

REPORT No. 147/10¹
PETITION 497-03
ADMISSIBILITY
JESÚS ÁNGEL GUTIERREZ OLVERA
MEXICO
November 1, 2010

I. SUMMARY

1. On July 3, 2003, the Inter-American Commission on Human Rights (hereinafter “Inter-American Commission,” “Commission,” or “the IACHR”) received a petition lodged by *Acción de los Cristianos para la Abolición de la Tortura* [Christian Action to Abolish Torture] (ACAT-Mexico) and by the Center for Justice and International Law (CEJIL) (hereinafter the “petitioners”),² in which they allege the international responsibility of the State of Mexico (hereinafter “the State,” “Mexico,” or the “Mexican State”) for the alleged arbitrary detention on March 14, 2002 and the subsequent forced disappearance of Jesús Ángel Gutiérrez Olvera, presumably committed by state agents, and for failure to conduct an investigation into and provide reparations for the denounced acts.

2. The petitioners allege that these acts constitute a violation of the rights recognized in Articles 4, 5, 7, 8, and 25, all considered in relation to Articles 1.1 and 2 of the American Convention on Human Rights (hereinafter “the American Convention”), as well as Articles I, III, and XI of the Inter-American Convention on Forced Disappearance of Persons (hereinafter “CIDFP”), and the rights established in the Inter-American Convention to Prevent and Punish Torture (hereinafter “CIPST”). With respect to the requirement of prior exhaustion of domestic remedies, they allege that they have proven ineffective.

3. The State, on the other hand, alleges that the petitioners have not complied with the requirement of prior exhaustion of domestic remedies, and that the case is pending in another international proceeding. It further contends that it has not incurred a rights violation because the government has acted to clarify the disappearance of the alleged victim.

4. Without prejudice to the merits of the petition, after analyzing the positions of the parties, and in compliance with the requirements set forth in Articles 46 and 47 of the American Convention, the Commission has decided that the case is admissible for the purpose of examining the alleged violations of the following rights: those established in Articles 4, 5, 7, 8, and 25 of the American Convention, considered in accordance with Articles 1.1 and 2 of that instrument; the rights recognized in Articles I, III, and XI of the Inter-American Convention on Forced Disappearance of Persons; and, the rights established in Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. Moreover, in accordance with the principle of *iura novit curia*, the Commission has decided to declare the petition admissible with respect to the presumed violation of the right established in Article 3 of the American Convention. The Commission further decides to notify the parties of this decision and to include it in its Annual Report to the OAS General Assembly.

¹ In accordance with the provisions of Article 17.2 of the Commission’s Rules of Procedure, Commissioner José de Jesús Orozco Henríquez, a Mexican national, did not participate in the debate or the decision in the present case.

² In a communication dated March 2, 2010, the Human Rights Commission of the Federal District (CDHDF) was presented as a co-petitioner.

II. PROCEDURES BEFORE THE COMMISSION

5. On July 3, 2003, the Commission received a petition lodged by *Acción de los Cristianos para la Abolición de la Tortura* (ACAT-Mexico) and the Center for Justice and International Law (CEJIL). On November 13, 2003, it transmitted the pertinent parts of the complaint to the State, with the request that it submit its response within two months, in accordance with Article 30.3 of the Rules of Procedure of the Inter-American Commission on Human Rights (hereinafter the "Rules of Procedure"). The response of the State was received on February 3, 2004.

6. In addition, the IACHR received information from the petitioners on the following dates: December 2 and 11, 2003; January 14, 2004; October 3, 2005; September 18, 2008; December 31; August 2, 2009; and, August 20, 2010.

7. In turn, the IACHR received observations from the State on June 17, 2005, November 10, 2008, and June 11, 2009.

- Precautionary measure (MC 362-02)

8. On October 9, 2002, the petitioners requested that precautionary measures be adopted in favor of the members of the Gutiérrez Olvera family and an eye-witness to the acts alleged in this petition. On October 11, 2002, the Commission granted the precautionary measures requested. The IACHR has continued to follow and monitor the measures adopted by the State to guarantee the personal safety of the beneficiaries.

