



Organization of  
American States



## Inter-American Commission on Human Rights

Application to the Inter-American Court of Human Rights  
in the case of  
Inés Fernández Ortega  
(Case 12.580)  
against the United Mexican States

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**APPLICATION FROM THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS  
TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS  
AGAINST THE UNITED MEXICAN STATES**

**CASE 12.580  
INÉS FERNÁNDEZ ORTEGA**

**I. INTRODUCTION**

1. The Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) refers this application to the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) in Case No. 12.580, Inés Fernández Ortega, against the United Mexican States (hereinafter “the State,” “the Mexican State,” or “Mexico”) for its responsibility in the rape and torture of Inés Fernández Ortega of the Me’phaa indigenous people (hereinafter “Mrs. Fernández Ortega” or “the victim”),<sup>1</sup> in an incident that occurred on March 22, 2002, in the community of Barranca Tecuani, municipality of Ayutla de los Libres, in the state of Guerrero.

2. The application also deals with the lack of due diligence in investigating and punishing those responsible for the incident; the failure to provide due redress to the victim and her next-of-kin; the use of the military justice system to investigate and prosecute human rights violations; and the difficulties encountered by indigenous people, women in particular, in securing access to justice.

3. This case has been processed in accordance with the terms of the American Convention and is submitted to the Court in compliance with Article 34 of its Rules of Procedure. Attached hereto, in the appendixes, is a copy of Report No. 89/08, drawn up according to Article 50 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”).<sup>2</sup>

4. The Commission believes it is justified in referring this case to the Court on account of the need to secure justice and redress for the victim and her next-of-kin. In addition, the Commission believes that the case illustrates the abuses committed against the indigenous population by the military deployed in the state of Guerrero, and in particular the use of rape as a form of torture against Me’phaa indigenous women and the impunity surrounding such incidents, which is largely due to the involvement of the military justice system in their investigation and prosecution.

**II. PURPOSE OF THE APPLICATION**

5. The purpose of this application is to respectfully request that the Court conclude and declare that:

- a) The Mexican State is responsible for violating Articles 5 (right to humane treatment), 8 (right to a fair trial), 11 (right to privacy), and 25 (right to judicial protection) of the Convention, in conjunction with the general obligation of respecting and ensuring

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<sup>1</sup> As detailed below, the members of Mrs. Inés Fernández’s family are also victims in the case at hand. However, the term “victim” is used solely to refer to her, and the term “victim’s next-of-kin” to refer to the members of her family.

<sup>2</sup> IACHR, Report No. 89/08 (Merits), Case 12.580, *Inés Fernández Ortega*, Mexico, October 30, 2008; Appendix 1.

human rights enshrined in Article 1.1 thereof, with respect to Mrs. Inés Fernández Ortega;

- b) The Mexican State is responsible for violating Articles 5 (right to humane treatment), 8 (right to a fair trial), and 25 (right to judicial protection) of the Convention, in conjunction with the obligation of respecting and ensuring human rights enshrined in Article 1.1 thereof, with respect to following members of Mrs. Inés Fernández Ortega's family: Fortunato Prisciliano Sierra (husband), Noemí, Ana Luz, Colosio, Nélide, and Neptalí Prisciliano Fernández (children), María Lidia Ortega (mother), and Lorenzo† and Ocotlán Fernández Ortega (brothers);
- c) The Mexican State is responsible for violating Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (hereinafter "the Convention of Belém do Pará") with respect to Mrs. Inés Fernández Ortega; and,
- d) The Mexican State failed to meet its obligations under Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter "the Convention against Torture").

6. In consideration of the above, the Inter-American Commission asks the Court to order that the Mexican State:

- a) Conduct a serious, impartial, and exhaustive investigation before the regular criminal courts to clarify the incident in which Mrs. Inés Fernández Ortega was a victim; to identify those responsible, be they members of the military or civilians; and to punish them accordingly. Also, to refer all previous proceedings conducted before the military justice system to the civilian courts;
- b) Adopt the measures necessary to impose on the military justice system a restrictive and exceptional scope, limited exclusively to the prosecution of members of the military for the commission of crimes or offenses that, by their nature, affect legal interests particular to the military order. In particular, take the legislative, administrative, and other measures necessary to ensure that the military justice system is disqualified from hearing human rights violations, particularly cases involving sexual violence;
- c) Extend rehabilitation measures to the victim and her next-of-kin;
- d) Design and implement mental health plans, agreed on in conjunction between mental health practitioners and indigenous women, for the recovery, rehabilitation, and full community reincorporation of indigenous women who have been victims of rape;
- e) Design protocols to facilitate and encourage the effective, uniform, and transparent investigation of acts of physical, sexual, and psychological violence, including a description of the complexity of the evidence and a detailing of the minimum evidence that must be gathered to provide an adequate evidentiary grounding, in consideration of the international provisions set forth in the Istanbul Protocol;
- f) Develop training programs for state officials, taking into account the international provisions set forth in the Istanbul Protocol, to ensure those officials have the technical and scientific elements necessary for evaluating potential cases of torture or cruel, inhuman, or degrading treatment;

- g) Guarantee indigenous women access to justice through the design of a policy that respects their cultural identity;
- h) Implement permanent human rights education programs within all hierarchical levels of the Mexican Armed Forces, and include in the curriculum of those training programs a particular reference to international human rights instruments, specifically those related to the protection of the rights of women, particularly their right to a life free of violence and discrimination;
- i) Provide the victim and her next-of-kin with redress for the material and nonmaterial damages suffered, and adopt measures of satisfaction on their behalf;
- j) Guarantee the security of the victim, her next-of-kin, and her representatives against acts of persecution and harassment against them as a result of their quest for justice in the case at hand; and,
- k) Reimburse the legal costs and expenses incurred in processing this case.

### **III. REPRESENTATION**

7. In accordance with the provisions of Articles 23 and 34 of the Court's Rules of Procedure, the Commission has appointed Commissioner Florentín Meléndez and Executive Secretary Santiago A. Canton to serve as its delegates in this case. Assistant Executive Secretary Elizabeth Abi-Mershed and attorneys Isabel Madariaga, Juan Pablo Albán Alencastro, Rosa Celorio, and Fiorella Melzi, specialists with the Executive Secretariat of the Commission, have been appointed to serve as legal advisors.

### **IV. JURISDICTION OF THE COURT**

8. Under Article 62.3 of the American Convention, the Inter-American Court is competent to hear all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it, provided that the states parties to the case recognize or have recognized its jurisdiction.

9. The Court has jurisdiction to hear this case. The State adhered to the American Convention on March 2, 1981, deposited its instrument of accession thereto on March 24, 1981, and accepted the Court's contentious jurisdiction on December 16, 1998.

10. In addition, the Court has jurisdiction to hear the instant case in that the Mexican State deposited its instrument of ratification of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women on November 12, 1998, and its instrument of ratification of the Inter-American Convention to Prevent and Punish Torture on June 22, 1987.

### **V. PROCESSING BY THE INTER-AMERICAN COMMISSION<sup>3</sup>**

11. On June 14, 2004, Mrs. Inés Fernández Ortega, the Indigenous Organization of the Tlapanec People, A.C. (hereinafter "OIPT"), and the Tlachinollan Human Rights Center of the Mountain (hereinafter "CDHT") lodged the complaint in the case at hand.

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<sup>3</sup> The formalities referred to in this section may be found in the record of the case before the IACHR; Appendix 3.

12. In accordance with Article 29 of its Rules of Procedure, the Commission recorded the complaint as No. 540/04 and proceeded to carry out its preliminary analysis. On February 2, 2005, pursuant to Article 30 of the Rules of Procedure of the Inter-American Commission on Human Rights (hereinafter "the Commission's Rules of Procedure"), the relevant parts of the complaint were forwarded to the State, along with a deadline of two months for it to submit its response.

13. On July 12, 2005, the State submitted its response to the petition, which was forwarded to the petitioners on July 18, 2005, with a period of one month for them to return any comments deemed relevant.

14. On October 21, 2006, the Commission declared Petition No. 540/04 formally admissible as regards Articles 5.1, 7, 8.1, 11, 17, 19, 21, and 25 of the American Convention, in conjunction with Article 1.1 thereof, and as regards Article 7 of the Convention of Belém do Pará and Articles 1, 6, and 8 of the Convention against Torture.<sup>4</sup> It also decided to continue with its analysis of the merits and consequently proceeded to open Case No. 12.580.

15. In communications dated November 9, 2006, the Commission conveyed the report on admissibility to the State and to the petitioners, granting them a period of two months in which to present any additional comments deemed necessary regarding the merits of the case. On that same occasion, in accordance with Article 48.1.f of the American Convention, the Commission made itself available to the parties in order to attempt to reach a friendly settlement agreement.

16. On April 26, 2007, the IACHR forwarded the petitioners' observations on the merits to the State and granted it two months to submit its own observations.

17. The State presented its observations on the merits in note OEA-01761, dated July 4, 2007, the relevant parts of which were forwarded to the petitioners on July 26, 2007, along with a period of one month to submit their observations. By means of note OEA-01935 of July 25, 2007, the State submitted annexes to its comments on the merits, which were forwarded to the petitioners in a communication dated August 20, 2007. In a communication dated October 2, 2007, received on October 10, 2007, the petitioners returned their comments on the State's submission.

18. On October 12, 2007, during the Commission's 130th regular session, a public hearing on the case was held, attended by the Mexican State and the petitioners. At the end of that hearing, the State submitted additional documents.

19. By means of note OEA-02650, dated October 15, 2007, the State forwarded the case file of the investigation to the Commission. It also requested that those documents be kept confidential, since they referred to "lines of investigation and procedures that are currently open and ongoing. To publish this information could cause serious damage to the investigation and hence to serving justice in this case." In light of that statement and the State's request for confidentiality, those documents were not incorporated into the case file on account of the fact that they could not be conveyed to the petitioners in accordance with the principle of mutual disclosure.

20. In communications dated October 16, 2007, the Commission conveyed to the State the petitioners' comments on its claims regarding the merits of the case, and it forwarded the additional documents submitted by the State during the public hearing to the petitioners.

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<sup>4</sup> See: IACHR, Report No. 94/06 (Admissibility), Petition 540/04, *Inés Fernández Ortega*, Mexico, October 21, 2006; Appendix 2.

21. In a communication of May 8, 2008, the petitioners informed the Commission that as of that date, the Center for Justice and International Law (hereinafter "CEJIL") was joining the case as a co-petitioner.

22. By means of note OEA-01567 of May 29, 2008, the State presented additional comments on the merits, the pertinent parts of which were forwarded to the petitioners on August 27, 2008, along with a deadline of one month in which to return their comments.

23. In note OEA-02193 of August 14, 2008, the State submitted additional information on the case, which was conveyed to the petitioners on August 20, 2008.

24. The petitioners submitted information about the case in communications received by the Commission on June 16, 2008, and June 19, 2008. Both communications were forwarded to the State on August 28, 2008.

25. The State submitted additional information in note OEA-02830 of October 16, 2008, and this was forwarded to the petitioners for their information on October 31, 2008.

26. On October 30, 2008, during its 133rd regular session, the Commission adopted Report on Merits 89/08, drawn up in compliance with Article 50 of the Convention. In that report it concluded that:

The State of Mexico is responsible for the violation of the rights to a fair trial and judicial protection provided for by Articles 8.1 and 25 of the American Convention, in connection with Article 1.1 thereof; Articles 5.1 and 11 of the American Convention, in connection with Article 1.1 thereof. It also concludes that the State is responsible for the violation of Article 7 of the Convention of Belém do Pará, and of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, with prejudice to Inés Fernández Ortega. Regarding her next of kin, the Commission concludes that the State is responsible for violations of Article 5.1 of the American Convention in connection with the general obligation to respect and ensure the rights provided for by Article 1.1 of that treaty.

27. In that report, the Commission extended the following recommendations to the Mexican State:

1. Complete the investigation in a timely, immediate, serious, and impartial manner under ordinary criminal jurisdiction to clarify the facts object of the complaint filed by Inés Fernández Ortega, in order to identify those responsible, be they members of the military or civilians, and punish them accordingly. Also, to refer all previous proceedings conducted before the military justice system to the civilian courts.
2. Compensate Inés Fernández Ortega and her next-of-kin for the violations of human rights herein established.
3. Adopt the measures necessary to impose on the military justice system a restrictive and exceptional scope, limited exclusively to the prosecution of members of the military for the commission of crimes or offenses that, by their nature, affect legal interests particular to the military order. In particular, take the legislative, administrative, and other measures necessary to ensure that the military justice system is disqualified from hearing human rights violations, particularly cases involving sexual violence.

4. Guarantee indigenous women access to justice through the design of a policy that respects their cultural identity.
5. Design and implement mental health plans, agreed on in conjunction between mental health practitioners and indigenous women, for the recovery, rehabilitation, and full community reincorporation of indigenous women who have been victims of rape.
6. Design protocols to facilitate and promote effective, uniform, and transparent investigations of acts of physical, sexual, and psychological violence, including a description of the complexity of the tests, and a listing of the minimum tests that should be made to provide adequate evidentiary grounding, bearing in mind the international norms established by the Istanbul Protocol.
7. Develop training programs for state officials that take into account the international norms established by the Istanbul Protocol, to the end that said officials dispose of the technical and scientific tools necessary to assess possible situations of torture or cruel, inhuman, or degrading treatment.
8. Implement, within a reasonable time, permanent human rights education programs within all hierarchical levels of the Mexican Armed Forces, and include in the curriculum of those training programs a particular reference to international human rights instruments, specifically those related to the protection of the rights of women, particularly their right to a life free of violence and discrimination.

28. The report was sent to the State on November 7, 2008, together with a period of two months for it to report back on the steps taken in implementing the recommendations, as provided for in Article 43.2 of the Commission's Rules of Procedure.

29. On that same date, pursuant to Article 43.3 of its Rules of Procedure, the Commission informed the petitioners that a report on the merits had been adopted and had been transmitted to the State, and it asked them to indicate, within the following month, their position and that of the victim regarding the possible referral of the case to the Inter-American Court.

30. In a communication dated December 7, 2008, received on December 11, 2008, the petitioners expressed their wish for the case to be taken to the Inter-American Court of Human Rights.

31. On December 12, 2008, the State submitted a preliminary report and requested a 12-month extension of the deadline for meeting the recommendations set out in Report 89/08, to begin on February 7, 2009. In its submission the State noted that if the extension requested was granted, "it would waive the three-month deadline set by Article 51 of the American Convention on Human Rights and Article 45 of the Rules of Procedure of the Inter-American Commission of Human Rights."

32. On December 29, 2008, the petitioners lodged with the Commission a series of documents as annexes to their communication of December 7, 2008, offering them as new evidence with a view toward the possible litigation of the case before the Court. These documents, together with the petitioners' position regarding the referral of the case to the Court, were forwarded to the State by means of a note dated April 21, 2009.

33. On February 5, 2009, the State was informed that in a decision adopted on February 4, 2009, the Commission had resolved to grant the requested extension for a period of three months.

34. By means of note OEA-00995 of April 20, 2009, the State submitted a final report on the state of its compliance with the recommendations contained in Report 89/08.

35. After reviewing the information furnished by the parties on the execution of the recommendations contained in the Report on the Merits, and taking into consideration the absence of any substantive progress with their effective implementation, the Commission resolved to refer the case to the Inter-American Court.

## **VI. PRECAUTIONARY MEASURES**

36. On August 27, 2007, Inés Fernández Ortega and her husband Fortunato Prisciliano Sierra filed a request for precautionary measures with the Commission, on account of a series of continuous threats from an alleged informant of the State intended to interfere with their pursuit of justice before the inter-American system for the harm inflicted on them by Mexican Army personnel. Those measures were granted by the Commission on September 20, 2007, and were registered as No. MC 167-07.<sup>5</sup>

37. Otilia Eugenio Manuel, attorney of the petitioners in this case and director of the Indigenous Organization of the Tlapanec People, A.C., has been under precautionary measures (No. MC 6/05) since the year 2005, on account of receiving death threats and being followed by persons unknown.<sup>6</sup>

38. Within the context of the precautionary measures, on May 30, 2008, the Commission was informed of the death of Lorenzo Fernández Ortega, the brother of Inés Fernández Ortega and a member of the OPIT. His body, with signs of torture, was found in the river that goes through the city of Ayutla. The petitioners said that the legally mandated autopsy was not carried out, and they also reported that in the days prior to his death, Lorenzo Fernández told Fortunato Prisciliano Sierra (Inés Fernández Ortega's husband) and Otilia Eugenio that he was afraid because lately certain unknown individuals had approached him to ask about the organization. The petitioners assume that Lorenzo Fernández Ortega was murdered on account of his activism and participation in the OPIT and because he was the brother of Inés Fernández Ortega.

39. On June 27, 2008 the Commission expanded Precautionary Measures No. MC 6-05 to cover another 41 members of the OPIT following the extrajudicial killing of Lorenzo Fernández Ortega.

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<sup>5</sup> See Annex 25.

<sup>6</sup> In June 2007, the petitioners stated that the precautionary measures had not been complied with and that Otilia Eugenio Manuel had been harassed by members of the Office of the Attorney General for Justice of the state of Guerrero and by officials of the Public Prosecution Service. They further stated that she filed a complaint before the Guerrero State Human Rights Commission, which in turn issued a recommendation to the Attorney General for him to order an investigation of the officials who harassed the beneficiary. In July 2007, in connection with the recommendation of the Guerrero State Human Rights Commission, the State reported that the Office of the Attorney General had initiated an inquiry, currently ongoing, for the crime of making threats; that, in addition, administrative proceedings had been initiated against Miguel Ángel Benítez Palacios, an officer of the Ministerial Police of the State of Guerrero; and a request had been made to the director of the Guerrero Ministerial Police to instruct police officers to abstain from injurious behavior against Mrs. Otilia Eugenio Manuel; Annex 24.

40. On February 3, 2009, Fortunato Prisciliano Sierra, Inés Fernández Ortega's husband, saw 50 soldiers, armed with rifles, searching for something on a plot of land belonging to him. He therefore decided to spend that day locked inside his home with the members of his family, out of fear that one of them might be stopped and interrogated by the military. The following day, Fortunato Prisciliano saw the damage caused by the soldiers and noted that they had stolen a part of his harvest.

41. During the time these measures have been in force, and in spite of them, the beneficiaries have continued to receive threats against their lives and persons and to be harassed, and the situation has worsened in the past two months.

## **VII. PROVISIONAL MEASURES**

42. On April 7, 2009, in accordance with Article 63.2 of the American Convention, Article 26 of the Rules of Procedure of the Court, and Article 74 of the Commission's Rules of Procedure, the Commission asked the Court to order provisional measures for the State to protect the lives and persons of: Obtilia Eugenio Manuel and her family; forty-one members of the Indigenous Organization of the Tlapanec People; Inés Fernández Ortega and her family; twenty-nine members of the Tlanichollan Mountain Organization; and the families of Messrs. Raúl Lucas Lucía and Manuel Ponce Rosas.

43. By means of an order of April 9, 2009, the President of the Inter-American Court resolved to "request that the State maintain such measures as it has in force, and also to immediately adopt such additional measures as may be necessary to protect the lives and persons of [*inter alia*] the following persons, taking into consideration the gravity of the situation and the particular circumstances of the risks they face": Obtilia Eugenio and her family, Inés Fernández Ortega and her family, the members of the OPIT, and the members of the CDHT.

## **VIII. CONSIDERATIONS OF FACT**

### **A. Background**

#### **1. The victim**

44. Inés Fernández Ortega is an indigenous woman, a member of the Me'phaa (Tlapanec) people. At the time of the incident in question, she was 27 years old and her family comprised her husband and four minor-aged children.

