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HAVING SEEN:

Resolution No. 32/86 of September 26, 1986, approved by the Commission at its 68th regular session (OEA/Ser.L/V/II.68, doc. 41);

The proposal made by the petitioners during the 69th regular session (March 1987) of the Commission to the effect that the Office of the Attorney General of the Republic of Mexico should begin proceedings for the recognition of innocence of Mr. Aulo Cebrián Elizondo in the Supreme Court of Justice of the Nation, in which the petitioners foresook any type of economic compensation; that proposal was forwarded by the Commission to the Government of Mexico, pursuant to Article 48.f of the American Convention on Human Rights (hereinafter the Convention), in a letter dated March 20, 1987;

The answer of the Government of Mexico, dated May 11, 1987, proposing a solution to the case, in which that Government said that it considered [FN1]

[FN1] Note on page 32 of files.

"...that a friendly solution is not in order inasmuch as it would not have been proposed by the Commission had it been aware of the crafty nature of the petitioner's arguments, which were distorted in this brief as a result of the investigation conducted, and because there had been no violation whatsoever of the petitioner's human rights."

TAKING INTO ACCOUNT all evidence presented to the Commission by both the petitioner and the Government of Mexico which points to the following:

1. Three criminal proceedings were initiated against Messrs. Alejandro and Aulo Cebrián Elizondo:
 - a. Case No. 190/77, in the local jurisdiction to which were joined cases 214/77, 215/77, 216/77, 397/78, and II/12/78 for acts punishable pursuant to Article 378, section IV of the Criminal Code of the State of Nuevo León, for the crime of fraud. That article reads:
Article 378. - "The sanctions referred to in the previous article shall apply to the following cases.

Section IV. To a person obtaining from another a quantity of money or any other profit by giving to him or endorsing over to him in his own name or the name of another person a document, to the order of someone or to the bearer, bearing the name of a fictitious person or someone that the dispenser of that document knows is not obliged to pay it.

If the amount is greater than 50,000 pesos, the prison term shall be from 6 to 12 years and the fine from 5,000 to 10,000 pesos."

b. Case No. 70/77 in the federal jurisdiction (joined with Case 65/77), for violation of Article 193 of the Ley General de Títulos y Operaciones de Crédito (General Law on Securities and Loan Operations), or for issuing uncovered checks. That article of the General Law on Securities reads as follows:

Article 193. - "The Drawer of a check presented for payment in time and not paid for reasons attributable to the drawer himself shall compensate the bearer for any resulting damages. In no case shall the compensation be less than 20% of the value of the check.

The drawer shall also be guilty of fraud if the check is not paid because he did not have funds available when writing the draft, because he disposed of the funds before the expiration of the presentation period, or because he was not authorized to issue to the order of the drawee.

c. Case No. 21/98, within the federal jurisdiction, for violation of Article 149, Section I of the Ley General de Instituciones de Crédito y Organizaciones Auxiliares (General Law on Credit Institutions and Subsidiary Organizations, or the Crime of Statutory Fraud. That provision reads:

Art. 149. - "The following shall be subject to a prison term of from 2 to 10 years and a fine from up to 1,000,000.00:

Section I. Individuals who, in order to obtain a loan, provide to accredit institution or subsidiary organization false information on the amount of assets or liabilities of a company or individual or a body cooperate if this action results in a material loss for the institution or organization."

2. In view of the applicable laws, the aforementioned cases are distinct in terms of the nature of the specific crimes that gave rise to each of them, namely: the first case (190/77) is a crime under the criminal legislation of Nuevo León characterized by the use of "nominative document" under the terms of the aforementioned article 378, as a way or means of committing fraud; in the second case (No. 70/71) the crime consists in placing in commercial circulation a document without value pursuant to any of the terms in Article 193, paragraph 2, of the Ley General de Títulos y Operaciones Crediticias; in the third case (No. 21/98) criminal activity occurs when someone, for the purpose of obtaining a loan, gives a bank or credit institution false information or data on the amount of the assets or liabilities, on the basis and as a result of which the lending institution suffers a material loss.

