, as long as said aspects are of a preliminary nature.[27] If these acts cannot be revised withouth previously analyzing the merits of a case, they cannot be analyzed through a preliminary objection.[28]

18. Based on the foregoing, it may be sustained that, if the idea is for the Court to act as a higher court regarding the scope of the evidence and the domestic law, a matter would be submitted to it on which it could not rule and for which it is not competent, in light of the subsidiary competence of an international tribunal. However, for this exception to be applicable, it would be necessary that the applicant must intend for the Court to review the decision of the domestic tribunal due to its incorrect assessment of the evidence, the facts or the domestic law without, in turn, alleging that such decision was a violation of international treaties over which the Tribunal is competent.

19. On the contrary, the Court is competent to check whether in the steps effectively taken at domestic level, the State violated or not its international obligations deriving from the Inter-American instruments that confer competence to the Tribunal. Therefore, according to the usual case law of the Court, the clarification of whether the State has violated its international obligations can lead the Court to examine the corresponding domestic proceedings in order to establish its compatibility with the American Convention.[29] This happens because, if there is

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Case of Zambrano Velez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C Nº. 166, para. 47, and *Case of Perozo et al v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 195, para. 64.

[25] In the Preamble of the American Convention, the international protection is justified "in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states." See also, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*. (Art. 74 and 75). Advisory Opinion OC-2/82 of September 24, 1982, Series A Nº.2, para. 31; *The Word "Laws" in Article 30 of the American Convention on Human Rights.* Advisory Opinion OC-6/86 of May 9, 1986, Series A Nº 6, para. *26, and Case of Velasquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 61.

[26] *Case of Nogueira de Carvalho et al v. Brazil. Preliminary Objections and Merits.* Judgment of November 28, 2006. Series C N° 161, para. 80.

[27] *Cf. Case of Las Palmeras v. Colombia. Preliminary Objections.* Judgment of February 4, 2000. Series C No. 67, para. 34; *Case of Garibaldi v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 23, 2009. Series C No. 203, para. 17 and *Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits and Reparations.* Judgment of May 26, 2010. Series C No. 213, para. 35.

[28] *Cf. Case of Castañeda Gutman v. México. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 6, 2008. Series C N. 184, para. 39; *Case of Garibaldi v. Brazil,* supra note 27, para. 17 and *Case of Manuel Cepeda Vargas v. Colombia*, supra note 27, para. 35.

[29] *Cf. Case of "Street Children" (Villagrán Morales et al) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C, Nº 63, para. 222; *Case of Garibaldi v. Brazil*, supra note 27, para. 120; and *Case of Dacosta Cadogan v. Barbados. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 24, 2009. Series C No. 204, para. 24.

a claim that a judgment has been incorrect because of the violation of the due process, the Court may not refer to this claim as a preliminary objection, since the Court will need to consider the merits of the case and determine whether such right under the Convention has been violated.

20. Based on the foregoing, the Court considers that the basic premise of the preliminary objection raised by the State is that no human rights violation has been committed in the instant case, which is precisely what will be discussed in the merits of the case. When assessing the merit of the petition the Court shall determine whether the domestic procedures responded, as alleged by the State, to all the acts claimed by the Commission and the representatives before this Tribunal and whether the State's international obligations were respected in doing so.

21. On the other hand, the above conclusion is not modified by the fact that the State alleges that the national tribunals have exercised an *ex officio* "conventionality control" between the domestic rules and the American Convention. In fact, the merits stage shall determine whether the alleged conventionality control alleged by the State involved a respect for the State's international obligations in the light of this Tribunal's case law and under the applicable international law.

22. Based on the foregoing, the Court rejects the preliminary objection lodged by the State of Mexico.

IV

JURISDICTION

23. The Inter-American Court has jurisdiction over this case in accordance with article 62(3) of the Convention, given the fact that Mexico has been a State Party to the American Convention since March 24, 1981 and has accepted the binding jurisdiction of the Court on December 16, 1998. Furthermore, the State ratified the Inter-American Convention to Prevent and Punish Torture (hereinafter "Convention against Torture") on November 2, 1987.

V

EVIDENCE

24. Based on the provisions of Articles 46 and 47 of the Rules of Procedure, as well as on the Court's case law regarding the evidence and assessment thereof,[30] the Court shall now examine and assess the documentary evidence forwarded by the parties at the different procedural stages, as well as the affidavits rendered and those received at the public hearing. In doing so, the Tribunal shall assess them on the basis of sound judgment, within the applicable legal framework.[31]

1. Witness and Expert Witness Evidence

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[30] *Cf. Case of the "White Van" (Paniagua Morales et al) v. Guatemala. Reparations and Costs.* Judgment of May 25, 2001. Series C No. 76, para. 50; *Case of Rosendo Cantu et al v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 31, 2010. Series C N° 216; para. 27; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations and Costs.* Judgment of September 1, 2010. Series C N° 217, para. 39.

[31] *Cf. Case of the "White Van" (Paniagua Morales et al) v. Guatemala*, *supra* note 30, para. 50; *Case of Rosendo Cantu et al v. Mexico*, *supra* note 30, para. 27; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra* note 30, para. 39.

25. The Court admitted the affidavits rendered by the following witnesses and expert witnesses:

1) *Teodoro Cabrera García*, alleged victim, a witness proposed by the representatives, who deposed on the following aspects: i) "the organizational process of the Organización de Campesinos Ecologistas de la Sierra de Petatlán y Coyuca de Catalán (OCESP) (Organization of Ecologist Peasants of Sierra de Petatlán and Coyuca de Catalán), and his participation in such organization;" ii) the facts of the alleged violations committed, "as well as the [alleged] persistent affectations to his physical and psychological health," iii) "the [alleged] affectations to his family members resulting from the reported violations," and iv) "the measures that the State should adopt to repair the damages caused;"

2) *Miguel Olivar López*, Mr. Cabrera García's stepson, a witness proposed by the representatives, who deposed on the following aspects: i) the alleged affectations of the Cabrera López family resulting from "the [alleged] unlawful and arbitrary detention, torture, imprisonment, criminal proceedings and lack of justice in his father's case;" ii) how "the [alleged] violations of the reported human rights had an impact on his family's capacity to earn a living by tilling the soil of an old community plot," iii) the alleged affectations to the health and well-being of his family members; iv) "the [alleged] impossibility to return to his community;" v) "the [alleged] persistent affectation [to his] family, due to both the [alleged] lack of recognition of his father's innocence and the [alleged] ineffective investigation into the acts of torture and other abuse against him;" vi) "the present situation of Teodoro Cabrera and his family," and vii) "the measures that the State should adopt to repair the damages caused;"

3) *Ubalda Cortés Salgado*, wife of Rodolfo Montiel Flores, a witness proposed by the representatives, who deposed on the following aspects: i) "the organizational process of OCEPS[,] as well as the work and struggle to defend the forests, particularly the work by Messrs. [Cabrera García and Montiel Flores];" ii) "the circumstances of the [alleged] unlawful and arbitrary detention of [the alleged victims] and indicated the affectation to her husband's health due to the [alleged facts that occurred];" iii) "the affectation to her own well-being and the well-being of the members of her family due to the [alleged] violations, and iv) "the necessary and adequate reparation measures in this case;"

4) *Mario Ernesto Patrón Sánchez*, counsel for the alleged victims in the domestic proceedings, a witness proposed by the representatives, who deposed on the following aspects: i) the alleged errors and irregularities of the domestic criminal proceeding conducted against Messrs. Cabrera García and Montiel Flores, who he represented as their lawyer and human rights advocate; ii) how the local judicial instances allegedly hindered the presentation or consideration of the evidence of the alleged torture suffered by the two alleged victims; iii) the alleged juridical and practical impediments faced during the exercise of their defense, and iv) "the [alleged] fabrication of evidence which he verified in the domestic criminal proceedings at local, federal and military levels;"

5) *Celsa Valdovinos Ríos*, a defender of Petatlán forests and awardee of the "Chico Mendes" environmental prize for her work in favor of the environment in the Guerrero state, a witness proposed by the representatives, who deposed on the following aspects: i) "the context of environmental devastation of the forests in the region;" ii) "the foundation process of OCESP, making reference to the [alleged] harassment and attacks against environmental defenders;" iii) the activities of OCESP,

including the activities of the alleged victims in this case; iv) the alleged attacks and harassment after the detention and imprisonment of Messrs. Cabrera García and Montiel Flores, and v) the alleged impact of these facts on the "organizational process of OCESP and the capacity of its members to freely associate;"

6) *Héctor Magallón Larson*, Coordinator of Greenpeace Forest and Jungle Campaign, Mexico, an expert in environmental and deforestation matters, a witness proposed by the representatives, who deposed on the following aspects: i) the "knowledge that Greenpeace-Mexico had on the [alleged] deforestation of the forests in Guerrero state and, particularly, in the region of Sierra de Petatlán and Coyuca de Catalán;" ii) the reasons giving rise to Greenpeace involvement in the campaign to release Messrs. Cabrera García and Montiel Flores; iii) "[the] overview of the [alleged] adversities faced in Mexico by environmental community defenders, stressing the [alleged] lack of protection of peasants and natives struggling to preserve the ecosystems of their communities;"

7) *Miguel Carbonell Sánchez*, a researcher at Universidad Nacional Autónoma de Mexico [National Autonomous University of Mexico], expert witness proposed by the Inter-American Commission, who deposed on the following aspects: i) "the participation of military justice in the investigation and trial of the crime which are not based on and/or which could be human rights violations;" ii) "the theses of the Mexican Supreme Court of Justice in relation to [the] scope of the application of military justice in Mexico," and iii) "the constitutional and legal regulation of the scope of application of military justice in Mexico;"

8) *Ernesto López Portillo Vargas*, an expert on public security, Executive Director of Instituto para la Seguridad y la Democracia A.C. (Institute for Security and Democracy) (Insyde) and Adviser to the Comisión de Derechos Humanos del Distrito Federal (Human Rights Commission of the Federal District), expert proposed by the representatives, who deposed on the following aspects: i) "the security policies implemented by the State […] whereby the armed forces have been [allegedly] involved in public security tasks and the [alleged] lack of adequate domestic or civil controls over the actions of such armed forces;" ii) "the profile that law-enforcement officials should have," and iii) the minimum necessary control standards to guarantee an adequate rendering of accounts by such entities, the consequences for their actions and the respect for the human rights of the civil population *vis-à-vis* the lack of adequate control;

9) *José Luis Piñeyro*, a sociologist and a researcher, Professor at the Sociology Department of Universidad Autónoma Metropolitana Campus Azcapotzalco, an expert witness proposed by the representatives, who deposed on the following aspects: i) "the particular context of militarization in Guerrero [state] ;" ii) "the reason for and the impact of the presence of the Armed Forces on the rural communities of Guerrero and on the peasant movement, highlighting the [alleged] patterns of human rights violations committed against civilians by the military;" iii) "the aspects of the [alleged] militarization in Guerrero which are particular to this [s]tate and that [would be] fundamental to understand the reasons for the military to [allegedly] detain, torture and make up crimes against the [alleged] victims and [how] the facts described occurred;" iv) "the present situation in Guerrero regarding the [alleged] militarization and the impact of the anti-drug fight on rural communities," and v) "the reparation measures that the Mexican State should adopt in this case;"

10) *Ana C. Deutsch*, an expert in Clinical Psychology with experience in

evaluating victims of torture, an expert witness proposed by the representatives, who deposed on the following aspects: i) "the results of a psychological evaluation made on Messrs. Montiel and Cabrera, detailing the persistent effects of the violations which they [allegedly] suffered," and ii) the results of the evaluations made to some of the relatives of Messrs. Montiel Flores and Cabrera García, in order to evidence the affectations caused by the alleged violations of human rights suffered by the alleged victims;

11) *José Quiroga*, co-founder and medical director of the Rehabilitation Program for Victims of Torture in Los Angeles, California, and Vice President of the International Council for the Rehabilitation of Victims of Torture, an expert witness proposed by the representatives, who deposed on the following aspects: i) "an evaluation of the physical health of [Messrs. Cabrera and Montiel], detailing the [alleged] persistent effects of torture and other violations of human rights [allegedly] suffered", and

12) *Carlos Castresana Fernández*, a former Commissioner of the International Commission against Impunity in Guatemala (ICAIG) and former Attorney of the High Court of Spain, expert witness proposed by the Inter-American Commission, who deposed on the following aspects: i) "[the] principle of immediacy in criminal procedural matter;" ii) "how to obtain confessions by cruel, inhuman and degrading treatment or torture," and iii) "the validity of such confessions as evidence in judicial proceedings."

26. As to the evidence produced at the public hearing, the Court heard the testimonies rendered by the following people:

1) Rodolfo Montiel Flores, alleged victim, witness proposed by the representatives, who deposed on the following aspects: i) "his work as a forest advocate, describing the organizational process of [OCESP] to stop the [alleged] excessive felling in the region by transnational and local companies;" ii) "the context of attacks against members of OCESP in the 90s;" iii) the alleged "specific violations [allegedly] suffered by him and by Mr. Teodoro Cabrera[,] as from May 1999" and "the effect of such [alleged] violations on his physical and psychological health;" iv) "the [alleged] affectations to his family members resulting from such facts," and v) "the measures that the State should adopt to repair this damage;"

2) Fernando Coronado Franco, a specialist in Mexican criminal law and general consultant of the Human Rights Commission of the Federal District, expert witness presented by the representatives, who deposed on the following aspects: i) "how the Mexican legal framework [allegedly] allowed and allows for granting evidentiary value to depositions and confessions given without judicial control;" ii) "the practical effects of the legal framework on the actions of the prosecution and judicial authorities," making comments on the most important domestic jurisprudence about this matter; iii) "the [alleged] practice of […] arbitrary and unlawful detentions and the [alleged] lack of adequate controls in the chain of custody and bringing detainees [before the judges]; iv) "the [alleged] practice of omission or forgery of data on official medical certificates issued in relation to the detainees;" v) the alleged distance between the design of the rules of the Mexican criminal proceedings and recurrent practices; vi) "how the written nature of Mexican criminal proceedings, their investigative aspects and broad powers of the [P]ublic [P]rosecutor's Office, [apparently] enable and encourage making up proceedings and granting evidentiary value to evidence or proceedings obtained without adequate control[, and] without investigating any report on torture made by individuals accused in criminal

proceedings," vii) "the implications of the Constitutional reform regarding criminal justice passed in June 2008 for the [alleged] practice of violations mentioned," and viii) "the present necessary reforms to stop admitting any depositions obtained without any judicial control in criminal proceedings;",

3) *Christian Tramsen*, former adviser to Physicians for Human Rights – Denmark (PHR), who examined the alleged victims in July 2000 in order to determine whether they had been tortured; an expert witness presented by the representatives, who issued a technical opinion on the following aspects: i) the physical and psychological health of Messrs. Cabrera and Montiel in July 2000; ii) "the relation between the symptoms he found and the facts that the [alleged] victims described to the doctors of PHR;" iii) the method used to perform the medical examination and how such method allegedly detects torture a year after the alleged facts had occurred; iv) "the methodology internationally accepted that must be followed in order to determine torture," and v) "the minimum standards in medical check-ups of detainees under the State jurisdiction in criminal proceedings, analyzing them from the standpoint of the content of the medical certificates issued regarding the health conditions of Messrs. Montiel and Cabrera by State forensic doctors,"[32] and

4) *Juana Ma. del Carmen Gutiérrez Hernández*, official forensic physician expert witness at the General Attorney's Office of Mexico, an expert witness presented by the State, who issued a technical opinion on forensic medicine about the following medical evaluations: i) the tests conducted on the alleged victims on the days following the facts of this case; ii) the test used as a basis to release the alleged victims from prison, and iii) the test conducted by Physicians for Human Rights – Denmark, as well as regarding the relation between such medical evaluations and the criminal proceeding in this case.

2. Admission of Documentary Evidence

27. In the case at hand, as in many other cases,[33] the Court admits the evidentiary value of such documents forwarded by the parties at the appropriate procedural stage that have not been disputed nor challenged, or its authenticity questioned. In relation to the documents forwarded as an answer to the request, in

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[32] The State requested a reconsideration of the decision made by the Court's President regarding summoning Mr. Tramsen as an expert witness. The full Court rejected such request. In its request, the State objected to Mr. Tramsen for "having been a defender and person of trust" of Messrs. Cabrera and Montiel and for indicating that "he did not know nor represented the alleged victims before issuing his opinion […] at the domestic level." The State further alleged that this attitude "questions the impartiality, objectivity and truthfulness with which the expert witness rendered his opinion." In this respect, the Court noted that the State "did not point out in which way Mr. Tramsen would have acted as defense counsel" nor "presented copies of his acting as a legal-technical support during the statements rendered before the prosecutors or judges or that it had filed judicial remedies or legal arguments about what happened." The Tribunal noted that "Mr. Tramsen is a physician" and that his "intervention as a physician does not seem to be related to a legal representation"; therefore, the lack of truthfulness argued by the State is not admitted. As to the lack of objectivity, the Court agreed with the President regarding the fact that "the objectivity an expert witness should have, even at the domestic level, does not end for the rendering of an expert opinion on another occasion". To this end, even when "the domestic courts would have adopted, communicated and assessed said expert opinion prior to the hearing of the case by the Tribunal, that does not imply that said opinion is no longer an expert or objective one." *Cf. Case of Cabrera Garcia and Montiel Flores v. Mexico.* Order of the Inter-American Court of August 23, 2010; dissenting opinion of Eduardo Vio Grossi, Judge.

[33] *Cf. Case of Velásquez Rodríguez v. Honduras.* supra note 25, para. 140; *Case of Rosendo Cantu et al v. Mexico*; *supra* note 30 and *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra* note 30, para. 42.

order to facilitate the adjudication of the case (*supra* para. 10), the Court admits them into the body of evidence, pursuant to the provisions of Article 47(2) of the Rules of Procedure.

28. On the other hand, the Court shall examine, first, the observations made by Mexico about some documents submitted in the petition and in the written brief of pleadings and motions; then the Court shall rule on the documents submitted by the representatives and the State after their written briefs of pleadings and motions and the response to the petition, respectively.

29. The State requested that "any exhibit or certificate that the C[omission] or the petitioners had attached to their respective briefs, related with this proceedings, be compared with the certified records [of the criminal proceedings]" in order "to avoid taking the facts or acts related to the proceedings out of context." The State indicated that "any record referring to the criminal proceedings which does not form part of the records thereof shall be considered as a mere interpretation or personal opinion." Regarding this matter, the Court notes that the State did not challenge the admission of evidence and considers that the pleading on the scope of the documentation that is not included in the domestic criminal file is a matter related to the burden of the proof of such documentation, a matter to be decided in the merits taking into account the allegations made by the State and the remaining evidence on file.

30. The State requested the Court "to grant the corresponding value to any publications and individual reports based on international standards seeking that such content abides by the fair dimension of the matter in this case." This Tribunal notes that the State did not challenge the admission of such reports of individuals and shall consider the results thereof together with the rest of the body of evidence.

31. As regards the documents submitted by the representatives related to "the ecological or ecologist issue," the State requested the Court "to keep to the main reason of the case, which would be to corroborate that the actions of the Mexican authorities were taken in accordance with the international standards in human rights." Furthermore, the State "question[ed] the consideration of the evidence and other elements foreign to the case" and requested that any "evidence" about "either the general situation of human rights in Guerrero or the situation or activities" of Messrs. Cabrera and Montiel "as ecologists or in other matters" "should be fully rejected." The Court notes that it is appropriate to determine as a prior consideration of this Judgment (*infra* para. 60) whether the facts related to these documents form part of the object of this case. To that end, the Court shall take into account the State's arguments as well as the rest of the body of evidence.

32. On the other hand, as regards the documents submitted by the representatives and the State after the forwarding of the briefs of pleadings and motions and the response to the petition, respectively, the Court considered it is timely to recall that article 46 of the Rules of Procedure, governing the admission of evidence, establishes that:

> 1. Items of evidence tendered by the parties shall be admissible only if they are offered in the application of the Commission, in the brief of pleadings and motions of the alleged victims, in the answer to the application and observations to the pleadings and motions filed by the State or, when appropriate, in the document setting out the preliminary objections and the answer thereto.
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> [...]
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> 3. Should any of the parties allege force majeure, serious impediment, or the emergence of supervening events as grounds for producing an item of

evidence, the Court may admit such evidence, provided that the opposing parties are guaranteed the right of defense.

33. During the course of the public hearing, the representatives submitted certain documentation in relation to the controversies in this case.[34] Since such documentation was considered pertinent and useful to determine the facts of this case and their possible consequences, pursuant to article 47 of the Rules of Procedure, the Court decides to admit it.

34. Likewise, also during the course of the public hearing, expert witness Coronado Franco and expert witness Gutiérrez Hernández submitted their opinions in writing.[35] For their part, expert witness Gutiérrez Hernández submitted documents supporting her expert opinion. For their part, expert witnesses Tramsen and Gutiérrez Hernández submitted PowerPoint presentations supporting the presentations made during the hearing.[36] Such documents were distributed to the parties. The Tribunal admits such documents insofar as they refer to the purpose duly defined, because they are complementary and are framed within the parameters of time and form of the purpose for which they were requested.

35. On the other hand, both the State and the representatives submitted documents together with their final written arguments. Some of them were addressed to answer the questions made by the Tribunal as evidence to facilitate adjudication of the case (*supra* para. 10), so they are included in the body of evidence, as well as the observations made by the parties thereto. In turn, the representatives submitted, among other documents, vouchers of expenses incurred after the filing of briefs of pleadings and motions. Such evidence was submitted to the State's observations and its admission was not rejected; therefore, it is included in the file.

36. The representatives indicated that one of the exhibits submitted by the State to its final written pleadings, related to an "identification card" of doctors Christian Tramsen and Morris Tidball Binz, is submitted "untimely." In this respect, the Court admits such evidence upon considering it is useful and shall assess it together with the rest of the body of evidence, particularly when assessing the different allegations made by the State in relation to Mr. Tramsen's expert opinion.

3. Evaluation of depositions by the alleged victims, witness and expert witness evidence

37. As to the statements made by the alleged victims, the testimonies and expert opinions offered at the public hearing and by means of affidavits, the Court deems they are relevant to the extent they relate to the purpose defined by the President of the Tribunal in the Order requiring them (*supra* para. 8) and together with the other evidence of the body of evidence, taking into account the observations made by the parties.[37]

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[34] There are several medical certificates mentioned in the cross-examination made by the representatives of the alleged victims to expert witness Christian Tramsen, which were transmitted to the parties by means of the minutes on document reception corresponding to the public hearing held on August 26 and 27, 2010.

[35] *Cf.* Minutes on document reception of August 27, 2010 corresponding to the public hearing held in this case (record of merits, volume IV; folios 1667 and 1668).

[36] *Cf.* Minutes on document reception of August 27, 2010, *supra* note 35, folios 1667 and 1668.

[37] *Cf. Case of Loayza Tamayo v. Peru. Merits*. Judgment of September 17, 1997. Series C. Nº 33, para. 43; *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 50; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra* note 30, para. 47.

38. As regards the depositions of the alleged victims, the State expressed, in general terms, that witnesses Cabrera García and Olivar López and witness Cortés Salgado rendered "many and considerable contradictory statements, and even made further statements, not only about the alleged acts of torture against the petitioners but also in relation to the facts mentioned by the representatives." As regards witness Montiel Flores, the State also alleged that there seemed to be numerous contradictions in his statement. To that end, the Tribunal shall evaluate, in the merits of the case, whether the statements made by these witnesses are based on evidence.

39. According to the case law of this Tribunal, in view of the fact that the alleged victims have a direct interest in the case, their statements shall not be assessed separately but as a whole with the rest of the body of evidence of the proceeding,[38] inasmuch as they are useful as long as they provide more information on the alleged violations and their consequences. The Court notes that the purpose of the State's objections is to discredit the evidentiary value of the depositions made by the alleged victims in this proceeding. Mainly, the Court considers that such depositions would show differences with the previous depositions made under domestic law or rather, that two alleged victims did not witness certain facts on which they depose or refer to facts that do not form part of the subject-matter of the case. The Tribunal considers that such objections do not challenge the admissibility of such evidence but that they question its evidentiary value. Based on the foregoing, the Court admits the statements mentioned, without prejudice to the fact that its evidentiary value may only be considered regarding the matters that adjust to the purpose timely defined by the President of the Court (*supra* paras. 25 and 26) therefore, the Court shall consider the body of evidence, the State's observations and the rules of sound judgment.

40. In relation to the deposition made by witness Patrón Sánchez, the State pointed out that "the initial part of [his] deposition" was "absolutely biased" since the witness made reference to "facts and circumstances that the witness does not know for a fact, as the witness expressed." Hence, the State requested the Tribunal "to reject the entire deposition." Likewise, as regards the other considerations made by the witness, in general terms the State "limit[ed] to submit the judicial case files to corroborate the witness's falsehood;" the State further alleged that "such irregularities should have been submitted in the brief of pleadings, motions and evidence, not as mere observations without any support or basis," apart from the fact that "there are remedies in the judicial system to challenge the irregularities mentioned by the witness." To that end, the Tribunal shall assess, in the merits of the case, whether the statements made by this witness are based on evidence. On the other hand, the Court recalls that the evaluation on biased or unbiased depositions is not made in relation to the witnesses, in respect of whom it is appropriate to assess the evidentiary weight of their statements; this shall be done at the merits stage when assessing the deposition together with the rest body of evidence.

41. As regards the deposition by witness Valdovino Ríos, the State pointed out that "the witness made reference to facts that are not related to this case, specifically, regarding experiences that Mr. Felipe Arreaga allegedly had on dates before and after the detention" of Messrs. Cabrera and Montiel. Due to this reason, the State requested to reject the depositions not related to the case. On the other hand, the State pointed out that the witness "made several considerations about various activities carried out by Mr. Felipe Arreaga and Messrs. Rodolfo Montiel and Teodoro Cabrera which the witness did not know for a fact and of which the witness

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[38] *Case of Loayza Tamayo v. Peru*, *supra* note 37, para. 43; *Case of Rosendo Cantu et al v. Mexico*, *supra* note 30, para. 52; and *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra* note 30, para. 47.

did not have any direct knowledge." Furthermore, the State pointed out that Mrs. Valdovinos recognized that "her knowledge about the circumstances of the detention" of Messrs. Cabrera and Montiel "had been obtained by merely referential sources." The State concluded that the deposition of this witness "is considered extremely general and without any grounds whatsoever." Therefore, the State requested the Court to "reject the deposition by Mrs. Valdovinos about the present legal condition" of Messrs. Cabrera and Montiel. To that end, the Tribunal shall assess, in the merits of the case, whether the statements made by this witness are based on evidence.

42. In relation to witness Magallón Larson statement, the State pointed out that "he made certain statements, without enough documentation, about deforestation level in Mexico and, particularly, about the situation of the Petatlán community." As regards the "alleged complicity of the governmental authorities regarding the clandestine felling on Petatlán hills," the State pleaded that "the witness does not provide any grounds whatsoever for his affirmations." On the other hand, the State pointed out that the "witness recognized that he was not directly involved in the facts of this case and that the advice provided by Greenpeace to the alleged victims started a long time afterwards," that is why the State requested to take into account only those affirmations exclusively related to the period when "the witness [directly] participated in the case." As regards these issues, the Court considers that these do not engage the admission of this deposition, since the State recognizes the participation of the witness in this case. The scope of his deposition shall be assessed, if applicable, together with the rest of the body of evidence, taking into account what the State pointed out and the object of the lawsuit.

43. The Court notes that the State objected to some of the witnesses' depositions mainly because the witnesses referred to facts that seemed to be foreign to the object of this case, or because there would be evidence against their affirmations. Such observations refer to the merits of the controversy, so the Court shall assess, in the corresponding chapter of the Judgment, the content of the witnesses depositions, insofar as it refers to the object that was duly defined by the Court's President (*supra* para. 8), according to the object of the case, taking into account the body of evidence, the observations of the parties and the sound judgment rules.

44. As regards the experts' reports, in relation to Mr. Tramsen's report, the State considered that it was not admissible to ask for it since such report had already been assessed at various judicial instances, in decisions that were not appealed by the representatives of the present petitioners; that the above would imply a revision of the proceedings conducted by the national judicial authorities, and that there is no methodology, among other arguments about its deficiencies. The Court points out that the State reiterated the arguments on admissibility of the report which have already been assessed by the Tribunal in the resolution by which the request to reconsider the matter was rejected (*supra* para. 26.3). Consequently, the Court has already resolved on the controversy about the admissibility of the report and shall assess the other arguments against this evidence when resolving on the merits of the case.

45. Regarding Mr. Carbonell's report, the State pointed out that "it was prepared for another case" which "has no relation whatsoever with this case." According to the State, "this practice favors the unnecessary repetition of arguments," so the State requested that this expert witness' deposition be rejected "since it had not been prepared specifically for this case and, therefore, it does not contain the necessary specificity required for any expert witness' report." Furthermore, the State requested not to consider the deposition "since the statements included therein have already been evaluated *in extenso"* in the case of *Radilla Pacheco.* To that end, the Court notes that such arguments do not prevent

the admissibility of the report and the Tribunal shall determine, in the merits of the case, up to what extent the opinion is pertinent to resolve some disputed issues.

46. As regards Mr. Castresana's expert report, the State indicated that "the witness statements in chapter VIII of his brief are clearly not about the purpose for which his deposition was requested, but it shows that the document is biased and that it lacks objectivity;" due to this reason it requested to reject such deposition. The State added that "the expert witness maliciously introduced his point of view in the reports issued by the United Nations Committee on Torture" and, therefore, "they do not adjust to the purpose of his deposition, invalidating it even further." In relation to expert witness Piñeyro, the State indicated that "his expert report included statements based on no grounds […], making generalizations showing serious lack of objectivity" and that "the expert witness makes serious accusations against the Armed Forces based on no grounds either since he has no evidence to prove it." Regarding the expert report of Mr. López Portillo Vargas, the State pointed out that "his opinion is false" and that "the country has the necessary control standards in place to sanction and punish any abuse from any authority, including those of the Armed Forces in relation to security tasks."

47. As regards the opinion by Mrs. Deutsch and Mr. Quiroga, the State submitted various arguments on the methodology they used, the alleged deficiencies and errors made, among other issues, in order to disprove the burden of the proof.

48. As regards the arguments against the expert witnesses regarding the methodology they used and other deficiencies, the Tribunal considers it is pertinent to point out that, unlike witnesses, who shall avoid offering personal opinions, experts witnesses may offer technical or personal opinions as long as they refer to their special knowledge or experience. Additionally, the experts may refer both to specific matters of the action or any other relevant subject of the litigation, as long as they are limited to the object for which they were convened.[39] The expert witness' conclusions shall be well enough founded. In the first place, the Tribunal notes that the expert reports refer to the purpose for which they were ordered (*supra* paras. 25 and 26). Additionally, regarding the expert opinions by Messrs. Castresana, López Portillo, Piñeyro, Quiroga and Mrs. Deutsch, the Court notes that the statements made by Mexico refer to the merits of the case and to the burden of the proof of their opinions, matters that shall be considered, if applicable, in the corresponding chapters of the Judgment, within the specific framework of the purpose for which they were convened and taking into account what the State has pointed out.

4. Considerations on the alleged "supervening evidence"

49. On May 28, 2010 the representatives submitted three documents as supervening evidence: the Final Observations issued on April 7, 2010 by the Committee on Human Rights regarding the report submitted by Mexico in view of the International Covenant on Civil and Political Rights,[40] the Report issued on May 27, 2009 on the visit to Mexico of the Sub-Committee for the Prevention of Torture

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[39] *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 30, 2009. Series C N° 197, para. 42; *Case of Fernández Ortega et al v. México. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 30, 2010. Series C N° 215; para. 61; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 68.

[40] United Nations. Committee on Human Rights. Final Observations of the Committee on Human Rights. Evaluation of the reports presented by the States Parties in light of article 40 of the Covenant (Mexico). Doc. ONU CCPRlC/MEXlCO/5, April 7, 2010.

and Other Cruel, Inhuman or Degrading Treatment or Punishment[41] and a Resolution issued on March 24, 2010 by the Federal Institute for Access to Public Information whereby it was ordered to publish the report by said Sub-Committee.[42]

50. The State alleged that such documents "do not have any relation whatsoever with the litigation in this matter," "nor do they provide any element at all" to "facilitate adjudication of this international contentious proceeding." The State further alleged that such reports do not include any statement "about a systematic and repeated practice of torture" in Mexico. Regarding the Final Observations of the Committee on Human Rights, the State pointed out that it does not make "reference to the case of Messrs." Cabrera and Montiel "or to any other specific case." Regarding the report by the Sub-Committee for the Prevention of Torture, the State alleged that "it was only limited to detect any possible risk factors for the commission of torture" by "visiting some detention centers" and "not drawing conclusions on the situation of *all* detention centers" in Mexico. Particularly, the State highlighted that the Sub-Committee "did not make its study in Guerrero state and, least of all, in the detention centers to which the alleged victims in this case were sent."

51. The Court has used several rulings of the Committees and other oversight mechanisms of the United Nations System as applicable for a certain case. This is related to the merits of each specific case and the Tribunal does not have any formal restriction to include information in the case file that refers to notorious facts or to facts of public knowledge. Hence, the Court includes these documents not as supervening evidence but as information considered complementary and useful according to article 47 of the Rules of Procedure. The Tribunal emphasizes that there was a contradiction between the parties in relation to such rulings and shall consider the information indicated therein as applicable for this case and taking into account the arguments put forward by the State regarding the content of such documents.

VI
PRIOR CONSIDERATIONS

1. Facts that were not included in the Commission's application

52. The representatives alleged that Messrs. Cabrera y Montiel were "unlawfully and arbitrarily detained, and later tortured" "due to their activism" in defense of the environment. They specified that these attacks "cannot be anything but a reprisal due to their environmental activism." Additionally, the representatives indicated that this reprisal was part of a pattern of attacks against environmental defenders and, in particular, against the Civil Association Organization of Environmentalist Peasants of the Sierra of Petatlán and Coyuca of Catalán (Organización de Campesinos Ecologistas de la Sierra de Petatlán y Coyuca de Catalán, hereinafter "the OEPSP"). As from that, according to the representatives, "the military officers of the zone had information about the whereabouts" of Mr. Montiel Flores and his companions. The representatives indicated, furthermore, that "[t]he way in which the detention occurred, the physical and mental abuse to which Messrs. Cabrera and Montiel were subjected, the extension of their detention

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[41] United Nations. Subcommittee for the Prevention of Torture. Report on the visit to Mexico of the Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatments. Doc, ONU CAT/OP/MEXIR.1, May 27, 2009.

[42] Federal Institute for Access to Public Information (IFAI). Petitioner: Edgar Cortez Morales. Agency before which it filed its request: Foreign Affairs Secretary. Page of request 0000500121909, Case file 5290/09. Resolution of session held on March 24, 2010.

and the lack of information concerning their whereabouts […], caused to their family members feelings of deep desperation and anguish that continue affecting them to this day."

53. In its merits report, upon evaluating the various allegations of the representatives on whether the events that occurred to Messrs. Cabrera and Montiel constituted a reprisal for his activities in defense of the forests and whether they could be seen as part of a pattern of similar reprisals and attacks against defenders of the environment, the Commission "observe[d] that the alleged violations of the rights enshrined in Articles 13 [freedom of expression], 15 [right of assembly], and 16 [freedom of association] were not alleged by the petitioners during the admissibility phase." Therefore, in its application, the Commission only mentioned that in 1998, Messrs. Cabrera and Montiel established the OEPSP along with other peasants "in order to stop the forest felling operations that, in their opinion, were threatening the environment and the livelihood of the local peasant communities in the mountains of Guerrero."

54. The State alleged that the Commission "never refer[red] to acts of harassment against the members of [the OEPSP]" and that "[t]his issue was never mentioned in the report of the [Commission]" and "was neither brought up by the petitioners during the admissibility phase." Additionally, the State indicated that as the representatives were "aware that the alleged threats against members of the OEPSP were not part of the litigation in the case *sub judice,*" they "put forth arguments with no foundation whatsoever in bad faith in order to link the criminal proceedings underway" to the alleged "acts of violence and harassment against the OEPSP," despite that "none of the case files indicate" that those acts "had occurred due to their participation as members of [that organization]" and that, in addition, "there are no claims related to threats against the alleged victims before any domestic court." Furthermore, it stated that "it is not possible to argue that the alleged acts of harassment are supervening events."

55. The representatives stated that "[c]ontrary to that alleged by the State, the Commission's application indicates that the direct victims of the present case were members of the OEPSP" and "also states that the victims have been given awards due to their work in defense of the environment […]." Additionally, the representatives "did not request the Court to decide the case based on the context in which the facts occurred" but as the Court has done in other cases "to take into account the context to assess the facts." To this sense, they sustained that "the State errs in indicating that [the representatives seek to] include acts of violence and harassment against the members of the OEPSP in the litigation of this case," as their intention when referring to the context of the case is not to introduce "facts different from those set out by the Commission in its application, but only to develop, explain, and clarify [the latter]." Furthermore, the representatives alleged that "the way in which the arrest was carried out (including the treatment received during the arrest) and the criminal proceeding against the victims," as well as the aforementioned events and "the circumstances in which they occurred, arise from the Commission's application."

56. According to the case law of the Court, the alleged victims, their next of kin, or representatives in the contentious proceedings before this Tribunal, may invoke the violation of rights different to those included in the Commission's application, as long as they refer to facts already included in the application,[43] which constitutes the factual framework of the proceeding.[44] In addition, since a contentious case is,

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[43] *Cf. Case of the "Five Pensioners" v. Perú. Merits, Reparations and Costs*. Judgment of February 28, 2003. Series C No. 98, para. 155; *Case of Fernandez Ortega et al v. Mexico*, *supra* note 39, para. 218; and *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra* note 30, para. 228.

[44] *Cf. Case of the "Mapiripán Massacre" v. Colombia. Preliminary Objections.* Judgment of March 7, 2005. Series C No. 122, para. 59; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 69; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 134.

substantially, a litigation between a State and a petitioner or presumed victim,[45] the latter can refer to facts that explain, contextualize, clarify or reject those mentioned in the application or else respond to the claims of the State,[46] based on their arguments and the evidence they provide, without impairing the procedural balance or the adversarial principle, because the State is given procedural opportunities to respond to these allegations at all stages of the proceedings. On the other hand, the Court can be informed of supervening facts at any stage of the proceedings before it delivers judgment,[47] provided they are related to the facts of the proceedings.[48] It is for the Court to determine the need to prove the facts, as they were presented by the parties or taking into account other elements of the body of evidence,[49] provided the right to defense of the parties and the purpose of the litigation are respected.

57. In this case, the Court has verified that in its report on admissibility, the Commission expressly stated that the petitioners alleged that all the violations they had suffered were due to their work in the defense of the environment.[50] However, in its merits report, the Commission considered that those allegations "were neither legally nor factually connected to its admissibility report."[51] Later, in its application – which establishes the factual framework of the case – the Commission only sets out as facts of the case that Messrs. Cabrera and Montiel were members of the OEPSP and that they received four awards related to the defense of the

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[45] In the case of *Manuel Cepeda Vargas v. Colombia*, the Court highlighted that the recent reform of the Court's Rules of Procedure (and even of those of the Commission) reflects this conception. The Court recalled that in the introduction to the reforms indicates that: "[T]he principal reform introduced by the new Rules of Procedure relates to the role of the Commission in the proceedings before the Court. In this regard, the different actors of the system that took part in this consultation referred to the advisability of modifying some aspects of the Commission's participation in the proceedings before the Court, granting greater prominence in the litigation to the representatives of the victims or presumed victims and the defendant State; thereby enhancing the role of the Commission as an organ of the inter-American system, and thus improving the procedural balance between the parties. *Case of Manuel Cepeda Vargas v. Colombia*, *supra* note 27, para. 49.

[46] *Cf. Case of the "Five Pensioners" v. Peru, supra* note 43, para. *153; Case of Manuel Cepeda Vargas v. Colombia*, *supra* note 27, para. 49; and *Case of Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C N. 214, para. 237.

[47] In a similar sense, *Cf. Case of the "Five Pensioners" v. Peru, supra* note 43, para. 154; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 69; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra* note 30, para. 134.

[48] *Cf. Case of the "Five Pensioners" v. Peru, supra* note 43, para. 155; *Case of González et al ("Cotton Field") v. Mexico*. *Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 16, 2009. Series C N° 205, para. 17 and *Case of Manuel Cepeda Vargas v. Colombia, supra* note 27, para. 49.

[49] *Cf. Case of Yvon Neptune v. Haiti. Merits, Reparations and Costs.* Judgment of May 6, 2008. Series C No. 180, para. 19; *Case of Rosendo Cantu et al v. Mexico; supra* note 30 and *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra* note 30, para. 47.

[50] When they submitted their petition before the Commission, the representatives based their case on "the actions and diverse mobilizations that" the OEPSP had "carried out" and they alleged "a strong wave of repression for the members of [this organization] by means of arbitrary detentions, torture, murders, and forced disappearances." They also indicated that "as a consequence of their fight for the environment, the peasants that are part of the OEPSP […] began to receive various death threats such as those received by Mr. Montiel in […] 1998." *Cf.* petition for the admissibility report filed on June 3, 2003 (record of annexes to the application, annex 3, volume III, folio 958) and request for the opening of the case against the United Mexican States filed on October 25, 2001 (record of annexes to the application, annex III, volume III, folio 1186). In their observations on the merits of the case, the petitioners provided a more in-depth study in their arguments and evidence related to this hypothesis and indicated that the violations alleged in the present case form part of "a broader framework of reprisals for their independent action as members of the OEPSP. *Cf.* observations on the merits of February 3, 2006, para. 171 (records of annexes to the application, annex 3, volume III, folio 872).

[51] *Cf.* Merits Report N° 88/08, para. 203, *supra* note 3, folio 271.

environment; that, after their release, the alleged victims had not returned to Guerrero and that each of them had requested asylum in a foreign country.[52]

58. Additionally, unlike with other contexts alleged by the Commission and that will be analyzed later on (*infra* para. 65), the Commission did not consider that the work of Messrs. Cabrera and Montiel, the threats that they allegedly suffered and the repression against defenders of the environment were related to the object of the case or were issues that should be adjudicated by the Court and, therefore, that the violations alleged are based on said threats and repression. On the other hand, the Commission, in its application, did not include facts related to the desperation and anguish that the next-of-kin allegedly suffered as a result of the alleged violations. Under no circumstances did the Commission include the relatives as alleged victims in its report on the merits or in the application.

59. In this respect, on previous occasions, this Tribunal has analyzed the question of whether a particular case forms part of a context in its analysis of the merits of the case, and has found that "there are no sufficient facts in the case file for this Tribunal to decide that the […] case is framed within the [context] situation" alleged by the Commission.[53] However, in order to conduct this type of analysis, it is necessary for the Commission to put forward specific arguments according to which this case is framed within a particular context, a question that was not raised in the instant matter as to the acts of threats and repression for the defense of the environment. Consequently, in another case, the Court rejected to adjudicate on certain facts that even though were presented as a "contextual background involving the history of the controversy," it was verified that they were not presented before the Tribunal "for the Court's adjudication."[54] It is a different case where the Commission considers that a fact that the Court has established as proven does not lead to any particular violation or where the Commission makes no allegations with respect to that fact at all. In these cases, the Court has applied the principle of *iura novit curia* to declare the existence of a violation not alleged by the Commission.

60. Due to the foregoing, the Tribunal considers that it is not appropriate to rule on the facts alleged by the representatives that were not set out in the application by the Commission as facts to be adjudicate by the Court, that is, regarding the threats that Messrs. Cabrera and Montiel allegedly suffered before their detention and after their release from prison, the alleged repression that they allegedly underwent for their environmental defense work, and the suffering that the next-of-kin of the alleged victims allegedly endured. Similarly, the Tribunal shall not rule on the alleged violations of Articles 5 and 16 of the American Convention in regard to said facts.

2. Alleged contextual facts

61. The Commission and the representatives referred to several contextual facts, particularly, "the abuses committed by military forces based in the state of Guerrero," some patterns in the use of torture in Mexico, and the impact that this has on judicial proceedings, as well as the "use of the military jurisdiction to investigate and trial human rights violations."

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[52] *Cf.* Application brief, paras. 42, 43 and 83 (record of the merits, volume I, folios 13 and 38).

[53] *Cf. Case of Escué Zapata v. Colombia. Merits, Reparations and Costs.* Judgment of July 4, 2007. Series C Nº. 165, para. 64.

[54] *Cf. Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2007. Series C N° 172, para. 16.

62. The State denied the relationship of this case with the context mentioned and indicated that the latter is not part of the object of the present case. It requested that the Court base its decisions solely on the case file of the criminal proceedings underway against the alleged victims for the purpose of determining what happened to Messrs. Cabrera and Montiel. It indicated that "any other characterization" of what happened "is nothing but the inappropriate search for the opening of the litigation to issues that escape from the facts of the case." Without prejudice to the foregoing, and in the event that the Court decides to assess the abovementioned context, the State put forward several arguments in order to refute what it considers to be unfounded generalizations that would have specific implications on the concrete facts of this case.

63. This Court has held that in cases involving highly complex facts, in which the existence of patterns or practices of massive, systematic or structural human rights violations are alleged, it is even more difficult to seek a strict delimitation of the facts. Thus, the litigation submitted to the Court cannot be examined piecemeal or trying to exclude those contextual elements that could inform the international judge about the historical, material, temporal and spatial circumstances in which the alleged facts took place. Nor is it necessary to distinguish or categorize each alleged fact, because the dispute submitted can only be settled based on an assessment of all the described circumstances,[55] in light of the body of evidence.

64. Consequently, the Court has considered that, when assessing elements of the context, in general terms, is not attempting to rule on the global phenomena related to a case, or judge the different circumstances included in that context.[56] Furthermore, it is not called on to rule on the different facts alleged by the State and the representatives, or on public policies adopted at different times to counter such aspects that scape to what took place in certain case. On the contrary, the Court takes these facts into consideration as part of the arguments of the parties within their litigation.

65. The Court notes that both in its report on the merits[57] and in its application,[58] the Commission framed the human rights violations that occurred in this case in a context of alleged abuses on the part of military forces in Guerrero, some patterns with respect to the use of torture and its impact on judicial proceedings, as well as the use of the military jurisdiction for the investigation of cases of human rights violations. Therefore, said a context is the object of the present litigation and relates to the facts alleged. In the analysis of the merits of the case and the possible award of reparations, the Court shall analyze the scope of this alleged contexts and the additional allegations of the representatives.

VII
RIGHT TO PERSONAL LIBERTY IN RELATION TO THE OBLIGATIONS TO RESPECT THE RIGHTS

4. General description of the processes and jurisdictional levels that assessed the facts in the domestic sphere

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55 *Case of Manuel Cepeda Vargas v. Colombia*, supra note 27, para. 50.

56 *See Case of the Rochela Massacre v. Colombia. Merits, Reparations and Costs.* Judgment of May 11, 2007. Series C No. 163, para. 32 and *Case of Manuel Cepeda Vargas v. Colombia, supra* note 27, para. 51.

57 *Cf.* Report on the Merits N° 88/08, paras. 166, 167, 170, 191, 193 to 196, 199 and 200, *supra* note 3, folios 65, 66, 70, 72, 73, and 75.