III. POSITIONS OF THE PARTIES

A. The petitioners

9. The petitioners allege that the presumed victim, Jesús Ángel Gutiérrez Olvera, twenty-five years of age, was working in "Oscar" repair shop, located in the "Doctores" neighborhood in Mexico City, when on March 14, 2002, he was subjected to arbitrary arrest by presumed state agents, and his whereabouts have not been known since. They contend that he was the victim of forced disappearance, and that the remedies pursued to find him have all proven fruitless. Consequently, the petitioners allege violation of the rights contained in Articles 2, 4, 5, 7, 8, and 25 of the American Convention, considered in relation to Article 1.1 of that instrument, as well as Articles I, III, and XI of the CIDFP and the rights enshrined in Articles 1, 6, and 8 of the CIPST.

10. More specifically, the petitioners relate that on March 14, 2002, at approximately 6:00 pm, two males dressed in civilian clothes arrived at the repair shop and asked for the alleged victim to personally attend to them. They indicated that when the young Gutiérrez Olvera walked out of the shop, one of the individuals grabbed him violently by the shoulder and said to him: "don't do anything, keep quiet or your mother will be in trouble." They indicate that later, a commando group of around eight individuals, some of them dressed in black in clothing similar to the uniforms worn by the federal police, but without the insignias and carrying machine guns, arrived in three vehicles, one of them a pick-up truck.³ They allege that they hit Jesús Ángel violently with their weapons and put him inside one of the vehicles. They report that the automobiles left, while the truck obstructed traffic for a few minutes, to prevent anyone from following the vehicle carrying the presumed victim. They allege that the whereabouts of Jesús Ángel Gutiérrez Olvera have not been known since then.

11. In the time leading up to these events, they maintain that in March 2002, in the presence of witnesses, two alleged agents of the Federal District's Judicial Police threatened to implicate the presumed victim in a kidnapping if he did not pay them a certain amount of money. They report that

³ They indicate that a fellow worker of Jesús Ángel Gutiérrez Olvera, who saw what happened, tried to help him, but a woman belonging to the group of aggressors pointed her machine gun at him and prepared to shoot it, threatening to kill him.

Jesús Angel Gutiérrez Olvera had refused to do so on repeated occasions, and so they warned him that “he was going to be sorry.”

12. As for the alleged participation of state agents, they report that there are consistent statements by three persons tried for an alleged kidnapping who were told during their detention at the Office of the General Prosecutor of the Republic [*Procuraduría General de la República*] that Jesús Ángel Gutiérrez Olvera was detained there as well. In addition, two of them stated that a former federal investigative agent told them that “he had noticed that while Jesús Angel Gutiérrez Olvera was detained in the facilities of the federal judicial police on March 14, 2002, that he was tied to a chair and tortured, and that after a blow to the chest, he fell and broke his neck.”⁴ The petitioners further reported that since the arbitrary detention of Jesús Angel Gutiérrez Olvera was in full daylight and in a public place, various witnesses could identify the three Federal District Judicial Police agents and a former agent of the Federal District Judicial Police, as the alleged participants in the illegal detention. They report that in May 2002, an identification proceeding was conducted, in which the same persons who had been recognized in photographs were identified.

13. They further report that the approach taken of alleging the participation of Jesús Angel Gutiérrez Olvera in criminal acts and the unfair manipulation by the media created situations that violated the rights of the victim and his family members, especially defamation and dishonor.⁵ They contend that Jesús Angel Gutiérrez Olvera was never tried for the crime of kidnapping and that there was no criminal proceeding against him at the time of his disappearance.

14. Moreover, they contend that Mrs. Leonor Olvera López, the mother of the alleged victim, and her family members, as well as a witness and private attorneys who instigated the investigation were constantly being harassed and even received death threats.⁶

15. As regards the prior requirement that domestic remedies be exhausted, they maintain that as soon as Leonor Olvera López, learned of the arbitrary detention of her son, she began searching for him in various agencies of the Public Ministry [*Ministerio Público*] and detention centers, and she pursued a series of remedies provided under domestic law. They allege that all of her efforts were in vain, and that to date the whereabouts of the alleged victim are not known.

16. The attachments to the petition show that on March 15, 2002, Leonor Olvera López appeared at the Public Ministry to report the illegal detention of her son. In view of this report, a preliminary investigation was initiated for the aggravated offense of illegal deprivation of liberty and the forced disappearance of persons; this proceeding was subsequently combined with another preliminary investigation.

