INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF CABRERA GARCÍA AND MONTIEL FLORES *v.* MEXICO

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

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

the Inter-American Court of Human Rights (hereinafter, the "Inter-American Court" or the "Court"), 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 as follows:

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[1] According to the provisions of Article 79(1) of the Court's Rules of Procedure which entered into force on January 1, 2010, "Contentious 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 correspond to the instrument approved by the Court during its Forty-ninth Regular Period of Sessions held from November 16 to 25, 2000, and partially amended by the Court in its Eighty-second Regular Period of Sessions, held from January 19 to 31, 2009, 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 Mexican States (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 the Center for Justice and International Law (CEJIL). On February 27, 2004 the Commission adopted Report 11/04, which declared the case admissible.[2] On October 30, 2008 the Commission approved the Merits Report 88/08, prepared according to Article 50 of the Convention.[3] Considering that Mexico had not adopted the recommendations included in said report, the Commission decided to submit this case to the Court's jurisdiction. The Commission designated Florentín Meléndez, Commissioner and Santiago A. Cantón, Executive Secretary of the Inter-American Commission, as delegates and appointed Elizabeth Abi-Mershed, Assistant Executive Secretary, and Isabel Madariaga, Juan Pablo Albán Alencastro, and Marisol Blanchard, specialists at the Executive Secretariat, as legal advisers.

2. The claim is related to the State's alleged responsibility 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 in the custody of members of the Mexican army, for the failure to bring them, without delay, before a judge or other official authorized to carry out judicial functions in order to oversee the legality of their detention, and for the irregular procedures carried out 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 courts to investigate and judge human rights violations. The detention of Messrs. Cabrera and Montiel took place on May 2, 1999.

3. The Commission requested that the Court declare the Mexican State responsible for the violation of the rights enshrined in 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 non-compliance with its general obligations under Article 1(1) (Obligation to Respect Rights) and 2

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[2] In the Admissibility Report 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, in relation to Article 1(1) of that international instrument, and Articles 1, 6, 8 and 10 of the Inter-American Convention to Prevent and Punish Torture" (File of attachments to the application, volume I, annex 2, page 93).

[3] In the Merits Report N° 88/08, the Commission concluded that the State 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 to establish violations of the rights contained in Articles 13, 15, and 16 of the American Convention (file of attachments to the application, volume I, annex 1, page 1).

(Domestic Legal Effects) of the Convention; and for non-compliance with the obligations set forth in Articles 1, 6, 8 and 10 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Messrs. Cabrera and Montiel. The Commission also asked the Court to order the State to implement several measures of reparation.

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 Montaña Tlachinollan A.C.[6] [Centro de Derechos Humanos de la Montaña Tlachinollan A.C.] (hereinafter "the representatives") filed the brief containing pleadings, motions and evidence (hereinafter, "brief of pleadings and motions"). In addition to the violation of rights alleged by the Commission, the representatives alleged that torture was committed in this case, in 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 loved ones and the continued impunity of said violations;" the violation of Article 16 (Freedom of Association) of the American Convention to the detriment of Messrs. Cabrera García and Montiel Flores, since the violations against them were in "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 safety." Within this framework, 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 that the Court order the State to adopt several reparation measures.

5. On February 7, 2010 the State submitted a brief containing its preliminary objections, its answer to the application and observations to the brief of pleadings and motions (hereinafter "answer brief"). In said brief the State filed a preliminary objection concerning the Court's "[l]ack of jurisdiction to hear the merits of the […] petition under 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. In accordance with Article 38(4) of the Rules of Procedure, on April 2, 2010 the Commission and the representatives submitted their arguments in relation to the preliminary objection filed by the State.

II
PROCEEDINGS BEFORE THE COURT

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

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[4] On behalf of Centro Prodh, Stephanie Erin Brewer, Jaqueline Sáenz, 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 the Centro de Derechos Humanos de la Montaña "Tlachinollan", Abel Barrera, Director of Tlachinollan, signed the brief.

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

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

8. In an Order issued on July 2, 2010, the Court's President (hereinafter "the President") summoned a public hearing in this case and ordered that certain affidavits and other statements be presented at said hearing.[8] The parties were granted an opportunity to present observations to the affidavits.

9. The Court also 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] concerning the admissibility of the alleged victims' arguments regarding the duration of the unlawful detention and abuse suffered during their detention; the Human Rights Clinic at the University of Texas,[10] concerning the vulnerability of persons detained without an arrest warrant and the need to be brought before a court, without delay; Gustavo Fondevila, a professor at the *Centro de Investigación y Docencia Económica* (Economic Research and Teaching Center) (CIDE),[11] concerning unlawful detentions carried out by the Mexican Army and the legalization of torture under the concept of coerced confession; *Asociación para la Prevención de la Tortura* (Association for the Prevention of Torture),[12] regarding the exclusion of evidence obtained under torture; Miguel Sarre, professor at the *Instituto Tecnológico Autónomo de Mexico* (Autonomous Technological Institute of Mexico) (ITAM),[13] regarding the State's obligation to regulate the registration of detainees 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 remedy for 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] regarding the broad discretion of the Mexican Public Prosecutor's Office to conduct a 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 they have suffered

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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 the 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, Secretary of the 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 the Instituto Tecnológico Autónomo de Mexico (Autonomous Technological Institute of Mexico) (ITAM).

14 The brief was filed on September 13, 2010 by Luis Miguel Cano López, 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 CEMDA's Human Rights and Environment Program.

and 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 oversight; International Forensic Program of Physicians for Human Rights,[18] on non-compliance with the international requirements regarding the evidence of sodium rhodizonate; EarthRights International,[19] on the human rights abuses carried out in the context of communities' resistance to extractive industries; and the Environmental Defender Law Center,[20] on the serious situation faced by Mexican environmentalists, 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 Court's Eighty-eighth Regular Period of Sessions, at the Court's seat.[21] During the hearing the judges asked a number of questions 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 González and José 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 The following individuals appeared at this hearing: 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 containing some of the questions asked by the Judges of the Court at the public hearing, concerning: i) The presence of the Armed Forces in Guerrero: a) the existence of a specific, well-grounded and reasoned request by the civilian authorities for the military forces to intervene at the scene of the events and b) further information about the jurisprudence of the Supreme Court of Justice of Mexico in relation to the role of the Armed Forces in matters of public security; ii) the detention of the alleged victims: c) the legal framework governing the authority of the military forces to arrest and/or detain civilians, d) a detailed description of events following the arrest of Messrs. Montiel Flores and Cabrera García until they were brought before a judge or a competent authority, explaining if applicable, the excessive 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 arrest; iii) The weapons allegedly seized from the alleged victims at the time of their arrest: f) record or records of confiscation of weapons when Messrs. Cabrera García and Montiel Flores were arrested, the type of weapons found and their exact number, the final judicial decisions regarding the alleged victims' responsibility for carrying such weapons and which weapons prompted the corresponding criminal investigation. In the event of any contradictions in some of the records, specific arguments regarding these, g) information about Mexican legislation on the classification of weapons in terms of their danger to public security, h) information on the validity and appropriateness of the sodium rhodizonate test to prove the use or handling of weapons, i) information and arguments regarding the alleged contradictions stemming from the sodium rhodizonate test in this case, and j)

11. On October 11, 2010 the Inter-American Commission, the representatives[23] and the State forwarded their final written arguments, which were conveyed to the parties so that they could present any observations deemed pertinent regarding certain documents presented by Mexico and by the representatives together with those briefs. In their final arguments, the parties presented evidence related to the questions and evidence to facilitate adjudication of the case, as requested by the Court.

III

PRELIMINARY OBJECTION TO THE "FOURTH INSTANCE RULE"

1. Arguments of the parties

12. The State filed a preliminary objection regarding the Court's "lack of jurisdiction to hear the merits of this application in light of the fourth instance principle." The State held that "the Court cannot determine whether the national courts applied domestic law correctly or whether the decision was wrong or unfair" and that the Court "should determine" only whether the judicial criminal proceedings "adhered to the principles of judicial guarantees and protection under the American Convention or whether there is any judicial error that may be or has been proven evidencing serious injustice." The State argued that this could not have occurred in this case, since Messrs. Cabrera and Montiel filed "a motion challenging their formal imprisonment, a motion through which they obtained partially favorable results," and that "they also had access to other levels of jurisdiction whereby they could appeal the conviction by the court of first instance, and to other instances to appeal subsequent decisions, remedies from which they also benefited," and even evidence submitted extemporaneously was accepted. Indeed, Mexico argued that "all the actions or omissions of the State" alleged as "violations of the American Convention, even those of a procedural nature, have already been assessed and considered by independent and impartial Mexican judicial bodies through effective and efficient motions" and "with full respect for the right to a fair trial and judicial protection."

13. The State noted that the Court "has been constant in declaring inadmissible preliminary objections based on the principle of fourth instance." However, this case would be exceptional because in previous cases the plaintiffs had not tried to obtain "a review of the judgments or decisions by the domestic courts," but rather the determination of "whether an action 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 already made by the domestic courts," since these would have "effectively [exercised] the *ex officio* 'conventionality control' that

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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 integrity 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 carry out the relevant procedures to facilitate the visit by Physicians for Human Rights to the prison where the alleged victims were held?, m) were physicians not attached to state institutions allowed to perform medical checkups when the alleged victims were arrested?, n) explanation for the coincidences and/or differences in the medical reports that seem to have led to the decision to release the alleged victims in November 2001 and the medical report by Dr. Tramsen and Dr. Tidball-Binz from Physicians for Human Rights- Denmark on July 31, 2000. Finally, aside from the above questions for all the parties, the Inter-American Commission was asked to clearly specify the reason why the elements examined in the petition were not sufficient to conclude that acts of torture were committed against the alleged victims.

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

must prevail for a fourth instance exception to be applicable." Consequently, the State asked the Court to declare itself not competent since "all the merits of the case […] were analyzed judicially" in judicial proceedings that "determined the non-existence of torture" and, "in a proceeding conducted pursuant to the right to a fair trial […] the criminal responsibility of the [alleged victims] was proven." Finally, the State requested that, in the event of this objection being declared inadmissible, the Court rule "on the criteria, legal grounds and circumstances in which, even when the national courts exercise conventionality control," the Court "may hear the matters submitted to its jurisdiction."

14. The Commission argued that it does "not seek to present issues related to the interpretation or application of the domestic law of the State to the facts" in this case "but requests the Court to declare that the Mexican State is responsible for the violation" of the rights enshrined in the stipulated in the inter-American instruments. Furthermore, the Commission emphasized that it had analyzed "the question of admissibility in this case in a timely and proper manner" and that in the Merits report and the application it had concluded that there was "failure to investigate and substantiate the complaint regarding the alleged acts of torture" and "the irregularities of the criminal proceedings against the [alleged] victims." Lastly, the Commission pointed out that "the objection filed by the Mexican State is groundless, since the State's arguments presuppose an assessment of the merits of the application and the evidence submitted in relation to the judicial system and the decisions of the domestic courts in this case."

15. For their part, the representatives pointed out that "the State's argument cannot be considered as a preliminary objection, since it is based on the compatibility of the actions of its domestic organs with the American Convention," and therefore "constitutes an argument on the merits." Furthermore, the representatives held that they are not requesting a review of "the way in which the Mexican courts applied their domestic legislation or made their decisions" but rather of "the alleged violations of the Inter-American instruments," bearing in mind that the State is internationally responsible for any actions or omissions by any of its powers or bodies, including the courts. The representatives also requested that the Court declare the "incompatibility of the military courts' jurisdiction to investigate the reported acts of torture with the provisions of the Convention." As to the argument that the "fourth instance" objection is applicable because all the violations alleged before the Court had already been examined and considered by the judicial bodies, the representatives affirmed that this would not be valid since "several human rights violations under examination in this case were never assessed by the domestic courts or, if they [were], it was not done in the appropriate manner," as in the case of the alleged torture. As regards the argument that the preliminary objection related to "fourth instance" would apply because the domestic Judiciary would have exercised "the *ex officio* conventionality control that must prevail for the fourth instance objection to be applicable," the representatives pointed out that the evaluation of compliance with such control "is within the competence of the Inter-American Court, along with the rest of the obligations under the Convention." Furthermore, they emphasized that "it is not true that such 'conventionality control' was indeed 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 it does not

[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; *Case of Zambrano Velez et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of July 4, 2007.

perform the role of a court of "fourth instance." This means that the Court cannot act as a higher court or as an appeal court in settling disputes between parties, on some aspects of the assessment of evidence, or of the application of the domestic law to certain matters not directly related to compliance with international human rights obligations. Thus, this Court has held that, in principle, "the courts of the State are called upon to examine the facts and evidence submitted in particular cases."[26] This 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 held that preliminary objections are motions aimed at preventing an examination of the merits of the matter called into question, by challenging the admissibility of an application or the Court's jurisdiction to hear a specific case. or any of its aspects, based on the person, matter, time or place involved, provided that these aspects are of a preliminary nature.[27] If these motions cannot be reviewed without previously analyzing the merits of a case, they cannot be analyzed through a preliminary objection.[28]

18. Accordingly, it may be argued that, if the Court were intended to act as a higher court in terms of the scope of the evidence and domestic law, a matter would be submitted to it on which it could not rule and lacks competence, having regard to the subsidiary jurisdiction of an international court. However, for this objection to be applicable, the applicant would need to apply to the Court to review the decision of the domestic court, based on its incorrect assessment of the evidence, the facts or domestic law without, in turn, alleging that such decision was a violation of international treaties over which the Court has jurisdiction.

19. On the contrary, it is up to the Court to ascertain whether or not the State, in the steps effectively taken at domestic level, violated its international obligations stemming from those Inter-American instruments that grant authority to the Court. Thus, according to the Court's constant case law, the determination of whether or not the actions of the judicial bodies constitute a violation of the State's international obligations may lead the Court to examine the corresponding domestic proceedings in order to establish their compatibility with the American Convention.[29] This is so because, if it is claimed that a judgment has been incorrect because of a violation of due process, the Court may not refer to this claim as a

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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] The Preamble of the American Convention states that 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. Mexico. 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.

preliminary objection, since the Court will need to consider the merits of the case and determine whether or not this conventional right was violated.

20. Bearing in mind the foregoing, the Court notes that the basic premise of the preliminary objection filed by the State is that no human rights violation was committed in this case, which is precisely what will be discussed in the merits stage. When assessing the merits of the petition the Court shall decide whether, as alleged by the State, the domestic proceedings responded to all the actions claimed by the Commission and the representatives before this Court, and whether the State fulfilled its international obligations in doing so.

21. Furthermore, the above conclusion is not altered by the fact that the State alleges that the national courts have exercised an *ex officio* "conventionality control" between domestic rules and the American Convention. Indeed, the merits stage shall determine whether the presumed conventionality control allegedly exercised by the State involved observance of the State's international obligations in accordance with this Court's case law and with the applicable international law.

22. Accordingly, the Court dismisses the preliminary objection filed by the State of Mexico.

IV
JURISDICTION

23. The Inter-American Court has jurisdiction to hear this case under the terms of Article 62(3) of the Convention, given that Mexico has been a State Party to the American Convention since March 24, 1981 and accepted the Court's binding jurisdiction on December 16, 1998. Mexico also 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, and on its case law regarding evidence and the assessment thereof,[30] the Court will now examine and assess the documentary evidence submitted by the parties at the different procedural stages, as well as the statements rendered by means of affidavits and those received at the public hearing. In doing so, the Court will adhere to the principles of sound judgment, within the applicable legal framework.[31]

1. Testimonial and Expert Evidence

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

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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 Cantú 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 Cantú et al. v. Mexico*, *supra* note 30, para. 27; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra* note 30, para. 39.

1) *Teodoro Cabrera García*, alleged victim, a witness proposed by the representatives, who testified 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 involvement in that organization;" ii) the facts of the alleged violations committed, "as well as their [alleged] continuing impact on his physical and psychological health," iii) "the [alleged] effects resulting from the reported violations on his family members," and iv) "the measures that the State should adopt to repair the damage caused;"

2) *Miguel Olivar López*, Mr. Cabrera García's stepson, a witness proposed by the representatives, who testified on the following aspects: i) the alleged effects on the Cabrera López family resulting from "the [alleged] unlawful and arbitrary arrest, torture, imprisonment, criminal proceedings and lack of justice in his father's case;" ii) how "the [alleged] human rights violations had an impact on his family's ability to earn a living by tilling the soil of an old community plot," iii) the alleged impact on the health and well-being of his family; iv) "the [alleged] inability to return to his community;" v) "the [alleged] continuing impact [on 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 damage caused;"

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

4) *Mario Ernesto Patrón Sánchez*, lawyer of the alleged victims in the domestic proceedings, a witness proposed by the representatives, who testified on the following aspects: i) the alleged errors and irregularities in the domestic criminal proceedings conducted against Messrs. Cabrera García and Montiel Flores, whom he represented as their lawyer and human rights advocate; ii) how the local courts allegedly hindered the presentation or consideration of evidence of the alleged torture suffered by the two presumed victims; iii) the alleged legal and practical obstacles encountered while exercising their defense, and iv) "the [alleged] fabrication of evidence found in the domestic criminal proceedings at the local, federal and military levels;"

5) *Celsa Valdovinos Ríos*, a defender of Petatlán forests and holder of the "Chico Mendes" environmental award for her environmental work in the state of Guerrero, a witness proposed by the representatives, who testified on the following aspects: i) "the context of environmental devastation in the forests of the region;" ii) "the process of founding the OCESP, with reference to the [alleged] harassment and attacks against environmental defenders;" iii) the activities of the OCESP, including the activities of the alleged victims in this case; iv) the alleged attacks and harassment following the arrest and imprisonment of Messrs. Cabrera García and Montiel Flores, and v) the alleged impact of these events on the "organizational process of OCESP and on the ability of its members to freely associate;"

6) *Héctor Magallón Larson*, Coordinator of Greenpeace Forest and Jungle Campaign, Mexico, an expert in environmental issues and deforestation, a witness proposed by the representatives, who testified on the following aspects: i) the "knowledge that Greenpeace-Mexico had regarding 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 that led to Greenpeace's involvement in the campaign to release Messrs. Cabrera García and Montiel Flores; iii) "[an] overview of the [alleged] difficulties encountered by community environmentalists in Mexico, emphasizing the [alleged] lack of protection faced by peasants and indigenous people struggling to preserve the ecosystems in their communities;"

7) *Miguel Carbonell Sánchez*, a researcher at Universidad Nacional Autónoma de Mexico [National Autonomous University of Mexico], an expert witness proposed by the Inter-American Commission, who testified on the following aspects: i) "the involvement of the military jurisdiction in the investigation and prosecution of crimes that are not the responsibility of and/or which could constitute human rights violations;" ii) "the theories 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 the application of military justice in Mexico;"

8) *Ernesto López Portillo Vargas*, an expert on public security, Executive Director of the *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), an expert witness proposed by the representatives, who testified on the following aspects: i) "the security policies implemented by the State […] in which the armed forces have [allegedly] been involved in public security tasks and the [alleged] lack of adequate domestic or civil controls over the actions of those forces;" ii) "the profile that a unit of law-enforcement officials should have," and iii) minimum standards of oversight required to ensure adequate accountability in such units, the consequences of their actions and respect for the human rights of the civilian population in the absence of adequate oversight;

9) *Jose Luis Piñeyro*, a sociologist and researcher, Professor at the Sociology Department of the Universidad Autónoma Metropolitana Campus Azcapotzalco, an expert witness proposed by the representatives, who testified on the following aspects: i) "the specific context of militarization in Guerrero [state] ;" ii) "the reason for and the impact of the presence of the Armed Forces in the rural communities of Guerrero and on the peasant movement, highlighting [alleged] patterns of human rights violations committed against civilians by the military;" iii) "aspects of the [alleged] militarization in Guerrero which are specific to this [s]tate and [would be] fundamental to understand the reasons for the military to [allegedly] detain, torture and invent crimes against the [alleged] victims and [how] the events described occurred;" iv) "the present situation in Guerrero regarding the [alleged] militarization and the impact of the anti-drug war 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 testified on the following aspects: i) "the results of a psychological evaluation carried out on Messrs. Montiel and Cabrera, specifying the continued effects of the violations which they [allegedly] suffered," and ii) the results of the evaluations conducted on relatives of

Messrs. Montiel Flores and Cabrera García, in order to demonstrate the impacts caused by the alleged human rights violations suffered by the presumed 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 testified on the following aspects: i) "an evaluation of the physical health of [Messrs. Cabrera and Montiel], describing the [alleged] continued effects of torture and other human rights violations [allegedly] suffered", and

12) *Carlos Castresana Fernández*, 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 testified on the following aspects: i) "[the] principle of immediacy in criminal procedural matters;" ii) "how to obtain confessions by cruel, inhuman and degrading treatment or torture," and iii) "the validity of such confessions as evidence in legal proceedings."

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

1) Rodolfo Montiel Flores, alleged victim, a witness proposed by the representatives, who testified on the following aspects: i) "his work as a forest advocate, describing the organizational process of [OCESP] to stop the [alleged] excessive logging in the region by transnational and local companies;" ii) "the context of the attacks against members of OCESP in the 1990s;" iii) the alleged "specific violations [allegedly] suffered by him and by Mr. Teodoro Cabrera[,] as from May 1999" and "the effect of those [alleged] violations on his physical and psychological health;" iv) "the [alleged] impact on his family members as a result of those events," 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, an expert witness presented by the representatives, who testified on the following aspects: i) "how the Mexican legal framework [allegedly] allowed and allows the granting of evidentiary value to statements and confessions rendered without legal oversight;" ii) "the practical effects of the legal framework on the actions of the prosecution and judicial authorities," referring to the most important domestic case law on this matter; iii) "the [alleged] practice of […] arbitrary and unlawful arrests 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 detainees;" v) the alleged disparity between the regulatory design of Mexico's criminal proceedings and recurrent practices; vi) "how the written nature of Mexican criminal procedure, its investigative aspects and the broad powers of the [P]ublic [P]rosecutor's Office, [apparently] enable and encourage irregular proceedings and the granting evidentiary of value to evidence or information obtained without adequate control[, and] without investigating any complaint of torture reported by individuals accused in criminal proceedings," vii) "the implications of the Constitutional reform regarding criminal justice approved in June 2008 for the [alleged] practice of violations mentioned," and viii) "the reforms currently needed to stop the admission of statements obtained without legal oversight 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 link between the symptoms he found and the facts described by the [alleged] victims to the PHR doctors;" iii) the method used to perform the medical examination and how this method can allegedly detect torture one year after the alleged events occurred; iv) "the internationally accepted methodology followed in order to determine torture," and v) "basic standards for the medical examination of detainees held under State jurisdiction in criminal proceedings, using these as a basis for analyzing the content of the medical certificates issued on the health status of Messrs. Montiel and Cabrera by State forensic doctors,"[32] and

4) Juana Ma. del Carmen Gutiérrez Hernández, official forensic physician at the Attorney General's Office of Mexico, an expert witness presented by the State, who issued a technical forensic-medical opinion on the following medical assessments: i) the tests conducted on the alleged victims on the days following the events of this case; ii) the test used as a basis for releasing the alleged victims from prison, and iii) the test conducted by Physicians for Human Rights – Denmark, and the relationship between these medical tests and the criminal proceedings in this case.

2. Admission of Documentary Evidence

27. In this case, as in others,[33] the Court admits the evidentiary value of those documents that were forwarded by the parties at the appropriate procedural stage that were not disputed or challenged, and the authenticity of which was not questioned. As to the documents forwarded in response to the request for evidence to facilitate adjudication of the case (*supra* para. 10), the Court incorporates these into the body of evidence, pursuant to the provisions of Article 47(2) of the Rules of Procedure.

28. Furthermore, the Court shall examine, in the first place, Mexico's observations regarding certain documents submitted with the petition and with the brief of pleadings and motions and shall then rule on the documents that were

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[32] The State asked the Court to reconsider its President's decision to summon Dr. Tramsen as an expert witness. The full Court rejected said request. In its request, the State objected to Dr. Tramsen for "having been a defender and person of trust" of Messrs. Cabrera and Montiel and for indicating that "he neither knew nor represented the alleged victims before issuing his opinion […] at the domestic courts." The State added that this attitude "calls into question the impartiality, objectivity and truthfulness with which the expert witness rendered his opinion." In this respect, the Court noted that the State "did not indicate how Dr. Tramsen would have acted as defense counsel" nor " did it present a document showing that he acted as a legal-technical support during the statements rendered before the prosecutors or judges or that he had filed judicial remedies or legal arguments about what happened." The Court 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 alleged by the State is not admissible. As to the lack of objectivity, the Court agreed with the President that "the objectivity that an expert witness should presumably have, even at the domestic level, does not cease because he or she has rendered an expert opinion on another occasion". Therefore, even though "the domestic courts may heard, reported and assessed that expert opinion prior to this Court hearing the case, this does not imply that said opinion is no longer an expert or objective one." *Cf. Case of Cabrera García 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 Cantú et al. v. Mexico*; *supra* note 30 and *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra* note 30, para. 42.

provided by the representatives and the State after submitting their pleadings and motions brief and answer brief, respectively.

29. The State requested that "any exhibit or certificate that the C[omission] or the petitioners have attached to their respective briefs, related to these proceedings, be compared with the certified records [of the criminal proceedings]" so as to "avoid taking any of the facts or actions related to the proceedings out of context." The State indicated that "any record referring to the criminal proceedings which does not form part of said records shall be considered as a mere interpretation or personal opinion." On this point, the Court notes that the State did not challenge the admissibility of the evidence and considers that its argument regarding the significance of the documents not included in the domestic criminal file is a matter related to the burden of proof of such documentation, a matter which should be decided in the merits stage, taking into account the State's arguments and the remaining evidence on file.

30. The State asked the Court "to grant the appropriate value to publications and reports by individuals, based on international standards, ensuring that their content fairly reflects the scope of the matter at hand." This Court notes that the State did not challenge the admissibility of these individual reports and shall consider these along with the rest of the body of evidence.

31. As to the documents submitted by the representatives in relation to "the ecological or environmental question," the State requested that the Court "confine itself to the main reason for the case, which would be to corroborate that the actions of the Mexican authorities adhered to international human rights standards." Furthermore, the State "question[ed] the consideration of evidence and elements foreign to the case" and requested that any "evidence" concerning "either the overall situation of human rights in Guerrero or the situation or activities" carried out by Messrs. Cabrera and Montiel "as ecologists or on other matters", "be rejected outright." The Court deems it appropriate to determine, as a prior consideration of this Judgment (*infra* para. 60), whether the facts contained in 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. Also, with respect to the documents submitted by the representatives and the State after the submission of the pleadings and motions and answer briefs, respectively, the Court considers it 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 disputes in this case.[34] Given that such documentation could be pertinent and useful in deciding the facts of this case and their possible consequences, pursuant to Article 47 of the Rules of Procedure, the Court decides to admit said documentation.

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[34] Refers to several medical certificates mentioned in the cross-examination of expert witness Christian Tramsen, conducted by the representatives of the alleged victims, which were transmitted to the parties in the record confirming receipt of documents for the public hearing held on August 26 and 27, 2010.

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

35. In addition, both the State and the representatives submitted documents with their final written arguments. Some of these responded to questions asked by the Court as evidence to facilitate adjudication of the case (*supra* para. 10), and are therefore included in the body of evidence, together with the observations made by the parties thereto. For their part, the representatives submitted, among other documents, vouchers of expenses incurred after filing their brief of pleadings and motions. Such evidence was subjected to the State's observations and its admissibility was not rejected; therefore, it is included in the file.

36. The representatives indicated that one of the attachments presented by the State with its final written arguments, an "identification card" of the doctors Christian Tramsen and Morris Tidball Binz, was submitted "extemporaneously." In this respect, the Court admits such evidence considering that it is useful and will assess it together with the rest of the body of evidence, particularly when examining the State's various arguments in relation to Mr. Tramsen's expert opinion.

3. Assessment of statements by the alleged victims, and of the testimonial and expert evidence

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

38. With respect to the statements of the alleged victims, the State noted in general terms, that the witnesses Cabrera García, Olivar López and Cortés Salgado rendered "numerous and considerable contradictory statements, and even additional 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 the witness Montiel Flores, the State also alleged that there seemed to be numerous contradictions in his statement. Therefore, in examining the merits of the case, the Court shall consider whether the statements made by these witnesses are based on evidence.

39. According to this Court's case law, given that the alleged victims have a direct interest in the case, their statements cannot be assessed separately but

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[35] *Cf.* Record of receipt of documents of August 27, 2010 for the public hearing held in this case (Merits file, volume IV; pages 1667 and 1668).

[36] *Cf.* Record of receipt of documents of August 27, 2010, *supra* note 35, pages 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.

rather in the context of the entire body of evidence in this proceeding,[38] since these are useful insofar as they provide more information on the alleged violations and their consequences. The Court notes that the State's objections are intended to discredit the evidentiary value of the statements made by the alleged victims in these proceedings. Basically, it considers that such statements would show differences with the previous statements made under domestic law or rather, that two alleged victims did not witness certain facts to which they testify, or refer to facts that do not form part of the subject-matter of the case. The Court considers that such objections do not challenge the admissibility of such evidence but seek to question its evidentiary value. Based on the foregoing, the Court admits these statements, without prejudice to the fact that their evidentiary value may be considered solely with regard to matters pertaining to the specific object 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. As to the statement by witness Patrón Sánchez, the State pointed out that "the initial part of [his] statement" was "absolutely biased" since the witness made reference to "facts and circumstances that he himself admitted not knowing about." Thus, the State asked the Court "to reject the entire statement." Also, in relation to other comments made by the witness, the State, in general terms "merely submitted the case files to corroborate the falsehood of the witness' statement;" the State further alleged that "these irregularities should have been pointed out in the brief of pleadings, motions and evidence, not as mere observations without any support or basis," aside from the fact that "there are remedies in the judicial system to challenge the irregularities mentioned by the witness." Accordingly, in examining the merits of the case, the Court will decide whether the statements made by this witness are based on evidence. At the same time, the Court recalls that an evaluation regarding biased or unbiased statements 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 statement together with the rest body of evidence.

41. As to the statement by the witness Valdovinos Ríos, the State pointed out that she "refers to facts that are unrelated to this case, specifically, to experiences that Mr. Felipe Arreaga allegedly had on dates before and after the detention" of Messrs. Cabrera and Montiel. For this reason, the State asked the Court to reject statements not related to the case. The State also pointed out that this witness "made several comments about various activities carried out by Mr. Felipe Arreaga and Messrs. Rodolfo Montiel and Teodoro Cabrera which she is not certain about of which she did not have any direct knowledge." Furthermore, the State pointed out that Mrs. Valdovinos acknowledged that "her knowledge about the circumstances of the arrest" of Messrs. Cabrera and Montiel "had been obtained by merely referential sources." The State concluded that the statement of this witness "is considered extremely general and completely unfounded." Therefore, the State asked the Court to "reject the statement by Mrs. Valdovinos regarding the current legal status" of Messrs. Cabrera and Montiel. Accordingly, in examining the merits of the case, the Court will decide whether the statements made by this witness are based on evidence.

42. With regard to the statement of the witness Magallón Larson, the State pointed out that "he made certain statements, not well documented, about deforestation levels in Mexico and, particularly, about the situation in the community of Petatlán." As to the "alleged complicity by government authorities in

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

clandestine logging in the Petatlán hills," the State argued that "the witness does not provide any grounds whatsoever for his assertions." Moreover, the State pointed out that the "witness recognizes that he was not directly involved in the events of this case and that the advice provided by Greenpeace to the alleged victims began a long time afterwards," for which reason the State asked the Court to take into account only those statements exclusively related to the period when "the witness was [directly] involved in the case." With regard to these aspects, the Court considers that they do not compromise the admissibility of this witness statement, given that the State itself acknowledges the witness' involvement in this case. The scope of his statement shall be assessed, if applicable, together with the rest of the body of evidence, taking into account the State's comments and the object of the litigation.

43. The Court notes that the State objected to some of the testimonies, mainly because the witnesses refer to facts that were seemingly outside the scope of this case, or because there would be evidence against their affirmations. Since these observations refer to the merits of the dispute, the Court shall assess, in the appropriate chapter of the Judgment, the content of the witness statements, insofar as these refer to the object duly specified by the President of the Court in this case (*supra* para. 8), taking into account the body of evidence, the observations of the State and the rules of sound judgment.

44. As to the expert reports, in relation to Mr. Tramsen's report, the State argued that it was not admissible to require it, since it had already been assessed by various judicial bodies, in decisions which were not appealed by the representatives of the petitioners; that this would imply a review of the proceedings conducted by the national judicial authorities, and that it lacks a methodology, among other arguments about its shortcomings. The Court emphasizes that the State reiterated arguments on the admissibility of the report which have already been decided by the Court in its decision to reject the request to reconsider the matter (*supra* para. 26(3)). Consequently, the Court has already ruled on the controversy about the admissibility of the report and shall assess the other arguments against this evidence when deciding on the merits of the case.

45. Regarding Mr. Carbonell's expert 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 encourages the unnecessary repetition of arguments," and therefore it requested that the evidence of this expert be rejected "since it had not been prepared specifically for this case and, therefore, it does not have the specificity required in an expert witness' report." Furthermore, the State asked the Court not to consider the report "since the statements included therein have already been evaluated *in extenso"* in the case of *Radilla Pacheco.* In this regard, the Court notes that such arguments do not prevent the admissibility of the report and in examining the merits of the case, shall determine to what extent this opinion is pertinent in resolving some aspects of the dispute.

46. As regards Mr. Castresana's expert opinion, the State indicated that "the statements made by the deponent in Chapter VIII of his brief are not only clearly outside the objective for which his opinion was requested, but show that the document is biased and that it lacks objectivity;" for this reason, the State asked the Court to reject these statements. It added that "the expert witness maliciously introduced his point of view into the reports issued by the United Nations Committee on Torture" and, therefore, "they do not adhere to the object of his statement, invalidating it even further." As regards the expert witness Piñeyro, the State indicated that "in his expert report he makes statements that are groundless […], making generalizations that show serious lack of objectivity" and that "the expert witness makes serious charges against the Armed Forces which are also unfounded, since they are not supported by any evidence." 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 oversight standards to sanction and punish any abuse by any authority, even by the Armed Forces in security tasks."

47. As regards the expert opinions of Mrs. Deutsch and Mr. Quiroga, the State presented several arguments on the methodology used, and on the alleged deficiencies and errors made, among other issues, in order to discredit their evidentiary value.

48. With respect to the arguments concerning the methodology used by the expert witnesses and other deficiencies, the Court considers it pertinent to point out that, unlike witnesses, who must avoid giving personal opinions, expert witnesses may offer technical or personal opinions provided these are related to their special knowledge or experience. In addition, expert witnesses may refer both to specific aspects of the proceedings or to any other relevant subject of the litigation, provided that they limit themselves to the object for which they were summoned[39] and their conclusions are sufficiently substantiated. First of all, the Court notes that the expert opinions refer to the object for which they were ordered (*supra* paras. 25 and 26). Also, with regard to the expert opinions of Messrs. Castresana, López Portillo, Piñeyro, Quiroga and Mrs. Deutsch, the Court notes that Mexico's observations refer to the merits of the case and to the evidentiary value of their opinions, matters that shall be considered, if applicable, in the corresponding chapters of the Judgment, within the specific framework of the object for which they were required, taking into account the State's comments.

