

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 94/06; Petition 540-04
Session:	Hundred Twenty-Sixth Regular Session (16 – 27 October 2006)
Title/Style of Cause:	Ines Fernandez Ortega v. Mexico
Doc. Type:	Decision
Decided by:	President: Evelio Fernandez Arevalos; First Vice-President: Paulo Sergio Pinheiro; Second Vice-President: Florentin Melendez; Commissioners: Clare K. Roberts, Freddy Gutierrez, Paolo G. Carozza, Victor E. Abramovich.
Dated:	21 October 2006
Citation:	Fernandez Ortega v. Mexico, Petition 540-04, Inter-Am. C.H.R., Report No. 94/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006)
Represented by:	APPLICANTS: the Organizacion Indigena de Pueblos Tlapanecos AC and the Centro de Derechos Humanos de la Montana “Tlachinollan” AC
Editor's Note:	Footnote 1 is attached to the title of the case and says " By express request from the victim, her complete name has been included in the petition."
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I. SUMMARY

1. The Inter-American Commission on Human Rights (the Inter-American Commission” or “the IACHR”) received a petition on June 14, 2004, alleging that the United Mexican States (“the State,” “the Mexican State”) are internationally responsible for the illegal detention, rape and torture of Inés Fernández Ortega (“alleged victim”), an indigenous person of the Tlapanec Me`paa people, and for the lack of subsequent investigation of said facts. The petition was lodged by the alleged victim, the Organización Indígena de Pueblos Tlapanecos AC. (OIPT) [Indigenous Organization of Tlapanec Peoples] and the Centro de Derechos Humanos de la Montaña “Tlachinollan” AC [“Tlachinollan” Human Rights Center of the Mountain] (hereinafter, jointly, “the petitioners”).

2. The petitioners contend that the facts reported constitute violations of several rights provided for by the American Convention on Human Rights (“the American Convention”): the right to personal integrity (Article 5), the right to personal freedom (Article 7), the right to due process (Article 8), the right to protection of the honor and dignity (Article 11), the right to protection of the family (Article 17), the right to property (Article 21), the right to judicial protection (Article 25), as well as the obligation of the State to respect and guarantee the rights of persons under its jurisdiction (Article 1.1). They also contend that there has been a violation of Articles 3, 4, 7, 8, and 9 of the Inter-American Convention on the Prevention, Punishment and

Eradication of Violence against Women “Convention of Belém do Pará,” and of Article 2 of the Inter-American Convention to Prevent and Punish Torture. They maintain that they have met all the admissibility requirements provided for by the American Convention.

3. The Mexican State, in turn, maintains that the Procuraduría General de Justicia Militar [Office of the Attorney General for Military Justice] initiated an ex officio investigation of the case; that the local civil prosecutor disqualified himself, deferring to the military venue, and that neither the alleged victim nor the witnesses appeared before the military prosecutor notwithstanding that they were summoned on several occasions. It also maintains that the proceedings related to the investigation to identify those responsible of the crime have not yet been exhausted.

4. Without prejudging on the merits of the case, the IACHR has concluded in this report that the petition is admissible, in accordance with Articles 46 and 47 of the American Convention. Therefore, the Inter-American Commission has decided to notify the parties of this decision and continue with the examination of the merits of the case regarding the alleged violation of Articles 5(1), 7, 8(1), 11, 17, 19, 21 and 25 of the American Convention, in accordance with the general obligation to respect and guarantee rights, provided for by Article 1 (1) of said international instrument; of Article 7 of the Convention of Belém do Pará, and of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. The Commission has also decided to publish this report and include it in its Annual Report to the General Assembly of the OAS.

II. PROCEEDINGS WITH THE INTER-AMERICAN COMMISSION

5. The petition was received on June 14, 2004. The Commission forwarded the relevant parts of the petition to the State on February 2, 2005, granting it two months to submit its observations. The State requested an extension on April 1, 2005. On July 12, 2005, the State responded to the observations of the petitioners. On July 18, 2005, the IACHR forwarded the observations of the State to the petitioners.

6. After the filing of the petition, on January 10, 2005, a request was submitted to the Commission for precautionary measures in favor of Otilia Eugenio Manuel, one of the petitioners in this case, and member of the Indigenous Organization of Tlapanec Peoples (OIPT), due to the threats and harassment she allegedly suffered because of her role in the defense of this and other similar cases. The precautionary measures were granted on January 14, 2005, under number MC 6-05.