17. On April 11, 2002, Ms. Olvera López filed a complaint with the Human Rights Commission of the Federal District (hereinafter “CDHDF”) based on the disappearance of her son. Petitioners report that as a result, on June 3, 2002, the CDHDF made the following request of the Federal District Government: 1) that an agent of the Public Ministry open a prompt, objective, exhaustive, impartial, and effective investigation, in which all of the elements comprising the case file are examined, and that the investigation not be restricted or obstructed, in view of the recommendations of the Inter-American Commission on Human Rights in the Report on the Human Rights Situation in Mexico; and 2)

⁴ According to the petitioners, the mother of the alleged victim said that one of them had told her that “the agents who kidnapped him killed him, as he broke his neck as a result of a kick to his chest.”

⁵ The petitioners allege that on October 16, 2002 in the “*Diario Reforma*” newspaper, the former prosecutor in charge of the investigation into the disappearance of Jesús Ángel Gutiérrez referred to the victim as the head of a criminal gang.

⁶ For instance, the petitioners pointed out that on May 21, 2002, the Public Ministry of the Office of the Prosecutor for the Civil Service, under the Office of Attorney General of the Federal District, urged two agents to cease all harassment directed against Mrs. Olvera.

that it continue to protect Leonor Olvera López and her family and witnesses so that they will not be subject to intimidation by the government agents involved.

18. On July 10, 2002, Leonor Olvera López initiated an amparo action for the search for her son. The proceeding was concluded on February 18, 2003, when the Fourth Amparo Judge for Criminal Matters closed the proceeding by virtue of Article 18 of the Amparo Law, on the grounds that no person had appeared at the proceeding as the legal representative of the injured party. The petitioners indicate that this decision proved to be illegal, since one year had not elapsed without the appearance of a party to the action. They further allege that the domestic body of law prevents an amparo action from being an effective remedy in cases of forced disappearance. In fact, they point out that domestic law establishes as a *sine qua non* requirement for the admissibility of such a complaint that the place where the injured party is detained and the authority ordering the detention be indicated, which is a distortion of such action and makes it ineffective in cases of disappearances.

19. By virtue of the foregoing, they argue that even if the remedy was formally exhausted, the requirements of domestic law make it ineffective in cases of forced disappearance, and so the exception stipulated in Article 46.2.a of the American Convention should apply since under "Mexican amparo legislation, there is no due legal process for protection of the right or rights alleged to have been violated."

20. They add that on October 15, 2002, the Federal District Office of the Attorney General declared that it was incompetent to hear the case since it involved federal agents, and so eventually the investigation was referred to the Office of the Attorney General of the Republic. They go on to say that on November 11, 2002, the Public Ministry of the Office of Attorney General declared "non-prosecution of criminal action" [*no ejercicio de la acción penal*], on the grounds that neither the *corpus delicti* of forced disappearance nor the responsibility of judicial agents in that agency had been proven. As a result, they allege that Leonor Olvera López appeared at the Public Ministry on December 13, 2002, but she was refused access to the case file and she was not allowed to make an official record of her dissent.

21. They further report that no investigative activities were pursued until January 31, 2005, when a criminal suit was filed for the crime of forced disappearance against five state agents denounced for that crime, whereupon an arrest warrant was issued against them on February 1, 2005; however, only one of those charged was served with said warrant. On this point, the petitioners dispute the state's arguments; they indicate that there was an unwarranted delay in the investigations, and identify a series of aspects of the investigation that they believe demonstrates that this delay can be attributed to the State. They further allege that the investigations did not comply with the obligation to act with due diligence to determine the truth of the events and to punish the responsible parties.

22. With regard to the point raised by the State as to its being absolved by a judgment handed down in the case of the one state agent, and the possibility of appeal, the petitioners indicate that under the Mexican legal system, the victims of a violation are not considered as parties to the criminal proceeding, as that power belongs exclusively to the Public Ministry, and that injured parties may appeal only in matters related to damages and losses. Moreover, they contend that consideration should be given to the fact that approximately ten persons, according to the witnesses, participated in the acts that are the subject of the petition. Thus, even in the event one guilty party is convicted, this would not be enough to arrive at the conclusion that it was an effective remedy.

23. In conclusion, they allege that the Mexican State did not guarantee the effectiveness of the remedies in the case of the forced disappearance of Jesús Angel Gutiérrez Olvera, and so the provisions of Article 46 of the American Convention should apply to this petition.

