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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 43/96; Case 11.430
Session: Ninty-Third Regular Session (30 September – 18 October 1996)
Title/Style of Cause: Jose Francisco Gallardo Rodriguez v. Mexico
Doc. Type: Report
Decided by: Chairman: Professor Claudio Grossman;
First Vice Chairman: Ambassador John S. Donaldson;
Second Vice Chairman: Professor Carlos Ayala Corao;
Members: Dr. Oscar Lujan Fappiano, Professor Robert Kogod Goldman, Dr. Jean Joseph Exume, Ambassador Alvaro Tirado Mejia.
Dated: 15 October 1996
Citation: Jose Francisco Gallardo Rodriguez v. Mexico, Case 11.430, Inter-Am. C.H.R., Report No. 43/96, OEA/Ser.L/V/II.95, doc. 7 rev. (1996)
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I. FACTS ALLEGED IN THE COMPLAINT

1. According to the information provided in the complaint submitted on January 25, 1995, by petitioners to the Inter-American Commission on Human Rights (hereinafter the Commission), since 1988 Mexican Army Brigadier General José Francisco Gallardo Rodríguez has been the victim, since being promoted to Brigadier General, of threats, harassment, and intimidation by high-level commanders of the Secretariat for National Defense (SEDENA). Similarly, the information indicates that he has been subjected to unjust judicial procedures and imprisonment; that the unrelenting persecution is based on the opening of 15 preliminary inquiries against him, with indictments handed down in nine criminal cases (one in 1983), and the issuance of seven arrest warrants; that the Secretariat for National Defense, through Mexican Army officers, undertook a campaign of defamation and sought to discredit him, and that on November 9, 1993, he was arbitrarily detained and imprisoned, upon false accusations. (folios 1 to 9).

II. PROCESSING BEFORE THE COMMISSION

2. On February 6, 1995, the Commission received a petition alleging that the Mexican state is responsible for the alleged violation of the human rights set forth in Articles 5, 7, 8, 11, 13, 25, and 1(1) of the American Convention on Human Rights (hereinafter American Convention).

3. On February 16, 1995, the Commission, pursuant to Article 34 of its Regulations, forwarded the pertinent parts of the complaint to the Government of Mexico and requested that it provide information on the allegations and in respect of any other criteria that would allow it to

assess whether domestic remedies were exhausted in this case; it gave the Government 90 days to respond.

4. On February 22, 1995, the Commission received additional information from petitioners.
5. On March 30, 1995, the Commission forwarded to the Government of Mexico, the pertinent parts of the additional information and requested that it report on said information within 60 days.
6. In a note of May 26, 1995, the Government requested a 30-day extension so as to assemble the documentation so as to provide an adequate response; the Commission granted the request on May 31, 1995.
7. By note received June 2, 1995, the Government submitted its response in relation to the case under consideration.
8. The petitioners submitted their observations to the Government's answer on August 10, 1995.
9. As the petitioners' arguments had been forwarded to the Government of Mexico, it submitted its final observations on November 13, 1995.
10. On November 29, 1995, the petitioners reported that they were willing to initiate a friendly settlement procedure with the Government of Mexico.
11. On January 12, 1996, the Government of Mexico responded in the negative to the proposal for friendly settlement.
12. In its communication of April 29, 1996, the Mexican Government requested the Commission to ask the petitioners for specific ideas concerning the possibility of initiating a friendly settlement procedure.
13. On April 30, 1996, the petitioners advised that they were not prepared to initiate a friendly settlement procedure.

III. PRELIMINARY INQUIRIES AND JUDICIAL PROCEDURES

14. In the case under examination, according to statements and evidence taken from the parties, 15 pretrial investigations and 9 criminal trials have been conducted against General José Francisco Gallardo in the period running from 1989 to the present (with the exception of case No. 1860/83). These proceedings are detailed below:

- a. On August 21, 1983 proceeding No. 1860/83 was begun against then-Lieutenant Colonel of Cavalry José Francisco Gallardo Rodríguez, accused of responsibility for the offense of abuse of authority, committed so as to cause injury to Cavalry Corporal Bernardino Mancio Catzin. On September 7, 1983, an arrest warrant was issued to the Federal Military Judicial Police, to

apprehend Lieutenant Colonel Gallardo Rodríguez. The case was dismissed on October 10, 1983, when the high commander withdrew the criminal charges against the accused.

b. As a result of the complaint lodged for the crimes of embezzlement and destruction of Army property, deduced from preliminary inquiry 28/89, which was closed without prejudice due to lack of grounds for bringing the action, and reopened in September 1993, after analysis of the investigation, criminal case 2949/93 was brought, and is now before the Second Military Court. Under this proceeding General Gallardo is now being held in the Military Prison, without the right to conditional release on bond, considering that the offense of destruction of Army property is considered a grave offense that does not allow for conditional release on bond.

c. Upon the complaint lodged by Cavalry Major Roberto Félix González Ruiz against then-Director of the School of General Equitation José Francisco Gallardo, for conduct that the complainant considered to unlawfully assail his military dignity, on May 8, 1989 preliminary inquiry No. 30/89 was opened. This preliminary inquiry was closed August 7, 1989, without prejudice.

d. As a result of the action of General Gallardo as commander of the Military Cattle Breeding Facility at Santa Gertrudis, Chihuahua, which suggested he was implicated in the crimes of embezzlement, fraud, damage of government property, and abuse of authority, preliminary inquiry No. 85/89 was opened in November 1989. On May 14, 1990, the military judge of the Seventy Military Zone issued an arrest warrant under criminal case No. 1140/90. With regard to the offense of abuse of authority, criminal case No. 1120/91 was opened, General Gallardo was sentenced to two months and twenty days of regular imprisonment when found guilty of the same. Nevertheless, through amparos issued by the federal justice system, he was acquitted of three offenses; the military authorities dropped charges in the other case.

e. On May 17, 1991 preliminary inquiry 42/91 was opened as a result of several gaps in the delivery and receiving of the Villa Ecuestre of the High Command of the Secretariat for National Defense. In this investigation it was decided to close the case, without prejudice, as the requirements for bringing the respective criminal charges were not met.

f. As a result of the written communication that Enrique Gallardo Rodríguez, brother of José Francisco, sent to the Secretariat for National Defense, on May 22, 1992 preliminary inquiry No. 39/92 was opened, for the alleged offense of dereliction of duty. Under this inquiry, an arrest warrant was issued in criminal case 1196/92 on June 10, 1992, the indictment was handed down by the Fourth Military Judge of the First Military Zone; the formal arrest warrant was issued for General Gallardo Rodríguez for the offense of desertion, in its form of dereliction of duty (abandono de plaza). Displeased by this situation, he brought a motion for amparo before the Ninth District Judge for Criminal Matters of the Federal District, who granted him the protection of federal justice, which was confirmed by the Fourth Collegial Court for Criminal Matters of the First Circuit; as a result, General Gallardo was released.

g. In criminal case No. 93/93, federal justice protected and extended amparo to General Gallardo Rodríguez, as appears in the resolution of January 21, 1993, of the Fourth Collegial Court for Criminal Matters in the Federal District.