#### **2. The indigenous population of Mexico and, in particular, the Me'phaa indigenous people**

45. Mexico's indigenous population accounts for around 12% of the total (13 million in 2005)<sup>7</sup> and is mostly concentrated in the poorest states, such as Oaxaca, Guerrero, and Chiapas.

46. Four indigenous peoples coexist alongside each other in the state of Guerrero: Mixtecs, Nahuas, Amuzgos, and Me'phaas (Tlapanecs). They pursue subsistence agriculture for self-consumption in a harsh, rural environment where the indigenous-impoverished combination is the

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<sup>7</sup> Information from the National Statistics and Geography Institute, <http://www.inegi.gob.mx>.

result of a complex historical process in which the basic rights of indigenous peoples were undermined over centuries.<sup>8</sup>

47. On account of the irregular topography, there are only three rough trails that lead in to the region of the Me'phaas (Tlapanecs), and so it is extremely isolated. Relations between the Me'phaa and the Mestizo population are essentially commercial in nature and, given their fear of exploitation, they avoid contact with them to the extent that is possible.<sup>9</sup>

48. The small Me'phaa rural communities preserve their traditions and strongly express the cultural identity of indigenous peoples: language, social organization and institutions, spirituality and world view, rites and ceremonies, medicine, oral literature, and other artistic expressions.

### 3. Militarization

49. Following the Zapatista uprising in Chiapas, the State increased the presence of the army in indigenous territories. Numerous complaints have been voiced regarding the militarization of indigenous areas in the state of Guerrero, with camps and military bases located near to indigenous communities, military patrols, and army checkpoints on roads, and this situation contributes to an atmosphere conducive to provocations and clashes with the civilian population.<sup>10</sup>

50. The State has not disputed the presence of the army in the area. The State has said that the function of the military personnel in the area was to enforce the firearms law and to pursue the permanent fight against drug trafficking, which is very common in the region.<sup>11</sup>

51. In its report *Indigenous Women and Military Injustice*, the international nongovernmental organization Amnesty International stated that the military operations in the area were also intended to obtain information on indigenous communities:<sup>12</sup>

Today, military operations primarily focus on search and destroy operations of drug crops in remote mountainous areas. However, these operations are also linked to gathering intelligence on indigenous communities and identifying those individuals the military consider subversive elements.

In a recent visit to the state of Guerrero, Amnesty International delegates learned of a range of abuses against indigenous communities by the military, as well as the various police forces, judicial, state and municipal. These included serious human rights violations committed over recent years, such as rape, arbitrary arrest and ill-treatment as well as intimidation and threats, and other arbitrary acts of destruction of property and crops, robbery, cutting off water supplies to the community, and illegally entering homes.

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<sup>8</sup> *Diagnosis of the Situation of Human Rights in Mexico*, Office of the United Nations High Commissioner for Human Rights in Mexico, 2003, p. 153, available at: <http://www.sre.gob.mx/derechoshumanos/docs/Diagnostico.pdf>; Annex 2.

<sup>9</sup> National Indigenous Institute (INI), *Peoples of Mexico*, Monograph Series, Me'phaa Tlapanecs.

<sup>10</sup> *Diagnosis of the Situation of Human Rights in Mexico*, Office of the United Nations High Commissioner for Human Rights in Mexico, 2003, pp. 156 and 157, available at: <http://www.sre.gob.mx/derechoshumanos/docs/Diagnostico.pdf>; Annex 2.

<sup>11</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

<sup>12</sup> Amnesty International, *Mexico: Indigenous Women and Military Injustice*, AI: AMR 41/033/2004, November 23, 2004, p. 12, available at: <http://www.amnesty.org/es/library/asset/AMR41/033/2004/es/c9fa2e2d-d57c-11dd-bb24-1fb85fe8fa05/amr410332004es.pdf>; Annex 3.

52. This situation was also described in 2003 by the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people following his mission to Mexico:<sup>13</sup>

Many human rights organizations informed the Special Rapporteur that the military on occasion participate in civilian public security operations and criminal investigations that fall outside their constitutional mandate: numerous checkpoints and searches on main and secondary roads, for example, arbitrary arrests and detention; body searches and inspection of possessions, raids on communities and properties, intimidating interrogations, death threats, extrajudicial or summary executions and sexual harassment and abuse of indigenous women, to mention only some of the complaints.

53. Among his recommendations, the Special Rapporteur said:<sup>14</sup>

When the indigenous communities so request, the army should fall back in the environs of indigenous communities; the army presence and activities in indigenous areas should be strictly compatible with its constitutional duties.

54. In the mountains of Guerrero there are reports of multiple violations of the human rights of the region's indigenous peoples at the hands of municipal authorities or members of the police or the armed forces.<sup>15</sup> The World Organization Against Torture compiled a series of cases involving rapes allegedly committed by regular members of the Mexican Army, in which neither the perpetrators nor their superiors have been prosecuted and/or punished in accordance with the law. Noteworthy among the cases described are six complaints made by indigenous women in the state of Guerrero between 1997 and 2002.<sup>16</sup>

## **B. The events of March 22, 2002**

55. The evidence made available to the Court and, in particular, the testimony given by Inés Fernández Ortega at the hearing held at the Commission in October 2007<sup>17</sup> indicates that the victim, through her defense counsel and interpreter, informed the authorities on March 24, 2002, that she had suffered sexual assault at the hands of members of the Mexican Army on March 22, 2002.

56. Part of her statement, given through her interpreter to the Public Prosecution Service for local jurisdiction offenses, reads as follows:

On March 22, 2002, at approximately three in the afternoon, I was at home along with my children [...] I was preparing a fruit drink [...] Then, eleven soldiers arrived, and my four dogs began to bark. Three soldiers, members of the Mexican national army, entered my home without my consent, pointed at me with their guns, and said, "where did your husband go to

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<sup>13</sup> *Diagnosis of the Situation of Human Rights in Mexico*, Office of the United Nations High Commissioner for Human Rights in Mexico, 2003, available at: <http://www.sre.gob.mx/derechoshumanos/docs/Diagnostico.pdf>; Annex 2.

<sup>14</sup> *Diagnosis of the Situation of Human Rights in Mexico*, Office of the United Nations High Commissioner for Human Rights in Mexico, 2003, p. 160, available at: <http://www.sre.gob.mx/derechoshumanos/docs/Diagnostico.pdf>; Annex 2.

<sup>15</sup> *Diagnosis of the Situation of Human Rights in Mexico*, Office of the United Nations High Commissioner for Human Rights in Mexico, 2003, p. 155, available at: <http://www.sre.gob.mx/derechoshumanos/docs/Diagnostico.pdf>; Annex 2.

<sup>16</sup> World Organization Against Torture, article "Alleged rape of an elderly indigenous woman by members of the military results in her death," Geneva, March 8, 2007, available at: <http://www.omct.org/index.php?id=EQL&lang=es&articleSet=Appeal&articleId=6913>; Annex 22.

<sup>17</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

steal meat; where did your husband go to steal meat; are you going to talk and tell us where it was or not?" And the three pointed their rifles at me and one of them shouted at me again, asking if I was going to talk [...]

Then one of the soldiers grabbed my hands, told me to get on the floor, and pointed at me with this gun [...] This soldier grabbed my hands with his right hand and stuck his left hand under my skirt and lifted it up and pulled my underpants on the right side and pulled them down and took them off. He then dropped his pants to his knees and lay on top of me and put his penis into my vagina and stayed on top of me for about ten minutes, and then he ejaculated. When he had finished the soldier got up, pulled up his pants, and they left [...]<sup>18</sup>

57. Later, in the expansion of her statement given on April 18, 2002, to the Public Prosecution Service for local jurisdiction crimes of the Allende Judicial District, Inés Fernández Ortega, through her interpreter, stated that during the violent attack she suffered, she was able to see that the Mexican Army soldiers belonged to the 41st Infantry Battalion, because they wore the insignia of that battalion on their shoulders:<sup>19</sup>

On March 22 of this year, when three soldiers of the Mexican Army raped me (facts that I have already narrated in my prior deposition on March 24 of this year), I could see that they belonged to the Forty-first Infantry Battalion, since as they were on top of me abusing me sexually, I could see that on their shoulders they wore the insignia of that battalion, and if I could see them in a lineup I would fully recognize them.<sup>20</sup>

I also wish to tell Your Honor that although it is true that on the day I filed my complaint I did not include what I am now stating, it was because of the emotional state I was in, caused by the rape that I was victim of by soldiers of the Mexican Army.

### **C. Investigation of the incident**

#### **1. Investigation by the civilian justice system**

58. On account of the complaint filed on March 24, 2002, the civilian justice system opened preliminary inquiry ALLE/SC/03/76/2002.

59. In her statement as an eyewitness of the incident, given to the authorities through an interpreter, Noemí Prisciliano Fernández, Inés Fernández Ortega's 9-year-old daughter, stated that her mother was sexually attacked by soldiers:<sup>21</sup>

I was inside my house with my mother, Inés Fernández Ortega, when three soldiers came and the three raped my mother; first they took off her dress and then her petticoat, and her underpants, and after they had finished stripping her one soldier unbuttoned his pants, pulled down his fly, and struck my mother with his hand, the soldier did, and I got very frightened and went running to my grandmother.

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<sup>18</sup> Complaint filed by Inés Fernández Ortega on March 24, 2002, with the Public Prosecution Service for local jurisdiction crimes of the Allende Judicial District; Annex 5.

<sup>19</sup> Expansion of statement given by Inés Fernández Ortega to the Public Prosecution Service for local jurisdiction crimes of the Allende Judicial District, April 18, 2002; Annex 6.

<sup>20</sup> Expansion of statement given by Inés Fernández Ortega to the Public Prosecution Service for local jurisdiction crimes of the Allende Judicial District, April 18, 2002; Annex 6.

<sup>21</sup> Partial transcript of Noemí Prisciliano Fernández's statement, submitted by the Mexican State in note OEA-01761 of July 4, 2007; Annex 9. The presence of Inés Fernández Ortega's daughter during the incident was also referred to by the State at the hearing held at the IACHR; Annex 4.

60. On March 24, 2002, Mrs. Fernández Ortega went to the General Hospital in Ayutla, Guerrero, seeking medical care. She refused to be examined by a male physician and requested an examination by female medical personnel; at that time, however, none were on duty. At the hearing held at the IACHR, the victim reported that the male doctor on duty said to her, "They weren't women who raped you, but men; why won't you let me examine you?" This statement was not contested by the Mexican State.

On March 25 she went down to Ayutla, to the people of the Public Prosecution Service, where she was told she was going to be examined to see if she was raped and she requested a woman, but the doctor was a man; she did not want a male doctor, she wanted a female doctor to examine her, and the doctor said to her, "It wasn't women who raped you, but men; why don't you let me examine you?"<sup>22</sup>

61. The victim was examined and treated on March 25, 2002, by Dr. Griselda Radilla López, a general physician at the hospital in Ayutla, Guerrero, who requested a series of laboratory tests.<sup>23</sup>

62. On July 9, 2002, the chemistry expert of the General Directorate of Expert Services of the office of the Attorney General of Guerrero issued a forensic chemical report on the samples taken from Inés Fernández Ortega's vaginal cavity; in this report she noted the positive reaction of acid phosphatase and the presence of sperm: "The presence of seminal fluid in the swabs taken, and the samples analyzed proved positive for the presence of sperm cells."<sup>24</sup>

63. In a communication dated August 16, 2002, the forensic chemistry coordinator of the General Directorate of Expert Services informed the agent of the Military Prosecution Service that the samples obtained from Inés Fernández Ortega's vaginal cavity were not in the biological archive because they were exhausted in the study.<sup>25</sup> According to the Directorate of Expert Services, the two slides taken from Inés Fernández Ortega were exhausted in the analysis procedure because they had been attached with spray fix.<sup>26</sup>

64. The State Attorney General's office, in communication 555 of May 17, 2002, declined jurisdiction in the investigation and forwarded the preliminary inquiry to the Military Prosecution Service attached to the 35th Military Zone, on the grounds that there existed evidence indicating the possible participation of military personnel in the facts object of the complaint:

These proceedings are hereby forwarded to the Prosecutor attached to the 35th Military Zone headquartered in the city of Chilpancingo, Guerrero, for the purpose of continuing with the preliminary inquiry initiated for the crime of rape, larceny, breaking and entering, and other crimes that may become evident, because persons who are members of the Mexican Army

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<sup>22</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

<sup>23</sup> Document 0176/02 of March 26, 2002, issued by the director of the General Hospital of Ayutla, Guerrero, addressed to the agent of the civilian Public Prosecution Service of the Allende Judicial District; Annex 8.

<sup>24</sup> Report No. PJGE/DGSP/XXVI-II/305/02, dated July 9, 2002, by expert chemist Estrella Carrera Malagón, addressed to the agent of the Military Prosecution Service attached to the 35th Military Zone; Annex 10.

<sup>25</sup> Communication of August 16, 2002, from Oscar Zepeda Castarena, coordinator of forensic chemistry, addressed to the agent of the Military Prosecution Service attached to the 35th Military Zone; Annex 11.

<sup>26</sup> Communication from the office of the Attorney General of Guerrero, Directorate of Expert Services, dated September 25, 2002; Annex 12.

are involved as those likely to be responsible, and it is appropriate to carry out the procedures of this inquiry.<sup>27</sup>

65. In response to the declination of jurisdiction, by means of a brief dated March 13, 2003, Inés Fernández Ortega asked the agent of the Military Prosecution Service attached to the 35th Military Zone headquartered in Chilpancingo, Guerrero, to inform her whether he had accepted jurisdiction or not and, should the answer be in the affirmative, to abstain from taking cognizance of the matter on the grounds that military jurisdiction would be unconstitutional, given that the victim of the crime was a civilian. The military justice system informed her on March 17, 2003, that her request was not admissible since the preliminary inquiry was in accordance with Mexican law.

66. Faced with this response, Inés Fernández Ortega filed petition 405/2003 for *amparo* constitutional relief with the First District Court of Chilpancingo, Guerrero, claiming that it was unconstitutional for the case to be investigated under military jurisdiction and that the military justice system lacked independence and impartiality. The *amparo* petition was ruled inadmissible on September 3, 2003, on the grounds that Inés Fernández Ortega lacked standing to appeal for constitutional protection because the act object of the appeal was not covered by Article 10 of the Amparo Law, i.e., acts involving: (a) the reparation of injury; (b) civil liability as a result of the commission of a crime; (c) those that arise from criminal procedure, immediately or directly related to the safeguarding of the object of the crime and of the property attached for reparations or civil liability; and (d) against decisions on the part of the Public Prosecution Service either confirming criminal action or its voluntary dismissal.<sup>28</sup>

67. On September 19, 2003, Inés Fernández Ortega filed an appeal for the review of the *amparo* decision with the Second Collegiate Circuit Court of Chilpancingo, Guerrero. On November 27, 2003, the Court upheld the first-instance decision and the *amparo* proceedings were abated.<sup>29</sup>

68. No further formalities took place within the civilian justice system until January 16, 2007, when the agent of the Public Prosecution Service for local jurisdiction crimes of the Allende Judicial District reopened the preliminary inquiry into the case.

69. At the hearing held at the IACHR, the State reported that the following procedures were still pending within that preliminary inquiry: information for the artist's sketch of the alleged perpetrators; a psychological report on Inés Fernández Ortega; and a lineup of the alleged perpetrators.<sup>30</sup> The Commission notes that the case remains at the preliminary investigation stage after almost seven years, and that the most basic formalities have not been conducted, nor have the alleged perpetrators been identified.

70. The State has not disputed the fact that Inés Fernández Ortega received no assistance from the State as the victim of a crime of sexual violence. At the hearing before the IACHR, the State contended that in 2005 it created the office of the Assistant Attorney General for Legal Affairs and Attention to Crime Victims, which offers psychological support and legal

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<sup>27</sup> Document No. 555 of May 17, 2002, sent from the Public Prosecution Service for local jurisdiction crimes to the Military Prosecution Service attached to the 35th Military Zone, declining jurisdiction and referring preliminary inquiry ALLE/SC/03/76/2002; Annex 13.

<sup>28</sup> Judgment of September 3, 2003, issued by Rafael González Castillo, First District Judge of the state of Guerrero; Annex 16.

<sup>29</sup> Judgment of November 27, 2003, handed down by Judges Agustín Raúl Juárez Herrera, José Luis García Vasco, and Arturo Rafael Segura Madueño, members of the Second Collegiate Court of the 21st Circuit; Annex 17.

<sup>30</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

counseling; however, it had only recently begun setting up the support centers for crime victims,<sup>31</sup> and so the victim in the instant case had not benefited from those services.

## **2. Investigation by the military justice system**

71. The investigation of the case was carried out under military jurisdiction from May 2002 until September 15, 2006, when the case was closed based on the opinion issued by the fourth and twelfth agents of the Military Prosecution Service, "regarding the crime of rape she says she was the victim of and since to date no direct and personal involvement of any member of the Mexican Army has been detected." The report about the decision leading to the closure of the inquiry stated as considerations: the statements of the soldiers who, at the time the complaint was filed, were assigned to the Méndez Operations Base, and who denied the accusation made by Inés Fernández Ortega; the testimony of hearsay witnesses; the failure to appear of the alleged victim to offer more information to identify the suspect or suspects; the contradictions between the facts as they were narrated by the complainant and by her minor daughter; and the medical tests carried out, which did not establish the participation of military personnel in the facts of the complaint.<sup>32</sup>

72. During the hearing on this case held at the IACHR, the State reported that the military justice system had investigated whether the military personnel deployed in the area where the incident occurred did at any time become separated from their group, because if that were established, the case should be investigated by the civilian justice system:

When a member of the military engages in unlawful conduct not related to military service, he or she is tried by the civilian courts. In this respect, I wish to clarify that the intervention or the preliminary inquiry initiated by the military prosecutor in this case was exclusively to verify if there was an infraction of military discipline; at no time was jurisdiction requested or assumed. In other words, the substance of the investigation, and the closing of the inquiry, is to verify whether the personnel deployed in the area, for example [...]

What was investigated, and specifically the inquiry was closed regarding this military jurisdiction, but the itemized report for jurisdictional purposes was forwarded to the civilian prosecution service for it to investigate whether these actions taken against Mrs. Inés Fernández Ortega took place or not; it is not an action that can be considered under military jurisdiction, because that was verified and that is why it was closed, i.e., that the military personnel deployed in the area did not move away from its area of responsibility, there were no charges, nor was there any fact that we could find any person in particular responsible for, and that is why the investigation was left up to the civilian authorities.<sup>33</sup>

73. Statements made by Gen. Mario López Gutiérrez, at the time the commanding officer of the Ninth Military Region headquartered in Guerrero, indicated that "in Barranca Tecuani the military have always been the object of a series of false accusations."<sup>34</sup>

74. Although the State provided details on the military investigation during the Commission's processing phase, it did so on a confidential basis; consequently, the Commission

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<sup>31</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

<sup>32</sup> Partial transcription of the recommendations adopted by the fourth and twelfth agents of the Military Prosecution Service, in State's reply No. OEA-01761, dated July 4, 2007; Annex 19.

<sup>33</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

<sup>34</sup> News report published in *El Sur* newspaper, dated February 11, 2004; Annex 22.

was unable to take that information into account because it was unable to convey it to the other party for them to offer any comments thereon that they might deem relevant.

75. Irrespective of the above, at the hearing before the Commission on October 12, 2007, Mrs. Fernández Ortega said that one of the formalities in the investigation pursued by the military justice system was to report to her home with a military platoon carrying a typewriter for her to give a statement in front of the soldiers.<sup>35</sup> This claim was not contested by the State.