4. Considerations regarding 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 related to the International Covenant on Civil and Political Rights,[40] the Report issued on May 27, 2009 on the visit to Mexico by the Sub-Committee for the Prevention of Torture 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, ordering the publication of the report by said Sub-Committee.[42]

50. The State argued that these documents "have no connection whatsoever with the case at hand," "nor do they provide any elements" to "facilitate adjudication of this international contentious proceeding." The State further alleged that such reports do not include any statement "about the 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 argued that

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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. Mexico. 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 Convention (Mexico). Doc. ONU CCPRIC/MEXICO/5, April 7, 2010.

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

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

"it merely limited itself to detecting possible risk factors for the commission on torture" by "visiting some detention centers" and "not drawing conclusions on the situation of *all* detention centers" in Mexico. In particular, the State emphasized that the Sub-Committee "did not carry out its study in the state of Guerrero and, even less, in the detention centers to which the alleged victims in this case were sent."

51. The Court has used several statements by the Committees and other oversight mechanisms of the United Nations System, where pertinent to a particular case. This is related to the merits of each specific case and the Court has no formal restriction on including in the case file information referring to well-known facts or to matters of public knowledge. For this reason, the Court includes such documents not as supervening evidence but as information considered complementary and useful according to Article 47 of the Rules of Procedure. The Court emphasizes that there was a dispute between the parties in relation to such rulings and will consider the information indicated therein as applicable to this case, taking into account the arguments put forward by the State regarding the content of such documents.

VI

PRIOR CONSIDERATIONS

1. Facts not included by the Commission in its application

52. The representatives alleged that Messrs. Cabrera y Montiel were "unlawfully and arbitrarily arrested, and later tortured" "due to their activism" in defense of the environment. They emphasized that these attacks "could be nothing other than a reprisal for their environmental activism." The representatives also pointed out that this reprisal was part of a pattern of attacks against environmentalists and, in particular, against the Civil Association Organization of Environmentalist Peasants of the Sierra de Petatlán and Coyuca de Catalán (*Organización de Campesinos Ecologistas de la Sierra de Petatlán y Coyuca de Catalán*, hereinafter "the OEPSP"). Consequently, according to the representatives, "the local military units had information about the whereabouts" of Mr. Montiel Flores and his companions. The representatives further indicated that "[t]he way in which the arrest occurred, the physical and mental abuse to which Messrs. Cabrera and Montiel were subjected, their prolonged detention and the lack of information concerning their whereabouts […], caused their families feelings of deep desperation and anguish that continue affecting them to this day."

53. In its merits report, the Commission, when assessing various allegations made by the representatives in order to determine whether what happened to Messrs. Cabrera and Montiel amounted to a reprisal for their activities in defense of the forests and whether this could be regarded as part of a pattern of similar reprisals and attacks against environmental activists, the Commission "note [d] that the petitioners did not allege violations of the rights enshrined in Articles 13 [freedom of expression], 15 [right of assembly], and 16 [freedom of association] during the admissibility phase." Therefore, in its petition, the Commission only mentioned that in 1998 Messrs. Cabrera and Montiel, together with other peasants, established the OEPSP "in order to stop logging operations in the forests of the mountains of Guerrero which, in their opinion, threaten[ed] the environment and the livelihood of local peasant communities."

54. The State argued that the Commission "never refer[red] to acts of harassment against members of [the OEPSP]" and that "[t]his issue was never mentioned in the [Commission's] report" and "nor was it mentioned by the

petitioners during the admissibility phase." The State also indicated that the representatives, "conscious of the fact that the alleged threats against members of the OEPSP were not part of the litigation in the case *sub judice,*" presented "completely unfounded arguments in bad faith in order to link the criminal proceedings underway" to the alleged "acts of violence and harassment against the OEPSP," even though "none of the case files indicate" that those acts "had occurred due to their involvement 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 the State's claim, the Commission's application indicates that the direct victims in this case were members of the OEPSP" and it "also states that the victims have received awards for their work in defense of the environment […]." Additionally, the representatives "did not ask the Court to decide the case based on the context in which the facts occurred" but rather, as the Court has done in other cases, "to take into account the context in assessing the facts." Therefore, they held that "the State is mistaken 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 established by the Commission in its application, but merely 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 Court's consistent case law, alleged victims, their families or representatives in contentious proceedings before this Court, may invoke the violation of rights different to those included in the Commission's application, provided that these refer to facts already included in the application,[43] which constitutes the factual framework of the proceeding.[44] Furthermore, since a contentious case is, essentially, a litigation between a State and a petitioner or a presumed victim,[45] the latter may refer to facts that explain, contextualize, clarify or rebut those mentioned in the application, or else respond to the State's claims,[46] based on the arguments and evidence they provide, without impairing the procedural balance or the adversarial principle, since the State is given procedural opportunities to respond to these allegations at all stages of the proceedings. Moreover, the Court may be informed of supervening facts at any stage of the

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43 *Cf. Case of the "Five Pensioners" v. Peru. Merits, Reparations and Costs*. Judgment of February 28, 2003. Series C No. 98, para. 155; *Case of Fernández 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 Fernández Ortega et al. v. Mexico, supra* note 39, para. 69; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 30, para. 134.

45 In the case of *Manuel Cepeda Vargas v. Colombia*, the Court emphasized that the recent reform of the Court's Rules of Procedure (and even of those of the Commission) reflects this concept. 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.

proceedings before it delivers judgment,[47] provided these are related to the facts of the proceedings.[48] It is for the Court to determine the need to prove the facts, as presented by the parties, or taking into account other elements of the body of evidence,[49] provided the parties' right to defense and the object of the litigation are respected.

57. In this case, the Court finds that in its report on admissibility, the Commission expressly stated that the petitioners alleged that all the violations they suffered were due to their work in 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] Subsequently, 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 for their defense of the environment; that, after their release, the alleged victims had not returned to Guerrero and that each one had requested asylum in a foreign country.[52]

58. In addition, unlike other contextual referents that were alleged by the Commission and will be analyzed subsequently (*infra* para. 65), the Commission did not assume that the work of Messrs. Cabrera and Montiel, the threats 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 decided by the Court and, therefore, that the violations alleged are based on said threats and repression. Furthermore, in its application the Commission did not include facts related to the desperation and anguish that the alleged victims' families presumably suffered as a result of the alleged violations. The Commission in no way included the relatives as alleged victims in its report on the merits or in the application.

59. In this respect, on previous occasions the Court has settled 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 not sufficient facts in the case file for the Court to decide that the […] case is framed within the [context] situation" alleged by the Commission.[53] However, in order to conduct such an analysis, the Commission

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47 Similarly, *Cf. Case of the "Five Pensioners" v. Peru, supra* note 43, para. 154; *Case of Fernández 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 Cantú et al. v. Mexico; supra* note 30 and *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra* note 30, para. 47.

50 In submitting their application to the Commission, the representatives based their case on "the actions and various mobilizations undertaken" by the OEPSP and alleged "a strong wave of repression against members of [this organization] by means of arbitrary arrests, torture, murders, and forced disappearances." They added that "as a consequence of their environmental struggle, the peasants who form part of the OEPSP […] began to receive various death threats, such as those received by Mr. Montiel in […] 1998." *Cf.* petition for an admissibility report filed on June 3, 2003 (file of attachments to the application, annex 3, volume III, page 958) and request for the opening of the case against the United Mexican States filed on October 25, 2001 (file of attachments to the application, annex III, volume III, page 1186). In their observations on the merits of the case, the petitioners provided further arguments and evidence related to this hypothesis and indicated that the violations alleged in the present case form part of "a broader pattern of reprisals for their independent actions as members of the OEPSP. *Cf.* Observations on the Merits of February 3, 2006, para. 171 (File of attachments to the application, annex 3, volume III, page 872).

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

52 *Cf.* Application brief, paras. 42, 43 and 83 (Merits file, volume I, pages 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.

must have put forward specific arguments showing that the case is framed within a particular context, something that did not occur in this matter in relation to the threats and repression for defending the environment. For that reason, in another case, the Court refused to rule on certain facts which, although presented as "contextual background concerning the history of the dispute," were found not to have been brought before the Court "as a matter to be decided by the Court."[54] It is a different matter when the Commission considers that a fact which the Court considers as proven does not produce a particular violation or omits to argue that it produces a violation. 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. Based on the foregoing, the Court considers that it is not appropriate to rule on facts alleged by the representatives which were not presented as such in the application by the Commission, that is, regarding the threats allegedly suffered by Messrs. Cabrera and Montiel before their arrest and after their release from prison, the alleged repression they allegedly suffered because of their work in defense of the environment, and the suffering allegedly experienced by the families of the presumed victims. Similarly, the Court shall not rule on the alleged violations of Articles 5 and 16 of the American Convention in relation to those 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 this has on judicial proceedings, as well as the "use of the military jurisdiction in the investigation and prosecution of human rights violations."

62. The State denied any link between this case with the context mentioned and pointed out that the latter is not part of the object of this case. It requested that the Court base its decisions solely on the case file of the criminal proceedings against the alleged victims for the purpose of determining what happened to Messrs. Cabrera and Montiel. It indicated that "any other characterization" of what occurred "is nothing more than an improper attempt to introduce into the litigation issues unrelated to the facts of the case." Notwithstanding the foregoing, and in the event that the Court should decide to assess the said context, the State presented several arguments to refute what it considers to be unfounded generalizations that would have specific implications for 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 difficult to seek a strict delimitation of the facts. Thus, the case 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 specify or categorize each alleged fact, because the dispute submitted can only be settled based on an assessment of all the circumstances described,[55] in light of the body of evidence.

64. Likewise, the Court has considered that, when assessing elements of context, in general terms, it does not seek to rule on overall phenomena related to

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[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.

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

a case, or to judge the various circumstances included in that context.[56] Furthermore, it is not called upon 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 outside the events of a certain case. On the contrary, the Court takes these facts into consideration as part of the arguments of the parties in their litigation.

65. The Court notes that the Commission, both in its report on the merits[57] and in its application,[58] presented the human rights violations that occurred in this case within a context of alleged abuses by the military forces in Guerrero, patterns related to the use of torture and their impact on judicial proceedings, as well as the use of military courts for the investigation of cases involving human rights violations. Therefore, this context is a subject of the present litigation and relates to the facts alleged. In analyzing the merits of the case and any possible reparations, the Court shall consider the scope of this alleged context and the respective arguments presented by the representatives.

VII
RIGHT TO PERSONAL LIBERTY IN RELATION TO THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS

4. General description of the domestic proceedings and jurisdictional levels that assessed the facts

66. In order to determine whether there was a breach of Article 7,[59] in relation to Article 1(1)[60] of the American Convention, in the following chapters the Court shall set forth in detail the disputes between the parties and the steps taken in the proceedings related to the instant case. However, as a general introduction, the following aspects shall be explained: 1.1) undisputed 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 filed by Messrs. Cabrera

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[56] *See Case of La 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.* Merits Report N° 88/08, paras. 166, 167, 170, 191, 193 to 196, 199 and 200, *supra* note 3, pages 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, pages 61, 62, 67,69, 70, 71 and 73.

[59] 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.

[...]

[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."

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. Undisputed facts related to the arrest of Messrs. Cabrera and Montiel

67. On May 2, 1999, Mr. Montiel Flores was outside the home of Mr. Cabrera García, along with the latter and with three other people, as well as his wife and daughter,[61] in the community of Pizotla, Municipality of Ajuchitlán del Progreso, in the state of Guerrero. That same day, at around 9:30 am, approximately 40 soldiers of the Mexican Army's 40th Infantry Battalion entered the community, as part of an anti-drug trafficking operation,[62] to confirm information regarding a gang or "gavilla"[63] presumably led by Ramiro "N" and Eduardo García Santana.[64] In this context, a shot fired from a soldier's gun hit Mr. Salomé Sánchez, who died instantly.[65] Messrs. Cabrera and Montiel hid among bushes and rocks and remained there for several hours. At approximately 4:30 pm that same day they were arrested.[66]

68. The soldiers kept Messrs. Cabrera and Montiel detained on the banks of Pizotla River until May 4th.[67] That same day, after midday, they transferred Messrs. Cabrera and Montiel by helicopter to the base of the 40th Infantry Batallion, located in the city of Altamirano, state of Guerrero.[68]

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

69. As a result of the complaint filed by certain members of the Army against Messrs. Cabrera and Montiel[69] for the alleged crimes of carrying weapons intended for the exclusive use of the Army and without a license, and for growing poppies and marijuana, the Public Prosecutor's Office of the Common Jurisdiction of Arcelia,

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61 *Cf.* Testimony rendered before the Fifth District Judge on October 26, 1999, by Cresencia Jaimes (Criminal Case 61/99) (File of attachments to the answer brief, volume XXIV, page 10244); Testimony of Ms. Ubalda Cortés Salgado rendered before the Fifth District Judge, on July 30, 1999 (Criminal Case 61/99) (File of attachments to the answer brief, volume XXIV, page 10071) and confrontation hearing of Messrs. Cabrera and Montiel with one of the military officers who filed the complaint against them on August 26, 1999 (Criminal Case 61/99) (File of attachments to the answer brief, volume XXIV, page 10128).

62 *Cf.* Application brief 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 (File of attachments to the application, volume V, page 1577).

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

64 *Cf.* Message issued by Brigadier General in Altamirano, *supra* note 63, page 4024.

65 *Cf.* Report on transfer of personnel, visual inspection, official death certificate of Salomé Sanchez of May 4, 1999 (Preliminary Inquiry N° CUAU/01/119/999) (File of attachments to the application, volume IX, page 4205) and Message issued by Brigadier General in Altamirano, *supra* note 63, page 4025.

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

67 *Cf.* Amplification of the statement of Messrs. Cabrera and Montiel before the Fifth District Judge, of December 23, 1999 (Criminal Case 61/99) (File of attachments to the answer brief, volume XXIV, pages 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) (File of attachments to the answer brief, volume XXIV, page 10134).

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

Guerrero, initiated a criminal investigation.[70] On May 4, 1999, said office ordered the legal detention of Messrs. Cabrera and Montiel.[71] Because these 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] Due to its lack of jurisdiction, on May 12, 1999 the case was submitted to the First Instance Court of the Criminal Branch of the Mina Judicial District, which notified Messrs. Montiel and Cabrera of the formal order of imprisonment.[73] The trial court of Mina declined its jurisdiction and the case was forwarded to the Fifth District Judge of the Twenty-First Circuit in Coyuca de Catalán (hereinafter "the Fifth District Court").[74] On August 28, 2000, this court handed down a conviction against Messrs. Cabrera and Montiel, sentencing them to 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 intended for the exclusive use of the Army, Navy and Air Force, possession of a firearm without a permit and for a crime against health through the cultivation of marijuana.[76] Mr. Cabrera García was convicted of the crime of carrying a firearm intended for the exclusive use of the Army, Navy, and Air Force.[77] After filing the motions of appeal, on October 26, 2000 the First Single-Magistrate Court of the Twenty-First Circuit (hereinafter "the First Single-Magistrate Court) upheld the convictions of Messrs. Cabrera and Montiel.[78] In 2001, they were released and kept under house arrest in order to continue serving the sentence, due to their health condition (*infra* para. 117).

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[70] *Cf.* Court order opening the preliminary criminal inquiry of May 5, 1999 (Preliminary Inquiry N° CUAU/01/119/999) (File of attachments to the answer brief, volume XXIII, page 9689).

[71] *Cf.* Court order for the legal detention of Messrs. Cabrera and Montiel on May 4, 1999 (Preliminary Inquiry N° CUAU/01/119/999) (File of attachments to the application, volume XI, page 4222).

[72] *Cf.* Decision to transfer proceedings due to lack of jurisdiction of May 5, 1999 (Preliminary Inquiry N° CUAU/01/119/999) (File of attachments to the answer brief, volume XI, page 4239).

[73] *Cf.* Formal imprisonment order of May 28, 1999 (Preliminary Inquiry N° 33/CC/999) (File of attachments to the answer brief, volume XXIII, page 9879).

[74] *Cf.* Acceptance of jurisdiction brief of May 12, 1999 (Criminal Case 61/99) (File of attachments to the answer brief, volume XXIII, pages 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) (File of attachments to the answer brief, volume XXVI, pages 11137 to 11303).

[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 established in Articles 81 and 83, section II of the Firearms and Explosives Federal Act, respectively. According to these rules, the penalty for possessing any regulated firearm without a proper permit is 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 activity is farming and who plants, cultivates or harvests marijuana, poppies, hallucinogenic mushrooms, peyote or any other plant that produces similar effects, either on his own account or with funding from third parties, if he has little education and is in extreme financial need, shall be imprisoned for one to six years. The same penalty shall be imposed on anyone who allows land he owns, is a tenant on, or holds to be used to plant, cultivate or harvest those plants, in similar circumstances to the previous hypothesis. If the conduct described in the two preceding paragraphs is not accompanied 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 carried out for the purpose of engaging in any conduct described in subparagraphs I and II of that Article. If that purpose is absent, the penalty shall be two to eight years in prison […].."

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

[78] *Cf.* Judgment issued on October 26, 2000 by the First Single-Magistrate Court of the Twenty-First Circuit (Docket number 406/2000) (File of attachments to the answer brief, volume XXVI, pages 11322 to volume XXVII, page 12205).

1.3. Applications for *amparo* filed by Messrs. Cabrera and Montiel against the decision of the First Single-Magistrate Court

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"), for the purpose of challenging the decision of the First Single-Magistrate Court.[79] Among the various arguments included in the petition by the representatives, it was claimed that the appeal judgment did not take into account a medical report that concluded that Messrs. Cabrera and Montiel had been tortured. This medical report was issued by the forensic experts Christian Tramsen and Morris Tidball-Binz, for 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 Single-Magistrate 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 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 issued its *amparo* ruling, and denied relief in relation to Mr. Cabrera García.[84] With respect to Mr. Montiel Flores, the court turned down the *amparo* in relation to the alleged irregularities in the conviction for carrying a firearm; therefore, his conviction became final. However, the Collegiate Court determined that "the evidence provided to the competent court is neither effective nor sufficient to prove the essential elements of the crime" of marijuana cultivation and of carrying a firearm without a permit, specifically, a rifle.[85]

1.4. Investigation opened into alleged acts of torture against the presumed victims. Actions of the Military Courts and of the National Human Rights Commission

74. On August 26, 1999, as part of the criminal proceedings conducted against Messrs. Cabrera and Montiel, their legal counsel asked 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

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79 *Cf.* Application for direct *amparo* of March 9, 2001 (Criminal Amparo ["relief"] 117/2001) (File of attachments to the answer brief, volume XXVII, pages 12243 to 12471).

80 *Cf.* Application for direct *amparo* of March 9, 2001, *supra* note 79, page 12440.

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

82 *Cf.* Judgment issued on July 16, 2001 by the First Single-Magistrate Court of the Twenty-First Circuit (Criminal Docket Number 406/2000) (File of attachments to the answer brief, volume XXVIII, page 13022 to volume XXIX, page 13733).

83 *Cf.* Application for direct *amparo* of October 24, 2001 (Criminal *amparo* ["relief"] 499/2001) (File of attachments to the answer brief, volume XXIX, page 13757 to volume XXX, page 13951).

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

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

facilities.[86] In response to 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, opened a Preliminary Inquiry into the complaints made by Messrs. Cabrera and Montiel.[88] On November 5, 1999, the Attorney General's Office of the Republic (hereinafter, the "PGR") announced that it did not have jurisdiction to investigate the crime of torture and transferred the matter to the Office of the Prosecutor General for Military Justice (hereinafter "PGJM"),[89] arguing that those potentially responsible were soldiers on active service.[90] On June 13, 2000, the PGJM ordered the inquiry into torture to be closed under "writ of reserve of the file" (administrative suspension), based on the military investigator's opinion that no evidence had been produced to prove torture.[91]

75. Concurrently with the above, on May 14, 1999 Messrs. Cabrera and Montiel filed a complaint in relation to the facts of the instant case before the National Human Rights Commission (hereinafter "CNDH"). On July 14, 2000, the CNDH determined that "military personnel violated the principle of legality and right to liberty of Messrs. Rodolfo Montiel and Teodoro Cabrera García, […] [and given] the continued silence [on the part of the PGJM]",[92] the CNDH presumed that the allegations of torture were true, in keeping with Articles 38[93] and 70[94] of the CNDH Law.[95] Accordingly, it recommended that "the Inspection Unit and Office of the Comptroller General of the Mexican Army and Air Force institute an administrative investigation against 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 that the Attorney General's Office launch 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

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86 *Cf.* Constitutional confrontations of August 26, 1999 before the Fifth District Court (Criminal Case 61/99) (File of attachments to the answer brief, volume XXIV, pages 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) (File of attachments to the answer brief, volume XXIV, page 10162).

88 *Cf.* Court order of October 1, 1999 (Preliminary Inquiry N° 91/CC/99) (File of attachments to the answer brief, volume XII, page 4842).

89 "On December 14, 1999 [the Public Prosecutor's Office of Coyuca Catalán, Guerrero] assigned the case to its military counterpart in zone [35/a] Military Zone, due to lack of jurisdiction" *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 (File of attachments to the application, volume XX, pages 8434 to 8461).

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

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

92 *Cf.* CNDH. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, pages 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, must 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.
Failure to submit the report or the supporting documentation, or any unjustified delay in doing so, shall result in the respective parties being held accountable and the facts of the complaint shall be deemed to be true, unless proven otherwise.

94 Article 70. - Public authorities and public servants shall be criminally and administratively liable for any actions or omissions committed in connection with the processing of complaints or grievances before the National Human Rights Commission, in accordance with the applicable constitutional and legal provisions.

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

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

determine and issue, as soon as possible, the corresponding judgment within the preliminary investigation on the alleged acts of torture.[97]

76. In response to the CNDH's recommendations, the PGJM launched another Preliminary Inquiry on September 29, 2000 to investigate the allegations of torture, prolonged detention and other crimes. On November 3, 2001, the Military Prosecutor decided to refer the inquiry to the PGMJ "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 find that acts of torture were committed against Mr. Cabrera and Mr. Montiel.[98]

2. Alleged violation of the right to personal security

77. The representatives argued "that the right to personal security, which is closely related to personal liberty, has a specific content" inasmuch as it "creates 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 may 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 stated that "the role played by the Army in public security tasks […] fostered an environment contrary to an effective protection of human rights." The representatives therefore argued that "the manner in which the Mexican Army operated in Guerrero at the time of the events of this case, implied a State action or policy that created 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 arguments regarding the violation of the right to personal security. Nevertheless, the State argued that the armed forces' participation 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 firearms."

79. The Court recalls that, with regard to Article 7 of the American Convention, it has reiterated that it contains two types of well-differentiated provisions, one general and one specific. The general provision is contained in the first subparagraph: "[e]very person has the right to personal liberty and security." Meanwhile, the specific provision consists of a number 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

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97 *Cf.* CNDH. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, page 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 (File of attachments to the application, volume XIX, annex 11, pages 8181 to 8367).

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. Haiti, 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.

violation of subparagraphs 2 to 7 of Article 7 of the Convention necessarily entails the violation of Article 7(1) thereof.[100]

80. Furthermore, the Court 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 an individual's physical liberty and his or her personal safety, in a context in which the lack of guarantees may undermine the rule of law and deprive detainees of the basic forms of legal protection.[102] For its part, 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]

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

82. In the abovementioned context, during that decade, the Armed Forces took on public security roles and tasks in some states, including Guerrero, patrolling highways and roads, setting up roadblocks, occupying towns, arresting and interrogating people and searching homes in search of uniforms, weapons and

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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. Peru. 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, Article 3 of the Universal Declaration of Human Rights refers to the individual's right to life, to liberty and to security. These elements are addressed in separate clauses in the text. Although the International Covenant on Civil and Political Rights only refers to the right to security in Article 9, there is no evidence that it was intended to limit the concept of the right to security solely to situations of deprivation of liberty. Thus, the Committee concludes that "[A]n interpretation of Article 9 which would allow a State party to ignore threats to the personal security of persons not detained or imprisoned within its jurisdiction would render the guarantees of the Covenant totally ineffective." *Cf.* United Nations. Committee on Human Rights. Case of Delgado Paez V. 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 (Merits file, volume III, page 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 (File of attachments to the brief of pleadings and motions, volume XXI, page 8675 to 8676).

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

documents.[108] Guerrero is "one [of] the few [states] with two military zones out of 41 in total" and also includes a military region, "IX, out of XII regions; the budget for this region had a percentage increase of 50.14 per cent from 2000 to 2009, an increase greater than that for all the other regions except for region I."[109]

83. In this specific case, the Court notes that in the military operation carried out in the community of Pizotla on May 2, 1999, prior to the arrest of Mr. Cabrera and Mr. Montiel, the military group involved was made up of 43 soldiers.[110] In this regard, the CNDH verified that the military unit went to this location to confirm information regarding a gang ("gavilla") (*supra* para. 67). The CNDH considered it proven that "the town […] was besieged," "was under surveillance," and that "military personnel […] fired their weapons, terrorizing the civilian population of the community of Pizotla, and treated the women and children brutally. They kept the entire community *incommunicado* for two days."[111] The CNDH established that "the conduct displayed [by the military forces] ordered to direct, supervise and authorize this operation violated the human rights of the inhabitants of the community, […] by preventing them from exercising their right to freedom of movement […]."[112]

84. For their part, the defense counsels of the alleged victims in the domestic proceedings pointed out that the Mexican Army is not a competent authority to investigate and prosecute crimes, and that "it will be the Public Prosecutor's Office, the Judicial 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 authorized to arrest the alleged victims "based on their carrying firearms intended for the exclusive use of the Armed Forces."[114]

85. Taking these elements into account, the Court considers that this case is related to previous jurisprudence where, based on an official State document,[115] it was confirmed 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 regard, the Court considers that, in some contexts and circumstances, a heavy military presence accompanied by the intervention of the Armed Forces in public security activities may imply a risk to human rights. Thus, for example, international organizations, such as the United Nations Human Rights Committee and the Special Rapporteur on the Independence of Judges and Lawyers, have considered the implications of allowing military units to act as

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

[109] *Cf.* Statement rendered by Jose Luis Piñeyro, *supra* note 107, page 1288.

[110] *Cf.* CNDH. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, page 8440.

[111] *Cf.* CNDH. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, pages 8181 to 8367.

[112] *Cf.* CNDH. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, pages 8181 to 8367.

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

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

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

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

judicial police and have expressed concern at the fact that the military carry out the tasks of investigation, arrest, detention and interrogation,[117] and have stated that "[t]he functions of the judicial police should be carried out exclusively by a civilian entity." […] This would ensure the independence of investigations and would greatly improve access to justice for victims and witnesses of human rights violations, whose complaints currently tend to be investigated by the very institutions they accuse of perpetrating those 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 according to Law and respectful of the fundamental rights of all individuals under its jurisdiction."[119] In that respect, the Court has emphasized the extreme care which States must exercise when they decide to use their Armed Forces as a means of controlling social protests, domestic disturbances, internal violence, public emergencies and common crime.[120]

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

89. The Court considers that the possibility of assigning the Armed Forces tasks aimed at restricting 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, bearing in mind, as indicated (*supra* paras. 86 and 87), that the system of the armed forces, from which it is difficult for members to remove themselves, is not compatible with the functions of civilian authorities.

3. Failure to promptly bring the matter before a judge or other officer authorized by law to exercise judicial power

90. The Commission indicated that "once arrest[ed], the [alleged] victims should have been brought, without delay, before the Public Prosecutor's Office so that it could hand them over to a judge," which "did not happen until at least four days after their arrest." It added that "from the records and arguments provided by

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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. (Detention Center of Catia) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 5, 2006. Series C Nº. 150, para. 78*; Case of Zambrano 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. (Detention Center of 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.

the State it is not possible to find sufficient grounds to justify [this delay]." Furthermore, at the public hearing the Commission stated that "it did not include [in its report on the merits and its application] a factual conclusion on the commission of the crime."

91. The representatives stated that the alleged victims were held "for 48 hours at the military post improvised on the banks of Pizotla river […] and were later transferred to the Battalion where [they remained] for another two days, until Friday May 7, [whe]n they were brought before a judge." According to the representatives, "[t]his delay is obviously unwarranted, because at the time when the [alleged] victims were arrested, there was a helicopter available for their transfer." The representatives also 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 […] is not a substitute for or equivalent to the judicial authority." Also, the representatives pointed out that Messrs. Cabrera and Montiel were unlawfully detained without an arrest warrant and were not committing any crime. Furthermore, the arrest was "carried out in retaliation against [them] for defending the forests," and "with an excessive use of force" and in order to "torture them and force them to sign false confessions," by soldiers who were not authorized by civilian authorities to be in the area.

92. For its part, the State emphasized 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 authorities, other than the military, went to the community of Pizotla, where the events occurred, apart from the military forces. These authorities included: 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 a forensic expert, who were able to confirm the conditions of detention of the petitioners; 3) that the geographic location of the community of Pizotla, the prevailing insecurity in the region, and the time at which the arrest took place did not allow for the detainees to be taken to the offices of the competent authority or for the authority to visit the scene of the events [until] the night of May 3," and "4) as is shown in the records, during the entire time that the petitioners were guarded by soldiers, they could be seen by their relatives and even communicated with them." Therefore, the State indicated that in order to set a time limit for a detainee to be brought before a judge, it is necessary to analyze "the conduct in light of the precepts established in the [Mexican] Constitution, as well as the general legal framework for the matter." Moreover, the State emphasized that the alleged victims "were held in custody by soldiers from May 2, 1999 at 4:30 P.M. to May 4 at 6: 00 P.M, when they were formally brought before the competent authority" and 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." Finally, the State pointed out that "Messrs. Montiel and Cabrera were arrested in flagrant possession of illegal weapons [used] by them against their captors."

93. With respect to the foregoing arguments, the Court recalls that the first part of Article 7(5) of the Convention establishes that any person detained shall be brought promptly before a judge. In this regard, the Court has pointed out that immediate judicial review is a measure designed to prevent arbitrary or unlawful

arrest or detention, taking into account that, under the Rule of Law, the judge must guarantee the rights of the detainee, authorize precautionary or coercive measures, when strictly necessary, and generally handle the matter in a manner consistent with the presumption of innocence in favor of the accused until his or her responsibility has been proven.[123]

94. As to the formalities required for the purposes of detention, Article 16 of the Mexican Constitution, at the time that the facts occurred, established that:[124]

> No one shall be disturbed in his person, family, home, papers or possessions, unless by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken.
>
> [...]
>
> In cases of *in flagrante delicto*, any person may arrest the offender, handing him over without delay, to the nearest authority, which in turn shall hand over the offender to the Office of the Public Prosecutor.
>
> [...]
>
> In urgent cases or when the offender is caught *in flagrante*, the judge who receives the detained person must either immediately ratify the arrest or order the person's release, except in those cases provided by law.
>
> [...]
>
> No accused person shall be detained by the public prosecutor for more than forty-eight hours; within this period, his release must be ordered or he shall be brought before a judicial authority. [...]

95. Where a person is caught *in flagrante delicto*, according to the constitutional text, "any person" may arrest the offender, provided that the suspect is brought, without delay, to the nearest 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 shall 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
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> III. Immediately after committing the crime, when the suspect is accused by the victim, any eye-witness to the events or anyone who intervened with him in the crime, or when there are objects or signs that provide solid grounds for presuming that he participated in a crime. In addition to these signs, other technical elements shall be considered.
>
> [...]
>
> An arrest in the event of *in flagrante delicto* shall be immediately recorded by the competent authority.

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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. Haiti, 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 issued on August 14, 2002 by the Second Collegiate Tribunal, *supra* note 84, page 14436. *Cf.* Political Constitution of the United Mexican States (File of attachments to the answer brief, annex 3 filed in digital format).

125 *Cf.* Federal Code of Criminal Procedures, New Code published in the Official Gazette of the Federation on August 30, 1934 (File of attachments to the answer brief, volume XXIV, page 10162).

96. Regardless of whether a crime was detected *in flagrante* in this case, whenever an arrest is made by an authority, Mexican law makes a distinction between two moments in determining the scope of control over the arrest. The first moment is the immediate referral of the suspect to the competent authority by the person making the arrest. The second moment is the referral by the Public Prosecutor to a judge within a term of 48 hours.

97. In the instant case, according to documents in the case file, and without passing 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 subsequent referral to the competent authority apparently occurred 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 in possession of poppy and marijuana;[126]

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 inspect the body of Salomé Sánchez Ortiz, without taking custody of the alleged victims.[127] Later, after 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] According to the case file, at 6:00 P.M. on 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, citing its lack of jurisdiction;[130]

d) On Thursday, May 6th, 1999, Messrs. Cabrera and Montiel were transferred to the offices of the Federal Public Prosecutor 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 under number 33/CC/99, and found sufficient elements to prove the probable criminal responsibility of the alleged victims.[133] At 6:06 p.m. the latter were brought before the First Instance Court of the Mina Judicial District, which opened case file

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126 *Cf.* Complaint filed by three soldiers, *supra* note 66, page 4213.

127 *Cf.* Record of transfer of personnel and others of May 4, 1999, *supra* note 65, page 4205.

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

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

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

131 *Cf.* Amplification of the preliminary statement of December 23, 1999, *supra* note 67, page 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) (File of attachments to the answer brief, volume XXIII, pages 9777 to 9785).

133 Record of court order of May 6, 1999 (Preliminary Inquiry N° 33/CC/999) (File of attachments to the answer brief, volume XXIII, pages 9798 to 9821).

03/999 and ruled that the arrest of Messrs. Cabrera and Montiel was lawful,[134] and

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

98. In this regard, in Recommendation 8/2000, the CNDH questioned the military's alleged inability to bring the alleged victims before the competent authority, without delay, given that Air Force flight logs show than on May 3 and 4, 1999 helicopters were providing support in the 35th Military Zone, and also that the military personnel dispatched to Pizotla had a radio station and 4 vehicles.[136] Thus, in conclusion, the CNDH indicated that if military agents had really been unable, 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, they could have placed 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 context of the domestic criminal proceedings, raised the issue of non-compliance with the reasonable term for bringing 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 carry out actions to justify *a posteriori* the arrest of [Messrs. Cabrera and Montiel] and accused them of crimes that they did not commit", and particularly questioned "the actions of 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 notes that, at the domestic level, some judges ruled on those allegations.[138] Regardless of what was stated by the domestic judges, this Court

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134 *Cf.* Court order of the filing and ratification of the lawful detention of May 6, 1999 (Preliminary Inquiry N° 33/CC/999) (File of attachments to the answer brief, volume XXIII, pages 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) (File of attachments to the answer brief, volume XXIII, page 9834).