3. The first two cases were actually brought on the basis of distinct material facts: in the first case (Case 190/77) the check used to commit the fraud was Check No. SO 480405 dated June 6, 1977; in the second case (No. 70/77) the bad check put into circulation was check No. SO 480438 dated June 8, 1977. The third case (No. 21/98) was brought for the crime of statutory fraud (Article 149 of the Ley General de Instituciones de Crédito y Organizaciones Auxiliares) in that, in January 1977, Mr. Cebrián Elizondo asked two banking institutions to expand his line of credit and provided false information on his property and amount of assets which had been sold prior to the request for credit, all of which led to a charge by the Polibanca e Innova, S.A., Banpaís, S.A., and Probanza del Norte, S.A., for the alleged crime of statutory fraud pursuant to the aforementioned Article 149.

4. According to the case files, those cases against Messrs. Cebrián Elizondo were processed within the respective jurisdictions and by competent judicial authorities; the warrants for arrest (or indictments) issued as the court orders for the investigation of each crime fulfilled legal requirements and, in particular mention is made of the previous investigation conducted in each case to establish incriminating evidence in support of those court orders.

5. In each of the cases, according to the case files, the accused were given the opportunity to take

any appropriate interlocutory substantive action, namely:

a. In the first trial, in the local jurisdiction, for the crime of fraud, the indictment was issued by the Fourth Magistrate (Juez de Letras) of the Criminal Court of Nuevo León and confirmed by the First Judge of the District of the State of Nuevo León. The writ of relief filed in the local jurisdiction was rejected by the Tribunal Colegiado (Collegiate Tribunal), Fourth Circuit, Monterrey, State of Nuevo León. A writ of relief was then filed because of the disappearance of data, namely, the disappearance of the evidence leading to the issuance of the warrant for arrest and was denied by the Fourth Magistrate. Writs of relief were filed against that denial, which was upheld by decisions of the Fourth Chamber of the Tribunal of Justice, the First District Judge, and the Collegiate Tribunal of the Fourth District. Thus all possible action was taken in connection with interlocutories and previous and special pronouncements.

b. With regard to the substance of the case, the Fourth Judge of the local jurisdiction acquitted the accused on January 29, 1980. That decision, appealed by the Public Ministry, was overturned by the second chamber of the Higher Tribunal of Justice of the State of Nuevo León, which found the defendants guilty on May 19, 1980.

c. Finally, the convicted defendants Aulo and Alejandro Cebrián Elizondo filed two writs of direct relief in this case (190/77) against the aforementioned decision of the Second Chamber of the Higher Tribunal of Justice of May 19, 1980. In the first appeal (Aulo Cebrián), number 5359/80, the Auxiliary Chamber of the Supreme Court of Justice of the Nation upholds the conviction for the crime of statutory fraud but acquitted him of the crime of breach of trust and therefore lowered the sentence accordingly. In the second case (Alejandro Cebrián), number 5615/80, the Auxiliary Chamber of the Supreme Court rejected all sections of the appeal and, after pointing out that the sentence (that issued on May 19) "does not violate guarantees," does not protect Alejandro Cebrián Elizondo against it. The appeals were decided on by the Supreme Court on January 13, 1983.

d. In the second trial (case 70/70), in the federal jurisdiction, for the issuance of uncovered checks, as pointed out earlier distinct from the charge brought in case 190/77 for writing uncovered checks under the local jurisdiction, an indictment was returned by the First Judge of the District of the State of Nuevo León, following the legally required prior investigation, for the crime under article 193 of the aforementioned Ley General de Título.

The indictment, serving as the court order for investigation of that crime, was followed by a conviction dated March 19, 1981, by the First District Judge of the State of Nuevo León. The convicted defendants filed an appeal against that sentence, which was denied by the magistrate of the Fourth Circuit Court, in a decision of July 6, 1981, which upheld the decision of the lower court.

e. In ruling on the appeal, the Unity Tribunal of the Fourth Circuit Court specifically refers to the problem presented by the defendants that they were being tried for the same crimes, in violation of Article 23 of the Mexican Constitution and (on pages 20-21) state the following: [FN1]

"Regarding the first offence, although Article 23 of the Constitution establishes the principle 'Non bis in Idem,' since in the decision they are acquitted or convicted, and if when an individual is tried it is understood that he has been convicted or acquitted by means of a firm or irrevocable decision there is no entry to Messrs. Cebrián Elizondo, since they were not tried twice for the same offense."