h. On April 17, 1993 preliminary inquiry 54/93 was opened as a result of the complaint brought by the Director General for Archives and History of the Secretariat for National Defense, to the effect that General Gallardo Rodríguez had gone to the facilities at said office and had ordered Lieutenant and archivist Rogelio Castellanos Arroyo to provide him with information which could only be provided by the director of that office. This inquiry was closed since General Gallardo's conduct did not constitute any offense against military discipline.

i. As a result of a writing presented by General Gallardo to the Secretary of National Defense, in which the General holds the Secretary responsible for his physical safety and that of his family, on September 17, 1993, preliminary inquiry SC/143/93/I was opened for the alleged offense of defaming the Army, infraction of duties shared by all who are required to serve in the Army, and against military honor. Under this inquiry formal arrest warrants were issued on December 6, 1993, under criminal case No. 3079/93, which was brought by the Second Military Court. The Tribunal acquitted General Gallardo of the charges of which he was accused.

j. On October 10, 1993, preliminary inquiry 157/93 was opened as a result of the written communication of Enrique Gallardo Rodríguez, brother of General José Francisco, sent to the President of the Republic, accusing him of various criminal offenses during his term as Commander of Military Cattle Breeding Facility No. 2 in Santa Gertrudis, Chihuahua. Charges were brought in criminal case 2389/94 by the First Military Court, of the First Military Zone, based on preliminary inquiry 157/93, for unlawful enrichment, which is the motive for his current detention in the military prison of said Military Zone, subject to the aforementioned proceedings.

k. Upon publication of an article entitled "The need for a military ombudsman in Mexico," in Forum magazine, on October 22, 1993 preliminary inquiry No. SC/167/93/II was opened, alleging that he was responsible for the offenses of libel, defamation, and slander against the Mexican Army, and the institutions under it, and against military honor. Under this inquiry a formal arrest warrant was issued on December 18, 1993, in criminal case No. 3188/93. He was protected and given amparo by constitutional resolution No. 336/94 of October 7, 1994.

l. On September 29, 1993, preliminary inquiry 04/93-E was opened in the wake of three documents of charges drawn up by the Military Judicial Police regarding the various complaints lodged against General Gallardo Rodríguez by personnel of Military Cattle Breeding Facility No. 2 at Santa Gertrudis, Chihuahua. A decision is now pending from this preliminary inquiry.

m. Because of the arguments put forth by General Gallardo Rodríguez before the Tenth District Court for Administrative Matters of the Federal District, in opposition to acts of the Secretary of Defense and other military authorities, preliminary inquiry SC/168/93/I was opened on October 20, 1993. It has been closed as it was deemed that a written communication submitted to a Court, using slanderous and defamatory language, does not give rise to liability.

n. On occasion of the journalistic note published in Proceso magazine, issue No. 893, of December 13, 1993, regarding the statements General Gallardo Rodríguez made on human rights

in the Army, preliminary inquiry SC/194/93/II was opened on December 17, 1993. This preliminary inquiry was closed on April 8, 1995.

o. Preliminary inquiry SC/49/94/I was opened based on the document of charges prepared on January 25, 1994 by Infantry Lieutenant José Manfred Castillejos Santiago, Barracks Officer of the Military Prison of the 1st Military Zone, denouncing events in which prisoner Mario Enrique González Gutiérrez was wounded by prisoners Brigadier General José Francisco Gallardo Rodríguez and Lieutenant Colonels and Construction Engineers Abel Vega Cortés and Héctor Miguel Bretón y Alba, in February 1994. A decision is still pending in this inquiry.

p. In early 1994 preliminary inquiry SC/21/94/I was opened as a result of a Military Judicial Police credential that was taken from him when he was detained. The current status of this inquiry is not known.

q. In March 1994 preliminary inquiry SC/59/94/VI was opened, based on a writing found on the person of Mrs. Leticia Rodríguez de Gallardo when she went to visit her husband, General Gallardo Rodríguez. A decision is pending in this investigation; there will probably be a trial for the offense of slander and libel.

IV. POSITION OF THE PARTIES

A. Position of the petitioners

15. The first communications from the petitioners state, in brief, that Brigadier General José Francisco Gallardo Rodríguez has been subjected by the high commanders of the Secretariat for National Defense to threats, harassment, and intimidation, subjecting him to unjust judicial proceedings and imprisonment, through the fabrication of offenses and responsibilities that were never proven. Likewise, that the Secretariat for National Defense, through Mexican Army officers, has begun a campaign to defame and discredit him, carried out through press conferences and interviews given by Military Justice authorities, accusing him without any evidence whatsoever, of engaging in criminal and undisciplined conduct and of dishonoring the Army. That as part of this campaign, on two occasions General Gallardo has been imprisoned, subjected to unjust proceedings and released upon verification of his innocence. In addition, he has been subjected to multiple preliminary inquiries and incriminated in actions in which he never participated. That the campaign of harassment is motivated by General Gallardo's critical position regarding corruption and human rights violations by the Mexican Army. That the persecution has increased as a result of two specific events: the letter directed to the Secretary for National Defense, Antonio Riviello Bazan, laying responsibility on him and other military authorities for violating his and his family's physical and moral integrity, and publication by the Mexican magazine Forum, in October 1993, of a summary of a paper by General Gallardo entitled "The need for a military ombudsman in Mexico." That in retaliation for the letter to the Secretary of Defense and the publication of his article, the Secretariat for National Defense in November 1993 reopened a case that had been closed since 1989 for lack of evidence, accusing him of the offense of embezzlement. In addition, he was accused of destruction of Army property, offenses against military honor, defamation, libel, and slander to the detriment of the

Mexican Army, for which Gallardo was arbitrarily detained and imprisoned at military base No. 1 in Mexico City on November 9, 1993.

16. Likewise, the petitioners state that on September 22, 1994, Gallardo was notified of a new complaint against him for unlawful enrichment. That the arbitrariness is such that, without even requesting his appearance, on November 24 the Supreme Military Tribunal issued an arrest warrant based on said complaint. That paradoxically, this new complaint, like the other previous accusations, was issued at the same time that General Gallardo was obtaining pronouncements from the civilian justice system that protect him from the arbitrary actions committed by military the justice system.

17. The petitioners add that the clear attempt to limit General Gallardo's freedom of expression is demonstrated by the accusations against the magazine Forum, which has published several articles by General Gallardo, and against its director, Eduardo Ibarra Aguirre. That the fact that General Gallardo has had access to protection of the federal justice system has not guaranteed a cessation of the persecution and harassment to which he has been subjected for more than five years, nor juridical and moral security for him and his family.

18. They add that the campaign against General Gallardo is a means to restrict his freedom of expression and information. That the right to freedom of expression presupposes that an individual is not subject to criminal punishment for the legitimate exercise of this right. That it is evident that the expression of criticisms regarding public officials is one of the acts that typically is at the core of protected acts, and that subjecting him to innumerable current and possibly future proceedings, the beginning of a preliminary inquiry into the Director of Forum magazine, the campaign to discredit and harass him, constitute disproportionate retaliation for exercising the legitimate right of expression, as well as a direct attack on the honor and dignity of General Gallardo.