58 *Cf.* Application brief, paras. 133, 134, 138, 152, 153, 159 to 161, 163, 166 and 167, *supra* note 52, folios 61, 62, 67,69, 70, 71 and 73.

66. To determine whether there was a breach of article 7,[59] in relation to article 1(1)[60] of the American Convention, the Court shall explain in detail, in the following chapters, the controversies between the parties and the procedures taken in the proceedings related to the instant case. However, as a general introduction, the following aspects shall be explained: 1.1) non-disputed facts related to the arrest of the alleged victims; 1.2) the criminal judicial proceeding that led to the conviction of the alleged victims; 1.3) the applications for amparo relief filed by Messrs. Cabrera and Montiel, and 1.4) the actions of the military courts and the National Commission on Human Rights regarding the allegations of possible torture.

1.1. Non-disputed facts related to the arrest of Messrs. Cabrera and Montiel

67. On May 2, 1999, Mr. Montiel Flores was outside the house of Mr. Cabrera García, together with him and with three other people, as well as his wife and daughter,[61] in the community of Pizotla, Municipality of Ajuchitlán del Progreso, state of Guerrero. That same day, at around 9:30 A.M., approximately 40 soldiers of the 40th Infantry Battalion of the Mexican Army entered the community, within the framework of an operation against drug trafficking,[62] which verified information regarding a gang pointed out as "gavilla,"[63] allegedly led by Ramiro "N" and Eduardo García Santana.[64] In this context, a shot coming from one of the soldier's guns hit Mr. Salomé Sánchez, who died immediately.[65] Messrs. Cabrera and Montiel

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[59] In its pertinent part, article 7 (Right to Personal Liberty) of the Convention provides that:

> 1. Every person has the right to personal liberty and security.
> 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
> 3. No one shall be subject to arbitrary arrest or imprisonment.
> 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
> 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
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> [...]

[60] According to Article 1.1 (Obligation to Respect the Rights) of the Convention, "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."

[61] *Cfr.* Testimony delivered before the Fifth District Judge on October 26, 1999, by Cresencia Jaimes (Criminal Case 61/99) (record of annexes to the answer to the application, volume XXIV, folio 10244); Testimony of Ms. Ubalda Cortés Salgado rendered before the Fifth District Judge, dated July 30, 1999 (Criminal Case 61/99) (record of annexes to the answer to the application, volume XXIV, folio 10071) and confrontation hearing of Messrs. Cabrera and Montiel with one of the military officers who filed the complaint against him on August 26, 1999 (Criminal Case 61/99) (record of annexes to the answer to the application, volume XXIV, folio 10128).

[62] *Cf.* Brief of the petition of May 3, 1999, filed by the Human Rights Commission of the Chamber of Members of Parliament by the Police Chief of the town of Pizotla (record of annexes to the application, volume V, folio 1577).

[63] "Gavilla" is a term used in some reports in the case file to refer to a suspected criminal gang. *Cf.* Message sent by Brigadier General in Altamirano on May 2, 1999 (record of annexes to the application, volume X, folio 4024).

[64] *Cf.* Message sent by Brigadier General in Altamirano, *supra* note 63, folio 4024.

hid among bushes and rocks, remaining there for several hours. At approximately 4:30 P.M., that same day, they were arrested.[66]

68. The soldiers kept Messrs. Cabrera and Montiel detained on the bank of Pizotla River until May 4th.[67] That same day, after noon, members of the Army transferred Messrs. Cabrera and Montiel in a helicopter to the facilities of the 40th Infantry Batallion, located in the city of Altamirano, state of Guerrero.[68]

1.2. Judicial proceeding that led to the conviction of Messrs. Cabrera and Montiel

69. In view of the complaint filed by certain members of the Army against Messrs. Cabrera and Montiel[69] for the commission of the alleged crimes of carrying weapons intended for the exclusive use of the Army and without a permit, and the cultivation of poppies and marihuana, the Public Prosecutor's Office of the Common Jurisdiction of Arcelia, Guerrero, initiated a criminal investigation.[70] On May 4, 1999, said body decreed the legal detention of Messrs. Cabrera and Montiel.[71] Because they were federal offenses, the Public Prosecutor's Office of the Common Jurisdiction of Arcelia, state of Guerrero, referred the inquiry to the Federal Public Prosecutor's Office of Coyuca de Catalán.[72] On May 12, 1999 the proceeding was submitted for lack of jurisdiction to the First Instance Court of the Criminal Branch of the Mina Judicial District, which notified the formal commitment order of Messrs. Montiel and Cabrera.[73] The trial court of Mina declined its jurisdiction and the proceeding passed to the Fifth District Court of the Twenty-First Circuit in Coyuca de Catalán (hereinafter "the Fifth District Court").[74] On August 28, 2000, this trial court handed down a judgment of conviction against Messrs. Cabrera and Montiel, sentencing them to serve prison terms of six years eight months and ten years, respectively.[75]

70. Mr. Montiel Flores was convicted of the crimes of possession of firearms, without a permit, intended for the exclusive use of the Army, Navy and Air Force,

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65 *Cf.* Removal minutes, visual inspection, death certificate of Salomé Sanchez of May 4, 1999 (Preliminary Inquiry N° CUAU/01/119/999) (Record of annexes to the application, volume IX, folio 4205) and Message sent by Brigadier General in Altamirano, *supra* note 63, folio 4025.

66 *Cf.* Complaint filed by three military officers against Messrs. Cabrera and Montiel on May 4, 1999 (record of annexes to the application, volume IX, folios 4212 and 4213).

67 *Cf.* Extension of the Statement of Messrs. Cabrera and Montiel before the Fifth District Judge, of December 23, 1999 (Criminal Case 61/99) (record of annexes to the answer to the application, volume XXIV, folios 10361 and 10365).

68 *Cf.* Confrontation hearing of Messrs. Cabrera and Montiel with one of the soldiers who filed the complaint against them on August 26, 1999, (Criminal Case 61/99) (record of annexes to the answer to the application, volume XXIV, page 10134).

69 *Cf.* Complaint filed by three soldiers, *supra* note 66, folios 4212 to 4214.

70 *Cf.* Court order opening of the criminal preliminary inquiry of May 5, 1999 (Preliminary Inquiry N° CUAU/01/119/999) (record of annexes to the answer to the application, volume XXIII, folio 9689).

71 *Cf.* Court order by which it was decreed the legal detention of Messrs. Cabrera and Montiel on May 4, 1999 (Preliminary Inquiry N° CUAU/01/119/999) (record of annexes to the application, volume XI, folio 4222).

72 *Cf.* Transfer proceedings based on lack of jurisdiction of May 5, 1999 (Preliminary Inquiry N° CUAU/01/119/999) (record of annexes to the answer to the application, volume XI, folio 4239).

73 *Cf.* Formal commitment order of May 28, 1999 (Preliminary Inquiry N° 33/CC/999) (record of annexes to the answer to the application, volume XXIII, folio 9879).

74 *Cf.* Acceptance of jurisdiction brief of May 12, 1999 (Criminal Case 61/99) (record of annexes to the answer to the application, volume XXIII, folios 9873 and 9874).

75 *Cf.* Judgment delivered on August 28, 2000 by the Fifth District Court of the state of Guerrero (Criminal Case 61/99) (record of annexes to the answer to the application, volume XXVI, pages 11137 to 11303).

and of the crime against health through the cultivation of marihuana.[76] Mr. Cabrera García was convicted of the crime of carrying a firearm of the exclusive use of the Army, Navy, and Air Force.[77] After filing the motions of appeal, on October 26, 2000 the First Unitary Court of the Twenty-First Circuit (hereinafter "the First Unitary Court") upheld the convictions of Messrs. Cabrera and Montiel.[78] In the year 2001, they were released and confined to house arrest in order to continue serving the sentence, due to their health conditions (*infra* para. 117).

1.3. Applications for *amparo* relief filed by Messrs. Cabrera and Montiel against the decision of the First Unitary Tribunal

71. On March 9, 2001, the alleged victims filed an application for *amparo* relief before the Second Collegiate Court of the Twenty-First Circuit (hereinafter "the Second Collegiate Court"), with the goal of challenging the decision adopted by the First Unitary Court.[79] In this petition, among the different arguments set forth by the representatives, it was claimed that the appeal judgment did not take into account a medical report that concluded the existence of torture against Messrs. Cabrera and Montiel. This medical report was issued by the forensic experts Christian Tramsen and Morris Tidball-Binz, by order of the Danish section of the organization "Physicians for Human Rights – Denmark."[80]

72. On May 9, 2001, the Second Collegiate Court granted the appeal (*amparo*), and ordered the First Unitary Court to issue a new appeal judgment that admitted said expert evidence offered by the legal counsel.[81] On July 16, 2001, after assessing said item of evidence, the judicial body upheld the condemnatory judgment of the Fifth District Judge against Messrs. Cabrera and Montiel.[82] On

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[76] The crimes of possession of firearms without a permit and possession of firearms for the exclusive use of the Navy, Army and National Air Force are stipulated in articles 81 and 83, section II of the Firearms and Explosives Federal Act, respectively. According to said norm, the penalty for any person who carries a firearm without the proper permit shall be of imprisonment "for three to ten years." Moreover, article 198 of the Federal Criminal Code refers to the crime of cultivation of poppies and marihuana in the following terms: "Article 198.- Anyone whose principal farming activity is the planting, cultivation or harvesting of marijuana, poppies, hallucinogenic mushrooms, peyote or any other plant that produces similar effects and who does so on his own or -because he is someone with little education and of very modest means- does so with funding from third parties, shall face a sentence of imprisonment for a period of one to six years. Anyone of similar circumstance, who allows land he owns, is a tenant on, or holds to be used to plant, cultivate or harvest those plants shall face the same penalty. If the conduct described in the preceding two paragraphs is not attended by the circumstances specified therein, the penalty shall be up to two thirds of the penalty stipulated in Article 194, provided the planting, cultivation or harvesting is for the purpose of engaging in any of the conduct provided for in subparagraphs I and II of that article. Absent that purpose, the penalty shall be two to eight years in prison […].."

[77] *Cf.* Judgment handed down on August 28, 2000 by the Fifth District Court, *supra* note 75, folio 11300.

[78] *Cf.* Judgment handed down on October 26, 2000 by the First Unitary Court of the Twenty-First Circuit (Docket number 406/2000) (record of annexes to the answer to the application, volume XXVI, folios 11322 to volume XXVII, folio 12205).

[79] *Cf.* Complaint of direct *amparo* ["relief"] of March 9, 2001 (Criminal Amparo ["relief"] 117/2001) (record of annexes to the answer to the application, volume XXVII, folios 12243 to 12471).

[80] *Cf.* Complaint of direct amparo ["relief"] of March 9, 2001, *supra* note 79, folio 12440.

[81] *Cf.* Ruling of direct *amparo* ["relief"] issued on May 9, 2001 by the Second Collegiate Court of the Twenty-First Circuit (Criminal amparo ["relief"] 117/2001) (record of annexes to the answer to the application, volume XXVIII, folios 12496 to 12961).

[82] *Cf.* Judgment handed down on July 16, 2001 by the First Unitary Court of the Twenty-First Circuit (Criminal Docket Number 406/2000) (record of annexes to the answer to the application, volume XXVIII, folio 13022 to volume XXIX, folio 13733).

October 24, 2001 the legal counsel of Messrs. Montiel and Cabrera filed a new application for direct *amparo* relief against this judgment.[83]

73. On August 14, 2002, the Second Collegiate Court decided on this *amparo*, and disallowed it in relation to Mr. Cabrera García.[84] Regarding Mr. Montiel Flores, it turned down the *amparo* with regard to the alleged irregularities in the conviction for carrying a firearm; therefore, the conviction became final. However, said Collegiate Court ordered "to determine that the evidence provided to the competent court was insufficient and ineffective to confirm the elements of the crime" of cultivation of marihuana and of carrying forbidden firearms without a permit, namely, a rifle.[85]

1.4. Investigation initiated due to the claims regarding acts of torture against the alleged victims. Actions of the Military Courts and of the National Commission on Human Rights

74. On August 26, 1999, within the framework of the criminal proceedings conducted against Messrs. Cabrera and Montiel, their legal counsel requested the Fifth District Judge to order the Public Prosecutor's Office to investigate the allegations of torture, solitary confinement and unlawful detention to which they were subjected at the army's facilities.[86] As a result of this request, on August 31, 1999, the Fifth District Judge ordered the Public Prosecutor's Office to investigate the facts denounced.[87] On October 1, 1999, the Federal Public Prosecutor's Office of Coyuca de Catalán, state of Guerrero, initiated the Preliminary Inquiry for the claims submitted by Messrs. Cabrera and Montiel.[88] On November 5, 1999, the Attorney General's Office of the Republic (hereinafter, the "PGR") declared its lack of jurisdiction to investigate the crime of torture and transferred jurisdiction to the Attorney General's Office of Military Justice (hereinafter "PGJM"),[89] claiming that those potentially responsible were soldiers acting in service.[90] On June 13, 2000, the Attorney General's Office of Military Justice solved the inquiry into torture under "writ of secrecy of file," based on the military investigator's opinion that there were no elements to prove torture.[91]

75. Parallel to the above, on May 14, 1999 Messrs. Cabrera and Montiel submitted a brief of complaint in relation to the facts of the instant case before the

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[83] *Cf.* Complaint of direct amparo ["relief"] of October 24, 2001 (Criminal amparo ["relief"] 499/2001) (record of annexes to the answer to the application, volume XXIX, folio 13757 to volume XXX, folio 13951).

[84] *Cf.* Ruling issued on August 14, 2002 by the Second Collegiate Court of the Twenty-First Circuit (Criminal amparo ["relief"] 499/2001) (record of annexes to the answer to the application, volume XXX, folios 13974 to 14536).

[85] *Cf.* Judgment of August 14, 2002 issued by the Second Collegiate Tribunal, *supra* note 84, folios 13974 to 14536.

[86] *Cf.* Constitutional confrontations of August 26, 1999 before the Fifth District Court (Criminal Case 61/99) (record of annexes to the answer to the application, volume XXIV, folios 10157 to 10158).

[87] *Cf.* Court order of August 31, 1999 of the Fifth District Court of the state of Guerrero (Criminal Case 61/99) (record of annexes to the answer to the application, volume XXIV, page 10162).

[88] *Cf.* Court order of October 1, 1999 (Preliminary Inquiry N° 91/CC/99) (record of annexes to the answer to the application, volume XII, folio 4842).

[89] "On December 14, 1999 [the Public Prosecutor's Office of Coyuca Catalán, Guerrero] due to lack of jurisdiction, remitted the case to its military counterpart in zone [35/a] Military Zone." *Cf.* CNDH. Recommendation No. 8/2000 of July 14, 2000. Case of the inhabitants of Pizotla Community, municipality of Ajuchitlán del Progreso, Guerrero, and of Messrs. Rodolfo Montiel Flores and Teodoro García Cabrera (record of annexes to the application, volume XX, folios 8434 to 8461).

[90] *Cf.* CNDH. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, folios 8434 to 8461.

[91] *Cf.* CNDH. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, folios 8434 to 8461.

National Commission on Human Rights (hereinafter "NCHR"). On July 14, 2000, the NCHR determined that the "military personnel violated the *Freedom from Ex Post Facto Laws* principle and right to liberty of Messrs. Rodolfo Montiel and Teodoro Cabrera García, […] [and due to] the continued silence [of the PGJM],[92] it presumed that the alleged allegations of torture were true, in keeping with articles 38[93] and 70[94] of the NCHR's Law,[95] hence it recommended that "the Inspection and Comptrollership Unit of the Mexican Army and Air Force begin an administrative investigation into the members of the Mexican Army who authorized, supervised, implemented, and executed the operation from May 1 to May 4, 1999."[96] It also recommended the Attorney General's Office of the Republic to begin a preliminary investigation into the members of the Mexican Army who authorized, supervised, implemented, and executed the operation. Likewise, it urged the Attorney General of Military Justice to hand down the measures necessary to determine and issue, as soon as possible, the corresponding judgment within the preliminary investigation on the alleged acts of torture.[97]

76. Based on the NCHR's recommendations, on September 29, 2000 the PGJM began a new Preliminary Inquiry into the crimes of torture, prolonged detention, among others. On November 3, 2001, the Attorney General's Office for Military Justice decided to refer the present inquiry to the Prosecutor General for Military Justice, with a reasoned report "proposing that no criminal action be brought and that the inquiry be definitively closed, with the exceptions that the law provides," on the grounds that the investigation did not determine acts of torture committed against Messrs. Cabrera and Montiel.[98]

2. Alleged violation of the right to personal security

77. The representatives claimed "that the right to personal security, which is closely related to personal liberty, has a specific content" related to "creating a favorable and adequate environment for the peaceful coexistence of people." According to the representatives, "[w]hile subsections 2 to 7 of the aforementioned article 7 constitu[te] specific guarantees that establish guidelines regarding how an individual can be validly deprived of liberty, the right to security protec[ts] the conditions under which physical liberty is ensured, or is free of threats." In this respect, the representatives indicated that "the role played by the Army in tasks related to public security […] fostered an environment contrary to an effective protection of human rights." The representatives therefore argued that "the way in

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92 *Cf.* CNDH. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, folios 8434 to 8461.

93 Article 38.- The report to be presented by the authorities in question, as the responsible parties against which a complaint or claim may be brought, is to include background information on the matter, the grounds and motives for the actions or omissions being challenged, if such grounds or motives exist, and the information deemed necessary to properly document the matter.
If the report or the supporting documentation is either not presented or is delayed without cause, the parties to blame shall be held accountable and the facts of the complaint shall be deemed to be true, unless proven otherwise.

94 Article 70.- The public authorities and public servants shall be criminally and administratively liable for the acts or omissions they incur during and in connection with the processing of complaints with the National Human Rights Commission, in accordance with the applicable provisions of the Constitution and the law.

95 *Cf.* CNDH. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, folio 8458.

96 *Cf.* CNDH. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, folio 8459.

97 *Cf.* CNDH. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, folio 8459.

98 *Cf.* Order issued on November 3, 2001 by the First Investigating Agent of the Office of the Public Prosecutor for Military Justice for the Area of Preliminary Inquiries of the Attorney General's Office for Military Justice (record of annexes to the application, volume XIX, annex 11, folios 8181 to 8367).

which the Mexican Army operated in Guerrero at the time of the facts of the case, implied an action or policy of the State that led to the constitution of a risk to the physical liberty [of the alleged] victims, […] infringing both articles 1(1) and 7(1) of the American Convention."

78. The Commission and the State did not submit claims regarding the violation of the right to personal security. Notwithstanding, the State claimed that the participation of the armed forces in the comprehensive security strategy is supported by the Mexican legal framework, which has determined that "this participation is subsidiary, temporary, and only upon request of the civil authorities," so as to "prevent, discourage, investigate, and prosecute high-impact crimes such as drug trafficking, organized crime, and the use of heavy gauge firearms."

79. The Court calls to mind that, with regards to Article 7 of the American Convention, it has reiterated that it contains two types of regulations, highly differentiated, one general and one specific. The general one is contained in the first subparagraph: "[e]very person has the right to personal liberty and security." While the specific one is composed of a series of guarantees that protect the right not to be deprived of liberty unlawfully (Art. 7(2)) or in an arbitrary manner (Art. 7(3)), to be informed of the reasons for the detention and the charges brought against him (Art. 7(4)), to judicial control of the deprivation of liberty (Art. 7(5)), and to contest the lawfulness of the arrest (Art. 7(6)).[99] Any violation of subparagraphs 2 to 7 of Article 7 of the Convention necessarily entails the violation of Article 7(1) thereof.[100]

80. Moreover, the Tribunal has held that security should also be understood as protection against all unlawful or arbitrary interference with physical liberty.[101] Likewise, the protection of liberty safeguards both the individuals' physical liberty and their personal safety, in a context in which the lack of guarantees may result in the subversion of the rule of law and in the deprivation of the minimum forms of legal protection against detainees.[102] On the other hand, the European Court of Human Rights has declared that the right to personal security implies protection of physical liberty.[103] In turn, the United Nations Human Rights Committee has pointed out that the right to security cannot be construed in a restrictive way, which implies that the State cannot ignore threats to the life of persons who are arrested or otherwise detained.[104]

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[99] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 21, 2007. Series C N° 170, para. 51; *Case of Yvon Neptune v. Haití, supra* note 49, para 89; *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 20, 2009. Series C N° 207, para. 143.

[100] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador, supra* note 99, para. 54; *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs.* Judgment of November 17, 2009. Series C N° 206, para. 116; *Case of Usón Ramírez v. Venezuela, supra* note 99, para. 143.

[101] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador, supra* note 99, para. 53.

[102] *Case of the "Street Children" (Villagrán Morales et al) v. Guatemala; supra* note 29, para. 135; Case of *Acosta Calderón v. Ecuador. Merits, Reparations and Costs.* Judgment of June 24, 2005. Series C N° 129, para. 56; *Case of García Asto and Ramírez Rojas v. Perú. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 25, 2005. Series C N° 137, para. 104.

[103] *Cf. ECHR, Case of Affaire Villa v. Italy,* Judgment of 20 April 2010, App. No. 19675/06, para. 41.

[104] According to the Committee, the Universal Declaration of Human Rights, in article 3, refers to the right to life, the right to liberty and the right to security of the person. These elements have been dealt with in separate clauses in the Covenant. Although in the Covenant the only reference to the right of security of person is to be found in article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty. Hence, the Committee concludes that "[A]n interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant." *Cf.* United Nations. Committee on Human Rights. Case of Delgado Paez V.

81. The facts of the instant case occurred in a context of significant military presence in the state of Guerrero in the 1990s,[105] as an official response to drug trafficking and to emerging armed groups like the "Ejército Zapatista de Liberación Nacional" (Zapatista Army of National Liberation) (EZLN) and the "Ejército Popular Revolucionario" (Popular Revolutionary Army) (EPR).[106] This response consisted in the deployment of armed forces to the states where these groups operated and where drug trafficking activities took place.[107] Consequently, and taking into account some of the controversies between the parties (*infra* paras. 90 to 92) the Court deems it relevant to specify the scope of some of the treaty obligations under this type of circumstances.

82. Within the previous framework, as of that decade, the Armed Forces assumed roles and duties of public security in some states, including Guerrero, through the establishment of patrols on highways and roads, roadblocks, occupation of towns, detention and interrogation of people and searching homes looking for uniforms, weapons and documents.[108] Guerrero is "one [of] the few [states] that has two military zones out of 41 in total" and also includes a military region, "IX, out of XII regions, whose budget had a percentage increase of 50.14 per cent from 2000 to 2009, an increase greater than that of all the other regions except for region I."[109]

83. In this specific case, the Court observes that in the military operation carried out in the town of Pizotla on May 2, 1999, prior to the arrest of Messrs. Cabrera and Montiel, the military group that intervened was made up of 43 soldiers.[110] In this regard, the NCHR verified that the military commission moved to this location to confirm a piece of information regarding a gang ("gavilla") (*supra* para. 67). The NCHR considered proven the facts that "the town […] was besieged," "it was under surveillance," and that "military personnel […] shot with firearms, terrorizing the civil population of the town of Pizotla, in addition to having violently treated the women and children and keeping this town isolated during two days."[111] The NCHR established that "the behavior exhibited [by the military personnel] in charge of directing, supervising and authorizing this operation violated the human rights of the community's inhabitants, […] in that they were prevented from [...] exercising their right to freedom of movement."[112]

84. Moreover, the defense counsels of the alleged victims at the domestic level indicated that the Mexican Army is not a competent authority to investigate and prosecute crimes, and that "it shall be the Public Prosecutor's Office, the Judicial

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Colombia. Communication N° 195/1985 of July 12, 1990, para. 5.5 and Case of Chongwe *V.* Zambia, Communication Nº 821/1998 of October 25, 2000, para. 5.3.

105 *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 70.

106 *Cf.* Affidavit of Miguel Carbonell Sanchez of March 30, 2010 (record of the merits, volume III, folio 1166) and Human Rights Watch. *Uniformed Impunity:* The inadequate use of justice in Mexico to investigate abuses committed during anti-drug trafficking and public security operations (*Impunidad Uniformada: uso indebido de la justicia en Mexico para investigar abusos cometidos durante operativos contra narcotrafico y de seguridad publica*), April 2009 (record of annexes to the brief of pleadings and motions, volume XXI, folio 8675 to 8676).

107 *Cf.* Affidavit rendered by Miguel Carbonell Sanchez, *supra* note 106, folio 1166 and Affidavit rendered by Jose Luis Piñeyro on August 9, 2010 (record of the merits, volume III, folios 1284 to 1294).

108 *Cf.* Affidavit rendered by Miguel Carbonell Sánchez, *supra* note 106, folios 1166 and 1168 and affidavit of José Luis Piñeyro, *supra* note 107, folios 1284 to 1294.

109 *Cf.* Statement rendered by Jose Luis Piñeyro, *supra* note 107, folio 1288.

110 *Cf.* NCHR. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, folio 8440.

111 *Cf.* NCHR. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, folios 8181 to 8367.

112 *Cf.* NCHR. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, folios 8181 to 8367.

Police under its command or the assistants of the Social Representative himself who may verify [the] inconveniences [and deprivation of liberty]."[113] In this regard, the Second Collegiate Court considered that the Army was empowered to arrest the alleged victims "based on the carrying of firearms for the exclusive use of the Armed Forces."[114]

85. Taking these elements into account, the Court considers that the instant case is related to previous jurisprudence where, based on an official State document,[115] it was noted that the presence of the Army carrying out police work in the state of Guerrero has been a controversial issue with respect to individual and community rights and freedoms, and has placed the population in a vulnerable situation.[116]

86. In this respect, the Court considers that, in some contexts and circumstances, a high military presence accompanied by the intervention of the Armed Forces in public security activities may entail the introduction of a risk to human rights. Thus, for example, international organizations have analyzed the implications of allowing the military bodies to act as judicial police, such as the United Nations Human Rights Committee and the Special Rapporteur on the Independence of Judges and Lawyers, who have expressed their concern by the fact that the military exercise the functions of investigation, arrest, detention and interrogation,[117] and have stated that "[t]he judicial police functions should be carried out exclusively by a civilian entity." […] This would allow the independence of investigations and constitute an important improvement in the access to justice for victims of and witnesses to human rights violations, who, at present, very often see their complaints being investigated by the very institutions they accuse of being responsible for these violations."[118]

87. Moreover, this Court has held that "even though […] the State has the right and obligation to guarantee its security and maintain public order, its power is not unlimited, since it has the duty, at all times, to apply procedures pursuant to Law and respectful of the fundamental rights, of all individual under its jurisdiction."[119] In that respect, the Court has emphasized the extreme care which States must observe when they decide to use their Armed Forces as a mean for controlling social protests, domestic disturbances, internal violence, public emergencies and common crime.[120]

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[113] *Cf.* Judgment issued on August 14, 2002 by the Second Collegiate Tribunal, *supra* note 84, folio 14414.

[114] *Cf.* Judgment issued on August 14, 2002 by the Second Collegiate Tribunal, *supra* note 84, folio 14533.

[115] Diagnosis on violence against women in the municipalities of the region of La Montaña de Guerrero. Secretariat of Women Affairs of the State of Guerrero and others. *Cf.* Case of Fernandez Ortega et al. v. Mexico. *Supra* note 39, para. 79.

[116] *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 79.

[117] *See* United Nations. Final Observations of the Committee on Human Rights. Colombia 05/05/97. CCPR/C/79/Add.76, para. 19.

[118] *Cf.* Special Rapporteurs on Torture and Extra-Judicial Executions E/CN.4/1995/111, para. 117.a). Ratified by the United Nations Special Rapporteur on the Independence of Judges and Lawyers (E/CN.4/1998/39/Add.2), para. 185.

[119] *Case of Bámaca Velásquez v. Guatemala. Merits.* Judgment of November 25, 2000. Series C No. 70, para. 174; *Case of Juan Humberto Sánchez v. Honduras. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 7, 2003. Series C N° 99, para. 111; and *Case of Servellón García et al v. Honduras. Merits, Reparations and Costs.* Judgment of September 21, 2006. Series C No. 152, para. 86.

[120] *Cf. Case of Montero Aranguren et al (Reten de Catia) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 5, 2006. Series C Nº. 150, para. 78*; Case of Zambrano*

88. As this Tribunal has held, States must restrict to the maximum extent the use of Armed Forces to control domestic crime or internal violence, since they are trained to defeat a legitimate objective and not to protect and control civilians, a training that is typical of police forces.[121] The strict fulfillment of the duty to prevent and protect the endangered rights must be assumed by the domestic authorities in observance of a clear demarcation between military and police duties.[122]

89. The Court considers that the possibility of granting the Armed Forces functions intended to restrict the personal liberty of civilians, in addition to meeting the requirements of strict proportionality in the restriction of a right, must respond, in turn, to strict exceptional criteria and due diligence in the protection of treaty guarantees, taking into account, as indicated (*supra* paras. 86 and 87) that the regime of the armed forces, from which its members can distance themselves only through great effort, is not compatible with the functions of civilian authorities.

3. Lack of prompt remittance to a judge or other officer authorized by law to exercise judicial power

90. The Commission indicated that "once detained, the [alleged] victims had to be promptly brought […] before the Public Prosecutor's Office in order for this authority to deliver them to the judge," which "did not happen until at least four days after their arrest," and "from the records and arguments of the State it is not possible to infer reasons to justify [this delay]." On the other hand, the Commission expressed in a public hearing that "it did not include [in its report on the merits and its application] a factual conclusion on the occurrence of the crime."

91. For the representatives, the alleged victims were "at the military post improvised on Pizotla river for 48 hours […] and later they were transferred to the Battalion where [they were held] for two additional days, until Friday May 7, [whe]n they were brought before a judge." According to the representatives, "[t]his delay is obviously unwarranted, since as of the time of the arrest of the [alleged] victims, there was a helicopter available for their transfer." In addition, the representatives noted that "the military never brought the [alleged] victims before the Public Prosecutor's Office nor they were in Arcelia, but at some point, several local officials appeared at the Battalion to draw up a report on the weapons and possibly issue other documents which would then be presented in the criminal proceedings[,] such as the sodium rhodizonate test." Therefore, "taking into account that [the Public Prosecutor's Office in Coyuca de Catalán] did not receive the [alleged] victims until Thursday 6, according to the official documents, it [would be possible] to conclude that they were held at the Battalion, at least, until that day." The representatives further alleged that the "intervention of the Public Prosecutor's Office […] does not substitute for or equal the judicial authority." Similarly, the representatives indicated that Messrs. Cabrera and Montiel were unlawfully detained without an arrest warrant and without them committing any crime. Furthermore, that the arrest was "made as a retaliation against [them] for defending the forests," "with excessive use of force" and "[t]o torture and force them to sign false confessions," by militaries without the authorization of civil authorities to be in the area.

Vélez et al v. Ecuador, supra note 24, para. 51; *Case of Perozo et al V. Venezuela, supra* note 24, para. 166.

[121] *Cf. Case of Montero Aranguren et al (Retén de Catia) v. Venezuela, supra* note 120, para. 78; *and Case of Zambrano Vélez et al v. Ecuador, supra* note 24, para. 51.

[122] *Cf. Case of Zambrano Vélez et al v. Ecuador, supra* note 24, para. 51.

92. On the other hand, the State highlighted that "1) since the petitioners attacked soldiers of the armed forces with firearms, and before their arrest was confirmed, military personnel reported the situation to the General Headquarters of the 35th military zone; 2) on May 3, several different authorities went to the community of Pizotla, where the events occurred, apart from the military forces. These authorities were: a deputy prosecutor of the Attorney General's Office of the State of Guerrero, an assistant of the Public Prosecutor's Office of Coyuca de Catalán, and an expert witness in field forensics, who were able to verify the conditions of the detention of the petitioners; 3) that the geographic location of the town of Pizotla, the prevailing insecurity in the region, and the time at which the arrest took place did not allow the transfer of detainees to the offices of the competent authority or its mobilization to the place of the facts [but until] the night of May 3," and "4) as evidenced by the records, during the entire time that the petitioners were guarded by soldiers, they could be visited by their relatives and even they communicated with them." Therefore, the State indicated that in order to set a time limit for a detainee to be placed at the disposal of a judicial authority, it is necessary to analyze "the behavior in light of the precepts established in the [Mexican] Constitution, as well as the general legal framework of the legal matters." On the other hand, the State emphasized that the alleged victims "were held in custody by the soldiers from May 2, 1999 at 4:30 P.M. to May 4 at 6: 00 P.M, until they were formally brought before the competent authority" and it claimed that the Public Prosecutor's Office, as the competent authority, "assigned the investigation to the judicial body on May 6, 1999 at 6:06 P.M., exceeding by [only] six minutes the constitutional term." Lastly, the State indicated that "Messrs. Montiel and Cabrera were arrested in flagrant possession of illegal weapons [used] by them against their captors."

93. Regarding the previous arguments, the Tribunal recalls that the first part of Article 7(5) of the Convention sets forth that the detention of a person shall be promptly subjected to judicial review. To this end, the Court has pointed out that another measure that seeks to prevent arbitrary treatment or illegality is immediate judicial control, taking into account that under the rule of law the judge must guarantee the rights of the detainee, authorize taking precautionary or coercive measures, when strictly necessary, and generally seek a treatment that is consistent with the presumption of innocence in favor of the accused until his or her responsibility has been proven.[123]

94. In relation to the formalities that must be met during a detention, article 16 of the Mexican Constitution, at the time that the facts occurred, established that:[124]

> No one can be bothered in regards to their person, family, home, papers or possessions, unless by virtue of the written mandate of a competent authority that provides grounds for the legal cause of the proceeding.
>
> [...]
>
> In cases where the person has been caught *in flagrante*, any person may detain the suspect and shall, without delay, hand over the suspect to the immediate authority, which shall just as swiftly hand the suspect over to the Office of the Public Prosecutor.

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[123] *Cf. Case of Bulacio V. Argentina. Merits, Reparations and Costs.* Judgment of September 18, 2003. Series C No. 100, para. 129; *Case of Yvon Neptune v. Haití, supra* note 49, para. 107; and *Case of Bayarri v. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of October 30, 2008. Series C Nº 187, para. 63**.**

[124] *Cf.* Article 16 of the Political Constitution of the United Mexican States, quoted in the judgment handed down on August 14, 2002 by the Second Collegiate Tribunal, *supra* note 84, folio 14436. *Cf.* Political Constitution of the United Mexican States (record of annexes to the answer to the application, annex 3 filed in digital format).

> [...]
>
> In urgent cases or when the suspect is caught *in flagrante*, the judge who receives the detained person must either immediately confirm the detention or order the person's release, except in those cases provided by law.
>
> [...]
>
> No suspect may be detained by the Attorney General for more than forty-eight hours, time within which his release must be ordered or he must be brought before a judicial authority. [...]

95. In case the suspect is caught *in flagrante*, according to the constitutional text, "any person" can detain another, as long as the suspect is brought, without delay, to the immediate authority. Moreover, article 193 of the Federal Code of Criminal Procedure, in reference to the arrest of the accused, establishes that;[125]

> Article 193 – Any person will be able to detain the suspect:
>
> I. At the time the crime is being committed;
>
> II. When the suspect is physically prosecuted, immediately after committing the crime, or
>
> III. Immediately after committing the crime, when the person is pointed out by the victim, any attesting witness to the events or who intervened with them in the crime, or when there are objects or signs that allow for a well-grounded presumption that he participated in a crime. In addition to these signs, other technical elements will be considered.
>
> [...]
>
> The detention for a crime *in flagrante* shall be immediately registered by the competent authority.

96. Whether or not a crime was detected *in flagrante*, in said case, when the detention is made by an authority, the Mexican law distinguishes two moments to assess the scope of the control over the detention. The first moment relates to the immediate referral to the competent authority by the person who makes the arrest. The second moment corresponds to the referral by the Public Prosecutor to a judge within a term of 48 hours.

97. In the instant case, according to the documentation in the judicial case file and without handing down a judgment on the alleged irregularities in relation to some evidence on which the following facts would be based (*infra* paras. 143 to 149) the arrest of Messrs. Cabrera and Montiel, and their later referral to the competent authority shall developed as follows:

a) On Sunday, May 2nd, 1999, at 4:30 P.M., Messrs. Cabrera and Montiel were arrested, when they were allegedly caught in *flagrante,* committing the crime of carrying prohibited and unlicensed weapons and possession of *amapola* and marihuana;[126]

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[125] *Cf.* Federal Code of Criminal Procedures, New Code published in the Official Gazette of the Federation on August 30, 1934 (record of annexes to the answer to the application, volume XXIV, folio 10162).

[126] *Cf.* Complaint filed by three soldiers, *supra* note 66, folio 4213.

b) On Tuesday, May 4th, 1999, at 8:00 A.M., the Prosecutor of the Public Prosecutor's Office of Arcelia visited the scene of the crime to certify the presence of the body of Salomé Sánchez Ortiz, without taking custody of the victims.[127] Later, past midday, members of the Army transferred Messrs. Cabrera and Montiel by helicopter to the headquarters of the 40th Infantry Battalion, located in the city of Altamirano.[128] As stated in the judicial case file, at 6:00 P.M. of that same day, Messrs. Cabrera and Montiel were brought before the respective authority of the Public Prosecutor's Office of Arcelia;[129]

c) On Wednesday, May 5th, 1999, at 4:00 P.M., the Public Prosecutor's Office of Arcelia forwarded the inquiry to the Federal Public Prosecutor's Office of Coyuca de Catalán based on lack of competence;[130]

d) On Thursday, May 6th, 1999, Messrs. Cabrera and Montiel were transferred to the offices of the Federal Public Prosecutor's Office in the city of Coyuca de Catalán.[131] That same day, at 3:00 a.m. and 4:00 a.m., the alleged victims rendered a second statement before the Public Prosecutor's Office.[132] The Agent of the Federal Public Prosecutor's Office recorded the preliminary investigation number 33/CC/99, by which it decided that there were elements to prove the probable criminal responsibility of the alleged victims.[133] At 6:06 p.m. they were brought before the First Instance Court of the Judicial District of Mina, this Court opened the case file 03/999 and qualified the detention of Messrs. Cabrera and Montiel as lawful,[134] and

e) On Friday May 7, 1999, the Judge of the First Instance Court of the Judicial District of Mina ordered to transfer the alleged victims to the Court in order for them to render their preliminary statements.[135]

98. In this regard, in its Recommendation 8/2000, the NCHR questioned the alleged impossibility of the military agents to bring the alleged victims, without delay, before the competent authority, given that there are flight logs of Air Force helicopters during May 3 and 4, 1999 providing support to the 35th Military Zone, as well as the fact that the military personnel that went to Pizotla had a radio station and 4 vehicles.[136] Thus, in conclusion, the NCHR indicated that if military

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127 *Cf.* Removal minutes and others of May 4, 1999, *supra* note 65, folio 4205.

128 *Cf*. NCHR. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, folio 8447.

129 *Cf.* Certification of May 4, 1999 (Preliminary Inquiry N° CUAU/01/119/999) (record of annexes to the application, volume XI, folio 4211).

130 *Cf.* Transfer proceeding based on lack of competence of May 5, 1999, *supra* note 72, folio 4239.

131 *Cf.* Expansion of the preliminary statement of December 23, 1999, *supra* note 67, folio 10367.

132 *Cf.* Statements of Messrs. Cabrera and Montiel before the Public Prosecutor's office of Coyuca de Catalan of May 6, 1999 (Preliminary Inquiry 33/CC/999) (record of annexes to the answer to the application, volume XXIII, folios 9777 to 9785).

133 Record court order of May 6, 1999 (Preliminary Inquiry N° 33/CC/999) (record of annexes to the answer to the application, volume XXIII, folios 9798 to 9821).

134 *Cf.* Court order of the filing and ratification of the lawful detention of May 6, 1999 (Preliminary Inquiry N° 33/CC/999) (record of annexes to the answer to the application, volume XXIII, folios 9827 to 9832).

135 *Cf.* Court order for release issued by the Judge of the First Instance Court of the Judicial District of Mina of May 7, 1999 (case file 03/999) (record of annexes to the answer to the application, volume XXIII, folio 9834).

136 According to the NCHR: a) there are "flight logs of the Bell-212 helicopters with plates 1115 and 1117, of the official letters 2164 and 2188 of May 3 and 4, 1999, signed by [a] Lieutenant Coronel

agents had really been unable, both physically and materially, to transfer the alleged victims "they could [have] remedied this deficiency when the agent of the Public Prosecutor's Office of the Common Jurisdiction arrived at that community, assisted by members of the Judicial Police under his command; or, otherwise, they could place them at his disposal when they arrived at the military headquarters in Altamirano, Guerrero."[137]

99. In addition, it is worth noting that the legal counsel of the alleged victims, in the framework of the domestic criminal proceedings, raised the issue of non-compliance with the reasonable term to bring them before a competent authority, and that Messrs. Cabrera and Montiel were never at the headquarters of the Public Prosecutor's Office of Arcelia; therefore, they questioned the authenticity of this record in the judicial case file (*infra* para. 149). Specifically, the representatives argued that the authorities "pretended to perform actions to justify the subsequent apprehension of [Messrs. Cabrera and Montiel] and accused them of crimes that they did not commit", particularly regarding "the actions performed by the agent of the Public Prosecutor's Office [of Arcelia on May 4, 1999], given that [Messrs. Cabrera and Montiel] were never physically taken to the offices of said authority."

100. The Court observes that, at the domestic level, some judges ruled on those allegations.[138] Regardless of what was mentioned by the domestic judges, the Tribunal considers that the State's argument grounded on the specific orography of Pizotla as a justification for the delay in the transfer of detainees before the competent authority is not convincing because: i) there are flight logs of some Air Force helicopters that carried out activities in the area on May 3, 1999; ii) the military personnel responsible for the operation had a radio station and 4 vehicles, and iii) given the military presence in Pizotla, the demand of control mechanisms over the detention activities that could be carried out by the military agents should be greater.

[...] whereby he reported to the Commander of Air Base number 7 of the Air Force, the air support provided during those dates to the 35th Military Zone; b) the military personnel, "when they left from their military headquarters on May 1, 1999, with the order to investigate a gang ('gavilla'), before and after the operation [...] had a radio station and 4 vehicles available, therefore they had the possibility of implementing the necessary mechanisms to promptly notify the agent of the Public Prosecutor's Office of the facts occurred [...], and c) "[on] May 3, 1999, in the 35th Military Zone, the Mexican Air Force commissioned the crew of the Bell helicopter with plate number 1117 to transport a military passenger to said Military Zone, in order to locate thirty-three poppy plantations and one marihuana plantation." *Cf.* NCHR. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, pages 8443 to 8444.

137 *Cf.* NCHR. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, folio 8448.

138 Some of the domestic judges considered "reasonable" or "tolerable" the delay observed in the instant case to bring the alleged victims before the competent authorities. Thus, according to the lower court judgment, the delay was reasonable because it only implied a delay of six minutes. According to said judgment: "although the Agent of the Public Prosecutor's Office [...] in Arcelia [...] became aware of the facts [...] at [6:00 p.m. on May 4, 1999], even when the legal detention of the accused was decreed at [6:30 p.m.] of the same day, and that his counterpart in the Federation residing in Coyuca de Catalán, Guerrero began instituting actions in this regard at [11:45 p.m.] on [May 5, 1999]; given that the Public Prosecutor's Office is a unique and indivisible entity, it is taken as parameter to begin counting the term established by the aforementioned precept 16 of the Constitution at [6:00 p.m. of May 4, 1999]." Consequently, according to the Judge of first instance, "the referred timeframe of [48] hours of the Public Prosecutor's Office expired at [6:00 p.m. of May 6, 1999]." Consequently, "the term that was said to be exceeded only by [6] minutes, is deemed more or less tolerable and insufficient to consider it to be a prolonged detention, taking into account that the detainees did not have any communication or contact with any person, or it is deemed that there was some sort of physical or moral coercion against them." *Cf.* Judgment issued on August 28, 2000 by the First Unitary Tribunal, *supra* note 75, folios 12161 to 12163. The criminal *amparo* ruling indicated, again that "there was no excessive and unwarranted detention on the part of the captors" To this end, the court indicated that "from the records of the case, it does not spring that when the military officers went to Pizotla, Guerrero, they had a means of transportation." It further alleged that "the military officers could not leave said place that was the scene of the crime, inasmuch as due to the death of one of the persons, they had the obligation to remain in there [...] until the arrival of [...] the Agent of the Public Prosecutor's Office." *Cf.* Judgment issued on August 14, 2002 by the Second Collegiate Tribunal, *supra* note 84, folio 14441.

101. Consequently, the Court verifies that, since the moment of the arrest of the victims, the Army agents had more than one means to transport the alleged victims and bring them, without delay, first before the Public Prosecutor's Office and, later, before the judicial authority, at least, on May 3, 1999. In addition, it is worth recalling that the authority of the Public Prosecutor's Office of Arcelia visited the place of the events at 8:00 a.m. on May 4th, 1999, and notwithstanding that, it did not take custody of the alleged victims (supra para. 97).

102. According to the case law of the Tribunal (*supra* para. 93) regarding the competent authority for the transfer without delay, this Tribunal reiterates that Messrs. Cabrera and Montiel should have been brought before a judge as soon as possible, and in the instant case, this did not happen until almost 5 days after their arrest. In this regard, the Court observes that Messrs. Cabrera and Montiel were not placed at disposal of the competent authority within the time established in the American Convention, which clearly requires that the detainee must be "promptly" brought before a judge or other officer authorized by law to exercise judicial power. In this regard, the Court reiterates that in areas of significant presence, where the members of the military institution take control of the internal security, the transfer without delay before the judicial authorities is more important in order to minimize any risk of violation of the rights of the person (*supra* para. 89). Accordingly, the Court considers that article 7(5) of the American Convention was violated to the detriment of Messrs. Cabrera and Montiel. Moreover, given the lack of transfer without delay before the competent authority, the Tribunal considers that this irregularity in the control of the detention made it into an arbitrary detention and it does not consider relevant to make any determination on the cause of the arrest. Therefore, the Court declares the violation of article 7(3) in conjunction with article 1(1) of the American Convention.

5. Alleged lack of information on the reasons for the detention and of notification, without delay, of the charge or charges filed

103. The representatives pointed out that "[i]t is not a disputed fact that Teodoro Cabrera and Rodolfo Montiel were not informed of the reasons for their detention when it was made. Also, as it has been proven, the [alleged] victims [would not have been] informed of the right they are entitled to [...] 'make contact with a third party, for example, a family member [or] an attorney'."

104. In its arguments on the alleged violation of the right to defense, the State argued that the victims were informed of the reasons for their detention and of the charges brought against them.

105. This Court has established that, in the light of article 7(4) of the American Convention, the information about the "motives and reasons" for detention shall be provided "once it occurs," which is a mechanism to avoid unlawful or arbitrary detentions from the very moment that the person is deprived of his liberty and, in turn, ensures the right to defense of the individual.[139] Second, this Court has mentioned that the agent who carries out the arrest must inform in simple language, free of technical terms, about the essential legal grounds and facts on which the arrest is based. Article 7(4) of the Convention is not satisfied by the mere mention of the legal grounds.[140]

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[139] *Cf. Case of Juan Humberto Sánchez v. Honduras, supra* note 119, para. 82; *Case of Yvon Neptune v. Haití, supra* note 49, para. 107; *Case of Usón Ramírez v. Venezuela, supra* note 99, para. 147.