[FN1] A certified copy of the Unity Tribunal's decision may be found in the court files on the indicated pages.

f. Two issues are relevant in that quotation: the first, that the matter non bis in idem was examined and rejected by the competent legal authorities in the two instances of case 70/77 and the case joined with it, case 65/70; and the second, that in the light of the sentences in case 70/77 the facts constituting the crime of fraud (in the local jurisdiction which led to case 190/77) are different from the facts comprising the crime under Article 193 of the Ley General de Títulos, within the federal jurisdiction, which are tried

and ruled on by other legal authorities and are sanctioned by different penalties. It is therefore wrong to believe that that principle was violated in any case, had there been any doubt on the part of the complainants, they could have filed a writ of direct relief before the Supreme Court of Justice for violation of a guarantee explicitly established in the Constitution of Mexico (Art. 23). In the case files there is no record that this appeal was filed in case 70/77, which is surprising in view of the large number of legal actions taken by the accused at various levels of the legal system, within both local and federal jurisdictions.

g. In the third trial (case 21/82), within the federal jurisdiction, for the offense of statutory fraud, the first judge of the state district returned an indictment once the previous investigation by the Public Ministry had been completed. The second judge of the State District found the defendants guilty on June 30, 1982, and sentenced the two Messrs. Cebrián to 7 years in prison and a \$5,000,000.00 fine. The sentence was appealed and, on February 4, 1983, the Unitary Tribunal of the Fourth Circuit upheld the lower court's decision and therefore rejected the defendants' appeal.

h. In its decision, the lower court had examined the problem of whether the defendants had been tried for the same crimes as in previous cases and rejected that allegation. Indeed, on pages 10 and 11 of that sentence, the following is stated which, in the opinion of the Commission, the defendants guilty on June 30, 1982, and sentenced the two Messrs. Cebrián to 7 years in prison and a \$5,000,000.00 fine. The sentence was appealed and, on February 4, 1983, the Unitary Tribunal of the Fourth Circuit upheld the lower court's decision and therefore rejected the defendants' appeal.

i. In its decision, the lower court had examined the problem of whether the defendants had been tried for the same crimes as in previous cases and rejected that allegation. Indeed, on pages 10 and 11 of that sentence, the following is stated which, in the opinion of the Commission, is sufficient to establish objectively that there was no violation of the principle non bis in idem, contained in the Mexican Constitutional guarantee of Article 23. The relevant portion reads as follows: [FN1]

Finally, with regard to the copy of the sentence contained in the summary on pages 300 to 339, handed down by the Fourth Judge of the Criminal Court, residing in this city, in connection with the joint cases 190/77, 214/77, 215/77 and 216/77, through which the accused endeavored to show that they were tried for the same facts as those that led to this criminal case, it points out that those cases were brought for the commission of the crimes of fraud and breach of trust, consisting in the issuance of checks by the accused that were not covered, in some cases, because of insufficient funds and, in others, because the drawer did not have an account or had cancelled it; these facts are separate from those of concern to us, consisting in providing false information to banking institutions on the amount of their assets to obtain loans, since, in the personal balance sheets they presented to POLIBANCA INNOVA' S.A., on March 18, 1977, and to PROBANCA NORTE, S.A., and BANPAIS, S.A. on March 22 of that year, Aulo and Alejandro Cebrián Lizondo included real estate that they had sold on November 30, 1976, as was proven by the respective legal documents, which leads to the conclusion that the facts behind this case are distinct from those behind earlier cases and that the defendants are not being tried twice for the same offenses. On the basis of the foregoing, it convicted AULO CEBRIAN ELIZONDO and ALEJANDRO CEBRIAN ELIZONDO.

[FN1] A certified copy of the decision of the Second Judge of the State District of July 30, 1982 in Case 21/982 for the crime of statutory fraud.

j. With regard to the sentences handed down in cases Nos. 190/77 and 70/77, the defendants have already served their sentences; however, in connection with Case 21/982, regarding the crime of statutory fraud under Art. 149, section I of the Ley General de Instituciones de Crédito y Organizaciones Auxiliares, the convict is also serving this sentence. Thus different penalties were imposed on Mr. Aulo Cebrián for different crimes investigated by different legal bodies on the basis of orders that were also distinct.

k. As for Case 21/82, as occurred for Case 70/77, although the complainant alleged violation of the constitutional guarantee of Art. 21 (non bis in idem), he has not filed a Writ of Direct Relief with the Supreme Court of Justice of the Nation that, if it were approved, would result in his immediate release; this domestic recourse to which he is entitled pursuant to Art. 22,2, of the Amparo Law is therefore pending in the Mexican system of Justice.

l. There is no evidence in the case filed that the defendants, Mr. Cebrián, once he had paid the penalties imposed in cases 190/77 and 70/77 within the local and federal jurisdictions, respectively, had been tried once again for the criminal acts that were the subject of those cases, thus respecting the constitutional guarantee under Art. 23.