136 According to the CNDH: a) there are "flight logs of the Bell-212 helicopters with license plates 1115 and 1117, in official letters 2164 and 2188 of May 3 and 4, 1999, signed by [a] Lieutenant Coronel [...] reporting 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 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.* CNDH. Recommendation N° 8/2000 of July 14, 2000, *supra* note 89, pages 8443 to 8444.

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

138 Some domestic judges considered "reasonable" or "tolerable" the delay confirmed in this case in bringing 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 that 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 though the legal detention of the accused was ordered at [6:30 p.m.] on 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 single and indivisible body, the aforementioned Article 16 of the Constitution is taken as parameter to begin counting the term established therein [6:00 p.m. of May 4,

considers that the State's argument citing the specific orography of Pizotla as a justification for the delay in bringing the detainees before the competent authority is not convincing because: i) there are flight logs showing that some Air Force helicopters carried out operations 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, there should have been greater control mechanisms over any detentions that might be carried out by the military agents.

101. Consequently, the Court finds that, from the moment the alleged victims were arrested, the Army agents had more than one means to transport them and bring them, without delay, first before the Public Prosecutor's Office and, subsequently, before a judge, at least, on May 3, 1999. Furthermore, it is worth recalling that the authority of the Public Prosecutor's Office of Arcelia visited the scene of the events at 8:00 a.m. on May 4th, 1999, and despite that, it did not take custody of the alleged victims (supra para. 97).

102. According to the Court's case-law (*supra* para. 93) concerning the competent authority, this Court reiterates that Messrs. Cabrera and Montiel should have been brought before a judge as soon as possible and, in this case, that did not happen until nearly 5 days after their arrest. In that regard, the Court notes that Messrs. Cabrera and Montiel were not brought before the competent authority within the time established in the American Convention, which clearly states that the detainee must be "promptly" brought before a judge or other officer authorized by law to exercise judicial power. The Court reiterates that in areas with a significant military presence, where members of the military forces take control of internal security, bringing a person without delay before the judicial authorities is even more important in order to minimize any risk of violating a person's rights (*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. Furthermore, given the failure to promptly bring them before the competent authority, the Court considers that this irregularity in overseeing the arrest transformed it into an arbitrary arrest and does not deem it pertinent to issue any type of ruling on the cause of the arrest. Therefore, the Court declares the violation of Article 7(3) in relation to Article 1(1) of the American Convention.*

5. Alleged lack of information on the reasons for the arrest and lack of prompt notification of the charge or charges filed

103. The representatives pointed out that "[i]t has not been disputed that Teodoro Cabrera and Rodolfo Montiel were not informed of the reasons for their arrest when this occurred. Also, as has been proven, the [alleged] victims [were not] informed of their right to [...] 'make contact with a third party, for example, a family member [or] an attorney'."

1999]." Consequently, according to the Judge of first instance, "the specified timeframe of [48] hours available to the Public Prosecutor's Office expired at [6:00 p.m. of May 6, 1999]." Consequently, "the term said to have been exceeded by only [6] minutes, is deemed more or less tolerable and is not sufficient to be considered 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 Single-Magistrate Tribunal, *supra* note 75, pages 12161 to 12163. The criminal *amparo* ruling indicated, again that "there was no prolonged or unjustified detention on the part of the arresting agents." In this regard, the court stated that "from the case records, there is no evidence that when the soldiers went to Pizotla, Guerrero, they had means of transportation." It added that "the soldiers were unable to leave the place that was the scene of the crime, since they had the obligation to remain there because of the death of a person, […] 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, page 14441.

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

105. This Court has established that, in light of Article 7(4) of the American Convention, information about the "motives and reasons" for arrest shall be provided "once it occurs," as a mechanism for preventing unlawful or arbitrary detentions from the very moment that a person is deprived of his liberty and, in turn, ensures the individual's right to defense.[139] This Court has also pointed out that the agent who carries out the arrest must inform the person in simple language, free of technical terms, about the essential legal reasons 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]

106. In this regard, the Court notes that Article 7(4) of the Convention refers to two aspects: i) the information, whether in oral or written form, at the time of the arrest and ii) the notification, which must be served in writing, of the charges. *There is no record in the case file that the victims were informed of 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," although it also indicated that it "neither asserts nor […] denies the existence of torture." However, it stated 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 more precisely the actions against the personal integrity" of Messrs. Cabrera and Montiel.

108. The representatives asserted that torture was committed because a number of actions were systematically perpetrated over several days for the purpose of making the victims accept the charges brought against them and sign self-incriminating confessions, which caused them grave suffering. They added that "the domestic authorities dismissed the allegations of torture" based on medical

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

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. […]

certificates that "did not comply with any standard, much less with the Istanbul Protocol." The Commission and the representatives pointed out that the statements made by Messrs. Cabrera and Montiel were consistent, similar and do not contradict each other.

109. The State argued that the various medical certificates and expert opinions "are appropriate and sufficient to discredit the petitioners' claims." It added that the domestic judicial authorities had completely disproved the victims' allegations, and that their statements contain inconsistencies which are "substantial and not due to the mere use of language." The State added that "fifteen medical certificates" were issued "at the appropriate time to determine, in each case, the existence of an irregularity." The State also emphasized that "perhaps […] due to the conditions in which [t]he test [of Messrs. Tramsen and Tidball-Binz] was carried out, [their] opinion […] does not meet the basic scientific standards and [does not] question the medical evaluations presented," adding that those doctors lacked impartiality.

110. The Court will refer, first of all, to some proven facts in relation to: i) the statements made by the alleged victims, ii) the medical certificates included in the case file, and iii) the expert opinions in the domestic proceeding and before the Court which considered whether torture was committed in this case. Secondly, it will analyze the compliance with the obligation to investigate such facts and finally, it will determine the legal classification of the facts in this case.

1. Proven Facts

1.1 Statements rendered by the victims

111. Throughout the domestic criminal proceedings, before the Inter-American Commission and before the Court, Messrs. Cabrera and Montiel rendered statements regarding the alleged acts of torture committed against them. The following statements were rendered: 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) a preliminary statement made before the first instance Court in Mina, Guerrero;[144] iv) first amplification of the

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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) (File of attachments to the application, volume XI, pages 4232 to 4236).

143 In the statement rendered before the Public Prosecutor's Office of Coyuca de Catalán, on May 6, 1999, Mr. Cabrera reported that: "when I was at the military base, I was hit in the abdomen. Though I don't know the name of the person who hit me, if you show me a photograph I would recognize him." For his part, Mr. Montiel Flores indicated that he was not beaten "when I was at the river, but when I was at the army base, I was hit in the stomach and punched on the left cheek." *Cf.* Statements of Messrs. Cabrera and Montiel of May 6, 1999, *supra* note 132, pages 9781 and 9785.

144 On May 7, 1999 Mr. Cabrera García stated: "When I was at the 40th Battalion, a drunken friend of the soldiers came along and began to beat me up, causing me to fall over. They had my hands tied behind my back, and my feet were also bound". He added that in Pizotla he was blindfolded and heard that "they wanted to cut off my testicles; they opened my mouth and put a pistol inside." For his part, Mr. Montiel Flores stated: "…that night, when I was in the soldiers' custody, they stepped on my face and put the mouth of a rifle to my forehead. The soldier said [to him] 'if something happens to me, I'm going to unload the rifle in you;' He said he was tied up for a while, like TEODORO[,].He added that "on Monday night, the soldiers told us to lie face down with our heads pointing east; later, they woke us up and told us to lie down with our heads pointing west; shortly thereafter, they got us up again and had us lying as if on a cross; still later, they came for us and took us to the mountain. Armed men were there with their faces covered […]." He stated that one man warned him not to play the fool and said they knew his family's location and another "pulled my testicles, saying he would cut them off if I didn't tell him what I knew. And I said that I would say whatever they wanted me to say, if they would just stop beating me." *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) (File of attachments to the answer brief, volume XXIII, pages 9836, 9837 and 9841).

preliminary statement before the Fifth District Court;[145] v) second amplification of the preliminary statement before the Fifth District Court,[146] and vi) the statements before the Inter-American Commission and the Inter-American Court. In these statements, Messrs. Cabrera and Mr. Montiel described the cruel, inhumane and degrading treatment or alleged acts of torture to which they were subjected during the days they remained under arrest.

112. From an analysis of the statements rendered by Messrs. Cabrera and Montiel during the criminal proceedings, in general terms, there is a record of the following actions: i) pulling of the testicles; 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 were threatened with weapons; and viii) that Tehuacán soda was forced up their noses.[147]

113. The Court notes that the domestic courts considered the testimonies of Messrs. Cabrera and Montiel to be inconsistent, and therefore challenged their value.[148] However, the Court considers that the differences between each

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[145] In an extension of his preliminary statement, on July 13, 1999, Mr. Cabrera García stated that: "in the Public Prosecutor's Office, they put a pistol to my head, [saying] that if I did not sign, [they would] blow it off […] and that's why I signed." For his part, Mr. Montiel Flores stated that: "the soldiers put a rifle to my head and stepped on my face,[…] and said 'if something happens to us, I'm going to blow your head off." He added that "on Monday May [3], I was given something to eat and wanted to wash my hands and one of the soldiers got angry and said he was going to smash my head with a stone" and they took them to [Court and to the Public Prosecutor's Office]. He also indicated that "at times, through torture, [they] made me sign or admit that the pistol and marijuana were mine," saying him that if he did not agree, they "knew where my family was. I was fearful that they would hurt my family" so he had to remain silent. *Cf.* Amplification 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) (File of attachments to the answer brief, volume XXIII, pages 10037, 10039 and 10040).

[146] On December 23, 1999, Mr. Cabrera García stated that: "as they were pulling us, I felt sick. My testicles were getting dry, and I had blood in my urine from their beatings." He emphasized that four soldiers pulled on his testicles. He added that: "they took us to the bank of the Pizotla River and kept us tied up there, with our hands and feet bound, they gave us nothing to eat," when they were lying on the ground, they used their "elbows to dig holes that would fill up with river water that we could drink" since they were not given water. "At the battalion's base, they continued to beat me and […] on Thursday a drunken soldier arrived and he continued to beat and torture us […]" Mr. Montiel Flores stated that when he was detained at the Pizotla River, "one of the soldiers pulled my pants down and pulled my testicles […]" He said another soldier grabbed him by the jaw and pulled him, while someone leaned on his shoulders and apparently dropped on his knees down on his stomach, that 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 they knew where his family was […], and that they wet him to give him electrical shocks. Later, [at the 40th Battalion], "they separated us and took me to a room. There they wanted to force me to say that I was carrying firearms and was a member of a guerrilla group […]." That night, "they took us and put us all tied up […] in a military vehicle, […]" placing the rifle muzzle to his head, near the neck, and a foot on the back, telling them that they would go to jail. *Cf.* Amplification of the statements rendered by Messrs. Cabrera and Montiel on December 23, 1999, *supra* note 67, pages 10360 to 10362 and 10364 to 10366.

[147] Mr. Cabrera García stated that: "[a]t night, they took us out, they poured mineral water up my nostrils, they pulled my hair, and the Tehuacán drink was so strong, that […] I felt it 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 García of March 4, 2010 (Merits file, volume III, page 1193).

[148] As to the alleged contradictions in the victims' accounts, the Single-Magistrate Court held that: "they are inadmissible because, aside from their vagueness and imprecision, they do not indicate which judicial and ministerial authority they are referring to; the physical and moral tortures to which they refer are not evident 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 included the following: "while RODOLFO MONTIEL FLORES alleged, in his initial statement, that one of the soldiers became angry when they fed him and he wanted to wash his

testimony rendered by Messrs. Cabrera and Montiel cannot be considered as contradictions that denote falsehood or lack of truthfulness in the testimony.[149] In particular, the Court notes that, in the various statements made by Messrs. Cabrera and Montiel, the main circumstances are consistent. In this regard, this Court finds that, as the statements were amplified, the victims described more details concerning the alleged torture, but that the general framework of their account is consistent, starting with the statements given on May 7th, 1999, before the Court of First Instance. Therefore, in order to examine each of the alleged tortures reported by Messrs. Cabrera and Montiel in their statements, the Court will proceed to examine the medical certificates and expert opinions included in the case file.

1.2. Medical certificates in the case file

114. The Court points out that in this 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 for humanitarian reasons. These certificates had three objectives: to certify their physical integrity, to verify their physical and mental condition for the application of the sentence and the compatibility between the age, health and physical state of Messrs. Cabrera and Montiel with the sentence imposed.

115. Indeed, as part of the criminal proceedings conducted against the victims, certain military and civil officials issued medical certificates or reports on their physical condition. The Court notes the following 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

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hands, threatening to smash his head with a stone, Teodoro Cabrera García, in his extended preliminary statement, said they were given nothing to eat and that they even had to use their elbows to dig holes that would fill up with river water for them to drink; thus, while RODOLFO MONTIEL FLORES asserted that they were tortured by soldiers in the presence of their neighbors and relatives, Cabrera García stated that when he was arrested, many people were around after he was beaten; while Teodoro Cabrera García held that "on the day of his arrest", they took him to a field to torture him, RODOLFO MONTIEL reported that 'all day Sunday', they were at the river and that 'the next Monday, they were taken to the mountain and then tortured ; this coupled with the fact that Teodoro Cabrera García does not mention electric shocks, whereas RODOLFO MONTIEL FLORES does; and while Teodoro Cabrera denies having signed the documents prepared by the soldiers, RODOLFO MONTIEL FLORES asserted that, because he was subjected to torture, he was forced to sign the document prepared by the 40th Battalion." *Cf.* Judgment issued on August 21, 2002 by the First Single-Magistrate Court of the Twenty-First Circuit (Criminal Docket number 406/2000) (File of attachments to the answer brief, volume XXXI, pages 15139 and 15140, and 15152 to 15155).

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) Lack of trust in the examining physician or interpreter;(d) The psychological impact of torture and trauma, for example high emotional stress 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." When defining post-traumatic stress disorders in cases of torture, the Protocol also notes 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] cut 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

in Arcelia, Guerrero;[151] b) certificate of May 6, 1999, issued by a forensic 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 from the CNDH who visited 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) certificates regarding their health condition were issued: a) on September 23, 1999, by a medical expert from the CNDH regarding Mr. Montiel Flores;[155] b) on May 19, 2000, by a medical expert from the CNDH,[156] and c) on July 6, 2000, by a medical expert from the CNDH for Mr. Montiel Flores.[157]

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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) (File of attachments to the application, volume XI, pages 4216 and 4217).

[151] Regarding Mr. Teodoro Cabrera, the doctor indicated that: "he has one cut 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) (File of attachments to the application, volume XI, pages 4216 and 4217).

[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) (File of attachments to the application, volume XI, pages 4274 to 4276).

[153] Following a visit to the Social Readaptation Centre where the alleged victims were held, the visitor stated that she had found Messrs. Cabrera and Montiel with several "bruises," and indicated that they both mentioned that the injuries were "the result of the beatings 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 (File of attachments to the application, volume X, pages 4006 to 4007).

[154] This was arranged "in order to perform [a] medical, psychophysical and injury examination." One (1) certificate was issued for each alleged victim, 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 García: 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 [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 CNDH on June 4, 1999 (Record 99/2336) (Merits file, volume IV, pages 2053 to 2056).

[155] The doctor issued a certificate at the Social Rehabilitation Center of Iguala, Guerrero, stating, *inter alia*, that "the left testicle [of Mr. Montiel Flores] has 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 […] has 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 CNDH on September 23, 1999 (File of attachments to the application, volume XI, pages 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 was established that the surgery

117. Finally, based on "the provisions 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 Secretariat for Public Security,"[158] on October 7, 2001, when Messrs. Cabrera and Montiel were still serving their sentence at the Prevention and Social Re-adaptation Center, a physician from the Center's Medical Service carried out one (1) further examination on each one and concluded that their respective penalties were incompatible with their state of health.[159] Based on the results of that examination, on November 8, 2001, the Federal Executive, by way of the General Directorate of Social Welfare and Rehabilitation, released Messrs. Cabrera[160] and Montiel.[161]

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performed by the specialist removed a small lipoma, located in the paravertebral region to the left of the midline, with no consequences or after-effects (it was not a cancerous tumor as claimed by the plaintiff) […]: male patient in good general condition; hygiene-dietary measures were recommended and he does not require 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 CNDH on May 19, 2000 (File of attachments to the application, volume V, pages 1713 to 1719).

157 One (1) medical certificate was issued for Mr. Cabrera García, indicating that his "psychophysical condition [was] normal." *Cf.* Medical Psychophysical Certificate of Mr. Montiel Flores, issued by a medical expert from the CNDH Expert Services Unit, on July 6, 2000 (File of attachments to the application, volume V, pages 1642 to 1643).

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 (Merits file, volume IV; pages 1738 and 1740).

159 Regarding Mr. Cabrera García, it was concluded that: "the testicular pain requires a medical evaluation by a urologist." Furthermore, "in [the] direct medical evaluation, a progressive general deterioration was noted and a physical appearance of neglect." 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) "he has abdominal pain, which is tolerable when not making an effort, but when doing do causes an intense increase in pain;" iii) "the dermatomal area with insensitivity on 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; therefore, the attention of a urology specialist is required." *Cf.* Direct medical evaluation of Messrs. Cabrera and Montiel performed by a forensic physician on October 7, 2001 (Merits file, volume IV, pages 1734 to 1737).

160 The diagnosis issued 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 health, including his state of mind, since the vision loss prevents him from participating in various activities organized by the Institution. All his pathologies are progressive in nature and require immediate medical treatment and 2nd or 3rd level hospital care; 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 is incompatibility between his age, health and physical constitution, and compliance with the punishment imposed; accordingly, his residence is designated as the place for him 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, pages 1740 and 1741.

161 The diagnosis issued by the State for Rodolfo Montiel was as follows: "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, significantly limit his ability to serve his sentence. In the case of Mr. Montiel Flores: "[…] it is determined that there is incompatibility between his health and physical constitution, and compliance with the punishment imposed; accordingly, his residence is designated as the place to continue serving his 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, pages 1738 and 1739.

118. In relation to the foregoing, it should be noted that expert witness Gutiérrez Hernández indicated, in her opinion rendered at the public hearing in this case, that:

> "when […] a person or persons [are] arrested, the Public Prosecutor's Office […] issues a request for a certification of physical integrity or injuries; in this regard, the doctor must examine the person and describe what he finds in terms of injuries." "However, if an accusation of torture is made in a statement by these persons, or any other, the Public Prosecutor's Office […] then specifically requests and inquiry into the injuries present, but with a focus on the medical-legal documentation and this is when the guidelines set by the international standards to document torture must be complied with. To summarize, the fifteen medical certificates were prepared only for the purpose of certifying the physical integrity [of the victims] and not to document torture."[162]

119. The above expert opinion coincides with the point made by the State itself, according to which there is a difference with "[a]nother type of intervention carried out by a forensic physician in Mexico, […] regarding the expert determination of physical torture, whose investigation and documentation guidelines are established in Agreement A/057/2003, in force since September 2003, following the Contextualization of the Istanbul Protocol […] in the country. This medical intervention, like all others undertaken by forensic physicians, requires an express written request by a judicial and/or ministerial authority and certain conditions for its application."

120. Therefore, the Court concludes that, given their purpose, the 14 medical certificates mentioned are not sufficient, by themselves, to provide grounds for rejecting or accepting the allegations of torture in this case. However, with regard to the possible violation of the right to humane treatment [personal integrity], the Court highlights certain medical certificates, such as the one issued on May 15, 1999, which reported the presence of bruises that allegedly resulted from the blows received by Messrs. Cabrera and Montiel during their detention[163] or the certificate issued on June 4, 1999, which concluded that the injuries had occurred approximately 30 days earlier.[164]

1.3. Expert opinions specifically aimed at verifying 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, acting on behalf of the organization "Physicians for Human Rights – Denmark", carried out a medical assessment specifically aimed at determining whether Messrs. Cabrera and Montiel had been victims of torture. Their expert opinion was issued more than one (1) year after the arrest of Messrs. Cabrera and Montiel.[165] It concluded that "[t]he physical results conclusively coincide with the

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

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

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

[165] The expert opinion was presented in the context of the proceeding instituted by the victims in order to specifically denounce the alleged acts of torture committed against them. According to the report, Dr. Tramsen and Dr. Tidball-Binz carried out the respective medical interviews 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 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 aware of time, space, location, and person, and both showed normal short and long-term memory. They answered the questions appropriately and responded coherently to relevant medical matters. However, as expected, in the case of Teodoro Cabrera, his visual impairment

statements regarding the time and the methods of torture suffered [by Messrs. Cabrera and Montiel]. Furthermore, the medical history of the patients coincides with the development of the symptoms described by medical science."[166] Nevertheless, they recommended that "in any case, […] additional examinations be performed on both individuals in order to determine […] the full repercussions of the physical and psychological harm caused by the torture and to propose the appropriate treatment."[167]

122. The domestic courts and the State[168] considered that this expert opinion was insufficient to prove torture, because: i) they alleged a lack of impartiality by Dr. Tramsen and Dr. Tidball-Binz, since the alleged victims regarded them as trusted advocates and, "in order to gain access to the detention center, the representatives "accredited [them] […] as members of their organization's legal department [which was not necessary, given that] there are procedures for authorizing the medical evaluation [...] of detainees;" ii) the conclusions reached by the expert witnesses constituted inaccurate and general assessments, which did not take into account the evidence provided in the criminal proceeding; also the conclusions of the experts' opinion were not supported by any scientific study but only by a physical examination,[169] and iii) the report was prepared a year later. Regarding the first argument, the Court reiterates the comments made in its Order of August 23, 2010, namely that "under Mexican law, the mere appointment 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; rather, there is evidence that his intervention was limited to his expert opinion" (*supra* para. 26). In the second place, the Court considers that Messrs. Tramsen and Tidball-Binz complied with the minimum requirements established in the Istanbul Protocol since they prepared an accurate report describing the circumstances of the interview, background, physical and physiological test, opinion

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seemingly influenced his observations and the reconstruction of events." During the public hearing, Dr. Tramsen stated that this examination was performed according to the methodology established in the Istanbul Protocol and by the International Rehabilitation Center for Tortured Victims. *Cf.* Physicians for Human Rights- Denmark. The case of Rodolfo Montiel Flores and Teodoro Cabrera García, Mexican farmers and environmental activists, July 29, 2000 (File of attachments to the application, volume XIX, pages 8374 to 8383).

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

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

168 The State attached an "Analysis of the expert opinion furnished as evidence", undated, in which the Public Prosecutor's Office (PGR) "made an analysis of the expert opinion issued by the organization "Physicians for Human Rights Denmark" and the "actions related to the different medical certifications […] in [the case file]." Based on this, the PGR concluded, *inter alia,* that the expert opinion prepared by Messrs. Tramsen and Tidball-Binz: i) "in no way conforms to what a forensic medical expert opinion should contain methodologically, 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 contain the information contemplated by international standards;" iv) "it is dogmatic since it does not select or order information obtained from 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 carried out 14 months and 27 days after the facts and was presented in the informative style of a Report, describing the alleged experiences of 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 truthful 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 (File of attachments to the answer brief, volume XLV, pages 22471 to 22477).

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

and authorship.[170] Finally, the Court points out that the Protocol states that "[t]he timeliness of such medical examination is particularly important" and that "[a] medical examination should be undertaken regardless of the length of time since the torture."[171] Therefore, carrying out the examination a year after the facts does not call into question its validity.

123. In addition to listening to Dr. Tramsen at the public hearing, the Court received three expert opinions concerning the allegations of torture, presented by the expert witnesses Gutiérrez Hernández, Deutsch, and Quiroga (supra paras. 25 and 26). As regards 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 ignored the necessary scientific basis, and that only provided unrealistic and subjective elements regarding the subject matter for which it was requested" and " did not comply 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] arrest 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 medical reports and certificates, and those contemporary to the events of the arrest of those 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. The psychological expert report prepared by Ana Deutsch and rendered before a notary public, states that Messrs. Cabrera and Montiel were diagnosed with symptoms of post-traumatic stress disorder and major depression, allegedly

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

171 *Cf.* Istanbul Protocol, *supra* note 149, para. 104.

172 Expert witness Gutiérrez Hernández also indicated that "in the case of Mr. Teodoro Cabrera, eight medical certificates had been issued, all of which agreed that he had no physical injuries, […] the first two certificates only mentioned a stab wound located behind the ear, […] which 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 issued […], the first two medical certificates state the presence of two linear excoriations 1 centimeter in length, located on the forehead and that […] after performing the relevant examination, it was determined that, due to the type of injury, its characteristics and its size, it was a very slight injury, that it is definitely not compatible with the acts of torture alleged." *Cf.* Statement rendered by expert witness Juana Ma. Gutierrez Hernández at the public hearing, *supra* note 162.

173 Specifically regarding Mr. Cabrera García, he mentioned that "he has daily, moderate to severe, headaches associated with emotional stress, consistent with tension headaches. 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 opportunities." In addition, "he has two scars in the temporal region (ears), related 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, after surgery to remove a mass that is possibly related to the trauma." Finally, "[t]he medical examination shows atrophy of the right testicle […] consistent with testicular atrophy after trauma." Concerning Mr. Montiel Flores, he indicated that "[h]e has reduced bilateral hearing acuity, which has worsened due to recurrent otitis that began during the detention period." 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 is well documented in the literature." Also, "[t]he loss of strength in the hands has been gradual and began during the detention period." "Decreased sensitivity in the frontal region of both thighs […] requires neurological evaluation." *Cf.* Expert opinion rendered by expert witness Jose Quiroga by means of an Affidavit on August 8, 2010 (Evidence file, volume III, pages 1316 to 1328).

linked to the physical damage stemming from the torture to which they were allegedly subjected.[174]

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 treatment.[175] The duty to investigate is reinforced through the provisions of Articles 1, 6, and 8 of the Convention against Torture,[176] which establish that the State is required 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 provisions 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.

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174 *Cf.* Expert opinion rendered by expert witness Ana Deutsch by affidavit on August 8, 2010 (Merits file, volume III, pages 1295 to 1304). Regarding this expert opinion, the State pointed out that "[t]he analysis of this expert witness does not describe nor provide grounds for the criteria mentioned in Annex 4 of the Istanbul Protocol." It added that "[t]he expert opinion does not contain a description and basic information regarding the previous personality of the patients, since it does not consider whether some factors of that personality have a bearing on or determine or, if applicable, change the symptoms described." The State argued that the foregoing suggests that this expert opinion "is not objective since it uses and refers to different evaluative or personal opinions and expressions, which describe only elements that are of interest to the petitioner; thus, the objectivity is substantially diminished 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 courts whose competence has been recognized by that State.

127. This obligation to investigate is based on the facts previously analyzed (*supra* paras. 111 to 125). Indeed, regarding the alleged pulling of the victims' testicles, in their statements in the domestic criminal proceeding, both Mr. Cabrera García and Mr. Montiel Flores indicated that soldiers had pulled their testicles while they were detained on the banks of Pizotla River.[177] On this point, the Court notes that although the medical certificates issued by the Mexican authorities regarding the victims' physical integrity mentioned an 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 indicated that his testicles were in normal condition.[179] Furthermore, it should be emphasized that the conclusions of the expert opinion of Dr. Tramsen and Dr. 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] since the latter mentioned that "[t]he medical examination shows a retraction of the right testicle which was previously described in the physical examination by Physicians for Human Rights in July 2000."[181] Nevertheless, the expert witness Gutierrez Hernández associated these last conclusions with degenerative problems characteristic of the victims' age and cholesterol related problems.[182]

128. At the same time, the Court notes that during the domestic criminal proceeding only Mr. Montiel mentioned that "they soaked him to give him [electric] shocks during short periods of time."[183] Despite the foregoing, the representatives stated that Mr. Cabrera García received electric shocks in the left thigh. In this respect, the Court emphasizes that electric shocks are a form of torture different from others because it is difficult to determine if it was applied, since it is possible to use mechanisms to leave no visible marks.[184] The medical examination

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177 In his affidavit, Mr. Cabrera García stated that, after he was beaten, "[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 García before a public notary, *supra* note 147, pages 1194. For his part, in his testimony given before the Court 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. Case of Messrs. Cabrera and Montiel, *supra* note 165, page 8381.

179 *Cf.* Physicians for Human Rights- Denmark. Case of Messrs. Cabrera and Montiel, *supra* note 165, page 8380.

180 The expert witness indicated that Mr. Cabrera García 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 following trauma." Regarding Mr. Montiel Flores, he stated that his "penis [was] normal [as well as] his testicles." *Cf.* Expert report rendered by expert witness José Quiroga before a public notary, *supra* note 173, pages 1318, 1319 and 1326.

181 *Cf.* Expert report rendered by expert witness José Quiroga before a public notary, *supra* note 173, page 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 establishes that "[s]ome forms of torture such as electric 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 electrical burns […]." *Cf.* Istanbul Protocol, *supra* note 149, paras. 174 and 211.

conducted when the victims were released from prison indicated that in Mr. Montiel's case there was an " area of skin (dermatome) with insensitivity" over an area of "5 cm" on the right thigh."[185] Likewise, the report by Dr. Tramsen and Dr. Tidball-Binz indicated that "[i]n the middle of the outer side of [Mr. Montiel Flores'] upper right thigh, [there is] a 5 centimeter long and 3 centimeter wide subcutaneous tumor without skin depigmentation. There is no sensitivity in this area."[186] Furthermore, regarding Mr. Cabrera García, they certified that "on the left thigh, there is a 3 centimeter long and 2 centimeter wide subcutaneous tumor."[187] The expert witness Gutiérrez Hernández made no comment regarding the alleged electric shocks. The Court also notes that in his statement rendered before notary public the expert witness Jose Quiroga mentioned the decreased sensitivity in Mr. Montiel Flores' thigh.[188]

129. With regard to the alleged blows to different parts of their bodies and threats, Messrs. Cabrera and Montiel described different times at which these had occurred.[189] Most of the examinations 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). However, the expert opinion of Messrs. Tramsen and Tidball-Binz concluded that the victims had scars and pain in different parts of their bodies.[190] With respect to the arguments and evidence related to the pain caused by the blows and the effects of threats, expert witness Gutiérrez Hernández indicated that "pain […] is subjective information that cannot

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

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

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

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

189 In his affidavit, Mr. Cabrera García indicated the following: a)"they kicked [them], they hit [him] with the rifle on the ear;" b) "they beat [him] in the ribs, they threw [him] down, and then hit [him] on the buttocks, and told [him] 'but the good part comes at night"; c) "they poured mineral water in [his] nostrils, they tugged [him by] the hair, and d) "they placed [him] lengthwise, stood [him] up and placed [him] again crosswise." *Cf.* Affidavit rendered by Mr. Teodoro Cabrera García, *supra* note 147, pages 1192 to 1194. Moreover, in his statement before the Court in the public hearing in this case, Mr. Montiel Flores reported, *inter alia*, that: a) on the day of the arrest, "a soldier quickly grabbed [him] by the hair, threw [him] on the ground, and once [he] was lying on the ground, dragged [him] by the hand, for about four or five meters, took [him] to the riverbank, and there he put his boot on [his] chest and held the muzzle of the firearm to [his] head, at the base of the neck, and said 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 [their backs] and made [them] cross the river, once they had crossed the river, [their] feet were bound […] on the riverbanks they made [them] lie face-up in the full sun, and would not allow [them] […] to sit, [they] were only lying face-down or face-up, so it was a torment for [them]"; b) on the following day, "at night they made [them] form a cross with [their] own bodies, pointing to the four cardinal points, they kept turning [their] heads; after [they] formed the cross, they were blindfolded, [their] feet were untied and [they were made] to cross the river; they took [them] to another place, when [they] got there, [their] blindfolds were removed, [he] could see that other men were there." Afterwards, "they shone a very blue light in [his] face and told [him] in a shrill voice to look at the light." Then, "they blindfolded [him] and dragged [him]; they leaned on [his] shoulders and knelt down on [his] stomach; c) At the 40th Battalion, "the torture continued, [they] were beaten with sticks." "At night, [they] were taken to a room […], where [they] were beaten again, put in a vehicle […],made to get out again, threatened again and then bags were piled up on [them] and the [soldiers] climbed on top […] of [them], put their weapons to [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. Case of Messrs. Cabrera and Montiel, *supra* note 165, pages 8380 and 8341.

be seen."[191] Regarding this affirmation, this Court refers to the Istanbul Protocol, according to which pain is a symptom and its "intensity, frequency and duration […] should be recorded."[192]

130. Finally, the Court notes that in proceedings at the domestic and Inter-American levels, the victims and other witnesses[193] stated that while Messrs. Cabrera and Montiel were detained in the municipality of Pizotla, they were unable to communicate with their families to let them know how they were, or where they were being taken.[194] Also, in the proceeding before this Court, the victims indicated that "on the night of the day [of their arrest], they did not drink water, they were not given anything to eat, and those who brought food were not allowed to pass - all this took place at the river."[195]

131. Despite the foregoing, this Court notes that, in the instant case, the inquiry was opened more than three months after the allegations of torture against Messrs. Cabrera and Montiel, on May 7, 1999, were first mentioned (*supra* para. 74). In addition, the Court notes that this investigation was initiated at the express request by the petitioners, on August 26, 1999, during the criminal proceeding conducted against them.[196] Although during the criminal proceeding conducted against

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

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

193 In addition, a witness reported that "they were taken to the edge of the Pizotla river, [...] where they were held face down in the water; then, nobody knows what the Army did next to Rodolfo and Teodoro, because they did not let anyone go." *Cf.* Testimony rendered by Silvino Jaimes Maldonado before the Fifth District Court on October 26, 1999 (Criminal Case 61/99) (File of attachments to the answer brief, volume XXIV, page 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 around sixty meters outside my house where I saw them detained." Cf. Testimony given by Cresencia Jaimes Maldonado, *supra* note 61, pages 10245 and 10246. Finally, a third witness stated that Mr. Montiel "was held next to Teodoro at the river's edge, face down in the wet sand, his hands behind him, but [she] could not see whether his hands were tied there [since she was] about fifty meters away, (...) at home." *Cf.* Testimony of Esperanza Jaimes Maldonado before the Fifth District Court on October 26, 1999 (Criminal Case 61/99) (File of attachments to the answer brief, volume XXIV, pages 10252 and 10253).

