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First Vice-President: Paolo Carozza;  
Second Vice-President: Victor Abramovich;  
Commissioners: Evelio Fernandez Arevalos, Clare K. Roberts, Paulo Sergio Pinheiro, Freddy Gutierrez.  
Dated: 8 April 2007  
Citation: Jimenez Alvarez v. Mexico, Petition 302-02, Inter-Am. C.H.R., Report No. 31/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007)  
Represented by: APPLICANTS: Accion de los Cristianos para la Abolicion de la Tortura, the Centro Regional de Defensa de los Derechos Humanos "Jose Maria Morelos y Pavon, A. C", and the Center for Justice and International Law  
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## I. SUMMARY

1. On April 25, 2002, the Inter-American Commission on Human Rights ("the Inter-American Commission" or "the IACHR") received a complaint lodged by Acción de los Cristianos para la Abolición de la Tortura (ACAT), the Centro Regional de Defensa de los Derechos Humanos "José Maria Morelos y Pavón, A. C", and the Center for Justice and International Law (CEJIL) (hereinafter, the petitioners) claiming the international liability of the State of Mexico (hereinafter, "the State") for the alleged forced disappearance of Faustino Jiménez Álvarez and subsequent failure to investigate and make reparations for the incident, which would constitute a violation of the rights enshrined in Articles 4 (right to life), 5 (personal integrity), 7 (personal liberty), 8 (judicial guarantees), 25 (judicial protection) all in relation to Article 1(1) of the American Convention on Human Rights (hereinafter "the American Convention"), Article XI (obligation to maintain detainees in an officially recognized place of detention) of the Inter-American Convention on Forced Disappearance of Persons (hereinafter the "Convention on Disappearance") and Article 1 (obligation to prevent and punish torture), Article 6 (obligation to take measures to prevent and punish torture) and Article 8 (obligation to grant judicial guarantees to those who report having been tortured) of the Inter-American Convention to Prevent and Punish Torture (hereinafter "the Convention against Torture").

2. The petitioners claim that on June 17, 2001, at approximately four o'clock in the morning, several members of the judicial police of Guerrero state arrived at the home of Mr. Faustino Jiménez Álvarez, while he was sleeping in the company of his wife, Enedina Cervantes, their minor children, and a sister and a sister-in-law, Antonia Jiménez Álvarez. After beating and

interrogating him as to the whereabouts of his boss, José Valle Álvarez, who had been kidnapped days before, they took Mr. Faustino Jiménez away, threatening to kill his wife and the rest of his family members. According to the petitioners, since that his whereabouts have remained unknown since that date and that his relatives have approached the Attorney General's Office and several judicial police headquarters to pursue the steps necessary to learn his whereabouts. They also relate that they have made use of all domestic remedies, including the presentation of an amparo remedy, a criminal complaint for disappearance, and an extraordinary remedy of habeas corpus [exhibición de personas], none of which have led to a determination of Mr. Faustino Jiménez's whereabouts. Therefore, it is the petitioners' view that the exceptions set forth in 46(2)(a) and (c) of the American Convention apply to the instant case.

3. The State, for its part, has argued that domestic remedies to locate Mr. Faustino Jiménez Álvarez have not been exhausted in the instant case, since a pretrial investigation [averiguación previa] opened in response to a complaint filed by Mr. Jiménez Álvarez's wife is still underway in the Public Ministry and is following up on several investigative leads. The State also claims that progress in the investigation indicates the probable involvement of two individuals in the disappearance of Faustino Jiménez, one of whom was the group chief of the State Judicial Police. The State contends that as a result, in October 2001, a criminal case was opened against both individuals with a request that an arrest warrant be issued against them, and both currently are fugitives from justice. Moreover, on October 22, 2002, the Attorney General of the Republic initiated a pretrial investigation pursuant to a complaint presented by Mrs. Enedina Cervantes Salgado concerning the kidnapping. The State adds that the Federal Investigation Agency [Agencia Federal de Investigación] is taking steps to carry out the arrest warrants against the individuals identified as the likely perpetrators in the disappearance of Mr. Jiménez Álvarez.

4. Without prejudging the merits of the matter, the IACHR concludes in this report that the case is admissible, insofar as it meets the requirements set forth in Articles 46 and 47 of the American Convention. The Inter-American Commission decides to notify the parties of its decision and to proceed with its analysis on the merits concerning the alleged violations of the American Convention, the Convention on Disappearance, and the Convention against Torture, and to publish this decision and include it in its Annual Report to the OAS General Assembly.