[140] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador, supra* note 99, para. 71; *Case of Yvon Neptune v. Haití, supra* note 49, para. 107; and *Case of Usón Ramírez v. Venezuela, supra* note 99, para. 147.

106. In this regard, the Court observes that article 7(4) of the Convention refers to two aspects: i) the information, whether in oral or written form, on the time of the detention and ii) the notification, which must be served in writing, of the charges. It does not spring from the case file that the victims had been informed on the reasons for their arrest at the time of their detention; therefore, the State violated article 7(4) of the American Convention to the detriment of Messrs. Cabrera and Montiel.

VIII
RIGHT TO HUMANE TREATMENT [PERSONAL INTEGRITY] IN RELATION TO THE OBLIGATIONS TO RESPECT RIGHTS AND THE OBLIGATIONS CONTAINED IN THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

107. In relation to article 5 of the American Convention,[141] the Commission considered in its application that "the evidence concerning the […] the acts of torture against the victims is inconclusive;" though it also indicated that it "neither asserts nor […] denies the existence of torture." Nevertheless, it specified that "there is sufficient circumstantial evidence to allow the Commission to […] infer that the victims were subjected to cruel, inhuman and degrading treatment." In its final arguments, the Commission pointed out that "based on the evidentiary elements furnished in the proceeding before the Court, [it] is possible to determine with more precision the acts contrary to the personal integrity" of Messrs. Cabrera and Montiel.

108. The representatives indicated that torture was committed because there were a set of acts systematically perpetrated during several days aimed at making the victims accept the charges brought against them and sign self-incriminating confessions, what caused them a grave suffering. They added that "the domestic authorities dismissed the allegations of torture" based on medical certificates that "did not comply with any standard, much less with the Istanbul Protocol." The Commission and the representatives indicated that the statements of Messrs. Cabrera and Montiel were ongoing, similar and without any contradictions.

109. The State argued that the several medical certificates and expert opinions "are suitable and sufficient to discredit the petitioners' claims." Likewise, the domestic judicial authorities completely disproved the allegations of the victims, and stated that their statements contain inconsistencies that are "substantial and are not owing to the mere use of language." The State added that the "fifteen medical certificates" were issued "in the ideal time to determine, in each case, the existence of an irregularity." Likewise the State underlined that "perhaps […] due to the conditions in which [t]he test [of Messrs. Tramsen and Tidball-Binz] was made, [its] opinion […] does not meet the basic scientific standards and [does not] question the medical evaluations presented," to which it further alleged the lack of partiality of said doctors.

110. The Court will refer, first, to some proven facts in relation to: i) the statements made by the alleged victims, ii) the medical certificates in the case file,

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[141] Article 5 (Right to Humane Treatment [Personal Integrity]) of the Convention provides that:

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

and iii) the expert opinions of the domestic proceeding and before the Court that analyzed if torture was committed in the instant case. Secondly, it shall analyze the compliance with the obligation to investigate such facts and lastly, it shall determine the legal classification of the facts of the instant case.

1. Proven Facts

1.1 Statements made by the alleged victims

111. During the course of the domestic criminal proceedings, before the Inter-American Commission and the Court, Messrs. Cabrera and Montiel rendered statements about the alleged acts of torture committed against them. The statements were the following: i) before the Agent of the Public Prosecutor's Office in Arcelia, Guerrero;[142] ii) before the Agent of the Federal Public Prosecutor's Office in Coyuca de Catalán, Guerrero;[143] iii) preliminary statement before the first instance Court in Mina, Guerrero;[144] iv) first expansion of the preliminary statement before the Fifth District Court;[145] v) second expansion of the preliminary statement before the Fifth District Court,[146] and vi) the statements before the Inter-American

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[142] *Cf.* Statements of Messrs. Cabrera and Montiel before the Public Prosecutor's Office of Arcelia of May 4, 1999 (Preliminary Inquiry 33/CC/999) (record of annexes to the application, volume XI, folios 4232 to 4236).

[143] On May 6, 1999, in the statement rendered before the Public Prosecutor's Office of Coyuca de Catalán, Mr. Cabrera declared that: "when he was detained at the military [b]ase, he was hit in the abdomen, without knowing who struck [him], but [that] he would recognize him if he were shown a photograph." For his part, Mr. Montiel Flores indicated that: "when he was at the river, he wasn't [subjected to beatings or abuse], but at the army base, he received a blow to the pit of the stomach and a slap on the left cheek." *Cf.* Statements of Messrs. Cabrera and Montiel of May 6, 1999, *supra* note 132, folios 9781 and 9785.

[144] On May 7, 1999 Mr. Cabrera García stated that: "when [he] was at the 40th Battalion, a drunken friend of the soldiers arrived and they began to beat [him] up, causing [him] to fall over, that they were making [him] kneel, with [his] hands tied behind [his] back, and that [his] feet were also bound, adding that in Pizotla they blindfolded [him] and [he] heard that they wanted to cut off [his] testicles; and they opened [his] mouth and put a pistol inside." For his part, Mr. Montiel Flores indicated that: "during the night when [he] was in the soldiers' custody, they stepped on [his] face and put the rifle muzzle to [his] forehead, and a soldier said to [him] 'if something happens to me dude, I'm going to unload the rifle in you;' that [he] was tied up for a while, like TEODORO[,]." Moreover, he indicated "that on Monday night, the soldiers told [them] to lie down and to place [their] heads where the sun rises; later, they woke [them] up and told [them] to lie down where the sun sets; shortly thereafter, they got [them] up again and laid [them] down forming a cross; still later they came for them and took them to the mountain, and [he] saw that there were other armed men with their faces covered […] telling [him] 'that he should not play the fool, that they knew his family's location and another one pulled [his] testicles, saying that they would cut them off if he didn't say what he knew, and [he] said to them that [he] would say whatever they said, if they would just stop beating him *Cf.* Preliminary Statements of Messrs. Cabrera and Montiel before the First Instance Court of the Judicial District of Mina of May 7, 1999 (case file 03/999) (record of annexes to the answer to the application, volume XXIII, folios 9836, 9837 and 9841).

[145] On July 13, 1999, during the expansion of his preliminary statement, Mr. Cabrera García declared that: "in the Public Prosecutor's Office, they put a pistol to [his] head, [telling him] that if he did not sign, [they were going to] blow it off […] and that's why he signed." For his part, Mr. Montiel Flores indicated that: "the soldiers put a rifle to [his] head and also put a foot on [his] head,[…] and told [him] that if anything happened to them, he would blow [his] head off." Likewise, "on Monday May [3], [he was given] something to eat and [he] wanted to wash [his] hands and one of the soldiers got angry and told [him] that he was going to smash [their] head in with a stone and they [took] them to [Court and to the Public Prosecutor's Office]." He also indicated that "at some point, through torture, [they] made [him] sign or agree that the pistol and marijuana [were his]," warning him "that if he did not agree, they knew who [his] family was, and for fear that they would hit [his] family, […] [he] had to remain silent." *Cf.* Expansion of the Preliminary Statements of Messrs. Cabrera and Montiel before the First Instance Criminal Court of the Judicial District of Mina of July 13, 1999 (case file 61/99) (record of annexes to the answer to the application, volume XXIII, folios 10037, 10039 and 10040).

[146] On December 23, 1999, Mr. Cabrera García stated that: "as they were pulling on his testicles, he felt sick, since [they] were getting dry, and he had blood in his urine from the beatings they gave him."." Likewise, he emphasized that "four soldiers pulled on his testicles.." Additionally, he indicated that: "they took them to the bank of the Pizotla River and kept them tied there with hands and feet

Commission and the Inter-American Court. In said statements, Messrs. Cabrera and Mr. Montiel mentioned acts of cruel, inhumane and degrading treatments or alleged acts of torture to which they were submitted during the days they remained under arrest.

112. From the statements of Messrs. Cabrera and Montiel during the criminal process, in general terms, it was reported: i) pulling of the testicles blows; ii) electric shocks; iii) blows to different parts of the body, such as the shoulders, abdomen and head; iv) that they were blindfolded and bound; v) that they were placed forming a cross according to the sun's location; vi) that they were blinded by a bright light; vii) that they received death threats by means of weapons; and viii) that Tehuacán soda was forced up their noses.[147]

113. The Court notes that the domestic tribunals considered Messrs. Cabrera and Montiel's testimonies as inconsistent, and thus, detracted value from them.[148] Nevertheless, the Court considers that the differences between each testimony given by Messrs. Cabrera and Montiel cannot be considered as contradictions

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bound, that they gave them nothing to eat, and that where they were lying on the ground, they dug with their elbows and they drank the water that they collected in this way, because they were not giving them water.." "[O]nce at the battalion's base, they continued to beat him and […] on Thursday a drunken soldier arrived and he continued to beat and torture them[…]" Mr. Montiel Flores attested that when he was detained at the Pizotla River, "one of the soldiers pulled his pants down and pulled on his testicles […] another soldier held him from the jaw and pulled him, another soldier was leaning on his shoulders and apparently dropped with his knees down on his stomach, that the three soldiers were doing this at the same time and they were telling [him] to say that […] he belonged to the EPR and that he should talk, because otherwise they said they knew who [his] family was […], that they wet him to give him electrical shocks." "Later, [at the 40th Battalion], they separated [them] and took him to a room and there they wanted to force him to say that he carried weapons and that he belonged to a guerrilla group […].." That night, "they took them and put them all tied up […] in a military vehicle, […] putting the rifle muzzle to the declarant's head, near the nape, and a foot on the back, telling them that they would bring them to jail.." *Cf.* Expansion of the statements of Messrs. Cabrera and Montiel of December 23, 1999, *supra* note 67, folios 10360 to 10362 and 10364 to 10366.

147 Mr. Cabrera Garcia stated that: "[a]t night, they took us out, they poured sparkling water in [my] nostrils, they pulled [by] my hair, and that Tehuacán drink was so strong, that […] [I] felt that it was coming up through [my] whole nose and head, [I] was suffocating so they would hit [me] in the head to revive [me] and while [I] came to and reacted, they were doing the same to Rodolfo." *Cf.* Affidavit of Mr. Teodoro Cabrera Garcia of March 4, 2010 (record on the merits, volume III, folio 1193).

148 In relation to the contradictions that the victims are allegedly guilty of, the Unitary Court held that: "they are inadmissible because, independently of their vagueness and imprecision, they do not indicate which judicial and ministerial authority they are referring to; the physical and moral tortures which they refer to do not spring from the preliminary investigation, given that […] the various statements they made before the Agent of the Public Prosecutor's office in Arcelia, Guerrero, the Federal Public Prosecutor's Office in Coyuca de Catalán, of the same office and the Criminal Court of First Instance of Coyuca de Catalán were all rendered according to the law, […]. In particular, the lower court pointed out that the main contradictions were evident in that: "while RODOLFO MONTIEL FLORES alleged, in his initial statement, that one of the soldiers got angry when they fed him and he wanted to wash his hands, threatening him with smashing his head with a stone, Teodoro Cabrera Garcia, in his expansion of the preliminary statement, stated that they gave them nothing to eat and that they even used their elbows to dig holes to fill up with river water to drink; hence, while RODOLFO MONTIEL FLORES asserted that, in the presence of his neighbors and relatives, they were tortured by the soldiers, Cabrera Garcia assured that when he was arrested, there were already lots of people beating him; that, while Teodoro Cabrera Garcia sustained that "on the same day of his arrest", they took him to a field to torture him, RODOLFO MONTIEL sustained that during 'the whole Sunday', they were at the river and that 'on the next Monday, they took them to the mountain' and then, they tortured them; this coupled with the fact that Teodoro Cabrera Garcia does not refer to electrical shocks, while RODOLFO MONTIEL FLORES does refer to this; and while Teodoro Cabrera denies having signed the documents prepared by the soldiers, RODOLFO MONTIEL FLORES asserted that, given he was subjected to torture, he was forced to sign the document prepared by the 40th Battalion."." *Cf.* Judgment handed down on August 21, 2002 by the First Unitary Court of the Twenty-First Circuit (Criminal Docket number 406/2000) (record of annexes to the answer to the application, volume XXXI, folios 15139 and 15140, and 15152 to 15155).

denoting falsehood or lack of truthfulness in the testimony.[149] In particular, the Court observes that, in the different statements given by Messrs. Cabrera and Montiel, the main circumstances are consistent. In this regard, this Court notes that, as the statements were expanded, the victims described more details concerning the alleged torture, but the general framework of their account is consistent as from the statements given on May 7th, 1999, before the first instance court. Therefore, in order to analyze each of the alleged tortures reported by Messrs. Cabrera and Montiel during their statements, the Court continues with the examination of the medical certificates and expert opinions that are in the case file.

1.2. Medical certificates in the case file

114. The Court notes that, in the instant case, 14 medical certificates were issued regarding Messrs. Cabrera and Montiel on three occasions: at the beginning of the criminal investigation, during the criminal proceedings conducted against them and when they were released due to humanitarian reasons. These certificates had three objectives: the certification of the physical integrity, the verification of the physical and mental condition in the enforcement of the judgment and the compatibility between age, health and physique of Messrs. Cabrera and Montiel with the sentence imposed.

115. Indeed, as part of the criminal proceeding conducted against the victims, certain military and civil officials issued medical certificates or records on their physical integrity. Next, the Court makes a recount of the certificates: a) certificate of May 4, 1999, issued by an assistant military surgeon, attached to the Regional Military Hospital of Chilpancingo, Guerrero[150] and a medical examiner of the Judicial District in Arcelia, Guerrero;[151] b) certificate of May 6, 1999, issued by a forensic

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[149] Paragraph 142 of the Istanbul Protocol provides that: "[T]orture survivors may have difficulty recounting the specific details of the torture for several important reasons, including: (a) Factors during torture itself, such as blindfolding, drugging, lapses of consciousness, etc.; (b) Fear of placing themselves or others at risk; (c) A lack of trust in the examining clinician or interpreter;(d) The psychological impact of torture and trauma, such as high emotional arousal and impaired memory, secondary to trauma-related mental illnesses, such as depression and post-traumatic stress disorder (PTSD); (e) Neuropsychiatric memory impairment from beatings to the head, suffocation, near drowning or starvation; (f) Protective coping mechanisms, such as denial and avoidance and (g) Culturally prescribed sanctions that allow traumatic experiences to be revealed only in highly confidential settings."." The Protocol also establishes, when defining post-traumatic stress disorders in cases of torture, that in some cases "[u]nder such circumstances, the inability to recall precise details supports, rather than discounts, the credibility of a survivor's story. Major themes in the story will be consistent upon re-interviewing."." *Cf.* United Nations. Istanbul Protocol. Manual for the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment, August 9, 1999, para. 142.

[150] This doctor "attested to the physical integrity" of the alleged victims. In the case of Mr. Teodoro Cabrera, he indicated that: "he has [one] stab wound in the left retro-auricular region, an injury that was not life-threatening and which would take less than fifteen days to heal; there were no signs anywhere on the body of any recent injury caused by beatings or torture."." Regarding Mr. Montiel Flores, he indicated that: "[there] were no signs anywhere on the body of any recent injury caused by beatings or torture."." *Cf.* Legal medical certificates of Messrs. Cabrera and Mr. Montiel issued by a military medical surgical Officer Lieutenant of the Mexican Army on May 4, 1999 (Preliminary Inquiry N° CUAU/01/119/999) (record of annexes to the application, volume XI, folios 4216 and 4217).

[151] Regarding Mr. Teodoro Cabrera, the doctor indicated that: "he has one stab wound in the left retro-auricular region. Vital signs within normal limits, with oculo-motor reflexes responding well to light stimuli; there are no signs of violence and no visible bruising from blows. Conclusion: Teodoro Cabrera García presents with good physical integrity, without any signs of violence; he has one injury that is not recent in the retro-auricular region."." Regarding Mr. Montiel Flores, he indicated that: "his "vital signs [are] within normal limits, with oculo-motor reflexes responding well to light stimuli, without any signs of violence, […] two (2) excoriations in the middle portion of the frontal region. Conclusion: Rodolfo Montiel Flores presents with good physical integrity, without any signs of violence."." *Cf.* Physical integrity examinations of Messrs. Cabrera and Mr. Montiel issued by a forensic physician of the Judicial District of Arcelia on May 4, 1999 (Preliminary Inquiry N° CUAU/01/119/999) (record of annexes to the application, volume XI, folios 4216 and 4217).

physician attached to the Mina Judicial District, who resides in Coyuca de Catalán, Guerrero;[152] c) record of May 15, 1999, issued by an inspector from the Commission for the Defense of Human Rights in Guerrero (Coddehum),[153] and d) a certificate of June 4, 1999, issued by a medical expert witness from the NCHR who appeared at the facilities of the Social Welfare Center in Coyuca de Catalán, Guerrero.[154]

116. During the criminal proceeding in which Messrs. Cabrera and Montiel were convicted, three (3) certifications regarding their health condition were issued: a) on September 23, 1999, by medical expert witness from the NCHR regarding Mr. Montiel Flores;[155] b) on May 19, 2000, by a medical expert witness from the NCHR,[156] and c) On July 6, 2000, by a medical expert from the NCHR for Mr. Montiel Flores.[157]

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[152] The doctor issued two (2) medical certificates of physical integrity, concluding in each case that the alleged victims were "physically and mentally sound."." *Cf.* Medical certificates of physical integrity of Messrs. Cabrera and Montiel issued by a medical examiner attached to the Judicial District of Mina on May 6, 1999 (Preliminary Inquiry N° CUAU/01/119/999) (record of annexes to the application, volume XI, folios 4274 to 4276).

[153] On the basis of a visit to the Social Readaptation Centre where the alleged victims were held, the visitor asserted that she had found Messrs. Cabrera and Montiel with several "bruises," and she indicated that they both mentioned that the injuries were "the result of the blows given by the public servants indicated as responsible [for the arrest]."." *Cf.* Commission for the Defense of Human Rights of the State of Guerrero (Coddehum), Detailed Affidavit CRTC/CODDEHUMI03111999- May 1 to 15, 1999 signed by the Coddehum Regional Coordinator (record of annexes to the application, volume X, folios 4006 to 4007).

[154] This "in order to perform [a] medical, psychophysical and injury examination."." One (1) certificate for each alleged victim was issued, concluding that they did have injuries and that these "were caused more than fifteen days ago, but less than 30 days ago."." Regarding Mr. Cabrera Garcia: EXTERNAL INJURIES: One centimeter, irregularly formed, star-shaped excoriation, covered with hematic scabs, located on the right lateral side of the neck, below the retro-auricular region on the same side; in the right temporal region, covered with hair, a slight, five by five millimeters, painless elevation (probably a lipoma) of considerable variation is palpable. COMMENT: the injury that [he] presents was caused more than fifteen days ago but less than 30 days ago. Regarding Mr. Montiel Flores: EXTERNAL INJURIES: 0.5 centimeter, irregularly formed excoriation, covered with hematic scabs, located on the side of the proximal lateral third of the right thigh. COMMENT: The injury that [he] presents was caused more than 15 days ago but less than 30 days ago."." *Cf.* Medical certificates of the psychophysical condition and injuries of Messrs. Cabrera and Montiel issued by a medical expert of NCHR on June 4, 1999 (Record 99/2336) (record of the merits, volume IV, folios 2053 to 2056).

[155] The doctor issued a certificate in the Social Rehabilitation Center of Iguala, Guerrero, indicating, *inter alia*, that "the left testicle [of Mr. Montiel Flores] [had] increased in volume with significant pain on palpation (apparently simulated by the patient since the vital signs present no alterations)." He concluded that "the pathology presented […] had been diagnosed and treated properly and in a timely manner since its first appearance." *Cf.* Medical health certificate of Mr. Rodolfo Montiel issued by a medical examiner of the NCHR on September 23, 1999 (record of annexes to the application, volume XI, folios 4403 to 4404).

[156] The expert opinion was issued following media reports on "the inappropriate treatment provided by the medical staff" at the Iguala Social Rehabilitation Center. In this respect, it concluded that "they presented a normal state of consciousness […] no signs of external injuries […] with a normal psychophysical condition. […] Regarding Mr. Teodoro Cabrera García, it is established that the surgery performed by the specialist removed a small lipoma, located in the paravertebral region to the left of the midline, with neither consequences nor sequelae (it was not a cancerous tumor as maintained by the injured person) […]: masculine patient in good general condition, to whom hygienic-dietary measures are recommended and he does not warrant medical and/or surgical treatment."." *Cf.* Medical and Psychophysical Certificate of Messrs. Cabrera and Montiel, issued by a medical expert from the Coordination of Expert Services of the NCHR on May 19, 2000 (record of annexes to the application, volume V, folios 1713 to 1719).

[157] One (1) medical certificate regarding Mr. Cabrera García was issued, in which it was indicated that his "psychophysical condition [was] normal." *Cf.* Medical Psychophysical Certificate of Mr. Montiel Flores, issued by a medical expert from the Coordination of Expert Services of NCHR, on July 6, 2000 (record of annexes to the application, volume V, folios 1642 to 1643).

117. Finally, based on the "the terms of Article 18 of the Political Constitution […] 75 and 77 of the Federal Criminal Code, 26 and 30 […] of the Organic Law of the Federal Administration [and] the Internal Rules of the Secretary of Public Security,"[158] on October 7, 2001, when Messrs. Cabrera and Montiel were still serving their sentence at the Social Welfare and Rehabilitation Detention Center, a surgeon from the Medical Service of the Center performed one (1) new examination on each of them and indicated that their health conditions were incompatible with the execution of their respective sentences.[159] On November 8, 2001, in light of the results of said examination, the Federal Executive branch, through the General Directorate of Social Welfare and Rehabilitation, released Messrs. Cabrera[160] and Montiel.[161]

118. In relation to the above mentioned, it is worth mentioning that expert witness Gutiérrez Hernández indicated, in her opinion rendered at the public hearing in the instant case, that:

> "when […] the person or persons [are] arrested, the Public Prosecutor's Office […] issues a request to carry out a certification of physical integrity or injuries; in this regard, the doctor must certify the person and describe the injuries that he finds." "Nevertheless, if an accusation of torture arises out of a statement made by these persons, or any other, the Public Prosecutor's Office [...] then specifically requests to inquire into the injuries

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158 *Cf.* Official Letter No. 210/3430/2001 and N° 210/3431/2001 of November 7, 2001 by which the sanctions imposed on Messrs. Cabrera and Montiel were modified (record of the merits, volume IV; folios 1738 and 1740).

159 Regarding Mr. Cabrera Garcia, it was concluded that: "due to the testicular pain, a medical evaluation by a urology specialist is necessary."." Furthermore, "in [the] direct medical evaluation, it was note[d] that a progressive general deterioration was occurring and physical activities were being neglected."." Regarding Mr. Montiel Flores: i) The deformity of the left clavicular region has caused intense pain which has spread to the shoulder joint on the same side and towards the chest area (heart area); ii) "[his condition corresponds to] a pattern of abdominal pain, that without efforts it is tolerable, but the act of straining himself or pushing too hard causes an intense increase in pain;" iii) "the dermatomal area with insensitivity in the right thigh alternates with periods of pain that spreads towards the lumbar region on the same side;" and iv) "the epididymo-orchitis (inflammation of the testicle and the epididymis) on the left side causes intense pain and makes it difficult for him to walk, thus the attention of a urology specialist is necessary."." *Cf.* Direct medical evaluation of Messrs. Cabrera and Montiel performed by a forensic physician on October 7, 2001 (records of the merits, volume IV, folios 1734 to 1737).

160 The diagnosis specified by the State for Teodoro Cabrera was the following: "[c]omplete loss of vision in the left eye secondary to cataract and corneal opacity caused by direct trauma suffered at the age of 10. Partial loss of vision in the right eye secondary to pterygium (fleshiness), located in the internal angle. Lower limb Grade II vascular insufficiency. Osteoarthritis (which is exacerbated by changes in temperature). Painful right testicle, withdrawn, and reduced in size relative to the left one. Onychomycosis in both feet (destruction of the nails by fungi). This is in addition to an obvious decline in his general condition, including his state of mind, since the vision loss prevents him from participating in various activities organized by the Institution. All of his pathologies are progressive in nature and require immediate medical treatment and hospitalization of the 2nd or 3rd degree; he should also be provided with comprehensive medical and surgical treatment in different specialties." Therefore, in the case of Teodoro Cabrera it was declared that: "there exists an incompatibility between his age, health and physical constitution, and the compliance with the punishment that was imposed; his residence is designated as the place to continue to serve the sentence, since the inmate requires medical attention and his family's assistance."." *Cf.* Official letter N° 210/3430/2001 of November 7, 2001, *supra* note 158, folios 1740 and 1741.

161 The diagnosis specified by the State for Rodolfo Montiel was the following: "Left ear hearing loss secondary to chronic bilateral otitis, deformity of the left subclavicular and supraclavicular regions grade II to III, contractile fibrosis sequelae secondary to bullet wound scar located in the abdomen, as well as a dermatomal area with insensitivity 5 centimeters in diameter, located on the external side of the proximal third of the right thigh, chronic and acute epididymo-orchitis, as well as visual loss. These are pathologies that, taken as a whole, limit in a significant way his capacity to comply with the sentence. In the case of Mr. Montiel Flores: "[…] it is determined that there exists an incompatibility between his health and physical constitution, and the compliance with the punishment that was imposed; his residence is designated as the place to continue serving the sentence, since the inmate requires medical attention and his family's assistance."." *Cf.* Official letter N° 210/3431/2001 of November 7, 2001, *supra* note 158, folios 1738 and 1739.

> that are exhibited, but with a focus on the medical-legal documentation and it is then when the guidelines set by the international standards to document torture must be complied with. To summarize, the fifteen medical certificates were prepared only to certify the physical integrity [of the victims] and not to document torture."[162]

119. Said expert opinion coincides with what was put forward by the State itself, according to which there exists a difference with "[a]nother type of intervention that the forensic physician carries out in Mexico, […] regarding an expert opinion on physical torture, whose investigation and documentation guidelines are found in Agreement A/057/2003, in force since the month of September 2003 due to the Contextualization of the Istanbul Protocol […] in the country. This medical intervention, in order to be carried out, like all the others carried out by the forensic physician, requires an express and written request on the part of the requesting judicial and/or ministerial authority and the conditions for its application."

120. Therefore, the Court concludes that, taking into account its purpose, the 14 medical certificates mentioned are not sufficient, by themselves, to stablish a foundation on the rejection or acceptance of the allegations of torture in the instant case. Nevertheless, regarding the possible violation to the right to humane treatment [personal integrity], the Court highlights certain medical certificates, such as the one issued on May 15, 1999, in which it was certified the presence of bruises that were allegedly the result of the blows received by Messrs. Cabrera and Montiel during their detention[163] or the certificate issued on June 4, 1999, in which it was sustained that the injuries had been produced approximately 30 days before.[164]

1.3. Expert opinions specifically aimed to verify the alleged acts of torture

121. The Court notes that on July 29, 2000, when the victims were already at the Social Rehabilitation Center of Iguala, Dr. Christian Tramsen and Dr. Morris Tidball-Binz, on behalf of the "Physicians for Human Rights – Denmark" Organization, carried out a medical assessment specifically aimed at determining whether Messrs. Cabrera and Montiel had been victims of torture. This expert opinion was issued more than one (1) year after the arrest of Messrs. Cabrera and Montiel.[165] Thus, they concluded that "[t]he physical results conclusively coincide with the statements regarding the time and the methods of the torture suffered [by

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[162] *Cf.* Expert opinion rendered by expert witness Juana Ma. Gutierrez Hernandez at the public hearing conducted in the instant case.

[163] *Cf.* Coddehum, Detailed Affidavit of May 15,1999, *supra* note 153, folios 4006 to 4007.

[164] *Cf.* Medical certificates of the psychophysical condition and injuries of June 4, 1999, *supra* note 154, folios 2053 to 2056.

[165] The expert opinion was presented within the framework of the proceeding instituted by the victims in which they specifically denounced the alleged acts of torture committed against them. According to what is stated in the report, Dr. Tramsen and Dr. Tidball-Binz carried out the respective medical interview with Messrs. Cabrera and Montiel "in the reception hall of the prison director's office […]. The physical examination [was allegedly] performed in complete privacy in a neighboring room used as a bathroom and a cellar that was sufficiently lit. [The alleged victims were allegedly] undressed for the physical examination."." They also indicated that "[d]uring the interview and the examination, Rodolfo Montiel and Teodoro Cabrera were completely conscious, and oriented in time, space, location, and person, and both had a normal level of short and long-term memory. They adequately answered the questions and responded coherently to important medical events. Nevertheless, in the case of Teodoro Cabrera, his visual impairment allegedly influenced, as was expected, his observations and the reconstruction of the events."." During the course of the public hearing, Dr. Tramsen added that this examination was performed in conformity with the methodology established in the Istanbul Protocol and by the International Rehabilitation Center of Tortured Victims. *Cf.* Physicians for Human Rights-Denmark. The case of Rodolfo Montiel Flores and Teodoro Cabrera Garcia, Mexican farmers and environmental activists, July 29, 2000 (record of annexes to the application, volume XIX, folios 8374 to 8383).

Messrs. Cabrera and Montiel]. Even more, the medical history of the patients coincides with the corresponding development of the symptoms described by the medical science."[166] Nevertheless, they recommended "to perform, at any case […] additional examinations to both individuals in order to determine […] the total physical and psychological harm caused by the torture and to propose the corresponding treatment."[167]

122. The domestic courts and the State[168] considered that said expert opinion was insufficient to prove torture, because: i) it was alleged lack of impartiality of doctors Tramsen and Tidball-Binz since the alleged victims recognized them as advocates of trust and "in order to have access to the confinement center, the representatives "authorized [them] […] as members of the legal area of their organization [which was not necessary, given that] there are procedures to authorize a medical evaluation [...] of detained people;" ii) the conclusions of the experts witnesses constituted inaccurate and general assessments; they did not take into account the evidence existing in the criminal proceeding and the conclusions of the experts' opinion were not supported by any scientific study but only with a body examination,[169] and iii) it was prepared a year later. Regarding the first argument, the Court reiterates what was established in its Resolution of August 23, 2010, in the sense that "according to Mexican law, the sole designation of a 'person of trust' does not necessarily imply the 'material conduct of the defense'" and that "there is no record of a defense proceeding conducted by Mr. Tramsen, instead there is evidence that his action was limited to the expert opinion" (*supra* para. 26). In second place, the Court considers that Messrs. Tramsen and Tidball-Binz met the minimum requirements established in the Istanbul Protocol since they drafted an accurate report containing an interview, history, physical and physiological test, opinion and authorship.[170] Finally, the Court notes that the Protocol provides that "[t]he timeliness of such medical examination is particularly important" and "[a] medical examination should be undertaken regardless of the length of time since the torture,"[171] therefore, the conduct of the examination a year after the facts does not question its validity.

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166 *Cf.* Physicians for Human Rights- Denmark. The case of Messrs. Cabrera and Montiel, *supra* note 165, folio 8382.

167 *Cf.* Physicians for Human Rights- Denmark. The case of Messrs. Cabrera and Montiel, *supra* note 165, folio 8383.

168 The State attached an "Analysis of the expert opinion furnished as evidence", issued without a date, in which the Public Prosecutor's Office (PGR ["Procuraduría General de la República" in Spanish]) "made an analysis in which the expert opinion issued by the organization "Physicians for Human Rights Denmark" and by the other [,] the proceedings that [existed] […] regarding the different medical certifications […] in [the case file]."." In view of this, the PGR concluded, *inter alia,* that the expert opinion prepared by Messrs. Tramsen and Tidball-Binz: i) "does not adjust to what a forensic medical expert opinion should methodologically consist of, apart from the fact that it was not offered as expert evidence with the formalities required by the Federal Code of Criminal Procedures;" ii) "it lacks of scientific-technical methodology;" iii) "[i]t does not contemplate the information of international standards;" iv) "it is dogmatic given that it does not select nor order the information obtained by means of the version of the patients, search and identification of fingerprints, indicia or after-effects of physical injuries and/or psychological disorders closely related to the facts denounced;" v) "[t]he medical investigation was conducted 14 months and 27 days after the facts and was presented with an informative style of a Report type, regarding facts allegedly lived by the petitioners;" vi) "it did not [take] into account the existing reports and medical certificates," and vii) that "the evidence is not consistent with the alleged narration of the facts, therefore, the physical-clinical-psychological diagnosis does not suggest a true allegation of physical or mental torture."." *Cf.* Analysis of the expert report exhibited as evidence. Public Prosecutor's Office of the Republic (PGR) without date (record of annexes to the answer to the application, volume XLV, folios 22471 to 22477).

169 *Cf.* Judgment issued on August 14, 2002 by the Second Collegiate Tribunal, *supra* note 84, folio 14464.

170 *Cf.* Istanbul Protocol, *supra* note 149, para. 82.

171 *Cf.* Istanbul Protocol, *supra* note 149, para. 103.

123. Apart from listening to Dr. Tramsen at the public hearing, the Court received three expert opinions related to the allegations of torture, presented by expert witnesses Gutiérrez Hernández, Deutsch, and Quiroga (supra paras. 25 and 26). In relation to the opinion prepared by the expert witnesses Dr. Tramsen and Dr. Tidball-Binz, expert witness Gutiérrez Hernández concluded that "it is basically an opinion that disregarded the necessary scientific basis, that only provided unreal and subjective elements regarding the subject matter for which it was requested" and that "it neither complied with the international guidelines established by the Istanbul Protocol."[172]

124. For his part, expert witness Quiroga concluded that "[t]he violent methods used during [the] detention and interrogation [of Messrs. Cabrera and Montiel] and the findings of the physical examinations are consistent with each other, and consistent with torture."[173] The State argued that the medical investigation was performed "11 years and 28 days after the facts," that "it did not take into account the preexisting reports and medical certificates, and those contemporary to the facts of the arrest of the people who are accused today," and that it did not assess certain factors such as "[t]he detainees' probable physical resistance during the arrest" and the contradictions in their statements.

125. In the psychological expert report of Ana Deutsch, given before notary public, Messrs. Cabrera and Montiel were diagnosed with symptoms of post-traumatic stress disorder and major depression, allegedly linked to the physical harm stemming from the alleged torture which they would have been the victims of.[174]

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[172] In addition, expert witness Gutiérrez Hernández indicated that "in the case of Mr. Teodoro Cabrera, eight medical certificates had been prepared, all of which agreed in stating that he had no physical injuries, […] the first two of these certificates only mentioned a stab wound located behind the ear, […] that it was not recent, so that […] it already existed at the time of the arrest. In the specific case of Mr. Teodoro Cabrera, therefore, there was never any injury compatible with acts of physical torture. In the case of Mr. Rodolfo Montiel, for whom seven medical certificates were prepared […], the first two medical certificates state the presence of two linear excoriations of 1 centimeter in length, located on the forehead and that […] after performing the corresponding test, it was determined that, due to the type of injury, its characteristics and its magnitudes, it was a very slight injury, that it is definitely not compatible with the acts of torture that were being alleged."." *Cf.* Statement rendered by expert witness Juana Ma. Gutierrez Hernandez at the public hearing, *supra* note 162.

[173] Regarding Mr. Cabrera García specifically, he mentioned that "he has daily, moderate to severe, headaches associated to emotional stress, consistent with a tension headaches diagnosis. He also complains of chronic, recurrent lumbar (back) pain, aggravated by physical activity and the years since he was arrested and beaten, which limits his work options."." In addition, "he has two scars in the temporal region (ears), secondary to old wounds inflicted by a sharp instrument […] consistent with his history of trauma caused by metal shards." He also "has a scar on the chest, secondary to surgery to remove a mass that is possibly related to the trauma."." Finally, "[t]he medical examination demonstrates an atrophy of the right testicle […] consistent with testicular atrophy secondary to trauma."." Concerning Mr. Montiel Flores, he indicated that "[h]e has reduced bilateral hearing acuity, which has increased due to recurrent otitis that began during the period of detention."." In addition, "Rodolfo suffers from chronic headaches, and chronic pain in the neck, shoulders and lumbar region. Chronic pain is the most frequent symptom of severe trauma victims, and it is well documented in the literature." Also, "[t]he decline in hand strength has been gradual and began during the period of detention." "The decreased sensitivity in the anterior region of both thighs […] requires a neurological evaluation." *Cf.* Expert opinion rendered by expert witness Jose Quiroga by means of an Affidavit on August 8, 2010 (record of evidence, volume III, folios 1316 to 1328).

[174] *Cf.* Expert opinion rendered by expert witness Ana Deutsch by means of an Affidavit on August 8, 2010 (record of the merits, volume III, folios 1295 to 1304). Regarding this expert opinion, the State pointed out that "[t]he analysis of the expert witness does not describe nor provide grounds for the criteria mentioned in Annex 4 of the Istanbul Protocol." Likewise, it mentioned that "[t]he expert opinion does not contain a description and minimum basic information regarding the previous personality of the patients, given that it disregards whether there are factors of said personality that have a bearing on or determine, or if applicable, modify the described symptomatology."." Therefore, the State indicated that all of the above denotes that this expert opinion "is not objective due to the fact that it uses and refers to different evaluative or personal opinions and expressions, describing only those elements that are

2. Obligation to investigate alleged acts of torture

126. The Court has pointed out that, according to article 1(1) of the American Convention, the obligation to guarantee the rights enshrined in articles 5(1) and 5(2) of the American Convention embodies the duty of the State to investigate possible acts of torture and other cruel, inhuman or degrading treatments.[175] The duty to investigate is reinforced through the provisions of Articles 1, 6, and 8 of the Convention against Torture,[176] which set forth that the State is bound to "take […] effective measures to prevent and punish torture within its jurisdiction," and "prevent and punish […] other cruel, inhuman, or degrading treatment or punishment." In addition, according to the provision of article 8 of that Convention, States Parties shall guarantee:

> […] that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case [and]
>
> [i]f there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, […] that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

127. This obligation to investigate is based on the facts previously analyzed (*supra* paras. 111 to 125). In fact, regarding the alleged pulling of the victims' testicles, in their statements in the domestic criminal proceeding, both Mr. Cabrera Garcia and Mr. Montiel Flores indicated that military agents had pulled their

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interesting for the petitioner; therefore, the objectivity is substantially detracted from and therefore, so it is the reliability of the investigation presented."."

[175] *Cf. Case of Ximenes Lopez v. Brazil, Merits, Reparations and Costs.* Judgment of July 4, 2006. Series C Nº. 149, para. 147; and *Case of Bayarri v. Argentina, supra* note 123, para. 88; *Case of González et al ("Cotton Field") v. Mexico, supra* note 48, para. 246.

[176] Article 1 of the Inter-American Convention to Prevent and Punish Torture provides that:

> The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.

Furthermore, article 6 provides that:

> In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.
>
> The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.
>
> The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

Moreover, article 8 provides that:

> The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.
>
> Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.
>
> After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.

testicles while they were detained at the banks of Pizotla River.[177] In this regard, the Court notes that even though in the medical certificates issued by the Mexican authorities regarding the physical integrity of the victims, it was mentioned some injury to their testicles as a result of the arrest (*supra* paras. 114 to 120), the expert opinion of Dr. Tramsen and Dr. Tidball-Binz concluded, in relation to Mr. Cabrera, that "[t]he right testicle is retracted and reduced to half the size of the left testicle,"[178] while, in the case of Mr. Montiel, it was indicated that his testicles were in normal condition.[179] Furthermore, it is worth emphasizing that the conclusions of the opinion of expert witnesses Tramsen and Tidball-Binz significantly coincide with those contained in the examination issued upon the release of Messrs. Cabrera and Montiel (*supra* para. 117) and with the expert opinion presented by expert witness Quiroga,[180] given that the latter indicated that "[t]he medical examination demonstrates an atrophy of the right testicle that was previously described in the physical examination of Physicians for Human Rights in July 2000."[181] Notwithstanding the foregoing, expert witness Gutierrez Hernández associated these last conclusions to degenerative problems of old age of the victims and cholesterol related problems.[182]

128. On the other hand, the Court notes that during the domestic criminal proceeding, only Mr. Montiel indicated that "they got him wet to give him [electric] shocks during short periods of time."[183] Notwithstanding the foregoing, the representatives stated that Mr. Cabrera Garcia received electric shocks in the left thigh. In this respect, the Tribunal emphasizes that electric shocks are a method of torture different from others due to the fact that it is difficult to determine if it was applied, since it is possible to use mechanisms to leave no visible marks.[184] In the medical examination that was performed when the victims were leaving jail, it was indicated that in Mr. Montiel's case there was a "dermatome area of insensitivity"

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[177] Hence, in his sworn statement before public notary, Mr. Cabrera García indicated that, after the blows he received, "[his] genitals hurt a lot, […] they were very swollen, [he] could not keep [his] legs either open or closed." *Cf.* Statement rendered by Teodoro Cabrera Garcia before a public notary, *supra* note 147, folios 1194. For his part, in his testimony given before the Tribunal at the public hearing held in this case, Mr. Rodolfo Montiel stated, *inter alia*, that one of the soldiers "pulled down [his] pants and underpants and they pulled […] [his] testicles" and that "at times, he lost consciousness." *Cf.* Statement rendered by Mr. Rodolfo Montiel Flores at the public hearing held in this case.

[178] *Cf.* Physicians for Human Rights- Denmark. The case of Messrs. Cabrera and Montiel, *supra* note 165, folio 8381.

[179] *Cf.* Physicians for Human Rights- Denmark. The case of Messrs. Cabrera and Montiel, *supra* note 165, folio 8380.

[180] Expert witness indicated that Mr. Cabrera Garcia presented "a normal penis, an atrophied right testicle, and a normal left testicle."." The atrophy "was confirmed during [his] physical evaluation and documented with an ultrasound of the testicular region in May 2010. The atrophy of the right testicle is consistent with testicular atrophy secondary to trauma."." Regarding Mr. Montiel Flores, he stated that his "penis [was] normal [as well as] his testicles." *Cf.* Expert report rendered by expert witness Jose Quiroga before a public notary, *supra* note 173, folios 1318, 1319 and 1326.

[181] *Cf.* Expert report rendered by expert witness Jose Quiroga before a public notary, *supra* note 173, folio 1319.

[182] *Cf.* Expert opinion rendered by expert witness Juana Ma. Gutiérrez Hernández at the public hearing, *supra* note 35.

[183] *Cf.* Statement rendered by Mr. Rodolfo Montiel Flores at the public hearing, *supra* note 177.

[184] To this end, the Istanbul Protocol provides that "[s]ome forms of torture such as electrical shocks or blunt trauma may be initially undetectable, but may be detected during a follow-up examination."." However, "the type, time of application, current and voltage of the energy used cannot be determined with certainty upon physical examination of the victim. Torturers often use water or gels in order to increase the efficiency of the torture, expand the entrance point of the electric current on the body and prevent detectable electric burns […]."." *Cf.* Istanbul Protocol, *supra* note 149, paras. 174 and 211.

"of 5 cm" in the right thigh."[185] Likewise, in Dr. Tramsen's and Dr. Tidball-Binz's opinion, it was indicated that "[i]n the center of the upper lateral side of [Mr. Montiel Flores'] right thigh, [there is] a 5 centimeter long and 3 centimeter wide subcutaneous tumor with no skin depigmentation. There is no sensitivity in this area."[186] On the other hand, regarding Mr. Cabrera Garcia, they certified that "in the left thigh, there is a 3 centimeter long and 2 centimeter wide subcutaneous tumor."[187] Expert witness Gutiérrez Hernández did not refer to the alleged electrical shocks. Also, the Court notes that in the declaration before notary public rendered by expert witness José Quiroga, he mentioned the decreased sensitivity in Mr. Montiel Flores' thigh.[188]

129. About the alleged blows to different parts of their bodies and threats, Messrs. Cabrera and Montiel described different moments in which these had happened.[189] Most of the tests conducted by the Mexican authorities in relation to the integrity of the alleged victims found that their physical condition was good or normal (*supra* paras. 115 to 117). Nevertheless, the expert opinion of Messrs. Tramsen and Tidball-Binz concluded that the victims presented scars and pain located in different parts of their bodies.[190] Regarding this type of arguments and evidence related to the pain caused by some blows and the effect of threats, expert witness Gutiérrez Hernández indicated that "pain […] is a subjective piece of information that cannot be seen."[191] Regarding this affirmation, this Tribunal refers

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185 *Cf.* Direct medical examination of Messrs. Cabrera and Montiel of October 7, 2001, *supra* note 159, folio 1734.

186 *Cf.* Physicians for Human Rights- Denmark. The case of Messrs. Cabrera and Montiel, *supra* note 165, folio 8380.

187 *Cf.* Physicians for Human Rights- Denmark. The case of Messrs. Cabrera and Montiel, *supra* note 165, folio 8381.

188 *Cf.* Expert report rendered by expert witness Jose Quiroga before a public notary, *supra* note 173, folio 1327.

189 In his sworn statement before public notary, Mr. Cabrera García indicated the following: a)"they kicked [them], they hit [him] with the rifle on the ear;" b) "they hit [him] in the ribs, they threw [him], and then hit [him] on the buttocks, and told [him] 'but at night, there would be good things'"; c) "they poured sparkling water in [his] nostrils, they pulled [him by] the hair, and d) "they placed [him] lengthwise, they picked [him] up and they placed [him] again forming a cross."." *Cf.* Statement rendered by Mr. Teodoro Cabrera Garcia before the public notary, *supra* note 147, folios 1192 to 1194. Moreover, in his statement before the Tribunal at the public hearing held in the instant case, Mr. Montiel Flores pointed out, *inter alia*, that: a) the day of the arrest, "a soldier rapidly pulled [him] by the hair, threw [him] on the ground, and once [he] was already lying on the ground, he dragged [him] by the hand, like for four or five meters, he took [him] to the riverbank, there he put his boot on [his] chest and the firearm's muzzle on [his] head, at the bottom of the nape and he told [him] that he was going to blow [his] head off with a single gunshot, then they did the same to Teodoro, they tied [them] with [their] hands behind [them] and they made [them] cross the river, once the river was crossed they bound [their] feet […] on the beachside under the sun and they made [them] lie face-up, they would not allow [them] […] to sit, [they] were only lying face-down or face-up, and so it was a torment for [them]"; b) on the following day, "at night they made [them] form a cross with [their] own bodies, at the four cardinal points, they were turning [their] heads; after [they] formed the cross, they blindfolded [them], they untied [their] feet and [made them] cross the river, they took [them] to another place, when [they] got there, they took [their] blindfolds off, [he] could see that there were other men there." Afterwards, "they shone a very blue light in [his] face and they told [him] in a shrill voice to look at the light."." Then, "they blindfolded [him] and dragged [him]; they leaned on [his] shoulders and dropped with his knees down on [his] stomach; c) At the 40th Battalion, "they continued to torture [them] while beating [them] with sticks." "At night, they took [them] to a room […], there they hit [them] again, they put [them] in a vehicle […], they made [them] get down again, they threatened [them] again and they piled up bags on [them] and they climbed on top […] of [them], they stuck their weapons in [their] heads and took [them] away, [telling them] that they were taking [them] to jail."." *Cf.* Statement rendered by Mr. Rodolfo Montiel Flores at the public hearing, *supra* note 177.

190 *Cf.* Physicians for Human Rights- Denmark. The case of Messrs. Cabrera and Montiel, *supra* note 165, folios 8380 and 8341.