194 In particular, Mrs. Ubalda Cortés Salgado stated that on May 2: "[The soldiers] would throw stones to make [Mr. Cabrera and Montiel] come out [[the soldiers] and they asked me where they had gone [...] later I went back into my house and I returned about an hour later, and a woman there told me that my husband had been arrested, and I went to look and realized that they had him on the ground lying face down with his hands behind his back [...] then they put Rodolfo Montiel and Teodoro [Cabrera] into a helicopter and [I asked the soldiers] to let me talk to him to know where they were taking 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, pages 10072 and 10073. She also stated: "they were at the [river] bank, we got closer and looked from that woman's backyard. I went over to the plum trees; they asked me what I was doing and I asked […] to cut some plums, but it was really so that I could get closer and see what they were doing to them. They had them lying on the sand." *Cf.* Affidavit rendered by Mrs. Ubalda Cortes Salgado on June 15, 2010 (File of attachments, volume III, page 1208). The Court notes that the direct criminal *amparo* [relief] ruling rejected the testimony of Mrs. Ubalda Cortés Salgado, because "[...] her partiality and intent to benefit her husband RODOLFO MONTIEL FLORES is evident, since it went beyond the statement made 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 to the area where the accused were in order to force them out and threw stones at them, circumstances which the accused do not mention; also it is not credible that if the soldiers were pursuing her husband and his companions and she had been told that if they did not come out from their hiding place they would be killed, she would go home and come back an hour later." In addition, it argued that "there is no logical explanation regarding why she returned to her home for an hour if she was not living in that community." *Cf.* Judgment of August 21, 2002 issued by the First Collegiate Tribunal, *supra* note 148, pages 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, pages 10157 and 10158.

Messrs. Cabrera and Montiel, the domestic courts examined both the medical certificates and the expert opinions in order to assess the allegations of torture, the Court fins that this 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 independent investigation against the alleged perpetrators was conducted by the ordinary courts prevented any attempt to dispel or clarify the allegations of torture. Based on the foregoing, it is clear to this Court that the State failed in 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 courts order new procedures to investigate the link between the signs found on the victims' bodies and the acts allegedly suffered as torture.

132. The Court also considers that this obligation to investigate the alleged acts of torture was even more crucial bearing in mind the prior context of the instant case, as regards the confessions and statements made under duress and the duty of strict due diligence that should apply in areas with a heavy 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 overwhelmed with work, which may result in a tendency to rely on confessions as a way of resolving cases rapidly."[197] Moreover, the United Nations Special Rapporteur held that "[…] in normal practice, there is broad discretion in the application of the law and therefore there is a great risk that investigations may be falsified, carried out under duress or recorded illegally, ignoring potentially key evidence or considering other less important evidence that might slant the investigation in such a way as to affect or benefit someone; evidence may even be made intentionally to "disappear."[198]

3. Legal classification

133. The Court has indicated that the violation of person's right to physical and psychological integrity is a category of violation that has several gradations. It encompasses actions ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment, with physical and psychological effects that vary in intensity depending on endogenous and exogenous factors (such as, *inter alia*, length of the mistreatment, age, sex, health, context and vulnerability, etc.), which must be proven in each specific situation. The Court has also 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 human dignity, 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 reaching a conclusion on the allegations of alleged torture committed against Messrs. Montiel and Cabrera. Nevertheless, despite the foregoing, the Court has indicated that, as guarantor of the rights enshrined in the Convention, the State is responsible for ensuring the right to humane treatment of every person

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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.

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

under its custody.[200] In its case-law, this Court has also established that whenever a person is arrested in a normal state of health and subsequently appears with health problems, the State must provide a credible explanation for that situation.[201] Consequently, under this assumption, the State must be considered responsible for the injuries shown by a person who has been in the custody of State agents.[202] In such a case, the State has the obligation to provide a satisfactory and convincing explanation of what happened and to disprove the allegations regarding its responsibility, using appropriate supporting evidence.[203] Thus, the Court emphasizes that from the evidence presented in this case, it is possible to conclude that cruel, inhuman and degrading treatment has been proved against Messrs. Cabrera and Montiel.

135. In light of the foregoing, this Court reiterates that whenever there are signs that torture has taken place, the State must initiate, *ex officio* and immediately, an impartial, independent and thorough investigation that makes it possible to determine the nature and origin of the injuries observed, identify those responsible and begin their prosecution.[204] It is essential that the State act diligently to prevent acts of torture or cruel, inhuman and degrading treatment, bearing in mind that the victim usually refrains from denouncing such actions through fear. Similarly, the judicial authorities have a duty to guarantee the rights of the detainee, which implies obtaining and protecting any evidence that may prove alleged acts of torture.[205] The State must also 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 assessments, respecting the standards established for their professional practice.[206]

136. At the same time, the Court wishes to emphasize that whenever a person alleges, within a proceeding, that his statement or confession was obtained under duress, the State party has the obligation to ascertain the veracity of such complaint[207] by means of a diligent investigation. Likewise, the burden of proof cannot rest with the plaintiff, but rather it is up to the State to prove that the confession was made voluntarily.[208]

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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. Peru. 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. Peru. 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 Gutiérrez 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.

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 stated 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 have taken place, specially when the victim has

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 inflicted on Messrs. Cabrera and Montiel and b) for 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 JUDICIAL GUARANTEES AND JUDICIAL PROTECTION IN RELATION TO THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS, THE DUTY TO ADOPT 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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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.
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> 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:
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> 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;
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> b) prior notification in detail to the accused of the charges against him;
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> c) adequate time and means for the preparation of his defense;
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> 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;
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> 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
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> h) the right to appeal the judgment to a higher court.
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> 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

criminal proceedings against Messrs. Cabrera and Montiel, evidentiary value was given to statements and self-incriminating confessions obtained under duress. The representatives also noted the following irregularities: the reversal of the burden of proof to the detriment of the accused; the presumption of guilt arising from 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 argued that the appeal through the filing of a direct *amparo* was ineffective, among other reasons, because of the erroneous application of the principle of procedural immediacy, the failure to exclude evidence obtained under torture and because it was not possible to contest both the detention and the solitary confinement of Messrs. Cabrera and Montiel, since the court considered that "it was not the appropriate procedural moment." Furthermore, the Commission and the representatives claimed that the victims' accusations regarding the alleged torture committed against them did not lead to investigations *ex officio;* that the proceeding was conducted by a jurisdiction that was not competent, and within an unreasonable time; that essential procedures were not followed; and that an effective remedy was not afforded to the alleged victims to allow them to contest the exercise of the military jurisdiction.

139. The State argued that all judicial guarantees were strictly observed in the proceedings conducted against the victims, and that the defense had access to several simple and expedite remedies, which it used to the full. It added that these 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. The State further indicated that "the fact that the appeals filed by the defense were not resolved, 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 the competent, impartial and independent judicial bodies led to substantive discussions to shed light on the alleged torture. Moreover, it indicated that there is nothing to suggest that the court or any other state agent intended to delay the investigation.

140. Article 8(1) of the Convention establishes the guidelines of the so-called "due process of law," which involves, 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 Court , 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 legal remedy against acts that violate their fundamental rights.[213] In particular, this Court has established that States Parties have an obligation to provide effective legal remedies to victims of human rights violations (Art. 25). Such remedies must be substantiated in accordance with the rules of due process of law (Art. 8(1)), in keeping with the general obligation of States to guarantee the

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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.

[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 Fernández Ortega et al. v. Mexico*, *supra* note 39, para. 180; and *Case of Rosendo Cantú et al. v. Mexico*, *supra* note 30, para. 164.

free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1(1)).[214]

142. The Court has also pointed out that States have the responsibility to embody in their legislation and ensure full 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 Court has likewise established that for a State to comply with the provisions of Article 25 of the Convention, it is not sufficient for such remedies to exist formally, but that these must be effective,[216] that is to say, there must provide results or answers to the violations of rights enshrined in the Convention, in the Constitution or in the law.[217] The Court has reiterated that this obligation implies that the remedy must be appropriate to combat the violation and that it must be applied effectively by the competent authorities.[218]

143. In this respect, the Court emphasizes that reference has been made to several general irregularities that would affect the aforementioned judicial guarantees.[219] The representatives alleged that these irregularities relate to the evidence produced regarding the possession and use of firearms and drugs (*inter alia*, some expert opinions and a sodium rhodizonate test), and other items of evidence furnished in the initial statements by the victims. The Court deems it appropriate to review the final conclusions of the judicial bodies regarding these issues.

144. As regards the controversies over the weapons, the Court notes that the judgment issued by the Second Collegiate Court rejected each of the arguments put forward by the defense counsel of the victims indicating, *inter alia*, that:

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[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 Fernández 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 Fernández 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 Fernández 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 Fernández 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 emphasized that they were not committing any crime at the time of the arrest. In particular, Mr. Montiel stated that he and his wife arrived at the home of Mr. Cabrera García because they were inviting the public to a 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, [his] wife […] was also chatting amicably at that moment […]. [He] did not see that people were armed and he only [saw] the soldiers coming [there] firing their weapons […] he [did] not realize that they were soldiers, because soldiers usually arrive or used to arrive at a community and identify themselves; they did not identify themselves with words, but with shots, they ran and suddenly, a bullet hit […] Salomé Sanchez Ortiz […]. [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 García stated in his affidavit that "the soldiers arrived firing their weapons, then everyone ran." *Cf.* Affidavit rendered by Mr. Teodoro Cabrera García, *supra* note 147, page 1192.

a) in relation to the expert opinion concerning the identification of the alleged firearms, "although [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) "it is legally irrelevant that [...] the expert witnesses [...] dedicated a short amount of time," "which is surely the result of the expertise they posses" since they work for the Federal Judicial Police";
c) "in general, firearms have [their] data engraved" which "facilitates their legal classification without the need to present the operations or tests on which their opinions were based;"
d) "it is not possible to accuse the military personnel for not having brought the detainees [before a judge] without delay," "it was less feasible to make available the instruments and objects of the crime," and
e) "in no way" can the alleged negligence "imply the inexistence of the weapons."[221]

145. The Court emphasizes that this Second Collegiate Court 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 a rifle and because Mr. Cabrera's testimony did not incriminate him in this respect. Nevertheless, the Second Collegiate Court confirmed Messrs. Cabrera and Montiel's criminal responsibility for carrying firearms intended for the exclusive use of the Army, Navy and Air Force, with respect to the firearms that they did admit to carrying in their statement of May 6, 1999.[222]

146. As regards the sodium rhodizonate test that showed positive on the victims' hands,[223] the First Single Magistrate Court 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 water," the trial court indicated that "only they stated this, but there is no data to confirm this fact,

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220 The expert witnesses stated that they has 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, with no serial number or brand; a .22 caliber Remington rifle, model 550-1. Possessing or carrying these weapons is allowed, provided the provisions and restrictions established in the Federal Firearms and Explosives Act are observed, a crime defined 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 Army rifle, serial number 035757, are intended for the exclusive use of the Army, Navy and Mexican Air Force, and their possession is 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 regarding the identification of the firearms, May 6, 1999 (Preliminary Inquiry N° 33/CC/99) (File of attachments to the answer brief, volume XXIII, page 9791).

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

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

223 On May 4, 1999, an expert witness conducted sodium rhodizonate tests on samples taken from both hands of Messrs. Cabrera and Montiel. In his report, said expert established that: "[a]ccording to the results obtained from the analysis of the samples of the detainees [...], it is confirmed that [Mr. Cabrera García] HAD lead and barium residue on both of his hands of the type left by discharging a firearm. It was established that [Mr. Montiel Flores] only had this residue on his right hand, of the type left by discharging a firearm; the test is negative regarding his left hand." *Cf.* Official letter N° 067/99 of May 4, 1999, containing the expert opinion of chemical expert Rey Yañez Sanchez, rendered before the Agent of the Public Prosecutor's Office, Judicial Department of Cuautemoc, Arcelia, Guerrero (File of attachments to the answer brief, volume XXIII, page 9729).

224 *Cf.* Judgment of October 26, 2000 issued by the First Single-Magistrate Tribunal, *supra* note 77, page 12015.

since while the soldiers indicate that they were lying down […], they in no way indicated that they had been in contact with the water in that river during that time."[225] Subsequently, the same court reiterated that only the victims had mentioned that they had been in contact with the river water while they were detained that day.[226]

147. Also, in relation to the crime of possession and planting of narcotics, the First Single Magistrate Court found various irregularities regarding the existence and destruction of the marijuana plantation. The court found that "no solid evidence was provided that proved its material and juridical existence, and instead the confession made by the accused […] was invalidated,[227] together with the remaining evidence produced in the natural proceeding."[228] Finally, the court concluded that "there is no solid evidence in the court records to prove that the procedures ordered by the preliminary inquiry were 'prefabricated' without the intervention of the accused; instead, what happened in this case is that the measures taken as a result of the preliminary inquiry were inadequate." Bearing in mind the foregoing, the conviction 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 use of firearms and narcotics and the sodium rhodizonate test, the representatives requested that the statements rendered by the victims on May 4 and 6, 1999 be disregarded, arguing that Messrs. Cabrera and García never left the premises of the military battalion where they were allegedly detained during those days. In this respect, their argument implies that, apart from other possible irregularities with

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225 *Cf.* Judgment of October 26, 2000 issued by the First Single-Magistrate Tribunal, *supra* note 77, page 12137.

226 *Cf.* Judgment of July 16, 2001 issued by the First Single-Magistrate Tribunal, *supra* note 82, page 13656.

227 According to said statement before the Public Prosecutor's Office on May 6, 1999, Mr. Montiel Flores allegedly claimed that "[he] plant[ed] marijuana because the Government did not help [them] with production projects." He said his marijuana plantation was "at most, one-quarter of a [h]ectare[,] that [he] plant[ed] because [he] needed to sell it" and that "the marijuana seeds found were owned by another person, since [he] only plant[ed] the seeds he had, which were plant[ed] on January twenty-second, and which [he] alone cared for." *Cf.* Statement of Mr. Montiel Flores of May 6, 1999, *supra* note 132, pages 9778 to 9779.

228 The First Single-Magistrate Tribunal considered that "none of the authorities charged with investigating the crimes, in accordance with Article 21 of the Constitution, exercised due diligence in inspecting the place where the marijuana plants were found;" there is an "evident and palpable contradiction" , as is clear from the statements given by the accused, that RODOLFO MONTIEL FLORES "is the one who planted the marijuana", but "in the complaint, the soldiers claimed that the plantation was owned by 'TEODORO CABRERA GARCÍA'." The Tribunal added that "the aforementioned soldiers have introduced inconsistent and contradictory matters in their accusation," "inasmuch as the alleged marijuana plantation was located 'three hours on foot' […] but this circumstance cannot be ascertained from the evidence furnished in the court records." The "record of the destruction [of the marijuana plantation] does not include a date […] nor does it include a description of the [plantation's] precise location" and "does not refer to the procedure" used to measure the plantation and its density. Also, the photographs of the plantation "are not appropriate to prove [its] destruction." Regarding the statement rendered by the Agent of the Federal Public Prosecutor's Office of Coyuca de Catalan, Guerrero, and 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 demonstrate that this plant was seen, […] but in no way demonstrates the existence of the marijuana plantation in question." Regarding the inconsistencies in the claims made by the soldiers, it indicated that one of them "admitted […] not remembering the exact location of the plot," and that "none of the accused accompanied him;" the other one stated that "the accused remained together [and] that on the day the plantation was destroyed, [Messrs. Montiel and Cabrera] were arrested in the community of Pizotla" and did not accompany them. *Cf.* Judgment issued on August 21, 2002 by the First Single-Magistrate Tribunal, *supra* note 148, pages 14580 to 14585.

229 *Cf.* Judgment of August 21, 2002 issued by the First Single-Magistrate Tribunal, *supra* note 148, pages 15317 and 15324.

respect to the firearms and the sodium rhodizonate test, the issue of *in flagrante delicto* had allegedly been proved on the basis of statements that were allegedly false and, moreover, obtained under torture. For this reason, the representatives criticized the Recommendation made by the CNDH, asserting that it "accepted, without any analysis, the version narrated by the soldiers concerning the reasons for the arrest [of Messrs. Cabrera and Montiel]," "disregard[ing] all evidence [to the contrary], without providing an assessment or explanation, to reaffirm the version of the agents mentioned as responsible [in this case]."

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

a) the alleged absence of an *ex officio* defense, that is, that the court-appointed counsels signed those statements, thereby endorsing those irregular documents. This alleged irregularity will be analyzed by the Court in the chapter concerning the right to defense (*infra* paras. 152 to 162);
b) one of the witnesses who attested to the statement made on May 4, 1999 before the Prosecutor's Office, and 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, carried a note containing 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 this did not call into question the truthfulness of the witness because Mr. 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 whose answers do not coincide when asked whether the victims were handed over to the Office of the Public Prosecutor of Arcelia, and about the caliber of the weapons seized. In this regard, the

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[230] The defense counsel of Messrs. Cabrera and Montiel placed on the record that "the declarant witness was reading a page from a small notebook, containing the answer given on the day of the events, which answers the question […] that I have just asked." Due to this request by the defense, the Acting Secretary in Charge placed on the record that "the witness […] present here took from his trouser pocket 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 (File of attachments to the answer brief, volume XXIV, pages 10440 to 10441).

[231] The judgment of October 26, 2000 stated that "it is unwise, on the part of the defendants, given that they mention that said altercation took place at the site of their arrest and at the military base, since the witness is an employee (…) of the Public Prosecutor's Office (…) of Arcelia, Guerrero, and was categorical in stating that he never left said office where he works as quartermaster general." As to the foregoing, the Court notes that this official was, in turn, the attesting witness during the proceedings for the removal of the body of Mr. Salome Sanchez in the municipality of Pizotla. *Cf.* Record of removal of body, visual inspection and death certificate of May 4, 1999, *supra* note 65, page 4208. In the judgment of August 21, 2002, the First Single-Magistrate Tribunal declared, in this respect, that: "and the defendants' intention is even more evident when they put forward defensive arguments and state that [the attesting witness] was one of the persons who physically attacked them at the site of their arrest; thus, in attempting to identify him as his aggressor, the (court) does not consider it appropriate 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. Thus, if those who arrested them were only soldiers, it is not understandable that they would attempt to note the presence of a civilian that they never mentioned in their early statements, all of which diminishes the evidentiary value of their subsequent statements and proceedings in which they make the same argument." *Cf.* Judgment of October 26, 2000 issued by the First Single-Magistrate Tribunal, *supra* note 77, pages 15265 and 15266.

domestic courts considered that although the soldiers did not agree on whether the victims were transferred to Arcelia, the case file contains records of the proceedings carried out 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, for which reason those statements could not be attributed to them.[233] The domestic courts made no specific reference to this argument.

150. In its analysis of the right to personal liberty, the Court previously indicated that it is not appropriate to make any statement on the causes that motivated the arrest of the alleged victims (*supra* para. 102). The Court will now proceed to analyze, where applicable, 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 thereto, the Court will examine the following points in relation to the criminal proceeding undertaken 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. As regards the investigation process into the alleged torture conducted by the military criminal justice system, the Court will examine: 1) the *ex officio* investigation; 2) the competence of the military criminal courts; 3) the effective judicial remedy of the military criminal justice system, and 4) adaptation of Mexican domestic law to the intervention of the military criminal justice system.

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[232] In the judgment of October 26, 2000, the Single-Magistrate Court indicated that: "it is irrelevant [that the first soldier] initially stated that he had no idea on what date and at what time the detainees were taken to Arcelia and, subsequently, in the same proceeding, said that they were never taken to that place […] while [the second soldier] indicated that they were brought before the Public Prosecutor's Office of Arcelia […], this because […] the case file contains precisely the measures taken by that investigating official, […] suggesting that there is no doubt whatsoever as to whether or not they were brought before the aforementioned authority." *Cf.* Judgment of October 26, 2000 issued by the First Single-Magistrate Tribunal, *supra* note 77, page 12083.

[233] In his statement at the public hearing, Mr. Montiel stated that he "cannot read or write" and that, as a result, had to "make up a signature" when he signed 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, cited in the Judgment issued on October 26, 2000 by the First Single-Magistrate Tribunal, *supra* note 77, page 11616. In his statement before a public notary, Mr. Cabrera indicated that he "cannot read or write" *Cf.* Statement rendered by Mr. Teodoro Cabrera García before a public notary, *supra* note 147, page 1191. This was also certified by expert witness Deutsch, who confirmed that Mr. Cabrera "cannot read or write." *Cf.* Expert opinion rendered by expert witness Ana Deustch by affidavit, *supra* note 174, page 1311. In the domestic sphere, the defense counsel of Messrs. Cabrera and Montiel indicated that "the first three statements attributed to the defendants have no value either, since they were clearly prepared previously; they did not make these statements, since the basic structure of the documents is simply the same: they accept the soldiers' allegations, that they were carrying firearms, they incriminate each other, if they disassociate themselves with some action, they immediately incriminate the co-accused and use expressions that are not typical of uneducated peasants." *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 Single-Magistrate Tribunal, *supra* note 77, pages 11528-11815. Moreover, a judicial authority noted that "Rodolfo Montiel only attended first grade of primary school and can only read and write very little." *Cf.* Judgment issued on October 26, 2000 by the First Single-Magistrate Tribunal, *supra* note 77, page 12706. Furthermore, a medical certificate issued in May 2000 in relation to Messrs. Cabrera and Montiel stated that they were "illiterate." *Cf.* Certificate of medical and psychophysical condition issued on May 19, 2000, supra note 156, page 2074.

A. Criminal proceedings 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 their right not to make a statement; iii) did not challenge the lack of diligence of the military officers; iv) did not challenge the interrogations conducted […] after their arrest without the presence of a lawyer; v) did not challenge the expert opinions rendered by persons not specialized [in this matter]; vi) did not demand the necessary measures 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 challenged, despite the fact that the 48-hour period for bringing them before a judicial authority had expired.

153. The Commission did not present arguments regarding this matter. The State pointed out that Messrs. Cabrera and Montiel "received the appropriate public legal counseling and assistance." It mentioned that the victims were always in contact with the lawyers in order to prepare their defense.

154. The Court has previously held that the right to defense must necessarily be exercised from the moment a person is accused of perpetrating or participating in an unlawful action and only ends when the proceeding concludes,[234] including, where applicable, the enforcement phase. To prevent a person from exercising his right to defense from the moment the investigation against him begins and the authority in charge orders or executes actions that imply an curtailment of rights is to enhance the investigative powers of the State to the detriment of the fundamental rights of the person under investigation. The right to defense requires the State to treat the individual, 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. In particular, the Court emphasizes that the defense provided by the State must be effective, for which purpose the State must adopt all the appropriate measures.[236] If the right to defense begins from the moment when an investigation into an individual is ordered, the accused must have access to legal representation from that moment onwards, especially during the procedure in which his statement is rendered. To prevent the accused from receiving assistance from a defense counsel is to severely limit his right to defense, which leads to a procedural imbalance and leaves the individual unprotected before the punitive authority.[237] However, the appointment of a defense counsel for the sole purpose of complying with a procedural formality would be tantamount to not having a technical legal representation; therefore, it is imperative that the defense counsel act 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 Panama. 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. Furthermore, this Court considers that one of the guarantees inherent in the right to defense is to have sufficient time and adequate means to prepare the defense, which requires the State to allow the accused to have access to the case file and to the evidence gathered against him.[238]

157. In this case, on May 4, 1999, Messrs. Cabrera and Montiel rendered their statements at the Public Prosecutor's Office in the presence of their court-appointed defense counsel and attesting witnesses.[239] Subsequently, 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 for the arrest of Messrs. Cabrera and Montiel,[241] which the victims appealed the following day. In that appeal, a new defense counsel was appointed by the court.[242] Later, on July 13, 1999 a private defense counsel accompanied them to render an amplification of their 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] From that moment, the Miguel Agustín Pro Juarez Human Rights Center (Centro de Derechos Humanos Miguel Agustín Pro Juárez) took on the defense of Messrs. Cabrera and Montiel and filed several motions and remedies.

158. The representatives reject the actions taken by the court-appointed defense counsels during the proceeding, considering that by failing to challenge certain evidentiary facts, these would have played an important role in their subsequent conviction. At the domestic level, the victims' defense counsel argued that the statements of May 4 and 6, 1999 were not rendered before the Public Prosecutor's Office but were signed at the military battalion and that the victims were always under the control of military personnel during those days.[245] The representatives further alleged that "at some point, certain local officials appeared

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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, pages 8198 to 8199.

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

241 Order of constitutional term issued on May 12, 1999 by the First Instance Court in Criminal Matters of the Judicial District of Mina (File of attachments to the answer brief, volume XXIII; pages 9844 to 9874).

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

243 Statement of the private defense counsel before the Fifth District Court of July 13, 1999 (File of attachments to the answer brief, volume XXIII, page 10035).

244 Brief signed by Messrs. Cabrera and Montiel on August 20, 1999, asking the Fifth District Court "[t]o consider as […] the sole private attorneys [Digna Ochoa and Plácido, Maria del Pilar Noriega and Jose Cruz Lavanderos Yañez]" (File of attachments to the answer brief, volume XXIV, page 10108 to 10109).

245 In this context, Mr. Montiel Flores stated that he saw the court-appointed defense counsel who advised them on May 6, 1999, "in the Examining Trial Court; that if she helped him, it was as an accomplice to the torture […] since there were only soldiers where he was detained, unless she was dressed as a military officer; that the only statements he admits are the ones rendered as an extension of his statement before the District Trial Court which he rendered voluntarily, without threats or torture." Moreover, Mr. Cabrera García said he met the defense counsel "at the Fifth District Trial Court and that he was tortured in the […] Battalion […], where he was stunned; they signed the documents without reading them (*sic*) … if she had been there, she would have asked [the soldiers] 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 Single-Magistrate Tribunal, *supra* note 148, page 15198.

at the Battalion to draw up a record of the weapons and, possibly, to issue other documents that would then be presented at the criminal proceeding" and which the judges considered valid. The representative indicated that all this was done in collusion with the court-appointed defense lawyers. The domestic courts accepted these arguments and, therefore, the defense counsels and the attesting witnesses, who submitted these statements before the Public Prosecutor, were called to render a testimony.[246] In addition, the courts conducted confrontation procedures with the victims[247] and concluded that the victims had received adequate counseling.

159. In the statements rendered on May 4, 1999, the victims accepted the facts[248] presented by the military in the complaint sheet against them.[249] However, the domestic courts considered that in that statement, Messrs. Cabrera and Montiel "were duly informed of their individual guarantees, as their court-appointed defense counsel was required to do, and as he [himself] admitted."[250] Regarding the statements rendered on May 6, the court-appointed defense counsel stated that she had spoken to Mr. Montiel but she could not remember for how long, that she asked him some questions regarding his arrest and his treatment by the soldiers who arrested him.[251] The domestic judicial courts considered that these statements rendered on May 6, 1999 were in accordance with the law and "with the assistance" of a court- appointed defense counsel "who was designated by the accused themselves" and that "the proceedings themselves contain the counsel's interventions in favor of the accused."[252] In particular, the judgment issued on August 21, 2002 by the First Single-Magistrate Court considered that:

> "Mr. [Montiel] received assistance during all his appearances before the Public Prosecutor's Office and the District Court, and was duly informed and notified of the reasons for the charges against him; he was granted adequate time and means to prepare his defense; he received counseling from his defense counsels or from trusted persons with whom he

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246 *Cf.* Proceeding before the Fifth District Court of January 21, 2000 in which the testimonies of two attesting witnesses and one court-appointed defense counsel were rendered, *supra* note 230, pages 10437 to 10462. Also, proceeding before the Fifth District Court of January 27, 2000, in which the testimonies of two attesting witnesses and one court-appointed defense counsel were rendered (File of attachments to the answer brief, volume XXIV, pages 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 (File of attachments to the answer brief, volume XXV, pages 10599 to 10615). Also, 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 (File of attachments to the answer brief, volume XXV, pages 10619 to 10624 and 10672 to 10687).

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

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

250 The First Single-Magistrate 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 acted as their defense counsel in that procedure, confirming that the procedure was conducted according to law and with full respect for individual guarantees." *Cf.* Judgment issued on August 21, 2002 by the First Single-Magistrate Tribunal, *supra* note 148, page 15187. According to the court-appointed defense counsel who assisted the victims in their statements of May 4, 1999, before the proceeding, he suggested that Messrs. Cabrera and Montiel "render the statement without feeling 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 in which two attesting witnesses and one court-appointed defense counsel rendered their testimonies, *supra* note 230, page 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, pages 10599 to 10615.

252 *Cf.* Judgment of August 21, 2002 issued by the First Single-Magistrate Tribunal, *supra* note 148, page 15191.

> communicated freely; he was informed about his right to defend himself or, if he did not have the necessary resources, or a particular attorney to defend him, about the right to have a Federal Public defender appointed for him; he ha[d] the right to question witnesses the present in Court and he was given help to arrange for the appearance of all those persons that could shed light on the facts, so much so, that his defender also took advantage of this benefit to question the witnesses who testified against him, the defenders who assisted him in the prosecution and preparation thereof, and the attesting witnesses who were present in the first statements; he was also informed about the right not to incriminate himself or to plead guilty; likewise, he was duly informed of his right to appeal the judgments before a Superior Court."[253]

160. Based on the foregoing, the First Single-Magistrate Court considered that Messrs. Cabrera and Montiel received the necessary defense, since "the fact that they mentioned that they do not recognize their court-appointed defense counsels […], does not undermine the evidentiary value of the proceedings in which they intervened, given that they were definite in mentioning that they had indeed counseled them and ensured that their individual guarantees were not violated."[254] The domestic courts that heard the case[255] responded to the charges of irregularities by the court-appointed defense counsels in a similar manner to the aforementioned Single-Magistrate Court.

161. At the same time, the domestic case file reveals that, in the statement rendered by Messrs. Cabrera and Montiel at the Public Prosecutor's Office on May 7, 1999, a court-appointed defense counsel as well as a private attorney intervened. On May 12, 1999 a formal detention order was issued against the victims and on the following day, they appealed that court order and appointed a defense counsel to represent them at this procedural stage (*supra* para. 69). On June 29, 1999, the First Single-Magistrate Court ruled on the motion of appeal and partially confirmed the arrest 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 Court upheld the formal order for his detention. Based on the foregoing, this Court notes that Messrs. Cabrera and Montiel did indeed have a defense counsel who appealed the court's decision and that said appeal brought some positive results for the interests of the victims.

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

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253 The court also stated that Messrs. Cabrera and Montiel "received appropriate 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 [them]." It was also established that although said defenders "did not inform them about the right to render or not a statement, this event does not discredit the proceeding", nor does the fact that "they remained in contact with the accused for a brief period, [that] they do not coincide with the objects placed before them, which as has been said did not occur, and that they indicated they do not remember what they said." *Cf.* Judgment of August 21, 2002 issued by the First Single-Magistrate Tribunal, *supra* note 148, pages 15301 to 15302 and 15238 to 15239.

254 *Cf.* Judgment of August 21, 2002 issued by the First Single-Magistrate Tribunal, *supra* note 148, pages 15227 to 15228.

255 *Cf.* Judgment of August 28, 2000 issued by the Fifth District Court, *supra* note 75, pages 11137 to 11293; Judgment of October 26, 2000 issued by the First Single-Magistrate Tribunal, *supra* note 77, page 11322, volume XXVII, page 12205 and Judgment of July 16, 2001, issued by the First Single-Magistrate Tribunal, *supra* note 82, volume XXVIII, page 13022 to volume XXIX, 13735. The Court notes that in the statements of May 6, 1999 the court-appointed defense counsel asked 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, pages 9777 to 9782 and 9783 to 9786.

256 *Cf.* Judgment issued on June 29, 1999 by the First Single-Magistrate Tribunal of the Twenty-First Circuit (File of attachments to the answer brief, volume XXIII, pages 9961 to 10020).

2. Exclusion of the evidence obtained under duress

163. The Commission and the representatives indicated that "when" the victims "made their self-incriminating statements before the Federal Public Prosecutor's Office and the Judge of the Mina Judicial District[,] they were still suffering from the effects of fear, anguish and inferiority, given that only a few days had passed since their detention and physical mistreatment." The Commission considered that the lack of "a serious, exhaustive and impartial investigation into the alleged acts of torture," meant that "any possible flaws in the confessions rendered" could not be corrected "and therefore the State could not use those statements as evidence." Furthermore, the Commission and the representatives pointed out that the practice of torture is reinforced by the legal validity granted to the first statement made by the accused, which was rendered before the Public Prosecutor's Office and not before a court, added to which the Mexican courts gave validity to this statement. The representatives also pointed out that "the confessions of the victims should have been excluded from the criminal proceeding" and that their ratification of these statements before the court should not have been taken into account, given that Messrs. Cabrera and Montiel "were still suffering from the effects of torture and threats and did not understand the significance or scope of that ratification."

164. The State argued that the conviction "was not exclusively based on the confessions made by the accused." It indicated that the trial judge "heard, assessed and corroborated all the evidence and records in the case file" and that if it were proven that the judgment "against the [...] victims was based on the confession obtained under the circumstances described, this would result in the competent authority calling into question its evidentiary value and ruling according to the rest of the body of evidence and pursuant to the relevant law and then determining whether such a violation left the accused unprotected and affected the outcome of the ruling."

165. In this respect, the Court notes that the rule of excluding from judicial proceedings all evidence obtained under torture or through cruel or inhumane treatment (hereinafter "exclusionary rule") has been recognized by several international treaties[257] and international bodies for the protection of human rights, which consider that the rule of exclusion is intrinsic to the prohibition of such acts.[258] Therefore, the Court considers that this rule is absolute and irrevocable.[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 regard, the Committee against Torture has pointed out that "the 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 circumstances." *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, the Committee on Human Rights has stated 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.

166. Accordingly, the Court has held that the annulment of procedural documents resulting from torture or cruel treatment is an effective measure to halt the consequences of a violation of judicial guarantees.[260] The Court also considers it necessary to emphasize that the rule of exclusion does not only apply to cases where 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. Indeed, whenever it is proven that any form of duress has interfered with the spontaneous expression of a person's will, this necessarily implies the obligation to exclude that evidence from the judicial proceeding. The annulment of such evidence is a necessary means to discourage the application of any form of coercion.

167. Furthermore, this Court considers that statements obtained under duress are seldom truthful, because the person tries to say whatever is necessary to make the cruel treatment or torture stop. Accordingly, the Court considers that accepting or granting evidentiary value to statements or confessions obtained by coercion, which affect the person or a third party, constitutes, in turn, an infringement of a fair trial.[261] Similarly, the absolute nature of the exclusionary rule is reflected in the prohibition on granting probative value not only to evidence obtained directly by coercion, but also to evidence derived from such action. Consequently, the Court considers that excluding evidence gathered or derived from information obtained by coercion adequately guarantees the exclusionary rule.

168. Some of these elements of international law are reflected in Mexican law. Article 20 of the Constitution, in force at the time of the events of this case, stated that "[a]ny form of solitary confinement, intimidation or torture is prohibited and shall be punished by criminal law. A confession rendered before any authority other than the Public Prosecutor's Office or the judge, or before such authorities without the assistance of a legal counsel, shall have no evidentiary value."[262]

169. Notwithstanding the foregoing, this Court notes that following its visit to Mexico in 2001, the Committee against Torture indicated that "[d]espite the binding rules in the [Mexican] Constitution and laws on the inadmissibility as evidence of statements obtained under duress, in practice it is extraordinarily difficult for an accused to have a confession forcibly obtained from 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,

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259 Moreover, the Committee against 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 January 25, 1996, App. *N°. 41/1994/488/570*, paras. 45-46 and Case of *Jalloh v. Germany*, Judgment of July 11, 2006, App. *N°. 54810/00*, paras. 121-123. *Cf.* Similarly, the European Court has established 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 decisive for the sentence." ECHR, *Case* of *Gafgen v. Germany,* Judgment of June 1, 2010, App. N°. 22978/05, para. 165 and *Case Harutyunyan v Armenia,* Judgment of June 28, 2007, App. N°. 36549/03, para. 63.