19. By written communication of February 22, 1995, the petitioners provided information regarding the new forms of persecution of General Gallardo. In this regard they stated that on February 3, 1995, General Gallardo was notified that he was the subject of a new preliminary inquiry for offenses against military honor and defamation because of a publication in the magazine "Proceso" on December 13, 1993 that alluded to a campaign of harassment and persecution against him. That this preliminary inquiry was opened on January 17, 1993, by General Mario Guillermo Fromow García, then-Attorney General for Military Justice. However, General Gallardo was not notified until two years later.

20. On August 10, 1995, the petitioners presented their observations for the Government's response, in which they stated that General Gallardo, an outstanding military officer and university graduate, had been forced to defend his moral integrity and honor for six years in the face of the intolerance of high military commanders and the partiality of military justice, who had endeavored to accuse him of offenses, portraying him as a common criminal: intolerant because of their inquisitorial posture, as they repress anyone who makes even the slightest criticism or who questions the actions and negative conduct of military commanders, and partial because the military justice apparatus is directly under the Secretary for National Defense in all

instances in which the Military Justice Code, in force since 1933, grants them supra-constitutional powers.

21. Likewise, they add that the ferocious persecution that General Gallardo has suffered since 1988 is evidenced by the following: 15 preliminary inquiries have been opened against him, nine criminal cases have been brought against him, and seven arrest warrants have been issued for different crimes, his right to pre-trial release has been roundly denied, acts and campaigns to discredit and defame him have been carried out on a national level before all the members of the Army and public opinion, through the posting and distribution of flyers, official notes, letters, and photographs, tendentious and false declarations in the press, on the radio and on television that always sought to tarnish his reputation in the eyes of public opinion and his military colleagues.

B. The Position of the Government

22. In its first communication on February 16, 1995, the Government of Mexico enumerated the distinct preliminary inquiries carried out and the criminal cases brought against General Gallardo, and explained their current status.

23. Likewise, it adds that the Secretariat for National Defense has stated categorically that there has never been a campaign of harassment against Brigadier General José Francisco Gallardo, but that from the information presented it can be concluded that General Gallardo, aware of the rectitude of Military Law and of the bodies of the Military Jurisdiction, before which several procedures are under way against him, has promoted support for his case from national and international governmental and non-governmental bodies, seeking to discredit the Army through the use of the mass media, orchestrating a campaign that hides his true responsibility for crimes under the jurisdiction of the military justice system.

24. The Government also states that the complaint submitted by the petitioners does not allege facts violating the rights recognized in the American Convention, and in this case, domestic remedies have not been exhausted. That as the petitioners state, in all the proceedings the fundamental guarantees established in the Constitution have been duly respected, such that in the cases which have proceeded according to law, he has been acquitted. Likewise, it adds that in the cases still pending, it is completely contrary to the law to allege any violation of human rights, as these processes have also been carried out in accordance with the law, even if criminal responsibility has yet to be determined. In this case, the petitioner has at his disposal the remedies that the law makes available to him to challenge any act he deems unlawful, including the amparo, whose procedure is well known.

25. In this regard, the Government states, none of the petitioner's arguments regarding the inefficacy, simplicity, and impartiality of the domestic remedies can be allowed, as they themselves recognize and affirm, "it is true that...he has had access to protection from the federal justice system, through the issuance of multiple amparos," and "he has been acquitted by constitutional resolution in five amparos in criminal matters, and has obtained more than eight amparos in administrative matters."

26. Through written communication of November 13, 1995, the Government submitted its final observations, in which it states that General Gallardo Rodríguez currently faces indictments in criminal cases numbers 2949/93 and 2389/94, under the jurisdiction of the Second and First Courts of the First Military Zone, for the crimes of embezzlement and destruction of Army property, and unlawful enrichment, respectively. This situation is not the result of any arbitrary order or detention, as the complainants allege, but the execution of a well-founded and reasoned arrest warrant, issued November 9, 1993, at the General Barracks of the Fourth Military Zone, based on legally competent judicial authority, for which he is currently subject to preventive detention.

27. As regards the alleged violation of freedom of expression, the Government notes that the petitioners' allegations are false, as the record reflects that he was held pending trial for the crimes of libel, defamation, and slander against the Mexican Army and the institutions under it, in view of the negative, false and injurious opinions proffered against the Army, and not for having proposed the creation of an ombudsman.

28. Likewise, the Government stated regarding the exhaustion of remedies that his initiatives before the military authorities, where his request to appear before the Supreme Commander was denied and his complaint of extortion against the Military Judge and the Clerk of Court under the 7th Military Zone was not heard, are unrelated to his arrest and his current legal status, which is completely null and inapplicable to the petitioners' claim, as none of these bodies can order the restriction of his freedom that he challenges. Therefore, whatever the result of these initiatives, they are not appropriate remedies for addressing the violations of guarantees alleged. They also add that the appropriate remedy is conclusion of the proceedings that continue before the military tribunals.

V. GENERAL CONSIDERATIONS

A. Considerations regarding the competence of the Commission

29. The Commission is competent to hear this case because it concerns violations of rights recognized by the American Convention: Article 1(1), regarding the obligation to respect human rights; Article 5, the right to humane treatment; Article 7, the right to personal liberty; Article 8, the right to a fair trial; Article 11, the right to protection of honor and dignity; Article 13, the right to freedom of thought and expression; and Article 25, the right to judicial protection, as provided for in Article 44 of the American Convention, to which Mexico has been a party since April 3, 1982.

B. Considerations regarding the formal requirements for admissibility

30. This petition meets the formal requirements for admissibility established in Article 46(1) of the American Convention and in Articles 32, 37, 38, and 39 of the Regulations of the Commission. In effect, the petition contains the information about the petitioners, describes the events allegedly violating the human rights protected by the American Convention, and identifies the Government considered responsible for the alleged violation. In addition, the complaint is not

pending before any other international body, nor is it the reproduction of a petition already examined by the Commission.

31. Regarding the procedures established in Article 48(1)(f) of the American Convention, while the petitioners reported that they are willing to reach a friendly settlement with the Government, the Government rejected this proposal.

32. Article 46(1) of the American Convention provides that for a petition or communication submitted to the Commission pursuant to Articles 44 and 45 to be admitted, petitioners must avail themselves of and exhaust domestic remedies, in accordance with generally recognized principles of international law.

33. In this sense, the Inter-American Court of Human Rights has stated that "the rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding".[FN19]

[FN19] I-A Court of H.R., Velásquez Rodríguez case, Judgment of July 29, 1988, p. 15, paragraph 61.

34. However, this right of the state to remedy through its own means an alleged human rights violation within its jurisdiction entails the obligation to provide such remedies in accordance with the generally recognized principles of international law.[FN20]

[FN20] Antonio A. Cançado Trindade, "A Aplicação da Regra do Esgotamento dos Recursos Internos no Sistema Interamericano de Proteção dos Direitos Humanos," *Derechos Humanos en las Américas*, Washington, IACHR, 1984, p. 217.