191 *Cf.* Expert opinion rendered by expert witness Juana Ma. Gutiérrez Hernández at the public hearing, *supra* note 162.

to what is established in the Istanbul Protocol, according to which pain may be the only manifest complaint and "the intensity, frequency and duration […] should be noted."[192]

130. Lastly, the Court observes that at the domestic and Inter-American levels, the victims and other witnesses[193] declared that while Messrs. Cabrera and Montiel were detained in the municipality of Pizotla, they were unable to communicate with their families in order to establish how they were doing or to where they were being transferred.[194] Also, in the proceeding before this Court, the victims indicated that "the night of the day [of the detention], they did not drink water, or were given something to eat, and they did not let through those who brought food, all that in the river."[195]

131. In spite of what was mentioned, this Tribunal notes that, in the instant case, the investigation was initiated more than three months after the allegations of torture committed against Messrs. Cabrera and Montiel on May 7, 1999, were first mentioned (*supra* para. 74). In addition, the Court observes that this investigation was initiated upon express request by the complainants, made on August 26, 1999 within the criminal proceeding conducted against them.[196] Although in the criminal

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[192] *Cf.* Istanbul Protocol, *supra* note 149, para. 169.

[193] Moreover, a witness stated that "they were taken to the side of the Pizotla river, […] where they were held face down in the water, and what the Army did next with Rodolfo and Teodoro is not known, because they did not let anyone go."." *Cf.* Testimony given by Silvino Jaimes Maldonado before the Fifth District Court on October 26, 1999 (Criminal Case 61/99) (record of annexes to the answer to the application, volume XXIV, folio 10237). Similarly, another witness who was questioned about the distance she was from the victims while they were in the river, stated that "it was about some sixty meters outside of my house where I saw that they were detained."." Cf. Testimony given by Cresencia Jaimes Maldonado, *supra* note 61, folios 10245 and 10246. Lastly, a third witness indicated that Mr. Montiel "was held next to Teodoro on the edge of the river over wet sand, face down, his hands behind him, but [she] wasn't able to see whether his hands were tied there [since she was] some fifty meters away, (…) at home."." *Cf.* Testimony of Esperanza Jaimes Maldonado before the Fifth District Court on October 26, 1999 (Criminal Case 61/99) (record of annexes to the answer to the application, volume XXIV, folios 10252 and 10253).

[194] Specifically, Mrs. Ubalda Cortés Salgado stated that on May 2: So that [Mr. Cabrera and Montiel] would come out [[the soldiers] threw stones and they came and asked me where they had gone […] later I went back to my house and I went back after about an hour, and a lady there told me that my husband had been detained, and I went to look and realized that they had him on the ground lying face down with his hands behind his back […] afterward, they boarded Rodolfo Montiel and Teodoro [Cabrera] onto a helicopter and [I asked the soldiers] to let me talk to him to know where they were going to take him, and they replied that I had no reason to talk to him, and to look for him afterwards."." *Cf.* Testimony of Ubalda Cortés Salgado, *supra* note 61, folios 10072 and 10073. She also stated: "they were at the bank of [the river], "we got closer and looked from that lady's backyard. I went to the plum plants; they asked me what I was doing and I asked […] to cut some plums, but it was so that I could get closer and see how they were being held. They had them lying on the sand." *Cf.* Affidavit rendered by Mrs. Ubalda Cortes Salgado on June 15, 2010 (record of annexes, volume III, folio 1208). The Court notes that the direct criminal *amparo* [relief] ruling denied the testimony of Mrs. Ubalda Cortes Salgado, given that "[…] her partiality and intention to benefit her husband RODOLFO MONTIEL FLORES is evident, given that she rendered a statement beyond what was asserted by the accused when she emphasized that the Captain told her that if she did not accompany him to look for them, he was going to throw a grenade to kill them; that they set fire where the accused were in order to force them out and threw stones at them, circumstances to which the accused do not make reference; it is also incredible that if the soldiers were chasing her husband and companions and she was already told that if they did not come out from where they were hidden, they were going to kill them, she went to her home and come back an hour later." In addition, it argued that "there is no logical explanation regarding why she went back to her home for an hour if she was not a neighbor of that community." *Cf.* Judgment of August 21, 2002 issued by the First Collegiate Tribunal, *supra* note 148, folios 15130 and 15131.

[195] *Cf.* Statement rendered by Mr. Rodolfo Montiel Flores at the public hearing, *supra* note 177.

[196] *Cf.* Constitutional confrontation hearings of August 26, 1999, *supra* note 86, folios 10157 and 10158.

proceeding conducted against Messrs. Cabrera and Montiel, the domestic courts assessed and examined both the medical certificates and the expert opinions undertaken in order to analyze the allegations of torture, the Court observes that said proceeding had a purpose other than to investigate the alleged perpetrators of these allegations since, at the same time, Messrs. Cabrera and Montiel were being tried. Therefore, the fact that no autonomous investigation against the alleged responsible was conducted before the ordinary courts prevented to dispelle of doubts and to clarify the allegations of torture. Based on the foregoing, it is clear to this Court that the State failed to comply with its duty to investigate *ex officio* the human rights violations committed against Messrs. Cabrera and Montiel. In the instant case, it was essential that the different domestic judicial courts ordered new measures to clarify the relationship between the signs found on the victims' bodies and the facts they alleged to have suffered as torture.

132. Likewise, the Court considers that this obligation to investigate the alleged acts of torture was even more relevant if the context that preceded the instant case regarding the confessions and statement made under duress is considered as well as the duties of strict due diligence that must operate in areas of high military presence (*supra* paras. 86 to 89). In this respect, the United Nations Special Rapporteur on Torture has pointed out that "generally speaking, not only judges but also lawyers, the Public Prosecutor's Office and the Judicial Police itself are overloaded with work, which may explain the tendency to rely on confessions as a way of clearing up cases rapidly."[197] Moreover, the United Nations Special Rapporteur sustained that "[…] in normal practice, there is broad discretion in the application of the law and therefore a great risk exists that investigations will be falsified, carried out using duress or recorded illegally, ignoring potentially key evidence or taking into account other less important evidence that might slant the investigation in such a way as to affect or benefit a particular person; evidence may even be made intentionally to "disappear."[198]

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[197] United Nations. Economic and Social Council. Report of the Special Rapporteur on Torture, Sir Nigel Rodley. Visit to Mexico UN Doc (E/CNA/1998/38/Add.2), January 14, 1998, para. 43.

[198] United Nations. Economic and Social Council. Report of the Special Rapporteur on Torture, *supra* note 197, para. 64.

3. Legal classification

133. The Court has indicated that the violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors (such as, *inter alia*, length of the treatment, age, sex, health, context and vulnerability, among others), which must be proven in each specific situation. Likewise, the Court specified that any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person in violation of Article 5 of the American Convention.[199]

134. In this case, the lack of an investigation against the alleged perpetrators of the violation of the right to humane treatment [personal integrity] limits the possibility of concluding on the allegations of the alleged torture committed against Messrs. Montiel and Cabrera. Without prejudice to the foregoing, the Court has mentioned that the State is responsible, in its conditions of guarantor of the rights enshrined in the Convention, for the observance of the right to humane treatment of every person under its custody.[200] The case law of this Tribunal has also pointed out that the State must provide a satisfactory explanation for what has happened to a person whose physical conditions were normal when custody began, and during it or at the end of it this worsened.[201] Consequently, it is possible to consider that the State is responsible for the injuries exhibited by a person who has been in the custody of State agents.[202] In said case, it falls upon the State the obligation to provide a satisfactory and convincing explanation of what happened and disprove the allegations regarding its responsibility, using adequate supporting evidence.[203] Therefore, the Court highlights that from the evidence presented in the case, it is possible to conclude that cruel, inhuman and degrading treatment were proved against Messrs. Cabrera and Montiel.

135. In light of the above, this Court reiterates that whenever there are indications that torture has taken place, the State must initiate, *ex officio* and immediately, an impartial, independent and meticulous investigation that allows the nature and origin of the injuries observed to be determined, those responsible to be identified and their prosecution to commence.[204] It is essential that the State act diligently to avoid the practice of torture or cruel, inhuman and degrading

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[199] *Cf. Case of Loayza Tamayo v. Perú, supra* note 37, para. 57; *Case of Miguel Castro-Castro Prison v. Perú. Interpretation of the Judgment on the Merits, Reparations and Costs.* Judgment of August 2, 2008. Series C N° 181; para. 76.

[200] *Cf.* Case of *López Álvarez V. Honduras. Merits, Reparations and Costs.* Judgment of February 1, 2006. Series C N° 141, paras. 104 to 106; *Case of the Miguel Castro Castro Prison v. Perú. Merits, Reparations and Costs.* Judgment of November 25, 2006. Series C N° 160, para. 273*; Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 117.

[201] *Cf. Case of Juan Humberto Sánchez v. Honduras, supra* note 119, para. 100; and *Case of Bulacio v. Argentina, supra* note 123, para. 127.

[202] *Cf. Case of the "Street Children" (Villagrán Morales et al) v. Guatemala; supra* note 29, para. 170; and *Case of Escué Zapata v. Colombia*, *supra* note 53, para. 71; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 95.

[203] Cf. *Case of Juan Humberto Sánchez v. Honduras, supra* note 119, para. 111, Case of the *Miguel Castro-Castro Prison v. Perú. Merits, Reparations and Costs. Supra* note 200, para. 273*; and Case of Zambrano Vélez et al v. Ecuador, supra* note 24*,* para. 108.

[204] *Cf. Case of Gutierrez Soler v. Colombia. Merits, Reparations and Costs.* Judgment of September 12, 2005. Series C No. 132, para. 54; *Case of Bayarri v. Argentina, supra* note 123, para. 92; *Case of Bueno Alves v. Argentina. Merits, Reparations and Costs.* Judgment of May 11, 2007. Series C No. 164, para. 88.

treatment, taking into account that the victim usually abstains from denouncing the facts because he is afraid. Likewise, the judicial authorities have the duty to guarantee the rights of the person detained, which entails obtaining and protecting any evidence that can prove any alleged acts of torture.[205] The State must guarantee the independence of the medical and health care personnel responsible for examining and providing assistance to those who are detained so that they can freely carry out the necessary medical evaluations, respecting the norms established for the practice of their profession.[206]

136. On the other hand, the Court whishes to highlight that whenever a person alleges, within a proceeding, that his statement or confession was obtained as a result of torture, the State party has the obligation to ascertain the veracity of such complaint[207] by means of a diligent investigation. Likewise, the burden of the proof cannot rest on the complainant, but it is on the State to prove that the confession was voluntary.[208]

137. Therefore, the Court concludes that the State is responsible: a) for the violation of the right to humane treatment [personal integrity], embodied in articles 5(1) and 5(2), in conjunction with article 1(1) of the American Convention, for the cruel, inhumane and degrading treatment to which Messrs. Cabrera and Montiel were subjected and b) for the non-compliance with articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, regarding the obligation to investigate the alleged acts of torture to the detriment of Messrs. Cabrera and Montiel.

IX

RIGHT TO A FAIR TRIAL AND RIGHT TO JUDICIAL PROTECTION, IN RELATION TO THE OBLIGATION TO RESPECT RIGHTS , DOMESTIC LEGAL EFFECTS AND THE OBLIGATIONS EMBODIED IN THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

138. Regarding the alleged violation of articles 8,[209] 25[210] and 2[211] of the American Convention, the Commission and the representatives alleged that in the

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205 *Cf.* Istanbul Protocol, *supra* note 149, para. 76.

206 *Cf.* Istanbul Protocol, *supra* note 149, para. 56, 60, 65 and 66.

207 *Cf.* United Nations. Committee against Torture. PE v. France. Communication 193/2001, Report of November 21, 2002, para. 6.3.

208 The Sub-committee on Prevention of Torture has indicated that: "As to the assessment of evidence, it falls upon the State to prove that its agents and institutions do not commit acts of torture and it is not for the victim to prove that acts of torture had taken place, specially when the victim has been subjected to conditions that make it impossible for him to prove it." *Cf*. United Nations, Committee against Torture, Report on Mexico Produced by the Committee Under Article 20 of the Convention, para. 39. Moreover, United Nations. Committee on Human Rights. Singarasa v. Sri Lanka, Report of July 21, 2004, para. 7.4.

209 Article 8.1 of the American Convention (Right to a Fair Trial) establishes that:

> 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
>
> 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
>
> a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

criminal proceeding conducted against Messrs. Cabrera and Montiel, evidentiary value was attributed to the statements and self-incriminating confessions obtained under duress. The representatives, in addition, observed the following irregularities: the reversal of the burden of proof to the detriment of the accused; the presumption of guilt associated with the admission of a series of tainted or insufficient evidence and the lack of a proper defense and effective remedies. In this respect, the representatives alleged that the appeal through the filing of a direct *amparo* was ineffective, among other elements, due to the erroneous application of the principle of procedural immediacy, the non-exclusion of evidence obtained under torture and because it was not possible to contest the detention and the solitary confinement of Messrs. Cabrera and Montiel given that the court considered that "it was not the appropriate procedural moment." Furthermore, the Commission and the representatives claimed that the accusation of the victims for the alleged acts of torture committed against them did not give rise to investigations *ex officio;* the proceeding was conducted under a jurisdiction that was not competent, within an unreasonable time; that essential procedures were not adopted; and that an effective remedy was not afforded to the alleged victims in order for them to contest the exercise of the military jurisdiction.

139. The State indicated that, in the proceeding conducted against the victims, all the judicial guarantees were strictly respected and that the defense had at its disposal and thoroughly used several simple and expedite remedies. It added that the remedies were effective, insofar as some of the charges were withdrawn and some items of evidence that were not initially taken into account were assessed, thanks to the filing of such remedies. It indicated that "the fact that the appeals filed by the defense were not solved, in general, favorably" does not imply that the victims "did not have access to effective remedies." As to the investigation for the alleged torture, the State pointed out that the remedies filed by the defense before competent, impartial and independent judicial bodies provoked far-reaching discussions to shed light on the alleged torture. Moreover, it indicated that there is no element that allows inferring that the court or any other state agent intended to delay the investigation.

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b) prior notification in detail to the accused of the charges against him;

c) adequate time and means for the preparation of his defense;

d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

g) the right not to be compelled to be a witness against himself or to plead guilty; and

h) the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

[210] Article 25.1 of the American Convention (Right to Judicial Protection) establishes that:

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.

[211] Article 2 of the American Convention (Domestic Legal Effects) provides that:
[W]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

140. Article 8(1) of the Convention establishes the guidelines of the so-called "due process of law," which consists in, among other aspects, the right of every person to be heard with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, for the determination of his rights.[212]

141. Moreover, article 25(1) of the Convention establishes, in broad terms, the obligation of every State Party to provide, to all persons subject to its jurisdiction, an effective judicial recourse against acts that violate their fundamental rights.[213] In particular, this Tribunal has established that States Parties have an obligation to provide effective judicial recourses to victims of human rights violations (Art. 25), recourses that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1(1)).[214]

142. Similarly, the Court has pointed out that States have the responsibility to embody in their legislation and ensure due application of effective remedies and guarantees of due process of law before the competent authorities, which protect all persons subject to their jurisdiction from acts that violate their fundamental rights or which lead to the determination of the latter's rights and obligations.[215] The Tribunal has also established has established that for the State to comply with that provided in Article 25 of the Convention, it is not enough that the remedies are formally admissible but rather that they be effective in the terms of such rule,[216] that is to say, there must be results or answers to the violations of rights in the Convention, the Constitution or the law.[217] The Court has held that said obligation implies that the remedy must be suitable to combat the violation and that its application must be made effective by competent authorities.[218]

143. In this respect, the Tribunal highlights that some general irregularities that would affect the mentioned judicial guarantees have been referred to.[219] The

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[212] *Cf. Case of Genie Lacayo v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 29, 1997. Series C No. 30, para. 74; *Case of Yvon Neptune v. Haiti*, *supra* note 49, para. 79; and *Case of Bayarri v. Argentina, supra* note 123, para. 101.

[213] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections.* Judgment of June 26, 1987. Series C N° 1, para. 91; *Case of Fernandez Ortega et al v. Mexico*, *supra* note 39, para. 180; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 164.

[214] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*, *supra* note 213, para. *91; Case of the "Las Dos Erres" Massacre v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 24, 2009. Series C N° 211, para. 104; *Case of Chitay Nech et al v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of May 25, 2010. Series C No. 212, para. 190.

[215] *Cf. Case of the "Street Children" (Villagrán Morales et al) v. Guatemala*; *supra* note 29, para. 237; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 182; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 166.

[216] *Cf. Judicial Guarantees in States of Emergency (art. 27.2, 25 and 8 American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 182; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 166.

[217] *Cf.* Advisory Opinion OC-9/87, *supra* note 216, para. 23; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 182; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 166.

[218] *Cf. Case of Maritza Urrutia v. Guatemala. Merits, Reparations and Costs.* Judgment of November 27, 2003. Series C N° 103, para. 117; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 182; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 166.

[219] In their statements before the Court, Messrs. Cabrera and Montiel declared that they were not committing any crime at the time of the arrest. In particular, Mr. Montiel indicated that he and his wife arrived at the home of Mr. Cabrera Garcia because they were inviting the public to take part in a

representatives argued that these irregularities are related to the evidence produced regarding the possession and use of weapons and drugs (*inter alia*, some expert opinions and a sodium rhodizonate test), and other items of evidence furnished in the statements made initially by the victims. The Court considers appropriate to review the final conclusions at the judicial levels regarding these issues.

144. In relation to the controversies over the weapons, the Court observes that the judgment of the Second Collegiate Tribunal rejected each one of the arguments put forward by the defense counsel of the victims indicating, *inter alia*, that:

a) in relation to the expert opinion related to the identification of the alleged firearms, "even though [the expert witnesses] did not prepare their report in written form,"[220] "this does not imply that it is invalid" in view of their appearance and their description of the firearms;
b) "the fact that [...] the expert witnesses [...] dedicated a short amount of time," "which is surely the result of the expertise they posses" because of they work for the Federal Judicial Police," "lacks juridical importance;"
c) "in general, firearms have [their] data engraved" which "facilitates their legal classification without having to demonstrate the operations or experiments on which their opinions were based;"
d) "it is not possible to accuse the military personnel of not having brought the detainees without delay," "it was less feasible to place the instruments and objects of the crime at disposal," and
e) "in no way" can the alleged negligence "lead to the inexistence of the weapons."[221]

145. The Court emphasizes that this Second Collegiate Tribunal acquitted Mr. Montiel Flores of the crime of carrying a ."22 caliber Remington rifle," given that, in one of his statements he "emphatically denied" carrying such rifle and because Mr. Cabrera's testimony did not incriminate him in this respect. Despite the foregoing, the Second Collegiate Tribunal confirmed the criminal responsibility of Messrs. Cabrera and Montiel for the crime of carrying firearms intended for the exclusive

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demonstration and, at the same time, selling clothing. "On May 2, 1999, I was […] outside the house, talking to an old man who [...] was 82 years, [her] wife [...] was also chatting at that moment [...]. [He] did not see that people were armed and he only [saw] that the soldiers came [there] firing their weapons [...] he [did] not see either that they were soldiers, since usually soldiers arrive or used to arrive at a community and identify themselves; they did not identify themselves with words, but with shots, they run and suddenly, and [...] Salomé Sanchez Ortiz got shot […]. [He] wanted to be clear [that] they never had weapons, because […] they are [not] fighting against life; to carry a weapon would imply an intention to attack someone [...]." *Cf.* Statement rendered by Mr. Rodolfo Montiel Flores at the public hearing, *supra* note 177. Moreover, Mr. Cabrera Garcia indicated in his affidavit that "the soldiers came firing their weapons, then everyone run." *Cf.* Statement rendered by Mr. Teodoro Cabrera Garcia before a public notary, *supra* note 147, folio 1192.

[220] The expert witnesses attested to having seen "a semi-automatic pistol, .380 caliber, Pietro Bereta, manufactured by Browning Arms Company; a .22-caliber Remington rifle, Model 550-1; a .22 rifle, bold action, no serial number or brand; a .22 caliber Remington rifle, model 550-1; possessing or carrying these weapons is allowed, provided the provisions and limitations established by the Federal Firearms and Explosives Act are observed, a crime prescribed and punished in article 9, section I and II second paragraph[,] respectively, in relation to article 81 first paragraph of said Act. Moreover, the 45-caliber Colt semi-automatic pistol, serial number 85900G70; and the 7.62 mm M1A Springfield Armoy rifle, serial number 035757, are the ones intended for the exclusive use of the Army, Navy and Mexican Air Force, a crime prescribed and punished in articles 11. b) and 11.c), in relation to article 83 sections II and III, respectively, of [said] Federal Firearms and Explosives Act."." *Cf.* Expert report in relation to the identification of the firearms of May 6, 1999 (Preliminary Inquiry N° 33/CC/99) (record of annexes to the answer to the application, volume XXIII, folio 9791).

[221] *Cf.* Judgment of August 21, 2002 issued by the First Collegiate Tribunal, *supra* note 148, folios 14593 and 14596.

use of the Army, Navy and Air Force with respect to the firearms that they did recognize having carried in their statement from May 6, 1999.[222]

146. In relation to the sodium rhodizonate test that was positive on the victims' hands,[223] the First Unitary Tribunal indicated that this test was performed in accordance with legal requirements and that it had not been "invalidated."[224] Regarding the fact that "the [defendants] were lying in the river's waters," the trial court indicated that "only they stated this, but there is no data to verify this fact, since while the soldiers indicate that they were lying down […], in no way they are indicating that they had been in contact with the water at said river during that time."[225] Subsequently, the same court reiterated that only the victims mentioned that they had been in contact with the river's water while they were detained that day.[226]

147. On the other hand, in relation with the crime of possession and planting of narcotics, the First Unitary Tribunal verified several irregularities related to the existence and destruction of the marijuana plantation. Said court indicated that "no suitable evidence proving its material and juridical existence was provided, and instead the confession given the accused […] was invalidated,[227] together with the remaining evidence produced in the natural proceeding."[228] Finally, the tribunal

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[222] *Cf.* Judgment of August 21, 2002 issued by the First Collegiate Tribunal, *supra* note 148, folios 15321 and 15324.

[223] On May 4, 1999, an expert witness conducted a sodium rhodizonate tests on the samples taken from both hands of Messrs. Cabrera and Montiel. Said expert opinion established that: "[a]ccording to the results obtained from the samples analyzed of the detainees […], it is established that [Mr. Cabrera Garcia] HAD lead and barium residue on both of his hands of the kind left from discharging a firearm. It was established that [Mr. Montiel Flores] only had the residue before mentioned on his right hand, of the kind left from discharging a firearm; and the test is negative regarding his left hand."." *Cf.* Official letter N° 067/99 of May 4, 1999, by which the chemical expert witness Rey Yañez Sanchez rendered an expert opinion before the Agent of the Public Prosecutor's Office, Judicial Department of Cuautemoc, Arcelia, Guerrero (record of annexes to the answer to the application, volume XXIII, folio 9729).

[224] *Cf.* Judgment of October 26, 2000 issued by the First Unitary Tribunal, *supra* note 77, folio 12015.

[225] *Cf.* Judgment of October 26, 2000 issued by the First Unitary Tribunal, *supra* note 77, folio 12137.

[226] *Cf.* Judgment of July 16, 2001 issued by the First Unitary Tribunal, *supra* note 82, folio 13656.

[227] According to this statement before the Public Prosecutor's Office on May 6, 1999, Mr. Montiel Flores had claimed that "[he] plant[ed] marijuana because the Government did not help [them] with productive projects." That his marijuana plantation was "at most one fourth of a [h]ectare[,] that [he] plant[ed] out of a need to sell it" and that "the marijuana seeds they found were owned by another person, since [he] only plant[ed] as far as the seeds lasted, which were plant[ed] on January twenty-second, and which he took care of it on his own."." *Cf.* Statement of Mr. Montiel Flores of May 6, 1999, *supra* note 132, folios 9778 to 9779.

[228] The First Unitary Tribunal asserted that "none of the authorities charged with investigating the crimes, in conformity with article 21 of the Magna Carta, exercised diligence of inspection at the place where the marijuana plants were found;" there is an "evident and palpable contradiction" as the statements given by the accused indicate that RODOLFO MONTIEL FLORES "is the one who planted the marijuana", and "in the accusation, the military personnel asserted that the plantation was owned by 'TEODORO CABRERA GARCIA'," that is "the mentioned military personnel have introduced inconsistent and contradictory issues in their accusation," "as the alleged marijuana plantation was located 'three hours on foot' […] but this circumstance cannot be clarified with the evidence furnished in the court records." The "act of destruction [of the marijuana plantation] does not contain the date in which it was created […] nor does it include a description of the precise location" where this destruction took place and "it does not refer to the procedure nor the way in which" they measured the plantation and its density. Also, the photographs of the plantation "are not suitable to prove [its] destruction;" regarding the attestation given by the Agent of the Federal Public Prosecutor's Office of Coyuca de Catalan, Guerrero, as well as by the Secretary of Agreements of the Criminal Court of First Instance of the Judicial District of Mina, it was concluded that the fact of "having seen fifteen plants with the characteristics of marijuana […], only helps to show that this plant was seen, […] but in no way demonstrates the existence of the marijuana plantation in question;" regarding the inconsistencies in the assertions made by the military personnel, it indicated that one of them "expressed […] not

concluded that "it has not been proven in the court records, based on suitable evidence, that the actions ordered by the preliminary inquiry had been 'prefabricated' without the intervention of the accused; but instead that, in the case, what happened is that the measures taken as a result of the preliminary inquiry were inadequate." In light of the foregoing, the condemnatory judgment against Mr. Montiel for the crime of planting of marijuana was revoked.[229]

148. In addition to the alleged irregularities related to the possession and carrying of firearms, narcotics and sodium rhodizonate test, the representatives requested to consider the statements rendered by the victims on May 4 and 6, 1999, to be considered as inexistent, claiming that Messrs. Cabrera and García never left the military battalion in which they were allegedly detained during those days. In this respect, their argument implies that, apart from other possible irregularities with respect to the firearms and the sodium rhodizonate, the flagrancy had allegedly been proved on the basis of these statements that were allegedly fraudulent declarations and allegedly, obtained under torture. For this reason, the representatives criticized the Recommendation made by the NCHR, asserting that such recommendation "affirmed, without analyzing the version of the facts regarding the reasons for the detention [of Messrs. Cabrera and Montiel], narrated by the soldiers," "disregard[ing] all the evidence [to the contrary], without providing an assessment or explanation, to take up again the version of the agents mentioned as responsible [in the instant case]."

149. In addition to the alleged torture, the Tribunal notes that the specific irregularities mentioned by the representatives in relation to said statements are the following:

a) The alleged non-existence of an *ex officio* defense, that is, that the court-appointed counsels signed those declarations to warrant those irregular documents. This alleged irregularity shall be analyzed by the Tribunal in the chapter related to the right to defense (*infra* paras. 152 to 162);
b) One of the attesting witnesses of the statement given on May 4, 1999 before the Prosecutor's Office, who was recognized by Mr. Montiel as one of his alleged torturers and who, during the confrontation hearing conducted within the framework of the criminal proceedings, had with him a note which indicated the specific details of both the ministerial statement and the way in which to identify Messrs. Cabrera and Montiel.[230] Regarding this irregularity, the domestic courts stated that the foregoing did not deny the truthfulness of the witness because Mr.

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remembering the exact location of the lot," and that "none of the accused accompanied him;" the other one stated that "the accused remained together [and] that on the day of the plantation's destruction, [Messrs. Montiel and Cabrera] were detained at the community of Pizotla" and that none accompanied them. *Cf.* Judgment issued on August 21, 2002 by the First Unitary Tribunal, *supra* note 148, folios 14580 to 14585.

229 *Cf.* Judgment of August 21, 2002 issued by the First Unitary Tribunal, *supra* note 148, folios 15317 and 15324.

230 The defense counsel of Messrs. Cabrera and Montiel placed on record that "the declarant witness was reading a page from a notebook, in shorthand, which contained the answer of the day of the facts, from which he could answer the question […] that I just posed."." Due to this request of the defense, the Acting Secretary in Charge placed on record that "the witness […] present in here took out from his pants a piece of paper which reads: 7:30 a.m., May 4, 1999, at 7:30 p.m. in Arcelia […] Forbidden weapons; Crime: enervating drugs 6: Weapons diff. caliber Teodoro sign in one eye Rodolfo."." *Cf.* Proceeding before the Fifth District Court of January 21, 2000 by which two witnesses and a court-appointed counsel rendered their testimony, during the statements of May 4, 1999 (record of annexes to the answer to the application, volume XXIV, folios 10440 to 10441).

Montiel had indeed recognized him and the witness is one of the employees of the Public Prosecutor's Office of Arcelia;[231]

c) the alleged contradictions between two soldiers who participated in the arrest and who do not agree on their answers when they are asked whether the victims were handed over to the Office of the Public Prosecutor of Arcelia, and about the caliber of the weapons that were seized. In this regard, the domestic courts considered that even though the soldiers did not agree on whether the victims were transferred to Arcelia, in the case file there are proceedings conducted on that day by the Public Prosecutor's Office,[232] and

d) the alleged formal language used by Messrs. Cabrera and Montiel, even though, at the time of the facts, they could not read or write, reason for which those declarations could not be attributed to them.[233] The domestic courts made no specific regarding this argument.

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[231] In the judgment of October 26, 2000, it was indicated that "it is unwise on the part of the accused given that they point out that such event occurred at the place of their arrest and at the military facilities, since the witness is an employee (…) of the Public Prosecutor's Office (…) of Arcelia, Guerrero, as well as it was convincing to state that he never left said office where he works as quartermaster general." In view of the foregoing, the Court notes that this official was, in turn, the attesting witness during the proceedings of the body removal of Mr. Salome Sanchez conducted in the municipality of Pizotla. *Cf.* Removal minutes, visual inspection and death certificate of May 4, 1999, *supra* note 65, folio 4208. In the judgment of August 21, 2002, the First Unitary Tribunal declared, in this respect, that: "and the intention of the accused is even more evident when they put forward defensive arguments and state that [said attesting witness] was one of the persons who physically attacked them at the place of their arrest; hence, in attempting to recognize him as his aggressor, it is not considered relevant that, in said proceeding, a piece of paper with information regarding the identification of the accused was found on him, even though he only served as an attesting witness of the deposition before the local prosecutor of Arcelia, Guerrero, and he indicated that he was an assistant quartermaster in said office; as such, if those who arrested them were only soldiers, it is not understandable that they attempt to note the presence of a civilian that they never mentioned in their early statements, all of which minimizes the evidentiary value of their subsequent statements and proceedings in which they sustain the same argument."." *Cf.* Judgment of October 26, 2000 issued by the First Unitary Tribunal, *supra* note 77, folios 15265 and 15266.

[232] The Unitary Court, in the judgment of October 26, 2000, indicated that: "it is irrelevant [that the first soldier] referred, in principle, to the fact that he had no idea on what date and at what time the detained were taken to Arcelia and, subsequently, in the same proceeding, that they were never taken to that place […] insofar as [the second soldier] indicated that they were brought before the Public Prosecutor's Office of Arcelia […], the foregoing because […] the case file contains precisely the measures adopted by such investigative official, […] from which it spring that there is no doubt about whether or not they were brought before the aforementioned authority."." *Cf.* Judgment of October 26, 2000 issued by the First Unitary Tribunal, *supra* note 77, folio 12083.

[233] In his statement at the public hearing, Mr. Montiel indicated that "he cannot read and write" and that, due to such fact, he had to "ma[de] up a signature" when he sign[ed] the statements. *Cf.* Statement rendered by Mr. Rodolfo Montiel Flores at the public hearing, *supra* note 177. Previously, in the domestic criminal proceeding, at a confrontation hearing with the defense counsel, Mr. Montiel indicated that "the soldiers never read the briefs, that he can read a little but that Teodoro cannot." *Cf.* Confrontation hearing between Mr. Rodolfo Montiel Flores and the court-appointed counsel of February 28, 2000 before the Fifth District Court of Iguala, quoted in the Judgment issued on October 26, 2000 by the First Unitary Tribunal, *supra* note 77, folio 11616. In his statement before a public notary, Mr. Cabrera indicated that "he cannot read nor write" *Cf.* Statement rendered by Mr. Teodoro Cabrera Garcia before a public notary, *supra* note 147, folio 1191. The foregoing was also certified by expert witness Deutsch, who indicated that Mr. Cabrera "cannot read nor write."." *Cf.* Expert opinion rendered by expert witness Ana Deustch before a public notary, *supra* note 174, folio 1311. At the domestic level, the defense counsel of Messrs. Cabrera and Montiel indicated that "the first three statements attributed to the accused do not have value either, given that they were evidently previously made up; they did not render such statements, since the basic structure of how they were prepared is simply the same, they accept what the soldiers said, that they were carrying firearms, they self-incriminate themselves; if they are not charged with some act, they are immediately incriminated for the co-accused and untypical expressions of uneducated peasants are used."." *Cf.* Motion of Appeal filed on August 30, 2000 before the Fifth District Judge, mentioned in the Judgment issued on October 26, 2000 by the First Unitary Tribunal, *supra* note 77, folios 11528-11815. Moreover, a judicial authority indicated that "Rodolfo Montiel only attended first grade of primary school and he can read and write very little."." *Cf.* Judgment issued on October 26, 2000 by the First Unitary Tribunal, *supra* note 77, folio 12706. Furthermore, a medical certificate issued in May 2000 in relation to Messrs. Cabrera and Montiel indicated that they

150. In the analysis of the right to personal liberty, the Court previously noted that it is not pertinent to make any type of pronouncement on the causes that originated the detention of the alleged victims (*supra* para. 102). Next, where applicable, it will be analyzed the specific impact that these alleged irregularities might have had on some guarantees.

151. In order to analyze the alleged violations of articles 8 and 25 of the American Convention and the alleged non-compliance with the obligations established in other Inter-American treaties related to it, the Court shall analyze, in relation to the criminal proceeding conducted against Messrs. Cabrera and Montiel, 1) the right to defense; 2) the obligation not to consider evidence obtained under duress and 3) the principle of presumption of innocence. In relation to the process of investigation into the alleged torture that was conducted by the military criminal justice, the Tribunal shall study: 1) the *ex officio* investigation; 2) the competence of the military criminal justice; 3) the effective judicial remedy of the military criminal justice, and 4) adaptation of the Mexican domestic law regarding the intervention of the military criminal justice.

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were "illiterate."." *Cf.* Certificate of medical and psychophysical condition issued on May 19, 2000, supra note 156, folio 2074.

A. Criminal proceedings conducted against Messrs. Cabrera and Montiel

1. Right to defense

152. The representatives alleged that the court-appointed defense counsels i) "d[id] not present evidence in favor of the [detainees] or [to] contradict the evidence […] presented against them; ii) did not inform them about the right not to make a statement; iii) did not object to the lack of diligence of the military officers; iv) did not challenge the interrogations conducted […] after the detention without the presence of a lawyer; v) did not challenge the expert opinions rendered by non-specialized persons [regarding the matter]; vi) did not require the necessary measures in order to certify the injuries [against the alleged victims]; vi) *(sic)* did not have a previous interview with them and vii) did not denounce the alleged torture committed against Messrs. Cabrera and Montiel. Likewise, they indicated that the court order declaring the lawfulness of the victims' arrest was not objected, despite the fact that the term of 48 hours to bring them before the judicial authority had expired.

153. The Commission did not present arguments about this topic. The State mentioned that Messrs. Cabrera and Montiel "had the corresponding public legal counseling and assistance." It mentioned that the victims always maintained contact with the lawyers in order to prepare their defense.

154. The Court has previously held that the right to defense must be necessarily exercised as from the moment a person is accused of being the perpetrator or participant of an illegal act and ends when the jurisdiction thereby ceases,[234] including, where applicable, the enforcement phase. To prevent a person from exercising his right to defense from the moment the investigation begins and the authority in charge orders or executes actions entailing an infringement of rights is to magnify the investigative powers of the State to the detriment of the fundamental rights of the person under investigation. The right to defense binds the State to treat the person, at all times, as a true party to the proceeding, in the broadest sense of this concept and not simply as an object thereof.[235]

155. Specially, the Court emphasizes that the defense provided by the State must be effective, for which the State must adopt all the adequate measures.[236] If the right to defense arises as of the moment in which an investigation into an individual is ordered, the accused must have access to a legal representation from that moment onwards, especially during the procedure in which his statement is rendered. To prevent the accused from being advised by a counsel means to strictly limit the right to defense, which leads to a procedural unbalance and leaves the individual unprotected before the punishing authority.[237] Notwithstanding, the appointment of a defense counsel by the court with the sole purpose of complying with a procedural formality would mean not to have legal representation, for which it is imperative that said defense counsel acts diligently in order to protect the procedural guarantees of the accused and thereby prevent his rights from being violated.

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234 *Case of Barreto Leiva v. Venezuela*, *supra* note 100, para. 29. See *mutatis mutandis Case of Suárez Rosero v. Ecuador. Merits.* Judgment of November 12, 1997, Series Nº. 35, para. *71; Case of Heliodoro Portugal v Panamá. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 12, 2008. Series C N. 186, para. 148; and *Case of Bayarri v. Argentina, supra* note 123, para. 105.

235 *Case of Barreto Leiva v. Venezuela*, *supra* note 100, para. 29.

236 *Cf.* ECHR, Case *of Artico v. Italy*, Judgment of 13 May 1980, App. N°. 6694/74, paras. 31-37.

237 *Case of Barreto Leiva v. Venezuela*, *supra* note 100, para. 62.

156. Moreover, this Tribunal considers that one of the guarantees inherent in the right to defense is to have adequate time and means for the preparation of his defense, which binds the State to allow access of the accused to the record of the case and to the evidence gathered against him.[238]

157. In the instant case, on May 4, 1999, Messrs. Cabrera and Montiel rendered their statements in the Public Prosecutor's Office in the presence of their court-appointed defense counsel and attesting witnesses.[239] Afterwards, on May 6, 1999, Messrs. Montiel and Cabrera rendered a second statement before the Public Prosecutor's Office in the presence of a federal court-appointed defense counsel.[240] On May 12, 1999 the first instance court issued a formal order of detention against Messrs. Cabrera and Montiel,[241] which was appealed on the next day by the victims. In that appeal, a new defense counsel was appointed by the court.[242] Afterwards, on July 13, 1999 a private defense counsel accompanied them to render an expansion of the statement.[243] On August 20, 1999, Messrs. Cabrera and Montiel appointed attorneys Digna Ochoa y Plácido, Maria del Pilar Noriega and Jose Cruz Lavanderos Yañez as private defense counsel.[244] As from that moment, the Miguel Agustín Pro Juarez Center of Human Rights (Centro de Derechos Humanos Miguel Agustín Pro Juárez) assumed the defense of Messrs. Cabrera and Montiel and filed several arguments and remedies.

158. The representatives reject the actions taken by the court-appointed defense counsels during the proceeding, taking into account that by failing to challenge certain supporting events, such events would have played an important role to condemn them afterwards. At the domestic level, the defense counsel of the victims argued that the statements of May 4 and 6, 1999 were not rendered before the Public Prosecutor's Office but that such statements were signed at the military battalion and that the alleged victims were always in the custody of military officers during those days.[245] The representatives alleged then "that, at some moment,

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238 *Cf. Case of Palamara Iribarne v. Chile*. *Merits, Reparations and Costs***.** Judgment of November 22, 2005. Series C N° 135, para. *170; Case of Barreto Leiva v. Venezuela*, *supra* note 100, para. 54.

239 Statement of Messrs. Cabrera and Montiel of May 4, 1999, *supra* note 142, folios 8198 to 8199.

240 Statements of Messrs. Cabrera and Montiel of May 6, 1999, *supra* note 132, folios 9777 to 9782 and 9783 to 9786.

241 Court order of constitutional term issued on May 12, 1999 by the First Instance Court in Criminal Matters of the Judicial District of Mina (record of annexes to the answer to the application, volume XXIII; folios 9844 to 9874).

242 Record of the appeal "against the resolution for not agreeing with it."." *Cf.* Court order of constitutional term issued on May 12, 1999, *supra* note 241, folio 9874.

243 Statement of the private defense counsel before the Fifth District Court of July 13, 1999 (record of annexes to the answer to the application, volume XXIII, folio 10035).

244 Brief signed by Messrs. Cabrera and Montiel of August 20, 1999 by which they requested the Fifth District Court "[t]o consider as […] unique private attorneys [Digna Ochoa and Plácido, Maria del Pilar Noriega and Jose Cruz Lavanderos Yañez]" (record of annexes to the answer to the application, volume XXIV, folio 10108 to 10109).

245 In this context, Mr. Montiel Flores indicated, as to the court-appointed defense counsel appointed who provided them with legal counseling on May 6, 1999, "that he saw her in the Examining Trial Court; that if she helped him, she did it as an accomplice to the tortures […] since where he was held, there were only soldiers, unless she was dressed as a military officer; that the only statements he admits are the ones rendered as expansion of the statement before the District Trial Court which he rendered voluntarily, without threats or torture."." Moreover, Mr. Cabrera García indicated that he met the defense counsel "at the Fifth District Trial Court and that he was tortured in the […] Battalion [...], where he was dazed; they signed the documents without reading them (*sic*), since if she had been there, she would have requested not to beat them; however, she did not do that since she was never there and he never saw her."." *Cf.* Judgment of August 21, 2002 issued by the First Unitary Tribunal, *supra* note 148, folio 15198.

certain officials of such locality appeared at the Battalion to draw up a record of weapons and, possibly, to issue some documents that were then presented in the criminal proceeding" and which the judges considered valid. It was indicated that all of the above was made in collusion with the defense counsels appointed by the court. The domestic courts valued these arguments and, therefore, the defense counsels and the attesting witnesses, who were part of these statements at prosecution, were called to render a testimony.[246] In addition, the courts conducted confrontation procedures with the victims[247] by which it was concluded that the victims had received adequate counseling.

159. In the statements rendered on May 4, 1999, the victims admitted the facts[248] that the military officers presented in the accusation report against them.[249] Notwithstanding, the domestic judicial instances considered that, in that statement, Messrs. Cabrera and Montiel "were duly informed of their individual guarantees, which compliance therewith corresponded to their court-appointed defense counsel to ensure like the defense counsel admitted [himself]."[250] Regarding the statements rendered on May 6, the court-appointed defense counsel specified that she talked to Mr. Montiel but she could not remember for how long, that she made him some questions related to the manner in which he was arrested and which treatment was afforded by the military officers who arrested him.[251] The domestic judicial instances considered that these statements of May 6, 1999, were according to the law and "with the assistance" of a court- appointed defense counsel "who was appointed to act as such by the accused themselves" and that "it spring from the proceedings, the interventions of the counsel in favor of the accused."[252] In particular, the judgment issued on August 21, 2002 by the First Unitary Tribunal considered that:

> "Mr. [Montiel] was assisted by in all his appearances before the Public Prosecutor's Office and the District Court, with whom he stayed in contact and

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246 *Cf.* Proceeding before the Fifth District Court of January 21, 2000 by which the testimonies of two attesting witnesses and one court-appointed defense counsel were rendered, *supra* note 230, folios 10437 to 10462. Moreover, proceeding before the Fifth District Court of January 27, 2000, by which the testimonies of two attesting witnesses and one court-appointed defense counsel were rendered (record of annexes to the answer to the application, volume XXIV, folios 10478 and 10497).

247 *Cf.* Confrontation procedures before the Fifth District Court of February 28, 2000 between Messrs. Cabrera and Montiel and a court-appointed defense counsel and an attesting witness (record of annexes to the answer to the application, volume XXV, folios 10599 to 10615). Likewise, confrontation procedures before the Fifth District Court of February 29 and March 15, 2000, between Messrs. Cabrera and Montiel and two attesting witnesses and a court-appointed defense counsel (record of annexes to the answer to the application, volume XXV, folios 10619 to 10624 and 10672 to 10687).

248 Statement of Messrs. Cabrera and Montiel of May 4, 1999, *supra* note 142, folios 8198 to 8199.

249 *Cf.* Complaint filed by the Second Infantry Captain et al, *supra* note 66, folios 4212 to 4214.

250 The First Unitary Tribunal pointed out that in the confrontation procedures conducted between the victims and the court-appointed defense counsel in the statement of May 4, "the latter repeated that they rendered their statement, without any pressure, before the Agent of the Public Prosecutor's Office of Arcelia, Guerrero and that he assisted them as their defense counsel in such procedure, verifying that the procedure was conducted according to law and in full respect of individual guarantees." *Cf.* Judgment issued on August 21, 2002 by the First Unitary Tribunal, *supra* note 148, folio 15187. According to the court-appointed defense counsel who assisted the victims in their statements of May 4, 1999, before the proceeding, he suggested Messrs. Cabrera and Montiel "to render the statement without felling any kind of pressure" and that "they should not feel pressured by the presence of the judicial officials."." *Cf.* Proceeding before the Fifth District Court of January 21, 2000 by which two attesting witnesses and one court-appointed defense counsel rendered their testimonies, *supra* note 230, folio 10455. This version was ratified in one of the confrontation hearings.

251 *Cf.* Confrontation hearings before the Fifth District Court of February 28, 2000, *supra* note 247, folios 10599 to 10615.

252 *Cf.* Judgment of August 21, 2002 issued by the First Unitary Tribunal, *supra* note 148, folio 15191.

> who informed him about the reasons for the charges against him; he was granted adequate time and means to prepare his defense; he received counseling by his defense counsels or persons of trust with whom he communicated freely; he was informed about the right to defend himself or if he did not have the necessary resources, about the right to have a Federal Public defender appointed for him; they had the right to interrogate witnesses present in the Tribunal and he was given help to obtain the appearance of all those persons that could shed light on the facts; in such an extent that this benefit was adopted also by the defender who interrogated the witnesses who declared against him, the defenders who assisted him when rendering a statement at prosecution and in the preparation thereof, and the attesting witnesses who were present in the first statements; he was also informed about the right not to incriminate against oneself or to plead guilty; likewise, he was also duly informed of his right to appeal the judgments before a Superior Court."[253]

160. As from that, the Unitary Tribunal considered that Messrs. Cabrera and Montiel had the necessary defense, given that "the fact that they admitted that they do not recognize their court-appointed defense counsels […], does not minimize the evidentiary value of the proceedings in which they intervened, given that they were straightforward in mentioning that they provided them with legal counseling and that they ensure compliance with their individual guarantees."[254] The domestic courts who heard the case[255] responded to the accusations of irregularities in the defense provided by court-appointed defense counsels in the same way the Unitary Tribunal did it.

161. On the other hand, the domestic judicial case file reveals that, in the statement rendered at the Public Prosecutor's Office by Messrs. Cabrera and Montiel on May 7, 1999, a court-appointed defense counsel as well as a private attorney intervened. On May 12, 1999 a formal order for detention was issued against the victims and on the next day, they appealed such court order and appointed a defense counsel to represent them at this procedural stage (*supra* para. 69). On June 29, 1999, the First Unitary Tribunal solved the motion of appeal and partially confirmed the detention order against Mr. Montiel Flores,[256] since it revoked the charges brought against him related to possession of narcotics due to lack of evidence. As to Mr. Cabrera, the Tribunal upheld the formal order for detention. Based on the foregoing, this Tribunal notes that Messrs. Cabrera and Montiel did have a defense counsel who appealed such decision and that said appeal produced some positive effects on the interests of the victims.