B. The State

24. The State requests the Commission to consider the petition inadmissible. In this regard, it maintains specifically that: a) this case is pending settlement in another international organ to which Mexico is a party; and b) the petitioners have not exhausted the remedies under domestic law.

25. As to the existence of another mechanism for international settlement, the State alleges that the presumed forced disappearance of Jesús Angel Gutiérrez Olvera is the subject of a proceeding pending settlement in the Working Group on Forced or Involuntary Disappearances of the United Nations Human Rights Commission. It indicates that if the petition is admitted by the IACHR, it would create litispendence, and so the petition should be considered inadmissible since the proceedings in the two international organs are identical, and the parties, the legal grounds, and the facts are the same.

26. As for the alleged legal violations, the State presents its arguments by refuting each of the allegations and arguing that the acts denounced are being investigated diligently and exhaustively. As regards the delay in proceedings, the State contends that, contrary to what the petitioners indicate, the proceedings of the criminal case have taken several years, due to the fact that the crime of forced disappearance of persons entails technical and legal issues that make it difficult to demonstrate *corpus delicti* and the criminal liability of the accused.

27. The State reports that on March 15 and April 12, 2002, the Federal District Office of the Attorney General initiated two preliminary investigations in the Central Investigative Prosecutor's Office for Civil Servants and combined them on April 19, 2002. It further indicates that the combined investigations were closed with "non-prosecution of criminal action" on February 10, 2003, and notice of this decision was given on February 18, 2003. The State alleges that the petitioners did not file an appeal for nonconformity against that decision, nor did they initiate a direct amparo action to question it, and so the decision remained final.

28. Moreover, the State reports that the Office of the Attorney General of Mexico transferred another preliminary investigation related to the alleged victim to the Federal District Office of Attorney General. It indicates that based on the investigations conducted in March, enough evidence was obtained to suspect the participation of "agents of the Federal Investigative Agency in the possible detention of Jesús Angel Gutiérrez Olvera." It further indicates that on October 16, 2002, "preliminary investigation 313/FESPI/02" was initiated in the General Directorate for Offenses Committed by the Civil Service, under the Office of the Attorney General of Mexico. In this regard, the State reports that said investigation consisted of a long list of procedures, since the Mexican authorities used all the means available to them to establish legal certainty in the case and to locate the alleged victim.

29. The State indicates that under that investigation, criminal action was brought against five persons for the crime of forced disappearance, and on February 1, 2005, an arrest warrant was issued, an order that was subsequently revoked in favor of three of the persons charged. On April 9, 2008, judicial detention against one of the persons charged was made effective, and on April 15, 2008, a formal incarceration order was issued against said person, as a probable perpetrator of the crime of forced disappearance of persons. With that, an ordinary criminal proceeding was initiated. By letter dated October 27, 2010, the State informed that on June 30, 2010 the trial judge handed down a conviction against the referred accused, by imposing for the crime of forced disappearance a prison sentence of nine years, 4 months and 15 days. The State indicated that the decision was appealed by the prosecution.

30. With respect to prior exhaustion of the remedies under domestic law, the State alleges that the petitioners did not comply with the requirements under the Convention. More specifically, it contends that the petitioners have the following remedies: 1) federal criminal proceedings in district courts for criminal matters; 2) appeal in the event that the judgment against the accused is not favorable to the agent of the Public Ministry of the Federation; and 3) amparo procedure, as a means of ensuring the constitutionality and legality of the proceedings of the jurisdictional authorities. The State further alleges that the petitioners committed certain omissions with regard to a series of remedies. In fact, it indicates that during the investigation by the Public Ministry, in the combined inquiries and investigations into the facts of this case, the petitioners failed to file an appeal for nonconformity or an amparo appeal against the decision "on non-exercise of legal action," despite the fact that they had the counsel of private attorneys.