35. Article 46(2) provides that this requirement shall not apply when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

36. Petitioners have alleged that the campaign of harassment against General José Francisco Gallardo since 1989 has forced him to defend himself before the Office of the Attorney General for Military Justice and the Supreme Military Tribunal; to file multiple amparo claims in both criminal and administrative matters; and to bring complaints and denunciations before various authorities. Yet these have not succeeded in halting the false accusations and campaign against him.

37. For the Government, Mexican domestic remedies have not been exhausted, given that it considers that none of the bodies to which the alleged injured party has recurred is suitable for upholding the rights he complains were violated. Likewise, it considers that the appropriate remedy is closing the case that continues before the Military Tribunals. (folios 34 and 110)

38. From the record before the Commission, it appears that five amparos for criminal matters and two amparos for administrative matters were granted in favor of General José Francisco Gallardo.

39. The Inter-American Court of Human Rights has stated:

Article 46(1)(a) of the Convention speaks of "generally recognized principles of international law." Those principles refer not only to the formal existence of such remedies, but also to their adequacy and effectiveness, as shown by the exceptions set out in Articles 46(2).[FN21]

[FN21] I-A Court of H.R., Velásquez Rodríguez case, Judgment of July 29, 1988, p. 16, paragraph 63.

40. Adequate domestic remedies are those which are suitable to address an infringement of a legal right.[FN22]

[FN22] I-A Court of H.R., Velásquez Rodríguez case, Judgment of July 29, 1988, p. 16, paragraph 64.

41. Effective domestic remedies are those which are capable of producing the result for which it was designed.[FN23]

[FN23] I-A Court of H.R., Velásquez Rodríguez case, Judgment of July 29, 1988, p. 16, paragraph 66.

42. In applying these principles to the case in question, the Commission observed that while General Gallardo did have access to protection through the federal justice system, through the multiple amparos that were granted, this has not succeeded in halting the reiterated and continued complaints and investigations against him that constitute persecution and harassing conduct by military authorities. In view of this situation, he is deemed to have lacked adequate remedies to uphold his rights in terms of the jurisprudence of the Court. It also observes that concluding the proceedings in the context of the case before us is not an adequate remedy to address an infringement of a legal right. If what is denounced is intent to harass General Gallardo, which has translated into the opening against him, since 1988, of 15 preliminary

investigations and nine criminal cases in chronological form, a final decision should not be waited for, as in the previous cases, given that even if he were acquitted, as occurred in previous decisions, his rights would not be restored. To the contrary, an "abuse of power" would be consummated through unending complaints and decisions which would only worsen the situation.

43. Likewise, the Commission observes that in this case the abuse of power with its detrimental impact on the human rights allegedly violated is also evident in the unwarranted delay in the decisions of the two cases pending, as criminal case No. 2949/93, in addition to having been issued the indictment more than five years after the alleged event was committed, two-and-a-half years have passed with the decision pending, and criminal case No. 2389/94 has been in the same situation for one-and-a-half years.

44. For the reasons stated above, the Commission concludes that the exceptions to the exhaustion of domestic remedies established in Article 46(2) of the American Convention are applicable in this case and so excuses the petitioners from meeting this admissibility requirement.

C. Considerations on the merits

45. In the first place, it must be determined whether there was persecution and harassment of General Gallardo by authorities of the Mexican State. In this regard, the record indicates that from 1989 to date, 15 preliminary inquiries[FN24] and nine criminal cases[FN25] have been opened against General Gallardo regarding events most of which took place long before the opening of the inquiries, and so long before the indictments. Likewise it is shown--as the Mexican State does not dispute it--that General Gallardo has been acquitted of all accusations brought against him by military authorities to date that are not pending decision.[FN26]

[FN24] The preliminary inquiries are the following: 28/89, 30/89, 85/89, 42/91, 39/92, 59/93, SC/04/93.II, SC/157/93.III, SC/167/93.II, SC/168/93/I, SC/194/93/II, SC/21/94/I, SC/21/94/VII, SC/49/94/VII and SC/59/94/VI.

[FN25] The criminal cases are the following: 1860/83, 1140/90, 1120/91, 1196/92, 93/93, 2949/93, 3079/93, 3188/93, and 2389/94.

[FN26] Criminal cases: 1860/83, 1140/90, 1120/91, 1196/92, 93/93, 3079/93, and 3188/93.

46. In this regard, the Commission observes that it is not reasonable for this number of preliminary inquiries and criminal cases to be opened, especially when General Gallardo has been acquitted of all charges in the cases decided to date. In this regard, the Commission considers that the Mexican State has adopted an anomalous position, which constitutes an abuse of power reflected in the unquestionable persecution and harassment directed against General Gallardo. Unfortunately, the fact that federal justice system has granted amparo on numerous opportunities has not diminished the state's drive to harass; to the contrary, it has proven and aggravated this position to the point that since 1993 he was been in preventive detention awaiting the decisions in two criminal cases.[FN27]

[FN27] Criminal cases: 2949/93 and 2389/94.

47. The Commission also considers that: the fact that so many prior investigations and the criminal cases cited have been opened; that there has been a series of suits in the wake of a declaration of innocence; that those suits target the same person; and that the individual in question has been absolved in every case tried to date, also leads to the presumption that officials of the Mexican Army have engaged in harassment and hounding to the detriment of Brigadier General José Francisco Gallardo.

48. In this respect, the petitioners request that the Commission establish that the Mexican State has violated General José Francisco Gallardo's rights established in Articles 5, 7, 8, 11, 13, 25, and 1(1) of the American Convention. In this respect, the Commission must issue an opinion as to whether they have been violated:

a. Right to a Fair Trial and to Judicial Protection

49. Articles 8 and 25 of the American Convention recognize that all individuals have the right to appeal, to be judged and heard in judicial proceedings, and to a decision by a competent authority.

50. Article 25(1) of the American Convention indicates that:

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 or 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.

51. The American Convention requires that the states provide effective remedies to victims of human rights violations. In this case General Gallardo has not had such a remedy that protects him against the harassment of which he has and continues to be a victim, for even though the Federal Justice system has handed down decisions favorable to him on several occasions, the effectiveness of these decisions has been minimal, since they have not succeeded in bringing a halt to the denunciations made and investigations carried out against his person.

52. Article 8(1) establishes the right of all persons to a hearing, with due guarantees and within a reasonable time, by a competent judge or tribunal.

53. The right to a trial "within a reasonable time" provided for in the American Convention is based, among other things, on the need to avoid undue delays that translate into a deprivation and denial of justice to the detriment of persons who argue that their rights protected in the American Convention have been violated.[FN28]

[FN28] Case before the I-A Court of .H.R., Case 11.219 (Nicholas Chapman Blake), August 3, 1995, p.32.

54. Even though the Convention has not clarified the scope of the expression "reasonable time"[FN29] there are a great many precedents in the jurisprudence of international bodies according to which, in the light of the particular circumstances of each case, the following criteria have been considered: the complexity of the litigation; the conduct of the petitioners and of the judicial authorities; and the manner in which the investigative stage of the proceedings has been conducted.[FN30]

[FN29] Nor has the European Convention done so; its Article 6(1) provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...."