Soldiers also came to her home and brought a typewriter, and said that she should come out and give a statement; she did not come out of her house because she was very afraid that they were going to do the same thing to her again.<sup>36</sup>

76. The office of the Attorney General for Military Justice issued a decision on March 28, 2006, forwarding the details of the inquiry to the office of the Attorney General of Guerrero for it to investigate, within the scope of its jurisdiction, the facts object of the complaint, because of the possibility of civilian involvement in them.<sup>37</sup>

### **3. Investigation by the National Human Rights Commission**

77. On April 1, 2002, the National Human Rights Commission received a complaint from Inés Fernández Ortega, lodged with the Commission for the Defense of Human Rights of Guerrero on March 25, 2002.

78. After examining that complaint, the National Human Rights Commission, in its Recommendation 48/2003, found that public servants working for the Secretariat of National Defense and for the office of the Attorney General of Guerrero had violated the alleged victim's human rights to legality and legal certainty, through delayed justice and an irregular preliminary inquiry.

79. The National Human Rights Commission found that there was no record of Inés Fernández Ortega having been lawfully summoned to the procedures reported by the State, and therefore the absence of the alleged victim from the procedures was not due to her abandonment of the action but to a failure to serve proper notice.

80. In its report, the National Human Rights Commission said that as a part of its investigation of the alleged incident, the expert physician assigned to the National Human Rights Commission issued a psychiatric report stating that Inés Fernández Ortega had been subjected to a traumatic event.

81. In addition, the National Human Rights Commission found that the expert tests carried out using the samples obtained from Inés Fernández Ortega's vaginal cavity presented deficiencies and omissions on the part of state officials that caused the destruction of the evidence, which in turn affected the proper course of the preliminary inquiry.

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<sup>35</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

<sup>36</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

<sup>37</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

82. The National Human Rights Commission specifically noted the following with respect to the agent of the Military Prosecution Service:

Deficiencies and omissions that caused the destruction of the evidence can be observed in the expert tests carried out on the samples taken from the victim, affecting the proper execution of the preliminary inquiry.

Thus, the military prosecutor requested the cooperation of the General Directorate of Expert Services of the office of the Attorney General for Justice of the state of Guerrero for a spermatobioscopy and an acid phosphatase study of the samples taken from the victim, and to this end sent two slides to the aforementioned state authority.

Once the samples were examined, the experts from the office of the Guerrero Attorney General reported a positive find for sperm; in response, the military prosecution service requested the return of the samples in order to carry out a forensic chemical test for genetic information. However, the coordinator of forensic chemistry of the General Directorate of Expert Services of the office of the Guerrero Attorney General reported that the sample "was destroyed in the course of its examination," which meant that those additional expert tests could not be carried out.

In this connection, the remarks of the expert assigned by this National Commission are noteworthy: spermatobioscopy tests with Gram's tincture and acid phosphatase identification are not destructive techniques, i.e., the samples analyzed are not exhausted by applying these methods.

In addition, the expert assigned by this national agency also pointed out that the military prosecutor should have foreseen the possibility that in the tests traces of semen could be found, and hence he incurred in an omission by failing to request that the Guerrero Attorney General return the slides and the swabs in the event that positive results regarding the identification of semen were found, or that they be preserved for future forensic genetic or molecular biology testing, or that identifying techniques, such as DNA testing, be applied in order to establish, should that be appropriate, the identity of an individual that would be assumedly responsible.

The military prosecutor's omission caused the loss of important evidence, thus affecting the proper course of the preliminary inquiry, and therefore, the due pursuit of justice.<sup>38</sup>

83. The National Human Rights Commission also found inconsistencies in the actions of the General Directorate of Expert Services of the office of the Attorney General for Justice of the state of Guerrero:

According to the report issued by the criminalistics expert assigned by this National Commission, given that the results were positive for the presence of spermatozoids when a spermatobioscopy with Gram's tincture was carried out, it was possible to establish if the sample tested contained semen. It was therefore a clear lack of foresight on the part of those who carried out the test not to preserve or return the slides and swabs they examined, which would have been useful to identify the person from whom the semen came.

In this respect, the report states that the acid phosphatase identification study is not conclusive in establishing the presence of semen; for this, an enzyme quantification is required. Therefore, because the sample was not preserved, this quantification could not be performed, and a lack of scientific and technical grounding can be seen.

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<sup>38</sup> National Human Rights Commission, Report 48/2003; Annex 20.

Lastly, the expert report says that the scientific investigation method applicable to semen samples as biological crime evidence was not followed, in that the samples received and the results obtained were not recorded in either photographs or video recordings.

This National Commission has not failed to note the contradiction that exists regarding the reasons for not preserving the samples taken from the victim and sent for testing to the General Directorate of Expert Services of the office of the Guerrero Attorney General: in a communication addressed to this national agency, the coordinator of forensic chemistry of the Directorate of Expert Services of the office of the Guerrero Attorney General reported that the sample had been exhausted during the tests. However, in a personal interview with this National Commission, the expert in forensic chemistry at the Directorate of Expert Services stated that the samples were discarded for lack of storage space.

Thus, the omissions on the part of the personnel of the General Directorate of Expert Services of the office of the Guerrero Attorney General caused the loss of evidence related to the investigation that would have allowed access to more data, most particularly the possibility of determining the identity of those likely to be responsible for the criminal acts under investigation by the military prosecutor to which this recommendation refers.<sup>39</sup>

84. The National Human Rights Commission found, from the documents in the case file, that “the victim alleges that she suffered a sexual attack by members of the Mexican Army. The supporting evidence includes: the declaration of her minor daughter who declared that she witnessed the facts alleged; the fact that personnel from the Méndez Operations Base of the 41st Infantry Battalion of the Mexican Army were present in time and place; the psychiatric certification signed by the medical expert [...] and, in addition, the results that determined the presence of sperm from the vaginal samples taken from the victim.” It also stated that these were “elements that should be taken into account by the agent of the Military Prosecution Service in charge of conducting preliminary inquiry 35ZM/06/2002.”<sup>40</sup>

85. The National Human Rights Commission recommended that the Governor of Guerrero initiate administrative proceedings for liability for the deficiencies and omissions of the public employees attached to the General Directorate of Expert Services of the office of the Guerrero Attorney General responsible for handling and analyzing the samples taken.

86. The National Human Rights Commission also recommended that the Secretary of National Defense initiate administrative proceedings for liability in connection with the omissions of the Military Prosecution Service agent responsible for preliminary inquiry 35ZM/06/2002. It also recommended the appearance, at a hearing, of the office of the Inspector and Comptroller General of the Army and Air Force in connection with the refusal to provide in timely fashion a copy of the investigation documents requested by the National Human Rights Commission.

87. During the proceedings before the IACHR, the Mexican State maintained that an order had been given to initiate disciplinary administrative proceedings against the two experts attached to the Directorate of Expert Services of the office of the Guerrero Attorney General, and that those officials had been suspended.<sup>41</sup> As of the date of drafting of this application, the Commission has received no information on this matter, in spite of having expressly asked the

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<sup>39</sup> National Human Rights Commission, Report 48/2003; Annex 20.

<sup>40</sup> National Human Rights Commission, Report 48/2003; Annex 20.

<sup>41</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

Mexican State to report on that situation.<sup>42</sup> Neither has it received any information on compliance with the recommendation of the National Human Rights Commission regarding the initiation of administrative proceedings against the military prosecutor who was assigned the preliminary inquiry.

## **IX. CONSIDERATIONS OF LAW**

### **A. Violation of the right to humane treatment and the right to privacy (Articles 5 and 11 of the American Convention, in conjunction with Article 1.1 thereof)**

#### **1. General analysis**

88. Rape committed by members of state security forces against the civilian population constitutes, in any situation, a serious violation of the human rights protected by Articles 5 and 11 of the American Convention.<sup>43</sup>

89. Article 5.1 of the American Convention stipulates that “every person has the right to have his physical, mental, and moral integrity respected.”

90. Similarly, Article 11 of the American Convention guarantees all persons the right to have their honor respected and their dignity recognized and provides that “no one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”

91. Particularly, in cases involving sexual violence, the Inter-American Court has ruled that sexual violence against women has devastating physical, emotional, and psychological consequences.<sup>44</sup> The Court has also acknowledged that the sexual rape of a detainee by a state agent is an especially gross and reprehensible act, taking into account the victim’s vulnerability and the abuse of power displayed by the agent.<sup>45</sup> In addition, it has maintained that rape is an extremely traumatic experience that may have serious consequences<sup>46</sup> and that it causes great physical and psychological damage which leaves the victim “physically and emotionally humiliated” – a situation

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<sup>42</sup> At the merits hearing in the case of Valentina Rosendo Cantú, held on the same date as the hearing in the instant case, Florentín Meléndez, then President of the Commission, said: “To conclude this hearing, I would only ask the State to provide us with the files from the office of the Attorney General of Guerrero on Valentina’s case, and I also take this opportunity to request the file covering Inés Fernández, the previous hearing. In the case of Inés, I would like to take this opportunity to request the forwarding, if possible, to the Inter-American Commission, of the proceedings before the Comptroller’s Office in which it was stated that the officer who carried out the chemical tests was sanctioned, and, finally, copies of both case files from the military justice system.”

<sup>43</sup> IACHR, Report No. 53/01 (Merits), Case 11.565, *Ana, Beatriz, and Celia González Pérez*, Mexico, April 4, 2001, paragraph 45.

<sup>44</sup> I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 313, citing: United Nations Commission on Human Rights, 54th Session, Report presented by Mrs. Radhika Coomaraswamy, Special Rapporteur on violence against women, its causes and consequences, pursuant to resolution 1997/44 of the Commission, Doc. E/CN.4/1998/54 of January 26, 1998, paragraph 14.

<sup>45</sup> I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 311.

<sup>46</sup> I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 311, citing: Report of the UN Commission on Human Rights, 50th Session, Matter of the human rights of all persons submitted to any form of detention or imprisonment, and especially torture and other cruel, inhuman, or degrading treatments or punishments, Report of the Special Rapporteur, Mr. Nigel S. Rodley, presented in accordance to resolution 1992/32 of the Human Rights Commission, Doc. E/CN.4/1995/34 of January 12, 1995, paragraph 19.

that, in contrast to other traumatic experiences, is difficult to overcome with time.<sup>47</sup> With specific reference to rapes of indigenous women, the IACHR has established that the pain and humiliation they suffer is worsened by their status as indigenous people:<sup>48</sup> first of all, because of their lack of knowledge of the language of their aggressors and of the other authorities involved; and also because of the repudiation they face from their own communities as a consequence of such violations.<sup>49</sup>

92. According to the facts established in the present case, the Commission believes there is solid evidence indicating that Inés Fernández Ortega was a victim of rape perpetrated by members of the armed forces. First, in her statement to the civilian authorities, in which she describes the facts in detail, and later in her expanded statement, Inés Fernández Ortega specifically declared that the individuals who raped her belonged to the 41st Infantry Battalion. Second, her minor daughter Noemí confirms in her statement that she saw members of the military inside her home hitting her mother and removing her dress right before the daughter ran out of the house with her siblings to her grandfather's home. Third, the results of the expert tests performed on the samples taken from the Inés Fernández Ortega's vaginal cavity indicated the presence of sperm, despite the fact that those tests were subsequently destroyed. Fourth, the report of Mexico's National Human Rights Commission indicates that the medical expert assigned to the National Human Rights Commission issued a psychiatric certification stating that Inés Fernández Ortega was exposed to a traumatic experience. Fifth, it is an uncontroverted fact that the military was present in the area at the time when the events of this case took place. Sixth, it is a proven fact that this case was investigated by the military for four years, despite the fact that those accused of the rape were members of the army, in contravention of the principles of independence and impartiality. Seventh, the IACHR notes the reports issued by agencies of the United Nations stating that they had received complaints of sexual attacks perpetrated against indigenous women in the state of Guerrero. In this regard, the Commission notes that experts in Mexico have documented an increased number of acts of sexual violence against women perpetrated for political ends, particularly in highly militarized areas such as the states of Chiapas, Oaxaca, Veracruz, and Guerrero.<sup>50</sup>

93. Based on the foregoing, the Commission holds that Inés Fernández Ortega was a victim of rape perpetrated by members of the Mexican Army.

94. The Commission notes that although most women who are victims of sexual violence do not report the incidents to the authorities, Inés Fernández Ortega did so, confronting cultural, economic, and social obstacles, including the language barrier.

95. In connection with this, Amnesty International has stated that: "Overcoming internalized guilt or shame to denounce the case, even to the community, takes enormous courage.

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<sup>47</sup> I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 311, citing: Eur.C.H.R., *Case of Aydın v. Turkey* (GC), Judgment of September 25, 1997, App. No. 57/1996/676/866, paragraph 83.

<sup>48</sup> IACHR, Report No. 53/01 (Merits), Case 11.565, *Ana, Beatriz, and Celia González Pérez*, Mexico, April 4, 2001.

<sup>49</sup> IACHR, Report No. 53/01 (Merits), Case 11.565, *Ana, Beatriz, and Celia González Pérez*, Mexico, April 4, 2001, paragraph 95.

<sup>50</sup> Juan Méndez, Guillermo O'Donnell, Paulo Sergio Pinheiro, *The (Un)Rule of Law & the Underprivileged in Latin America*, "Overcoming the Discrimination of Women in Mexico: A Task for Sisyphus," Mariclaire Acosta, University of Notre Dame Press, 1999, p. 170; Annex 23.

If she speaks out, a woman may face stigmatization or outright rejection by the family or community.”<sup>51</sup>

96. On earlier occasions, the IACHR has said that states must incorporate the specific needs of indigenous women into their judicial systems, by respecting their cultural identity, ethnicity, language, and uniqueness, and by creating culturally aware expert systems and methods for cases of violence.<sup>52</sup>

97. In the instant case, it is the opinion of the IACHR that the State’s response to Inés Fernández Ortega – who had to suffer, along with her family, ostracism from her community for having sought justice – has inflicted emotional harm on herself and on her family and constitutes humiliation and degradation in violation of her right to personal integrity and privacy guaranteed by the American Convention. During the proceedings before the IACHR, the petitioners contended that as a result of the complaint she lodged with the authorities and the lack of an effective judicial response, Inés Fernández Ortega is a stigmatized woman: “in her community of Barranca Tecuani, she is the woman who was raped by members of the Mexican Army.”<sup>53</sup> The State offered no comments on this point.

98. This situation was exacerbated by the investigation methods used by the military justice system as reported to the Commission by the alleged victim at the merits hearing in this case, which were in clear contravention of the Istanbul Protocol. That protocol states that because of the nature of torture cases and the trauma individuals suffer as a result, it is particularly important to show sensitivity to the alleged torture victim and other witnesses. It also says that states must protect alleged victims of torture, witnesses, and their families from violence, threats of violence, or any other form of intimidation that may arise during the investigation.<sup>54</sup> It also requires that any treatment that would increase the psychological trauma of a torture survivor be avoided.<sup>55</sup> The Commission believes that actions of this kind are a way to victimize the alleged victim anew, in clear contravention of the provisions of the Convention of Belém do Pará that require states to refrain from any action or practice of violence against women. In addition, the Commission believes that this situation is exacerbated by the fact that Inés Fernández Ortega is an indigenous woman and that she does not know the language of her aggressors.

99. The Commission finds it remarkable that Inés Fernández Ortega did not receive specialized assistance as a victim of violent crime from the day on which she filed her complaint with the authorities. At the merits hearing on the case at the Commission, the State reported on the creation in 2005 of the Office of the Assistant Attorney General for Legal Affairs and Attention to Crime Victims.<sup>56</sup>

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<sup>51</sup> Amnesty International, *Mexico: Indigenous Women and Military Injustice*, AI: AMR 41/033/2004, November 23, 2004, p. 6, available at: <http://www.amnesty.org/es/library/asset/AMR41/033/2004/es/c9fa2e2d-d57c-11dd-bb24-1fb85fe8fa05/amr410332004es.pdf>; Annex 3.

<sup>52</sup> IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, Specific Recommendations for States; Annex 1.

<sup>53</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

<sup>54</sup> United Nations, *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)*, 2001, paragraph 87.

<sup>55</sup> United Nations, *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)*, 2001, paragraph 216.

<sup>56</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

100. In connection with this, the Commission would like to note that the Mexican State has acknowledged:

The institutional violence, the indifference and discrimination suffered by indigenous women at the hands of personnel associated with health institutions and instances to impart justice, poorly trained and insensible to the poverty conditions and cultural diversity of these women.<sup>57</sup>

101. In light of these considerations, the Commission asks the Court to rule that the Mexican State is responsible for violating Article 5.1 and Article 11 of the American Convention on Human Rights with respect to Inés Fernández Ortega, in conjunction with Article 1.1 thereof, through the rape perpetrated by members of the armed forces as well as through the harm suffered as a result of the state authorities' deficient investigation of that sexual attack.

## 2. Rape as torture

102. Torture and cruel, inhuman, or degrading punishments and treatment are strictly prohibited by international human rights law. The absolute prohibition of torture, both physical and mental, is currently part of the international *jus cogens*.<sup>58</sup>

103. Within the inter-American system, the definition of what acts constitute torture is set out in the Inter-American Convention to Prevent and Punish Torture, which states:

Torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.<sup>59</sup>

104. The Inter-American Convention to Prevent and Punish Torture, which was in force for Mexico at the time the incident occurred, provides:

Article 1:

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

Article 6:

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.

Article 8:

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<sup>57</sup> Submission by the Mexican State, IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, paragraph 202; Annex 1.

<sup>58</sup> I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 271.

<sup>59</sup> Inter-American Convention to Prevent and Punish Torture, Article 2.

The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.

105. In addition, this Convention provides that the following persons shall be held guilty of the crime of torture:<sup>60</sup>

- a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
- b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

106. At both the universal and regional levels, it has been established that a rape committed by state agents – either inside a detention center or outside in society at large – constitutes torture because of two factors: the status of the perpetrator and the purpose of the attack.

107. At the international level, in its final verdict in the *Čelebići* case, the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY”) expressly ruled that “there can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law.”<sup>61</sup> With reference to rape at the hands of state agents, the ICTY said that:

The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation.<sup>62</sup>

108. Similarly, the European Court of Human Rights has underscored the aggravating fact of the physical and psychological control that the perpetrator enjoys over his victim when he is an agent of the state:

Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep

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<sup>60</sup> Inter-American Convention to Prevent and Punish Torture, Article 3.

<sup>61</sup> Case No. IT-96-21-T, Judgment, paragraph 476, November 16, 1998. In: Louis Henkin *et al.*, *Human Rights*, Foundation Press, New York, 1999, pp. 380 and 381.