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[253] Likewise, the court indicated that Messrs. Cabrera and Montiel "had the corresponding legal counseling when they rendered their preliminary statements [through] Mr. Juan Carlos Palacios Sebastian Federal Public Defender and Liberio Melquiades Jardón[,] private attorney, who were appointed by the [them]."." In addition it was established that even though, as has been mentioned by the appellants, said defenders "did not inform them about the right to render or not a statement, this event does not discredit the proceeding", nor the fact that "they stayed in contact with the accused during a short term, [that] they do not agree with the objects placed at their sight, as has been said that it did not occur and that they indicated they do not remember what they declared about." *Cf.* Judgment of August 21, 2002 issued by the First Unitary Tribunal, *supra* note 148, folios 15301 to 15302 and 15238 to 15239.

[254] *Cf.* Judgment of August 21, 2002 issued by the First Unitary Tribunal, *supra* note 148, folios 15227 to 15228.

[255] *Cf.* Judgment of August 28, 2000 issued by the Fifth District Court, *supra* note 75, folios 11137 to 11293; Judgment of October 26, 2000 issued by the First Unitary Tribunal, *supra* note 77, folio 11322, volume XXVII, folio 12205 and Judgment of July 16, 2001, issued by the First Unitary Tribunal, *supra* note 82, volume XXVIII, folio 13022 to volume XXIX, 13735. The Court notes that in the statements of May 6, 1999 the court-appointed defense counsel made questions for the defense of Messrs. Cabrera and Montiel and that, based on the interrogation, they mentioned for the first time the mistreatment against them. *Cf.* Statement of Messrs. Cabrera and Montiel of May 6, 1999, supra note 132, volume XXIII, folios 9777 to 9782 and 9783 to 9786.

[256] *Cf.* Judgment issued on June 29, 1999 by the First Unitary Tribunal of the Twenty-First Circuit (record of annexes to the answer to the application, volume XXIII, folios 9961 to 10020).

162. Taking into account the foregoing elements, the Court considers that the evidence is not sufficient to conclude that the actions taken by the court-appointed defense counsels in the proceedings of May 4, 6 and 7, 1999 had constituted *per se* a violation of the right to defense.

2. Exclusion of the evidence obtained under duress

163. The Commission and the representatives indicated that "when" the victims "made their self-incriminating statements in the presence of the Federal Public Prosecutor's Office and the Judge of the Mina Judicial District[,] they were still in the grips of fear, anguish and inferiority, since it had been only a few days since their detention and physical mistreatment." The Commission considered that "because the State did not conduct a serious, exhaustive and impartial investigation into the allegations of torture," any possible flaws in the confessions given […] "could not be corrected; the State, therefore, could not use those statements as evidence." In addition, the Commission and the representatives pointed out that the practice of torture has been encouraged by the legal validity granted to the first statement made by the accused, which is rendered before the Public Prosecutor's Office and not before a court, to which the Mexican courts conferred value. Moreover, the representatives pointed out that "the confessions of the victims should have been excluded from the criminal proceeding" and that the court's ratification of the statements should not have been taken into account, given that Messrs. Cabrera and Montiel "were under the effects of torture and threats and that they did not understand the meaning or scope of said ratification."

164. The State indicated that the condemnatory judgment "was not exclusively based on the confessions made by the convicted." It indicated that the trial judge "heard, valued and corroborated the totality of the evidence and records of the case file" and that if it were to be proven that the judgment "against the […] victims was based on the confession obtained under the circumstances described, the consequence would be for the competent authority to minimize the probative value and to solve according to the rest of the body of evidence and pursuant to law and to determine, then, if such violation prevented the accused from having a defense and went beyond the result of the ruling."

165. In this respect, the Court notes that the rule of the exclusion from judicial proceeding of evidence obtained under torture or cruel or inhumane treatment (hereinafter "exclusionary rule") has been acknowledged by several international treaties[257] and international bodies for the protection of human rights, insofar as they have considered that the rule of exclusion is inherent to the prohibition of such acts.[258] In this respect, the Court considers that this rule is absolute and non-derogable.[259]

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[257] Article 15 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment provides that "[E]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." Moreover, article 10 of the Inter-American Convention to Prevent and Punish Torture indicates that "[N]o statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means."

[258] In this respect, the Committee against Torture has pointed out that "he obligations in articles 2 (whereby "no exceptional circumstances whatsoever may be invoked as a justification of torture") 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) must be observed in all circumstance."." *Cf.* United Nations. Committee against Torture. General Comment N° 2, 'Implementation of article 2 by States Parties' of January 24, 2008 (CAT/C/GC/2) para. 6. Furthermore,

166. To this end, the Court has held that the nullification of procedural acts as a result of torture or cruel treatment constitutes an effective measure to end the consequences of the said violation of judicial guarantees.[260] In addition, the Tribunal considers necessary to emphasize that the rule of exclusion does not only apply to cases in which acts of torture or cruel treatment have been committed. In this regard, Article 8(3) of the Convention is clear in indicating that "[t]he defendant's confession is only valid if made without duress of any kind," that is, it is not limited to the factual situation of torture or cruel treatment, but extends to any form of duress. In fact, upon verifying any type of duress capable of breaking the spontaneous expression of will of a person, this necessarily implies the obligation to exclude the respective evidence from the judicial proceeding. This nullification is a necessary means to discourage the use of any type of duress.

167. On the other hand, this Tribunal considers that the statements obtained under duress are not usually truthful, given that the person tries to assert whatever it is necessary to make the cruel treatment or torture stop. Based on the foregoing, the Tribunal considers that accepting or giving probative value to statements or confessions achieved by a form of duress, which affect the person or a third party, constitutes, in turn, a violation of a fair trial.[261] Likewise, the absolute character of the exclusionary rule is reflected on the prohibition of granting probative value not only to the evidence obtained directly under duress, but also to evidence deriving from said act. In consequence, the Court considers that excluding the evidence gathered or derived from information obtained under duress, adequately guarantees the exclusionary rule.

168. Some of these elements of international law are reflected on the Mexican laws. Article 20 of the Constitution, in force at the time of the event, provided that "[a]ny state of solitary confinement, intimidation or torture is prohibited and shall be punished by criminal law." Confession made before any authority different from the Public Prosecutor's Office or the court or before them without the assistance of a counsel, shall have no probative value."[262]

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the Committee on Human Rights has indicated that: "The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. (…) no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency, except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred."." United Nations. Committee on Human Rights. General comment No. 32: Right to a fair trial and to equality before courts and tribunals (HRI/GEN/1/Rev.9 (vol.I)), para.6.

259 Moreover, the Committee agains Torture has indicated that the "broad scope of the prohibition in article 15, proscribing the invocation of any statement which is established to have been made as a result of torture as evidence "in any proceedings", is a function of the absolute nature of the prohibition of torture and implies, consequently, an obligation for each State party to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction, including extradition proceedings, have been made as a result of torture."." United Nations. Committee against Torture. G.*K. v. Switzerland*, May 7, 2003 (CAT/C/30/D/219/2002), para. 6.10.

260 Cf. *Case of Bayarri v. Argentina, supra* note 123, para. 108.

261 *Cf.* ECHR, Case *of John Murray v. UK*, Judgment of 25 January 1996, App. *N°. 41/1994/488/570*, paras. 45-46 and Case of *Jalloh v. Germany*, Judgment of 11 July 2006, App. *N°. 54810/00*, paras. 121-123. *Cf.* Similarly, the European Court has indicated that "the use of statements obtained as a result of acts of torture or mistreatments as evidence to assert the facts in a criminal proceeding makes said proceeding completely unfair and this conclusion is independent from the proving value assigned to said statements, or if its use was conclusive for the sentence."." ECHR, *Case* of *Gafgen v. Germany,* Judgment of 1 June 2010, App. N°. 22978/05, para. 165 and *Case Harutyunyan v Armenia,* Judgment of 28 June 2007, App. N°. 36549/03, para. 63.

262 *Cf.* Article 16 of the Political Constitution of the United Mexican States, *supra* note 124.

169. Without prejudice to the foregoing, this Tribunal notes that the Committee against Torture, on its visit to Mexico in 2001, indicated that "[d]espite the binding rules in the Constitution and laws [of Mexico] on the inadmissibility as evidence of statements obtained under duress, in practice it is extraordinarily difficult for an accused to have a confession that has been forced out of him excluded from the body of evidence. In practice, when an accused retracts the confession on which the Public Prosecutor's Office has based the decision to commit him for trial, complaining that he was forced to make it under torture or duress, the courts have no independent proceeding of ascertaining whether the confession was made voluntarily."[263]

170. Taking into account the aforementioned background, the Court proceeds to analyze whether, in the instant case, a coerced confession was used. It is worth mentioning that Messrs. Cabrera and Montiel, who could not read or write (*supra* para. 149) recorded their fingerprints on the declarations, in which they confessed to criminal activities at three procedural opportunities:

- In the statement rendered before the Public Prosecutor's Office on May 4, 1999, Mr. Montiel Flores admitted: i) the possession of a weapon for the exclusive use of the Army, specifically a .45 caliber semi-automatic pistol; ii) the possession, without a permit, of a .22 caliber rifle and iii) the possession and cultivation of marijuana. Moreover, Mr. Cabrera admitted: i) the possession of a weapon, for the exclusive use of the army, specifically a 7.62 mm MI rifle, and magazine, ii) having fired a weapon against the Army and iii) being a member of an illegal armed group (EPR).[264]
- In the statement rendered before the Public Prosecutor's Office on May 6, 1999, Mr. Montiel Flores modified his initial confession; therefore, he only ratified the part of the possession of the firearm for the exclusive use of the Army (a .45 caliber pistol) and the cultivation of marijuana. In addition, Mr. Cabrera García modified the content of his initial statement since he only admitted the possession of the firearm (a 7.62 caliber MI rifle).[265]
- In the preliminary statement of May 7, 1999, before the First Instance Court, Mr. Montiel Flores only admitted the possession of the firearm, whereas Mr. Cabrera ratified having been in the possession of the rifle and the magazine.[266]

171. After these statements, the victims have never admitted again having committed an illicit act. The defense in the domestic proceeding alleged that:

> "[…] it springs that my client[s] were forced to sign papers, without knowing the content thereof, which resulted to be their self-incriminating statements rendered at the Public Prosecutor's Office, after they had been confin[ed], tortured, both physically and mentally, and threatened to cause damage to their families if they fail to render such a statement; I request this court not to give probative value when resolving the instant case."[267]

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[263] United Nations. Committee against Torture. Report on Mexico of May 25, 2003, *supra* note 203, para. 202.

[264] Statements of Messrs. Cabrera and Montiel of May 4, 1999, *supra* note 142, folios 8198 and 8199.

[265] Statements of Messrs. Cabrera and Montiel of May 6, 1999, *supra* note 132, folios 9778 and 9784.

[266] Preliminary statements of Messrs. Cabrera and Montiel of May 7, 1999, *supra* note 144, folios 9835 to 9838 and 9838 to 9842.

[267] *Cf.* Arguments put forward on July 25, 2000 before the Fifth District Court of Iguala, Guerrero, by the private defense counsel of Messrs. Cabrera and Montiel (record of annexes to the answer to the application, volume XXVI, folio 11111).

172. The Court notes that the courts, which heard the instant case, indicated that: i) the mistreatment or torture committed against Messrs. Cabrera and Montiel in order to obtain their confession was not confirmed;[268] ii) even though it was not proven that the statements before the Public Prosecutor's Office were invalid as a result of cruel treatment, torture or solitary confinement, Messrs. Cabrera and Montiel confessed, before a competent court on May 7, 1999, to several crimes of which they were convicted; therefore, their confessions would be valid,[269] and iii) based on the foregoing, probative value was given to the statements made on that day.[270] However, the Court considers that upon comparing between the crimes admitted by Messrs. Cabrera and Montiel in three statements and the final judgment by which they were convicted, it is possible to conclude that they were sentenced for the same crimes they confessed in the statement of May 7, 1999. Indeed, Mr. Montiel Flores was convicted of possession of firearm, while Mr. Cabrera was convicted of possession of a rifle and magazine.

173. In order to analyze the relationship between the three statements, the Court notes that the European Court on Human Rights, in the case of *Harutyunyan v. Armenia,* indicated that where there is reasonable evidence that a person has been tortured or subjected to cruel and inhuman treatment, the fact that this person ratifies his confession before a different authority other than the one responsible for the first confession, should not automatically lead to the conclusion that such confession is valid. The foregoing because a subsequent confession may be the consequence of the mistreatment suffered by the person and specifically, because of the fear that remains after this kind of experience.[271]

174. The Court shares the criterion previously described and reiterates that the situations of defenselessness and vulnerability that the individual feels when detained and subjected to cruel, inhuman and degrading treatment in order to wear down that individual's psychological resistance and force him to incriminate himself,[272] that stir up feelings of fear, anguish and inferiority capable of humiliating and debasing an individual and possibly breaking his physical and moral resistance.

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[268] The Fifth District Court declared that the criminal acts "were mainly corroborat[ed] by the statements made by the accused."." To this end, it pointed out that "said statements […] were made in the presence of the Public Prosecutor's Office and the Trial Court […] by fully cognizant adults, not subject to neither coercion or violence." *Cf.* Judgment handed down on August 28, 2000 by the Fifth District Court, *supra* note 75, folio 11197 and 11213.

[269] The Second Collegiate Tribunal pointed out that "contrary to what the appellants allege, the appealed judgment was not only based on the confessions they made in the record of the case, but the Tribunal admitted said confessions into the other evidentiary items of the proceeding."." Furthermore, it indicated that "[e]ven in the event that their initial statements had not been made spontaneously and freely, the ratification made before the court purged any possible procedural irregularities previously committed by the accused; that is why the confessions in question take on legal value and, therefore, the appealed judgment that take them into account providing additional proof to the other evidence on record, does not violate the guarantees."." *Cf.* Judgment of August 14, 2002 issued by the Second Collegiate Tribunal, *supra* note 84, folios 3139 and 3202.

[270] The Second Collegiate Tribunal considered that "it is worth noting that the judgment being appealed was not only based on the confession made by the accused [before] the prosecutor's office of the common and federal jurisdiction, respectively, or before the court that initially heard the case against them; or that the evidence furnished in the original case demonstrated that, prior to the issuance, they had been in solitary confinement and let alone, it does not spring that their statements had been obtained under threats or any form of coercion" *Cf.* Judgment of August 14, 2002 issued by the Second Collegiate Tribunal, *supra* note 84, folios 3137 to 3138.

[271] *Cf.* ECHR, *Case of Harutyunyan v. Armenia, supra* nota 261, para. 65.

[272] *Cf. Case of Cantoral Benavides v. Peru. Merits.* Judgment of August 18, 2000. Series C N° 69, para. *104; Case of Maritza Urrutia v. Guatemala. supra* note 218, para. 93, and *Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 7, 2004. Series C No. 114, para. 146.

175. In this respect, the Court already verified that Messrs. Cabrera and Montiel were subjected to cruel and inhuman treatments on the days they were detained in Pizotla, without being timely brought before a competent judicial authority (*supra* para. 134). From the foregoing, it is possible to conclude that Messrs. Cabrera and Montiel were subjected to cruel treatments in order to break down their psychological resistance and force them to incriminate themselves or confess to certain illegal activities. The cruel treatment showed consequences in the first statements rendered before the Public Prosecutor's Office, as well as in the statement of May 7, 1999. As a result, the trial court decided to value this fact and not to rule out the allegations presented by the victims.

176. On the contrary, one of the reasonings offered by the trial courts in order not to exclude the evidence from the proceedings was based on that "it is not sufficient that someone alleges that he has been physically or mentally abused for the person to be liberated, since in principle he should prove that such violence existed and that it served as means to obtain the confession, which, at most, would invalidate the confession […]."[273] Likewise, expert witness Coronado indicated that "if, from a confession allegedly obtained under torture, it is not proven in the proceeding that there was a person who committed such torture, the confession will be valid."[274] As it was previously mentioned, this Tribunal repeats that the burden of proof for this type of facts lays on the State (*supra* para. 136) for which it is not valid the argument according to which the petitioner did not fully prove his complaint in order to rule it out.

177. Based on the foregoing, the Court concludes that the domestic courts, which heard the case in all the stages of the proceeding, should have totally excluded the statements rendered at the Public Prosecutor's Office and the confessions made on May 7, 1999, given that the existence of cruel and inhuman treatment disqualified the probative use of such evidence, according to the international standards previously mentioned. Therefore, the Court declares the violation of article 8(3), in conjunction with article 1(1) of the American Convention, to the detriment of Messrs. Cabrera and Montiel.

3. Presumption of innocence principle

178. The Commission did not allege a violation of this guarantee. The representatives argued that "[t]he form in which the evidence was gathered and valued […] shows that the criminal proceeding was intended, from the very beginning, to prove the guilt of the [victims]." They mentioned that "the body of evidence was divided and that the courts gave value to those items of evidence that, though produced irregularly, were useful to sustain [their] participation […] in an illicit act, excluding those items of evidence that necessarily lead to the conclusion that the evidence has been fabricated and the confessions obtained under torture." In addition, the courts shifted the burden of proof to the victims and assumed that it was not a duty of the State "to verify that [such] were not coerced confessions."

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[273] Likewise, the Fifth District Court expressed that "[e]ven though the accused indicated that when they were arrested, they were tortured […] it is not less true, irrespective of what has been mentioned, that such alleged violence was not proven in the criminal proceeding […] to confirm the versions given in the expansion of the preliminary statement, in defense of the accused, [several] items of evidence were furnished […], however, this evidence is not sufficient to modify the judgment."." *Cf.* Judgment handed down on August 28, 2000 by the Fifth District Court, *supra* note 75, folio 11220 to 11223.

[274] *Cf.* Expert opinion rendered by expert witness Fernando Coronado Franco at the public hearing in this case.

179. Moreover, the State indicated that "even when the arrest of [Messrs. Cabrera and Montiel] took place during the commission of a crime *in flagrante* and the detainees themselves confessed to have committed certain illicit acts," the courts channeled their efforts "to prove the existence of a criminal codification and consequently, their criminal responsibility." Likewise, the State "emphasize[d] that at no time, the defense was hindered […] and each one of the arguments and evidence furnished by the defense was subjected to legal assessment." In addition, "the burden of proof laid on the [P]ublic [P]rosecutor's Office, office that had to prove the elements of the crime based on different items of evidence which, once furnished and correlated with each other, proved the criminal responsibility of Messrs. Montiel and Cabrera.

180. In the instant case, the lower court judgment established that "[t]he court weighted what was beneficial and prejudicial to them, the fact that their health was jeopardized, the tranquility, peace and public security, […] and it [was] determin[ed] that the level of guilt" of Messrs. Cabrera and Montiel "[was] minimal and [that] minimum penalties [should be] imposed on them, specially because it was not conclusively verified that […] they belong[ed] to an armed group."[275]

181. Moreover, the judgment of August 21, 20002 indicated that the principle of innocence "[was] revalidated upon having verified, taking into account all the evidence, [the] criminal responsibility for the perpetration of the crime [which] was […] consider[ed] proven, based on the evidence that proved to be suitable and sufficient to that end."[276] At any case, the final judgment prior to said ruling emphasized that "[the] Federal Court deemed the evidence the Public Prosecutor's Office gathered at the preliminary inquiry stage regarding the crimes of possession of firearm without a permit and crime against health in the form of cultivation of marijuana to be ineffective."[277]

182. This Court has pointed out that the principle of presumption of innocence is a tenet of a fair trial [judicial guarantees].[278] The presumption of innocence implies that the defendant does not have to prove that he has not committed the offense of which he is accused, because the *onus probandi* lays on the prosecutor.[279] Hence, irrefutable demonstration of the guilt is an essential requirement for the criminal penalty, for that the burden of proof lays on the prosecutor and not the accused.[280]

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[275] *Cf.* Judgment issued on August 28, 2000 by the Fifth District Court, *supra* note 75, folio 11276.

[276] *Cf.* Judgment of August 21, 2002 issued by the First Unitary Tribunal, *supra* note 148, folio 15301.

[277] *Cf.* Judgment of August 14, 2002 issued by the Second Collegiate Tribunal, *supra* note 84, folios 14641 to 14642.

[278] Cf. *Case of Suárez Rosero v. Ecuador*, *supra* note 234, para. 77; *Case of García Asto and Ramírez Rojas v. Peru, supra* note 102, para. 160; and *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra* note 99, para. 145.

[279] *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs.* Judgment of August 31, 2004. Series C N. 111, para. 154.

[280] Likewise, the United Nations Human Rights Committee has indicated that "the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proof, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused."." United Nations. Human Rights Committee. General Comment N° 32, *supra* note 258, para. 30.

183. Likewise, the Tribunal has held, as stated in Article 8(2) of the Convention, that the principle of presumption of innocence demands that a person cannot be convicted unless there is full proof of his criminal liability. If the evidence presented is incomplete or insufficient, he must be acquitted, not convicted.[281] Hence, the lack of full proof of the criminal responsibility in a condemnatory judgment constitutes a violation of the principle of presumption of innocence,[282] which is an essential element for the effective exercise of the right to defense and accompanies the defendant throughout the proceedings until the judgment determining his guilt is final.[283]

184. According to that stablished by the European Court, the principle of presumption of innocence implies that the judges should not start a proceeding with a preconceived idea that the accused has committed the crime charged; the burden of proof is on the prosecutor, and any doubt should benefit the accused. The presumption of innocence will be violated if, without the accused having previously been proven guilty, a judicial decision concerning him reflects an opinion that he is guilty.[284]

185. In the instant case, the Court notes that, in the first stage of the proceeding against Messrs. Cabrera and Montiel, evidence challenged by the defense for being irregular and tainted was admitted. These questionings were analyzed by the different instances that heard the case and, in some cases, the argument of the defense was recognized. In fact, according to the terms of the final judgment of August 14, 2002, "[the] Federal Court deemed the evidence the Public Prosecutor's Office gathered at the preliminary inquiry stage regarding the crimes of possession of firearm without a permit and crime against health in the form of cultivation of marijuana to be ineffective" (*supra* para. 73), with which part of the evidence challenged by the defense was not assessed when determining the conviction of the victims.

186. The Court notes that there is no sufficient evidence to consider that the victims had been treated as guilty. In fact, despite they were associated with a situation of *flagrante delicto*, in general terms, the domestic judicial instances treated them as if they were persons whose criminal responsibility was still subjected to a clear and sufficient determination. Therefore, this Court deems that it has not been proven that the State violated article 8(2) of the Convention, to the detriment of the victims, in relation to the proceeding conducted against them.

B. Criminal proceedings to investigate the alleged torture committed against Messrs. Cabrera and Montiel

187. The Commission stated that the military jurisdiction "was not the competent authority to investigate the facts, inasmuch as military justice should only be used in cases in which military criminal legal interests are endangered […]." Hence, it considered that the complaint of torture "extends beyond any defense and security related function [of the State]," therefore "[it] cannot be considered [as a] service-related crime and [that] the investigation into these facts should have been conducted [in] the regular courts." The representatives agreed with the

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281 *Cf. Case of Cantoral Benavides v. Peru, supra* note 272, para. 120; *Case of Ricardo Canese v. Paraguay, supra* note 279, para. 153.

282 *Cf. Case of Cantoral Benavides v. Peru, supra* note 272, para. 121.

283 *Cf. Case of Ricardo Canese v. Paraguay, supra* note 279, para. 154.

284 ECHR, *Case of Barberà, Messegué and Jabardo v Spain*, Judgment of 6 December 1988, App. Nos. 10588/83, 10589/83, 10590/83, paras. 77 and 91.

Commission and added that "the *amparo* proceeding, which by definition constitutes the mechanism of a legal guarantee of the fundamental rights in Mexico, is ineffective to contest the scope of the military jurisdiction, given that it establishes limited grounds for legal standing when the victims or injured parties seek to resort to the courts." On the other hand, the representatives argued that the investigation of torture was not initiated *ex officio* by the judicial authorities that received the complaint of the alleged facts.

188. The State mentioned that the instant case "is not related to the military justice in Mexico," given that "the assessment and determination of the alleged perpetration of torture was considered by independent and impartial tribunals that belong to the Judiciary of the Mexican State, remedying any violation that, […], may entail an investigation conducted by a military authority." In addition, it clarified that even though "the proceedings conducted by the Military Attorney General […] concluded that no torture was committed, they were not taken into account by the Judiciary when issuing its respective rulings." On the other hand, the State indicated that "the defense […] had at its disposal and thoroughly used different simple and prompt remedies that legally allowed it to put forward before the competent judicial instances the alleged acts of torture." It emphasized that "[s]aid remedies were effective for the defense inasmuch as, at first, […] the Collegiate Tribunal ordered the judicial assessment of an expert opinion that could have demonstrated the innocence of the […] victims [and], secondly, the Unitary Tribunal acquitted Mr. Rodolfo Montiel of the commission of the crime against health and consequently, reduced the sentence imposed on him."

189. The investigation initiated by the victims into the allegations of torture committed against them was conducted by military authorities, since article 57(II)(a) of the Code of Military Justice stablishes that the crimes against military discipline are those that are committed by military personnel in active service or in connection with active service.

1. *Ex officio* investigation before ordinary courts

190. During the first stages of the arrest, Messrs. Cabrera and Montiel presented different complaints of torture committed against them. It has been indicated that though in the statements rendered before the Public Prosecutor's Office on May 4, 1999, no reference was made to said acts;[285] on May 6, 1999, they complained before the Federal Public Prosecutor's Office that they had been beaten while at the Army facilities.[286] Likewise, on May 7, 1999, in the presence of the Criminal Court of the Mina Judicial District, they described various forms of abuse suffered while in the custody of the Army.[287] Afterwards, on July 13, 1999, the victims expanded the preliminary statements,[288] repeating that they had received degrading treatment and threats from the state agents in order to accept to sign a confession (*supra* paras. 134 and 175). Said statements were expanded, in turn, on December 23, 1999 before the Fifth District Court.[289]

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[285] Statement of Messrs. Cabrera and Montiel of May 4, 1999, *supra* note 142, folios 8198 to 8199.

[286] Statements of Messrs. Cabrera and Montiel of May 6, 1999, *supra* note 132, folios 9781 and 9785.

[287] Preliminary statements of Messrs. Cabrera and Montiel of May 7, 1999, *supra* note 144, folios 9836 to 9837 and 9841.

[288] *Cf.* Expansion of the preliminary statement of Messrs. Cabrera and Montiel of July 13, 1999, *supra* note 145, folios 10036 to 10041.

[289] *Cf.* Expansion of the statements of Messrs. Cabrera and Montiel of December 23, 1999, *supra* note 67, folios 10360 to 10368.

191. Without detriment to such statements, on August 26, 1999, the defense asked the Fifth District Judge to order the Public Prosecutor's Office to investigate the allegations of torture, the state of *incommunicado* and the unlawful detention to which Messrs. Cabrera and Montiel were subjected at the Army's facilities.[290] Hence, on August 31, 1999, the Fifth District Judge ordered the Public Prosecutor's Office to investigate the facts denounced[291] and on October 1, 1999, the Federal Public Prosecutor's Office of Coyuca de Catalán, in the state of Guerrero, launched the Preliminary Inquiry (*supra* para. 74).

192. The Court has pointed out that 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[292]. Likewise, it has been held that article 8 of the Inter-American Convention to Prevent and Punish Torture clearly establishes "if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process."[293] Likewise, the Court has also mentioned that the obligation to investigate and the corresponding right of the alleged victim or his next-of-kin not only derives from conventional international Law rules binding upon the States Parties, but also from domestic legislation related to the duty to investigate *ex officio* certain unlawful conducts and the rules that allow victims or their relatives to report or file claims, evidence, petitions or any other proceeding, in order to participate in criminal investigation proceedings to find the truth of the events.[294]

193. This Tribunal verifies that the investigation against the alleged perpetrators of torture was initiated more than three months after the first mention made to said acts committed against Messrs. Cabrera and Montiel. In addition, the Court notes that said investigation was initiated upon the express request of the petitioners of August 26, 1999 (*supra* para. 74). Based on the foregoing, it is clear for this Tribunal that the State failed to comply with the obligation to conduct an *ex officio* investigation into the facts that violated the human rights of Messrs. Cabrera and Montiel and, consequently, the Court concludes that the State violated article 8(1) of the American Convention, as well as article 8 of the Inter-American Convention to Prevent and Punish Torture.

2. Competence of the military criminal justice

194. Apart from what was mentioned in relation to an *ex officio* investigation into

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290 *Cf.* Constitutional confrontation hearings of August 26, 1999, *supra* note 86, folios 10157 and 10158.

291 *Cf.* Court order of August 31, 1999 by the Fifth District Court, *supra* note 87, folio 10162 to 10163.

292 *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 192; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 176.

293 Similarly, *Case of Gutierrez Soler v. Colombia*, *supra* note 204, para. 54.

294 *Cf.* As way of example, article 141 of the Federal Code of Criminal Procedure recognizes the rights of victims or injured party in the preliminary inquiry (Paragraph A), in the criminal proceeding (paragraph B) and during the enforcement of penalties (paragraph C) and the Code of Criminal Procedures of the state of Guerrero, in its article 5, first paragraph, recognizes the right of the victim or the injured party to assist the Public Prosecutor's Office at providing the members of the court with of all the information available, leading to verify the admissibility and amount of the damage caused by the crime. Quoted in *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 192.

the allegations of torture, the Court verifies that on October 10, 1999, the agent of the Federal Public Prosecutor's Office referred a question on lack of competence *ratione materiae* to the Agent of the Federal Public Prosecutor's Office and State Delegate of the Guerrero Attorney General's Office of the Republic in the state of Guerrero, because it considered that "the accused were in active service when they committed the illicit acts therefores these acts must be considered as violations of military discipline."[295] On November 5, 1999, the Agent of the Federal Public Prosecutor's office decided to decline jurisdiction in order to continue with the corresponding investigations to the Agent of the Military Prosecutor's Office, arguing that the suspects were Mexican military officers in active service on the day of the facts. On December 14, 1999, said Officer of the Federal Public Prosecutor declined jurisdiction to its military counterpart in the 35th Military Zone.[296] Finally, on June 13, 2000, the Office of the Prosecutor General for Military Justice issued an order to store the case file since he considered that there were no elements to prove the torture.[297]

195. It has also been mentioned that (*supra* para. 75) at the same time, Messrs. Cabrera and Montiel filed a complaint before the Human Rights Defense Commission of the state of Guerrero on May 14, 1999, regarding the facts of the instant case. As a result, case file CODDEHUM-CRTC/031/99-I was opened, which, by then, was referred to the NCHR due to competence issues. The NCHR launched an investigation in order to corroborate the facts. In this way, the NCHR issued Recommendation 8/2000, in which it was determined that "given the repeated silence [on the part of the Office of the Prosecutor General for Military Justice],"[298] said office "presumed that the [allegations] of torture were true" in keeping with articles 38 and 70 of the NCHR Law" (*supra* para. 75). Likewise, in one of its recommendations, the NCHR ordered "the Office for the Prosecutor General of the Military Justice (PGJM) to start a preliminary investigation against the members of the Mexican Army who authorized, supervised, implemented and carried out the operation in the period from May 1 through May 4, 1999."[299]

196. In response to the NCHR's recommendations, the State launched another Preliminary Inquiry classified as number SC/304/2000/VII-I. On February 10, 2001, the Office of the Prosecutor General for Military Justice went to the facilities of *Iguala de la Independencia* Prison, where the victims were being held in order to confirm their complaints. That day, Messrs. Cabrera and Montiel filed a brief addressed to the PGJM, wherein they demanded that said institution decline jurisdiction and return the Preliminary Inquiry to the Attorney General's jurisdiction.[300] In the case file before the Court, there is no response to such a request. On November 3, 2001, the Office of the Prosecutor General for Military Justice recommended to file the criminal record, since it determined that:

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295 *Cf.* Consultation on lack of competence *ratione materiae* of October 10, 1999 (Proceeding N° 91/CC/99) (record of annexes to the application, volume XII, folio 4846 to 4849).

296 NCHR. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, folio 311.

297 *Cf.* Brief of June 20, 2006 by which the State presented "its observations to the arguments on the merits of the petitioners, related to case 11449 Rodolfo Montiel Flores and Teodoro Cabrera Garcia" before the Inter-American Commission on Human Rights (record of annexes to the application, volume II, folio 676).

298 NCHR. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, folio 312.

299 NCHR. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, folio 313.

300 *Cf.* Brief presented on February 10, 2001 by Messrs. Cabrera and Montiel before the agent of the Attorney General's Office for Military Justice (Preliminary Inquiry N° 5C/304/2000/VIII) (record of annexes to the brief of pleadings and motions, volume XXI, folio 8904).

> "in the body of evidence of this inquiry there is not sufficient evidence to demonstrate that civilians RODOLFO MONTIEL FLORES and TEODORO CABRERA GARCÍA were tortured while in the custody of military personnel.
>
> […]
>
> To refer the present inquiry to the Prosecutor General for Military Justice, with a reasoned report proposing that no criminal action be brought and that the inquiry be definitively filed, with the exceptions that the law provides, so that after consulting his assigned agents, he may decide whether or not to confirm the proposal […]."[301]

197. Regarding the intervention of the military courts to hear facts that constitute human rights violations, this Tribunal recalls that it has declared in this respect in relation to Mexico in the Judgment of the case of Radilla Pacheco, a precedent that has been repeated in the cases of Fernandez Ortega and Rosendo Cantu. Taking into account the foregoing and what was mentioned by the State (*supra* para. 188), for the purposes of this case, the Tribunal deems sufficient to repeat that:

> [i]n a democratic State of law, the military criminal jurisdiction shall have a restrictive and exceptional scope and be directed toward the protection of special juridical interests, related to the tasks characteristic of the military forces. Therefore, the Tribunal has previously stated that only active soldiers shall be prosecuted within the military jurisdiction for the perpetration of crimes or offenses that based on their own nature threaten the juridical rights of the military order itself.[302]
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> Likewise, […] taking into account the nature of the crime and the juridical right damaged, military criminal jurisdiction is not the competent jurisdiction to investigate and, in its case, prosecute and punish the authors of violations of human rights but that instead the processing of those responsible always corresponds to the ordinary justice system. In that sense, the Court, on multiple occasions, has indicated that "[w]hen the military jurisdiction assumes competence over a matter that should be heard by the ordinary jurisdiction, it violates the right to a competent tribunal and, *a fortiori*, to a due process," which is, at the same time, intimately related to the right to a fair trial. The judge in charge of hearing a case shall be competent, as well as independent and impartial.[303]
>
> Regarding situations that violate human rights of civilians, the military jurisdiction cannot operate under any circumstance.[304]
>
> The Court [has] point[ed] out that when the military courts hear of acts that constitute violations to human rights against civilians they exercise jurisdiction not only with regard to the defendant, who must necessarily be a person with an active military status, but also with regard to the civil victim, who has the right to participate in the criminal proceeding not only for the effects of the corresponding reparation of the damage but also to exercise

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[301] *Cf.* Decision of the Preliminary Inquiry SC/304/2000/VIII-I of November 3, 2001, initiated in light of Recommendation 08/2000 of the National Commission on Human Rights of Mexico (Record of annexes to the application, volume XIX, folios 8364 to 8367).

[302] *Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 23, 2009. Series C Nº 209 para. 272; *Case of Fernandez Ortega et al v. Mexico*, *supra* note 39, para. 176; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 160.

[303] *Case of Radilla Pacheco v. Mexico, supra* note 302, para. 273; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 176; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 160.

[304] *Case of Radilla Pacheco v. Mexico, supra* note 302, para. 274; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 176; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 160.

> their rights to the truth and to justice […]. In that sense, the victims of the violations of human rights and their next of kin have the right to have said violations heard and resolved by a competent tribunal, pursuant with the due process of law and the right to a fair trial. The importance of the passive subject transcends the sphere of the military realm, since juridical rights characteristic of the ordinary regimen are involved.[305]

198. In summary, according to the case law of this Court, the military jurisdiction is not the competent jurisdiction to investigate and, in its case, prosecute and punish the authors of alleged violations of human rights but that instead the processing of those responsible always corresponds to the ordinary justice system. This conclusion applies not only to cases of torture, forced disappearance and rape, but to all human rights violations.

199. Subjecting a person to inhuman, cruel or degrading treatment by military officers is not related, under any circumstance, to the military discipline or mission. On the contrary, the alleged acts committed by military officers against Messrs. Cabrera and Montiel affected juridical rights protected by the domestic criminal law and the American Convention, like the integrity and personal dignity of the victims. It is clear that such conduct is openly contrary to the duties of respect and protection of the human rights and, therefore, is excluded from the competence of the military jurisdiction. Based on the foregoing considerations, the Court concludes that the intervention of the military courts in the preliminary inquiry of torture was contrary with the parameters of exceptionality and restriction characteristic of such courts and entailed the application of a personal jurisdiction that was exercised without taking into account the nature of the acts involved.[306]

200. This conclusion is valid in the instant case even though the fact did not go beyond the investigative stage of the Office of the Public Prosecutor for Military Justice. As it springs from the criteria mentioned, the incompatibility of the American Convention with the intervention of the military courts in this type of cases does not only refer to the tribunal's duty to prosecute, but mainly to the investigation itself, given that its conduct constitutes the beginning and the necessary premise for the subsequent intervention of an incompetent tribunal.[307]

201.Hence, regarding the arguments of the State in the sense that the deficiencies related to the intervention of the military criminal courts would be remedied due to the fact that in the investigation against Messrs. Cabrera and Montiel at the regular court, the allegations of torture were heard in order to establish whether it corresponded to exclude certain evidence, it is clear that the exclusive objective of said proceeding was not to investigate, prosecute and, if applicable, punish the alleged responsible for torture. Therefore, it is not possible to remedy or confirm the effects of a judicial investigation launched in light of the specific complaint regarding torture or mistreatment, with the decisions made within the proceeding, the investigative line of which was not to shed light on facts but, on the contrary, to investigate the claimants. Based on the foregoing, the Court concludes that the State violated the right to a fair trial [judicial guarantess] enshrined in article 8(1) of the American Convention, in conjunction with article 1(1) therein, to the

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[305] *Case of Radilla Pacheco v. Mexico, supra* note 302, para. 275; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 176; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 160.

[306] Cf. *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 177; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 161.

[307] *Cf. Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 177; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 161.

detriment of Messrs. Cabrera and Montiel. As it has held in previous cases,[308] based on the conclusion that the military criminal courts were not competent, the Tribunal considers that it is not necessary to adjudge and declare regarding the other arguments related to the independence or impartiality of the military courts or the possible violation, in relation to the same facts, of other Inter-American treaties.

3. Effective judicial remedy in the military criminal justice system

202. As to the alleged inexistence of an effective remedy to contest the military jurisdiction, the Court has stated that Article 25(1) of the Convention contemplates the duty of the States Parties to ensure to all persons subject to their jurisdiction an effective recourse against acts that violate their fundamental rights.[309]

203. As has been previously indicated (*supra* para. 196) during the processing of preliminary inquiry SC/304/2000/VII-I, on February 10, 2001, Messrs. Cabrera and Montiel presented a brief before the PGJM, by means of which they demanded that it decline jurisdiction and return the Preliminary Inquiry to the common jurisdiction. However, said petition was not answered. In this respect, the representatives alleged that "before this omission" the victims "were unable to challenge the scope of the military jurisdiction regarding the investigation into the torture committed against them." The State did not contest the lack of response to the above mentioned request and it did not refer to this argument.

204. In application of the previously mentioned standards regarding the effectiveness of the judicial remedies and taking into account the decisions made by the military courts, this Tribunal concludes that Messrs. Cabrera and Montiel could not effectively contest the jurisdiction of such military courts to hear the matters that, due to their nature, corresponded to the authorities of the common jurisdiction. Consequently, Messrs. Cabrera and Montiel did not have effective remedies at their disposal to challenge the competence of the military justice over said allegations of torture. Based on the foregoing, the Court concludes that the State violated the right to judicial protection enshrined in article 25(1) of the American Convention, in conjunction with article 1(1) therein, to the detriment of Messrs. Cabrera and Montiel.

4. Adapting the Mexican domestic law regarding the intervention of the military criminal courts

205. On the other hand, the Tribunal notes that the intervention of the military jurisdiction was based on article 57(II)(a) of the Code of Military Justice[310] (*supra* para. 189). In this respect, the Court reiterates that said norm:

> is an ample and imprecise provision that prevents the determination of the strict connection of the ordinary jurisdiction crime with the military

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[308] *Cf. Case of Cantoral Benavides v. Peru, supra* note 272, para. 115; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 177; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 161.

[309] Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*, *supra* note 213, para. 91; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 180; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 164.

[310] Article 57. II.a) of the Code of Military Justice provides, in its pertinent part: "Crimes against military discipline are:

> II. Common or federal crimes when any of the following circumstances attend their commission: a) The crimes were committed by military officers in active service or in connection with active service.

> jurisdiction objectively assessed. The possibility that the military courts prosecute any soldier who is accused of an ordinary crime, for the mere fact of being in service, implies that the jurisdiction is granted due to the mere circumstance of being a soldier. In that sense, even when the crime is committed by soldiers while they are still in service or based on acts of the same, this is not enough for their knowledge to correspond to the military criminal justice.[311]

206. In the case of *Radilla Pacheco* the Tribunal considered that the provision contained in said article 57 operates as a rule and not as an exception, a necessary characteristic of military jurisdiction for it to comply with the standards established by this Court.[312] In this regard, the Court emphasizes that compliance with said standards is made with the investigation into all violations of human rights within the framework of ordinary criminal jurisdiction, and thus the scope of application cannot be limited to specific violations, such as torture, forced disappearance or rape. The Tribunal recalls that article 2 of the American Convention establishes the general obligation of each State Party to adapt its domestic laws to the Convention's provisions, so as to guarantee the rights therein protected, which means that the provision of domestic law must be effective (principle of *effet utile).*[313] Consequently, the Court concludes that the State failed to comply with the obligation contained in article 2, in connection with articles 8 and 25 of the American Convention, upon extending the competence of the military jurisdiction to crimes that do not have a strict relation to military discipline or to juridical rights characteristic of the military realm.

207. Finally, regarding the codification of the crime of torture at the federal level, the representatives indicated that Article 3 of the Mexican Federal Law to Prevent and Punish Torture restricts the motive of the torture to the following premise: "to obtain, from the tortured or a third party, information or a confession, or to punish him or her for an act that he or she has committed or is suspected of having committed, or coerce him or her to behave or stop behaving in a certain way," which would not comply with the definition enshrined in article 2 of the American Convention and articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture. Similarly, they emphasized that, in the Criminal Code of the State of Guerrero, there is no criminal classification for the crime of torture. For its part, the State indicated that both the Convention and the Inter-American Convention to Prevent and Punish Torture "establish a general obligation for the State to classify the crime of torture, but not the obligation to stipulate a definition literally based on the terms of the Inter-American Convention to Prevent and Punish Torture." In addition, the Mexican State argued that, according to Article 3 of the Federal Law to Prevent and Punish Torture, "the crime of torture is regulated in all federal entities, both in criminal codes and special laws." In this regard, the Court notes that the representatives put forward this argument concerning the violation of Article 2 of the American Convention without stating the reasons why the above had an effect on the instant case. Therefore, and as the Tribunal has held on

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311 *Case of Radilla Pacheco v. Mexico, supra* note 302, para. 286; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 178; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 162.

312 Cf. *Case of Durand and Ugarte v. Perú. Merits.* Judgment of August 16, 2000. Series C N°. 68, para. 117; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 179; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 163.

313 *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and Costs.* Judgment of August 27, 1998. Series C N. 39, para. 68; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 179; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 163.

previous occasions, the Court cannot review laws in abstract which were not applied or dit not have effects on the specific case.[314]

X
REPARATIONS
(Application of Article 63(1) of the American Convention)

208. Pursuant to the terms of article 63(1) of the American Convention,[315] the Court has indicated that any violation of an international obligation that has caused damage entails the duty to provide adequate reparation[316] and that this provision "reflects a customary norm that is one of the fundamental principles of contemporary international law regarding the responsibility of the States."[317]

209. This Tribunal has established that the reparations must have a causal link with the facts of the case, the declared violations, the proven damages, as well as with the measures requested to repair the resulting damages. Therefore, the Court must observe such coincidence in order to adjudge and declare according to law.[318]

210. In consideration of the violations declared in the preceding chapters, the Tribunal shall address the requests for reparations made by the Commission and the representatives, as well as the State's arguments thereof, in light of the criteria embodied in the Court's case law in connection with the nature and scope of the obligation to make reparations,[319] in order to adopt the measures required to repair the damage caused to the victims. As regards the State's motions, the Court notes that the State only submitted specific pleadings on some reparation measures requested. In all other respects, in general terms, Mexico requested the Tribunal to reject any request for reparation submitted by the Commission or the petitioners.

A. Injured Party

211. According to article 63(1) of the American Convention, an injured party is a party that has been declared a victim of the violation of a right enshrined in the Convention.[320] The victims in this case are Messrs. Teodoro Cabrera García and

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314 *Case of Genie Lacayo v. Nicaragua. Preliminary Objections*. Judgment of January 27, 1995. Series C No. 21, para. 50; *Case of Usón Ramírez v. Venezuela, supra* note 99, para. 154 and *Case of Manuel Cepeda Vargas v. Colombia, supra* note 27, para. 51.

315 Article 63.1 of the Convention provides: "[I]f the Court finds that there has been a violation of a right or freedom protected by [this] Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

316 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*. Judgment of July 21, 1989. Series C Nº. 7, para. 25; *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 203; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 231.

317 *Cf. Case of the "Street Children" (Villagrán Morales et al) v. Guatemala. Reparations and Costs.* Judgment of May 26, 2001. Series C No. 77, para. 62; *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 203; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 231.

318 *Cf. Case of Ticona Estrada et al v. Bolivia. Merits, Reparations and Costs.* Judgment of November 27, 2008. Series C N° 191, para. 110; *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 204; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 262.

319 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra* note 316, para. 25 to 27; *Case of Garrido and Baigorria v. Argentina*, *supra* note 313, para. 43; *Case of the "White Van" (Paniagua Morales et al) v. Guatemala, supra* note 30, paras. 76 to 79.

320 *Cf. Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 224; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. *232.*

Rodolfo Montiel Flores, who shall be considered beneficiaries of the reparations ordered by this Tribunal.

212. On the other hand, although the representatives submitted some evidence about the alleged damages suffered by the relatives of Messrs. Cabrera and Montiel as an alleged consequence of the violations declared, the Court notes that the Commission did not allege in its report on the merits or in its application that such individuals were victims of any violation of a right under the American Convention (*supra* para. 60). Based on the foregoing and considering the case law of the Tribunal,[321] the Court does not considere that the next-of-kin of the victims in the case at hand are "injured parties"[322] and it also determines that they will be beneficiaries of reparations only in the capacity as heirs, that is, if the victim dies and pursuant to the provisions of the domestic legislation.

B) Obligation to investigate the facts, identify, prosecute and, if applicable, punish the responsible

213. The Commission and the representatives agreed on pointing out that "a comprehensive reparation requires that the Mexican State investigates with due diligence and in a serious, unbiased and exhaustive manner, the human rights violations suffered by Messrs. Cabrera and Montiel in order to clarify the historical truth of the facts, to prosecute and punish those who are not only materially but intellectually responsible." Thus, they requested the Court to order the State "to locate, prosecute and punish all those who participated in the facts," including all those responsible for the irregularities and omissions committed in the judicial proceeding.