[FN30] See for example: IACHR, Resolution No. 17/89, Report on Case No. 10.037 (Mario Eduardo Firmenich), in Annual Report of the Inter-American Commission on Human Rights 1988-1989, p. 38; European Court of Human Rights, Konig Case, judgment of June 28, 1978, Series A No. 27, pp. 34-40, paragraphs 99, 102-105, and 107-111; Guincho Case, Judgment of July 10, 1984, Series A, No. 81, p. 16, paragraph 38; Unión Alimentaria Sanders S.A., Judgment of July 7, 1989, Series A, No. 157, p. 15, paragraph 40; Buchholz Case, Judgment of May 6, 1981, Series A, No. 42, p. 16, paragraph 51, pp. 20-22, paragraphs 61 and 63; Kemmache Case, Judgment of November 27, 1991, Series A, No. 218, p. 27, paragraph 60.

55. With respect to complexity of the litigation, the offenses of which General Gallardo is accused are embezzlement, destruction of Army property, and unlawful enrichment. In this regard, the Code of Military Justice provides in its Article 616 that:

The investigation shall be carried out as soon as possible, so that the accused may be judged within four months in the case of offenses whose penalties are no more than two years imprisonment, and within one year if the penalty is greater than said time period, unless an extension is requested for preparation of his defense.

56. The offenses of embezzlement, destruction of Army property, and unlawful enrichment all have a penalty greater than two years imprisonment; therefore, pursuant to the aforementioned article, General Gallardo should have been tried within one year, for the record does not show that he sought any extension for his defense.

57. The Commission observes that Mexican law too has objectively established the parameters for complexity of the cases, by making the distinguishing factor the seriousness of the punishment. Nonetheless, even if this Commission were to analyze the complexity of the cases on an individual basis, it is deemed that two-and-a-half years exceeds the reasonable time.

58. As regards the conduct of petitioners, in this case General Gallardo has at all times been kept waiting for a determination, and subject to juridical insecurity, for after inquiry No. 28/89

was closed, it was reopened years later, and the indictment handed down, and when he was detained in military camp No. 1 of Mexico City, another investigation was opened. It is for these reasons that he is currently detained. In addition, the record reflects that General Gallardo has duly cooperated to clear up the facts in all the proceedings mentioned.

59. As regards the conduct of the judicial authorities, the Commission deems that the tribunal has not acted diligently, for in criminal case No. 2949/93, in which charges were brought five years after the alleged act was committed, two-and-a-half years have elapsed without any decision; and in criminal case No. 2389/94, in which charges were brought while General Gallardo was detained, one-and-a-half years have gone by with no decision.

60. With respect to the last point, the processing of the litigation at the investigative stage, as indicated above at paragraphs 6 and 7, the investigation should be carried out as soon as possible so that, as in this case, the accused may be tried within one year. If the time period established by the Code of Military Justice for decision in cases of this type is one year, the time period for processing of the investigative phase should be much less. Nonetheless, according to the latest information the Commission has obtained, it appears that the two cases in which General Gallardo is being tried are still at this stage. In addition, no information has been obtained on abnormal complications in the proceedings during the investigative stage.

61. Article 8(2) of the American Convention provides that everyone indicted of an offense has the right to be presumed innocent until their guilty is legally established.

62. In this context, as has indeed been pointed out already, the fact that an extensive series of investigations and criminal cases have been instituted; that there have been successive trials following a declaration of innocence; that these acts target the same person; that the person has been acquitted in each of the cases tried to date; and that the person in question is now being held in custody, lead the Commission to presume that General Gallardo's right to be presumed innocent has been violated by the use of military justice organs.

63. In conclusion, the Commission considers that General José Francisco Gallardo's rights to a fair trial and to judicial protection, stipulated in Articles 8 and 25 of the American Convention, have been violated.

b. Right to Personal Liberty

64. Article 7(2) of the American Convention provides that no one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

65. Article 16 of the Mexican Constitution establishes:

No arrest warrant shall be issued other than by judicial authority, or without a prior denunciation, accusation, or complaint of a specific act considered by law an offense, punishable by at least imprisonment, and there is information that indicates the elements that constitute the criminal conduct and the probable responsibility of the accused.... in cases of in flagrante delicto, any

person may detain the accused, placing him or her before the immediate authority which, with the same promptness, places him or her before the authority of the Public Ministry....

66. As Mexican jurist Carlos Francisco Sodi stated, "Article 16 of the Constitution empowers not only the representative of authority, but any person, to apprehend a criminal surprised in flagrante delicto, and when the person responsible is not so surprised, then he can only be detained through an order of the judicial authority...."[FN31]

[FN31] El Procedimiento Penal Mexicano, Carlos Francisco Sodi, Editorial Porrúa, S.A., Mexico City, 1957, p. 13.

67. Petitioners have stated that on November 9, 1993, General Gallardo was arbitrarily detained and imprisoned at military base No. 1 in Mexico City, the victim of false accusations made by members of the Mexican Army. (Folio 7).

68. In this regard, the Government has stated that there never was any arbitrary detention of General José Francisco Gallardo, as his detention was pursuant to a judicial warrant, issued by a competent Military Tribunal, which issued the warrant against him in the use of its constitutional powers. (Folio 41).

69. On this point, the Commission observes that petitioners never disputed that an arrest warrant was issued by a Military Tribunal against General José Francisco Gallardo, simply stated what was described above, without detailing or substantiating the facts alleged.

70. With respect to this matter, the Commission finds that while in principle General Gallardo was detained after the respective arrest warrant was issued by a competent Tribunal, it is evident that said public authority was used for ends other than those provided for in Mexican law, thus constituting an abuse of power, through successive and related actions that have tended to deny General José Francisco Gallardo his personal liberty, through acts that have the appearance of legality. Therefore, said conduct by the Mexican military authorities means that the law has been used for a purpose other than the one established in the law, i.e. the unlawful deprivation of liberty through acts that abide by legal formality.

71. Analyzing the case, the Commission considers that General Gallardo has been the victim of disrespect for his personal liberty, through acts that appear to conform with the law. As a result, the Commission concludes that the Mexican State violated the right to personal liberty of General José Francisco Gallardo, as set forth in Article 7 of the American Convention.

c. Right to the Protection of Honor and Dignity

72. Article 11 of the American Convention provides that:

1. Everyone has the right to have his honor respected and his dignity recognized.

2. 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.
3. Everyone has the right to protection of the law against such interference or attacks.

73. Petitioners have indicated that actions and campaigns have been waged against General Gallardo to discredit and defame him nationally before all members of the Army and public opinion by the posting and distribution of flyers, notes, letters and photographs, tendentious and false statements in the press, radio, and television. (Folio 98).

74. Documentaries have been presented in which statements by members of the Mexican Army are shown in which they accuse General Gallardo of having committed various offenses defined in Mexican legislation[FN32] and of planning to destabilize the country so as to carry out a military coup.[FN33] In addition, evidence has been presented of communiques issued by the Secretariat for National Defense indicating that "Gallardo also displayed reprehensible conduct and on several occasions has been subject to trials for the offenses of abuse of authority, embezzlement, opposition to military honor, defamation, slander and libel, and infractions of military duties, all of which led him to be subjected to the action of military justice on several occasions, thereby demonstrating that he operates outside the law." [FN34]

[FN32] See the interview by journalists from the daily newspapers El Sol de México and La Reforma, of Attorney General for Military Justice of the Army, Mario Fromow García, December 24, 1993.