## II. PROCEEDINGS BEFORE THE COMMISSION

5. The IACHR received a request for precautionary measures on behalf of Faustino Jiménez Álvarez on July 12, 2001, which it granted on July 13, 2001. On July 27, 2001, the State requested an extension to report on the adoption of the precautionary measures, which was granted by the IACHR on August 1, 2001. On August 10, 2001, the petitioners requested a hearing at the 113th regular session of the IACHR. On August 23, 2001, the State sent information concerning the precautionary measures, which was forwarded to the petitioners on August 27, 2001. On August 27, 2001, the IACHR responded to the petitioners' request for a hearing. On September 9, 2001, the petitioners submitted their observations concerning the State's response, which were forwarded to the State on September 24, 2001. On October 9, 2001, the State submitted its observations about the petitioners' report, which was forwarded to the petitioners on October 25, 2001. On November 2, 2001, the petitioners submitted additional information, which was forwarded to the State on November 12, 2001. On November 22, 2001,

the petitioners submitted additional information. On November 26, 2001, the State submitted its response to the information provided by the petitioners. On November 29, 2001, the petitioners presented additional information which was forwarded to the State on November 30, 2001. On November 30, 2001, the IACHR requested that the State expand the precautionary measures. On December 19, 2001, the State submitted information on the expansion of the precautionary measures, which was forwarded to the petitioners on December 19, 2001. On December 17, 2001, the State sent additional information. On July 27 and August 16, 2002, the petitioners submitted additional information on the precautionary measures.

6. The IACHR received the petition on April 25, 2002 and it was forwarded to the State on June 18, 2002 with a two-month period to submit its observations. On September 24, 2002, the State submitted its observations concerning the petition, which were forwarded to the petitioners on November 11, 2002, with a one-month period to present their observations. On July 17, 2003, the petitioners submitted their observations about the State's report. On January 8, 2004, this information was forwarded to the State with one month to submit its observations. On May 3, 2004, the petitioners submitted additional information which, on May 5, 2004, was forwarded to the State. On January 9, 2004, the petitioners requested a hearing at the 119th regular session. On February 3, 2004, the Commission responded to the petitioners' request. On February 17, 2004, the State requested an extension of the time period to submit its observations concerning the information submitted by the petitioners.

7. On March 19, 2004, the State submitted its observations concerning the petitioners' information, which was forwarded to the petitioners on March 25, 2004 with a one-month period in which to submit their observations. On November 19, 2004, the State submitted additional information which was forwarded to the petitioners on December 27, 2004, with a one month period in which to submit its observations. On June 1, 2005, the Commission reiterated its request for information from the petitioners. On June 28, 2005, the petitioners requested an extension of time to submit their observations on the State's information. On July 13 and October 2, 2006, the petitioners submitted additional information, which was forwarded to the State on October 13 and November 6, 2006, for its observations. On December 18, 2006, the State submitted its observations, which were forwarded to the petitioners on January 19, 2007.

### III. POSITIONS OF THE PARTIES

#### A. The petitioner

8. The petitioners state that on June 17, 2001, five members of the Judicial Police of the State of Guerrero violently entered the home of Mr. Faustino Jiménez Álvarez while he was sleeping. They set upon him, beating him and questioning him as to the whereabouts of his boss, José Valle Álvarez, who had been kidnapped several days before. Under threat that they would kill his wife and other family members, they took Mr. Faustino Jiménez away and caused him to disappear. The petitioners continue that on the day of his disappearance, his family members visited the Attorney General's Office [State Attorney General's Office] and several stations of the Judicial Police of Acapulco, Tierra Colorada, and Chilpancingo to investigate his whereabouts, to no avail.

9. The petitioners claim that on October 1, 2001, former police agent, Francisco Cortés Pastenes, testified before the Human Rights Commission of the State of Guerrero that several police agents were presumably responsible for the disappearance of Faustino Jiménez, including the director of the Judicial Police, Jaime Figueroa Vásquez, and judicial police agents Víctor Castro Valente, Jaime Nicolás Cabaña, Fidel Morales Vargas, Juan Carlos Miranda Castro, Raymundo Rodríguez, and others under Commander Arturo Sánchez Detague. In his testimony, former agent Francisco Cortés Pastenes, alleged that after several days in the headquarters of Renacimiento city, Mr. Faustino Jiménez was taken to the ranch of Mr. Ángel Castro Valente. On October 13, 2001, another former judicial official, Mr. Ultiminio Díaz Castillo, testified that Mr. Faustino Jiménez was alive and was being held in a clandestine jail in a place known as “la venta”. The petitioners state that Mr. Faustino Jiménez’s wife, Mrs. Enedina Cervantes Salgado, received an anonymous telephone call from an individual who told her that her husband was being held on Mr. Ángel Castro Valente’s ranch, that occasionally he was taken to other ranches where he was tortured, and that the State Attorney General’s Office should not investigate because it wasn’t expedient that Mr. Faustino Jiménez appear dead or alive.