31. Moreover, with regard to the amparo petition filed by Leonor Olvera López, the State alleges that the amparo action was filed on July 11, 2002, in other words over 100 days after the alleged

disappearance of Jesús Angel Gutiérrez Olvera. It indicates that in spite of the difficulty in carrying out proceedings due to the time elapsed since the presumed detention, the mother of the alleged victim was requested to confirm the petition filed as established in the applicable law. The State alleges that said confirmation was never submitted, and thus the attempted amparo action was considered as never filed or nonexistent, in view of the failure of the petitioners to keep the proceeding open. The State explains that "ensuring the continuity of a proceeding that requires the confirmation, not to mention the cooperation, of the complainants in order to process it" cannot be considered as an omission or negligent action imputable to the State. It contends that this remedy is effective, since in situations in which persons are either legally or illegally detained by state agents, it can be used not only to request information, but also to investigate directly in the facilities of the authorities considered liable to determine whether or not the person is in detention there, thereby protecting the legal situation violated.

32. On the basis of the foregoing, the State requests the IACHR to declare the petition inadmissible, by virtue of the provisions of Articles 46.1.a and 46.1.c of the American Convention on Human Rights, and Article 33.1 and 33.1.a of the Rules of Procedure of the Inter-American Commission on Human Rights.

IV. ANALYSIS OF ADMISSIBILITY

A. Jurisdiction of the Commission *ratione personae, ratione materiae, ratione temporis y ratione loci*

33. The petitioners are authorized under Article 44 of the American Convention to lodge petitions with the IACHR. According to the petition, the alleged victims are Jesús Angel Gutiérrez Olvera and his family members, individual persons in respect of whom Mexico has pledged to respect and guarantee the rights recognized in the American Convention. As regards the State, Mexico has been a party to the American Convention since March 24, 1981, the date on which it deposited the respective instrument of ratification. Thus the Commission has personal jurisdiction to examine the petition.

34. The Commission has territorial jurisdiction to take up the case, since it alleges violations of the rights protected in the American Convention that took place in the territory of Mexico, a state party to that instrument.

35. The Commission also has temporal jurisdiction, since the obligation to respect and guarantee the rights protected by the American Convention was already in force for the State on the date on which the events alleged in the petition occurred. It is also competent to examine violations of the Inter-American Convention to Prevent and Punish Torture, since Mexico has been a party to it since June 22, 1987, when it deposited the corresponding instrument of ratification. With regard to the Inter-American Convention against the Forced Disappearance of Persons, the Mexican State ratified it on February 28, 2002, and deposited the relevant instrument of ratification on April 9, 2002. However, it should be noted that the State formulated an interpretative declaration at the time of ratification, to the effect that "it is understood that the provisions of this Convention shall apply to events that constitute the forced disappearance of persons that are ordered, executed, or committed subsequent to the entry into force of this Convention."⁷ In this regard, the Inter-American Court has found that the forced disappearance of persons constitutes a multiple, continuous violation of the rights recognized in the American Convention. Along these same lines, the Mexican Supreme Court of Justice has established that in accordance with Mexican positive law, the forced disappearance of persons is permanent or continuous in nature.⁸ Consequently, by virtue of the jurisprudence of the Inter-American System and the

⁷ The Inter-American Court has established that "the forced disappearance of human beings is a multiple and continuous violation of many rights recognized in the Convention, that states parties have the obligation to respect and guarantee." Inter-American Court, Case of Válesquez Rodríguez vs. Honduras. Judgment of July 29, 1988. Series C No 4, para.155.

⁸ IACHR, Report N° 31/07 (Admissibility), Petition 302-02, Faustino Jiménez Álvarez, Mexico, 9 April 2007. Para. 31, footnote 5, citing "FORCED DISAPPEARANCE OF PERSONS. This crime of permanent or continuous in nature. 9a. Época; Pleno; S.J.F. Gaceta; July, 2004; P. 968."

Mexican Supreme Court, the IACHR determines that it has temporal jurisdiction to examine the allegations of violation of the rights contained in CIDFP.

36. Finally, the Commission has subject matter jurisdiction, since the petition denounces violations of human rights protected by the American Convention, the Inter-American Convention to Prevent and Punish Torture, and the Inter-American Convention on Forced Disappearance of Persons.

B. Exhaustion of domestic remedies

37. The requirement of prior exhaustion applies when the national system has in fact available remedies that are adequate and effective to remedy the alleged violation. On this point, Article 46.2 specifies that the requirement does not apply when: a) the domestic legislation does not afford due process of law for the protection of the right in question; b) the alleged victim was denied access to the remedies under domestic law; or c) there has been unwarranted delay in rendering a judgment under the aforementioned remedies.