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

complaining that he was forced to make it under torture or duress, the courts have no independent procedure to establish whether or not the confession was made voluntarily."[263]

170. Bearing in mind the foregoing, the Court considers it appropriate to determine whether, in the instant case, a forced confession was used. It is worth noting that Messrs. Cabrera and Montiel, who could not read or write (*supra* para. 149) placed their fingerprints under the statements in which they confessed to criminal activities at three procedural stages:

- In the statement rendered before the Public Prosecutor's Office on May 4, 1999, Mr. Montiel Flores admitted: i) possession of weapon for the exclusive use of the Army, specifically a .45 caliber semi-automatic pistol; ii) possession, without a permit, of a .22 caliber rifle and iii) possession and cultivation of marijuana. For his part, Mr. Cabrera admitted: i) possession of a weapon for the exclusive use of the Army, specifically a 7.62 mm MI rifle, and magazine, ii) firing 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 amended his initial confession, ratifying only the offenses of possessing a firearm for the exclusive use of the Army (a .45 caliber pistol) and the cultivation of marijuana. Mr. Cabrera García also amended the content of his initial statement, admitting only to possession of a 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 to possessing the firearm, whereas Mr. Cabrera ratified that he had been in the possession of a rifle and the magazine.[266]

171. Since making these statements, the victims have never again admitted to having committed an unlawful act. The defense counsel in the domestic proceeding alleged that:

> "[…] it is clear that my client[s] were forced to sign papers, without knowing their content, which resulted in self-incriminating statements rendered at the Public Prosecutor's Office, after they had been held incommunicado, tortured, both physically and mentally, and threatened that their families would be harmed if they did not do so; I ask this court not to give any probative value whatsoever [to the statements] when ruling on this case."[267]

172. This Court notes that the tribunals which heard the instant case stated that: i) there was no proof that Messrs. Cabrera and Montiel were mistreated or torture in order to obtain their confession;[268] ii) although it was not proven that the

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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, pages 8198 and 8199.

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

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

267 *Cf.* Arguments presented before the Fifth District Court of Iguala, Guerrero, on July 25, 2000, by the private defense counsel of Messrs. Cabrera and Montiel (File of attachments to the answer brief, volume XXVI, page 11111).

268 The Fifth District Court declared that the criminal acts "were mainly corroborat[ed] by the statements made by the accused." Accordingly, it pointed out that "said statements […] were made before the Public Prosecutor's Office and the Trial Court […] by fully cognizant adults, subject neither to

statements made before the Public Prosecutor's Office were invalid, having resulted from cruel treatment, torture or solitary confinement, Messrs. Cabrera and Montiel confessed, before a competent court on May 7, 1999, to several of the crimes for 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 when making a comparison between the crimes admitted by Messrs. Cabrera and Montiel in three statements, and the final judgment in which they were convicted, it may be concluded that they were sentenced for the same crimes they confessed to 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 if 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. This is so because a subsequent confession may be the consequence of the mistreatment suffered by the person and, more specifically, because of the fear that remains after this type of experience.[271]

174. The Court shares the aforementioned view and reiterates that the situations of defenselessness and vulnerability felt by an individual 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] can produce feelings of fear, anguish and inferiority capable of humiliating and overwhelming an individual and possibly breaking his physical and moral resistance.

175. In this regard, the Court has already confirmed that Messrs. Cabrera and Montiel were subjected to cruel and inhuman treatments during the days they were detained in Pizotla, without being promptly 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 treatment in order to break

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coercion nor violence." *Cf.* Judgment issued on August 28, 2000 by the Fifth District Court, *supra* note 75, page 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 confessions they made in the record of the case, but the Tribunal admitted that these confessions into the other evidentiary items of the proceeding." It added that "[e]ven assuming that their initial statements were not rendered freely and spontaneously, their ratification before the court remedied any possible procedural irregularities previously committed by the defendants; for this reason, the confessions in question have legal value and, therefore, the appealed judgment that takes them into account, with the rest of the evidence on record, does not violate the guarantees." *Cf.* Judgment of August 14, 2002 issued by the Second Collegiate Tribunal, *supra* note 84, pages 3139 and 3202.

270 The Second Collegiate Tribunal considered that "it should be noted that the judgment being appealed was not solely based on the confession made by the defendants [before] the prosecutor's office of the common and federal jurisdiction, respectively, or before the court that initially heard the case against them; nor did the evidence furnished in the original case prove that, prior to the confession, they had been in solitary confinement; and there is even less evidence that their respective statements were obtained through threats or any form of coercion" *Cf.* Judgment of August 14, 2002 issued by the Second Collegiate Tribunal, *supra* note 84, pages 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.

down their psychological resistance and force them to incriminate themselves or confess to certain illegal activities. The cruel treatment had an impact on the first statements rendered before the Public Prosecutor's Office, as well as on the statement made on May 7, 1999. Consequently, the trial court decided to assess this matter and not to rule out the allegations presented by the victims.

176. Indeed, one of the arguments used by the trial judges in order not to exclude the evidence from the proceedings was based on the fact that "it is not sufficient for someone to allege that he has been physically or mentally abused for that person to be released, since in principle he must prove that such violence existed and that it was used as a means to extract a confession, which, at most, would invalidate the confession […]."[273] Similarly, the expert witness Coronado indicated that "if it is alleged that a confession was obtained under torture, and it is not proven during the trial that there was a torturer, the confession will stand."[274] As stated previously, this Court reiterates that the burden of proof for such facts rests with the State (*supra* para. 136), and therefore it cannot be argued that the petitioner did not fully prove his complaint in order to rule it out.

177. For all the above reasons, the Court concludes that the domestic courts, which heard the case at all stages of the proceeding, should have completely excluded the statements rendered before the Public Prosecutor's Office and the confessions made on May 7, 1999, given that the existence of cruel and inhuman treatment disqualified the use of such evidence, according to the international standards previously mentioned. *Therefore, the Court declares the violation of Article 8(3), in relation to 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 manner in which the evidence was gathered and assessed […] shows that, from the outset, the criminal proceeding was intended to prove the guilt of the [victims]." They pointed out that the courts "fragmented the body of evidence, placing value only on those items of evidence which, although produced irregularly, were useful to prove [their] involvement […] in an unlawful act, and excluding those items of evidence that necessarily led to the conclusion that the evidence had been fabricated and the confessions obtained under torture." Furthermore, the courts shifted the burden of proof to the victims and assumed that it was not the State's duty "to confirm that [their] confessions were not coerced."

179. For its part, the State pointed out that "even through [Messrs. Cabrera and Montiel] were arrested during the commission of a crime *in flagrante* and the detainees themselves confessed to have committed certain illicit acts," the courts focused their efforts "on proving the existence of a criminal act and consequently, their criminal responsibility." Also, the State "emphasize[d] that at no time was the defense was hindered […] and each one of the arguments and evidence furnished by the defense was subjected to legal assessment." Moreover, "the burden of proof

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[273] Also, the Fifth District Court noted that "[a]lthough the accused indicated that when they were arrested, they were tortured […] it is no less true, regardless of what has been mentioned, that this alleged violence was not proven in the criminal proceeding […] to confirm the versions given in the extension of the preliminary statement, in defense of the accused, [several] items of evidence were furnished […], however, this evidence is not sufficient to change the judgment." *Cf.* Judgment issued on August 28, 2000 by the Fifth District Court, *supra* note 75, page 11220 to 11223.

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

fell upon the [P]ublic [P]rosecutor's Office, which had to fully prove the elements that constituted 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 judgment by the court of first instance established that "[t]he court weighed up the issues that were beneficial and prejudicial to them, the fact that their health was endangered, 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, especially because it was not conclusively proven that […] they belong[ed] to an armed group."[275]

181. For its part, the judgment of August 21, 20002 indicated that the principle of innocence "[was] revalidated since all the evidence demonstrated [the] criminal responsibility for the perpetration of the crime [which] was […] consider[ed] proven, based on the evidence that turned out to be appropriate and sufficient for that purpose."[276] In any case, the writ of execution prior to that judgment emphasized that "[the] Federal Court considered ineffective the evidence gathered by the Public Prosecutor's Office during the preliminary inquiry in relation to the crimes of possessing a firearm without a permit and a crime against health in the form of cultivating marijuana."[277]

182. This Court has pointed out that the principle of presumption of innocence is the basis 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* rests with the prosecutor.[279] Thus, the convincing demonstration of guilt is an essential requirement for a criminal sanction, so that the burden of proof falls on the prosecutor and not on the accused.[280]

183. The Court has also held, as stated in Article 8(2) of the Convention, that the principle of presumption of innocence means 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] Thus, the lack of full proof of a person's criminal responsibility in a condemnatory judgment violates

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

[276] *Cf.* Judgment of August 21, 2002 issued by the First Single-Magistrate Tribunal, *supra* note 148, page 15301.

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

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

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 the European Court, the principle of presumption of innocence implies that judges should not start a proceeding with a preconceived idea that the accused has committed the crime as charged; the burden of proof is on the prosecutor, and any doubt that arises must benefit the accused. The presumption of innocence is violated if, prior to the accused being found guilty, a judicial decision concerning him reflects the 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 as being irregular and fraudulent was admitted. These questions were duly analyzed by the different courts that heard the case and, in some cases, the argument of the defense was accepted. Indeed, according to the ruling of August 14, 2002, "[the] Federal Court considered ineffective the evidence gathered by the Public Prosecutor's Office during the preliminary inquiry regarding the crimes of possession of firearm without a permit and a crime against health in the form of cultivation of marijuana" (*supra* para. 73), and therefore part of the evidence challenged by the defense was not assessed in the decision to convict the victims.

186. The Court finds that there is not sufficient evidence to consider that the victims were treated as though guilty. In fact, although they were associated with a situation of *flagrante delicto*, in general terms, the domestic courts treated them as persons whose criminal liability was still subject to a clear and sufficient determination. *Therefore, this Court considers 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 trial conducted against them.*

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

187. The Commission held that the military jurisdiction "was not the competent authority to investigate the facts, given that the military courts should only be used when military criminal legal interests are endangered […]." It therefore considered that the allegation of torture "exceeds any action for the defense and security [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 ordinary courts." The representatives agreed with the Commission and added that "the *amparo* proceeding, which by definition is the mechanism for the legal guarantee of fundamental rights in Mexico, is ineffective to contest the scope of the military jurisdiction, since it establishes very limited legal assumptions when the victims or injured parties seek to resort to the courts." The representatives further argued that the investigation of torture was not initiated *ex officio* by the judicial authorities who received the complaint of the alleged facts.

188. The State pointed out that this case "is no way related to the military justice system in Mexico," since "the alleged use of torture was assessed and determined by independent and impartial Courts belonging to the Judicial Branch of the

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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 December 6, 1988, App. Nos. 10588/83, 10589/83, 10590/83, paras. 77 and 91.

Mexican State, thereby remedying any violation […], which could be implied by an investigation conducted by a military authority." It also explained 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." Furthermore, the State indicated that "the defense […] had at its disposal and made full use of different simple and prompt remedies, which legally enabled it to bring 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 Court ordered the legal assessment of an expert opinion that could have demonstrated the innocence of the […] victims [and], secondly, the Single-Magistrate Court acquitted Mr. Rodolfo Montiel of committing a crime against health and consequently, reduced his sentence."

189. The investigation promoted by the victims into the allegations of torture committed against them was conducted by military authorities, since Article 57(II)(a) of the Military Justice Code establishes 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 by the ordinary courts

190. During the early stages of their detention, Messrs. Cabrera and Montiel presented various complaints of torture committed against them. It has been noted that although the statements rendered before the Public Prosecutor's Office on May 4, 1999, made no reference to such actions,[285] on May 6, 1999, the victims reported to the Federal Public Prosecutor's Office that they had been beaten while at the Army base.[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 custody of the Army.[287] Subsequently, on July 13, 1999, the victims amplified their preliminary statements,[288] repeating that they had been subjected to degrading treatment and threats by state agents in order to make them sign a confession (*supra* paras. 134 and 175). Those statements were further amplified on December 23, 1999 before the Fifth District Court.[289]

191. Notwithstanding these 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, isolation and unlawful detention to which Messrs. Cabrera and Montiel were subjected at the Army facilities.[290] Thus, on August 31, 1999, the Fifth District Judge ordered the Public Prosecutor's Office to investigate those allegations[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).

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

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

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

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

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

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

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

192. The Court has pointed out that Article 8 of the Convention establishes that victims of human rights violations, or their families, have should have ample opportunities to be heard and to act in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek appropriate reparation.[292] Likewise, it has 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] Also, the Court has pointed out that the obligation to investigate, and the corresponding right of the alleged victim or his family, not only stems from conventional standards of international law, which are binding upon the States Parties, but also from domestic legislation regarding the duty to investigate *ex officio* certain unlawful behavior and the rules that allow victims or their relatives to report or file complaints, evidence, petitions or engaged in any other proceeding, in order to participate in criminal investigation proceedings to determine the truth of the facts.[294]

193. This Court notes that the investigation against the alleged perpetrators of torture was initiated more than three months after the first mention that those acts were committed against Messrs. Cabrera and Montiel. Moreover, the Court notes that said investigation was initiated at the express request of the petitioners, on August 26, 1999 (*supra* para. 74). Based on the foregoing, it is clear to this Court that the State failed to comply with its obligation to conduct an *ex officio* investigation into actions that violated the human rights of Messrs. Cabrera and Montiel. 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. Jurisdiction of the military criminal justice system

194. In addition to the points mentioned concerning the *ex officio* investigation into the allegations of torture, the Court confirms that on October 10, 1999, the agent of the Federal Public Prosecutor's Office submitted a question regarding lack of jurisdiction *ratione materiae* to the Agent of the Federal Public Prosecutor's Office and State Representative of the Attorney General's Office of the Republic in the state of Guerrero, considering that "the accused were on active service when they committed the unlawful actions and therefore those acts should 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 to continue with the corresponding investigations, to the Agent of the Military Prosecutor's Office,

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[292] *Case of Fernández 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.* By way of example, Article 141 of the Federal Code of Criminal Procedure recognizes the rights of victims or injured parties in the preliminary inquiry (Paragraph A), in the criminal proceeding (paragraph B) and during the enforcement of sanctions (Paragraph C). The Code of Criminal Procedures of the state of Guerrero, in Article 5, paragraph 1, recognizes the right of the victim or injured party to assist the Public Prosecutor's Office in providing members of the court with all the available information, so as to confirm the admissibility and degree of damage caused by the crime. Cited in the *Case of Fernández Ortega et al. v. Mexico, supra* note 39, para. 192.

[295] *Cf.* Consultation on lack of jurisdiction *ratione materiae* of October 10, 1999 (Proceeding N° 91/CC/99) (File of attachments to the application, volume XII, page 4846 to 4849).

arguing that the suspects were Mexican military officers on active service on the day of the events. On December 14, 1999, said Agent of the Federal Public Prosecutor declined jurisdiction to his 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 archive the case file, considering 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, concerning the facts of this case. As a result, case file CODDEHUM-CRTC/031/99-I was opened, which was subsequently referred to the CNDH due to jurisdiction issues. The CNDH launched an investigation in order to corroborate the facts. The CNDH then issued Recommendation 8/2000, which 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 CNDH Law" (*supra* para. 75). Also, in one of its recommendations, the CNDH ordered "the Office for the Prosecutor General of the Military Justice (PGJM) to open 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 CNDH's recommendations, the State ordered the opening of Preliminary Inquiry number SC/304/2000/VII-I. On February 10, 2001, the Office of the Military Prosecutor General went to the *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, demanding 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 Military Prosecutor General recommended that the criminal record be archived, since it determined that:

> "the body of evidence in this inquiry is not sufficient 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 matters that

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

297 *Cf.* Brief of June 20, 2006 in which the State submitted "its observations to the arguments on the merits of the petitioners, related to case 11449 Rodolfo Montiel Flores and Teodoro Cabrera García" before the Inter-American Commission on Human Rights (File of attachments to the application, volume II, page 676).

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

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

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

301 *Cf.* Decision of the Preliminary Inquiry SC/304/2000/VIII-I of November 3, 2001, opened in response to Recommendation 08/2000 of the National Commission on Human Rights of Mexico (File of attachments to the application, volume XIX, pages 8364 to 8367).

constitute human rights violations, this Court recalls that it has ruled in this regard in relation to Mexico in the Judgment of the case of Radilla Pacheco, a precedent that has been repeated in the cases of Fernández Ortega and Rosendo Cantú. Bearing in mind the foregoing and the points made by the State (*supra* para. 188), for the purposes of this case, the Court deems sufficient to reiterate 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 Court 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, if applicable, prosecute and punish the perpetrators of human rights violations; instead, the processing of those responsible always corresponds to the ordinary justice system. In that sense, the Court, on numerous 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 Court and, *a fortiori*, to 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 human rights violations 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 civilian victim, who has the right to participate in the criminal proceedings, not only for the purposes of the respective reparation of the damage but also to exercise his right to the truth and to justice […]. Thus, the victims of human rights violations and their families have the right to have those violations heard and addressed by a competent Court, according to due process of law and the right to a fair trial. The importance of the passive subject transcends the military sphere of action, since juridical rights associated with the ordinary regimen are involved.[305]

198. To summarize, according to this Court's case law, the military jurisdiction is not competent to investigate and, if applicable, prosecute and punish the perpetrators of alleged human rights violations; instead, those responsible must always be tried by the ordinary justice system. This conclusion applies not only to cases of torture, forced disappearance and rape, but to all human rights violations.

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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 Fernández 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 Fernández 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 Fernández Ortega et al. v. Mexico, supra* note 39, para. 176; and *Case of Rosendo Cantú et al. v. Mexico*, *supra* note 30, para. 160.

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

199. The use of cruel, inhuman or degrading treatment against a person by military officers is an action that is in no way related 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 under domestic criminal law and the American Convention, such as the personal integrity and dignity of the victims. Clearly, such conduct is openly contrary to the duties to respect and protect 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 investigation of torture was contrary to 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 present case, even though the matter did not go beyond the investigative stage at the Office of the Public Prosecutor for Military Justice. As is clear from the abovementioned criteria, the incompatibility between the American Convention and h the intervention of military courts in these types of cases not only applies to act of prosecuting by a court, but mainly to the investigation itself, given that its actions constitute the starting point and the necessary premise for the subsequent intervention of an non-competent Court.[307]

201. As to the State's arguments that any shortcomings associated with the intervention of the military criminal courts would be remedied by fact that in the investigation against Messrs. Cabrera and Montiel conducted by the ordinary court, the allegations of torture were heard in order to decide whether certain evidence should be excluded, it is clear that the sole 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, through decisions made within the proceeding, the purpose of which was not to shed light on facts but, on the contrary, to investigate the petitioners. Accordingly, *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 relation to Article 1(1) thereof, to the 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 Court considers that it is not necessary to rule on other arguments regarding the independence or impartiality of the military courts or the possible violation, based on the same facts, of other Inter-American treaties.

3. Effective legal remedy in the military criminal justice system

202. With regard to the alleged absence of an effective remedy to contest the military jurisdiction, the Court has stated that Article 25(1) of the Convention establishes the duty of the States Parties to ensure to all persons subject to their

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

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

jurisdiction an effective recourse for protection against acts that violate their fundamental rights.[309]

203. As mentioned previously (*supra* para. 196) in the course of the preliminary inquiry SC/304/2000/VII-I, on February 10, 2001, Messrs. Cabrera and Montiel filed a brief before the PGJM, requesting that it decline jurisdiction and return the Preliminary Inquiry to the ordinary jurisdiction. However, there was no response to this petition. In this respect, the representatives alleged that "in the face of this omission" the victims "were unable to challenge the intervention by the military jurisdiction in the investigation into the torture committed against them." The State did not deny the lack of response to the aforementioned request and did not refer to this argument.

204. In application of the abovementioned standards regarding the effectiveness of judicial remedies, and taking into account the decisions taken by the military courts, this Court concludes that Messrs. Cabrera and Montiel were unable to effectively contest the jurisdiction of the military courts to hear the matters that, due to their nature, should be heard by the ordinary judicial authorities. Consequently, Messrs. Cabrera and Montiel did not have effective remedies at their disposal to challenge the military courts' jurisdiction over the allegations of torture. Accordingly, *the Court concludes that the State violated the right to judicial protection enshrined in Article 25(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Messrs. Cabrera and Montiel.*

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

205. Furthermore, the Court notes that the intervention of the military courts 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 rule:

> is a broad and imprecise provision that prevents the determination of the strict connection of the crime of the ordinary jurisdiction with the military 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 those acts, this is not enough for them to be tried by the military criminal justice system.[311]

206. In the case of *Radilla Pacheco* the Court considered that said provision of Article 57 operates as a rule and not as an exception, this being an essential feature of military jurisdiction for it to comply with the standards established by

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309 Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*, *supra* note 213, para. 91; *Case of Fernández 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 defines "Crimes against military discipline" as follows:

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

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

this Court.[312] In this regard, the Court emphasizes that compliance with these standards is required in the investigation of all human rights violations within the framework of the ordinary criminal jurisdiction, and therefore the scope of its application cannot be limited to specific violations, such as torture, forced disappearance or rape. The Court recalls that Article 2 of the American Convention establishes the general obligation of every State Party to adapt its domestic laws to the Convention's provisions, so as to guarantee the rights protected therein, which means that the provisions of domestic law must be effective (principle of *effet utile).*[313] Consequently, the Court concludes that the State failed to comply with its obligation under Article 2, in relation to Articles 8 and 25 of the American Convention, by extending the jurisdiction of the military courts to crimes that are not strictly related to military discipline or to legal interests in the military sphere.

207. Finally, regarding the legal definition 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 grounds for administering torture as follows: "to obtain, from the tortured individual or a third party, information or a confession, or to punish him for an action he has committed or is suspected of having committed, or coerce him to behave or stop behaving in a certain way," which does not comply with the definition contained 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 the Criminal Code of the State of Guerrero has no criminal definition 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 of the State to define 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, as the Court has stated on previous occasions, the Court cannot review laws in abstract that were not applied or did not have effects on the specific case.[314]

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

[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.

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

208. Based on the provisions of Article 63(1) of the American Convention,[315] the Court has indicated that any violation of an international obligation which 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 Court has established that reparations must have a causal link with the facts of the case, the declared violations, the proven damages and the measures requested to repair the consequences of those damages. Therefore, the Court must adhere to this premise in order to rule properly and according to law.[318]

210. In consideration of the violations declared in the preceding chapters, the Court shall address the requests for reparations submitted by the Commission and the representatives. It shall also consider the State's arguments, in light of the criteria embodied in the Court's case law regarding 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 arguments, 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 Court 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 Rodolfo Montiel Flores, who shall be considered as beneficiaries of the reparations ordered by this Court.

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

212. Furthermore, although the representatives submitted some evidence regarding the alleged damages suffered by the relatives of Messrs. Cabrera and Montiel as an presumed consequence of the violations declared, the Court notes that the Commission did not argue in its Merits Report or in its application that these individuals had their rights violated under the American Convention (*supra* para. 60). Based on the foregoing, and bearing in mind the Court's case law,[321] the Court does not consider the relatives of the victims in this case as "injured parties"[322] and emphasizes that they shall be entitled to reparations only in their capacity as heirs, that is, if the victim dies and according to the provisions of domestic law.

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

213. The Commission and the representatives agreed that "comprehensive reparation requires that the Mexican State investigate with due diligence and in a serious, unbiased and exhaustive manner, the human rights violations suffered by Messrs. Cabrera and Montiel in order to reveal the historical truth of the facts, and to prosecute and punish all those responsible, both materially and intellectually." Thus, they asked the Court to order the State "to locate, prosecute and punish all those who participated in the actions," including all those responsible for the irregularities and omissions committed in the judicial proceedings.

214. In this Judgment the Court has established that the State 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), together with Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. The Court analyzed the way in which the ordinary courts assessed the allegations of torture presented by the victims. However, the Court notes that the only judicial proceeding which specifically set out to investigate the alleged torture and cruel and inhuman treatment committed against Messrs. Cabrera and Montiel was conducted by the military criminal justice system, which was not competent to hear this case (supra. para. 201).

215. For this reason, as it has ordered on other occasions,[323] the Court requires that the abovementioned events be effectively investigated by the ordinary courts in a proceeding against those allegedly responsible for the offenses committed against the victims' personal integrity. Consequently, the Court rules that the State shall effectively carry out the criminal investigation into the facts of this case, particularly into the allegations of torture against Messrs. Cabrera and Montiel, in order to determine the corresponding criminal responsibilities and, if appropriate, effectively apply the punishments and consequences established by law. This obligation shall be complied with within a reasonable period of time, according to

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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 In relation to 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. In relation to 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 Fernández Ortega et al. v. Mexico, supra* note 39, para. 228; and *Case of Rosendo Cantú et al. v. Mexico*, *supra* note 30, para. 211.

the criteria established for the investigation of such cases,[324] which includes due diligence in investigating different hypotheses for the reasons that prompted violations of the personal integrity of Messrs. Cabrera and Montiel. In this regard, the Court notes that the Istanbul Protocol has been incorporated into the domestic legislation (*supra* para. 119) and it is important that those standards are upheld in order to strengthen the due diligence, appropriateness and effectiveness of the respective investigation. Similarly, the pertinent disciplinary and administrative or criminal actions must be undertaken in the event that the investigation of the facts reveals procedural and investigative irregularities.

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

C.1 Measures of satisfaction

i) Publication of the Judgment

216. The Commission requested that the Court order the State to publish this Judgment in a newspaper with national circulation. The representatives specified that it should be published "both in the Official Gazette of the Federation as well as in two newspapers with the largest circulation in the country chosen in agreement with the victims." The representatives also requested that excerpts of the Judgment be published in the "Official Gazette of the [s]tate of Guerrero and in publications of the Public Prosecutor's Office, the Federal Judiciary, the Public Federal Defense Office, the Secretariat for National Defense (SEDENA) and the Secretariat for the Environment and Natural Resources (SEMARNAT)." Furthermore, "[i]n view of the fact that radio is most widely used medium in the state of Guerrero, the Judgment should also be broadcast [using] such media," particularly the that "cover the municipalities of Petatlán and Coyuca de Catalán."

217. As it 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 Federation's Official Gazette and in *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 with a large circulation in the state of Guerrero; ii) fully publish this Judgment[326] on the official web site of the Federal State and of the state of Guerrero, taking into account the nature of the publication ordered, which shall remain available for at least one year and iii) broadcast the official summary, at least once, on a radio station[327] which covers the municipalities of Petatlán and Coyuca de Catalán. These

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[324] *Cf. Case of Radilla Pacheco v. Mexico, supra* note 302, para. 331; *Case of Fernández 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. Peru. Reparations and Costs.* Judgment of November 30, 2001. Series C N° 87, Operative Paragraph 5.d); *Case of Rosendo Cantú 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.

[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 Fernández Ortega et al. v. Mexico, supra* note 39, para. 247; and *Case of Rosendo Cantú et al. v. Mexico*, *supra* note 30, para. 229.

publications and radio broadcasts shall be made within six months following notice of this Judgment.

C.2 Measures of rehabilitation

i) Medical and psychological care

218. The Commission asked the Court to order the State to adopt measures of medical and psychological rehabilitation for the victims. In turn, the representatives added that this healthcare must be provided "by competent professionals, and must include the supply of any medicines they may require." The representatives also requested that the Court order the State to cover "any other expenses related to treatment, such as transportation, among any other needs that may arise." The representatives also emphasized that "healthcare mu[st be provided] for life […] in view of the [alleged] torture inflicted on Messrs. Cabrera and Montiel]." In addition, in their final written arguments, the representatives requested that this measure be applied "by means of a reimbursement scheme that allows the victims to choose doctors and psychologists in whom they trust."

219. The psychological report issued by expert witness Ana Deutsch diagnosed the victims as suffering from post-traumatic stress disorder and severe depression, related to the physical injuries resulting from the mistreatment suffered (*supra* para. 125). Moreover, expert witness Quiroga explained that the attacks against their personal integrity had produced symptoms that still persist today and that justify the medical care.[328]

220. As it has done in other cases[329] the Court deems it necessary to order a measure of reparation that provides adequate treatment of the physical and mental suffering inflicted on the victims, bearing in mind their specific needs. Therefore, having confirmed the violations and the damages suffered by the victims, the Court considers it necessary to order measures of rehabilitation in this case. Moreover, the Court notes that Mr. Montiel Flores does not live in Mexico and that Mr. Cabrera García does not live in the state of Guerrero and does not wish to have his place of residence disclosed for security reasons.[330]

221. Accordingly, the Court considers it necessary that Mexico 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 their place of residence. In this regard, the Court reiterates that for the implementation of these measures, the State must obtain the consent of the victims by providing them with previous, clear and sufficient background information. Consequently, the State must pay each of the victims, within a term of two months as of notification of this Judgment, a single payment of US$ 7,500.00 (seven thousand five hundred dollars of the United States of America) to cover specialized medical and psychological treatment, as well as medicines and other related expenses.

ii) Removing the victims' names from all criminal records

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328 *Cf.* Expert report rendered by expert witness José Quiroga by affidavit, *supra* note 173, page 1316 to 1328.

329 Cf. *Case of Barrios Altos v. Peru. Reparations and Costs, supra* note 325, paras. 42 and 45; *Case of Fernández 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 With reference to the power-of-attorney presented by the victims' representatives, the Inter-American Commission requested, in a brief dated July 9, 2009, "that information related to the current abodes of Mr. Montiel and Cabrera, and their respective families, be kept in the strictest confidence […] given the risks [to] their lives and personal safety" (Merits file, volume I, page 91).

222. The representatives held that Messrs. Cabrera and Montiel "are innocent" of the charges for which they were convicted. Therefore, they asked the Court to order the Mexican State "to take all necessary measures to immediately remove the names of Messrs. Montiel and Cabrera from any criminal records as well as to permanently eliminate any criminal record related to the facts reported in this case." The State pointed out that it was not appropriate to eliminate 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 errors."

223. This Court has pointed out in other cases that it does not have competence to establish the criminal liability of individuals, and that any decision on the guilt or innocence of persons is a matter for the domestic criminal courts.[331] In light of the foregoing, and based on the violations declared in this Judgment, this Court 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 of justice

224. The Commission asked the Court to order Mexico to limit the scope of its military jurisdiction. The representatives requested that "the State […]be required to amend Article 57 of the Code of Military Justice, in order to establish, in a clear, precise and unambiguous manner, that military justice must abstain from considering any human rights violations allegedly committed by members of the Mexican armed forces, whether on active duty or not." The representatives also called for the establishment of an "effective remedy to challenge the decision to transfer proceedings to the military jurisdiction." Finally, based on the State's information regarding a proposal to amend Article 57 of the Code of Military Justice, in compliance with the Court's Judgment in the case of Radilla Pacheco, the representatives pointed out that "the information issued by the Presidency suggests that the proposed amendment [...] will not comply with [the terms established in said Judgment]" and that, in any case, "the amendment […] has not been adopted."

225. In its case law, this Court has acknowledged that domestic authorities are bound to respect the rule of law, and therefore, they are required to apply the provisions in force within the legal system.[332] But when a State has ratified an international treaty such as the American Convention, all its institutions, including its judges, are also bound by such agreements, which requires them to ensure that all the effects of the provisions embodied in the Convention are not impaired by the enforcement of laws that are contrary to its purpose and end. The Judiciary, at all levels, must exercise *ex officio* a form of "conventionality control" between domestic legal provisions and the American Convention, obviously within the framework of their respective competences and the corresponding procedural regulations. In this task, the Judiciary must take into account not only the treaty

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[331] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, *supra* note 25, para. 134, *Case of Lori Berenson Mejía v. Peru***.** *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.

itself, but also the interpretation thereof by the Inter-American Court, which is the ultimate interpreter of the American Convention.[333]

226. Thus, for example, the highest courts of the region have referred to and applied the conventionality control taking into account the interpretations issued by the Inter-American Court. The Constitutional Chamber of the Supreme Court of Justice of Costa Rica has pointed out that:

> it should be noted 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 assessing domestic laws in light of this standard, either in a contentious case or in a simple consultation, shall have -in principle- the same value as the interpreted rule.[334]

227. For its part, the Constitutional Court of Bolivia has stated that:

> In fact, the Pact of San Jose, Costa Rica, as a component of the collection of constitutional standards, is comprised of three essential parts, closely related to each other: the first is the preamble; the second is termed the dogmatic section and the third is the organic section. 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 body and, therefore, its decisions, also form part of this collection of constitutional standards.
>
> This is so for two specific legal reasons, namely: 1) The object of the jurisdiction of the Inter-American Court of Human Rights and, 2) the application of the "*effet utile*" doctrine to judgments concerning Human Rights.[335]

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

> consequently, the Dominican State and, therefore, Judiciary, are bound not only by the rules of the American Convention on Human Rights but also by interpretations thereof made by the competent organs, created as means of protection, according to Article 33, which confers competence with respect to matters relating to the fulfillment of the commitments made by the States Parties.[336]

229. Furthermore, the Constitutional Court 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 Chapter of the [Constitutional Procedural Code], the judgment is binding upon all national government institutions, including in those cases in which the Peruvian State is not a state party to the proceeding. In fact, the Inter-American Court's powers to interpret and apply the Convention, enshrined in Article 62(3) of said treaty, together with the mandate of the CDFT of the Constitution, means that an interpretation of the

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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 Chamber of the Supreme Court of Justice of Costa Rica. Constitutional Motion. Opinion 2313-95 (Case File 0421-S-90), Considering clause VII.

[335] Judgment issued on May 10, 2010 by the Constitutional Court 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."