<sup>62</sup> Case No. IT-96-21-T, Judgment, paragraph 495, November 16, 1998. In: Louis Henkin *et al.*, *Human Rights*, Foundation Press, New York, 1999, p. 380 and 381.

psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence.<sup>63</sup>

109. As regards the requirement of the purpose behind the act, in the *Furundžija* case the ICTY stated:

As evidenced by international case law, the reports of the United Nations Human Rights Committee and the United Nations Committee Against Torture, those of the Special Rapporteur, and the public statements of the European Committee for the Prevention of Torture, this vicious and ignominious practice can take on various forms. International case law, and the reports of the United Nations Special Rapporteur evince a momentum towards addressing, through legal process, the use of rape in the course of detention and interrogation as a means of torture and, therefore, as a violation of international law. Rape is resorted to either by the interrogator himself or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person.<sup>64</sup>

110. The Commission must add that the ICTY Appeals Chamber, in the case of *Kunarac, Kovač, and Vuković*, went a step further and ruled that to establish that the crime of torture had been committed, it was enough to determine that a perpetrator had acted in such a way as to cause his victims severe pain and suffering, either physical or mental, even if his motivation was “exclusively sexual.”<sup>65</sup> In that same case, the ICTY Appeals Chamber held that the “severe pain and suffering” required by the definition of the crime of torture can be said to be established once rape has been proved, since the act of rape necessarily implies pain or suffering.<sup>66</sup>

111. With regard to the place where the rape takes place, the United Nations Committee against Torture has also stated that rape can constitute torture even when it takes place outside a detention center, emphasizing the control that a state agent can bring to bear over a victim in other settings.<sup>67</sup> Thus, the Committee stated that:

In assessing the risk of torture in the present case, the Committee considers that the complainant was clearly under the physical control of the police even though the acts concerned were perpetrated outside formal detention facilities [...] Therefore, the Committee believes that the sexual abuse by the police in this case constitutes torture even though it was perpetrated outside formal detention facilities.<sup>68</sup>

112. In the inter-American system, the Commission has determined that for torture to exist, three elements must be present:<sup>69</sup>

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<sup>63</sup> European Court of Human Rights, *Aydin v. Turkey* (57/1996/676/866), Judgment of September 25, 1997, paragraph 83.

<sup>64</sup> ICTY, *Prosecutor v. Anto Furundžija*, Judgment of December 10, 1998, paragraph 163, upheld on appeal by the Appeals Chamber of the ICTY in a judgment of July 21, 2000.

<sup>65</sup> ICTY, Appeals Chamber, *Prosecutor v. Kunarac, Kovač, and Vuković*, Judgment of June 12, 2002, paragraph 153.

<sup>66</sup> ICTY, Appeals Chamber, *Prosecutor v. Kunarac, Kovač, and Vuković*, Judgment of June 12, 2002, paragraph 151.

<sup>67</sup> In the case of *V.L. v. Switzerland*, the petitioner claimed that prior to leaving Belarus, she was constantly interrogated and raped by three police officers who wanted information about her husband's whereabouts. United Nations Committee Against Torture, *V.L. v. Switzerland*, CAT/C/37/D/262/2005, November 20, 2006.

<sup>68</sup> United Nations Committee Against Torture, *V.L. v. Switzerland*, CAT/C/37/D/262/2005, November 20, 2006, paragraph 8.10.

<sup>69</sup> IACHR, Report No. 5/96, Case 10.970, *Raquel Martín de Mejía*, Peru, March 1, 1996.

1. it must be an intentional act through which physical and mental pain and suffering is inflicted on a person;
2. committed with a purpose;
3. and committed by a public official or by a private person acting at the instigation of the former.

113. In analyzing these elements in the case of Raquel Martín Mejía, in which the victim was raped on two occasions by members of the military in her own home, after she and her husband were accused of being subversive members of the Túpac Amaru Revolutionary Movement,<sup>70</sup> the Commission determined that the Peruvian State was responsible for acts of torture. The Commission stressed the physical and mental suffering inherent in rape, and how it can be used as a form of psychological torture because its goal, in many cases, is to humiliate not only the victim, but also her family or her community:

Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.<sup>71</sup>

114. The Commission also found in its analysis that Raquel Martín Mejía “was raped with the aim of punishing her personally and intimidating her.”<sup>72</sup>

115. Similarly, in its report on the merits in the case of Ana, Beatriz, and Celia González Pérez, who were sexually assaulted during an illegal interrogation conducted by members of the armed forces in an armed conflict area, the Commission found that those abuses of the physical, mental, and moral integrity of the three Tzeltal sisters committed by the agents of the Mexican State constituted torture.<sup>73</sup> Given the manner in which they were assaulted, the accusations made against them, and the serious threats they received, the Commission maintained that the military officers wanted to humiliate and punish the women for their alleged links with the rebels.<sup>74</sup>

116. In turn, the Inter-American Court has ruled that acts of violence sexual inflicted on women detainees constituted torture.<sup>75</sup> In its analysis, the Inter-American Court found explicitly that “the women [...] were subject to the complete control and power of State agents, absolutely defenseless.”<sup>76</sup> The Court also ruled that the sexual rape of a detainee by a state agent is an especially gross and reprehensible act, taking into account the victim’s vulnerability and the abuse of power displayed by the agent.<sup>77</sup> The Court stressed that sexual rape is an extremely traumatic

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<sup>70</sup> IACHR, Report No. 5/96, Case 10.970, *Raquel Martín de Mejía*, Peru, March 1, 1996.

<sup>71</sup> IACHR, Report No. 5/96, Case 10.970, *Raquel Martín de Mejía*, Peru, March 1, 1996.

<sup>72</sup> IACHR, Report No. 5/96, Case 10.970, *Raquel Martín de Mejía*, Peru, March 1, 1996.

<sup>73</sup> See: IACHR, Report No. 53/01 (Merits), Case 11.565, *Ana, Beatriz, and Celia González Pérez*, Mexico, April 4, 2001.

<sup>74</sup> IACHR, Report No. 53/01 (Merits), Case 11.565, *Ana, Beatriz, and Celia González Pérez*, Mexico, April 4, 2001, paragraph 51.

<sup>75</sup> I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 312.

<sup>76</sup> I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 307.

<sup>77</sup> I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Merits, Reparations, and Costs, Judgment of November 25, 2006, Series C No. 160, paragraph 311.

experience that may have serious consequences and it causes great physical and psychological damage that leaves the victim “physically and emotionally humiliated,” a situation that in contrast to what happens with other traumatic experiences, is difficult to overcome with time.<sup>78</sup>

117. Based on the development of international and regional standards, the Commission believes that a rape committed by a state agent will invariably cause the intimidation, humiliation, and/or coercion of the victim, along with other prohibited goals and purposes identified in the international standards related to torture. This is because of the severe and lasting physical and mental suffering inherent in all acts of rape, on account of its nonconsensual and invasive nature that affects the victim, her family, and the community. This situation is exacerbated when the perpetrator is a state agent, because of the physical and psychological power that the attacker can abusively bring to bear over the victim through his position of authority.

118. In accordance with the applicable international standards and the Commission’s own case law, the facts of the instant case entail the commission of the crime of torture.<sup>79</sup> The Commission therefore asks the Court to rule that the abuse of Inés Fernández Ortega’s physical, mental, and moral integrity, committed by agents of the Mexican State, constitutes torture.

### 3. Regarding the victim’s next-of-kin

119. The Inter-American Court has held that under the general obligation of states parties to respect and ensure the rights of all individuals subject to their jurisdiction set out in Article 1.1 of the American Convention, the State has the duty of starting, immediately and on its own initiative, an effective investigation to identify, prosecute, and punish the guilty when a complaint has been made or good reason exists to believe that an act of torture has been committed in violation of Article 5 of the American Convention. In the case at hand, as has already been seen, the State did not act in accordance with those precepts.<sup>80</sup>

120. At the hearing held before the Commission during its 130th regular session, the petitioners stated that Inés Fernández Ortega “faces serious problems with her husband because of the cultural view of a woman’s reproductive function that prevails in Tlapanec communities.”<sup>81</sup> That situation has also affected her children, in that “her children cannot go to school when soldiers are around, and she doesn’t leave her community because of the justifiable fear felt toward the military.”<sup>82</sup> The State, for its part, in the hearing on the merits of the case, offered Inés Fernández Ortega psychological support and legal counsel through the office of the Assistant Attorney General for Legal Affairs and Attention to Crime Victims,<sup>83</sup> but it made no comparable offer to her next-of-kin.

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<sup>78</sup> I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Merits, Reparations, and Costs, Judgment of November 25, 2006, Series C No. 160, paragraph 311.

<sup>79</sup> IACHR, Report on Merits No. 53/01, *Ana, Beatriz, and Celia González Pérez*, Mexico.

<sup>80</sup> I/A Court H. R., *Case of Tibi*, Judgment of September 7, 2004, Series C No. 114, paragraph 159.

<sup>81</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

<sup>82</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

<sup>83</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4. The hearing was told that this office to support the victims of crime was created only recently.

121. Article 5.1 of the American Convention stipulates that “every person has the right to have his physical, mental, and moral integrity respected.” Based on international human rights case law, under certain circumstances, the anguish and suffering imposed on the close relatives of the victims of serious human rights violations also constitute a violation of the right of those persons to humane treatment.<sup>84</sup> Among the elements to be considered are the existence of close family ties, the particular circumstances of the bond with the victim, and the way in which the family witnessed the violations or was involved in the quest for justice, in light of the subsequent actions or omissions of the state authorities in connection with the facts.<sup>85</sup>

122. The Commission believes that Inés Fernández Ortega’s next-of-kin were affected in their personal integrity both as a consequence of the facts of the complaint and because of the actions and omissions of the authorities in investigating Inés Fernández Ortega’s torture allegations. In the case at hand, it has been shown that numerous circumstances affected the members of Inés Fernández Ortega’s family, such as the way in which her daughter witnessed her rape and torture, the feelings of powerlessness and insecurity that Inés Fernández Ortega’s family experienced at the presence of the Mexican Army operating in the area in which they live, the impact on their relations with their own indigenous community, and others.

123. In consideration whereof, the Commission asks the Court to declare that the Mexican State is responsible for violating Article 5.1 of the American Convention, in conjunction with Article 1.1 thereof, with respect to Inés Fernández Ortega’s next-of-kin.

**B. Violation of the right to a fair trial and judicial protection (Articles 8 and 25 of the American Convention, in conjunction with Article 1.1 thereof)**

**1. General considerations**

124. The inter-American human rights system has affirmed the obligation of states to act with due diligence in connection with human rights violations.<sup>86</sup> This duty includes four obligations: preventing, investigating, punishing, and providing redress for human rights violations.<sup>87</sup> In this regard, the Inter-American Court has ruled that:

This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, states must prevent, investigate, and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.<sup>88</sup>

125. The state’s obligation to act with due diligence includes facilitating access to suitable, effective judicial remedies for dealing with human rights violations.<sup>89</sup> The Inter-American

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<sup>84</sup> IACHR, Report No. 53/01 (Merits), *Ana, Beatriz and Celia González Pérez*, Mexico, April 4, 2001.

<sup>85</sup> I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Merits, Reparations, and Costs, Judgment of November 25, 2006, Series C No. 160, paragraph 335; I/A Court H. R., *Case of Servellón García et al.*, Merits, Reparations, and Costs, Judgment of September 21, 2006, Series C No. 152, paragraph 128; and I/A Court H. R., *Bámaca Velásquez Case*, Reparations and Costs, Judgment of February 22, 2002, Series C No. 91, paragraph 163.

<sup>86</sup> See: I/A Court H. R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No. 4.

<sup>87</sup> See: I/A Court H. R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No. 4.

<sup>88</sup> I/A Court H. R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No. 4, paragraph 166.

<sup>89</sup> IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007; Annex 1.

Court has ruled that all individuals who have suffered a violation of their human rights are entitled “to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention.”<sup>90</sup> The Inter-American Court has also stated that the power of access to justice must ensure, within a reasonable period of time, the right of the alleged victims or their next of kin that everything possible be done to know the truth of what happened and that the possible responsible parties be punished.<sup>91</sup>

126. Article 25 of the American Convention provides 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.
2. The States Parties undertake:
  - a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
  - b. to develop the possibilities of judicial remedy; and,
  - c. to ensure that the competent authorities shall enforce such remedies when granted.

127. Similarly, Article 8.1 of the American Convention stipulates:

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.

128. The protection of these rights is strengthened by Article 1.1 of the American Convention. In this regard, the Inter-American Court of Human Rights has ruled that:

Article 25, read in conjunction with Article 1.1 of the American Convention, requires the State to guarantee to all persons access to the administration of justice and, in particular, to prompt and simple recourse for, among other results, having the persons responsible for human rights violations judged, and to obtain reparations for the harm suffered... Article 25 “is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society.” That article is closely linked to Article 8.1, which provides that every person has the right to a hearing, with due guarantees [...] for the determination of his rights, whatever their nature.<sup>92</sup>

129. The main objectives of the regional human rights system and the principle of effectiveness require that those guarantees be upheld. Consequently, when exercise of any of those rights is not yet guaranteed *de jure* and *de facto* by a state within the sphere of its jurisdiction,

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<sup>90</sup> I/A Court H. R., *Barrios Altos Case*, Judgment of March 14, 2001, Series C No. 75, paragraph 48.

<sup>91</sup> See: I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 382; I/A Court H. R., *Case of the Massacre of Pueblo Bello*, Judgment of January 31, 2006, Series C No. 140, paragraph 171.

<sup>92</sup> I/A Court H. R., *Loayza Tamayo Case*, Reparations, Judgment of November 27, 1998, Series C No. 42, paragraph 169; I/A Court H. R., *Velásquez Rodríguez Case*, Preliminary Objections, Judgment of June 26, 1987, Series C No. 1, paragraph 91; I/A Court H. R., *Fairén Garbí and Solís Corrales Case*, Preliminary Objections, Judgment of June 26, 1987, Series C No. 2, paragraph 90; I/A Court H. R., *Godínez Cruz Case*, Preliminary Objections, Judgment of June 26, 1987, Series C No. 3, paragraph 93.

under Article 2 of the American Convention it is required to adopt such legislative or other measures as may be necessary to enforce them. Thus, the duty of the state to provide judicial remedies is not limited to making them formally available to the victims, but also to ensuring that those remedies are suitable for remedying the human rights violations involved.<sup>93</sup> The Inter-American Court has ruled that:

The absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.<sup>94</sup>

130. Inter-American precedent stresses the importance of conducting an immediate, exhaustive, serious, and impartial investigation into human rights violations. The Court has held that the investigation must be undertaken:

In a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.<sup>95</sup>

131. Similarly, the Commission has stated that the investigation must not be “the product of a mechanical implementation of certain procedural formalities without the State genuinely seeking the truth”<sup>96</sup> but should instead be aimed at exploring all the possible lines of inquiry to identify the perpetrators of the crime with a view to their subsequent prosecution and punishment.

132. Accordingly, a state may be responsible for not “ordering, practicing, or evaluating” evidence that could be crucial for the due clarification of the incident.<sup>97</sup>

133. The Court has established that in order to comply with the obligation to investigate and punish in the instant case, the State must remove all the *de facto* and *de jure* obstacles and mechanisms that maintain impunity, must grant sufficient guarantees of security to witnesses,

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<sup>93</sup> In this connection, the Inter-American Court has ruled that: “In regards to this case, the Court considers that in order to satisfy the right to access to an effective remedy it is not sufficient that final judgments be delivered in the appeal for legal protection proceedings, ordering protection of plaintiffs’ rights. It is also necessary that there are effective mechanisms to execute the decisions or judgments, so that the declared rights are protected effectively. As it is established, one of the effects of the judgment is its binding character. The enforcement of judgments should be considered an integral part of the right to access to the remedy, encompassing also full compliance with the respective decision. The contrary would imply the denial of this right.” I/A Court H. R., *Case of Acevedo Jaramillo et al.*, Judgment of February 7, 2006, Series C No. 144, paragraph 220.

<sup>94</sup> I/A Court H. R., *The Street Children Case (Villagrán Morales et al.)*, Judgment of November 19, 1999, Series C No. 63, paragraph 235; I/A Court H. R., *Castillo Petruzzi Case*, Judgment of May 30, 1999, Series C No. 52, paragraph 185; I/A Court H. R., *Judicial Guarantees in States of Emergency* (Arts. 27.2, 25, and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987, Series A No. 9, paragraph 24.

<sup>95</sup> I/A Court H. R., *Godínez Cruz Case*, Judgment of January 20, 1989, Series C No. 5, paragraph 188; I/A Court H. R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No. 4, paragraph 177; I/A Court H. R., *The Street Children Case (Villagrán Morales et al.)*, Judgment of November 19, 1999, Series C No. 63, paragraph 226.

<sup>96</sup> IACHR, Report No. 55/97, Case 11.137, *Juan Carlos Abella et al.*, Argentina, November 18, 1997, paragraph 412.

<sup>97</sup> I/A Court H. R., *The Street Children Case (Villagrán Morales et al.)*, Judgment of November 19, 1999, Series C No. 63, paragraph 230.

judicial authorities, prosecutors, other judicial agents, and the next of kin of the victims, and must use all possible measures to advance the proceedings.<sup>98</sup>

134. Impunity, understood as “the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention” must be combated by the State through “all the legal means at its disposal [...] since impunity fosters chronic recidivism of human rights violations, and total defenseless of victims and their relatives.”<sup>99</sup>

135. To prevent impunity, the State has the obligation, under Article 1 of the American Convention, of respecting and ensuring the rights enshrined in the Convention:

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.<sup>100</sup>

136. In the following section the Commission will set out its specific claims regarding the violation of Articles 8.1 and 25 of the American Convention through the involvement in the case at hand of the military justice system and the investigation undertaken by state authorities following the complaint filed by Inés Fernández Ortega.

## **2. Involvement of the military justice system**

137. Article 13 of the Mexican Constitution provides as follows with respect to the military justice system:<sup>101</sup>

No one may be tried by private laws or special tribunals. No person or corporate body shall have privileges or enjoy emoluments other than those given in compensation for public services and which are set by law. Military jurisdiction shall be recognized for the trial of crimes against and violation of military discipline, but military tribunals shall in no case have jurisdiction over persons who do not belong to the army. Whenever a civilian is implicated in a military crime or violation, the corresponding civilian authority shall deal with the case.

138. Similarly, Article 57.II.A of the Code of Military Justice provides:

Article 57: The following are offenses against military discipline:

- II. Those covered by local or federal jurisdiction, when their commission involves any of the circumstances listed below:
  - (a) when committed by military personnel on active service or in actions related to that service.

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<sup>98</sup> I/A Court H. R., *Case of Carpio Nicolle et al.*, Judgment of November 22, 2004, Series C No. 117, paragraph 134.

<sup>99</sup> I/A Court H. R., *Loayza Tamayo Case*, Reparations (Art. 63.1 American Convention on Human Rights), Judgment of November 27, 1998, Series C No. 42, paragraph 170, citing: I/A Court H. R., *The “Panel Blanca” Case (Paniagua Morales et al.)*, Judgment of March 8, 1998, Series C No. 37, paragraph 173.

<sup>100</sup> IACHR, Report No. 54/01, Case 12.051, *Maria Da Penha Maia Fernandes*, Brazil, April 16, 2001, paragraph 42, citing: I/A Court H. R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No. 4, paragraph 176, and I/A Court H. R., *Godínez Cruz Case*, Judgment of January 20, 1989, Series C No. 5, paragraph 175.

<sup>101</sup> Political Constitution of the United Mexican States, Art. 13.

139. Article 37 of the Internal Service Regulations of Units, Agencies, and Installations of the Mexican Army and Air Force defines the term “service actions” in the following terms:

Service actions are those performed by members of the military within the military sphere, either in pursuit of a mission, pursuant to an order received, or in the performance of the operational or administrative functions for which they are competent, in accordance with their position in the hierarchy, posting, or commission, and in accordance with the laws, regulations, and rules of the Army and Air Force.<sup>102</sup>

140. In the instant case it has been established that on March 24, 2002, Inés Fernández Ortega, a Me’phaa (Tlapanec) indigenous woman, filed a complaint before the competent authority – the Public Prosecution Service for local jurisdiction crimes – alleging that members of the Mexican army had entered her home without her permission and raped her. The Mexican State’s response to this complaint was for the office of the Guerrero Attorney General to transfer the proceedings to the Military Prosecution Service on May 17, 2002, for it to continue the investigation of the complaint, since it involved evidence that could establish the participation of military personnel in the alleged facts.