[FN33] See statements made December 23, 1993 by Secretary of National Defense Antonio Riviello Bazán, published December 27, 1993 in Proceso magazine.

[FN34] See article published in the daily El Universal, August 16, 1994.

75. Article 8(2) of the American Convention provides that everyone indicted of an offense has the right to be presumed innocent until their guilty is legally established.

76. From the aforementioned, the Commission observes that it is duly shown in the record that authorities of the Mexican government have made statements and issued communiques in which General Gallardo is blamed for deeds not proven, as a result of which it is considered that his honor and dignity have been attacked, for his good name and reputation have been injured, particularly considering that there are judicial decisions acquitting him, which demonstrates that he has been subjected to public harassment.

77. Based on the analysis, it is concluded that the Mexican State has violated, to the detriment of Brigadier General José Francisco Gallardo Rodríguez, the right to dignity and honor, set forth at Article 11 of the American Convention.

d. Right to Humane Treatment

78. Article 5 of the American Convention states that:

Every person has the right to have his physical, mental, and moral integrity respected.

79. Having already concluded that the Mexican Army authorities have displayed an attitude of dogged pursuit and harassment toward General Gallardo, we must now determine whether--as a result of such persecution and harassment--General Gallardo's physical, mental and moral integrity has not been respected. In this regard, the Commission considers that to subject a person who occupies a high rank in the Armed Forces to the constant annoyance of having to defend himself before the Courts (in this case military tribunals), to the degradation of being detained on several occasions and to the humiliation of being the target of attacks by military authorities in the Mexican media, in addition to causing serious material damage to his person, also seriously damages his mental and moral integrity, as it affects the normal development of daily life and causes great tumult and perturbation to him and his family. The severity of the harassment is likewise verified by General Gallardo's constant uncertainty about his future, after seven years of constant harassment and more than two years in prison.

80. Analyzing the case, this Commission considers that General José Francisco Gallardo Rodríguez has been the victim of a failure to respect his moral and psychological integrity by officials in the Mexican Armed Forces. Consequently, the Commission concludes that the Mexican State violated General José Francisco Gallardo's right to humane treatment set forth in Article 5(1) of the American Convention.

e. Right to Freedom of Thought and Expression

81. Article 13 of the American Convention provides that:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others; or
- b. the protection of national security, public order, or

public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

82. In this case, petitioners have indicated that the main objective of the attacks on General Gallardo is to prevent him from expressing his position in relation to the duty to respect the human rights of members of the military. (Folio 97)

83. In this regard, based on the publication of the article "The need for a military ombudsman in Mexico," in Forum magazine on October 22, 1993, preliminary inquiry No. SC/167/93/II was opened, under which the petitioner was accused of responsibility for the offenses of libel, defamation, and slander against the Mexican Army and the institutions under it, and against military honor. Under this inquiry a formal arrest warrant was issued for him on December 18, 1993, in criminal case No. 3188/93, and by constitutional resolution No. 336/94 of October 7, 1994, he was protected and given amparo by the federal justice system, thereby acquitting him of all charges.

84. The Government has stated in this connection that the Organ of the Military Jurisdiction [Órgano del Fuero de Guerra] deemed that this article included acts that constitute the offense of infraction of military discipline; for this reason it was ordered that the pertinent investigations be carried out, and if appropriate that criminal charges be brought against its author. (Folio 110).

85. In considering the arguments presented by the parties, and irrespective of any considerations which might be put forth as to what reasonable constraints might be placed--for reasons of discipline and security--on the freedom of expression enjoyed by members of the armed services in a democratic society, the Commission finds that despite the attitude of persecution and harassment leveled against General Gallardo which was seen in the preceding points to exist on the part of the Mexican State--that the IACHR cannot share the opinion of the petitioners, i.e. that the deprivation of his freedom of expression and thought has been the main objective of the attacks. Yes, the previous investigation and the criminal suit against him are part of the Government's harassment scenario, and at the time they occurred, they did indeed restrict General Gallardo's freedom of thought and expression. But those events took place considerably later than the onset of the attitude described. The petitioners themselves indicated that time factor in their initial claim, when they said that: "since December of 1988, 15 days after José Francisco Gallardo was promoted to the rank of Brigadier General, he has been the target of threats, harassment and intimidation on the part of the high-level chief of SEDENA." (Folio 8).

86. In addition, the Commission deems that despite the preliminary inquiry, the criminal case, and the arrest warrant, all directed against General Gallardo for expressing his opinion, he was acquitted of all charges by the Mexican federal justice system, for which reason this Commission considers that the domestic remedies in this case have enabled the Mexican State to solve the problem under its domestic law, especially when the file shows that the inquiries opened by the Mexican State into General Gallardo after completion of this trial are not the result of opinions voiced by the General, which indicates that there has not been an intent to harass exclusively aimed at depriving Gallardo of his freedom of expression; rather, it is more generalized.

87. As a result, the Commission concludes that in this case the Mexican State has not violated General José Francisco Gallardo's right to freedom of thought and expression set forth in Article 13 of the American Convention.

f. Obligation to Respect Rights

88. The conduct described in points a., b., c., and d. constitute a failure by the Mexican State to abide by the commitment assumed in Article 1(1) of the American Convention to respect the rights and freedoms recognized therein and to guarantee their free and full exercise, with respect to all persons under its jurisdiction.

g. Compensation for damages and losses

89. The violations of human rights to the detriment of General José Francisco Gallardo by the Mexican State should be duly indemnified, for to do otherwise would allow the damages and losses suffered by the victim, in this case General Gallardo, to persist over time. Further, the Inter-American Court of Human Rights has indicated the following in this respect:

It is a principle of international law, which jurisprudence has considered "even a general concept of law," that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand, is the most usual way of doing so. (Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21, and Factory at Chorzow, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, No. 17, p. 29; Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184.)[FN35]

[FN35] I-A Court of H.R., Velásquez Rodríguez case, Compensatory Damages, Judgment of July 21, 1989, page 49, paragraph 25.

90. Similarly, it is unquestionable that international law attributes much importance to the issue of reparations when a state is internationally liable for an infraction of an obligation that emanates from a treaty. Thus, José Pastor Rigruejo, on referring to this matter, states: "The essential and most important function of international liability is reparation.... The purpose of this rule is reparation for damages caused by a state in violation of international law."[FN36]

[FN36] José A. Pastor Ridruejo, Curso de Derecho Internacional Público, Ed. Tecnos, Madrid, 1986, p. 483.

91. In view of the foregoing considerations, the Commission concludes that the Mexican State must pay compensation to Brigadier General José Francisco Gallardo for the damages caused by the violation of his human rights.

VI. OBSERVATIONS OF THE GOVERNMENT ON REPORT No. 26/96

92. On April 29, 1996, in its 92nd special session, the Commission approved report No. 16/95 based on Article 50 of the American Convention. The report was trans-mitted confidentially to the Government as provided in the second paragraph of that article.