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

> provisions of the Convention issued in any proceeding is binding for all domestic governmental institutions, including, of course, this Court .[337]

230. This Court has also established:

> the direct link between the Inter-American Court of Human Rights and this Constitutional Court, a link that has two facets: on the one hand, a *restorative* facet, given that once the violated fundamental right has been interpreted in light of the Court's decisions, it is possible to provide adequate and effective protection; and, on the other hand, a *preventive* facet, given that, through its observance, it is possible to avoid the harmful institutional consequences stemming 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 acknowledged that the decisions of the Inter-American Court "are binding for the Argentine State (Art. 68(1), American Convention);" therefore, it has established that "in principle, the content of its decisions must be subordinated to the decisions of the international Court."[339] The Supreme Court has also stated that its "interpretation of the American Convention on Human Rights must be guided by the case law of the Inter-American Court of Human Rights" given that it constitutes "an ineludible guide for interpretation by the Argentine constitutional branches of government within their sphere of competence and, therefore, 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. For its part, the Constitutional Court of Colombia has indicated that, since the Colombian Constitution stipulates that constitutional rights and duties are to be interpreted "according to international human rights treaties ratified by Colombia," it is understood that "the case law of the international bodies responsible for interpreting those treaties, provides a relevant interpretative criterion for defining the meaning of the constitutional rules on fundamental rights."[341]

233. Therefore, as was established in the cases of Radilla Pacheco, Fernández Ortega and Rosendo Cantú, it is necessary that the constitutional and legislative interpretations concerning the criteria for the material and personal jurisdiction of the military courts in Mexico be adapted to the principles established in the case law of this Court, which have been reiterated in the present case[342] and apply to all human rights violations allegedly committed by members of the armed forces. This means that, regardless of any legislative reforms that the State should adopt (*infra* para. 234) in this case, based on the conventionality control, the judicial authorities

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[337] Judgment issued 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*), clause 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 para. 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

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

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

must rule immediately and *ex officio* that the facts be heard by a natural judge, that is, by the ordinary criminal courts.[343]

234. Furthermore, this Court recalls that it has already stated in the case of Radilla Pacheco, and reiterated in the cases of Fernández Ortega and Rosendo Cantú, that it is not necessary to order the amendment of the regulatory provisions included in Article 13 of the Political Constitution of the United Mexican States. Nevertheless, in Chapter IX of this Judgment the Court has stated that Article 57 of the Military Criminal Code is incompatible with the American Convention (*supra* para. 206). Therefore, this Court reminds the State that it has an obligation to introduce, within a reasonable period of time, the appropriate legislative reforms in order to make the aforementioned provision compatible with international standards in this regard and with the American Convention, under the terms established in this Judgment.[344]

235. Finally, as stated in Chapter IX of this Judgment, Messrs. Cabrera and Montiel did not have access to an adequate and effective remedy that would have enabled them to challenge the intervention of the military courts in the proceedings to examine the alleged acts of torture committed against them (*supra* para. 204). Consequently, as the Court determined in the cases of Fernández Ortega and Rosendo Cantú, Mexico must adopt, also within a reasonable period of time, the appropriate legislative reforms to allow individuals affected by the actions of the military courts to have access to an effective remedy to challenge their jurisdiction.[345]

ii) Adapting domestic laws to international standards regarding torture

236. The Commission requested that the Court order the State "to adopt legislative, administrative and any other measures to adapt Mexican legislation and practices to Inter-American standards regarding torture." In turn, the representatives pointed to its omission in classifying the crime of torture in the state of Guerrero, which, they noted, "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 a preceding paragraph (*supra* para. 207) that the arguments put forward on this issue were not a violation of Article 2 of the American Convention, and therefore it is not appropriate to order a measure of reparation in this regard.

iii) Adopting a mechanism for an accessible and public register of detainees

237. The Commission requested the "adop[tion of] the necessary measures in order to ensure that all detainees are promptly brought before a judge or any other official with sufficient authority to oversee the lawfulness of the arrest."

238. The representatives called for "the creation of a public registry of detainees, which should be accessible and immediate," in all places where "individuals charged with a crime are detained before appearing before the competent court." Said registry should specify the name of the civil servant in charge of the investigation;

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343 *Cf. Case of Fernández 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 Fernández 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 Fernández Ortega et al. v. Mexico, supra* note 39, para. 240; and *Case of Rosendo Cantú et al. v. Mexico*, *supra* note 30, para. 223.

however, although the representatives acknowledge that such registers currently exist, they also also pointed out that "in many cases, these registers do not contain complete and accurate information [and] are not filled in immediately, an essential prerequisite for the effective protection of detainees' human rights." This register should specify "the time, place and circumstances of the arrest, the place where the detainee will be taken and estimated time of arrival, the detainee's procedural status, the names of the individuals in charge of the detainee's immediate physical custody at all times, and the names of individuals in charge of his legal custody."

239. In their final written arguments, the representatives stated that the General Law of the National Public Security System "requires that an administrative register of detainees be kept and specifies the data to be included, obtained or updated." However, the representatives also pointed out that this register "merely contains data regarding the individual's identity and information about the arrest itself, but does not record the place where arresting authority finally sends the detainee; thus, the chain of custody of the individual from the time of his or her arrest is not recorded. Moreover, it does not guarantee access to information about the detainee's physical whereabouts." Finally, the representatives argued that "there is no contradiction between a public register of detainees and their rights to [privacy and dignity]," since there are "several mechanisms" for reconciling both these rights and overcoming the obstacle mentioned by the State.

240. In response, the State argued that the representatives acknowledge the existence of a detainees' register in Mexico, with "features to safeguard their privacy." The State held that the Federal Act of Transparency and Access to Public Governmental Information and its regulations determine that "the authorities are not authorized to disclose information on personal data, except with the express agreement of the party concerned" and that "under no circumstances, can the information contained in [the register] be provided to third parties." The State also stressed that this Federal Act also considers as classified any information that "may prevent or hinder actions or measures implemented to prevent a crime, or the authority exercised by the Public Prosecutor during the preliminary inquiry and before the courts of the Federal Judiciary." In addition to the foregoing, the State mentioned the "Administrative Register of Detentions," its contents, the need to update the information contained therein and the relevant provision which states that the "Public Prosecutor and the police shall inform anyone who requests information about the arrest of an individual and, if applicable, the authority in whose custody he or she is to be found."

241. As is evident from the attachments submitted by the State, the constitutional reform of 2008 mentions a register of detainees,[346] the existence of which is not covered by eight years of *vacatio legis* established in the temporary provisions of the constitutional reform.[347] Similarly, the court records show that Mexico already has a registry system whose purpose is "to inform anyone who

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[346] Paragraph five of Article 16 of the Political Constitution of the United Mexican States provides that: "[a]ny person may arrest a suspect caught *in flagrante delicto*, or immediately after the commission of a crime and shall promptly hand over the suspect to the immediate authority, which shall in turn, promptly bring the before the Office of the Public Prosecutor. A register of detainees shall be created […]." Political Constitution of the United Mexican States, *supra* note 124.

[347] Regarding the entry into force of the constitutional reform, the provisional second Article of the Decree of June 18, 2008 states 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, from the day following publication of this Decree. […]." *Cf.* Decree amending and incorporating several provisions of the Political Constitution of the United Mexican States, published in the Official Gazette of the Federation on June 18, 2008 (File of attachments to the answer brief, annex 3, presented in digital format).

requests information about the detention of an individual."[348] Regarding the appropriateness of allowing greater public access to this register 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 an 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. The Court further notes that under the General Law on the National Public Security System, the information contained in the Register may be provided to anyone who requests information about an individual under arrest, which allows for compliance with the purpose of assisting in the defense of the detainees' rights. The Court deems it appropriate to require measures to ensure that increased public access to such information does not affect the right to private life - among other rights - of detainees.

243. Bearing in mind the foregoing, the Court considers that, within the framework of the register of detainees currently kept in Mexico, the following supplementary measures should be adopted in order to reinforce the operation and usefulness of this system: i) continuous updating; ii) interconnection between the database of the register and any other relevant databases, establishing a network that allows each detainee to be easily located; iii) guarantee that the register respects the requirements of access to information and privacy; and iv) an oversight mechanism to ensure that authorities comply with the requirement to update the register.

iv) Training program for civil servants

244. The Commission requested that the Court order the Mexican State to implement "training programs for civil servants, based on the international standards established in the Istanbul Protocol so that such civil servants have the necessary technical and scientific knowledge to assess potential situations of torture or cruel, inhuman or degrading treatment." The Commission also asked the Court to order the State to implement "permanent human rights education programs within the Mexican Armed Forces, at all hierarchical levels." For its part, the State pointed out that "[t]he Public Prosecutor's Office of Mexico is working to implement the Istanbul Protocol throughout the country, training the civil servants of the Public Prosecutor's Offices." In addition, the State explained that the Public Security Secretariat "through the General Directorate of Human Rights organizes workshops and training programs to prevent torture in the exercise of public security operations and to improve the implementation of the Istanbul Protocol." The also State pointed out that the 2008-2012 National Human Rights Program has provided training to public servants of the Ministerial Federal Police. It further indicated that human rights training is provided through the National Human Rights

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[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 provide information upon request regarding the detention of an individual and, if applicable, the authority at whose disposal such individual is to be found […]." (File of attachments to the answer brief, 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.

Program (PNDH), in coordination with the National Human Rights Commission; through the Workshop on Human Rights and Humanitarian Principles applicable to policing in coordination with the International Committee of the Red Cross; and through courses, workshops, international seminars and video-conferences.

245. The Court positively acknowledges the various training courses and actions undertaken by the State. In this regard, it considers that such actions and courses should include, where pertinent, the study of the provisions of the Istanbul Protocol. Therefore, as it has done previously,[350] the Court requires the State to continue implementing permanent training programs and courses on diligent investigation in cases of cruel, inhuman or degrading treatment and torture. Such courses shall be imparted to Federal officials and Guerrero state officials, and particularly to members of the Public Prosecutor's Office, the Judiciary, the Police and health sector personnel with competence in such cases and whose functions require them to assist victims alleging violations of their personal integrity. Furthermore, this Court considers it important to strengthen the State's institutional capabilities through training programs for the Mexican Armed Forces on the principles and standards for the protection of human rights, including the restrictions to which they are subject[351], in order to avoid the repetition of events similar to those of this case.

v) Other measures requested

246. The Commission and the representatives called for State to hold a public act acknowledging its responsibility for the harm caused to the victims. For their part, the representatives requested the following additional measures of reparation: i) organization of an awareness campaign on the importance of the work done by human rights advocates in Mexico, ii) establishment of an educational center close to Petatlán and Coyuca de Catalán for technical training in forestry and community management of natural resources, iii) change the present name of "Premio al Mérito Ecológico – Categoría Social" (Award for Ecological Merit – Social Category") to "Premio al Mérito Ecológico – Campesinos Ecologistas de Guerrero" (Award for Ecological Merit – Peasant Ecologists of Guerrero), and iv) measures to reunite the family of Montiel Cortés.

247. First, regarding these requests, the Court considers that issuing 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] Also, the Court has considered that several issues raised by the representatives were not included by the Commission in its application; thus, for procedural reasons, they were not assessed in the merits of this case. Finally, in this regard, 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 Court shall not rule on the request for reparations related to facts which, for procedural reasons, were not addressed by the Court in this Judgment.

D. Compensatory damages

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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 La Rochela Massacre v. Colombia, supra* note 56, para. 303; *Case of Fernández Ortega et al. v. Mexico, supra* note 39, para. 262

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.

D.1 Pecuniary damages

248. In its case law, the Court has developed the concept of pecuniary damages and has established that these 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 requested that the Court, "[n]otwithstanding any claims that the victims' representatives might make at the appropriate procedural stage," 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 farmlands which they tilled together with their relatives. According to the representatives, Mr. Cabrera García worked in agriculture, had a house and a plot of land of two (2) hectares on which he grew crops, which he used to feed his family and for sale. Although the land was subject to a collective land ownership system (the "ejido" – area of common land), the representatives stressed that "for all practical purposes, they belonged to [Mr. Cabrera García]." As to Mr. Montiel Flores, the representatives explained that Mr. Montiel Flores tilled common land for which he had obtained a permit from the community [*comunidad ejidal*], an activity he complemented by selling clothes with his wife on Sundays and breeding pigs for sale. The income he generated from these activities was variable, but, in general, he made $800.00 Mexican pesos monthly from the sale of pigs and $ 2,500.00 from selling clothes, i.e. $ 3,300.00 Mexican pesos, or $ 39,600.00 Mexican pesos annually, equivalent to US$ 2,995.18 American dollars. The representatives pointed out that the victims were forced to abandon their land not only because of their fear due to intimidation by local political bosses but also by the military. In addition, the representatives requested the reimbursement of transportation expenses and expenses for visits to the detention centers, incurred mainly by the victims' wives, which, according to the representatives, amounted to approximately US$ 1,905.49 American dollars which, together with the loss of their land, implied damage to the family assets.

251. The State pointed out that, in this case, there were no violations of the Convention, and therefore compensatory reparations would not be applicable. Moreover, 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 be no order for reparations due to the lack of a causal link. The State added that the victim's decision to leave the common lands was due to their fear of the actions taken by local political bosses, according to their own relatives. According to the State, "the interruption of the victims' activities [apparently occurred] due to their involvement in several serious crimes and their arrest in *flagranti delicto*" 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 loss of income suffered by Messrs. Cabrera and Montiel. The main evidence on this regard is testimonial evidence, which is acceptable in the circumstances of this case, because the victims worked in the fields, and this explains a certain degree of informality. Furthermore, the Court considers it foreseeable that the violation of the right to humane

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[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.

treatment [personal integrity] resulted in several levels of inactivity for a certain period of time.

253. The representatives only reported 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, from the case file it appears that in his statement 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 and a half years, 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, for loss of income. This amount shall be paid to Messrs. Cabrera and Montiel, within the term established by the Court for that purpose (*infra* para. 268).

254. As this Court has noted previously, 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 Court shall not rule on any arguments of the representatives that are not related to the foregoing.

D.2 Non-pecuniary damage

255. In its case law, the Court has developed the concept of non-pecuniary damages and has established that these "may include both the suffering and distress caused to the direct victims and their families, and the impairment of values that are highly significant to them, as well as other forms of suffering that cannot be assessed in financial terms, which affect the living conditions of the victims or their families."[355]

256. The Commission asked 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 argued that "[t]he unlawful detention and torture, as well as the lack of justice and reparation, caused serious physical, psychological and emotional damage to Rodolfo Montiel and Teodoro Cabrera, but also had a serious impact on their life project," the effects of which continue to this day. According to the representatives, the victims in this case have experienced very severe emotional symptoms such as "periods of deep sadness, anxiety, depression, headaches and mood changes, among other symptoms," as well as symptoms related to a Post-traumatic Stress Disorder. Moreover, the separation from their families "produced severe anguish in the victims," since they "believed that they may have caused them harm." The representatives further argued that "[the alleged] context of criminalization and repression of their colleagues in the OCESP" meant that they had to leave that organization. The representatives also referred to the period when the victims were unfairly imprisoned in poor conditions of confinement, a matter that warrants reparation.

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

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.

258. The State argued that, should the Court determine that violations were indeed committed, "the facts of this case would not, for any reason, warrant non-pecuniary damages subject to reparation by means of a sum of money." The State held that "it does not deny the petitioners' commendable efforts in protecting the environment, but pointed out that this matter is in now way under consideration in this case."

259. The victims were carrying out activities on behalf of the OCESP, an organization of which Mr. Montiel Flores was a founding member. In his statement before a notary public, Mr. Cabrera García pointed out that OCESP consisted of around 45 people, and that they always met "[m]ainly […] to stop trucks carrying timber illegally, without a permit."[356] At the public hearing held in this case, Mr. Montiel Flores also stated that "[since] 1995, [when a] foreign company […] came to Guerrero […] for excessive [timber] exploitation, [they] realized that this was a risk for all the region's inhabitants and […] then beg[an] to get organiz[ed]."[357]

260. International case law has repeatedly held that a judgment *per se* constitutes a form of reparation.[358] However, considering the circumstances of this case, the suffering caused to the victims of the violations and the denial of justice, together with the changes in their living conditions, and the other non-pecuniary consequences, the Court deems it appropriate to award compensation, in equity, for non-pecuniary damages.[359]

261. Accordingly, the Court deems it appropriate to set, in equity, the sum of US$ 20,000.00 (twenty thousand dollars of the United States of America) in favor of each of the victims in this case, as compensation for non-pecuniary damage.

E. Legal Costs and Expenses

262. As the Court has stated in previous cases, costs and expenses are included within the concept of reparation under Article 63(1) of the American Convention.[360]

263. The Commission requested "the payment of reasonable and necessary costs and expenses, duly proven, which have arisen and continue to arise in the processing of this case."

264. The representatives requested that the Court order the State to pay the following amounts: i) in favor of CEJIL, US$ 25,012.37 (twenty-five thousand and twelve dollars and thirty-seven cents of the United States of America) for expenses incurred since 2001 and up until the presentation of the brief of pleadings and motions, and US$ 17,803.72 (seventeen thousand, eight hundred and three dollars and seventy-two cents of the United States of America) for expenses incurred after

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356 *Cf.* Statement rendered by Mr. Teodoro Cabrera García by affidavit, *supra* note 147, page 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. Peru. 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.

359 *Cf. Case of Neira Alegría et al. v. Peru. 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.

that date; and ii) in favor of Centro Prodh, US$ 13,062.13 (thirteen thousand and sixty-two dollars and thirteen cents of the United States of America) for expenses incurred from 1999 until October 31, 2009 and US$ 18,566.51 (eighteen thousand five hundred and sixty-six dollars and fifty-one cents of the United States of America) for expenses incurred after that date. Furthermore, the representatives of CEJIL stated that they incurred expenses for photocopies, stationery and phone calls for an estimated amount of US$ 250 (two hundred and fifty dollars of the United States of America). Lastly, the representatives requested the Court to set an amount for future expenses related to compliance with the Judgment. This amounts to a total of US$ 74,694.74 (seventy-four thousand six hundred and ninety-four dollars and seventy-four cents of the United States of America).

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

266. Regarding the reimbursement of legal costs and expenses, it is up to the Court to prudently assess their scale, including the costs related to proceedings before the domestic courts, and 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 basis and taking into account the expenses incurred by the parties, provided their *quantum* is reasonable.[361]

267. The Court notes that the representatives have incurred various expenses before this Court related to fees, gathering of evidence, transportation, communication services, *inter alia*, in both the domestic and the international proceedings in this case.[362] However, from the expenditure vouchers submitted by the representatives, the Court finds that some are not related to the instant case and others do not correspond to expenses exclusively incurred for the purposes of this case.[363] Therefore, taking into account the evidence submitted, the Court decides that the State shall pay the sum of US$ 20,658.00 (twenty thousand six hundred and fifty-eight dollars of the United States of America) in favor of CEJIL and US$ 17,307.00 (seventeen thousand three hundred and seven dollars of the United States of America) in favor of Centro Prodh for professional fees. Likewise, in accordance with the evidence submitted by the representatives, the Court determines that the State must pay the sum of US$ 17,708.00 (seventeen thousand seven hundred and eight dollars of the United States of America), in

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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 With respect to CEJIL: air and land tickets; travel allowance for officials (airport transfers, *per diem*, telephone calls, lodging) and fees (File of attachments to the brief of pleadings and motions, volume XXII, pages 9243 to 9321); travel, fees, stationery, expert reports, participation of expert witness at public hearing, photocopies, telephone calls (Merits file, volume VI, pages 3429 to 3468). With respect to Centro Prodh: Air and land tickets, travel allowance for officials (airport transfers, *per diem*, telephone calls and hotel), fees, photocopies, sending of stationery, printing (File of attachments to the brief of pleadings and motions, volume XXII, pages 9323 to 9592), trips, affidavits, salaries (record of annexes, volume VI, pages 3470 to 3675).

363 With respect to Centro Prodh: Expenses for trips to Iguala to deliver the "Chico Mendes" award for the case of *Campesinos Ecologistas* [Environmentalist peasants] (File of attachments to the brief of pleadings and motions, volume XXII, page 9477); travel expenses for visit to Iguala to deliver the *Fundacion Goldman* award to Rodolfo Montiel (File of attachments to the brief of pleadings and motions, volume XXII, page 9548); invoices for medical care (File of attachments to the brief of pleadings and motions, volume XXII, pages 9460- 9461), invoice for medical care (eye-glasses) (File of attachments to the brief of pleadings and motions, volume XXII, pages 9475-9476), and invoices for medical care and bacteriological tests (File of attachments to the brief of pleadings and motions, volume XXII, pages 9482- 9486). Also ultrasound examination for Mr. Cabrera García (Merits file, volume VI, page 3659).

favor of CEJIL and US$ 10,042.00 (ten thousand and forty-two dollars of the United States of America) in favor of Centro Prodh for expenses incurred during the proceeding. Said amounts shall be paid within one year as from notification of this Judgment (*infra* para. 268). In the procedure to monitor compliance with this Judgment, the Court shall order the State to reimburse the victims or their representatives for any reasonable expenses duly demonstrated.

F. Method of compliance with the payments ordered

268. The State shall pay compensation for pecuniary and non-pecuniary damages directly to the beneficiaries, and shall directly reimburse the legal representatives of CEJIL and Centro Prodh for legal costs and expenses incurred, within the period of one year, as from the notification of this Judgment, under the terms of the following paragraphs.

269. If the beneficiaries should die before the aforementioned compensatory amounts are paid, such amounts shall be paid directly to their heirs, according 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 Mexican currency, at the New York, USA exchange rate between both currencies prevailing on the day prior to the day payment is made.

271. If, for reasons attributable to the beneficiaries of the compensations or their successors, respectively, it is not possible for them to receive the amounts ordered within the period indicated, the State shall deposit those amounts in an account held in the beneficiaries' names or in 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 customary banking practice in Mexico. If, after ten years, the compensation has not been claimed, these amounts shall be returned to the State with the accrued interest.

272. The amounts allocated in this Judgment as compensation shall be delivered to the victims in their entirety in accordance with these provisions of this Judgment. The amounts allocated as reimbursement of costs and expenses shall be delivered directly to the legal representatives of CEJIL and Centro Prodh, without deductions derived from future taxes.

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

XI
OPERATIVE PARAGRAPHS

274. Therefore:

THE COURT,

DECIDES,

Unanimously,

1. To dismiss the preliminary objection of "fourth instance" filed by the State, pursuant to 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 relation to Article 1(1) of the American Convention on Human Rights, to the detriment of Messrs. Teodoro Cabrera García and Rodolfo Montiel Flores, under the terms of paragraphs 93 to 102; 105 and 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 relation to Articles 1(1) of the American Convention on Human Rights, for the cruel, inhuman and degrading treatment inflected on Messrs. Teodoro Cabrera García and Rodolfo Montiel Flores, under 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, under the terms of Articles 5(1) and 5(2), in relation to Article 1(1) of the American Convention on Human Rights, as well as Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Messrs. Teodoro Cabrera García and Rodolfo Montiel Flores, in accordance with 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 García and Rodolfo Montiel Flores, under 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 relation to Articles 1(1) and 2 of the American Convention on Human Rights, for having submitted a case of alleged torture to the military criminal courts, 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 is not appropriate 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 García and Rodolfo Montiel Flores, respectively, under 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 the jurisdiction of the military courts to crimes that are not strictly

related to military discipline or to military legal interests, under the terms of paragraph 206 of this Judgment.

9. The State is not responsible for the violation of the right to defense, enshrined in Article 8(2)(d) of the American Convention on Human Rights, to the detriment of Messrs. Teodoro Cabrera García 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, enshrined in Article 8(2) of the American Convention on Human Rights, to the detriment of Messrs. Teodoro Cabrera García and Rodolfo Montiel Flores, under the terms of paragraphs 182 to 186 of this Judgment.

AND ORDERS,

Unanimously that:

11. This Judgment constitutes *per se* a form of reparation.

12. The State shall, within a reasonable period, conduct an effective criminal investigation into the facts of this case, particularly into the alleged acts of torture committed against Messrs. Cabrera and Montiel, to determine the corresponding criminal liabilities and, if applicable, effectively apply the penalties and consequences established by law; also, it shall impose the appropriate disciplinary, administrative or criminal measures if the investigation into the aforementioned facts reveals procedural or investigative irregularities in relation thereto, according to paragraph 215 of this Judgment.

13. The State shall, within the term of six months, issue the publications ordered, under the terms of paragraph 217 of this Judgment.

14. The State shall pay each of the victims once only, within a term of two months, the amount specified in paragraph 221 of this Judgment, to cover specialized medical and psychological treatment, as well as for medicines and other related expenses.

15. The State shall introduce, within a reasonable time, the appropriate legislative reforms in order to bring Article 57 of the Code of Military Justice into line with international standards on the matter and with the American Convention on Human Rights, and adopt the pertinent legislative reforms so that individuals subject to intervention by the military courts have an effective remedy to challenge their jurisdiction, under the terms of paragraph 235 of this Judgment.

16. The State shall adopt, within a reasonable period of time and within the framework of existing register of detainees in Mexico, appropriate supplementary measures in order to reinforce the operation and usefulness of said system, according to the terms of paragraph 243 of this Judgment.

17. The State shall continue to implement training programs and permanent courses for the diligent investigation of cases of cruel, inhuman or degrading

treatment and torture, as well as to strengthen the State's institutional capabilities by means of training programs for the Mexican Armed Forces on the principles and rules governing the protection of human rights, including the restrictions to which they are subject, according to paragraph 245 of this Judgment.

18. The State shall pay the amounts specified in paragraphs 253 and 261 of this Judgment, as compensation for pecuniary and non-pecuniary damages and reimbursement of legal costs and expenses, where applicable, within the term of one year, under the terms of paragraphs 260 to 261.

19. The Court shall monitor full compliance with this Judgment, in exercise 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 the measures ordered in this Judgment. The State shall submit to the Court a report on the measures adopted in compliance with this Judgment, within one year of its notification.

Ad hoc Judge Eduardo Ferrer Mac-Gregor Poisot advised the Court of his Concurring Opinion, which accompanies this Judgment.

Done in Spanish and English, the Spanish text being the official version, in San Jose, Costa Rica, on November 26, 2010.

Diego García-Sayán
President

Leonardo A. Franco

Manuel E. Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

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 *AD HOC* JUDGE EDUARDO FERRER MAC-GREGOR POISOT REGARDING THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE *CASE OF CABRERA GARCÍA AND MONTIEL FLORES v. MEXICO*, NOVEMBER 26, 2010

I. INTRODUCTION

1. The Inter-American Court of Human Rights (hereinafter the "Inter-American Court " or the "Inter-American Court") has reiterated in the case at hand, by unanimity, its doctrinal jurisprudence on "conventionality control." I consider it timely to issue this concurring opinion in order to highlight the new considerations and clarifications 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 comprising the Inter-American Court . in the present matter, we deliberated on several aspects of the "conventionality control" at two different moments, as is evident from the two 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 Inter-American Court . as a "court of appeals" or "fourth instance";[1] second, upon establishing the measures of reparation stemming from the breach of 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. For the purposes of greater clarity, we will address the following separately: a) the preliminary objection filed, considering that the Inter-American Court . lacked jurisdiction based on the argument of "fourth instance" due to the domestic courts exercising "conventionality control" (paras. 4 to 12); b) the principal characteristics of the "diffused conventionality control" and its details in the present case (paras. 13 to 63); c) the implications of this jurisprudential doctrine in the Mexican legal system (paras. 64 to 84), and d) some general conclusions regarding the importance of this fundamental doctrine of the Inter-American Court, which is progressively creating a *ius constitutionale commune* on the subject of human rights for the American continent, or at least, for Latin America (paras. 85 to 88).

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[1] *Cf. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment 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.

II. PRELIMINARY OBJECTION OF "FOURTH INSTANCE" AND "CONVENTIONALITY CONTROL"

4. The respondent State asserted the preliminary objection of the Inter-American Court's lack of jurisdiction, considering that the intention before this international body was to review the criminal procedures that were followed by all competent judicial organs at the domestic level, where remedies (appeals) were also filed, as were amparo appeal hearings; moreover, it affirmed that the "conventionality control" was exercised *ex officio,* which renders the Inter-American Court incompetent inasmuch as it cannot "review" a matter that was adjudicated and decided previously by the domestic judges, who applied conventional parameters. This argument regarding the prior exercise of "conventionality control" in the domestic courts, as a preliminary objection, is an innovation and was the subject of special attention by the judges of the Inter-American Court.

5. In principle, we should recall that the Inter-American Court has held that "if the State has violated its international obligations by virtue of the actions of its judicial bodies, this may prompt the [Inter-American] Court to examine the respective domestic procedures to establish their compatibility with the American Convention,[3] which may possibly include the decisions of higher courts."[4]

6. In this regard, although constant case law exists on preliminary objections regarding the "fourth instance," this is the first time that it is argued that domestic courts effectively exercised "conventionality control" in an ordinary [civil] process which was continued in all the instances, including the ordinary and extraordinary remedies filed, and therefore cannot be examined again by the judges of the Inter-American Court, since this would imply a review of the decisions issued by the domestic courts, which applied Inter-American standards. In this regard, the Inter-American Court 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 compliance with certain international obligations, "there is an intrinsic relationship between an analysis of international and domestic law." (para. 16 of the Judgment).

7. This "interaction" becomes, in reality, a "live interaction"[6] with intense communicating vessels that bring about "jurisprudential dialogue," in the sense

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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)."

[6] Statement by the current President of the Inter-American Court of Human Rights, Diego García-Sayán; *Cf.* His work, "Una Viva Interacción: Corte Interamericana y Tribunales Internos", [A Live

that both jurisdictions (the domestic and the international) must, necessarily, have regard to "domestic" and "conventional" norms under certain circumstances. This occurs, for example, in assessing the legality of a detention. The action taken by domestic bodies (including the judges), in addition to applying the norms required by the domestic courts, are required to follow the guidelines and rules of those international treatises that the State, exercising its sovereignty, expressly recognized and assumed international commitments. For its part, the international jurisdiction must assess the legality of the detention in light of domestic laws, given that the American Convention itself refers to domestic legislation in order to examine conformity with the Convention of the actions taken by the domestic authorities, since Article 7(2) of the Pact of San Jose refers to "the constitution of the State Party concerned or to the laws established in accordance with it" in order to properly rule on the lawfulness of the detention as a parameter for conformity with the convention. The domestic judges, on the other hand, must comply with other provisions enshrined in Article 7, so as to not violate the conventional right to personal liberty, having regard to the interpretation of its provisions given by the Inter-American Court.

8. In order to determine whether the actions of national judges are compatible with the Pact of San Jose, in certain cases it will be necessary to analyze their actions in light of domestic laws and always having regard to the American Convention, especially to assess what we might call "the conventional due process standard" (in broad terms).[7] This analysis, therefore, cannot constitute a "preliminary matter," but rather it essentially represents a "decision on the merits," in which, *inter alia*, would require analysis of whether the exercise of "conventionality control" by the domestic courts was compatible with the obligations assumed by the respondent State and according to Inter-American jurisprudence itself.

9. The foregoing considerations, of course, do not grant absolute jurisdiction to the Inter-American Court to review, in any case or circumstance, the actions of the domestic judges in light of domestic legislation, since this would imply reexamining the facts, assessing the evidence, and rendering a judgment that may possibly serve to confirm, modify or reverse a domestic verdict, something that is clearly beyond the competence of said international jurisdiction, since it would be replacing the domestic jurisdiction and violating its essential subsidiary and complimentary nature. Thus, the conventional guarantees rest on the aforementioned "principle of subsidiarity", expressly recognized in Article 46(1)(a) of the American Convention itself, which clearly stipulate as a requisite for action by the Inter-American bodies, "that the remedies under domestic law have been

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interaction: Inter-American Court and Domestic Courts] 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] Although "due process" is not expressly stated in the American Convention, the rights contained in the Treaty and the development of the Inter-American Court's jurisprudence, have created, what might be termed "conventional due process" 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 Jose does not literally invoke "due process". However, using 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 those State bodies called upon 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 issued 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).

pursued and exhausted in accordance with generally recognized principles of international law." This rule compliments Article 61(2) of the same agreement, which explicitly states 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 Inter-American Court does not have the jurisdiction to become a "new and last resort" to settle the original disputes of the parties in a domestic proceeding. The Inter-American Court clearly understands that 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 conducting "conventionality control" based on the comparison between the action carried out and the provisions of the American Convention, cannot and should not seek –indeed, it has never done so- to become a new and last resort to hear a dispute which originated in the domestic jurisdiction. The idea that the Inter-American Court constitutes a third or fourth instance, and potentially a jurisdiction of last resort, arises from a popular conception whose reasons are understandable, but does it not apply to the Court's jurisdiction, to the legal dispute brought before it, the parties to the respective proceedings and to the nature of international proceedings for the protection of human rights. (Underlining added)

11. From the foregoing, it is clear that the Inter-American Court shall have jurisdiction, in certain cases, to review the actions of domestic judges, including the proper exercise of "conventionality control", provided that the analysis is based on an examination of the compatibility of domestic measures with the American Convention on Human Rights, with its additional Protocols, and with its conventional jurisprudence; this, without 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 substituting the domestic jurisdiction, violating the very essence of the reinforcing and complementary nature of the international courts.

12. On the contrary, the Inter-American Court has jurisdiction to hear "matters related to the compliance with the commitments made by State Parties";[9] the main purpose of the Inter-American Court's is precisely "the application and interpretation of the American Convention on Human Rights,"[10] from which it also derives its jurisdiction to analyze the proper exercise of "conventionality control" by a domestic judge *when there are violations of the Pact of San Jose.* This analysis shall necessarily be undertaken by the conventional judge when deciding on the "merits" of the matter and not as a "preliminary objection," this being the moment when domestic actions are subjected to an "examination of conventionality" in light of the American Convention, along with their interpretation by the Inter-American Court.

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[8] Para. 3 of the Concurring Opinion of Judge Sergio García Ramírez in relation to the Judgment in the *Case of Vargas Areco v. Paraguay. Merits, Reparations and Costs*, 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.

III. THE DOCTRINE OF "DIFFUSE CONVENTIONALITY CONTROL" AND ITS CLARIFICATION IN THE PRESENT CASE

A. EMERGENCE AND REITERATION OF THE DOCTRINE

13. The doctrine of "conventionality control" emerged in 2006[11] in the *Case of Almonacid Arellano v. Chile:*[12]

> 123. The abovementioned legislative requirement established by Article 2 of the Convention is also intended to facilitate the work of the Judiciary so that the law enforcement authority has a clear option on how to settle a particular case. However, when the Legislative branch fails to abolish or adopt laws that are contrary to the American Convention, the Judiciary remains bound to honor the obligation to respect rights as stated in Article 1(1) of the Convention; consequently, it must refrain from enforcing any laws contrary to said Convention. When State agents or officials uphold a law that violates the Convention, the State is internationally liable under International Human Rights Law, inasmuch as every State is internationally responsible for the acts or omissions committed by any of its branches or bodies in 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 subject to the rule of law and, therefore, are required 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 that treaty. This obliges them to ensure that the effects of the provisions embodied in the Convention are not impaired by the enforcement of laws which are contrary to its object and purpose, and which have had no legal effects from the outset. <u>In other words, the Judiciary must exercise a form of conventionality control" between the domestic legal provisions which apply to specific cases and the American Convention on Human Rights. In this task, the Judiciary must take into account not only the treaty, but also the interpretation thereof by the Inter-American Court, which is the ultimate interpreter of the American Convention.</u> (Underlining added).
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> 125. Similarly, this Court has established that "under international law, the obligations imposed must be fulfilled in good faith and domestic laws cannot be invoked to justify their violation."[14] This provision is embodied in

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[11] There have been previous references to "conventionality control" in some concurring opinions by Judge Sergio García Ramírez. *Cf.* His concurring opinions in the *Case of Myrna Mack Chang v. Guatemala*, of November 25, 2003, para. 27; *Case of Tibi v. Ecuador,* of September 7, 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. Peru. Merits, Reparations and Costs.* Judgment of April 6, 2006. Series C No. 147, para. 140.