141. The IACHR believes that the rape of Inés Fernández Ortega cannot be held to affect legal interests particular to the military order. Neither can it be considered an excess committed while the soldiers were performing the legitimate functions entrusted to them under Mexican law. It is the opinion of the IACHR that there is no link with any kind of activity inherent to the armed forces that could justify the intervention of military justice in the investigation of a complaint of rape perpetrated against a civilian.

142. In the Commission’s view, military justice should be used only to judge active-duty military officers for the alleged commission of service-related offenses in the strictest sense. Human rights violations must be investigated, tried, and punished in keeping with the law, by the regular criminal courts. Inverting the jurisdiction in cases of human rights violations should not be allowed, as this undercuts judicial guarantees, under an illusory image of the effectiveness of military justice, with grave institutional consequences, which in fact call into question the civilian courts and the rule of law.<sup>103</sup>

143. On that same point, the Inter-American Court has ruled that in democratic states, military criminal jurisdiction is to be restricted and exceptional in scope and be intended to protect special juridical interests associated with the functions that the law assigns to the armed forces.<sup>104</sup> Therefore, it must only try military men for the commission of crimes or offenses that due to their nature may affect military interests.<sup>105</sup> That same line was taken by the Constitutional Court of Colombia in its Judgment C-357/98 of August 5, 1997.<sup>106</sup>

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<sup>102</sup> Internal Service Regulations of Units, Agencies, and Installations of the Mexican Army and Air Force, *Official Journal of the Federation*, November 28, 2005.

<sup>103</sup> IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, doc.59 rev., June 2, 2000, Chapter II, paragraph 214.

<sup>104</sup> I/A Court H. R., *Case of Almonacid Arellano*, Judgment of September 26, 2006, Series C No. 154, paragraph 131.

<sup>105</sup> I/A Court H. R., *Case of Almonacid Arellano*, Judgment of September 26, 2006, Series C No. 154, paragraph 131; I/A Court H. R., *Case of Palamara Iribarne*, Judgment of November 22, 2005, Series C No. 135, paragraph 124; I/A Court H. R., *Case of the “Mapiripán Massacre,”* Judgment of September 15, 2005, Series C No. 134, paragraph 202; I/A Court H. R., *Case of the 19 Merchants*, Judgment of July 5, 2004, Series C No. 109, paragraph 165.

<sup>106</sup> IACHR, *Third Report on the Situation of Human Rights in Colombia*, Chapter V, paragraphs 31-32.

144. On earlier occasions, the Commission has held that “when the State permits investigations to be conducted by the entities with possible involvement, independence and impartiality are clearly compromised,” as a result of which it is “impossible to conduct the investigation, obtain the information, and provide the remedy that is allegedly available,” and what occurs is *de facto* impunity, which “has a corrosive effect on the rule of law and violates the principles of the American Convention.”<sup>107</sup>

145. The Inter-American Court has held that “any person subject to a proceeding of any nature before an organ of the State must be guaranteed that this organ is impartial and that it acts in accordance with the procedure established by law for hearing and deciding cases submitted to it.”<sup>108</sup>

146. As a result of their nature and structure, military courts do not meet the requirements of independence and impartiality imposed by Article 8.1 of the American Convention for cases involving human rights violations.<sup>109</sup>

147. Specifically in cases of torture, the Inter-American Court has ruled on the State’s obligation to conduct an effective investigation to identify, prosecute, and punish the perpetrators:

In the light of the general obligation to guarantee all persons under their jurisdiction the human rights enshrined in the Convention, established in Article 1.1 of the same, along with the right to humane treatment pursuant to Article 5 (Right to Humane Treatment) of said treaty, there is a state obligation to start *ex officio* and immediately an effective investigations that allows it to identify, prosecute, and punish the responsible parties, when there is an accusation or well-grounded reason to believe than an act of torture has been committed.<sup>110</sup>

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<sup>107</sup> IACHR, Report No. 53/01 (Merits), Case 11.565, *Ana, Beatriz, and Celia González Pérez*, Mexico, April 4, 2001.

<sup>108</sup> I/A Court H. R., *Case of Herrera Ulloa*, Judgment of July 2, 2004, Series C No. 107, paragraph 169; I/A Court H. R., *Constitutional Court Case*, Judgment of January 31, 2001, Series C No. 71, paragraph 77; I/A Court H. R., *Case of Almonacid Arellano*, Judgment of September 26, 2006, Series C No. 154, paragraph 130.

<sup>109</sup> IACHR, Report No. 53/01 (Merits), Case 11.565, *Ana, Beatriz, and Celia González Pérez*, Mexico, April 4, 2001, paragraph 81. The fact that the military courts are not suited to the investigation, prosecution, and punishment of cases involving human rights violations has been addressed by rulings of the Inter-American Commission:

The military criminal justice system has several unique characteristics which prevent access to an effective and impartial judicial remedy in this jurisdiction. First, the military justice system may not even be properly referred to as a true judicial forum. The military justice system does not form part of the judicial branch of the Colombian State. Rather, this jurisdiction is operated by the public security forces and, as such, falls within the executive branch. The decision-makers are not trained judges, and the Office of the Prosecutor General does not fulfill its accusatory role in the military justice system. IACHR, *Third Report on the Situation of Human Rights in Colombia* (1999), pp. 175 to 186.

Similarly, the Constitutional Court of Colombia has ruled:

For the military criminal justice system to have jurisdiction over a crime, there must be from the onset an evident link between the crime and the inherent activities of military service. In other words, the punishable act must come about as an excess or abuse of power that occurs in an activity directly linked to the role of the armed forces. The link between the criminal action and the activity related to military service breaks down when the crime is extremely serious, such as is the case with crimes against humanity. In such circumstances, the case must be referred to the civilian courts. Constitutional Court of Colombia, Decision C-358 of August 5, 1997.

<sup>110</sup> I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 345; I/A Court H. R., *Case of Vargas Areco*, Judgment of September 26, 2006, Series C No. 155, paragraph 79; I/A Court H. R., *Case of Gutiérrez Soler*, Judgment of September 12, 2005, Series C No. 132, paragraph 54; and I/A Court H. R., *Case of Baldeón García*, Judgment of April 6, 2006, Series C No. 147, paragraph 156. In this connection, see: Eur.C.H.R., *Case of İlhan v. Turkey* [GC], Judgment of June 27, 2000, App. No. 22277/93, paragraphs 92 and 93; and Eur.C.H.R., *Case of Assenov and others v. Bulgaria*, Judgment of October 28, 1998, App. No. 90/1997/874/1086,

148. This concern is shared by other international agencies that work to protect human rights. For example, during his visit to Mexico in 1998, the United Nations Special Rapporteur on Torture specifically recommended that the State ensure that human rights violations perpetrated by members of the armed forces against civilians be investigated and prosecuted under civilian jurisdiction:

88(j) Cases of serious crimes committed by military personnel against civilians, in particular torture and other cruel, inhuman or degrading treatment or punishment, should, regardless of whether they took place in the course of service, be subject to civilian justice.<sup>111</sup>

149. Similarly, the United Nations Special Rapporteur on the independence of judges and lawyers concluded that:

The want of impartiality of the military courts and the reluctance or unwillingness of civilian witnesses to appear before military courts to give evidence against military personnel are matters of concern.<sup>112</sup>

150. He also formulated the following recommendation for the Mexican State:

(d) With regard to the military and military courts: Crimes alleged to be committed by the military against civilians should be investigated by civilian authorities to allay suspicions of bias. In any event current legislation should be amended to provide for the civil judiciary to try cases of specific crimes of a serious nature, such as torture and killings, alleged to have been committed by the military against civilians outside the line of duty. Urgent consideration should be given to removing the military from policing public law and order in society.<sup>113</sup>

151. The problem of impunity in the military justice system is not tied only to the acquittal of defendants. Criminal investigations into human rights violations carried out by the military justice system impede access to an effective and impartial judicial remedy. When the military justice system conducts the investigation of a case, the possibility of an objective and independent investigation by judicial authorities which do not form part of the military hierarchy is precluded. Investigations into the conduct of members of the State's security forces carried out by other members of those same security forces generally serve to conceal the truth rather than to reveal it. Thus, when an investigation is initiated in the military justice system, a conviction will probably be impossible even if the case is later transferred to the civil justice system. The military authorities will probably not have gathered the necessary evidence in an effective and timely manner.<sup>114</sup>

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...cont.

paragraph 102. See also: IACHR, Report No. 53/01, Case 11.565, *Ana, Beatriz, and Celia González Pérez*, Mexico, April 4, 2001.

<sup>111</sup> United Nations, Report of the Special Rapporteur on Torture, Report E/CN.4/1998/Add.2, January 14, 1998. United Nations, Matter of the human rights of all persons submitted to any form of detention or imprisonment, and especially torture and other cruel, inhuman, or degrading treatments or punishments, Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1997/38, E/CN.4/1998/38/Add.2, January 14, 1998, paragraph 86.

<sup>112</sup> United Nations, Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Dato'Param Coomaraswamy, E/CN.4/2002/72/Add., January 24, 2002, p. 44.

<sup>113</sup> United Nations, Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Dato'Param Coomaraswamy, E/CN.4/2002/72/Add., January 24, 2002, p. 48.

<sup>114</sup> IACHR, *Third Report on the Situation of Human Rights in Colombia*, Chapter V.

152. During the processing of this case by the Commission, the State maintained that the military justice system became involved to determine whether there had been a breach of military discipline:

When a member of the military engages in unlawful conduct not related to military service, he or she is tried by the civilian courts. In this respect, I wish to clarify that the intervention or preliminary inquiry initiated by the Military Prosecution Service in this case was exclusively to verify if there was an infraction of military discipline; at no time was jurisdiction requested or assumed, in other words, the substance of the investigation, and the closing of the inquiry was for the verification of whether the personnel deployed in these areas, for example, as was remarked before, that has the function of enforcing the law on firearms and the permanent fight against drug trafficking, which is rife in this area, as has already been documented, and military presence is because of staff assigned to these areas, without entering into the communities, to verify that military personnel has not left these military bases of operations and engaged in unlawful conduct, in a dereliction of duty.<sup>115</sup>

153. According to the State, “the preliminary inquiry initiated by the Military Prosecution Service was exclusively to verify if there was an infraction of military discipline.” In this regard, the Commission notes that the civilian justice system declined jurisdiction in favor of military justice on May 17, 2002, and it was not until March 28, 2006, that it reassumed jurisdiction. In other words, it took the military justice system almost four years to determine that there had been no infraction of military discipline, thus delaying a timely and effective investigation.

154. The instant case is steeped in impunity, in that more than six years after the human rights violations established herein were committed and reported, the State has not met its duty of investigating, prosecuting, and punishing those responsible for the actions denounced by Inés Fernández Ortega, nor has it made amends for the harm arising from those violations. On the contrary, the State failed in its duty of due diligence in investigating the matter and transferred the investigation to the military justice system, which clearly lacks competence over the substance of the case as well as the impartiality necessary to establish the facts in accordance with due process.

155. The Mexican State informed the Commission that the proceedings in this case are currently before the regular courts: in other words, that the State has remedied, on its own initiative, the initial violation of that right. The State said that “to avoid undermining the constitutional rights of Mrs. Inés Fernández Ortega,”<sup>116</sup> it referred the investigation to the office of the Guerrero Attorney General for Justice for it to decide, within the scope of its jurisdiction, how to lawfully proceed. According to the State, the office of the Attorney General for Justice of the state of Guerrero took up the investigation “against the person or persons responsible for the facts object of the complaint, given that there was the possibility of the involvement of civilians, and sent a communication to the zone coordinator of the Ministerial Police of the state of Guerrero, for him to engage in the investigation of the facts.”<sup>117</sup>

156. In similar situations, the Court has ruled that the transfer of the proceedings to the regular courts is not enough for the State to comply in full with its international commitments derived from the American Convention.<sup>118</sup> According to the State, upon the return of the case to its jurisdiction, the civilian justice system recommenced the investigation exclusively with respect to

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<sup>115</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

<sup>116</sup> Communication from the State in note OEA-01761, dated July 4, 2007; Appendix 3.

<sup>117</sup> Communication from the State in note OEA-01761, dated July 4, 2007; Appendix 3.

<sup>118</sup> I/A Court H. R., *Case of Escué Zapata*, Judgment of July 4, 2007, Series C No. 165, paragraph 106.

the possible involvement of civilians.<sup>119</sup> This claim was corroborated at the merits hearing on the case held at the IACHR in October 2007.<sup>120</sup> The IACHR believes that the military justice system's partial transfer of jurisdiction for the investigation of civilians alone is incompatible with the American Convention on Human Rights.

157. On an earlier occasion, the Court held that "the next investigation should be conducted using all available legal means and directed at determining the truth and the pursuit, capture, prosecution and punishment of all the masterminds and perpetrators of the facts, whatever the nature of their involvement in the case."<sup>121</sup>

158. In consideration of the foregoing, the Inter-American Commission asks the Court to rule that by allowing the matter to be investigated by the military justice system for more than four years, the State incurred in a violation of Articles 8.1 and 25 of the American Convention, in conjunction with Article 1.1 thereof.

### **3. Investigation initiated after Inés Fernández Ortega filed her complaint**

159. During processing by the Commission, the State argued that there was insufficient evidence to accuse members of the Mexican Army of rape, based on the medical communication issued by the Ayutla Hospital which states that from the examination practiced on March 25, 2002, it can be inferred that Inés Fernández Ortega had no signs of physical assault and that although sperm cells were found, that report is questionable because it the finding was made three days after the facts reported had occurred. In turn, the petitioners claimed before the Commission that the gynecological studies performed established the presence of sperm cells, but that due to handling irregularities, the samples were destroyed by the authorities.

160. After analyzing the facts and evidence now placed before the Court, the Commission concluded that the State's investigation of the facts was marked by grave shortcomings. In the first place, the Commission finds glaring negligence on the part of the State's expert services when they destroyed the slides containing items of evidence items relevant to the case, thus obstructing the possibility of identifying those responsible for the torture reported by Inés Fernández Ortega and consequently impeding her access to justice.

161. Second, the expert services and authorities did not foresee the need to carry out DNA tests, even though the complaint was for the crime of rape. In this regard, in Recommendation 48/2003, the National Human Rights Commission held that the actions of the personnel attached to the General Directorate of Expert Services of the office of the Guerrero Attorney General were inconsistent, because when the studies gave a positive result for the existence of spermatozoids with the technique applied, it was possible to establish whether the sample contained semen; therefore, there was a lack of foresight on the part of those who performed the tests when they did not return the examined slides and the swabs. The National Human Rights Commission also stated that the tests carried out did not entail the use of destructive techniques, and therefore samples are not consumed in the process of their application.

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<sup>119</sup> Communication from the State in note OEA-01761, dated July 4, 2007; Appendix 3.

<sup>120</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4.

<sup>121</sup> I/A Court H. R., *Case of Escué Zapata*, Judgment of July 4, 2007, Series C No. 165, paragraph 106; I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Merits, Reparations, and Costs, Judgment of November 25, 2006, Series C No. 160, paragraph 256; I/A Court H. R., *Case of Goiburú et al.*, Judgment of September 22, 2006, Series C No. 153, paragraph 117; and I/A Court H. R., *Case of Servellón García et al.*, Judgment of September 21, 2006, Series C No. 152, paragraph 119.

162. The National Human Rights Commission's report clearly establishes that the scientific investigation method applicable to semen samples as biological evidence of a crime was not followed, in that the samples received and the results obtained were not recorded in either photographs or video recordings. Thus, the omissions on the part of the personnel of the General Directorate of Expert Services of the office of the Guerrero Attorney General caused the loss of evidence related to the investigation that would have allowed access to more data, most particularly the possibility of determining the identity of those likely to be responsible for the criminal acts under investigation.<sup>122</sup>

163. Third, the Commission observes that Dr. Griselda Radilla López, who examined Inés Fernández Ortega, did not have the specialization required to carry out the appropriate evaluation, since she was not a forensic expert but a general physician. Therefore, she did not have the specialized knowledge needed to attend to victims of crimes of this type. The Commission notes that the fact that a general practitioner carried out the tests had negative repercussions on the results of Inés Fernández Ortega's examination. The United Nations Commission on Human Rights has defined a series of principles to be taken into account by medical practitioners in investigating torture allegations.<sup>123</sup> The "accurate written report" to be prepared promptly by the medical expert is to include, at the least, the following information:

- (i) Circumstances of the interview: name of the subject and affiliation of those present at the examination; the exact time and date; the location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g. detention centre, clinic, house, etc.); the circumstances of the subject at the time of the examination (e.g. nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanour of those accompanying the prisoner, threatening statements to the examiner, etc.); and any other relevant factor.
- (ii) History: a detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, the times when torture or ill-treatment is alleged to have occurred and all complaints of physical and psychological symptoms.
- (iii) Physical and psychological examination: a record of all physical and psychological findings on clinical examination including appropriate diagnostic tests and, where possible, colour photographs of all injuries.
- (iv) Opinion: an interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment and/or further examination.
- (v) Authorship: the report should clearly identify those carrying out the examination and should be signed.

164. In clear violation of these United Nations parameters, the medical notes regarding the examination of Inés Fernández Ortega only indicate the following: "Female patient, 27 years of age, native of Barranca Tecuani, municipality of Ayutla, from the Mixtec area, states that three days ago she was raped." The report requests the following laboratory exams: GUT, VDRL PT, VAGINAL SECRETION EXUDATE, AND SEARCH FOR ACTIVE SPERMATOZOIDS.<sup>124</sup> The medical examination focused on a physical and gynecological examination, ignoring the parameters established by the United Nations and failing to consider any psychological issues.

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<sup>122</sup> National Human Rights Commission, Recommendation No. 48/2003; Annex 20.

<sup>123</sup> United Nations, Torture and other cruel, inhuman or degrading treatment or punishment, "Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment," Annex, E/CN.4/RES/2000/43, April 20, 2000.

<sup>124</sup> Medical examination report, dated March 25, 2002, issued by Dr. Radilla López; Annex 7.

165. The Commission finds it remarkable that the state authorities did not diligently investigate the circumstances surrounding the facts object of the complaint because of the weight given to the “direct” evidence of rape.<sup>125</sup> In its report on *Access to Justice for Women Victims of Violence*, the IACHR stressed the need for evidence other than physical evidence and testimonies to be considered in ruling on cases of violence against women, particularly those involving sexual violence.<sup>126</sup>

166. The International Criminal Court’s Rules of Procedure and Evidence has established the factors that may prevent a victim from physically resisting a sexual attack, even when consent has not been given, and how those factors are to be taken into consideration in legal proceedings.<sup>127</sup> Rule 70 specifically states that in cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:<sup>128</sup>

- a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent;
- b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

167. The European Court of Human Rights has followed this line of reasoning, and has held that in cases of sexual violence, although it is sometimes in practice very difficult to prove the lack of consent in the absence of “direct” proof of rape such as traces of violence or direct witnesses, the authorities must explore all the facts and decide on the basis of an assessment of all the surrounding circumstances.<sup>129</sup>

168. Likewise, the Istanbul Protocol states that the most significant component of a medical evaluation may be the examiner’s assessment of the background information and demeanor of the individual, bearing in mind the cultural context of the woman’s experience.<sup>130</sup>

169. The National Human Rights Commission established in its Recommendation 48/2003 that the psychiatric report on Inés Fernández Ortega prepared by the medical expert assigned to the National Human Rights Commission stated that the alleged victim lived through a traumatic event. However, the IACHR has received no information indicating the existence of any psychological

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<sup>125</sup> European Court of Human Rights, *Case of M.C. v. Bulgaria*, Application No. 39272/98, December 4, 2003, paragraph 227.