III. POSITIONS OF THE PARTIES

A. The petitioners

7. The petitioners contend that the State is responsible, inter alia, for the illegal detention, rape, and torture, with prejudice to Inés Fernández Ortega (“alleged victim”), an indigenous person of the Tlapanec Me`paa people, and for the lack of subsequent investigation of said facts. According to the petition, Inés Fernández Ortega, of 29 years of age, was sexually assaulted by members of the Mexican Army.

8. According to the petition, on March 22, 2002, at approximately 3:00 p.m., Inés Fernández Ortega was at home when three soldiers entered her kitchen without her permission, while another 9 remained outside in her yard. Inside also were the children of the alleged victim, all minors, who fled out of fear to the house of their grandfather Raymundo Prisciliano Jesús. The soldiers who had entered the home of the alleged victim asked her regarding the whereabouts of her husband and about the meat that she had in her yard. Since she did not answer, and remained silent because she did not speak Spanish, the soldiers became infuriated and began threatening her with their weapons, they ordered her to lie down on the floor, and raped her: "Already on the floor, the soldier held both her hands in his right hand and with his left hand lowered her underpants. The soldier then lowered his own pants down to his knees, got on top of her and began to rape her for approximately 10 minutes. The other two soldiers, acting as accomplices, observed and surrounded Inés." Once the soldiers finished assaulting her, they left the house and headed towards the mountain, stealing the meat that was in her yard. The alleged victim remained in her kitchen until her husband, Fortunato Prisciliano Sierra, arrived.

9. The petitioners claim that on March 24, 2002, the alleged victim arrived to the Office of the Attorney General of the Civil Jurisdiction in Ayutla de los Libres, Guerrero, and lodged a formal complaint against the soldiers for the crimes of rape, unlawful entry, abuse of authority, and others that could arise from the investigation. A gynecological examination was practiced by Dr. Griselda Radilla López on March 25, 2002, because the alleged victim refused the examination on the previous day due to the fact that there were no female medical personnel present.

10. The petitioners maintain that on April 2, 2002, the office of the Attorney General sent a communication to Dr. Griselda Radilla López requesting the results of the laboratory study for the alleged victim. The director of the Hospital of Ayutla de los Libres, Guerrero, responded, saying that for lack of reagents they had not been able to perform the studies, but that they still had the slides with the samples obtained. On April 10, 2002, the Office of the Attorney General ordered the director of the hospital to forward the results of the gynecological exam practiced as well as the slides for their examination by a forensic chemist. These samples and the results of the exam were sent to the Health Ministry of Chilpancingo, Guerrero. According to the petitioners, the results of the aforementioned studies were positive for the existence of sperm in the vaginal cavity but when they requested the genetic results from the forensic chemical exam, the Dirección General de Servicios Periciales de la Procuraduría de Justicia del Estado de Guerrero [Office of the Director General of Expert Services of the Office of the Attorney General of the State of Guerrero] responded that to carry out said study was impossible, since the samples obtained had been destroyed by the spermatobioscopy and the acid phosphatase study.

11. According to the petitioners, on May 17, 2002, the incumbent prosecutor of the Office of the Attorney General in the Civil Jurisdiction in charge of this matter, recused himself from the case. In response to this development, the alleged victim wrote to the Agente del Ministerio Público Militar [Military Prosecutor] attached to Military Zone 35, inquiring whether he had accepted to hear the case, given the recusal, and should the answer be in the affirmative, she requested that he recuse himself from hearing the case, on the grounds that the assumption of military jurisdiction would be unconstitutional, since the alleged victim was a civilian. In this

regard, the petitioners state that on March 17, 2002, the alleged victim was notified that the military venue was competent to hear the case, in response to which the alleged victim lodged an amparo petition [protection of constitutional rights] on April 9, 2003, requesting that military jurisdiction for the case to be ruled unconstitutional. The amparo petition 405/2003 was denied by the First District Judge, of Chilpancingo, Guerrero. Faced with this result, the petitioners state that the alleged victim, on September 19, 2003, lodged a petition for amparo review. The denial was upheld, however, in a November 28, 2003 ruling, on the grounds that the alleged victim was precluded from lodging a petition for a trial on constitutional guarantees (amparo), because she was the victim of the crime. The petitioners allege that at the time of lodging the petition they are unaware of the procedural stage of the case, since the alleged victim has not been notified of any proceedings in the military venue.

