CONCURRING VOTE OF JUDGE *AD HOC* ALEJANDRO CARLOS ESPINOSA IN RELATION TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE *CASE OF FERNÁNDEZ ORTEGA ET AL. V. MEXICO*, OF AUGUST 30, 2010

1. The present concurring vote is for the cited case *ut supra* as well as for the case of *Fernández Ortega et al. v. México* in consideration of the following reasons:

a) It deals with soldiers in service, namely agents of the State of Mexico, that under special conditions committed grave violations of the domestic and international legal codes, which should have been observed in attention given their role as guarantors of the domestic legal system of the State of Mexico and regarding the rights of their co-nationals;

b) The passive subject [victim] of the crime of rape for whom this case has unfolded, is a woman, poor, and indigenous, exposed to a high level of vulnerability; apart from not speaking the Spanish language;

c) The Code of Military Justice is similarly applied to investigate crimes committed by soldiers and those in which civilian victims are found, in attention to the provisions of Article 57, section II, subsection a) of the mentioned legal code; that which was ordered modified in the case of *Radilla Pacheco v. México*;

d) The unfavorable circumstances for the victims in regard to geo-referencing elements, access to justice, and health, as well as high vulnerability are similar;

e) The delay was extreme in the preliminary investigation of the criminal procedure, and timely results by the various instances available in the search for justice were not produced, and

f) The victims underwent torturous paths to obtain access to justice.

2. In this concurring opinion, I express my agreement with the logic of motivation and argumentation, and therefore, with the content of the Judgment, given the case analysis by the Inter-American Court of Human Rights that provoked the ruling in the case of Rosendo Cantú et al v. México, as well as with the criteria and sums for reparation of harm detailed in the Judgment, due to their nature and proportionality. I add in this statement, and in addition to the findings held in the Judgment, my reasoning *ad cautelam* derived from specifics that I find the State of Mexico should observe.

3. As indicated by the American Convention on Human Rights, the subsidiary nature of the Inter-American jurisdiction of human rights, in contrast to the domestic jurisdiction, is fundamental, given that it enhances and compliments that provided in the domestic laws of the American States; as such, I consider that the appropriate interpretation of Article 13 of the Constitution of the United Mexican States should harmonize not only Article 57, section II, subsection a) of the Code of Military Justice, but also the provisions enshrined in subsections b), c), d), and e), of the indicated normative instrument.

4. Despite the structural and normative weaknesses presented in the Code of Military Justice, which dates back to 1933, it should be noted that the State of Mexico was willing to investigate the case institutionally, but it is also evident that it did not go beyond carrying out routine procedures knowing that the facts would not be ascertained nor responsibility be

pinned on the State agents, without seeking the maximum in the quest for justice “in that as time passes the truth passes.”

5. The State of Mexico should ensure that legal uncertainty no longer occurs, that which affects governed individuals when crimes are investigated of one and of another application of the law within the constitutional jurisdiction, namely, that investigative procedures be undertaken without a definite juridical criteria derived from a factual relation, such as when soldiers are criminally charged, then it becomes less coherent when an investigations is then carried out in the common jurisdiction, leaving the victims defenseless because of the lack of a legal remedies to strengthen their defense and to guarantee access to justice for them.

6. It must be noted, that however negligence and lack of results in procuring justice from the Mexican Estate were duly proven within the different criminal constitutional jurisdictions that were involved in the investigation of the facts, even with those acting as assistant to the public prosecutor, it shall also be said, that this is not a systematic violation used by the Mexican State as an instrument to intentionally frighten the indigenous communities in the region, particularly in regards to women.

7. The application, setting the litigious framework of the proceeding, does not exclude the possibility of presenting supervening evidence before a judgment is pronounced, those of which must be distinguished, in a timely matter, from the facts that are not grounds of the *litis*, even if they are related to the case, therefore the complaint, or the initial written document, sets the beginning of the *litis*.

8. The attention given by the Mexican State to the Judgment, shall not only emphasize the State’s obligation to provide first level psychological care to the victim, namely, care given by experts on the field to all direct and indirect victims, but it also shall supervise that such treatments are indeed carried out until the victims are medically discharged.

9. Resulting from retrospective and prospective studies, the Mexican State must redesign and strengthen public policies that involve its Armed Forces in order to minimize interaction between military soldiers and the civil population, thereby ensuring not only a decrease in inconveniences caused, but also a decrease in violations to fundamental rights for greater offenses to the civil population, while disciplinary forces carry out their tasks and that have been emphasized due to public safety issues in Mexico; consequently, indoctrination should be given to military soldiers who provisionally carry out tasks of public safety or tasks which are linked to it or to the investigation and persecution of the crimes in which they participate.

10. With the current paradigmatic case, the Mexican State should seize the opportunity, not only to restore its commitment to civil society, but also to simultaneously, execute proper compliance to the Judgment handed down in this case, as well as in the case of *Fernández Ortega et. al*; it is now time to start a review and transformation of a lagging military model of justice, not only pertaining to the legislative methodology, but also to the distribution of its courts and tribunals and substantive and procedural rules, thus considering adopting a new model which will not play down the importance of service, obedience, and discipline, but yet will allow for the transformation of the Mexican military judicial system.

11. With *ad cautelam*, the importance and significance for the State of Mexico of, in a preventive sense, taking its military tribunals to the Judicial branch of the Federation, should be considered because if it is true that irregularities were involved in the criminal

proceedings of the preliminary investigation of this case, it is likely that subsequent cases face, in addition, the burden of yet another element that conflicts with international standards, which under said fact would be the concurrence of two powers of the State in one and the rupture of the unity of the trial process.

Alejandro Carlos Espinosa
Judge *Ad hoc*

Pablo Saavedra Alessandri
Secretary