<sup>126</sup> IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, paragraph 138; Annex 1.

<sup>127</sup> United Nations, Rule 70, Principles of evidence in cases of sexual violence, International Criminal Court, Rules of Procedure and Evidence, U.N.. Doc. PCNICC/2000/1/Add.1 (2000).

<sup>128</sup> United Nations, Rule 70, Principles of evidence in cases of sexual violence, International Criminal Court, Rules of Procedure and Evidence, U.N.. Doc. PCNICC/2000/1/Add.1 (2000).

<sup>129</sup> European Court of Human Rights, *Case of M.C. v. Bulgaria*, Application No. 39272/98, December 4, 2003, paragraph 181.

<sup>130</sup> United Nations, Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), 2001, paragraph 227.

evaluation and report on Inés Fernández Ortega. In fact, at the hearing on the merits of the case before the IACHR, six years after the facts and when the investigation was again under civilian jurisdiction, the State reported that, among the pending evidence to be gathered, was a psychological evaluation of the alleged victim.<sup>131</sup>

170. Taking together the actions of the state authorities in investigating the case, it can be seen that they fragmented the evidence, in breach of the principle of evidentiary unity: i.e., that evidence must be appraised as a whole, taking into consideration the relationships between its different components and the way in which different elements support or weaken others.

171. Based on the foregoing considerations, the Commission asks the Court to declare that the State failed in its duty of acting with due diligence in conducting a proper investigation, punishing the actions described in Inés Fernández Ortega's complaint, and avoiding impunity, in breach of Articles 8.1 and 25 of the American Convention, in conjunction with Article 1.1 thereof.

**C. Violation of the right to a life free of violence and discrimination (Article 7 of the Convention of Belém do Pará)**

172. The Convention of Belém do Pará, the instrument of the inter-American human rights system with the most ratifications,<sup>132</sup> establishes that the obligation of acting with due diligence has a special connotation in cases of violence against women. The Convention reflects the Hemisphere's shared concern about the seriousness of the problem of violence against women, its relationship with historical discrimination, and the need to adopt comprehensive strategies for preventing, punishing, and eradicating it. The Convention of Belém do Pará recognizes the critical link that exists between women's access to adequate judicial protection after suffering acts of violence, and the elimination of the problem of violence and of the discrimination that perpetuates it.

173. Article 7 of the Convention of Belém do Pará sets out a set of complementary and immediate obligations whereby states can ensure effective prevention, investigation, sanction, and redress in cases of violence against women. These include:

- a. Refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;
- b. Apply due diligence to prevent, investigate, and impose penalties for violence against women;
- c. Include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;
- d. Adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
- e. Take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;
- f. Establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;

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<sup>131</sup> CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega; Annex 4. In addition, the State indicated that the following matters were pending: an artist's sketch from the information provided by Inés Fernández Ortega; the ratification and/or expansion of the statements of Inés Fernández Ortega and Noemí Prisciliano Fernández; and taking statements from all relevant persons.

<sup>132</sup> The Convention of Belém do Pará has been ratified by 32 OAS member states.

- g. Establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and,
- h. Adopt such legislative or other measures as may be necessary to give effect to this Convention.

174. In addition, Article 9 of the Convention of Belém do Pará provides that the states parties shall take special account of women's vulnerability to violence by reason of, among others, their race or ethnic background or their socio-economically disadvantaged status.

175. As the Inter-American Court has held, Article 7.b of the Convention of Belém do Pará obliges states parties to act with due diligence in investigating and punishing violence against women.<sup>133</sup> That provision creates specific obligations and complements state obligations as regards complying with the rights enshrined in the American Convention.<sup>134</sup>

176. The IACHR has ruled that among the most important principles, the State's obligation in cases of violence against women includes the duty to investigate, prosecute, and punish the guilty, along with the duty to "prevent these degrading practices."<sup>135</sup> The Commission has also stated that judicial ineffectiveness in cases of violence against women creates a climate of impunity that is conducive to violence "since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts."<sup>136</sup>

177. The evidence enclosed with this application establishes that the investigation into the rape suffered by Inés Fernández Ortega was referred to the military justice system, which, as has been shown, clearly lacked jurisdiction over the matter. It also showcases the irregularities committed in the investigation of the complaint, such as the destruction of the expert test materials, which would have assisted in identifying the perpetrators.

178. From various sources and through the use of the mechanisms of the Inter-American system, the Commission has received information on the obstacles faced by indigenous women in obtaining access to justice, usually related to social exclusion and the ethnic discrimination they have historically suffered.<sup>137</sup> The IACHR, in its report on the merits in the case of the González Pérez sisters, underscored the fact that the pain and humiliation suffered by those women as victims of torture was aggravated by their being members of an indigenous group: first of all, because of their lack of knowledge of the language of their aggressors and of the other authorities, and also because they were repudiated by their own community as a consequence of the established violations.<sup>138</sup> In the instant case, in meeting with authorities, Inés Fernández Ortega had invariably to be accompanied by persons who spoke Spanish and who could communicate her reports, complaints, and claims to those public officials.

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<sup>133</sup> I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 378.

<sup>134</sup> I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 379.

<sup>135</sup> IACHR, Report No. 54/01, Case 12.051, *Maria Da Penha Maia Fernandes*, Brazil, April 16, 2001, paragraph 56.

<sup>136</sup> IACHR, Report No. 54/01, Case 12.051, *Maria Da Penha Maia Fernandes*, Brazil, April 16, 2001, paragraph 56.

<sup>137</sup> The most common definition of social exclusion is: a chronic shortage of opportunities and access to good quality basic services, to labor and credit markets, to proper physical conditions and infrastructure, and to the justice system.

<sup>138</sup> IACHR, Report No. 53/01 (Merits), Case 11.565, *Ana, Beatriz, and Celia González Pérez*, Mexico, April 4, 2001, paragraph 95.

179. The IACHR has further noted that the obstacles such women face in securing access to suitable and effective judicial remedies to redress the violations they suffer can be even more daunting in that they suffer from a combination of various forms of discrimination: as women, because of their ethnic or racial origin, and/or by virtue of their socio-economic status.<sup>139</sup>

180. Along the same lines, the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has spoken of the threefold discrimination and marginalization suffered by indigenous women:<sup>140</sup>

Indigenous women continue to be discriminated against and marginalized in many parts of the world. The threefold discrimination they suffer (for being women, indigenous and poor) marginalizes them even further – even compared with indigenous men – regarding economic and political opportunities for employment, social services, access to justice, and, more particularly, access to land and other productive resources.

181. In connection with this, the Commission has received information indicating that in cases involving the rape of indigenous women, instead of taking steps to conduct exhaustive and impartial investigations, the military investigators have frequently set about refuting the allegations, causing the burden of proof to fall on the victim. Amnesty International has said that: “Investigation mechanisms including lodging a complaint, the ratification process, initial investigations, visit to the site, identity parades, protection of witnesses, medical examinations have all been seriously deficient and have been conducted in a manner that at times has been both threatening and disrespectful. There has been virtually no oversight of the proceedings and certainly no accountability.”<sup>141</sup>

182. In this case, the Commission holds that the State failed in its duty of acting with due diligence to prevent, investigate, and punish violence against women, as required by Article 7 of the Convention of Belém do Pará, in that more than six years have gone by since the incident was reported and no suspects have been identified.

183. The judiciary is the first line of national defense for protecting the rights and individual freedoms of women, whence the importance of it giving an effective response to human rights violations. A suitable judicial response is indispensable to provide women victims of violence with a remedy for the crimes they suffer and for ensuring that they do not go unpunished.

184. However, the Commission notes with particular concern the low level of usage of the justice system among the victims of violence against women and their persistent mistrust of the courts’ ability to resolve the crimes they suffer. The reasons detected for this include the secondary victimization they can receive while attempting to report such offenses; the absence of judicial safeguards and guarantees to protect their dignity, safety, and privacy – as well as those of witnesses – during proceedings; the financial cost of judicial proceedings; and the geographical location of the agencies responsible for receiving accusations. Similarly, the IACHR notes with concern the lack of information available to victims and their next-of-kin about how to approach the judicial agencies responsible for affording protection and processing cases.

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<sup>139</sup> IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, paragraph 195; Annex 1.

<sup>140</sup> United Nations, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, A/HRC/4/32, February 27, 2007, paragraph 67.

<sup>141</sup> Amnesty International, *Mexico: Indigenous Women and Military Injustice*, AI: AMR 41/033/2004, November 23, 2004, p. 14, available at: <http://www.amnesty.org/es/library/asset/AMR41/033/2004/es/c9fa2e2d-d57c-11dd-bb24-1fb85fe8fa05/amr410332004es.pdf>; Annex 3.

185. The factors that influence how officers of the judiciary treat victims of violence include the social acceptance of violence and discrimination against women as normal patterns of behavior within the social structure, and the perception that the problem of violence against women belongs to the private sphere.

186. Another important obstacle to access to judicial protection by women victims of violence, noted by the Commission in the past, is the pronounced stigmatization they can suffer from their communities as victims of violence, and the shame they can feel in reporting such offenses.

187. The IACHR has received information about the obstacles faced by indigenous women in securing access to justice, particularly when they have been victims of rapes committed by state agents.<sup>142</sup>

188. Reports from institutions indicate that Inés Fernández Ortega's case reflects the general climate of impunity that surrounds the military justice system, since none of the guilty has been brought to justice.<sup>143</sup>

The women [...] who have dared to confront the very real cultural, economic and social barriers that exist to seek redress from the state have had to contend with a system that offers poor medical care, substandard forensic examinations and a judicial system that appears reluctant or incapable of providing even minimum guarantees of a successful outcome. The principal obstacle in these cases, however, has been the transfer of the cases to military jurisdiction which continues to demonstrate an alarming lack of accountability towards those who denounce serious human rights violations committed by military officials. This failure to investigate, hold accountable and bring to justice members of the armed forces suspected of being responsible for serious human rights violations is almost absolute and has been extensively documented by Amnesty International and other national and international non-governmental organizations.<sup>144</sup>

189. In its judgment in *The Plan de Sánchez Massacre v. Guatemala*, the Court said that: "Access to the State's justice system is very difficult for indigenous peoples, given the geographical distances and linguistic particularities. The courts usually hear them in Spanish and, even though there are interpretation services, insufficient importance is given to the task of the interpreters; also, the difference in cosmovisions makes this interpretation very difficult."<sup>145</sup> In addition, some judicial officials maintain attitudes of discrimination and racism toward the members of indigenous peoples,

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<sup>142</sup> IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007; Annex 1. Amnesty International maintains that the lack of due diligence negatively impacts other cases of violence against women, in that the victims and their families have to live with the serious consequences their denunciations have. Similarly, "this lack of justice has a profound knock-on effect on indigenous communities, particularly women, and how they respond to the presence of the military." Amnesty International, *Mexico: Indigenous Women and Military Injustice*, AI: AMR 41/033/2004, November 23, 2004, p. 5, available at: <http://www.amnesty.org/es/library/asset/AMR41/033/2004/es/c9fa2e2d-d57c-11dd-bb24-1fb85fe8fa05/amr410332004es.pdf>; Annex 3.

<sup>143</sup> Amnesty International, *Mexico: Indigenous Women and Military Injustice*, AI: AMR 41/033/2004, November 23, 2004, p. 5, available at: <http://www.amnesty.org/es/library/asset/AMR41/033/2004/es/c9fa2e2d-d57c-11dd-bb24-1fb85fe8fa05/amr410332004es.pdf>; Annex 3.

<sup>144</sup> Amnesty International, *Mexico: Indigenous Women and Military Injustice*, AI: AMR 41/033/2004, November 23, 2004, available at: <http://www.amnesty.org/es/library/asset/AMR41/033/2004/es/c9fa2e2d-d57c-11dd-bb24-1fb85fe8fa05/amr410332004es.pdf>; Annex 3.

<sup>145</sup> I/A Court H. R., *Case of the Plan de Sánchez Massacre*, Reparations and Costs, Judgment of November 19, 2004, Series C No. 116, p. 19, expert report of Augusto Willemsen-Díaz.

which serves as a major factor in discouraging those people from pursuing justice. On occasions, the costs of pursuing a trial and of hiring counsel to represent their interests can convince them to abandon their quest for justice in a given matter.

190. For the reasons given, the Commission asks the Court to declare that the Mexican State failed in its duty of acting with due diligence to prevent, investigate, and punish the acts of violence committed against Inés Fernández Ortega, in breach of Article 7 of the Convention of Belém do Pará.

**D. Noncompliance with the obligation of investigating and punishing torture (Articles 1, 6, and 8 of the Convention against Torture)**

191. The investigation that the State must undertake regarding alleged violations of Article 5.1 of the Convention is also specifically required by Articles 1, 6, and 8 of the Convention against Torture, whereunder states parties must take all steps that may be effective to prevent and punish all acts of torture within their jurisdiction, as well as to guarantee that torture cases are impartially examined.<sup>146</sup>

192. The Inter-American Court has said that when a complaint has been filed or when there are sufficient reasons to believe that an act of torture has been committed, the State has the obligation to immediately initiate an effective *ex officio* investigation to identify, prosecute, and punish the perpetrators, in accordance with the general obligation of ensuring all persons under its jurisdiction the human rights enshrined in the Convention as set out in Article 1.1 thereof in conjunction with the right to humane treatment.<sup>147</sup>

193. The Inter-American Court has stated that from the moment the Convention against Torture becomes effective, “the obligations undertaken under said treaty must be fulfilled by the State.”<sup>148</sup> Confronting the facts of this case with the above exposition reveals that the Mexican State conducted some judicial proceedings in connection with the incident; it is apparent, however, that the investigation carried out has not been adequate because, to date, the perpetrators have been neither identified nor punished. Regardless of whether the persons indicated were or were not responsible for the unlawful acts, the State should have initiated an exhaustive and impartial investigation to identify and punish the perpetrators.

194. The United Nations Committee against Torture, in its concluding observations on Mexico given in 1997, said:<sup>149</sup>

The fragility of the culture of respect for guarantees of the rights of individuals and insufficient awareness on the part of the various authorities of the importance of punishing torture harshly and in accordance with the law [...] are subjective factors which probably

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<sup>146</sup> I/A Court H. R., *Case of Baldeón García*, Judgment of April 6, 2006, Series C No. 147, paragraph 157; I/A Court H. R., *Case of Gutiérrez Soler*, Judgment of September 12, 2005, Series C No. 132, paragraph 54; and I/A Court H. R., *Case of Tibi*, Judgment of September 7, 2004, Series C No. 114, paragraph 159.

<sup>147</sup> I/A Court H. R., *Case of Baldeón García*, Judgment of April 6, 2006, Series C No. 147, paragraph 156; I/A Court H. R., *Case of Gutiérrez Soler*, Judgment of September 12, 2005, Series C No. 132, paragraph 54; and I/A Court H. R., *Case of Tibi*, Judgment of September 7, 2004, Series C No. 114, paragraph 159; I/A Court H. R., *Case of Ximenes Lopes*, Judgment of July 4, 2006, Series C No. 149, paragraph 148. See also: Eur.C.H.R., *Assenov and others v. Bulgaria*, No. 90/1997/874/1086, Judgment of October 28, 1998, paragraph 102; and Eur.C.H.R., *Ilhan v. Turkey* [GC], No. 22277/93, Judgment of June 27, 2000, paragraphs 89-93.

<sup>148</sup> I/A Court H. R., *Case of Vargas Areco*, Judgment of September 26, 2006, Series C No. 155.

<sup>149</sup> Committee against Torture, Report to the 52nd Session, Mexico, Supplement No. 44 (A/52/44), September 10, 1997.

make it more difficult fully to guarantee the fulfillment of the obligations imposed on the State party by the Convention

195. Having seen the facts and evidence now placed before the Court, the Commission asks it to declare that the failure to conduct an impartial investigation of torture, together with the impunity that the guilty parties to date enjoy, constitutes a failure to comply with the obligations set forth in Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

## **X. REPARATIONS AND COSTS**

196. In light of the facts alleged in this application and of the constant jurisprudence of the Inter-American Court, which establishes “that it is a principle of International Law that any violation of an international obligation that has caused damages triggers the duty to make adequate amends,<sup>150</sup> the Commission hereby submits to the Court its views on the reparations and costs that Mexican State must provide as a result of its responsibility in the human rights violations committed with respect to the victim and her next-of-kin.

197. In line with the Court’s Rules of Procedure, which grant individuals autonomous representation, the Commission will at this time simply outline the general guidelines related to reparations and costs it believes the Court should apply in the case at hand. The Commission understands that it falls to the victim and her representatives to substantiate their claims, in compliance with Article 63 of the American Convention and the Articles 24 *et al.* of the Rules of Procedure of the Court.

### **A. Obligation of making reparations**

198. One essential function of justice is to remedy the harm inflicted on the victim. This function must be expressed through rectification or restitution, and not only through compensation, which does not reset the moral balance nor return what was taken.

199. Article 63.1 of the American Convention provides that:

If the Court finds that there has been a violation of a right or freedom protected by [the] 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.

200. In turn, Article 7.g of the Convention of Belém do Pará states that:

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: [...]

- g. Establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies.

201. As the Court has consistently maintained in its jurisprudence, “Article 63.1 of the American Convention contains a rule of customary law that constitutes one of the fundamental

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<sup>150</sup> I/A Court H. R., *Case of Perozo et al.*, Judgment of January 28, 2009, Series C No. 195, paragraph 404; I/A Court H. R., *Case of Tristán Donoso*, Judgment of January 27, 2009, Series C No. 193, paragraph 170; and I/A Court H. R., *Case of Valle Jaramillo et al.*, Judgment of November 27, 2008, Series C No. 192, paragraph 198.

principles of contemporary international law on State responsibility. The occurrence of a wrongful act that is attributable to a State gives rise to the State's international liability, and its resulting duty to make reparation for and remove the consequences of the violation."<sup>151</sup>

202. Reparations are crucial in ensuring that justice is done in a given case, and they are the mechanism whereby the Court's decisions move beyond the realm of mere moral condemnation. Reparations are those measures that tend to make the effects of past violations disappear. Reparation of harm caused by a violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of restoring the situation that existed before the violation occurred.

203. If full restitution is not possible, as in the instant case, it is for the international court to determine a set of measures, in addition to ensuring the rights abridged, to address the consequences of the infractions, as well as ordering payment of a compensation for the damage caused.<sup>152</sup>

204. A respondent state may not invoke domestic legal provisions to modify or avoid complying with its obligations to redress, which are regulated in all their aspects (scope, nature, modes, and establishment of the beneficiaries) by international law.<sup>153</sup>

205. In the case at hand, the Inter-American Commission has shown that the Mexican State incurred in international responsibility for violating Articles 5 (right to humane treatment), 8 (right to a fair trial), 11 (right to privacy), and 25 (right to judicial protection) of the Convention, in conjunction with the general obligation of respecting and ensuring human rights enshrined in Article 1.1 thereof, and Article 7 of the Convention of Belém do Pará, with respect to Mrs. Inés Fernández Ortega; Articles 5 (right to humane treatment), 8 (right to a fair trial), and 25 (right to judicial protection) of the Convention, in conjunction with the general obligation of respecting and ensuring human rights enshrined in Article 1.1 thereof, with respect to Fortunato Prisciliano Sierra (husband of the victim), Noemí, Ana Luz, Colosio, Nelida and Neptalí Prisciliano Fernández (children of the victim), María Lidia Ortega (the victim's mother), Lorenzo† and Ocotlan Fernández Ortega (the victim's brothers); and in failing to abide by its obligations under Articles 1, 6, and 8 of the Convention against Torture.