10. The petitioners claim that on June 21, 2001, Mrs. Enedina Cervantes filed an amparo remedy for incommunication before the Sixth District Judge of the State of Guerrero on behalf of Faustino Jiménez Álvarez, against actions taken by the Attorney General’s Office of that State, registered under number 600/2001. The judge declared his lack of jurisdiction and remanded the remedy to the First District Judge, which, on June 28, 2001, processed it under number 542/2001. On that same date, the judge suspended the actions which were the subject of the complaint in light of the possibility that Mr. Jiménez Álvarez might be subjected to treatments prohibited under Article 22 of the Constitution of the United Mexican States and ordered that Enedina Cervantes report on the legal status of Mr. Jiménez Álvarez. They assert that this amparo remedy has been exhausted without yielding positive results concerning the whereabouts of Mr. Jiménez Álvarez.

11. The petitioners claim that on June 26, 2001, Enedina Cervantes Salgado filed a complaint before the Guerrero State Human Rights Commission for the forced disappearance of Faustino Jiménez Álvarez, which was processed under number VG-167/2001/IV. On March 14, 2002, this entity issued recommendation 19/2002 urging the Guerrero State Attorney General to issue instructions for the punishment of 20 officers allegedly responsible for the disappearance of Mr. Faustino Jiménez Álvarez.

12. On July 3 and 4, 2001, Mrs. Enedina Cervantes Salgado filed extraordinary remedies of habeas corpus before the Third First Instance Judge of the Criminal Branch of the Los Bravos Judicial District and another before the Sixth First Instance Judge for criminal matters of the Tabáres Judicial District. In both instances, the cells of the Attorney General’s Office were searched and Mr. Faustino Jiménez Álvarez was not found. They add that on July 17, 2001, the organization Acción de los Cristianos para la Abolición de la Tortura (ACAT) filed a complaint before the National Human Rights Commission against the Attorney General of the Republic for the disappearance of Mr. Jiménez Álvarez, which was admitted and assigned number 2001/1889.

13. On July 2, 2001, Enedina Cervantes Salgado filed a complaint before the Public Ministry of the local jurisdiction [fuero comun] of “Los Bravos” Judicial District, for the illegal detention

and disappearance of Mr. Faustino Jiménez Álvarez, which was registered as pretrial investigation [averiguación previa] BRA/ SC/05/1162/2001. On November 8, 2001, the presiding judge in the criminal case issued a warrant for the arrest of Manuel de Jesús Noriega Moctezuma and Fidel Morales Vargas. The petitioners claim that while it is true that Mr. Fidel Morales Vargas was apprehended and sentenced to 45 years in prison for the illegal deprivation of liberty of Faustino Jiménez, in early April 2004, the defense appealed the verdict, which the Superior Court modified and remanded for pending procedural formalities; once these were resolved, the verdict was reissued and was again appealed by the defense. After the third appeal, on June 29, 2006, the First Criminal Chamber of the Superior Court of Justice modified the previous verdicts and sentenced him to 35 years in prison and a fine of \$46,605.00 pesos, absolving him of the payment of material and moral reparations. In relation to Manuel de Jesús Noriega Moctezuma, the arrest warrant has not been served, and therefore the investigation would still be open.

14. In criminal case 132/200, the petitioners contend that arrest warrants were indeed issued against Arturo Valle Álvarez and Raúl Valle Álvarez for the offense of kidnapping, but were annulled by means of an amparo remedy, owing to a procedural error. After the error was corrected and the arrest warrants were reissued, they were no longer effective in the sense that the individuals are still fugitives and there is no record of orders indicating that the warrants will be carried out.

15. The petitioners state that on July 11, 2001, they requested the adoption of precautionary measures before the Commission, so that the State would take the steps necessary for the immediate presentation alive of Mr. Faustino Jiménez Álvarez and also would ensure his personal integrity. They assert that the State responded that “at no time has Mr. Jiménez Álvarez been detained by elements of those corporations.” On July 20, 2001, the State claimed that no complaint whatsoever had been presented naming Mr. Jiménez Álvarez as the aggrieved party, for which the petitioners raised their objection at the appropriate time.

16. The petitioners’ state that Mexican law does not criminalize forced disappearance of persons, and this leaves Mr. Faustino Jiménez and his family without legal protection. The arrest and conviction of Fidel Morales Vargas has been for the offense of kidnapping, but was not based on arguments of forced disappearance. The offense of kidnapping is limited to the deprivation of liberty, and does not take into account the right to physical and psychological integrity, or even to life.

17. The petitioners assert that there are many irregularities in the composition of investigation BRA/SC/05/1162/2001, which has not been pursued with the primary objective of investigating the whereabouts of Mr. Jiménez Álvarez. They state that former judicial police agents Ultiminio Díaz Castillo and Francisco Cortés Pastenes testified before the Guerrero State Human Rights Commission, at which time they provided information concerning the possible whereabouts of Faustino Jiménez Álvarez and those allegedly responsible for his disappearance, but that the institution in question did not report this information to the competent authorities, so that it would search for the disappeared person in the locations mentioned and conduct an investigation into those believed to be responsible. They contend that the Attorney General’s Office has not conducted a single operation, nor has the State, represented by the Ministry of

Foreign Affairs whose officials are aware of this information, taken any steps whatsoever to safeguard the life of Mr. Jiménez.