214. The Court has established in this Judgment that the State has violated the rights to humane treatment [personal integrity] and personal liberty, fair trial [judicial guarantees] and judicial protection embodied in articles 5, 7, 8 and 25 of the American Convention, respectively (*supra* paras. 137, 177, 193, 201 and 204), as well as articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. The Tribunal analyzed the way in which the regular tribunals evaluated the allegations of torture presented by the victims. However, the Court notes that the only judicial proceeding whose exclusive purpose was to investigate the reports on the alleged torture and cruel and inhuman treatment against Messrs. Cabrera and Montiel were conducted by the military criminal justice, which was not competent to hear this case (supra. para. 201).

215. Based on the foregoing, as ordered on other occasions,[323] it is necessary that the abovementioned facts are effectively investigated by common bodies and jurisdiction in a proceeding conducted against the alleged perpetrators of the offenses committed against humane treatment. Consequently, the Court rules that the State shall effectively carry out the criminal investigation into the facts of the

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321 Cf. *Case of Acevedo Buendía et. al. ("Discharged and Retired Employees of the Comptroller") v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 1, 2009. Series C 198, para. 114.

322 As regards Mr. Montiel Flores, his wife, Mrs. Ubalda Cortés Salgado, and their children: Claudia, Andrés, María Magda Lizbeth, José Orvelín, Mareny and Leonor, all bearing the surname Montiel Cortés. As regards Mr. Cabrera García, his wife, Mrs. Ventura López Ramírez and his stepson, Miguel Olivar López.

323 Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra* note 25, para. 174; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 228; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 211.

instant case, especially into the allegations of torture against Messrs. Cabrera and Montiel, in order to determine the corresponding criminal responsibilities and, if it were the case, effectively apply the punishments and consequences established by law. This obligation shall be complied with within a reasonable period of time, following the criteria established regarding investigations in this type of cases,[324] which includes due diligence in the investigation into the different hypotheses of the reasons that would have given rise to the attacks to humane treatment against Messrs. Cabrera and Montiel. In this respect, the Court observes that the Istanbul Protocol has been adopted in the domestic legislation (*supra* para. 119) and it is important that those standards are used in order to strengthen the due diligence, suitability and effectiveness of the respective investigation. Likewise, should the procedural and investigative irregularities related to the facts are proven while under investigation, it will be appropriate to adopt the pertinent disciplinary, administrative or criminal actions.

C. Measures of satisfaction, rehabilitation and guarantees of non-repetition

C.1 Measures of satisfaction

i) Publication of the Judgment

216. The Commission requested the Court to order the State to publish this Judgment in a communication media with national circulation. The representatives indicated that such publication must be done "both in the Official Gazette of the Federation as well as in two newspapers with the largest circulation in the country chosen in common agreement with the victims." Likewise, the representatives requested that excerpts of the Judgment should be published in the "Official Gazette of the [s]tate of Guerrero and in the dissemination media of the Public Prosecutor's Office, the Judiciary of the Federation, the Public Federal Defense Office, the Secretariat for National Defense (SEDENA) and the Secretariat for the Environment and Natural Resources (SEMARNAT)." On the other hand, "[i]n view of the fact that the radio is more used in the state of Guerrero, the publication of the Judgment should also me made [using] such media," particularly to "cover the municipalities of Petatlán and Coyuca de Catalán."

217. As the Tribunal has ordered in other cases,[325] the Court deems appropriate to order the State, as a measure of satisfaction, to publish this Judgment, once, in the Official Gazette of the Federation and in the *Semanario Judicial de la Federación* [Judiciary Weekly Magazine] and its Gazette, with the corresponding headings and subheadings, but without the footnotes, as well as the operative paragraphs. Likewise, the State must: i) publish the official summary of the Judgment issued by the Court in a newspaper with wide national circulation and in a newspaper of a large circulation in the state of Guerrero; ii) fully publish this Judgment[326] in the official web site of the Federal State and of the state of Guerrero, taking into account the characteristics of the publication ordered, which

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[324] *Cf. Case of Radilla Pacheco v. Mexico, supra* note 302, para. 331; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 228; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 211.

[325] *Cf. Case of Barrios Altos v. Perú. Reparations and Costs.* Judgment of November 30, 2001. Series C N° 87, Operative Paragraph 5.d); *Case of Rosendo Cantu et al v. Mexico, supra* note 30, para. 229; and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 30, para. 244.

[326] Cf. *Case of the Serrano Cruz Sisters v. El Salvador. Merits, Reparations and Costs*. Judgment of March 1, 2005. Series C No. 120, para. 195; *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 229; and *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 244.

shall remain available for, at least, a year and iii) broadcast the official summary, at least once, on a radio station[327] to which the members of the municipalities of Petatlán and Coyuca de Catalán have access. Said publications and radio broadcast shall be made within six months following notice of this Judgment.

C.2 Measures of rehabilitation

i) Medical and psychological care

218. The Commission requested the Court to order the State to adopt measures of medical and psychological rehabilitation for the victims. In turn, the representatives added that such health care must be provided "by competent professionals, including the supply of medicines they may require." The representatives also requested the Court to declare that the State must cover "any other expenses related to treatment, such as transportation, among any other needs that may be required." It must also be pointed out that for the representatives "their health care mu[st be] for life […] due to the [alleged] torture inflict[ed] on Messrs. Cabrera and Montiel]." Furthermore, in their final written arguments, the representatives requested to comply with such measure "by means of a reimbursement scheme allowing for the victims to choose the doctors and psychologists they trust."

219. In the psychological report of expert witness Ana Deutsch, it was diagnosed that the victims suffered from post-traumatic stress disorder and major depression, related to the physical damages resulting from the attacks against their personal integrity they suffered (*supra* para. 125). Moreover, expert witness Quiroga indicated that the attacks against the personal integrity had developed symptoms that still persist today and that justify the medical care.[328]

220. The Court deems, as it has held in other cases[329] that it is necessary to provide for a measure of reparation that provides an adequate treatment to the bodily and psychological suffering inflicted on the victims, taking into account their needs. Therefore, having confirmed the violations and the damages suffered by the victims, the Tribunal considers necessary to order measures of rehabilitation in the instant case. Moreover, the Court notes that Mr. Montiel is not currently living in Mexico and that Mr. Cabrera García does not live in the state of Guerrero and does not want his place of residence to be revealed for security reasons.[330]

221. Following this line of thought, the Court considers necessary for Mexico to provide Messrs. Cabrera and Montiel with an amount to cover the expenses of the specialized medical and psychological treatment, as well as other related expenses, at the place where they reside. In this regard, the Court reiterates that for the implementation of these measures, the State must obtain the consent of the

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[327] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs.* Judgment of June 17, 2005. Series C No. 125, para. 227; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 247; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 229.

[328] *Cf.* Expert report rendered by expert witness Jose Quiroga before a public notary, *supra* note 173, folio 1316 to 1328.

[329] Cf. *Case of Barrios Altos v. Perú. Reparations and Costs, supra* note 325, paras. 42 and 45; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 251; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 252.

[330] In reference to the power-of-attorney presented by the victims' representatives, the Inter-American Commission requested, by means of brief of July 9, 2009, "to keep the information related to the current domicile of Mr. Montiel and Cabrera, as well as their respective families, in the more strict confidentiality […] due to the risks [to] their lives and personal integrities" (record of the merits, volume I, folio 91).

victims by providing them with previous, clear and sufficient background information. Consequently, the State must allocate to each of the victims, only once, within a term of two months as of notification of this Judgment, the amount of US$ 7.500,00 (seven thousand five hundred dollars of the United States of America) on account of specialized medical and psychological treatment, as well as medicines and other related expenses.

ii) Deleting the victims' names from all criminal records

222. The representatives sustained that Messrs. Cabrera and Montiel "are innocent" of the accusations for which they were sentenced. Therefore, the representatives requested the Court to order the Mexican State "to take all the necessary measures to delete immediately the names of Messrs. Montiel and Cabrera from any criminal record as well as to permanently delete any criminal record for the facts reported in this case." The State pointed out that it was not applicable to delete the criminal record of the petitioners in this case, reiterating that no violations of the American Convention have been committed and that their release was due to "humane considerations and not to procedural faults."

223. The Court has noted in other cases that it is not a criminal court that analyzes the criminal liability of individual and that it shall not decide on the guilt or innocence of individuals, since this is a matter of the domestic criminal jurisdiction.[331] Based on the foregoing and of the violations declared in this Judgment, this Tribunal considers that it is not possible to order a measure of reparation under the terms requested.

C.3 Guarantees of Non-Repetition

i) Adapting domestic law to international standards regarding justice

224. The Commission requested the Court to order Mexico to limit the scope of its military jurisdiction. The representatives requested that "the State […] must be ordered to amend article 57 of the Code of Military Justice, in order to establish, in a clear and precise manner and with no ambiguities, that military justice must abstain from hearing any violations of human rights allegedly committed by members of the Mexican armed forces, whether on duty or not, in any alleged situation." Likewise, the representatives requested to establish an "effective remedy to challenge the decision to transfer the proceedings to military jurisdiction." Lastly, in view of the State's information regarding a proposal to amend article 57 of the Code of Military Justice, in compliance with the Judgment of the Court in the case of Radilla Pacheco, the representatives pointed out that "the information disseminated by the Presidency seems to imply that the amendment proposal [...] shall not comply with [the terms established in said Judgment]" and that, at any case, "the amendment […] has not been adopted."

225. This Court has held in its case law that it is aware that domestic authorities are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system.[332] But when a State has ratified an

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[331] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, *supra* note 25, para. 134*, Case of Lori Berenson Mejía v. Perú. Merits, Reparations and Costs.* Judgment of November 25, 2004. Series C N° 119, para. *92; Case of Barreto Leiva v. Venezuela*, *supra* note 100, para. 24

[332] *Cf. Case of Almonacid Arellano et al v. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 124; *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 219; and *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 202.

international treaty such as the American Convention, all its bodies, including its judges, are also bound by such Convention, which forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and end. The Judiciary, in all its levers, must exercise *ex officio* a sort of "conventionality control" between the domestic legal provisions and the American Convention, evidently within the framework of their respective competence and the corresponding procedural rules. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[333]

226. Hence, for example, supreme tribunals of the region had referred to and applied the conventionality control taking into account the interpretations made by the Inter-American Court. The Constitutional Room of the Supreme Court of Justice of Costa Rica has pointed out that:

> it is worth noting that if the Inter-American Court of Human Rights is the natural organ to interpret the American Convention on Human Rights […], the power of its decision when interpreting the convention and trying the domestic laws in light of this rule, be it in a contentious case or in a simple consultation, shall have -in principle- the same value of the interpreted rule.[334]

227. In turn, the Constitutional Court of Bolivia has mentioned that:

> In fact, the Pact of San Jose, Costa Rica, as a rule included in the collection of constitutional rules, is comprised of three essential parts, closely related to each other: the first one, made up of the preamble; the second one, called the dogmatic part and the third one related to the organic part. Precisely, Chapter VIII of this treaty regulates the Inter-American Court of Human Rights; consequently, following a "systemic" criterion of constitutional interpretation, it should be established that this organ and therefore, its decisions, also form part of this collection of constitutional rules.
>
> The foregoing because of two specific legal reasons, namely: 1) The subject-matter of the competence of the Inter-American Court of Human Rights and, 2) the application of the "*effet util*" doctrine to judgments concerning Human Rights.[335]

228. Likewise, the Supreme Court of Justice of the Dominican Republic has established that:

> consequently, it is binding for the Dominican State and, therefore, for the Judiciary, not only the rules of the American Convention on Human Rights but its interpretations made by the competent organs, created as means of protection, according to article 33 therein, which confers competence with

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[333] *Cf. Case of Almonacid Arellano et al v. Chile, supra* note *332,* para. 124; *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 219; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra* note 30, para. 202.

[334] *Cf.* Judgment of May 9, 1995 issued by the Constitutional Room of the Supreme Court of Justice of Costa Rica. Constitutional motion. Opinion 2313-95 (Case File 0421-S-90), Considering clause VII.

[335] Judgment handed down on May 10, 2010 by the Constitutional Tribunal of Bolivia (Case file N° 2006-13381-27-RAC), chapter III.3 on "The Inter-American System of Human Rights. Grounds and effects of the Judgments issued by the Inter-American Court of Human Rights."

> respect to matters relating to the fulfillment of the commitments made by the States Parties.[336]

229. Moreover, the Constitutional Tribunal of Peru has sustained that:

> The binding nature of the judgments of the [Inter-American Court] does not end with the operative paragraphs (which, certainly, applies only to the State party to the proceeding), but it also extends to its grounds or *ratio decidendi*; moreover, in view of the [Fourth Final and Transitory Disposition (CDFT)] of the Constitution and article V of the Preliminary Title of the [Constitutional Procedural Code], the judgment is binding on all national government, including in those cases in which the Peruvian State is not a state party to the proceeding. In fact, in view of the Inter-American Court's capacity to interpret and apply the Convention, enshrined in article 62(3) of said treaty, coupled with the mandate of the CDFT of the Constitution, the interpretation made in a proceeding of all the provisions of the Convention is binding for all domestic government, including, of course, this Tribunal.[337]

230. Said Tribunal has also established that:

> from the Inter-American Court of Human Rights and this Constitutional Tribunal, it springs a direct connection; a connection that has two aspects: on the one hand, a *restorative* aspect, since once the violated fundamental right has been interpreted in light of the decisions of the Court, it is possible to provide an adequate and effective protection; and, on the other hand, a *preventive* aspect, given that, through its observance, it is possible to avoid the harmful institutional consequences derived from the condemnatory judgments of the Inter-American Court of Human Rights for the legal certainty of the Peruvian State.[338]

231. The Supreme Court of Justice of Argentina has mentioned that the decisions of the Inter-American Court "are binding for the Argentine State (art. 68(1), American Convention)," therefore, said Court has established that "in principle, the content of its decisions must be subordinated to the decisions of said international tribunal."[339] Likewise, said Supreme Court established that "the interpretation of the American Convention on Human Rights must be made following the case law of the Inter-American Court of Human Rights" given that "it deals with an inescapable pattern of interpretation for the Argentine constitutional branches of government within the realm of its competence and, in consequence, also for the Supreme Court of Justice, in order to safeguard the obligations assumed by the Argentine State in the Inter-American system of Protection of Human Rights."[340]

232. Moreover, the Constitutional Court of Colombia has determined that, in light of the fact that the Colombian Constitution provides that the constitutional rights and duties must be interpreted "according to the international human rights

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[336] Resolution N° 1920-2003 issued on November 13, 2003 by the Supreme Court of Justice of the Dominican Republic.

[337] Judgment handed down on July 21, 2006 by the Constitutional Tribunal of Peru (case file N° 2730-2006-PA/TC), Ground 12.

[338] Judgment 00007-2007-PI/TC issued on June 19, 2007 by the Full Constitutional Tribunal of Peru (*Colegio de Abogados del Callao v. Congreso de la República*), ground 26.

[339] Judgment issued on December 23, 2004 by the Surpeme Court of Justice of the Republic of Argentina (Case file 224.XXXIX), *"Esposito, Miguel Angel s/* motion of statute of limitation of the criminal proceeding brought by his defense*,"* considering clause 6.

[340] Judgment of the Supreme Court of Justice of Argentina, Mazzeo, Julio Lilo *et al.*, Appeal for annulment and constitutional motion. M. 2333. XLII *et al.* of July 13, 2007, para. 20

treaties ratified by Colombia," it is understood that "the case law of the international instances, in charge of interpreting those treaties, constitutes a relevant interpretative criterion to establish the meaning of the constitutional rules on fundamental rights."[341]

233. Therefore, as it has been held in the cases of Radilla Pacheco, Fernández Ortega and Rosendo Cantu, it is necessary that the constitutional and legislative interpretations regarding the material and personal competence criteria of military jurisdiction in Mexico be adjusted to the principles established in the jurisprudence of this Tribunal, which have been reiterated in the present case[342] and that are applied to every human right violation allegedly committed by members of the armed forces. This implies that, independently of the legislative reforms the State shall adopt (*infra* para. 234), in the instant case, the judiciary authorities must, based on the conventionality control, rule immediately and *ex officio* that the facts be heard by a natural judge, that is, the common criminal jurisdiction.[343]

234. On the other hand, this Tribunal recalls that it has already considered in the case of Radilla Pacheco, and reiterated in the case of Fernandez Ortega and Rosendo Cantu, that it is not necessary to order the modification of the regulatory content included in Article 13 of the Political Constitution of the United Mexican States. Despite the aforementioned, the Court stated in Chapter IX of the present Judgment that Article 57 of the Military Criminal Code is incompatible with the American Convention (*supra* para. 206). Therefore, the Court repeats the State that it has the obligation to adopt, within a reasonable period of time, the appropriate legislative reforms in order to make the mentioned provision compatible with the international standards of the field and of the American Convention, pursuant to the terms established in this Judgment.[344]

235. Lastly, according to Chapter IX of this Judgment, Messrs. Cabrera and Montiel did not have access to an adequate and effective remedy whereby it was possible to challenge the intervention of the military jurisdiction in the proceedings conducted for the alleged acts of torture committed against them (*supra* para. 204). In consequence, as it has been ordered in the cases of Fernández Ortega and Rosendo Cantu, México must adopt, also within a reasonable period of time, the corresponding legislative reforms to allow the individuals affected by the intervention of the military jurisdiction to have access to an effective remedy to challenge its competence.[345]

ii) Adapting the domestic law to the international standards regarding torture

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[341] Judgment C-010/00 issued on January 19, 2000 by the Constitutional Court of Colombia, para. 6.

[342] *Cf. Case of Radilla Pacheco v. Mexico, supra* note 302, para. 340*; Case of Fernandez Ortega et al. v. Mexico, supra* note 39, para. 237; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 220.

[343] *Cf. Case of Fernandez Ortega et al. v. Mexico, supra* note 39, para. 237; and *Case of Rosendo Cantú et al. v. Mexico*, *supra* note 30, para. 220.

[344] *Cf. Case of Radilla Pacheco v. Mexico, supra* note 302, para. 341 and 342; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, paras. 238 and 239; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, paras. 221 and 222.

[345] *Cf. Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 240; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 223.

236. The Commission requested the Court to order the State "to adopt legislative, administrative and any other similar measures in order to adapt the Mexican legislation and practices to Inter-American standards regarding torture." In turn, the representatives called the attention on the omission to classify the crime of torture in the state of Guerrero, which, according to them, "it is a flagrant violation of article 6 paragraph two of the Inter-American Convention to Prevent and Punish Torture." In this regard, the Court concluded in the above mentioned paragraphs (*supra* para. 207) that the allegations presented on this issue did not constitute a violation of Article 2 of the American Convention, which is why it is not appropriate to order a measure of reparation for this matter.

iii) Adopting a mechanism for a public and accessible registry of detainees

237. The Commission requested the "adop[tion of] the necessary measures in order to guarantee the prompt presentation of any detainee before a judge or any other official with sufficient authority to control the lawfulness of such detention."

238. The representatives requested "the creation of a public registry of detainees, which should be accessible and immediate," wherever "individuals who are charged with a crime are detained before appearing before the competent court." Such registry should specify the name of the civil servant in charge of the investigation; although the representatives recognized that there were detainees registries, they also also pointed out that "such registries do not contain, in many cases, full and truthful information [and the]y are not updated immediately; a fundamental pre-requirement for the effective protection of the human rights of detainees." Such a registry shall specify "the time, place, detention circumstances, place where the detainee shall be taken and estimated arrival time, arrival time, the detainee's procedural status, names of individuals in charge of the immediate physical custody of the detainee at all times, and names of individuals in charge of the legal custody of the detainee."

239. In their final written arguments, the representatives informed that the General Act of the Public Security National System "sets forth that an administrative registry of detainees must be kept as well as the data to be included, obtained or updated;" but the representatives also sustained that such registry "only gathers the identification data of the individual and the information about the detention, but it does not record the place where the detention authority finally sends the detainee; thus, the chain of custody of the individual as from his or her detention is not recorded. Access to information on where the detainee is to be found physically is not guaranteed either." Lastly, the representatives argued that "there is no contradiction between a public registry of detainees and their rights to [privacy and dignity]," since there could be "technical ways" to reconcile both rights and overcome the obstacle mentioned by the State.

240. In view of the above, the State alleged that the representatives recognize that a registry of detainees is kept in Mexico, with "certain characteristics that safeguard the privacy." The State sustained that the Federal Act of Transparency and Access to Public Governmental Information and its regulation determine that "the authorities are not authorized to disclose information about personal data, unless there is an express authorization by the interested party" and that "under no circumstances, can the information contained in [such registry] be provided to third parties." Likewise, the State stressed that such act also sets forth that any information that "may prevent or hinder the actions or measures implemented in order to avoid committing [crime], or the power exercised by the Public Prosecutor during the preliminary inquiry and before the courts of the Federal Judiciary" is classified. Apart from the above, it referred to the "Administrative Detention Registry," its contents, the need to update the information therein and the

corresponding provision pointing out that the "Public Prosecutor and the police shall inform to whoever requests information about the detention of an individual and, if the case may be, the authority at whose disposal such individual is to be found."

241. As seen in the annexes submitted by the State, the constitutional reform of 2008 makes reference to a registry of detainees,[346] the existence of which is not covered by eight years of *vacatio legis* established in the temporary provisions of such constitutional reform.[347] Likewise, according to the record case, in the State of Mexico there is already a registry system whose purpose is "to inform to whoever requests information about the detention of an individual."[348] Regarding the relevance of creating more public access to this registry and keeping it up to date, the United Nations Subcommittee on Prevention of Torture, in 2010, recommended:

> [T]hat the Offices of Attorney General develop a system for documenting the chain of custody of detainees, with a standardized record for logging, immediately and completely, the essential information about the deprivation of liberty of and individual and about the personnel responsible for that individual at all times, together with information on the doctors responsible for certifying the individual's physical and mental integrity. This should enable the responsible officials and the persons concerned to have access to this information, with, of course, due respect for the right to privacy and dignity of persons in custody. All entries in the record should be signed by an officer and countersigned by a superior.[349]

242. Moreover, the Court notes that under the General Act for the Public Security National System, the data in the Registry may be delivered to whoever requests information about an individual presently detained; this allows for complying with the purpose of assisting in the defense of the detainees' rights. The Tribunal considers appropriate to take measures in order to avoid that a larger publicity affects the right to the private life amongst other rights of detainees.

243. In consideration of the foregoing, the Court considers that, within the framework of the registry of detainees that is kept in Mexico at present, the following supplementary measures should be adopted so as to reinforce the operation and usefulness of said system: i) on-going updating; ii) interconnection between the database of such registry and any other existent database, so that there is a network allowing the easy identification of the place where the detainees

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[346] Paragraph five of article 16 of the Political Constitution of the United Mexican States provides that: "[I]n cases where the person has been caught *in flagrante*, any person may detain the suspect and shall, without delay, hand over the suspect to the immediate authority, which shall just as swiftly hand the suspect over to the Office of the Public Prosecutor. A registry of detainees will be created […]." Political Constitution of the United Mexican States, *supra* note 124.

[347] The transitory second article of Decree of June 18, 2008 provides, regarding the entry into force of the constitutional reform, that "[t]he criminal procedural system established in article 16, paragraphs two and thirteen; 17, paragraphs three, four and six; 19; 20 and 21, paragraph seven of the Constitution, shall enter into force when the corresponding secondary legislation establishes so, without exceeding the term of eight years, as of the following day of the publication of this Decree. […]." *Cf.* Decree by which several provisions of the Political Constitution of the United Mexican States are amended and incorporated, published in the Official Gazette of the Federation on June 18, 2008 (record of annexes to the answer to the application, annex 3, presented in digital format).

[348] Article 114 of the General Law of the National Public Security System provides that: "[t]he Public Prosecutor's Office and the police shall inform to whoever requests information about the detention of an individual and, if applicable, the authority at whose disposal such individual is to be found […]." (record of annexes of the answer to the application, annex 3, presented in digital format).

[349] *Cf.* United Nations. Subcommittee for the Prevention of Torture. Report of May 31, 2010 on the visit to Mexico (CAT/OP/MEX/1), para. 119.

are; iii) guarantee so that said registry respects the requirements for the access to information and privacy; and iv) implementation of a control mechanism for any authorities not complying with updating such mechanism.

iv) Training program for civil servants

244. The Commission requested the Court to order the Mexican State to develop "training programs for civil servants taking into account the international rules established in the Istanbul Protocol so that such civil servants can have the necessary technical and scientific elements to evaluate any possible situations of torture or cruel, inhuman or degrading treatments." The Commission also requested the Court to order the State to implement "permanent human rights education programs within the Mexican Armed Forces, at all hierarchical levels." In turn, the State sustained that "[t]he Public Prosecutor's Office of Mexico is working on the implementation of the Istanbul Protocol all over the country, training the civil servants of the Public Prosecutor's Offices in the entities of Mexico." Additionally, the State expressed that the Public Security Secretariat "through the General Direction of Human Rights conducts workshops and training programs to prevent torture when working in public security issues and to improve the implementation of the Istanbul Protocol." Moreover, the State pointed out that the 2008-2012 National Human Rights Program is providing training to public servants of the Ministerial Federal Police. Likewise, it indicated that the human rights training is being provided by means of the National Human Rights Program (PNDH), in coordination with the National Commission on Human Rights; the Workshop on Human Rights and Humanitarian Principles applicable to the political role in coordination with the International Committee of the Red Cross and through courses, workshops, international seminars and video-conferences.

245. The Court positively values the existence of various training courses and actions developed by the State. To that end, the Court considers that such actions and courses must include, as applicable, the study of the provisions established in the Istanbul Protocol. Therefore and as it has held in other cases,[350] the Tribunal establishes that the State must continue implementing permanent training programs and courses on diligent investigation in cases of cruel, inhuman or degrading treatments and torture. Such courses shall be taught to federal and Guerrero state officials and particularly to members of the Public Prosecutor's Office, the Judiciary, the Police and personnel from the health sector having competence in this type of cases and that, due to their functions, are called to assist victims alleging attacks to their personal integrity. Moreover, this Tribunal considers important to strengthen the institutional capacities of the State by means of training programs for the Mexican Armed Forces on the principles and rules governing the protection of human rights, including limitations that constrain them[351], in order to avoid the repetition of similar facts.

v) Other measures requested

246. The Commission and the representatives requested the organization of an act of public acknowledgment of state responsibility for the damage caused to the victims. In turn, the representatives requested the following additional measures of reparation: i) to organize an awareness campaign on the importance of the work done by human rights advocates in Mexico, ii) to establish an educational center

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[350] *Cf. Case of González et al ("Cotton Field") v. Mexico*, *supra* note 48, para. 541; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 245 and 246.

[351] *Cf. Case of the Rochela Massacre v. Colombia, supra* note 56, para. 303; *Case of Fernandez Ortega et al v. Mexico, supra* note 39, para. 262

close to Petatlán and Coyuca de Catalán for technical training in forestry and community management of natural resources, iii) to change the present name of "Premio al Mérito Ecológico – Categoría Social" (Award on Ecological Merit – Social Category") to "Premio al Mérito Ecológico – Campesinos Ecologistas de Guerrero" (Award on Ecological Merit – Guerrero Ecologist Peasants), and iv) to adopt measures to reunite the family of Montiel Cortés.

247. In the first place, regarding these requests, the Court considers that the issuing of the present Judgment and the reparations ordered in this chapter are sufficient and adequate for the reparation of the violations suffered by the victims.[352] On the other hand, the Tribunal has considered that several issues raised by the representatives were not included by the Commission in its application; therefore, due to procedural reasons, they were not assessed in the merits of this case. Finally, in this respect, the Court reiterates that reparations must have a causal connection with the facts of the case and the violations declared (*supra* para. 209). Therefore, the Tribunal shall not rule on the request of reparations related to facts that, due to procedural reasons, were not addressed by the Court in the instant Judgment.

D. Compensatory damages

D.1 Pecuniary damage

248. The Tribunal has developed in its case law the concept of pecuniary damage and has established that pecuniary damage involve "the loss of or detriment to the victims' income, the expenses incurred as a result of the facts and the monetary consequences that have a casual nexus with the facts of the case."[353]

249. The Commission asked the Court, "[n]otwithstanding any claims that the representatives of the victims may make at the appropriate stage in the proceedings," "and in exercise of its broad authority, to set an amount as compensation for *damnum emergens* and *lucrum cessans* based on the principle of equity."

250. The representatives pointed out that as a direct consequence of the violations suffered, the victims lost their croplands which they tilled together with their relatives. According to the representatives, Mr. Cabrera García worked on agriculture, had a house and a plot of land of two (2) hectares which he used for sowing and whose produce was used for family consumption and sale. Although the land was subject to a collective landownership system (the "ejido" – area of common land), the representatives sustained that "for all practical purposes, they belonged to [Mr. Cabrera García]." As regards Mr. Montiel Flores, the representatives indicated that Mr. Montiel Flores worked on tilling the land whose permit was obtained from the common land community [comunidad ejidal], an activity that he complemented by selling clothes together with his wife on Sundays and breeding porks for sale. These activities generated a variable income, but, in general, it was $ 800.00 Mexican pesos monthly for selling pork and $ 2,500.00 for selling clothes, i.e. $ 3,300.00 Mexican pesos, namely $ 39,600.00 Mexican pesos annually, equivalent to US$ 2,995.18 American dollars. The representatives alleged

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[352] *Cf. Case of Radilla Pacheco v. Mexico, supra* note 302, para. 359*; Case of Manuel Cepeda Vargas v. Colombia*, *supra* note 27, para. 238; and *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 267.

[353] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and Costs*. Judgment of February 22, 2002. Series C No. 91, para. 43; *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 270; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 260.

that they left the land also because they were afraid of the frightening acts caused not only by the local political bosses but also by the military. Additionally, the representatives requested the reimbursement of transportation expenses and expenses for visits to the detention centers, especially incurred by the victims' wives, which, according to the representatives, amounted approximately to US$ 1,905.49 American dollars, and together with the loss of their land, it seemed to have caused damages to the family property.

251. The State pointed out that, in this case, there were no violations of the Convention, so the compensatory reparations would not be applicable. Furthermore, since "each and every one of the amounts requested for pecuniary damages by the petitioners […] result solely and exclusively from the fact that Messrs. Montiel and Cabrera were imprisoned," there should not be any ruling for reparations due to the lack of a causal link. Likewise, the State indicated that leaving the common land seems to have occurred, as sustained by the victims' relatives, for fear of the actions adopted by the local political bosses. According to the State, "the interruption of the victims' activities [seems to have occurred] due to their participation in various serious crimes and their flagrant detention" and "not due to any violation by the Mexican State."

252. The Court notes that the representatives did not submit any documentary evidence concerning the alleged consequential damages or the loss of income suffered by Messrs. Cabrera and Montiel. The main evidence regarding this topic is testimonial evidence, which is acceptable within the circumstances of the present case, because the victims worked in the field; this can explain certain degree of informality. Furthermore, the Court considers that it is foreseeable that the effects of the violation of the right to humane treatment [personal integrity] caused several degrees of inactivity for a certain period of time.

253. The representatives only informed about the income of Mr. Montiel Flores, which was $ 3,300.00 Mexican pesos monthly, i.e. $ 39,600.00 Mexican pesos annually, equivalent to US$ 2,995.18 American dollars (*supra* para. 250). However, it springs from the case file that in his deposition before the Federal Public Prosecutor, Mr. Cabrera García said his income was, approximately, $ 50 Mexican pesos daily,[354] i.e. $ 18,250.00 Mexican pesos annually, equivalent to US$ 1,380.18 American dollars. Based on the foregoing, and taking into account the violations of the rights suffered by Messrs. Cabrera and Montiel during their imprisonment and in the judicial proceeding conducted against them, as well as the fact that they were deprived of their liberty for over two years and a half, this Court decides to set, in equity, the amount of US$ 5,500.00 (five thousand five hundred U.S. dollars) or its equivalent in Mexican pesos, as a loss of income. This amount shall be delivered to Messrs. Cabrera and Montiel, within the term established by the Court to that end (*infra* para. 268).

254. As this Tribunal has previously established, the reparations must have a causal link with the facts of the case, the alleged violations, the proven damages, as well as with the measures requested to repair the resulting damages (*supra* para. 209). Therefore, this Tribunal shall not rule on the arguments of the representatives that do not respond to the foregoing.

D.2 Non-pecuniary damage

255. The Court has developed in its case law the concept of non-pecuniary damages and has established that the non-pecuniary damage "may include both

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[354] Statement of Messrs. Cabrera and Montiel of May 6, 1999, *supra* note 132, folio 9783.

the suffering and distress caused to the direct victims and their next-of-kin, and the impairment of values that are highly significant to them, as well as other sufferings that cannot be assessed in financial terms, to the living conditions of the victims or their families."[355]

256. The Commission requested the Court "in view of the nature of the case and the seriousness of the damage caused to the victims, […] to set the amount of compensation for non-pecuniary damages based on the principle of equity."

257. The representatives indicated that "[t]he unlawful detention and torture, as well as the lack of justice and reparation, caused serious physical, psychological and emotional damages to Rodolfo Montiel and Teodoro Cabrera, but also had a serious impact on their life project," whose effects are still present. According to the representatives, the victims in this case have experienced very serious emotional symptoms such as "periods of deep sadness, anxiety, depression, headaches and changes in humor, among other symptoms," as well as symptoms related to a Post-traumatic Stress Disorder. On the other hand, the separation from their families "produced serious anguish in the victims," since they "thought that some harm could be inflicted on their relatives." Additionally, the representatives sustained that "[the alleged] criminalization context and repression of their colleagues in the OCESP" meant that they had to abandon such organization. Likewise, the representatives made reference to the moment in which the victims were unfairly imprisoned in bad confinement conditions, an issue that should be repaired.

258. The State sustained that, if the Court determines that violations were in fact committed, "the facts of this case could not give rise, under any circumstances, to non-pecuniary damages capable of being repaired by means of a sum of money." The State sustained that "it does not deny the commendable task the petitioners could perform in protecting the environment, but said issue is not pending resolution in the instant case."

259. The victims were carrying out activities within the framework of OCESP, an organization of which Mr. Montiel Flores was one of its founders. In his statement before a notary public, Mr. Cabrera García pointed out that OCESP was formed by 45 people, and that they always met "[m]ainly […] to stop trucks carrying illegal wood, without a permit."[356] In the public hearing held in this case, Mr. Montiel Flores similarly stated that "[since] 1995, [when a] foreign company […] came to Guerrero […] to operate abusively, [they] saw that it was a risk for all the inhabitants of the region and […] then they start[ed] to get organiz[ed]."[357]

260. The international case law has repeatedly established that a Judgment constitutes *per se* a form of reparation.[358] However, in view of the circumstances of the instant case, the sufferings that the violations have caused to the victims and the denial of justice, as well as the changes in the standards of living, and the

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[355] *Cf. Case of the "Street Children" (Villagrán Morales et al) V. Guatemala. Reparations and Costs, supra* note 317, para. 84; *Case of Rosendo Cantú et al V. Mexico*, *supra* note 30, para. 275; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 278.

[356] *Cf.* Statement rendered by Mr. Teodoro Cabrera Garcia before a public notary, *supra* note 147, folio 1192.

[357] *Cf.* Statement rendered by Mr. Rodolfo Montiel Flores at the public hearing, *supra* note 177.

[358] *Cf. Case of Neira Alegría et al. v. Perú. Reparations and Costs.* Judgment of September 19, 1996. Series C No. 29, para. 56; *Case of Rosendo Cantú et al V. Mexico*, *supra* note 30, para. 278; and *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 282.

other non-pecuniary consequences they bore, the Court deems it appropriate to award compensation for non-pecuniary damage, assessed on equitable grounds.[359]

261. Consequently, the Court deems pertinent to determine, in equity, the amount of US$ 20.000,00 (twenty thousand dollars of the United States of America) in favor of each one of the victims in the instant case, as compensation for non-pecuniary damage.

E. Legal Costs and Expenses

262. As held by the Court in prior cases, costs and expenses are included within the concept of reparation as enshrined in Article 63(1) of the American Convention.[360]

263. The Commission requested "the payment of the reasonable and necessary costs and expenses, duly proven, which have originated and keep originating in the processing of the case."

264. The representatives requested the Court to order the State to pay the following amounts: i) in favor of CEJIL, US$ 25,012.37 (twenty-five thousand and twelve United States dollars and thirty-seven cents) for the expenses incurred since 2001 until the presentation of the brief of pleadings and motions and US$ 17,803.725 (seventeen thousand eight hundred and three United States dollars with seven hundred and twenty-five cents) for expenses incurred after such date; and ii) in favor of Centro Prodh, US$ 13,062.13 (thirteen thousand and sixty-two United States dollars and thirteen cents) for expenses incurred from 1999 until October 31, 2009 and US$ 18,566.51 (eighteen thousand five hundred and sixty-six United States dollars and fifty-one cents) for expenses incurred after such date. Furthermore, the representatives of CEJIL indicated that they incurred in some expenses of photocopies, stationery and phone calls for an estimated amount of US$ 250 (two hundred and fifty United States dollars). Lastly, the representatives requested the Court to set an amount for future expenses related to the compliance with the Judgment. This amounts to a total of US$ 74,694.74 (seventy-four thousand six hundred and ninety-four United States dollars and seventy-four cents).

265. The State requested "to analyze and certify it with due diligence and caution, if applicable, […] in order to determine [the] legal costs."

266. Regarding the reimbursement of the legal costs and expenses, it is for the Tribunal to assess their scope prudently. This reimbursement includes the costs arising before the domestic authorities, as well as those arising during the proceedings before the Inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment must be made on an equitable

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[359] *Cf. Case of Neira Alegría et al v. Perú. Reparations and Costs, supra* note 358 para. 56; *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 278; and *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 282.

[360] *Cf. Case of Garrido and Baigorria v. Argentina, supra* note 313, para. 79; *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 280; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 284.

basis and taking into account the expenses incurred by the parties, provided their *quantum* is reasonable.[361]

267. The Court notes that the representatives incurred in various expenses before this Tribunal related to fees, gathering of evidence, transportation, communication services, *inter alia*, in the domestic and international proceedings of this case.[362] However, from the expenditure vouchers submitted by the representatives, the Court notes that some of them are not related to the instant case and other do nor correspond to expenses exclusively incurred for this case.[363] Thus, and taking into account the evidence submitted, the Court determines that the State must deliver the amount of US$ 20.658.00 (twenty thousand six hundred and fifty-eight United States dollars) in favor of CEJIL and US$ 17.307,00 (seventeen thousand three hundred and seven United States dollars) in favor of Centro Prodh as professional fees. Likewise, in conformity with the evidence submitted by the representatives, the Tribunal determines that the State must deliver the amount of US$ 17.708.00 (seventeen thousand seven hundred and eight United States dollars), in favor of CEJIL y US$ 10.042,00 (ten thousand forty-two United States dollars) in favor of Centro Prodh as expenses incurred during the proceeding. Said amounts shall be delivered within one year of notification of this Judgment (*infra* para. 268). In the procedure to monitor compliance with the instant Judgment, the Tribunal shall order the reimbursement by the State to the victims or their representatives of the reasonable expenses duly demonstrated.

F. Method of compliance with the payments ordered

268. The State should make the payment of the indemnities for the concept of pecuniary and non-pecuniary damages directly to the beneficiaries, and the reimbursement of legal costs and expenses directly to the legal representatives of CEJIL and Centro Prodh, within the period of one year, as from the time of service of the present Judgment, under the terms of the following paragraphs.

269. Should the beneficiaries die before the pertinent above compensatory amounts are paid thereto, such amounts shall be paid to the benefit of their heirs, pursuant to the provisions of the applicable domestic legislation.

270. The State must discharge its pecuniary obligations by tendering United States dollars or an equivalent amount in the Mexican legal currency, at the New

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361 *Cf. Case of Garrido and Baigorria v. Argentina, supra* note 313, para. 82; *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 284; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 313, para. 288.

362 Regarding CEJIL: air and land tickets; travel allowance of officials (transfer to the airport, *per diem*, telephone calls, lodging) and fees (ecord of annexes to the brief of pleadings and motions, volume XXII, folios 9243 to 9321); trips, salaries, stationary, expert reports, participation of expert witness at public hearing, photocopies, telephone calls (record of merits, volume VI, folios 3429 to 3468). Regarding Centro Prodh: Air and land tickets, travel allowance of officials (transfer to the airport, *per diem*, telephone calls and hotel), fees, photocopies, sending of stationary, printing (record of annexes to the brief of pleadings and motions, volume XXII, folios 9323 to 9592), trips, affidavits, salaries (record of annexes, volume VI, folios 3470 to 3675).

363 Regarding Centro Prodh: Expenses of trips to Iguala for the delivery of the award "Chico Mendes" for the case of *Campesinos Ecologistas* [Environmentalist peasants] (record of annexes to the brief of pleadings and motions, volume XXII, folio 9477); expenses of trips to Iguala for the delivery of the award of *Fundacion Goldman* to Rodolfo Montiel (record of annexes to the brief of pleadings and motions, volume XXII, folio 9548); invoice of medical care (record of annexes to the brief of pleadings and motions, volume XXII, folios 9460- 9461), invoice of medical care (eyegasses) (record of annexes to the brief of pleadings and motions, volume XXII, folios 9475-9476), and invoices of health care service and bacteriological tests (record of annexes to the brief of pleadings and motions, volume XXII, folios 9482- 9486). Moreover, ultrasound exam of Mr. Cabrera Garcia (record of the merits, volume VI, folio 3659).

York, USA exchange rate between both currencies prevailing on the day prior to the day payment is made.

271. If, due to reasons attributable to the beneficiaries of the above compensatory amounts or their heirs, respectively, they were not able to collect them within the period set for that purpose, the State shall deposit said amounts in an account held in the beneficiaries' name or draw a certificate of deposit from a reputable Mexican financial institution, in US dollars and under the most favorable financial terms allowed by the legislation in force and the customary banking practice in Mexico. If after ten years compensation set herein were still unclaimed, said amounts plus accrued interests shall be returned to the State.

272. The amounts allocated in this Judgment as compensation shall be delivered to the victims in their entirety in accordance with the provisions herein. The amounts allocated in this Judgment as reimbursement of costs and expenses shall be delivered directly to the legal representatives of CEJIL and Centro Prodh. These amounts may not be affected, reduced, or conditioned on account of current or future tax purposes.

273. Should the State fall into arrears with its payments, the United Mexican States banking default interest rates shall be paid on the amounts due.

XI
OPERATIVE PARAGRAPHS

274. Therefore:

THE COURT,

DECIDES,

By unanimous vote,

1. To dismiss the preliminary objection of "fourth instance" raised by the State, in accordance with paragraphs 16 to 22 of this Judgment.

DECLARES,

Unanimously that:

2. The State is responsible for the violation of the right to personal liberty, enshrined in articles 7(3), 7(4) and 7(5) in conjunction with articles 1(1) of the American Convention on Human Rights, to the detriment of Messrs. Teodoro Cabrera Garcia and Rodolfo Montiel Flores, according to the terms of paragraphs 93 to 102, 105 to 106 and 133 to 137 of this Judgment.

3. The State is responsible for the violation of the right to humane treatment [personal integrity], enshrined in articles 5(1) and 5(2) in conjunction with articles

1(1) of the American Convention on Human Rights, for the cruel, inhuman and degrading treatment afforded to Messrs. Teodoro Cabrera Garcia and Rodolfo Montiel Flores, according to the terms of paragraphs 100 to 125 of this Judgment.

4. The State has failed to comply with the obligation to investigate the alleged acts of torture, in the terms of Articles 5(1) and 5(2), in conjunction with Article 1(1) of the American Convention on Human Rights and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Messrs. Teodoro Cabrera Garcia and Rodolfo Montiel Flores, in accordance the paragraphs 126 to 132 of this Judgment

5. The State is responsible for the violation of the principle of freedom from *ex post facto laws*, enshrined in article 8(3), in conjunction with article 1(1) of the American Convention on Human Rights, to the detriment of Messrs. Teodoro Cabrera Garcia and Rodolfo Montiel Flores, according to the terms of paragraphs 165 to 177 of this Judgment.

6. The State is responsible for the violation of the right to a fair trial [judicial guarantees] and judicial protection, enshrined in Articles 8(1) and 25(1), respectively, in conjunction with Articles 1(1) and 2 of the American Convention on Human Rights, for having submitted the hearing of the alleged torture to the criminal military jurisdiction, to the detriment of Messrs. Teodoro Cabrera García and Rodolfo Montiel Flores, in accordance with paragraphs 197 to 201, 203 to 204 and 205 to 206 of this Judgment.

7. It does not correspond to issue a ruling on the alleged violations of the right to humane treatment [personal integrity] and freedom of association, embodied in articles 5(1) and 16 of the American Convention on Human Rights, to the detriment of the relatives of Messrs. Teodoro Cabrera Garcia and Rodolfo Montiel Flores and to their detriment, respectively, according to the terms of paragraphs 56 to 60 of this Judgment.

8. The State has failed to comply with the obligation contained in article 2, in connection with articles 8 and 25 of the American Convention on Human Rights, by extending jurisdiction of the military courts over crimes that are not closely related to the military discipline or legal interests typical of the military, according to the terms of paragraph 206 of this Judgment.

9. The State is not responsible for the violation of the right to defense, embodied in article 8(2)(d) of the American Convention on Human Rights, to the detriment of Messrs. Teodoro Cabrera Garcia and Rodolfo Montiel Flores, under the terms of paragraphs 154 to 162 of this Judgment.

10. The State is not responsible for the violation of the principle of presumption of innocence, embodied in article 8(2) of the American Convention on Human Rights, to the detriment of Messrs. Teodoro Cabrera Garcia and Rodolfo Montiel Flores, under the terms of paragraphs 182 to 186 of this Judgment.

AND ORDERS,

Unanimously that:

11. This Judgment is in itself a form of redress.

12. The State must, within a reasonable time, effectively conduct a criminal investigation into the facts of the instant case, particularly into the alleged acts of torture committed against Messrs. Cabrera and Montiel, to determine the corresponding criminal liability and, if applicable, effectively impose the penalties and consequences established by the law; as well as to adopt the pertinent disciplinary, administrative or criminal measures in the event that in the investigation into said facts, procedural or investigative irregularities are proven in relation thereto, according to paragraph 215 of this Judgment.

13. The State must, within the term of six months, make the publications ordered, in accordance with paragraph 217 of this Judgment.

14. The State must allocate to each one of the victims only once, within the term of two months, the amount established in paragraph 221 of this Judgment, for specialized medical and psychological treatment, as well as medicines and other related future expenses.

15. The State must make, within a reasonable time, the appropriate legislative reforms in order to bring article 57 of the Code of Military Justice into line with the international standards on the subject and the American Convention on Human Rights, as well as to make the pertinent legislative reforms so that the people subjected to the intervention of the military jurisdiction have an effective recourse to challenge such jurisdiction, according to the terms of paragraph 235 of this Judgment.

16. The State must adopt, within a reasonable period of time and within the framework of the registry of detainees that is kept in Mexico at present, the appropriate supplementary measures so as to reinforce the operation and usefulness of said system, according to the terms of paragraph 243 of this Judgment.

17. The State must continue to implement training programs and permanent courses on diligent investigation in cases of cruel, inhuman or degrading treatment and torture, as well as to strengthen the institutional capacities of the State by means of the training programs for the Mexican Armed Forces on the principles and rules governing the protection of human rights, including limitations that constrain them, according to paragraph 245 of this Judgment.

18. The State must pay the amounts set in paragraphs 253 and 261 of this Judgment, as compensation for pecuniary and non-pecuniary damage and reimbursement of legal costs and expenses, if applicable, within the term of one year, under the terms of paragraphs 260 to 261 herein.