93. The Mexican Government sent in its observations on the report on August 12, 1996.

94. In those observations the Government said that the Commission's assertion of misuse of power is legally inadmissible, for pursuant to Articles 13 and 21 of the Constitution and 1, 37, 76, and 435 of the Code of Military Justice, such a view was out of order, the issuance of such a finding lying solely with the military courts, which alone are empowered to rule on the innocence or guilt of a person and on that basis to pass sentence or acquit, and, moreover, no provision of national or international law empowers a nonjurisdictional body to order the release of an accused outside of legal procedure.

95. The Government also stated that the motive assigned by petitioners to the harassment campaign against General Gallardo was to abridge his freedom of expression; that the Commission had concluded in its report 26/95 that the cause or motive alleged by petitioners did not exist, and it was therefore considered that, in accordance with article 35(c) of the Commission's Regulations, the petition was groundless.

96. That regarding an unjustified delay in coming to decisions in the proceedings, it was the accused himself who on several occasions had requested extensions of time for his defense and expressly waived the normal term for the investigation of his cases provided for his benefit in the Political Constitution of Mexico.

97. The Government stated that it was firmly resolved to accelerate the decisions of the military courts in the pending cases provided that General Gallardo took no further delaying action in his own defense.

98. It also noted that the Commission had not been very consistent in arguing the principle of the presumption of innocence, for General Gallardo has been held in accordance with all the requirements and formalities of law, which means that the presumption of his innocence has been respected at all times.

99. It stated further that the exact numbers of preliminary inquiries opened and criminal investigations carried out are 16 and 8, respectively; that the fact of opening preliminary inquiries does not constitute sufficient proof of a harassment campaign, for the Attorney General's Office (Ministerio Público) is obliged to open them when the requirements for doing so are present; that of the 8 matters in which criminal action was taken, 2 were dismissed, so that it cannot be said that General Gallardo has been acquitted in all the cases decided to date.

VII. CONSIDERATIONS ON THE OBSERVATIONS OF THE GOVERNMENT

100. Based on the analysis set forth in the present report, and taking account of the observations presented by the Government of Mexico on preliminary report No. 26/95, the Inter-American Commission on Human Rights puts forward the following considerations:

101. The Mexican Government challenges the Commission's first recommendation (requesting the release of General José Francisco Gallardo as legally inadmissible, for under Articles 13 and 21 of the Mexican Constitution and 1, 37, 76 and 435 of the Code of Military

Justice, such a decision may only be taken by the military courts, which alone are empowered to rule on the guilt or innocence of a person and to sentence or release him accordingly, and, moreover, no provision of national or international law empowers a nonjurisdictional body to order the setting at liberty of an accused outside of judicial procedure.

102. In this regard the Commission must point out that, while jurisdictional bodies alone are competent to absolve or sentence General Gallardo, the Commission is competent, under article 41(b) of the American Convention, to which Mexico became a party on April 3, 1982, to make recommendations when it deems it appropriate. In this context, all of the organs of the states parties have an obligation to comply in good faith with the recommendations issued by the Commission. The Commission cannot establish the way in which they are to be implemented at the domestic level, however. That task is incumbent upon the Government of each State, which must determine--in accordance with its constitutional and legal precepts--how the recommendations are to be carried out. The Judicial Branch, as one of the organs of the state, has that same obligation to respect the provisions of the Convention. The state cannot allege the division of powers to justify noncompliance with its international obligations.

103. In regard to the second recommendation—that the necessary measures be taken for cessation of the campaign of persecution, defamation and harassment of General Gallardo Rodríguez—the Government has stated that the proof on which the Commission seeks to found its recommendation is insufficient to show the existence of that campaign. It adds that the only grounds presented by petitioners and accepted by the Commission were the various preliminary inquiries and criminal cases lodged against General Gallardo as the probable perpetrator of several offenses and not, as petitioners state, the abridgement of his freedom of expression. It makes the point that, the primary cause asserted by petitioners as the legal basis for the harassment campaign is the attempt of the Department of National Defense (SEDENA) to abridge General Gallardo's freedom of expression, the communication neither exists nor subsists once the Commission has concluded that General Gallardo's right of freedom of expression was not violated by the Mexican Government.

104. The Commission wishes to point out, as already stated in its preliminary report, that the campaign of intimidation and harassment to which General José Francisco Gallardo has been subjected is not primarily motivated by the intent to deprive him of his freedom of expression. Though petitioners have asserted that the campaign of persecution is prompted by the General's complaints of acts of corruption and violation of human rights by the Mexican Army, their argument of the violation of his right to freedom of expression and of the other rights alleged to have been violated springs from the harassment to which General Gallardo is being subjected. In its preliminary report the Commission said nothing about the motives behind this campaign because they could have been various and are insufficiently clear, but it did find sufficient proofs that the campaign of persecution and harassment of the General is real.

105. Moreover, regarding the Commission's argument that "the record does not show that General Gallardo requested any extension of time for his defense in the cases built against him," the Government asserts that the facts show that in both cases it was the accused himself who on several occasions requested in writing more time for his defense, expressly waiving the normal term for preparation of the cases against him provided for his benefit in the Political Constitution

of Mexico by requesting revocation of the acts pronouncing that stage concluded, which has made it materially impossible for the judges to declare the investigation of the cases concluded and closed so that conclusions might be drawn and, if appropriate, a council of war be convoked to hear and hand down final decisions on those oft-cited proceedings, and pass such sentence as might be appropriate in law.

106. In this connection, the European Court of Human Rights has held, in the Toth case, that “although the case was complex and the petitioner entered appeals on several occasions, the prolonged duration of the proceedings was not directly attributable to that cause. On the contrary, the delay was due to the procedural rules of the Austrian courts, which had the effect of suspending the investigation on several occasions.” The Court found that the procedures under which the release of the accused was repeatedly delayed were not compatible with the right to personal liberty as guaranteed by the relevant European Convention[FN37]. In conclusion, although the conduct of the prisoner may appear to have delayed the process, that conduct bears no direct relation to the length of time that has elapsed without the rendering of a decision, and in light of this fact the Commission considers that in the present case the Mexican State has failed in its obligation to guarantee that justice is administered swiftly and without undue delay, under the terms of the Convention.

[FN37] Toth, Decision of the European Court of Human Rights, 12 December, 1991, Vol. 224, Para. 77, page 21.

107. The Commission is of the view that, while these arguments may appear to be duly proven, they were not adduced when they should have been. Article 34 of the Commission's Regulations provides that:

1. The Commission, acting initially through its Secretariat, shall receive and process petitions lodged with it...

5. The Commission shall request the affected government to provide the information requested within 90 days after the date on which the request is sent...

7. The Commission may, in order to gain a better understanding of the case:

a. Forward to the petitioner or his attorney the documents supplied by the government, requesting petitioner to submit his comments and any opposing evidence he may have within a period of 30 days.

b. Any such comments or evidence as may be received shall be transmitted to the government, with the request that it submit its final comments within a period of 30 days.

8. Any additional information received under conditions other than those previously established shall be communicated to the opposing party...