18. The petitioners contend that the remedies they have pursued, such as the amparo remedy, the criminal complaint for the disappearance of Mr. Faustino Jiménez, and the extraordinary habeas corpus remedy, have failed to ascertain the whereabouts of Mr. Faustino Jiménez Álvarez. Therefore, the petitioners consider that the exceptions set forth in Article 46(2)(a) and (c) of the American Convention apply to the instant case.

#### B. The State

19. The State claims that the petitioners have failed to exhaust domestic remedies in view of the fact that the Mexican government has taken several steps to locate Faustino Jiménez Álvarez since July 2, 2001, the date on which his wife, Enedina Cervantes Salgado, reported the disappearance to an agent of the Public Ministry, where pretrial investigation BRA/SC/05/1162/2001 was opened. The matter was brought before a judge and criminal case 132/02-2002 was opened, in which Arturo Valle Álvarez is being prosecuted, a verdict has been issued for Fidel Morales Vargas, and the arrest warrant against Manuel de Jesús Noriega Moctezuma is pending.

20. With regard to the investigations, the State claims that it established that there was no evidence to indicate that Mr. Jiménez Álvarez had been detained pursuant to an arrest warrant issued by the Office of the Attorney General of the Republic or the Guerrero State Attorney General's Office. It asserts that the Office of the Attorney General of the Republic made a significant effort to apprehend Fidel Morales Vargas and Manuel de Jesús Noriega Moctezuma, group commander in chief of the State Judicial Police, identified by Mrs. Enedina Cervantes Salgado as the alleged perpetrators of the disappearance of Faustino Jiménez Álvarez. Posters were distributed in the Attorney General's offices across the nation with the goal of carrying out the arrest warrants issued against them. In March 2002, the Directorate of the Judicial Police issued a form letter to all of the headquarters of that corporation with instructions to locate and arrest the suspects.

21. On November 8, 2001, the First Judge of the First Instance Court for Criminal Matters of the Los Bravos, Chilpancingo, Guerrero Judicial District, issued an arrest warrant against Fidel Morales Vargas and Manuel de Jesús Noriega Moctezuma for the offense of kidnapping Faustino Jiménez Álvarez and, on January 27, 2003, pursuant to criminal case 132/2001, it issued an arrest warrant against Arturo Valle Álvarez and Raúl Valle Álvarez for the same offense. Likewise, on October 29, 2002, the First Judge of the First Instance Court sentenced Fidel Morales Vargas to a prison term [decretó formal prisión] for the offense of kidnapping.

22. The State asserts that besides the investigations undertaken by the Guerrero State Attorney General's Office, the federal ministerial authority [autoridad ministerial federal] opened a pretrial investigation on October 22, 2002, (PGR/UEDO/306/2002), based on the complaint presented by Mrs. Enedina Cervantes Salgado against Jaime Figueroa Velásquez, Fidel Morales Vargas, and others for their involvement in the kidnapping and torture of Mr. Jiménez Álvarez, which is currently registered in the Office of the Attorney General of Republic

under the number SIEDO/UEEIS/5276/2004. This was the case because the complainant requested that the federal ministerial authority conduct its investigations independently of those being carried out by the local ministerial authority, since members of the latter institution apparently were implicated in the commission of several offenses, including the disappearance of Mr. Jiménez Álvarez.

23. The State claims that this investigation included an on-site inspection of the area known as ejido “El podrido,” with the assistance of experts in criminology, photography, topography, and canine investigations. The purpose was to locate corpses or human remains, based on the testimony of Mr. Francisco Cortes Pastenes, who had indicated that Faustino Jiménez Álvarez’s body allegedly was buried on a lot in Acapulco, Guerrero; the inspection, however, failed to turn up any information.

24. The State asserts that the National Human Rights Commission opened a complaint file in July 2001, which was assigned to the special program on presumed disappearances currently being set up.

25. In relation to the Precautionary Measures granted by the IACHR on behalf of Mr. Jiménez Álvarez, a meeting was held with the petitioners in November 2001, at which time they agreed that the petitioners would request the intervention in the context of the pretrial investigation in progress in the State Attorney General’s Office, yet there is no record of such a request by the petitioners.

26. On November 3, 2003, the Specialized Kidnapping Investigations Unit under the federal ministerial authority initiated a criminal proceeding against Víctor Manuel Castro Valente, Fortunato Zamora Paz, Fidel Morales Vargas, Javier Villalobos Martínez, Raymundo Rodríguez Sánchez, Álvaro Gallo Clavel, Jaime Nicolás Cabañas García, Manuel de Jesús Noriega Moctezuma, Julio Caballero Bello, Saúl Martínez Mondragón, Juan Carlos Miranda Castro, José Luís Gómez Román, José Luís Armando Junquera Reyes, Arturo Valle Álvarez, and Raúl Valle Álvarez as probable perpetrators of the violation of the federal law against organized crime. However, the Sixth District Judge of Tamaulipas state, in criminal case 142/2003V denied the request for an arrest warrant because it considered the accusations formulated by Enedina Cervantes, Gabriel Cortes and Francisco Cortes were insufficient and out of order.