19. The Court shall monitor full compliance with this Judgment, by virtue of its authority and in compliance with its duties according to the American Convention on Human Rights, and shall consider this case closed once the State has fully complied with what was decided in this Judgment. Within the term of one year as from the date notice of the Judgment is served, the State shall submit to the Tribunal a report on the measures adopted in order to comply with the Judgment.

Ad hoc Judge Eduardo Ferrer Mac-Gregor Poisot advised the Court of his Concurring Opinion, which accompanies this Judgment.

Written in Spanish and English, the Spanish text being the official version, in San José, Costa Rica, on November 26, 2010.

Diego García-Sayán
President

Leonardo A. Franco Robles

Manuel E. Ventura

Margarette May Macaulay Blondet

Rhadys Abreu

Alberto Pérez Pérez

Eduardo Vio Grossi

Eduardo Ferrer Mac-Gregor Poisot
Ad hoc Judge

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE *AD HOC* EDUARDO FERRER MAC-GREGOR POISOT IN REGARD TO THE JUDGEMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE *CASE OF CABRERA GARCÍA AND MONTIEL FLORES V. MEXICO*, OF NOVEMBER 26, 2010

I. INTRODUCTION

1. The Inter-American Court of Human Rights (hereinafter the "I/A Court of H.R" or the "Inter-American Court") has reiterated in the case at hand, unanimously, its doctrinal jurisprudence on the "control of compliance." I find it timely to issue this concurring opinion in order to highlight new considerations and clarifications that are rendered on this doctrine in this Judgment, as well as to emphasize its importance for the Mexican judicial system, and in general, for the future of the Inter-American System for the Protection of Human Rights.

2. As the judges that makeup the I/A Court of H.R. in the present matter, we deliberated on several aspects of the "control of compliance" at two different times, as is evident from the two separate sections of the Judgment rendered in the *Case of Cabrera García and Montiel Flores v. Mexico* (hereinafter "the Judgment"). First, upon dismissing the preliminary objection raised by the respondent State, regarding the alleged lack of jurisdiction of the I/A Court of H.R. as a "court of appeals" or "fourth instance";[1] second, upon establishing the measures of reparation that stemmed from the violations to certain international obligations, particularly in the chapter on "Guarantees of non-repetition" and specifically in the section on the necessary "Adaptation of domestic law to international standards of justice."[2]

3. To provide more clarity, we will address the following separately: a) the preliminary objection that considered the I/A Court of H.R. lacked jurisdiction based on an argument of "fourth instance" due to the domestic courts use of the "control of compliance" (paras. 4 to 12); b) the principal characteristics of the "diffused control of compliance" and its details in the present case (paras. 13 to 63); c) the implications of this doctrinal jurisprudence in the Mexican rules of procedure (paras. 64 to 84), and d) some general conclusions on the importance of this fundamental doctrine of the I/A Court of H.R., which in a progressive manner

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[1] *Cf. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgement of November 26, 2010, para. 12 to 22.

[2] *Case of Cabrera García and Montiel Flores v. Mexico, supra* note 1, para. 224 to 235.

is creating a *ius constitutionale commune* in the subject of human rights for the American continent, or at least, for Latin America (paras. 85 to 88).

II. PRELIMINARY OBJECTION OF "FOURTH INSTANCE" AND "CONTROL OF COMPLIANCE"

4. The respondent State asserted the preliminary objection of the I/A Court of H.R.'s lack of jurisdiction given that it considered that what was intended for the international instance consisted in reviewing the criminal procedures that were followed by all competent judicial instances at the domestic level, where remedies (appeals) were also filed, as were amparo appeal hearings; moreover, it is affirmed that the "control of compliance" was exercised *ex officio,* which makes the Inter-American Court incompetent in that it cannot "review" that which was adjudicated and decided previously by the domestic judges whom applied conventional parameters, that is, parameters that fall within treaty obligations. This argument regarding the prior exercise of the "control of compliance" in the domestic forum, as a preliminary exception, is innovative and was the subject of special attention by the judges of the I/A Court of H.R.

5. In principle, we must remember that the I/A Court of H.R. has held that "if the State has violated its international obligations due to the actions of its judicial bodies, this may lead the [Inter-American] Court to examine the respective domestic processes to establish their compatibility with the American Convention,[3] that which may possibly include the decisions of higher courts."[4]

6. In this regard, although there is constant jurisprudence on preliminary objections regarding the "fourth instance," this is the first time that it is argued that domestic courts effectively exercised the "control of compliance" in an ordinary [civil] process that was followed in all the instances, including the ordinary and extraordinary remedies filed, which cannot thereby be analyzed by the judges of the Inter-American Court upon implying a revision of that decided by the domestic courts that applied Inter-American norms. As such, the I/A Court of H.R. reiterates that although international protection in the form of a convention reinforc[es] or complement[s] the protection provided by the domestic law of the American states," as stated in the Preamble to the American Convention on Human Rights (principle of subsidiarity that has also been recognized from its initial jurisprudence),[5] the fact is that in order to carry out an evaluative analysis of the compliance with certain international obligations, "there is an intrinsic relationship between an analysis of international and domestic law." (para. 16 of the Judgment).

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[3] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 222; *Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 6, 2009. Series C No. 200, para. 44, and *Case of Da Costa Cadogan v. Barbados. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 24, 2009, Series C No. 204, para. 12.

[4] *Cf. Case of Gomes Lund et al. ("Guerrilha do Araguala") v. Brazil. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 24, 2010, para. 49.

[5] *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 61: "The rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its domestic law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter 'reinforces or complements' the domestic jurisdiction (American Convention, Preamble)."

7. This "interaction" becomes, in reality, a "live interaction"[6] with intense communicating vessels that bring about "jurisprudential dialogue," in the sense that both jurisdictions (the domestic and the international) must, necessarily, head to "domestic" and "conventional" norms under certain circumstances. This occurs, for example, regarding the legality of a detention. The action taken by domestic bodies (including the judges), in addition to applying the norms required by the domestic forum, are required to follow the guidelines and rules of those international treatises that the State, in use of its sovereignty, expressly recognized and whose international commitment it assumed. In turn, the international forum must assess the legality of the detention in light of the domestic norms, given that the American Convention itself turns to the domestic legislation in order to examine the conformity with the convention of the actions taken by the domestic authorities, since Article 7(2) of the Pact of San Jose turns to "the constitution of the State Party concerned or by a law established pursuant thereto" in order to better decide on the legality of the detention as a parameter of conformity with the convention. The domestic judges, on the other hand, must comply with the other provisions enshrined in Article 7 itself so as to not violate the conventional right to personal liberty, also heading to the interpretation that the I/A Court of H.R. has carried out regarding the provisions of said numeral.

8. So as to determine whether the actions of national judges are compatible with the Pact of San José, in certain cases it will be necessary to analyze their actions in light of domestic norms and always heading to the American Convention, especially in order to assess what might be called "the conventional due process standard" (in broad terms).[7] This analysis, therefore, can not constitute a "threshold issue," but rather it essentially represents a "decision on the merits," where the issue will be discussed, *inter alia*, of whether an exercise of "the control of compliance" by domestic courts was compatible with the obligations undertaken by the respondent State and in light of Inter-American jurisprudence itself.

9. The prior considerations, of course, do not grant absolute jurisdiction to the I/A Court of H.R. to review, in any case or circumstance, the actions of the domestic judges in light of the domestic legislation, each time this implies a reexamination of the facts, assess the evidence, and render a judgment that may possibly serve to confirm, modify, or reverse a domestic verdict; an issue that clearly exceeds the competence of said international jurisdiction upon substituting

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[6] Statement by the current president of the I/A Court of H.R., Diego García-Sayán; *Cf.* His work, "Una Viva Interacción: Corte Interamericana y Tribunales Internos", [A Live interaction: Inter-American Court and Domestic Tribunals] in the *Inter-American Court of Human Rights: a Quarter Century: 1970-2004,* San José, Inter-American Court of Human Rights, 2005, pp. 323-384.

[7] Eventhough "due process" is not stated in an express manner in the American Convention, all the rights of the Pact and the development of the jurisprudence of the I/A Court of H.R., have cerated, in its entirety, what might be called "the due process standard" composed of various rights. In an interesting concurring opinion, Sergio García Ramírez notes that "[...] Among the issues examined most frequently by the Inter-American Court is the so-called due process of law, a concept developed by Anglo-American case law and regulations. The Pact of San José does not invoke "due process" literally. However, with other words, it organizes the system of hearing, defense and decision contained in that concept. It fulfills this mission – essential for the protection of human rights – in different ways and with different provisions, including Article 8, which is entitled "Right to a Fair Trial" (Note: "Judicial Guarantees" in Spanish). The purpose of this article is to ensure that the State bodies called on to determine an individual's rights and obligations – in many aspects – will do so using a procedure that provides the individual with the necessary means to defend his legitimate interests and obtain duly reasoned and justified rulings, so that he is protected by the law and safeguarded from arbitrariness. (Para. 3, of the concurring opinion formulated, in relation to the Judgment in the *Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151).

it for the domestic jurisdiction and violates its essential subsidiary and complimentary nature. Thus, the conventional guarantees rest on the "principle of subsidiarity" mentioned prior, recognized expressly in Articles 46(1)(a) of the American Convention itself, which enshrines as a requisite for the Inter-American bodies, "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law"; a rule which compliments provision 61(2) of the same Pact, by explicitly providing as a condition for action, that "[i]n order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 [be] completed." (referring to the procedure before the Inter-American Commission on Human Rights).

10. The I/A Court of H.R. does not have jurisdiction to become a "new and last resort" in order to resolve the original arguments of the parties from a domestic proceeding. This is clear to the Inter-American Court as it cannot be otherwise. The lucid reflections of an outstanding Inter-American judge are relevant regarding this issue:[8]

> The Inter-American Court, which is responsible for performing a "control of compliance" based on the confrontation of the facts at stake and the provisions of the American Convention, cannot and does not intent –indeed, it never did- to become a new and last resort to hear a controversy originated in the domestic jurisdiction. The idea that the Inter-American Court constitutes a third or fourth instance, and eventually a jurisdiction of last resort, arises from a popular belief that is rooted in reasonable grounds; however, this idea has absolutely no connection with the jurisdiction of the Court, the legal conflict brought before it, the parties to the corresponding proceedings and the nature of international proceedings for the protection of human rights. (underlining added)

11. Therefore, it is deemed that the Inter-American Court has jurisdiction, in certain cases, to review the actions of domestic judges, including the proper exercise of the "control of compliance," provided that the analysis is derived from an examination carried out regarding the compatibility of domestic actions in light of the American Convention on Human Rights, of its additional Protocols, and of its conventional jurisprudence; without this turning the Inter-American Court into a "court of appeals" or court of "fourth instance," *because its actions are limited to the analysis of certain violations of the international commitments made by the respondent State in each particular case, and not of each and every one of the actions of domestic judicial bodies*, which obviously in this latter case would mean to replace the domestic jurisdiction, violating the very essence of the reinforcing and complementary nature of the international tribunals.

12. On the contrary, the I/A Court of H.R. has jurisdiction to hear "matters related to the compliance of the commitments made by State parties";[9] being that the principal objective of the Inter-American Court is "the application and interpretation of the American Convention on Human Rights,"[10] from where it derives its jurisdiction to also analyze the due exercise of the "control of compliance" by the domestic judge *when there are violations of the Pact of San Jose,* an analysis that conventional judge shall carry out, necessarily, upon deciding

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[8] Para. 3 of the concurring opinion of Judge Sergio García Ramírez, for the judgment issued in the *Case of Vargas Areco v. Paraguay. Merits, Reparaciones y Costas*, of September 26, 2006. Series C No. 155.

[9] Article 33 of the American Convention on Human Rights.

[10] Article 1 of the Statute of the Inter-American Court of Human Rights.

the "merits" of the matter and not as an issue of a "preliminary objection," as that is where the "examination of conformity with the convention" of the domestic actions taken in light of the American Convention are carried out, as well as the interpretation made of it by the I/A Court of H.R.

III. THE DOCTRINE OF THE "DIFFUSED CONTROL OF COMPLIANCE" AND ITS SPECIFICATIONS IN THE PRESENT CASE

A. RISE AND REITERATION OF THE DOCTRINE

13. The doctrine of the "control of compliance" arose in 2006[11] in the *Case of Almonacid Arellano v. Chile:*[12]

> 123. The above mentioned legislative obligation established by Article 2 of the Convention is also aimed at facilitating the work of the Judiciary so that the law enforcement authority may have a clear option in order to solve a particular case. However, when the Legislative Power fails to set aside and / or adopts laws which are contrary to the American Convention, the Judiciary is bound to honor the obligation to respect rights as stated in Article 1(1) of the said Convention, and consequently, it must refrain from enforcing any laws contrary to such Convention. The observance by State agents or officials of a law which violates the Convention gives rise to the international liability of such State, as contemplated in International Human Rights Law, in the sense that every State is internationally responsible for the acts or omissions of any of its powers or bodies for the violation of internationally protected rights, pursuant to Article 1(1) of the American Convention. [13]
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> 124. The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "conventionality control [control of compliance]" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention. (underlining added).

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[11] Previosly, the "control of compliance" has been referenced in some concurring opinions by the judge Sergio García Ramírez. *Cf.* His opinions in the *Case of Myrna Mack Chang v. Guatemala*, resovlved on November 25, 2003, para. 27; *Case of Tibi v. Ecuador,* of September 7, de 2004, para. 3; *Case of Vargas Areco v. Paraguay, supra* note 8, para. 6 and 12.

[12] *Case of Almonacid Arellano v. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 123 to 125.

[13] *Cf. Case of Ximenes Lopes v. Brazil. Merits, Reparations and Costs*. Judgment of July 4, 2006. Series C No. 149, para. 172; and *Case of Baldeón García v. Perú. Merits, Reparations and Costs.* Judgment of April 6, 2006. Series C No. 147, para. 140.

> 125. By the same token, the Court has established that "according to international law, the obligations that it imposes must be honored in good faith and domestic laws cannot be invoked to justify their violation."[14] This provision is embodied in Article 27 of the Vienna Convention on the Law of Treaties, 1969.

14. The prior precedent was reiterated with some variation, two months later, in the *Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru.*[15] Here, in this ruling, the standards in the *Case of Almonacid Arellano* are used in what regards the "control of compliance" and it "specifies" it in two ways: (i) it should proceed "ex officio," without the parties requesting it; and (ii) it should be exercised in the context of their respective spheres of competence and the corresponding procedural regulations, considering other formal and material plans regarding admissibility.

15. Since then, the essence of this doctrine has been growing stronger, upon being applied to the following contentious cases: *La Cantuta v. Perú* (2006);[16] *Boyce et al. v. Barbados* (2007);[17] *Heliodoro Portugal v. Panamá* (2008);[18] *Rosendo Radilla Pacheco v. the United Mexican States* (2009);[19] *Manuel Cepeda Vargas v. Colombia* (2010);[20] *The Xákmok Kásek Indigenous Community v. Paraguay* (2010);[21] *Fernández Ortega et al. v. México* (2010);[22] *Rosendo Cantú et al. v. México* (2010);[23] *Ibsen Cárdenas and Ibsen Peña v. Bolivia* (2010);[24] *Vélez*

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[14] *Cf. International Responsibility for the Issuance and Application of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94 of December 9, 1994, Series A No. 14, para. 35.

[15] *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Perú. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2006. Series C No. 158, para. 128: When a State has ratified an international treaty such as the American Convention, the judges are also subject to it; this obliges them to ensure that the *effet util* of the Convention is not reduced or annulled by the application of laws contrary to its provisions, object and purpose. In other words, the organs of the Judiciary should exercise not only a control of constitutionality, but also of "conventionality[compliance]"[15] *ex officio* between domestic norms and the American Convention; evidently in the context of their respective spheres of competence and the corresponding procedural regulations. This function should not be limited exclusively to the statements or actions of the plaintiffs in each specific case, although neither does it imply that this control must always be exercised, without considering other procedural and substantive criteria regarding the admissibility and legitimacy of these types of action. (underlining added).

[16] *Case of La Cantuta v. Perú*. *Merits, Reparations and Costs.* Judgment of November 29, 2006. Series C No. 162, para. 173.

[17] *Case of Boyce et al. v. Barbados*. *Preliminary Exception, Merits, Reparations and Costs.* Judgment of November 20, 2007. Series C No. 169, para. 79.

[18] *Case of Heliodoro Portugal v. Panamá. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 12, 2008. Series C No. 186, para. 180.

[19] *Case of Rosendo Radilla Pacheco v. United Mexican States. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2009. Series C No. 209, para. 339.

[20] *Case of Manuel Cepeda Vargas v. Colombia. Preliminary Exceptions, Merits and Reparations*. Judgment of May 26, 2010. Series C No. 213, para. 208, note 307.

[21] *Indigenous Community Xákmok Kásek v. Paraguay. Merits, Reparations and Costs.* Judgment of August 24, 2010. Series C No. 214, para. 311.

[22] *Case of Fernández Ortega et al. v. México*. *Preliminary Exception, Merits, Reparations and Costs*. Judgment of August 30, 2010. Series C No. 215, para. 234.

[23] *Case of Rosendo Cantú et al. v. México*. *Preliminary Exception, Merits, Reparations and Costs*. Judgment of August 31, 2010. Series C No. 216, para. 219.

Loor v. Panamá (2010);[25] *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil* (2010),[26] and now, *Cabrera García and Montiel Flores v. México* (2010).[27]

16. Moreover, the doctrinal jurisprudence was also applied in the orders for monitoring of compliance of the judgments, in the *Cases of Fermín Ramírez, and Raxcacó Reyes,* as well as in the request for "expansion of provisional measures" in *Raxcacó Reyes et al. v. Guatemala.*[28] It has also been a cause for profound reflection by some of the judges of the I/A Court of H.R. in casting their concurring opinions, to include former presidents García Ramírez,[29] and Cançado Trindade,[30] as well as *ad hoc* judge Roberto de Figueiredo Caldas,[31] to which I will refer to later.

B. CONTRIBUTIONS IN THE CASE OF CABRERA GARCÍA AND MONTIEL FLORES

17. Regarding the Judgment to which this concurring opinion corresponds, the essence of the doctrine of "control of compliance" is reiterated with some precisions that are of relevance, in the following terms:

> 225. This Court has held in its case law that it is aware that domestic authorities are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system.[32] But when a State has ratified an international treaty such as the American Convention, <u>all its bodies, including its judges,</u> are also bound by such Convention, which forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and end. The Judiciary, in all its levers, must exercise *ex officio* a sort of "conventionality control" between the domestic legal provisions and the American Convention, evidently within the framework of their respective

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[24] *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations and Costs*. Judgment of September 1, 2010. Series C No. 217, para. 202.

[25] *Case of Vélez Loor v. Panamá. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 23, 2010. Series C No. 218, para. 287.

[26] *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 24, 2010. Series C No. 219, para. 106.

[27] *Case of Cabrera García and Montiel Flores v. Mexico*, *supra* note 1, para. 225.

[28] Matter of the Inter-American Court of Human Rights of May 9, 2008, para. 63.

[29] In addition to the concurring opinions reffered *supra* note 11, see also the votes subsequent to the *leading case Almonacid Arellano*, issued reflecting on the "control of conformity with the Convention": *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Perú, supra* note 15, para. 1 to 13 of concurring opinion; and *Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations and Costs*. Judgment of November 27, 2008. Series C No. 192, para. 3 of the concurring opinion.

[30] *Cf.* Its concurring opinion in the *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Perú, supra* note 15, particularly paras. 2 and 3 of its opinion; as well as the request for interpretation of the Judgment rendered in said case, on November 30, 2007, particularly paras. 5 to 12, 45 and 49, of its dissenting opinion.

[31] *Cf.* Its concurring opinion in the *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. supra* note 4, paras. 4 and 5.

[32] *Cf. Case of Almonacid Arellano et al v. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 124; *Case of Rosendo Cantú et al v. Mexico*, *supra* note 30, para. 219; and *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 202.

> competence and the corresponding procedural rules. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention. (Underlining added).

18. As is evident, the I/A Court of H.R. clarifies its doctrine on the "control of compliance," by substituting the statements regarding the "Judicial Branch" that appeared since the *leading case* of *Almonacid Arellano v. Chile* (2006), and now, it alludes to "all of the bodies" of the State that have ratified the American Convention, "including its judges," all of which should fight for the *effet utile* of the Pact, and that the "judges and bodies linked to the administration of justice at all levels" are obligated to exercise, *ex oficio*, "the control of compliance."

19. The intent of the I/A Court of H.R. is clear: to define that the doctrine of "control of compliance" should be exercised by "all judges," regardless of their formal membership in the Judiciary Branch, and regardless of their rank, grade, level or area of expertise.

20. Thus, there is no doubt that the "control of conventionality" must be carried out by *any and all judges or courts that materially perform judicial functions*, including, of course, the Courts, Chambers or Constitutional Courts, and the Supreme Courts of Justice and other high judicial bodies of the twenty-four countries have signed and ratified or acceded to the American Convention on Human Rights, [33] and even more so, of the twenty states that have recognized the contentious jurisdiction of the I/A Court of H.R. [34], a total of thirty-five countries that make up the OAS.

C. CHARACTERIZATION OF THE "DIFFUSED CONTROL OF COMPLIANCE" IN LIGHT OF THE DEVELOPMENT OF ITS JURISPRUDENCE

a) "Diffused" nature: all domestic judges "must" exercise it

21. This involves, in all actuality, a "**diffused control of conformity with the Convention,"** given that *it must be exercised by all domestic judges.* As a consequence, there exists an assimilation of concepts regarding Constitutional Law, that which has been present since the beginning and in the development of the International Law of Human Rights, particularly in the creation of the international "guarantees" and "bodies" for the protection of human rights. There is clearly an "internationalization of Constitutional Law," particularly in what regards the transport of "constitutional guarantees" as procedural instruments for the protection of fundamental rights and the safeguarding of "constitutional supremacy," to that of "the conventional guarantees," as judicial and quasi-judicial mechanisms for the protection of the human rights enshrined in the international pact when the other has not been sufficient; as such, in some way, there is also a "conventional supremacy."

22. One of the manifestations of this process of "internationalization" of the constitutional categories is, precisely, the diffused concept of conformity with the

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[33] Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominicana, Ecuador, El Salvador, Guatemala, Haití, Honduras, Jamaica, México, Nicaragua, Panamá, Paraguay, Perú, Domincan Republic, , Suriname, Uruguay and Venezuela. Trinidad and Tobago denounced the American Convention on Human Rights.

[34] The States mentioned in the foregoing note, with the exception of the Domincan Republic and Jamaica (which to date have not accepted said jurisdiction) and Trinidad and Tobago (denounced in 1999).

convention that we are analyzing, given that part of the deeply rooted connotation of the "diffused control of conformity with the Convention" is in comparison to the "concentrated control" carried out in the constitutional States by its highest "constitutional judicial entities," upon which the Tribunals, Courts, or Constitutional Chambers, and in some cases the Supreme Courts and other high judicial bodies, have the last constitutional interpretation. Thus, the "concentrated control of conformity with the Convention" has been developed by the I/A Court of H.R. since its very first judgments, submitting the actions and norms of the State, in each particular case, to an examination of said conformity. That "concentrated control" was carried out, fundamentally, by the I/A Court of H.R.. Now, it has been transformed into a "diffused control of conformity with the Convention" by extending said "control" to all the domestic judges as a requirement for action within the domestic forum, although the I/A Court of H.R. retains its power as "last interpreter of the American Convention" when the effective protection of human rights in the domestic forum is not achieved.[35]

23. It involves an "extensive system of control (vertical and general)" as has been rightly highlighted by the former Inter-American judge Sergio García Ramírez. In this regard, his reflections are illustrative, those of which are expressed in his concurring opinion in the Judgment rendered in the *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru:*[36]

> 4. On other occasions, I have compared the function of international human rights tribunals to the mission of national constitutional courts. The latter are responsible for safeguarding the rule of law through their decisions concerning the subordination of acts of governmental authorities to the supreme law of the nation. A case law of principles and values (principles and values of the democratic system) has arisen in the development of constitutional justice, which illustrates the direction taken by the State, provides security to the individual, and establishes the route and the boundaries for the work of the State's organs. Considered from another angle, the control of constitutionality, as an assessment of and a decision on the act of the governmental authority put on trial, is entrusted to a high-ranking organ within the State's jurisdictional structure (concentrated control) or assigned to diverse jurisdictional bodies in the case of matters they hear pursuant to their respective competences (diffuse[d] control).
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> 12. This control of "conventionality" [control for conformity with the convention]– on the successful results of which the increased dissemination of the regime of guarantees depends – can have (as has occurred in some countries) a diffuse[d] nature; in other words, it can be in the hands of all the courts when they have to decide cases in which the provisions of international human rights treaties are applicable.
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> 13. This would allow an extensive (vertical and general) system of control of the legality of the acts of governmental authorities to be drawn up – as regards the conformity of such acts to international human rights norms – without prejudice to the fact that the source of interpretation of the

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[35] *Cf.* Ferrer Mac-Gregor, Eduardo, "El control difuso de convencionalidad en el Estado constitucional", [The diffused control of conformity with the Convention in the constitutional State] in Fix-Zamudio, Héctor, and Valadés, Diego (coords.), *Formación y perspectiva del Estado mexicano,* [Formation and persepective of the Mexican State] México, El Colegio Nacional-UNAM, 2010, pp. 151-188.

[36] *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Perú*, *supra* note 15, para. 4, 12, and 13 of the concurring opinion.

> relevant international provisions is where the States have deposited it when setting up the protection system established in the American Convention and in other instruments of the regional *corpus juris*. I consider that this extensive control – to which the control of "conventionality" corresponds – is among the most relevant tasks for the immediate future of the inter-American system for the protection of human rights. (underlining added)

24. The "diffused control or diffused control of conformity with the Convention" converts the domestic judge into an Inter-American judge: in the first and true guardian of the Convention, its Additional Protocols (possibly other instruments) and the jurisprudence of the I / A Court of HR that interprets that law. The domestic judges and bodies charged with the administration of justice have the important mission of safeguarding the fundamental rights, not only of fundamental rights under the domestic forum, but also of the set of values, principles, and human rights that the State has recognized in international instruments and whose international commitment it has assumed. The domestic judges become the first interpreters of international norms if the subsidiary, complementary, and contributory nature of the Inter-American bodies are considered with respect to those provided in the domestic forum of American States and the new "mission" that they now have to safeguard the inter-American *corpis juris* through this new "control."

25. This evolving process of domestic reception of international law of human rights is clearly expressed in important legislative reforms in the national States, upon incorporating different constitutional clauses in order to receive the influx of International Law. This occurs with the recognition of the constitutional hierarchy of the international human rights treatises,[37] or also by accepting their supraconstitutional nature when they are more favorable;[38] the recognition of their specificity in this matter;[39] the acceptance of the *pro homine* or *favor libertatis* principles as interpretive national criteria;[40] the incorporation of "open clauses" for receiving other rights under convention regulations; [41] or in constitutional clauses to interpret the rights and freedoms "in accordance with" international human rights instruments, [42] among other scenarios.[43] Thus, the norms of the convention acquire constitutional status.

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[37] In an explicit manner, for example, in Argentina (art. 73) and the Domincan Republic (art. 74(3), of the new Constitution proclaimed in January 2010).

[38] Bolivia (art. 256); Ecuador (art. 424); and Venezuela (art. 23).

[39] With independance of the normative heirarchy provided, an important number of constitutional texts recognize some type of specificity to the international treatises on human rights, for example, in Argentina, Bolivia, Chile, Ecuador, Guatemala, Colombia, Paraguay, Perú, Dominican Republic and Venezuela. Moreover, in the Federal Mexican Entities of Sinaloa, Tlaxcala, and Querétaro.

[40] For example, in Peru (art. Fourth); Ecuador (art. 417); and in the new Constitution of the Dominican Republic, of January 2010 (art. 74.4).

[41] For example, Brazil (Article 5.LXXVII.2), Bolivia (art. 13.II), Colombia (art. 94), Ecuador (art. 417), Panamá (art. 17), Perú (art. 3), Dominican Republic (art. 74.1) y Uruguay (art. 72).

[42] For example, Bolivia (art. 13.IV), Colombia (art. 93), Haití (art. 19) and in the Federal Mexican Entities of Sinaloa (4º Bis C), Tlaxcala (Article 16 B) and Querétaro (Considerando 15).

[43] On the "interpretation pursuant" to the international pacts, see Caballero, José Luis, *La incorporación de los tratados internacionales sobre derechos humanos en México y España,* [The incorporation of international treatises on human rights in Mexico and Spain], México, Porrúa, 2009.

26. The development illustrated of incorporation of international human rights at the national level, is also due to the domestic jurisdictions, especially the high constitutional judicial bodies, which have progressively favored dynamic interpretations that promote and enable the reception of human rights established in international treaties.[44] A true "constitutional block" forms, which although it varies from country to country, the tendency is to not only consider human rights enshrined in international covenants, but also to consider the jurisprudence of the I/A Court of H.R. Thus, sometimes the "block of conformity with the convention" is subsumed in the "constitutional block", to which upon assuring the "constitutional control," the "control of conformity with the Convention" is also effectuated.

27. Specifically, the I/A Court of H.R. in paragraphs 226 to 232 of the Judgment so referred to in this concurring opinion, has attempted to demonstrate the way in which the tribunals of "the highest hierarchical level" have applied and accepted the "control for conformity with the convention," in consideration of Inter-American jurisprudence. It represents a clear manifestation of this interesting process of "reception at the domestic level of international law of human rights" and without a doubt "constitutes one of the positive outstanding features to date, which should be recognized, maintained, and continue to grow."[45]

28. In this regard, in the judgment that inspires this concurring opinion, there are excerpts from several rulings of the Constitutional Chamber of the Supreme Court of Costa Rica; the Constitutional Tribunal of Bolivia; of the Supreme Court of Justice of the Dominican Republic; of the Constitutional Tribunal of Peru; of the Supreme Court of Justice of the Nation of Argentina; and of the Constitutional Court of Colombia. These are some examples that allow one to understand the dynamic reception of jurisprudence of international human rights law and of jurisprudence of the convention.

29. Upon a closer look at the decisions mentioned, it can be seen that some of the standards were adopted prior to the Praetorian establishment of "the control for conformity with the convention" in the *Case of Almonacid Arellano v. Chile* of 2006, as happened in the precedents of Argentina (2004) Costa Rica (1995), Colombia (2000), Dominican Republic (2003) and Peru (2006). Clearly, the I/A Court of H.R. created the doctrine of "diffused control of conformity with the Convention" noting the trend of "constitutionalization" or, if you will, "nationalization"[46] of the "international law of human rights" and particularly the acceptance of jurisprudence of the convention as an element that is "hermeneutic" and of "control" of internal norms by domestic courts themselves; that is, the I/A Court of H.R. received the influx of the jurisprudential practice of national judges in order to create the new doctrine of "diffused control of conformity with the Convention."

30. In turn, we see that several high national judicial bodies incorporated the parameters of the "diffused control of conformity with the Convention" due to recognition of the jurisprudence of the I/A Court of H.R. from the creation of the

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[44] Two of the most representative constitutional jurisdictions that since the early nineties have adopted outstanding interpretations to encourage the applicability of international treaties on human rights are the Constitutional Chamber of the Supreme Court of Costa Rica and the Constitutional Court Colombia. The first granted supranational character to the international human rights treaties to the extent that they are more favorable than those provided in the Constitution. The second, acknowledging in these treatises in the "constitutional block." Both jurisdictions have made significant further developments in this area.

[45] Para. 9 of the concurring opinion issued by judge Sergio García Ramírez, in the judgment of the *Case of Dismissed Congressional Employees* (*Aguado Alfaro et al.*) *v. Perú, supra* note 15.

[46] *Cf.* García-Sayán, Diego, "Una Viva Interacción: Corte Interamericana y Tribunales Internos", *op. cit.*, *supra* note 6.

doctrine in 2006. It is important to mention precedent for the landmark Supreme Court of Argentina in 2007 (Case "Mazzeo"),[47] which expresses the obligation of the local Judicial Branch to exercise the "control of conformity with the Convention," practically repeating that expressed by the Inter-American Court of Human Rights in the *Case of Almonacid Arellano v. Chile*. Indeed, in para. 21 of that ruling the Supreme Court of Argentina states:

> 21) That the Inter-American Court has noted that it "is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception." In other words, the Judiciary must exercise a sort of "control [of conformity with the Convention" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention. –I/A Court of H.R. Series C N- 154, case of "Almonacid", of September 26, 2006, paragraph. 124-

31. There is an interesting influence between the I/A Court of H.R. and the national jurisdictions that fosters "jurisprudential dialogue."[48] Dialogue that affects the proper articulation and creation of standards for the protection of human rights in the Americas or, at least, in Latin America. The International Law of Human Rights is combined with constitutional law, or if preferred, International Constitutional Law and International Law of Human Rights are combined; this implies, necessarily, permanent and continuous training of national judges regarding dynamics of jurisprudence of the Convention.

32. In this regard, the considerations of former president of the I/A Court of H.R., Antônio Augusto Cançado (now judge of the International Court of Justice) are relevant, upon reflecting on the "control of conformity with the Convention" in

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[47] *Case of "Mazzeo, Lulio Lilo et al. s/Recurso de Casación and Inconstitucionalidad*, of July 13, 2007. On this important ruling in general on the evolutionary nature of the reception of international law on behalf of the Supreme Court of Justice of Argentina, See Bazán, Víctor, "El derecho internacional en la jurisprudencia de la Corte Suprema de Justicia, con particular énfasis en materia de derechos humanos", [International law in the jurisprudence of the Supreme Court of Justice, and with particular emphasis in matters of human rights] in *La Ley, Suplemento Extraordinario (75 Aniversario),* Buenos Aires, August 2010, pp. 1-17, particularly in the Case of "Mazzeo" See pp. 10, 11 and 16; moreover, Hitters, Juan Carlos, "Control de constitucionalidad y control de onvencionalidad. Comparación. (Criterios fijados por la Corte Interamericana de Derechos Humanos)" [Control of Constituitonality and control of conformity with the Convention. Comparison. (Fixed criteria by the Inter-American Court of Human Rights)] in *Estudios Constitucionales*, Santiago, Centro de Estudios Constitucionales de Chile/Universidad de Talca, Año 7, N° 2, 2009, pp. 109-128; and Loiano, Adelina, "El marco conceptual del control de convencionalidad en algunos fallos de la Corte Suprema Argentina: "Arancibia Clavel", "Simón", "Mazzeo", [the conceptual framework of the control for conformity with the Convention in some of the rulings of the Argentine Supreme Court: 'Arancibia Clavel,' 'Simon,' 'Mazzeo'] in Albanese, Susana (coord.), *El control de convencionalidad*, Buenos Aires, Editorial Ediar, 2008.

[48] Specifically *Diálogo Jurisprudencial* [Jurisprudential Dialogue] is the name of the semestral magazine edited in conjunction with the Institute of Legal Investigations of the UNAM, the Inter-American Court of Human Rights, and the Foundation Konrad Adenauer Stiftung, since the second semester of 2006. The objective is to shed light on the rulings of the national courts that apply the jurisprudence of the I/A Court of H.R. and of the international law on human rights, and on the influence that is received by the Inter-American Court by the domestic jurisprudence.

his concurring opinion in the *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru,* stated:[49]

> 3. In other words, the organs of the Judiciary of each State Party to the American Convention should have an in-depth knowledge of and duly apply not only constitutional law but also international human rights law; should exercise *ex officio the control of compliance with the constitution (constitutionality) and with international treaties (conventionality),* considered together, since the international and national legal systems are in constant interaction in the domain of the protection of the individual. (underlining added).

33. The doctrine of "diffused control of conformity with the Convention" established by the I/A Court of H.R. is addressed *to all national judges*, who must exercise such "control" regardless of rank, grade, level or jurisdiction given to them by domestic regulations.

b. Intensity of the "diffused control of conformity with the Convention": of a greater degree when there is jurisdiction to not apply or declare the invalidity of a general norm

34. All judges and judicial bodies that perform functions from a material perspective "should" implement the "control of conformity with the Convention." This is the clear message that the I/A Court of H.R. imparted in the Judgement in the *Case García Cabrera and Montiel Flores*, on the subject of this concurring opinion. This does not exclude the judges that can not carry out a "control of constitutionality."

35. Indeed, the specificity of the doctrine on which judges must "ex oficio" carry out the control of conformity with the Convention "clearly within their respective competence and corresponding procedural regulations," [50] can not be interpreted as limited in the exercise of the "diffused control of conformity with the Convention" but rather as a way to "calibrate" its intensity. This is because this type of control does not necessarily imply the application of the norms or jurisprudence of the Convention as opposed to the domestic ones, but rather it also implies, first, an attempt to harmonize domestic legislation with that of the Convention, through an "interpretation of the Convention" of the national standard.

36. Thus, in the so-called "diffused" systems of constitutional control where all judges have the power to not apply a law to the specific case because it contravenes the national Constitution, the degree of "control of conformity with the Convention" encompasses more when the domestic judges are able to disapply norms that are in accordance with the Convention. E This course is an intermediate degree of "control," which will operate only if there is a possible "interpretation" of national regulations in accordance with the Pact of San José (or some other international treaties, as discussed below) and the jurisprudence of the Convention. Through this "interpretation in accordance" the "conventional" internal standard is reflected. The degree of maximum intensity of the "control of conformity of the Convention" can be made by the highest Constitutional courts (usually the last interpreters in a particular constitutional legal system) that generally also have the power to declare the invalidity of the unconstitutional norm with *erga omnes*

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[49] *Supra* note 15, para. 3 of the concurring opinion of judge Antônio Augusto Cançade Trindade.

[50] Specification carried out as of the Case of *Dismissed Congressional Employees* (*Aguado Alfaro et al.*) *v. Perú, supra* note 15, para. 128.

effects. This involves a general declaration of invalidity for nonconformity with the Convention of the national standard.

37. Instead, the intensity of the "diffused control of conformity with the Convention" will diminish in those systems where the "diffused control of constitutionality" is not allowed, and therefore, not all judges have the power to stop enforcing a law to a specific case. In these cases it is obvious that the judges who lack such jurisdiction, shall exercise the "diffused control of conformity with the Convention" with less intensity, *without this implying that they can not do so* "within their respective jurisdictions." This implies that they can not fail to apply the norm (even though they may not have that power), and shall, in any case, make a "standard interpretation" of it, that is, make a "consistent interpretation," not only of the national Constitution, but also of the American Convention and the jurisprudence of the Convention. This interpretation requires a creative action in order to achieve compatibility of the national standard in accordance with the conventional parameter and thus achieve the realization of the right or freedom in question, with the broadest and most encompassing reach in terms of the *pro homine* principle.

38. In this regard, upon carrying out an "examination of compatibility with the Convention," the domestic judge must always apply the *pro homine* principle (enshrined in Article 29 of the Pact of San José), which implies, *inter alia,* to implement the most favorable interpretation for the use and enjoyment of fundamental rights and freedoms;[51] being able to also opt for the interpretation that is most favorable in regard to its applicability with the American Convention and other international human rights treatises. The I/A Court of H.R. has indicated this, noting that:[52]

> 51. With respect to the comparison between the American Convention and the other treaties already mentioned, the Court cannot avoid a comment concerning an interpretation suggested by Costa Rica in the hearing of November 8, 1985. According to this argument, if a right recognized by the American Convention were regulated in a more restrictive way in another international human rights instrument, the interpretation of the American Convention would have to take those additional restrictions into account for the following reasons:
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> > If it were not so, we would have to accept that what is legal and permissible on the universal plane would constitute a violation in this hemisphere, which cannot obviously be correct. We think rather that with respect to the interpretation of treaties, the criterion can be established that the rules of a treaty or a convention must be interpreted in relation with the provisions that appear in other treaties that cover the same subject. It can also be contended that the

[51] This concept notes: "Article 29. Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as: a). permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b). restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c}. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d}. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

[52] *Advisory Opinion OC-5/85*. November 13, 1985. Series A No. 5, in regard to *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights),* para. 51 and 52.

> provisions of a regional treaty must be interpreted in the light of the concepts and provisions of instruments of a universal character. (Underlining in original text.)

It is true, of course, that it is frequently useful, -and the Court has just done it- to compare the American Convention with the provisions of other international instruments in order to stress certain aspects concerning the manner in which a certain right has been formulated, but that approach should never be used to read into the Convention restrictions that are not grounded in its text. This is true even if these restrictions exist in another international treaty.

52. The foregoing conclusion clearly follows from the language of Article 29 which sets out the relevant rules for the interpretation of the Convention. Subparagraph (b) of Article 29 indicates that no provision of the Convention may be interpreted as

> restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.

Hence, if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.

39. In case of absolute incompatibility, where there is no possible "interpretation of the Convention", if the judge has no authority to disapply the rule, said judge is limited to merely indicating the unconventionality of it or, where appropriate, "raising doubts of its unconventionality" to other competent courts within the same legal system that can exercise "control of conformity with the Convention" with greater intensity. Thus, the reviewing judicial bodies will have to exercise that "control" and disapply the rule or declare its invalidity given its lack of conformity with the Convention.

40. What does not seem reasonable and would be outside the parameters of interpretation of the I/A Court of H.R., is that no national body has jurisdiction to exercise the " diffused control of conformity with the Convention" with strong intensity, that is, to cease to apply the norm to particular cases or to its general effects as a result of its nonconformity with the Convention, because otherwise there would be international responsibility of the State. We must not lose sight of the provisions of Articles 1 and 2 of the Convention relating to the obligation to respect human rights and the duty to adopt provisions of domestic law. As noted by the I/A Court of H.R., the latter is “aimed at facilitating the work of the Judiciary so that the law enforcement authority may have a clear option in order to solve a particular case” [53] in situations involving fundamental rights. As such, the I/A Court

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[53] *Case of Almonacid Arellano v. Chile*, *supra* note 13, para. 123.

of H.R., specifically in the *Case of Almonacid Arellano* which gave rise to the doctrine of "diffused control of conformity with the Convention," is emphatic upon establishing in para. 123 that:

> when the Legislative Power fails to set aside and / or adopts laws which are contrary to the American Convention, the Judiciary is bound to honor the obligation to respect rights as stated in Article 1(1) of the said Convention, and consequently, it must refrain from enforcing any laws contrary to such Convention. The observance by State agents or officials of a law which violates the Convention gives rise to the international liability of such State, as contemplated in International Human Rights Law, in the sense that every State is internationally responsible for the acts or omissions of any of its powers or bodies for the violation of internationally protected rights, pursuant to Article 1(1) of the American Convention. [54] (underlining added).

41. Thus, the "diffused the control of conformity with convention" although exercised by all national judges, it has different degrees of intensity and execution, in accordance with "*their respective competences and corresponding procedural regulations."* In principle, it corresponds to all judges and courts to make an "interpretation" of the national standard in light of the Convention, its Additional Protocols (and possibly of other treaties), as well as the jurisprudence of the I/A Court of H.R. and always with the interpretive rule of the principle *pro homine* of Article 29 of the Pact of San José; in this first degree of intensity, an interpretation according to the conventional parameters will be made, and therefore, those interpretations that are not in conformity with the Convention or less effective in regard to the enjoyment and protection of the right or freedom concerned will be discarded; there exists, is in this sense, a comparison with the "consistent interpretation" and with the Constitution made by national courts, especially constitutional judges. Second, and only if the conformity with the Convention of the internal standard cannot be saved, the " control of conformity with the Convention" should be applied with more intensity, be it by disapplying the norm in the specific case or by declaring the invalidity with general effects, as a result of the unconventionality, in accordance with the respective responsibilities of each national court.

c) It must be exercised "ex oficio": be it invoked or not by the parties

42. This characteristic of the "diffused control of conformity with the Convention" constitutes a precision of the original doctrine. The *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Perú*,[55] two months after the *Case of Almonacid Arellano v. Chile,* established that as of then, the jurisprudence of the I/A Court of H.R. has remained the same. It consists of the possibility of exercising said control by domestic judges, *regardless of whether the parties invoked* it. In fact, it constitutes a complement of the "diffused" nature of said control. If in the prior characteristic of the "diffused control of conformity with the Convention" the intent of the I/A Court of H.R. is established regarding the "obligation" of any judge, regardless of rank, grade level or subject of specialization (whence it is a "fuzzy control"), now that character is accentuated further by specifying that it is an obligation that must be exercised "ex oficio," which means that under any circumstance, judges must exercise this control, since "this function

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[54] *Cf. Case of Ximenes Lopes, supra* note 13, para. 172; and *Case of Baldeón García*, *supra* note 13, para. 140.

[55] *Idem.*

should not be limited only by the manifestations or actions of the plaintiffs in each case."[56]

43. It may even happen that in the domestic forum there be appeals or measures of defense that are appropriate and efficient to combat the lack of or improper exercise of the "diffused the control of conformity with convention" by a judge (for example, through an appeal, cassation remedy, or petition for legal protection [amparo]), upon this control not being exercised *ex oficio*. This regards a new aspect of the principle of *iura novit curia (the judge knows the law and jurisprudence of the Convention).*

D) *Parameter of "diffused control of conformity with the Convention": The "Block of Conformity with the Convention"*

44. In principle, the parameter of the "diffused the control of conformity with convention" by national judges (regardless of whether or not they implement the control of constitutionality), is the Pact of San Jose and the jurisprudence of the I/A Court of H.R. that interprets it. The last part of the jurisprudential doctrine so provides:

> "In this task, the judges and bodies linked to the administration of justice must take into account not only the [Pact of San José], but also the interpretation of it made by the Inter-American Court, the last interpreter of the American Convention.[57] (underlining added).

45. Nevertheless, the "jurisprudence" itself of the I/A Court of H.R. has expanded the Inter-American *corpus juris* in regard to human rights in order to establish foundations for its rulings. It should not go unnoticed that it is the Pact of San Jose which permits the inclusion "in the system of protection of this Convention, other rights and freedoms recognized in accordance with Articles 76 and 77," which has allowed for the approval of various "additional" Protocols to (the American Convention) and their interpretation by the Inter-American Court. Likewise, the Pact itself establishes as an interpretive norm that one can not exclude or limit the effect that the American Declaration of the Rights and Duties of Man and "other international acts of the same nature."[58]

46. Regarding this, the opinions in the concurring opinion Judge García Ramírez in the *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru* are illustrative, specifically regarding the analysis of the parameter of "control of conformity with the Convention":[59]

> In the instant case, when referring to the control of "conventionality," the Inter-American Court has considered the applicability and application of the American Convention on Human Rights, Pact of San José. However, the same function is deployed, for the same reasons, with regard to other instruments of a similar nature, that comprise the *corpus juris* arising from the human rights conventions to which the State is a party: the Protocol of

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[56] Para. 128, *in fine*, *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Perú, supra* note 15.

[57] *Case of Cabrera García and Montiel Flores v. Mexico, supra* note 1, para. 227.

[58] Article 29, d). See *supra* note 50.

[59] Para. 2 of the concurring opinion of judge Sergio García Ramírez, regarding the Judgment of cited case, of November 24, 2006.

> San Salvador, the Protocol to Abolish the Death Penalty, the Convention to Prevent and Punish Torture, the Convention of Belém do Pará on the Eradication of Violence against Women, the Convention on Forced Disappearance of Persons, etcetera. The task is to ensure consistency between actions at the national level and the international commitments made by the State that generate specific obligations for the latter and recognize certain rights for the individual (underlining added).