108. In consequence, if the Government did not report facts at the stage in the proceeding when it should have done so, at the present stage the Commission may not consider them because those allegations and proofs were adduced too late. The parties have the burden of

proving their allegations at the time assigned to them for the purpose in the proceeding. If they do not do so, their allegations may not be considered. This rule pertaining to timeliness and preclusion in the stages of the proceedings is based on the principles of legal certainty and due process of the parties.

109. The Government has stated that the Commission is inconsistent in its application of the principle of the presumption of innocence. It asserts that General Gallardo is being detained in compliance with all the requirements and formalities prescribed by law and hence that the presumption of his innocence has at no time been violated. That at no time has he suffered from the fact that the military courts have not found him guilty before the end of the trial, and if he is still being held it is because the offense of which he stands accused is one for which it is not lawful to release him on bail.

110. Regarding the arguments of the Government, the Commission observes that while General Gallardo is indeed in preventive detention pending decisions in two proceedings against him for misappropriation of funds and destruction of Army property, it is also true, as has already been said, that it is not reasonable to have continually and successively opened preliminary inquiries and criminal proceedings in the numbers mentioned over a period of 7 years, the more so since, as has been shown, the General has been acquitted of all charges in the proceedings so far decided. The Commission reiterates that these facts certainly violate the presumption of innocence to which every individual is entitled, for not only is this right being expressly violated when he is pronounced guilty before the end of a trial, but it may also be tacitly violated when the context of the actions betrays a pattern of unmistakable hounding and harassment that prejudice the individual as guilty.

111. Moreover, the Commission wishes to point out that during its in-situ visit to Mexico in the month of July, 1996, thanks to the cooperation shown by the various Mexican State authorities, and in particular by the Secretary of National Defence, it was able to interview General José Francisco Gallardo, and to confirm that the conditions under which he was being detained were acceptable.

112. The Government also states in its reply that 16 preliminary inquiries have been opened—including 02/83, relating to criminal case 1860/83—filed against him for the offense of abuse of authority, which investigation petitioners failed to mention in their account to the Commission. Also, that to date only 8 criminal cases have been filed against the General; that the opening of preliminary inquiries is insufficient grounds for the assumption that a harassment campaign is being waged against him, since in most domestic legal systems, among them the Mexican, to open a preliminary inquiry certain legal requirements must be met as provided in Article 118 of the Federal Code of Criminal Procedure, to wit: a) a charge by the constituted authorities or a complaint, and b) a description of the criminal act. It added that in the present case the preliminary inquiries adduced by General Gallardo before the Commission as proofs of the supposed harassment campaign against him were prompted by ex parte complaints filed with the Justice Department, which placed that public institution for the administration of justice in the legal obligation, if it was not to incur administrative and/or legal liability, to open and complete a preliminary inquiry, and, if sufficient legal indications were found, to act and hold the suspect for trial.

113. The Government further stated that of the 8 matters in which criminal action was taken, two were dismissed, one when the criminal action was extinguished by pardon on the part of the injured party, and the other when the criminal action was withdrawn, so that it cannot be said that General Gallardo has been acquitted in all proceedings in which decisions have been taken to date. The Commission observes that the very fact that 16 proceedings have been opened, some of which have been closed and others dismissed, is evidence of an unreasonable succession of cases, which taken together constitute an “abuse of power”, with the intent of maintaining constant proceedings against General Gallardo, thereby depriving him of his personal liberty and violating other human rights as established by this Commission.

114. The eminent jurists Eduardo García de Enterría and Tomás Ramón Fernández have stated that “every administrative act must be directed at the accomplishment of a purpose, which is always determined, either expressly or tacitly (and hence is subject to regulation), by the provision that confers the authority to act. If the administrative authority or organ departs from that purpose, which conditions the exercise of its competence, any act or decision it takes for a different purpose ceases to be legitimate...”[FN38]. Similarly, Aliberty [sic] has said that “an agent of the administration commits an abuse of power when, in performing an act within his competence and respecting the forms imposed by legislation, he makes use of his power in cases, for motives and to purposes other than those for which this power was conferred upon him. The abuse of power is an abuse of mandate, an abuse of law. An administrative act may have been performed by the competent official with all the appearances of legality and yet this discretionary act, which the qualified official had the strict right to perform, may be rendered illegal if its author has used his powers for a purpose other than that for which they were conferred on him, or to speak in terms of jurisprudence, for a purpose other than the public interest or the good of the service”[FN39]. The Commission notes that, while it may appear that the law has been adhered to in all the procedures by which the accused has been detained, the above-cited investigations have been opened, and the subsequent criminal actions have been brought, nevertheless the Mexican justice authorities, whether regular or military, who are responsible together with the Judicial Police for the prosecution of crimes, pursuant to Article 21 of the Mexican Constitution, have used the public power to launch preliminary investigations, whether *ex officio* or *ex parte*, and to bring subsequent criminal actions, for purposes other than those established in Mexican legislation, and in so doing have abused that power, through a series of successive and seemingly legal acts that have tended to deprive General José Francisco Gallardo of his personal liberty. Those acts, as the Government has stated, have resulted in the opening of 15 prior investigations since 1988, and the initiation of 7 criminal proceedings, in none of which the accused has been found responsible, since the fact that two cases have been dismissed does certainly not imply any probable responsibility on his part: on the contrary, as the Dictionary of the Spanish Language states, dismissal is “an action that, because of the evident absence of a crime or of responsibility on the part of the accused, terminates the process with effect analogous to that of an acquittal.”

[FN38] Eduardo García de Enterría and Tomás Ramón Fernández, *Curso de Derecho Administrativo*, Madrid, Civitas, 1991, Volume 1.

[FN39] Alibert, *Le controle juridictionnel de l'Administration*, Paris, 1926, p. 236.

VIII. CONCLUSIONS

115. That through the detention and continuous submission of General José Francisco Gallardo to 16 preliminary inquiries and 8 criminal cases without a reasonable and justifiable purpose, the Government of Mexico has failed to discharge its obligation to respect and guarantee the rights to personal integrity, legal guarantees, honor and dignity, and legal protection of Brigadier General José Francisco Gallardo Rodríguez, according to articles 5, 7, 8, 11 and 25 of the American Convention, for the repeated acts that have taken place in Mexico since 1988.

116. That pursuant to the facts denounced the Mexican Government has not fulfilled its obligations to respect the human rights and guarantees imposed by article 1.1 of the American Convention.

IX. RECOMMENDATIONS

In view of the foregoing,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

117. That Brigadier General José Francisco Gallardo be set at liberty immediately,

118. That all necessary measures be taken to cease the campaign of persecution, defamation and harassment against Brigadier General José Francisco Gallardo.

119. That those responsible for the campaign of persecution, defamation and harassment against Brigadier General José Francisco Gallardo be investigated and punished.

120. That the necessary measures be taken for decision of the pending proceedings as soon as possible.

121. That General José Francisco Gallardo be paid a fair compensation in reparation for the violations to which he has been subjected.

122. To publish this report in the Annual Report to the General Assembly of the OAS, pursuant to Article 48 of the Commission's Regulations and Article 51.3 of the Convention, because the Government of Mexico did not adopt measures to correct the situation denounced within the time period.