27. The State claims that on July 28, 2004, the Federal Public Ministry initiated a criminal proceeding before the Sixth District Judge in Guerrero state, a federal judge, who issued arrest warrants against 10 individuals, 6 of which have been carried out since the suspects were in custody in the Social Readaptation Center [Centro de Readaptación Social] of Chilpancingo, Guerrero, while the remaining four are still outstanding. In light of the foregoing, the State requests that the instant case be declared inadmissible due to the failure to exhaust domestic remedies, particularly since the competent authorities are continuing to take steps to locate the alleged perpetrators of the kidnapping of Mr. Faustino Jiménez Álvarez.

#### IV. ANALYSIS OF ADMISSIBILITY

A. The Commission's competence *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

28. The petitioner is eligible under Article 44 of the American Convention to lodge complaints before the IACHR. The petition indicates as the alleged victim Faustino Jiménez Álvarez, an individual person with respect to whom Mexico has undertaken to respect and ensure the rights embodied in the American Convention. With regard to the State, Mexico has been a party to the American Convention since March 24, 1981, on which date it deposited its respective ratification instrument. Therefore, the Commission is competent *ratione personae* to examine the petition.

29. The IACHR is competent *ratione loci* to take up the petitioner insofar as it claims violations protected in the American Convention that allegedly occurred within the territory of Mexico, a State party to that treaty. The Inter-American Commission also is competent *ratione temporis* since the obligation to respect and ensure the rights protected in the American Convention was already in force for the State on the date that the acts alleged in the instant petition would have occurred. It is also competent to take up violations of the Convention against Torture, since the latter was ratified by Mexico prior to the date the acts took place.[FN1] In relation to the Convention on Disappearance,[FN2] the State of Mexico, upon ratifying it,[FN3] issued an interpretive statement to the effect that "it shall be understood that the provisions of said Convention shall apply to acts constituting the forced disappearance of persons ordered, executed, or committed after the entry into force of this Convention." In that respect the Inter-American Court of Human Rights has stated that forced disappearance of persons constitutes a multiple and continuing violation of rights recognized in the American Convention[FN4]. Along those same lines, the Supreme Court of Justice of Mexico has established that, under Mexican positive law, forced disappearance of persons is permanent or continuous[FN5], and that, "in that interpretive statement,[...] the Mexican Government intended to indicate that those provisions could not be applied to actions constituting such a crime the consummation of which had ceased before the new instrument became binding; it should not be taken to mean that it does not apply to actions constituting such crime which, having begun before its entry into effect, continue after its entry into effect; since the crime of forced disappearance of persons is ongoing or continuous, actions constituting such crime could continue into the period of effect of the Convention." [FN6] Therefore, under the jurisprudence of the inter-American system and the rulings of the Supreme Court of Justice of Mexico, the IACHR finds itself competent *ratione temporis* to hear, additionally, allegations of violations of rights set forth in the Convention on Disappearance.

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[FN1] The United Mexican States ratified the Inter-American Convention to Prevent and Punish Torture on June 22, 1987.

[FN2] The United Mexican States ratified the Inter-American Convention on Forced Disappearance of Persons on April 9, 2002.

[FN3] The Government of the United Mexican States, upon ratifying the Inter-American Convention on Forced Disappearance of Persons, on April 9, 2002, issued the following interpretive statement on Article IX of that Convention: "Based on Article 14 of the Political Constitution of the United Mexican States, the Government of Mexico declares, upon ratifying the Inter-American Convention on the Forced Disappearance of Persons adopted in Belém,

Brazil on June 9, 1994, that it shall be understood that the provisions of said Convention shall apply to acts constituting the forced disappearance of persons ordered, executed, or committed after the entry into force of this Convention.”

[FN4] The Inter-American Court of Human Rights has established that “The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obliged to respect and guarantee.” IACourtHR. Case of Velásquez Rodríguez v. Honduras. Ruling of July 29, 1988. Series C, No. 4, para. 155. The Court also has established that “forced disappearance of persons is a multifaceted phenomenon involving multiple and continuous violations of many rights established in the Convention, since it not only brings about arbitrary deprivation of liberty but also violates well-being and personal safety and jeopardizes the very life of the disappeared person, who is rendered entirely defenseless; and it entails other related crimes as well.” The Court recognizes that in cases of forced disappearance “it is necessary to examine not only possible violations of the American Convention but also those that may have been committed under the Inter-American Convention on Forced Disappearance of Persons, since the latter Convention provides, inter alia, means of protecting human rights that are violated when such situations are perpetrated. IACourtHR. Case of Gómez Palomino v. Peru. Judgment of November 22, 2005. Series C, No. 136. paras. 92 and 94.