38. In the present case, the IACHR notes that the parties disagreed on compliance with this requirement in the Convention. In fact, the State argued lack of exhaustion of domestic remedies, whereas the petitioners allege that the Mexican State did not guarantee the effectiveness of the remedies in the case of the forced disappearance of Jesús Ángel Gutiérrez Olvera.

39. In view of the allegations of the parties, it is necessary first to determine what are the domestic remedies that must be exhausted in relation to the subject matter of the case in point. In this regard, the Commission notes that the subject of the petition in this case is the alleged forced disappearance of Jesús Angel Gutiérrez Olvera, presumably perpetrated by state agents, as well as the presumed failure to investigate and punish the responsible parties, and finally the failure to clarify the whereabouts of the alleged victim.

40. On this matter, it is appropriate to point out that the precedence established by the Commission is that whenever an actionable crime is committed, the state has the obligation to initiate and advance a criminal proceeding and that, in such cases, this constitutes the appropriate way to clarify the facts, judge the responsible parties, and establish the corresponding punishment, in addition to providing for other appropriate reparations. The acts described forth by the petitioners in relation to the disappearance of Jesús Angel Gutiérrez Olvera are considered in Mexican legislation as criminal conduct, in respect of which the State is responsible for initiating an investigation and passing judgment; hence, this is the process that constitutes the appropriate remedy in the case under examination.

41. Moreover, according to the system's jurisprudence, filing a habeas corpus or another similar appeal constitutes the appropriate remedy in a search for an allegedly disappeared person.⁹

42. The Commission notes that the petitioners have lodged various complaints since the forced disappearance of the youth, Jesús Angel Gutiérrez Olvera, including both judicial and other types of actions. Specifically, his mother filed an amparo appeal for his search, a criminal complaint regarding his arbitrary detention and disappearance, and a complaint with the CDHDF, without obtaining positive results on the whereabouts of the alleged victim up to the time of the drafting of this report.¹⁰

⁹ The Inter-American Court has reiterated that: "...the presentation of the person or habeas corpus would normally be the appropriate procedure for finding a person alleged to have been detained by the authorities, for determining if that person is legally detained, and, as appropriate, to obtain his release." Inter-American Court, *Case of Velásquez Rodríguez Vs. Honduras*. Judgment of July 29, 1988.. Series C No. 4. para. 65. The Court has further established that the recourse to exhibition of the person may prove to be ineffective if it is subject to procedural requirements that make it inapplicable, if in fact there is no way to obligate the authorities, or if or it is not applied with impartiality. See Inter-American Court, *Case of Godínez Cruz*. Judgment on the Merits of January 20, 1989, para.69.

¹⁰ The foregoing is without prejudice to the fact that the complaint being examined by the CDHDF concluded with the request, in the pertinent section, to the Public Ministry to conduct a prompt, objective, exhaustive, impartial, and effective investigation, in which all the information in the case file is analyzed, and to ensure that the investigation is not limited or obstructed.

43. In fact, on July 10, 2002, Leonor Olvera López, the mother of the alleged victim, filed an amparo action pertaining to the disappearance of her son. The petition was received and processed by the Fourth District Judge for Amparo in Criminal Matters of the Federal District. In a decision handed down on July 15, 2002, the court cautioned Mrs. Olvera, telling her that the action would be considered as nonexistent if, within three days, she did not explain in the proceeding “what her interests were,” since the “direct complainant, Jesús Angel Gutiérrez Olvera, was not found in any of the detention centers indicated.”¹¹ In accordance with the information in the case file, on February 18, 2003, the amparo proceeding was closed, on the grounds that one year had elapsed, during which no one had appeared at the proceeding as the legal representative of the injured party, in accordance with Article 18 of the Amparo Law.¹²

44. For purposes of admissibility, the IACHR considers that the amparo appeal referred to was not effective, because of the way in which it is regulated in the Mexican legal system. On this point, the IACHR considers that although the family members filed the amparo appeal, they did not have access to an effective and adequate remedy to locate the alleged victim according to the legal requirements of the remedy.