[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.

Article 27 of the Vienna Convention on the Law of Treaties, 1969.

14. The above precedent was reiterated, with some variations, two months later in the *Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru.*[15] In this ruling, the criterion applied in the *Case of Almonacid Arellano* regarding "conventionality control" is invoked and is "specified" in two ways: (i) it should be applied "ex officio," without the parties requesting it; and (ii) judges should exercise it in the context of their respective spheres of competence and the corresponding procedural regulations, considering other formal and material assumptions on admissibility and appropriateness.

15. Since then, the essence of this doctrine has been gradually consolidated, in its application to the following contentious cases: *La Cantuta v. Peru* (2006);[16] *Boyce et al. v. Barbados* (2007);[17] *Heliodoro Portugal v. Panama* (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. Mexico* (2010);[22] *Rosendo Cantú et al. v. Mexico* (2010);[23] *Ibsen Cárdenas and Ibsen Peña v. Bolivia* (2010);[24] *Vélez*

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[15] *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. 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 requires 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 Judicial bodies should exercise not only constitutionality control, but also "conventionality control"[15] *ex officio* between domestic norms and the American Convention; obviously within the framework of their respective competences and the corresponding procedural rules. This function should not be limited exclusively to the statements or actions of the plaintiffs in each specific case, nor should it imply that this control must always be exercised, without considering other procedural and substantive criteria regarding the admissibility and legitimacy of such actions. (underlining added).

[16] *Case of La Cantúta v. Peru*. *Merits, Reparations and Costs.* Judgment of November 29, 2006. Series C No. 162, para. 173.

[17] *Case of Boyce et al. v. Barbados*. *Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 20, 2007. Series C No. 169, para. 79.

[18] *Case of Heliodoro Portugal v. Panama. 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 Objections, Merits and Reparations*. Judgment of May 26, 2010. Series C No. 213, para. 208, note 307.

[21] *Xákmok Kásek Indigenous Community 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. Mexico*. *Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 30, 2010. Series C No. 215, para. 234.

[23] *Case of Rosendo Cantú et al. v. Mexico*. *Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 31, 2010. Series C No. 216, para. 219.

[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.

Loor v. Panama (2010);[25] *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil* (2010),[26] and now, *Cabrera García and Montiel Flores v. Mexico* (2010).[27]

16. Furthermore, the doctrinal jurisprudence was also applied in the orders for monitoring compliance with judgment in the *Cases of Fermín Ramírez and Raxcacó Reyes,* as well as in the request for "extension of provisional measures" in *Raxcacó Reyes et al.* all *v. Guatemala.*[28] This issue has also been considered in great depth by some judges of the Inter-American Court when issuing their concurring opinions, including former presidents García Ramírez[29] and Cançado Trindade,[30] as well as *ad hoc* judge Roberto de Figueiredo Caldas,[31] to whom I will refer later.

B. CONTRIBUTIONS IN THE CASE OF CABRERA GARCÍA AND MONTIEL FLORES

17. Regarding the Judgment to which this concurring opinion refers, the essence of the doctrine of "conventionality control" is reiterated with some important specifications, in the following terms:

> 225. This Court has held in its case law that it is aware that domestic authorities are subject to the rule of law and, therefore, are required to apply the provisions in force within the legal system. But when a State is a Party to an international treaty such as the American Convention, all its organs, including its judges, are also bound by that treaty. This obliges them to ensure that the effects of the provisions embodied in the Convention are not impaired by the enforcement of laws which are contrary to its object and purpose. The judges and organs linked to the administration of justice at all levels are required to carry out *ex officio* a form of "conventionality control" between domestic legal provisions and the American Convention, obviously within the framework of their respective competences and the corresponding procedural rules. In this task, the judges and organs linked to the administration of justice must take into account not only the treaty, but also the interpretation thereof by the Inter-American Court, which is the final interpreter of the American Convention. (Underlining added).

18. As is evident, the Inter-American Court clarifies its doctrine on "conventionality control," by replacing statements that referred to the "Judicial Branch," which appeared since the *leading case* of *Almonacid Arellano v. Chile*

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[25] *Case of Vélez Loor v. Panama. 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 aforementioned concurring opinions *supra* note 11, see also the opinions issued subsequent to the *leading case of Almonacid Arellano*, concerning "conventionality control": *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru, 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.* Concurring Opinion in the *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru, supra* note 15, particularly paras. 2 and 3 thereof; and the request for interpretation of the Judgment rendered in that case, on November 30, 2007, particularly paras. 5 to 12, 45 and 49, of the Dissenting Opinion.

[31] *Cf.* Concurring Opinion in the *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. supra* note 4, paras. 4 and 5.

(2006), and referring now to "all the organs" of States which have ratified the American Convention, "including their judges," who must safeguard the *effet utile* of the Treaty, and that "judges and organs linked to the administration of justice at all levels" are required to conduct "conventionality control" *ex officio*.

19. The intention of the Inter-American Court is clear: to establish that the doctrine of "conventionality control" must be exercised by "all judges," whether or not they are formal members of the Judicial Branch, and regardless of their rank, grade, level or area of expertise.

20. Thus, there is no doubt that "conventionality control" 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, as well as the Supreme Courts of Justice and other high courts of the twenty-four countries which have signed and ratified or acceded to the American Convention on Human Rights, [32] and even more so, those of the twenty states that have recognized the contentious jurisdiction of the Inter-American Court, [33] out of a total of thirty-five countries that make up the OAS.

C. CHARACTERIZATION OF "DIFFUSE CONVENTIONALITY CONTROL" IN LIGHT OF THE DEVELOPMENT OF ITS JURISPRUDENCE

a) "Diffuse" nature: all domestic judges "must" exercise it

21. In real terms, this involves **"diffuse conventionality control"** given that *it must be exercised by all domestic judges.* Consequently, there has been an assimilation of the concepts of Constitutional Law, which has been present since the beginning and in the development of International Human Rights Law, particularly in the creation of international "guarantees" and "organs" for the protection of human rights. There has been a clear "internationalization of Constitutional Law," particularly as regards the transfer of "constitutional guarantees" as procedural instruments for the protection of fundamental rights of "constitutional supremacy," to "the conventional guarantees," as judicial and quasi-judicial mechanisms for the protection of human rights enshrined in international treaties when the former have not been sufficient; in a sense, this also gives rise to a "conventional supremacy."

22. One of the expressions of this process of "internationalization" of constitutional categories is, precisely, the diffuse concept of conventionality control that we are analyzing, since it is based on the deeply-rooted connotation of "diffuse constitutional control" as opposed to "concentrated control" carried out in constitutional States by their highest "constitutional bodies," with the final constitutional interpretations being issued by the Constitutional Tribunals, Courts or Chambers, and in some cases by the Supreme Courts and other high judicial bodies. In this sense, the Inter-American Court has been carrying out "concentrated conventionality control" since its very first judgments, examining the actions and rules of the State, in each particular case, in light of the Convention. This "concentrated control" was basically carried out by the Inter-American Court.

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[32] Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Uruguay and Venezuela. Trinidad and Tobago denounced the American Convention on Human Rights.

[33] The States mentioned in the preceding footnote, except for Dominica and Jamaica (which have not yet accepted said jurisdiction) and Trinidad and Tobago (denounced in 1999).

Now it has been transformed into a "diffuse conventionality control" by extending said "control" to all national judges as a requirement for action within the domestic jurisdiction, although the Inter-American Court retains its power as "final interpreter of the American Convention" when human rights are not effectively protected within the domestic jurisdiction.[34]

23. This involves an "extensive system of control (vertical and general)", as former Inter-American judge Sergio García Ramírez has rightly pointed out. On this matter, his thoughts expressed in his concurring opinion on the Judgment rendered in the *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru* are illustrative:[35]

> 4. On other occasions, I have compared the function of international human rights courts to the mission of national constitutional courts. The latter are responsible for safeguarding the rule of law through their decisions concerning the subordination of actions by governmental authorities to the nation's supreme law. In the development of constitutional law, a case law has emerged based on principles and values - principles and values of the democratic system - which illustrates the direction taken by the State, provides security to the individual, and defines the route and boundaries for the work of the State organs. Viewed from another angle, constitutional control, as an assessment of and a decision on the action by the governmental authority subject to examination, is entrusted to a high-ranking organ within the State's jurisdictional structure (concentrated control) or assigned to various jurisdictional bodies in the case of matters under their consideration, in accordance with their respective competences (diffuse control).
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> 12. This "conventionality control," whose successful results determine a greater dissemination of the system of guarantees may be of a diffuse nature - as has occurred in some countries; in other words, it may be carried out by all 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 for the development of an extensive (vertical and general) control system to ensure that the actions of governmental authorities are lawful– in terms of their compliance with international human rights standards– notwithstanding the fact that the source of interpretation of the relevant international provisions is where States have deposited it when instituting the protection system established in the American Convention and in other instruments of the regional *corpus juris*. I consider that this extensive control– which is involved in "conventionality control"– is among the most important tasks for the immediate future of the inter-American system for the protection of human rights. (Underlining added)

24. "Diffuse conventionality control" converts the domestic judge into an Inter-American judge: into the first and true guardian of the American Convention, of its Additional Protocols (and possibly of other international instruments) and of the

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[34] *Cf.* Ferrer Mac-Gregor, Eduardo, "El control difuso de convencionalidad en el Estado constitucional", [Diffuse conventionality control in the constitutional State] in Fix-Zamudio, Héctor, and Valadés, Diego (coords.), *Formación y perspectiva del Estado mexicano,* [Formation and perspective of the Mexican State] Mexico, Colegio Nacional-UNAM, 2010, pp. 151-188.

[35] *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, *supra* note 15, para. 4, 12, and 13 of the Concurring Opinion.

jurisprudence of the Inter-American Court which interprets those provisions. The national judges and organs charged with the administration of justice have the important mission of safeguarding not only the fundamental rights provided under domestic law, but also the set of values, principles and human rights recognized by the State when it assumed its international commitment to uphold these international instruments. Domestic judges become the first interpreters of international standards, if we consider the subsidiary, complementary, and contributory nature of the Inter-American organs with respect to those contemplated in the domestic jurisdiction of the 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 national acceptance of international human rights law is clearly expressed in important legislative reforms in the States, which incorporate different constitutional clauses in order to allow the influx of International Law. This is evident in the recognition of the constitutional hierarchy of international human rights treatises,[36] or the acceptance of their supra-constitutional nature when they are more favorable;[37] recognition of their specificity in this matter;[38] acceptance of the *pro homine* or *favor libertatis* principles as interpretive national criteria;[39] the incorporation of "open clauses" to incorporate other rights under convention regulations; [40] or in constitutional clauses to interpret rights and freedoms "in accordance with" international human rights instruments, [41] among other scenarios.[42] In this way, conventional standards acquire constitutional status.

26. The process described above of incorporating international human rights law at national level, is also due to the domestic courts, especially the higher constitutional judicial bodies, which have progressively favored dynamic interpretations that promote and enable the acceptance of human rights established in international treaties.[43] This forms a true "constitutional block" or mass which, though it varies from country to country, takes into consideration not

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[36] In an explicit manner, for example, in Argentina (Art. 73) and the Dominican Republic (Art. 74(3) of the new Constitution proclaimed in January 2010).

[37] Bolivia (Art. 256); Ecuador (Art. 424); and Venezuela (Art. 23).

[38] Regardless of the established regulatory hierarchy, a large number of constitutional texts recognize some level of specificity to international human rights agreements, for example, in Argentina, Bolivia, Chile, Ecuador, Guatemala, Colombia, Paraguay, Peru, Dominican Republic and Venezuela. Moreover, in the Federal Mexican Entities of Sinaloa, Tlaxcala, and Querétaro.

[39] For example, in Peru (Art. 4); Ecuador (Art. 417); and in the new Constitution of the Dominican Republic of January 2010 (art. 74.4).

[40] For example, Brazil (Article 5.LXXVII.2), Bolivia (art. 13.II), Colombia (art. 94), Ecuador (art. 417), Panama (art. 17), Peru (art. 3), Dominican Republic (art. 74.1) y Uruguay (art. 72).

[41] For example, Bolivia (Art. 13.IV), Colombia (Art. 93), Haiti (Art. 19) and in the Federal Mexican Entities of Sinaloa (4º Bis C), Tlaxcala (Article 16 B) and Querétaro (Considering para. 15).

[42] On the "interpretation pursuant" to the international pacts, see Caballero, José Luis, *La incorporación de los tratados internacionales sobre derechos humanos en Mexico y España,* [The incorporation of international treatises on human rights in Mexico and Spain], Mexico, Porrúa, 2009.

[43] Two of the most representative constitutional jurisdictions which have adopted outstanding interpretations to encourage the applicability of international human rights treaties since the early nineties are the Constitutional Chamber of the Supreme Court of Costa Rica and the Constitutional Court of Colombia. The first granted supranational status to international human rights treaties when their provisions are more favorable than those provided in the Constitution. The second acknowledged said treatises within the "constitutional block." Both Courts have subsequently made significant progress in this area.

only the human rights enshrined in international agreements, but also the case law of the Inter-American Court. Thus, in some cases the "block of conventionality" is subsumed in the "block of constitutionality", so that by carrying out "constitutional control" one is also carrying out"conventionality control."

27. The Inter-American Court in paragraphs 226 to 232 of the Judgment to which this concurring opinion refers, has specifically attempted to demonstrate the way in which the courts of "the highest hierarchical level" have applied and accepted "conventionality control" based on Inter-American jurisprudence. It is a clear manifestation of the interesting process of "national acceptance of international human rights law" and undoubtedly "constitutes one of the outstanding positive features to date, which should be recognized, upheld and promoted."[44]

28. In this regard, the Judgment that inspires this concurring opinion contains excerpts from several rulings of the Constitutional Chamber of the Supreme Court of Costa Rica; the Constitutional Court of Bolivia; the Supreme Court of Justice of the Dominican Republic; the Constitutional Court of Peru; the Supreme Court of Justice of Argentina; and the Constitutional Court of Colombia. These are some examples that illustrate the dynamic national acceptance of international human rights law and conventional jurisprudence.

29. A closer examination of the aforementioned rulings shows that some criteria were adopted prior to the Praetorian establishment of "conventionality control" in the *Case of Almonacid Arellano v. Chile* of 2006, as occurred with the precedents of Argentina (2004) Costa Rica (1995), Colombia (2000), Dominican Republic (2003) and Peru (2006). Clearly, the Inter-American Court created the doctrine of "diffuse conventionality control" noting the trend toward the "constitutionalization" or "nationalization"[45] of "international human rights law" and particularly the acceptance of conventional jurisprudence as a "hermeneutic" element and for the "control" of domestic regulations by the domestic courts themselves. In other words, the Inter-American Court received the influx of jurisprudential practice by the national judges in order to create the new doctrine of "diffuse conventionality control."

30. In turn, we find that several high national courts incorporated the parameters of "diffuse conventionality control" by recognizing the jurisprudence of the Inter-American Court following the creation of that doctrine in 2006. It is important to mention the landmark ruling of Argentine's Supreme Court in 2007 (Case "Mazzeo"),[46] which establishes the obligation of the local Judiciary to

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[44] Para. 9 of the Concurring Opinion issued by Judge Sergio García Ramírez in the Judgment in the *Case of the Dismissed Congressional Employees* (*Aguado Alfaro et al.*) *v. Peru, supra* note 15.

[45] *Cf.* García-Sayán, Diego, "Una Viva Interacción: Corte Interamericana y Tribunales Internos", *op. cit.*, *supra* note 6.

[46] *Case of "Mazzeo, Lulio Lilo et al. s/Recurso de Casación and Inconstitucionalidad*, of July 13, 2007. On this important general ruling concerning the evolving nature of acceptance of international law by 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; also, Hitters, Juan Carlos, "Control de constitucionalidad y control de convencionalidad. Comparación. (Criterios fijados por la Corte Interamericana de Derechos Humanos)" [Constituitonality Control and Conventionality Control. A Comparison. (Criteria established 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", [Conceptual framework for conventionality control in some rulings of the Argentine Supreme Court: 'Arancibia

exercise "conventionality control", practically repeating the view expressed by the Inter-American Court of Human Rights in the *Case of Almonacid Arellano v. Chile*. Indeed, paragraph 21 of that ruling by the Supreme Court of Argentina states:

> 21) That, for its part, the Inter-American Court has indicated that it "is aware that domestic judges and courts are subject to the rule of law and, therefore, are required 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 said Convention, which requires them to ensure that all the effects of the provisions embodied in the Convention are not impaired by the enforcement of laws that are contrary to its purpose and end, and which have had no legal effects from the outset." In other words, the Judiciary must exercise a form of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. In this, the Judiciary must take into account not only the treaty, but also the interpretation thereof by the Inter-American Court, which is the ultimate interpreter of the American Convention. –Inter-American Court. Series C N- 154, case of "Almonacid", of September 26, 2006, para. 124.

31. An interesting exchange occurs between the Inter-American Court and the national courts, which fosters "jurisprudential dialogue."[47] This dialogue influences the effective articulation and creation of standards for the protection of human rights in the Americas or, at least, in Latin America. International Human Rights Law combines with Constitutional Law, or if preferred, International Constitutional Law and International Human Rights Law are linked; this necessarily implies the continuous training and updating of national judges on the dynamics of Conventional jurisprudence.

32. In this regard, the former President of the Inter-American Court, Antônio Augusto Cançado (currently a judge of the International Court of Justice) makes some important points in his reflections on "conventionality control." In his concurring opinion in the *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru,* he stated*:*[48]

> 3. In other words, the Judicial organs of each State Party to the American Convention should have an in-depth knowledge and duly apply not only Constitutional Law but also International Human Rights Law; they should conduct, *ex officio, conventionality control and constitutional control,* considered together, given that 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 "diffuse conventionality control" established by the Inter-American Court is directed at *all national judges*, who must exercise such "control" regardless of rank, grade, level or jurisdiction conferred by domestic regulations.

Clavel,' 'Simon,' 'Mazzeo'] in Albanese, Susana (coord.), *El control de convencionalidad*, Buenos Aires, Editorial Ediar, 2008.

[47] Specifically *Diálogo Jurisprudencial* [Jurisprudential Dialogue] is the name of the semiannual magazine published with the Institute of Legal Investigations of the UNAM, the Inter-American Court of Human Rights, and the Konrad Adenauer Stiftung Foundation, 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 Inter-American Court of Human Rights, on international human rights law and, in turn, on the influence of domestic case-law on the Inter-American Court.

[48] *Supra* note 15, para. 3 of the concurring opinion of Judge Antônio Augusto Cançade Trindade.

b. Intensity of "diffuse conventionality control": of a greater degree when a court has jurisdiction to disregard a general norm or declare it invalid

34. All judges and judicial organs that carry out jurisdictional functions from a material perspective "should" conduct "conventionality control". This is the clear message sent by the Inter-American Court in its Judgment in the *Case García Cabrera and Montiel Flores*, the subject of this concurring opinion. This does not exclude those judges who cannot carry out "constitutionality control."

35. Indeed, the specific nature of the doctrine requiring judges to conduct "ex officio" conventionality control "obviously within the framework of their respective competences and the corresponding procedural regulations"[49] cannot be interpreted as a restriction on the exercise of "diffuse conventionality control" but rather as a way to "calibrate" its intensity. This is so, because this type of control does not necessarily imply the application of Conventional provisions or jurisprudence, as opposed to domestic ones, but rather it also implies, above all, an attempt to harmonize domestic legislation with that of the Convention, through a "conventional interpretation" of the national standard.

36. Thus, in the so-called "diffuse" systems of constitutional control where all judges are authorized not to apply a law to a specific case when it contravenes the national Constitution, the degree of "conventionality control" has greater scope, since all national judges have the power to disregard any standards that are not consistent with the Convention. This approach affords an intermediate degree of "control", which will only work if there is no possible "interpretation" of national regulations compliant with the Pact of San Jose (or other international treaties, as discussed below) and conventional jurisprudence. Through this "compliant interpretation" the "conventionality" of domestic laws is safeguarded. The highest Constitutional courts (usually the final interpreters in a specific constitutional legal system) are able to carry out the maximum degree of "conventionality control" and generally also have the power to declare invalid an unconstitutional norm with *erga omnes* effects. This involves a general declaration of invalidity based on the national standard's non-compliance with the Convention.

37. By contrast, the intensity of "diffuse conventionality control" will diminish in those systems that do not permit "diffuse constitutionality control" and, therefore, not all judges have the authority to not apply a law to a specific case. In these cases it is obvious that judges who lack such jurisdiction will exercise "diffuse conventionality control" with less intensity, *without this implying that they cannot do so* "within their respective jurisdictions." This means that they may not suspend application of the law (since they do not have that power), and will, in any case, make a "conventional interpretation" of it, i.e. a "compliant interpretation," not only of the national Constitution, but also of the American Convention and conventional jurisprudence. This interpretation requires a creative effort in order to ensure compatibility between the national standard and the conventional parameter, thereby guaranteeing the effectiveness of the right or freedom in question, with the greatest possible scope in terms of the *pro homine* principle.

38. Indeed, when "examining compatibility with the Convention," the domestic judge must always apply the *pro homine* principle (enshrined in Article 29 of the Pact of San Jose), which implies, *inter alia,* giving the most favorable interpretation

[49] Clarification made in the Case of the *Dismissed Congressional Employees* (*Aguado Alfaro et al.*) *v. Peru, supra* note 15, para. 128.

for the use and exercise of fundamental rights and freedoms;[50] a judge may also opt for the most favorable interpretation as regards *the applicability of the American Convention and other international human rights treaties*. The Inter-American Court itself has issued this interpretation, noting that:[51]

> 51. For the purposes of comparison between the American Convention and the other treaties mentioned, the Court cannot avoid commenting on an interpretation suggested by Costa Rica at the hearing of November 8, 1985. According to this argument, if a right enshrined in the American Convention were regulated in a more restrictive way in another international human rights instrument, the interpretation of the American Convention would need to take into account those additional restrictions because:
>
> > Otherwise, we would have to accept that what is legal and permissible in the universal sphere would constitute a violation in the American continent, which is obviously an erroneous assertion. Rather, we believe that with regard to the interpretation of treaties, it is possible to establish the criterion that the rules of a treaty or a convention must be interpreted in relation to the provisions contained in other treaties covering the same subject matter. We can also establish the criterion that the provisions of a regional treaty must be interpreted in light of the concepts and provisions contained in instruments of a universal nature. (Underlining in original text.)
>
> Certainly, it is often useful to compare the American Convention with the provisions of other international instruments – as the Court has just done - in order to highlight specific aspects of the regulation of a particular right. However, that approach could never be used to incorporate into the Convention restrictive criteria that are not directly included in its text, even though they may be present in any other international treaty.
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> 52. The foregoing conclusion is clear from the language used in Article 29, which contains the rules for the interpretation of the Convention. Subparagraph (b) of Article 29 indicates that no provision of the Convention shall be interpreted as:
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> > 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.
>
> Consequently, if the American Convention and another international treaty are applicable to a given situation, the rule most favorable to the individual

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[50] This provision states: "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.

[51] *Advisory Opinion OC-5/85*. November 13, 1985. Series A No. 5, concerning *Compulsory Membership of an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights),* para. 51 and 52.

> must prevail. If the Convention itself establishes that its provisions do not have a restrictive effect on other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but not in the Convention, to limit the exercise of the rights and freedoms recognized in the latter.

39. In the case of absolute incompatibility, where no "conventional interpretation" is possible, if the judge lacks the authority to suspend the rule, he is limited merely to indicating its non-compliance with the Convention or, where appropriate, "calling into question its conventionality" before other competent courts within the same national legal system so that they can exercise "conventionality control" with greater intensity. Thus, the reviewing judicial bodies will have to exercise that "control" and disregard the rule or declare it invalid based on its non-compliance with the Convention.

40. What does not seem reasonable and would be outside the scope of the Inter-American Court's interpretation, is that no national body has jurisdiction to exercise "diffuse conventionality control" with strong great intensity, that is, to cease to apply the rule to a particular case or with general effects as a result of its nonconformity with the Convention, since otherwise there would be international responsibility on the part 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 the Inter-American Court itself has pointed out, the latter provision is also "aimed at facilitating the work of the Judiciary so that the law enforcement authority has a clear option on how to settle a particular case" [52] in situations involving fundamental rights. Thus, in the specific *Case of Almonacid Arellano* which gave rise to the doctrine of "diffuse conventionality control", the Inter-American Court is emphatic in establishing in para. 123 that:

> when the Legislative Branch fails to abolish and/or adopt laws that 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 Convention, and consequently, it must refrain from enforcing any laws contrary to that Convention. When State agents or officials uphold a law that violates the Convention, the State is internationally liable under International Human Rights Law, inasmuch as every State is internationally responsible for the acts or omissions committed by any of its branches or bodies in violation of internationally protected rights, pursuant to Article 1(1) of the American Convention. [53] (Underlining added).

41. Thus, although "diffuse conventionality control" is exercised by all domestic judges, it has different degrees of intensity and application, according to "*their respective competences and the corresponding procedural regulations."* In principle, all judges and courts are required to make an "interpretation" of the national standard in light of the Convention, its Additional Protocols (and possibly other treaties), as well as the case-law of the Inter-American Court, always using the interpretive rule of the *pro homine* principle in Article 29 of the Pact of San Jose. In this first degree of intensity, the judge will make an interpretation according to the conventional parameters and, therefore, will discard those

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[52] *Case of Almonacid Arellano v. Chile*, *supra* note 13, para. 123.

[53] *Cf. Case of Ximenes Lopes, supra* note 13, para. 172; and *Case of Baldeón García*, *supra* note 13, para. 140.

interpretations that are not in conformity with the Convention or less effective as regards the enjoyment and protection of the respective right or freedom; in this sense, there is a parallel with the "compliant interpretation" of the Constitution made by national courts, especially the constitutional judges. Secondly, and only if compliance of the domestic rule with the Convention cannot be achieved, "conventionality control" should be applied with greater intensity, either by suspending the norm in the specific case or by declaring it invalid with general effects, due to its non-compliance with the Convention, according to the respective competences of each national judge.

c) Conventionality control must be exercised "ex officio": whether or not invoked by the parties

42. This feature of "diffuse conventionality control" is a specification of the original doctrine. It was established in the *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*,[54] two months after the *Case of Almonacid Arellano v. Chile,* and ever since then has been firmly upheld in the Inter-American Court's case-law. It involves the possibility domestic judges exercising conventionality control, *regardless of whether the parties invoked* it. In fact, it complements the "diffuse" nature of that control. If the prior nature of "diffuse conventionality control" established the Inter-American Court's intention that any judge, regardless of rank, grade or area of expertise had the "obligation" to exercise it (from where the term "diffuse control" comes), now that feature is further accentuated by specifying that it is an obligation that must be exercised "ex officio," which means that under any circumstance, judges must exercise this control, since "this function should not be exclusively limited by the expressions or actions of the plaintiffs in each specific case."[55]

43. It is even possible that in the domestic jurisdiction there are appeals or measures of defense that are appropriate and efficient to combat the lack of or ineffective exercise of "diffuse conventionality control" by a judge (for example, through an appeal, cassation remedy, or motion of *amparo*), when such control has not been exercised *ex officio*. This is a new facet of the principle of *iura novit curia* principle *(the judge knows the law and jurisprudence of the Convention).*

d) *Parameter of "diffuse conventionality control": the "Conventionality Block"*

44. In principle, the parameter of "diffuse conventionality control" by national judges (regardless of whether or not they carry out constitutionality control), is the Pact of San Jose and the case-law of the Inter-American Court which interprets it. The last part of the jurisprudential doctrine establishes:

> "In this task, the judges and bodies linked to the administration of justice must take into account not only the [Pact of San Jose], but also its interpretation by the Inter-American Court, the final interpreter of the American Convention.[56] (Underlining added).

45. Nevertheless, the Inter-American Court's own "jurisprudence" has gradually expanded the Inter-American *corpus juris* on human rights in order to lay the

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[54] *Idem.*

[55] Para. 128, *in fine*, *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru, supra* note 15.

[56] *Case of Cabrera García and Montiel Flores v. Mexico, supra* note 1, para. 227.

foundations for its rulings. It should not be overlooked that it is the Pact of San Jose itself that permits the inclusion "in this Convention's protection system, other rights and freedoms recognized in accordance with Articles 76 and 77", which has allowed for the approval of several "additional" Protocols to (the American Convention) and their interpretation by the Inter-American Court. The Pact also establishes as an interpretive norm that one cannot exclude or limit the effects of the American Declaration of the Rights and Duties of Man and "other international acts of the same nature."[57]

46. Regarding this point, the thoughts expressed in the Concurring Opinion of Judge García Ramírez in the *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru* are illustrative, specifically when analyzing the parameter of "conventionality control":[58]

> In this case, when referring to "conventionality control" the Inter-American Court has considered the applicability and application of the American Convention on Human Rights, Pact of San Jose. However, the same function is deployed, for the same reasons, with regard to other instruments of a similar nature, which comprise the *corpus juris* contained in human rights conventions to which the State is a party: the Protocol of 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, etc. The idea is to ensure consistency between actions at the national level and the international commitments assumed by the State. (Underlining added).

47. The foregoing demonstrates that, in fact, the parameter of "diffuse conventionality control" not only includes the American Convention, but also its additional "Protocols," as well as other international instruments that have been incorporated into the Inter-American *corpus juris* through the jurisprudence of the Inter-American Court. The purpose of its mandate, -as stated by the Inter-American Court in a recent ruling,- "is the application of the Convention and of other treaties that grant it jurisdiction"[59] and, therefore, the interpretation of those treaties.

48. For the purposes of the parameter of "diffuse conventionality control", the term "jurisprudence" should be understood to mean any interpretation by the Inter-American Court of the American Convention, its additional Protocols and other international instruments of the same nature that are incorporated into the Inter-American *corpus juris,* the Inter-American Court's sphere of competence. It should not be forgotten "that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions."[60] Indeed, 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 the Due Process of Law," the Inter-American Court established that:[61]

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[57] Article 29, d). See *supra* note 50.

[58] Para. 3 of the Concurring Opinion of Judge Sergio García Ramírez, regarding the Judgment in the cited case, of November 24, 2006.

[59] *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra* note 24, para. 199.

[60] *OC-16/99* of October 1, 1999, para. 114.

[61] *OC-16/99, supra* note 60, para. 115.

> 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 conventional provisions include not only those contained in judgments delivered in "contentious cases," but also interpretations made in other orders issued. [62] Therefore, they include interpretations contained in rulings on "provisional measures"; on "monitoring compliance with judgment"; or even on requests for "interpretation of judgment" under the terms of Article 67 of the Pact of San Jose. They should also include interpretations derived from the "advisory opinions" referred to in Article 64 of said Pact, precisely due to the fact that their objective is "the interpretation of this Convention or other treaties concerning the protection of human rights in the American States."[63]

50. In this way, a true "conventionality block" is built up as a parameter for exercising "diffuse conventionality control." National judges must give consideration to this "block", which requires them to continuously update the Inter-American Court's case-law and promotes a "lively interaction" between the national and inter-American jurisdictions, with the ultimate goal of setting standards for the effective protection of human rights in our region.

51. The domestic judges, therefore, must apply conventional jurisprudence, including the case-law established in matters in which the State to which they belong is not a party, since what defines the development of the Inter-American Court's jurisprudence is that Court's interpretation of the inter-American *corpus juris* in order to create a standard in the region on its applicability and effectiveness.[64] We consider this to be of the utmost importance for the sound understanding of "diffuse conventionality control", since attempting to limit the obligatory nature of conventional jurisprudence only to cases in which the State has been a "material party" would be equivalent to nullifying the very essence of the American Convention by the national States who assumed its commitments upon signing and ratifying or acceding to it, and whose noncompliance produces international responsibility.

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[62] Under Article 29 of the Court's Rules of Procedure, in force since January 1, 2010, which establishes: "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."

[63] *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.

[64] 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, may form part of its jurisprudence, provided that the IACHR's uses and endorses these in making its interpretation of the Inter-American *corpus juris* and to create the conventional standard interpreted as the Inter-American standard.

52. Thus, the "regulatory force" of the American Convention extends to the interpretation made thereof by the Inter-American Court, as the "final interpreter" of the Pact in the Inter-American System for the Protection of Human Rights. The Inter-American Court's interpretation of the provisions of the Convention, *acquires the same efficacy as the latter,* since "conventional rules" are really the result of the "conventional interpretation" undertaken by the Inter-American Court as an "autonomous judicial organ whose objective is the independent judicial application and interpretation" [65] of the Inter-American *corpus juris*. In other words, the result of the interpretation of the American Convention constitutes its jurisprudence; that is to say, "the standards derived from the ACHR, which enjoy the same (direct) effectiveness as that international treaty."[66]

e) *Effects of "diffuse conventionality control": retroactive where necessary to ensure full effectiveness of the right or freedom*

53. As noted in our analysis of the degrees of intensity of "diffuse conventionality control", the outcome of the examination of compatibility between the national standard and the "conventionality block" involves "annulling" those interpretations that not in conformity with the Convention, or those which are less favorable; or, if this cannot be achieved, the consequence would be to "invalidate" the national standard, either in a specific case or with general effects, declaring it invalid in accordance with the judge's authority to carry out said control.

54. The foregoing is more complicated when national regulations only allow the general announcement of the standard for the future (*ex nunc* effect) and not in the past (*ex tunc*), as it seems that the intention of the Inter-American Court when it established the doctrine of "diffuse conventionality control" was that any standard not in conformity with the Convention lacks legal effect "from the outset."[67] This precedent was reiterated in subsequent cases, especially in cases regarding self-amnesty laws[68] or in other circumstances. [69] However, this criterion

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[65] Article 1 of the Statute of the Inter-American Court of Human Rights, approved by resolution num. 448 of the OAS General Assembly in La Paz, Bolivia (October 1979).

[66] Ferrer Mac-Gregor, Eduardo, and Silva García, Fernando, "Homicidios de mujeres por razón de género. El *Case of Campo Algodonero*", [Homicides of women for reasons of gender. The Case of the Cotton Fields]. in 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 Commune* in Latin America?] Mexico, UNAM-Max Planck Institut, 2010, tome II, pp. 259-333, in pp. 296-297.

[67] *Cf. Case of Almonacid Arellano et al. v. Chile, supra* note 13, para. 124.

[68] For example, in the *Case of La Cantúta v. Peru, 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 adapt domestic law to the Convention. In order to better understand the issue, it should be noted that the Court has found that, in Peru, the self-amnesty laws are *ab initio* incompatible with the Convention; that is, their mere enactment "constitutes *per se* a violation of the Convention" since it "overtly conflicts with the obligations assumed by a State Party" to such treaty. This is the rationale behind the Court's ruling 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.