47. The foregoing reflects that, in fact, the parameter of the "diffused control of conformity with the Convention" encompasses not only the American Convention, but also its additional "Protocols," as well as other international instruments that have been the subject of integration to the Inter-American *corpus juris* through the jurisprudence of the I/A Court of H.R. The purpose of its mandate, -as stated by the Inter-American Court in a recent ruling,- "is the implementation of the Convention and other treaties that grant it jurisdiction"[60] and, as follows, the interpretation of those treaties.

48. For purposes of the parameter of the "diffused control of conformity with the Convention," regarding "jurisprudence," all of the interpretations should be encompassed made by the I/A Court of H.R. of the American Convention, its additional Protocols, and other international instruments of the same nature that are integrated in said Inter-American *corpus juris,* those of which are of the jurisdiction of the Inter-American Court. It should not be forgotten "that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions."[61] Specifically in Advisory Opinion OC-16/99, requested by the United Mexican States, on "The right to information on consular assistance within the framework of the guarantees of due process of law," the I/A Court of H.R. stated: [62]

> The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.(underlining added).

49. The "interpretations" of this regulation of the Convention include not only those in the judgments of "contentious cases," but also in the interpretations made in other orders issued. [63] Thus, the interpretations fall within the "provisional measures;" on "the monitoring of compliance with the judgments," or, even, on the request for an "interpretation of the judgment" in terms of Article 67 of the Pact of San Jose. Moreover, it should also encompass the interpretations derived from the

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[60] *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 24, para. 199.

[61] *OC-16/99* of October 1, 1999, para. 114.

[62] *OC-16/99, supra* note 60, para. 115.

[63] In terms of Article 29 of the Court Rules of Procedure, in force as of January 1, 2010, that establish: "Article 31. Resolutions. 1. Judgments and orders completing proceedings shall be rendered exclusively by the Court. 2. All other orders shall be rendered by the Court if it is sitting and by the Presidency if it is not, unless otherwise provided. Decisions of the Presidency that are not merely procedural may be appealed from to the Court. 3. Judgments and orders of the Court may not be contested in any way."

"advisory opinions" referred to in Article 64 of said Pact, due precisely to the fact that its objective is "the interpretation of this Convention or other treaties concerning the protection of the humans rights in the American States."[64]

50. In this manner, an authentic "conformity with the Convention block" forms as a parameter to exercise "diffused control of conformity with the Convention." National judges must head to this "block," which implies, on their behalf, the continuous actualization of the jurisprudence of the I/A Court of H.R. and promotes a "live interaction" between national jurisdictions and that of the Inter-American system, with the ultimate aim of setting standards in our region for the effective protection of human rights.

51. The domestic judge, therefore, must apply the jurisprudence of the Convention, including that which is established in matters where not part of the national State to which it belongs, given that what defines the integration of the jurisprudence of the I/A Court of H.R. is the interpretation that said Inter-American Court carries out regarding the Inter-American *corpus juris* in order to create a standard in the region on applicability and effectiveness.[65] This, is considered of utmost importance for the healthy understanding of the "diffused control of conformity with the Convention," given that intending to reduce the obligatory nature of the jurisprudence of the Convention only in cases where the State has been a "material part" would be equivalent to a rejection or annulment of the essence of the American Convention, whose commitments were assumed by national States upon signing and ratifying or acceding to it, and whose noncompliance produces international responsibility.

52. Thus, the "normative force" of the American Convention reaches the scope of the interpretation made of it by the I/A Court of H.R., as "ultimate interpreter" of the Pact in the Inter-American System for the Protection of Human Rights. The interpretation taken by the Inter-American Court of the provisions of the Convention, takes on the same effectiveness encompassed by them, since in fact the "norms of the Convention" are the result of the "interpretation of the Convention" undertaken by the I/A Court of H.R. as a body "whose goal is the independent judicial application and interpretation" [66] of the Inter-American *corpus juris*. In other words, the result of the interpretation of the American Convention constitutes its jurisprudence, that is, "the norms that derive from the ACHR, from which it is stated that they are to enjoy the same (direct) effectiveness of such international treaty."[67]

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[64] *Cf. Advisory Opinion OC-1/82.* September 24, 1982. Series A No. 1, related to "Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights), presented by the government of Peru.

[65] Thus, for example, the standards set by the European Court of Human Rights, international treaties, the universal system, the resolutions of the UN Committee on the recommendations of the Commission on Human Rights or reports of special rapporteurs of the OAS or UN, among others, can be part of its jurisprudence, provided the IACHR's use and endorse it form their interpretation of the Inter-American *corpus juris* and to create the conventional standard interpreted as the Inter-American standard.

[66] Article 1 of the Statute of the Inter-American Court of Human Rights, approved by resolution num. 448 of the General Assembly of the OAS, in La Paz, Bolivia (October 1979).

[67] Ferrer Mac-Gregor, Eduardo, and Silva García, Fernando, "Homicidios de mujeres por razón de género. El *Case of Campo Algodonero*", [Homicides of women for gender purposes. The Case of the Cotton Fields]. en von Bogdandy, Armin, Ferrer Mac-Gregor, Eduardo, and Morales Antoniazzi, Mariela (coords.), *La justicia constitucional y su internacionalización: ¿Hacia un* Ius Constitutionale Commune *en América Latina?*, [Constitutional Justice and its Internationalization: Towards a *Ius Constitutionale*

e) *Effects of the "diffused control of conformity with the Convention": retroactive where necessary to achieve full effectiveness of the right or freedom*

53. As we held in analyzing the degree of intensity of the "diffused control of conformity with the Convention," the outcome of the examination of the compatibility between the national standard and the "block of conformity with the Convention," consists in "revoking" those interpretations not in conformity with the Convention or those which are less favorable; or, if this can not be achieved, the consequence is to "revoke" the national norm, either in the specific case or with general effects declaring the invalidity made in accordance with the judge's authority to conduct such monitoring.

54. The foregoing involves a higher degree of complexity when national regulations only allow the general statement of the standard for the future (*ex nunc* effect) and not in the past (*ex tunc*), as it seems that the intent of the I/A Court of H.R. at the time of establishing the doctrine of "diffused control of conformity with the Convention" is that the norm not in conformity with the Convention lacks legal effect "from its conception;"[68] this is a precedent that is reiterated in subsequent cases, especially in cases regarding self-amnesty laws[69] or in other circumstances. [70] However, this criterion has not been constant for the I/A Court of H.R., rather it depends on the specific case. [71]

55. We believe that the I/A Court of H.R. will, in the future, have to more precisely define this delicate aspect of the temporality of the effects of national standards not in conformity with the Convention because its jurisprudence is not clear. It should not be overlooked that, in principle, any violation of human rights should encompass a comprehensive remedial effect and, consequently, carry this effect into the past when required in order to achieve that goal.

56. The foregoing was established in Article 63(1) of the American Convention, upon stating:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule <u>that the injured party be ensured the enjoyment of his right or freedom that was violated.</u> It shall also

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Commune in Latin America?] México, UNAM-Max Planck Institut, 2010, tome II, pp. 259-333, in pp. 296-297.

[68] *Cf. Case of Almonacid Arellano et al. v. Chile, supra* note 13, para. 124.

[69] For example, in the *Case of La Cantuta v. Perú, supra* note 16, para. 174: "In line with this view, the remaining dispute must be understood as part of the first set of measures that must be adopted to adjust the domestic law to the Convention. In order to better understand the issue, it must be noted that the Court has found that, in Perú, the self-amnesty laws are *ab initio* incompatible with the Convention; that is, their mere enactment "constitutes *per se* a violation to the Convention" since it "overtly conflicts with the duties undertaken by any State Party" to such treaty. Such is the rationale behind the Court's pronouncement with general effects in the *case of Barrios Altos.* That is why its application by a state organ in a specific case, through subsequent statutory instruments or through its enforcement by state officers, constitutes a violation to the Convention. Moreover, in the *Case of Gomes Lund et al. ("Guerrilha do Araguala") v. Brazil, supra* note 4, para. 106.

[70] For example, in the *Case of Radilla Pacheco v. United Mexican States, supra* note 19, para. 339; as well as the recent *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 24, para. 202.

[71] *Cf.,* For example, *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Perú, supra* note 15, para. 128; *Case of Indigenous Community Xármok Kásek v. Paraguay, supra* note 21, para. 311; *Case of Fernández Ortega et al.. v. México, supra* note 22, para. 234; *Rosendo Cantú et al. v. México, supra* note 23, para. 234; and *Case of Vélez Loor v. Panamá, supra* note 25, para. 287.

> rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party. (underlining added)

57. Although that provision refers to the attributes of the I/A Court of H.R, *mutatis mutandis*, it should be applied by domestic judges because they are also Inter-American judges when they carry out the "diffused control of conformity with the Convention." And that implies ensuring, as far as is possible, the effective enjoyment of the right or freedom violated. This leads to the affirmation that, in certain cases, the consequences of unconventional standards must be repaired, which can only be achieved by "revoking" these national standards from its conception and not from its nonapplication or declaration of unconventionality. In other words, such retroactivity is necessary in some cases to achieve an adequate enjoyment of the relevant right or freedom. This affirmation, in addition, is consistent with the jurisprudence of the I/A Court of H.R. in the interpretation of Article 63(1) of the Pact of San Jose, when it has considered that any violation of an international obligation that has caused damage must "appropriately" remedy it; [72] This constitutes "one of the fundamental principles of contemporary international law on State responsibility." [73]

f) Legal basis of "diffused control of conformity with the Convention": the Pact of San Jose and the Vienna Convention on the Law of Treatises

58. From the beginning of this jurisprudential doctrine of this type of control, in the *Case of Almonacid Arellano v. Chile,*[74] the following was established:

> 124. (…) But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception (…)
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> 125. By the same token, the Court has established that "according to international law, the obligations that it imposes must be honored in good faith and domestic laws cannot be invoked to justify their violation." This provision is embodied in Article 27 of the Vienna Convention on the Law of Treaties, 1969. (underlining added).

59. The principles of international law relating to *Good Faith* and *Effet Utile*, which in turn involves the principle of *Pacta Sunt Servanda,* make up the international foundations for national States to comply with international treaties and have been constantly reiterated by the jurisprudence of the I/A Court of H.R. in cases brought under its jurisdiction, whether before the advisory body, as in

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[72] Cf. *Case of Velásquez Rodríguez v. Honduras, supra* note 5, para. 25; *Case of Chitay Nech et al.. Preliminary Objections, Merits, Reparations and Costs.* Judgment of May 25, 2010. Series C No. 212 para. 227; and *Case of Manuel Cepeda Vargas. Preliminary Exceptions, Merits and Reparations*. Judgment of May 26, 2010. Series C No. 213, para. 211.

[73] *Cf. Case of Castillo Páez v. Perú*. *Reparations and Costs*. Judgment of November 27, 1998. Series C No. 43, para. 43; *Case of Chitay Nech et al.*, *supra* note 71, para. 227, and *Case of Manuel Cepeda Vargas*, *supra* note 71, para. 211.

[74] *Supra* note 12, para. 125.

contentious cases. This Inter-American Tribunal has established, in Advisory Opinion 14/94, of December 9, 1994, on **international responsibility for the promulgation and enforcement of laws in violation of the Convention**,[75] the interpretive scope of Articles 1[76] and 2[77] of the American Convention on Human Rights. It was deemed that the obligation to dictate the necessary measures to make effective the rights and liberties recognized in said Pact, includes not dictating them when they lead to violations, and also to adapt existing non-conventional norms, a foundation based in a general principle of international law, related to those obligations being carried out in "good faith" and related to them not being invoked for non-compliance of domestic law; this has been picked up by international tribunals such as the Permanent Court of International Justice and the International Court of Justice, also codified in Articles[78] and 27[79] of the Vienna Convention on the Law of Treatises.

60. The obligation of compliance of laws of the Convention obligate all authorities and national bodies, regardless of their pertinence before the legislative, executive, or judicial powers, when the State responds and takes on international responsibility for the breaches of international instruments it has undertaken. As stated by García Ramírez:

> 27. For the effects of the American Convention and of the exercise of the contentious jurisdiction of the Inter-American Court, the State is considered integrally, as a whole. Accordingly, responsibility is global, it concerns the State as a whole and cannot be subject to the division of authority established in domestic law. At the international level, it is not possible to divide the State, to bind before the Court only one or some of its organs, to grant them representation of the State in the proceeding – without this representation affecting the whole State – and excluding other organs from this treaty regime of responsibility, leaving their actions outside the "treaty control [control of conformity with the Convention]" that involves the jurisdiction of the international court. [80] (underlining added).

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[75] *Cf. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights).* Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14

[76] "Article 1. *Obligation to Respect Rights*. 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

[77] "Article 2. *Domestic Legal Effects*. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

[78] "Art. 26: *Pacta sunt servanda*. Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[79] "Art. 27. *Internal law and observance of treatises.* A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

[80] *Cf.* para. 27 of his concurring opinion in the *Case of Myrna Mack Chang v. Guatemala, supra* note 11.

61. Thus, the judges of the States Parties of the Convention are also obligated to comply with the norms of the Convention and the doctrine of "diffused control of conformity with the Convention" facilitates this work, in order to make interpretations of the national provisions (including the constitutional text) that are in conformity with the Inter-American *corpus juris* and to not apply those that are in absolute contravention of the aforementioned "block of conventionality," to avoid that in such a manner the State to which they belong is internationally responsible for violating international commitments acquired in the field of human rights.

62. The "diffused control of conformity with the Convention" is also based on Article 29 of the Pact of San José, to the extent that all the powers and bodies of the signatory States of said international instrument, including judges and bodies that administrate justice which materially perform judicial functions, are obligated, through their interpretations, to allow the widest possible enjoyment and exercise of the rights and freedoms recognized in the Convention and its additional protocols (and other international instruments in the terms analyzed above), [81] which implies, in turn, restrictive interpretations when it comes to their limitations, always in the light of the jurisprudence of the I/A Court of HR.

63. It does not go unnoticed that Article 68(1) establishes that the States Party to the Pact of San José "are committed to compliance with the decisions of the Court in all cases where they are parties." The foregoing cannot limit in the sense that the jurisprudence of the I/A Court of H.R. acquires "direct effect" in all national States that have expressly recognized its jurisdiction, regardless of whether it stems from a matter where they have not participated formally as a "material part," since the I/A Court of H.R. is the international judicial body of the Inter-American System for the Protection of Human Rights, whose essential function is the application and interpretation of the Convention, *its interpretations acquire the same degree of effectiveness as the text of the convention.* In other words, the norms of the Convention which should be applied by States are a result of the interpretations of the provisions of the Pact of San José (and its additional protocols, as well as other international instruments). The interpretations carried out by the I/A Court of H.R. are projected in two dimensions: (i) in achieving its effectiveness in the particular case with *subjective effects,* and (ii) in establishing general effectiveness *with the effects of interpreted norms.* From there, the logic and necessity of the ruling, aside from notifying the State party in the particular controversy, must also be "transmitted to the State parties of the Convention," [82] for them to have full understanding of the normative conventional content derived from the interpretation of the I/A Court of H.R., as the "last interpreter" of the Inter-American *corpus juris.*

IV. THE DIFFUSED CONTROL OF CONFORMITY WITH THE CONVENTION BY MEXICAN JUDGES

64. The prior characteristics of the jurisprudential doctrine of "diffused control of conformity with the Convention" apply for the Mexican judicial system. To date, this has been reiterated in four cases regarding complaints against the Mexican State: *Rosendo Radilla Pacheco v. the United Mexican States* (2009);[83] *Fernández Ortega et al. v. México* (2010);[84] *Rosendo Cantú et al. v. México* (2010);[85] and *Cabrera García and Montiel Flores v. México* (2010).[86]

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81 *Cf. supra* para. 44 to 52 in his concurring opinion.

82 Art. 69 of the American Convention on Human Rights.

83 *Supra* note 19, para. 338 to 342.

84 *Supra* note 22, para. 233 to 238.

65. Upon the United Mexican States' signing of the American Convention on Human Rights (1981) and upon accepting the contentious jurisdiction of the I/A Court of H.R. (1998), these international judgments must be complied with,[87] and they take on a "definitive and unappealable" nature;[88] without allowing for any domestic provision or judicial criteria to be alleged to justify the noncompliance, since the international pacts obligate the State party and its norms must be complied with, in the terms of Articles 26 and 27 of the Vienna Convention on the Law of Treatises,[89] also signed by the State of Mexico.

66. In this manner, the "diffused control of conformity with the Convention" implies that all of the Mexican judges and bodies linked to the administration of justice *at all levels* that pertain to the Judicial Powers, independent of the level of hierarchy, grade or amount of specialization, are obligated, *ex oficio,* to carry out an exercise of compatibility between the domestic acts and norms and the American Convention on Human Rights, its additional protocols (and other international instruments), as well as the jurisprudence of the I/A Court of H.R., forming a "block of conventionality" in the terms analyzed.[90] The foregoing is due to:[91]

> (…)it is not only the suppression or expedition of domestic legal provisions that guarantee the rights contained in the American Convention. Pursuant to the obligation established in its Article 2 thereof, the State must also develop practices leading to the effective observance of the rights and freedoms embodied in the Convention. The existence of a norm does not, in and of itself, guarantee that its application will be adequate. It is necessary that the application of the norms **or their interpretation**, as jurisdictional practices and expressions of the State's public order, must be adapted to the objective sought by Article 2 of the Convention. [92] In practical terms, as the Court has already established, the interpretation of Article 13 of the Mexican Constitution must be coherent with the constitutional and the treaty-based principles of due process and access to justice contained in Article 8(1) of the American Convention and the pertinent provisions of the Mexican Constitution. (underlining and highlighting added).

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85 *Supra* note 23, para. 218 to 223.

86 *Supra* note 27, para. 225 to 235.

87 Article 68(1) of the American Convention on Human Rights: "The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties."

88 Article 67(1) of the American Convention on Human Rights: "The judgment of the Court shall be final and not subject to appeal. […]"

89 See these standards *supra* notes 77 and 78.

90 On the "block of comformity with the Convention" as a parameter of the "diffused control of conformity with the Convention," see *supra* para. 44 to 52 of this concurring opinion.

91 *Case of Rosendo Radilla Pacheco v, supra* note 19, para. 338; *Case of Fernández Ortega et al. v. México, supra* note 22, para. 233; y *Case of Rosendo Cantú et al. v. México, supra* note 23, para. 218.

92 *Cf. Case of Castillo Petruzzi et al. v. Perú*, supra note 72, para. 207; *Case of Ximenes Lopes v. Brazil, supra* note 13, para. 83, and *Case of Almonacid Arellano et al. v. Chile, supra* note 13, para. 118.

67. In this sense, the judges or tribunals that materially realize judicial activities, be it of local or federal jurisdiction, must necessarily exercise the "diffused control of conformity with the Convention" in order to achieve the interpretations that conform with the Inter-American *corpus juris*. In the case of absolute incompatibility between the national norm and the conventional parameter, *it must be disapplied* for those to prevail and thereby achieve the realization of the right or freedom concerned. The foregoing applies as well to the local judges, in conformity with the Political Constitution of the United Mexican States, in its Article 133 in force, which states:[93]

> This Constitution, the laws of Congress under it, and all the Treaties that are in accordance therewith, entered into and to be held by the President with Senate approval, will be the Supreme Law of the Union. Judges in every State shall conform to the Constitution, laws and treaties, notwithstanding any contradictory provisions that may appear in the Constitutions or laws of the States. (Underlining added).

68. As can be seen in the latter part of this constitutional provision, local judges apply "the Supreme Law of the Union" (where the international treaties are found) when there is incompatibility with some other standard that does not integrate this "Supreme Law"; this implies that the local jurisdiction judges should go as far as to disapply those standards inconsistent with the norm of the "constitutional block." In other words, it is the Constitution which empowers the judges of ordinary courts to exercise "the diffused control of constitutionality" and therefore the American Convention on Human Rights can become a valid parameter control, not just the Constitution. Thus, as it has been held by the I/A Court of H.R., judges and bodies linked to the administration of justice "shall exercise not only constitutional control but also of "control of conformity with the Convention" *ex officio* between the domestic norms and the American Convention, apparently in the framework of their powers and the corresponding procedural regulations."[94]

69. The last part of this provision is of special significance to the intensity of the "diffused control of conformity with the Convention," since judges must exercise it "under their respective powers and corresponding procedural regulations." As we have discussed in advance (see *supra* paras. 34 to 41), all judges must carry out the "control" and the intensity will be determined by the skills and procedural regulations. In principle, all Mexican judges should part from the principle of constitutionality and of conformity with the Convention of the national standard and therefore a first step should always be to carry out the "interpretation" of the national standard under the Constitution and the conventional parameters, which means opting for the interpretation of the rule more favorable and of more effective protection regarding the rights and freedoms under the principle *pro homine libertatis* or *favor libertatis* provided for in Article 29 of the Pact of San Jose, rejecting those interpretations of inconsistent or less protective reach, so that, *contrario sensu*, when it involves the case of restrictions or limitations to rights and freedoms, it should be the strictest interpretation for this limitation. And only when possible conventional constitutional interpretation can not be achieved,

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[93] This Article has only gone through one reform of its original text of 1917, in the year 1934, published in the *Official Gazette of the Federation* on January 18, of that year. The concept has been interpreted in different manners by the tribunals and the Mexican doctrine during its time in force, including in the Constitutions prior to the 1917. On the different interpretative stances, See Carpizo, Jorge, "La interpretación del Article 133 constitucional", [The interpretation of Article 133 of the Constituiton] in *Boletín Mexicano de Derecho Comparado,* México [Mexican Bulletin of Comparative Law], IIJ-UNAM, núm. 4, 1969, pp. 3-32.

[94] *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Perú, supra* note 15, para. 128.

judges should *disapply* the national legislation or *declare its invalid*, according to the jurisdiction that the Constitution and laws given to each judge, which will cause a greater degree of intensity "of the control of conformity with the Convention."

70. It does not go unnoticed that the Supreme Court of Justice of the Nation has interpreted Article 133 of the Constitution in the sense (i) that international treaties, if in fact, they form part of the "Supreme Law of the Union" are located hierarchically below the Constitution; [95] and (ii) that there does not exist a "diffused control of constitutionality" on the part of local judges. [96] The first is an interpretation which is not a binding precedent given the failure to achieve the required vote for it, [97] and thereby different interpretations exist by other Mexican judicial bodies; [98] and the second, although the jurisprudence is mandatory for all Mexican judges in terms of norms applicable, we believe it should be harmonized to achieve greater development of the "diffused control of conformity with the

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[95] Thesis IX/2007, of the Plenary of the Supreme Court, whose rubric and text are:

"INTERNATIONAL TREATISES. THEY ARE PART OF THE SUPREME LAW OF THE UNION AND ARE HEIRARCHICALY SITUATED ABOVE THE GENERAL LAWS, FEDERAL AND LOCA LAWS. CONSTITUTIONAL INTERPRETAITON OF ARTICLE 133.

The systematic interpretation of Article 133 of the Constitution of the United Mexican States allows for the identification of the existence of a superior legal order, of a national character, integrated by the Federal Constitution, international treaties, and the general laws. Also, from this interpretation, harmonized with the principles of international law in the constitutional text scattered, as well as rules and basic premises of that law, it is concluded that international treaties are located hierarchically below the Federal Constitution and above the general, federal and local laws, to the extent that the Mexican State to such transactions, in accordance with the provisions of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, following the fundamental principle of customary international law "pacta sunt servanda" freely contracted obligations to the international community can not be ignored by invoking rules of law and breach which is, moreover, a responsibility of an international character." (underlining added). Published in the *Semanario Judicial de la Federación y su Gaceta,* Pleno, Tome XXV, abril de 2007, p. 6.

[96] Jurisprudencial Thesis 74/99, of the Plenary of the Supreme Court, whose rubric and text are:

"DIFFUSED CONTROL OF CONSTITUTIONALITY OF GENERAL NORMS. NOT AUTHORIZED IN ARTICLE 133 OF THE CONSTITUITON.

The express language of Article 133 of the Federal Constitution prevents that "Judges in every State shall be bound to the Constitution, laws and treaties despite the contradictory provisions that may appear in the Constitutions or laws of the States." In that literal sense, the Supreme Court ruled, however, the position supported later by the High Court, predominantly, has been in another sense, taking into account a systematic interpretation of the precepts and principles that shape our Constitution. Indeed, the Supreme Court of Justice of the Nation considers that Article 133 of the Constitution is not a source of constitutional control for authorities exercising jurisdiction materially, for acts of others, such as the laws emanating from the Congress itself, nor of their own actions, allowing them to ignore some and not others, since that provision shall be construed in light of the system established by the Constitution itself to that effect. "(Underlining added). Published in the *Semanario Judicial de la Federación y su Gaceta,* Pleno, tome X, agosto de 1999, p. 5.

[97] In the terms of Article 192 of the Law of Ampara, the resolutions constitute obligatory jurisprudence, when what is resolved in them is based on five executions not interrupted by another contradicting one, and that it also require, in addition, at least eight votos of the judges of the Plenary. In the specific case, the matter was approved by the majority of six against five.

[98] For example, the Thesis XI.1º.A.T.45 K, whose rubric and text are:

"INTERNATIONAL TREATISES. WHEN THE CONFLICTS ARISE IN REGARD TO HUMAN RIGHTS, THEY SHOULD BE ANALYZED AT THE CONSTITUITONAL LEVEL.

Treaties or conventions signed by the Mexican government on human rights, must be centered on the Constitution of the United Mexican States, because these instruments were designed as an extension of the provisions of Basic Law concerning human rights, in as much as these are the reason and purpose of the institutions. As the principles that make up the public the legal right, they must be adapted to different purposes of defense which are provided for by the Constitution and in accordance with Article 133 the Mexican authorities must respect them, so it and under no circumstance must they ignore it acting according to their jurisdiction." (Underlining added) Published in the *Semanario Judicial de la Federación y su Gaceta*, TCC, Tome XXXI, May 2010, p. 2079).

Convention" in light of article 133 and the four judgments issued so far by the I/A Court of H.R. regarding the Mexican State and which have applied that doctrine.

71. Now, the above criteria from Mexico's highest court jurisdiction make up "constitutional interpretations" that could eventually change, either through new reflections, or by reason of constitutional reform.

72. There are currently two constitutional reform bills being processed that are of great relevance in human rights[99] and amparo, [100] both adopted by the Senate and pending approval by the Chamber of Deputies, which if it gets to the point of being converted into constitutional text, will surely produce "new thinking" by the Mexican Supreme Court regarding the interpretation criteria mentioned above. Regardless of its approval and the "consultation in process" that the President of the Supreme Court held before the plenary session of that body on May 26, 2010, on compliance by the Federal Judicial Power of the Judgment of the *Case of Radilla Pacheco*[101] on the case; the fact is that in that international case, as in the cases referred to of Fernández Ortega, Rosendo Cantú, Montiel and Cabrera Garcia and Flores, there are "direct" obligations that must be met by Mexican judges (as organs of the Mexican State) "immediately" and "ex oficio" as discussed below.

73. It should not be overlooked that the judgments against the Mexican State allude that the norms need to be "interpreted," in view of the aim pursued by Article 2 of the American Convention on Human Rights, namely, to "enforce" the rights and freedoms of the American Convention on Human Rights. In this conventional provision, it provides that "the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect

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[99] As relevant here, what is highlighted of this reform is the "Article 1. In the United Mexican States all persons shall enjoy the rights recognized by this Constitution and international treaties on human rights of which the Mexican State is a party, as well as guarantees for their protection, which can not be restricted or suspended except in cases and under conditions established by this Constitution.

The rules on human rights shall be construed in accordance with this Constitution and with international human rights treaties mentioned above.

All authorities within the scope of its powers, have an obligation to promote, respect, protect, and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressiveness. Consequently, the State must prevent, investigate, punish and remedy human rights violations in the terms established by law." (Underlining added.)

[100] Article 103, fraction I, of this reform notes: "Article 103. . The federal courts decide all controversies that arise: I. By general norm, acts or omissions of the authority that violate human rights and the guarantees for protection under this Constitution and by international treaties to which the Mexican State is a party. "(Underlining added).

[101] The "consultation process" corresponds to the file 489/2010, having been discussed for the project by the Plenary of the Supreme Court on August 31, 2, 6, and 7 September 2010. The debate in those four days is of utmost importance for relations between national and international law of human rights, which even allowed for positions on and for the "diffused control of conventionality;" however, for by a majority, it determined to restrict the query to "make a statement about the possible involvement of the federal judicial power in implementing the ruling of the Inter-American Court of Human Rights in the "*Case of Cabrera and Montiel Flores Garcia,*" so the matter went to another Minister to define the specific obligations of the Judiciary of the Federation and the manner of the instrument.

Significantly, the Supreme Court in this "consultation process" established by a majority, the object of analysis, noting, *inter alia*, "it will be necessary to interpret the scope of reservations or interpretative declarations made by the Mexican State, both in adhering to the American Convention [sic] on Human Rights and the Convention on Forced Disappearance of Persons, given the impact that such exceptions would have on the concrete case, and that could have on other international disputes in which a future United Mexican States could also become a party. "(Underlining added).

to those rights or freedoms." Hence the phrase "or other measures" includes "constitutional interpretations" that allow the applicability of the rights with greater effectiveness and reach, in terms of the *pro homine* principle enshrined in Article 29 of the Pact of San José. This could be cause for reflection to overcome the jurisprudential criteria mentioned by the Plenary of the Supreme Court of Justice of the Nation.

74. The *pro homine* principle has been considered by a Mexican tribunal of "obligatory application," given that it is foreseen in international treaties that form part of the Supreme Law of the Union in terms of the reproduced Article 133 of the Federal Constitution. In this way, it was established by the Fourth Collegiate Tribunal on Administrative Matters of the First Circuit, upon deciding on the direct amparo 202/2004, on October 20, 2004, forming thesis I.4º.A.464 A, whose rubric and text are:[102]

> *PRO HOMINE* PRINCIPLE. ITS OBLIGATORY APPLICATION.
> The *pro homine* principle implies that the legal interpretation must always seek the greatest benefit to man, that is, it should be set to the most comprehensive standard or broad interpretation when it comes to protected rights and, in contrast to the standard or narrower interpretation when it comes to setting limits to its exercise provided for in Article 29 of the American Convention on Human Rights and 5 of the International Covenant on Civil and Political Rights, published in the Official Gazette of the Federation on May 7 and 20, 1981, respectively. However, as these treaties are part of the Supreme Law of the Union under Article 133 of the Constitution, it is clear that this principle should be applied on a compulsory basis. (Emphasis added).

75. The "constitutional" and "legal" interpretations carried out by the judges and bodies that impart justice in Mexico *at all levels,* must be carried out in the light, not only of the international instruments whose commitment is taken on by the State of Mexico, but also by the jurisprudence of the I/A Court of H.R.. The latter, given that it constitutes a judicial organ of the Inter-American System for Protection of Human Rights at the international seat, whose jurisdiction is the application and interpretation of the American Convention; this body in reality determines the same content of the Conventional text, in such a way that the interpreted norm acquires direct effectiveness in Mexico, upon the Pact having been signed by the State of Mexico and having been recognized the jurisdiction of the I/A Court of H.R.. As established in the Judgment of the *Case of Cabrera García and Montiel Flores,* that motivates the present concurring opinion (and that applies to the three cases mentioned):

> 233. Hence, as indicated in the case of Radilal Pacheco, Fernandez Ortega and Rosendo Cantu, it is necessary that the constitutional and legislative interpretations concerning the criteria for the personal and subject matter jurisdiction of the military jurisdiction in Mexico needs to be adapted to the principles established in the Court's jurisprudence, which have been reiterated in the present case[103] and that apply for all violations of human

[102] Published in the *Semanario Judicial de la Federación y su Gaceta*, Novena Época, TCC, Tome XXI, February 2005, p. 1744.

[103] *Cf. Case of Radilla Pacheco v. United Mexican States, supra* note 19, para. 340; *Case of Fernández Ortega et al.. v. México, supra* note 21, para. 237, and *Case of Rosendo Cantú et al. v. México, supra* note 22, para. 220.

> rights that are alleged to have been committed by members of the armed forces. This implies that, irrespective of the reforms to the law that the State may adopt, in this case, it is incumbent on the judicial authorities, based on the control of the harmonization of domestic law with the Convention, to order immediately and *ex officio* that the facts be heard by the ordinary criminal justice system. [104] (Underlining added).

76. The intentionality of the I/A Court of H.R. upon referring to the expressions "immediately"[105] and "ex oficio,"[106] denote a "direct" action of all the Mexican judges to exercise the "diffused control of conformity with the Convention" without the need for prior declarations by any body of the Mexican State and regardless of whether the parties invoked it. Here the standard of the *ad hoc* judge Roberto de Figueriedo Caldas is noteworthy:[107]

> 5. For all States of the American Continent, which have willingly adopted it, the Convention is the equivalent to a supranational Constitution pertaining to Human Rights. All public powers and national spheres, as well as the respective Federal, state and municipal legislatures of all adherent States are under obligation to respect it and conform it. (underlining added).

77. The Mexican judges must, on the one hand, carry out constitutional and legal interpretations that allow "the victims of the violations of human rights and their next of kin have the right to have said violations heard and resolved by a competent tribunal, pursuant with the due process of law and the right to a fair trial. The importance of the passive subject transcends the sphere of the military realm, since juridical rights characteristic of the ordinary regimen are involved";[108] so that "this conclusion applies not only to cases of torture, forced disappearance and rape, but to all human rights violations"[109] (underlining added). So that the obligation of the Mexican judges is "immediate" and with "independence of the legal reforms that the State should adopt" (amendment to Article 57 of the Code of Military Justice)." This becomes more important if we consider the text of Article 13 of the Mexican Federal Constitution, [110] a provision that deems conventional the I/A

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[104] *Cf. Case of Fernández Ortega et al. v. México, supra* note 21, para. 237, and *Case of Rosendo Cantú et al. v. México, supra* note 22, para. 220.

[105] "Without the interposition of other things" and "Now, the point, at the instant" (*Real Academia de la Lengua Española,* vigésima segunda edición).

[106] "On the imposition of private initiative, said of the spontaneous action or interference of the judge in the process, without request or petition, or initiative of the judge without request of a party." *Cf*. Couture, Eduardo J., *Legal Dictionary. Spanish and latin, with translation into french, italian, portuguese, english, and german. 4th* ed., corrected, updated and broadened by Ángel Landoni Sosa, Montevideo, Julio César Faira-Editor, 2010, p. 534.

[107] Para. 4 of the concurring opinion formulated in the *Case of Gomes Lund et al. ("GUERRILHA DO ARAGUAIA") v. Brazil, supra* note 4.

[108] *Case of Radilla Pacheco v. United Mexican States*, *supra* note 19, para. 275.

[109] Para. 198 of the Judgment of *Case of Cabrera García and Montiel Flores v. Mexico*, to which this concurring opinion pertains, *supra* note 1.

[110] In this regard, the standard notes: "Article 13. (…)the military jurisdiction subsists for crimes against and violations of military discipline, but the military tribunals in any case and for any reason, may not extend its jurisdiction over persons outside the army. When a crime or lack of military law involves a civilian, the the competent civil authority shall know the case."

Court of H.R. and, therefore, the interpretations of secondary legislation must comply with the Constitution and the American Convention:[111]

> In practical terms, the interpretation of Article 13 of the Political Constitution of Mexico shall be coherent with the conventional and constitutional principles of the due process of law and the right to a fair trial, included in Article 8(1) of the American Convention and the relevant regulations of the Mexican Constitution. [112]

78. Moreover, it also implies an obligation of the Mexican judges to always carry out the "diffused control of conformity with the Convention" and not just for what it does for the determination in individual cases on the standards of subject matter jurisdiction and personal jurisdiction and military jurisdiction referred to in the judgments issued by the I/A Court of H.R., but in general in all matters within its jurisdiction where the Inter-American Court makes interpretations to the Inter-American *corpus juris,* given that it is said Inter-American Court that is the last and final interpreter of the Pact of San Jose (objective dimension of the interpreted norm). [113]

79. Indeed, as we noted at the time (supra paras. 51, 52, and 63), the jurisprudence of the I/A Court of H.R. takes on a “direct effect” on all nation States that have expressly recognized its jurisdiction, whether resulting from a case where they have not participated formally as a "material part." This was due to the effects of the interpreted treaty provision, which produces "spillover effects" of conventional law and not only subjective efficacy for the protection of law and liberty in a case submitted to its jurisdiction. In this sense, the conventional jurisprudence is not just guidance, [114] but it is mandatory for Mexican judges (in their subjective and objective dimension) and its effectiveness begins with the international rulings notified or forwarded to the Mexican state, in terms of Article 69 the American Convention on Human Rights and regardless of the domestic procedure carried out to allow the Mexican bodies and authorities to coordinate its implementation and enforcement, as well as other acts carried out to raise awareness and adopt the judgment and international jurisprudence.

80. The “diffused control of conformity with the Convention” initiated its implementation by some Mexican courts in the light of conventional jurisprudence. Indeed, the First Appellate Court on Administrative and Work Matters of the Eleventh Circuit, based in Morelia, Michoacan, upon deciding upon the direct amparo 1060/2008, on July 2, 2009 (months before the judgment of the *Case of Radilla Pacheco*), referring to the *Case of Almonacid Arellano v. Chile* (2006), considered the following:

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111 *Case of Rosendo Cantú et al. v. México, supra* note 22, para. 218.

112 *Cf. Case of Radilla Pacheco v. United Mexican States*, *supra* note 19, para. 338.

113 See *supra* para. 63 and 75.

114 See the Thesis I.7o.C.51 K, of the Seventh Collegiate Tribunal on Civil Matters of the First Circuit, whose rubric and test are:

“INTERNATIONAL JURISPRUDENCE. ITS GUIDING USE IN MATTERS OF HUMAN RIGHTS.

Once incorporated int the Supreme Law of the Union in the international treatises by Mexico, in matters of human rights, and given the recognition of the contentious jurisdiction of the Inter-American Court of Human Rights, it is possible to invoke the jurisprudence of said international tribunal as guidance when interpretaing and complying with the provisions of protection of the human rights.” (Underlining added). Published in the *Semanario Judicial de la Federación y su Gaceta*, TCC, Tome XXVIII, December 2008, p. 1052.

In that order, it should be established that the local courts of the Mexican State should not limit themselves to applying only the local laws but are also obligated to apply the Constitution, treaties, or international conventions and the jurisprudence of the Inter-American Court of Human Rights, among others, which obligates them to exercise the control of conformity with the Convention among the domestic legal and supranational norms, as was considered by the First Chamber of the Supreme Court of the Nation, upon solving the direct review under 908/2006, promoted by Nahum Ramos Yescas, at the session held on April 18 two thousand seven, when it was determined that:

"The concept of best interest of the child has been interpreted by the Inter-American Court of Human Rights (whose jurisdiction the Mexican state accepted on March 24,1981, upon ratifying the American Convention on Human Rights and whose standards, therefore are mandatory."

(...)

Then, upon the First Chamber of the Supreme Court of Argentina having considered that given that Mexico accepted the American Convention on Human Rights, it also acknowledged the interpretation of said Convention made by the Inter-American Court of Human Rights, which leads the appellate court to consider that all State courts are obligated to exercise control of conformity with the Convention to resolve any matter under its jurisdiction, as stated by the Inter-American Court decision cited in the case of Almonacid Arellano et al. v. Chile, in a ruling issued on September twenty-six, two thousand six.

Hence, the national judicial bodies are obliged to exercise 'control of conformity with the Convention,' with respect to acts of authority, including general standards, pursuant to the authority conferred upon them by the codes to which they are subject and the provisions of international law of human rights, to which they are bound by the conclusion or ratification of treaties or conventions of the President of the Republic, which aims to create conformity among the domestic acts and international commitments of the State, which generate it certain duties and recognize certain rights for individuals; a control which remains in international-or supranational-tribunals, as well as in the national ones, who therefrom entrust them with the new regional courts of human rights and acquire further obligation to adopt in their legal apparatus, both the norms and the interpretation thereof, through policies and laws that guarantee respect for human rights and guarantees, expressed in their national constitutions, and of course in their international treaty commitments.

Because of this, it is necessary to establish that the authorities of the Mexican state have the unavoidable obligation to observe and apply in their domestic jurisdiction-- as well as in the legislative-- actions of any other order to ensure respect for the rights and guarantees, not only of the constitution and internal rules but also of the international conventions to which Mexico is party and the interpretations of its provisions carried out by international bodies; which leads to substantiate that all courts must carry out the diffused control of conformity with the Convention, to resolve the issues under its jurisdiction.

(...)

This means that although the Mexican courts and judges, in principle, are subject to the observance and application of the rule of national law; when the Mexican State ratified an international treaty, the American Convention, as part of the State apparatus, they also are subject to it, therefore, are obligated to ensure that the effects of the provisions that make it up are not diminished by the application of laws contrary to its object and purpose; through the exercise of control of conformity with the

> Convention between domestic legal norms and the American Convention on Human Rights; indeed the interpretation of such a convention would have made the Court, as the final interpreter. (Emphasis added).

81. The foregoing standard is reflected in the Thesis XI.1º.A.T.47 K, whose rubric and text is:[115]

> CONTROL OF CONFORMITY WITH THE CONVENTION AT THE DOMESTIC LEVEL. MEXICAN TRIBUNALS ARE OBLIGATED TO EXERCISE IT.
> In the case of human rights, the courts of the Mexican State, as they should not be limited to apply only the local laws, but also the laws of the Constitution, treaties, or international conventions under the jurisprudence of any international court that carry out the interpretation of treaties, agreements, conventions or agreements signed by Mexico; this forces to exercise control of conformity with the Convention among the domestic legal and supranational levels, because it implies abiding by and implementing in their jurisdiction, including the legislative, measures of any order to ensure respect for the rights and guarantees, through policies and laws that guarantee. (Emphasis added).

82. Moreover, the Fourth Collegiate Tribunal on Administrative Matters of the First Circuit, with residence in the Federal District, upon deciding the direct amparo 505/2009, on January 21, 2010, has maintained the thesis I.4º.A.91 K, whose rubric and text are:[116]

> CONTROL OF CONFORMITY WITH THE CONVENTION. MUST BE EXERCISED BY THE JUDGES OF THE MEXICAN STATE IN MATTERS SUBMITTED FOR CONSIDERATION IN ORDER TO VERIFY THAT THE DOMESTIC LAWS DO NOT INFRINGE THE OBJECT AND PURPOSE OF THE AMERICAN CONVENTION ON HUMAN RIGHTS.
>
> The Inter-American Court of Human Rights has issued standards in the sense that when a State, as in this case Mexico, has ratified an international treaty such as the American Convention on Human Rights, its judges, as part of the State apparatus should ensure that the provisions contained therein are not adversely affected or limited by domestic rules that run counter to its object and purpose, so they must exercise "control of conformity with the Convention" between the rules of law and the Convention itself, taking into account not only the treaty but also the interpretation of it. This becomes important for those organs that are responsible for judicial functions, since they must attempt to remove at any time, practices that tend to deny or define the right of access to justice. (Underlining added).

83. This demonstrates the beginning of the practice of "diffused control of conformity with the Convention" in the Mexican judicial system, in line with Inter-American conventional jurisprudence and with examples of the high courts of Latin

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[115] Published in the *Semanario Judicial de la Federación y su Gaceta*, Novena Época, TCC, Tome XXXI, May 2010, p. 1932.

[116] Published in *Semanario Judicial de la Federación y su Gaceta,* Novena Época, TCC, tome XXXI, March 2010, p. 2927.

American countries, referred to in paras. 226 to 232 of the Judgement in the *Case of Cabrera Garcia and Montiel Flores v. Mexico,* which motivates this separate concurring opinion.

84. Finally, this trend is evident in recent legislative reforms, as in the Constitution of the State of Sinaloa (2008). In this supreme local code, criteria is established for interpreting the fundamental rights and "its meaning is determined in accordance with international instruments incorporated into the Mexican legal system and which meet the criteria applicable to the international protection of human rights recognized by the Mexican state, especially the Inter-American Court of Human Rights." [117] (Underlining added).

V. TOWARDS AN *IUS CONSTITUTIONALE COMMUNE* IN THE AMERICAS

85. The interaction between international and constitutional law is inescapable and its communicating vessels are constricted. On the one hand, the "internationalization" of various categories that exist in the national scope of constitutional States is evident, especially with international covenants on human rights and the creation of universal and regional systems of protection, with the purpose that these international instruments are implemented and be truly effective by the States. It moves from the traditional "constitutional guarantees" to "guarantees of the Convention," having its maximum level of development with the judgments dictated by international tribunals.

86. The doctrine of "diffused control of conformity with the Convention" seems to have been adopted by the I/A Court of H.R. in an evolutionary process of "internationalization," upon having influenced the practices of national high courts. (see *supra* para. 29). Moreover, the influence that from 2006 is set by the Inter-American Court to "irradiate" jurisprudence and therefore achieve the national reception of international standards in those States Party to the Convention, produces an intensity and depth of "nationalization" or "constitutionalization" of the International Law of Human Rights, as evidenced by the receipt of that doctrine by the national high courts (see above paras. 28 and 30).

87. In the present 2010, said doctrine has been reiterated by the I/A Court of H.R. in eight contentious cases, reflecting its consolidation. Its elements and distinctive characteristics will surely remain being carefully analyzed by the Inter-American and national judges. It does not aim to establish which body has the final word, but to encourage creative jurisprudential dialogue, responsible and committed to the effectiveness of fundamental rights. National judges will now become the first Inter-American judges. It is they who bear the greatest responsibility to harmonize national legislation within the Inter-American parameters. The I/A Court of H.R. should monitor this and be fully aware of the standards that will be constructed through the use of its jurisprudence, considering also the "national discretion" that nation-States have to interpret the Inter-American *corpus juris*. [118] Much is anticipated from the Inter-American judges and much is

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[117] Article 4 Bis C-II. The reform was pubished in the *Official Newspaper* of said Federal Entity on May 26, 2008.

[118] On this doctrine, *Cf.* García Roca, Javier, *El margen de apreciación nacional en la interpretación del Convenio Europeo de Derechos Humanos: soberanía and integración,* [The margin of national appreciation of the European Convention on Human Rights: soveriegnty and integration] Madrid, Civitas, 2010.

expected, and “to the extent that self-demand, they may in turn demand more from national courts." [119]

88. In short, the significance of the new doctrine of “diffused control of conformity with the Convention” is of such magnitude that it is probable that the future of the Inter-American System of Human Rights rests in it, and in turn, contributes to the constitutional and democratic development of nation-States in the region. The construction of an authentic "jurisprudential dialogue" between national and Inter-American judges, is sure to become the new standard for effective judicial review of human rights in the XXI century. There lies the future: a point of convergence in human rights to establish an *ius constitutionale commune* in the Americas.

Eduardo Ferrer Mac-Gregor Poisot
Judge *ad hoc*

Pablo Saavedra Alessandri
Secretary

[119] Sagués, Néstor Pedro, “El “control de convencionalidad” como instrumento para la elaboración de un *ius commune* interamericano”, [The control of conformity with the Convention” as an instrument in the elaboration of the Inter-American *ius commune*] in *La justicia constitucional y su internacionalización. ¿Hacia un* Ius Constitutionale Commune *en América Latina?, [The Constitutional Justice and its internalization. Towards an Ius Constitutionale Commune in Latin America] op. cit. supra* note 66, tome II, pp. 449-468, in p. 467.