12. The petitioners contend that in view of the lack of effectiveness demonstrated by the civil and military authorities in the investigation of the case of the alleged victim, the Comisión Nacional de Derechos Humanos (CNDH) [National Human Rights Commission] issued recommendation 48/2003 regarding the violation of guarantees of legality and legal certainty, since the office of the military prosecutor intended to close the preliminary investigation without having undertaken the proceedings necessary to prove that a crime had been committed.

B. The State

13. In response to the petition, the Mexican State maintains that on March 27, 2002, the Office of the Attorney General for Military Justice initiated an ex officio investigation of the case in response to a newspaper report titled “Second Woman Raped by Soldiers in the Me Paa Region,” published in the newspaper El Sur. The office performed several proceedings: the taking of depositions of 31 soldiers stationed at the Méndez Base of Operations, who were carrying out operations on the day of the facts in Barranca Tecuani. The Mexican State contends that all of the soldiers who gave testimony headed out in different directions, but none to the village where the victim was to be found.

14. The State contends that on May 17, 2002, the local civil prosecutor decided to recuse himself, referring the case to the military venue, and handing over the chemical forensic report of the examination practiced on the alleged victim, which identified sperm cells. In this connection, and with the purpose of making a chemical forensic study of genetic material, the coordinator of Forensic Chemistry of the Office of the Attorney General of the State of Guerrero reported that the material had been exhausted in the analysis and that the samples had been destroyed.

15. The State contends that proceedings were scheduled for November 15 and December 18, 2002, and January 24, 2003, but neither did the alleged victim appear nor did the witnesses, although they had been duly served with summons. The Mexican State maintains that due to the unexcused lack of appearance on the part of the alleged victim, the military prosecutor requested the Office of the Attorney General for Military Justice to “close the case file, with the reservations required by law, on the grounds of a lack of legal interest of the victim, the lack of a charged suspect, and the lack of certainty or sufficient evidence leading to believe that soldiers of the Mexican Army would have committed the crime.” [FN2] However, the State further argues,

the Office of the Attorney General for Military Justice denied the request and returned the preliminary inquiry for its continuation and ordered the remaining proceedings to be carried out.

[FN2] State's response dated July 12, 2005, p. 3.

16. The State maintains that on March 13, 2003 the alleged victim requested that the military prosecutor abstain from continuing with the case, receiving the reply that the "proceeding was legally grounded and that for that reason, they could not evade their legal duty to continue investigating the facts."

17. The Mexican State states that it wishes to "emphasize the need to exhaust all the remaining investigation proceedings, because it is a sine qua non requirement to learn the identity of those responsible in order to punish them." Consequently, and wishing to resolve the matter, the State contends that it considers necessary to provide the conditions so that the victim can exhaust all the remaining proceedings and be in the position of identifying those probably responsible. In addition, the Mexican State has considered forming a Working Group composed of representatives of the Secretaría de la Defensa Nacional [Ministry of National Defense] and of the Dirección General de Derechos Humanos y Democracia [Office of the Director for Human Rights and Democracy] of the Ministry of Foreign Affairs, the Office of the Attorney General of the State of Guerrero, and representatives of the petitioners, to jointly review the investigation process, identify necessary proceedings to clarify the facts, and subsequently have female personnel carry out the agreed proceedings.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *rationae personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

18. The petitioners are authorized by Article 44 to lodge complaints before the IACHR. The petition identifies Inés Fernández Ortega as the alleged victim, an individual with respect to whom the Mexican State undertook to respect and guarantee the rights provided for by the American Convention. Regarding the State, Mexico is a party to the American Convention since March 24, 1981, the date on which it deposited its instrument of ratification. For these reasons, the Commission is competent *rationae personae* to examine the petition.

19. The Mexican State, in addition, ratified the Convention of Belém do Pará on November 12, 1998 and the Inter-American Convention to Prevent and Punish Torture on June 22, 1987. Therefore, the IACHR is competent *rationae temporis* to examine the merits of the arguments regarding alleged violations of said international instruments.

20. The IACHR is competent *ratione loci* and *materiae* to examine the petition, because it alleges the violation of human rights protected by the American Convention, the Convention of Belém do Pará, and the Inter-American Convention to Prevent and Punish Torture, within the territory of Mexico, a State Party to said treaties.