[FN5] The Supreme Court of Justice of the Nation states “...under Mexican positive law, [the crime of forced disappearance] is of an ongoing or continuing nature, since, while the crime may be committed when the perpetrator detains one or more persons, with the authorization, support, or acquiescence of the State, followed by the lack of information on his, her, or their whereabouts, the crime continues until the victims appear or their fate has been established.” FORCED DISAPPEARANCE OF PERSONS. THE CRIME IS OF AN ONGOING OR CONTINUING NATURE. Series 9; Plenary; S.J.F. Gaceta; XX, July 2004; page 968.

[FN6] FORCED DISAPPEARANCE OF PERSONS, REFERRED TO IN THE INTER-AMERICAN CONVENTION ADOPTED IN BELÉM DO PARÁ," BRAZIL, OF JUNE 9, 1994. THE INTERPRETIVE STATEMENT ISSUED BY THE MEXICAN GOVERNMENT DOES NOT VIOLATE THE PRINCIPLE OF NON-RETROACTIVITY OF LAWS, ESTABLISHED IN ARTICLE 14 OF THE CONSTITUTION. Series 9; Plenary; S.J.F. Gaceta; XX, July 2004; page 967. The Supreme Court of Justice adds that this interpretation is consistent with the principle of non-retroactivity of the law, established in Article 14 of the Constitution, according to which the provisions of laws shall not be applied to the past—to actions taken or completed before those laws took effect; therefore, it is incontrovertible that, in the case of instantaneous crimes, the new law cannot apply to conduct or acts previously consummated, since that would constitute retroactivity, which is prohibited by the Constitution. On the other hand, the new instrument is applicable, and without such application constituting retroactivity, to actions constituting continuing or ongoing crimes that, having begun before the instrument entered into effect, continue thereafter. An example is the crime of forced disappearance of persons, addressed in the aforementioned Convention, which is of an ongoing or continuing nature, because it is consummated at every moment throughout the period in which the victim is “disappeared.”

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30. Finally, the Commission is competent *ratione materiae*, since the petition claims violations of the human rights protected by the American Convention and the Convention against Torture.

B. Other admissibility requirements of the petition

1. Exhaustion of Domestic Remedies

31. Article 46(2)(c) of the American Convention establishes an exception to the prior exhaustion of domestic remedies and the six month period to present the petition when “there has been an unwarranted delay in rendering a decision under the aforementioned remedies.”

32. In the instant case, the Commission observes that the State presented its objection based on the failure to exhaust domestic remedies by arguing that pretrial investigation BRA/SC/05/1162/2001 is still open, which gave rise to criminal case 132/02, under which Arturo Valle Álvarez is currently being prosecuted, Fidel Morales Vargas has been convicted, and an arrest warrant is pending against Manuel de Jesús Noriega Moctezuma. The State also contends that on January 27, 2003, in the context of criminal case 132/2001, an arrest warrant was issued against Arturo Valle Álvarez and Raúl Valle Álvarez for the same offense. This indicates that there are still measures pending completion.

33. The State also argues that the Office of the Attorney General of the Republic has taken up another investigation registered as number SIEDO/UEEIS/5276/2004 and initiated on October 22, 2002 by the federal ministerial authority (previously registered as pretrial investigation PGR/UEDO/306/2002), pursuant to a complaint presented by Mrs. Enedina Cervantes Salgado against Jaime Figueroa Velásquez, Fidel Morales Vargas and others, for their involvement in the kidnapping and torture of Mr. Jiménez Álvarez. The State claims that on July 28, 2004, the Federal Public Ministry initiated a criminal proceeding before the Sixth District Judge in the Guerrero State, a Federal Judge, who issued arrest warrants against 10 people, 6 of which have been carried out since the suspects already were in custody in the Social Readaptation Center in Chilpancingo, Guerrero, while the other four remain outstanding.

34. The petitioners, for their part, state that the relatives of Mr. Faustino Jiménez Álvarez have pursued all available remedies in the domestic venue and they have not been effective. They claim that they have attempted an amparo remedy, a criminal complaint for the disappearance of Mr. Faustino Jiménez and an extraordinary remedy of habeas corpus, none of which have yielded any positive outcomes concerning the whereabouts of Mr. Jiménez Álvarez. They assert that the criminal case, as well as the existing pretrial investigations, have not been geared toward searching for Mr. Jiménez Álvarez. Moreover, the remedies have not been effective in terms of carrying out the outstanding arrest warrants against the individuals identified as the perpetrators, and that the only arrest, trial, and conviction that has occurred has been that of Mr. Fidel Morales Vargas. Therefore, the domestic remedies pursued to date have been ineffective, given that the whereabouts of Mr. Faustino Jiménez Álvarez are still unknown and all of the perpetrators have not been convicted.