[69] 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.

has not been constantly upheld by the Inter-American Court and depends on the specific case. [70]

55. We believe that in the future, the Inter-American Court will need to define more precisely this sensitive issue 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 forgotten that, in principle, any human rights violation must offer a comprehensive remedial effect and, consequently, this effect must reach back into the past, when required, in order to achieve that goal.

56. This is established in Article 63(1) of the American Convention, which states:

> If 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. (Underlining added)

57. Although that provision refers to the attributes of the Inter-American Court, *mutatis mutandis*, it should be applied by domestic judges because they are also Inter-American judges when they carry out "diffuse conventionality control. And this means ensuring, as far as possible, the effective enjoyment of the right or freedom infringed. This leads to the affirmation that, in certain cases, the *consequences* of standards that do not conform to the Convention must be repaired, which can only be achieved by "revoking" these national standards from the outset, and not based on their non-application or a declaration of non-conformity with the Convention. In other words, retroactivity is necessary in some cases in order to achieve an adequate enjoyment or exercise of the relevant right or freedom. This affirmation is also consistent with the Inter-American Court's case-law in its interpretation of Article 63(1) of the Pact of San Jose, which considers that any violation of an international obligation that has caused damage must be "appropriately" repaired. [71] This constitutes "one of the fundamental principles of contemporary international law on State responsibility." [72]

f) Legal basis of "diffuse conventionality control": the Pact of San Jose and the Vienna Convention on the Law of Treaties

58. From the inception of the jurisprudential doctrine on this type of control, in the *Case of Almonacid Arellano v. Chile,*[73] the following was established:

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[70] *Cf.,* For example, *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru, 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. Mexico, supra* note 22, para. 234; *Rosendo Cantú et al. v. Mexico, supra* note 23, para. 234; and *Case of Vélez Loor v. Panama, supra* note 25, para. 287.

[71] 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 Objections, Merits and Reparations*. Judgment of May 26, 2010. Series C No. 213, para. 211.

[72] *Cf. Case of Castillo Páez v. Peru*. *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.

[73] *Supra* note 12, para. 125.

> 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 that treaty. This obliges them to ensure that the effects of the provisions embodied in the Convention are not impaired by the enforcement of laws which are contrary to its object and purpose, and which have had no legal effects from the outset. (…)
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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 involve the principle of *Pacta Sunt Servanda,* are the international foundations that ensure that States comply with international treaties, and have been constantly reiterated by the jurisprudence of the Inter-American Court in cases submitted to its jurisdiction, both in an advisory capacity, and in contentious cases. In Advisory Opinion 14/94, of December 9, 1994, on **international responsibility for the promulgation and enforcement of laws in violation of the Convention**,[74] the Inter-American Court has established the interpretive scope of Articles 1[75] and 2[76] of the American Convention on Human Rights. It considered that the obligation to issue the necessary measures to make effective the rights and liberties enshrined in said instrument, includes an obligation not to issue measures when these lead to violations, and also to adapt existing non-conventional norms, based on the general principle of international law that obligations must be carried out in "good faith" and that domestic law must not be invoked as a reason for non-compliance. This principle has been upheld by international courts such as the Permanent Court of International Justice and the International Court of Justice, and is also contained in Articles 26[77] and 27[78] of the Vienna Convention on the Law of Treaties.

60. The obligation to comply with conventional provisions applies to all national authorities and organs, regardless of whether they belong to the legislative,

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[74] *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

[75] "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."

[76] "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."

[77] "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."

[78] "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."

executive, or judicial branches of the State, which is accountable as a whole and assumes international responsibility for any breaches of international instruments it has signed. As stated by García Ramírez:

> 27. *For the purposes of the American Convention and the exercise of the contentious jurisdiction of the Inter-American Court, the State is considered integrally, as a whole. Accordingly, responsibility is global, it involves 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 bring 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 conventional system of responsibility, leaving their actions outside the "conventionality control" which is implied by the jurisdiction of the international court.* [79] (Underlining added).

61. Thus, the judges of the States Parties to the Convention are also required to comply with the provisions of the Convention and the doctrine of "diffuse conventionality control" facilitates their task of interpreting national provisions (including the constitutional text) to ensure these conform to the Inter-American *corpus juris* and not applying those that are in absolute contravention of the aforementioned "block of conventionality". In this way, they prevent the State from being internationally responsible for violating international human rights commitments.

62. "Diffuse conventionality control" is also based on Article 29 of the Pact of San Jose, inasmuch as all the powers and organs of the States that have signed this international instrument, including judges and bodies that administer justice and perform judicial functions, are required, through their interpretations, to allow the broadest possible enjoyment and exercise of the rights and freedoms recognized in the Convention and its additional protocols (and in other international instruments under the aforementioned terms). [80] This, in turn, implies making restrictive interpretations whenever these treaties are being limited, always based on the jurisprudence of the Inter-American Court.

63. From Article 68(1) it is clear that States Parties to the Pact of San Jose "are committed to compliance with the Court's decisions in all cases to which they are parties." This cannot limit the task of ensuring that the Inter-American Court's jurisprudence has "direct effectiveness" in all national States that have expressly recognized its jurisdiction, regardless of whether it concerns a matter in which they have not participated formally as a "material party." Given that the Inter-American Court is the international judicial body of the Inter-American System for the Protection of Human Rights, whose essential function is to apply and interpret the Convention, *its interpretations acquire the same degree of effectiveness as the text of the Convention.* In other words, the conventional provisions which States must apply are the result of interpretations of the provisions of the Pact of San Jose (and its additional protocols, as well as other international instruments). The interpretations issued by the Inter-American Court have two purposes: (i) to ensure the Convention's effectiveness in the particular case with *subjective effects,* and (ii) to establish general effectiveness *with the effects of interpreted standards.* Hence, the logic and necessity that the ruling - aside from being notified to the State party in the specific dispute - also be "transmitted to the State Parties to the

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[79] *Cf.* para. 27 of his Concurring Opinion in the *Case of Myrna Mack Chang v. Guatemala, supra* note 11.

[80] *Cf. supra* para. 44 to 52 in his Concurring Opinion.

Convention," [81] so that they have a full understanding of the Convention's regulatory content derived from the interpretation of the Inter-American Court, as the "final interpreter" of the Inter-American *corpus juris.*

IV. DIFFUSE CONVENTIONALITY CONTROL BY MEXICAN JUDGES

64. The abovementioned features of the jurisprudential doctrine of "diffuse conventionality control" apply to the Mexican judicial system. To date, this doctrine has been reiterated in four cases regarding complaints against the Mexican State: *Rosendo Radilla Pacheco v. the United Mexican States* (2009);[82] *Fernández Ortega et al. v. Mexico* (2010);[83] *Rosendo Cantú et al. v. Mexico* (2010);[84] and *Cabrera García and Montiel Flores v. Mexico* (2010).[85]

65. Given that the United Mexican States signed the American Convention on Human Rights (1981) and accepted the contentious jurisdiction of the Inter-American Court (1998), these international judgments are binding,[86] and take on a "definitive and unappealable" character.[87] Therefore, Mexico cannot invoke any domestic provision or jurisprudential principle as justification for not complying with the Convention, since international treaties are binding upon the States Parties and their provisions must be complied with, under the terms of Articles 26 and 27 of the Vienna Convention on the Law of Treaties,[88] also signed by Mexico.

66. Thus, "diffuse conventionality control" means that all Mexican judges and organs linked to the administration of justice *at all levels* of the Judiciary, regardless of their rank, grade or area of expertise, are required, *ex officio,* to examine the compatibility between domestic actions and provisions and those of the American Convention on Human Rights, its Additional Protocols (and other international instruments), as well as the jurisprudence of the Inter-American Court, creating a "block of conventionality" under the terms analyzed.[89] This is so because:[90]

> (…)it is not only the suppression or issue of domestic legal provisions that guarantee the rights contained in the American Convention, in accordance with the obligation established in Article 2 thereof. The State must also develop practices leading to the effective observance of the rights and freedoms enshrined in the Convention. Consequently, the existence of a

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[81] Art. 69 of the American Convention on Human Rights.

[82] *Supra* note 19, para. 338 to 342.

[83] *Supra* note 22, para. 233 to 238.

[84] *Supra* note 23, para. 218 to 223.

[85] *Supra* note 27, para. 225 to 235.

[86] 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."

[87] Article 67 (1) of the American Convention on Human Rights: "The judgment of the Court shall be final and not subject to appeal. […]"

[88] See these standards *supra* notes 77 and 78.

[89] Regarding the "block of conventionality" as a parameter for "diffuse conventionality control," see *supra* para. 44 to 52 of this Concurring Opinion.

[90] *Case of Rosendo Radilla Pacheco v, supra* note 19, para. 338; *Case of Fernández Ortega et al. v. Mexico, supra* note 22, para. 233; and *Case of Rosendo Cantú et al. v. Mexico, supra* note 23, para. 218.

> provision does not, in itself, guarantee its effective application. It is necessary that the application of provisions **or their interpretation**, as jurisdictional practices and expressions of the State's public order, be adapted to the objective pursued by Article 2 of the Convention. [91] In practical terms, the interpretation of Article 13 of the Mexican Constitution must be consistent with the constitutional and conventional principles of due process and access to justice contained in Article 8(1) of the American Convention and the relevant provisions of the Mexican Constitution. (Underlining and highlighting added).

67. In this sense, the judges or courts that carry out jurisdictional activities, whether at the local or federal level, must necessarily exercise "diffuse conventionality control" in order to ensure that their interpretations are in line with the Inter-American *corpus juris*. In the event of absolute incompatibility between a domestic provision and the conventional parameter, the former *must be disregarded* so that the latter may prevail, in order to guarantee the effectiveness of the right or freedom concerned. This also applies to local judges, in accordance with Article 133 of the Mexican Political Constitution, which states that: [92]

> This Constitution, the laws of the Congress of the Union, and all Treaties that are in accordance with it, entered into and to be entered into by the President with the approval of the Senate, shall be the Supreme Law of the entire Union. Judges in every State shall adhere to said Constitution, laws and treaties, notwithstanding any contradictory provisions that may appear in the Constitutions or laws of the States. (Underlining added).

68. As is evident in the latter part of this constitutional provision, local judges apply "the Supreme Law of the Union" (which includes international treaties) when incompatibility exists with any other provision that does not form part of that "Supreme Law". This means that local jurisdiction judges should go as far as to disregard any standards inconsistent with the provisions of the "constitutional block." In other words, it is the Constitution itself that empowers the judges of ordinary courts to exercise "diffuse constitutionality control" and therefore the American Convention on Human Rights can provide a valid parameter for control, not just the Constitution. Thus, as stated by the Inter-American Court, judges and organs linked to the administration of justice "should exercise not only constitutional control but also "conventionality control" *ex officio* between domestic standards and the American Convention, obviously within the framework of their competences and the corresponding procedural regulations." [93]

69. The final part of this provision is of special significance for the degree of intensity of "diffuse conventionality control" since judges must exercise it "within the framework of their respective competences and the corresponding procedural regulations." As stated previously (See *supra* paras. 34 to 41), all judges must

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[91] *Cf. Case of Castillo Petruzzi et al. v. Peru*, 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.

[92] This Article has only undergone one reform since the original text of 1917; this was in 1934, an it was published in the *Official Gazette of the Federation* on January 18, of that year. The courts have interpreted this concept and the Mexican doctrine in different ways, even in the Constitutions prior to that of 1917. On the different interpretative positions, See Carpizo, Jorge, "La interpretación del articulo 133 constitucional", [Interpretation of Article 133 of the Constitution] in *Boletín Mexicano de Derecho Comparado,* Mexico [Mexican Bulletin of Comparative Law], IIJ-UNAM, núm. 4, 1969, pp. 3-32.

[93] *Case of Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru, supra* note 15, para. 128.

conduct this "control" and the degree of intensity will be determined by their competences and procedural regulations. In principle, all Mexican judges must ensure that the national standard adheres to the principle of constitutionality and conventionality. Therefore, from the outset they must "interpret" the national standard in line with the Constitution and conventional parameters, which means opting for the most favorable interpretation for the use and exercise of fundamental rights and freedoms in application of the *pro homine libertatis* or *favor libertatis* principle enshrined in Article 29 of the Pact of San Jose, rejecting interpretations that are incompatible or less protective. Conversely, whenever rights and freedoms are restricted or limited, judges must use the strictest interpretation of that limitation. And only when it is not possible to arrive at a constitutional and conventional interpretation, should judges *disregard* the national provision or *declare it invalid*, according to the jurisdiction conferred by the Constitution and national laws on each judge, producing a greater degree of intensity in the "conventionality control."

70. It should be noted that the Supreme Court of Justice has interpreted Article 133 of the Constitution to mean that (i) although international treaties indeed form part of the "Supreme Law of the Union" they rank below the Constitution; [94] and (ii) that local judges do not conduct "diffuse constitutionality control". [95] The first interpretation is not considered a binding precedent, since it did not obtain the number of votes required, [96] and different interpretations have been rendered by other Mexican courts; [97] as to the second interpretation, although this

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[94] Thesis IX/2007, of the Plenary of the Supreme Court, whose rubric and text are:

"INTERNATIONAL TREATIES ARE AN INTRINSIC PART OF THE SUPREME LAW OF THE UNION AND ARE RANKED ABOVE THE GENERAL, FEDERAL AND LOCAL LAWS. CONSTITUTIONAL INTERPRETATION OF ARTICLE 133.

The systematic interpretation of Article 133 of the Constitution of the United Mexican States reveals the existence of a superior legal order, of a national character, integrated by the Federal Constitution, international treaties, and the general laws. Similarly, based on this interpretation, harmonized with the principles of international law dispersed in the constitutional text, as well as rules and basic premises of that law, it is concluded that international treaties are ranked below the Federal Constitution and above the general, federal and local laws, to the extent that the Mexican State when signing such treaties, in accordance with the provisions of the Vienna Convention on the Law of Treaties between States and International Organizations or among International Organizations, following the fundamental principle of customary international law "pacta sunt servanda" freely contracted obligations to the international community cannot be disregarded by invoking rules of law, a breach which is, moreover, implies international liability." (Underlining added). Published in the *Semanario Judicial de la Federación y su Gaceta,* Pleno, Tome XXV, April 2007, p.6.

[95] Jurisprudential Thesis 74/99, of the Plenary of the Supreme Court, whose rubric and text are:

"DIFFUSE CONVENTIONALITY CONTROL OF GENERAL STANDARDS IS NOT AUTHORIZED BY ARTICLE 133 OF THE CONSTITUTION.

The text of Article 133 of the Federal Constitution specifically states that "Judges in every State shall abide by the Constitution, its laws and treaties, notwithstanding any contradictory provisions that may appear in Constitutions or laws of the States." This literal meaning was eventually adopted by the Supreme Court; however, the position held subsequently by this same High Court has been, predominantly, in another direction, taking into account a systematic interpretation of the precepts and principles that govern our Constitution. Indeed, the Supreme Court of Justice considers that Article 133 of the Constitution is not a source of constitutional control for authorities exercising jurisdictional functions over the actions of others, such as the laws emanating from the Congress itself, or of their own actions, allowing them to disregard some and not others, since that provision must be interpreted in light of the system established by the Constitution itself to that effect. "(Underlining added). Published in *Semanario Judicial de la Federación y su Gaceta,* Tome X, August 1999, p. 5.

[96] Under Article 192 of the Law of Amparo, resolutions shall constitute obligatory jurisprudence, provided that the decisions therein are supported by five consecutive applications, uninterrupted by a contradicting one, and with at least eight votes by judges of the Full Court. In the specific case, the matter was approved by a majority of six votes against five.

[97] For example, Thesis XI.1º.A.T.45 K, whose heading and text are:

jurisprudence is mandatory for all Mexican judges in terms of applicable standards, we believe it should be harmonized to ensure a greater development of "diffuse conventionality control" in light of Article 133 and of the four judgments issued so far by the Inter-American Court regarding the Mexican State, which have applied that doctrine.

71. The foregoing criteria established by Mexico's highest court comprise "constitutional interpretations" that could eventually change, either through new insights or due to constitutional reforms.

72. At present, two constitutional reform bills are being processed which are of major importance for human rights[98] and amparo. [99] Both have been approved by the Senate and are pending approval by the Chamber of Deputies. If these should eventually be incorporated into constitutional text, will surely lead to "new thinking" in the Mexican Supreme Court regarding the interpretative criteria mentioned above. Regardless of its approval and of the "consultation process" undertaken by the President of the Supreme Court during the plenary session held on May 26, 2010, regarding the Federal Judiciary's compliance with the Judgment in the *Case of Radilla Pacheco*[100]*,* the fact is that in this particular international

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"INTERNATIONAL TREATIES. CONFLICTS THAT ARISE IN RELATION TO HUMAN RIGHTS SHOULD BE ANALYZED AT THE CONSTITUTIONAL LEVEL.

Treaties or conventions on human rights signed by the Mexican government must be placed at the level of the Constitution of the United Mexican States, because these instruments were designed as an extension of the provisions of Basic Law concerning human rights, inasmuch as these constitute the purpose and object of the institutions. Thus, the principles governing subjective public law must be adapted to the different purposes of the means of defense contemplated in the Constitution itself and, in accordance with Article 133 thereof, the Mexican authorities must respect them; therefore under no circumstances may they disregard these in acting within their jurisdiction." (Underlining added) Published in the *Semanario Judicial de la Federación y su Gaceta*, TCC, Tome XXXI, May 2010, p. 2079).

98 The following aspects of this reform are especially relevant here: "Article 1. Everyone in the United Mexican States shall enjoy the rights recognized by this Constitution and international treaties on human rights to which the Mexican State is a party, as well as the guarantees for their protection, which cannot be restricted or suspended except in the cases and under the terms established by this Constitution.

Human rights standards shall be interpreted in accordance with this Constitution and with the aforementioned international human rights treaties.

All authorities, within the framework of their competences, 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 shall prevent, investigate, punish and repair violations of human rights under the terms established by law." (Underlining added.)

99 Article 103, part I, of this reform notes: "Article 103. The Federal courts shall settle all disputes that arise: I. Regarding general rules, actions or omissions by the authorities that violate human rights and guarantees for their protection recognized under this Constitution, as well as by international treaties to which the Mexican State is a party." (Underlining added).

100 The "consultation process" corresponds to File 489/2010, the draft bill having been discussed by the Plenary of the Supreme Court on August 31, 2, 6, and 7 September 2010. The debate during those four days was of the utmost importance for the relationship between domestic and international human rights law, since it reflected positions for and against "diffuse conventionality control;" however, by a majority, it was decided to restrict the consultation to 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 García.*" Thus the matter was submitted to another Minister in order to define the specific obligations of the Federal Judiciary and how to apply these.

Significantly, in this "consultation process" the Supreme Court 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 specific case, and other international disputes to which the United Mexican States could also be a party in the future. "(Underlining added).

judgment, and in those related to the Cases of *Fernández Ortega, Rosendo Cantú, Montiel and Cabrera García and Flores,* the Mexican judges (as organs of the Mexican State) have "direct" obligations that must be fulfilled "immediately" and "ex officio", as discussed below.

73. It should not be overlooked that the judgments delivered against the Mexican State emphasize that standards must be "interpreted" bearing in mind the objective pursued by Article 2 of the American Convention on Human Rights, namely, to "give effect" to the rights and freedoms enshrined in that instrument. This conventional provision establishes 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 to those rights or freedoms." Thus, the phrase "or other measures" also includes "constitutional interpretations" that allow for rights to be applied with greater effectiveness and scope, in terms of the *pro homine* principle enshrined in Article 29 of the Pact of San Jose. This could lead to considerations to supersede the jurisprudential criteria established by the Plenary of the Supreme Court of Justice.

74. A Mexican Court considered that the *pro homine* principle is of "obligatory application," because it is contemplated in international treaties that form part of the Supreme Law of the Union, under the terms of Article 133 of the Federal Constitution. This was established by the Fourth Collegiate Court on Administrative Matters of the First Circuit when it ruled in the direct amparo 202/2004, on October 20, 2004, producing thesis I.4º.A.464 A, with the following title and text:[101]

> *PRO HOMINE* PRINCIPLE: ITS APPLICATION IS OBLIGATORY.
> The *pro homine* principle, which means that the legal interpretation should always seek the greatest benefit for the individual, that is, it should apply the most comprehensive standard or the broadest interpretation when addressing protected rights and, on the contrary, apply the most restricted standard or narrowest interpretation when an attempt is made to limit its exercise, is contemplated in Article 29 of the American Convention on Human Rights and Article 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, since these treaties form part of the Supreme Law of the Union under Article 133 of the Constitution, it is clear that this principle must be applied on a mandatory basis. (Emphasis added).

75. The "constitutional" and "legal" interpretations made by judges and organs that impart justice in Mexico *at all levels,* must be based not only on the international instruments to which the State of Mexico is a party, but also on the jurisprudence of the Inter-American Court. This is because it is the court of the Inter-American System for the Protection of Human Rights at the international level, whose jurisdiction is the application and interpretation of the American Convention. This body actually determines the content of the text of the Convention, in such a way that the interpreted provision acquires direct effectiveness in Mexico, since this State has signed the Convention and has accepted the jurisdiction of the Inter-American Court. As established in the Judgment in the *Case of Cabrera García and Montiel Flores,* which has prompted this Concurring Opinion (and which applies to the other three cases mentioned):

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[101] Published in *Semanario Judicial de la Federación y su Gaceta*, Ninth Period, TCC, Tome XXI, February 2005, p. 1744.

> 233. Therefore, as was established in the cases of Radilla Pacheco, Fernández Ortega and Rosendo Cantú, it is necessary that the constitutional and legislative interpretations concerning the criteria for the material and personal jurisdiction of the military courts in Mexico be adapted to the principles established in the case law of this Court, which have been reiterated in the present case[102] and which apply to all human rights violations allegedly committed by members of the armed forces. This means that, regardless of any legislative reforms that the State should adopt in this case, based on the conventionality control, the judicial authorities must rule immediately and *ex officio* that the facts be heard by a natural judge, that is, by the ordinary criminal courts. [103] (Underlining added).

76. In using the expressions "immediately"[104] and "ex officio,"[105] the intention of the Inter-American Court is to ensure "direct" action by all Mexican judges to exercise "diffuse conventionality control" without the need for prior statements by any organ of the Mexican State and regardless of whether the parties requested it. On this matter the view of *ad hoc* Judge Roberto de Figueriedo Caldas is important:[106]

> 5. For all States of the American Continent, which have willingly adopted it, the Convention is the equivalent of a supranational Constitution pertaining to Human Rights. All public institutions and national spheres, as well as the respective Federal, state and municipal legislatures of all adherent States are under obligation to respect and comply with it. (Underlining added).

77. Mexican judges must, on the one hand, conduct constitutional and legal interpretations that allow "the victims of human rights violations and their families to have the right to have those violations heard and addressed by a competent Court, according to due process of law and the right to a fair trial. The importance of the passive subject transcends the military sphere of action, since juridical rights associated with the ordinary regimen are involved";[107] consequently, "this conclusion applies not only to cases of torture, forced disappearance and rape, but to all human rights violations"[108] (Underlining added). Thus, the obligation of the

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[102] *Cf. Case of Radilla Pacheco v. United Mexican States, supra* note 19, para. 340; *Case of Fernández Ortega et al. v. Mexico, supra* note 21, para. 237, and *Case of Rosendo Cantú et al. v. Mexico, supra* note 22, para. 220.

[103] *Cf. Case of Fernández Ortega et al. v. Mexico, supra* note 21, para. 237, and *Case of Rosendo Cantú et al. v. Mexico, supra* note 22, para. 220.

[104] "Without the interposition of other things" and "Now, forthwith, instantly" (*Real Academia de la Lengua Española,* 22nd edition).

[105] "As an imposition on private initiative, this refers to the spontaneous action or intervention by the judge in the process, without the need for a request or petition, or on the initiative of the judge without the 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.

[106] Para. 4 of the Concurring Opinion issued in the *Case of Gomes Lund et al. ("GUERRILHA DO ARAGUAIA") v. Brazil, supra* note 4.

[107] *Case of Radilla Pacheco v. United Mexican States*, *supra* note 19, para. 275.

[108] Para. 198 of the Judgment of *Case of Cabrera García and Montiel Flores v. Mexico*, to which this Concurring Opinion refers, *supra* note 1.

Mexican judges is "immediate" and "regardless of any legislative reforms that the State should adopt" (Amendment to Article 57 of the Code of Military Justice). This becomes more important when considering the text of Article 13 of the Mexican Federal Constitution, [109] a provision that the Inter-American Court deemed compliant with the Convention and, therefore, the interpretations of secondary legislation must be compliant with the Constitution and the American Convention: [110]

> In practical terms, as this Court has established, the interpretation of Article 13 of the Mexican Constitution must be consistent with the constitutional and conventional principles of due process and access to justice contained in Article 8(1) of the American Convention and the relevant provisions of the Mexican Constitution. [111]

78. Furthermore, it also requires the Mexican judges to always carry out "diffuse conventionality control", not only for deciding in specific cases the criteria for the material and personal jurisdiction of the military courts mentioned in the judgments issued by the Inter-American Court, but in general in all matters within its jurisdiction, where the Inter-American Court makes interpretations of the inter-American *corpus juris,* given that this court is the final and definitive interpreter of the Pact of San Jose (objective aspect of the interpreted provision). [112]

79. Indeed, as noted previously (supra paras. 51, 52, and 63), the Inter-American Court's jurisprudence has a "direct effect" on all States that have expressly accepted its jurisdiction, regardless of whether it concerns a matter in which they have not participated formally as a "material party." This is due to the effects of the *interpreted conventional provision*, which produces "spillover effects" of conventional case-law and not only subjective efficacy for the protection of the rights or liberties in a particular case submitted to its jurisdiction. In this sense, conventional jurisprudence is not simply guidance, [113] but is also mandatory for Mexican judges (in its subjective and objective dimensions) and its effectiveness begins when international rulings are notified or transmitted to the Mexican State, under the terms of Article 69 the American Convention on Human Rights and regardless of the domestic procedure undertaken by the Mexican organs and authorities to coordinate its implementation and enforcement, as well as other acts carried out to make known and adopt the judgment and international jurisprudence.

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[109] In this regard, the provision states: "Article 13. (…) the military jurisdiction subsists for crimes against and violations of military discipline, but the military courts may not, in any case and for any reason, extend their jurisdiction over persons outside the army. When a crime or lack of military law involves a civilian, the competent civil authority shall hear the case."

[110] *Case of Rosendo Cantú et al. v. Mexico, supra* note 22, para. 218.

[111] *Cf. Case of Radilla Pacheco v. United Mexican States*, *supra* note 19, para. 338.

[112] See *supra* para. 63 and 75.

[113] 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 GUIDANCE ON MATTERS OF HUMAN RIGHTS.

Once incorporated into 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 interpreting 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.

80. Some Mexican courts have begun to exercise “diffuse conventionality control” in light of conventional jurisprudence. Indeed, the First Collegiate Court on Administrative and Labor Matters of the Eleventh Circuit, based in Morelia, Michoacán, when ruling on the direct amparo 1060/2008, on July 2, 2009 (months before the Judgment in the *Case of Radilla Pacheco*), referring to the *Case of Almonacid Arellano v. Chile* (2006), considered the following:

> In that regard, 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 required to apply the Constitution, treaties, or international conventions and the case-law of the Inter-American Court of Human Rights, among others, which requires them to exercise conventionality control between domestic and supranational legal provisions, as decided by the First Chamber of the Supreme Court when ruling on the direct amparo under review 908/2006, promoted by Nahum Ramos Yescas, at the session held on April 18, 2007, when it stated that:
>
> *"The concept of the 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, the First Chamber of the Supreme Court of Justice considered that, given that Mexico accepted the American Convention on Human Rights, it also accepted the interpretation of said Convention made by the Inter-American Court of Human Rights; consequently, this collegiate court considers that all State courts are required to exercise conventionality control to settle any matter submitted to their jurisdiction, as established by the Inter-American Court in its ruling in the case of Almonacid Arellano et al. v. Chile, in the judgment issued on September 26, 2006.
>
> Thus, the domestic judicial organs are obliged to exercise 'conventionality control,' with respect to acts of authority, including general standards, in accordance with the powers conferred upon them by the codes to which they are subject and the provisions of international human rights law, to which they are bound through the signing or ratification of treaties or conventions by the President of the Republic. This seeks to ensure that domestic provisions conform to the State’s international commitments, which entail certain duties and recognize certain rights for individuals; such control is deposited in international-or supranational-courts, as well as in domestic courts, which are entrusted with the new regional justice system on human rights and have the additional obligation to adopt within their legal system, both the standards and the interpretations thereof, through policies and laws that ensure respect for human rights and their guarantees, which are expressed in their national constitutions, and of course in their international treaty commitments.
>
> Consequently, it is necessary to establish that the authorities of the Mexican State have the ineludible obligation to observe and apply in their domestic jurisdictions-- as well as in the legislative sphere-- actions of any other nature to ensure respect for the rights and guarantees, not only of the Constitution and its domestic provisions but also of the international treaties to which Mexico is party and the interpretations of its provisions carried out by international bodies; this serves to confirm that all courts must carry out diffuse conventionality control, to settle the matters submitted to their jurisdiction.
>
> (...)

This means that although - in principle - the Mexican courts and judges remain subject to the observance and application of domestic law, when the Mexican State has ratified an international treaty such as the American Convention, they, as part of the State apparatus, are also subject to it. Therefore, they are obligated to ensure that the effects of its provisions are not impaired by the application of laws contrary to its object and purpose, through the exercise of conventionality control between domestic legal provisions and the American Convention on Human Rights; and any interpretation of that Convention made by the Court, as the final interpreter. (Emphasis added).

81. The above standard is reflected in Thesis XI.1º.A.T.47 K, with the following title and text:[114]

CONVENTIONALITY CONTROL AT THE DOMESTIC LEVEL. MEXICAN COURTS ARE REQUIRED TO EXERCISE IT.
In matters of human rights, the courts of the Mexican State should not limit themselves solely to applying local laws, but also the Constitution, and international treaties or conventions in accordance with the jurisprudence of any of the international courts that interpret treaties, pacts, conventions or agreements signed by Mexico. This requires them to exercise conventionality control between domestic and supranational legal standards, which implies abiding by and applying legislative and any other measures in their jurisdiction to ensure respect for the rights and guarantees, through policies and laws that protect them. (Emphasis added).

82. Likewise, the Fourth Collegiate Court on Administrative Matters of the First Circuit, sitting in the Federal District, upon deciding the direct amparo 505/2009, on January 21, 2010, upheld the Thesis I.4º.A.91 K, with the following title and text:[115]

CONVENTIONALITY CONTROL. MUST BE EXERCISED BY THE JUDGES OF THE MEXICAN STATE IN MATTERS SUBMITTED TO THEIR CONSIDERATION IN ORDER TO ENSURE THAT DOMESTIC LAWS DO NOT CONTRAVENE 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, 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, must ensure that the provisions contained therein are not impaired or limited by domestic rules that contravene its object and purpose. Therefore, they must exercise "conventionality control" between the provisions of domestic law and the Convention itself, taking into account not only the treaty but also the interpretation thereof. This is important for the organs responsible for judicial functions, since they must try to suppress, at all times, practices that tend to deny or restrict the right of access to justice. (Underlining added).

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[114] Published in *Semanario Judicial de la Federación y su Gaceta*, Ninth Period , TCC, Tome XXXI, May 2010, p. 1932.

[115] Published in *Semanario Judicial de la Federación y su Gaceta,* Ninth Period , TCC, Tome XXXI, March 2010, p. 2927.

83. The foregoing marks the beginning of the practice of "diffuse conventionality control" in the Mexican judicial system, in line with Inter-American conventional jurisprudence and with the examples of the high courts of Latin American countries, referred to in paras. 226 to 232 of the Judgment in the *Case of Cabrera García and Montiel Flores v. Mexico,* which prompts the present Concurring Opinion.

84. Finally, this trend is evident in recent legislative reforms, such as in the Constitution of the State of Sinaloa (2008). This local legal system establishes criteria for interpreting the fundamental rights and "their 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." [116] (Underlining added).

V. TOWARDS A *IUS CONSTITUTIONALE COMMUNE* IN THE AMERICAS

85. The interaction between international and constitutional law is ineludible and their "communicating vessels" are becoming closer. On the one hand, the "internationalization" of various categories existing within the domestic sphere of constitutional States is evident, especially with international human rights treaties and the creation of universal and regional systems of protection, with the aim of ensuring that States effectively apply these international instruments. There is a shift from traditional "constitutional guarantees" to "conventional guarantees", a process that has developed to a higher degree with the judgments issued by the international courts.

86. The doctrine of "diffuse conventionality control" appears to have been adopted by the Inter-American Court in an evolving process of "internationalization", which has influenced the practices of domestic high courts. (See *supra* para. 29). Moreover, since 2006, when the Inter-American Court began to "irradiate" its jurisprudence, thereby promoting the national acceptance of international standards in the States Party to the Convention, this "nationalization" or "constitutionalization" of International Human Rights Law has become deeper and more intense, as evidenced by the acceptance of this doctrine by the domestic high courts (see above paras. 28 and 30).

87. In 2010, the Inter-American Court reiterated this doctrine in eight contentious cases, denoting its consolidation. Its elements and distinctive features will certainly continue to be carefully analyzed by the Inter-American and national judges. The doctrine does not seek to establish which body has the final word, but to encourage creative, responsible jurisprudential dialogue, committed to ensuring the effective application of fundamental rights. Domestic judges now become the first Inter-American judges. It is they who bear the greatest responsibility in harmonizing national legislation within the Inter-American parameters. The Inter-American Court must monitor this process and be fully aware of the standards developed in its jurisprudence, considering also the "national margin of discretion" enjoyed by States in interpreting the Inter-American *corpus juris*. [117] Much is

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[116] Article 4 Bis C-II. The reform was published in the Federal State's *Official Gazette* on May 26, 2008.

[117] Regarding this doctrine, *Cf.* García Roca, Javier, *El margen de apreciación nacional en la interpretación del Convenio Europeo de Derechos Humanos: soberanía and integración,* [The national

expected from the Inter-American judges and, "the more they demand of themselves, the more they can demand, in turn, from the domestic courts." [118]

88. Ultimately, the significance of the new doctrine of "diffuse conventionality control" is such that the future of the Inter-American System of Human Rights will likely rest upon it and, in turn, will contribute 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 will surely become the new jurisdictional standard for the effective application of human rights in the 21st century. There lies the future: a point of convergence in human rights for the establishment of a *ius constitutionale commune* in the Americas.

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Ad hoc Judge

Pablo Saavedra Alessandri
Secretary

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margin of discretion in the European Convention on Human Rights: sovereignty and integration] Madrid, Civitas, 2010.

[118] Sagués, Néstor Pedro, "El "control de convencionalidad" como instrumento para la elaboración de un *ius commune* interamericano", [Conventionality control" as an instrument for the formulation 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.