B. Other requirements for admissibility of the petition

1. Exhaustion of domestic remedies

21. The Mexican State has made the sole argument that the process is still in the investigation stage. The petitioners contend that domestic remedies have been exhausted, having filed an amparo petition which was denied, and a subsequent request for amparo review, that argued the absence of independence and impartiality of the military venue. The petitioners also invoke the applicability of the exception to the exhaustion of domestic remedies on the basis of an unwarranted delay caused by the intervention of an organ without jurisdiction which lacks impartiality and the proper disposition to act.

22. It must first be clarified which are the domestic remedies that should be exhausted according to the provisions, in spirit and in letter, of Article 46(1)(a) of the American Convention. This rule requires, for the admissibility of a petition, “that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.” The Inter-American Court has interpreted the norm to mean that the remedies that should be exhausted are only those that are adequate to remedy the alleged violations. Adequate domestic remedies are those:

which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable. [FN3]

[FN3] I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988, Series C No. 4, para. 63.

23. The Commission’s jurisprudence acknowledges that when a crime is committed which is ex officio prosecutable, the State is under the obligation to set the criminal law system into motion and to process the matter until the end, [FN4] and that, in these cases, this is the appropriate venue to clarify the facts. Likewise, both the Inter-American Court and the Commission have reaffirmed the obligation of the State to investigate all violations of human rights, to try those responsible, indemnify the victims, and avoid impunity. [FN5] It is the opinion of the Commission that the facts alleged by the petitioners in the instant case refer to an alleged violation, to an act that, according to the state’s domestic legislation, constitutes a crime liable to ex officio prosecution. Hence, it is this criminal proceeding, moved forward by the State itself, which should be considered in order to determine the admissibility of the complaint.

[FN4] IACHR, Report No. 52/97, Case 11,218, Arges Sequeira Mangas, Nicaragua, February 18, 1998, paras. 96-97. See also Report No. 55/97, para. 392.

[FN5] IACHR, Report No. 54/01, Case 12,051, Maria Da Penha Fernandes, Brazil, April 16, 2001, para. 43, citing I/A Court H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988. Series C. No. 4, para. 176, and I/A Court H.R., Godínez Cruz Case. Judgment of January 20, 1989. Series C No. 5, para. 175; IACHR, Report N° 53/01, Case 11,565, Ana, Beatriz and Celia González Pérez, México, April 4, 2001, para. 84.

24. With respect to the use of military courts to try the members of the Army allegedly implicated, the Commission has reiterated its opinion on several occasions that military jurisdiction is not an appropriate venue and hence does not provide adequate recourse to investigate, try, and punish violations of human rights provided for by the American Convention. [FN6]

[FN6] IACHR, Third Report on the Human Rights Situation in Colombia (1999), p. 175; Second Report on the Situation of Human Rights in Colombia (1993), p. 246; Report on the Situation of Human Rights in Brazil (1997), pp. 40-42. In addition, the Inter-American Court has confirmed that criminal military justice is an adequate venue only for the trial of members of the armed forces for crimes or offenses that by nature attempt against legally protected interests of military order. I/A Court H.R., Durand and Ugarte Case. Judgment of August 16, 2000. Series C No. 68, para. 117.

25. Therefore, considering the features of the instant case, it is the opinion of the Commission that the exception provided for by Article 46 (2) (a) of the American Convention is applicable; consequently the requirement to exhaust domestic remedies is not enforceable. The requirement established by Article 46 (1) (b) of the Convention, regarding the period of six months, is not applicable either, since the petition was lodged within the reasonable time period referred to by Article 32 (2) of the Commission's Rules of Procedure for those cases in which a final judgment has not been handed down before the lodging of the petition.

26. Finally, the appeal to the exceptions to the rule on the exhaustion of domestic remedies, found in Article 46(2) of the Convention, is closely related to the finding of possible violations to certain rights provided for therein, such as guarantees of access to justice. However, Article 46(2), by nature and purpose, is a norm with autonomous content, vis-à-vis the substantive norms of the Convention. Therefore, the decision as to whether the exceptions to the rule of exhaustion of domestic remedies in said Article are applicable to the case at hand must be made beforehand and separately from the examination of the merits of the case, since it relies on a standard of evaluation different from the one used to establish the existence of violations of Articles 8 and 25 of the Convention. It should be clarified that the causes and the effects that have impeded the exhaustion of domestic remedies in the instant case shall be examined, as appropriate, in the Report that the Commission shall adopt on the merits of the controversy, in order to establish whether they indeed are violations of the American Convention.