35. The Commission observes that Mrs. Enedina Cervantes Salgado filed two extraordinary habeas corpus remedies, one before the Sixth First Instance Judge of the Criminal Branch of the Los Bravos Judicial District and the other before the Sixth First Instance Judge for Criminal Matters of the Tabáres Judicial District and neither has yielded positive results concerning the whereabouts of Mr. Faustino Jiménez Álvarez. Moreover, an amparo remedy for incommunication 542/2001 was filed by Mrs. Cervantes Salgado before the Sixth District Judge of Morelos State. This remedy, however, was not effective since it was made contingent upon procedural requirements that rendered it inapplicable, such as providing the location where the person is deprived of their liberty, which was impossible to do. According to the petitioners, when processing the amparo proceeding on behalf of Mr. Faustino Jiménez, the First District Judge of the State of Guerrero ruled: "...Pursuant to Art. 17 of the Amparo Law, it is requested that within three days beginning the day after the notification of this writ, the plaintiff in the amparo proceeding, Enedina Cervantes Salgado, inform this Federal Court of the place in which the direct plaintiff is confined so that he can state whether or not he ratifies the petition for guarantees brought on his behalf..." In this case the amparo remedy would not be appropriate, since his whereabouts are unknown and therefore cannot be reported. Therefore, in relation to the remedies of habeas corpus and amparo, the IACHR considers that while they ought to be the appropriate remedies in this case, the petitioners have pursued them and they have not been effective in determining the whereabouts of Mr. Faustino Jiménez Álvarez.[FN7]

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[FN7] The Inter-American Court has stated that, "habeas corpus would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty..." See Inter-Am. Ct. H.R. Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, para. 65.

The Court has also noted that "a remedy must also be effective, that is, capable of producing the result for which it was designed. Procedural requirements can make the remedy of habeas corpus ineffective: if it is powerless to compel the authorities; if it presents a danger to those who invoke it; or if it is not applied impartially." See Inter-Am. Ct. H.R. Godínez Cruz Case. Judgment of January 20, 1989. para. 69.

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36. The Commission observes that Ms. Enedina Cervantes Salgado lodged two special habeas corpus petitions with the Sixth Judge of the First Instance of the Criminal Branch of the los Bravos Judicial District, and another with the Sixth Judge of the First Instance of the Criminal Branch of the Judicial District of Tabáres; none of these resulted in a positive determination of the whereabouts of Mr. Faustino Jiménez Álvarez. In addition, the amparo remedy for incommunication 542/2001 was lodged by Ms. Cervantes Salgado with the Sixth Judge of the District of the State of Morelos. That petition was unsuccessful, since it was subordinated to procedural requirements that rendered it inapplicable, such as indicating where the person is being held, which was impossible. The First Judge of the District of the State of Guerrero, in processing the amparo proceeding on behalf of Mr. Faustino Jiménez, ruled: "...Pursuant to Art. 117 of the Amparo Law,[FN8] it is requested that within three days beginning the day after the notification of this writ, the plaintiff in the amparo proceeding, Enedina Cervantes Salgado, inform this Federal Court of the place in which the direct plaintiff is confined so that he can state whether or not he ratifies the petition for guarantees brought on his

behalf ....” Therefore, as for the petitions for habeas corpus and amparo, the Commission finds that, although these should be the appropriate remedies in this case, the petitioners have exhausted them, and they have been ineffective in terms of establishing the whereabouts of Mr. Faustino Jiménez Álvarez.[FN9]

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[FN8] Article 117 of the Mexican Law of Amparo provides: Article 117. In the case of actions that pose a threat to life, attacks on personal liberty outside judicial procedures, deportations or exiles, or any of the actions prohibited by Article 22 of the Federal Constitution, it shall be sufficient, for the application to be admitted, for it to identify the action regarding which the claim is made; the authority that ordered it, if the person filing it is able to; the place where the victim is located; and the authority or agency that should execute or attempt to execute the action. In such cases the application may be made by means of an appearance, with a deed being drawn up before the judge.”

[FN9] The Inter-American Court has reaffirmed that “...habeas corpus would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty.” I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C, No. 4., para. 65. The Court has also observed that “a remedy must also be effective, that is, capable of producing the result for which it was designed. Procedural requirements can make the writ of habeas corpus ineffective; if it is powerless to compel the authorities; if it presents a danger to those who invoke it; or if it is not applied impartially. See I/A Court H.R., Godínez Cruz Case. Judgment of January 20, 1989. Series C No. 5, para. 69.