45. Moreover, the Commission notes that a series of preliminary investigations into the events of the case were conducted, and that one of them eventually resulted in the opening of a criminal case against one of the accused. Nonetheless, the IACHR considers that said criminal investigations presented a presumed unwarranted delay, since there were various persons implicated in the acts denounced, who had been identified by witnesses, and only one of them is presently being tried. Moreover, more than 8 years since the disappearance of the alleged victim, the State has no information on concrete advances in the investigations, that may lead to the possibility of determining the whereabouts of Jesús Angel Gutiérrez Olvera or clarification of the circumstances in which the events occurred. The Inter-American Court has found in cases of forced disappearances perpetrated by state agents that “wherever this practice has existed, it has been possible precisely because of the absence or ineffectiveness of the domestic remedies to protect the essential rights of persons persecuted by the authorities.”¹³

46. Consequently, in view of the characteristics of this case, the Commission considers that the exceptions stipulated in Article 46.2.b and 46.2.c of the American Convention apply, since the requirement for exhaustion of domestic remedies is not applicable to the present case. The Commission reiterates that the exceptions to the rule of exhaustion of domestic remedies provided for in Article 46.2 of the Convention are closely linked to determination of possible violations of certain rights protected therein, such as guarantees of access to justice. However, Article 46.2 of the American Convention, by its nature and purpose, is a norm whose content is autonomous in comparison with the substantive norms of the Convention. Therefore, determination of whether the exceptions to the rule of exhaustion of domestic remedies stipulated in this norm are applicable to the case in question must occur prior to and separate from the examination of the merits of the case, since it relies on a different standard of evaluation to determine a violation of Articles 8 and 25 of the Convention.

C. Deadline for filing

47. Article 46.1.b of the Convention establishes that in order for the petition to be declared admissible, it must have been lodged within a period of six months from the date on which the party

¹¹ Judicial Branch of the Federation, Decision of the Fourth Judge for Amparo in Criminal Matters in the Federal District, July 15, 2002.

¹² Judicial Branch of the Federation, writ of the Fourth Judge for Amparo in Criminal Matters in the Federal District, February 18, 2003.

¹³ Inter-American Court, *Case of Godínez Cruz vs. Honduras. Preliminary Objections*. Judgment of June 26, 1987 Series C No. 3, paragraph 96.

alleging violation of the rights was notified of the final judgment. This rule is not applicable when the Commission finds that one of the exceptions for exhaustion of domestic remedies established in Article 46.2 of the Convention applies. In such cases, the Commission must determine if the petition was filed within a reasonable time pursuant to Article 32 of its Rules of Procedure.

48. As indicated previously, the Commission concluded in the present case that the exceptions provided for in Article 46.2.b and 46.2.c of the American Convention apply. Taking into account the continuous nature of the presumed forced disappearance of the alleged victim that occurred as of March 14, 2002, the lack of clarification as to his whereabouts, the absence of a decision as to the responsible parties, the presumed ineffectiveness of the amparo appeal, the fact that the ordinary criminal proceedings are still pending, and the fact that the petition was lodged on July 3, 2003, the Commission considers that the petition was lodged within a reasonable period of time.

D. Duplication of international proceedings and cosa juzgada

49. The Commission notes that the State alleged improper jurisdiction in view of international litispendence, since the case of Jesús Angel Gutiérrez Olvera was being processed in the Working Group on Forced or Involuntary Disappearances of the United Nations Organization. It contends that the proceedings of the two international organs are identical, and that the parties, the legal basis, and the facts are the same. Article 46.1.c of the Convention establishes that in order for a petition to be admissible, the "subject of the petition or communication is not pending in another international proceeding for settlement," and Article 47.d of the Convention states that the Commission shall consider inadmissible any petition or communication when "it is substantially the same as one previously studied by the Commission or by another international organization." The Inter-American Commission and Court have established that "the phrase substantially the same" means that the cases must be identical. In order for them to be considered identical, three elements must be present, i.e., the parties must be the same, the subject must be the same, and the legal grounds must be identical."¹⁴

50. The Commission has maintained that in order for it to determine that there is duplication of international proceedings and *cosa juzgada* in a case, the petition must be under consideration or have been decided¹⁵ by an international organization that is competent to decide on the specific acts described in the petition, and has measures for effective settlement the dispute in question.¹⁶ The Commission is of the view that the aforesaid Working Group does not belong to the category of international organizations whose mandate could generate the duplication referred to in Articles 46(1)(c) and 47(1)(d) of the American Convention. In fact, the proceeding conducted by the United Nations Working Group on Forced and Involuntary Disappearances is not authorized to adjudicate specific cases. Instead, it is a mechanism in which specific cases of disappearances can be raised with States, but it does not have a case system that purports to issue decisions attributing specific responsibilities. Consequently, the proceeding of the Working Group is primarily humanitarian, and is not contentious, and its primary purpose is to establish a channel of communication between the injured parties and governments, for an effective search for disappeared persons. The proceeding in the inter-American system for the protection of human rights is conventional and contentions in nature, and the Inter-American Commission does play an adjudicative role in this procedure.