6. It is not clear from the context of the complaint filed with the Commission or from the data and information provided by the Government of Mexico that, in the course of the proceedings referred to here, the legal guarantees provided for in Art. 8 of the American Convention on Human Rights were violated. In this connection, the following should be mentioned:

a. With regard to the guarantee provided for in Art. 8, section 1, it is beyond any reasonable doubt that Messrs. Aulo and Alejandro Cebrián Elizondo were heard by the competent judges and tribunals of the legal system of Nuevo León and the federal jurisdiction as well as by part of the highest tribunal of the Mexican nation, namely, the Supreme Court of Justice, which ruled on the writs of relief in connection with the complainants' allegations regarding the cases brought by the legal authorities. There is no evidence that the complainants were denied access to judges in the courts of justice to argue in their favor as is apparent in the complaint itself and for series of judicial proceedings initiated in the course of the three aforementioned trials. In this connection the complainants had recourse to the Fourth Criminal Judge of Nuevo León; the Second Chamber of the Tribunal of Justice of that State, which is an appeals court; the First District Judge of the State of Nueva León; the Fourth Circuit Collegiate Tribunal; and, as has been pointed out, the Supreme Court of Justice (Auxiliary Chamber).

b. These legal bodies were not special or ad hoc tribunals but part of the country's legal system, which were established prior to the commission of the crimes involved in these trials and, unless evidence is provided to the contrary, independent and impartial bodies.

c. As concerns the guarantee provided for in Art. 8, paragraph 2, presumption of innocence, it may be noted that the indictments were issued on the basis of previous investigations proceedings conducted in each case by the public ministry and that, in ruling on the writ of relief, the Supreme Court (Nos. 5359/80 and 5615/80) the Supreme Court rejected the appeals but upheld the legal validity of the legal proceedings that had been conducted, in particular with regard to respect for the individual guarantees of the complainants. Moreover, if the complainant still had some doubt about the matter of respect for guarantees in the actions taken, it should be recalled that they still had access to writs of direct relief before the Supreme Court, as indicated in paragraphs 5 f) and j) of this resolution. In other words, the warrants for arrest were not issued until there was clear prima facie evidence of the alleged guilt of the accused and they could request a writ of relief against such warrants.

d. The proceedings were conducted in accordance with the guarantees provided for in the aforementioned Art. 8, paragraphs a through h, as is clear from the facts provided to the Commission, viz: the proceedings were conducted in the language of the complainants; the complainants received prior detailed information about the charges brought against them in each case as is apparent in the indictments based on Mexican Constitutional guarantee (Art. 19); no one was detained for more than three days without due justification as provided for in that provision, the accused had time to prepare their defense and appropriate means to do so; the complainants were assisted by legal counsel in their defence and, during the proceedings, as is clear in the briefs, the defendants were able to act in their defense as their legal counsel instructed; finally, it is obvious that the complainants had full access to the appropriate resources to appeal the decisions or resolutions (interlocutory or substantive) handed down in the respective cases and, as mentioned earlier, to bring those cases to the highest court of the nation to appeal for the protection of individual guarantees.

e. In connection with the complainant's allegation that in Case 190/77 the most benign interpretation of the law was not applied as provided for in Art. 9 of the American Convention, the case files show exactly the opposite since in its decision on the request for amparo the Supreme Court of Justice, when it decided to uphold the responsibility of the accused for the crime of fraud (Amparo No. 5953/80), decided to apply the law in effect as of August 1981 and not the previous one, which was harsher. This explains the fact that the accused was then sentenced to 5 years in prison instead of 6 as would have occurred if the less favorable law had been applied.