206. Redress in the case at hand must serve to vindicate the rights of the victim and of her loved ones. It must serve to require the State to resolve this case and to take specific steps to prevent, punish, and eradicate gender-based violence. The impunity prevailing in this case and other similar cases in the state of Guerrero sends society the message that crimes of this kind are not a priority. It is vital that the reparations set in the case at hand transmit a message of prevention and protection. In this connection, the UN Special Rapporteur on violence against women, its causes,

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<sup>151</sup> I/A Court H. R., *Case of La Cantuta*, Judgment of November 29, 2006, Series C No. 162, paragraph 200; I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 414; I/A Court H. R., *Case of Montero Aranguren et al. (Detention Center of Catia)*, Judgment of July 5, 2006, Series C No. 150, paragraph 116.

<sup>152</sup> I/A Court H. R., *Case of La Cantuta*, Merits, Reparations, and Costs, Judgment of November 29, 2006, Series C No. 162, paragraph 201; I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 415; I/A Court H. R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.)*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2006, Series C No. 158, paragraph 143.

<sup>153</sup> I/A Court H. R., *Case of Cantoral Huamaní and García Santacruz*, Judgment of July 10, 2007, Series C No. 167, paragraph 190; I/A Court H. R., *Case of Zambrano Vélez et al.*, Judgment of July 4, 2007, Series C No. 166, paragraph 148; I/A Court H. R., *Case of La Cantuta*, Merits, Reparations, and Costs, Judgment of November 29, 2006, Series C No. 162, paragraph 200; I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 415.

and consequences and the Special Rapporteurs on the rights of women of the Inter-American Commission on Human Rights and of the African Commission on Human and Peoples' Rights made the following statement in a joint declaration:

We reiterate that international standards of human rights protect women from violence and discrimination by private non-state actors. States have a duty to take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise. States are held to a due diligence standard to prevent, prosecute, and punish those who commit violence against women and to take measures to permanently eradicate violence against women in their societies [...]

We highlight the fact that women who have been subjected to violence and discrimination generally lack access to effective judicial protection and remedies. Strategies must be implemented that involve law reform and, in particular, reform of the criminal justice system. Training is required for policy makers, police, judges, and prosecutors. There must also be provision of legal, medical and psychological counselling and adequate social services for the victims. States should use the education system and awareness-raising campaigns aimed at the general public to assist them in implementing international standards at the national level.<sup>154</sup>

## **B.      Reparation measures**

207. In circumstances such as those at hand, to remedy the situation of the victim and her next-of-kin, the State must meet the following obligations: "obligation of investigating and disclosing the facts that can be reliably established (truth); obligation of prosecuting and punishing the guilty (justice); obligation of making comprehensive reparations for the moral and material injuries inflicted (redress); and obligation of removing from the security forces all individuals known to have committed, ordered, or tolerated such abuses (creation of security forces worthy of a democratic state). These obligations are neither mutual alternatives nor optional; the responsible state must comply with each of them to the extent that it can and in good faith."<sup>155</sup>

208. The United Nations Special Rapporteur on the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights has classified the components of that right into four general categories: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.<sup>156</sup> In the opinion of the United Nations Special Rapporteur on the impunity of perpetrators of human rights violations, these measures include: the cessation of continuing violations; verification of the facts and full and public disclosure of the truth; an official declaration or a judicial decision restoring the dignity, reputation, and legal rights of the victim and/or of persons connected with the victim; an apology, including public acknowledgement of the facts and acceptance of responsibility, judicial or administrative sanctions against persons responsible for the violations; and the prevention of further violations.

209. In addition, the United Nations Commission on Human Rights has stated that:

In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice

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<sup>154</sup> Joint declaration of the Special Rapporteurs on women's rights, available at: <http://www.cidh.org/women/declaracion.mujer.htm>.

<sup>155</sup> Méndez, Juan E., "The Right to Truth in Serious Human Rights Violations," in: *The Application of Human Rights Treaties by National Courts*, CELS, 1997, p. 517.

<sup>156</sup> Principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law, prepared by Dr. Theodore Van Boven pursuant to Human Rights Sub-Commission decision 1995/117. E/CN.4/sub.2/1997/17.

by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>157</sup>

210. Similarly, the Court has said that reparations tend to eliminate the effects of the violations committed.<sup>158</sup> These measures cover the different ways in which a state can meet the international responsibility in which it incurred and, in accordance with international law, can be measures of restitution, compensation, rehabilitation, satisfaction, and guarantees of nonrepetition.<sup>159</sup>

211. In light of the above remarks, the Inter-American Commission seeks for the Court to order comprehensive measures of reparation; these would, in turn, send a message against the impunity that surrounds the vast majority of human rights violations in the member countries of the Organization of American States. That demands establishing and strengthening the judicial and administrative mechanisms that enable victims to obtain redress through *ex officio*, swift, fair, affordable, and accessible procedures.

212. In consideration of the criteria established by inter-American and universal jurisprudence, the Commission presents its conclusions and aspirations regarding the forms of redress due in the case of Inés Fernández Ortega and her next-of-kin.

#### **1. Measures of cessation**

213. Cessation of the wrongful conduct is essential once a state is determined to be responsible for human rights violations.<sup>160</sup>

214. The Court has consistently held that the identification of those responsible is a natural outcome of the obligations established by the Convention and a requirement for eliminating impunity.<sup>161</sup>

215. The Court has also held that impunity is a violation of the state's duty, that it is harmful to victims, their next-of-kin, and society as a whole, and that it fosters chronic recidivism of the human rights violations in question.

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<sup>157</sup> United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1996/17, *The Administration of Justice and the Human Rights of Detainees: Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law*, prepared by Mr. Theo Van Boven pursuant to Sub-Commission decision 1995/117 of May 24, 1996, paragraph 7.

<sup>158</sup> I/A Court H. R., *Case of La Cantuta*, Merits, Reparations, and Costs, Judgment of November 29, 2006, Series C No. 162, paragraph 202; I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 416; I/A Court H. R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.)*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2006, Series C No. 158, paragraph 144.

<sup>159</sup> See: United Nations, Final Report submitted by Theo Van Boven, Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights, E/CN.4/Sub.2/1990/10, July 26, 1990. See also: I/A Court H. R., *Blake Case*, Reparations (Art. 63.1 American Convention on Human Rights), Judgment of January 22, 1999, Series C No. 48, paragraph 31; I/A Court H. R., *Case of Suárez Rosero Case*, Reparations (Art. 63.1 American Convention on Human Rights), Judgment of January 20, 1999, Series C No. 44, paragraph 41.

<sup>160</sup> I/A Court H. R., *Castillo Páez Case*, Reparations (Art. 63.1 American Convention on Human Rights), Judgment of November 27, 1998, Series C No. 43, paragraph 52.

<sup>161</sup> In this regard, see: I/A Court H. R., *Case of Blanco Romero et al.*, Judgment of November 28, 2005, Series C No. 138, paragraph 94; I/A Court H. R., *Gómez Palomino Case*, Judgment of November 22, 2005, Series C No. 136, paragraph 76.

216. The Commission thus believes that an investigation is not just a measure of satisfaction; it is also a measure of cessation, since so long as the State is in noncompliance with its obligation of duly investigating, prosecuting, and punishing the human rights violations committed in the instant case, it is in continuing violation of the right established in Articles 8.1 and 25 of the Convention and of its obligation under Article 1.1 thereof, and in continuing violation of its obligations under Articles 1, 6, and 8 of the Convention against Torture.

217. The Court has stated on repeated occasions that all individuals, and society as a whole, have the right to be informed about incidents involving human rights violations.<sup>162</sup> Similarly, the United Nations Commission on Human Rights has recognized that for the victims of human rights violations, public knowledge of their suffering and the truth about the perpetrators and their accomplices are essential steps towards rehabilitation and reconciliation; consequently, it has urged states to intensify their efforts to provide victims of human rights violations with a fair and equitable process through which these violations can be investigated, and it has encouraged victims to participate in that process.<sup>163</sup>

218. The Court has also ruled that:

The State must also remove all *de facto* and legal mechanisms and obstacles that maintain impunity [...] it must provide sufficient security measures to the judicial authorities, prosecutors, witnesses, legal operators, and victims, and use all means available to it so as to expedite the proceeding.<sup>164</sup>

219. Pursuant to the Court's jurisprudence, and in light of the particular seriousness of the human rights violations in the case at hand, full redress requires the Mexican State to investigate the rape and torture of Inés Fernández Ortega with due diligence and in a serious, impartial, and exhaustive way, in order to clarify the historical truth of the incident and to prosecute and punish all those responsible, both the physical perpetrators and the masterminds behind it. To this end, it must adopt all the judicial and administrative measures necessary to complete the investigation before the regular courts, to locate, prosecute, and punish all those who participated in the incident, and to report on the outcome thereof. The State is also obliged to investigate and punish those responsible for the impunity, obstructions of justice, and concealments that have characterized this case.

220. On November 29, 1985, the General Assembly of the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>165</sup> according to

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<sup>162</sup> I/A Court H. R., *Case of Bueno Alves*, Merits, Reparations, and Costs, Judgment of May 11, 2007, Series C No. 164, paragraph 90; I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 347.

<sup>163</sup> E/CN.4/RES/2001/70.

<sup>164</sup> I/A Court H. R., *Case of Heliodoro Portugal*, Judgment of August 12, 2008, Series C No. 186, paragraph 246; I/A Court H. R., *Case of La Cantuta*, Judgment of November 29, 2006, Series C No. 162, paragraph 226; I/A Court H. R., *Case of Carpio Nicolle et al.*, Judgment of November 22, 2004, Series C No. 117, paragraph 134. See also: I/A Court H. R., *Case of Almonacid Arellano*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of September 26, 2006, Series C No. 154, paragraph 156.

<sup>165</sup> A/RES/40/34, *Access to justice and fair treatment*. "4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. 5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms. 6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially

which victims “are entitled to access to the mechanisms of justice and to prompt redress,” for which purpose “the views and concerns of victims [must] be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.”

221. Accordingly, the victim and her next-of-kin must be given full access and authority to appear at all phases and stages of those investigations, in accordance with domestic law and the provisions of the American Convention. The State must also ensure effective compliance with the decisions adopted by the domestic courts under this obligation. The result of this process must be made public, to make Mexican society aware of the truth.<sup>166</sup>

222. In addition, and as another means of cessation, the State must guarantee the security of the victim, her next-of-kin, and her representatives, since they have already suffered acts of harassment and persecution on account of their efforts to obtain justice in this case.

## 2. Measures of satisfaction

223. Satisfaction has been defined as all measures that the perpetrator of a violation is required to adopt under international instruments or customary law with the purpose of acknowledging the commission of an illegal act.<sup>167</sup> It takes place when, generally in sequential order, apologies or any other gesture showing acknowledgement of responsibility for the act in question are offered and, when applicable, the individuals responsible are prosecuted and punished.<sup>168</sup>

224. The serious nature of the facts in this case demands that, in addition to conducting an investigation, the State take steps intended to restore the victim’s dignity. Thus, the Commission asks the Court to order, *inter alia*:

- The public dissemination of the outcome of the domestic investigation and sanctioning process, in order to uphold the right to truth of the victim, her next-of-kin, and Mexican society as a whole;
- The publication, in a national newspaper, of whatever judgment the Court may hand down; and,
- A public acknowledgement of the State’s responsibility in the harm inflicted and in the grave violations perpetrated.

## 3. Guarantees of nonrepetition

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...cont.

where serious crimes are involved and where they have requested such information; (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system; (c) Providing proper assistance to victims throughout the legal process; (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.”

<sup>166</sup> I/A Court H. R., *Case of Tiu Tojin*, Judgment of November 26, 2008, Series C No. 190, paragraph 72; I/A Court H. R., *Case of Heliodoro Portugal*, Judgment of August 12, 2008, Series C No. 186, paragraph 247; I/A Court H. R., *Case of Huilca Tecse*, Judgment of March 3, 2005, Series C No. 121, paragraph 107; I/A Court H. R., *Case of the Serrano Cruz Sisters*, Judgment of March 1, 2005, Series C No. 120, paragraph 175.

<sup>167</sup> Brownlie, *State Responsibility*, Part 1. Clarendon Press, Oxford, 1983, p. 208.

<sup>168</sup> *Ibid.*

225. In addition, the Commission believes that the State is obliged to prevent the reoccurrence of human rights violations such as those in the instant case; consequently, it asks the Court to order Mexico to adopt, *inter alia*, the following measures:

- Impose on the military justice system a restrictive and exceptional scope, limited exclusively to the prosecution of members of the military for the commission of crimes or offenses that, by their nature, affect legal interests particular to the military order. In particular, take the legislative, administrative, and other measures necessary to ensure that the military justice system is disqualified from hearing human rights violations, particularly cases involving sexual violence;
- Design protocols to facilitate and encourage the effective, uniform, and transparent investigation of acts of physical, sexual, and psychological violence, including a description of the complexity of the evidence and a detailing of the minimum evidence that must be gathered to provide an adequate evidentiary grounding, in consideration of the international provisions set forth in the Istanbul Protocol;
- Develop training programs for state officials, taking into account the international provisions set forth in the Istanbul Protocol, to ensure those officials have the technical and scientific elements necessary for evaluating potential cases of torture or cruel, inhuman, or degrading treatment;
- Guarantee indigenous women access to justice through the design of a policy that respects their cultural identity; and,
- Implement permanent human rights education programs within all hierarchical levels of the Mexican Armed Forces, and include in the curriculum of those training programs a particular reference to international human rights instruments, specifically those related to the protection of the rights of women, particularly their right to a life free of violence and discrimination.

#### **4. Measures of rehabilitation**

226. Mexico must adopt measures for the medical and psychological rehabilitation of the victim and her next-of-kin. Those measures must include the design and implementation of mental health plans, arrived at in consensus between mental health professionals and indigenous women who have suffered rape, for their recovery, rehabilitation, and full reincorporation into the community.

#### **5. Measures of compensation**

227. The Court has established basic criteria that should guide fair compensation intended to make adequate and effective economic amends for harm arising from violations of human rights. The Court has also ruled that indemnification is merely compensatory in nature, and that it is to be granted in volume and fashion sufficient to repair both the material and the nonmaterial harm inflicted.<sup>169</sup>

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<sup>169</sup> I/A Court H. R., *Case of La Cantuta*, Merits, Reparations, and Costs, Judgment of November 29, 2006, Series C No. 162, paragraph 210; I/A Court H. R., *Case of Hilaire, Constantine, Benjamin et al.*, Judgment of June 21, 2002, Series C No. 94, paragraph 204; I/A Court H. R., *Garrido and Baigorria Case*, Reparations (Art. 63.1 American Convention on Human Rights), Judgment of August 27, 1998, Series C No. 39, paragraph 41.

228. The Commission believes that the Court must establish the compensation due to the various victims in this case in accordance with the criteria of equity that have always guided its decisions regarding reparations and in line with its existing jurisprudence.

### 5.1. Material damages

229. In its jurisprudence on reparations, the Court has been consistent in maintaining that material damages include consequential damages and future losses, together with nonmaterial and moral damages, for both the victims and, in certain cases, their immediate families.<sup>170</sup>

230. Consequential damages have been defined as the direct and immediate effect of the incident on property.<sup>171</sup>

231. In contrast, future losses are understood as the loss of economic income or benefits not accrued on account of a given circumstance, which can be quantified using certain measurable and objective indicators.<sup>172</sup>

232. Notwithstanding the claims that the representatives of the victim and her next-of-kin may submit at the appropriate point in the proceedings, the IACHR asks the Court to set an equitably determined sum of money as indemnification for the consequential damages and future losses, in exercise of its broad powers in this regard.

### 5.2. Nonmaterial damages

233. With respect to nonmaterial damages, the Court has stated that:

Non-pecuniary damage may include the suffering and affliction caused to the direct victims and to their next-of-kin and the impairment of values that are very significant for a person, together with changes, of a non-pecuniary nature, in the living conditions of victims or their next-of-kin. As it is not possible to assign a precise monetary equivalent to non-pecuniary damages, for purposes of integral reparation to the victims all that can be done is for them to receive compensation, and this in two ways. First, by means of the payment of an amount of money or by providing goods or services that can be appraised in monetary terms, to be determined by the Court through reasonable use of judicial discretion and in terms of equity. Secondly, by carrying out acts or public works whose scope or public repercussion have an effect in terms of the remembrance of the victims, recovery of their dignity, consolation to their relatives or issuing a message of official reproof of the violations of human rights involved and of commitment to avoid their repetition.<sup>173</sup>

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<sup>170</sup> I/A Court H. R., *Case of La Cantuta*, Merits, Reparations, and Costs, Judgment of November 29, 2006, Series C No. 162, paragraphs 213 and 214; I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 423; I/A Court H. R., *Case of Tibi*, Judgment of September 7, 2004, Series C No. 114.

<sup>171</sup> I/A Court H. R., *Case of La Cantuta*, Merits, Reparations, and Costs, Judgment of November 29, 2006, Series C No. 162, paragraph 215; I/A Court H. R., *Loayza Tamayo Case*, Reparations (Art. 63.1 American Convention on Human Rights), Judgment of November 27, 1998, Series C No. 42, paragraph 147; and I/A Court H. R., *Aloeboetoe et al. Case*, Reparations (Art. 63.1 American Convention on Human Rights), Judgment of September 10, 1993, Series C No. 15, paragraph 50.

<sup>172</sup> See, for example: I/A Court H. R., *Case of Carpio Nicolle et al.*, Judgment of November 22, 2004, Series C No. 117, paragraphs 105 *et seq.*; I/A Court H. R., *Case of De la Cruz Flores*, Judgment of November 18, 2004, Series C No. 115, paragraphs 151 and 152.

<sup>173</sup> I/A Court H. R., *Case of La Cantuta*, Merits, Reparations, and Costs, Judgment of November 29, 2006, Series C No. 162, paragraph 216; I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, paragraph 430; I/A Court H. R., *Case of the Ituango Massacres*, Judgment of July 1, 2006, Series C No. 148, paragraph 383; I/A Court H. R., *Case of the Massacre of Pueblo Bello*, Judgment of January 31, 2006, Series C No. 140, paragraph 254.

234. In the instant case, the Commission asks the Court, in light of the nature of the case, to set an equitably determined sum as compensation for nonmaterial damages.

### **C. Beneficiaries**

235. Article 63.1 of the American Convention requires that the consequences of a violation be remedied and that “fair compensation be paid to the injured party.” The persons entitled to this compensation are generally those who suffered direct harm as a result of the violation in question.

236. In accordance with the nature of the instant case, the beneficiaries of the reparations that the Court may order the Mexican State to provide are the victim, as already identified in this application, and her next-of-kin who suffered materials and/or nonmaterial harm as a consequence of the human rights violations described. According to information in the case file, her direct next-of-kin include:

- Fortunato Prisciliano Sierra (husband)
- Noemi Prisciliano Fernández (daughter)
- Ana Luz Prisciliano Fernández (daughter)
- Colosio Prisciliano Fernández (son)
- Nélide Prisciliano Fernández (daughter)
- Neptalí Prisciliano Fernández (son)
- María Lidia Ortega (mother)
- Lorenzo Fernández Ortega† (brother, deceased)
- Ocotlán Fernández Ortega (brother)

### **D. Costs and expenses**

237. In accordance with the Court’s consistent jurisprudence, costs and expenses must be included in the reparations described in Article 63.1 of the American Convention. This is because the activities pursued by the injured parties, their heirs, or their representatives in securing access to international justice imply expenditures and financial commitments that must be compensated.<sup>174</sup>

238. In the instant case the Commission requests that the Court, after hearing the representatives of the victim and her next-of-kin, order the reimbursement by the Mexican State of such reasonable and necessary costs and expenses as they duly evidence as originating from the processing of the case.