¹⁴ IACHR, Report No. 96/98, Case 11827, Inadmissibility, Peter Blaine, Jamaica, 17 December 1998, paragraphs 40 to 49. Inter- American Court, *Case of Baena Ricardo et al.* Preliminary Objections. Judgment of 18 November 1999. Series C No. 61, para. 53.

¹⁵ See: IACHR. Report No. 89/05, Petition 12103, Inadmissibility, *Cecilia Rosa Núñez Chipana*, Peru, 24 October 2005, para. 37. IACHR. Report No. 96/98, Petition 11828, Admissibility, *Peter Blaine*, Jamaica, 17 December 1998, para. 40.

¹⁶ Inter-American Court, *Case of Baena Ricardo et al vs. Panamá.* Preliminary Objections. Judgment of 18 November 1999. Series C No. 61, para. 53.

51. The Commission therefore concludes that the proceeding in the Working Group on Forced and Involuntary Disappearances does not belong to the category of international organs whose mandate could generate a duplication, pursuant to Articles 46.1.c and 47.d of the American Convention.

E. Description of the alleged facts

52. In view of the information submitted by the parties and the nature of the matter before it, the Commission considers that in the present case, the allegations of the petitioners regarding the lack of judicial clarification as to the truth of the events surrounding the disappearance of Jesús Angel Gutiérrez Olvera by State agents, the alleged failure of the State to act with due diligence in the investigation and punishment of the responsible parties, and the ineffectiveness of the amparo appeal, among other factors, could characterize possible violations of the rights established in Articles 4, 5, 7, 8, and 25 of the American Convention, considered in relation to the obligations established in Articles 1.1 and 2 of that instrument, as well as the rights established in Articles I, III, and XI of the CIDFP, and Articles 1, 6, and 8 of the CIPST, all to the detriment of Jesús Ángel Gutiérrez Olvera. Thus, the Commission considers that these facts could characterize possible violations of the rights recognized in Articles 4, 5, 7, 8, and 25 of the American Convention, considered in relation to Articles 1.1 and 2 of that instrument, in addition to the rights established in Articles I, III, and XI of CIDFP, and Articles 1, 6, and 8 of CIPST, all to the detriment of Jesús Angel Gutiérrez Olvera. In addition the Commission considers that these facts could characterize violations of the rights established in Articles 5, 8, and 25 of the American Convention, in relation to the obligations established in Articles 1.1 and 2 of that instrument, as well as Articles 6 and 8 of CIPST, to the detriment of the family members of Jesús Angel Gutiérrez Olvera. Moreover, in application of the principle of *iura novit curia*, the Commission has determined a possible violation of the right to juridical personality stipulated in Article 3 of the Convention, considered in conjunction with Article 1.1 of that instrument.

53. Since these aspects of the petition are not manifestly groundless or obviously out of order, the Commission considers that the requirements established in Articles 47.b and 47.c of the American Convention are satisfied with regard to this aspect of the complaint.

V. CONCLUSIONS

54. The IACHR concludes that it is competent to examine this petition and that it complies with the requirements for admissibility, in accordance with Articles 46 and 47 of the American Convention, and Articles 30, 37, and other related provisions of its Rules of Procedure.

THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

DECIDES:

1. To declare, without prejudice to the merits of this case, that the petition is admissible in relation to the facts reported, and with respect to Articles 3, 4, 5, 7, 8, and 25 of the American Convention, considered in conjunction with Articles 1.1 and 2 of the Convention, as well as in relation to Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, and Articles I, III, and XI of the Inter-American Convention on the Forced Disappearance of Persons.

2. To notify the Mexican State and the petitioners of this decision.

3. To continue with an analysis of the merits of the matter.

4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 1st. day of the month of November 2010.
(Signed): Felipe González, President; Dinah Shelton, Second Vice-President; María Silvia Guillén, and Rodrigo Escobar Gil, members of the Commission.