7. With regard to the complainants' request, made at the hearing held with the Commission on March 19, 1987, in Washington, D.C., to submit as a formula for peaceful settlement a petition to the Government of Mexico that the Office of the Attorney General of the Republic of Mexico initiate the proceedings for the recognition of innocence of Mr. Aulo Cebrián Elizondo with the Supreme Court of Justice of Mexico. Since the complainants said that they could not make that request directly, the Commission forwarded it to the Government of Mexico in a note dated March 20, 1987. In a note dated May 11, 1987, said that it did not agree with the proposed solution because it was irregular and ran counter to the internal legislation of the Federal jurisdiction in effect regarding the recognition of innocence. The Commission deems it appropriate to make the following observations:

a. The proposal forwarded by the Commission to the Government concerned on March 20, 1987, as indicated above, was made without detriment to the decision on the substance of Case 9706 which it was incumbent on it to make in due course, since Resolution 32/86 of the 68th session was merely of a provisional or prima facie nature and, therefore, the processing of the case had not been completed and at that time the Commission did not have full information to reach a final decision.

b. The procedure for the recognition of innocence of the accused, established in Arts 560 of the Federal Code of Criminal Procedure expressly provides (Art. 561) that it is for the interested or convicted party "who considers that he is entitled to obtain the recognition of his innocence" to appear before the Supreme Court of Justice. In that connection, the Code clarifies, "The petition is actually a demand for the dismissal of the sentence, review of the previous trial, and consequently the declaration of innocence of the person unjustly convicted."

c. Art. 560 of the Code establishes the circumstances in which the aforementioned proceeding may occur, among which are not found, in the Commission's view, those alleged by the complainant.

d. The proceeding of innocence is only applicable to cases under federal jurisdiction and therefore would not be applicable to case 190/77 under local jurisdiction, which was the subject of the request for direct amparo before the Supreme Court of Justice of the Nation.

e. The procedure for recognition of innocence does not exist in the Code of Criminal Procedures of Nuevo León, according to the information available to the Commission in this case. In that State the formula applicable under the Code is that of necessary pardon (Art. 528), but the cases which allow for this provision would not include one similar to Mr. Cebrián's case. In any event in the local jurisdiction as well it is for the person concerned to initiate the proceedings under Arts. 528 to 532 of this code.

f. The Office of the Attorney General of the Republic, through the office of legal counsel, and the Secretariat of the Presidency of the Republic of Mexico have informed the parties concerned of these details which are also clearly explained in the aforementioned legislation itself. Thus the Commission declines to elaborate further on this point, [FN1] except to say that there is no proof of the violation of human rights of the parties concerned in this regard, as is stated in their communication of February 25, 1987, in the case files.

[FN1] The case files contain the respective communications dated January 17, 1987, and May 20, 1986, addressed to the interested parties by these offices.

8. With regard to the jurisprudence of the Request of Amparo from the Supreme Court of justice in Mexico mentioned by the complainant, [FN2] in that what is decided by the Supreme Court in a case of the issuance of an uncovered check could be valid in his own case, the Commission refrains from elaborating or issuing an opinion on this subject inasmuch as it would be outside its purview, under the terms of the Convention, to determine the scope of the national jurisprudence of the states parties to it, except when this jurisprudence establishes situations contrary to law and to guarantees provided for in the Convention.

[FN2] Note dated February 25, 1987, in the case files.

Without prejudice to the above, it should be mentioned that the Request for Amparo is individual in nature and in scope and consequently that the sentences handed down in this sphere merely affect the complainants without implying general declarations. [FN3]

[FN3] In this connection see the note from the Government of Mexico dated May 11, 1987 (page 26), in the case files.

CONSIDERING:

1. That there is no evidence of a violation of any of the legal guarantees provided for in Article 8 of the American Convention on Human Rights, in particular, that provided for in paragraph 4 of that provision;
2. That the remedies under domestic jurisdiction have not been exhausted, since the accused may still file a request for amparo directly with the Supreme Court of Mexico in Case No. 21/982, for which he is now serving his prison sentence; that, further, within the federal jurisdiction, the complainant may request initiation of the procedure for recognition of innocence provided for in the Federal Code of Criminal Procedures (Arts. 560 ff) in the case case 21/982.
3. That it is not possible to arrive at a friendly settlement of the case since, pursuant to Mexico's legal procedure, the basis or proposal for such a solution is out of order;
4. That on the basis of the facts of the case, the presentation by the complainant is himself, and the information provided by the State concerned, the complainant presented in case 9706 is clearly unfounded.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
RESOLVES:

1. To declare that the petition in Case 9706 does not present facts constituting a violation of the human rights provided for in the American Convention on Human Rights, in particular, the legal guarantees under Article 8 of the Convention;
2. To close the case.
3. To communicate this decision to the Government of Mexico and to the complainer.

(*) The complainant requested reconsideration of this case which was denied by the Commission during its 74th Meeting.