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37.     Secondarily, and in relation to the criminal proceedings and pretrial investigations before the ministerial authority, the Commission observes that, since the disappearance of Mr. Jiménez Álvarez, there has been some progress toward the identification of parties possibly responsible for the disappearance of Mr. Jiménez Álvarez, such as the arrest and conviction of Mr. Fidel Morales Vargas in criminal case 132/02 and the orders issued for the arrest of Arturo Valle Álvarez and Manuel de Jesús Noriega Moctezuma in that same criminal proceeding. Moreover, the Sixth District Judge in the State of Guerrero ordered the arrest of 10 persons; six of these orders have been executed. The Commission notes, however, that six years have passed without progress in determining the whereabouts of Mr. Faustino Jiménez Álvarez. In this connection, the jurisprudence of the Inter-American Court of Human Rights has established “...the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate, and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.” The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.[FN10] In this case, Mr. Faustino Jiménez allegedly was detained by State agents; to date, i.e., six years after his detention, information as to his whereabouts is not available, despite two legal

proceedings still in progress. The Commission, therefore, finds that the exception provided for in the second part of Article 46(2) of the American Convention does apply.

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[FN10] I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C, No. 4. para. 166, 174.

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38. The Commission reiterates that the invocation of the exceptions to the rule on the exhaustion of domestic remedies provided in Article 46(2) of the Convention is closely linked to the determination of possible violations of certain rights enshrined therein, such as guarantees of access to justice. Nevertheless, the content of Article 46(2) of the American Convention, by nature and purpose, is autonomous vis á vis the substantive provisions of the Convention. Therefore, the determination as to whether the exceptions to the rule on the exhaustion of domestic remedies stipulated in that provision apply in this case should be made separately, and prior to the examination on the merits, since it depends upon a standard of judgment distinct from that used to determine the violation of Articles 8 and 25 of the Convention. The causes and effects that have hindered the exhaustion of domestic remedies in this case will be analyzed, as appropriate, in the Commission's report on the merits of the case, so as to determine whether in effect they constitute violations of the American Convention. For those reasons, the Commission finds sufficient evidence to exempt the petitioner from the requirement of the prior exhaustion of domestic remedies, in application of Article 46(2) of the American Convention.

2. Time period to present the petition

39. Article 32 of the IACHR's Rules of Procedure provide that in those cases in which the exceptions to the requirement of exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period as determined by the Commission, considering the date on which the alleged violation occurred and the circumstances of each case. The IACHR notes that the petitioners attempted the remedy of habeas corpus and the remedy of amparo which, although appropriate, were not effective in determining the whereabouts of Faustino Jiménez Álvarez. The IACHR decides, in relation to the situation generated by the criminal proceeding in progress, to apply the exception set forth in the second part of Article 46(2) of the American Convention.

40. In view of the foregoing, bearing in mind the potential that it is dealing with a situation of an ongoing violation of human rights, as well as the status of the various domestic remedies, the Commission considers that the petition under study was presented within a reasonable time period.

3. Duplication of proceedings and international res judicata

41. There is nothing in the file of the instant petition to suggest that the matter is pending in another international proceeding or that it has been previously taken up by the Inter-American Commission. Therefore, the IACHR concludes that the exceptions set forth in Article 46(1)(d) and Article 47(d) of the American Convention are not applicable.

4. Characterization of the alleged facts

42. The Commission finds that the petitioner's statement refers to events that, if proven, could constitute violations of Articles 4, 7, 5, 8, and 25 of the American Convention, all connected with the obligation to respect the rights to which Article 1(1) of the Convention refers. This is also true of Articles 1, 6, and 8 of the Convention against Torture and Articles I, III, and XI of the Inter-American Convention on Forced Disappearance of Persons. As for Article 2 of the American Convention, Article 117 of the Law of Amparo requires that the petitioner for amparo report "the place where the victim is located; and the authority or agency that should execute or attempt to execute the action." The petitioners argue that this requirement was applied to their case, which prevented the remedy from functioning as a means of locating Mr. Faustino Jiménez. The Commission finds that these facts, if proven, could constitute, in addition, a violation of Article 2 of the American Convention on Human Rights.

VIII. CONCLUSIONS

43. The IACHR concludes that it is competent to take up the instant petition and that it satisfies the requirements for admissibility, in accordance with Articles 46 and 47 of the American Convention and Articles 30, 37, and related Articles of its Rules of Procedure.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare, without prejudging the merits of the instant complaint, that the petition is admissible in relation to the allegations of fact and with respect to Articles 4, 2, 7, 5, 8, and 25 of the American Convention on Human Rights and the obligation to respect rights enshrined in Article 1(1) of the Convention, as well as Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, and Article I, III y XI of the Inter-American Convention on the Forced Disappearance of Persons.
2. Under the principle *iura novit curia*, to find admissible the petition concerning Article 2 of the American Convention, insofar as it pertains to the law of Amparo.
3. To forward this report to the State and to the petitioners.
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 8th day of the month of April, 2007. (Signed: Florentín Meléndez, President; Paolo G. Carozza, First Vice-President; Víctor E. Abramovich, Second Vice-President; Evelio Fernández Arévalos, Clare K. Roberts, Paulo Sérgio Pinheiro, and Freddy Gutiérrez, Members of the Commission.