## **XI. CONCLUSION**

239. The rape and torture of Inés Fernández Ortega; the discrimination she suffered on account of her status as an indigenous woman; the lack of due diligence in investigating and punishing the people responsible for these facts; the use of the military justice system to investigate and prosecute human rights violations; the obstacles faced by indigenous people, women in particular, in securing access to justice; the failure to provide the victim and her next-of-kin with due redress; and the negative impact of the threats and harassment suffered by the victim, her next-of-kin, and her representatives constitute violations of the rights protected by Articles 5, 8, 11, and 25

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<sup>174</sup> I/A Court H. R., *Case of Perozo et al.*, Judgment of January 28, 2009, Series C No. 195, paragraph 417; I/A Court H. R., *Case of Tristán Donoso*, Judgment of January 27, 2009, Series C No. 193, paragraph 212; I/A Court H. R., *Case of Valle Jaramillo et al.*, Judgment of November 27, 2008, Series C No. 192, paragraph 243.

of the American Convention; failure to comply with the general obligation of respecting and ensuring those rights set forth in Article 1.1 thereof; a violation of Article 7 of the Convention of Belém do Pará; and noncompliance with the obligations established by Articles 1, 6, and 8 of the Convention against Torture.

## **XII. PETITION**

240. Based on the considerations of fact and law set out above, the Inter-American Commission on Human Rights asks the Court to conclude and declare that:

- a) The Mexican State is responsible for violating Articles 5 (right to humane treatment), 8 (right to a fair trial), 11 (right to privacy), and 25 (right to judicial protection) of the Convention, in conjunction with the general obligation of respecting and ensuring human rights enshrined in Article 1.1 thereof, with respect to Mrs. Inés Fernández Ortega;
- b) The Mexican State is responsible for violating Articles 5 (right to humane treatment), 8 (right to a fair trial), and 25 (right to judicial protection) of the Convention, in conjunction with the general obligation of respecting and ensuring human rights enshrined in Article 1.1 thereof, with respect to the following members of Mrs. Inés Fernández Ortega's family: Fortunato Prisciliano Sierra (husband), Noemí, Ana Luz, Colosio, Nelida, and Neptalí Prisciliano Fernández (children), María Lída Ortega (mother), and Lorenzo† and Ocotlan Fernández Ortega (brothers);
- c) The Mexican State is responsible for violating Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará) with respect to Mrs. Inés Fernández Ortega; and,
- d) The Mexican State failed to meet its obligations under Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture (Convention against Torture).

And, consequently, to order that the State:

- a) Conduct a serious, impartial, and exhaustive investigation before the regular criminal courts to clarify the incident in which Mrs. Inés Fernández Ortega was a victim; to identify those responsible, be they members of the military or civilians; and to punish them accordingly. Also, to refer all previous proceedings conducted before the military justice system to the civilian courts;
- b) Adopt the measures necessary to impose on the military justice system a restrictive and exceptional scope, limited exclusively to the prosecution of members of the military for the commission of crimes or offenses that, by their nature, affect legal interests particular to the military order. In particular, take the legislative, administrative, and other measures necessary to ensure that the military justice system is disqualified from hearing human rights violations, particularly cases involving sexual violence;
- c) Extend rehabilitation measures to the victim and her next-of-kin;
- d) Design and implement mental health plans, agreed on in conjunction between mental health practitioners and indigenous women, for the recovery, rehabilitation, and full community reincorporation of indigenous women who have been victims of rape;
- e) Design protocols to facilitate and encourage the effective, uniform, and transparent investigation of acts of physical, sexual, and psychological violence, including a description of the complexity of the evidence and a detailing of the minimum evidence that must be gathered to provide an adequate evidentiary grounding, in consideration of the international provisions set forth in the Istanbul Protocol;
- f) Develop training programs for state officials, taking into account the international provisions set forth in the Istanbul Protocol, to ensure those officials have the technical and scientific elements necessary for evaluating potential cases of torture or cruel, inhuman, or degrading treatment;
- g) Guarantee indigenous women access to justice through the design of a policy that respects their cultural identity;
- h) Implement permanent human rights education programs within all hierarchical levels of the Mexican Armed Forces, and include in the curriculum of those training programs a particular

reference to international human rights instruments, specifically those related to the protection of the rights of women, particularly their right to a life free of violence and discrimination;

- i) Provide the victim and her next-of-kin with redress for the material and nonmaterial damages suffered, and adopt measures of satisfaction on their behalf;
- j) Guarantee the security of the victim, her next-of-kin, and her representatives against acts of persecution and harassment committed against them as a result of their quest for justice in the case at hand; and,
- k) Reimburse the legal costs and expenses incurred in processing this case.

### **XIII. EVIDENCE**

#### **A. Documentary evidence**

241. The documentary evidence available at this time is listed below:

**APPENDIX 1.** IACHR, Report No. 89/08 (Merits), Case 12.580, *Inés Fernández Ortega*, Mexico, October 30, 2008.

**APPENDIX 2.** IACHR, Report No. 94/06 (Admissibility), Petition 540/04, *Inés Fernández Ortega*, Mexico, October 21, 2006.

**APPENDIX 3.** Case file from the Inter-American Commission on Human Rights.

**APPENDIX 4.** Documents submitted by the petitioner organizations following the adoption of the merits report, comprising:

1. Office of the State Attorney General for Justice, Agency of the Public Prosecution Service for local jurisdiction crimes, Allende Judicial District, Prelim. enquiry No. ALLE/SC/03/001/2007. Complainant: Inés Fernández Ortega. Crime: Rape, breaking and entering, and abuse of authority. Suspect: Person or persons unknown. Commencement date: January 3, 2007. Place: Barranca Tecuani, municipality of Ayutla, Guerrero; and referral from the office of the Attorney General for Military Justice, XIV Investigating Agency, Preliminary inquiry No. SC/172/2005/XIV. Suspect: person or persons unknown. Crime: to be determined. That case file contains the following documents furnished as documentary evidence for the case:
  - a. Complaint lodged by Inés Fernández Ortega with the Public Prosecution Service for local jurisdiction crimes (pp. 265 to 269).
  - b. Expansion of statement by Inés Fernández Ortega, given to the Public Prosecution Service for local jurisdiction crimes (pp. 379 to 383).
  - c. Document requesting female personnel to perform the gynecological examination of Inés Fernández Ortega (pp. 269 and 353).
  - d. Opinion given by forensic chemist Estrellita Carrera Malago, concluding that after conducting spermatobioscopy and acid phosphatase studies, spermatozoids were found in Inés Fernández Ortega's vaginal cavity (pp. 436 and 437).
  - e. Document dated August 16, 2002, signed by the coordinator of forensic chemistry, Oscar Zepeda Castarena, and by the director of expert services of the office of the Guerrero Attorney General, Alejandro Toriz Díaz, reporting that the slides taken as samples from Inés Fernández Ortega's vaginal cavity had been exhausted during their analysis (pp. 444 and 445).
  - f. Document No. 555 of the Public Prosecution Service for local jurisdiction crimes, declining jurisdiction and referring preliminary inquiry ALLE/SC/03/76/2002 to the Military Prosecution Service attached to the

- 35th Military Zone (pp. 340 and 341).
- g. Objection document, filed by Inés Fernández Ortega with the Military Prosecution Service attached to the 35th Military Zone, requesting it decline jurisdiction on the grounds that the regular justice system should investigate members of the military (pp. 567 to 576).
  - h. Application for amparo No. 405/2002, filed by Inés Fernández Ortega with the First District Court in the state of Guerrero (pp. 582 to 612).
  - i. Resolution adopted by the First District Court in the state of Guerrero, ruling amparo suit No. 405/2002 inadmissible (p. 1099; pp. 1044 to 1054).
  - j. Filing for review of amparo filing, lodged by Inés Fernández Ortega with the Second Collegiate Circuit Court in the state of Guerrero as No. 200/2003 (pp. 1056 to 1064).
2. Recommendation 48/2003, adopted by the National Human Rights Commission in the case of Inés Fernández Ortega.
  3. Press reports. Newspaper *El Sur*, February 11, 2004, citing statements made by Gen. Mario López Gutiérrez of the Ninth Military Region.
  4. Office of the United Nations High Commissioner for Human Rights, *Diagnosis of the Situation of Human Rights in Mexico*, 2003.
  5. Global Exchange, Center for Economic and Political Research for Community Action (CIEPAC), and National Center for Social Communication, *Always Near, Always Far: The Armed Forces in Mexico*, Mexico, 2000.
  6. Amnesty International, *Mexico: Indigenous Women and Military Injustice*, AI: AMR 41/033/2004, November 23, 2004.
  7. Economic and Social Council, Civil and Political Rights, Including the Question of Torture and Detention, Report of the Working Group on Arbitrary Detention on its Visit to Mexico, December 17, 2002.
  8. Economic and Social Council, Report of Rapporteur Asma Jahangir on extrajudicial, summary, or arbitrary killings, submitted pursuant to resolution 1999/35 of the Commission on Human Rights, November 25, 1999.
  9. First Chamber of the Supreme Court of Justice of Mexico, Contradiction of thesis 105/2005-PS held by the First and Second Collegiate Criminal Courts of the first circuit, Registration No. 19321, Location: Ninth Period. Source: Judicial Weekly and Gazette of the Federation. Volume XXII, February 2006.
- ANNEX 1:** IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007.
- ANNEX 2:** *Diagnosis of the Situation of Human Rights in Mexico*, Office of the United Nations High Commissioner for Human Rights in Mexico, 2003, available at: <http://www.sre.gob.mx/derechoshumanos/docs/Diagnostico.pdf>.
- ANNEX 3:** Amnesty International, *Mexico: Indigenous Women and Military Injustice*, AI: AMR 41/033/2004, November 23, 2004, available at: <http://www.amnesty.org/es/library/asset/AMR41/033/2004/es/c9fa2e2d-d57c-11dd-bb24-1fb85fe8fa05/amr410332004es.pdf>.
- ANNEX 4:** CD containing the recording of the hearing held at the Inter-American Commission on Human Rights on October 12, 2007, Case 12.580, Inés Fernández Ortega.
- ANNEX 5:** Complaint filed on March 24, 2002, by Inés Fernández Ortega with the Public Prosecution Service for local jurisdiction crimes of the Allende Judicial District.
- ANNEX 6:** Expansion of statement given by Inés Fernández Ortega to the Public Prosecution Service for local jurisdiction crimes of the Allende Judicial District, April 18, 2002.
- ANNEX 7:** Medical examination report dated March 25, 2002, issued by Dr. Radilla López.

- ANNEX 8:** Document 0176/02 of March 26, 2002, from the director of the General Hospital of Ayutla, Guerrero, to the agent of the civilian Public Prosecution Service of the Allende Judicial District.
- ANNEX 9:** Partial transcript of Noemí Prisciliano Fernández's statement, submitted by the Mexican State in note OEA-01761 of July 4, 2007.
- ANNEX 10:** Opinion No. PJGE/DGSP/XXVI-II/305/02, dated July 9, 2002, by expert chemist Estrella Carrera Malagón, addressed to the agent of the Military Prosecution Service attached to the 35th Military Zone.
- ANNEX 11:** Communication dated August 16, 2002, from Oscar Zepeda Castarena, coordinator of forensic chemistry, to the agent of the Military Prosecution Service attached to the 35th Military Zone.
- ANNEX 12:** Communication dated September 25, 2002, signed by Oscar Zepeda Castarena, coordinator of forensic chemistry.
- ANNEX 13:** Document No. 555 of May 17, 2002, sent from the Public Prosecution Service for local jurisdiction crimes to the Military Prosecution Service attached to the 35th Military Zone, declining jurisdiction and referring preliminary inquiry ALLE/SC/03/76/2002.
- ANNEX 14:** Objection document, filed by Inés Fernández Ortega with the Military Prosecution Service attached to the 35th Military Zone, requesting it decline jurisdiction on the grounds that the regular justice system should investigate members of the military.
- ANNEX 15:** Application for amparo No. 405/2002, filed by Inés Fernández Ortega with the First District Court in the state of Guerrero.
- ANNEX 16:** Resolution adopted on September 3, 2003, by the First District Court in the state of Guerrero, ruling amparo suit No. 405/2002 inadmissible.
- ANNEX 17:** Filing for review of amparo filing, lodged by Inés Fernández Ortega with the Second Collegiate Circuit Court in the state of Guerrero as No. 200/2003.
- ANNEX 18:** Resolution issued on November 27, 2003, by the Second Collegiate Court, Twenty-first Circuit, state of Guerrero, dismissing amparo review filing No. 200/2003 and upholding the inadmissibility of the amparo proceedings.
- ANNEX 19:** Partial transcript of the recommendations issued by the fourth and twelfth agents of the Military Prosecution Service attached to the office of the Attorney General for Military Justice, in the State's reply No. OEA-01761 of July 4, 2007.
- ANNEX 20:** Recommendation 48/2003, adopted by the National Human Rights Commission in the case of Inés Fernández Ortega.
- ANNEX 21:** Press report published in newspaper *El Sur*, February 11, 2004, citing statements made by Gen. Mario López Gutiérrez of the Ninth Military Region.
- ANNEX 22:** World Organization Against Torture, article "Alleged rape of an elderly indigenous woman by members of the military results in her death," Geneva, March 8, 2007, available at: <http://www.omct.org/index.php?id=EQL&lang=es&articleSet=Appeal&articleId=6913>.
- ANNEX 23:** Juan Méndez, Guillermo O'Donnell, Paulo Sergio Pinheiro, *The (Un)Rule of Law & the Underprivileged in Latin America*, "Overcoming the Discrimination of Women in Mexico: A Task for Sisyphus," Mariclaire Acosta, University of Notre Dame Press, 1999.
- ANNEX 24:** Precautionary measures No. MC 6-05, granted by the Commission on January 14, 2005.
- ANNEX 25:** Precautionary measures No. MC 167-07, granted by the Commission on September 20, 2007.
- ANNEX 26:** CV of Rodolfo Stavenhagen, expert called by the Commission.
- ANNEX 27:** CV of Jan Perlin, expert called by the Commission.
- ANNEX 28:** CV of Paloma Bonfil Sánchez, expert called by the Commission.

- ANNEX 29:** CV of Lorena Frías Monleón, expert called by the Commission.  
**ANNEX 30:** CV of Federico Andreu Guzmán, expert called by the Commission.  
**ANNEX 31:** Power of attorney extended by Mrs. Inés Fernández Ortega.

242. The Commission notes at this juncture that the copies of the documents it is sending as annexes and appendices are the best that it has and has been able to obtain to date.

243. The Commission believes it is essential and expressly requests the Mexican State, in order to ensure the Court has all the elements needed to reach a decision, to submit certified copies of all documents relating to the judicial, administrative, and other investigations conducted at the domestic level in connection with these facts, together with authenticated copies of the applicable laws and regulatory provisions.

## **B. Witness evidence**

244. The Commission asks the Court to hear statements from the following persons:

- Inés Fernández Ortega, the victim, who will give testify regarding: the events of March 22, 2002; the steps taken to clarify the historical truth of the incident and to identify, prosecute, and punish the perpetrators; the response of the authorities to those efforts, and the attitude they adopted; the obstacles encountered in the search for justice; the threats and acts of harassment made against her, against her family, and against her representatives during the search for justice in this case; the impact of the human rights violations described in this application on her personal life and on her family; and other issues of relevance to the purpose and scope of this application.
- Noemí Prisciliano Fernández, the victim's daughter and eyewitness, to give testimony regarding: the events of March 22 2002; the steps taken to clarify the truth about what happened to her mother and to identify, prosecute, and punish the perpetrators; the response of the authorities to those efforts, and the attitude they adopted; the obstacles encountered in the search for justice; the threats and acts of harassment made against her family during the search for justice in this case; the impact of the human rights violations described in this application on her personal life and on her family; and other issues of relevance to the purpose and scope of this application.
- Otilia Eugenio Manuel, a member of the Indigenous Organization of the Tlapanec People, to give testimony regarding: the steps taken to clarify the truth about what happened to Inés Fernández Ortega and to identify, prosecute, and punish the perpetrators; the response of the authorities to those efforts, and the attitude they adopted; the obstacles encountered in the search for justice; the threats and acts of harassment made against her and other persons during the search for justice in this case; and other issues of relevance to the purpose and scope of this application.
- An officer from the NGO Amnesty International, whose name will be communicated to the Court in due course, to give testimony on: the research on which it based the report *Indigenous Women and Military Injustice* of November 23, 2004; the militarization of the state of Guerrero; the behavior of the armed forces deployed in Guerrero toward the indigenous population; discrimination against indigenous women in this context; the rape of indigenous women by members of the armed forces in this context; the involvement of the military justice system in investigating those human rights violations; and other issues of relevance to the purpose and scope of this application.

### **C. Expert evidence**

245. The Commission asks the Court to hear the opinions of the following expert witnesses:

- Rodolfo Stavenhagen, an anthropologist and sociologist, former United Nations Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples, to present an expert opinion on: the situation of the indigenous population in the state of Guerrero; the behavior of the Mexican armed forces toward the indigenous population; the impact on indigenous Mexicans of the constraints on access to justice and of the impunity that surrounds human rights violations; and other issues of relevance to the purpose and scope of this application.
- Jan Perlin, a lawyer and former director of the project for a diagnosis on access to justice by indigenous people in Mexico of the Office of the United Nations High Commissioner for Human Rights, to present an expert opinion on the access to justice of indigenous people in Mexico and the corrective measures that should be adopted in that regard, and on other issues of relevance to the purpose and scope of this application.
- Paloma Bonfil Sánchez, an ethnohistorian, researcher, and consultant on topics related to gender and indigenous women, to present an expert opinion on discrimination against indigenous women in Mexico and on other issues of relevance to the purpose and scope of this application.
- Lorena Fries Monleón, a lawyer specializing in women's rights and gender violence, to present an expert opinion on: the problem of violence against women in general; its relationship with the discrimination suffered in the past; rape as a form of torture; the challenges faced by women in securing access to justice in cases involving sexual violence; evidence gathering in sexual violence cases; reparations in cases of sexual violence; and other issues of relevance to the purpose and scope of this application.
- Federico Andreu Guzmán, a lawyer specializing in human rights, to present an expert opinion on the use of military courts to investigate and prosecute military non-service crimes and, in particular, human rights violations; and other issues of relevance to the purpose and scope of this application.

### **XIV. INFORMATION ON THE VICTIMS AND THEIR REPRESENTATIVES**

246. In accordance with the provisions of Article 34 of the Rules of Procedure of the Court, the Inter-American Commission holds the victims in the case at hand to be Mrs. Inés Fernández Ortega and the members of her family: Fortunato Prisciliano Sierra (husband), Noemí, Ana Luz, Colosio, Nelida and Neptalí Prisciliano Fernández (children), María Lidia Ortega (mother), Lorenzo† and Ocotlan Fernández Ortega (brothers).

247. Mrs. Inés Fernández Ortega extended a power of attorney to the Organization of the Tlapanec (Me'phaa) Indigenous People, A.C., the Tlachinollan Human Rights Center of the Mountain, A.C., and the Center for Justice and International Law (CEJIL) for them to represent her in the judicial phase of proceedings before the System, as indicated in the enclosed document.<sup>175</sup>

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<sup>175</sup> See: Annex 31, power of attorney.

248. The representatives of the victim and her next-of-kin have indicated, as their joint domicile, the following address: 225 metros Sur y 75 metros Este del Centro Cultural Mexicano Los Yoses, San José, Costa Rica, tel (506) 2280-7473/7608, fax (506) 2280-5280.