2. Duplication of proceedings and res judicata

27. The record of the petition does not contain any information which may tend to establish that the subject of the petition is pending in another international proceeding for settlement; or that it has been previously decided by the Inter-American Commission. Therefore, the IACHR concludes that the exceptions provided for by Articles 46(1)(d) and 47(c) of the American Convention are not applicable.

3. Characterization of the facts alleged

28. In the instant case, the petitioners contend that the State is responsible for alleged violations of the rights to personal integrity, to personal freedom, to due process, to protection of the honor and dignity, to protection of the the family, of the right to property, of the right of women to a life free from violence, of the right to live free from torture, of the right to judicial protection, and of the obligation of the State to respect and guarantee the rights of the persons under its jurisdiction. The Mexican State, in turn, maintains that the process is still in the investigation stage, and that it is still carrying out proceedings to find those responsible. However, it is considering the possibility of forming a Working Group to review the investigation procedures.

29. In this regard, it is the opinion of the Commission that it is not appropriate at this stage of the process to establish whether or not the alleged violations occurred. For purposes of admissibility, the IACHR must decide whether the facts put forward tend to establish possible violations of the Conventions, as provided for by Article 47 (b) of the American Convention. The criterion to evaluate these points is different from the one required to decide on the merits of a complaint. The Inter-American Commission must carry out a prima facie evaluation, to examine whether the complaint contains any apparent violation or violations of the American Convention. This analysis is preliminary, and does not constitute prejudgment or the advancement of an opinion on the merits of the matter.

30. The arguments of the petitioners refer to facts that, should they be true, would constitute a violation of several rights guaranteed by the American Convention, the Convention of Belém do Pará and the Convention to Prevent and Punish Torture. The Commission also notes preliminarily in the present case, that the alleged violations may have been aggravated by the pain and humiliation of the alleged victim due to her condition as an indigenous person and her lack of knowledge of the language of her aggressors. [FN7] The IACHR believes that the facts presented require a more thorough and complete study at the merits stage. On the other hand, although the petitioners have not invoked Article 19 of the American Convention and Articles 1, 6, and 8 of the Convention to Prevent and Punish Torture, based on the principle *iura novit curia*, the Commission will hear arguments related to alleged violations of said Articles.

[FN7] IACHR, Report N° 53/01, Case 11,565, Ana, Beatriz and Celia González Pérez, México, April 4, 2001, para. 95.

31. It is the opinion of the IACHR that, should the facts be proven, they would constitute the violation of the rights of Inés Fernández Ortega guaranteed by Articles 5(1), 7, 8(1), 11, 19, 21,

and 25 of the American Convention, in connection with the general obligations provided for by Article 1(1). Likewise, it is of the opinion that the facts put forward could constitute possible violations of Article 7 of the Convention of Belém do Pará, and of Articles 1, 6, and 8 of the Convention to Prevent and Punish Torture.

32. In regards to Article 17 of the American Convencion, invoked by the petitioners, the IACHR considers it is admissible. However, the decision regarding this provision at the merits stage will require more clear, complete and detailed information from each of the parties.

33. Based on the aforementioned, the IACHR concludes that the petitioners have prima facie met the requirements established by Article 47 (b) of the American Convention.

V. CONCLUSIONS

34. The Inter-American Commission concludes that it is competent to examine the merits of this case and that the petition is admissible pursuant to Articles 46 and 47 of the American Convention. Based on the foregoing arguments in fact and in law, and without prejudging on the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the petition admissible regarding alleged violations, with prejudice to Inés Fernández Ortega, of the rights protected by Articles 5(1), 7, 8(1), 11, 17, 19, 21, and 25 of the American Convention, in connection with the general obligations provided for by Article 1(1) of said treaty; of Article 7 of the Convention of Belém do Pará, and of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.
2. To notify the parties of this decision.
3. To continue with the analysis of the merits of the case, and
4. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 21st day of the month of October, 2006.
(Signed): Evelio Fernández Arévalos, President; Paulo Sérgio Pinheiro, First Vice-President; Florentín Meléndez, Second Vice-Presidente; Clare K. Roberts, Freddy Gutiérrez, Paolo G. Carozza and Víctor E. Abramovich, Members of the Commission.